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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DRAFT OPINION  
ON DRAFT AMENDMENTS  
TO ARTICLE 23(5) OF THE LAW  
ON THE HUMAN RIGHTS DEFENDER  
OF ARMENIA**

**on the basis of comments by**

**Mr Marek Antoni NOWICKI (Expert, Poland)  
Mr Kaarlo TUORI (Member, Finland)**

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*\*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.*

1. By letter of 1 July 2008, the Human Rights Defender of Armenia, Mr Harutyunyan, requested an opinion the draft amendments to Article 23(5) of the law on the Human Rights Defender. The Commission invited Messrs Nowicki and Tuori to act as rapporteurs in this issue. Their comments figure in documents CDL(2008)088 and 089 respectively.
2. The present opinion was adopted by the Venice Commission at its ... Plenary Session on ...

### **The amendment**

3. The draft amendment reads as follows:

*"5. In case of subjecting any person holding a post in the HRDO staff to detention, arrestment, administrative or criminal liability by court order, the enforcing agency shall inform the Defender of this occurrence in the defined procedure and due time."*

4. The text of Article 23(5) currently in force reads as follows:

*"5. Those persons that hold any position in the Defender's staff cannot be convicted, persecuted, detained, arrested or brought to court for any action performed, opinion expressed or decision made while performing their responsibilities under the Defender's instructions. In all these circumstances when any person holding a post in the staff is detained, arrested or brought to court, the enforcing agency shall inform the Defender of this occurrence in the defined procedure and due time."*

5. The amendment would deprive the staff of the immunity they enjoy under the present law. Only the duty to inform the Defender would be retained.
6. The amendment would not, however, affect the position of the Defender her- or himself. The Defender's immunity is based on Art. 19 of the Law on the Human Rights Defender:

*"No criminal prosecution or bringing to account shall be brought against the Defender over the whole period of execution of his/ her powers and after that for the actions following from his/ her status including for the opinion expressed at the National Assembly, if it does not contain slander or offence. The Defender shall not be involved as a defendant, be detained or called to the administrative account without the consent of the national Assembly. The Defender shall not be arrested without the consent of National Assembly, except the cases when the Defender is caught in act of crime. In this case the President of the National Assembly shall be informed immediately."*

### **The 2006 Opinion of the Venice Commission on the Law on the Human Rights Defender of Armenia**

7. In 2006, upon request by the Speaker of the Parliament of Armenia, the Venice Commission gave an Opinion on the Law on the Human Rights Defender of Armenia (CDL-AD(2006)038). This Opinion dealt with the issue of immunity of the Human Rights Defender and the staff of his or her office. Its paragraphs 74 and 75 read as follows:

*"74. In general terms, both the Human Rights Defender and his or her 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 should 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 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 (e.g. waiving by the Defender for his or her staff).

75. *In the Amending Law, the first two paragraphs of this Article have been joined in a single paragraph with some changes in wording. A change which is clearly positive and important is that the immunity of the Human Rights Defender from prosecution or criminal proceedings is now expressed as persisting not only during his or her term of office, but also thereafter. This accords with the principle of the Constitution that the Defender shall be endowed with the immunity envisaged for a Deputy of the National Assembly (Article 83.1.6 of the Constitution), and the new phrasing of the Article appears to have been modelled in most part upon the constitutional provision regarding Deputies (Article 66). However, it may be questioned whether the extent of the immunity is sufficient. There is no reference here to the staff of the Defender, but under Article 23.5, they are endowed with immunity during their period of tenure in respect of their conduct while performing their responsibilities under the Defender's instructions. This immunity should be more extensive. The Law also lacks sufficiently precise provisions on the procedure for waiving immunity."*

8. The Venice Commission thus expressed a positive view of the extension of the immunity to the staff of the Human Rights Defender's office. The Commission even called for its extension in temporal respect. All those remarks remain relevant and are in line with other opinions of the Commission on this issue (see for example CDL-AD(2004)041 on the draft Law on the Ombudsman of Serbia and CDL-AD(2007)024 on the draft Law on the People's Advocate of Kosovo).

#### **The fight against corruption as a justification for the amendment and the position of the Group of States against Corruption (GRECO)**

9. The proposed amendment has been justified with reference to the fight against corruption. Counteracting corruption in a democratic society is indeed a task that should be treated with due attention and concern, especially in the face of major problems in this area. This combat requires various actions to be taken by the legislator and the executive.

10. In this respect, attention should be paid to principle 6 of the Committee of Ministers' Resolution 97(24) on the Twenty Guiding Principles for the Fight against Corruption. This principle concerns the limitation of immunity from investigation, prosecution or adjudication of corruption offences to the degree necessary in a democratic society.

11. In its fifth General Activity Report the Council of Europe's Group of States against Corruption stated that "*compliance with Guiding Principle 6 requires that the categories of professionals benefiting from immunity be limited to a minimum*", but added that "*according to GRECO's standing practice each Member has been assessed on its own merits and, as a consequence, a few exceptions to the aforementioned rather strict interpretation of General Principle 6 have been accepted*".

