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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT JOINT OPINION

**ON THE LAW ON THE PROTECTOR
OF HUMAN RIGHTS AND FREEDOMS**

OF MONTENEGRO

**by the Venice Commission
and
the OSCE Office for Democratic Institutions and Human Rights
(OSCE/ODIHR)**

**on the basis of comments by
Mr Latif HÜSEYNOV (Member, Azerbaijan)
Mr Kaarlo TUORI (Member, Finland)**

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Introduction

1. By letter dated 21 June 2011, Mr Dick Marty, Chair of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, requested an opinion on the Draft Law on the Protector of Human Rights and Freedoms of Montenegro (CDL-REF(2011)041). Mr Ranko Krivokapic, Speaker of the Parliament, requested also an opinion on this same Draft on 7 July 2011.
2. The Commission invited Messrs Hüseyinov and Tuori to act as rapporteurs on this issue. Their comments are contained in documents CDL(2011)057 and CDL(2011)056 respectively. The Commission further invited the OSCE/ODIHR to produce a joint opinion on this issue.
3. The Commission had previously issued an opinion on a former draft of the Law on the Protector of Human Rights and Freedoms of Montenegro (CDL-AD(2009)043).
4. As the Law on the Protector of Human Rights and Freedoms of Montenegro was adopted by the Parliament of Montenegro on 29 July 2011, the scope of this draft joint opinion focuses on the adopted Law. The draft joint opinion thus does not constitute a full and comprehensive review of all available framework legislation governing human rights protection mechanisms in the Montenegro.
5. *The present joint opinion was adopted by the Venice Commission at its ... plenary session (Venice, October 2011).*

Relevant texts

6. The present joint opinion has been made in the light of relevant Council of Europe and OSCE documents, especially Recommendation 1615 (2003) of the Parliamentary Assembly of the Council of Europe on the institution of ombudsman, the Venice Commission's opinions on relevant national legislative texts, the United Nations Principles relating to the status of national institutions for the promotion and protection of human rights (the so-called "Paris Principles"), the provisions of the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) relating to national preventive mechanisms, and the Council of Europe standards concerning specialised national anti-discriminatory bodies (ECRI's General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination adopted on 13 December 2002).
7. The comments are based upon the English translation of the text of the Law, as it was submitted to the Venice Commission. It may be that some of the observations originate from a misunderstanding of the Law due to an unclear or inaccurate translation.

Specific comments on the Law

Article 2

8. One of the principal novelties of the present Law is that it introduces provisions relating to the mandate of the Protector of Human Rights and Freedoms of Montenegro (hereinafter: "Human Rights Protector" or "Protector") as a national preventive mechanism within the meaning of Article 3 of the OPCAT. This is expressly stated in Article 25 of the draft Law (see below). However, the fact that the Human Rights Protector is assigned with the role of a National Prevention Mechanism (NPM) is also envisaged in Article 2 of the Law, which provides that the Protector shall take measures "to prevent torture and other forms of inhuman or degrading treatment or punishment". This role of prevention should also have been mentioned in Article 1. In Article 2, the phrase is couched in a broad manner. In order to be in line with the OPCAT, it should include a reference to the context of deprivation of liberty. So, the article should have specified that the mandate of the Protector should also cover (alongside the general function of protection of human rights and the anti-discrimination mandate) the protection of persons deprived of their liberty from torture and other cruel, inhuman or degrading treatment or punishment.

9. Article 81 of the Constitution of Montenegro includes basic provisions on the position and tasks of the Human Rights Protector. According to Art. 81(1), "the protector of human rights and liberties of Montenegro shall be independent and autonomous authority that takes measures to protect human rights and liberties". Art. 81(2), in turn, lays down that "the protector of human rights and liberties shall exercise duties on the basis of the Constitution, the law and the confirmed international agreements, observing also the principles of justice and fairness". The Human Rights Protector is elected by the Parliament (Art. 82(14)), with the majority of the total number of its members (Art. 91(2)) and on the proposal of the President (Art. 95(5)).

10. According to the Law, therefore, the competence of the Human Rights Protector is limited to human rights issues. This is also the case with the former Law, which dates from 2003. Thus, the Protector does not fulfill such a general task of monitoring legality in public administration as do, for instance, the Swedish and Finnish Ombudsmen.

