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**Study on Homophobia, Transphobia and Discrimination on  
Grounds of Sexual Orientation and Gender Identity**

**Legal Report: Montenegro**

**by Tea Gorjanc Prelevic, LL.M.<sup>1</sup>**

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<sup>1</sup> The author is the executive director of the Human Rights Action NGO from Podgorica, Montenegro.

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## A. Executive summary

1. The Constitution of Montenegro prohibits discrimination "on any grounds". Until 2010, the Media Act and Labour Act were the only laws to explicitly recognise prohibition of discrimination on the basis of sexual orientation. In August 2010 Law on Prohibition of Discrimination introduced, for the first time, explicit prohibition of discrimination based on gender identity. Other laws, on education, health protection, labour relations, social insurance, asylum, prohibit discrimination with open-ended provisions that should include sexual orientation and gender identity grounds as well. However, terms "transsexual, transgender, intersexual, bisexual and homosexual" have not been defined in any regulation or official commentary, which may cause problem with interpretation in practice.
2. Marriage and cohabiting union have been recognised by the Constitution and Family Act, respectfully, as partnerships of a man and woman. As partners from a cohabiting union have been generally equalled in rights with married spouses, especially regarding property related relations and complete adoption, homosexual partners are necessarily excluded from the enjoyment of same rights.
3. The Government does not have any particular programme of education or plan of action focusing on the rights of LGBT persons. Only in 2010 a group of police officers was sent to Canada and USA for training.
4. There were no cases of refusals or bans of public demonstrations in favour of LGBT rights nor any publicly reported attempts or plans for organisation of such events.
5. The Constitution of Montenegro prohibits infliction or encouragement of hatred or intolerance on any grounds (Art. 7)<sup>1</sup> and therefore also applies to sexual orientation and gender identity. However, the Criminal Code of Montenegro<sup>2</sup> incriminates incitement only of national, racial and religious hatred and intolerance, without explicit reference to sexual orientation or gender identity (Art. 370, Art. 443, para. 3). Nevertheless, the Criminal Code provides for criminal offenses Infringement of Equality of Citizens (Art. 159), Racial and Other Discrimination (Art. 443), Maltreatment (Art. 166a) and Torture (Art. 167), which all may provide protection in case of serious discrimination on the basis of sexual orientation and gender identity. The Media Act<sup>3</sup> explicitly prohibits publishing information and opinion instigating discrimination, hatred or violence against persons or a group of persons due to sexual orientation (Art. 23).
6. In spite of a fairly developed legal framework, and available legal remedies, there is no case law involving discrimination against the LGBT population, presumably due to high level of homophobia in Montenegro that discourages from reporting such cases.
7. Adoption by same-sex couples is not explicitly regulated by law. The Family Act envisages complete adoption by married couples or cohabiting partners, who are in both cases considered partners belonging to a different sex, or, in case of incomplete adoption, by single individuals, who should only be between 30 and 50 years of age and older than the child to be adopted at least 18 years (Art. 126). It has never been tested in practice whether a person in a same-sex relationship would be allowed to adopt a child and the competent ministry claimed that no regulation or guidelines existed against adoption by a homosexual person.

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1 Infliction or encouragement of hatred or intolerance on any grounds shall be prohibited (Art. 7 of the Constitution of Montenegro, adopted on 19 October 2007).

2 Criminal Code (Krivicni zakonik), Official Gazette of Montenegro, No. 70/2003, 13/2004, 47/2006, 40/2008 25/2010.

3 Media Act (Zakon o medijima), Official Gazette of the Republic of Montenegro, No. 51/2002 and 62/2002.

8. In the process of applying for granting asylum discrimination is prohibited "on any ground" and especially due to "race, colour, gender, nationality, social origin or birth, religion, political or other opinion, state of origin, wealth, culture, language, age, psychological or physical disability", which therefore clearly provides for inclusion of LGBT persons.<sup>4</sup>
9. There are no particular legislative provisions relating to social security and social protection of LGBT persons except for a general provision prohibiting discrimination against the rights to social security by all.<sup>5</sup> However, homosexual partners may not benefit from "material family" support, nor could they inherit a family pension, as homosexual partnership is not recognized by law, or considered a family.
10. Regarding inheritance, including of a rental contract, while heterosexual partners have equal rights to inherit like spouses, the same right has not been recognized to same-sex partners. They may inherit on the basis of a will, only if their right does not infringe upon the rights of persons belonging to an "obligatory circle of successors", which are spouses and other close family members.<sup>6</sup>
11. The school curriculum still does not include obligatory sexual education or human rights lessons inclusive of sexual orientation and/or gender identity. However, the Ministry of Education noted the general lack of information among youth on sexuality in general and envisaged certain activities by the 2007 National Action Plan for Youth that should eventually lead to the introduction of the sexual education in schools.
12. Cases of administration of hormone or gender affirmative therapy treatment were not recorded. However, public statements of psychiatrists relating to homosexuality as a disease were recorded.
13. No cases were recorded where journalism ethics codes and legal requirements were interpreted against LGBT interests.
14. The status of transgender persons is not explicitly regulated by law. Change of personal name is not conditioned upon the legal gender recognition.<sup>7</sup> The gender marker change is conditioned, in practice, by full completion of gender reassignment treatment,<sup>8</sup> which is not being performed in health institutions in Montenegro and is not covered by health insurance.<sup>9</sup>

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4 Art. 2, para. 2 of Asylum Act (Zakon o azilu), Official Gazette of the Republic of Montenegro, no. 45/2006.

5 Social and Child Protection Act (Zakon o socijalnoj i dječjoj zaštiti). Official Gazette No.78/2005 and 22 December 2005. Article 5: "In enjoyment of rights from the sphere of social and child protection everyone is equal, regardless of ethnic origin, race, gender, language, religion, social background or other personal features."

6 Law on Inheritance, (Zakon o nasljedjivanju), Official Gazette of Montenegro, No. 74/08, Arts. 4, 9 and 27.

7 Personal Name Act (Zakon o licnom imenu), Official Gazette of Montenegro, No. 47/08.

8 Response of the Ministry of Interior to the request for information by A. S. Zekovic, 03/01 No. 270/10-888, 8 June 2010.

9 Clinical Centre of Montenegro, Response to the request for information, No. 03/01-18056/1, of 30 December 2009, and Republican Fund for Health Insurance, response to the request for information, no. 02-66, of 14 January 2010.

## B. Findings

### B.1. Overall legal framework

15. The Preamble of the Constitution of Montenegro states its citizens are committed to live in a state in which the fundamental values are freedom, peace, tolerance, respect for human rights and freedoms, multiculturalism, democracy and the rule of law.<sup>10</sup> The Constitution guarantees rights and freedoms as inviolable (Art. 6, paras. 1 and 2). All are obliged to respect the rights and freedoms of others (Art. 6, para. 3). Anything not prohibited by the Constitution and the law is free in Montenegro (Art. 10, para. 2).<sup>11</sup>
16. The Constitution prohibits direct and indirect discrimination on any grounds, except for measures of positive discrimination (Art. 8<sup>12</sup>). All persons are deemed equal before the law, regardless of any particularity or personal feature (Art. 17, para. 2). Particularly, the Constitution guarantees equality of women and men and obliges the state to develop policies of equal opportunities (Art. 18).
17. Apart from the Constitution, human rights are protected on the basis of the published international agreements and generally accepted rules of international law, which have precedence over national legislation and apply directly "when they regulate the relations differently from the internal legislation".<sup>13</sup> Montenegro ratified all major international human rights treaties,<sup>14</sup> including the International Covenant on Civil and Political Rights with the two Optional Protocols, International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination Against Women, International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Rights of Persons with Disabilities with the Optional Protocol, the European Convention on Human Rights with all its Protocols, including Protocol 12 (general prohibition of discrimination) and the Revised European Social Charter.<sup>15</sup> The Constitutional Court is competent to decide on the alignment of the laws with the Constitution and ratified international agreements.<sup>16</sup> However, direct application of the international treaties and standards established by the UN treaty bodies or the European Court of Human Rights in practice still remains a challenge for the Montenegrin judiciary.<sup>17</sup>

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10 Ustav Crne Gore (Constitution of Montenegro), Official Gazette of Montenegro No. 1/2007, 19 October 2007.

11 Article 10, para. 2 reads: "U Crnoj Gori je slobodno sve što Ustavom i zakonom nije zabranjeno. (In Montenegro, anything not prohibited by the Constitution and the law shall be free)".

12 Article 8 reads: "Direct or indirect discrimination on any grounds shall be prohibited. Regulations and introduction of special measures aimed at creating the conditions for the exercise of national, gender and overall equality and protection of persons who are in an unequal position on any grounds shall not be considered discrimination. Special measures may only be applied until the achievement of the aims for which they were undertaken".

13 Article 9 of the Constitution of Montenegro: "The ratified and published international agreements and generally accepted rules of international law shall make an integral part of the internal legal order, shall have the supremacy over the national legislation and shall be directly applicable when they regulate the relations differently from the internal legislation."

14 Treaty Body Database, [www.unhcr.ch/tbs/doc.nsf/Statusrset?OpenFrameSet](http://www.unhcr.ch/tbs/doc.nsf/Statusrset?OpenFrameSet), accessed 30 September 2010.

15 Council of Europe,

<http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?PO=MOT&MA=44&SI=2&DF=&CM=3&CL=ENG>, accessed 30 September 2010.

16 Art. 149 of the Constitution of Montenegro, Competence: "The Constitutional Court decides: (1) on the alignment of the laws with the Constitution and confirmed international agreements; (...) (3) on constitutional complaint due to violation of human rights and freedoms protected by the Constitution, following the exhaustion of all effective legal remedies..." (Ustavni sud odlučuje: 1) o saglasnosti zakona sa Ustavom i potvrđenim i objavljenim međuna-rodnim ugovorima; 2) o saglasnosti drugih propisa i opštih akata sa Ustavom i zakonom; 3) o ustavnoj žalbi zbog povrede ljudskih prava i sloboda zajamčenih Ustavom, nakon iscrpljivanja svih djelotvornih pravnih sredstava.).

17 The former Constitutional Charter on Human and Minority Rights and Civil Liberties of Serbia and Montenegro explicitly called for interpretation of the Charter's provisions "in accordance with the valid international guarantees for human and

18. The Law on Prohibition of Discrimination,<sup>18</sup> adopted on 27 July 2010, for the first time explicitly prohibited both discrimination based on gender identity and sexual orientation. Discrimination has also been prohibited in Montenegro before, by various laws, predominantly by open-ended provisions. Only the Labour Act<sup>19</sup> and Media Act<sup>20</sup> explicitly referred to sexual orientation among other prohibited grounds of discrimination. Gender-based discrimination has been prohibited by the Gender Equality Act,<sup>21</sup> but discrimination based on gender identity, that would include transgender, transsexual and intersex persons was recognised for the first time by the 2010 Law on Prohibition of Discrimination. The Law recognises gender identity and sexual orientation among other grounds of discrimination (Art. 2, para. 2)<sup>22</sup> and within a chapter outlining special forms of discrimination contains the provision "Discrimination on the grounds of gender identity and sexual orientation" (Art. 19), which reads: "Every differentiation, unequal treatment or bringing to unequal position of persons on the basis of gender identity or sexual orientation shall be considered discrimination. Everyone has the right to express one's gender identity and sexual orientation. Gender identity and sexual orientation are a private issue of every individual and no one may be asked to publicly declare his/her gender identity or sexual

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minority rights and practices of international bodies supervising their implementation" (Art. 10). Such an explicit obligation to consider case law of the European Court of Human Rights and interpretation of standards by other international human rights bodies is now missing from the Montenegrin Constitution and legislation, with the only exception being the Media Act (FN 14). It has been noted in practice that the reference to the international legal standards, as interpreted by the UN bodies or the European Court of Human Rights has been rare in practice of the Montenegrin courts, especially of those of higher instance. See, for example, the 2009 appeal by the NGO Human Rights Action to the president of the Supreme Court of Montenegro for urgent publication of translated judgments of the European Court of Human Rights and promotion of application of standards established by the judgments by the Supreme Court (Apel Akcije za ljudska prava za hitnim objavljivanjem zvaničnih prevoda presuda Evropskog suda za ljudska prava i promovisanjem primjene standarda iz tih presuda od strane Vrhovnog suda, HRA, 8 September 2009, [www.hracion.org/?p=235](http://www.hracion.org/?p=235), accessed 30 September 2010). In 2010, the president of the Supreme Court publicly acknowledged the need for the judges to learn more about the case law of the European Court of Human Rights: statement of Mrs. Vesna Medenica, president of the Supreme Court of Montenegro, 14 June 2010, "Sudije sve efikasnije" (Judges more and more efficient), Pobjeda; "Dobri su ali mogu i bolje" (They are good but may do even better), Dan. The president of the Supreme Court also announced that a department with the Supreme Court would be created to focus on the research of the jurisprudence of the European Court for Human Rights.

18 *Law on Prohibition of Discrimination* (Zakon o zabrani diskriminacije), Official Gazette of Montenegro, No. 46/2010.

19 Art. 5. Labour Law (Zakon o radu). Official Gazette of the Republic of Montenegro, No. 49/2008 and 26/2009: „Every direct and indirect discrimination of persons seeking employment is prohibited, as well as discrimination of employees regarding sex, birth, language, race, religion, skin colour, age, pregnancy, health condition, handicap, ethnic origin, marital status, family obligations, sexual orientation, political or other conviction, social origin, property status, membership in political or labour union organisations or other personal feature“. (Zabranjena je svaka neposredna i posredna diskriminacija lica koja traže zaposlenje, kao i zaposlenih, s obzirom na pol, rođenje, jezik, rasu, vjeru, boju kože, starost, trudnoću, zdravstveno stanje, odnosno invalidnost, nacionalnost, bračni stus, porodične obaveze, seksualno opredjeljenje, političko ili drugo uvjerenje, socijalno porijeklo, imovno stanje, članstvo u političkim i sindikalnim organizacijama ili neko drugo lično svojstvo.)

