

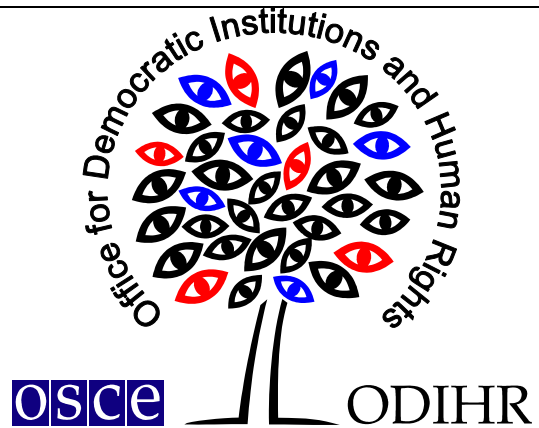
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COMMENTS

ON THE DRAFT POLICE ACT

AND THE DRAFT PARLIAMENTARY

POLICE OVERSIGHT ACT

OF THE REPUBLIC OF SERBIA

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1. SCOPE OF REVIEW

This is not a comprehensive review, but rather a comment on the draft Police Act and the draft Parliamentary Police Oversight Act of the Republic of Serbia.

The comment intends to (a) assess the compliance of the draft legislation with international human rights standards pertaining to policing, and (b) assess the organization of police proposed by the draft and its conduciveness to the respect of such aforementioned rights and standards and, (c) to propose recommendations in respect of both (a) and (b).

Attention of the reader is drawn to the inherent limitations of this comment considering the scope of the ramifications of the drafts under scrutiny across numerous strata of the domestic legal system, particularly the criminal framework legislation.

The comments are based on an English translation provided by the OSCE Mission to Serbia and Montenegro. It should be noted that discrepancies may arise as a result of the translation.

2. SUMMARY OF RECOMMENDATIONS

Draft Police Act (hereinafter, “Draft Law”)

Recommendations of a general scope

1. It is recommended that, in order to strengthen the rule of law internal regulations should be reduced to a minimum, in particular with regard to matters of internal organization. Policing should be primarily governed by the law, not by internal regulations.
2. It is strongly recommended that, police be strictly separated from the Minister/the Ministry of Interior. The functions of the Minister should be limited to those elements necessary for the Minister to exercise his political responsibility over the police, including strategic and policy decisions as well as internal oversight.
3. In line with the overall development of the Police of the Republic of Serbia attention should be given to creating an organizational structure that is sufficiently decentralized to leave room for discretion, flexibility and responsibility to those who administer policing on the regional and local

level. Regional Police Directorates should be created as police authorities distinct from the Police Directorate General as the Supreme police authority.

4. The responsibility of the Minister and the Ministry should be restricted to strategic development of the police and legislative reform, financial control and internal police oversight.
5. It is proposed that, on the operational level the powers assigned to the Directorate General should be restricted to those tasks that cannot be performed on the regional or local level, such as policing organized crime and extremism or international police co-operation. Also, besides administrative functions and monitoring the overall security situation, the Directorate General should be in charge of defining and securing standards of professional performance (on the basis of pre-defined key performance indicators).
6. The Director General should be vested with the authority to issue internal regulations, not the Minister.
7. The Draft Law should exhaustively list the matters in respect of which internal regulations may be issued by the Director General.
8. Internal regulations should be founded on sound legal grounds, which should be stipulated in the text of the regulations.
9. It is recommended that a strict line of separation between police and military functions be drawn in the text of the draft; the police should not be asked to perform military functions or to prepare for such performance.
10. Article 30, 131 and 154 through 163 should be reconsidered in light of the need for a police culture not restricted to adherence to the rules and obedience of orders, but expanded to include accountability for their conduct and a clear sense of their mission.
11. It is proposed that the complaint procedures elaborated in Article 179 are placed under the jurisdiction of a court or alternatively, an established independent body for review of complaints, rather than being dealt with by the police themselves or by the Ministry.
12. In respect of the complaint procedures it is recommended that the following principles be established:

