

PAÍSES DEL ESTE

CRÓNICA LEGISLATIVA

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1. ALBANIA. LEY N. 221 SOBRE PROTECCIÓN CONTRA LA DISCRIMINACIÓN DE 4 DE FEBRERO DE 2010

El 4 de febrero de 2010 la Asamblea de la República de Albania aprobó la Ley n. 221 sobre protección contra la discriminación en desarrollo de lo dispuesto en el art. 18 de la Constitución de 21 de octubre de 1998 que consagra los principios de igualdad y no discriminación por razones de sexo, raza, religión, origen étnico, idioma, creencias políticas, religiosas o filosóficas, la situación económica, la educación, condición social o de ascendencia salvo que exista una justificación objetiva y razonable para ello. El ámbito de aplicación de la Ley concierne a todas las personas, tanto físicas como jurídicas, que residen o tienen su sede social en el territorio de la República, así como a aquellos nacionales albaneses o aquellas personas jurídicas con sede social en Albania que

residen, temporal o permanentemente, en otro país (art. 4). En orden a garantizar su igualdad ante y en la aplicación de la ley y sus derechos fundamentales, la norma prohíbe que puedan ser discriminados en relación con el género, la raza, el color, el origen étnico, el idioma, la identidad y orientación sexual, las creencias políticas, religiosas o filosóficas, el estatus económico, la educación o situación social, el embarazo, la paternidad, la responsabilidad paternal, la edad, el estado civil, la residencia, la salud individual, las predisposiciones genéticas, las situaciones de incapacidad, la pertenecía a una colectividad determinada o por cualquier otro motivo en general (arts. 1 y 2). A tal efecto, el art. 3 de la Ley sanciona cualesquier tipo de conductas que den lugar a:

- Una "discriminación directa" que es definida como aquella forma de discriminación que se produce cuando un persona o grupo de personas es tratada de manera menos favorable que otro individuo o grupo que se encuentra en la misma situación o similar, en base a cualquiera de los motivos enunciados con anterioridad.
- Una " discriminación indirecta" que es definida como aquella que se produce cuando una disposición, criterio o práctica aparentemente neutros, ponen a una persona o a un grupo en condiciones desfavorables, en base a cualquiera de los motivos enunciados con anterioridad, con respecto a otra persona u otro grupo de personas en la misma situación o similar, salvo que dicha disposición, criterio o práctica puedan justificarse objetivamente en atención a una finalidad legítima y que los medios para alcanzar dicha finalidad sean necesarios y adecuados.
- Una "calumnia" que es definida como aquella forma de discriminación que se produce como resultado de una conducta calumniosa realizada en base a cualquiera de los motivos enunciados con anterioridad, que tenga por objeto o efecto de atentar contra la dignidad de una persona o la creación de un contexto intimidatorio, hostil, degradante, humillante u ofensivo para esa persona, así como en el caso de

dar un tratamiento desfavorable a la persona que ha sido víctima de este tipo de comportamientos.

En orden a evitar a que se produzcan este tipo de discriminaciones, la Ley prohíbe a las autoridades públicas y a las personas jurídicas que participan en las distintas esferas de los sectores público o privado cualquiera acción u omisión que sea motivo de desigualdad en contra de una persona o de un grupo, cuando se encuentran en las mismas o similares circunstancias que otras personas u otros colectivos. La prohibición de discriminación por estos motivos no es aplicable cuando exista una causa justificable para ello en base a la Constitución, la legislación vigente o en los Tratados internacionales ratificados por Albania (arts. 6 y 7). Tampoco constituyen formas de discriminación aquellas medidas de signo positivo que, con carácter temporal, hayan sido adoptadas con la finalidad de corregir situaciones patentes de desigualdad de hecho basadas en cualquier causa proscrita expresamente por la Ley, siempre que cesen tan pronto como se hayan logrado los objetivos perseguidos por la medida que haya sido adoptada en el caso concreto.

Junto a estas disposiciones de carácter general, la Ley n. 221 de 4 de febrero de 2010 dedica parte de su articulado a delimitar los supuestos en los que los poderes públicos de la República de Albania deben prestar mayor atención para evitar que se produzcan cualquier forma de discriminación basados en los motivos que hemos enunciado con anterioridad. A saber:

- Prohibición de discriminación en relación con el pleno disfrute de la libertad ideológica o de conciencia (art. 10).

La Ley prohíbe que puedan tener lugar discriminaciones en el ejercicio de la libertad de conciencia y de religión, especialmente en lo que tiene que ver con su expresión individual o colectivamente, en público o en privado, mediante el culto, la educación o la observancia de las prácticas o ritos religiosos. Salvo, eso sí, que exista una justificación objetiva y razonable para ello que haya sido impuesta por la ley para la salvaguarda del interés público o de los derechos de los demás.

- Protección contra la discriminación en el ámbito laboral (arts. 12-16).

En este ámbito, la Ley prohíbe expresamente cualquier forma de discriminación contra una persona en relación con su derecho al empleo en base a los motivos enunciados con anterioridad, que afecten, entre otras cosas, a la ofertas de empleo, al proceso de selección de empleados o a sus condiciones laborales o salariales o al procedimiento de extinción, en su caso, del contrato de trabajo. En orden a prevenir este tipo de conductas discriminatorias, los poderes públicos deben adoptar las acciones positivas que sean necesarias para luchar contra la discriminación en relación con el acceso al mercado laboral. Muy especialmente: A) Proporcionar suficiente información a los empleadores y trabajadores sobre el alcance y significado de la Ley; y B) Adoptar políticas especiales y temporales, en base a cualquiera de los motivos enunciados con anterioridad, con el propósito de fomentar la igualdad en el ámbito laboral y, en particular, entre el hombre y la mujer y las personas incapacitadas. Asimismo, el empleador se encuentra obligado a tomar las medidas necesarias, incluidas medidas disciplinarias, para proteger a sus trabajadores contra cualquier forma de discriminación y a satisfacer, en el plazo máximo de un mes, las quejas que haya recibido sobre los actos discriminatorios que hayan cometido sus empleados. El empleado tiene el derecho a recibir información, en cualquier momento, sobre el estado en que se encuentra la queja que ha formulado, así como a ser debidamente informado de las medidas adoptadas por el empleador para atender la demanda planteada. En el supuesto de que el empleador no haya adoptado la debida diligencia para investigar y resolver la queja que ha sido formulada, el trabajador tiene derecho a interrumpir el desempeño de su actividad profesional por cuenta ajena, sin que pueda ser suspendido de su salario, durante el tiempo que sea necesario hasta que sea protegido contra el acto discriminatorio que está padeciendo. En este supuesto, si la

queja del trabajador era infundada, deberá devolver al empleador el salario que hubiese percibido durante el periodo de tiempo en que interrumpió el desempeño de su actividad profesional.

- Protección contra la discriminación en el ámbito educativo (arts. 17-19).

En este ámbito, la Ley prohíbe cualquier tipo de distinción, limitación o exclusión en base a los motivos enunciados con anterioridad que repercutan, entre otras cosas, sobre: A) La libre creación de centros docentes públicos o privados; B) La financiación de los centros docentes públicos; C) El contenido de los principios y criterios que informan el sistema educativo, los contenidos de los materiales docentes o los métodos de enseñanza; y D) Los estudiantes o alumnos, incluyendo los proceso de selección, evaluación, sanción o, incluso, expulsión de la institución educativa. La Ley prohíbe la comisión de conductas calumniosas en las instituciones educativas, especialmente aquellas que recaigan sobre los alumnos o los empleados del centro docente. En orden a evitar que se produzcan estos o similares actos discriminatorios en el contexto educativo albanés, tanto el Consejo de Ministros como el Ministro de Educación se comprometen a adoptar todas las medidas de signo positivo necesarias para proporcionar suficiente información a los miembros de la comunidad académica sobre el alcance y significado de la Ley, incluir materias que fomenten la igualdad y no discriminación en los programas de enseñanza y adoptar medidas antidiscriminatorias a favor de las mujeres, las niñas, los miembros de las minorías étnicas, culturales o lingüísticas, las personas incapaces y todas aquellas personas que se encuentren en situaciones de vulnerabilidad en base a los motivos enunciados con anterioridad. Por su parte, los directores de los centros docentes están obligados a adoptar todas aquellas medidas de signo positivo que sean necesarias para evitar que se produzcan discriminaciones en relación con el pleno disfrute del derecho a la educación. Medidas que deben incluir, entre otras, acciones cuya finalidad sea: 1)

Evitar comportamientos discriminatorios en las dependencias de la institución educativa; 2) Proteger a los empleados de los centros de actos o conductas discriminatorias; 3) Atender, en plazo máximo de un mes, las quejas que reciban sobre la comisión de actos discriminatorios en el interior de la institución educativa; y 4) Imponer, en el ámbito de sus competencias, sanciones disciplinarias contra cualquier persona que haya cometido un acto discriminatorio en las dependencias de la institución educativa.

- Protección contra la discriminación en el acceso a bienes y servicios (art. 20).