20 Art. 23 (1), Media Act (Zakon o medijima), Official Gazette of the Republic of Montenegro, No. 51/2002 and 62/2002: "Publication of information and opinion instigating discrimination, hatred or violence against persons or groups of persons for their belonging or lack of belonging to a certain race, nation, religion, ethnic group, sex or sexual orientation is prohibited". (Zabranjeno je objavljivanje informacija i mišljenja kojima se podstiče diskriminacija, mržnja ili nasilje protiv osoba ili grupe osoba zbog njihovog pripadanja ili nepripadanja nekoj rasi, vjeri, naciji, etničkoj grupi, polu ili seksualnoj opredijeljenosti.)

21 *Gender Equality Act* ( Zakon o rodnoj ravnopravnosti ), Official Gazette of Montenegro, No, 46/2007.

22 Prohibition of discrimination, article 2, paras. 1 and 2 (of 4): "(1) All forms of discrimination are prohibited, on any grounds. (2) Discrimination is any unjustified, legal or real, indirect or direct differentiation or unequal treatment, or omission of treatment towards a person or group of persons in relation to other persons, as well as exclusion, limitation or provision of priority to a person in relation to others, based on race, skin colour, national affiliation, social or ethnic origin, relation to a minority people or minority ethnic community, language, religion or opinion, political or other opinion, sex, gender identity, sexual orientation, health condition, invalidity, age, property, belonging to a group or assumption of a belonging to a group, as well as other personal characteristics." ((1) Zabranjen je svaki oblik diskriminacije, po bilo kom osnovu. (2) Diskriminacija je svako neopravdano, pravno ili faktičko, neposredno ili posredno pravljenje razlike ili nejednako postupanje, odnosno propuštanje postupanja prema jednom licu odnosno grupi lica u odnosu na druga lica, kao i isključivanje, ograničavanje ili davanje prvenstva nekom licu u odnosu na druga lica, koje se zasniva na rasi, boji kože, nacionalnoj pripadnosti, društvenom ili etničkom porijeklu, vezi sa nekim manjinskim narodom ili manjinskom nacionalnom zajednicom, jeziku, vjeri ili uvjerenju, političkom ili drugom mišljenju, polu, rodnom identitetu, seksualnoj orijentaciji, zdravstvenom stanju, invaliditetu, starosnoj dobi, imovnom stanju, pripadnosti grupi ili pretpostavci o pripadnosti grupi, kao i drugim ličnim svojstvima.)

orientation".<sup>23</sup> However, the fact that neither the text of the Law nor its reasoning<sup>24</sup> defined gender identity or terms "transgender, transsexual, intersex" may cause problems in implementation, as even members of the Government and its experts had shown lack of understanding while preparing the Law.<sup>25</sup>

19. The adoption of the Law on Prohibition of Discrimination opens the door to necessary reforms which would bring Montenegrin family law in compliance with the international standards suppressing discrimination of LGBT persons, particularly regarding equality of rights enjoyed by homosexual and heterosexual partners in a cohabiting union.<sup>26</sup> The Constitution (Art. 71) and Family Act (Art. 2) recognise marriage as union of a man and woman.<sup>27</sup> Cohabiting union is also recognised only between persons of different sex.<sup>28</sup> While the rights of cohabiting partners have been equalised with the rights of married couples, no rights are recognised for same-sex cohabiting partners. This in turn allows for different treatment of homosexual and heterosexual cohabiting couples in a range of rights, such as financial support, inheritance, complete adoption, paid absence from work in case of illness or death of partner, etc. that will be discussed in greater detail below.
20. Apart from the general attitude prohibiting discrimination, there is still no particular official policy directed at recognition and protection of the rights of LGBT persons<sup>29</sup> and suppression of an alarming level of homophobia and transphobia in Montenegro.<sup>30</sup> No funding has yet been designated to a particular state project designed to focus on the promotion of LGBT rights, although the two projects of the Ministry for Human and Minority Rights: "Promotion of the anti-discrimination legislation" and "Promotion of human rights

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23 "Svako pravljenje razlike, nejednako postupanje ili dovođenje u nejednak položaj lica po osnovu rodnog identiteta ili seksualne orijentacije smatra se diskriminacijom. Svako ima pravo da izrazi svoj rodni identitet i seksualnu orijentaciju. Rodni identitet i seksualna orijentacija su privatna stvar svakog lica i niko ne može biti pozvan da se javno izjasni o svom rodnom identitetu i seksualnoj orijentaciji".

24 Government of Montenegro, Reasoning for the adoption of the proposed Law on Prohibition of Discrimination (Obrazloženje), 4 June 2010, [www.skupstina.me/index.php?strana=zakoni&id=1176](http://www.skupstina.me/index.php?strana=zakoni&id=1176), accessed 30 September 2010.

25 The final version of the Article 19 was based on recommendations of several human rights NGOs who strongly criticised its original proposal by the Government (Art. 18 of the late Draft Act on Protection Against Discrimination): "(1) Every differentiating, unequal treatment or bringing to an unequal position of person on the basis of sexual identity or sexual orientation is considered discrimination. (2) Every one has the right to express ones sexual identity and sexual orientation. (3) The provisions of paragraphs 1 and 2 of this article shall apply also to a person who changed gender and person who is being masked to the person of another gender by make-up and clothing." As for criticism by NGOs Centre for Civic Education, Juventas, Youth Initiative for Human Rights and HRA: "Petricevic: Mehanizmi zastite nijesu dobri (Petricevic: Protection mechanisms are not good)", *Vijesti*, 13 December 2009; "Nakon cetiri godine daleko od dobrog (After four years far from good)", *Vijesti*, 11 December 2009; "Predstavnic Venecijanske komisije, OEBS-a i NVO ostro kritikovali Predlog zakona o zabrani diskriminacije (Representatives of the Venice Commission, OSCE and NGOs sharply criticized the Proposal of the Law on Prohibition of Discrimination)", *Dan*, 20 February, 2010. Amendments to the Draft Act on Protection Against Discrimination by the HRA are available at, [www.hracion.org/?p=316](http://www.hracion.org/?p=316), accessed 30 September 2010.

26 In accordance with the principle established by the European Court of Human Rights in *Karner v. Austria*, no. 40016/98, 2003, that cohabiting same-sex couples should in principle be granted the same rights as heterosexual couples (Karner judgment, para. 42: " The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. In cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people – in this instance persons living in a homosexual relationship – from the scope of application of section 14 of the Rent Act. The Court cannot see that the Government have advanced any arguments that would allow such a conclusion."

27 Art. 12, Family Act (Porodichni zakon), Official Gazette of Montenegro, no. 1/2007, of 9 January 2007. For the text of the provisions, please see the Chapter on Family issues and FN 85.

28 Ibid.

29 This information was conveyed by the Deputy Minister for Human and Minority Rights, Mr. Sabahudin Delic at the opening ceremony of the international conference „Out of the Darkness – Justice in the Balkans: Equality for Sexual Minorities“ on 25 October 2009 in Podgorica, Montenegro.

30 Public opinion poll "Homophobia in Montenegro", October 2009, Human Rights Action, available at, [www.hracion.org/wp-content/uploads/homophobia-in-montenegro-presentation.pdf](http://www.hracion.org/wp-content/uploads/homophobia-in-montenegro-presentation.pdf), accessed 30 September 2010. Please also consider the sociologic report on Montenegro.

and freedoms” will, according to the Ministry for Human and Minority Rights encompass promotion of the rights of LGBT population.<sup>31</sup>

21. Although Montenegro provides for civil and criminal remedies, including constitutional appeal in case of violation of human rights, there is no case law concerning discrimination against the LGBT population as the high level of homophobia in Montenegro,<sup>32</sup> still a traditional and “para-democratic society in transition”,<sup>33</sup> advises against promoting one’s LGBT identity by filing a complaint to the police, state prosecutor or court. The Ombudsman (Protector of Human Rights and Freedoms) reported never having had received a complaint regarding discrimination on the basis of sexual orientation or gender identity or transgender status.<sup>34</sup> The Prime Minister referred to the lack of officially reported cases of discrimination based on sexual orientation by stating: “Luckily, we do not have any information that the rights of sexual minorities have been endangered in Montenegro.”<sup>35</sup> On the other hand, the research of human rights organisations shows that LGBT persons dare not disclose their orientation or transgender status, especially to the state bodies for fear of social stigmatisation and discriminatory treatment.<sup>36</sup>
22. The Supreme Court of Montenegro has explained that it does not keep a database enabling searches on sanctions and compensation payments.<sup>37</sup> The Supreme State Prosecutor did not provide the author with the exact number of criminal complaints filed for the offence of discrimination (“Violation of the Equality of Citizens”), nor for the number of complaints filed on the grounds of discrimination based on sexual orientation or gender identity. According to our monitoring of the media, we conclude that there have been no such official complaints and this is also corroborated by the Prime Minister’s statement.<sup>38</sup>
23. With regards to criminal law, Montenegro was among the first republics of the former Yugoslavia to decriminalise homosexual relations already in 1977. The Constitution prohibits torture, inhuman or degrading treatment (Art. 28)<sup>39</sup> and infliction and encouragement of hatred on any ground (Art. 7).<sup>40</sup> While the Criminal Code supports the prohibition of torture, including maltreatment by behaviour offending human dignity,<sup>41</sup> it

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31 Information provided by the deputy Minister for Human and Minority Rights, Mr. Sabahudin Delic to the Centre for Civic Education in Podgorica, on 21 January 2010, No. 65/10. Total amounts of 14,000.00 € and 7,700.00 € have been designated by the 2010 State Budget Act for the two projects, respectively.

32 In Montenegro 71 percent of the population consider homosexuality as a disease; 58 percent expect the state bodies to suppress it and 67 percent thinks that the Serbian Orthodox Church is rightfully against homosexuality (Research “Homophobia in Montenegro” was conducted in October 2009 by the Human Rights Action, [www.hracion.org/wp-content/uploads/homophobia-in-montenegro-presentation.ppt](http://www.hracion.org/wp-content/uploads/homophobia-in-montenegro-presentation.ppt), accessed 30 September 2010).

33 “Sindromi (ne)tolerantnosti”, Srdjan Vukadinovic (professor of sociology), daily Pobjeda, 6 December 2004.

34 The reports are available at the web site of the institution of Ombudsman, [www.ombudsman.co.me](http://www.ombudsman.co.me), accessed 30 September 2010.

35 “Djukanovic: Protection also for the LGBT Population”, daily Vijesti, 22 November 2009.

36 Results of anonymous questionnaire - 30 persons members of sexual minorities, Podgorica, October 2009, Human Rights Action, available at, [www.hracion.org](http://www.hracion.org), accessed 30 September 2010; Aleksandar Sasa Zekovic, “Kratki osvrt na neke aspekte položaja transrodnih osoba u Crnoj Gori” (Summary Remarks on some aspects of the position of transgender persons in Montenegro), [www.hracion.org/wp-content/uploads/asz-transgender-lica-report.pdf](http://www.hracion.org/wp-content/uploads/asz-transgender-lica-report.pdf), accessed 30 September 2010, updated edition soon to be published.

37 Response of the Supreme Court of Montenegro, Su. V No. 510/2009, of 25 December 2009.

38 “Djukanovic: Protection also for the LGBT Population”, daily Vijesti, 22 November 2009.

39 Art. 28 of the Constitution reads: “The dignity and security of a man shall be guaranteed. The inviolability of the physical and mental integrity of a man, and privacy and individual rights thereof shall be guaranteed.”

40 Article 7 of the Constitution reads: “Infliction or encouragement of hatred or intolerance on any grounds shall be prohibited.”

