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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

**ON THE DRAFT LAW ON THE
PUBLIC ATTORNEY (OMBUDSMAN) OF
THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA**

by

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A. GENERAL COMMENTS¹

1. The Draft Law on the Ombudsman is a very good one and contains many statements to applaud as, for instance, those of Articles 26 and 31, amongst many others.
2. It seems to me that the Ombudsman, as a unified institution, adds to the aims clearly stated in the Ohrid Agreement of “*promoting the peaceful and harmonious development of civil society while respecting the ethnic identity and the interests of all Macedonian citizens*”. Actually, splitting the institution into an Ombudsman for the majority and a deputy for the minority issues would divide and add nothing to the desirable peaceful unification.
3. In Bosnia-Herzegovina it was created an Ombudsman which was composed of three persons of three different ethnic origins. But even that Ombudsman is an **unified institution**, as all the claims are appreciated by the three persons and for each claim there is a **unique decision signed by the three**. Besides, it is envisaged that, in a near future, having three persons will no longer be necessary.
4. In this case, I fear that the possible division, with the consequent different decisions and different approaches to the problems, would weaken the role of the Ombudsman and lead to other divisions.

B. COMMENTS ON THE LAW DRAFT

I- BASIC PROVISIONS

Article 2

1. Legal persons can not apply to the Ombudsman? This limitation impoverishes the potential scope of action of the Ombudsman.
2. The word “*citizens*” reduces the possible field of action of the Ombudsman.
3. It is true that Article 77 (2) of the Annex A to the Ohrid Agreement says that “*The Public Attorney protects the rights of citizens when violated.*”

It is also true that the *Basic Principles* of the same Agreement refers to “*citizens*”. Anyhow, some provisions of Annex A have references to the word “*person*” like in Article 7 (4) “*Any person living in*”, or Article 8 (1) “*equitable representation of persons belonging*”. Maybe it could be possible, with a view to widening the scope of the Law, to use the word “*persons*” instead of “*citizens*”.

¹ The present comments have been prepared in parallel with an opinion by Mr. Monette, Federal Ombudsman of Belgium (see document DG II(2003)6).

II - TERMS OF APPOINTMENT AND DISCHARGE OF THE OMBUDSMAN

Article 5

1. The way according to which an Ombudsman is appointed is of the utmost importance as far as the *independence* of the institution is concerned and the independence of the Ombudsman is a crucial corner stone of this institution.
In order that the Ombudsman investigations will be credible to both public and the government, the procedure of appointment must be a transparent one. In addition, the procedure of appointment must be an election, as set out in the Draft Law.

Besides, the appointment of the Ombudsman by a large majority of Members of the Parliament (MPs) is a warrant that the person chosen is supported by a large part of society, with the consequences thereof like independence and impartiality.

What the Draft Law does not regulate is how someone is proposed to the election. Who proposes? How many candidates must be proposed?

2. The statement of *Article 5, first paragraph*, is not quite clear to me. However, according to Article 77 of Annex A to the Framework Agreement, 13 August 2001, I assume that the Ombudsman is appointed by a majority of votes of the total number of MPs, within which majority there must be a majority of votes of the total number of MPs who belong to non-majority communities in the Republic of Macedonia.
In other words, is it necessary that the Ombudsman gathers the majority of the total number of votes in the Parliament **and** the majority of the total number of votes of MPs not belonging to the majority community in Parliament? If that is so I fully agree.
3. In the same first paragraph, does the word “*entitled*”, in the expression “*shall be entitled to another tenure*”, mean that he may, eventually, be reappointed, according to a similar procedure of the first appointment?

If it is so, it would be better to make it clear, in order to avoid misunderstandings.

If it is not so, if the Ombudsman **has the right** to a second mandate — what would seem odd — than it should be clarified and said what that “*right*” depends on. Otherwise it would be easier to say that he is appointed for a period of 16 years. And this **also** would seem odd.

Article 6

Usually the Ombudsman does not have the power to make decisions that are binding on the government and the Ombudsman makes *recommendations*. It even 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.

I would advise to add something of the kind to the requisites necessary (Article 6) to be elected Ombudsman.