La Ley prohíbe a las personas físicas o jurídicas que, en el sector público o en el privado, suministren bienes o servicios disponibles para el público, con o sin ánimo de lucro, impidan el acceso a los bienes o servicios dispensados o a negarse ofrecer bienes o servicios a una persona de manera similar o, con características similares, a la forma con que son prestados al público en general, en base a los motivos anunciados con anterioridad. En el acceso a bienes y servicios, ningún contratante podrá indagar sobre la situación de embarazo de una mujer demandante de los mismos, salvo por razones de protección de su salud. Disposiciones que son especialmente aplicables cuanto se trata actos discriminatorios que afectan a:

- 1) La libertad de entrada a un lugar público o un local abierto al público; o donde se permite la entrada al público o utilizar un lugar que se le permite ser utilizado por el público;
- 2) El acceso a bienes o servicios sanitarios;
- 3) El acceso a prestaciones sociales;
- 4) El ingreso en una institución educativa;
- 5) La venta o el alquiler de viviendas y otros locales;
- 6) Servicios bancarios;
- 7) El ingreso en instalaciones deportivas, relajación ó descanso;
- 8) El acceso a los medios de transporte; y
- 8) Los servicios prestados por profesionales por cuenta propia. No constituye, sin embargo, un acto discriminatorio la negativa a prestar o suministrar bienes o servicios cuando exista una justificación objetiva y razonable

en atención a una finalidad legítima de interés público o para proteger los derechos y libertades de los demás.

Del capítulo V en adelante encontramos regulado el Comisionado para la Protección ante la Discriminación. El primero de los capítulos al respecto se compone de doce artículos, que van del 21 al 33, en los que realiza una exhaustiva regulación acerca del citado órgano.

El Comisionado se concibe como una persona jurídica de derecho público que ofrece protección frente a cualquier clase de conducta discriminatoria o actuación que incite a la misma. Depende de la Oficina del Comisionado para la Protección de la Discriminación que gozará de personal, equipamiento y presupuesto propio. El personal adscrito al mismo tendrá consideración de funcionario público. El Comisionado gozará de total independencia en el ejercicio de su deber, encontrándose sometido de manera exclusiva a la constitución y a las leyes. Será elegido por mayoría de las Cortes a propuesta de un grupo de diputados. Para tomar posesión el Comisionado deberá prestar juramento ante el Parlamento con una fórmula predeterminada en la propia ley (artículo 23).

El artículo 24 recoge las condiciones para poder ser elegido Comisionado: tener elevadas cualidades morales y actividad distinguida y reconocida por la comunidad, tener estudios universitarios, tener una reconocida actividad y conocimiento en el campo de los Derechos Humanos; no tener condena penal firme y no ser diputado en la legislatura que ha de ser elegido. Unido a todos estos requisitos se sitúa como primero y principal tener la nacionalidad albanesa.

El mandato del Comisionado tendrá la duración de cinco años pudiendo ser reelegido una sola vez. El mandato terminará al final del período de cinco años, en caso de fallecimiento, por renuncia escrita a las cortes o por cese.

El cese del Comisionado se producirá por condena penal firme, incapacidad o por realizar actividades contrarias a esta ley o al conjunto del ordenamiento jurídico. El cese deberá ser

propuesto por, al menos, un tercio de las cortes y votado por la mayoría de la cámara. La elección de un nuevo Comisionado se producirá en el plazo de un mes desde que quede vacante el puesto. Al concluir el mandato, si el Comisionado pertenece a la función pública podrá volver a su puesto y si esto no fuera posible, a uno equivalente.

El artículo 30 señala las incompatibilidades con la función del Comisionado a fin de que su actividad no interfiera en su función. No puede realizar tarea política alguna, ni liderar organizaciones económicas o comerciales. Podrá, sin embargo, realizar actividades docentes y literarias siempre que no afecten al ejercicio de sus funciones.

El Comisionado deberá realizar, al menos, un informe al año acerca del cumplimiento de esta ley. El Comisionado tiene como competencias las siguientes: Examinar las quejas de aquellos que invocan el incumplimiento de esta ley; examinar las quejas de aquellas organizaciones con interés legal; desempeñar investigaciones administrativas sobre el cumplimiento de la ley; imponer sanciones en su caso; promover el principio de igualdad y no discriminación; velar por el cumplimiento de esta ley; hacer encuestas sobre discriminación, realizar recomendaciones a la autoridad competente especialmente en lo relativo a la futura legislación; publicar los informes sobre discriminación; dirigirse a la opinión pública en materia de discriminación; colaborar en procedimientos judiciales en la materia; y en definitiva, contribuir al respeto de la igualdad y no discriminación por los medios puestos a su disposición.

Para hacer efectivo el cumplimiento de su deber tanto las instituciones públicas como las privadas deberán colaborar con el Comisionado otorgándole la información necesaria.

El artículo 33 regula el procedimiento a seguir en caso de discriminación. La demanda por discriminación podrá ser interpuesta por personas físicas o jurídicas, en este último caso será preciso contar con un apoderado que la represente. El artículo recoge el contenido de la reclamación de una manera

exhaustiva; nombre de quien/es interpone/n la queja; cómo contactarle y la exposición clara y pormenorizada de la discriminación producida.

Los supuestos en los que la queja no será admitida se encuentran encabezados por el supuesto de reclamación anónima, si constituye abuso del derecho a presentar queja ante el Comisionado si el mismo caso está siendo examinado en el marco de una queja previa, si no contiene información suficiente para proceder a la investigación, si los hechos acontecieron hace más de tres años o más de un año desde que se conocieron por la parte agraviada. Es preciso poner de manifiesto que una de las causas de inadmisión incide en la irretroactividad de la ley, al señalar que no se aceptará la demanda en el supuesto de que los hechos hubiesen transcurrido antes de la entrada en vigor de la presente norma.

La actividad del Comisionado no supondrá el cobro de tarifa alguno al demandante, siendo obligación del Comisionado verificar los hechos.

El Comisionado podrá, cuando lo considere apropiado, realizar audiencia pública e invitar a las partes; podrá, igualmente, favorecer un acuerdo de conciliación, gozando de noventa días desde la interposición de la queja para emitir su decisión. En el caso de que ordene medidas para resarcir el daño el demandado tendrá treinta días para cumplir con la decisión del Comisionado, quien, en caso de incumplimiento podrá imponer un castigo o multa que podrá ser recurrido en el plazo de siete días.

Al imponer cualquier medida, el Comisionado deberá asegurarse de que es efectiva y proporcionada, y deberá tener en cuenta las circunstancias personales y económicas del demandado, además del efecto en la víctima. La ley establece, incluso, la cuantía de las multas a imponer. El impago podrá conducir a la suspensión de licencias para la actividad que desarrolla.

El capítulo cuarto está dedicado a los procedimientos ante los tribunales, ya que la existencia del Comisionado no excluye la posibilidad de acudir a los tribunales en los supuestos en los que se vulnere el principio de igualdad y no discriminación. De esta manera el Comisionado se sitúa como una garantía extra, un refuerzo en la protección de la igualdad y no discriminación. Se muestra, por tanto, clara la finalidad de la ley: defensa de la igualdad ante la ley, igualdad de oportunidades, igualdad en el ejercicio de los derechos y la protección efectiva frente a cualquier acto de discriminación.

Como venimos señalando la protección jurisdiccional se compatibiliza con la existencia del Comisionado. Así pues, las personas físicas o jurídicas que hayan sufrido discriminación por las causas recogidas en el artículo primero de esta ley podrán presentar una demanda ante el tribunal competente de conformidad con lo establecido en la Ley de Enjuiciamiento Civil o, en su caso, una denuncia ante los órganos penales competentes.

Ahora bien, tal y como señala la Ley, la queja ante el Comisionado no supondrá, necesariamente, la incoación de procedimiento alguno y no supondrá impedimento para dirigirse a los órganos penales. El Comisionado podrá interponer demanda siempre que se encuentre apoderado para ello. La demanda se interpondrá ante el tribunal competente, en atención a lo establecido por el artículo 34, antes de que hayan pasado cinco años de la vulneración de la igualdad y tres años desde que la parte agraviada haya tenido conocimiento. La parte que ha sufrido discriminación no está obligada a citar al Comisionado antes del comienzo del pleito, será el tribunal el que lo notifique, pudiendo llamar al mismo en cualquier momento del proceso. El demandante está obligado a aportar la prueba de la discriminación, en definitiva tiene la carga de la prueba.

La ley establece que toda persona es responsable cuando por obra u omisión comete discriminación, aplicando un principio de responsabilidad individual. La responsabilidad individual no excluye la de las personas jurídicas, públicas o privadas.

La decisión del tribunal establece la indemnización si el tribunal considerase que existe violación de ley al igual que el período para que ésta se abone. La decisión del tribunal se comunicará a las partes y también al Comisionado. La indemnización supondrá además de otras cosas, la restitución del daño colocando al demandado en la situación anterior a los hechos, y una compensación adecuada de los daños materiales e inmateriales o cualesquiera otras medidas apropiadas al efecto. En cualquier caso la imposición de medidas tomadas de conformidad con lo establecido en la presente ley, no excluye, en modo alguno las que deban tomarse en aplicación de cualesquiera otras normas.

La ley concluye con las disposiciones transitoria y final, en las que se establece que el Comisionado será el encargado de crear la normativa específica que regule el funcionamiento de su oficina antes de que transcurran tres meses desde la fecha de su nombramiento. El Consejo de Ministros será el encargado de dictar las normas precisas para la aplicación del artículo 18 de esta ley, en los seis meses siguientes a su entrada en vigor. La ley entrará en vigor a los quince días de su publicación en el Boletín Oficial.