- a. Police investigating other police should not be the rule, but the exception;
 - b. When a complaint is received from a member of the public about the behaviour of a police officer, which suggests that that officer may have committed a criminal offence or a breach of the Code of Conduct, the matter should be investigated by or under the supervision of an independent body;
 - c. Where there is evidence that a police officer has committed a criminal offence, whether in the course of his/her duty or otherwise, (s)he could be charged and taken before a court and if found guilty punished in the same way as anyone convicted of a criminal offence;
 - d. Special mechanisms internal to the police for deciding cases of breach of the Code of Conduct should be considered;
 - e. The draft should also include or refer to provisions securing the right for victims to an effective remedy.
 - f. If appropriate compensation should be awarded to victims by a national authority to be identified in the draft.
13. The Police Law should outline in principle the structure of co-operation of the police with bodies of local self-government (or their representatives) and NGOs, but should however leave it to the Police Directorates to shape such co-operation without any control by the Ministry or the Police Director General.
14. It is recommended to restrict each article to addressing one subject. It would also be advisable to create headings, for increased clarity and referencing.
15. It is proposed that the language used in the law is kept clear and simple, and sentences be kept as short as possible.
16. It is recommended that the reform of the legislative basis of the Police of the Republic of Serbia be placed within the comprehensive framework of an overall development of the police, the key elements of that development being the central features of the police such as the organizational structure and the police culture (defined by elements such as the mission of the

police, a code of police conduct and the guiding principles of police education).

17. Essential standards listed in Article 12 of the Draft Law are proposed to be developed and integrated throughout the text, to ensure implementation and shaping of police behaviour, thereby achieving the aim of the Draft Law. For instance, as one example, the prohibition on torture and inhumane and degrading treatment should be followed by a definition of such behaviour, informing additionally that criminal responsibility is attached to such acts, notwithstanding orders that may be issued under Article 30 of the Draft Law.
18. It may also be considered to elaborate the Police Code of Ethics in the Draft Law, as an extension to Article 12 in order to meet the purpose set out by the Draft Law.
19. Crime investigation should be regulated by the Code of Criminal Procedure to avoid an isolation of criminal policing from the functions performed by public prosecutors and judges.
20. Police functions related to road traffic should not be dealt with in the present Draft Law. It is recommended for separate regulations to govern these issues.

Recommendations by Article

21. It is recommended that Article 2 be moved to chapter two where core police function are described.
22. It is proposed for the Draft Law (particularly, under Article 5) to be clear in defining what information is confidential for what reasons and establishing the procedures to classify information as confidential.
23. It is proposed that the head of a police directorate be entitled to appoint his media officer (Article 5).
24. It is recommended that on the operational level international co-operation be left to the police (Article 7).
25. It is proposed that Article 7 make clear the distinction between professional and political accountability.
26. It is recommended that in reference to the relevant European standards Article 15 further establishes the conditions under which the freedom of

movement may be restricted, particularly the requirement of necessity and the principle of proportionality;

27. The legal basis upon which such orders (as defined under Article 39) may be issued is recommended to be defined with more precision, in order to eliminate the potential vague justifications for, and arbitrary issuance of, such orders. It would be worth considering terminology other than “successful performance of police activities”, which does not provide for clear and unquestionable criteria for determining the justification for issuing such orders.
28. Police powers under article 41 should be restricted to circumstances under which it can be seen that the identification of a person is necessary;
29. There should be safeguards either in Article 41 or elsewhere in the draft against preventive identity checks being carried out by the police in a generalized and discretionary manner or in a discriminatory manner.
30. It is recommended to consider merging the sections of the draft pertaining to “escorting” (Articles 48 through 51) and “detention” (Articles 52 through 57). There may be a need to specify differences in certain modalities or parameters for arresting, detaining or interning any individuals under these provisions, in which case this may be included in the same section. However, the principles upon which freedom of movement may be restricted would remain the same.
31. For the sake of consistency and clarity, it would be worth considering including references to other acts governing these matters, particularly the Code of Criminal Procedure; alternatively, such matters as those addressed in Article 48, Article 55 2) and 3), which require the issuance of a court order (or a warrant of arrest or the like) should be dealt with in the Code of Criminal Procedure;
32. The formulation of Article 52 should be improved so that this provision may not be understood as authorising a policy of general prevention for the preservation of the peace and maintenance of order without any need for suspicion of having committed an offence (or belief that it was necessary to prevent a crime being committed).

33. It is recommended that Articles 53 and 54 that deal with border control, the policing of road traffic, migration police or criminal proceedings, not be included in the present Draft Law.
34. It is recommended that Article 55 no. 4 further elaborate on what persons would fall within the ambit of the provision, that is, for instance, those present at the crime scene, passers by, or persons reasonably suspected of destroying or concealing evidence.
35. Article 58 should be restricted to the prevention of criminal offences.
36. Article 69 on polygraph testing is recommended to be deleted.
37. The regulation on police surveillance is proposed to be further elaborated (cf. Article 70). The most important principles would be:
- a. If a crime has been committed the covert surveillance should be ordered by a court or, under certain circumstances by a public prosecutor; however, such a regulation should be incorporated in the Code of Criminal Procedure.
 - b. For the sake of security (preventive) policing covert surveillance should be restricted to public places and to conditions under which it is necessary to conduct covert surveillance in order to prevent serious crime.
 - c. All covert surveillance should be placed under the strict control of a body independent from the police.
 - d. Any person who has been subject to covert surveillance should be informed of this fact as soon as the performance of police tasks allows for such information to be shared.
38. Article 75 is suggested to be revised in order to clearly specify for what reason and under which circumstances the police would be allowed to collect personal data.
39. It is also recommended that the information retained and used for identification purposes be clearly kept separate from criminal records.
40. It follows that where personal data such as fingerprints and photographs have been collected in the course of investigating crime, it should be destroyed once the subject is no longer suspected of an offence. The same applies to DNA samples. This implies that Article 80 be revised.

