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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

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I. Introduction

1. The present comments have been made in the light of relevant Council of Europe documents, especially Recommendation 1615 (2003) of the Parliamentary Assembly of the Council of Europe on the institution of ombudsman, the Venice Commission's opinions on relevant national legislative texts, the United Nations Principles relating to the status of national institutions for the promotion and protection of human rights (the so-called "Paris Principles"), the provisions of the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) relating to national preventive mechanisms, and the Council of Europe standards concerning specialised national anti-discriminatory bodies (ECRI's General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination adopted on 13 December 2002).

2. The comments are based upon the English translation of the text of the draft Law, as it was submitted to the Venice Commission. It may well be that some of the observations originate from a misunderstanding of the draft due to an unclear or inaccurate translation.

II. Specific comments on the draft law

Article 2

3. One of the principal novelties of the present draft Law is that it introduces provisions relating to the mandate of the Protector of Human Rights and Freedoms of Montenegro (hereinafter: "Human Rights Protector" or "Protector") as a national preventive mechanism within the meaning of Article 3 of the OPCAT. This is expressly stated in Article 25 of the draft Law (*see* below). However, the fact that the Human Rights Protector is assigned with the role of an NPM is also envisaged in Article 2 of the draft which provides that the Protector shall take measures "to prevent torture and other forms of inhuman or degrading treatment or punishment". In my view, this phrase is couched too broadly; in order to be in line with the OPCAT, the drafters could be more specific here, making a reference to the context of deprivation of liberty. So, the article could specify that the mandate of the Protector shall also cover (alongside the general function of protection of human rights and the anti-discrimination mandate) the protection of persons deprived of their liberty from torture and other cruel, inhuman or degrading treatment or punishment.

Article 3

4. As the provisions contained in paragraphs 1 and 2 of this Article are repeated in Articles 30 and 28 respectively, Article 3 might be unnecessary. As concerns paragraph 3 of the Article ("Proceedings before the Protector shall be free of charge"), it might be included in Article 28.

Articles 7-10

5. As concerns the procedure for the appointment of the Protector, Article 7 merely refers to the Constitution, providing that "the Protector shall be appointed in accordance with the Constitution". According to the Constitution, Human Rights Protector is appointed by Parliament upon proposal of the President of Montenegro (*see* Articles 82(14) and 95(5)). Further, Article 91(2) of the Constitution provides that Human Rights Protector is appointed by the majority of the members of Parliament.

6. It should be noted that already in its Interim opinion on the draft Constitution of Montenegro adopted at its 71st Plenary Session on 1-2 June 2007 (CDL-AD(2007)017), § 103), the Venice Commission criticised this provision and underlined that "[t]he constitution must... provide for the need for a qualified majority in the appointment of the ombudsman by parliament"[1]. Election of a Human Rights Protector by a broad consensus in Parliament would certainly strengthen the Protector's independence, impartiality and legitimacy and ensure the public trust in the institution.

[1] *See also the Commission's Opinion on the Constitution of Montenegro adopted at its 73rd Plenary Session, § 55-56 (CDL-AD(2007)047) and Opinion on Draft amendments to the Law on the Protector of Human Rights and Freedoms of Montenegro adopted at its 80th Plenary Session, § 11-13 (CDL-AD(2009)043).*

7. Further, the Venice Commission has found it highly questionable that the President of Montenegro should have the power to propose the Human Rights Protector[2].

8. It is evident that to comply with the above-mentioned recommendations, relevant amendments of the Constitution would be required. Nevertheless, certain improvements could be made without amending the Constitution. In particular, the law should provide for a transparent, inclusive and pluralistic procedure for selecting and proposing a Human Rights Protector, in order to avoid the perception of the Protector as the "President's candidate".

9. The term of office of the Protector is envisaged in the Constitution (six years). However, neither the Constitution, nor the current draft Law establishes whether Protector may be re-elected or not. Interestingly, the draft Law does provide for the term of office of the deputies of the Protector, specifying that they "may be re-appointed" (Article 10(2)). In settling this issue, the law-maker should bear in mind that the possibility of re-election could be seen as detrimental to the Protector's independence, constituting a great risk that his or her activities might be influenced by considerations of future re-election.

