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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DRAFT LAW**  
**ON THE PROTECTOR OF HUMAN RIGHTS AND FREEDOMS**  
**OF MONTENEGRO**

**Comments by**

**Mr Kaarlo TUORI (Member, Finland)**

1. Art. 81 of the Constitution of Montenegro includes basic provisions on the position and tasks of the Human Rights Protector. According to Art. 81(1), “the protector of human rights and liberties of Montenegro shall be independent and autonomous authority that takes measures to protect human rights and liberties”. Art. 81(2), in turn, lays down that “the protector of human rights and liberties shall exercise duties on the basis of the Constitution, the law and the confirmed international agreements, observing also the principles of justice and fairness”. The Human Rights Protector is elected by the Parliament (Art. 82(14)), with the majority of the total number of its members (Art. 91(2)) and on the proposal of the President (Art. 95(5)).

2. Art. 2 of the Draft Law lays down the mandate of the Protector. He or she “shall take measures to protect human rights and freedoms, when they are violated by the act, action or failure to act of state bodies, state administration bodies, bodies of the local self-administration and local administration, public services and other holders of public powers”. The Protector shall also take “measures to prevent torture and other forms of inhuman or degrading treatment or punishment and measures for protection from discrimination”. Art. 25-26 stipulate that the Human Rights Protector will act as the national mechanism for prevention of torture and other forms of inhuman treatment and punishment, in accordance with the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Art. 27, in turn, lays down that “the Protector shall be the institutional mechanism for protection against discrimination”.

3. According to the draft law, the competence of the Human Rights Protector is limited to human rights issues. This is also the case with law in force, which dates from 2003. Thus, the Protector does not fulfil such a general task of monitoring legality in public administration as do, for instance, the Swedish and Finnish Ombudsmen. Prioritizing human rights issues may be justified in a young democracy.

4. However, it should be made clear that the Protector is obliged to react not only to individual human rights violations but also to general patterns of action which he/she considers endangering human rights. Art. 18-19, of the draft law which grant the Protector the power to “initiate the adoption of laws, other regulations and general acts for the reason of harmonization with internationally recognized standards in the area of human rights and freedoms” (Art. 18(1)), and to “initiate a proceeding before the Constitutional Court of Montenegro for the assessment of conformity of laws with the Constitution and confirmed and published international treaties or the conformity of other regulations and general acts with the Constitution and law (Art. 19)”, already imply that the Protector is also expected to address more general issues than merely individual human rights violations. In addition, Art. 21 explicitly states that “the Protector deals with general issues of importance for the protection and promotion of human rights and freedoms and cooperates with organizations and institutions dealing with human rights and freedoms”. The more general responsibilities of the Protectors should be explicitly mentioned in Art. 2, too.

5. The Human Rights Protector’s responsibilities as “the institutional mechanism for protection against discrimination” are regulated in a separate Law on Prohibition of Discrimination. Art. 27(2) makes an appropriate reference to this law.

6. According to Art. 3, “the Protector can be addressed by anyone who believes that an act, action or failure to act of the authorities violated his/her rights or freedoms”. In addition to party initiatives, “the Protector shall, as well, act on his/her own initiative”. Chapter V on Procedure includes more precise provisions on the initiation of proceedings before the

Protector. If the Protector acts on his/her own initiative, the consent of the victim is required (Art. 28(3)). When the victim initiates the proceeding, “the complaint may be filed through a Member of Parliament, as well as organization dealing with human rights and freedoms”. It is evident that Members of Parliament or human rights organizations do not have any independent standing.

7. The restricted power to initiate proceedings before the Protector diverges from the Nordic Ombudsman institution where anyone can file a complaint. At least a limited *actio popularis* –system could have been considered in Montenegro, too; such a system could be expected to add to the efficacy of human rights monitoring. The solution adopted in the draft law – as well as in the present law, too - gives the procedure characteristics of judicial proceedings, which are further emphasised by the quite formal and detailed provisions in Chapter V on the form and contents of the complaint, as well as the absolute time limits. This may be argued to contradict the idea of the Ombudsman institution as a “soft”, informal alternative to the formality of court proceedings.

8. In its opinions on the Constitution of Montenegro (CDL-AD(2007)017 and CDL-AD(2007)047, the Venice Commission has criticized the constitutional provisions on the election of the Human Rights Protector from the point of view of his/her independence, which would, for example, require qualified majority in the Parliament. Such a change cannot, however, be realised at the level of an ordinary but would require a constitutional amendment.

9. The draft law does not contain any complementary provisions on the election of the Human Rights Protector. Repealing the provisions of the present law on procedure in the Parliament would, however, be a setback from the point of view of involving civil society and guaranteeing the transparency. Art. 8 of the present law stipulates that the Parliament “shall elect the Protector upon a proposal of the competent working body of the Assembly, by a majority vote of all members of the Assembly”. The competent working body of the Assembly is obliged to “undertake consultations with scientific and specialised institutions, organs as well as representatives of the non- governmental sector dealing with human rights and freedoms issues”. The law also requires informing the public about the initiation of the procedure to propose candidates.

10. The grounds for the dismissal of the Human Rights Protector should also be laid down by the Constitution. This not being the case, it is necessary to provide for them in the law in a way which leaves as little discretion to the Parliament as possible. Dismissal for the grounds laid down in Art. 15(2) 3)-4) can be considered a too severe sanction, at least without the requirement of a prior warning.

11. Art. 20(2-4) of the present law regulate the procedure of dismissal. Their inclusion in the new law, too, should be considered.

12. The Draft Law lacks sufficient guarantees for the immunity of the Human Rights Protector and his/her Deputies. The draft law only provides that “the Protector cannot be held responsible for the opinion or recommendation he/she provided. Immunity should be extended to all activities and decisions within the responsibilities of the Protector, and expanded to his/her Deputies and staff.

13. The Annual Report of the Human Rights Protector plays an important role in facilitating parliamentary as well as public debate on the situation of human rights and freedoms in Montenegro. Art. 47 of the Draft Law, dealing with the Annual Report, should explicitly stipulate that the Report is submitted to the Parliament and that the Parliament shall have a debate on its basis.

14. Financial independence is an important aspect of the independence of the Human Rights Protector institution. Art. 53(2) grants Protector have “the right to participate in the work of the Parliament and its working bodies in occasion of considering the budget proposal”. In order to strengthen financial independence, the Protector should also have the right to prepare the proposal and submit it directly to the Parliament. In its opinion CDL-AD(2007)017, the Venice Commission stated that budgetary independence should be guaranteed at constitutional level.

15. The need for constitutional amendments in order to strengthen the independence of the Human Rights Protector should be reiterated.