

PROHIBITION OF GENDER DISCRIMINATION IN MONTENEGRO IN THE LIGHT OF CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE COURT OF JUSTICE OF THE EUROPEAN UNION

STOP
DISCRIMINATION

Dagmara Rajska, PhD

“Support to the National Institutions in Preventing Discrimination in Montenegro” (PREDIM)

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Dagmara Rajska, PhD

Council of Europe: 2016

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INTRODUCTION

Discrimination on grounds of sex is a form of discriminatory treatment of somebody because of that person's sex. This unequal treatment is not justified for any objective reason. Sex discrimination can involve the discrimination of a person of different or the same sex as the perpetrator of that discriminatory treatment.

Direct discrimination occurs when, in a comparable situation, a man or woman is treated less favourably on grounds of sex, than he/she would be if he/she was a member of the opposite sex.

Indirect discrimination occurs when a seemingly neutral decision, applied criterion or undertaken action results or could result from a disproportionate or particularly unfavourable situation for a woman or a man because of his/her gender, unless that provision, criterion or action is objectively justified by a legitimate aim and the means employed to achieve that aim are proportionate and necessary.

The stereotype of superiority of one of the sexes comes about as a result of discrimination based on gender. Sex discrimination takes a form of physical or psychological violence against women; different treatment with regards to workplace promotions and salaries, for example, in relation to maternity or paternity leave; or a discriminatory image of women or men in the use of advertisements.

Discrimination on grounds of sex is also apparent in the unfavourable treatment of somebody because of his/her gender identity. Discrimination on grounds of gender identity results in treating somebody with a different gender identity less favourably in similar circumstances because of his/her gender identity; imposing an unreasonable requirement or condition which disadvantages people because of their gender identity. This discriminatory treatment most often affects employment. For example, dismissal after

transition from one gender to another; or in the education system, for example, when refusing to modify the person's name after transition from one gender to another. In many countries, those who have undergone sexual reassignment surgery also have difficulties having their new gender noted on the birth or adoption register.

Prohibition of discrimination based on sex is an important principle, which affects all other rights protected by international treaties, directives and other instruments established by States in order to protect human rights. Naturally, the most important among these texts are the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. Gender equality is also protected by the United Nations Convention on the Elimination of All Forms of Discrimination against Women and the Council of Europe Convention on preventing and combating violence against women and domestic violence, which are however not the subject of this comparative study.

The European Convention on Human Rights has been binding since the ratification of the Convention by Montenegro in 2004. Since 29 June 2012, Montenegro has been negotiating its accession to the European Union; it is therefore obliged to implement the legal rules of the organisation in order to become a Member State of the European Union.

PART I - PROHIBITION OF GENDER DISCRIMINATION IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

The European Convention on Human Rights was signed on 4 November 1950 in Rome. In the context of this Convention, the European Court of Human Rights (ECHR) and the European Commission of Human Rights were established. Since 1 November 1988, the European Court of Human Rights has become an international permanent court. If a State has recognized a right to lodge an individual complaint, the Court is competent to deal with individual complaints raising allegations of human rights violations, including allegations of discriminatory treatment in conjunction with other substantive right protected by the Convention. Article 14 of the Convention requires: “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.”

In 2000, a Parliamentary Assembly opinion proposed that “sex discrimination” be added to the list of prohibited grounds of discrimination for Protocol 12, which establishes the 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 on any ground such as those mentioned in paragraph 1.”

I. Gender equality

1. Right to life and prohibition of torture and inhuman or degrading treatment resulting from sex discrimination or gender inequality

State authorities should protect women against domestic violence. If these authorities are alerted to repeated violence, death threats and injury, but do not react through negligence or owing to the inadequacy of the legal framework, the European Court of Human Rights may conclude that there has been a breach of the rights protected by the European Convention on Human Rights.

Examples:

- In *Opuz v. Turkey* (no. 33401/02), in light of the lack of protection under Turkish domestic law, the authorities failed to protect the applicant's mother, who was killed by the applicant's husband. Nor did they protect the applicant herself from her husband's physical violence. The Court found a violation of Articles 2 (right to life), Article 3 (prohibition of inhuman or degrading treatment) and Article 14 (prohibition of discrimination) in conjunction with Articles 2 and 3 (see also *M.G. v. Turkey*, (646/10)). The inefficient protection from violence against women and thus systemic discrimination were also at issue in the cases of *Eremia and Others v. the Republic of Moldova* (no. 3564/11) and *Rumor v. Italy* (no. 72964/10). The difficulty in these cases is with the burden of proof, which falls on the applicant. It often results in procedural difficulties (*A. v. Croatia* (no. 55164/08)).