2. LEY SOBRE EL DEFENSOR DE LOS DERECHOS HUMANOS Y LIBERTADES DE MONTENEGRO

El 29 de julio de 2011 el Parlamento de Montenegro adopta la Ley sobre el Defensor de los Derechos humanos y libertades, modificando, de este modo, la regulación que venía recogida en la Ley No. 41/2003 (Artículo 58 de la Ley de 2011).

En esta norma se regula la competencia, facultades, atribuciones y modos de actuación de la institución del Defensor de los Derechos y libertades (artículo 1 de la Ley). Por lo tanto, su objetivo fundamental es determinar la creación, estructura, y funcionamiento de dicha institución.

El Defensor se configura como una institución autónoma e independiente, autonomía que no es extensible a la labor de los Tribunales (artículo 2). Según la norma, el Defensor sólo podrá entrar a conocer quejas relacionadas con la labor desempeñada por los tribunales en caso de que se produzcan retrasos en el procedimiento, abusos en las autorizaciones de procedimiento o falta de ejecución de las decisiones judiciales (artículo 17)

Toda la actuación del Defensor se encuentra sometida a los principios de justicia y equidad (artículo 2) y será pública. De hecho, su actividad será accesible a la ciudadanía a través de un informe anual emitido por el propio Defensor (artículo 4). Los gastos que suponga su actividad serán sufragados a través de una partida extraída de los presupuestos del Estado (artículo 6).

El Defensor se instituye como mecanismo nacional de protección contra la tortura el castigo y otros tratos crueles, inhumanos o degradantes de las personas privadas de libertad (artículo 25 y 27) que colaborará directamente con el Subcomité para la Prevención de la Tortura y Otros Tratos o Penas Crueles, Inhumanos o Degradantes de Naciones Unidas (artículo 26).

Según el articulado de la norma, la misión del Defensor consiste en: a) adoptar medidas de protección de los Derechos humanos y las libertades, cuando los poderes y servicios públicos, en los distintos niveles estructurales propios del Estado,

cometen una violación de los Derechos humanos mediante acción u omisión; b) adoptar medidas preventivas contra la tortura y otras formas de trato inhumano o denigrante o contra la discriminación (artículo 2)

El Defensor será elegido entre los ciudadanos de Montenegro con Título universitario, reconocido prestigio y, al menos, 15 años de experiencia. Será nombrado por mayoría del Parlamento, a propuesta del Presidente (artículo 7). Fundamentalmente protegerá a las personas privadas de libertad de la tortura y otros tratos inhumanos degradantes. Del mismo modo, procurará una especial protección contra la discriminación, a los derechos de las minorías, al ámbito laboral, a la infancia, a las personas con discapacidad y a la igualdad de género (artículo 8).

Junto al Defensor se prevé la existencia de uno y varios Adjuntos. Este será nombrado entre los ciudadanos de Montenegro, con Título universitario y 10 años de experiencia y reconocido prestigio (artículo 8). El/Los Adjuntos desarrollarán su actividad dentro del ámbito de las competencias asignadas al Defensor, aunque en la Ley se prevé la existencia de un Adjunto específicamente dedicado a la protección contra la discriminación. La decisión sobre el número de adjuntos adscritos al Defensor será adoptada por el Parlamento de Montenegro (artículo 9). Del mismo modo, el Adjunto será nombrado por el Parlamento, pero a propuesta del Defensor, por un periodo de 6 años, pudiendo ser reelegido (artículo 10).

Cabe destacar que el artículo 11 de la Ley contempla el juramento como declaración formal para la asunción del cargo. De hecho, el artículo contiene el tenor literal de la fórmula: "Juro a proteger los derechos humanos y libertades de conformidad con la Constitución y las leyes, y respetar los principios de justicia y equidad".

Tanto el Defensor como el Adjunto no puede ser miembro de una organización política, o participar en actividades políticas, ni ejercer otras funciones públicas o cualquier actividad

profesional, salvo actividades científicas, educativas o artísticas, o actividades protegidas con derechos de autor (artículo 13)

El Defensor y/o el Adjunto sólo cesarán en su función antes de la expiración del plazo para el que es nombrado si: a) renuncia al cargo; b) pierde la nacionalidad; c) reúne las condiciones para la jubilación; o d) es despido.

Entre las causas justificadas de despido figuran:

- 1) ser condenado por una pena de prisión sin suspensión por un delito que le hace indigno para ejercer la función;
- 2) ser privado de su capacidad jurídica mediante sentencia firme
- 3) convertirse en miembro de una organización política,
- 4) llevar a cabo otra función pública o profesionalmente se dedica a otra actividad (artículo 14)

El Defensor informará al sobre las razones de su cese en las funciones encomendadas o del despido (artículo 15). El Defensor y su Adjunto tendrá documento que acredite su condición. La forma y contenido de dicho documento de identidad será determinado por el Defensor (artículo 16)

Del artículo 17 al 23 la Ley regula las competencias y actividades autorizadas al Defensor. Según el artículo 18 este puede iniciar el procedimiento para la adopción de leyes, reglamentos y demás normas de carácter general que permitan armonizar la regulación de Montenegro con los estándares reconocidos internacionalmente en materia de derechos humanos y las libertades. Incluso, si lo considera necesario, el Defensor podrá iniciar un procedimiento ante el Tribunal Constitucional de Montenegro para verificar la adecuación de las leyes con la Constitución y los Tratados internacionales ratificados por el Estado o, en su caso, la adecuación de los reglamentos y otras disposiciones generales con la Constitución y la Ley (artículo 19).

Las acciones encomendadas al Defensor aparecen determinadas en el artículo 20. Así el Defensor actúa para señalar, advertir, criticar o recomendar. Por lo tanto, queda claro

que entre sus funciones no está la de juzgar y/o sancionar las conductas consideradas como lesivas de los Derechos humanos. Más explícitamente, el artículo 22 señala que el Defensor no está autorizado para modificar, suspender o anular los actos de los poderes públicos.

De forma especial, el Defensor, el Adjunto o un empleado de la oficina del Defensor debidamente autorizado podrá:

- Inspeccionar, sin previo aviso, los locales de las autoridades, organizaciones, instituciones y otros lugares donde esté o pueda estar detenida una persona privada de libertad;
- Visitar, sin previo aviso, a una persona privada de libertad y verificar el nivel de respeto de sus derechos;
- Hablar, ya sea personalmente o a través de un intérprete, con una persona privada de libertad, o con otra persona de la que piensa que puede proporcionar información precisa, sin la presencia del oficial u otra persona (artículo 24)

Si la autoridad lo entiende necesario el Defensor puede ser requerido para emitir un dictamen sobre la situación de la protección y promoción de los Derechos humanos.

El procedimiento de actuación del Defensor se puede iniciar por iniciativa propia o a petición de todo aquel individuo que considere que una norma o actuación de los poderes públicos a lesionado sus derechos fundamentales. Para que el Defensor actúe por iniciativa propia se requiere consentimiento de la víctima (artículo 3 y 28).

La queja puede ser presentada oralmente o a través de un miembro del parlamento. Cuando la violación afecte a un menor puede ser presentada por sus padres, tutor o representante legal o una asociación encargada de la protección de los derechos del menor. Si el denunciante fuera una persona privada de libertad, la queja será presentada por la institución donde se encuentre, a través de la persona facultada para ello, en sobre cerrado y sellado (artículo 30).

El contenido de la denuncia viene desarrollado en el artículo 31 de la norma y debe expresar la identificación de la entidad causante de la violación los hechos, las pruebas que apoyan la denuncia, declaración de haber agotado previamente todos los recursos legales, nombre y dirección del demandante e indicación de si el demandante acepta revelar su nombre en el procedimiento. Si la queja no contiene toda la información señalada o es incomprensible, el Defensor podrá requerir al demandante para que modifique y subsane los errores o ausencias en un plazo determinado de tiempo.

El plazo para presentar la demanda es de seis meses desde que se tiene conocimiento de la violación o un año desde que se produjeron los hechos. Aún así, el plazo puede subsanarse, si el Defensor considera que tiene relevancia suficiente (artículo 32).

El Defensor informará a la autoridad denunciada sobre la queja para tomar declaración en el plazo que establezca, nunca inferior a ocho días (artículo 35).

El Director o responsable de la autoridad denunciada estará obligado a poner a disposición del Defensor todos los datos de su competencia, independientemente del grado de confidencialidad, así como a proporcionarle acceso sin restricciones a todos los locales, de acuerdo con las normas que regulan la confidencialidad y la protección de datos de carácter personal, y el manejo de los archivos y documentos oficiales (artículo 36).

Las autoridades públicas están obligadas a cooperar con el Defensor (artículo 38). Si no lo hiciera está obligado a informar de las razones por las que no aporta información, considerando el incumplimiento obstaculización de la labor del Defensor que informará a la autoridad competente inmediatamente superior (artículo 37).

El Defensor puede citar a cualquier persona que considere necesario en calidad de testigo o contratar a un experto en el campo correspondiente. Ambos tendrán derecho a remuneración y reembolso de los gastos, conforme a la normas que regulan

dicho reembolso en los procedimientos judiciales, y el montante será extraído de los fondos del Defensor (artículo 40).