10. The draft Law contains no indication as to when the procedure for selecting and proposing a new Protector begins. Such a provision is of key importance for ensuring continuity in the running of the office. It is thus recommended to fill this gap in the draft, by specifying that the procedure for selecting and proposing a new Protector begins at least six months before the expiry of his or her term of office.

Article 11

11. It would be advisable to amend the text of the oath so as to avoid an interpretation that the Protector should protect human rights in accordance with the law.

Article 12

12. The functional immunity foreseen in this Article ("The Protector cannot be held responsible for the opinion or recommendation he/she provided while exercising his/her duty") is restrictive in several aspects. First, not only the Protector, but also his or her Deputies as well as his or her staff should enjoy immunity. Second, such immunity should cover not only "opinions or recommendations", but also other actions (e.g. decisions) of the Protector and his or her deputies. Third, this immunity should also include luggage, correspondence and means of communication of the Protector, Deputies or the staff. Finally, the draft Law should clearly specify that the immunity of the Human Rights Protector, his or her deputies and staff shall also apply after the end of the Protector's or deputies' mandate or after the members of staff cease their employment with the Protector's institution.

Article 15

13. According to this Article, the Protector or Deputy shall be dismissed, if, *inter alia*, he or she "becomes a member of a political organisation" or "is performing other public function or professionally is engaged in other activity". In my view, it would be too rigid to invoke these cases for immediately dismissing the Protector (or his or her deputy). It would be advisable to provide them the opportunity to withdraw that incompatibility, and a decision on dismissal could be taken only after the Protector or Deputy disregards the relevant official warning.

14. Similar to the issue of proposing and electing the Human Rights Protector, the draft Law does not properly regulate the procedure for dismissal of the Protector. Article 15(3) only provides that Parliament should be informed of the reasons for dismissal. This provision is clearly not sufficient given the key importance of the said issue for the effective functioning of the Ombudsman institution. The draft does not even refer to the Constitution which provides that the Human Rights Protector may be dismissed by Parliament by a majority vote of the total number of members of Parliament.

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[2] Opinion on the Constitution of Montenegro (adopted at the 73rd Plenary Session on 14-15 December 2007), § 95 (CDL-AD(2007)047).

15. It is very important for the independence of the Human Rights Protector that he or she is dismissed not by a simple majority as foreseen in the Constitution, but by a qualified majority of the members of Parliament. Such a majority is desirable in order to guarantee that the Protector cannot be removed from office because of his or her acts which were disapproved by the governmental majority on Parliament. Further, the draft Law should provide for a transparent procedure for the dismissal of the Protector, establishing that the Protector whose dismissal is envisaged, is granted the opportunity to express his or her views at the session of Parliament prior to the vote on the dismissal.

Article 21

16. The article states that the Protector "deals with general issues of importance for the protection and promotion of human rights and freedoms and cooperates with organisations and institutions dealing with human rights and freedoms". The meaning and function of this provision are not entirely clear and it may therefore be omitted.

Article 23

17. The article enumerates certain state representatives and officials who are obliged to receive the Human Rights Protector at his or request, without delay. This provision should be extended to make it clear that not only those officials but also any state or local official should have such an obligation.

Articles 24-25

18. Article 25 of the draft Law states that the Human Rights Protector "shall be the national mechanism for prevention of torture and other forms of inhuman treatment and punishment".

19. Before commenting on the substance, I would like to make two remarks of a technical nature. First, it would be advisable to start the chapter which is devoted to powers of the Protector as an NPM, with the above mentioned general provision. Second, it is recommended that the drafters refer to the precise terminology that is used in the OPCAT which is "torture and other cruel, inhuman or degrading treatment or punishment".

20. Article 24 of the draft Law stipulates that the following powers shall be assigned to the Protector, his or her Deputy and "the employee authorised by the Protector" as to members of the NPM: 1) to "inspect", without prior notice, places of deprivation of liberty; 2) to visit, without prior notification and permission, persons deprived of their liberty; and 3) to talk in private to persons deprived of their liberty as well as to other persons who may provide relevant information.