- In *R.R. v. Poland*, (no. 27617/04), a pregnant woman suffering from a severe genetic abnormality was deliberately denied access to the genetic tests to which she was entitled by doctors opposed to abortion. Therefore, she is obliged to bring up and educate a severely disabled child, which results in difficulties to herself and her two other children. The Court held that the State was obligated to organise its health service to ensure that the effective

exercise of the freedom of conscience of health professionals in a professional context did not prevent patients from obtaining access to services to which they were legally entitled. The applicant's lack of access to prenatal genetic tests resulting in the inability to have an abortion on grounds of foetal abnormality resulted in a violation of Article 3 and 8 of the Convention. Similarly, in the case of *Confederazione Generale Italiana del Lavoro (CGIL) v. Italy* (no. 91/2013), the European Committee of Social Rights decided that Article 9 of Italian Law No. 194 of 1978, which governs medical practitioners' conscientious objections in cases of pregnancy termination, violates the right to health of women as well as several aspects of the right to work, as guaranteed by the European Social Charter.

2. Prohibition of slavery and forced labour resulting from sex discrimination or gender inequality

One of the most serious international issues affecting women today is the trafficking of women and girls for the purpose of forced labour and sexual slavery (*Rantsev v. Cyprus and Russia* (no. 25965/04)). However, the problem of forced labour also concerns men in the context of gender discrimination.

Examples:

- In *Zarb Adami v. Malta* (no. 17209/02), the applicant – a man, who was placed on the list of jurors in Malta, considered that this civic obligation, which had been imposed on him, was discriminatory on the ground of sex, because the percentage of women requested to undertake jury service in Malta was negligible. As a consequence, he did not appear at one of the hearings and he received a fine. As he did not pay the fine, he had to face criminal proceedings in relation to the imposition of this discriminatory civic obligation. The Court found a violation of Article 14 in conjunction with Article 4 § 3 (d) (prohibition of forced labour) of the Convention.

- In *Karlheinz v. Schmidt v. Germany* (no. 13580/88), the Court also found a violation of Article 14 in conjunction with Article 4 § 3 (d) of the Convention

in the case of the applicant who had been obliged to serve as a fireman or pay a financial contribution in lieu of such service taking into account that women were not involved in this civic obligation.

3. Right to liberty and security free from sex discrimination or gender inequality

Discrimination based on sex applies both to women and men; there is however more cases of women's rights being breached than that of men's rights. Violence against women means a violation of women's human rights and different forms of discrimination against women, which result in the physical, sexual, psychological or economic harm or suffering of women, including threats of such acts, coercion or the arbitrary deprivation of liberty, whether occurring in public or in private life (Article 3a, Council of Europe Convention on preventing and combating violence against women and domestic violence).

Under the European Convention on Human Rights, deprivation of liberty resulting from sex discrimination cannot be imposed on anybody and this prohibition is applicable to public authorities and to private individuals.

Example:

- In *Khamtokhu and Aksenchik v. Russia* (nos. 60367/08 and 961/11), the applicants sentenced to the death penalty in Russia complained that they were discriminated against because, while for certain crimes the death penalty can be imposed on them, it cannot be imposed on other categories of people sentenced by the Russian courts for the same crimes: women, persons under 18 when the offence was committed or over 65 when the verdict was delivered. On 13 May 2014, the European Court of Human Rights delivered a decision on admissibility under Article 14 (prohibition of discrimination) of the Convention in conjunction with Article 5 (right to liberty and security). The application is pending.

4. Right to a fair trial free from sex discrimination or gender inequality

Sex equality before the law means that women and men both have the right of effective non-discriminatory access to justice and remedies when their rights are violated. Women's rights are still less protected, even if significant progress has been made "with revising laws that discriminate against women and drafting constitutions that incorporate guarantees of equality and non-discrimination" (available at <http://www.ohchr.org/Documents/Events/WHRD/WomenRightsAreHR.pdf> visited on 14 October 2016). There is also a problem of effective application of these laws by the police and the judiciary in the investigation, which must comply with the human rights standards.

Examples:

- In *Schuler-Zraggen v. Switzerland* (no. 14518/89), the Federal Insurance Court had adopted in its entirety the Appeal Board's assumption that women gave up work when they gave birth to a child and had not attempted to probe the validity of that assumption itself by weighing arguments to the contrary. As a consequence, her disability pension was decreased. The European Court of Human Rights found a violation of Article 14 taken together with Article 6 § 1 of the Convention.

- In *García Mateos v. Spain* (no. 38285/09), the applicant was refused the right to reduce her working hours so that she could take custody of her child. The authorities failed to enforce a judgment delivered in favour of the applicant acknowledging gender discrimination. The Court found a violation of Article 6 § 1 combined with Article 14 of the Convention.

5. Right to respect for private and family life free from sex discrimination or gender inequality

The right to private and family life protected by Article 8 of the Convention involves a broad scope of rights, such as sexuality, physical integrity, personal identity, forming and maintaining relationships with other people and personal data protection. This right should be exercised without any discriminatory treatment on grounds of sex.

Examples:

- In *Mizzi v. Malta* (no. 26111/02), the European Court of Human Rights declared a violation of Article 6 § 1, 8 and 14 in conjunction with Article 6 and 8 as regards fathers who want to bring proceedings to challenge the paternity of a child, and do not have access to court contrary to other parties in the proceedings. However, the Court did not find a violation in a case where a father's right to challenge the paternity of a child born in wedlock was placed within a time-limit that was shorter than the mother's right.

