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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION

**ON THE DRAFT LAW
ON THE PUBLIC ATTORNEY (OMBUDSMAN) OF
“THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA”**

**Adopted by the Venice Commission
at its 54th Plenary Session
(Venice 14-15 March 2003)**

on the basis of comments by:

Ms. Serra Lopes (Substitute-member, Portugal)

Introduction

By letter dated 3 April 2003, the Ministry of Justice of “the Former Yugoslav Republic of Macedonia” requested to provide an opinion on the Draft Law on the Public Attorney (Ombudsman) (CDL (2003) 19). Following this request, the Venice Commission appointed Ms Serra Lopes as rapporteur on this issue. The Commission adopted her comments (CDL (2003) 20) set out below at its 54th Plenary Session (Venice, 14-15 March 2003).

A. GENERAL COMMENTS¹

1. The Draft Law on the Public Attorney is a very good one and contains many statements to applaud as, for instance, those of Articles 26 and 31, amongst many others.
2. It seems to me that the Public Attorney, as a unified institution, adds to the aims clearly stated in the Ohrid Agreement of “*promoting the peaceful and harmonious development of civil society while respecting the ethnic identity and the interests of all Macedonian citizens*”. Actually, splitting the institution into a Public Attorney for the majority and a deputy for the minority issues would divide and add nothing to the desirable peaceful unification.
3. In Bosnia-Herzegovina it was created an Ombudsman which was composed of three persons of three different ethnic origins. But even that Ombudsman is a **unified institution**, as all the claims are appreciated by the three persons and for each claim there is a **unique decision signed by the three**. Besides, it is envisaged that, in a near future, having three persons will no longer be necessary.
4. In this case, I fear that the possible division, with the consequent different decisions and different approaches to the problems, would weaken the role of the Ombudsman and lead to other divisions.

B. COMMENTS ON SPECIFIC ARTICLES OF THE LAW DRAFT

I - BASIC PROVISIONS

Article 2: The Public Attorney is a body of the Republic of Macedonia that protects the constitutional and legal freedoms and rights of citizens when they have been violated with acts, actions and failures by bodies of state administration and by other bodies and organisations having public mandates, and who undertakes actions and measures for the protection of the principle of indiscriminate and appropriate and just representation of the members of the communities in bodies of state government, bodies of the units of local self-government and public institutions and services.

1. Legal persons cannot apply to the Public Attorney? This limitation impoverishes the potential scope of action of the Public Attorney. According to information provided, this could be a problem of translation, though.

¹ *The present opinion has been prepared in parallel with an opinion by Mr. Monette, Federal Ombudsman of Belgium (see document DG II(2003)6) and comments by the Office of the Commissioner for Human Rights of the Council of Europe.*

2. The word “*citizens*” reduces the possible field of action of the Public Attorney.
3. It is true that Article 77 (2) of the Annex A to the Ohrid Agreement says that “*The Public Attorney protects the rights of citizens when violated.*”

It is also true that the *Basic Principles* of the same Agreement refers to “*citizens*”. Anyhow, some provisions of Annex A have references to the word “*person*” like in Article 7 (4) “*Any person living in*”, or Article 8 (1) “*equitable representation of persons belonging*”. Maybe it could be possible, with a view to widening the scope of the Law, to use the word “*persons*” instead of “*citizens*”.

II - TERMS OF APPOINTMENT AND DISCHARGE OF THE PUBLIC ATTORNEY

Article 5: The Assembly of the Republic of Macedonia shall elect and discharge the Public Attorney with a majority vote of the total number of representatives belonging to the communities that do not constitute the majority in the Republic of Macedonia. The Public Attorney is elected for a term of eight years, with the right to a second term in office. ...

1. The way according to which an Ombudsman is appointed is of the utmost importance as far as the *independence* of the institution is concerned and the independence of the Ombudsman is a crucial corner stone of this institution.

In order that the Public Attorney’s investigations will be credible to both public and the government, the procedure of appointment must be a transparent one. In addition, the procedure of appointment must be an election, as set out in the Draft Law.

Besides, the appointment of the Public Attorney by a large majority of Members of the Parliament (MPs) is a warrant that the person chosen is supported by a large part of society, with the consequences thereof like independence and impartiality.

What the Draft Law does not regulate is how someone is proposed to the election. Who proposes? How many candidates must be proposed?

2. The statement of *Article 5, first paragraph*, is not quite clear to me. However, according to Article 77 of Annex A to the Framework Agreement, 13 August 2001, I assume that the Public Attorney is appointed by a majority of votes of the total number of MPs, within which majority there must be a majority of votes of the total number of MPs who belong to non-majority communities in the Republic of Macedonia.