41. It is recommended that Article 87 stipulate that police dogs shall only be used when a suspect has committed a violent crime, is believed to be armed, or where there is probable cause the suspect poses a serious threat.
42. Recordkeeping of incidents involving canines should be foreseen under Article 87 of the law.
43. The establishment of an auxiliary police is recommended not be promoted (cf. Articles 190 to 195).

Draft Parliamentary Police Oversight Act

44. It is recommended that sessions where police activities are being discussed be open to the public unless a two-thirds majority vote requires otherwise. Alternatively, the mandate of the commission could be restricted to issues of state security.
45. It is recommended that the primary task of the parliamentary commission would be to monitor the lawfulness of police activities rather than whether police activities are performed “in line with established public security policy”. Therefore, from the list of article 11 the first task (“monitor ... security policy”) should be deleted.
46. Article 15 is recommended to cover all forms of covert surveillance.
47. The last paragraph of article 18 should be deleted.
48. It is recommended that the list in the second paragraph of article 19 be restricted to points 1), 4) and 5). In addition, instead of “serious threat to human life”, the wording should run “threat to human life”.

3. COMMENTS ON ISSUES THAT REQUIRE PARTICULAR ATTENTION

3.1 Police organization and police culture

One key criteria for assessing any comprehensive police related legislation is the extent to which and the grounds upon which it leaves discretion to police forces to interfere with the rights of individuals. However, an assessment of the extent to which this criteria is met is not exclusively influenced by the range of lawful powers accorded to police forces. Equally important are such elements as police culture and police organization.

With regard to the organizational features, there are two possible models. The first model is that of a police structure centred around the concept that policing is primarily concerned with law and order. This perception infers a heavily centralized and hierarchical police organization. In such an organization internal cohesiveness tends to prevail over transparency and internal accountability over accountability to the community. These features are not by themselves conducive to a culture respectful and moreover, protective of the rights of individuals.

The opposite model is a *police service* providing a service to the community. Emphasis is placed on the protection of the rights of the individuals and understood as the core function of the police. The shift in priority results in a decentralized structure geared to the diverse and ever changing nature of the community needs. This further implies efforts to enhance public trust, which, in turn, requires transparency and accountability. It is general recognized that this type of organizational culture brings benefits both to the public and to police officials and is in itself more likely to meet the public demand for security.

All police national structures can be categorized in reference to the two models described above.

The type of organization foreseen in the proposed legislation is closer to the first than to the second model.

3.1.1 Separate police activities from political functions

It is crucial that the police be organized in a way that it is not subject to political influence. The draft, however, does not separate the Minister and the Ministry as political entities from the police as a service. The General Police Directorate is placed within the Ministry of Interior (see article 1). The Police Director General holds the position of an Assistant Minister (article 21). Article 4 gives discretion to the Minister to decide which posts within the Ministry form the General Police Directorate. Thus, by an internal order the Minister can shift the line separating the Police from the rest of the Ministry. Even regional police departments are regarded as sub-divisions of the Ministry: Article 22 states that regional police departments and police stations are

created by means of internal regulation of the Ministry. The whole police organization is therefore deemed an integral part of the Ministry.

Recommendations:

1. In order to strengthen the rule of law internal regulations should be reduced to the minimum, in particular with regard to matters of internal organization. Policing should be governed by the law, not primarily by internal regulations.
2. Police should be strictly separated from the Minister/the Ministry of Interior. The functions of the Minister should be limited to those elements necessary for the Minister to take political responsibility over the police, including strategic and policy decisions as well as internal oversight.

3.1.2 Organizational Structure: Centralization versus Accountability

The draft stresses the dominant position of the Ministry of Interior. According to article 7 the Ministry has the power to direct and monitor the performance of police functions. Under article 8 the Minister shall issue obligatory instructions upon the police. The Minister may require that police officials report to him. Pursuant to Article 10, last paragraph, the Minister is required to lay down performance standards for exercising police powers. Likewise the Minister is required to prescribe the means of self-protection for the police upon recommendation by the Police Director General (article 29).

