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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

**ON THE DRAFT LAW ON THE PEOPLE'S ADVOCATE
OF KOSOVO**

On the basis of comments by

Mr Pieter van DIJK (Member, the Netherlands)

**This document has been classified restricted at the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

I. **Introduction**

1. *By a letter of 10 April 2007, the Kosovo Assembly submitted a request for assessment of the draft law on the People's Advocate of Kosovo (CDL(2007)043). This request was endorsed by UNMIK on 13 April 2007.*
2. *Mr Pieter van Dijk acted as rapporteur and prepared this draft opinion, in consultation with the Directorate General II of the Council of Europe.*
3. *The draft opinion was sent to the Kosovo Assembly and to UNMIK on 19 April 2007 and was subsequently endorsed by the Commission at its ... Plenary Session (Venice, ...).*

II. **Analysis of the draft law**

Constitutional basis

4. The draft Constitution of Kosovo (as proposed at this stage) does not contain an express provision providing for the establishment of an Ombudsman or comparable institution. The only reference is to be found in Article 6.7 of Annex I, stating that "the current powers and role of the ombudsperson shall remain in place". The current Ombudsperson institution is regulated by UNMIK Regulation No. 2006/6, which entered into force on 16 February 2006.
5. It is submitted that, in view of the status and powers of the institution, an express basis in the Constitution is preferable, if not necessary. This, however, should not delay the adoption of the law, as a statutory basis is legally sufficient.

Terminology

6. Although not very important, it would seem advisable to avoid the term "Advocate", since this creates the wrong impression as to the impartiality of the institution. Although the powers are intended to protect individuals against the government, this must be done in full impartiality, taking into account also the powers and responsibilities of the government body concerned.
7. Since the term "Ombudsman" is derived from the Swedish terminology and does not imply any connotation to the male gender, for reasons of uniformity of terminology in the European States the term "Ombudsman" is to be preferred over that of "Ombudsperson". However, it is acknowledged that the institution has been called ombudsperson since its creation, and that for reasons of continuity it might be advisable to maintain this term.

Jurisdiction

8. The definition of the jurisdiction of the People's advocate reproduces Section 3 of UNMIK Regulation No. 2006/6 on the Ombudsperson institution in Kosovo. It nonetheless presents certain problems.
 - a) *ratione personae*
9. Article 2, paragraph 2, of the Draft Law extends the scope of the Law to persons outside of Kosovo to protect them against unlawful actions or inactions of the public administration of Kosovo. Especially since this extraterritorial application is not restricted to citizens, it is not clear in what way and by what procedure the People's Advocate will implement this jurisdiction.

10. Moreover, there seems to be some inconsistency between this provision and Article 16, paragraph 2, of the Draft Law. The latter provision restricts the extraterritorial application to persons who are habitual residents of Kosovo but are temporarily outside the territory of Kosovo.

11. Finally, it is not clear why Article 16, paragraph 1, refers explicitly to "any citizen of Kosovo" next to "any natural ... person" It raises the question of whether the citizen qualification has any legal meaning? Clarification on these points is recommended.

b) *ratione materiae*

12. While Article 1 refers, in general, to the "protection of human rights and freedoms", Article 16, paragraph 1, speaks of "violations of international human rights standards as incorporated in the applicable law". This creates the impression that the jurisdiction of the People's Advocate only extends to complaints about violations of human rights which are protected by international instruments, and not to violations of other, exclusively national human rights provisions or national human rights provisions with a broader scope. Moreover, the words "as incorporated in the applicable law" raise the issue of the relation between international law and domestic law: will the People's Advocate be bound to apply the international standard *as incorporated*, even if he or she is of the opinion that the incorporation is incomplete or incorrect, or has become outdated in the light of the international case law?

13. In this context, reference is also made to Article 16, paragraph 5, of the Draft Law; the power of the People's Advocate "to make recommendations to any natural and legal person concerning the compatibility of domestic laws and regulations with recognized international human rights standards" is unclear: should the People's Advocate find that there is such incompatibility, he or she should rather appeal to the Special Chamber of the Supreme Court, as foreseen under Article 17 g (but see para. 19 below). It is therefore recommended to refer to the international and domestic standards in a cumulative and not in an inter-connected order.

14. Article 2 gives the impression that the People's Advocate's jurisdiction mainly, if not exclusively, concerns the area of human rights. It is submitted that this is too narrow an area. In view of European traditions, but also in view of the present situation in Kosovo, the jurisdiction of the Office should extend to the area of "good governance" in general. This should also be reflected in Article 17, e.g. by adding to paragraph 1.a) the words "as well as abuse of authority by public authorities in Kosovo".