- In *di Trizio v. Switzerland* (no. 7186/09), the applicant's disability pension was stopped on the presumption made by the authorities that even if she had not had a disability the applicant would not have worked full time after the birth of her children. The Court concluded that there was no reasonable justification of this difference in treatment, and it found a violation of Article 14 taken in conjunction with Article 8 of the Convention.

The European Court of Human Rights delivered a number of judgments concerning the choice of family name and transmission of parent's surnames to their children.

- In *Burghartz v. Switzerland* (no. 16213/90), the Swiss authorities had withheld from one applicant the right to put his own name before the family name although Swiss law afforded that possibility to married women who had chosen their husbands' surname as their family name. The European Court of Human Rights found that it resulted in a difference of treatment on

grounds of sex and it found a violation of Article 14 together with Article 8 of the Convention.

- In *Losonci Rose and Rose v. Italy* (no. 664/06), the applicants were a binational couple wishing to get married and keep their own surnames. However, Swiss national rules did not allow them to keep both names, because there was a rule concerning a double-barrelled surname for one of the spouses. The Court found a violation of Article 14 taken together with Article 8 of the Convention, as the rules in force in Switzerland gave rise to discrimination between binational couples according to whether the man or the woman has Swiss nationality.

- In *Ünal Tekeli v. Turkey* (no. 29865/96), a married applicant who could not keep her maiden name for professional reasons, complained that she was discriminated against because a married man could continue to bear a family name after he had married. The Court found violation of Article 14 in conjunction with Article 8 of the Convention.

- In *Cusan and Fazzo v. Italy* (no. 77/07), the applicants complained that the Italian authorities had refused to give the name of the mother to their daughter because it was mandatory to give the father's surname to legitimate children. The Court found a violation of Article 14 in conjunction with Article 8 of the Convention.

There are also other examples of discrimination, such as dismissal after three years' public service for not being a man and not having completed military service (*Emel Boyraz v. Turkey* (no. 61960/08)); refusal of permission for a husband to remain or join his wife in accordance with immigration rules because there was a difference between the treatment of male and female immigrants as regards permission for their non-national spouse to enter or remain in the country (*Abdulaziz, Cabales and Balkandali v. the United Kingdom* (nos. 9214/80, 9473/81, and 9474/81)).

As regards parental leave for men, the case law of the European Court of Human Rights is a living instrument. In the 1990s, a father of a child took parental leave, yet did not receive the allocation which he would have received if he had been a woman. However, the Court did not find a violation of Article 14 read in conjunction with Article 8 (*Petrovic v. Austria* (no. 20458/92)).

The refusal of parental leave for a man was however considered as a violation of Article 14 read in conjunction with Article 8 of the Convention in the more recent judgments of *Konstantin Markin v. Russia* (no. 30078/06) and *Hulea v. Romania* (no. 33411/05).

6. Freedom of thought, conscience and religion free from sex discrimination or gender inequality

Article 14 of the Convention explicitly prohibits discrimination on grounds of religion. This discrimination of freedom of religion, including the wearing of religious symbols, is present especially in public and in work places. Restrictions are however allowed in the case of a legitimate and proportional occupational requirement. There is a triple gender, ethnic and religious penalty with regards to employment, with the headscarf acting as an additional obstacle for women as they look for, find and then keep a job.

Example:

- A ban on the wearing of religious clothing to preserve the secular nature of a State education system does not constitute a breach neither of Article 14 nor of Article 9 of the Convention (*Leyla Şahin v. Turkey* (no. 44774/98)). The general ban on the wearing of a full-face veil in public places, established in order to protect the exercise of fundamental rights and freedoms, is also in compliance with Article 8, 9 and 14 of the Convention (*S.A.S. v. France* (no. 43835/11)).

7. Right to property free from sex discrimination or gender inequality

As mentioned above, applicants raising allegations of discrimination have to indicate which substantive rights they were denied owing to discrimination. Article 14 does not have an independent existence but rather completes other articles of the Convention, also Article 1 of Protocol 1. Among discrimination cases, there are cases of discrimination on grounds of sex, including a right to pension or other social benefits, which depend particularly on sex. The right to a pension depends on the age of a person and is different for women and men; social benefits like maternity are established only for women and depend on childbirth. As a result, persons of the opposite sex deny the rights afforded to the privileged group, which raises allegations of discrimination based on sex. Each case depends on its own circumstances and each time the proportionality of inference by the authorities in the rights of the defendant has to be examined.

Examples:

- In *Vrontou v. Cyprus* (no. 33631/06), the applicant complained about the refusal of the authorities to grant her a refugee card, alleging that this deprived her of a range of benefits, including housing assistance. This refusal was founded on the basis that the applicant was the child of a displaced woman and not the child of a displaced man. The Court considered this difference in treatment was discriminatory on grounds of sex and it found a violation of Article 14 read in conjunction with Article 1 of Protocol No. 1 to the Convention.

- In *Stec v. the United Kingdom* (nos. 65731/01 and 65900/01) the applicants complained that they had suffered sex discrimination in eligibility for reduced earnings allowance. As the benefit was intended to compensate for reduced earning capacity during a woman's working life, the decision to link eligibility for the reduced earning capacity to the pension system was reasonably and objectively justified. The Court did not find a violation of

Article 14 taken in conjunction with Article 1 of Protocol No. 1 to the Convention.