Therefore, the Minister appears to be vested with power to command without any limitations. This means not only a complete overlapping of political and police functions, but also a heavily centralised structure, leaving no discretion to the local level where the responsibility for taking operative decisions should be placed.

In addition to the comprehensive functions of the Minister/the Ministry the Police Director General shall organize, direct and control the regional police departments. However, in light of the functions of the Minister/the Ministry, the Police Director(ate) General appears to be one link in the chain of command stretching from the Minister to the local level.

Recommendations

3. In line with the overall development of the Police of the Republic of Serbia attention should be given to creating an organizational structure that is sufficiently decentralized to leave room for discretion, flexibility and responsibility to those who administer policing on the regional and local level. Regional Police Directorates should be created as police authorities distinct from the Police Directorate General as the Supreme police authority.
4. The responsibility of the Minister and the Ministry should be restricted to strategic development of the police and legislative reform, financial control and internal police oversight.
5. On the operational level the powers assigned to Directorate General should be restricted to those tasks that cannot be performed on the regional or local level, such as policing organized crime and extremism or international police co-operation. Also, besides administrative functions and monitoring the overall security situation, the Directorate General should be in charge of defining and securing standards of professional performance (on the basis of pre-defined key performance indicators).

3.1.3 The use of internal regulations

Internal regulations and procedures monitoring strict compliance with these regulations are the back-bone of an organization centred around hierarchy and subordination. The draft foresees that the Minister issue internal regulations on an unlimited number of police-related matters. Most importantly, there is no stipulation of the legal grounds upon which such regulations are based, so long as they do not contravene existing laws (cf. Article 10, last paragraph).

Recommendations

6. The Director General should be vested with the authority to issue internal regulations and not the Minister.
7. The police law should exhaustively list the matters in respect of which internal regulations can be issued by the Director General.
8. Internal regulations should be funded on a sound legal ground, which should be stipulated in the text of the regulations.

3.1.4 Militarization of Police

Under article 14 civilian police departments would be required to prepare for the performance of functions in a state of war. These functions would aim at bringing an end to the state of war.

Such a regulation leaves room for militarization of the police in times of peace. The regulation on the use of special vehicles equipped with machineguns and chemical devices (article 86) and the regulation on the use of chemical agents, such as chemical hand grenades or rifle-launched grenades, could lead to confusing police functions with the military functions as well as to dangerous and unintended consequences such as unnecessary shootings and killings. It may feed the wrong mindset among police officers that they are not serving a community, but soldiers at war, that they are confronting an “enemy” rather than individuals whose rights and freedoms they are obliged to protect. There exists a danger that adopting a military model might well affect the behaviour of police officials in situations that should be handled with routine policing.

This line of thought is further reflected in the emphasis placed on internal hierarchy and a rigid chain of command as illustrated in Article 30. Such provisions should be re-drafted or supplemented with references to a police culture as opposed to a paramilitary mindset. The draft should stress that police officers are responsible for their own professional conduct and that their primary responsibilities are to serve the community, safeguard lives and property, protect the innocent and keep the peace. Although discipline is essential to policing it should not be referred to as an end in itself or in a way that would sanctify adherence to rules rather than fulfilment of a mission.

Recommendation:

9. It is recommended that a strict line of separation between police and military functions be drawn in the text of the draft; the police should not be asked to perform military functions or to prepare for such performance.

10. Article 30, 131 and 154 through 163 should be reconsidered in light of the need for a police culture not restricted to adherence to the rules and obedience to orders, but expanded to include accountability for their conduct and a clear sense of their mission.

3.1.5 Complaint procedures

The Rule of Law requires that police behaviour can be challenged before a court or an independent body which would have the competence to efficiently review the said complaints. Article 179 permits individuals to file complaints about police work with the police or directly with the Ministry, but fails to elaborate on the procedure for the review and resolution of such complaints.

Recommendations:

11. It is proposed that the complaint procedures elaborated in Article 179 are placed under the jurisdiction of a court or alternatively, an established independent body for review of complaints, rather than being dealt with by the police themselves or by the Ministry.
12. In respect of the complaint procedures it is recommended that the following principles be established:
 - a. Police investigating other police should not be the rule, but the exception;
 - b. When a complaint is received from a member of the public about the behaviour of a police officer, which suggests that that officer may have committed a criminal offence or a breach of the Code of Conduct, the matter should be investigated by or under the supervision of an independent body;
 - c. Where there is evidence that a police officer has committed a criminal offence, whether in the course of his/her duty or otherwise, (s)he could be charged and taken before a court and if found guilty punished in the same way as anyone convicted of a criminal offence;
 - d. Special mechanisms internal to the police for deciding cases of breach of the Code of Conduct should be considered;

- e. The Draft Law should also include or refer to provisions securing the right for victims to an effective remedy.
- f. If appropriate compensation should be awarded to victims by a national authority to be identified in the Draft Law.