12. In its evaluation report on Armenia adopted in March 2006, the GRECO was indeed concerned about the rather wide scope of immunities and recommended "*to consider reducing the categories of persons enjoying immunity from prosecution and to abolish, in particular, the immunity provided for parliamentary candidates, members of the central electoral commission, members of regional and local electoral commissions, candidate mayors and local council candidates*" (para 56). Immunities granted to the categories of persons mentioned in the report – according to GRECO – constitute a privilege and are not related to the status and activities of the holders of the public office concerned.

13. The recommendation was repeated in the compliance report on Armenia, adopted in June 2008. However, the staff of the Human Rights Defender's office has not been included in the categories whose immunity the GRECO has found particularly problematic.

14. According to the Guiding Principles for the Fight against Corruption, immunity should be limited *"to the degree necessary in a democratic society"*. The independence of the institution of the Human Rights Defender can be regarded as *"necessary in a democratic society"* in the sense implied by the Guiding Principles.

15. Consequently, the criticism relating to the issue of immunities and recommendations for authorities which have been expressed in the "Evaluation Report on Armenia" cannot be interpreted in a manner that recommends the limitation of the immunity of the Human Rights Defender or his/her staff.

### **Immunity as a necessary guarantee for the independence of an ombudsman**

16. In its Recommendation 1615 (2003) on the Institution of Ombudsman, the Parliamentary Assembly of the Council of Europe confirmed *"the importance of the institution of ombudsman within national systems for the protection of human rights and the promotion of the rule of law, and of its role in ensuring the proper behaviour of public administration"* (para1.). It included in the characteristics essential for the institution of ombudsman, *inter alia*, *"personal immunity from any disciplinary, administrative or criminal proceedings or penalties relating to the discharge of official responsibilities, other than dismissal by parliament for incapacity or serious ethical misconduct"*, as well as *"guaranteed sufficient resources for discharge of all responsibilities allocated to the institution, allocated independently of any possible interference by the subject of investigations, and complete autonomy over issues relating to budget and staff"* (para 7, v. and vii.).

17. The Assembly called on the governments of Council of Europe member states to, *inter alia*, *"ensure that the institution of parliamentary ombudsman exhibits the characteristics described in paragraph 7 above, and that these characteristics are sufficiently protected and appropriately elaborated in the enabling legislation and statute"*, and *"give this institution a mandate which clearly encompasses human rights as being fundamental to the concept of good administration, and which includes a wider role in human rights protection where, in the absence of specific complementary alternative mechanisms, national circumstances so require"* (para 10, ii.-iii.).

### **Need to extend the immunity to the staff of the Human Rights Defender**

18. The present provision in Art. 23(5) of the Law on the Human Rights Defender grants the staff functional immunity merely with regard to *"action performed, opinion expressed or decision made while performing their responsibilities under the Defender's instructions"* (underlining added).

19. As emphasised in the above mentioned texts, the independence of the Ombudsman institution is crucial to its effective functioning in the defence of human rights, as well as in securing good administration, including the fight against corruption. The Ombudsman works through her or his staff, and, hence, the independence of the institution also requires guarantees concerning the position of the staff.

20. The Human Rights Defender, as every other ombudsman, performs most of his/her duties assisted by and through his/her staff. Each member of the staff acts within their official authority on behalf of the Human Rights Defender under the latter's authority. In consequence, the aforementioned guarantees and protection, including the immunity, must be obviously granted to such persons as well. Revoking their immunity would result in significant impairment of the essence of the immunity of the Human Rights Defender himself/herself, all the more so

because in its operational sense the immunity in question is an immunity granted to the institution of the Human Rights Defender as such and therefore always should be understood as the immunity of the “Human Rights Defender and his/her staff”, even if the limits of the immunity of the staff and conditions of its revocation can differ or be more limited from those relating to the immunity of the Human Rights Defender himself/herself.

## **Conclusion**

21. Immunity for the office of the Human Rights Defender (ombudsman) including his or her staff is one of the key guarantees of independence of this institution, giving it a capability to play its special role in a democratic society governed by rule of law. If in such a society any institution is to enjoy the immunity, the Ombudsman is certainly the one. Owing to its tasks of conducting a special kind of examination often resulting in strong criticism of the authorities, the institution becomes a likely target of attacks motivated by political and other interests.

22. GRECO’s standing practice in monitoring compliance with the Guiding Principles and its reports on Armenia do not support the proposed amendment, which would strip the staff of the Defender from their functional immunity. The staff of the Human Rights Defender has not been included in the categories whose immunity GRECO has found to be problematic. The institution of the Human Rights Defender falls within the “justifiable range of holders of public office” who should enjoy an immunity according to the distinctive characteristics of the office and the functions performed.

23. The functional immunity of the staff is a logical extension of the Defender’s immunity. Its abolition would weaken the independence of the institution of the Human Rights Defender.

24. It can be concluded that despite the importance of the fight against corruption and the ensuing necessity of limiting the categories of persons enjoying immunity, the need to ensure the independence of the institution of the Human Rights Defender provides a strong justification favouring the preservation of the present immunity of the staff of the Human Rights Defender.