11. Prioritising human rights issues may be justified in a young democracy. However, it should be made clear that the Protector is obliged to react not only to individual human rights violations but also to general patterns of action which he/she considers endangering human rights. Articles 18 and 19 of the law, which grant the Protector the power to "*initiate the adoption of laws, other regulations and general acts for the reason of harmonization with internationally recognized standards in the area of human rights and freedoms*" (Art. 18(1)), and to "*initiate a proceeding before the Constitutional Court of Montenegro for the assessment of conformity of laws with the Constitution and confirmed and published international treaties or the conformity of other regulations and general acts with the Constitution and law*" (Art. 19)", already imply that the Protector is also expected to address more general issues than merely individual human rights violations. In addition, Art. 21 explicitly states that "*the Protector deals with general issues of importance for the protection and promotion of human rights and freedoms and cooperates with organizations and institutions dealing with human rights and freedoms*". The more general responsibilities of the Protectors should have also been explicitly mentioned in Article 2.

12. The Human Rights Protector's responsibilities as "the national mechanism for protection against discrimination" are regulated in a separate Law on Prohibition of Discrimination, but there is no reference to this law.

Article 3

13. According to Art. 3, "the Protector can be addressed by anyone who believes that an act, action or failure to act of the authorities violated his/her rights or freedoms". In addition to party initiatives, "the Protector shall, as well, act on his/her own initiative". Chapter V on Procedure includes more precise provisions on the initiation of proceedings before the Protector. If the Protector acts on his/her own initiative, the consent of the victim is required (Art. 28(3)). When the victim initiates the proceeding, "the complaint may be filed through a Member of Parliament, as well as organisation dealing with human rights and freedoms". It is evident that Members of Parliament or human rights organisations do not have any independent standing.

14. As the provisions contained in paragraphs 1 and 2 of this Article are repeated in Articles 30 and 28 respectively, Article 3 therefore appears unnecessary. As concerns paragraph 3 of the Article ("Proceedings before the Protector shall be free of charge"), it could have been included in Article 28.

Articles 7-10

15. As concerns the procedure for the appointment of the Protector, Article 7 of the Law reproduces what is said in the Constitution, according to which the Human Rights Protector is appointed by Parliament upon proposal of the President of Montenegro (see Articles 82(14) and 95(5)). Further, Article 91(2) of the Constitution provides that the Human Rights Protector is appointed by the majority of the members of Parliament.

16. It should be noted that already in 2007 the Venice Commission criticised this provision and underlined that "[t]he constitution must... provide for the need for a qualified majority in the appointment of the ombudsman by parliament"¹. Election of a Human Rights Protector by a broad consensus in Parliament would certainly strengthen the Protector's independence, impartiality and legitimacy and ensure the public trust in the institution.

17. The Venice Commission has also found it highly questionable that the President of Montenegro should have the power to propose the Human Rights Protector².

18. It is evident that to comply with the above-mentioned recommendations, relevant amendments of the Constitution would be required. Nevertheless, certain improvements could be made even without amending the Constitution. In particular, the law could have provided for a transparent, inclusive and pluralistic procedure for selecting and proposing a Human Rights Protector, in order to avoid the perception of the Protector as the "President's candidate". Moreover, the new law has repealed the provisions of the former existing law concerning the procedure in the Parliament and

¹ See the Interim opinion on the draft Constitution of Montenegro adopted at its 71st Plenary Session on 1-2 June 2007 (CDL-AD(2007)017), para. 103), Opinion on the Constitution of Montenegro adopted at its 73rd Plenary Session, § 55-56 (CDL-AD(2007)047) and Opinion on Draft amendments to the Law on the Protector of Human Rights and Freedoms of Montenegro adopted at its 80th Plenary Session, § 11-13 (CDL-AD(2009)043).

