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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMPILATION
OF VENICE COMMISSION OPINIONS
CONCERNING THE OMBUDSMAN
INSTITUTION*

**This document will be updated regularly. This version contains all opinions and reports/studies adopted up to and including the Venice Commission's 129th Plenary Session (10-11 December 2021)*

Introduction

The present document is a compilation of extracts taken from opinions and reports/studies adopted by the Venice Commission relating to the Ombudsman institution. The aim of this Compilation is to provide an overview of the Venice Commission's doctrine on this topic.

This Compilation is intended to serve as a source of reference for drafters of legislation on ombudsman institutions and researchers as well as the Venice Commission's members, who are requested to prepare comments and opinions on legal texts and/or other initiatives relating to ombudsman institutions. It should, however, not prevent members from introducing new points of view or diverge from earlier ones, if there is a good reason to do so. It merely provides a frame of reference.

This Compilation is structured in a thematic manner to facilitate the reader's access to topics dealt with by the Venice Commission over the years.

The Compilation is not a static document and will continue to be updated regularly with extracts of newly adopted opinions or reports/studies by the Venice Commission.

Each opinion referred to in this Compilation relates to a specific country and any recommendation made has to be seen within the specific context of that country. This is not to say that such recommendation cannot be of relevance for other countries as well.

The Venice Commission's reports and studies quoted in this Compilation seek to present general standards for all member and observer states of the Venice Commission. Recommendations made in the reports and studies will therefore be of a more general application, although the specificity of national/local situations is an important factor and should be taken into account adequately.

Both the brief extracts from opinions and reports/studies presented here must be seen in the context of the wider text adopted by the Venice Commission from which it was taken. Each citation therefore has a reference that sets out its exact position in the opinion or report/study (paragraph number, page number for older opinions), which allows the reader to find it in the opinion or report/study from which it was taken.

Venice Commission opinions may change or develop over time as new opinions are given and new experiences acquired. Therefore, to have a full understanding of the Venice Commission's position, it would be important to read the entire Compilation under a particular theme.

Please kindly inform the Venice Commission's Secretariat if you believe that a citation is missing, superfluous or filed under a wrong heading (Venice@coe.int)

Table of Contents

Introduction	2
1. Guarantees and Standards	4
2. Constitutional guarantee for the institution of the Ombudsman	5
2.1. The choice of the model: one single/several specialised Ombudsperson(s)	9
3. Criteria for office	10
3.1. General criteria	10
3.2. Incompatibilities	13
4. Election of the Ombudsman	14
5. Status of the Ombudsman institution and relation with other state and local institutions / bodies	19
5.1. Status	19
5.2 Independence from other state institutions / bodies	27
6. Features of the Ombudsman’s term of office	30
6.1. Term of office	30
6.2. Termination of the Ombudsman’s term of office	32
7. Budgetary independence	35
8. Competences and powers of the Ombudsman	41
8.1. Scope of the monitoring competence of the Ombudsman	41
8.2. Powers of investigation	46
8.3 Power of recommendation / proposition	50
8.4 Relations with courts	52
8.5 Prevention Mechanism function of the Ombudsman	56
8.6 Reporting	57
9. Applicants and formalities for application	57
10. Organisation of the Ombudsman institution	60
11. Threats	64
12. Reference documents	66

1. Guarantees and Standards

«On 16 December 2020, the United Nations General Assembly adopted Resolution A/RES/75/186 on “The role of Ombudsman and mediator institutions in the promotion and protection of human rights, good governance and the rule of law”.»

CDL-AD(2021)041 - Opinion On the Possible Exclusion of the Parliamentary Commissioner for Administration and Health Service Commissioner from the “Safe Space” Provided for by the Health and Care Bill adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021), §10.

«Five main elements can be cited from the UN Resolution A/RES/75/186 on “The role of Ombudsman and mediator institutions in the promotion and protection of human rights, good governance and the rule of law”.»

«First, it recognises in its Preamble “the long history of mediation institutions and subsequent developments around the world to create and strengthen ombudsman and mediator institutions, and recognises the important role that such institutions can play, in accordance with their mandate, in the promotion and protection of protection of human rights and fundamental freedoms, promoting good governance and respect for the state of and respect for the rule of law by redressing the imbalance of power between the individual and public service providers”.»

«Second, the UN Resolution states also further “Acknowledging the importance of affording these institutions, as appropriate, the necessary mandate, including the authority to assess, monitor and, where provided for by national legislation, investigate matters on their own initiative, as well as protection to allow action to be taken independently and effectively against unfairness towards any person or group and the importance of State support for the autonomy, competence and impartiality of the Ombudsman and of the process.”»

«Thirdly, the UN Resolution stresses also “that these institutions, where they exist, can play an important role in advising Governments with respect to drafting or amending existing national laws and policies, ratifying relevant international instruments and bringing national legislation and national practices into line with their States’ international human rights obligations”.»

«Fourth, the UN Resolution also “3. Recognizes that, in accordance with the Vienna Declaration and Programme of Action, it is the right of each State to choose the framework for national institutions, including those of the Ombudsman and the mediator, which is best suited to its particular needs at the national level, in order to promote human rights in accordance with international human rights instruments.»

«Last but not least, the UN Resolution “Strongly encourages Member States: (a) To consider the creation or the strengthening of independent and autonomous Ombudsman and mediator institutions at the national level and, where applicable, at the regional or local level, consistent with the principles on the protection and promotion of the Ombudsman institution (the Venice Principles), either as national human rights institutions or alongside them;”»

CDL-AD(2021)041 - Opinion On the Possible Exclusion of the Parliamentary Commissioner for Administration and Health Service Commissioner from the “Safe Space” Provided for by the Health and Care Bill adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021), §§47 – 52.

«... The UN Resolution A/RES/75/186, which was adopted by consensus in the General Assembly on 16 December 2020, in its Preamble acknowledges “ the principles on the protection and promotion of the Ombudsman institution (the Venice Principles)”; in operative §2, strongly encourages Members States to create and strengthen Ombudsman institutions “consistent with the principles on the protection and promotion of the Ombudsman institution (the Venice Principles)”; in operative § 8 “Encourages Ombudsman and mediator institutions, where they exist, (a) To operate, as appropriate, in accordance with all relevant international instruments, including the Paris Principles and the Venice Principles”.»

CDL-AD(2021)041 - Opinion On the Possible Exclusion of the Parliamentary Commissioner for Administration and Health Service Commissioner from the "Safe Space" Provided for by the Health and Care Bill adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021), §11.

«Consequently, the Venice Principles will also serve as a reference standard for the analysis of the draft law. The Venice Commission adopted the Principles on the Protection and Promotion of the Ombudsman Institution (the "Venice Principles") at its 118th Plenary Session (Venice, 15- 16 March 2019). The Venice Principles were endorsed by the Committee of Ministers of the Council of Europe at the 1345th Meeting of the Ministers' Deputies, on 2 May 2019; by the Parliamentary Assembly of the Council of Europe, Resolution 2301(2019), on 2 October 2019; by the Congress of Local and Regional Authorities of the Council of Europe, Resolution 451(2019) on 29-31 October 2019.»

CDL-AD(2021)049 - Opinion On the Draft Law "On the Commissioner for Human Rights" adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), § 14.

2. Constitutional guarantee for the institution of the Ombudsman

«In order to protect the institution of an independent ombudsperson from political fluctuation, it would be preferable to guarantee its existence and basic principles of its activity in the Constitution.»

CDL-AD(2004)041 - Joint Opinion on the Law on the Ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe (Strasbourg, 24 November 2004), §9.

«In order to promote and preserve the independence and neutrality of an Ombudsman or Human Rights Defender as well as the respect in the nation and the place of importance among other institutions which are vital to the effective functioning of this institution, it is essential that the status of this institution should rest on a firm legislative foundation. Accordingly, it is highly desirable that the existence of the institution be guaranteed at the constitutional level, by express provisions in the constitution setting for the essence of the characteristics and powers of the office of Ombudsman or Human Rights Defender and the basic terms of his/her appointment. Such provisions need not be very extensive, as the characteristics and functions of the office should be further elaborated and safeguarded in an enabling legislation or statute providing comprehensively for the framework and activity of the institution, by relegation in the constitution. It is also desirable that the constitutional provisions should not be framed in such narrow terms as to prevent a reasonable development of the institution proceeding from its essential basis. Especially, the provision in the constitution for an Ombudsman or Human Rights Defender at the national level should not be seen as preventing the establishment of similar institutions at a local or regional level or within specific fields.»