- In *Barrow v. the United Kingdom* (no. 42735/02), *Pearson v. the United Kingdom* (no. 8374/03) and *Walker v. the United Kingdom* (no. 37212/02), the difference in retirement age for women and men is not considered as discriminatory treatment. A different age when a man or a woman is entitled to a pension according to national rules has been established in order to correct financial inequality between the sexes, the slowly evolving nature of the change in women's working lives and the absence of a common standard among European States. The Court did not find a violation of Article 14 in conjunction with Article 1 of Protocol No. 1 to the Convention.

- In *Van Raalte v. the Netherlands* (no. 20060/92), the applicant who had never been married and had no children was obligated, according to national law to pay contributions under the General Child Care Benefits Act. However, this obligation was not imposed on unmarried childless women of the same age. The European Court of Human Rights concluded that this difference of treatment constituted discrimination based on gender and it found a violation of Article 14 taken together with Article 1 of Protocol No. 1 to the Convention.

- In *Wessels-Bergervoet v. the Netherlands* (no. 34462/97), the reduction of the pension under the General Old Age Pension Act resulting from the fact that a married woman was only insured under the Act for periods when her husband was insured, whereas there was no equivalent rule for a man, constitutes discrimination on grounds of sex. Therefore, the European Court of Human Rights found a violation of Article 14 taken together with Article 1 of Protocol No. 1.

- In *Andrle v. the Czech Republic* (no. 6268/08), the elderly pension eligibility age, which is fixed at 60 for men and 57 or lower for women according to the number of children which she had had was challenged in the national courts

by a man who considered this to be sex discrimination against men. The European Court of Human Rights found that this difference of treatment is reasonably and objectively justified by the social and economic context, and that the measure pursued “the legitimate aim” as it was designed to compensate for inequality and hardship generated by expectations of women under the family model of working on a full-time basis as well as taking care of the children and the household. At the same time, women had a generally lower income than that of men. The Court found that the national authorities are best placed to regulate these differences among socio-economic actors at the national level. Therefore, there was no violation of Article 14 in conjunction with Article 1 of Protocol No. 1 to the Convention.

The different level of the survivor’s pension for women (60% of the pension of their deceased husband) and men (40%) is not based on any “objective and reasonable justification”. For this reason, in the case of *Zeman v. Austria* (no. 23960/02), the Court found a violation of Article 14 taken together with Article 1 of Protocol No. 1 to the Convention.

The difference of treatment of widows and widowers was also raised before the European Court of Human Rights. In the case of *Cornwell v. the United Kingdom* (no. 36578/97) and *Leary v. the United Kingdom* (no. 38890/97) (see also: *Sawden v. the United Kingdom* (no. 38550/97); *Loffelman v. the United Kingdom* (no. 44585/98); *Downie v. the United Kingdom* (no. 40161/98); and *Rice v. the United Kingdom* (no. 65905/01)), the authorities provided only for widow’s benefits and not for widower’s benefits. The United Kingdom Government and the applicants signed a friendly settlement and the case was struck out of the list of the cases. In April 2001, the Welfare Reform and Pensions Act came into force making the benefit available for both men and women.

The difference in treatment between man and women regarding entitlement to the Widow’s Payment and Widowed Mother’s Allowance, when it is not based on any objective and reasonable justification, in particular on the fact

that the applicant did not satisfy the various statutory conditions for payment of the benefits, is considered as sex discrimination resulting in a violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1 to the Convention (*Willis v. the United Kingdom* (no. 36042/97); and *Runkee and White v. the United Kingdom* (nos. 42949/98 and 53134/99)). The non-entitlement to Widow's Bereavement Tax Allowance was at stake in another analogous case, *Hobbs, Richard, Walsh and Geen v. the United Kingdom* (nos. 63684/00, 63475/00, 63484/00 and 63468/00). The difference in treatment between men and women was again not justified and objective. Therefore, the European Court of Human Rights found a violation of Article 14 in conjunction with Article 1 of Protocol No. 1 to the Convention in case of three first applicants.

8. Right to free elections free from sex discrimination or gender inequality

Political participation is the basis of democracy and an important part of the enjoyment of all human rights. The right of all people to vote in elections, without any discrimination, including sex discrimination, is one of the most fundamental of all human rights and civil liberties.

Example:

- In *Staatkundig Gereformeerde Partii v. the Netherlands* (no. 58369/10), the applicant challenged the judicial decision requiring the State to take steps to oblige a highly traditional protestant political party to allow women to enrol on lists of candidates for election to representative bodies. The case was declared inadmissible, but the European Court of Human Rights recalled that democracy was the only political model contemplated by the Convention and the only one compatible with it. It also criticised the applicant party's position, and stated that it was unacceptable regardless of the deeply held religious conviction on which it was based.