41, Torture, Art. 167 of the Criminal Code reads: “(1) The one who causes great pain or grave suffering, physical or psychological, with an end of obtaining confession or other information from that or other person, or if the one unlawfully punishes or intimidates or pressures another person to intimidate or pressure someone else, or perpetrates that for motives grounded on any form of discrimination, shall be punished by imprisonment from six months to five years. (2) If the act from the paragraph 1 of this article is performed by person acting in official capacity or the act is performed with his/her explicit agreement or if that person instigated another person to perform the act from paragraph 1 of this article, shall be punished by imprisonment from one to eight years.” 1) Ko drugom nanese veliki bol ili teške patnje, bilo da su tjelesne ili duševne, sa ciljem da od njega ili trećeg lica dobije priznanje ili drugo obavještenje, ili da ga nezakonito kazni ili da ga zastraši, ili da na njega izvrši pritisak, ili da zastraši ili izvrši pritisak na neko treće lice, ili iz nekog drugog razloga



restricts the general Constitutional prohibition of promotion of hatred to racial, religious or national grounds.<sup>42</sup> The Criminal Code also provides for criminal offences of Infringement of Equality of Citizens (Art. 159)<sup>43</sup> and Racial and Other Discrimination (Art. 443)<sup>44</sup> sanctioning discrimination on the basis of, *inter alia*, gender and "other personal features". Furthermore, Article 443 particularly prohibits "persecution of organizations or individuals who promote equality of persons".<sup>45</sup> However, in spite of the criminal law provisions that should provide protection against discrimination or maltreatment for LGBT persons as well, we were unable to ascertain that any such case has ever been reported or processed by the authorities.<sup>46</sup> The state bodies were also not obliged by law to keep record of

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koji se zasniva na diskriminaciji, kazniče se zatvorom od šest mjeseci do pet godina. (2) Ako djelo iz stava 1 ovog člana izvrši službeno lice u vršenju službe ili je djelo izvršeno uz njegov izričiti ili prećutni pristanak ili ako je službeno lice podstrekavalo drugo lice na izvršenje djela iz stava 1 ovog člana, kazniče se za djelo iz stava 1 ovog člana zatvorom od jedne do osam godina). Criminal Code (Krivični zakonik), Official Gazette of Montenegro, No. 70/2003, 13/2004, 47/2006, 40/2008, 25/2010 (the latest corrections are from 22 April 2010). Maltreatment, Art. 166a of the Criminal Code reads: "(1) The one who maltreats another person or behaves in such a manner as to offend human dignity, shall be punished by imprisonment up to one year. (2) If the act from paragraph 1 is perpetrated by a person acting in official capacity, the one shall be punished by imprisonment ranging from three months to three years." ((1) Ko zlostavlja drugog ili prema njemu postupa na način kojim se vrijeđa ljudsko dostojanstvo, kazniče se zatvorom do jedne godine. (2) Ako djelo iz stava 1 ovog člana učini službeno lice u vršenju službe, kazniče se zatvorom od tri mjeseca do tri godine. Criminal Code (Krivični zakonik), Official Gazette of Montenegro, No. 70/2003, 13/2004, 47/2006, 40/2008, 25/2010 (the latest corrections are from 22 April 2010).

42 Causing national, racial and religious hatred, divisions and intolerance, Art. 370 of the Criminal Code:

(1) Anyone who publicly incites violence or hate towards a group or member of a group determined on the basis of race, skin colour, religion, origin, belonging to a state or nationality, shall be punished by imprisonment for a term of six months to five years.

(2) Anyone who publicly approves, denies existence or significantly minimizes the gravity of crimes of genocide, crimes against humanity or war crimes perpetrated against a group or a group member determined on the basis of race, colour of skin, religion, belonging to a state or nationality, in a manner that may lead to violence or incite violence against a group, or a member of such group, if the crimes are determined by a final judgment of court in Montenegro or by the International Criminal Court.

(3) If an Act referred to in paragraphs 1 and 2 of this Article is done by coercion, maltreatment, endangering of safety, exposure to mockery of national, ethnic or religious symbols, by damaging other person's goods, by desecration of monuments, memorial-tablets or tombs, the offender shall be punished by imprisonment for a term of one to eight years.

(4) The one who perpetrates acts from paragraphs 1-3 of this Article by abuse of position or if such acts caused disorder, violence or other grave consequences for the common life of people, national minorities or ethnic groups living in Montenegro, shall be punished by imprisonment from one to eight years for the crime from paragraph 1 of this Article, and for the crimes from paragraphs 2 and 3 shall be punished by imprisonment from two to ten years". Also, see Racial and Other Discrimination, art. 443, para. 3: "The one who disseminates ideas on superiority of one race over another or promotes racial hatred or racial discrimination shall be punished by prison sentence from three months to three years". Criminal Code (Krivični zakonik), Official Gazette of Montenegro, No. 46/2007/2003, 13/2004, 47/2006, 40/2008, the latest corrections of 22 April 2010.

43 Infringement of equality of citizens, Art. 159 reads: "(1) Anyone who, due to national affiliation or affiliation to an ethnic group, race or confession, or due to absence of such an affiliation or due to differences in political or other beliefs, sex, language, education, social status, social origin, property or other personal status denies or restricts human rights and freedoms prescribed by the Constitution, laws or other regulations or general enactments or recognized by international treaties or, on the grounds of such differences, grants privileges or exemptions, shall be sentenced to imprisonment not exceeding three years. (2) Should the act referred to in Paragraph 1 of this article be performed out of hate towards the member of the group determined on the basis of race, skin colour, religion, origin, state or national affiliation, the perpetrator shall be sentenced to three months to five years of imprisonment. (3) Should the act referred to in Paragraph 1 of this Article be committed by a person acting in an official capacity while performing his/her duties, s/he shall be sentenced to one year to eight years of imprisonment." Criminal Code, *Ibid.*

44 Racial and other discrimination, Art. 443, reads: "(1) Who on the basis of difference in race, skin colour, nationality, ethnic origin or some other personal feature violates fundamental human rights and freedoms guaranteed by generally accepted rules of international law and ratified international treaties by Montenegro shall be punished by prison sentence ranging from six months to five years. (2) The one who persecutes organizations or individuals due to their promotion of equality of persons shall be punished by the same sentence prescribed in paragraph 1. (3) The one who disseminates ideas on superiority of one race over another or promotes racial hatred or racial discrimination shall be punished by prison sentence from three months to three years." ((1) Ko na osnovu razlike u rasi, boji kože, nacionalnosti, etničkom porijeklu ili nekom drugom ličnom svojstvu krši osnovna ljudska prava i slobode zajamčena opšteprihvaćenim pravilima međunarodnog prava i ratifikovanim međunarodnim ugovorima od strane SCG, kazniče se zatvorom od šest mjeseci do pet godina. (2) Kaznom iz stava 1 ovog člana kazniče se ko vrši proganjanje organizacija ili pojedinaca zbog njihovog zalaganja za ravnopravnost ljudi. (3) Ko širi ideje o superiornosti jedne rase nad drugom ili propagira rasnu mržnju ili podstiče na rasnu diskriminaciju, kazniče se zatvorom od tri mjeseca do tri godine.)

45 *Ibid.*

46 There were never any media or NGOs or other known reports on a criminal complaint being filed on the basis of discrimination on the grounds of sexual orientation or gender identity. The police informed that there were never any

discrimination claims. This will now change with the adoption of the Law on the Prohibition of Discrimination, which requires all competent state bodies to keep data of all reported cases of discrimination and prescribes penalties for failure to comply with that obligation (Arts. 33 and 34).

24. The Labour Act<sup>47</sup> explicitly prohibits discrimination on the basis of, among else, sexual orientation or "other personal feature" (Art. 5), provides for court protection also in the case of discrimination (Art. 10), as well as for administrative supervision by the Labour inspection of the competent ministry (Art. 147). It also explicitly prohibits sexual harassment, defined as: "all unwanted verbal, non-verbal or physical behaviour intended to violate dignity of a person seeking employment, as well as of an employee in the sphere of sexual life and which causes fear or promotes hostile, degrading, unpleasant, aggressive or offensive environment" (Art. 8, para. 3). However, no cases were recorded alleging discrimination in the workplace on the basis of sexual orientation or gender identity.<sup>48</sup> Also, the Media Act<sup>49</sup> explicitly prohibits publishing information and opinion instigating discrimination, hatred or violence against persons or a group of persons due to their belonging or not belonging to a gender or sexual orientation (Art. 23). Other laws also contain open-ended anti-discrimination provisions without explicit reference to sexual orientation as one of the prohibited grounds of discrimination,<sup>50</sup> but no cases were likewise recorded of LGBT persons ever invoking such provisions before state authorities.

## B.2. Freedom of assembly and association

25. Freedoms of assembly and association are protected by the Constitution<sup>51</sup> Public assemblies should be reported to the authorities, but do not require previous approval and may be temporarily restricted by the authorities in order to prevent disorder, execution of criminal offense, threat to health, morality or security of people.<sup>52</sup> There was not an

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cases reported in relation to harassment due to sexual orientation (Police Department for Planning, Development and Analysis, document 09 Br: 051/10-5672/1, Podgorica, 26 February 2010, HRA archive). The Supreme State Prosecutor was only able to provide a total number of criminal complaints (566) filed for a total of 27 different criminal offenses related against rights and freedoms, also encompassing the act of Infringement of Equality of Citizens among else (decision on the request for information, No. 051/10-5672/1, 15 March 2010). The Supreme Court of Montenegro informed that they do not have data on cases initiated on the grounds of discrimination based on sexual orientation or transgender status (Vrhovni sud Crne Gore, Su. V br 510/2009, of 25 December 2009). On the other hand, a research media article on the actual status of Montenegrin LGBT population published the story of several police officers who, after having found two young men of Podgorica having sex on the outskirts of the town, had brutally beaten them and left them without clothing, an incident that was never reported to the authorities ("Nevidljivost kao strategija prezivljavanja crnogorske LGBT populacije" - Invisibility as the Survival Strategy of the Montenegrin LGBT Population, by Nela Lazarevic in cooperation with the Balkan Investigative reporting Network (BIRN), published in Montenegrin daily Vijesti and Serbian weekly Vreme and available at, [http://fellowship.birn.eu.com/en/main/publication\\_articles\\_2009/23917/](http://fellowship.birn.eu.com/en/main/publication_articles_2009/23917/), accessed 30 September 2010. The case was also documented by Aleksandar Sasa Zekovic, researcher of human rights violations and member of the Council for Civic Control of the Police. Also, no criminal prosecution ever took place for stoning Mr. Atila Kovac, a gay rights activist from Serbia, in Podgorica in 2005, for his public appearances intended to protect the rights of sexual minorities, although the police did initially arrest three attackers and the authorities were therefore informed of the attack.

47 Labour Act (Zakon o radu) Official Gazette of Montenegro, no. 49/2008 i 26/2009.

48 Supreme Court of Montenegro, Response to the request for information, Su. V br 510/2009, of 25 December 2009

49 Media Act (Zakon o medijima), Official Gazette of the Republic of Montenegro, No. 51/2002 and 62/2002.

50 *General Law on Education*, Official Gazette of Montenegro, No. 64/02, 31/05, 49/07 and 45/2010; *High Education Act*, Official Gazette, No. 60/2003, 4/2008; *Health Protection Act*, Official Gazette of Montenegro, No. 39/2004, 14/2010; *Law on Social and Child Protection*, Official Gazette of Montenegro, no. no. 78/2005; *Law on Pension and Disability Insurance*, Official Gazette of Montenegro, No. 54/2003, 39/2004, 81/2004, 14/2010; *Protection of Genetic Data Act*, Official Gazette, No. 25/2010, etc.

51 Freedom of Assembly, art. 52 of the Constitution reads: "The freedom of peaceful assembly, without approval, with prior notification of the competent authority shall be guaranteed. The freedom of assembly may be temporarily restricted by the decision of the competent authority in order to prevent disorder or execution of a criminal offense, threat to health, morality or security of people and property, in accordance with the law." Freedom of Association, art. 53, para 1 of the Constitution reads: "The freedom of political, trade union and other association and action, without approval, by the registration with the competent authority, shall be guaranteed."

52 Art. 52, para. 2 of the Constitution and arts. 4 and 11 of the Public Gatherings Act (Zakon o javnim okupljanjima), Official Gazette of the Republic of Montenegro, No. 31/05.

opportunity to assess whether reporting organisation of a "pride parade" would trigger the authorities to prevent it as potential cause of disorder or "threat to morality of people", as there were no reports of attempts or plans for organisation of such an event in Montenegro.

26. Five physical or legal persons, either nationals or foreigners temporarily or permanently residing in Montenegro may register a non-governmental organisation (NGO).<sup>53</sup> Freedom of association may only be restricted if the organisation is directed to "forceful destruction of the constitutional order, infringement of the territorial integrity of Montenegro, violation of guaranteed freedoms and rights or instigating national, racial, and religious and other hatred and intolerance".<sup>54</sup> Nevertheless, there are no registered associations of LGBT persons or NGOs set up for promotion of the rights of the LGBT population.
27. Demonstrations in favour of LGBT persons were never organised in Montenegro. For the first time, an international conference on the protection of the rights of LGBT persons was held in Montenegro in October 2009.<sup>55</sup> This academic conference was organised by the German Academic Exchange Service (DAAD) Alumni Club Montenegro in partnership with Leipzig University – *Department of European, Public International and Public Law, Germany*; Lund University – *Department of Sociology of Law, Sweden*; MJCLA School of Law – *The Williams Institute, United States*; University of Montenegro – *Faculty of Political Science, Montenegro*; European Commission on Sexual Orientation Law (ECSOL) AND International Lesbian Gay Bisexual Trans and Intersex Law Association (ILGLaw)<sup>56</sup> foreign universities and the University of Montenegro, Faculty of Political Science. The organisers did not face legal problems, as the conference was not prohibited, but financially supported by the Ministry of Human and Minority Rights and well safeguarded by the police, due to some threats and hate speech occurring before the conference at an internet forum.<sup>57</sup> No demonstrations or incidents occurred during three days of the conference. However, the lack of participation of Montenegrin state officials and politicians at the conference was significant.<sup>58</sup>
28. In November 2004, fans of the Montenegrin soccer club "Buducnost" stoned Mr. Atila Kovac, a prominent gay rights activist from Serbia in front of the national TV station just before he was to appear as a guest in its show.<sup>59</sup> Although Mr. Kovac was not seriously injured, no one was ever processed and punished for this attack. There were no other demonstrations since.
29. Montenegrin Police in cooperation with the Justice in the Balkans: Equality for Sexual Minorities International Academic Conference accepted to send 6 (six) police officers for LGBT training in Toronto and Los Angeles from 28 June – 10 July 2010. This happened in

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53 Arts. 2 and 9 of the Law on Non-Governmental Organizations, Official Gazette of Montenegro, no. 27/99, 09/02, 30/02, 11/07.