Una vez finalizado el procedimiento, el Defensor emitirá un dictamen sobre si se ha producido la violación y cómo y en qué medida ha ocurrido. Cuando el Defensor considere que la violación de los derechos humanos y las libertades se produjo, el informe debe contener una recomendación sobre lo que hay que hacer para reparar la violación, así como el plazo para su solución (artículo 41). El jefe o el responsable de la autoridad involucrada, estará obligado a presentar, dentro del plazo previsto, un informe sobre las medidas adoptadas para llevar a cabo las recomendaciones contenidas en el dictamen del Defensor. Si no cumple con la recomendación en un plazo determinado, el Defensor podrá informar a la autoridad superior inmediata, presentar un informe especial o informar al público (artículo 42). A su vez, el Defensor informará al denunciante sobre los resultados obtenidos (artículo 43). Tanto el Defensor como el Adjunto y las personas que trabajan en la oficina del defensor están sometidas al deber de guardar la confidencialidad sobre caso, incluso después del cese de su función (artículo 45).

Finalmente, el artículo 46 prevé el desarrollo del procedimiento a través de un Reglamento que contendrá las “Reglas de Procedimiento del Defensor” y que será publicado en el Boletín Oficial de Montenegro

Además de sus funciones ordinarias, y específicas para casos determinados de violación de derechos y demandas particulares, el Defensor deberá presentar al Parlamento un informe anual de trabajo. En él incluirá, con carácter general: una perspectiva estadística general de los casos en los que actuó, el resumen de las áreas de trabajo en las que actuó, su evaluación sobre la situación en que se encuentran los derechos humanos y las libertades en Montenegro, recomendaciones y medidas para la mejora de la los derechos humanos y la eliminación de las deficiencias detectadas. Con carácter específico un parte contendrá un informe sobre la percepción del fenómeno de la

discriminación y una evaluación en materia de protección contra la discriminación, donde evaluará la labor desarrollada por las autoridades, los proveedores de servicios y otras personas, las deficiencias detectadas y las recomendaciones para su eliminación, así como el análisis de la ley. Dicho informe será público y el Parlamento y el Gobierno presentará una opinión sobre le mismo (artículo 47 y 48)

Finaliza la Norma fijando los honorarios y estructura del Servicio Administrativo y profesional del Defensor y su procedencia de los Presupuestos Generales de Montenegro. Cabe destacar la sanción que prevé de multa entre 500 y 2000 Euros (artículo 54) para: 1) la persona responsable de la autoridad que no cumplan con lo solicitado por el Defensor dentro del plazo previsto (artículo 35, párrafo 2); 2) la persona que no comparezca ante el Defensor (artículo 40, párrafo 2).

ANEXO I
ALBANIA

LAW ON PROTECTION FROM DISCRIMINATION

(No. 10 221 dated 4.2.2010)

In reliance on articles 18, 78 and 83 point 1 of the Constitution of the Republic of Albania, on the proposal of a group of deputies,

THE ASSEMBLY OF THE REPUBLIC OF ALBANIA
D E C I D E D:

CHAPTER I
GENERAL PROVISIONS

Article 1

Object

This law regulates the implementation of and respect for the principle of equality in connection with gender, race, colour, ethnicity, language, gender identity, sexual orientation, political, religious or philosophical beliefs, economic, education or social situation, pregnancy, parentage, parental responsibility, age, family or marital condition, civil status, residence, health status, genetic predispositions, restricted ability, affiliation with a particular group or for any other reason.

Article 2

Purpose

The purpose of this law is to assure the right of every person to:

- a) equality before the law and equal protection by law;
- b) equality of opportunities and possibilities to exercise rights, enjoy freedoms and take part in public life;
- c) effective protection from discrimination and from every form of conduct that encourages discrimination.

Article 3

Definitions

1. “Discrimination” is every distinction, exclusion, limitation or preference because of any cause mentioned in article 1 of this law that has as a purpose or consequence the hindering or making impossible the exercise, in the same manner as with others, of the fundamental rights and freedoms recognized by the Constitution of the Republic of Albania, with international acts ratified by the Republic of Albania as well as with the laws in force.

2. “Direct discrimination” is that form of discrimination that occurs when a person or group of persons is treated in a less favourable manner than another person or another group of persons in a situation that is the same or similar based on any cause mentioned in article 1 of this law.

3. “Indirect discrimination” is that form of discrimination that occurs when a provision, criterion or practice, apparently neutral, would put a person or group of persons in unfavourable conditions, in connection with the causes set out in article 1 of this law, in relation to a person or another group of persons, and also when that measure, criterion or practice is not objectively justified by a legitimate aim, or when the means of achieving that aim either are not appropriate or are not essential and in fair proportion with the condition that has caused it.

4. “Discrimination because of association” is that form of discrimination that occurs when there is a distinction, limitation or preference, because of association with persons who belong to

the groups mentioned in article 1 of this law, or because of a supposition of such an association.

5. “Annoyance” is that form of discrimination that occurs in the case of an undesirable conduct, when it is related to any of the causes mentioned in article 1 of this law, which has the purpose or effect of violating the dignity of a person and the creation of an intimidating, hostile, degrading, humiliating or offensive environment for that person, as well as in the case of a less favourable treatment performed as a result of an objection or failure to submit by the person infringed on by such a behaviour.

6. “Instructions to discriminate” are instructions or a request based on hierarchical relations to discriminate against one or more persons on the basis of the causes mentioned in article 1 of this law.

7. “Denial of a reasonable accommodation” is that form of discrimination that happens whenever there is a denial of or objection to making essential and appropriate regulations or changes that are necessary in a particular case and do not impose an excessive burden, for the purpose of assuring the enjoyment and exercise, on an equal basis, of the fundamental rights and freedoms for persons with restricted ability or which occurred in other conditions mentioned in article 1 of this law.

8. “Victimisation” is an unfavourable treatment or adverse consequence that comes as a reaction to a complaint or to a proceeding that aims at implementation of the principle of equality.

9. “Organisations with legitimate interests” are those organisations that have been registered in the Republic of Albania and have as the declared object of their activity the protection of human rights or which offer assistance to victims of discrimination.

Article 4

Subjects

1. This law is applicable to all persons who live and stay in the territory of the Republic of Albania.

2. Albanian citizens with a temporary or permanent residence outside the borders of the Republic of Albania enjoy the protection that this law offers in relations with the Albanian state organs.

3. Natural and legal foreign persons with a residence domicile or headquarters outside the territory of the Republic of Albania enjoy the protection that this law offers in relations with the Albanian state organs.

Article 5

Prohibition of discrimination

1. Discrimination is prohibited for the causes mentioned in article 1 of this law and the failure to examine an appeal or procedure, according to the cases mentioned in article 3 of this law, as well as any other form of behaviour that hinders the implementation of the principle of equal treatment.

2. The denial of adaptations and modifications that are appropriate and necessary for persons with restricted ability constitutes discrimination.

Article 6

Justified different treatment

1. The prohibition of discrimination described by this law is not applicable in cases when there is an objectively justifiable purpose supported on the basis of the Constitution, international acts or agreements ratified by the Republic of Albania and the legislation in force.

2. Different treatment that is based on a characteristic related to the causes mentioned in article 1 of this law does not constitute discrimination when because of the nature of the professional activities or the conditions in which the profession or activity is conducted, those characteristics constitute an essential real and professional requirement, provided that the purpose of the different treatment shall be justified and the requirement shall not exceed that which is essential to realise it.

Article 7

Protection from discrimination

1. Every action or failure to act of the public authorities or of natural or legal persons who take part in the private or public sectors and life, which creates bases for the denial of equality against a person or group of persons, or which expose them to an unfair, unequal treatment when they are in the same or similar circumstances in comparison with other persons or other groups of persons constitutes discrimination.

2. The elimination of all privileges and of unfair discrimination is guaranteed for everyone, on the basis of the personal, political, economic, social and cultural rights assured by the Constitution of the Republic of Albania and international acts ratified by the Republic of Albania as well as by the laws in force.

Article 8

Discriminating advertisements

The publication of advertisements and various announcements is prohibited if they present, openly or in an implied manner, a purpose to discriminate for the causes mentioned in article 1 of this law.

Article 9

Participation in politics

Discrimination in the exercise of the right to vote, to be elected and to be appointed to a public duty for the causes mentioned in article 1 of this law is prohibited.

Article 10

Conscience and religion

1. Discrimination is prohibited in connection with the exercise of freedom of conscience and religion, especially when it has to do with their expression individually or collectively, in public or in private life, through worship, education, practices or the performance of rites.

2. An exception from this provision may be permitted only when a reasonable and objective justification exists. However, in every case, the permission of discrimination because of the exercise of the freedom of conscience and religion may be imposed only by law for a public interest or for the protection of the rights of others. An exception for this reason should be proportionate to the situation that has dictated the need for a discrimination. In any case, the permission of the discrimination because of the exercise of the freedom of conscience and religion cannot violate the core of the rights and freedoms and in no case may it exceed the restrictions provided in the European Convention for Human Rights.

Article 11

Positive actions

A particular temporary measure that aims at speeding up the real establishment of equality, when the absence of equality has been caused by discrimination for any cause mentioned in article 1 of this law, is considered a positive action and does not constitute discrimination according to this law. This measure is

interrupted as soon as the objectives of the treatment and offering of equal opportunities have been achieved.

