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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

(VENICE COMMISSION)

**OMBUDSMAN  
IN THE REPUBLIC OF ARMENIA.**

**Comments by:**

**Mrs Maria de Jesus SERRA LOPES  
(Substitute Member, Portugal)**

## PART I

### THE APPOINTMENT OF THE HUMAN RIGHTS DEFENDER (OMBUDSMAN) ON THE DRAFT LAW OF THE REPUBLIC OF ARMENIA ON THE HUMAN RIGHTS DEFENDER AND THE DRAFT ON THE REVISION OF THE CONSTITUTION OF THE REPUBLIC OF ARMENIA

#### Brief Comments

1. Considering that there is a Working Group of Venice Commission on Revision of the Constitution of Armenia, and considering that an institution that has its basis in the Constitution is reputed to enjoy a higher degree of strength and independence, it could eventually be considered to enshrine the institution of the Ombudsman in the Constitution of Armenia.
2. Although chapter 2 says “*Procedure of Appointment and Dismissing the Defender*”, the draft subject to my comments misses any procedure for appointment or dismissal of the Ombudsman. It states the requisites for the function, and says (article 4/2) that the Ombudsman “shall be appointed to and dismissed from office *by* the President of the Republic of Armenia”. There is no appointment and dismissal process but the act of appointment.
3. The independence of the Ombudsman from the executive/administrative branch of government is a crucial foundation stone of the Ombudsman institution. In order that the Ombudsman investigations will be credible to both public and government, the procedure of appointment must be a transparent one.

So, the participation of the National Assembly in the appointment of the Ombudsman would be advisable.

4. At this stage of the revision of the Constitution it may eventually be possible to construct a procedure of appointment of the Ombudsman with the participation of both the President of the Republic and the National Assembly.

The Ombudsman could, also, be appointed by the National Assembly, <sup>(i)</sup>following a proposal by the President of Republic of Armenia, or <sup>(ii)</sup>following a proposal by the competent committee of the National Assembly (if there is one) and the President of Republic, or <sup>(iii)</sup>following a joint proposal by the President of Republic, the President of the National Assembly and the Prime Minister.

5. The election of the Ombudsman by a specified majority of the parliament could be a warrant that the person chosen is supported by a large part of society, with the consequences thereof like independence and impartiality.

**PART II**  
**LEGAL OPINION**

*ON THE*  
**DRAFT LAW OF THE REPUBLIC OF ARMENIA ON THE**  
***HUMAN RIGHTS DEFENDER***

**I - General Comments**

1. In order to appreciate this Draft Law I examined:
  - 1.1. THE CONSTITUTION OF THE REPUBLIC OF ARMENIA — 1995 — CDL (95) 62;
  - 1.2. THE REPORT of the FIRST MEETING OF THE WORKING GROUP ON THE REVISION OF THE CONSTITUTION OF ARMENIA — CDL (2000) 49;
  - 1.3. THE BASIC PROVISIONS FOR THE CONCEPT OF REFORMING THE CONSTITUTION OF THE REPUBLIC OF ARMENIA — CDL (2000) 88;
  - 1.4. THE REPORT of the SECOND MEETING OF THE WORKING GROUP ON THE REVISION OF THE CONSTITUTION OF ARMENIA — CDL (2000) 102 rev.
2. According to the documents above referred to, it is patent that a considerable evolution has occurred, as far as the reforming of the Constitution of the Republic of Armenia is concerned, since the elaboration of the Draft Law submitted to this legal opinion and the present time.

This evolution was a beneficial one to the institution of the Ombudsman, regarding his *independence* and *public credibility*, two important pillars of this institution.

3. The institution of a *Human Rights Defender* (hereafter the *Defender*) is a very positive one. Very positive is also the construction of the Draft Law submitted to my review.

However, this institution shall have a greater strength if it is enshrined in the Constitution. One article with three or four points stating the main lines of the institution would be enough.