In other words, is it necessary that the Public Attorney gathers the majority of the total number of votes in the Parliament **and** the majority of the total number of votes of MPs not belonging to the majority community in Parliament? If that is so I fully agree.

3. In the same first paragraph, does the clause “with the right to a second term in office” mean that he may, eventually, be reappointed, according to a similar procedure of the first appointment?

If it is so, it would be better to make it clear, in order to avoid misunderstandings.

If it is not so, if the Public Attorney **has the right** to a second term — what would seem odd — than it should be clarified and said what that “*right*” depends on. Otherwise it would be easier to say that he is appointed for a period of 16 years. And this **also** would seem odd.

The Commission was informed that this issue might be due to a problem of translation.

Article 6: A person who meets the general requirements determined by the act on employment in state bodies, who is a law graduate with over nine years' work experience in legal matters and with a proof of positive performance in the field of the protection of the rights of citizen, may be elected Public Attorney. ...

Usually the Ombudsman does not have the power to make decisions that are binding on the government and the Ombudsman makes *recommendations*. In most countries the power of the Ombudsman resides exactly in this lack of power.

This is one of the reasons why some laws state that the appointment of the Ombudsman may only fall upon a citizen who enjoys a **well-established reputation for integrity and independence**, or any similar formulation.

I would advise to add something of the kind to the requisites necessary (Article 6) to be elected Public Attorney.

Article 7: Prior to coming to office, the Public Attorney shall take an oath before the Assembly of the Republic of Macedonia, which reads as follows: "I swear that I shall carry out the office of Public Attorney conscientiously, impartially and responsibly, protect the rights of citizens and abide by the Constitution, laws and international treaties ratified in accordance with the Constitution of the Republic of Macedonia."

1. If it is accepted to enlarge the field of action of the Public Attorney in order to include all the persons that, not being “*citizens*”, like foreigners residing in the territory or legal persons, should also be under the protection of the Public Attorney, than the oath contained in this Article should be rephrased accordingly.
2. I assume that the expression “*international agreements*” means the ratified international treaties and international law binding Macedonia.
The Commission was informed that this might be a problem of translation.

Anyhow, it would be better to clarify it, not only in the oath contained in this article, as well as in Article 3, second paragraph.

Article 8: The function of Public Attorney is incompatible with the performance of another public function and profession or with being a member to a political party.

The Public Attorney function should not be compatible with another function or profession, public or private, neither with the belonging to political parties or unions. It could eventually be compatible with lecturing but, even in that case, the activity should be exercised without

compensation.

Article 9: The Public Attorney is discharged: 1) if he/she so requests; 2) if he/she is sentenced for a criminal offence to an unconditional prison term of at least six months; 3) if he/she permanently loses the psychophysical capability of carrying out the office of Public Attorney, which is determined on the basis of documented findings and the opinion of a competent medical institution; 4) if he/she fulfils the conditions for retirement.

Each one of the situations described in 1), 2), 3) and 4) of this article is enough to discharge a Public Attorney. This being so it seems advisable to make a slight alteration in this article in order to make clear that the Public Attorney may be discharged on the ground of each one of those cases.

III - JURISDICTION AND MANNER OF WORK

Article 13(1): The Public Attorney undertakes actions and measures to protect from unjust delay of court procedures or from the work of the court services, as well as actions and measures to protect from tardy performance of other administrative tasks and jobs defined by law. ...

Paragraph 1 of Article 13 touches a rather delicate matter, as it is generally understood that the activity of the Ombudsman should not interfere with the judiciary.

To say that the Public Attorney "*shall undertake actions and measures*" is too vague. It should be stipulated which "*measures and actions*" are at stake.

Article 15(2): A language that is spoken by at least 20% of the citizens and its alphabet is also an official language in the procedure being conducted before the Public Attorney.

1. I presume that Article 15, paragraph 2 will only be applicable when there is a complaint presented by someone speaking another language, spoken by at least 20% of the population, or when are in cause interests of that minority.
2. Here again the word "*citizen*" limits the action of the Public Attorney. Besides, the concept of "*citizen*" is a legal one. This is so much so that, analysing this statement, I felt forced to use the words "*population*" and "*persons*" instead of "*citizens*" whose exact meaning in Macedonian Law I don't know.

Article 17: The petition addressed to the Public Attorney shall be signed and contain personal data about the petitioner and contain the circumstances, facts and evidence on which the petition is founded. The petition shall contain the body, organization, institution or person to which the petition refers; it shall also be noted whether the petitioner has already submitted legal remedies and which legal remedies have been submitted. The petition to initiate a procedure is submitted in writing or orally in minutes. There is no prescribed form for the petition initiating a procedure. The petitioner is exempt from paying fees for the procedure before the Public Attorney.