54 Art. 55, para. 1 of the Constitution of Montenegro.

55 "Justice in the Balkans: Equality for Sexual Minorities", 23-26 October 2009, Podgorica, Montenegro, [www.lu.se/justice-in-the-balkans/overview](http://www.lu.se/justice-in-the-balkans/overview), accessed 30 September 2010.

On behalf of the organizers of the conference, Mr. Jovan Kojicic, president of the German Academic Exchange Service (DAAD) Alumni Club Montenegro, was reported confirming that the organizers of the conference on the rights of sexual minorities in Montenegro had a good cooperation with the police that had provided good support to the conference ("Lunacek: Izostanak politicara govori o strahu", daily Vijesti, 25 October 2010).

56 Ibid. The donors of the Conference: Lund University – Department of Sociology of Law, Lund, Sweden; Williams Institute – UCLA School of Law, Los Angeles, United States; Foundation Open Society Institute – Representative Office Montenegro (FOSI ROM); German Academic Exchange Service (DAAD), Bonn, Germany Montenegro Ministry for Human and Minority Rights Government of Canada; Vasja Grabner, Artist, Celje, Slovenia; Roy Elliott O'Connor LLP Barristers, Toronto, Canada.

57 On behalf of the organizers of the conference, Mr. Jovan Kojicic, president of the German Academic Exchange Service (DAAD) Alumni Club Montenegro, was reported confirming that the organizers of the conference on the rights of sexual minorities in Montenegro had a good cooperation with the police that had provided good support to the conference ("Lunacek: Izostanak politicara govori o strahu" (The absence of politicians suggests fear), daily Vijesti, 25 October 2010).

58 Ibid.

59 „Varvari dočekali Atilu” (Barbarians Awaited Atila), Pobjeda, 20 November 2004.

cooperation with Roy Elliott O'Connor LLP Barristers (Toronto, Canada), Toronto Police Service, Toronto Pride, The Williams Institute – UCLA School of Law, The City of West Hollywood, Christopher Street West, and the West Hollywood Sheriff's Department.<sup>60</sup> The aim of such training is to support not only the rule of law but also the human rights culture and encourage organisers of some future LGBT pride parade in Montenegro.

### B.3. Freedom of expression

30. The constitutionally protected right to freedom of expression may be limited only by the rights of others to dignity, reputation or honour or in case of endangering public moral or security of Montenegro.<sup>61</sup> The Constitution also guarantees the right to a response and correction of any untrue, incomplete or incorrectly conveyed information that violates a person's right or interest and the right to compensation of damage caused by the publication of untruthful data or information.<sup>62</sup>
31. The Law on Obligations provides for the right of compensation of damage for violation of one's honour or reputation and the Media Act provides with a right to claim publication of correction or reply.<sup>63</sup> The Criminal Law provides for criminal offences of Defamation,<sup>64</sup> Insult<sup>65</sup> and Spreading information about private or family life.<sup>66</sup>

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60 "Montenegrin Police Officers at a Gay Parade", daily Dan, July 2010, also daily Vijesti and Pobjeda; Press release at the Police Directorate web site, [www.upravapolicije.com/uprava\\_policije\\_sluzbenici-pj-podgorica-završili-obuku-o-odnosu-policije-sa-lgbt-populacijom\\_4404.html](http://www.upravapolicije.com/uprava_policije_sluzbenici-pj-podgorica-završili-obuku-o-odnosu-policije-sa-lgbt-populacijom_4404.html), accessed 30 September 2010.

61 *Freedom of Expression*, art. 47 of the Constitution of Montenegro: "Everyone shall have the right to freedom of expression by speech, writing, picture or in some other manner. The right to freedom of expression may be limited only by the right of others to dignity, reputation and honour and if it threatens public morality or the security of Montenegro."

62 *Freedom of the Press*, art. 49, para. 3. This provision, guaranteeing the right to compensation of damage in the case of publication of incorrect information may be at odds with the interpretation of the art. 10 of the European Convention on Human Rights, as established by the Venice Commission in its Opinion on the Constitution of Montenegro (European Commission for Democracy through Law - Venice Commission, Opinion No. 392/2006, CDL-AD(2007)047, Strasbourg, 20 December 2007).

63 Art. 205-207, Law on Obligations, (Zakon o obligacionim odnosima), Official Gazette of Montenegro, No. 47/08. Art. 20 and chapter VI, Media Act (Zakon o medijima), Official Gazette of the Republic of Montenegro, No. 51/2002 and 62/2002.

64 Defamation, art. 196 of the Criminal Code of Montenegro, last corrections in 2010:

"(1) Anyone who speaks or transmits untrue information about someone that may harm his/her honour and reputation shall be punished by a fine in the amount of € 3.000 to 10.000. (2) If an act referred to in Paragraph 1 of this Article is performed through media or other similar means or at a public gathering, s/he shall be punished by a fine in the amount of € 5.000 to 14.000. (3) If an untrue information said or transmitted has caused or could have caused significant harm to the injured party, the perpetrator shall be punished by a fine in the minimum amount of € 8.000. (4) If the accused proves to have had founded reasons to believe in truthfulness of what s/he spoke or transmitted, s/he shall not be punished for charged with defamation, but s/he can be punished for insult (Article 195), if the conditions for the existence of such an act have been met."

(5) A journalist or editor who behaved with due professional care shall not be punished for defamation."

65 Insult, art. 195, of the Criminal Code of Montenegro, last corrections 2010:

"(1) Anyone who insults other person shall be punished by a fine in the amount of € 1,200 to 4,000. (2) If an act referred to in Paragraph 1 of this Article is performed through media or other similar means or at some public gathering, the perpetrator shall be punished by a fine in the amount of € 3,000 to 10,000. (3) If the insulted person returned the insult, the court may punish or free both sides or one side from punishment. (4) Any person who commits an act referred to in Paragraphs 1 to 3 of this Article shall not be liable to any punishment whatsoever if the statement is given within serious critique in a scientific, literary or artistic work, performance of a public service, or journalistic writing, political activity, or to defend a right or protect justifiable interests, if the manner in which the statement is expressed or other circumstances indicate it is not done on the grounds of discrediting a person."

66 *Spreading Information about Private or Family Life*, art. 197 of the Criminal Code of Montenegro: "(1) Anyone who spreads or transmits information about personal or family life of a person and thereby potentially harms his/her honour or reputation shall be punished by a fine in the amount of € 3.000 to 10.000. (2) If an act referred to in Paragraph 1 of this Article is performed through media or other similar means or at a public gathering, the perpetrator shall be punished by a fine in the amount of € 5.000 to 14.000. (3) If what is being said or transmitted has entailed or could have entailed serious consequences for the injured party, the perpetrator shall be punished by a fine in the minimum amount of € 8.000. (4) If the accused person has spread or transmitted information about personal or family life within performing a official duty, journalist profession, defending a right or protecting justified interest, s/he shall not be punished provided s/he proves that the information is true or that s/he had founded reasons to believe that the information s/he disclosed or transmitted is

32. The first article of the Media Act stipulates that "Montenegro secures and guarantees freedom of information in Montenegro on the level of standards contained in international documents on human rights and freedoms (CoE, EU, OSCE) and that "it should be interpreted and implemented in accordance with the principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms with use of the precedent practice of the European Court of Human Rights". As will also be discussed below in the chapter on hate speech, Media Act prohibits publication of information and opinion instigating discrimination, hatred or violence against persons or group of persons due to them belonging or not belonging to certain gender or sexual affiliation.<sup>67</sup>
33. No criminal or civil court case involving violation of freedom of expression or privacy of a LGBT person has been recorded by the press or by human rights NGOs, nor was anyone recorded to have been sentenced or ordered to pay compensation for violation of privacy, honour or reputation of an LGBT person. The Supreme Court of Montenegro does not keep database of such court cases.<sup>68</sup>

#### **B.4. Hate crimes - hate speech**

34. Although the Constitution of Montenegro explicitly prohibits incitement and promotion of hate on *any* grounds (Art. 7), the Criminal Code of Montenegro incriminates incitement only of national, racial and religious hatred and intolerance by articles 370 and 446, para. 3) , which do not explicitly include hatred and intolerance towards LGBT persons within their scope of protection.<sup>69</sup> The criminal offence of Maltreatment (art. 166a),<sup>70</sup> incriminating behaviour offending human dignity, as well as Torture (art. 167), when caused out of motives grounded on any form of discrimination, represent the most explicit answer of the Montenegrin criminal law to hate crimes and hate speech to date.
35. The Criminal Code<sup>71</sup> contains "general sentencing rules", providing that the court will take into account "all mitigating and aggravating circumstances, and especially: the level of guilt, motives for perpetration of the offence, the level of endangering or damage to the protected value, circumstances surrounding the execution of the offense, former life of the perpetrator, his personal circumstances, his behaviour following the perpetration of the offence, and especially his relation towards the victim of the offence, as well as other circumstances pertaining to the personality of the perpetrator."<sup>72</sup> Homophobic/transphobic motivation has not been stated as the motivation that would be considered an aggravating or mitigating circumstance. However, aggravating forms of several criminal offences, for example, "aggravated murder" occur if perpetrated with "low motives", which have not been explicitly defined.<sup>73</sup> Furthermore, the offence of "Maltreatment" provides for punishment for maltreatment and violation of human dignity in terms of pecuniary penalty and up to a year

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true. (5) The truthfulness or untruthfulness of what is being said or transmitted pertaining to personal or family life is not liable to any evidence establishing procedure, except in cases referred to in Paragraph 4 of this Article."

67 "Zabranjeno je objavljivanje informacija i mišljenja kojima se podstiče diskriminacija, mržnja ili nasilje protiv osoba ili grupe osoba zbog njihovog pripadanja ili nepripadanja nekoj rasi, vjeri, naciji, etničkoj grupi, polu ili seksualnoj opredijeljenosti." Art. 23, para. 1, Media Act, *ibid*.

68 For reference: Art. 28 of the Constitution reads: "The dignity and security of a man shall be guaranteed. The inviolability of the physical and mental integrity of a man, and privacy and individual rights thereof shall be guaranteed." However, the Supreme Court of Montenegro, as well as all other courts will have to start keeping such databases in accordance with the new Law on Prohibition of Discrimination.

69 For the text of the articles 370 and 443, para. 3, please see above FN 35 and 37.

70 For texts of Articles 166a and 167: "Sindromi (ne)tolerantnosti", Srdjan Vukadinovic (professor of sociology), daily Pobjeda, 6 December 2004.

71 Criminal Code (Krivicni zakonik), Official Gazette of Montenegro, No. 70/2003, 13/2004, 47/2006, 40/2008, 25/2010 (the latest corrections are from 22 April 2010).

72 *Ibid*. Article 42, para. 1.

73 *Ibid*. As "low motives" the Criminal Code considers "greed, careless revenge or other low motives" (see Art. 144, point 4 - "Aggravated Murder"; Art. 217, point 3 "Apprehension of a Minor"; Art. 434, para. 2 "Illegal Killing or Wounding an Enemy").

in prison<sup>74</sup> and "Torture" for causing great suffering or pain, physical or psychological, by the use of force, threat or another prohibited manner out of motivation *rooted in any kind of discrimination*, a prison sentence from six months to five years.<sup>75</sup> If a state officer commits such acts while performing service, he/she will be punished from three months to three years of prison or one to eight years of prison, respectively.<sup>76</sup> Furthermore, the aggravated form of the offence "Endangering of Safety", incriminating threats to life or body of a person, is caused if the offence is committed against several persons or if the crime caused *disturbance of citizens or other grave consequences*.<sup>77</sup> Although the Criminal Code does not provide with further guidance as to how "disturbance of citizens" or "grave consequences" or "low motives" mentioned above should be interpreted, those formulations should provide with sufficient ground for interpretation favouring protection of LGBT persons from crimes motivated by discrimination and hatred.

36. The only criminal proceeding known to the public involving protection of a homosexual has been initiated by the state prosecutor against a man named D.M. due to continuing blackmailing practice. The investigation is still ongoing.<sup>78</sup>
37. The 1994 Public Order and Peace Act<sup>79</sup>, prescribes small offences for breach of public order and peace punished by pecuniary penalties or a prison sentence up to 60 days. Under Art. 7, the Act prescribes a small offence of "breach of racial, national or religious sentiments of citizens or a public moral by speech, writing, by posting a sign or in another way". Although public moral should be interpreted as protective of the constitutionally guaranteed human rights of LGBT persons, there are no guarantees that in practice it would be so interpreted giving the actual homophobic climate within large majority of population, as above noted. Another small offence, prescribed under Art. 17 of the Act that should be used to protect against maltreatment and hate speech, prohibits "offending someone in a public place, endangering safety of citizens or causing disapproval of citizens, or causing a sentiment of insecurity or disturbance or acting in an especially impudent, shameless or offensive manner". In practice, there were no cases recorded of either sanctioning LGBT persons or protecting them under the Public Order and Peace Act.
38. The Media Act prohibits publishing of information and opinion inciting discrimination, hatred or violence against persons or a group of persons due to them belonging or not belonging to a gender or due to sexual orientation.<sup>80</sup> The founder of the media or the author will not be found responsible if they publish information and opinion as part of scientific or author's research on a public issue in an objective journalistic report, without intention to incite discrimination, hatred or violence and with the purpose to critically point to discrimination, hatred, violence or an event that incites to such behaviour or may cause such incitement.<sup>81</sup> A punishment of 20-50 times the value of guaranteed minimal monthly earning is prescribed for the founder of the media if the media publishes information or opinion in violation of the above stated rules.<sup>82</sup> There has been no record of any such punishment

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74 Ibid. Art. 166a. For the text of the article: "Sindromi (ne)tolerantnosti", Srdjan Vukadinovic (professor of sociology), daily Pobjeda, 6 December 2004.