A specific law, based in this Draft Law with the alterations deemed necessary, would determinate the functions and competencies of the Defender.

4. The institution of the Ombudsman exists in more than a hundred countries around the world. The word Ombudsman, of Swedish origin, means “representative”. Many other names are used to represent the ombudsman in the different countries that have adopted this institution: “*Commissioner for Administration*” (United Kingdom) “*Médiateur de*

*la République*” (France), “*Difensore Civico*” (Italy) “*Defensor del Pueblo*” (Spain), “*Provedor de Justiça*” (Portugal).

In the countries where the protection of human rights is the main purpose of the Ombudsman this reflects in the name of the institution. Such is the present case: “*Human Rights Defender*”.

This conception of the institution reflects, also, in his functions: “*to protect the human rights violated by central and local government agencies or officials*” (Article 2/2).

These are, indeed, the main functions of an Ombudsman.

However, his scope of action could be enlarged if the law would state, too, that are functions of the Defender to promote the rights, freedoms, safeguards and legitimate interests of the citizens, or, to use another formulation, to protect the people against violation of rights, abuse of power, error, negligence, unfair decision and misadministration.

5. Usually the Ombudsman does not have the power to make decisions that are binding on the government.

The Ombudsman makes *recommendations*.

And it could be said that the power of the Ombudsman resides exactly in this lack of power.

This is one of the reasons why some laws state that the appointment of the Ombudsman may only fall upon a citizen who enjoys a well – established reputation for integrity and independence, or any similar formulation.

This is also a reason why in most countries the Ombudsman is an organ of the state, elected by the Parliament by a qualified majority, and enjoys total independence in the exercise of his functions.

6. **In order to ensure this independence it could be advisable to establish in the Law of the Human Rights Defender a *Guarantee of Work*, stating that the Defender shall not, in taking that office, prejudice the stability of his employment, his career, or his social security benefits.**

**For that purpose the period of time actually served in the functions of Defender should be taken into account as if it were served in his prior function.**

## II- Comments on the Draft Law

### CHAPTER 1 – GENERAL PROVISIONS

#### *Article 2. Human Rights Defender*

I think it would be advisable to mention here the possibility of the Human Rights Defender to apply to the Constitutional Court on some issues, as stated in Article 101, 7) of the “Constitutional Reforms”. Yerevan — February 2001.

This is, indeed, a very important function of the Defender.

### CHAPTER 2. PROCEDURE OF APPOINTING AND DISMISSING THE DEFENDER

1. Although this Chapter says “*Procedure of Appointment and Dismissing the Defender*”, the Draft Law misses any procedure for appointment or dismissal. It states the requisites for the function and says (article 4/2) that the Ombudsman “shall be appointed to and dismissed from office *by* the President of the Republic of Armenia”.

There is no appointment and dismissal procedure but the act of appointment.

2. The independence of the Ombudsman from the executive/administrative branch of government is a crucial foundation stone of the Ombudsman institution. In order that the Ombudsman investigations will be credible to both public and government, the procedure of appointment must be a transparent one.
3. When I was asked for some “*Brief Comments*” on the appointment of the Human Rights Defender, I wrote:

"The participation of the National Assembly in the appointment of the Ombudsman should be advisable.

“At this stage of the revision of the Constitution it may eventually be possible to construct a procedure of appointment of the Ombudsman with the participation of both the President of the Republic and the National Assembly.

The Ombudsman could, also, be appointed by the National Assembly,

- a) following a proposal by the President of Republic of Armenia, or
- b) following a proposal by the competent Committee of the National Assembly (if there is one) and the President of Republic, or
- c) following a joint proposal by the President of Republic, the President of the National Assembly and the Prime Minister.

"The election of the Ombudsman by a specified majority of the Members of the National Assembly could be a warrant that the person chosen is supported by a large part of society, with the consequences thereof like *independence* and *impartiality*.”

