



Strasbourg, 27 November 2006

Opinion no. 397 / 2006

CDL(2006)088
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

LAW ON THE HUMAN RIGHTS DEFENDER OF ARMENIA

Comments by

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The Council of Europe has turned to me with a request for an opinion on the Law of the Republic of Armenia on the Human Rights Defender and amendments introduced in this Law on 1 June 2006.

I am pleased to share my comments and suggestions from the perspective of my many years of experience in the field of human rights, including most recently as the international Ombudsperson in Kosovo.

It is an undisputed fact that institutions like the Ombudsman hold a strong, important and permanent position among the range of institutions that form the infrastructure of a democratic system based on the rule of law and human rights. Recently, more and more such institutions are being established, which are clearly focused, first and foremost, on human rights protection.

One example for this is the institution of the Human Rights Defender in the Republic of Armenia. The possibility for this type of institution to play an appropriate role within the State depends on many political, social and legal factors. Such an institution must assume its proper place within the constitutional system, possess a sufficiently broad scope of competence as well as a range of legal instruments allowing it to effectively stimulate the legal sphere and practice in significant human rights areas. An important characteristic of an effectively operating institution of this type must be its independence, particularly with relation to the Executive. Therefore, special significance should be given to its constitutional and statutory safeguards, including those involving the institution's budget. The success of such institutions depends to a significant degree on its moral and professional authority within the structures of the State and within society. Thus, it is of utmost importance to establish *inter alia* appropriate criteria and an adequately transparent procedure for appointing or electing the Human Rights Defender as well as guarantees as to the high professional qualifications of his/her staff.

With this in mind, I have the following in-depth comments and suggestions regarding the Law of the Republic of Armenia on the Human Rights Defender.

Re: Article 2

The role and responsibilities of the Human Rights Defender have been defined too narrowly. Of course, in each case the scope of such responsibilities is based on political decisions and expectations associated with the existence and operation of this type of institution. However, the trends of recent years, as well as examples of similar institutions established in other countries, have shown that the areas of activity of the Human Rights Defender in Armenia should be expanded. My suggestion would be to follow UNMIK Regulation No. 2006/06 on the Ombudsperson Institution in Kosovo, a very good example in my opinion, which states in Section 1 that this institution “shall ***monitor, promote and protect*** the rights and freedoms of natural and legal persons [...] in order to ensure that all such persons are able to exercise effectively the human rights and fundamental freedoms safeguarded by...”.

In relation to the “state and local self-governing bodies and their officials” that would be subject to the Human Rights Defender's jurisdiction, it is worth stressing that the respective provisions should be interpreted in a manner that allows for the broadest possible spectrum of public bodies to fall under the jurisdiction of the Human Rights Defender.

Re: Article 3

Para. 1

Concerning the qualifications required from candidates for the Human Rights Defender, I suggest refraining from establishing an age barrier and to focus instead on those aspects that are most important in this respect. It is worth considering whether the candidates should need to have a legal background. However, there is no uniform approach to this issue among the Council of Europe's member states.

Para. 2

I am pleased to note that there has been a departure from the requirement that the candidate for the Human Rights Defender should be nominated jointly by the President of the Republic and a group of parliamentarians. Considering the need to exercise an exceptional solicitude for the independence of the Human Rights Defender and to create his/her appropriate "image" within society, I consider it necessary to abandon this option. It should be sufficient for a candidate to be recommended to the parliament by a sufficiently large group of deputies. In this way, nobody will perceive the Ombudsman as being "the president's man". The institution of Human Rights Defender should in all aspects (and in a natural manner) be clearly linked to the Parliament.

The condition that the appointment shall be made by a qualified majority of 3/5 of the total number of deputies, included in the Constitution and accordingly reflected in the Law, is of utmost importance. Political practice shows that such a qualified majority sufficiently guarantees that in order to appoint the Human Rights Defender, a political agreement between the majority parties and at least part of the opposition will always be indispensable.

Apart from that, it may be worthwhile to consider whether at least two (or three) candidates need to be proposed for the office of the Human Rights Defender, including at least one woman.