CHAPTER II

PROTECTION FROM DISCRIMINATION IN EMPLOYMENT

Article 12

Prohibition of discrimination

1. Discrimination against a person in connection with his right to employment is prohibited. Discrimination includes every distinction, limitation or exclusion that is based on the causes mentioned in article 1 of this law and which, among other things, is related to:

- a) the announcement of free places of work;
- b) the recruitment and selection of employees;

c) the treatment of employees in the work place, including their treatment during the establishing or changing of working conditions, compensation, benefits and the work environment, treatment related to professional training or during the disciplinary process or related to dismissal from work or the dissolution of the labour contract;

ç) membership in labour unions and the possibility of benefiting from the facilities that this membership secures.

2. Every kind of annoyance is prohibited, including sexual annoyance, by an employer against an employee or an applicant for work or between employees.

3. The implementation of special and temporary measures, based on the causes mentioned in article 1 of this law, for the purpose of speeding up equality in the field of employment, is not considered discrimination. The implementation of such measures can in no case mean maintaining unequal or different standards in a permanent manner, and the special measures are interrupted

when the objective of the offering of equal opportunities and treatment is achieved.

Article 13

Obligations of the employer

1. The employer is obliged:

a) to implement, protect and encourage the principle of equality and the prohibition of every kind of discrimination;

b) to take necessary measures, including disciplinary measures, for the protection of employees from discrimination and victimisation, within one month from receiving knowledge [of them];

c) to respond effectively and in compliance with this law to complaints received because of discrimination committed by his employees, within one month from receiving them.

2. The employer is obliged to raise consciousness about this law also by posting it in public premises of the work place as well as enabling a full understanding of it by his own means or with the assistance of specialized subjects.

Article 14

Duties of the Council of Ministers, the Minister of Labour, Social Issues and Equal Opportunities and the Interior Minister.

The Council of Ministers, the Minister of Labour, Social Issues and Equal Opportunities and the Interior Minister are each responsible for taking measures of a positive nature in order to fight discrimination in connection with the right to employment. The measures that are taken, among others, are:

a) raising consciousness about this law with employees and employers, among other things, by supplying information about this law;

b) establishing special and temporary policies, on the basis of the causes mentioned in article 1 of this law, for the purpose of encouraging equality, in particular, between man and woman as well as between fully physical able persons and those who are of restricted ability.

Article 15

The rights of the employee

1. Every employee has the right to complain to the employer, to the Commissioner for Protection from Discrimination or in court, if he believes that he has suffered discrimination. This provision does not limit the right to complain to special institutions created at various sectors of employment.

2. During the period of examination of the complaint, the employee has the right to continue work according to the conditions of the contract.

3. The employee has the right to receive information at any time in connection with the treatment of a complaint as well as to receive explanations about the decisions taken by the employer in response to his complaint immediately after it is examined.

4. If the employer does not take measures to investigate and resolve a complaint about discrimination, the employee who has made the complaint has the right to interrupt work, without losing the right to pay, for as long as necessary to be protected from discrimination. The employee returns the pay received according to this article if the claimed discrimination turns out not to be proven by a final decision.

Article 16

Implementation of the law for self-employed persons

The provisions of chapter II of this law are applicable in connection with the conditions for acceptance into a profession

and the receipt of licenses to exercise a profession, especially in cases when the persons are self-employed.

CHAPTER III

PROTECTION FROM DISCRIMINATION IN THE FIELD OF EDUCATION

Article 17

Prohibition of discrimination

1. Every distinction, limitation or exclusion is prohibited based on the causes mentioned in article 1 of this law and which, among other things, is related to:

a) the creation of public or private institutions that offer educational or professional services;

b) the financing of public institutions that offer educational or professional services;

c) the content of principles and criteria of educational activity, including teaching programmes and teaching methods;

ç) the treatment of students or pupils, including acceptance, evaluation, application of disciplinary measures or their expulsion.

2. It is prohibited for a person or group of persons to be refused acceptance into a public educational institution for the causes mentioned in article 1 of this law.

3. Every kind of annoyance is prohibited, especially annoyance, of students, pupils and employees in educational institutions.

4. The implementation of special and temporary measures, based on the causes mentioned in article 1 of this law, for the purpose of speeding up equality in education, is not considered discrimination. The implementation of such measures can in no case mean maintaining unequal or different standards, in a

permanent manner, and these measures are interrupted when the objective of offering equal opportunities and treatment is achieved.

Article 18

Duties of the Council of Ministers and the Minister of Education and Science

1. The Council of Ministers and the Minister of Education and Science are each responsible for taking measures of a positive nature in order to fight discrimination in connection with the right to education.

2. The Council of Ministers and the Minister of Education and Science, among other things, each take measures for:

a) raising consciousness about this law in the educational system, among other things, including information about it in teaching programmes;

b) including concepts and actions against models of discriminating behaviour in teaching programmes;

c) educating the entire population, in particular, by taking measures in favour of women and girls, minorities, persons of restricted ability as well as persons who are or have more possibility of being the object of discrimination for the causes mentioned in article 1 of this law;

ç) respecting and assuring the right to education in the languages of minorities, as well as in appropriate manners for persons with restricted ability.

Article 19

Duties of the director of an educational institution

The director of an educational institution is responsible for taking measures of a positive nature in the respective institution,

in order to fight discrimination in connection with the right to education. The measures that are taken, among other things, are:

a) raising consciousness about this law within the institution, among other things by posting the law in a visible place;

b) the fight against models of discriminating behaviour that constitute or encourage discrimination within the institution;

c) taking necessary measures, including disciplinary measures, for the protection of employees from discrimination and victimisation, within one month from receiving knowledge;

ç) the effective treatment of complaints about discrimination in the institution, examining every complaint within 30 days from its submission;

d) imposing disciplinary measures against any person who is verified to have performed a discriminatory act when such a thing is appropriate, proportional and in conformity with the competences of the director.

CHAPTER IV

PROHIBITION OF DISCRIMINATION IN THE FIELD OF GOODS AND SERVICES

Article 20

Goods and services

1. A natural or legal person who offers goods or services to the public, whether or not for payment, is prohibited from discriminating against another person who seeks to achieve or use them:

a) by refusing to give a person or group of persons goods or services for the causes mentioned in article 1 of this law;

b) by refusing to offer a person goods or services in a similar manner, or with similar qualities, or in conditions similar

to that in which those goods or services are offered to the public in general.

2. Point 1 of this article is especially applicable to:

a) the ability to enter into a place where the public is permitted to enter or to use a place that is permitted to be used by the public;

b) the ability to receive or to benefit from goods or services that have to do with health;

c) the contribution and possibility to benefit from goods from social protection schemes, including social assistance, social insurance, protection of children, disability benefits or any another scheme of social protection or other advantage offered to the public;

ç) the ability to use or enter into an educational institution;

d) systemisation in a place where housing is offered;

dh) the sale or renting of residences and other premises;

e) banking services and the possibility of obtaining grants, loans, bank deposits or financing;

ë) facilities for entertainment, relaxation and refreshment;

f) facilities for transport or travel;

g) services of the free professions.

3. It is prohibited for a natural or legal person who offers goods and services to the public not to accept or to oppose the realisation of changes or accommodations that are necessary and appropriate, which aim at enabling a person of restricted ability to benefit from those goods and services, so long as the modifications or adjustments do not impose a disproportionate or unlawful burden on the person who offers the goods and services.

4. Refusal according to point 1 of this article also includes situations when the refusal in fact is based on the causes mentioned in article 1 of this law, but other reasons are declared

by the discriminating subject or no reason is declared as a reason for the refusal.

5. Distinctions in compensation and benefits, established because of the causes mentioned in article 1 of this law, do not constitute discrimination when these distinctions are reasonable and in proportion to a risk that is evaluated on the basis of current and statistical data that can be verified and are closely linked to the risk.

6. Costs related to pregnancy and motherhood may not be a reason for distinctions in compensation and benefits of the individual.

7. The prohibition of discrimination is not applicable to the setting of a particular age for the possibility of social benefits, goods, facilities and services, if there exist reasonable and objective criteria for the determination, without infringing the core of the right to benefits and when the determination aims to achieve a lawful purpose for a public interest, or to protect the rights of others, always in a fair proportion to the situation that has caused the determination.

CHAPTER V

THE COMMISSIONER FOR PROTECTION FROM DISCRIMINATION

Article 21

The commissioner

1. The commissioner for Protection from Discrimination, below the commissioner, assures the effective protection from discrimination and from every other form of conduct that incites discrimination. The commissioner is a public legal person.

2. The commissioner is supported by the Office of the Commissioner for Protection from Discrimination (office). The

office has its personnel and necessary equipment to support the commissioner in fulfilling the duties assigned by law.

3. The Assembly decides on the pay of the commissioner, the organisational structure and the classification of pay for the employees of the Office of the Commissioner for Protection from Discrimination. The employees of this office enjoy the status of civil servant.

4. The Commissioner has his own independent budget, which is financed from the State Budget and from various donations.

Article 22

Status

The commissioner is independent in the exercise of duty and is subject only to the Constitution and law.

Article 23

Manner of election of the commissioner

1. The commissioner is elected by a majority of all the members of the Assembly.

2. Possible candidates for commissioner are proposed to the Assembly by a group of deputies.

3. Before taking office or taking office again, the commissioner takes an oath before the Assembly.

4. The formula of the oath is: “I swear that during the performance of my duties, I will always protect the principle of equality in compliance with the Constitution and laws of the Republic of Albania”.

