Venice Commission
Commission de Venise

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

THE COMMISSIONER
FOR HUMAN RIGHTS

LE COMMISSAIRE AUX
DROITS DE L´HOMME

Strasbourg, 6 December 2004

CDL-AD(2004)041
Or. Engl.

Opinion no. 318/2004

JOINT OPINION ON THE DRAFT LAW ON THE OMBUDSMAN OF SERBIA

by
the Venice Commission,
the Commissioner for Human Rights
and
the Directorate General of Human Rights
of the Council of Europe

Adopted by the Venice Commission
at its 61st Plenary Session,
Venice, (3-4 December 2004)

on the basis of comments by

Mr R. Lavin (Member, Sweden)
Mr K. Tuori (Member, Finland)

1. By letter of 4 November 2004, the Minister for Public Administration and Local Self Government of Serbia, Mr. Loncar, requested the Council of Europe to give an opinion on the draft Law on the Ombudsman of Serbia (CDL(2004)113, hereinafter the "draft"). The present opinion on the draft have been prepared jointly by a working group of the Venice Commission based on comments by Messrs Lavin and Tuori, the Office of the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe.

2. This opinion takes into account information given and arguments developed at a roundtable organised by the Ministry for Public Administration and Local Self government of Serbia, the OSCE Mission to Serbia and the Council of Europe (Belgrade, 22 November 2004), in which Mr. Markus Jaeger from the Office Commissioner for Human Rights and Mr. Schnutz Dürr from the Secretariat of the Venice Commission presented a draft version of the present opinion. The round table was attended by the Prime Minister of Serbia, Mr. Kostunica, the Minister for Public Administration and Local Self Government of Serbia, Mr. Loncar and his deputy Ms Prelic, the Secretary General of Legislation of the Government of Serbia, Mr. Balinovac, the chief legal expert for the Serbian Government on this issue, Mr. Milkov, OSCE experts, representatives of several embassies and non-governmental organisations.

3. The Commissioner for Human Rights of the Council of Europe, Mr. Alvaro Gil-Robles, endorses this text, while underlining the responsibility which is entrusted to him under Article 3c of his mandate to facilitate the setting up of human rights institutions in Council of Europe member States (Resolution 99(50) of the Committee of Ministers). This opinion has been adopted at the 61st Plenary Session of the Venice Commission (Venice, 3-4 December 2004.).

General remarks

4. These comments take into account the relevant texts adopted by the Committee of Ministers of the Council of Europe and in particular Recommendation No. R (85) 13 on the Institution of the Ombudsman and Recommendation R (97) 14 on the Establishment of Independent National Institutions for the Promotion and Protection of Human Rights, the Recommendation on the Institution of Ombudsman of the Parliamentary Assembly of the Council of Europe 1615 (2003) as well as the so-called "Paris Principles" embodied in resolution 48/134 on National Institutions for the Promotion and Protection of Human Rights of the General Assembly of the United Nation, dated 20 December 1993 (A/RES/48/134).

5. The draft Law on the Ombudsman of the Republic of Serbia (hereinafter called "the draft") is welcomed as an important step to guarantee fundamental rights and freedoms in Serbia. The powers attributed to the ombudsperson are wide reaching and seem to enable the future ombudsperson to work effectively.

6. While the original Swedish term "ombudsman" is gender neutral, we encourage the use of gender-neutral language in English, therefore we refer below to "ombudsperson" instead of "ombudsman".

7. Particularly welcomed are provisions on the ombudsperson's mandate to the promotion, in addition to the protection, of human rights and fundamental freedoms, the ombudsperson's right

to appeal to the Constitutional Court, his or her right of unhindered access in private to persons deprived of their liberty and the ombudsperson's budgetary independence.

8. Nevertheless, some provisions would need to be amended in order to be in compliance with applicable European and international standards. Important elements are in particular:

1. It would be preferable to have the institution of the ombudsperson guaranteed not only on the legislative level but also on the constitutional level.
2. It would be preferable to have the ombudsperson appointed and dismissed by a qualified majority in Parliament.
3. The criteria for becoming ombudsperson should not be restrictive.
4. The ombudsperson, his or her deputies and the staff of the secretariat should benefit from a functional immunity.
5. The competence of the ombudsperson should cover all persons and not only citizens.
6. The requirement of exhaustion of judicial remedies before the ombudsperson can take up a complaint would go counter the very idea of the ombudsperson institution. In general, the procedure provided for in Chapter IV of the draft is procedure is too rigid and court-like.
7. It should be made clear that the ombudsperson will be able to inspect all places where persons are deprived of their liberty by a public authority.
8. The ombudsperson should have investigative powers.
9. The staff of the ombudsperson should provide assistance in order to enable individuals to fulfill formal criteria for a complaint.

Remarks relating to specific Articles

9. Article 1: In order to protect the institution of an independent ombudsperson from political fluctuation, it would be preferable to guarantee its existence and basic principles of its activity in the Constitution. Given the constitutional context in Serbia, it could be envisaged to establish this guarantee at a later stage.