«The desirability of a constitutional guarantee of existence is generally recognised among nations favouring the establishment or maintenance of the institution of Ombudsman or Human Rights Defender. Nonetheless, the principle involved is not universally regarded as indispensable, and it is well known that in many countries, the institution is in fact being maintained on the basis of ordinary enabling legislation. It is fair to say, however, that this may partly be explained in historical terms, i.e. by the fact that the legislation dates back to a period when the significance of the role of the Ombudsman in relation to human rights and freedoms was not as strongly recognised as it is today. A further explanation lies in the fact that the procedure for constitutional amendment is naturally quite cumbersome in many countries, so that provision for an institution such as the Ombudsman is difficult to make except in the course of a wider constitutional revision process.»

«According to current European and international standards, therefore, a constitutional guarantee for the Ombudsman is distinctly considered as preferable. It has been advocated in such declarations of the organs of the Council of Europe as the Recommendation 1615 (2003) 1 of the Parliamentary Assembly on the Institution of Ombudsman. And in opinions of the Venice Commission relating to constitutions and/or to rules on the Ombudsman or Human Rights

Defender in various countries, the provision for a constitutional guarantee has been consistently proclaimed as the preferable solution as compared with provision for the institution by ordinary legislation or statute.»

«The model most widely followed for the institutions of Ombudsman or Human Rights Defender may be briefly described as that of an independent official having the primary role of acting as intermediary between the people and the state and local administration, and being able in that capacity to monitor the activities of the administration through powers of inquiry and access to information and to address the administration by the issue of recommendations on the basis of law and equity in a broad sense, in order to counter and remedy human rights violations and instances of maladministration.»

However, a constitutionally defined mandate and status are essential, especially in a young democracy, for the consolidation and strengthening of this institution and its efficiency, for its stability and its independence, as well as for its appearance of independence and impartiality. Previous recommendations of the Venice Commission and the AOMF resolution adopted in Dakar in November 2013 go in the same direction.

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 (Venice, 1-2 June 2007), §§7, 9, 10 and 12; see also CDL-AD(2015)017 - Opinion on the Law on the People's Advocate (Ombudsman) of the Republic of Moldova, adopted by the Venice Commission at its 103rd Plenary Meeting (Venice, 19-20 June 2015), §22.

«In order to give the Ombudsman office sufficient weight, the Venice Commission⁷⁴ recommends raising the rules on appointment and dismissals of the Ombudsman as well as his/her powers to the constitutional level. This concerns notably the right to information of the Ombudsman. Parliament should be obliged to debate reports addressed to it by the Ombudsman.»

CDL-AD(2018)028 - Malta - Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement, adopted by the Venice Commission at its 117th Plenary Session (Venice, 14-15 December 2018), §101.

«The Ombudsman Institution, including its mandate, shall be based on a firm legal foundation, preferably at constitutional level, while its characteristics and functions may be further elaborated at the statutory level.»

CDL-AD(2019)005 - Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles"), adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019), §2.

«The HRD's Institution of Armenia is a Constitutional institution. It is an Ombudsman and at the same time NHRI, it is provided for in Article 52 (Right to Apply to the Human Rights Defender), 103 (Adoption of Laws, National Assembly Decisions, Statements and Addresses), 169 (Applying to the Constitutional Court), 191 (Functions and Powers of the Human Rights Defender), 192 (Election of the Human Rights Defender), 193 (Guarantees for the Activities of the Human Rights Defender), 210 (Bringing Laws into Compliance with the Amendments of the Constitution) and 218 (Holding Office on the Part of the Human Rights Defender) of the Constitution of this country. The activity, functioning and organization of human rights defenders are more specifically regulated by the Constitutional Law on Human Rights Defenders of 16 December 2016.»

CDL-AD(2021)035 - Opinion On the Legislation Related to the Ombudsman's Staff of Armenia adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 December 2021), §33.

«On the basis of the above it can be concluded that the former version of the Constitutional law ensured the independence of the Ombudsman in all staff-related proceedings by providing a series of safeguards for discretionary powers of the Ombudsman in all aspects of staff policies.»

«The provisions of the constitutional law appear to have been aimed at ensuring that the Ombudsman's staff was treated fairly and appropriately. Furthermore, it can be noted that all these provisions were meant to ensure compliance with the Paris Principles and would be today in line with the above-mentioned international standards, which is commendable.»

CDL-AD(2021)035 - Opinion On the Legislation Related to the Ombudsman's Staff of Armenia adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 December 2021), §§41, 42.

«The Venice Commission recommends that care be taken to ensure that applicable legislative provisions subsequent to the Constitutional Law do not contradict it and effectively nullify its applicability, and recommends that specific guarantees should be included in the legislation that the Ombudsman be equipped with sufficient staff commensurate to the needs of the Institution.»

CDL-AD(2021)035 - Opinion On the Legislation Related to the Ombudsman's Staff of Armenia adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 December 2021), §66.

«The Human Rights Defender of Armenia is an A-status Ombudsman and NHRI with long experience in the field of protection and promotion of human rights and other specific aspects of the mandate assigned to it by the Constitutional Law. This institution, as a key player in strengthening the rule of law, democracy and human rights, can play a key role in their development and consolidation in Armenia.»

«The Venice Commission recommends therefore that care be taken to ensure that applicable legislative provisions subsequent to the Constitutional Law do not contradict it and effectively nullify its applicability.»

CDL-AD(2021)035 - Opinion On the Legislation Related to the Ombudsman's Staff of Armenia adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 December 2021), §§83, 85.

«The Council of Europe's the Parliamentary Assembly Resolution 2301 (2019) on "Ombudsman institutions in Europe - the need for a set of common standards" endorses the Venice Principles and calls on member States of the Council of Europe to: 9.1. ensure that the Venice Principles and other relevant recommendations of the Council of Europe are fully implemented in practice; 9.2. take all necessary measures to ensure the independence of ombudsman institutions; 9.3. invite their national parliaments and relevant governmental bodies to systematically refer to the Venice Principles when assessing the need for and the content of legislative reform concerning ombudsman institutions; 9.4. refrain from any action aiming at or resulting in the suppression or undermining of ombudsman institutions and from any attacks or threats against such institutions and their staff, and protect them against such acts; 9.5. promote an "ombudsman-friendly climate" in particular by guaranteeing easy and unhindered access to ombudsman institutions, providing sufficient financial and human resources to those institutions and allowing them to co-operate freely with their peers in other countries and with international associations of ombudspersons.»

«The Venice Principles emphasize that the Ombudsman is an important element in a State based on democracy, the rule of law, the respect for human rights and fundamental freedoms and good administration»

«Ombudsman institutions are at times experiencing attacks in some Council of Europe member States (and beyond); the importance of the international standards becomes all the more important in these situations. Deviating from them requires special justification.»

CDL-AD(2021)041 - Opinion On the Possible Exclusion of the Parliamentary Commissioner for Administration and Health Service Commissioner from the "Safe Space" Provided for by the Health and Care Bill adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021), §§53 – 55.

«The Venice Principle are in some aspects very general, the Venice Commission accepts that many different interpretation of the Venice Principles are acceptable.»

CDL-AD(2021)041 - Opinion on the Possible Exclusion of the Parliamentary Commissioner for Administration and Health Service Commissioner from the "Safe Space" Provided for by the Health and Care Bill adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021), §58.

«Principle 2 states: “The Ombudsman Institution, including its mandate, shall be based on a firm legal foundation, preferably at constitutional level, while its characteristics and functions may be further elaborated at the statutory level.”

This principle implies that any change in the status and functions of the PSHO should preferably have the most stable legal basis possible, and should not, for example, be dealt with in secondary legislation.»

CDL-AD(2021)041 - Opinion on the Possible Exclusion of the Parliamentary Commissioner for Administration and Health Service Commissioner from the “Safe Space” Provided for by the Health and Care Bill adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021), §60.

«According to Principle 2 of the Venice Principles, “*The Ombudsman Institution, including its mandate, shall be based on a firm legal foundation, preferably at constitutional level, while its characteristics and functions may be further elaborated at the statutory level.*”»

«On the basis of these principles there should preferably be a constitutional provision to establish e.g the existence of the CHR, the basic mandate of the CHR and the basic procedure for election and dismissal of the CHR. These are the three main elements that should preferably be found at the constitutional level.»

«The Commission however welcomes that the legal basis of the institution will be strengthened, since the institution will be provided for in a law and no longer in a presidential decree as is the case today.»

«The Commission recommends that the institution of the CHR and his/her mandate be provided for in the Constitution, in addition to the current provisions on the procedure for his/her election and dismissal.»

CDL-AD(2021)049 - Opinion on the Draft Law “On the Commissioner for Human Rights” adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §§18 – 21.