75 Ibid. Art. 167. For the text of the article: "Sindromi (ne)tolerantnosti", Srdjan Vukadinovic (professor of sociology), daily Pobjeda, 6 December 2004.

76 Ibid. Art. 166a, para. 2 and 167, para. 3.

77 Ibid. Article 168. This aggravated form is to be punished from three months to three years in prison.

78 Response of the Basic State Prosecutor in Podgorica to the request for information, No. Ktr. No. 973/09, 28 October 2009.

79 Public Order and Peace Act (Zakon o javnom redu i miru), Official Gazette of the Republic of Montenegro, No. 41/94 of 22 December 1994.

80 Art. 23 (1), Media Act (Zakon o medijima), Official Gazette of the Republic of Montenegro, No. 51/2002 and 62/2002.

81 Ibid, Art. 23 (2).

82 Ibid. Art. 43 (1) point 3.

since 2002 when the Media Act came to force,<sup>83</sup> although there have been some examples of offensive speech against LGBT population in the Montenegrin media in the meantime.<sup>84</sup>

39. The Montenegrin Broadcasting Act envisages “duty [of broadcasters] to contribute to the respect and promotion of human rights and freedoms, democratic values and institutions, pluralism of ideas... and dignity of citizens” and prescribes punishment in the range of 20-50 minimal wages in Montenegro for the broadcasters who broadcast content in breach of related requirements of the Media Act (as emphasised above).<sup>85</sup> Since its foundation, the Broadcasting Agency sanctioned media only on two occasions and that had been for broadcasting SMS messages promoting religious and national hatred in 2006.<sup>86</sup>
40. No court or small-offence court cases on homophobic/transphobic hate speech have been recorded either by the media or NGOs or the competent state bodies.<sup>87</sup>

## **B.5. Family issues**

41. The 2007 Constitution guarantees the right to respect for private and family life without providing any grounds for their possible limitation, other than in relation to the search of home or interception of correspondence on the basis of a court decision.<sup>88</sup> Subject to the general clause on limitation of rights “guaranteed human rights and freedoms may be limited only by the law, within the scope permitted by the Constitution and to such an extent necessary to meet the purpose for which the limitation is allowed in an open and democratic society”, it appears that the constitutional guarantee of the right to respect private and family life is left without any possible limitation.<sup>89</sup>
42. Both marriage and cohabiting union are recognised as a union of a man and woman.<sup>90</sup> Same-sex cohabiting partnerships have not been recognised by law. Family is considered as a community of parents (married or in a cohabiting union) with children and possibly other relatives.<sup>91</sup> As a result, the same-sex partners may not claim the rights recognised to

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83 The Small Offences Court in Podgorica confirmed that there were never any proceedings for small offences against any media for violating the Media Act (Response to the request for information, No. 246/10, 11 February 2010).

84 For example, an offensive caricature published by daily Dan in September 2007; an article published by a columnist of daily Dan, D. Rosandic, “Zecevi (Rabbits)”, 19 November 2007, referring in an offensive language (“peder”) to Atila, gay activist from Serbia; interview with singer H. Dzinovic who referred in offensive terms to homosexuals, “Navucen na merak (Hooked on leisure)”, Dan, 31 December 2008.

85 Articles 56 (2) and 117 (1) point 3, Broadcasting Act (Zakon o radio-difuziji), Official Gazette of the Republic of Montenegro, No. 51/2002, 62/02, 56/04.

86 Broadcasting Agency of Montenegro, Response to the request for information, No. 02-18/2, 2 February 2010.

87 That is until 22 September 2010.

88 Article 40 of the Constitution of reads: “Everybody shall have the right to respect for private and family life.” Article 41 protects Inviolability of home, providing that the court order is necessary for the search of home or other premises, except in case of necessity for prevention of execution of a criminal offence, immediate apprehension of a perpetrator of an offence or to save people and property. Article 42 protects Confidentiality of correspondence and provides that the only deviation from the principle may occur on the basis of a court decision, if required for the purposes of conducting criminal proceedings or for the security of Montenegro.

89 Article 24, para. 1 “Limitation of human rights and liberties”, Constitution of Montenegro.

90 “Marriage may be entered into only on the basis of a free consent of a woman and a man.” (Constitution of Montenegro, Art. 71, para. 1). “Marriage is concluded by the consent of a woman and man before the competent state authority (Family Act, Art. 17)”. Art. 12, Family Act (Porodici zakon), Official Gazette of Montenegro, no. 1/2007, of 9 January 2007, “Cohabiting union”: “(1) A union of a man and woman lasting for a longer period of time (cohabiting union) has been equalled with marital union regarding right to alimentation and other property related legal relations. (2) A cohabiting union will not be valid in accordance with paragraph 1, if at the time of its conception hindrances existed for the conclusion of a valid marriage.” (“(1) Zajednica zivota muskarca i zene koja traje duze (vanbracna zajednica), izjednacena je sa bracom zajednicom u pogledu prava na medjusobno izdrzavanje i drugih imovinsko-pravnih odnosa. (2) Vanbracna zajednica ne proizvodi dejstvo iz stava 1 ovog clana, ako su u vrijeme njenog zasnivanja postojale smetnje za sklapanje punovaznog braka.”)

91 “Family is a community of life of parents, children and other relatives, who, in terms of this Law, have mutual rights and obligations, as well as other basic community of life where children are nurtured and raised” Art. 2 of the Family Act. “Family is composed of married spouses or partners in a cohabitation union and children (marital, out of wedlock, adopted

heterosexual couples who are living together, such as the right to financial support by the partner, right to property acquired by labour contribution of the partner, right to inherit from the partner in the absence of a testament, etc.<sup>92</sup> contrary to the European standard established under the European Convention on Human Rights.<sup>93</sup> Also, one of the most obvious examples of discrimination of homosexual cohabiting partners is found in the Law on Obligations (*Zakon o obligacionim odnosima*), which restricts the right to compensation of damage for emotional pain due to death or grave disability of a close person to a spouse and partner from a cohabiting union (who is only recognised as a person of opposite sex).<sup>94</sup>

43. The notion 'spouse' would not extend to same-sex spouses even if the same-sex marriage is validly concluded in a foreign jurisdiction. Although there were no such requests recorded, a request for recognition of a same-sex marriage would most likely be considered in breach of mandatory Constitutional legal order and hence not allowed, as the Constitution describes marriage as a union of a woman and a man.<sup>95</sup>
44. As legal definitions of marriage and cohabitation union exclude same-sex couples, and a family is defined as a union of heterosexual parents with children, as a consequence, discrimination is enabled of homosexual partners with regard to paid leave from work due to serious illness or death "of a close family member".<sup>96</sup> Also, the Law on protection from family violence (*Zakon o zaštiti od nasilja u porodici*), adopted in August 2010, provides protection for spouses, partners from a cohabiting union and "members of family household", which again leaves out homosexual cohabiting partners, due to a narrow definition of a family.<sup>97</sup> Although one should be able to successfully challenge those provisions before the constitutional court, no such attempt was recorded to date.
45. There are no provisions referring to transgender persons in family law. The right to marry or exercise rights afforded to partners in a cohabitation union is conditional upon opposite sex, and the sex is determined by official documentation. The change of gender marker in personal documents is conditional for a transgender person wishing to marry or enjoy rights belonging to a cohabiting partner in Montenegro.<sup>98</sup> This has been tested in practice by Mr. Marko Bojanic, who married after fully completing gender reassignment procedure

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and fostered) and other relatives who live together." Art. 11 of the Law on Social and Child Protection (*Zakon o socijalnoj i dječjoj zaštiti*), Official Gazette of Montenegro, no. no. 78/2005.

92 "A union of a man and a woman of a longer duration (cohabiting) has been equalised with a marital union in terms of rights of financial support between the partners and other relations related to property", Family Act, Art. 12, para. 1. "Cohabiting partners and the related relatives have equal right to inherit like spouses relatives(...)" (*Vanbracni srodnici izjednačeni su u pogledu nasljedivanja sa bracnim(...)*), Article 4, Inheritance Act (*Zakon o nasljedivanju*), Official Gazette of Montenegro, No. 74/08.

93 European Court of Human Rights, *Karner v. Austria*, Application no. 40016/98, judgment of 24 July 2003 and *P.B. and J.S. v. Austria*, Application no. 18984/02, judgment of 22 July 2010, para. 29. Also see, Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity (Adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies), para. 23.

94 Article 208 of the Law on Obligations (*Zakon o obligacionim odnosima*), Official Gazette of Montenegro, No. 47/2008.

95 „The foreign law shall not apply if its effect would be contrary to the constitutional basis of the social order." Art. 4, Conflict of Laws Act (*Zakon o resavanju sukoba zakona sa propisima drugih zemalja*), Official Gazette of the SFRJ, no. 43/1982, Official Gazette of the FRJ, no. 46/96.

96 *Paid Leave due to Personal Needs*, Art. 72, paras. 1, 3 and 4 of the Labour Act, Official Gazette of Montenegro, no. 49/2008 i 26/2009: "(1) An employee has the right to a paid leave in the case of grave illness of a ... close family member; (3) (...) to seven working days due to death of a close family member. (4) As close family members for the purpose of paras. 1 and 3 of this article shall be considered: a spouse, children (marital, out-of-wedlock, adopted or fostered), brothers, sisters, parents, an adopter and guardian. Paid Leave, Art. 7: "An employee has the right to a paid leave, on the basis of a filed request, in the cases of: ... grave illness of a close family member up to seven working days", General Collective Agreement (*Opsti kolektivni ugovor*), Official Gazette of the Republic of Montenegro, no. 1/2004, 59/2005.

97 Art. 3 of the Law on protection from family violence, Official Gazette of Montenegro, No. 46/2010.

98 Article 6, para. 2, Personal Registry Act (*Zakon o matičnim knjigama*), Official Gazette of Montenegro, No. 47/08 and information obtained from the Ministry of Interior Department for administrative affairs, 03/1 no. 270/10-888, Podgorica, 8 June 2010 (documentation of Aleksandar Zekovic).



and changing the gender marker in official documents.<sup>99</sup> For further details, please see the section on Transgender issues.

46. The change of gender marker in the birth registry and other personal documents is possible once the gender reassignment medical procedure is completed, which should be supported by medical documentation.<sup>100</sup> The procedure is explained in more detail in the chapter devoted to Transgender issues. To date three persons have obtained gender marker change in Montenegro.<sup>101</sup>
47. The name change procedure is regulated in a liberal way by the Personal Name Act.<sup>102</sup> The procedure is initiated upon personal request or request of a guardian in case of a minor, and is not conditional upon the legal gender recognition. The only limitations applicable to the freedom to choose a personal name are protection of public safety or the rights or freedoms of others.<sup>103</sup> The change of a personal name will not be permitted to a person sentenced for a criminal offence that has been prosecuted *ex officio*, until the punishment is fully executed or until legal consequences of the sentencing last.<sup>104</sup> As noted above, the procedure was completed by three transgender persons in Montenegro to date.<sup>105</sup>
48. The Family Act provides that a marriage may be annulled if concluded in fallacy regarding personality of a spouse, when one assumes one's spouse to be another person or if a spouse turns out to be different from the person the spouse presented him or herself to be (Art. 50). However, one may not request the annulment after a year had passed from the day the error had been detected when the spouses had been living together during this period (Art. 53). No case-law in relation to the above provision has been recorded to involve a transgender or homosexual person.
49. According to the Family Act, "adoption establishes parent-child relations between the adopter and adopted child, with an aim to provide the adopted child with the same life conditions enjoyed by children living in a family".<sup>106</sup> The Act recognises two forms of adoption, complete (*potpuno usvojenje*) and incomplete adoption (*nepotpuno usvojenje*). The *complete adoption* has an effect of abolishing all ties with the natural parents and/or relatives, while in *incomplete adoption*, the child and the adoptive parent or parents establish in principle all rights and obligations applicable to a child-parent relation under the law, but the adoption does not abolish legal ties between the adopted child and his/her

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99 "Muskarac posle cetiri operacije (A man after four operations)", *Vijesti*, 10 August 2009.

100 Response of the Ministry of Interior to the request for information by A. S. Zekovic, 03/01 No. 270/10-888, 8 June 2010.

101 *Ibid.*

102 Personal Name Act (Zakon o licnom imenu), Official Gazette of Montenegro, No. 47/08.

103 *Ibid.* Art. 2, para. 6 reads: "The right to free choice of personal name should not be restricted unless it is necessary to protect public safety or the rights and freedoms of others". (Pravo na slobodan izbor ličnog imena ne smije se ograničiti, osim ako je to potrebno radi zaštite javne bezbjednosti ili prava i sloboda drugih lica).

104 *Ibid.* Art. 15, para. 1 reads: "The change of a personal name, or just last name, or just name will not be permitted to a person sentenced for a criminal offence that has been prosecuted *ex officio*, until the punishment is fully executed or until legal consequences of the sentencing last." (Promjena ličnog imena ili samo prezimena ili samo imena neće se dozvoliti licu koje je pravosnažno osuđeno za krivično djelo koje se goni po službenoj dužnosti, do izvršenja kazne ili dok traju pravne posljedice osude.).