10. Article 1 and Article 6 of the draft refer to the human rights of citizens. **Beneficiaries of human rights and fundamental freedoms are all persons under the jurisdiction of Serbia,** be they citizens or not. Consequently, reference needs to be made to persons instead of citizens.

11. Article 3 provides for the appointment of the ombudsperson by the National Assembly by simple majority. However, a broad consensus for the choice of the ombudsperson is important in order to ensure public trust in the independence of the ombudsperson. Consequently, a **qualified majority in Parliament** for the appointment of the ombudsperson is appropriate **(2/3 or 3/5 of votes cast).** If existing constitutional provisions render the fulfillment of such requirement impossible, other possibilities should be explored, which would allow to come to the same result. However, such modalities would have to be safeguarded on the level of law.

12. Article 3: It should be the Committee for Constitutional Issues that deals with the election and the dismissal of the ombudsperson because the institution of the ombudsperson is fundamental in the State and because the work of this Committee is more likely to be geared toward human rights question (Article 3). (Accordingly, Article 9 should state that it is this

Committee of the Assembly that is empowered to make a proposal for dismissal of the ombudsperson.) All candidates should be heard in a public session. All political groups in Parliament should have the right to present candidates to the Committee.

13. Article 4: The **criteria for becoming ombudsperson are too restrictive**. They could be replaced by the more general requirement that the candidates should be "persons of a high moral character", as can be found in most national and international mandates. The requirement of holding a law degree should not be a prerequisite for being ombudsperson. Article 4 also refers to the necessity for an ombudsperson to have "at least ten years of experience in jobs related to the purview of the ombudsperson". This seems vague as it is unclear what the "purview of the ombudsman" could be. In a country in transition, the length of ten years of experience seems too long as it may exclude competent persons from eligibility to the office of the ombudsperson, who were unable to hold certain positions due to their opposition to the previous regime.

14. Article 5: In order to increase the independence of the deputies, the drafters of the Law might consider providing for the same the process for appointing and dismissing the deputies as for the ombudsperson him or herself, i.e. the Assembly could also appoint the deputies. If this alternative were to be followed, the order of the appointment of the deputies would also determine their order in replacing the ombudsperson. On the other hand it has to be recognized that the mutual trust between the ombudsperson and his or her deputies might be better ensured by the current wording of the draft.

15. Article 5 and Article 12, first alternative: There may be valid reasons for having four deputy ombudspersons and to have only one of them who replaces the ombudsperson. While the **distribution of work between the ombudsperson and his or her deputies** is not specified in the draft, this could of course be provided for in the internal rules of the ombudsperson (Articles 34 and 36). In any case, the draft should reflect the pluralistic nature of Serbian society both as concerns gender and ethnic composition. Concerning Article 5.5, please refer to the comments related to Article 4 on requisites to become an Ombudsperson.

16. Article 7: The drafters might consider to allow the ombudsperson his or her deputies to pursue teaching activities. However it would be preferable to replace the list of public offices, which cannot be held by an ombudsperson, with a more comprehensive provision stating that the ombudsperson shall not hold any position which is incompatible with the proper performance of his or her official duties or with his or her impartiality and public confidence therein. It is noted that a more general formula is used by the drafters in Article 9 (reasons for dismissal).

17. Article 7.3: Without knowledge of the provisions of the law regulating the conflict of interests in performing public functions no comment can be made relating to the application of the law on the ombudsperson.

18. Before Article 8: The **ombudsperson, his or her deputies and the staff of the secretariat should be immune from legal process in respect of works spoken or written and all acts performed by them in their official capacity and within the limit of their authority** (functional immunity)**.**

19. Article 9: Even more important for the independence of the ombudsperson at the time of appointment is the issue of the **majority required for the removal of the ombudsperson from office**. Here, a qualified majority is desirable in order to guarantee that the ombudsperson cannot be removed from office because of his or her acts which were disliked by the governmental majority on Parliament. This solution may be limited by the provisions of the current Constitution and could be envisaged at a later stage. If indeed the guarantee of dismissal by qualified majority were introduced, on the other hand, the reasons for dismissal need not be stated in Article 9 given that as the ombudsperson needs also the trust of Parliament. In order to guarantee transparency in the process of the dismissal of the ombudsperson it is necessary to provide for a public procedure. The ombudsperson whose dismissal is envisaged, must be heard in public prior to the vote on the dismissal. A prior consultation of the Constitutional Court could be envisaged.

20. Article 13: This article should be consistent with Article 1 empowering the Ombudsperson with a broad based mandate to promote and protect human rights and fundamental freedoms. In view of the necessity for the executive to follow **principles of good administration**, it may be useful to empower the ombudsperson to intervene not only when the are irregularities, i.e. violation of legal norms but also when such principles have been disregarded (e.g. humiliating behavior in relation to individuals, ostentatiously slow processing of affairs) and control the objectivity and impartiality of the work of administrative bodies. In this respect, the European Code of Good Administrative Behaviour of the European Ombudsman can be a source for inspiration. Only general, "political" decisions of the Government as a whole should be excluded from the scope of the competence of the ombudsperson; **ministerial and governmental decisions directly affecting individuals should be open to control by the ombudsperson**. The work of Parliament, its committees and its members should be excluded from the control of the ombudsperson.