Article 7

1. If it is accepted to enlarge the field of action of the Ombudsman in order to include all the persons that, not being “*citizens*”, like foreigners residing in the territory or legal persons, should also be under the protection of the Ombudsman, than the oath contained in this Article should be rephrased accordingly.
2. I assume that the expression “*international agreements*” means the ratified international treaties and international law binding Macedonia.

Anyhow, it would be better to clarify it, not only in the oath contained in this article, as well as in Article 3, second paragraph.

Article 8

The Ombudsman function should not be compatible with another function or profession, public or private, neither with the belonging to political parties or unions.

It could eventually be compatible with lecturing but, even in that case, the activity should be exercised without compensation.

Article 9

Each one of the situations described in 1), 2), 3) and 4) of this article is enough to discharge an Ombudsman. This being so it seems advisable to make a slight alteration in this article in order to make clear that the Ombudsman may be discharged on the ground of each one of those cases.

III - JURISDICTION AND MANNER OF WORK

Article 13

Paragraph 1

This paragraph touches a rather delicate matter, as it is generally understood that the activity of the Ombudsman should not interfere with the judiciary.

To say that the Ombudsman “*shall undertake actions and measures*” is too vague.

It should be stipulated which “*measures and actions*” are at stake.

Article 15

Paragraph 2

1. I presume that paragraph 2 will only be applicable when there is a complaint presented by someone speaking another language, spoken by at least 20% of the population, or when are in cause interests of that minority.
2. Here again the word “*citizen*” limits the action of the Ombudsman. Besides, the concept of “*citizen*” is a legal one. This is so much so that, analysing this statement, I felt forced to use the words “*population*” and “*persons*” instead of “*citizens*” whose exact meaning in Macedonian Law I don't know.

Article 17

This article, as well as the previous one, admits complaints presented by third persons. It is a

good provision, as well as it is a good measure not to impose many formalities to the presenting of complaints.

Article 21

Item 2

Sometimes, reading a complaint put forward by an unauthorized person, the Ombudsman may conclude that, although not authorised by reasons that, if known, could eventually lead to exempt the authorisation, the complaint should be examined.

In those cases the Ombudsman should be able not to discard the submission. (see Article 22)

Item 6

The latin formula “*id est*” or “*i.e.*” used in this item, although of generalized use in other countries —it is used in England and in Portugal, for instance —, can eventually create problems of translation.

Article 22

The request for “*consent*” when the Ombudsman begins a procedure on his own initiative, or when a third person presents the complaint, may represent a severe limitation to the functioning of these two rather good initiatives.

Actually, when the Ombudsman acts on his own initiative, one could presume he knows better, and the consent should not be necessary.

On the other hand, when a third person presents the claim, it should be possible for the Ombudsman to act without consent when it is impossible or very difficult to obtain it and he thinks advisable to do without it, as said above in Article 21.2.

Article 24

Item 5

I would say that the phrase “*except if his/her successors do not demand*” should be an affirmative one: “*except if his/her successors demand*”.

Article 26

Paragraph 3

I assume that this paragraph applies to the cases where *obstruction to the work of the Ombudsman* occurred and infringement of freedoms and rights was in cause.

Article 30

The meaning of paragraph 2 of this article does not seem clear enough. It could be rephrased.

IV – THE PUBLICITY OF THE WORK

Article 37

Paragraph 3

This provision says that the Ombudsman report shall be announced in the mass media and, indeed, the media are the best allies of Ombudsmen.

To be announced means that the report is given to the media and that they can use it according to their right to inform and their peculiar taste to explore and expose divergences and criticisms existing among bodies of the State.

The Draft Law does not say that the report shall be *published* by the mass media, but that it shall be *announced* in the mass media, what is a quite different thing.

One good form of publicizing nowadays is to put things in the internet.

Article 38

Paragraph 3

The “*special funds provided for the announcement of reports*” does not contradict what was said above, as the reports must be **published**, i.e. printed, in order to be announced, i.e. presented to the authorities and distributed among the different mass media.

V — LEGAL POSITION OF THE OMBUDSMAN

Article 41

The right of the Ombudsman and his deputies to return to the previous jobs includes public and private sectors or only the public sector? This should be clarified.

Article 50

In order to make the Ombudsman institution more accessible to people and more widely known, it could be a good idea to publicise the Book of Rules.

Here again, a very good way of publicising something is to put it in the internet.

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