«Article 1.1 of the draft law on the “Legal status and basis of activities of the Commissioner” reads as follows : “*The position of the Commissioner for Human Rights in the Republic of Kazakhstan (hereinafter - the Commissioner) is established in accordance with the Constitution of the Republic of Kazakhstan in order to ensure protection of human and civil rights and freedoms, as well as their observance and respect by state bodies, local government and self- government bodies, officials and civil servants of the Republic of Kazakhstan.*”»

«The Venice Commission welcomes that the draft law refers to the Constitution as a strong basis for the CHR (however, this should be seen in context with paragraph 18 above). As concerns the other parts of Article 1.1, it appears that the Commissioner's field of competence is dealt with in different articles of the draft law. There is no general provision in the draft law on the jurisdiction of the CHR. The jurisdiction has been dealt with more in terms of defining the targets of the Commissioner's activities than in terms of the Commissioner's area of competence.»

CDL-AD(2021)049 - Opinion on the Draft Law “On the Commissioner for Human Rights” adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §§22, 23.

«The Venice Commission welcomes that an important effort has been made to strengthen the legal basis of the institution of the Commissioner for Human Rights (CHR) since it will be provided for in a law and no longer in a presidential decree.»

«Nevertheless, the Venice Commission recommends that the existence of the institution of the CHR, his/her mandate and the procedure for his/her election and resignation be provided for in the Constitution.»

CDL-AD(2021)049 - Opinion on the Draft Law “On the Commissioner for Human Rights” adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §§115, 116.

2.1. The choice of the model: one single/several specialised Ombudsperson(s)

«It is important to point out that States have a wide margin of discretion in choosing the model of ombudsman institution. Moreover, it is by no means unusual in a European context to have more than one Ombudsman, each dealing with specified areas (this is the case in e.g. Sweden). It is recalled on the other hand that the model of a general Ombudsman with overall functions was chosen by France, for instance, when it instituted the Defender of Rights to replace the “Médiateur de la République”. It should be pointed out, however, that the Defender is assisted in his/her mission by three deputies, each active in a different field: security’s ethics, defence and promotion of children’s rights, fight against discrimination and promotion of equality.»

The Moldovan legislature has already decided for a system that appears to mix the two above-mentioned models. This essentially amounts to a policy choice, which is most probably the result of political negotiations and aims to take due account of the country’s specific context and needs. That being said, it is of particular importance that, in the framework of the chosen model, all necessary conditions and safeguards be provided to ensure the independent and effective functioning of the new Ombudsman institution, in accordance with relevant standards and good practices in the field. Practical problems arising from the legal framework adopted in relation to the new model chosen by the Republic of Moldova will be addressed in the specific comments relating to individual provisions of the Law.»

CDL-AD(2015)017 - Opinion on the Law on the People’s Advocate (Ombudsman) of the Republic of Moldova, adopted by the Venice Commission at its 103rd Plenary Meeting (Venice, 19-20 June 2015), §§25,26.

«At the level of principles, the Venice Commission has always advocated the diminution of the number of Ombudspersons, the final goal being a single Ombudsman. However, the particularities of the situation in the country concerned do not always allow the implementation of this solution in the short-term and a multiple Ombudsman - or even a plurality of Ombudsman institutions - is in some cases unavoidable.»

«Article 12 of the draft law provides for the appointment, by the Parliamentary Assembly of BiH, of a Lead Ombudsman and three Ombudspersons “from the constituent peoples and others”, instead of three Ombudspersons, within the present system. The Lead Ombudsman cannot be appointed from the same constituent people or “Others” for two consecutive mandates (article 12.3).»

CDL-AD(2015)034 - Opinion on the Draft Law on Ombudsman for Human Rights of Bosnia and Herzegovina, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), §§40,42.

«The choice of a single or plural Ombudsman model depends on the State organisation, its particularities and needs. [...]»

«States shall adopt models that fully comply with these Principles, strengthen the institution and enhance the level of protection and promotion of human rights and fundamental freedoms in the country.»

CDL-AD(2019)005 - Principles on the Protection and Promotion of the Ombudsman Institution (“The Venice Principles”), adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019), §§4, 5.

«It is worth recalling that according to Principle 5 of the Venice Principles “States shall adopt models that fully comply with these Principles, strengthen the institution and enhance the level of protection and promotion of human rights and fundamental freedoms in the country. The choice to establish this new specialised Ombudsman within the PAO needs to be implemented in a manner that guarantees that the Ombudsman’s office, even if it is composed of specialised ombudsmen, shall be in its entirety compact, coherent and independent from the outside and from other institutions. Precisely independence, as a norm and principle, is to be associated with the protection of this constitutionally based institution and its safeguarding against inappropriate external influences. The Venice Commission expresses several concerns in this respect.»

CDL-AD(2021)017 - Republic of Moldova - Opinion on the draft Law amending some normative acts relating to the People's Advocate, adopted by the Venice Commission at its 126th Plenary Session (online, 19-20 March 2021), §52.

«Principle 4 states : "The choice of a single or plural Ombudsman model depends on the State organisation, its particularities and needs. The Ombudsman Institution may be organised at different levels and with different competences." While this article opens the way for different models, organisation and competencies of an Ombudsman institution, it does not pave the way for a downward transformation of the existing model.

This principle recalls the discretion of States to choose the most appropriate model of Ombudsman. In this case, it is not a question of the Venice Commission assessing the model chosen, but of assessing whether, within the framework of the model chosen, some of the principles relating to the powers which the Ombudsman should enjoy have been respected.»

CDL-AD(2021)041 - Opinion On the Possible Exclusion of the Parliamentary Commissioner for Administration and Health Service Commissioner from the "Safe Space" Provided for by the Health and Care Bill adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021), §61.

«According to Principle 5 , "States shall adopt models that fully comply with these Principles, strengthen the institution and enhance the level of protection and promotion of human rights and fundamental freedoms in the country."»

CDL-AD(2021)041 - Opinion On the Possible Exclusion of the Parliamentary Commissioner for Administration and Health Service Commissioner from the "Safe Space" Provided for by the Health and Care Bill adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021), §62.

3. Criteria for office

3.1. General criteria

«...The Commission notes with satisfaction that Article 3 par. 1 and 2 now only require that a candidate to the office of Ombudsman should have "higher education, high morals and experience in the field of human rights protection" and that such restrictions as a degree in law and the prohibition for a candidate to be a member of an NGO that appeared in previous drafts have been lifted.»

CDL(2001)083 - Consolidated Opinion On the Law on Ombudsman in the Republic of Azerbaijan adopted by the Venice Commission at its 47th Plenary Session (Venice, 6-7 July 2001), §9 (see CDL(2001)PV 47, §6).

«Article 3.5 provides that "the ombudsman and two deputies shall be appointed from the three different constituent peoples, Bosniak, Serb and Croat nationality". This provision aims to ensure the multi-ethnicity of the ombudsman institution. However, it should be noted that, as it stands, this provision would exclude the possibility for a person of any other ethnicity to be appointed to the position of ombudsman. While it is highly likely that the three positions will be filled by persons of Bosniak, Serb and Croat nationality, persons belonging to the category of "others" should not necessarily be prevented from being appointed ombudsman or deputy ombudsman. It would therefore be advisable to change Article 3.5 to read: «The Ombudsman and two Deputies shall be citizens of Bosnia and Herzegovina and shall be appointed...»

«The Venice Commission considers that the draft Law should clarify that the Parliamentary Assembly will appoint at the same time three persons, each to serve for six years, two years as ombudsman and four years as deputy, and will also decide on their schedule of rotation on the positions of Ombudsman and Deputy. The provision of the draft Law which states that the ombudsman and two deputies shall be appointed from persons of "Bosniak, Serb and Croat nationality" should be amended to ensure that persons who belong to the category of «others» are not prevented from being appointed ombudsman or deputy ombudsman.»

CDL-AD(2004)031 - Opinion on the Draft Law on Amendments to the Law on Ombudsman for Human Rights in Bosnia and Herzegovina adopted by the Venice Commission at its 60th Plenary Session (Venice, 8-9 October 2004), §§14 and 29.

«The criteria for becoming ombudsperson are too restrictive. They could be replaced by the more general requirement that the candidates should be “persons of a high moral character”, as can be found in most national and international mandates.»

CDL-AD(2004)041 - Joint Opinion on the Draft Law on the Ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe adopted by the Venice Commission at its 61st Plenary Session (Venice, 3-4 December 2004), §13.