This article, as well as the previous one, admits complaints presented by third persons. It is a good provision, as well as it is a good measure not to impose many formalities to the presenting of complaints.

Article 21: The Public Attorney shall not initiate a procedure based on a petition: ...

- if the petition was submitted by an unauthorised person; ...
- if, based on the petition itself, the circumstances and facts and evidence enclosed, it derives that it does not refer to a violation of the constitutional and legal freedoms and rights against the petitioner by the bodies of state administration and by other bodies and organizations having public mandates, i.e. a violation of the principle of indiscrimination and appropriate and just representation of the members of the communities in the bodies of state administration, bodies of the units of local self-government and public institutions and services of public interest;

Item 2

Sometimes, reading a complaint put forward by an unauthorized person, the Public Attorney may conclude that, although not authorised by reasons that, if known, could eventually lead to exempt the authorisation, the complaint should be examined.

In those cases the Public Attorney should be able not to discard the submission. (see Article 22)

Item 6

The Latin formula “*id est*” or “*i.e.*” used in this item, although of generalized use in other countries —it is used in England and in Portugal, for instance —, can eventually create problems of translation.

Article 22: If the Public Attorney initiates a procedure on his/her own initiative or if another person on behalf of the damaged party submits a petition, in order to initiate a procedure it is necessary to obtain the agreement of the damaged party that has had his/her constitutional and legal rights violated or has had the principle of indiscrimination and appropriate and just representation of the members of the communities violated. ...

The request for “agreement” when the Public Attorney begins a procedure on his own initiative, or when a third person presents the complaint, may represent a severe limitation to the functioning of these two rather good initiatives.

Actually, when the Public Attorney acts on his own initiative, one could presume he knows better, and the agreement should not be necessary.

On the other hand, when a third person presents the claim, it should be possible for the Public Attorney to act without agreement when it is impossible or very difficult to obtain it and he thinks advisable to do without it, as said above in Article 21.2.

Article 26(3): In case when a violation of freedoms and rights has been determined, the Public Attorney may announce the case in the mass media at the expense of the body under Article 2 of this Law, to which the case refers.

I assume that this paragraph applies to the cases where *obstruction to the work of the Public Attorney* occurred and infringement of freedoms and rights was in cause.

Article 30: (1) The Public Attorney, within the framework of his/her competence, also follows the conditions in terms of ensuring respect and protection of citizens' freedoms and rights and respect of the principle of indiscriminate and appropriate and just representation of the members of the communities by paying visits and having insights into the bodies of Article 2 of this Law.

(2) The Public Attorney may pay visits and have insights under paragraph 1 of this Article even without prior announcement and approval.

The meaning of paragraph 2 of this Article does not seem clear enough. It could be rephrased.

IV – THE PUBLICITY OF THE WORK

Article 37(3): The report of the Public Attorney is announced in the mass media.

This provision says that the Public Attorney report shall be announced in the mass media and, indeed, the media are the best allies of Ombudsmen.

To be announced means that the report is given to the media and that they can use it according to their right to inform and their peculiar taste to explore and expose divergences and criticisms existing among bodies of the State.

The Draft Law does not say that the report shall be *published* by the mass media, but that it shall be *announced* in the mass media, what is a quite different thing. The Commission was informed that this issue might be based on a problem of translation.

One good form of publicizing nowadays is to put things in the Internet.

Article 38(3): Special funds are provided for the announcement of the reports, announcements and other undertaken measures in the part of the budget earmarked for the Public Attorney.

The "*special funds provided for the announcement of reports*" does not contradict what was said above, as the reports must be **published**, i.e. printed, in order to be announced, i.e. presented to the authorities and distributed among the different mass media.

V - LEGAL POSITION OF THE PUBLIC ATTORNEY

Article 41: The Public Attorney and Deputies to the Public Attorney, who have been employed until their election, shall have the right to return to the job they have done before or to another job that corresponds with the type and level of their professional education, within three months since their mandate terminated.

The right of the Public Attorney and his deputies to return to the previous jobs includes public and private sectors or only the public sector? This should be clarified.

Article 50: The Public Attorney adopts a Book of Procedures for his/her work. The Book of Procedures specifies the manner of work and the procedure before the Public Attorney.

In order to make the Public Attorney institution more accessible to people and more widely known, it could be a good idea to publicise the Book of Rules.

Here again, a very good way of publicising something is to put it in the Internet.