² Opinion on the Constitution of Montenegro (adopted at the 73rd Plenary Session on 14-15 December 2007), § 95 (CDL-AD(2007)047).

this is a setback from the point of view of involving civil society and guaranteeing the transparency. Art. 8 of the former law in force stipulated that the Parliament “*shall elect the Protector upon a proposal of the competent working body of the Assembly, by a majority vote of all members of the Assembly*”. The competent working body of the Assembly was obliged to “*undertake consultations with scientific and specialised institutions, organs as well as representatives of the non-governmental sector dealing with human rights and freedoms issues*”. The former law also required informing the public about the initiation of the procedure to propose candidates. In the interests of clarity and foreseeability of the law, the procedure for appointing or electing the Human Rights Protector should have been set out in the law.

19. As regards the eligibility criteria for being appointed Human Rights Protector under Article 8, it is noted that one of the requirements should be 15 years of *relevant* work experience in the field of human rights, not merely work experience in general, as currently stated in Article 8 (1). The same should apply for eligibility criteria for being appointed Deputy under Article 8 (3).

20. The term of office of the Protector is envisaged in the Constitution (six years). However, neither the Constitution, nor the current Law establishes whether the Protector may be re-elected or not. Interestingly, the Law does provide for the term of office of the deputies of the Protector, specifying that they “*may be re-appointed*” (Article 10(2)). It should be borne in mind that the possibility of re-election could be seen as detrimental to the Protector’s independence, constituting a great risk that his or her activities might be influenced by considerations of future re-election.

21. The Law contains no indication as to when the procedure for selecting and proposing a new Protector begins. Such a provision is of key importance for ensuring continuity in the running of the office. It is recommended to fill this gap and the procedure for selecting and proposing a new Protector should begin at least six months before the expiry of his or her term of office.

Article 11

22. It would have been advisable to amend the text of the oath so as to avoid an interpretation that the Protector should protect human rights in accordance “*only*” with the domestic law and include also international human rights treaties.

Article 12

23. The functional immunity foreseen in this Article (“*The Protector cannot be held responsible for the opinion or recommendation s/he provided while exercising his/her duty*”) is restrictive in several aspects. First, not only the Protector, but also his or her Deputies as well as his or her staff should enjoy immunity. Second, such immunity should cover not only “*opinions or recommendations*”, but also other actions (e.g. decisions) of the Protector and his or her deputies in the exercise of their functions. Third, this immunity should also include luggage, correspondence and means of communication of the Protector, Deputies or the staff. Finally, the Law should have specified that the immunity of the Human Rights Protector, his or her deputies and staff shall also apply after the end of the Protector’s or deputies’ mandate or after the members of staff cease their employment with the Protector’s institution but only for acts performed during their time in office.

Article 15

24. The grounds for the dismissal of the Human Rights Protector should also be laid down by the Constitution. This not being the case, it is necessary to provide for them in the law in a way which leaves as little discretion to the Parliament as possible. The new Law does not properly regulate

the procedure for dismissal of the Protector. Article 15(3) only provides that Parliament should be informed of the reasons for dismissal. This provision is clearly not sufficient given the key importance of the said issue for the effective functioning of the Ombudsman institution. The Law does not even refer to the Constitution, which provides that the Human Rights Protector may be dismissed by Parliament by a majority vote of the total number of members of Parliament. The Protector whose dismissal is envisaged should have been granted the opportunity to express his or her views at the session of Parliament prior to the vote on the dismissal.

25. It is very important to reaffirm again to ensure the independence of the Human Rights Protector that he or she should not be dismissed by a simple majority as foreseen in the Constitution, but by a qualified majority of the members of Parliament. Such a majority would be desirable in order to guarantee that the Protector cannot be removed from office because of his or her acts being disapproved by the governmental majority on Parliament. The Constitution should be amended in this sense.

26. Article 15(2) 2 should have specified that the deprivation of legal capacity shall require the decision of a medical experts' panel. Dismissal for the grounds laid down in Art. 15(2) 3)-4), which states that the Protector or Deputy shall be dismissed, if he or she "*becomes a member of a political organisation*" or "*is performing other public function or professionally is engaged in other activity*", can be considered a too severe sanction, at least without the requirement of a prior warning. It would have been advisable to provide them also with the opportunity to remove that incompatibility by giving up on the other activity.

Article 23

27. This article enumerates certain state representatives and officials who are obliged to receive the Human Rights Protector at his or her request, without delay. This provision should have been extended to make it clear that not only those officials but also any state or local official should have such an obligation.

