



Strasbourg, 3 March 2008

Opinion no. 467 / 2008

CDL(2008)025*
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

**ON THE DRAFT LAW AMENDING THE
LAW ON THE STATE PROSECUTOR'S OFFICE
OF MONTENEGRO**

by

Mr Paul BROECKHOVEN
**(Netherlands Expert for the Directorate for Legal Co-operation of
the
Directorate General for Human Rights and Legal Affairs
of the Council of Europe)**

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

Comments on the Law Amending the Law on State Prosecutor (Official Gazette of the Republic of Montenegro, no. 69/2003)

Preliminary remark

It is a pity that no explanatory memorandum on the Law Amending the Law on State Prosecutor is available. Now it stays mere guesswork, why certain amendments are proposed.

Comments

Art. 2

The amendment says: "State Prosecutor's Office shall be single and autonomous state authority..." Why is the word "single" used instead of "independent" as in the old law and in article 134 of the Constitution ("unique and independent state authority") ?

Art. 4 and art. 5

These amendments mesh with the desirable pushing back of the tasks of the public prosecutor to protect the interests of the state, which should be done by private or public attorneys at law.

Art. 7

The new paragraph 3 of article 26 of the Law on State Prosecutor, stating that Deputy State Prosecutors shall be appointed and removed from office by the Prosecutors Council, is sensible in the light of a reduction of the now always lurking political influence on appointments within the public prosecution and more in line with the notion that deputies are civil servants.

Art. 8

This amendment sees to the desirable possibility of renewal of the term of office of the State Prosecutor. The amendment that the office of the Deputy State Prosecutor shall be permanent, shows that deputies are more considered to be civil servants, who normally perform their duties without a fixed term. The reason of the addition "except in case of the first appointment of a Deputy Basic Prosecutor" escapes me.

Art. 9

This amendment is questionable if it means that in the future the State Prosecutor and the Deputy shall be always accountable for an opinion expressed or a decision rendered in performance of their functions. Accountability is a good thing, but not under all circumstances.

Art. 10

This amendment is an improvement and in line with the practice in many European countries, if it means that the decision can be brought in judicial review before a court of administrative law.

Art. 12

Criteria for appointment as proposed in this amendment, create a safeguard against politically influenced unwise appointments and create more clarity. Therefore this amendment is welcome.

Art. 14

The new article 35a, paragraph 2, raises the question if the list of candidates is a public document. This question seems to be answered affirmatively in the new article 36b, q.v.

Art. 16

The new article 36b should be discussed extensively. The fact that a candidate shall be entitled to have an insight into documentation of **other candidates**, the results of written tests, assessments of the **other** candidates and opinions on **other** candidates and to deliver a written statement thereon, can open the door to nasty business, false allegations and whatever. In any case, such a provision can bring much unnecessary and undeserved damage to the candidates. The question is also, if this provision is not conflicting with the right on privacy. In general one has to be very careful with the outcome of assessments, because the objective and impartial quality of that outcome is controversial.

With regard to the new article 36c, see the comments on **Art. 10**.

Art. 19

With regard to the new article 48a, see the comments on **Art. 10**.

Art. 31

Secondment is something, at which one looks suspiciously, because it easily can threaten the independence of the office holder. As formulated in the new proposed paragraph 2, there can be made an exception in the therein described circumstances. So, the basic assumption is: *not without consent of the office holder*. In that respect it is better to maintain the current second paragraph and add the proposed second paragraph as the third.

Art. 33

The reason why the President of Montenegro should propose two members of the Prosecutors Council from renowned lawyers in Montenegro, escapes me.

Art. 35 and art. 37

These articles are incorrect in comparison with my text of the current Law on State Prosecutor.

Art. 43

With regard to the new article 106a, see the comments on **Art. 31**.

Art. 49

There is a great difference between *official secret* and *confidential information*. The amendment deserves some clarification.

Transitional and Final Provisions

The proposed amendments should be numbered 129, 130, 131 and 132.