In the text of the oath, I suggest dropping the word "citizen" found at the end. The Human Rights Defender is supposed to assist each individual staying within the territory of the Republic of Armenia, whose rights and freedoms are under threat. This is acknowledged by the text of the Constitution, which uses the term "everyone".

Para. 4

The Constitution does not provide the opportunity to hold the office of the Human Rights Defender for longer than one six-year term. The legislator is therefore bound by this constitutional provision. This solution, found among the amendments, is by all means justified. The possibility of holding office for one suitably long period (a six-year term of office seems to fulfill this condition) constitutes a crucial safeguard for an Ombudsman's independence. It would help avoid the accusations that his/her manner of operations and his/her opinions or recommendations – especially at the end of the period in office – are dictated by efforts to win the favors of politicians and ensure reelection for a second term.

Re: Article 4***Para. 1***

The possibility for the Human Rights Defender to perform other activities should be more limited than it is in the law. Obviously, this limitation results from the condition that an Ombudsman should be independent, but also from the obligation that the office-holder should be able to focus on duties related to this very demanding office. I would propose that the legislator follow certain solutions found for this issue, for example in Poland, where the exception to the prohibition of other activities is limited to the post of university professor.

Para. 2

Moreover, holding office in an independent manner also requires the Human Rights Defender to not be a member of any labor union and to refrain from performing any public activity that cannot be reconciled with his/her status as the Human Rights Defender.

Re: Article 5***Para. 1***

There is no need for the second sentence. The position of the Human Rights Defender in relation to other authorities and institutions has been set out clearly enough in the Constitution and in Article 2 of the Law.

Re: Article 6***Para. 2***

The procedure for the termination of the Human Rights Defender's mandate prior to the end of his/her term of office is extremely important. In this case, we are dealing with various types of situations. An absolutely objective or random circumstance (e.g. death) on the one hand is very different from the early termination of the mandate due to incompatibility or removal from office, which require the Parliament to assess the situation and then decide. There should be different procedures for each situation.

In connection to the early termination of the mandate, the act must also clearly settle whether: 1/the successor will hold office only until the end of his/her predecessor's term of office or whether: 2/he/she will be appointed for a full six-year term.

Article 7***Para. 1***

The second part of this paragraph deals with an issue that is very sensitive for every Ombudsman and concerns the question of whether and to what extent he/she may intervene in court cases. It is clear that the legislator has ultimately chosen the option of non-intervention in

such cases. The direction in which solutions related to this question will point depends on the political decision of the legislator. One may however discuss the extent of the Human Rights Defender's intervention in cases dealt with by prosecution offices and courts but limited to ensuring that these cases are conducted within a reasonable time limit and that court decisions are taken within a reasonable time and are diligently and properly executed. However, one can also consider another model similar to the one existing in Poland, where the Ombudsman's powers in this area are significantly broader and include *inter alia* the right to demand the initiation of proceedings in civil and administrative cases and the right to participate in them, the right to demand the initiation of criminal proceedings in cases concerning criminal offences prosecuted ex-officio, as well as the right to lodge a cassation appeal against every final judgment in criminal or civil cases.

Article 8

Para. 1

The Human Rights Defender 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 institution and it must be clearly written in the Law. This opportunity is still not fully reflected in Article 8, especially as the Human Rights Defender's access to such places is only possible provided it takes place in order "*to get/receive complaints from the applicants*".

It is necessary to stress clearly, already at the very beginning of Article 8, para. 1, that the right to lodge a complaint with the Human Rights Defender cannot be restricted in any way.

Para. 1 of Article 8 cannot be limited to ensuring the Ombudsman or his/her representatives 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 Human Rights Defender 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. This type of provision should, in my opinion, be included in Article 8 rather than in Article 9 (par. 4). Moreover, it must be clearly stated that it relates to two-way correspondence: to correspondence to and correspondence from the Human Rights Defender.