Articles 24-25

28. Article 24 of the Law stipulates that the following powers shall be assigned to the Protector, his or her Deputy and "*the employee authorised by the Protector*": 1) to "inspect", without prior notice, places of deprivation of liberty; 2) to visit, without prior notification and permission, persons deprived of their liberty; and 3) to talk in private to persons deprived of their liberty as well as to other persons who may provide relevant information.

29. These powers do not fully comply with the requirements laid down in the Optional Protocol of the Convention Against Torture in relation to the national preventive mechanisms (Art. 17-23). In particular, the following important elements should have been included in the Law: 1) the power of the National Prevention Mechanism (NPM) to carry out regular visits to all places where persons are or may be deprived of their liberty (it should be borne in mind that preventive regular visits are a fundamental feature of NPMs); 2) the right of the members of the NPM to be granted access to all relevant information concerning, in particular, the number of detainees and places of detention, the treatment of detainees and their conditions of detention; 3) a legal guarantee that the persons who have cooperated with the office of the Protector will not suffer any retaliation; 4) the right of the Protector to receive responses from the authorities to the recommendations issued by him or her as an NPM and the obligation of the competent State authorities to enter into a dialogue with the Protector on possible implementation measures.

30. Article 25 of the new Law merely stipulates that the Human Rights Protector “*shall be the National Mechanism for the protection of persons deprived of their liberty from torture and other cruel, inhuman or degrading treatment or punishment*”.

31. From a technical point of view, it would have been advisable to start the chapter devoted to the powers of the Protector as a national mechanism for the prevention of torture with the above mentioned general provision. It is a good improvement that the text uses the OPCAT terminology, but it is regrettable that the rest of the article has been deleted in the new Law.

32. More generally, the former Law referred to the establishment of a specialised group that could assist the Human Rights Protector in his or her function as an NPM. Although the relevant entitlements and responsibilities, as well as the eligibility criteria for the NPM membership were missing, the Article 25 in the new Law does not contain any type of reference concerning the responsibilities of the Protector as the NPM as stipulated in the OPCAT.

Article 27

33. This Article states that the Human Rights Protector “*shall be the national mechanism for protection from discrimination*”. In fact, the Protector was designated as an anti-discrimination body under another Act, namely the Law on the Prohibition of Discrimination adopted on 29 July 2010. Chapter III of that Law provides for specific powers of the Human Rights Protector in the field of combating discrimination. In addition to them, the present Law stipulates a very important provision that extends the enforcement powers of the Protector to private persons³.

34. However, the Law does not sufficiently set out the competences of the Human Rights Protector as an anti-discrimination mechanism and it even does not make any reference to the Law on the Prohibition of Discrimination, in which those competences are foreseen.

35. Concerning the specialisation within the Ombudsman institution, the Venice Commission has stated previously that when the Ombudsman is “*in a stage of consolidation and development*”, it is possible “*to organise the functions for the specialised ombudsperson within the overall institution of the national Ombudsman, by way of establishing a special department and/or appointing a deputy ombudsman for the special field*” (CDL-AD(2007)020, *Opinion on the possible reform of the Ombudsman institution in Kazakhstan*, adopted by the Venice Commission at its 71st Plenary session, June 2007). Although “*the alternative of appointing regional or local ombudspersons who are not subordinated to the national Ombudsman is preferred in many countries and has its advantages of its own*” (*ibidem*, para. 29), the size and population of the country can also be taken into consideration to establish the specialised departments under the monitoring of the national Ombudsperson. Concerning the Human Rights Protector in Montenegro, the Venice Commission stated in 2009 that the specialisation of the deputies (on people deprived of liberty, people belonging to minorities, the rights of the child, gender equality, disabled and discrimination) “*is welcome because it allows the deputies to deal efficiently with the issues attributed to them whereas the general mandate of the Protector provides for coherence between these specialised areas*” (CDL-AD(2009)043, para. 14).