II Gender identity issues

Transgender inequality is the unequal protection of transgender people's rights related to their education, employment and in society in general. In the 1980s and 1990s, the rights of transsexuals were still not recognized. When female-to-male transsexuals complained that national laws did not confer them a legal status corresponding to their actual condition and they raised in Article 8 (right to respect for private and family life) and Article 12 (right to marry). The European Court of Human Rights did not find a violation of these provisions because the eventual amendments would have required the important administrative consequences for the whole population (*Rees v. the United Kingdom* (no. 9532/81), *Cossey v. the United Kingdom* (no. 10843/84), and *Sheffield and Horsham v. the United Kingdom* (nos. 22985/93 and 23390/94).

In *Christine Goodwin v. the United Kingdom* (GC) (no. 28957/95), the European Court of Human Rights declared for the first time that the applicant's lack of legal recognition of changed gender as regards employment rights, social security and pension rights is in breach of Article 8 (right to respect private and family life) and Article 12 (the applicant's impossibility to marry) *mutatis mutandis* *I. v. the United Kingdom*, (no. 25680/94), and *L. v. Lithuania*, (no. 27527/03).

The obligation to divorce for applicants who had undergone gender assignment surgery and wished to have legal recognition of their changed gender conforms with the provisions of the European Convention on Human Rights. For this reason, the Court declared the application inadmissible in the case of *Parry v. the United Kingdom*, (no. 42971/05) and *R. and F. v. the United Kingdom*, (no. 35748/05). For the same reason, the Court found no violation of Article 8 in the case of *Hämäläinen v. Finland*, (no. 37359/09).

The refusal to reimburse the costs of gender assignment surgery by the insurance company is a breach of Article 8 of the Convention. In the case of *Grant v. the United Kingdom*, (no. 32570/03), the European Court of Human Rights found that gender identity was one of most intimate aspects of a person's private life and it appeared disproportionate to require the applicant to prove the medical necessity of the treatment for the reimbursement of the surgery. In the case of *Schlumpf v. Switzerland*, (no. 29002/06), the applicant did not respect a delay of two years required by the insurer to take account of the costs of proceedings advanced by the applicant. The insurer refused the reimbursement without taking account of the age of the applicant. The Court found a violation of Article 8.

In *Y.Y. v. Turkey*, (no. 14793/08), the authorities refused gender assignment surgery, because the applicant was not permanently unable to procreate. The Court found that the fact that the applicant did not for many years have the possibility to undergo the operation resulted in interference with the applicant's right to respect for his private life and cannot be considered as "necessary" in a democratic society. Therefore, there was a breach of Article 8 of the Convention.

The issues of transsexuals are still evolving in the case law of the European Court of Human Rights. Firstly, a pending case *D.Ç. v. Turkey*, (no. 10684/13) concerns the right to gender assignment surgery of a transsexual serving a prison sentence and the authorities' obligation to take into account the costs of the operation. Secondly, many other pending cases (*A.P. v. France* (no. 79885/12), *Garçon v. France* (no. 52471/13), *Nicot v. France* (no. 52596/13)) are related to the lack of legal recognition of changed gender prior to the operation.

PART II – PROHIBITION OF GENDER DISCRIMINATION IN THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

Human rights were first enshrined in EU Law under the Maastricht Treaty, which was signed on 7 February 1992, and entered into force on 1 November 1993. The following dispositions of the Maastricht Treaty cover human rights:

- “Confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law...” (Preamble)
- Article 130u (...) “2. Community Policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.”
- Article J.1 (...) “2. The Objectives of the common foreign and security policy shall be: to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.”
- Article K.2 “1. The matters referred to in Article K.1 (for example judicial cooperation, asylum and immigration policy etc.) shall be dealt with in compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Convention relating to the Status of Refugees of 28 July 1951 and having regard to the protection afforded by Member States to persons persecuted on political grounds.”

Article 153 (ex Article 137 TEC) states that: “1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields: (i) equality between men and women with regard to labour market opportunities and treatment at work.”

Article 157 (ex Article 141 TEC) states that: “Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied”.

The Treaty of Amsterdam amended the founding treaties on the European Union. According to Article 2: “The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community (...) equality between men and women”. Further, Article 3 states that: “(...) the Community shall aim to eliminate inequalities and to promote equality, between men and women”.

On 1 May 1999, Article 13 of the European Community Treaty entered into force to explicitly mention and protect sex equality (now it is Article 19 TFEU): “[...] the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.

In December 2000, the Member States of the European Union proclaimed the EU Charter of Fundamental Rights. Although the Charter is not a binding document, it covers human rights explicitly non-discrimination provisions in Article 21 (1): “Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited”.

Finally, Article 10 of the Treaty on European Union and the Treaty on the Functioning of the European Union (2012/C, 326/01) states that: “In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

The gender equality is also protected by a soft law of the European Union: Directive 79/7/EEC of 19 December 1978 obliging Member States to progressively implement the principle of equal treatment for men and women in matters of social security; Directive 92/85/EEC of 19 October 1992 introducing measures to improve health and safety at work for pregnant workers and workers who have recently given birth or are breastfeeding; Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between women and men in the access to and supply of goods and services.

Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation defines direct and indirect discrimination, harassment and sexual harassment, it sets the gender for authorities that promote equal treatment, encourages taking preventive measures to combat sexual harassment, and reinforces sanctions for discrimination.