105 "Marriage may be entered into only on the basis of a free consent of a woman and a man." (Constitution of Montenegro, Art. 71, para. 1). "Marriage is concluded by the consent of a woman and man before the competent state authority (Family Act, Art. 17)". Art. 12, Family Act (Porodnici zakon), Official Gazette of Montenegro, no. 1/2007, of 9 January 2007, "Cohabiting union": "(1) A union of a man and woman lasting for a longer period of time (cohabiting union) has been equalled with marital union regarding right to alimentation and other property related legal relations. (2) A cohabiting union will not be valid in accordance with paragraph 1, if at the time of its conception hindrances existed for the conclusion of a valid marriage." ("(1) Zajednica zivota muskarca i zene koja traje duze (vanbracna zajednica), izjednacena je sa bracnom zajednicom u pogledu prava na medjusobno izdrzavanje i drugih imovinsko-pravnih odnosa. (2) Vanbracna zajednica ne proizvodi dejstvo iz stava 1 ovog clana, ako su u vrijeme njenog zasnivanja postojale smetnje za sklapanje punovaznog braka.").

106 Article 8 of the Family Act (Porodnici zakon), Official Gazette of the Republic of Montenegro, No. 1/2007.

natural parents or relatives.<sup>107</sup> There are also differences in the maximum age of a child who may be adopted and in the procedure of adoption termination between the two forms of adoption.<sup>108</sup> While complete adoption is clearly provided only for heterosexual persons, an LGBT person would be eligible for incomplete adoption, as unmarried persons may incompletely adopt in specially justified cases<sup>109</sup> and the competent ministry confirmed that there is no prohibition for an LGBT person to incompletely adopt under the Family Act or other laws or by-laws or guidelines issued by the State.<sup>110</sup> Any form of adoption may not be completed, *inter alia*, by a person “who does not provide with sufficient guarantees that he/she will provide the child with appropriate parental care”, which is judged in every particular case by the state social services.<sup>111</sup> It was not recorded that an LGBT person ever filed for adoption, nor that any person was denied a request to adopt due to suspected LGBT status.<sup>112</sup> Furthermore, there were no attempts at challenging the constitutionality of the Family Act provisions that effectively deny the LGBT persons with the right to completely adopt a child.

50. Assisted reproduction is available and has been regulated by the Law on the Treatment of Infertility by the Assisted Reproductive Technologies.<sup>113</sup> There is no explicit prohibition for access to these services by LGBT persons. However, the Law provides that the right to treatment belongs to a man and woman who live in marital or cohabiting union, or to women who are not married nor live in a cohabiting union (Art. 11). Considering that cohabitation of two lesbian women is not recognised as a cohabiting union by the law of Montenegro, lesbian women would fulfil the criteria “of not living in marriage or a cohabiting union” and would hence have no legal obstacles to be awarded a treatment. The question of lesbian mothers was not debated at the time of the adoption of the Law, according to media reports.<sup>114</sup> The initial text of the Law was improved only at a later stage to include the right of single women to the treatment. In such a case, the consent is required by the Minister of Health, who is to give his/her opinion upon the opinion provided by the Commission made of experts and charged with supervision of the implementation of the Law (Art. 11, paras. 3 and 4). The law provides that a woman should be of age, healthy and fit to provide appropriate care to the child in terms of her psycho-social situation (Art. 12). If the Minister would not provide consent due to the lesbian relationship of a mother, one would have the right to challenge his decision before the Administrative Court and the Constitutional Court. However, no such cases have been reported so far.

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107 Ibid. Art. 144 Rights and obligations arising from complete adoption, Family Act (Porodnicni zakon): “By complete adoption, between the adopters and their relatives on one side, and the adoptee and his descendants on the other, an inseparable relationship of kinship equal to blood relationship is established. Adopters are entered in the birth registry as parents of the adoptee.” (Potpunim usvojenjem se između usvojlaca i njegovih srodnika s jedne strane, i usvojenika i njegovih potomaka s druge strane zasniva neraskidiv odnos srodstva jednak krvnom srodstvu. U matičnu knjigu rođenih usvojioci se upisuju kao roditelji usvojenika.). Art. 145: “By complete adoption the mutual rights and obligations of the adoptee and his blood relatives are abolished, except if the child is adopted by a step-mother or a step-father.” (Potpunim usvojenjem prestaju međusobna prava i dužnosti usvojenika i njegovih krvnih srodnika, osim ako dijete usvoji maćeha ili očuh.). Art. 148, Rights and obligations arising from incomplete adoption, Family Act: “By incomplete adoption, between the adopters on the one side and the adoptee on another arise rights and obligations existing under the law between the parents and children, except if the law provides otherwise. The incomplete adoption does not influence the rights and duties between the adoptee to his parents and other relatives.” (Nepotpunim usvojenjem nastaju između usvojlaca s jedne strane i usvojenika i njegovih potomaka s druge strane prava i dužnosti koja po zakonu postoje između roditelja i djece, osim ako zakonom nije drukčije određeno. Nepotpuno usvojenje ne utiče na prava i dužnosti usvojenika prema njegovim roditeljima i drugim srođnicima.).

108 Ibid. A child may be completely adopted until the age of 10, and incompletely until the age of 18 (Arts. 131 and 133, Family Act). For abolishment of incomplete adoption see Arts. 151-154 and for complete adoption Arts. 154-156.

109 Ibid. Art. 134, para. 2.

110 Ministry of Labour and Social Care, decision no. 01-27, of 12 January 2010.

111 Art. 127, para. 1, point 4 and Art. 134 of the Family Act.

112 According to the Ministry of Labour and Social Care, see media reports and Article 8 of the Family Act (Porodnicni zakon), Official Gazette of the Republic of Montenegro, No. 1/2007.

113 Zakon o liječenju neplodnosti asistiranom reproduktivnim tehnologijama, Official Gazette of Montenegro, no. 74/2009.

114 “Humanost kao lijek” (Humanity as medicine), Pobjeda; “Doktori preuzeli mikrofon” (Doctors took over the microphone), Dan; “Varnice oko zakona Marijane Mugosa” (Sparkles around the Marijana Mugosa law), Vijesti, 21 October 2009.

51. The Law on the Treatment of Infertility by the Assisted Reproductive Technologies (Art. 13) explicitly prohibits treatment of women who intend to deliver a child after birth, with or without compensation, to another person (surrogate motherhood).
52. The rights of transgender persons have not been recognised by the Law on the Treatment of Infertility by the Assisted Reproductive Technologies. The female partners of the transgender person who has completed gender reassignment and changed personal documents, should face no obstacles to participate in the procedure. On the other hand, in case of an incomplete gender change, the female partner would be eligible for treatment only if declared single, not living in marriage or a cohabitation union, and if so approved by the Ministry of Health, who consults the Commission as above mentioned. Also, expert committees are formed in each medical institution implementing the treatment who supervise implementation and report to the Ministry on every procedure.<sup>115</sup> The law prohibits usage of donated cells only between people among which there are obstacles to conclude marriage due to family relations, in accordance with the Family Act (Art. 14, para. 3).
53. Storing sperm/fertile eggs has been prescribed by the Law as the right of persons who are otherwise eligible for the treatment, as above stated, is based on consent and may last up to five years on the basis of one statement of approval (Art. 40).

#### **B.6. Asylum and refugee issues**

54. The right to asylum, as guaranteed by the Constitution, may be requested by "a foreign national reasonably fearing from persecution on the grounds of his/her race, language, religion or association with a nation or a group or due to own political beliefs."<sup>116</sup> The Asylum Act states that asylum "is provided to foreign citizens in need of international protection in accordance with the 1951 Convention on the Status of Refugees, 1967 Protocol on the Status of Refugees, European Convention on Human Rights and other ratified international treaties and generally accepted rules of international law".<sup>117</sup>
55. Neither the Constitution, nor the Asylum Act explicitly refer to sexual orientation or gender identity, but to "association with a group" as a ground that may cause reasonable fear from persecution and hence justify a request for asylum.<sup>118</sup>
56. Furthermore, the Asylum Act explicitly states that in the process of applying for granting asylum discrimination is prohibited "on any ground" and especially due to "race, colour, sex, nationality, social origin or birth, religion, political or other opinion, state of origin, wealth, culture, language, age, psychological or physical disability" (art. 7). Hence, if the fear from persecution in the country of origin may be shown as real due to belonging to a social group, such as the LGBT population, the asylum claim should not fail.
57. The competent state body to decide in the first instance on asylum claim is the Asylum Office within of the Ministry of Interior and Public Administration. The decision of the Office may be appealed with the State Commission, formed at the level of Government, and there is no right to appeal the decision of the Commission before the court or another body (art. 17). However, one may than file a constitutional complaint to the Constitutional Court.

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115 The Ministry of Health provides authorization for the hospitals to perform the treatment and is in charge of monitoring the implementation of the law. All health institutions conducting the treatment, private or public need to report on the initiation and conclusion of the treatment to the Ministry of Health and are subject to penalty for not doing so (Law on the Treatment of Infertility by the Assisted Reproductive Technologies, Arts. 45, 49, 50). The expert committees are staffed with various medical specialists and a lawyer (Art. 18).

116 Art. 44, para. 1 of the Constitution.

117 Art. 2, para. 2 of the Asylum Act (Zakon o azilu), Official Gazette of the Republic of Montenegro, no. 45/2006.

118 Art. 44, para 1 of the Constitution and art. 2, para. 3 of the Asylum Act.

58. The Ministry of Interior and Public Affairs confirms that for reaching decision on an asylum claim “all circumstances are considered that are important for reaching a decision, and especially subjective elements and objective circumstances in the country of origin, taking into account the reports of all relevant organisations, including the UN High Commissioner for Refugees”.<sup>119</sup>
59. Since the Asylum Law came to force in 2007, the Ministry of Interior and Public Administration approved the refugee status to one person, while another one was awarded “additional protection”.<sup>120</sup> Seventeen asylum requests were rejected and seven are being processed.<sup>121</sup> UNHCR chief of mission stated that the mission has no objections against decisions of the Asylum Office and the Appeal Commission, but criticised the fact that the Law provides only for a limited, one-year long social protection for the person requesting asylum, regardless of his/her real needs, and announced cooperation with the Government on further amending the Law.<sup>122</sup>The information on the grounds for granting refugee status and additional protection was not provided.
60. The Asylum Act provides that in the process of acquiring asylum special needs of minors and other vulnerable persons, especially those who were exposed to torture, rape or other grave forms of psychological, physical or sexual violence should be taken care of (Art. 11). The Act also specifically provides for gender sensitive treatment: “The person requesting asylum shall be treated in a manner respectful of his/her gender. The person requesting asylum has the right to communicate with the officer and interpreter of the same gender. The person of a female gender, accompanied by a person of a male gender shall be informed on the right to file a personal request for asylum (Art. 12).” As there are no data on a transgender person ever requesting asylum in Montenegro, one may only suppose that the competent officers would respect his/her gender preference and not necessarily insist on gender treatment in accordance with the data entered in personal documents.
61. The Centre for the asylum seekers has not yet been established due to financial difficulties. In the meantime, the Ministry of Interior and Public Administration is renting two premises for the purpose. There are no guidelines on the operation of those premises, but according to the response from the competent Department for Taking Care of Refugees, in the space in which asylum seekers are presently accommodated, a separate space for LGBT persons has not been provided, nor is there a special procedure for their treatment.<sup>123</sup>
62. The competent Department for Taking Care of Refugees was not able to answer whether it would be possible for the state to ensure continuation of gender reassignment treatments (for example, cross hormonal treatment) during the stay in the house that serves as Centre for the asylum seekers.<sup>124</sup> The answer shows that the authorities never considered the issue before, which is not too surprising considering that the health institutions in

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119 Ministry of Interior, Response to a request for information, No. 03-051/10- 15894/2 of 28 January 2010.

120 “One got protection, another asylum”, *Vijesti*, 19 April 2010, p. 13. “Additional protection, as additional protection of refugees in accordance with the documents on human rights, is approved to a foreigner that does not fulfil the conditions for recognition of the refugee status, and that would, in the case of a return to the country of origin or another state, be subjected to torture or inhuman or degrading treatment or punishment or his/her life, safety or freedom would be endangered by violence of a general scope, by the foreign aggression, internal conflicts, massive violations of human rights or other circumstances that seriously endanger life, safety or freedom. Additional protection is an urgent and exceptional measure providing protection to foreigners in case of a massive, surprising or expected arrival from the state where their lives, safety or freedom have been endangered by a general scale violence, by the foreign aggression, internal conflicts, massive violation of human rights or other circumstances that seriously endanger life, security or freedom, while due to a massive arrival one may not fulfil the procedure on individual requests for determination of the refugee status.” (Art. 2, para. 4 of the Asylum Law).

121 “One got protection, another got asylum”, *Vijesti*, 19 April 2010, p. 13.

122 *Ibid.*

123 Department for Taking Care of Refugees (Zavod za zbrinjavanje izbjeglica), Response to a request for information, No. 02/02470/1, of 5 March 2010.

124 *Ibid.*

Montenegro themselves do not provide gender reassignment treatments, as is discussed below, in the chapters on Health Care and Transgender issues.

### **B.7. Social security, social care and insurance**

63. According to the Law on Social and Child Protection,<sup>125</sup> the goal of social and child protection is to "provide for protection of family, individuals, children at risk and persons in social need or social exclusion" (Art. 4, para. 1). The Law explicitly states that in acquiring protection "all citizens are equal, with no differentiation as to nationality, race, sex, language, religion, social background or other personal features" (Art. 5). LGBT persons should, therefore, clearly be eligible to all basic rights of social protection<sup>126</sup> without discrimination, except for same-sex cohabiting couples who would not be entitled to "material family support", as the Law defines family as: "married spouses or spouses from a cohabitation union and children (marital, out of wed-lock, adopted and fostered) and other relatives living together" (Art. 11, point 1). As above stated, married spouses or couples in cohabitation union are recognised by law only as persons of different sex.<sup>127</sup>
64. Rights to pension and disability insurance, including the right to a pension due to age and in case of invalidity apply to all persons in equal terms, LGBT persons included. However, the surviving same-sex partner will not be allowed to receive a family pension, as only spouses and children are designated by law as eligible family members.<sup>128</sup>
65. No court cases in relation to deprivation of LGBT persons of available rights of social protection were recorded.

