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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

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

by
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The Council of Europe has turned to me with a request for an opinion on the draft law on amendments to the law on Protector of Human Rights and Freedoms prepared by the Government of Montenegro in May 2009.

I have the following in-depth comments and suggestions regarding this draft law.

Re: Article 1

I agree with the suggested change of the phrase “shall protect human rights” to “shall undertake measures for the protection.” In this phrasing, the role of the Protector of Human Rights and Freedoms (“Protector”) is underscored not only in the direct protection of individual rights by this institution as such but also as a body obligated to take initiatives for better protection of those rights throughout the entire state system.

In each case, states make sovereign decisions as to the form of their effective national preventive mechanism, described in Article 3 of the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Various options are available in that regard. In this draft law, I was pleased to find the expressed intent for the Protector to constitute a significant element of such mechanism. Many states have adopted a similar solution and many others continue to do so. It seems a most natural fit in places where the ombudsman is sufficiently strong to undertake this very demanding additional obligation.

The same positive comments apply to the idea of the Protector as a mechanism for protection from discrimination.

However, in my view the suggested new para. 3 is unnecessary. It is difficult to see what it adds to the general provision of para. 2 as put forth in the draft. In my understanding, para.2 also covers everything described in para. 3 of this Article.

Re: Article 2

I'm in favor of maintaining the current Articles 2 and 3. They affirm principles that seem obvious with respect to institutions of an ombudsman, but are worth stressing and keeping in the text.

Re: Article 3

The legislature should only provide for a general possibility for the Protector to establish organizational units in addition to its headquarters. However, the Protector should have discretion whether to establish such additional units and in what form (including how many) in order to properly perform its mandate. There is no need to involve the legislature in such decisions.

Re: Article 4

Due to the suggested new paragraph in Article 7 concerning funding, there should be more clarity regarding whether donations include only domestic or also foreign funding. This is a delicate issue and therefore it is all the more important to delineate it clearly. In order to guarantee the proper functioning and development of the Protector's activities, it is very

important to create an opportunity for the Institution to receive additional subsidies from international donors. The grants received may not, however, threaten the institution's independence or affect the amount of financial means available from the State budget.

Re: Article 5

I feel that scrapping the current system (which could be amended instead) and the suggestion for a Parliament to appoint the Protector at the proposal of the President of Montenegro is not a good solution, considering the need to exercise an exceptional solicitude for the independence of the Protector and to keep his/her appropriate "image" within society. It should be enough for a candidate to be recommended to the Parliament by a sufficiently large group of deputies. In this way, nobody will perceive the Protector as being "the president's person." The institution of the Protector should, in all aspects (and in a natural manner), be clearly linked to the Parliament.

The condition or requirement that the appointment be made by a qualified majority is of utmost importance. For instance, appointment by three-fifths of the total number of deputies might be an appropriate method. Political practice shows that such a qualified majority sufficiently guarantees that in order to appoint an ombudsman, a political agreement between the majority parties and at least part of the opposition will always be indispensable. And that is precisely what is needed in the appointment for this office.

Re: Article 7

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 legal guarantees for representation of minorities among the deputies of the Protector.

Re: Article 9

After expiration of the Protector's term, and prior to selection of a new Protector, it may be more expedient for the current Protector to continue until the new one will take office - as opposed to the solution proposed in the draft. This would help to avoid a situation where no Protector holds an office - as tends to happen sometime for up to several months - with only 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 one. The solution proposed in the draft should be used only in situations where, due to objective circumstances (e.g. death, illness, etc.) a Protector is unable to perform his/her duties anymore.

Re: Article 11

The Protector and every person acting on his/her behalf should be guaranteed free access to all places where individuals deprived of their liberty are detained at any time, without the need to receive consent from any agency and without prior warning. He/she must be guaranteed the opportunity to visit and inspect such places in connection with concrete complaints or on his/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.

In this respect, it is important that the current draft introduces more precise provisions.

However, these provisions cannot be limited to ensuring the Protector or persons acting on his/her behalf unconstrained contact with detainees, but must also be phrased as a guarantee for these individuals.

Moreover, a detained person must 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. A statement that “individuals deprived of their liberty shall be entitled to file their complaint in a sealed envelope” is insufficient in this respect. Furthermore, the provisions must expressly state that special guarantees must apply to two-way correspondence: to correspondence to and from the Protector.

Re: Article 12

In the context of the suggested wording of the new Article 28 (b), due to its significant guarantor function, this provision should be formulated in a more precise manner. It must also make expressly clear that it refers to prerogatives of the Protector as well as to those acting on his or her behalf.

Re: Article 13

Is important for the Protector to be able to meet without delay with state representatives and officials enumerated in the proposed provision, but this clause should be more general in order to make clear that every state or local official should have such a legal obligation.

Re: Article 14

In the proposed text, I suggest a slight amendment by changing the proposed text to read “shall reform without delay”.

Re: Article 15

There must be an error here because para.3 does not contain the word “complaint” at all. The word occurs only in para. 1, but in its context may not be changed to the word “recommendation”. There must be an error here because para. 3 does not contain the word “complaint.” The word only appears in para.1. In the context of this Article, the word “recommendation” is not accurate.

Re: Article 18

The solutions adopted in the new proposed Article 48 (a) deserve absolute approval. These are very important guarantees of the Protector’s and his/her deputy’s independence.

Re: Article 20

Considering its exceptionally sensitive nature and the significance of this provision for the independence of the institution, I’m very satisfied by the changes suggested in Article 50. Issues concerning the budget of the Protector’s institution should be solely in the hands of the Parliament, without any involvement of the Government.

Re: Article 21

My suggestion is to change the title of the new Article 50 (a), because the current proposed title may indicate that it generally concerns the Protector’s participation in parliamentary sessions, while the proposed provision refers solely to the specific issue of the Protector’s participation in the budgetary session of the Parliament.

Re: Article 23

The proposed provision does not indicate with sufficient clarity the sort of relations between Deputies and the General Secretary, which are inherently delicate, especially since he/she 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 in the future.

Re: Article 25

Granting the staff of the institution of the Protector a special status is quite commendable. This is an additional confirmation of the exceptional nature of such an institution and the attendant needs and demands. It further provides for an additional guarantee of the institution's independence as well as its proper perception within society.

Re: Article 26

The draft does not devote sufficient attention to immunity related issues. Article 14 does state that the immunity of the Protector and his/her Deputy are the same as granted to parliamentarians. Nonetheless, in my mind such regulation is insufficient, especially so because 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 phrasing which I propose here is modeled on UNMIK Regulation No. 2006/06 on the Ombudsperson Institution in Kosovo (Section 12.1). This immunity should also include baggage, correspondence and means of communication belonging to the Protector. One could consider a different scope of immunity with regard to the staff.

Guarantees as to the inviolability of the institution's possessions, documents and premises, etc. are also very important. Also in this case, I would recommend to follow the example of UNMIK Regulation 2006/06 on the Ombudsperson Institution in Kosovo, which in Section 12.2 states that "*The archives, files documents, communications, property, funds and assets [...], wherever located and by whomsoever held, shall be inviolable and immune from search, seizure, requisition, confiscation, expropriation or any other form of interference, whether by executive, administrative, judicial or legislative action.*"