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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**DRAFT OPINION
ON
THE POSSIBLE REFORM
OF THE OMBUDSMAN INSTITUTION
IN KAZAKHSTAN**

On the basis of comments by

**Mr Peter PACZOLAY (Member, Hungary)
Mr Hjörtur TORFASON (Member, Iceland)**

* 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.

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1. *By letter dated 25 December 2006 addressed to the President of the Venice Commission, the Commissioner for Human Rights (Ombudsman) of Kazakhstan, Mr Baikadamov, requested an opinion on certain questions relating to the possible reform or development of the institution of Ombudsman for Human Rights of the Republic of Kazakhstan.*
2. *Within the framework of its Joint Programme with the European Commission, a delegation of the Venice Commission composed of Mr. Torfason and Mr. Colliard, accompanied by Mr. Buquicchio and Mr. Dürr met on 15 May 2007 in Astana with Mr. Kalyuzhnii, the head of the National Centre for Human Rights, which provides the staff support for the Human Rights Ombudsman to discuss the issues raised in the request.*
3. *The present opinion was drawn up on the basis of comments by Mr. Peter Paczolay and Mr. Hjörtur Torfason.*
4. *This opinion was adopted at the ... Plenary Session of the Venice Commission (Venice, ...).*

General remark

5. *The questions or issues are six in number, and will be commented on in order below. The comments are given in the light of the existing legal provisions for the institution, which are embodied in a Statute on the Commissioner for Human Rights established by a Decree of the President of the Republic of Kazakhstan No. 947 of 19th September 2002 (CDL(2007)054), but do not deal with the Statute in its entirety.*

I. Constitutional and Statutory Underpinning for the Office of the Ombudsman

6. The Constitution of 30 August 1995 of the Republic of Kazakhstan contains extensive provisions concerning human rights, especially within its Section II on the *Individual and Citizen* (Articles 10-39). In particular, Article 12(2) declares that “*human rights and freedoms shall belong to everyone by virtue of birth, be recognised as absolute and inalienable, and define the contents and implementation of laws and other regulatory legal acts*”, and in the same vein, Article 13(1) provides that “*everyone shall have the right to be recognised as a subject of the law and protect his rights and freedoms with all means not contradicting the law*”. In Section VII on the *Courts and Justice*, it is also expressly provided that the judicial power “*shall be intended to protect the rights, freedoms and legal interests of the citizens and of organisations for ensuring the observance of the Constitution ...*”. Under the Constitution, therefore, a recourse to the courts of law is appropriately seen as the basic means to be available for the protection of human rights and freedoms, and the Constitution does not contain any express reference to a non-judicial recourse or process of which individuals and legal entities might avail themselves for purposes of such protection.

7. In order to promote and preserve the independence and neutrality of an Ombudsman or Human Rights Defender as well as the respect in the nation and the place of importance among other institutions which are vital to the effective functioning of this institution, it is essential that the status of this institution should rest on a firm legislative foundation. Accordingly, **it is highly desirable that the existence of the institution be guaranteed at the constitutional level, by express provisions in the constitution setting for the essence of the characteristics and powers of the office of Ombudsman or Human Rights Defender and the basic terms of his/her appointment.** Such provisions need not be very extensive, as

the characteristics and functions of the office should be further elaborated and safeguarded in an enabling legislation or statute providing comprehensively for the framework and activity of the institution, by relegation in the constitution. It is also desirable that the constitutional provisions should not be framed in such narrow terms as to prevent a reasonable development of the institution proceeding from its essential basis. Especially, the provision in the constitution for an Ombudsman or Human Rights Defender at the national level should not be seen as preventing the establishment of similar institutions at a local or regional level or within specific fields.

8. A number of constitutions do contain provisions on the ombudsperson: Albania (Articles 60 – 63), Austria (Articles 148a – 148j), Croatia (Article 93), Estonia (Articles 139 – 145), Finland (Articles 108-113), Georgia (Article 43), Hungary (Article 43/B), Poland (Articles 208 – 212), Romania (Articles 58-60), Russia (Article 103 on appointment by Parliament), Slovakia (Article 151a), Slovenia (Article 159), Spain (Article 54), Sweden (Institute of Government, Chapter 13, Article 6), “the former Yugoslav Republic of Macedonia” (Article 77) and Ukraine (Article 101).

9. The desirability of a constitutional guarantee of existence is generally recognised among nations favouring the establishment or maintenance of the institution of Ombudsman or Human Rights Defender. Nonetheless, the principle involved is not universally regarded as indispensable, and it is well known that in many countries, the institution is in fact being maintained on the basis of ordinary enabling legislation. It is fair to say, however, that this may partly be explained in historical terms, i.e. by the fact that the legislation dates back to a period when the significance of the role of the Ombudsman in relation to human rights and freedoms was not as strongly recognised as it is today. A further explanation lies in the fact that the procedure for constitutional amendment is naturally quite cumbersome in many countries, so that provision for an institution such as the Ombudsman is difficult to make except in the course of a wider constitutional revision process.