«In this Article (previously entitled “Appointment”), §1 describes the qualifications of eligibility of the Defender. The text has been changed so as to bring the Law into line with Article 83.1.2 of the Constitution, which states plainly that “[a]ny person held in high esteem by the public and corresponding to the requirements envisaged for a Deputy of the National Assembly may be elected as a Human Rights Defender.” From the qualifications required of a Deputy according to the Constitution (Article 64 of the Constitution), it follows that the Defender must be a citizen of the Armenian Republic having had residence in Armenia for the preceding five years and having electoral rights and must have attained the age of 25 years. The originally stipulated age limit of 35 has thus been removed in deference to the limit for Deputies, and the former requirements for the person having a university degree and having knowledge and experience in the field of human rights and fundamental freedoms have also been deleted.

The reduction in the age limit does appear correct in consequence of the impact of the Constitution and accordingly is acceptable. The same applies to the requirement for a university degree, which similarly has a formal connotation. There is perhaps some question whether it also was necessary to remove the reference to knowledge and experience in the field of human rights, seeing that such requirement allows for flexibility and lies very close to the core of the Defender’s mission. In general terms, however, it may be said that the main significance of having references such as those here deleted is to lend support to the essential requirement of the person of the Defender enjoying high respect and trust in the community, which is of extreme importance and is of course proclaimed in the Constitution as a primary condition for eligibility.

In recent opinions of the Venice Commission on the Ombudsman institution (such as CDL-AD(2004)041 concerning Serbia), the view has been expressed that the criteria for his or her eligibility should not be too restrictive, and that e.g. a university degree in law is not a necessary prerequisite (although that criterion is widely relied on, e.g. among the Nordic countries). At the same time, it may be noted that the conditions of eligibility as stated in the original Article 3.1 of the Law were favourably commented on in the above opinion CDL-AD(2003)006. There is non-uniform approach to this issue among the Council of Europe’s member states.

The key matter here is that the qualifications of the Defender as now declared in the Constitution and affirmed in the Law are acceptable as long as it may be assumed that the primary condition of the person being held in high respect/esteem by the public at large is given a strong interpretation, consistent with the general purpose of the Law. On such interpretation, this declared condition does indicate respect not only based on renown for achievement, but also on a reputation for sagacity and integrity (which similarly is indicated by the degree of consensus envisaged for his or her election to the office). Such qualities are of immense value as a pillar of the effectiveness and authority of the Defender both towards the administration being monitored and the members of the public plying for his or her assistance (especially during a period of consolidation of the position of the Defender within the democratic system), as well as for his or her independence.»

CDL-AD(2006)038 - Opinion on Amendments to the Law on the Human Rights Defender of Armenia adopted by the Venice Commission at its 69th Plenary Session (Venice, 15-16 December 2006), §§21-24.

«According to article 13, only persons with a law degree, who have passed the bar examination and have “at least ten years of prominent working experience in the field of law”, have proven experience in the protection of human rights, are known for their moral standing and have not been convicted for criminal offences may be elected as Ombudsman.

The Venice Commission has always been opposed to such restrictive requirements. In particular, the requirement to be a law graduate, to have passed the bar exam and to have 10 years' experience in legal practice (article 13.1.b) seems excessive. In the Commission's view, although the mandate of the Institution extends beyond human rights issues, including also matters of good governance, the Ombudsman is not a judicial body. Therefore, it is the person's good reputation in the society and a recognized expertise in the field of human rights that should be essential for this position.

The Commission acknowledges that, as stressed during the meetings held by its Rapporteurs in Sarajevo, the issues to be addressed by the BiH Ombudsman are essentially legal, especially difficult and complex in this country. However, this does not justify imperatively reserving the Ombudsman position to law graduates having passed the bar examination. Management, communication and other skills should also be taken into account, especially in respect of the Lead Ombudsman (see comments before). In addition, one of the aims of the current reform is to give increased importance to the Ombudsman's promotional function, where qualities other than those revealed by the practice of law may be required. Besides that, the necessary legal knowledge could be provided by the staff and the "advisor" appointed by each Ombudsman according to his or her area of responsibility. Finally, the current text would lead, for example, to refusing the application of a law professor, specialized in human rights, who has not passed the bar examination and has no legal practice. The Venice Commission recommends reconsidering the eligibility criteria with a view to making them more inclusive. »

CDL-AD(2015)034 - Opinion on the Draft Law on Ombudsman for Human Rights of Bosnia and Herzegovina, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), §§56-58

« Article 12 sets out the conditions and procedure for the election of the Defender. The first paragraph reads: "Everyone having attained the age of 25, enjoying high reputation among the public, having higher education, having been a citizen of only the Republic of Armenia for the preceding four years, permanently residing in the Republic of Armenia for the preceding four years, and having the right of suffrage, as well as having command of the Armenian language may be elected to the position of the Defender." This text seems to be in line with Article 192.2 and to Article 48.2 of the new Constitution. »

« The Venice Commission recommends that the possibility of civil society to propose candidates be added to the draft constitutional law in order to introduce some competition, which in turn would provide more legitimacy to the process e.g. there would be more candidates to choose from. The standing committee could present to the plenary of the Parliament a list of three candidates, out of which at least one would be proposed by civil society, thereby allowing for competition in the selection process. The Venice Commission's delegation was informed in Yerevan that this issue would be dealt with by the Rules of Parliament. The Venice Commission is of the opinion that the selection procedure for candidates is an essential issue for the independence of the Defender and should be regulated in the constitutional law, which should set out a transparent procedure that allows for input from and discussion with civil society. »

«[...] The diversity of staff is particularly important in the case of an NHRI headed by one person,⁴² as is the case in Armenia. Generally, pluralism at all staff levels can help strengthen an NHRI's visible commitment to inclusiveness and diversity, and positively influence the institution's overall credibility and effectiveness.⁴³ Pluralism also ensures the representation of persons or groups who are under-represented in other official bodies and who would thus have particularly relevant experience and insights related to their needs.⁴⁴ It is thus recommended to supplement the draft constitutional law by including, under Chapter 6, provisions to ensure gender balance and diversity at all levels of the Defender's staff. »

CDL-AD(2016)033 - Armenia - Opinion on the draft Constitutional Law on the Human Rights Defender, adopted by the Venice Commission at its 109th Plenary Session (Venice, 9-10 December 2016), §§31, 33, 69.

«The criteria for being appointed Ombudsman shall be sufficiently broad as to encourage a wide range of suitable candidates. The essential criteria are high moral character, integrity and appropriate professional expertise and experience, including in the field of human rights and fundamental freedoms.»

CDL-AD(2019)005 - Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles"), adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019), Principle 8.

«The current draft under in article 4.2 does list a number of required qualifications which is to be welcomed. The Venice Commission has on previous occasions stressed the importance of specifying qualifications requirements but also the view that the criteria for eligibility should not be too restrictive.»

«However, some of the requirements listed in the Venice Principles are not included, such as public call, testing and shortlisting which would respond to the requirements of “*merit based*” and “*objective and transparent*” provided for in the Venice Principles. The shortlist can be a practical working tool, not a binding limitation on candidates. This is essential for the democratic legitimacy of the office holder.»

CDL-AD(2021)049 - Opinion On the Draft Law “On the Commissioner for Human Rights” adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §§61, 62.

3.2. Incompatibilities

«The function of Public Attorney is incompatible with the performance of another public function and profession or with being a member to a political party.

The Public Attorney function should not be compatible with another function or profession, public or private, neither with the belonging to political parties or unions. It could eventually be compatible with lecturing but, even in that case, the activity should be exercised without compensation.»

CDL-AD(2003)007 - Opinion on the Draft Law on the Public Attorney of “The former Yugoslav Republic of Macedonia” adopted by the Venice Commission at its 54th Plenary Session (Venice, 14- March 2003), B. II Article 8.

«...The drafters might consider to allow the ombudsperson [and] his or her deputies to pursue teaching activities. However it would be preferable to replace the list of public offices, which cannot be held by an ombudsperson, with a more comprehensive provision stating that the ombudsperson shall not hold any position which is incompatible with the proper performance of his or her official duties or with his or her impartiality and public confidence therein. It is noted that a more general formula is used by the drafters in Article 9 (reasons for dismissal).»

CDL-AD(2004)041 - Joint Opinion on the Draft Law on the Ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe adopted by the Venice Commission at its 61st Plenary Session (Venice, 3-4 December 2004), §§16-17.

«The Ombudsman shall not, during his or her term of office, engage in political, administrative or professional activities incompatible with his or her independence or impartiality. The Ombudsman and his or her staff shall be bound by self-regulatory codes of ethics.»

CDL-AD(2019)005 - Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles"), adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019), Principle 9.

«The draft law foresees in article 6 “*For the period of exercising his powers, the Commissioner suspends his membership in political parties*”.»