High importance in the field of gender equality have as well: Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental; Directive 2010/41/EC of 7 July 2010 laying down objectives for the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood; Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims.

Examples:

- In a judgment of 8 April 1976, *Defrenne II (Case 43/75)*, the Court recognised direct effect of the principle of equal pay for men and women established in Article 119 of the EEC Treaty, and it covers the actions of public authorities as well as all agreements which regulate paid labour collectively.

- In a judgment of 13 May 1986, *Bilka (Case 170/84)*, the Court found that part-time employees excluded from an occupational pension scheme were indirectly discriminated against in the light of former Article 119, because this exclusion concerned a greater number of women than men. At the same time, there was no objectively justified factor unrelated to gender discrimination for this exclusion.

- In a judgment of 17 May 1990, *Barber (Case 262/88)*, the Court decided the principle of equal treatment applied to all forms of occupational pension which should be considered as pay in the meaning of Article 119: “it is contrary to that provision to impose an age condition which differs according to sex for the purposes of entitlement to a pension under a private occupational scheme which operates in part as a substitute for the statutory scheme, even if the difference between the pensionable age for men and that for women is based on the one provided for by the national statutory scheme”.

- In a judgment of 11 November 1997, *Marschall (Case C-409/95)*, the Court found that there must be a priority given to the promotion of female candidates in cases where there were fewer women than men at the level of the relevant post in a sector of the public service and both female and male candidates for the post are equally qualified in terms of their suitability on condition that the advantage is not automatic and that male candidates are not excluded *a priori* from applying.

- On 10 November 2010, the Court of Justice of the European Union (CJEU) delivered a judgment in the case of *Dita Danosa v LKB Lizings SIA (C-232/09)*. After having been dismissed by the general meeting of shareholders, the former sole member of the board of directors of a public limited company argued in court that, due to her pregnancy, the dismissal was illegal in the light of EU secondary law. The Court found that: “Even if the Board Member concerned is not a ‘pregnant worker’ within the meaning of Directive 92/85, the fact remains that the removal, on account of pregnancy or essentially on

account of pregnancy, of a member of a Board of Directors who performs duties such as those described in the main proceedings can affect only women and therefore constitutes direct discrimination on grounds of sex, contrary to Article 2(1) and (7) and Article 3(1)(c) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002.”

- In a judgment of 1 March 2011, *Association belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v. Conseil des ministres* (C-236/09), the Court of Justice ruled that the use of sex as an actuarial factor must not result in differences in premiums and benefits for insured individuals in order to respect the principle of equal treatment between men and women in the field of insurance, contained in Directive 2004/113/EC.

The European Union Equality Directives (76/207/EEE and 2000/78/EC) applying to employers, employees and self-employed persons, providing the entitlement to equal pay for work of equal value, and prohibiting discrimination on any ground, include also gender as such a protected ground. The European Commission defines a pay gender gap as the average difference between men’s and women’s aggregate hourly earnings. This pay gender gap still exists in European countries. It was at stake in the case examined by the Court of Justice of the European Union *Deutsche Post AG v. Elisabeth Sievers and Brunhilde Schrage* (C-270/97 and C-271/97) and the European Committee of Social Rights *University of Women of Europe (UWE) v. 15 States* (no. 124-138/2016).

PART III - NATIONAL RULES AND EXPERIENCE AS REGARDS PROHIBITION OF GENDER DISCRIMINATION IN MONTENEGRO

I Montenegrin gender discrimination legislation and national Ombudsperson competencies in this area

The European Convention on Human Rights has been binding since the ratification of the Convention by Montenegro in 2004. The European Social Charter has had legal force and effect since its entry into force in Montenegro in 2010. Since 29 June 2012, Montenegro has been negotiating its accession into the European Union; it is therefore obligated to implement the legal rules of the organisation in order to become a Member State.

Ratified international legal instruments form an integral part of the Montenegrin internal legal system and they have supremacy over national legislation in the case of a difference in regulating relations, according to Article 9 of the Constitution of 19 October 2007.

The Law on Gender Equality, which is within the competence of the Ministry for Human and Minority Rights of the Government of Montenegro (Official Gazette of the Republic of Montenegro no. 46/07 and Official Gazette of Montenegro no. 73/10, 40/11 and 35/15) regulates the manner of ensuring and exercising rights on the basis of gender equality. Law on Amendments to the Law on Gender Equality was adopted by the Parliament of Montenegro in June 2015.

Purpose of the amendments is alignment with the Montenegrin Law against Discrimination, as well as aim to be aligned with the EU *acquis*. This primarily refers to harmonization of definitions of discrimination based on

sex with the definitions of direct and indirect discrimination with aim to align it with EU standards.

In order to eliminate discrimination based on sex and achieve gender equality, the Law stipulates obligations of state authorities, state administration and local self-government, public institutions, public companies, and other legal persons exercising public authority in order to implement the principles of gender equality. The Law also emphasizes the role of the civil sector and offers considerable space for activities of NGOs in overall activities towards achieving gender equality.