15. Furthermore, in Article 16, paragraph 7, and Article 19, paragraph 2, of the Draft Law it should be clarified what the scope is and the conditions are of the power of the People's Advocate to conduct investigations on his or her own initiative.

16. Finally, the possibility under Article 19, paragraph 1, of the Draft Law to complain about a violation "by a law" raises the question what the object of investigation is, who may lodge such a complaint and to whom the People's Advocate should direct his or her recommendation.

c) *relation to the jurisdiction of the courts*

17. The object of Article 18 of the Draft Law is unclear. It would appear to deal with the relationship between the competence of the People's Advocate, on the one hand, and the jurisdiction of the courts, on the other, in the same area of human rights, and would appear to anticipate, without any reasonable explanation, the condition of admissibility of complaints set out in Article 23 d. The words "pending court procedure" do not constitute a clear delimitation and create uncertainty about the situation before and after such pending procedures. It must be assumed that the People's Advocate has supplementary jurisdiction only (see Article 20, paragraph 1, last sentence), and that court decisions are also binding for that institution.

18. On the other hand, Article 18 could be taken to concern the powers of the People's Advocate in respect of the judiciary. In this case, the exception of "evident abuse of authority" appears inappropriate, to the extent that it could turn the institution into some sort of *Prokuratura* organ with oversight powers over all court cases.

19. In general, it would seem preferable to give the People's Advocate the power to make general recommendations about the functioning of the courts system, and exclude the power to intervene in individual cases (not even as regards their length); this should be left to the judiciary itself. Article 30 of the Draft Law provides in paragraph 1 under e) that the People's Advocate has also competence to investigate complaints about the judiciary, but with the proviso that this may not lead to interference with the procedure conducted by the court. However, it is difficult to imagine how a complaint about violation of a human rights provision by a court (including as regards the length of the proceedings) would not be part of the judiciary procedure. This needs clarification.

20. Article 17, paragraph 10, of the Draft Law provides that the People's Advocate "may be present at meetings or hearings involving such persons". However, if a hearing takes place before a court, it must be assumed that it is the court who decides about the public character of the hearing and about who may attend the hearing.

Responsibilities

21. The responsibility of the People's Advocate to investigate, as formulated in Article 17, paragraph 1 under a) - c) is too broad. No institution will be able to investigate "any situation of violation of human rights" nor to draw the attention to any such situation, or to combat "all forms of discrimination". In the same way, the responsibility under g) to initiate proceedings before the Special Chamber of the Supreme Court of Kosovo for evaluation of "the lawfulness and constitutionality of any law or subordinate legal acts" would be a duty that would be impossible to fulfil, and would also create for the Special Chamber a work load it would not be able to cope with. The responsibilities concerned should be further qualified.

The organisation of the Office

22. Article 5 provides that the People's Advocate Institution shall be composed of a People's Advocate, a Principal Deputy People's Advocate, and three Deputy People's Advocates.

23. Although such structure is currently in place already, it is submitted that, in view of the size of the population of Kosovo, but even more in view of the maintenance of the unity of the office, this is too top-heavy an organisation. Even taking into account the necessity of proportional representation in the Office of the two main ethnic groups, a People's Advocate and a Deputy should be sufficient.

24. Moreover, Article 2, paragraph 3, provides that special units for the protection of specific categories of human rights shall function within the People's Advocate Institution. This should not be prescribed by the Law but left to the People's Advocate's discretion to organise the Office. Too complicated a structure will make it more difficult for the Office to keep uniformity in its operations.

Criteria for appointment

25. Article 4 of the Draft Law is not specific enough in this respect. Under c) it is stated that the candidate must "be distinguished for professional skills" without any further specification; it is clear, however, that certain professional skills are relevant while others are not.

26. Under d) persons are excluded who “have been convicted for a criminal offence” This would seem to be too broad an exclusion since it would also include those who have been convicted for a minor offence, e.g. a traffic violation. A further qualification would seem to be needed, such as a conviction for a crime for which imprisonment may be imposed (compare Article 12, paragraph 1 under a).

27. Under e) it is stated that the candidate must “not hold a political post”, also without further specification. This raises the question, first of all, whether all political posts are excluded, also less important functions and, e.g., also any position in a political party. Secondly, it creates the impression that the candidate may not hold such a post at the moment of applying for the position, even if he or she indicates to be willing to give up that post when elected. This would exclude some of the most qualified candidates as former ministers and former members of Parliament. It is recommended that Article 4 be formulated in a more precise way.

