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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

**ON AMENDMENTS TO THE LAW
ON THE PROTECTOR OF HUMAN RIGHTS AND FREEDOMS
OF MONTENEGRO**

on the basis of comments by

**Mr Marek Antoni NOWICKI (Expert, Directorate of Co-operation,
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Mr Kaarlo TUORI (Member, Finland)**

**This document has been classified restricted on 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.*

1. *By letter dated 23 March 2009, the Minister for the Protection of Human and Minority Rights of Montenegro, Mr Fuad Nimani, requested an opinion on amendments (CDL(2009)110) to the Protector of Human Rights and Freedoms (CDL(2009)111).*
2. *The Commission invited Messrs Nowicki and Tuori to act as rapporteurs in this issue. Their comments are contained in documents CDL(2009)112 and 113 respectively.*
3. *The present opinion has been adopted by the Commission at its ... Plenary Session (Venice, ...).*

Article 1 of the Amending Law – General initiatives / prevention of torture / discrimination

4. In Article 1, paragraph 1, of the Law on the Protector of Human Rights and Freedoms (hereinafter “the Protector”), the words “shall protect human rights” are to be changed to “**shall undertake measures for the protection.**” This wording is to be **welcomed** because it underlines the role of the Protector not only for the protection of the rights of individuals but it also obliges the Protector to take **general initiatives** for the improvement of the protection of human rights throughout the entire state system.

5. The amended paragraph 2 would establish the Protector as the “**national mechanism for prevention from torture and other forms of inhuman treatment**” in the sense of in Article 3 of the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Following the example in other countries, the attribution of this role to the ombudsman is a **welcome choice**, which endows the Protector with a very demanding function, for which sufficient resources will be required. Furthermore, a new article (Article 28a) would deal with prevention of torture and the rights of persons deprived of liberty in general. These provisions emphasise the prevention of torture as a central function of the Protector and are to be endorsed.

6. The new paragraph 3 would lay down that “the Protector deals with the issues of discrimination”. It is **positive to refer explicitly to discrimination as competence of the Protector**. One of the deputies of the Protector is to deal with discrimination issues (Article 9). In the light of the General Policy Recommendation No. 7 of the European Commission against Racism and Intolerance (ECRI) on National Legislation to Combat Racism and Racial Discrimination of 13 December 2002, which calls for the “establishment of an independent specialised body to combat racism and racial discrimination at national level”, the Protector should also have the competences referred to in paragraph 24 of the Recommendation. The Commission currently prepares a separate opinion on the draft Law on Discrimination, which will deal with this issue in more detail.

7. The relation of the clause “other general issues relevant for the protection and promotion of human rights and freedoms” in paragraph 3 to paragraph 2, which is also phrased in general terms, is unclear and may be unnecessary. It is difficult to see what this clause adds to paragraph 2.

Article 2 – Basic principles

8. According to the amendments, Articles 2 and 3 of the Law in force, which lay down the **principles of autonomy and independence, and constitutionality and legality**, would be **repealed**. Such a change could lead to misinterpretations with regard to the significance of these principles and can therefore **not be endorsed**.

Article 3 – Organisational units in places other than the headquarters

9. The possibility to establish organisational units in places other than the headquarters foreseen in the amended Article 6 would strengthen the territorial organisation of the Protector's office and is to be welcomed. However, the **Protector should have discretion whether to establish such additional units and in what form** (including how many) in order to properly perform his or her mandate. There is no need to involve the legislature in such decisions.

Article 4 – Extra-budgetary funding

10. According to a new paragraph in Article 7, the Protector could collect "additional revenue for its activities by means of donations". However, extra-budgetary funding can be problematic from the point of view of the Protector's independence. There should be **more clarity regarding whether donations include only domestic or also foreign funding**. In order to guarantee the proper functioning and development of the Protector's activities, additional subsidies from international donors can be important. The grants received must not, however, threaten the institution's independence or negatively affect the amount of financial means available from the State budget. In any case, **full transparency for any donation needs to be ensured**. The proposed amendment should be reconsidered.

Article 5 - Procedure for the appointment of the Protector

11. Amendments to Article 8 would change the procedure for the appointment of the Protector. According to the new procedure, the Parliament would appoint the Protector on the proposal of the President of Montenegro. The present provisions which aim to ensure the influence of civil society and give the right of nomination to a parliamentary body would be repealed. The proposed amendments can be regarded as a set-back from the point of view of the transparency of the procedure.

12. Similar to judges, the Protector does not only need to be independent, he or she must also be "seen" to be independent. The perception of the Protector as the "President's candidate" has to be avoided. Given that the prime task of the Protector is to supervise the executive, the institution should be clearly linked to the Parliament.

13. Instead of the proposed amendments, **a provision on a qualified majority in the Parliament for the election of the Protector is strongly recommended**. This should help to bring about a need for consensus in Parliament and, consequently, the choice of an independent candidate. This would require an amendment of the Constitution as has been recommended in the Venice Commission's Opinion on the Constitution of Montenegro (CDL-AD(2007)047, para. 56).

Article 6 – Specialisation of deputies

14. The amendment proposed to Article 9 provides for a division of labour between the deputy protectors. The deputies would have "*special functions for the protection of persons deprived of liberty, protection of people belonging to minority nations and other minority national communities, protection of the rights of child, protection of gender equality, protection of disabled persons and protection from discrimination*". **The specialisation of the deputies is welcomed** because it allows the deputies to deal efficiently with the issues attributed to them whereas the general mandate of the Protector provides for coherence between these specialised areas.