Para. 2

The right of legal entities to lodge a complaint to the Ombudsman is too restricted. It should also include situations where the rights of those very entities are being violated. The existing provision does not provide for this possibility. In this respect, one should also regulate the situation of groups of individuals as a separate question.

Para. 5

In my view, this provision is not necessary. It is obvious that State officials (and what about other officials?) maintain their rights as individuals. If these rights are under threat or violated, they must be entitled to receive assistance from the Human Rights Defender, as all other people.

Article 9

Para. 1

A complaint shall be lodged “no later than one year” and not “one year from”.

Article 10

I would suggest to reconsider the conditions of admissibility and – by modeling them on the solution applied by the Ombudsperson Institution in Kosovo – to decide that the Human Rights Defender will not deal with complaints that:

1/do not fall under the jurisdiction of the Human Rights Defender;2/are anonymous;3/are manifestly ill-founded or constitute an abuse of the right of petition;3/have not been brought before the competent authorities, if there are reasonable grounds to believe that the authority in question would provide an effective remedy (in these cases one should retain the possibility of transferring the complaint over to these other competent authorities following the plaintiff's consent).

Apart from the cases that do not fall under the jurisdiction of the Human Rights Defender, he/she should have the opportunity, at his/her discretion, to waive any of the conditions listed above.

Article 11

Para. 1, item 2

I presume that this relates to indicating how to potentially protect the plaintiff's rights, through other institutions than the Human Rights Defender, which are available to him/her in a specific situation. I believe that this should be adopted as a general obligation in each case where a complaint is not admitted for consideration.

Para. 4

Situations in which the Human Rights Defender can deal with certain issues ex-officio, regardless of whether he/she has received complaints from persons considering themselves to be victims, should constitute a distinct and important category of activities for the Human Rights Defender and should be set out in a special separate Article.

Para. 6

The Human Rights Defender can and should turn to various offices and institutions for information, materials and explanations. He/she cannot however entrust them to examine complaints lodged with him/her, regardless of whether the case concerns the offices and institutions to which the complaint relates, or different ones. This would contradict the nature of the institution of the Human Rights Defender and its independent role in protecting human rights. Persons who lodge complaints expect them to be examined in an independent and impartial manner directly and exclusively by the Human Rights Defender. This is part of the essence of this type of institutions.

Article 12

Para. 1

This provision should be rephrased so that it generally defines the scope and conditions for accessing as well as demanding and receiving documents and information essential for the proper examination of the case. It should also precisely determine the principles of the Human Rights Defender's access to classified information. Considering the sensitive nature of this issue, the way it is regulated in para. 2 is insufficient.

The powers of the Human Rights Defender listed in paras. 1, 2, 5 and 6 may also be exercised by his/her staff, but there is no reason to grant similar powers to the Expert Council or Councils, especially since these are supposed to be groups of individuals providing advice to the Human Rights Defender, which they will do merely on a voluntary basis.

Irrespective of these remarks, here are other detailed issues:

Para. 1, item 4

The opportunity to seek expert opinions should not be limited only to "State agencies". There is no reason for such a restriction. In certain situations, the opinion of a non-governmental organization or institution or of independent freelance experts would be much more important to have. The Human Rights Defender should have an extensive margin of appreciation in this respect.

Article 13

This provision shows that institutions or officials, against whom the complaint is directed, have the opportunity to take a stand both during the course of the complaint examination, as well as directly after its completion. Article 13 does not, however, indicate the necessary procedure to be applied when this occurs during the course of examining the complaint, or the form in which the result of the complaint's examination should later be delivered to the institutions or officials concerned, along with a request for possible comments and explanations.

Article 15

Para. 1, item 1

The Human Rights Defender should not "propose" but "recommend" to the authorities.

Para.1, item 2

The point concerning a situation where the Human Rights Defender has not found any violation should be included in a separate paragraph.