21. These powers do not fully comply with the requirements laid down in the OPCAT in relation to the national preventive mechanisms (Art. 17-23). In particular, the following important elements should be included in the draft Law: 1) the power of the NPM to carry out <u>regular</u> visits to all places where persons are or may be deprived of their liberty (it should be borne in mind that preventive regular visits are a fundamental feature of NPMs); 2) the right of the members of the NPM to be granted access to all relevant information concerning, in particular, the number of detainees and places of detention, the treatment of detainees and their conditions of detention; 3) a legal guarantee that the persons who have cooperated with the office of the Protector will not suffer any retaliation; 4) the right of the Protector to receive responses from the authorities vis-à-vis the recommendations issued by him or her as an NPM and the obligation of the competent State authorities to enter into a dialogue with the Protector on possible implementation measures.

22. More generally, it would be advisable to envisage in the draft Law the establishment of a specialised group that could assist the Human Rights Protector in his or her function as an NPM. Consequently, relevant entitlements and responsibilities as foreseen in the OPCAT should be assigned to the members of this group. The law should lay down relevant eligibility criteria for the NPM membership as stipulated in the OPCAT as well as provide for the open and transparent procedure for appointment and dismissal of such members. I wish to add that such groups have been set up within the Ombudsman institutions in a number of countries.

Article 27

23. The Article states that the Human Rights Protector "shall be the institutional mechanism for protection against discrimination". In fact, the Protector was designated as an anti-discrimination body under another Act, namely the Law on the Prohibition of Discrimination adopted on 29 July 2010. Chapter III of that Law provides for specific powers of the Human Rights Protector in the field of combating discrimination. In addition to them, the present draft Law stipulates a very important provision that extends the enforcement powers of the Protector to private persons[3].

24. It is regrettable that the draft Law does not set out the competencies of the Human Rights Protector as an anti-discrimination mechanism and even does not make any reference to the Law on the Prohibition of Discrimination in which those competencies are foreseen.

25. It would be advisable to include in the draft Law a provision that the Human Rights Protector may initiate judicial proceedings on behalf or in support of alleged victims of discrimination. Further, the draft should indicate what concrete measures can be taken by the Protector if private persons who have committed a discrimination act fail to comply with the Protector's recommendations.

Article 28

26. Paragraph 3 of the Article provides that for the Human Rights Protector to act on his or her own initiative the consent of the victim would be required. In my view, in certain cases, in particular, where serious human rights violations have allegedly occurred or the rights of particularly vulnerable persons have allegedly been violated, the Protector should be entitled to act without seeking such consent.

Article 32

27. The Article establishes that a complaint may be filed with the Human Rights Protector "within six months as of the day of cognition about the violation of human rights and freedoms, or within one year as of the day of the violation".

28. Fixing such strict deadlines does not appear to be fully justified. The complaint proceedings before the Human Rights Protector should be flexible given the specific, non-judicial nature of the Ombudsman institution. It is thus recommended to insert a new paragraph, indicating that in exceptional cases the Human Rights Protector may act after the expiry of the above-mentioned time-limit.

Article 46

29. The Article should specify that the Rules of Procedure shall be approved by the Human Rights Protector.

Article 47

30. It is recommended to insert in this Article the following amendments; thus, it should be specified that: 1) the Annual Report of the Human Rights Protector is submitted to Parliament; 2) there should be a parliamentary debate on the Report; 3) the Report should contain a separate section on the activities of the Human Rights Protector as an NPM.

Article 53

31. It is essential that the Human Rights Protector is directly involved in the budgetary procedure. However, it would not be sufficient if this involvement is only limited to the participation of the Protector in the budgetary session of Parliament as it is foreseen in paragraph 2 of this Article. Further safeguards necessary for ensuring the functional independence of the institution would be required. In particular, two important elements should be introduced: 1) that the financial resources of the Human Rights Protector shall be provided in a separate budget allocation; 2) the annual budget allocation shall be proposed by the Human Rights Protector to Parliament.

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[3] Introduction of such a provision has been strongly recommended by the Venice Commission in its Opinion on the draft Law on the Prohibition of Discrimination adopted in October 2009 (see CDL-AD(2009)045, § 42).