The Law on Gender Equality aims to be aligned with the ratified international agreements and other documents passed under the auspices of the UN, EU and the Council of Europe, in particular the European Union Directives related to gender equality and equal treatment of women and men: Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security; Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation; Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services; Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation; Directive 2010/41/EU of the European Parliament and of the Council on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

This represents a step forward since it aims to further align the legislation with the EU Directives on equal opportunities. It is important to note that the Law extended the scope of sanctions related to gender discrimination and violation of the principle of equal treatment of men and women in certain areas of life including discrimination against women because of pregnancy. Amendments to the Law from 2015 imposed sanctions - fines that are high both for legal persons and responsible persons in the legal person and

entrepreneurs. The Law particularly underlines the fines for violations for discrimination against women because of pregnancy or maternity or sex change, in the area of employment or self-employment or in exercising social or other protection. Also, the principles which are the basis of this law aim at implementation of the principle of non-discrimination from the Charter of Fundamental Rights of the European Union and the European Charter for Equality of Women and Men in Local Life, as well as the practice of the Court of Justice of the European Union.

Among other things, the new amendments define gender equality, beside men and women, as involving people of different gender identity. The proposal also extended the obligation to conduct gender equality to companies, other legal entities and entrepreneurs. The law is defining the issues of direct and indirect discrimination on grounds of sex (alongside all forms of discrimination) are within the jurisdiction of the Protector of human rights and freedoms and therefore, the procedure of petitions in cases of discrimination based on sex is also within the competence of this institution. The law introduces more misdemeanours than has been the case so far.

The Ombudsperson institution, the so-called Protector of human rights and liberties of Montenegro, was established in Article 81 of the Constitution of 19 October 2007. The competencies of the Protector are further detailed in the Law on the Protector of Human Rights and Freedoms passed on 10 July 2003.

The Law on the prohibition of discrimination was adopted on 27 July 2010, and amended in April 2014 (Law on the prohibition of discrimination was adopted on 27 July 2010, available at <http://www.legislationline.org/topics/country/57/topic/84>, visited 14 October 2016). According to this Law, the Protector of Human Rights and Freedoms of Montenegro is competent to act on complaints relating to discriminatory treatment committed by an authority, business entity, entrepreneur, natural or legal person, and can undertake measures and

actions to eliminate discrimination and protect the rights of a discriminated person, if the court proceedings have not been initiated. The protector is further charged with providing advice to the complainant in this field; conciliating between parties; alerting the public about the appearances of severe discrimination; collecting data and keeping records of cases of discrimination and, finally, promoting equality and submitting reports to the Parliament of Montenegro on the activities conducted regarding protection from discrimination and promotion of equality.

For cases involving discrimination, the Ombudsperson analyses whether or not there is indeed evidence of discrimination. If there is a priori appearance of discrimination concerning more than one person, the Ombudsperson gets involved or initiates court proceedings with the consent of the complainants. The following groups are the most concerned by discrimination: persons with disabilities, women, LGBT persons as well as Roma and other minorities.

The Ombudsperson has intervened successfully in many cases. For example, the Ombudsperson supported and obtained maintenance of a women's shelter.

Discrimination may also result from the actions of public institutions. The Ombudsperson receives his legal personality from the State. In this situation he cannot initiate judicial proceedings against the national authorities, he can only get involved in them. In the past two years, the Ombudsperson has been involved in four such cases.

The Ombudsperson takes a case in charge *ex officio* or following a complaint by anyone who believes that his/her rights and freedoms have been violated (Article 28 of the Law). In the case of violations of the rights of a child, his/her parents, guardians or legal representatives may file the complaint (Article 30 of the Law).

The Ombudsperson refers complainants to the relevant institutions and provides legal advice. The Ombudsperson does not follow the cases of the persons referred to other institutions, as s/he does not have such jurisdiction. Point 2 of Article 21 of the Law on prohibition of discrimination forms the legal basis for the Ombudsperson to provide information to the complainant about his/her rights and duties, as well as about possibilities of court and other protection. It should be noted that the Ombudsperson's obligation to provide legal advice is not established by the Law on the Protector of Human Rights and Freedoms, and should be limited to cases involving discrimination.

According to Article 18 of the Law, the Protector may initiate the adoption of laws, other regulations and general acts for the purpose of harmonization with internationally recognized standards in the area of human rights and freedoms. The relevant authority shall be obliged to make a statement about this initiative. If he deems it necessary for the protection and promotion of human rights and freedoms, the Protector can recommend a legal proposal, other regulation or general act.

The Ombudsperson may initiate a proceeding before the Constitutional Court for the assessment of conformity of laws with the Constitution and confirmed and published international treaties or the conformity of other regulations and general acts with the Constitution and laws (Article 19 of the Law).

II Montenegrin gender discrimination case law and practice

Gender-based discrimination is any legal or factual, direct and indirect unjustified differentiation or unequal treatment or a failure to deal with it (exclusion, restriction or prioritizing) aimed at hindering, jeopardizing, preventing or denying the exercise or enjoyment of human rights and

freedoms for a person or a group of persons in, among others, the social area. Gender equality must be promoted particularly in the area of labour, social and health protection.