Article 24

Conditions for being elected commissioner

Any Albanian citizen who meets the following requirements may be elected commissioner:

a) to have high moral qualities and distinguished activity in the community;

b) to have a university diploma;

c) to have distinguished activity and knowledge in the field of human rights and freedoms and law;

ç) not to have been convicted by a final decision for the commission of a criminal offence;

d) not to be a deputy in the legislature of the Assembly that proposes or elects him.

Article 25

Length of time in office

The commissioner is elected for a mandate of five years, with the right to be re-elected only once.

Article 26

Reporting

The commissioner submits a report at least once a year before the commissions of the Assembly. The report includes an analysis about the implementation of this law in general, as well as the work of the commissioner and the office.

Article 27

End of the mandate

The mandate of the commissioner ends when:

a) the five year term ends;

b) he is discharged;

c) he submits a written resignation to the Assembly;

ç) he dies.

Article 28

Cases of discharge of the commissioner from duty

1. The commissioner is discharged from duty only in cases when:

a) he has been convicted by a final court decision for the commission of a criminal offence;

b) he is mentally or physically incapable of exercising his functions;

c) he commits activity in opposition to the provisions of this law, with the Constitution or with the legislation in force.

2. A motion for the discharge of the commissioner is proposed by no fewer than 1/3 of the deputies of the Assembly. A decision for the discharge of the commissioner from duty is taken by a majority of the votes of all the members of the Assembly.

Article 29

Election of the commissioner

The Assembly elects a new commissioner within one month from the place becoming vacant. When the five year mandate of the commissioner ends, he stays in office until the new commissioner is elected.

Article 30

Incompatibility with the function of commissioner

The commissioner is prohibited from being part of a political organization or party, from carrying out political, state and professional activity, and from taking part in the leading organs of social, economic and commercial organisations. The commissioner may exercise teaching activity and the publication

of literary and scientific works, without affecting the exercise of his functions in a normal manner.

Article 31

Assuring later work for the commissioner

With the end of the function according to letters “a” and “b” of article 27 of this law, a commissioner who, at the time of appointment, had worked in a state function or public work, has the right to reassume the function or work that he had before his election as Commissioner. When this is not possible, he is assured work equivalent to what he had before his election to the duty of commissioner.

Article 32

Competences

1. The commissioner has the competence:

a) to examine complaints from persons or groups of persons who claim that they have been discriminated against as provided in this law;

b) to examine complaints from organisations that have a lawful interest to act in the name and with the written consent of individuals or groups of individuals who claim that discrimination has occurred;

c) to perform administrative investigations after the receipt of credible information about a violation of this law;

ç) to impose administrative sanctions according to the specification of this law;

d) to encourage the principle of equality and non-discrimination, especially by sensitising and informing about those issues, also including the offering of written information among other things about this law, in the Albanian language, in

the languages of minorities, as well as in formats usable by persons of restricted ability;

dh) to monitor the implementation of this law;

e) to take polls in connection with discrimination

ë) to make recommendations to the competent authorities, especially by proposing the approval of new legislation or the amendment or reform of existing legislation;

f) to publish reports and make recommendations about any kind of issue related to discrimination;

g) to address public opinion directly about any kind of issue related to discrimination;

gj) at the request of the court examining a case, to set out an opinion in writing on any kind of issue that is related to discrimination;

h) to contribute to reporting and, as the case may be, to submit reports to international and regional bodies;

i) to represent a complainant in the judicial organs in civil cases, with his approval in compliance with point 3 of article 34 of this law;

j) to inform about the right of protection from discrimination and the legal means available or this protection;

k) to hold a regular dialogue in connection with issues of discrimination with the respective social groups, including non-governmental organisations;

l) to conduct consciousness-raising and educational activities that aid in the implementation of this law.

2. All public institutions and private subjects are obliged to support the commissioner in the fulfilment of his duties, especially by supplying information needed by him.

3. For the examination of complaints addressed to him, the commissioner applies the norms provided in the Code of

Administrative Procedure, except for the procedures that are provided by this law.

4. The obligation mentioned in point 2 of this article is fulfilled in compliance with law no. 9887 dated 10.3.2008 “On the protection of personal data”.

Article 33

Procedures

1. A person or group of persons who claim that they have been discriminated against, or an organisation with legitimate interests that claims discrimination in the name of a person or group of persons, may submit a complaint together with available evidence to the commissioner, in writing or in exceptional cases orally, so that minutes can be taken.

2. An organisation with legitimate interests submits a special power of attorney to represent the person or group of persons.

3. The complaint contains at least:

- a) the name of the complainant;
- b) an explanation of how the complainant can be contacted;
- c) the subject who is claimed to have committed the discrimination or an explanation about the impossibility of identifying him;
- ç) an explanation of the claimed discrimination;
- d) the measures requested of the commissioner;
- dh) the date and signature of the complainant or his representative.

4. The complaint is not accepted if:

- a) if it is anonymous;
- b) it constitutes abuse of the right of complaining to the commissioner, or is incompatible with the provisions of this law;

c) the same case is being examined in the framework of another complaint for a prior decision has been taken on it and there are no new data;

ç) it is openly without a basis or there is insufficient information to make in investigation possible;

d) all the facts that constitute the essence of the complaint happened before the entry of this law into force;

dh) it is submitted later than three years from the occurrence of the discrimination or later than one year from receipt of knowledge of this fact by the injured party.

5. The natural or legal persons against whom the complaint has been submitted are notified in writing by the commissioner within 15 days from the day of receipt of the complaint.

6. The commissioner does not charge the complainant with any tariff for examining the complaint.

7. On receipt of the complaint, the commissioner verifies the facts. For this purpose, the commissioner may ask the complainant and the person against whom the complaint has been made to submit written presentations within 30 days from the day the parties receive notice. When he considers it necessary, the commissioner also takes information from any other person or source.

8. When he considers it appropriate, the commissioner holds a public hearing session and invites the parties and every other interested person.

9. When he considers it appropriate, the commissioner seeks to reach a conciliation agreement between the complainant and the person against whom the complaint was submitted.

10. The commissioner expresses himself by a decision, which is made known to the parties within 90 days from the date of receipt of the complaint or, if a public hearing session has been held, within 90 days from the day of the session. The decision

contains appropriate measures and regulations, also setting a time period for performing them.

11. If the commissioner orders regulations or measures, the person against whom the complaint was submitted reports within 30 days before the commissioner in connection with the actions undertaken for the implementation of the decision. If the person against whom the complaint was submitted does not inform the commissioner or does not implement the decision, the commissioner imposes a measure of a punishment by fine for the person against whom the complaint was submitted. The sanction by fine is repealed if the person against whom the complaint was submitted implements the decision within seven days after the sanction was imposed.

12. When he imposes a measure, the commissioner assures that it will be:

a) effective and preventative; and

b) proportionate with the situation that caused the imposition of the measure. If a fine is imposed, the commissioner determined the amount of the fine while taking into account:

i) the nature and field of action of the violation and the effect on the victim, and

ii) the personal and financial circumstances of the violator, especially taking into account all sources of income, and if the violation is committed by a private legal person, the balance sheet assets and profit are taken into account, as well as the total payroll;

c) if the same violation discriminates against several persons, only one fine is imposed, but taking into account the requirements of letter “b” of this article.

13. Every person who violates the provisions of this law is punished by a fine as follows:

a) a natural person, from 10,000 to 60,000 lek;

b) a legal person, from 60,000 to 600,000 lek;

c) a natural person within a legal person who is responsible for the violation, from 30,000 to 80,000 lek;

ç) a person who exercises a public function and is responsible for the violation on the basis of this law, from 30,000 to 80,000 lek.

14. The decision to impose a measure of punishment by fine also sets a reasonable time period within which the fine is paid.

15. As a final means, especially when the natural or legal subject does not comply with the decision of the commissioner or does not pay the fine within three months after the time period set by the commissioner and the sanction has not been objected to in court, the commissioner may ask the competent authorities to remove or suspend the license or authorisation of the violator to conduct his activity.

16. A natural or legal subject against whom a measure of punishment by fine is taken has the right to appeal to the competent court according to the Code of Civil Procedure.

17. The fine is deposited into the State Budget.

CHAPTER VI

PROCEDURES BEFORE THE COURT

Article 34

Subjects who have the right to submit a lawsuit for discrimination

1. Every person or group of persons who claim that discrimination has been exercised against them for one of the causes mentioned in article 1 of this law may submit a lawsuit to the competent court according to the definitions of the Code of Civil Procedure for indemnification according to law or, as the case may be, to make a criminal denunciation before the competent organs for criminal prosecution.

2. The submission of a complaint before the commissioner is not a condition to submitting a lawsuit and it does not constitute an impediment for the injured person to turn to the court or the organs of criminal prosecution.

3. An organisation with a lawful interest or the commissioner may submit a lawsuit in the name of a person or group of persons, provided that the commissioner or organisation shall have the consent by special power of attorney or by declaration before the court of the person or group of persons injured by the discrimination.

Article 35

Individual responsibility

Every person has responsibility on the basis of the provisions of this law, when by his actions or failures to act, he has committed a discriminatory act within the meaning of this law. Individual responsibility does not exclude the responsibility of the state or a private legal person.