3.1.6. Structures of Co-operation

In community policing jurisdictions emphasis is placed on trust, cooperation, assistance and interaction with community members. The Draft contains general programmatic statements in this regard (Articles 6, 7, 9 and 187), but fails to convert these statements in concrete measures. Centralization seems to remain the rule at the expenses of communication and coordination at the local level as illustrated in the Articles 17 and 18 which provide for a procedure of consultation.

Recommendation:

- 13.** The Draft Law should outline in principle the structure of co-operation of the police with bodies of local self-government (or their representatives) and NGOs, but should however leave it to the Police Directorates to shape such co-operation without any control by the Ministry or the Police Director General.

3.2 Law Drafting Technique: Comprehensibility and Clarity

It is recommended that in order for police legislation to properly regulate and influence police behaviour regulations it must be precise, concrete and as short as possible. A clear and transparent systematic supports the comprehensibility of the text and furthermore, allows for increased success in implementation.

Recommendations:

- 14.** It is recommended to restrict each article to addressing one subject. It would also be advisable to create headings, for increased clarity and referencing.
- 15.** It is proposed that the language used in the law is kept clear and simple, and sentences should kept as short as possible.

3.3 Overall approach to policing

The draft on several occasions and in length proclaims that the police are responsible for protecting the rights and freedoms of all and obey international standards (see e.g. articles 1, 11, 12, 13 and 34), simultaneously, as outlined above, it creates a centralized, hierarchical, militaristic and closed structure that cannot be expected to enhance and promote a style of policing that would be responsive to the needs and rights of individuals or to create a police service that is integrated in local communities.

The Draft Law does not adequately address standards of utmost importance with go to the very purpose of the act, such as the prohibition on torture or inhuman treatment, requirement of assistance to victims and resistance to corruption amongst others, which are merely listed in Article 12 of the Draft Law without further guidance. Such guidance is essential to building police behaviour and culture. It is therefore again emphasized that the improvement of the legal basis of the police has to be thoroughly embedded in an overall development of the Police of the Republic of Serbia into a democratic police service aiming to promote the rights of individuals and to meet their security-related needs.

Recommendations:

- 16.** It is recommended that the reform of the legislative basis of the Police of the Republic of Serbia be placed within the comprehensive framework of an overall development of the police, the key elements of that development being the central features of the police such as the organizational structure and the police culture (defined by such element as the mission of the police, a code of police conduct and the guiding principles of police education).
- 17.** Essential standards listed in Article 12 of the Draft Law are proposed to be developed and integrated throughout the text, to ensure implementation and shaping of police behaviour, thereby achieving the aim of the Draft Law. For instance, as one example, the prohibition on torture and inhumane and degrading treatment should be followed by a definition of such behaviour, informing additionally that criminal responsibility is attached to such acts, notwithstanding orders that may be issued under Article 30 of the Draft Law.

18. It may also be considered to elaborate the Police Code of Ethics in the Draft Law, as an extension to Article 12 in order to meet the purpose set out by the Draft Law.

3.4 Scope of the Police Act (“Draft Law”)

3.4.3 *Crime investigations*

An effective criminal justice system requires that investigation police be clearly separated from law and order policing. As a matter of principle the draft deals with security policing and criminal policing in one. In Article 10, defining police functions, point 3 combines the prevention and uncovering of criminal offences in one task. It is advisable to separate these tasks. The police function of investigating a crime is a basic one, and should be regulated by the Code of Criminal Procedure. Criminal policing aims at allowing the public prosecutor to decide on a case and to prepare a court trial. This requires close interaction between the police, public prosecutors and judges. For this reason the regulations on criminal policing should be integrated into the overall regulations on criminal proceedings and not separated from the regulations governing the actions of prosecutors and courts.

The drafting of regulations that deal with security and criminal policing in one runs a risk of overlooking fundamental differences between the two concepts. Article 58 can serve as an example. To request information in order to prevent a criminal offence is not problematic. However, once an offence has been committed, the provision in the Draft Law should stipulate the fundamental rights of every person suspected of having committed a crime as proclaimed by Article 6 of the European Convention on Human Rights. That is, before requesting a crime suspect to give information he/she has to be informed that he/she has the right to remain silent and that if he/she decides to give evidence this can be used in subsequent court trials. Article 58 falls short from drawing these clear and pivotal distinctions.

Recommendation:

19. Crime investigation should be regulated by the Code of Criminal Procedure to avoid an isolation of criminal policing from the functions performed by public prosecutors and judges.