10. According to current European and international standards, therefore, a constitutional guarantee for the Ombudsman is distinctly considered as preferable. It has been advocated in such declarations of the organs of the Council of Europe as the Recommendation 1615 (2003) 1 of the Parliamentary Assembly on the Institution of Ombudsman. And in opinions of the Venice Commission relating to constitutions and/or to rules on the Ombudsman or Human Rights Defender in various countries, the provision for a constitutional guarantee has been consistently proclaimed as the preferable solution as compared with provision for the institution by ordinary legislation or statute.

11. As a final matter under this head, it is to be noted that according to the above general standards, the normative text regulating the status and functions of the Ombudsman for Human Rights should be embodied in legislation of the national parliament, and the person of **the Ombudsman should be elected by the parliament by a majority large enough to ensure a reasonable consensus, i.e. by a qualified majority of all members.**

II. The Ombudsman’s Right to Petition the Constitutional Review Body to Rule on the Constitutionality of Legislation Concerning Human Rights

12. The model most widely followed for the institutions of Ombudsman or Human Rights Defender may be briefly described as that of an independent official having the primary role of acting as intermediary between the people and the state and local administration, and being able in that capacity to monitor the activities of the administration through powers of inquiry and access to information and to address the administration by the issue of recommendations on the basis of law and equity in a broad sense, in order to counter and remedy human rights violations and instances of maladministration. To achieve this, it is imperative for the institution to preserve its neutrality, and accordingly, the institution should not involve itself in litigation or

intervention in court cases, although it certainly should have the power to advise those who seek its assistance as to the legal remedies which may be available to them.

13. Quite a number of countries do allow the ombudsman to challenge a legislative act before the Constitutional Court (e.g. Albania, Armenia, Georgia, Estonia, Moldova, Poland, Portugal, Romania, Russia, Spain). Thus, the power to challenge laws before the Constitutional Court is not alien from the institution of the ombudsman. On the other hand it is not its necessary attribute. If the ombudsman's competence within the general mandate of protecting human rights covers also the defence against possible violations of those rights by the legislature, then it is appropriate to enable the ombudsman to challenge those laws through constitutional review.

14. Consequently, it is recognised as desirable that the mandate of the Ombudsman or Human Rights Defender should include the possibility of applying to the constitutional court of the country for an abstract judgment on questions concerning the constitutionality of laws and regulations or general administrative acts which raise issues affecting human rights and freedoms. The Ombudsman should be able to do this of his/her own motion or triggered by a particular complaint made to the institution. In the latter case, it will be appropriate to observe the distinction that the issues raised by the complaint are in fact suitable for being dealt with by a constitutional court, and that the position of the complainant is not such as to indicate a recourse to the courts of law as the primary solution, which may or may not result in the court of law submitting the question of constitutionality to the constitutional court.

15. Accordingly, **the question whether the Human Rights Ombudsman of Kazakhstan should be endowed with a mandate to make appeal to the Constitutional Council as above related should be positively considered.** In this connection, it is to be noted that as the jurisdiction of the Constitutional Council is defined within the Constitution (Article 72), the measure would seem to call for a constitutional amendment.

III. The Ombudsman's Right to Introduce Legislation

16. It may generally be seen as consistent with the mandate of an Ombudsman or Human Rights Defender according to the model most widely accepted that the institution should have the power to make recommendations to the parliament or legislature for the introduction of amendments or additions to existing laws or other legislative innovation in respect of matters related to his mandate, in the annual report on its activities which the institution is expected to deliver or otherwise. This is the more so as in most countries, the Ombudsman/Defender is appointed by the parliament and expected to report to the legislative body. At the same time, it is generally seen as inconsistent with the neutrality essential to the institution to take the matter further and enable the Ombudsman/Defender to initiate legislation in his/her own right, as this might tend to compromise his/her independence of political pressures and other social forces. It would politicise the ombudsman's functioning because without the support of considerable political forces within the legislature the proposals could not be successful. Thus the ombudsman would be constrained to seek for the support of political forces, and thus put at risk his or her authority.

17. Under the Constitution of the Republic of Kazakhstan (Article 61), the right of legislative initiative is vested exclusively in the deputies of the Parliament and the Government of the Republic. Accordingly, no provision is made for such direct initiative in the existing Statute for the Human Rights Ombudsman of Kazakhstan. The Statute also does not address the position of the institution towards the legislative body in terms of the Ombudsman having the power to make recommendations for legislative amendments to the Parliament, but such power presumably is implied within Article 19, which provides importantly that the Ombudsman within

his/her competence shall contribute to the improvement of legislation of the Republic relating to human rights and freedoms and the manner and means of their protection.