36. In the opinion concerning the Draft Law on Prohibition of Discrimination of Montenegro, the Venice Commission further stated that “*whereas the creation of a specialised body is considered as the best solution, transferring the same competences to an already existing institution, which*

³ Introduction of such a provision has been strongly recommended by the Venice Commission in its Opinion on the draft Law on the Prohibition of Discrimination adopted in October 2009 (see CDL-AD(2009)045, § 42).

would benefit from the competencies described above [the ones detailed by the ECRI General Policy Recommendation No. 7] would be equally adequate" (CDL-AD(2009)045, para. 38). Article 9 par 3 of the Law established that one of the Deputies will deal specially with discrimination issues.

37. Nevertheless, the Human Rights Protector of Montenegro, in order to become an effective national mechanism for the protection from discrimination, should have detailed and full powers to implement the anti-discrimination legislation. This would be the case only if he or she enjoyed all the competencies set forth by the General Recommendation No. 7 of the ECRI.

Article 28

38. Paragraph 3 of the Article provides that for the Human Rights Protector to act on his or her own initiative the consent of the victim would be required. This Article refers to the general powers of the Protector and its possibility of different type of actions, such as investigative powers and the right to make human rights violations public. Therefore, in certain cases, in particular, where serious human rights violations have allegedly occurred or the rights of particularly vulnerable persons have allegedly been violated, the Protector should be entitled to act without seeking such consent in the general interest.

39. A different issue is the relationship between the Protector and the ordinary courts. As stated by the Venice Commission in former opinions, "*in general, it would seem preferable to give the People's Advocate the power to make general recommendations about the functioning of the court system, and exclude the power to intervene in individual cases (...)*" (CDL-AD (2007)024, para. 19). Article 2 para. 2 is in line with this position, as it states that the Protector does not have authority over the work of the courts, except as determined by this Law.

Article 32

40. This article has established a strict deadline of six months for filing a complaint within the Protector, but the inclusion of the second paragraph is welcome. As the complaints proceedings before the Human Rights Protector are not of a judicial nature, the possibility of being flexible when the importance of the case demands it is welcome.

Article 46

41. This Article should have specified that the Rules of Procedure shall be approved by the Human Rights Protector.

Article 47

42. The Annual Report of the Human Rights Protector plays an important role in facilitating parliamentary as well as public debate on the situation of human rights and freedoms in Montenegro. It is therefore to be welcome the inclusion in this Article of a reference concerning the submission of the Protector's Annual Report to the Parliament. However, it could have been specified also that: 1) there should be a parliamentary debate on the Report; 2) the Report should contain a separate section on the activities of the Human Rights Protector as an NPM.

Article 53

43. Financial independence is an important aspect of the independence of the Human Rights Protector institution. The new Article 53 establishes that the budget for the Protector appears in a separate allocation of the Budget of Montenegro and also grants the Protector the right to submit the proposal on this respect directly to the working body of the Parliament. This provision is therefore a good improvement which follows previous comments.

Conclusions

44. The new Law contains several positive steps in order to ensure the independence of the Human Rights Protector of Montenegro, such as in the field of the financial independence concerning the possibility for the Protector to submit the proposal on his/her own budget and to participate in the debate at the Parliament; it also allows for the presentation of an Annual Report of Activities at the Parliament; the Protector is endowed with specific competences in the field of prevention of torture and inhuman or degrading treatment or punishment and in the field of combating discrimination, etc.

45. However, the need for constitutional amendments in order to strengthen the independence of the Human Rights Protector remains important, mainly as concerns the issue of the appointment of the Protector. In the former opinions issued by the Venice Commission on the topic⁴, this particular aspect has been strongly criticised and it has been underlined that *"[t]he constitution must... provide for the need for a qualified majority in the appointment of the ombudsman by parliament"*. Election of a Human Rights Protector by a broad consensus in Parliament would certainly strengthen the Protector's independence, impartiality and legitimacy and ensure the public trust in the institution. Moreover, the dismissal of the Human Rights Protector should also be regulated at the constitutional level and in a detailed manner by the Law on the Protector.

⁴ Commission's Opinion on the Constitution of Montenegro, § 55-56 (CDL-AD(2007)047, Opinion on Draft amendments to the Law on the Protector of Human Rights and Freedoms of Montenegro, § 11-13 (CDL-AD(2009)043).