«This provision is in line with the Venice Principles. The independence of the Ombudsman is a key element of the institution, and any provision aimed at reinforcing it is of course welcome, and to this end the requirement that the Ombudsman must not being a member of any political party for a period of two years before his appointment, would reinforce this aspect. This requirement

could be inserted for instance in addition to the requirements listed in article 4.2 of the draft.»

CDL-AD(2021)049 - Opinion On the Draft Law "On the Commissioner for Human Rights" adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §§81, 82.

4. Election of the Ombudsman

«As regards the procedure for designation of the Ombudsman, the Working Group observes the following:

Article 10 of the Law provides that the Ombudsman «*shall be appointed and dismissed by the House of Representatives and the House of Peoples following a joint proposal by the competent body of the House of Representatives and the House of Peoples. The competent body shall adopt the proposal by a majority of two thirds of its members*».

«The Working Group's preliminary draft provided for a two-thirds majority at all stages of the appointment procedure, i.e. in the competent joint committee, in the House of Representatives and in the House of Peoples. As indicated by the Working Group in its final report on the Ombudsman institutions in Bosnia and Herzegovina, the provisions in the draft laws regarding the composition and the appointment of Ombudsman «are intended to ensure the broadest possible consensus on the persons concerned. This is the only way of making the institution's impartiality an objective fact, recognisable in the eyes of all citizens» (CDL-INF(99)10). The appointment of the Ombudsman as provided for in Article 10 of the Law, i.e. by a simple majority of members present in the two Houses, seems to be inadequate. Simple majority does not require a broad consensus of all tendencies in the Houses and appointment of Ombudsman without such a consensus may compromise the institution's credibility.»

«The Working Group would therefore recommend that the Law be amended in such a way as to require for the appointment of the Ombudsman a two thirds majority in both Houses.

Similarly, the draft approved by the Venice Commission provided for a «permanent joint committee» of the two Houses whereas the Law now provides for a «competent body». The Working Group finds this wording too vague. The importance of a body composed of members of the two Houses, competent to deal with various aspects of the Ombudsman's functioning should not be overseen. It is recalled in this respect, that the Ombudsman in FBH are primarily a parliamentary Ombudsman institution and that therefore it would be advisable to set up a specific parliamentary committee to deal with all aspects of the Parliament's relations with the Ombudsman.

It is also important that the joint committee's composition be fixed *ab initio* in the Law or in the Rules of procedure of the two Houses. It would be detrimental to the transparency of the procedure - and consequently to the credibility of the institution - if the composition is fixed) *ad hoc* with a view to proposing the appointment of specific Ombudsman.»

«The Working Group would therefore recommend that the relevant provision be amended to clearly provide for a joint committee of the House of Representatives and the House of Peoples, whose composition should be regulated in a transparent way (by law or by the Rules of Procedure of the Houses).»

CDL-INF(2001)007 (English only) – Memorandum on the Organic Law on the Institution of the Ombudsman of the Federation of Bosnia and Herzegovina, approved by the Venice Commission at its 46th Plenary Meeting (Venice, 9-10 March 2001), §2.

«By entrusting the Joint Committee (instead of, under the present law, a "special *ad hoc*, temporary committee") with the candidates' selection, a radically new solution is proposed. This definitely represents a step forward, in line with previous recommendations of the Venice Commission and relevant international reports. The proposed solution has at least two advantages. First, it involves a standing committee which deals with human rights in a systematic manner and collaborates by definition with the Ombudsman. Second, it is for the benefit of the transparency of the procedure - and of the credibility of the Institution - that the composition of

the Joint Committee is stable and known, usually including a proportional number of representatives of the ruling and the opposition parties, and not formed for the express purpose of selecting candidates for the Ombudsman function. »

CDL-AD(2015)034 - Opinion on the Draft Law on Ombudsman for Human Rights of Bosnia and Herzegovina, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), §60.

«The Commission welcomes the new provision in Article 2 par. 1 that «*The Ombudsman shall be elected by 83 votes of the deputies of the Milli Mejlis of the Republic of Azerbaijan of three candidates proposed by the President of the Republic*». The election by the increased majority in the Parliament will certainly strengthen the Ombudsman's impartiality, independence and legitimacy. This is a very positive change compared to the provision of the first draft, which stated that «*the Ombudsman shall be appointed by the Milli Mejlis of the Republic of Azerbaijan following a recommendation of the President of the Republic of Azerbaijan*». The proposal to also involve other persons (such as academics and/or judges of the highest judicial authorities) in the selection of persons proposed for the office of Ombudsman to the *Milli Mejlis* has not been retained.»

CDL(2001)083 - Consolidated Opinion On the Law on Ombudsman in the Republic of Azerbaijan (Strasbourg, 7 September 2001), §8 (see CDL(2001)PV 47, §6.

«The selection of candidates is entrusted (Article 7) to a special parliamentary commission composed of members of three parliamentary committees, whose mode of operation, number of members (and their mode of appointment) are not specified. The selection procedure as described in the Law *per se* does not give rise to any particular concern. The selection of candidates by a "special parliament commission" does not seem to be problematic provided that: 1) the composition of the commission includes representatives of all parliamentary parties; and 2) and the selection is based on merit.

However, Article 8.1 seems to imply that the only candidates presented to the Parliament (for PA as well as CPA) are the two highest ranked in the Commission's evaluation procedure. Although no formal European standard seems to prohibit such a system, the plenary of Parliament should be free to elect a candidate who does not appear on the shortlist provided by the special commission but does meet the objectively stated criteria. The shortlist should be a practical working tool for the Parliament, not a binding limitation on candidates. This is essential for the democratic legitimacy of the function's holder. For this reason, it would be advisable that the special parliamentary committee present to the Moldovan Parliament, if any, in order of preference, all eligible candidates. The choice of candidates would then be that of Parliament as a whole and not that of a small group of parliamentarians with decisive influence on the election of the PA. »

CDL-AD(2015)035 - Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Amendments to the Law on the Human Rights Defender of the Republic of Armenia, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015); §§12, 13.

«Election of the candidate by a 2/3 majority would be a better solution than a 3/5 majority provided by the existing law and by the constitutional amendments. Indeed, in the previous opinion on the Defender the Venice Commission welcomed the election of the Defender by a 3/5 majority, by contrast with the previously existing system; however, the question remains whether 3/5 represents "qualified majority of votes sufficiently large as to imply support from parties outside government", required by p. 7.3 of the PACE Recommendation 1615 (2003). The Venice Commission also draws attention to CDL-PI(2015)015rev where it recommended to the Armenian authorities to consider the election of the Defender by a two-third majority (§ 192). In addition to that, the ideal of "nearly-consensual" election of the Defender would better be served by ensuring personal voting in the Parliament instead of voting by "delegation".

Furthermore, an anti-deadlock mechanism should be put in place for situations where a candidate does not obtain the necessary qualified majority of votes in the Parliament. The purpose of such mechanism would be "to create incentives for both the majority and the opposition in Parliament to find a reasonable compromise (or, rather, to create disincentives to prevent situations where they are not capable of finding a compromise)" ».

CDL-AD(2015)017 - Opinion on the Law on the People's Advocate (Ombudsman) of the Republic of Moldova, adopted by the Venice Commission at its 103rd Plenary Meeting (Venice, 19-20 June 2015), §§48,49.

«...§2 sets out the appointment procedure. It introduces appointment of the Defender by the Parliamentary Assembly, which is an undoubted step forward in respect of the previous draft in terms of independence of this institution from the Executive, which it is mandated to control. It is in accordance with §4 of the Principles Relating to the Status of National Institutions for the promotion and protection of human rights (the United Nations' so-called «Paris Principles»). In particular, the appointment of the Defender «by a vote of more than half of the general number of deputies» is in accordance with my previous suggestion to provide for the election of the Defender by a qualified majority of the members of parliament. Actually, the larger the majority of the deputies involved in the appointment of the Human Rights Defender, the greater his independence and public authority. I assume that the appointment is made «from candidates nominated by the President of the Republic and 1/5 of the National Assembly deputies» (otherwise the sense of this last phrase would be unclear).»

CDL-AD(2003)006 - Opinion on the Draft Law on the Human Rights Defender of Armenia adopted by the Venice Commission at its 54th Plenary Session (Venice 14-15 March 2003), II Article 3.

«The Assembly of the Republic of Macedonia shall elect and discharge the Public Attorney with a majority vote of the total number of representatives belonging to the communities that do not constitute the majority in the Republic of Macedonia. The Public Attorney is elected for a term of eight years, with the right to a second term in office....»