4. After having looked through the "Constitutional Reforms", February 2001, I could see that the advisable formulation has been adopted:

*"Article 83: The National Assembly:*

.....

*4) appoints the Defender of Human Rights for a five-year term. The grounds for the early termination of the authorities of the Defender of Human Rights are defined by law."*

***Article 4. Paragraph one***

The qualities required to be "a legitimate candidate" could also include, as mentioned above, a "well-established reputation for integrity and independence" or any other similar formulation.

***Article 4. Paragraph two***

The formulation of this paragraph is no longer to be considered.

According to what I said above, the Defender shall be appointed by the National Assembly.

However, there are some questions that remain:

- Is he elected by the National Assembly with a specific majority?
- The National Assembly appoints (elects?) the Defender on whom proposal?

***Article 7. Termination of the Defender's Powers***

The formulation of article 83,4) of "Constitutional Reforms" referred to above does not exclude beyond any reasonable doubt the participation of the National Assembly in a decision on the relieving the Defender of his functions before the end of his term of office.

In fact, the law could define "the grounds for the early termination of the authorities of the Defender", and the same law could define as well that "It is for the National Assembly, in accordance with its Rules of Procedure, to control the reasons for the Defender's functions having ended".

### **CHAPTER 3. Responsibilities of the Defender**

#### ***Article 9. Paragraph three***

The limitation of *third persons* complaints is rather restrictive.

I would suggest a broader formulation such as "claims addressed to the Defender are not subject to any requirements concerning a direct, personal and legitimate interest on the part of the claimant".

#### ***Article 12. Paragraph three***

The period of 10 days mentioned in this paragraph may prove to be too short.

#### ***Article 12. Paragraph four***

The situation described in this paragraph seems to be the only possibility for the Defender to investigate violations of human rights and freedoms on his own motion.

And yet it is a very restrictive one.

In my opinion, the Defender could be allowed to act either in response to claims submitted to him, or, on his own initiative, in response to facts that come to his notice by any other means.

Furthermore, the duty of publication that this paragraph *imposes* regarding all the decisions taken according to it, may prove to be excessive.

### **CHAPTER 4. [3] COMPENSATION OF THE DEFENDER, FACTORS THAT GUARANTEE THE PERFORMANCE OF THE DEFENDER'S DUTIES.**

#### ***Article 21. The Defender's Immunity***

##### ***Paragraphs one and two***

The authorisations foreseen in these paragraphs should belong to the National Assembly, according to the alterations that the "Constitutional Reforms" introduced in the Draft Law.

It could be considered a reformulation of these provisions, stating that the Defender shall not be arrested or imprisoned without the authorisation of the National Assembly, except for the commission of a crime that carries a prison sentence of over three years, for which he is caught in the act of crime.

**Article 22. Social Guarantees for the Defender**

1. It could be advisable to insert here a *Guarantee of Work* suggested on the point 6 of my **General Comments**, if it is deemed to be acceptable.
2. Usually the *salary*, rights and rank of the Ombudsman are linked to those who hold the highest judicial functions, or to Ministers, or to the Chair of the Council of Ministers.

**CHAPTER 5. THE DEFENDER'S STAFF****Article 26. Financing of the Defender's Activities**

In order to guarantee his independence from the executive, the budget of the Ombudsman figures, in many countries, in the budget of the Parliament.

Like that, it would be possible to escape to the “*negotiations*” that can be foreseen if “*the government proposes to reduce the initial amount requested by the Defender in the Draft budget*”, as stated in Article 26.

**FINAL REMARK**

The Draft Law submitted to my review is, in the whole, a good one, well constructed and with provisions that can ensure the functions of the *Human Rights Defender* and enable him to be a true Defender of the Fundamental Rights of the Citizens.

It is with the scope to contribute to a better law that all the previous remarks and suggestions are made.

**MARIA DE JESUS SERRA LOPES**