21. Article 15 provides that the ombudsperson can "launch initiatives with the Government for the amendment of laws or other regulations or general acts". Given the fact that Parliament is the legislator and also the nature of the ombudsperson as a parliamentary institution, recommendations for the amendment of laws should also be directed to Parliament. Likewise, the Parliament should be obliged to consider such recommendations. The reference to "citizen's rights" should be replaced with the "rights and fundamental freedom of all persons".

22. Article 16: It is particularly welcomed that Article 16 provides for the power of the ombudsperson to initiate proceedings **before the Constitutional Court**. The legislation on the Constitutional Court may have to be amended accordingly to enable the Court to accept these requests. This article could be reformulated to state that the ombudsperson can initiate proceedings before the Constitutional Court for the assessment of the constitutionality of laws, and the constitutionality and legality of other regulations and general acts which govern issues related to the rights and freedoms of all persons.

23. Article 17 makes the ombudsperson a powerful institution. This is to be welcomed in principle. Nevertheless, dismissal of an official from office is a very severe penalty. Reference should be made in the first place to **disciplinary procedures** and only as a means of last resort to have recourse to **criminal proceedings against officials**. It should be made clear that disciplinary measures can only be recommended by the ombudsperson but it will be up to the

competent bodies to decide on the imposition of such measures. In any case, such measures should be available only against officials who have clearly violated legislation and refuse to remedy their acts. This also applies to Article 18.3, which establishes dismissal as the penalty for non-cooperation with the ombudsperson without providing for less drastic measures in minor cases.

24. Article 18: The ombudsperson should be able also to interview officials of administrative authorities and should, in general, have **investigative powers**.

25. Article 19, providing for **unhindered access of the ombudsperson to persons deprived of their liberty**, is another provision that is particularly welcomed. In order to make the scope of this access clearer and broader, the draft should provide for "free access to all places where persons are deprived of their liberty by a public authority". This should include not only penal institutions but also prisons, police detention centres, military prisons, psychiatric institutions and other similar sites (e.g. centres for the detention of foreigners pending expulsion). The wording of the last part of the sentence could be amended to read: "and interview these persons in private".

26. Article 21: In line with the above comment relating to Article 13 and in order to comply with the "Paris Principles", consideration should be given to make reference to the ability of the ombudsperson to receive complaints, monitor, investigate, offer good offices, take preventive steps, make recommendations and advise on matters in relation to his or her functions.

27. Article 22: The scope of powers of the ombudspersons should not cover only outright violations of rights but also of the principles of good administration (see above). The **availability of a legal remedy should not prevent a person from filing a complaint** with the ombudsperson but the latter should have the obligation to advise the complainant about legal remedies and about the fact that the complaint to the ombudsman does not prevent the expiry of deadlines for such remedies. In Article 22.5 of the draft it could be specified that the rejection of anonymous complains does not prevent the ombudsperson to act *ex officio* in a matter.

28. Article 23 could provide for an interruption or extension of the one year limitation period in exceptional cases. This also applies to Article 25.1.2.

29. Article 24: The **formal requirements for complaints** are **too rigid and court-like**. At least, it should be provided that the **staff of the ombudsperson should assist individuals in fulfilling the formal criteria for a complaint** (obligation of *manu ducere).*

30. Article 25: Too strict formal requirements concerning the complaints contradict the very idea of the institution. This article could be deleted.

31. Article 26.2: The ombudsperson should have discretion not to communicate the identity of the complainant to the administrative authorities if he or she deems this necessary

32. Article 28.4: The clause "is obliged to proceed" is too far reaching. From the very nature of the institute of **ombudsperson**, it follows that he or she **can only make recommendations**. There cannot be a direct obligation to follow these recommendations. However, there should

indeed be an obligation for the administrative authority to react within a given time span to the ombudsperson's recommendation, either by accepting it and redressing the situation, or by giving a motivated refusal. The 15 days time span for reaction seems unrealistic and should only apply to exceptional cases where irreparable harm to a human right of the claimant is to be feared. In normal cases the administrative authorities should be given between one and two months for reaction.

33. Article 29 refers to Articles 26 through 28 but Article 27 is not relevant in respect of *ex officio* procedures.

34. Article 31 should make it clear that no hierarchical relationship exists between the ombudsperson of the Republic and regional or local ombudspersons.

35. Article 33: The **budgetary independence** provided for in Article 33 is a very positive element. In addition, explicit reference should be made in the first paragraph to *adequate* provision of funds for the effective and efficient functioning of the office. In addition, (this may be a question of translation,) it seems that the Government is obliged to include the ombudsperson's draft proposal into the global draft budget submitted to Parliament without any change ("as an integral part").

36. Article 34: The criteria to become Secretary General seem too restrictive.

37. Article 36.1 seems to repeat Article 34.3, only adding the deadline of 30 days. Instead, reference to Article 34.3 could be made in Article 36.1. The deadline seems very short, given that the first ombudsperson will have to deal with the question of premises, recruitment of staff at the same time.