The way according to which an Ombudsman is appointed is of the utmost importance as far as the *independence* of the institution is concerned and the independence of the Ombudsman is a crucial corner stone of this institution.

In order that the Public Attorney's investigations will be credible to both public and the government, the procedure of appointment must be a transparent one. In addition, the procedure of appointment must be an election, as set out in the Draft Law.

Besides, the appointment of the Public Attorney by a large majority of Members of the Parliament (MPs) is a warrant that the person chosen is supported by a large part of society, with the consequences thereof like independence and impartiality.»

CDL-AD(2003)007 - Opinion on the Draft Law on the Public Attorney of "The former Yugoslav Republic of Macedonia" adopted by the Venice Commission at its 54th Plenary Session (Venice, 14- March 2003), B.II Article 5.1.

«...It would be preferable to have the ombudsperson appointed and dismissed by a qualified majority in Parliament....»

«Article 3 provides for the appointment of the ombudsperson by the National Assembly by simple majority. However, a broad consensus for the choice of the ombudsperson is important in order to ensure public trust in the independence of the ombudsperson. Consequently, a qualified majority in Parliament for the appointment of the ombudsperson is appropriate (2/3 or 3/5 of votes cast). If existing constitutional provisions render the fulfilment of such requirement impossible, other possibilities should be explored, which would allow to come to the same result. However, such modalities would have to be safeguarded on the level of law.»

CDL-AD(2004)041 - Joint Opinion on the Draft Law on the Ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe.(Strasbourg, 6 December 2004), §§8.1,11.

«As a final matter under this head, it is to be noted that according to the above general standards, the normative text regulating the status and functions of the Ombudsman for Human Rights should be embodied in legislation of the national parliament, and the person of the Ombudsman should be elected by the parliament by a majority large enough to ensure a reasonable consensus, i.e. by a qualified majority of all members.»

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 (Venice, 1-2 June 2007), §11.

«The Venice Commission acknowledges that, in the particular context of BiH, the decision-making in parliament, which can be subject to multiple vetoes, is extremely difficult to achieve. Introducing a qualified majority requirement would create additional difficulties and further complicate the procedure, notably in the appointment of the Ombudspersons. In the light of these considerations, the Commission believes that it belongs to the authorities of BiH to assess whether a qualified majority rule may be successfully introduced and implemented or, from a more pragmatic perspective, a joint decision of the two Houses could serve as a sufficient guarantee for the “broad consensus” needed both to appoint an Ombudsman or to decide on the early termination of his/her mandate. »

CDL-AD(2015)034 - Opinion on the Draft Law on Ombudsman for Human Rights of Bosnia and Herzegovina, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), §63.

«The election of the Ombudsman (Article 91a(1)) should require a qualified majority to provide the office with a politically and socially broad base.»

CDL-AD(2008)009 – Opinion on the Constitution of Bulgaria adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008), §81; see also

«According to Article 8(2) of the Law, in order to be elected as People’s Advocate, a candidate is required to get the majority of votes in the Parliament. This provision is not in line with the European standards. Recommendation 1615(2003) requires “qualified majority of votes sufficiently large as to imply support from parties outside government.” Also, the Venice Commission has repeatedly stressed that the election of an Ombudsman by a broad consensus in the Parliament would certainly strengthen the Ombudsman’s impartiality, independence and legitimacy and contribute to the public trust in the institution. Article 8.2 should therefore be amended in such a way as to require for the appointment of the People’s Advocate a qualified majority in the Parliament. This may require a constitutional amendment.»

CDL-AD(2015)017 - Opinion on the Law on the People's Advocate (Ombudsman) of the Republic of Moldova, adopted by the Venice Commission at its 103rd Plenary Meeting (Venice, 19-20 June 2015), §50.

« In its 2015 Joint Opinion, the Venice Commission questioned whether a 3/5th majority of the total number of deputies would indeed provide the Defender with sufficient support from parties outside the Government.²² It is not hard to imagine a parliamentary context in which one political party or a coalition of parties controls 3/5th of the votes in the National Assembly. It should be remembered that a key criterion of PACE Recommendation 1615 (2003) on Ombudsman Institutions is not a qualified majority in itself, but the requirement of support for the Defender among parties, including those outside the Government. A qualified majority is only a means to achieve wide political support for the Defender, and the majority requirement in the draft constitutional law should be aligned to the specific parliamentary system of Armenia. This would ensure a broader consensus, and thus consolidate the impartiality of the institution. In the same vein, the First Opinion on the Draft Amendments to the Constitution also recommended that Őas the broadest possible consensus on the person elected should be ensured, the election by a two-third majority should be considered.²³ However, as this recommendation was not followed, Article 12.2 now corresponds to Article 192.1 of the new Constitution, making it difficult to change this provision without having to amend the Constitution.»

« It should be pointed out that a qualified-majority requirement increases the risk of a parliamentary deadlock in the election of the Defender. However, Article 138 of the new Constitution (Temporary Appointment of Officials) only provides a provisional remedy to this problem. Article 138 applies to a broad range of public officials and notably provides that should a 3/5th majority not be reached, then the President of the Republic of Armenia appoints a Human Rights Defender ad interim until the procedure is repeated and a Defender is elected. This can of course not be considered a viable solution if repeated elections also fail.»

« This draft constitutional law, like the previous one, has no provisions referring to the possibility of a re-election of the Defender. PACE Recommendation 1615 (2003) admits “renewable mandates at least equal in duration to the parliamentary term of office.²⁵” The Venice Commission reiterates its recommendation that this issue should be clarified in the text and that, as a matter of principle, considers that it would be preferable to have the Defender elected for a single, longer term without the possibility of being re-elected.²⁶ This would further consolidate the Defender’s impartiality and independence. However, a future constitutional amendment might be required to introduce such a limitation.»

CDL-AD(2016)033 - Opinion on the draft Constitutional Law on the Human Rights Defender, adopted by the Venice Commission at its 109th Plenary Session (Venice, 9-10 December 2016), §§35, 36, 37.

«The Ombudsman shall be elected or appointed according to procedures strengthening to the highest possible extent the authority, impartiality, independence and legitimacy of the Institution. The Ombudsman shall preferably be elected by Parliament by an appropriate qualified majority.»
 «The procedure for selection of candidates shall include a public call and be public, transparent, merit based, objective, and provided for by the law.»

CDL-AD(2019)005 - Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles"), adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019), Principle 6, 7.

«Furthermore, the conditions under which the Ombudsman is elected as head of the institution and subsequently appoints his or her staff are also interdependent guarantees of the institution's independence. The entire staff of the institution, beginning with the head of the institution, must function without undue external interference that could compromise its independence.

CDL-AD(2021)035 - Opinion On the Legislation Related to the Ombudsman’s Staff of Armenia adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 December 2021), §24.

«While it is conceivable that the appointment of the CHR by the President of the Republic and then by the Upper House of Parliament could be seen as affording to “highest possible extent the authority, impartiality, independence and legitimacy of the Institution”, the Venice Principles provide for this election to be done by an appropriate qualified majority. Hence, the election by an increased majority could strengthen the Ombudsman’s impartiality, independence and legitimacy.»

«The Commission invites the drafters to consider the possibility of a selection by the Parliament, as envisaged in the Venice Principles, by a qualified majority, in order to strengthen the Ombudsman’s impartiality, independence and legitimacy.»

CDL-AD(2021)049 - Opinion on the Draft Law “On the Commissioner for Human Rights” adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §§58, 59.

«In order to align the draft law with international standards, the Venice Commission recommends with regard to the election of the Commissioner, foreseeing a public and transparent selection procedure comprising public call, testing and shortlisting, an election by qualified majority by Parliament, a longer term of office and preferably a non-renewable term of office...»

CDL-AD(2021)049 - Opinion on the Draft Law “On the Commissioner for Human Rights” adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §117.

5. Status of the Ombudsman institution and relation with other state and local institutions / bodies

5.1. Status

5.1.1 Rank and salary

«Some of the countries which responded establish the status, rank and subsequently remuneration of their Ombudsman with reference to the judiciary. This is the case in *Malta*, where the Ombudsman is remunerated at the level of a judge of the Superior Courts; in *Norway*, where the Parliamentary Ombudsman is remunerated 20% more than a Supreme Court judge; and in *Sweden*, where the rank of the Parliamentary Ombudsman is the same as a Supreme Court judge or a judge of the Supreme Administrative Court and the remuneration is 20% higher.

