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(VENICE COMMISSION)

COMMENTS

**ON THE DRAFT AMENDMENTS
TO ARTICLE 23(5) OF THE LAW
ON THE HUMAN RIGHTS DEFENDER
OF ARMENIA**

by

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Comments on the draft Amendment to the Article 23(5) of the Armenian law on the Public Defender

1. The draft amendment reads as follows: "5. In case of subjecting any person holding a post in the HRDO staff to detention, arrestment, administrative or criminal liability by court order, the enforcing agency shall inform the Defender of this occurrence in the defined procedure and due time."
2. The amendment would deprive the staff of the immunity they enjoy under the present law. Only the duty to inform the Defender would be retained. The present Article 23(5) reads as follows: "5. Those persons that hold any position in the Defender's staff cannot be convicted, persecuted, detained, arrested or brought to court for any action performed, opinion expressed or decision made while performing their responsibilities under the Defender's instructions. In all these circumstances when any person holding a post in the staff is detained, arrested or brought to court, the enforcing agency shall inform the Defender of this occurrence in the defined procedure and due time."
3. The amendment would not, however, affect the position of the Defender her- or himself.

The Defender's immunity is based on Art. 19 of the Law on the Public Defender:

No criminal prosecution or bringing to account shall be brought against the Defender over the whole period of execution of his/ her powers and after that for the actions following from his/ her status including for the opinion expressed at the National Assembly, if it does not contain slander or offence. The Defender shall not be involved as a defendant, be detained or called to the administrative account without the consent of the national Assembly. The Defender shall not be arrested without the consent of National Assembly, except the cases when the Defender is caught in act of crime. In this case the President of the National Assembly shall be informed immediately.

4. In its opinion on amendments to the Law on the Public Defender CDL-AD(2006)038 expressed a positive view of the extension of the immunity to the staff of the Public Defender's office. The Commission even called for its extension in temporal respect. Paragraphs 74-75 of the opinion read as follows:

Erreur ! Signet non défini. *In general terms, both the Human Rights Defender and his or her staff should have immunity from legal process in respect of words spoken or written and acts performed by them in their official capacity. Such immunity should continue to be accorded even after the end of the Human Rights Defender's mandate or after the staff cease their employment with the Human Rights Defender institution. This immunity should also include baggage, correspondence and means of communication belonging to the Human Rights Defender. One could consider a different scope of immunity with regard to the staff (e.g. waiving by the Defender for his or her staff).*

Erreur ! Signet non défini. *In the Amending Law, the first two paragraphs of this Article have been joined in a single paragraph with some changes in wording. A change which is clearly positive and important is that the immunity of the Human Rights Defender from prosecution or criminal proceedings is now expressed as persisting not only during his or her term of office, but also thereafter. This accords with the principle of the Constitution that the Defender shall be endowed with the immunity envisaged for a Deputy of the National Assembly (Article 83.1.6 of the Constitution), and the new phrasing of the Article appears to have been modelled in most part upon the constitutional provision regarding Deputies (Article 66).*

However, it may be questioned whether the extent of the immunity is sufficient. There is no reference here to the staff of the Defender, but under Article 23.5, they are endowed with immunity during their period of tenure in respect of their conduct while performing their responsibilities under the Defender's instructions. This immunity should be more extensive. The Law also lacks sufficiently precise provisions on the procedure for waiving immunity.

5. The proposed amendment has been justified with reference to the fight against corruption. In this respect, attention should be paid to principle 6 of the Committee of Ministers' Resolution 97(24) On the Twenty Guiding Principles for the Fight against Corruption. This principle concerns the limitation of immunity from investigation, prosecution or adjudication of corruption offences to the degree necessary in a democratic society.
6. In its fifth General Activity Report the Greco (Group of States against Corruption) stated that "compliance with Guiding Principle 6 requires that the categories of professionals benefiting from immunity be limited to a minimum", but added that "according to GRECO's standing practice each Member has been assessed on its own merits and, as a consequence, a few exceptions to the aforementioned rather strict interpretation of General Principle 6 have been accepted".
7. In its evaluation report on Armenia adopted in March 2006, the GRECO was concerned about the rather wide scope of immunities and recommended "to consider reducing the categories of persons enjoying immunity from prosecution and to abolish, in particular, the immunity provided for parliamentary candidates, members of the central electoral commission, members of regional and local electoral commissions, candidate mayors and local council candidates" (para 56). The recommendation was repeated in the compliance report on Armenia, adopted in June 2008. The staff of the Public Defender's office has not included in the categories whose immunity the GRECO has found particularly problematic.
8. In its recommendation 1615 (2003)1, the Parliamentary Assembly of the Council of Europe confirmed "the importance of the institution of ombudsman within national systems for the protection of human rights and the promotion of the rule of law, and of its role in ensuring the proper behaviour of public administration" (para1.). It included in the characteristics essential for the institution of ombudsman, *inter alia*, "personal immunity from any disciplinary, administrative or criminal proceedings or penalties relating to the discharge of official responsibilities, other than dismissal by parliament for incapacity or serious ethical misconduct", as well as "guaranteed sufficient resources for discharge of all responsibilities allocated to the institution, allocated independently of any possible interference by the subject of investigations, and complete autonomy over issues relating to budget and staff" (para 7, v. and vii.).
9. The Assembly called on the governments of Council of Europe member states to, *inter alia*, "ensure that the institution of parliamentary ombudsman exhibits the characteristics described in paragraph 7 above, and that these characteristics are sufficiently protected and appropriately elaborated in the enabling legislation and statute", and "give this institution a mandate which clearly encompasses human rights as being fundamental to the concept of good administration, and which includes a wider role in human rights protection where, in the absence of specific complementary alternative mechanisms, national circumstances so require" (para 10, ii.-iii.).
10. In its declaration on Council of Europe action to improve the protection of human rights defenders and promote their activities, adopted on 6 February 2008, the Committee of Ministers called on member states to, *inter alia*, "consider giving or, where appropriate, strengthening competence and capacity to independent commissions, ombudspersons, or national human rights institutions to receive, consider and make recommendations for the resolution of complaints by human rights defenders about violations of their rights" (para 2., v.).

11. As emphasized in Council of Europe documents, the independence of the Ombudsman institution is crucial to its effective functioning in the defence of human rights, as well as in securing good administration, including the fight against corruption. The Ombudsman works through her or his staff, and, hence, the independence of the institution also requires guarantees concerning the position of the staff.
12. The present provision in Art. 23(5) of the Law on the Public Defender grants the staff immunity merely with regard to “action performed, opinion expressed or decision made *while performing their responsibilities under the Defender’s instructions*” (italics added). Such an immunity can be regarded as a logical extension of the Defender’s immunity. Its abolition would weaken the independence of the institution of the Public Defender.
13. According to the Guiding Principles for the Fight against Corruption, immunity should be limited “to the degree necessary in a democratic society”. The independence of the institution of the Public Defender can be regarded as “necessary in a democratic society” in the sense implied by the Guiding Principles.
14. GRECO’s standing practice in monitoring compliance with Guiding Principles or its reports on Armenia do not support the proposed amendment. The staff of the Public Defender has not been included in the categories whose immunity GRECO has found problematic.
15. It can be concluded that despite the importance of the fight against corruption and the ensuing necessity of limiting the categories of persons enjoying immunity, the need to ensure the independence of the institution of the Public Defender provides a strong justification favouring the preservation of the present immunity of the staff of the Public Defender.