3.4.4 Road traffic

The Draft Law refers to the policing of road traffic on several occasions, e.g. in articles 10, 39 and 53. From a systematic point of view it would, again, be strongly advisable to regulate the functions of the police related to road traffic in the context of the relevant administrative laws and regulations.

Recommendation:

- 20.** Police functions related to road traffic should not be dealt with in the present Draft Law. It is recommended for separate regulations to govern these issues.

4. COMMENTS BY ARTICLE

Article 2

This article does not qualify as a basic provision. The regulation of the police performing emergency measures would better be placed in the context of the second chapter outlining police functions.

Recommendation:

- 21.** It is recommended that Article 2 be moved to chapter two where core police function are described.

Article 5

Paragraphs 1 and 5:

This article does not adequately define the concept of “confidentiality”. The only regulation specifying what is to be considered secret is article 137 dealing with the pledge of secrecy. This regulation, again, does not define the terms “official secret” or what information if disclosed would endanger the “efficient performance of duties”. As it stands, Article 5 of the draft does not make clear under what conditions information would be classified as secret and by whom.

Recommendation:

- 22.** It is proposed for the law to be clear in defining what information is confidential for what reasons and establishing the procedures to classify information as confidential.

Paragraph 3: This important regulation is repeated in the first paragraph of article 188. It is not necessary to deal with the issue in Article 5.

Paragraph 4: It is significant that the authorisation of a press officer is not left to the chief of the police directorate but to the Minister.

Recommendation:

23. It is proposed that the head of a police directorate be entitled to appoint his media officer.

Article 7

As previously outlined, the functions of the Ministry have to be reduced to the strategic development and control-mechanisms allowing the Minister to take political responsibility for the police. Political activities cover international exchange and co-operation on an international level. However, on an operational level international co-operation should be left to the police.

Internal oversight should be based on legal and professional standards and not on public opinion. This article should make clear the distinction between professional and political accountability.

Recommendations:

24. It is recommended that on the operational level international co-operation be left to the police.

25. It is proposed that Article 7 make clear the distinction between professional and political accountability.

Article 15

Pursuant to this article, “should the government assess that it is otherwise impossible to maintain public order”, it may instruct the Minister of Interior to issue an order restricting or prohibiting “movement in certain facilities, in certain areas or in public places, and prohibit residence in a certain area or departure from a certain area.” Such a regulation must be qualified in light of Article 2, paragraphs 3 and 4 of Protocol No.

4 to the European Convention on Human Rights¹, which has been ratified by Serbia and Montenegro on 3 March 2004. It should be clear that the permissible restrictions which may be imposed on the freedom of movement must be governed by the requirement of necessity, be exceptional in scope as well as duration and not impair the essence of that freedom. Restrictive measures must conform to the principle of proportionality and be the least intrusive instrument amongst those which might achieve the desired result. Also, the principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative, police and judicial authorities in applying the law.

Recommendation:

26. It is recommended that in reference to the above mentioned European standards Article 15 further establishes the conditions under which the freedom of movement may be restricted, particularly the requirement of necessity and the principle of proportionality;

Article 39

The regulation contained in article 39 is particularly in need of clarification. There is a long list of areas in which police are given the power to issue orders permitting potentially a very wide scope of cases in which such orders may be implemented (for instance, an order not to go home for the sake of preventing domestic violence or the order not to leave one's home for the sake of upholding traffic safety). Again, this regulation needs to be viewed in light of paragraphs 3 and 4 of Protocol No. 4 to the European Convention on Human Rights.

¹ Paragraph 3 reads as follows: "No restrictions shall be placed on the exercise of these rights [the right to liberty of movement and freedom to choose one's residence as well the freedom to leave any country, including his own] other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." Paragraph 4 reads as follows: "the rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society."

Additionally, the last sentence appears to state that these orders may only be issued to ensure successful performance of police activities.

Recommendation:

27. The legal basis upon which such orders may be issued is recommended to be defined with more precision, in order to eliminate the potential vague justifications and arbitrary issuance of such orders. It would be worth considering another terminology than “successful performance of police activities’, which does not provide for clear and unquestionable criteria for determining the justification for issuing such orders.

Article 41

Several of the cases in which the draft allows for identification require clarification and possibly, restriction. Paragraphs 3 and 4 are of particular concern as well as paragraph 9. Preventive identify checks should be narrowly defined. There should be safeguards either in this Article or elsewhere in the draft against such identity checks being carried out by the police in a generalized and discretionary manner or in a discriminatory manner. Furthermore, Article 41 should be assessed in the light of article 49, which allows bringing a person to a police station merely for the purpose of his or her identification.