Para. 5

Special reports should be subject to a separate provision. The Law does not contain any indication of what the special reports of the Human Rights Defender are, how they are prepared

or what they should cover. Such reports are crucial instruments that should be regulated separately. Then there is also the question of who should be the addressee of such reports; whether it should be the Parliament or also the President. I believe that since the Human Rights Defender is an institution linked to the Parliament, both the annual report as well as special reports should consequently be addressed officially only to the Parliament. This does not prevent the Human Rights Defender from officially informing the President and other important State institutions about such reports.

Para. 6

In principle, with the exception of special situations, not only “special information”, but also all other decisions and recommendations issued by the Human Rights Defender should be presented to the public. The best solution would be a separate provision regarding all significant issues related to the publication of reports and decisions. Publicity is one of the most important tools that the Human Rights Defender can have at his disposal.

Article 16

I see no need for this provision. The Human Rights Defender’s reports and decisions should by definition include sufficient clarifications and recommendations, without any need for additional “advisory” assistance provided by the Law. Problems with the correct understanding of the Human Rights Defender’s position and his expectations may be explained in the course of working contacts.

Article 17

This article should be rephrased. The annual report should be officially addressed to the Parliament, and afterwards become the subject of a parliamentary debate. However, for the time being this provision does not precisely state who the official addressees are. There is no reason for the President to also be the official addressee of the annual report. There may even actually be certain doubts as to the constitutionality of such a solution.

The President and other important State institutions should, however, be officially presented with an official copy of the annual report, which – as it has been indicated above - should also promptly be made publicly available to the widest possible audience.

The provision regarding the annual report, which is an element of exceptional importance in the Human Rights Defender’s activity, should not deal with other types of reports. A separate article dealing with special, unscheduled, thematic or other reports should be devoted to this. The Law should e.g. clearly indicate the difference between a “special report” and an “unscheduled public report”.

Article 19

The extent of immunity is insufficient. Both the Human Rights Defender and his 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 Human Rights Defender’s mandate or after the staff cease their employment with the Human Rights Defender institution. This phrasing 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 Human Rights Defender. One could consider a different scope of immunity with regard to the staff.

The Law lacks sufficiently precise provisions on the procedure for waiving immunity.

Guarantees as to the inviolability of the institution's possessions, documents and premises, etc. are also very important. In this case, I would also 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"*.

Article 21

I believe that there is no need to deal with the issue of security of the Human Rights Defender in this Law.

Article 22

The question of whether or not the Defender should have a Deputy is rather political. There are different examples in this respect. I have no clear preference for any of them.

Article 23

Considering the exceptional role of the institution of the Human Rights Defender and its responsibilities, as well as the necessary safeguards for its independence, the staff, if it is not to be included under Civil Service, should have a distinct special status regulated by this Law. A solution merely stipulating that members of the staff should be contract employees is absolutely insufficient.

Article 24

Considering its exceptionally sensitive nature and the significance of this provision for the independence of the institution, I would suggest adding that public authorities shall not use the budgetary process for allocating funds from the budget in a manner that interferes with the independence of the institution of the Human Rights Defender. In order to guarantee the proper functioning and development of the Human Rights Defender'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.

Additional comments:

It is worth considering whether to include in the Law the opportunity for the Human Rights Defender to apply interim measures. Where, in the course of an investigation, the Human Rights Defender finds that the execution of an administrative decision may result in irreparable harm to any natural or legal person, it is important that he/she is able to recommend that the competent authority suspend the execution of the decision at issue. This opportunity would reinforce the efficiency of the instruments at the Human Rights Defender's disposal.

Furthermore, the Law should include:

- a provision specifying the location of the institution's headquarters as well as a provision stipulating the possibility to establish, if necessary, additional offices throughout Armenia.
- a provision stating that the Human Rights Defender may cooperate with other similar institutions and with other organizations and institutions dealing with human rights and human rights monitoring, protection and promotion.
- a provision stating that the Human Rights Defender and his/her staff shall maintain the confidentiality of all information and data obtained, with special attention being given to the protection of the safety of complainants, injured parties and witnesses.
- a provision indicating that the Human Rights Defender shall adopt his/her own Rules of Procedure.

Warsaw, 4 November 2006