Article 7 - Representation of minorities among the deputies of the Protector

15. In Article 10 a new paragraph is to be added, which would read: *“In proposing the candidates for deputy Protector, the Protector is obliged to give consideration to appropriate representation of people belonging to minority nations and other minority national communities.”* It might be worthwhile to consider whether the proposed solution, though generally headed in the right direction, is sufficient. Maybe it would be **better to provide stronger guarantees for the representation of minorities** among the deputies of the Protector.

Article 9 – Appointment of a new Protector

16. After expiration of the Protector’s term, and prior to selection of a new Protector, **the current Protector should to continue in office until the new one takes office** - as opposed to the solution proposed in the draft. This would help to avoid a situation where no Protector holds an office - as happens sometimes for up to several months - with only a deputy as an acting ombudsman filling in temporarily. This is also important due to the need for the proper transfer of Protector’s duties between the old and the new office holder. The solution proposed in the draft should be used in situations where, due to objective circumstances (e.g. death, illness, etc.) the Protector is unable to perform his or her duties.

Article 11 – Access to places where individuals are deprived of their liberty

17. The Protector - and every person acting on his or her behalf - **should be guaranteed free access at any time to all places where individuals deprived of their liberty are detained**, without the need for consent from any agency and without prior notification. S/he should have the right to visit and inspect such places in connection with concrete complaints or on his or her own initiative. This is one of the most important safeguards for the effective operation of this type of institutions and it must be clearly written in the law, especially also because the prevention of torture and other inhuman and degrading treatments will be one of the main tasks of the Protector.

18. The provisions on access to detained persons should be phrased both as a competence of the Protector or persons acting on his/her behalf to have unconstrained contact with detainees and as a right of the individuals detained to seek such visits without constraints.

19. Consequently, a detained person should have the opportunity to freely communicate, without any supervision, with the Protector or his/her representatives. The law should clearly state that this is not limited to conversations, but that it also covers all other means of communication, e.g. telephone or electronic communications, where applicable. A statement that “individuals deprived of their liberty shall be entitled to file their complaint in a sealed envelope” is not sufficient in this respect. The provisions should expressly state that these guarantees apply in both ways - to correspondence to and from the Protector.

Article 12 – Supervision of care for placed children

20. The new Article 28b provides that the Protectors shall be entitled to “get an insight” into the care for children placed by an authority. This provision is an important guarantee for minors. However, the Law should expressly **specify how the Protector** – and his or her representative – **can get an insight** (visits, communication etc.).

Article 13 – Request for meetings with officials

Is important for the Protector to be able to **meet without delay** with state representatives and officials enumerated in the proposed provision. However, this provision should be made wider

to make clear that not only highest officials but **every state or local official** should have such an obligation.

Article 14 – information of the complainant without delay

The protector should not only **obliged to inform the complainant** of the “commencement and conclusion of the procedure” but also to do so **without delay**.

Article 15

[There must be a translation error.]

Re: Article 18 – Right to resume former function

The **right to resume the former function** provided for in draft Article 48a is **welcomed** because they are important guarantees of the Protector’s and his/her deputy’s independence. The right to resume the former post will however be available only in case of prior work in a public post.

Article 20 – Direct budgetary proposal to Parliament

21. Considering its exceptionally sensitive nature and the significance of this provision for the independence of the institution the amendment proposed in Article 50 is **welcomed**. Issues concerning the budget of the Protector’s institution should be solely in the hands of the Parliament, without any involvement of the Government.

Article 21 – Budgetary procedure

22. The proposed provisions on the **budgetary procedure** (Arts. 50 and 50a) as well as the staff of the Protector (Art. 51 and 51a) aim to secure the financial and personnel means necessary for the effective functioning of the Protector’s office and are therefore **welcome**. However, the title of the new Article 50a, may be misleading because it refers to the Protector’s participation in parliamentary sessions in general, whereas the text of this article refers solely the Protector’s participation in the budgetary session of the Parliament.

Article 23 – Relations between Deputy Protectors and the Secretary General

23. The proposed provision does not indicate with sufficient clarity the sort of relations between Deputies and the Secretary General, which are inherently delicate, especially since s/he shall be, *inter alia*, the head of the team of researchers. Lack of clarity in this regard may lead to serious problems related to the division of competences within the institution.

Article 25 – Special status for staff

24. Granting the **staff of the Protector a special status is commendable**. This is an additional confirmation of the exceptional nature of such an institution. It further provides for an additional guarantee of the institution’s independence as well as its proper perception within society.

Article 26 – Functional immunity

25. The draft does not devote sufficient attention to immunity issues. Article 14 provides that the immunity of the Protector and his/her Deputy are the same as granted to parliamentarians.

26. This seems however inappropriate. Not only **the Protector and his/her Deputies, but also his/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 shall continue to be accorded even after the end of the Protector’s mandate or after the members of staff cease their employment with the Protector’s institution. This immunity should also include baggage, correspondence and means of communication belonging to the Protector.

Conclusion

27. The amendments are well drafted and coherent. They provide a number of improvements for the institution of the Protector of Human Rights.

28. In particular, the Commission welcomes attribution to the Protector of the task of the prevention of torture and other inhuman and degrading treatments, the prevention of discrimination, the specialisation of the Protector’s deputies, minority representation in their appointment, the right of the Protector to resume his or her previous function or the budgetary procedure.

29. Other provisions could be further improved like that on the establishment of units of the office of the Protector, on donations, on functional immunity, on the succession of office holders. The Protector - and every person acting on his or her behalf - should also have free access at any time to individuals deprived of their liberty.

30. Provisions on some basic principles should be kept rather than deleted. The Commission strongly recommends keeping the current system of appointment of the Protector but to add a provision on a qualified majority for his or her election in Parliament.

31. The Commission remains at the disposal of the Montenegrin authorities for any further assistance in this issue.