In some countries, the Ombudsman's status, rank, and/or salary is established with reference to a number of different institutions or functions on a similar level. This is the situation in *Croatia*, where the National Ombudsman has a rank and remuneration equivalent to that of the president of a working body of the Parliament, a judge of the Constitutional Court, a minister and the head of the State Audit Office; the *Czech Republic*, where the Public Defender of Rights is entitled to a salary equivalent to that of the President of the Supreme Control Office; *Estonia*, where the Legal Chancellor, who performs the functions of Ombudsman, has the highest rank, equivalent to the Parliament, the President, the Government, the Courts and the State Audit Office and is remunerated at the level of the average wage multiplied by a coefficient of 5.5; the *Netherlands*, where the National Ombudsman is remunerated at a level equivalent to the Vice-President of the Council of State and the President of the Chamber of Audit, these three institutions together being called the High Councils of State; and "*The former Yugoslav Republic of Macedonia*", where the Ombudsman's rank is at the same level of a minister, the President of the Supreme Court, the Public Prosecutor, a judge of the Constitutional Court and the Governor of the National Bank.»

CDL-AD(2002)008 - Opinion on the Status and Rank of the Ombudsman in the Federation of Bosnia and Herzegovina (Strasbourg, 17 May 2002), §§6,7.

«...In Austria, the Ombudsman has an extraordinary rank, equivalent to members of Parliament, while a number of countries do not formally provide for the rank of the Ombudsman (see §§7-10). Similar variations exist also at the sub-national level (see §11).

Whatever status the Ombudsman institution is assimilated with - the judiciary or public officials – it is always given an appropriately high rank. The high rank is one of the essential factors that guarantee the Ombudsman's independence from political interference and enable that institution to function effectively and efficiently.»

«There is no European standard as to the status of the Ombudsman. Indeed, there are a variety of ways of establishing such status in Europe. However, whatever status the Ombudsman institution is assimilated with - the judiciary or public officials – it is always given an appropriately high rank, which is also reflected in salary levels. The issue of setting the ombudsman's remuneration is not only an issue of public respect but also of independence of the institution.»

CDL-AD(2004)006 – Opinion on the status and rank of the human rights ombudsman of Bosnia and Herzegovina adopted by the Venice Commission at its 58th Plenary Session (Venice, 12-13 March 2004), §§9,10,16.

«The Venice Commission finds that equating the salaries of the ombudsman and deputy ombudsmen with that of a BiH Constitutional Court judge fixes salaries at an appropriately high level to ensure the ombudsman's independence and is in line with European standards in this field. The salaries of ombudsman's staff should however be determined in accordance with applicable legislation.»

CDL-AD(2004)031 - Opinion on the Draft Law on Amendments to the Law on Ombudsman for Human Rights in Bosnia and Herzegovina adopted by the Venice Commission at its 60th Plenary Session (Venice, 8-9 October 2004), §30.

«Article 13.2 of the Law implies that the status and remuneration of the PA are equivalent to those of a judge of the Supreme Court. This provision provides for an appropriately high rank for the Moldovan Ombudsman and is in line with the European practice in this field. In this regard, the concern raised in the request for opinion that a pending draft law (on amendment and completion of some legislative acts) would provide a lower remuneration for the PA than that of a Supreme Court judge appears to be legitimate; such an arrangement would undermine the letter and the spirit of the above-mentioned Article 13.2 of the Law. In this connection, the Venice Commission recalls the general principles laid down in relation to the status, rank and remuneration of the Ombudsman in its previous opinions dealing with this institution. As noted by the Commission, “[t]here is no European standard as to the status of the Ombudsman, besides as concerns its independence. Indeed, there are a variety of ways of establishing such status in Europe. However, whatever status the Ombudsman institution is assimilated with – the judiciary or public officials – it is always given an appropriately high rank, which is also reflected in salary levels. The issue of setting the ombudsman’s remuneration is an issue both of public respect and of independence of the institution.»

CDL-AD(2015)017 - Opinion on the Law on the People’s Advocate (Ombudsman) of the Republic of Moldova, adopted by the Venice Commission at its 103rd Plenary Meeting (Venice, 19-20 June 2015), §57.

«The Ombudsman Institution shall be given an appropriately high rank, also reflected in the remuneration of the Ombudsman and in the retirement compensation.»

CDL-AD(2019)005 - Principles on the Protection and Promotion of the Ombudsman Institution (“The Venice Principles”), adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019), Principle 3.

«In its 2006 Opinion on the amendments to the law of the HRD of Armenia, the Venice Commission had stated that “Considering the exceptional role of the institution of the Human Rights Defender and its responsibilities, as well as the necessary safeguards for its independence, the staff, if it is not to be included under Civil Service, should have a distinct special status regulated by this Law. A solution merely stipulating that members of the staff should be contract employees is insufficient.”»

«With regard to the rank of the institution, the Principle 3 of “the Venice Principles” provides that “The Ombudsman Institution shall be given an appropriately high rank, also reflected in the remuneration of the Ombudsman and in the retirement compensation”. This principle refers to the head of the institution but should be understood as extending to all staff.»

«Issues relating to the institution's staff and rank have budgetary consequences and are therefore linked to the institution's budget. International standards are again consistent in this respect in order to secure guarantees of independence.»

CDL-AD(2021)035 - Opinion on the Legislation Related to the Ombudsman’s Staff of Armenia adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 December 2021), §25-27.

«Article 35 paragraph 1 of the Law provides that “State service with the Staff of the Defender shall be considered a professional activity performed for the purpose of ensuring the exercise of powers reserved to the Defender by the Constitution of the Republic of Armenia and this Law. State service within the Staff of the Defender shall be a special type of state service prescribed by the legislation of the Republic of Armenia.»

«Also in article 35 paragraph 3 the classes and ranks according to the positions of state servants were foreseen according to this scheme:

- “(1) state servants holding highest positions — class ranks of the 1st and 2nd class state counselor of state service within the Staff of the Defender;
- (2) state servants holding chief positions — class ranks of the 1st and 2nd class counselor of state service within the Staff of the Defender;
- (3) state servants holding leading positions — class ranks of the 1st and 2nd class leading servant of state service within the Staff of the Defender;

(4) state servants holding junior positions — class ranks of the 1st and 2nd class junior servant of state service within the Staff of the Defender.”»

«The legislator had also provided in Article 35 paragraph 4 that “Class ranks of state service to all state servants within the Staff of the Defender shall be conferred, their class rank shall be lowered, as well as they shall be deprived of the class rank by the Defender.”»

«An analysis of these legal provisions suggests that the constitutional law has provided sufficient guarantees for the independence of the staff of the Ombudsman institution. Indeed, it seems that the staff of the institution has enjoyed a high status in terms of the category of civil service, which must have had a positive impact on the financial and social status of the institution's staff.»

CDL-AD(2021)035 - Opinion on the Legislation Related to the Ombudsman's Staff of Armenia adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 December 2021), §§35-37, 39.

«To sum up: the new amendments to the HRD Constitutional Law consist of three main elements/modifications creating confusion with regard to the status and ranking of the ombudsman's staff and the competence on organizing competition procedures. In particular, it derives from the new amendments to the HRD Constitutional Law that:

- The ombudsman staff's status has changed from “state servants” to “civil servants”;
- The law does not provide for the ranks for the Ombudsman staff, since the Ombudsman's staff now belong to the category of civil servants;
- Any competition procedures are now regulated by the law on civil service.»

CDL-AD(2021)035 - Opinion on the Legislation Related to the Ombudsman's Staff of Armenia adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 December 2021), §48.

«In financial terms, as a guarantee of its independence, the rank of the Ombudsman's staff should be proportionate and in direct relation to the rank that the legislator has given to the Ombudsman himself or herself. In this respect, the Venice Principles clearly state that “the institution of the Ombudsman must be given a sufficiently high rank, which is also reflected in the Ombudsman's remuneration and retirement allowance”. Principle 3 of the Venice Principles, with the term “ombudsman institution”, requires a broad interpretation and, in this sense, it is valid for both the ombudsman and his or her staff.

«Moreover, in this context, the criteria and classification of staff should also be within the competence of the Ombudsman. It would be preferable that all such guarantees be provided for in the Law on the Ombudsman in order to ensure the stability and sustainability of the Ombudsman's activity in fulfilling his constitutional mandate.

CDL-AD(2021)035 - Opinion on the Legislation Related to the Ombudsman's Staff of Armenia adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 December 2021), §§68, 69.

«...The staff should benefit, as the head of the institution, from an appropriate high rank, a distinct special status regulated by the law.»

CDL-AD(2021)049 - Opinion On the Draft Law “On the Commissioner for Human Rights” adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §114.

«In order to align the draft law with international standards, the Venice Commission recommends: with regard to the staff of the institution, providing for the ability for the Commissioner to recruit his/her staff according to ranks under a distinct special status regulated by the law;»

CDL-AD(2021)049 - Opinion On the Draft Law “On the Commissioner for Human Rights” adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §117.

