



COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Strasbourg, 6 December 2006

Opinion no. 397/2006

Restricted
CDL(2006)093
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

LAW OF THE HUMAN RIGHTS DEFENDER OF ARMENIA

Comments by

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Article 1. General Provisions

Considering the content of this law, for accuracy reasons, I would suggest to add the term “functioning” as one of the aspects of the Defender’s activity defined by the law

Article 2. Human Rights Defender

Recalling the European Court of Human Rights judgement in the case of *Egmez v. Cyprus*¹, and the specific role of the Defender/Ombudsman for the protection of human rights I would suggest to add the following words in the text of Article 2:

“protects the human rights and fundamental freedoms violated by acts and omissions of the central and local government agencies or their officials”

Article 3. Appointment of the Defender

In relation to this Article I agree with the comments of Mr. Nowicki regarding the necessity for a strong qualified majority in for the election of the Defender.

In the oath formula of the elected Defender I consider at least superfluous the added term “citizens”. In the worst of the cases the existence of this term separately from the term individuals could lead to the question whether the rights and freedoms of citizens are differently protected from those of the individuals.

The term of office sounds appropriate.

Article 5. Independence of the Defender

I do not understand the sense of second sentence of the second paragraph of this Article.

Article 6. Termination of Defender’s Powers

Under this Article I think the term “Court” should be defined further. Does it mean any court in the Armenian judiciary system or the jurisdiction to consider the Armenian Defender’s legal situation in relation to this law is reserved to higher courts such as Supreme or the Constitutional Court? In any case I think that this should be considered under the perspective of Article paragraph 5 of Article 83.1 of the Armenian Constitution providing that:

“The Human Rights’ Defender shall be endowed with the immunity envisaged for the Deputy.”²

In some countries, the concept of immunity comprises initial jurisdiction of the higher courts of the country for the persons enjoying immunity, such as the President or the members of the Parliament.

¹ In that judgement the ECtHR recognised that the complaint to the Ombudsman for allegation of ill-treatment by the police would have to be considered as an effective remedy for the purposes of Article 13 of the ECHR. The fact that the referral of the allegation by the Ombudsman to the Prosecutor did not lead to an investigation by the later, was considered a violation of Article 13 of the ECHR.

² Presuming Deputy in this text means member of the Parliament.

Article 7. Complaints that are Subject to the Defender's Consideration

Considering the provision of paragraph 2 of this Article I wonder whether the Defender would be able to defend the rights and freedoms of individuals violated by legal persons, including NGOs, where the individuals do not find a remedy with the state authorities over these alleged violations. I believe this paragraph should be interpreted in function of Article 2 of the Law.

Article 8. The Right to Appeal to the Defender

Paragraph 3 of this Article seems to be limiting the powers of the Defender. This considering the generally recognised competence of the Ombudsman to act *ex officio* in cases s/he has information about human rights violations.

Limiting the number, the time-limits and requiring a relationship and/or special interests for complaining about human rights violations before the Ombudsman would limit the very essence of the Ombudsman role and mission.

Article 9. Appealing to the Defender

This Article poses again problems related to the active *locus standi* before the Defender, as to the time limits and subjects who might complain. This Article does not say expressly that the complaints shall not be anonymous, but by requiring the name and other information about the complainant the result is the same. This suggestion is followed by paragraph 2 of the subsequent Article³.

Article 10. Complaints that are not subject to the Defender's Consideration

The major problem of this Article stays with the first paragraph providing that the Defender "shall not consider those complaints that must be settled only by Court." In a state of rule of law where the principles of access to court and effective remedy against human rights violations are respected – as ECHR, to which Armenia is party, requires – in principle there must be no affecting human rights situations which fall outside the judicial control. Therefore the human rights protection interests do not exclude a parallel safeguard of human right both by the judiciary and by the Ombudsman. This especially when the later does not have either decisive either judicial competencies.

Article 15. The Defender's Decisions

In relation to this Article I do agree with the general remark from Mr. Nowicki that Ombudsman normally recommends and do not propose. Further on, paragraph 3 seems to go beyond what Ombudsman normally does and gives to her/him the competencies of a private lawyer. I would agree with a general provision considering the Ombudsman competence to present an in abstracto request before the courts (especially Constitutional Court) for invalidating legal or administrative provisions leading the authorities to human rights and individual freedoms violations.

³ See in this relation CDL-AD(2004)041 Joint opinion on the draft law on the ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe, on the basis of comments by Mr R. LAVIN, Mr K Tuori, Strasbourg, 6 December 2004, §27

Article 17. The Defender's Report

I find it more appropriate that the paragraphs 3 and 4 of Article 7 of this Law be included in this Article

Article 24. Financing of the Defender's Activities

For increasing the financial independence of the Defender I would propose to add the principle that the budget for the Defender could be reduced in relation to the previous financial year not below the percentage the budget of the Parliament, President and Government is reduced.