28. In the same context, Article 11 of the Draft Law may need some specification: What is the meaning of the exclusion of “any political (professional) activity or office” in addition to the exclusion of “any public professional activity or office”? Does it also cover, for instance, any position in a political party?

29. Even apart from that, the exclusion would seem to be too broad. Teaching and educational activities, e.g., should be allowed.

30. The criteria for appointment should apply to the deputies as well.

Election procedure

31. Article 6 of the Draft Law seems not to take into account that there may be more than one candidate for the same post. If there are, for instance, more than two candidates and none of them receives two thirds of the votes, an intermediate procedure could be to have a second vote relating to only the two candidates who collected the most votes in the first round, still with a two thirds requirement..

32. More in general, the fact that Article 6.2 allows for the election of the Peoples Advocate by simple majority after one unsuccessful vote by a qualified majority, makes it too easy to overcome the requirement of the qualified majority. The governmental majority could simply obstruct the first vote in order to be able to have its candidate accepted by simple majority in the second vote. It is therefore recommended that at least three failed votes should be necessary before reverting to a simple majority. Attempts to negotiate a ‘ticket’ of the candidates with most of the votes could be made obligatory (allowing one to become the People’s Advocate and the other to become Deputy).

33. Another modus would be that, after the People’s Advocate has been elected by qualified majority, the election of the Deputy only requires a simple majority.

34. The second paragraph of Article 7 should be redrafted, since it is not the nomination but the vacancy that will be announced.

35. It is also recommended that Article 7, paragraphs 3 and 4, makes it clear that the President of Kosovo, when making a nomination for both posts, has to nominate for each post more than one candidate, and preferably more than two. Otherwise the election by Parliament, provided for in Article 6, loses much of its meaning. Proportional representation also requires that the President nominates more that two candidates.

36. However, it is questioned that the President of Kosovo should participate in the procedure of nominating candidate for the people's advocate, which is a parliamentary institution (Article 7). Nomination of candidates should rather be done by a committee of parliamentarians or an independent committee of citizens.

37. Article 8 should specify that the People's Advocate choose the three candidates from amongst those who have responded to the relevant vacancy notice (Article 7.2) and possess the relevant qualifications (see para. 23 above). Moreover, it is recommended that Article 8 also specifies that the candidates have to be citizens of Kosovo.

38. Finally, it is recommended that Article 9 of the Draft Law is more specific about ethnic representation in the nominations and elections. A rule (at least a transitional one) that the People's Advocate and his or her Principal Deputy should not belong to the same ethnic group, could be advisable..

Term of office

39. Article 6, paragraph 1, of the Draft Law is not clear about the question of whether the People's Advocate and the Deputies may serve for a third term. From the second paragraph of Article 8 of the draft Law it is clear that for the three Deputies their term of office may be renewed only once, but these same words are not used in Article 6.

40. It might be preferable for the sake of independence that the People's Advocate and Deputies serve a longer term, but which would then not be renewable.

Oath

41. It is recommended to expressly include in Article 10, paragraph 2, of the Draft Law in the formula of the oath the word "independently", since strictly speaking this is a separate requirement from that of "impartiality".

Suspension and removal from office

42. The involvement of the Assembly in the termination of the mandate is delicate (Article 12). Points a) and b) should only require the Assembly to take note, while the words "may be removed" suggest that there is discretion. Point c) however comes close to a vote of non-confidence. Since this may involve elements of a subjective/not-impartial evaluation, a qualified majority should be required, without any possibility to revert to a simple majority. More in general, the procedure for removal should be spelled out in more detail. The same goes for the suspension of the mandate.

43. It should be regulated who will perform the duties during suspension, and during the period between removal and election of the successor.

44. Article 12 of the draft Law does not provide for any legal remedy against the decision of suspension or removal. Even if in view of the Pellegrin case law of the European Court of Human Rights Article 6 of the European Convention on Human Rights would not apply to these decisions since they concern "public servants whose duties typify the specific activities of the public service in so far as the latter is acting as the depository of public authority responsible for protecting the general interests of the State or other public authorities", the decision of suspension or removal may imply for the holder of the post concerned an infringement of a right or freedom laid down in the Convention (e.g. private life, personal integrity, enjoyment of possessions) and for that reason requires an "effective remedy" under Article 13 of the Convention.

45. It is recommended that a provision to that effect is included in the Draft Law.

Immunity of the office

46. It is submitted that Article 13, paragraph 1, of the Draft law is not accurately formulated. The accountability should not be excluded only for opinions and recommendations, but for any act performed in (not: during) the exercise of the function. It should also cover baggage, correspondence and other means of communication of the Office (and its staff: see para. 43 below). The immunity should also be continued after the mandate has ended.