Recommendation:

28. Police powers under article 41 should be restricted to circumstances under which it can be seen that the identification of a person is necessary;
29. There should be safeguards either in this Article or elsewhere in the draft against preventive identity checks being carried out by the police in a generalized and discretionary manner or in a discriminatory manner.

Articles 48 through 51 (“escorting”) versus Article 52 through 57 (“detention”)

The notion of “escorting” as opposed to “detention and temporary restriction of freedom of movement” is not clearly defined in the draft. There seems to be a distinction between ‘escorting’ carried out on the basis of a mandated written court order (article 48) and ‘escorting’ for which such court order is not required (article

49). Additionally, article 49, paragraph 3 draws a link to some provisions under the section of the draft pertaining to detention, which adds some ambiguity to the scope of the provisions governing “escorting” specifically and the rationale behind the procedural distinctions foreseen in the draft.

The requirements stated under Article 53 (drawn upon Article 5(2) of the ECHR) that anyone arrested or detained be promptly ‘in a language he understands’ of ‘the reasons for his arrest and of any charge against him’ should also apply to the provisions pertaining to “escorting”. Furthermore, Article 52 should not be construed as authorising a policy of general prevention for the preservation of the peace and maintenance of order without any need for suspicion of having committed an offence (or belief that it was necessary to prevent a crime being committed). Such an assumption could obviously not be brought within the terms of Article 5(1)c).

Recommendations:

- 30.** It is recommended to consider merging the sections of the draft pertaining to “escorting” and “detention”. Should there be the need for differences in certain modalities or parameters for arresting, detaining or interning any individuals under these provisions, there should be included in the same section.
- 31.** For the sake of consistency and clarity, it would be worth considering including references to other acts governing these matters, particularly the Code of Criminal Procedure; alternatively, such matters as those addressed in Article 48, Article 55 2) and 3), which require the issuance of a court order (or a warrant of arrest or the like) should be dealt with in the Code of Criminal Procedure;
- 32.** The formulation of Article 52 should be improved so that this provision may not be understood as authorising a policy of general prevention for the preservation of the peace and maintenance of order without any need for suspicion of having committed an offence (or belief that it was necessary to prevent a crime being committed).

33. It is recommended that Articles 53 and 54 that deal with border control, the policing of road traffic, migration police or criminal proceedings, not be included in the present Draft Law.

34. It is recommended that Article 55 no. 4 further elaborate on what persons would fall within the ambit of the provision, that is, for instance those present at the crime scene, passers by, or persons reasonably suspected of destroying or concealing evidence.

Article 58

As stated above, (please see: subsection 1.4.1) it would be preferable not to deal with criminal policing in the present Draft Law. This is particularly relevant with regard to requesting information from persons after a crime has been committed. Otherwise, the police would be obliged to decide whether the person requested to give information is a suspect, a witness (and in what relation to the suspect) or a victim.

Recommendation:

35. Article 58 should be restricted to the prevention of criminal offences.

Article 69

Polygraph testing is not acknowledged as a valid means of gathering evidence. With or without the consent of the person involved it should not be encouraged by the present law.

Recommendation:

36. Article 69 on polygraph testing is recommended to be deleted.

Article 70

The forms of surveillance activities that can be authorised under the Draft is not clearly defined in Article 71. In particular, it falls short of adequately dealing with the highly sensitive issue of covert surveillance. It is indispensable that the applicable legal rules be accessible and formulated with sufficient precision to enable individuals to foresee the consequences of their actions. It should also be made explicit that the activity in question must be necessary and proportionate, which means that it should

be restricted to that which is strictly necessary to achieve the required objective. What is legitimate for the prevention and detection of serious crime may not be legitimate for less serious crime. Furthermore, there should be proper methods of accountability over both the authorisation and the use of police surveillance and other information gathering activities. This is not apparent from the draft. In general, it is proposed that the conditions allowing for covert surveillance be defined in a far more precise manner. There ought to be a specification on the type and reliability of information that would allow the police to start covert surveillance.

Recommendation:

37. The regulation on police surveillance is proposed to be further elaborated .

The most important principles would be:

- a. If a crime has been committed the covert surveillance should be ordered by a court or, under certain circumstances by a public prosecutor; however, such a regulation should be incorporated in the Code of Criminal Procedure.
- b. For the sake of security (preventive) policing covert surveillance should be restricted to public places and to conditions under which it is necessary to conduct covert surveillance in order to prevent serious crime.
- c. All covert surveillance should be placed under the strict control of a body independent from the police.
- d. Any person who has been subject to covert surveillance should be informed of this fact as soon as the performance of police tasks allows for such information to be shared.