Article 36

Procedure before the court

1. The lawsuit is submitted to the competent court by one of the subjects provided in article 34 of this law no later than five years from the day when the behaviour claimed to be discriminatory happened and no later than three years from the day when the injured party receives knowledge of this behaviour.

2. The injured party has no obligation to notify the commissioner before submitting a lawsuit for discrimination in court.

3. The court notifies the commissioner of the submission of every lawsuit about discrimination.

4. The court may ask the commissioner, at any phase of the proceeding, to submit a written opinion, the results of his investigation if an investigation was made, or any other information that has importance for the case.

5. The plaintiff has the obligation to bring evidence in support of the lawsuit, using every kind of lawful evidence that may show discriminating behaviour.

6. After the plaintiff submits the evidence on which he bases his claim and on the basis of which the court may presume discriminating behaviour, the defendant is obligated to prove that the facts do not constitute discrimination according to this law.

Article 37

Decision of the court

1. The decision of the court sets the indemnification, if the court decides that there is a violation of this law, also including a time period for making the indemnification.

2. The decision of the court is communicated to all the interested parties, including the commissioner.

3. The imposition of measures according to this law does not exclude the imposition of measures according to other laws.

Article 38

Indemnification

Indemnification includes, among other things, the correction of the legal violations and their consequences through return to the prior situation, appropriate compensation for the property and non-property damages or through other appropriate measures.

CHAPTER VII

FINAL AND TRANSITIONAL PROVISIONS

Article 39

Subordinate legal acts

1. The Commissioner is charged with issuing rules of the functioning of the office within three months from the date of his appointment.

2. The Council of Ministers is charged with issuing subordinate legal acts in implementation of article 18 of this law within six months from its entry into force.

Article 40

Entry into force

This law is goes into force 15 days after publication in the Official Journal.

LAW ON THE PROTECTOR OF HUMAN RIGHTS AND FREEDOMS OF MONTENEGRO

Adopted by the Parliament of Montenegro on the 29th July 2011

I GENERAL PROVISIONS

Article 1

This law shall regulate the competency, authorizations¹ and manner of working and procedure of the Protector of Human Rights and Freedoms of Montenegro (hereinafter referred to as: the Protector) regarding the protection of human rights and freedoms guaranteed by the Constitution, law, ratified international human rights treaties and generally accepted rules of international law, as well as other issues of relevance to the work of the Protector.

Article 2

The Protector shall autonomously and independently, on the principles of justice and fairness, take measures to protect human rights and freedoms, when they are violated by the act, action or failure to act of state bodies, state administration bodies, bodies of the local self-administration and local administration, public services and other holders of public powers (hereinafter referred to as: authorities) as well as measures to prevent torture and other forms of inhuman or degrading treatment or punishment and measures for protection from discrimination.

The Protector does not have authority over the work of courts, except in cases determined by this Law

Article 3

The Protector can be addressed by anyone who believes that an act, action or failure to act of the authorities violated his/her rights or freedoms. The Protector shall, as well, act on

his/her own initiative. Proceeding before the Protector shall be free of charge.

Article 4

The work of the Protector shall be public, unless otherwise specified by the law. Publicity of the work of the Protector is provided through submission and publication of annual and special reports and in other ways, in accordance with the law.

Article 5

The seat of the Protector shall be in Podgorica. The Protector may organize the Protector's Days out of his/her seat.

Article 6

The resources necessary for the effective and efficient implementation of the functions of the Protector shall be provided in the budget of Montenegro.

II. APPOINTMENT AND CESSATION OF FUNCTION

Article 7

The Protector shall be appointed by, on proposal of the President of Montenegro, the Parliament of Montenegro (hereinafter: the Parliament), with a majority of all MPs and can be dismissed in the cases stipulated by law.

Article 8

For the Protector may be appointed a person who is citizen of Montenegro, possessing university degree and at least 15 years of working experience with high personal and professional authority.

The Protector, based on internal arrangement of tasks, provides specialization, above all, for the protection of persons deprived of their liberty in order to prevent torture and other forms of inhuman or degrading treatment or punishment, protection from discrimination, protection of minority rights, protection of the rights from the area of labour and employment, child protection, protection of persons with disability and gender equality.

For the Deputy may be appointed a person who is a citizen of Montenegro, possessing university degree and at least 10 years of working experience with high personal and professional authority.

Article 9

The Protector shall have one or more Deputies. The Deputy shall perform duties within the competency of the Protector. One of the Deputies shall also deal with the protection from discrimination. Decision about the number of Deputies of the Protector shall be brought by the Parliament of Montenegro.

Article 10

The Deputy Protectors (hereinafter referred to as: the Deputy) shall be appointed by the Parliament on the proposal of the Protector. The Deputy shall be appointed for a period of six years and may be re-appointed.

Article 11

The Protector and the Deputy before taking function shall take an oath that reads: "I swear to protect human rights and freedoms in accordance with the Constitution and law, and abide by the principles of justice and fairness."

Article 12

The Protector cannot be held responsible for the opinion or recommendation he/she provided in performing his function.

Article 13

The Protector or Deputy may not hold any other public function, nor perform any professional activity.

Protector or Deputy may not be a member of a political organization, or participate in political activities.

The restriction referred to in paragraph 1 of this Article shall not apply to scientific, educational or artistic activities, or activities protected with copyright.

Article 14

The Protector, in the case of his/her absence or impediment to perform function, shall be replaced by the Deputy designated by the Protector. In the event of cessation of function of the Protector, his/her duties shall be performed by the longest performing Deputy on this function.

Article 15

The function of the Protector or the Deputy shall cease before the expiration of the time for which he/she is appointed by:

- 1) resignation;
- 2) loss of citizenship;
- 3) meeting the conditions for retirement;
- 4) dismissal.

The Protector or the Deputy shall be dismissed from the function if he/she:

- 1) is convicted of a non-suspended prison sentence for the offense that makes him/her unworthy of performing the function;

- 2) is deprived of his/her legal capacity by a final decision;
- 3) becomes a member of a political organization;
- 4) is performing other public function or professionally is engaged in other activity.

About the reasons for cessation of function or dismissal, the Parliament shall be informed by the Protector, the Deputy or competent working body of the Parliament.

Article 16

The Protector and the Deputy shall have identity document. Form and content of identity document shall be determined by the protector.

III. COMPETENCY AND AUTHORIZATIONS

Article 17

The Protector is authorized to act upon complaints relating to the work of courts in case of delay in the proceedings, abuse of procedural authorizations or failure to execute court decisions.

Article 18

The Protector may initiate the adoption of laws, other regulations and general acts for the reason of harmonization with internationally recognized standards in the area of human rights and freedoms.

The authority to which has been submitted the initiative referred to in paragraph 1 of this Article shall be obliged to make a statement about this initiative.

If he/she deems it necessary for the protection and promotion of human rights and freedoms, the Protector shall give opinion on proposal of the law, other regulation or general act.

Article 19

The Protector may initiate a proceeding before the Constitutional Court of Montenegro 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 law.

Article 20

The Protector in the exercise of his/her function acts in a way that: points, warns, criticizes, proposes or recommends.

At the request of the authorities the Protector may give an opinion on the protection and promotion of human rights and freedoms.

Article 21

The Protector deals with general issues of importance for the protection and promotion of human rights and freedoms and cooperates with organizations and institutions dealing with human rights and freedoms.

Article 22

The Protector is not authorized to alter, suspend or annul the acts of the authorities. Protector cannot represent the party in the proceedings, or file on its behalf legal remedies, except in the case referred to in Article 27 paragraph 2 of this Law.

Article 23

The President of Montenegro, the President of the Parliament, the President and the members of the Government of Montenegro (hereinafter referred to as: the Government), the

President of the Municipality, the Mayor of the Capital City and the Mayor of the Old Capital shall receive the Protector on his/her request, without delay.

IV. SPECIAL AUTHORIZATIONS

Article 24

The Protector, the Deputy as well as the employee authorized by the Protector has the right to: -without prior notice, inspect the premises in the authorities, organizations, institutions and other places where a person deprived of liberty is or may be held;

-without prior notification and permission, visit a person deprived of liberty and verify the respect of its rights;

-without the presence of official or other person, either personally or through an interpreter, talk to a person deprived of liberty, as well as with other person for who he/she thinks it can provide the necessary information.

Article 25

The Protector shall be the National Mechanism for the protection of persons deprived of their liberty from torture and other cruel, inhuman or degrading treatment or punishment.

Article 26

The Protector shall directly cooperate with the United Nations Sub-Committee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Article 27

The Protector shall be the National Mechanism for protection from discrimination. In acting of the Protector in cases of discrimination by physical or legal persons, the provisions of this Law shall apply *mutatis mutandis*.

V. PROCEDURE

Article 28

The procedure of examination of violations of human rights and freedoms shall be initiated following a complaint or by the initiative of the Protector.

Protector shall examine violations of human rights and freedoms by his/her own initiative after he/she finds out that the act, action or failure to act of authorities violated human rights and freedoms.

In order for Protector to act by his/her own initiative is required the consent of the victim.

Article 29

The procedure before the Protector is confidential. A person who files a complaint or participates in the procedure cannot therefore be held liable or brought in an unfavourable position.

Article 30

The complaint can be filed by anyone who believes that his/her rights and freedoms are violated.

In the case of violation of the right of a child, the complaint may be filed by its parent or guardian or legal representative.