18. A further possibility which might also be considered would be to follow the second named alternative, according to which the specialized ombudsman would be appointed independently, but would be expected to operate in liaison with the general Ombudsman by sharing the same office facilities and supporting staff. This approach has e.g. been taken in Hungary.

19. In line with the general views above referred to, it is **to be doubted that the institution of the Human Rights Ombudsman of Kazakhstan would gain by being endowed with a right of legislative initiative.** In view of the neutrality and independence which the institution needs to possess in the pursuit of its functions, it is believed that **the nation would be better served by having the mandate of the Ombudsman limited to the power of issuing recommendations for legislative reform to the Parliament and/or to the Government or the President of the Republic** (to whom the Ombudsman reports according to the present Statute), without a direct initiative. Such recommendations in the annual or ad hoc reports obviously do not have binding effect, and do not oblige the state organs to act, but can influence them and might draw the attention of the public opinion to the issue in question.

IV. The Ombudsman's Right to Interpret Existing Legislation and Ratified Human Rights Treaties

20. This question relates to the issue whether it might be desirable to vest the Human Rights Ombudsman with the power to issue authentic interpretations of domestic legislation and ratified international treaties in the field of human rights and freedoms. Here again, it is to be observed that the key to the success of the Ombudsman institution among the nations lies in his/her power to convince by reasoning on the basis of law and equity, rather than a power to hand down orders or issue directives. In the course of such reasoning, the Ombudsman will be able to express opinions as to the meaning of legislative provisions and the proper interpretation of ratified treaties, whether in connection with the handling of complaints brought before the institution or with matters which the Ombudsman may be able to take up on his/her own motion. On balance, the preferable view is that **the ability to state such opinions is appropriate and sufficient to the general purposes of the Ombudsman, and that endowing them with binding authenticity would go beyond the scope of the ideal role for the institution.** At the same time, it would raise the possibility of conflict with the competences and independence of the Constitutional Court and of the judicial power in general.

V. Establishment and Operation of Specialised Ombudsman Offices

21. This question is prompted by the fact that the development of the Ombudsman institution in many states has led to the emergence of similar offices or institutions having the special purpose of protecting the rights of particular sections of the population, or safeguarding rights in relation to a particular field of activity. It is noted that a process of this kind is currently under way in Kazakhstan, with plans e.g. for appointing an Ombudsman for children's rights.

22. The establishment of Ombudsmen for special fields is a relatively recent phenomenon, but growing in popularity. The concept for these institutions generally is related to the concept for the traditional parliamentary or national Ombudsman monitoring the administration and the observance of human rights in general terms, and these other institutions normally will benefit from the relationship and from the similarity of working methods which may be followed. However, the basic requirement for independence from the administration and other authorities does not necessarily make itself as strongly felt in these cases, and the issue of guaranteeing the existence of the institutions by constitutional provisions in the interest of democratic

government and human rights protection in general does not have the same essential weight as discussed under Question I above in relation to the national Ombudsman or Defender. On the other hand, the establishment by legislation will remain a clear requisite.

23. While these specialised institutions will need to have competences similar to those of the national Ombudsman/Defender as regards the capacity for requiring information and access to institutions, as well as the ability to address governmental authorities by way of recommendations and reports and informing the general public of his/her activities, the competences and the background are not necessarily the same in all respects. Thus as regards the protection of children's rights, the background in several countries (including Norway and Iceland, where the laws on the institution are very similar) is that the Ombudsman for Children is established as an independent official within and not outside of the state administration (in Norway appointed by the Social Minister, in Iceland by the Prime Minister). Also in many countries (again including Norway and Iceland), this Ombudsman operates more as an advocate and general protector of children's rights than as an official engaging directly in conflict resolution in the interest of individual claimants. Thus the Ombudsman for children certainly will hear complaints from individuals and advise the complainants as to the remedies available to them. In most countries, however, the institution generally will not involve itself in the resolution of conflicts between private individuals in relation to children (though Ireland provides an exception or alternative in this respect), and will need to avoid taking sides among individuals in its approach to the authorities, even though the approach is by recommendation rather than an order. Among other things, it may be noted that the assistance to the individual complainant may take the form of advice to make appeal to the national Ombudsman.

24. In the Republic of Kazakhstan, the question may arise whether the prospective Ombudsman for Children (or other such special offices) should be wholly independent and operating in parallel with the Human Rights Ombudsman, or whether the office should operate in liaison with the latter or even as a specialised department or bureau within the office of the Human Rights Ombudsman (which is the approach taken in Greece and certain other countries). Under the first named alternative, the view generally held is that the special ombudsman should be independent also to the extent of not being subordinated to the national ombudsman by way of a hierarchical relationship.