Articles 75 and 80

It is proposed that article 75 on police records be elaborated by providing the purpose for which, in particular, such personal data be kept. The provision should also clearly stipulate under which circumstances the police are allowed to collect and process information relating to individuals. The collection and storage of personal data has to be restricted to those instances when such processing is absolutely necessary.

Recommendations:

- 38. Article 75 is suggested to be revised in order to clearly specify for what reason and under which circumstances the police would be allowed to collect personal data.
- 39. It is also recommended that the information retained and used for identification purposes be clearly kept separate from criminal records.
- 40. It follows that where personal data such as fingerprints and photographs have been collected in the course of investigating crime, it should be destroyed once the subject is no longer suspected of an offence. The same applies to DNA samples. This implies that Article 80 be revised.

Article 87

Police dogs should only be used when a suspect has committed a violent crime, is believed to be armed, or where there is probable cause the suspect poses a serious threat. It also calls for better training of handlers and recordkeeping of incidents involving canines. The scope of Article 87 is too broad in this regard. It should be considered to narrow it down, particularly in respect of points 1) and 2) of the first paragraph where emphasis ought to be placed on the suspect's behavior or the threat posed by him, rather than the general conditions for the use of physical force and firearms by the police.

Recommendations:

- 41. It is recommended that Article 87 stipulate that police dogs shall only be used when a suspect has committed a violent crime, is believed to be armed, or where there is probable cause the suspect poses a serious threat.
- 42. recordkeeping of incidents involving canines should be foreseen under this article of the law.

Article 179

As stated above, the lack of court proceedings or proceedings filed with an independent body, assigned to deal with complaints directed against the police is one of the central short-comings of the present draft. Only in certain instances, such as complaints related to breaches of the Code of Police Ethics, an internal procedure

could be observed before the complainant takes the case to court. Under certain circumstances, indeed, a mediation procedure could better serve the interests of the complainant than a court procedure consuming considerable amounts of time and money (See recommendation 12).

Article 188

Paragraphs 2 and 3 stipulate the fundamental right to protection. However, the Article does not continue to define the remedies a person could take in case the police are reluctant to assist. For instance, if a woman experiences violence from the side of her husband and informs the police which then decide not to “interfere with family matters”, it is unclear how the victim can enforce her right to be protected. An average court proceeding would take by far too long. This kind of example, again speaks for an expedient and independent complaint procedure to be established (see Recommendation 12).

Articles 190 to 195

The establishment of an auxiliary police is recommended not be promoted. Contemporary standards of pre-service and, in particular, of an ongoing in-service training will never be met by members of the auxiliary police. However, article 190 confers upon such a member full police powers. Under article 193 the auxiliary police wear police uniform and have the same authority as regular police officers. Reserve officers may be appropriate for a military organization, however, it is contended that it does not fit within the context of a modern police service.

Recommendation:

43. The establishment of an auxiliary police is recommended not be promoted.

5.COMMENTS ON A DRAFT PARLIAMENTARY POLICE OVERSIGHT ACT OF THE REPUBLIC OF SERBIA

5.1 General Comments

While the concept of parliamentary scrutiny over police activities is welcome, it may be worth reconsidering the provision, which requires that such scrutiny be exercised

in sessions closed to the public. Furthermore, it should be clear that parliamentary control can not substitute proper legal remedies.

Recommendation:

44. It is recommended that sessions where police activities are being discussed be open to the public unless a two-thirds majority vote requires otherwise. Alternatively, the mandate of the commission could be restricted to issues of state security.

5.2 Comments by article

Article 11

It is recommended that the primary task of the parliamentary commission would be to monitor the lawfulness of police activities rather than whether police activities are performed “in line with established public security policy”.

Recommendation:

45. It is recommended that the primary task of the parliamentary commission would be to monitor the lawfulness of police activities rather than whether police activities are performed “in line with established public security policy”. From the list of article 11 the first task (“monitor ... security policy”) should be deleted.

Article 15

It is particularly important that the commission would monitor all forms of covert surveillance. In this respect, article 15 is suggested to be broadened.

Recommendation:

46. Article 15 is recommended to cover all forms of covert surveillance.

Article 18

The last paragraph of article 18 is proposed to be clarified. If a police employee engages in undercover operations he/she is not recommended to attend the meetings of

a parliamentary committee at all. This seems to be covered by the regulation of article 19, second paragraph.

Recommendation:

47. The last paragraph of article 18 should be deleted.

Article 19

The list in article 19, second paragraph, is suggested as being by far too long.

Recommendation:

48. It is recommended that the list in the second paragraph of article 19 be restricted to points 1), 4) and 5). In addition, instead of “serious threat to human life”, the wording should run “threat to human life”.