In Montenegro, there is no relevant case law and a lack of reliable statistics for analysis and assessment of discrimination. It is worth remembering that therefore there is no international case law in this area, for example of the European Court of Human Rights. Among rare judgments delivered against this State, there are cases concerning the rights of property or excessive length of proceedings. However, the Montenegrin authorities have to take into account the judgments delivered against other Member States. The national institutions should also refer to the case law of the Court of Justice of the European Union in view of the future accession of Montenegro to the European Union.

Many cases pending before the civil courts concerning gender discrimination concern mobbing (for example workplace bullying). The Ombudsperson dealt recently with two cases concerning discrimination based on gender. One of them concerned an older woman in poor health deprived of labour rights and harassed. However, the proceedings before the Montenegrin Ombudsperson are long because the reaction of the other authorities has not been swift and there is a lot of bureaucracy.

Despite existing antidiscrimination legislation, there are identified cases of women who were dismissed when they became pregnant or after they had started or used their pregnancy leave. This happens more often in the private sector than in the public sector.

Gender discrimination presumed victims have access to free legal aid in accordance with the Law on Free Legal Aid and they can obtain support from the NGOs in Montenegro, for example the NGO, Safe Women's House, or the Women's Rights Centre.

The antidiscrimination legislative framework was established in accordance with European human rights standards. However, there is still a huge gap between the legislative framework and the implementation of existing legislation.

Relevant solutions need to be introduced to raise awareness and a culture of gender equality in Montenegro.

CONCLUSIONS

The rights of a man or woman treated less favourably on grounds of sex are broadly protected under the European Convention on Human Rights, more specifically Article 14 of the Convention and its Protocol 12. Among the EU legal instruments, Article 19 of the European Community Treaty, Article 21(1) of the EU Charter of Fundamental Rights and the Directive 2000/78 EC specifically serve those persons concerned by gender discrimination. Women's rights are also protected by the United Nations Convention on the Elimination of All Forms of Discrimination against Women and the Council of Europe Convention on preventing and combating violence against women and domestic violence.

The analysed case law of the European Court of Human Rights has a direct and deep impact on the national legal reality. If the European Court of Human Rights finds a violation of the right protected by the Convention, the judgment is implemented by a legislative amendment (general measures) or by modification of the case law, for example by reopening the proceedings (individual measures).

The Court of Justice of the European Union delivers the interpretation of the law only within the limits of the provisions of European Union treaties and the general principles of EU law. This has a very strong impact on the application of national legislation, but it does not change its shape or content.

The European Court of Human Rights has examined the rights of men or women treated less favourably on grounds of sex on many occasions in the light of gender equality: right to life and prohibition of torture, inhuman or degrading treatment (*Opuz v. Turkey*), prohibition of slavery and forced labour (*Karlheinz and Schmidt v. Germany*), right to liberty and security (*Khamtokhu and Aksenchik v. Russia*), right to a fair trial (*García Mateos v. Spain*), private and family life (*Mizzi v. Malta*), freedom of thought (*Dahlab*

v. Switzerland) and right to property (*Stec v. the United Kingdom*). The Court has also examined many issues related to gender identity, going from the official recognition of gender change by the national authorities (*Christine Goodwin v. the United Kingdom*), through the right to gender assignment surgery (*Y. Y. v. Turkey*) to taking account of the costs of surgery by the State (*D.C. v. Turkey*).

The Court of Justice of the European Union has examined many cases involving the notion of gender discrimination. For example, it has clarified the notions of the “pay gap” and has confirmed that it still exists in European countries (*Deutsche Post AG v. Elisabeth Sievers and Brunhilde Schrage*), *mutatis mutandis* the European Committee of Social Rights in the case of *University of Women of Europe (UWE) v. 15 States*. The importance of the promotion of female candidates was pointed out by the Court of Justice of the European Union in the case of *Marschall*.

The European Convention on Human Rights (2004) and the European Social Charter (2010) are binding for Montenegro. Montenegro must implement EU rules in order to become a Member of the European Union. According to the Law on the prohibition of discrimination (2010), the Protector of Human Rights and Freedoms of Montenegro is competent to act on complaints relating to discriminatory treatment and to get involved or initiate court proceedings, initiate adoption of laws, and proceed before the Constitutional Court for the assessment of conformity of laws with the Constitution. In Montenegro, the groups most concerned by discrimination are: persons with disabilities, women, LGBT persons as well as Roma and other minorities.

Gender discrimination is also present in Montenegro. There are for example identified cases of women who were dismissed when they became pregnant or after they had started or used their pregnancy leave. There are also cases, which are taken in charge by the Montenegrin Ombudsperson, such as for

example a case in which women were deprived of a shelter. In this case, the Ombudsperson succeeded in obtaining maintenance of this women's shelter.

The Law on Gender Equality, which is within the competence of the Ministry for Human and Minority Rights of the Government of Montenegro (Official Gazette of the Republic of Montenegro no. 46/07 and Official Gazette of Montenegro no. 73/10, 40/11 and 35/15) regulates the manner of ensuring and exercising rights on the basis of gender equality. Law on Amendments to the Law on Gender Equality was adopted by the Parliament of Montenegro in June 2015.

There is still an important gap between the national legislative framework and the implementation of the existing legislation as regards the prohibition of gender discrimination in Montenegro.