47. The second paragraph is not specific enough. First of all, since it only provides for immunity from detention but not for immunity from criminal prosecution in general, and secondly since it does not specify what majority is required in Parliament to waive immunity (a qualified majority would seem justified).

48. The question should be raised whether lifting of the immunity should not be competence of the Special Chamber of the Supreme Court instead of the prerogative of the Assembly in order not to politicise the matter.

49. The functional immunity of the People's Advocate and the Deputies should also extend to the staff.

Confidentiality

50. While applications to the People's Advocate must not be anonymous, applicants should be given the possibility of requesting that their identity be kept confidential by the People's Advocate.

Time-limit

51. It is not clear from Article 21 of the Draft Law whether the time limit of 30 days in the second paragraph also applies to the final decision to declare the complaint well-founded. If that is the case, there should be a possibility to extend the period, since in complicated cases it will be impossible to meet the deadline.

52. This also holds good for decisions to reject a complaint.

53. This point is strengthened further by the mere fact that a complainant may have 30 days to provide clarifications and additional information (Article 25, paragraph 2).

Rejection of complaints

54. Article 23 of the Draft Law does not distinguish between rejection of the complaint and declaring the complaint inadmissible, although several of the grounds mentioned do not relate to the well-founded character of the complaint but to its admissibility (see under c) and d).

55. The provision that incomplete applications should be rejected appears too harsh on applicants, who should be given the possibility of supplementing, within a set time limit the information submitted (particularly in view of the existence of a rather short time-limit for applying to the People's Advocate).

56. The need for a possibility of obtaining a (concrete) result in order for an application to be admissible is explicitly mentioned only in sub-paragraph e), and not generally, although Article 29 authorises the People's Advocate to discontinue the investigation if "the case was resolved in some other way". If the People's Advocate's action is conditional on the possibility of solving the case, which would mean that the mere finding that the applicant's human rights were violated in a given case does not justify the Advocate's intervention, this should be stated explicitly in relation to the scope of competence of the Advocate.

57. Moreover, Article 30 (f) is unclear in that it provides for the power of the People's Advocate to "recommend the injured parties to submit claims to the court". This would seem to in particular concern cases which are referred to the People's Advocate but primarily fall under the jurisdiction of the court. If this power also implies that the People's Advocate, after having investigated the complaint, must advise applicants on the legal venues which are open to them on the basis of the People's Advocate's findings, this risks turning the People's Advocate in an attorney and may expose him or her to financial consequences should the advice have no or even a negative outcome. If the provision also refers to the possibility of claiming compensation when the People's Advocate has found that there was a human rights breach, this should be stated explicitly and it should be ensured that the legal basis for claiming compensation in those cases exist in the legal order of Kosovo.

58. The People's Advocate should have the discretion to continue the investigation of a case even if the complainant shows lack of interest, if he or she deems that it is in the general interest to do so. In this case, however, the case should not be treated as an individual one and the original complainant should no longer be required to appear.

Staff

59. It would be appropriate to specify whether the staff of the People's Advocate's office are civil servants or not and if the level of remuneration should correspond to that of the civil service (logically, employees of court registries).

Secondment of other civil servants should be done under the guarantee that the independence, impartiality and confidentiality of the People's Advocate's work is kept.

Finances

60. It is not clear what the words "in accordance with the proposals of the People's Advocate" mean; is Parliament bound by these proposals, and if not, what exactly is the status of the proposals? Although Parliament may be assumed to guarantee that its Institution will receive the financial means to function properly, Article 41 should prescribe that the allocated means are in conformity with the duties and responsibilities of the People's Advocate and take into consideration the number of complaints lodged the previous year.

Confidentiality and publicity

61. It should be provided that the People's Advocate and his or her staff keep all information and data obtained confidential, unless publicity serves the ratio of the procedure and meets with approval of the complainant.

62. The decisions and recommendations of the People's Advocate should be made public, with guarantees for keeping the complainant and witnesses confidential if requested and justified.

63. There should be guarantees for the protection of complainants and other persons involved, and of witnesses.

III. Conclusions

64. The draft law under consideration constitutes a good basis for an effective regulation of the institution of the People's Advocate in Kosovo. It certainly draws from the experience of the institution in the recent past. A certain number of improvements are nonetheless proposed. It is also underlined that a constitutional basis for this institution in the near future would be strongly recommended.