### **B.8. Education**

66. The General Law on Education<sup>129</sup> provides for equality of all citizens in exercise of the right to education, without differentiation as to nationality, race, sex, language, religion, social origin or other personal feature (art. 9, para. 1). The General Law was amended in 2010 to include the provision explicitly prohibiting "physical, psychological or social violence; maltreatment and negligence; physical punishment and offending a person; sexual abuse of children, pupils or teachers and every other form of discrimination within educational institutions".<sup>130</sup> The Law on Prohibition of Discrimination defines discrimination in education as a specific form of discrimination and prohibits it explicitly with regard to sexual orientation and gender identity.<sup>131</sup> Therefore, there is no basis in law for discriminatory treatment of LGBT persons.

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125 Zakon o socijalnoj i dječjoj zaštiti, Official Gazette of Montenegro, No. 78/2005.

126 "Basic rights of social protection are: 1) material family support; 2) personal disability allowance; 3) care and assistance of another person; 4) institutional care; 5) residence in another family; 6) support for education of children and youngsters with special needs; 7) health protection; 8) compensation of funeral costs; one time financial support." Art. 12 of the Law on Social and Child Protection, *ibid*.

127 Broadcasting Agency of Montenegro, Response to the request for information, No. 02-18/2, 2 February 2010.

128 Art. 43, Law on Pension and Disability Insurance (Zakon o penzijskom i invalidskom osiguranju), Official Gazette of Montenegro, No. 54/2003, 39/2004, 81/2004, last amendments 14/2010.

129 Opsti zakon o obrazovanju i vaspitanju, Official Gazette of Montenegro, No. 64/02, 31/05, 49/07 and 45/2010.

130 Art. 9a, "Prohibition of Discrimination", Law on Amendments to the General Law on Education (Zakon o izmjenama i dopunama Opšteg zakona o obrazovanju i vaspitanju), Official Gazette of Montenegro No. 45/2010, 4 August 2010.

131 Law on Prohibition of Discrimination (Zakon o zabrani diskriminacije), Art. 15: Bill of Law on Prohibition of Discrimination, art. 15: "Discrimination in the area of up-bringing education and professional training, art. 14: "By discrimination in the area of upbringing, education and professional training shall be considered aggravation or prevention of enrolment into an education institution and institution of higher education and choice of educational program on all levels of upbringing and education, exclusion from the said institutions, aggravation or denial of the possibility to follow lectures and participate in other educational activities, segregation of children, pupils, students, maltreatment or other unreasonable differentiation or unequal treatment under grounds from article 2 paragraph 2 of this Law." For the article 2,

67. The Ministry of Education and Science does not register cases on homophobic/transphobic bullying and harassment of LGBT students and teachers in Montenegrin schools, nor does it keep evidence of such cases or of any other incidents of school violence, because such obligation has not been prescribed by any law.<sup>132</sup> The police acts only in serious incidents of a beating, and none have been recorded to date as having involved violence based on sexual orientation or gender identity.<sup>133</sup>
68. Nevertheless, the research conducted within a group of 30 homosexual persons up to the age of 30 shows that some of them sensed discriminatory treatment from some professors, but resented reporting it.<sup>134</sup> A professor of law was reported as referring to the LGBT persons in the following terms: "I would burn down all of them."<sup>135</sup>
69. Although Article 2 of the General Law on Education among the goals of education promotes "development of consciousness, need and ability to protect and promote human rights, legal state, natural and social environment, multiculturalism and diversity", the obligatory school curriculum still does not include sexual education or human rights lessons inclusive of sexual orientation and/or gender identity. However, the Ministry of Education noted the general lack of information among youth on sexuality in general and envisaged certain activities by the 2007 National Action Plan for Youth that should eventually lead to introduction of the sexual education in schools.<sup>136</sup>
70. Noting that around 70 percent of Montenegrins believe homosexuality to be an illness<sup>137</sup> and that the experts from the Ministry of Human Rights and Rights of Minorities lack sufficient knowledge of the LGBT rights, it is essential for Montenegro to develop not only its legal standards with regard to this part of its population, but also its educational policy and human rights culture.

## B.9. Housing

71. Law on Obligations regulates the apartment rental contract.<sup>138</sup> If not otherwise contracted by the parties, in case of death of either the landlord or tenant the tenancy will continue with their successors (art. 635, para. 1). Under the Law on Inheritance, a same-sex partner would be excluded from the circle of successors entitled to inherit according to the law, as

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paragraph 2 of the Law, please see FN 16. (Diskriminacija u oblasti vaspitanja, obrazovanja i stručnog osposobljavanja, član 14: "Diskriminacijom u oblasti vaspitanja, obrazovanja i stručnog osposobljavanja smatra se otežavanje ili onemogućavanje upisa u vaspitno-obrazovnu ustanovu i ustanovu visokog obrazovanja i izbora obrazovnog programa na svim nivoima vaspitanja i obrazovanja, isključivanje iz ovih ustanova, otežavanje ili uskraćivanje mogućnosti praćenja nastave i učešća u drugim vaspitnim, odnosno obrazovnim aktivnostima, razvrstavanje djece, učenika/ca, polaznika/ca obrazovanja i studenata/kinja, zlostavljanje ili na drugi način neopravdano pravljenje razlika ili nejednako postupanje prema njima, po nekom od osnova iz člana 2 stav 2 ovog zakona.)

132 Ministry of Education and Science, decision on the request for information, No. 01-7466/2, 5 January 2010.

133 Ministry of Interior, Response to the request for information, No. 051/10-5672/1 of 26 February 2010.

134 Results of the anonymous questionnaire, HRA, October 2009, [www.hracion.org/wp-content/uploads/results-of-anonymous-questionnaire.pdf](http://www.hracion.org/wp-content/uploads/results-of-anonymous-questionnaire.pdf), accessed 30 September 2010,

135 Ibid.

136 As reported by the School Department advisor M. Lucic, "there are no conditions for the sexual and reproductive health to become a special and obligatory subject. For the time being it is considered (since 2010) within the optional subject "Healthy Life Styles" in the eight and ninth grade of elementary school and within Psychology, Biology and optional Civic education within the high school program." (The Youngsters Know Little About Sex (Mladi malo znaju o seksu, Pobjeda, 27 January 2010). Meanwhile, in 2008 the NGO Women Safe House published a Guidebook on Sexual and Reproductive Health, with explicit chapters on sexual orientation and gender identity and organized a number of workshops within Montenegrin High schools. However, the Guidebook is not part of the obligatory school curriculum, [www.szk.me/index.php?option=com\\_content&view=article&id=58:prirunik-za-seksualno-i-reproduktivno-zdravlje&catid=37:izdatvatvo&Itemid=61](http://www.szk.me/index.php?option=com_content&view=article&id=58:prirunik-za-seksualno-i-reproduktivno-zdravlje&catid=37:izdatvatvo&Itemid=61), accessed 30 September 2010.

137 The percentage is between 69-71%. See the Public opinion poll "Homophobia in Montenegro", October 2009, Human Rights Action, available at, [www.hracion.org/wp-content/uploads/homophobia-in-montenegro-presentation.pdf](http://www.hracion.org/wp-content/uploads/homophobia-in-montenegro-presentation.pdf), accessed 30 September 2010, and the most recent poll by Juventas, "Istrazivanje Juventasa o homoseksualnosti u Crnoj Gori", daily Vijesti, 22 July 2010.

138 *Law on Obligations* (Zakon o obligacionim odnosima), Official Gazette of Montenegro, No. 47/08.

only marital spouses and partners from a cohabitation union have been recognised as *successors by law*, as well as children, parents and other relatives.<sup>139</sup> A same-sex partner would hence be in the same position as any other person entitled to inherit on the basis of a will. This right is, however, conditional upon respect for the "obligatory part of the estate", which may be claimed by the inner circle of successors by law, the so-called *obligatory successors*.<sup>140</sup>

72. State subsidised tenancies, *social tenancies*, intended to provide housing for households who due to social and economic reasons may not provide apartments under market prices, will soon be regulated by a special law. The proposed Law on Social Tenancies and Maintenance of Buildings<sup>141</sup> entitles citizens of Montenegro residing in Montenegro, who neither own a house or apartment, nor live in an apartment of adequate size, and who within a family household have earnings not larger than 1.5 average monthly income in Montenegro to an apartment on the basis of subsidised tenancy (Art. 31, para. 1). In case of death of a tenant, the tenancy will be succeeded by the person from the household determined in the contract if the one fulfils the above stated general conditions (Art. 42, para.1). The problem regarding LGBT couples arises with regard to the wording "family household". While one could argue that a *household* should be understood as a community of people continuously living together, a *family household* excludes LGBT persons, as the family is strictly defined as a "living community of parents, children and other relatives(...)"<sup>142</sup>.
73. No case was ever recorded involving allegations of discrimination of LGBT persons in relation to housing.

#### B.10. Health Care

74. According to the Health Protection Act,<sup>143</sup> every citizen has the right to equal treatment throughout the process of health protection (Art. 18, point 1) and to protection of all data related to his/her health (Art. 18, para. 8). Sanctions ranging from 20 to 300 times minimal wage in Montenegro are prescribed against the health care institution that violates the stated provision. There has been no record of cases filed or sanctions issued for the violation of the right to access health care treatment on the grounds of gender identity or sexual orientation.

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139 *Law on Inheritance* (Zakon o nasljedivanju), Official Gazette of Montenegro, No. 74/08, Article 9, "the Circle of Successors by Law: "On the basis of law the deceased is inherited by his/her descendants, adoptees and their descendants, spouse, parents, adopters, brothers and sisters, great-grandfather and great-grandmother." (Na osnovu zakona zaostavstinu ostavioca nasljeduju: njegovi potomci, usvojenici i njihovi potomci, njegov supružnik, njegovi roditelji, usvojioci, njegova braca i sestre i njihovi potomci, njegovi djedovi i babe i njihovi potomci, njegovi pradjedovi i prababe). Cohabiting partners have equal rights with regard to inheritance as spouses, according to Art. 4 of the Inheritance Act.

140 *Ibid.*, Art. 27, par.1, "Obligatory Successors": "(1) Obligatory successors are descendants of the intestate, his spouse, adoptees and their descendants, his parents and his adopters. Grandfathers and grandmothers and brothers and sisters of the intestate are obligatory successors only if they are permanently incapable of work and do not have necessary means of support. (2) Persons from paragraphs 1 and 2 of this article are obligatory successors when they are called to inherit by the order of law." Art. 28, Law on Inheritance, id.: "(1) Obligatory successors have the right to the part of estate by which the intestate could not have disposed (obligatory part of estate). (2) Obligatory part of descendants, adoptees and their descendants and spouses amounts to 1/2, and of the others 1/3 of the part of estate each of them would inherit in accordance with the legal order of inheritance." "Obligatory successors are the descendants of the deceased, his/her spouse, his/her adoptees and their decentres, his/her parents and his/her adopters."

141 Predlog zakona o stanovanju i održavanju zgrada, available at the web site of the Government of Montenegro, [www.gov.me/files/1259246508.pdf](http://www.gov.me/files/1259246508.pdf), accessed 30 September 2010.

142 Art. 2 of the Family Act and Art. 11 of the *Law on Social and Child Protection*, that is until 22 September 2010.

143 Health Protection Act, (Zakon o zdravstvenoj zaštiti), Official Gazette of the Republic of Montenegro, no. 39/2004, 14/2010.

75. Medical Chamber of Montenegro confirmed in 2009 that it follows the policy of the World Health Organisation that removed homosexuality from the list of illnesses in 1990.<sup>144</sup> Cases of administration of hormone or affirmative therapy treatment of homosexuality were not recorded. However, public statements of psychiatrists relating to homosexuality as a disease.<sup>145</sup> In a radio broadcast in November 2009 a psychologist was heard saying that homosexuality is “treated by hormonal treatment”, but as there is no professional association of psychologists in Montenegro that would regulate their license and performance, no claim had been filed in that case.<sup>146</sup>
76. Gender reassignment treatments are not available in Montenegro and they are not covered by health insurance.<sup>147</sup> There is no record that anyone ever requested such treatment related to the legal gender recognition or filed for compensation of expenses related to such treatment performed abroad.<sup>148</sup> The largest private hospital in Montenegro also does not provide any aspect of the gender reassignment treatment, nor has never received such a request.<sup>149</sup> Please see the chapter on Transgender issues for more background detail.
77. The Health Protection Act in Art. 18 states that the closest family members or other relatives are competent to pass a decision on a medical treatment of the person who is unconscious or incapable of rational judgment. The law does not regulate in other terms the rights of the next of kin, including same sex partners to receive information on the patient’s health. According to the information received from the Clinical Centre of Montenegro, no information exists that a same sex partner ever presented himself or herself as the partner of the patient in order to receive any information.<sup>150</sup> “We are of the opinion that such issues are still not openly communicated in our state”, stated the director of the Centre.<sup>151</sup>

#### **B.11. Access to goods and services**

78. Discrimination in access to goods and services should also fall within the permit of the general Constitutional prohibition of discrimination. Particular laws also provide for open ended provisions prohibiting discrimination in education, health services, social protection, media and else, as noted above.<sup>152</sup>

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144 Response of the Medical Chamber of Montenegro to the request of information filed by Mr. Aleksandar Zekovic, no. 155/3, of 11 November 2009.