If the right of a child is violated by a person referred to in paragraph 2 of this Article, the complaint may be filed by the

organization or authority that deals with the protection of child rights.

The complaint may be filed through a Member of Parliament, as well as organization dealing with human rights and freedoms.

The complaint may be filed orally on the record.

A person deprived of liberty shall have the right to file a complaint in a sealed envelope.

The authorized person from authority, organization or institution in which reside a person deprived of liberty, is required to immediately submit to the Protector unopened and unread complaint or other writing of such person.

Article 31

The complaint shall contain the name of the authority on whose work it refers, description of the violation of human rights and freedoms, the facts and evidence supporting the complaint, information about exhausted legal remedies, name and address of the complainant and an indication of whether the complainant agrees his/her name to be revealed in the procedure.

If the complaint does not contain all the necessary information or is incomprehensible, the Protector may request from the complainant to amend it within specified period of time.

Article 32

The complaint is to be filed within six months as of the day of cognition about the violation of human rights and freedoms, or within one year as of the day of violation.

Exceptionally, the Protector may act even after the expiration of the deadline referred to in paragraph 1 of this Article, if he considers that the importance of the case so requires.

Article 33

The Protector may, during the examination procedure, instruct the complainant to exhaust other legal remedies to remedy the violation he/she is indicating if he/she considers that the violation can be remedied only by these remedies, or the remedy of the violation would be more efficient.

Article 34

The Protector shall not act upon the complaint if:

- 1) he/she is not competent;
- 2) the complaint is anonymous, unless he/she considers that there are grounds for acting on his/her own initiative in accordance with Article 28, paragraph 2 of this Law;
- 3) it is submitted after the expiry of the prescribed deadline;
- 4) it does not contain the necessary information, and the complainant fails to amend it within the prescribed deadline;
- 5) the complainant withdraws the complaint before initiating the procedure;
- 6) the complainant fails to act in accordance with Article 33 of this Law;
- 7) the complaint is repeated, and new evidences are not submitted;
- 8) it is an obvious abuse of the right to file a complaint.

The Protector shall notify the complainant about the reasons for not taking the action upon the complaint and shall indicate the possibility for potential achievement of the protection of his/her rights before other authority.

Article 35

The Protector shall inform about the complaint and its content the Head or the person managing the authority on whose act, action or failure to act the complaint refers to, for the purpose of taking the statement and shall set a deadline that cannot be shorter than eight days.

The Head or the person managing the authority shall be obliged to give a statement about the allegations in the complaint within the deadline set by the Protector.

If the statement does not contain all the necessary information and documents, the Protector may request the amendment of the statement.

Article 36

The Head or the person managing the authority shall be obliged to make available to the Protector all data from the jurisdiction of the authority he/she is managing, regardless of the degree of confidentiality as well as to provide to him/her unrestricted access to all premises, in accordance with the regulations governing the data confidentiality and protection of personal data, and handling of the official files and documents.

Article 37

If the Head or to the person managing the authority fails to comply with the request within a specified period of time, he/she shall be obliged to, without delay, inform the Protector about the reasons.

Failure to comply with the request is considered obstruction of the work of the Protector, who can notify about that the immediate superior authority or the Parliament or inform the public.

Article 38

The Authorities shall be obliged to cooperate with the Protector, and provide him/her the assistance.

Article 39

Protector shall stop the proceeding if:

1) finds that after filing a complaint was initiated the court proceeding;

2) the complainant is not cooperating in the procedure;

3) the complainant withdrew the complaint;

4) the authority, meanwhile, remedies the violation;

5) the complainant dies, unless the heirs request that the procedure continue.

About stopping the procedure the Protector shall notify the complainant.

Article 40

For the purpose of examining the violation of human rights and freedoms, the Protector may invite any person as a witness or hire an expert from the relevant field.

The persons referred to in paragraph 1 of this Article, shall be required to respond to the invitation and are entitled to remuneration or reimbursement of expenses in accordance with regulations governing the remuneration and reimbursement in judicial proceedings, which are paid from the funds of the Protector.

Article 41

Upon completion of examining the violation of human rights and freedoms, the Protector shall issue an opinion on

whether, how and to what extent the violation of human rights and freedoms occurred.

When the Protector finds that the violation of human rights and freedoms occurred, the opinion shall also contain a recommendation on what needs to be done to remedy the violation, as well as the deadline for its remedy.

Article 42

The Head or the person managing the authority on whose work refers the recommendation, shall be obliged to, within the provided deadline, submit the report on actions taken to carry out the recommendations.

If the Head or the person managing the authority fails to comply with the recommendation within a specified deadline, the Protector may inform the immediate superior authority, submit a special report or inform the public.

Article 43

About the results of the examination of the violation of human rights and freedoms, the Protector shall notify the complainant by submitting the opinion.

Article 44

The Protector may submit the initiative for opening a disciplinary procedure or procedure for the dismissal of the person whose work or failure to act resulted in violation of human rights and freedoms.

For misdemeanours prescribed by this Law and the Law on Prohibition of Discrimination, the Protector may submit a request for initiation of misdemeanour proceeding.

Article 45

The Protector and the Deputy, as well as employees of the Protector, shall be obligated to keep confidential and personal information they have gained during the work in accordance with the law.

The obligation referred to in paragraph 1 of this Article shall be also valid after the cessation of function or employment.

Article 46

Detailed manner of working and procedure shall be established in the Rules of Procedure of the Protector.

Rules of Procedure of the Protector shall be published in the “Official Gazette of Montenegro”.

VI. REPORT

Article 47

The Protector shall submit the Annual Work Report to the Parliament.

The Annual Work Report shall include in particular: general statistical overview of the cases in which he acted, the statistical overview by the areas of work, evaluation of the situation in the area of human rights and freedoms in Montenegro, recommendations and measures proposed by the Protector for improvement of the human rights and elimination of perceived shortcomings.

A special part of the Report with which the Protector informs the Parliament about the perceived phenomenon of discrimination shall include: assessment of the situation in the field of protection from discrimination, which includes evaluation of the work of authorities, service providers and other persons, perceived shortcomings and recommendations for their removal, analysis of the law.

The Annual Work Report for the previous year shall be submitted not later than 31 March of the current year.

Upon request of the Parliament, the Government is obliged to give its statement about the Annual Work Report of the Protector.

The Annual Work Report shall be made accessible to the public.

Article 48

The Protector may submit to the Parliament a special report, if he/she deems that to be necessary for the protection of human rights and freedoms. The special report shall be available to the public.

VII. SALARIES AND RIGHTS

Article 49

The Protector and the Deputy are entitled to salary and other income, and to achieve other rights arising from the exercise of function, in accordance with the legislation governing those rights for public functionaries.

The fixed part of the salary of the Protector shall be determined by applying the coefficient of 12.98.

The fixed part of the salary of the Deputy shall be determined by applying the coefficient of 11.50.

The value of the coefficient shall be determined by the competent working body of the Parliament.

The Protector and the Deputy shall have the right to allowances based on the exercise of function in the amount of 30% from the fixed part of the salary.

Article 50

The decision on the salary, allowances, and other incomes and rights of the Protector and the Deputy shall be delivered by the competent working body of the Parliament.

VIII. ADMINISTRATIVE AND PROFESSIONAL SERVICE

Article 51

In order to perform professional and administrative tasks, the Protector shall establish the Administrative and Professional Service.

The Administrative and Professional Service is managed by the Secretary.

The Secretary shall be appointed and dismissed by the Protector.

The Secretary shall be entitled on the salary established for management staff in the ministry, in accordance with regulations on salaries of civil servants and state employees. The Act on internal organization and systematization of the Administrative and Professional Service shall be delivered by the Protector, with the prior opinion of the competent working body of the Parliament.

Article 52

On employees in the Administrative and Professional Service shall apply the regulations on civil servants and state employees.

IX. FINANCING

Article 53

Financial resources for the work of the Protector shall be provided in the separate allocation of the Budget of Montenegro.

The proposal for allocation of budgetary resources to the Protector shall be submitted by the working body of the Parliament responsible for human rights and freedoms, on the proposal of the Protector.

The Protector shall have the right to participate in the work of the competent working bodies and sessions of the Parliament in occasions when the budget proposal is discussed.

X. PENALTY PROVISIONS

Article 54

A fine amounting from 500 Euros to 2000 Euros shall be imposed for misdemeanour on:

- 1) the responsible person in the authority who do not comply with the request of the Protector within provided deadline (Article 35, paragraph 2);
- 2) the person who fails to appear before the Protector (Article 40, paragraph 2).

XI. TRANSITIONAL AND FINAL PROVISIONS

Article 55

The procedures of examining the human rights and freedoms initiated before the day of entering into force of this Law shall continue in accordance with this Law.

Article 56

The Rules of Procedure of the Protector and the Act on internal organization and systematization of the Administrative and Professional Service shall be delivered within three months as of the day of entering into force of this Law.

Article 57

The Protector and the Deputy appointed, that is, elected before the entry into force of this Law shall continue to perform the function until the expiry of the time he/she is elected for.

Article 58

On the day of entering into force of this Law, the Law on Protector of Human Rights and Freedoms ("Official Gazette of the Republic of Montenegro", No. 41/03) shall cease to have effect.

Article 59

This Law shall enter into force eight days as of the day of its publication in the "Official Gazette of Montenegro".