25. On balance, however, it would seem **preferable** to follow the third-named alternative **in Kazakhstan**, where the Ombudsman institution is presently in a stage of consolidation and development, and **to organise the functions of the specialised ombudsperson within the overall institution of the national Ombudsman**, by way of establishing a special department and/or appointing a deputy ombudsman for the special field. The special function presumably could then benefit directly from the status and legitimacy of the general Ombudsman, and the connection could in fact lend added strength and efficiency both to the special function and the national institution. If this approach is followed, it would be appropriate to have the deputy ombudsperson or head of department appointed either by the Ombudsman or by the appointing authority (Parliament/President) upon recommendation of the Ombudsman.

VI. Staffing and regional Ombudsman Offices

26. Under the establishing Statute of 19th September 2006 (Section 6), the staff and other support of the office of the Human Rights Ombudsman of Kazakhstan are provided by the National Centre for Human Rights, a state agency established under a presidential Statute of its own. The Ombudsman appoints the Head of the Centre and its other staff, who have the status of civil servants, and the activities of the Ombudsman and the Centre are funded by the national budget. The above final question is firstly prompted by the fact that the staff of the institution (14 members) is relatively small considering the population and size of the country, and has been faced with a growing number of applications over its recent initial years of activity.

27. It does seem clear that in practical terms, a staff of the present number is insufficient and needs to be substantially increased. As well known, this basically involves a budgetary question with corresponding political implications, and it is difficult to provide by general legislation for criteria or methods of budgeting which are effective enough to ensure that the staffing of the Ombudsman institution and its other recourse to assistance is satisfactorily provided for at all times. This has been attempted in several countries, however, and should similarly be considered in Kazakhstan.

28. Thus the law or statute regulating the Ombudsman could prescribe that **the budgetary allocation of funds for the operations of the institution should be adequate to the need to ensure full, independent and effective discharge of the responsibilities and functions of the institution, and take into account such matters of reference as the number of complaints lodged with the institution in the previous year.** The law or statute **could also provide for a relative budgetary independence of the Ombudsman, by prescribing that the institution itself should submit a proposal for its budget** to the governmental authority responsible for presentation of the national budget to the parliament, and that this proposal should be included within the national budget without changes, either as a proposal of the government or for purposes of comparison with the eventual proposal of the governmental authority, if the government should find it necessary to make reductions in the allocation requested. Finally, if the Human Rights Ombudsman is constituted as a parliamentary ombudsman in the ordinary sense (i.e. appointed by the legislature and reporting to the legislature), this may serve to strengthen the assumption that the parliament will in fact regularly provide the institution with financial means adequate to ensure its proper functioning.

29. The above question secondly refers to the issue whether there might be reason to establish regional offices for human rights protection in Kazakhstan. In view of the size and population of the country, this clearly would seem desirable, at least in order to facilitate the investigative and monitoring functions of the national Ombudsman and the personal access to the institution. Referring again to the comments under Question V. above, it is to be noted that the alternative of appointing regional or local ombudspersons who are not subordinated to the national Ombudsman is preferred in many countries and has advantages of its own. Unless specific conditions in certain regions otherwise indicate, however, it would seem **preferable in Kazakhstan to organise regional or local offices manned by representatives of the national Ombudsman**, with or without being designated as Deputy ombudspersons.

Conclusions:

30. The six questions raised by the Human Rights Commissioner (Ombudsman) of Kazakhstan can be answered as follows:

- I. The institution of the Human Rights Commissioner (Ombudsman) should be guaranteed at the constitutional level, setting out the essence of the characteristics and powers of the office of Ombudsman or Human Rights Defender and the basic terms of his/her appointment providing for an election by a qualified majority in parliament.
- II. The Human Rights Ombudsman of Kazakhstan should be endowed with a mandate to make an appeal to the Constitutional Council.
- III. The Human Rights Ombudsman of Kazakhstan would not gain by being endowed with a right of legislative initiative but should remain limited to the power of issuing recommendations for legislative reform to the Parliament and/or to the Government or the President of the Republic.

- IV. While the Ombudsman should express his or her opinion on the interpretation of legislation and ratified human rights treaties, such opinions should not have binding force.
- V. In Kazakhstan, where the Ombudsman institution is presently in a stage of consolidation and development, the functions of specialised ombudspersons should be established within the overall institution of the national Ombudsman.
- VI. The legislation on the Ombudsman should provide that the budgetary allocation should be adequate to the need to ensure full, independent and effective discharge of the responsibilities and functions of the institution taking into account such matters of reference as the number of complaints lodged with the institution in the previous year. The law or statute could also provide for a relative budgetary independence of the Ombudsman by prescribing that the institution itself should submit a proposal for its budget.

31. The Venice Commission remains at the disposal of the Ombudsman of Kazakhstan and the Kazakh authorities in general for the implementation of the reform of the Ombudsman institution and any other reforms promoting democracy, human rights and the rule of law.