145 On 12 November 2009, in the broadcasting “Replika” by the Television of Montenegro, a psychiatrist and Head of Neuropsychiatric clinic in Podgorica, Mr. Z.G. demonstrated a theory of homosexuality being an illness. “Propis za mahanje”, Monitor, 27 November 2009; “Dinosa prvi medju homofobima”, Vijesti, 15 January 2010.

146 Broadcasting “Mozaik”, Radio Crne Gore, November 2009, HRA archive.

147 Clinical Centre of Montenegro, Response to the request for information, no. 03/01-18056/1, of 30 December 2009.

148 Republican Fund for Health Insurance, response to the request for information, no. 02-66, of 14 January 2010.

149 Information received from “CODRA” policlinic on 19 July 2010.

150 Information provided by director of the Clinical Centre of Montenegro, Mrs. Olivera Miljanovic, no. 03/01-18056/1, Podgorica, 30 December 2009 (HRA archive).

151 Ibid.

152 Racial and other discrimination, Art. 443, reads: “(1) Who on the basis of difference in race, skin colour, nationality, ethnic origin or some other personal feature violates fundamental human rights and freedoms guaranteed by generally accepted rules of international law and ratified international treaties by Montenegro shall be punished by prison sentence ranging from six months to five years. (2) The one who persecutes organizations or individuals due to their promotion of equality of persons shall be punished by the same sentence prescribed in paragraph 1. (3) The one who disseminates ideas on superiority of one race over another or promotes racial hatred or racial discrimination shall be punished by prison sentence from three months to three years.” ((1) Ko na osnovu razlike u rasi, boji kože, nacionalnosti, etničkom porijeklu ili nekom drugom ličnom svojstvu krši osnovna ljudska prava i slobode zajamčena opšteprihvaćenim pravilima međunarodnog prava i ratifikovanim međunarodnim ugovorima od strane SCG, kazniče se zatvorom od šest mjeseci do pet godina. (2) Kaznom iz stava 1 ovog člana kazniče se ko vrši proganjanje organizacija ili pojedinaca zbog njihovog zalaganja za ravnopravnost ljudi. (3) Ko širi ideje o superiornosti jedne rase nad drugom ili propagira rasnu mržnju ili podstiče na rasnu diskriminaciju, kazniče se zatvorom od tri mjeseca do tri godine.)



79. There is no record of a claim or case ever filed alleging discrimination in access to goods or services of an LGBT person.
80. The recently adopted Law on Prohibition of Discrimination explicitly prohibits discrimination in access to goods and services as a special form of discrimination, as well as it specifically refers to prohibition of discrimination based on gender identity and sexual orientation.<sup>153</sup>

## B.12. Media

81. Code of Journalists of Montenegro<sup>154</sup> provides that "...sexual orientation of a person the journalist will mention only if that is necessary for the information" (point 5). A journalist is obliged to carefully observe ones' privacy... (point 8). A journalist is obliged to protect the integrity of minors, those who are different and handicapped (point 9). The Programme Principles and Professional Standards of the Public Broadcasting Services Radio Montenegro and Television Montenegro<sup>155</sup> contain the following guideline for presenting sexual minorities: "In portraying sexuality, we have to avoid simplification, stereotypes and personal judgment. We must not confuse homosexuality with transvestism and transsexuality" (page 26).
82. The Journalistic Self Regulatory Body<sup>156</sup>, a non-governmental organisation, monitors implementation of the Code of Journalists of Montenegro. According to the information received from the chairman of the Council of this Body, the Council did not determine a violation of the Code with regards to the rights of sexual minorities or transgender persons.<sup>157</sup> However, there were some offensive references to homosexual persons in the daily *Dan* that were not assessed by the Council.<sup>158</sup> In addition to the monitoring conducted by the Council, adherence to prohibition against discrimination is observed also by the Broadcasting Agency of Montenegro and the Small Offenses Body, as stated above. No cases were recorded where journalistic ethics code or legal requirements were interpreted against LGBT interests.<sup>159</sup>
83. As stated above, the 2002 Media Act prohibited publishing information and ideas inciting discrimination, hatred against persons or groups of persons because of their belonging to, inter alia, gender or sexual affiliation. However, the authorities, for example, the Ministry of Human and Minority Rights has not, to date, sponsored a broadcasting designed to

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153 Art.11, Discrimination in Provision of Public Services: "Discrimination in provision of public services on the grounds stated in the article 2 paragraph 2 of this Law, is considered: 1) aggravation or disabling provision of public services; 2) denial of public services; 3) conditioning provision of public services in a manner not requested from other persons or group of persons; 4) deliberate delay or postponing provision of services, although the person or group of persons requested and fulfilled conditions for timely provision of services before other persons." (Diskriminacijom u oblasti pružanja javnih usluga, po nekom od osnova iz člana 2 stav 2 ovog zakona, smatra se: 1) otežavanje ili onemogućavanje pružanja javnih usluga; 2) odbijanje pružanja javnih usluga; 3) uslovljavanje pružanja javnih usluga uslovima koji se ne traže od drugih lica ili grupe lica; 4) namjerno kašnjenje ili odlaganje pružanja usluga, iako je lice ili grupa lica zatražila i ispunila uslove za blagovremeno pružanje usluga prije drugih lica.)

154 Available at the web site of the Montenegro Media Institute, [www.mminstitute.org/kodex.php](http://www.mminstitute.org/kodex.php), accessed 30 September 2010.

155 Radio of Montenegro and Television of Montenegro, [www.rtcg.me/images/biblioteka/dokumentacija/eng\\_principles\\_standards\\_rtcg.pdf](http://www.rtcg.me/images/biblioteka/dokumentacija/eng_principles_standards_rtcg.pdf), accessed 30 September 2010.

156 NST, [www.nstcg.org/](http://www.nstcg.org/), accessed 30 September 2010.

157 Electronic correspondence with Mr. Mirsad Rastoder, chairman of the Council of the Journalistic Self-Regulatory Body in December 2009. The Council published its latest report in January 2010, [www.nstcg.org/?page=35](http://www.nstcg.org/?page=35), accessed 30 September 2010.

158 Public Order and Peace Act (Zakon o javnom redu i miru), Official Gazette of the Republic of Montenegro, No. 41/94 of 22 December 1994.

159 Art. 28 of the Constitution reads: "The dignity and security of a man shall be guaranteed. The inviolability of the physical and mental integrity of a man, and privacy and individual rights thereof shall be guaranteed."

159 Article 7 of the Constitution reads: "Infliction or encouragement of hatred or intolerance on any grounds shall be prohibited." and Public Order and Peace Act (Zakon o javnom redu i miru), Official Gazette of the Republic of Montenegro, No. 41/94 of 22 December 1994.

counter prejudices against sexual minorities and even the public broadcasting service, especially the Television of Montenegro has not particularly lived-up to the task.<sup>160</sup>

### B.13. Transgender issues

84. There are no official data on the number of transgender persons in Montenegro, not even on the number of persons who have undertaken gender reassignment treatment, as such treatment is not available in Montenegrin health institutions, both public and private. The Clinical Centre in Montenegro never received any request in relation to gender reassignment and there were no treatments due to complications or regular check-ups following the gender reassignment operations performed abroad.<sup>161</sup> Moreover, the gender reassignment treatment is not covered by the obligatory health insurance and the National Fund for Health Insurance does not have data on requests for gender reassignment treatment within last ten years in Montenegro.<sup>162</sup>
85. The first Montenegrin person who publicly spoke of his gender reassignment, Mr. Marko Bojanic,<sup>163</sup> stated that the doctors he approached for information in Montenegro mostly avoided the topic and stated that no one may help him, while one did suggest seeking more information in Belgrade, Serbia, which is where Mr. Bojanic eventually began the treatment in 1999. The fact that gender reassignment treatment is very expensive and not covered by health insurance, as well as the perception that it may further social stigmatisation in a highly homophobic/transphobic society is the probable reason for a lack of registered requests for the treatment in Montenegro.
86. Transgender persons have not been a topic of any public discussion in Montenegro before an interview was published in August 2009 with Mr. Bojanic, who spoke on his gender reassignment treatment and the experience of having to live a difficult life of a transgender person in Montenegro before he moved to Italy.<sup>164</sup> The only research on the transgender persons and their status in Montenegro was conducted by Mr. Aleksandar Zekovic, researcher of human rights violations and member of the Council for the Citizens Control of the Police, who managed to interview ten transgender persons, of whom five do not live in Montenegro anymore, while others dream of undergoing the operation abroad and leaving Montenegro.<sup>165</sup>
87. The terms transgender, transsexual or intersex person have not been defined under Montenegrin law to date. The Law on Prohibition of Discrimination is the first law to highlight discrimination due to gender identity, but also did not define it. The general prohibition of discrimination provided by the Constitution and particular laws should have applied also to transgender, transsexual and intersex people as well under the open ended provisions prohibiting discrimination according to "other status", even before the Law on Prohibition of Discrimination was finally adopted in 2010. However, there was never any case-law whatsoever that would have confirmed or rebutted such interpretation in practice.

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160 On 12 November 2009, in the broadcasting "Replika" by the Television of Montenegro, the host journalist allowed for a psychiatrist Z.G., director of the Neuropsychiatric clinic in Podgorica to demonstrate a theory that homosexuality is a mental illness, without countering his stands with the standing of the World Health Organization. The level of ignorance and the resulting homophobia in Montenegro deserves more accurate educational programs on sexual identities, as well as the rights of sexual minorities.

161 Clinical Centre of Montenegro, Response to the request for information, no. 03/01-18056/1, of 30 December 2009.

162 Republican Fund for Health Insurance, response to the request for information, no. 02-66, of 14 January 2010.

163 Interview with Mr. Bojanic, "A man after four operations (Muskarac nakon cetiri operacije)", Vijesti, 10 August 2009.

164 Ibid.

165 "Kratki osvrt na neke aspekte položaja transrodnih osoba u Crnoj Gori" (Summary report on some aspects of the position of transgender persons in Montenegro), Aleksandar Sasa Zekovic, researcher of human rights violations in Montenegro, [www.hraction.org/wp-content/uploads/asz-transgender-lica-report.pdf](http://www.hrraction.org/wp-content/uploads/asz-transgender-lica-report.pdf), accessed 30 September 2010.

88. Montenegrin law allows for a gender marker change following the final decision on change of personal status by the department of the Ministry of Interior, and this has in practice been interpreted to apply to persons who have completed gender reassignment medical procedure. The Law on Birth Registry<sup>166</sup> and Law on Central Registry of Population<sup>167</sup> recognise the possibility of a gender marker change in the birth registration number, birth certificate and other personal documents, although without explicit reference to transgender persons. In practice, the Ministry of Interior conditions such change with completion of the medical gender reassignment procedure, which should be supported by appropriate medical documentation.<sup>168</sup> According to the information obtained from the Ministry of Interior, to date three persons have completed the change of gender marker procedure.<sup>169</sup>
89. The change of name is not conditional upon the change of gender. According to the Personal Name Act, the change of name is allowed upon the personal request of an adult person, or, in case of a minor, upon the request of the minors' parents or other guardian and with the consent of the minor who is ten years old.<sup>170</sup> The public administration body in charge for interior affairs decides upon such a request. The only limitation to the change of name is provided if the person requesting the change is subject to criminal proceedings or if the name requested violates public safety, or breaches the rights and freedoms of others.<sup>171</sup> Both procedures for legal gender recognition and name are not expensive and do not involve excessive waiting time.<sup>172</sup>
90. All other status issues relevant for transgender persons have not been explicitly regulated. The right to marry or exercise rights afforded to partners from marriage and cohabitation union are conditional upon opposite sex, and the sex is determined by official documentation.

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166 *Law on Birth Registry (Zakon o maticnim registrima)* Official Gazette of Montenegro, no. 47/08, in force as of 1 January 2009, arts. 6, para. 2 Content of the birth registry and 14, para. 1 Change, addition or erasing of data. The law explicitly provides for gender marker change, following the final decision on change of personal status by the competent body (department of the Ministry of Interior).

167 *Law on the Central Registry of Population (Zakon o centralnom registru stanovništva)*, Official Gazette of Montenegro, no. 49/07, art. 22 and 27, para. 2. The law prescribes the content of the birth registration number, with one digit marking the gender, as well as it explicitly provides for the change of gender and hence of the birth registration number, conditional for change of gender data in all personal documents including the birth certificate, identification cards, passport, etc.

168 Response of the Ministry of Interior to the request for information by A. S. Zekovic, 03/01 No. 270/10-888, of 8 June 2010.

169 Ibid.

170 Article 6, para. 2, Personal Registry Act (*Zakon o maticnim knjigama*), Official Gazette of Montenegro, No. 47/08 and information obtained from the Ministry of Interior Department for administrative affairs, 03/1 no. 270/10-888, Podgorica, 8 June 2010 (documentation of Aleksandar Zekovic). "Muskarac posle cetiri operacije (A man after four operations)", *Vijesti*, 10 August 2009. Response of the Ministry of Interior to the request for information by A. S. Zekovic, 03/01 No. 270/10-888, 8 June 2010.

171 Ibid.

172 "Kratki osvrt na neke aspekte položaja transrodnih osoba u Crnoj Gori" (Summary report on some aspects of the position of transgender persons in Montenegro), A.S. Zekovic.(see FN 167).