5.1.2. Immunities

«After having studied the first draft the Rapporteurs recommended that the Azerbaijani authorities clarify certain provisions of Article 6 on immunities of the Ombudsman. The original wording did

not specify what majority was required in the Parliament to lift the immunity of the Ombudsman and did not foresee the Ombudsman's immunity for opinions held or action taken while in office after the expiry of the term of office. The Commission is satisfied that the draft adopted in the third reading solves both problems. It establishes a requirement of 83 votes in *Milli Mejlis* for lifting the immunity and includes a special paragraph on immunity for opinions held or action taken while in office.»

CDL(2001)083 - Consolidated Opinion on the Law on Ombudsman in the Republic of Azerbaijan (Strasbourg, 7 September 2001), §13.

« ... The ombudsperson, his or her deputies and the staff of the secretariat should be immune from legal process in respect of works spoken or written and all acts performed by them in their official capacity and within the limit of their authority (functional immunity).»

CDL-AD(2004)041 - Joint Opinion on the Draft Law on the Ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe adopted by the Venice Commission at its 61st Plenary Session (Venice, 3-4 December 2004), §18.

«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).»

«In order to enhance the independence of the Defender, guarantees as to the inviolability of the institution's possessions, documents and premises, etc. are also very important. An example could be UNMIK Regulation 2006/06 on the Ombudsperson Institution in Kosovo, which in Section 12.2 provides that *«The archives, files documents, communications, property, funds and assets [...], wherever located and by whomsoever held, shall be inviolable and immune from search, seizure, requisition, confiscation, expropriation or any other form of interference, whether by executive, administrative, judicial or legislative action».*»

CDL-AD(2006)038 – Opinion on Amendments to the Law on the Human Rights Defender of Armenia adopted by the Venice Commission at its 69th Plenary Session (Venice, 15-16 December 2006), §§74 and 76.

«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.»

«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).»

CDL-AD(2008)028 – Opinion on draft amendments to Article 23(5) of the law on the Human Rights Defender of Armenia adopted by the Venice Commission at its 76th Plenary Session (Venice, 17-18 October 2008), §§7,8.

«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 a forementioned guarantees and protection, including the immunity, must be obviously granted to such persons as well....»

CDL-AD(2008)028 – Opinion on draft amendments to Article 23(5) of the law on the Human Rights Defender of Armenia adopted by the Venice Commission at its 76th Plenary Session (Venice, 17-18 October 2008), §20.

«Granting the staff of the Protector a special status is commendable. This is an additional confirmation of the exceptional nature of such an institution. It further provides for an additional guarantee of the institution's independence as well as its proper perception within society.»

« ... Not only the Protector and his/her Deputies, but also his/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 shall continue to be accorded even after the end of the Protector's mandate or after the members of staff cease their employment with the Protector's institution. This immunity should also include baggage, correspondence and means of communication belonging to the Protector.»

CDL-AD(2009)043 – Opinion on the draft amendments to the law on the Protector of Human Rights and Freedoms of Montenegro, adopted by the Venice Commission at its 80th Plenary Session (Venice, 9-10 October 2009), §§27 and 29.

«According to Article 4.1 of the Law, when performing their duties the People's Advocate and his or her Deputies shall not be prosecuted or held legally liable for opinions expressed and actions taken in conformity with the law. The Venice Commission has already stated that not only the Ombudsman and his/her Deputies, but also his/her staff should enjoy immunity from legal process in respect of words spoken or written and acts performed by them in their official capacity. It is positive that Article 36.3 of the Law extends this functional immunity, as well as the above-mentioned clause in Article 3.3, to the staff of the PA's Office. Yet, it is recommended that the non-liability guarantee also include correspondence and means of communication of the Ombudsman, Deputies or the staff.

Furthermore, under Article 4.2, "[d]uring his/her mandate, the People's Advocate and his/her deputies may be under criminal investigations and trial for other deeds except those provided by Para. (1), but the People's Advocate cannot be apprehended, searched or arrested without the prior consent of the Parliament." It is recommended that the same immunity applies to both the PA and the CPA and the two Deputies.

In addition, to be in line with applicable standards, the immunity of the Ombudsman, Deputies or the staff shall also apply after the end of the Ombudsman or Deputies' mandate or after the members of staff cease their employment with the Ombudsman institution but only for acts performed during their time in office. In the opinion of the Venice Commission, immunity is little worth if the PA should fear for arbitrary prosecution etc. as soon as his/her mandate expires. Hence, the immunity provided by Law should extend beyond the term of the PA. It is recommended that Article 4.1 and 4.2 be amended in line with the above recommendations.

That being said, the prohibition in Article 4.2 against apprehension, search and arrest without the consent of Parliament appears to be unconditional. There should probably be an exception concerning situations of emergency where it is not practically possible to put the matter before Parliament before action needs to be taken. This provision should be reviewed from this perspective»

GDL-AD(2015)017 - Opinion on the Law on the People's Advocate (Ombudsman) of the Republic of Moldova, adopted by the Venice Commission at its 103rd Plenary Meeting (Venice, 19-20 June 2015), §§39-42.

«According to article 17 of the draft law, the Ombudsman and the staff of the Institution “*shall not be prosecuted, arrested or detained in custody, nor tried in civil proceedings*” for opinions expressed or decisions taken within their official duties. This provision is in line with international standards and the best practices in the field. In particular, it is positive that this functional immunity granted to the Ombudsman is extended to the staff and that it continues to be accorded after the end of the Ombudsman’s mandate or after the staff cease their employment with the Ombudsman Institution. Also, the draft law rightly includes the official documents and the premises of the Institution in the scope of the above protection.

It is suggested to make it clear that this protection applies to all documents of the Institution, including correspondence and internal notes, as well as to the baggage and means of communication belonging to the Ombudsman. More generally, the immunities provided should also include protection from any administrative action.

At the same time, the law should also provide for the possibility (and specific modalities) of withdrawal of the immunity of the Ombudsman, as well as of his/her staff, in specific cases.»

GDL-AD(2015)034 - Opinion on the Draft Law on Ombudsman for Human Rights of Bosnia and Herzegovina, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), §§67-69.

«It is unclear how to interpret the exclusion from the general rule establishing the Defender’s immunity, set in the first paragraph of Article 19, namely that the immunity is not applied if the Defender’s opinion expressed in his official capacity contains “slander or offence”. It is normal that in the course of his/her mandate the Defender would publicly condemn certain actions of State officials. The Defender must not be prevented from doing so out of fear of being prosecuted by those officials for “slander” or “offence” (whatever the latter means). State officials should be prepared to tolerate criticism from the Defender, even if the Defender is mistaken. Probably, the only possible exclusion from the general immunity rule should be where the Defender makes deliberately false and very grave public accusations»

GDL-AD(2015)035 - Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Amendments to the Law on the Human Rights Defender of the Republic of Armenia, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), §27.

« In general, Article 6 (Immunity of the Defender) is in line with existing standards on the guarantee of the independence of the ombudsman, including the provision that his or her immunity continues after the end of his or her term of office. Nevertheless, in the 2015 Joint Opinion, the Venice Commission¹¹ stressed “that this immunity should not only concern the person of the Defender and his (or her) staff, but should also cover baggage, correspondence and means of communication belonging/used to the Human Rights Defender and his/her staff in their professional capacity” (emphasis added). The staff’s functional immunity is partly covered by Article 11 of the draft constitutional law, which refers to procedural mechanisms to protect the staff when criminal prosecution is instituted against them. At the same time, this does not per se prevent the initiation of criminal, administrative or civil proceedings for words spoken or written or other acts performed by the Defender’s staff in the exercise of their functions (functional immunity). Such functional immunity of the staff of an NHRI is essential to protect the independence of the institution.¹² This is all the more important since the Defender is also entrusted with the mandate of NPM. As such, the legislation pertaining to the Defender should comply with the relevant provisions of the OPCAT, particularly its Article 35 which states that

“[m]embers [...] of the national preventive mechanisms shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions”. In its Guidelines on National Preventive Mechanisms (2010),¹³ the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has specified that both the members of the NPM and its staff shall enjoy such privileges and immunities as are necessary for the independent exercise of their functions. Article 11 of the draft constitutional law should thus be supplemented to expressly refer to the functional immunity of the Defender’s staff and of experts of the NPM.»

CDL-AD(2016)033 - Opinion on the draft Constitutional Law on the Human Rights Defender, adopted by the Venice Commission at its 109th Plenary Session (Venice, 9-10 December 2016), §20.

«The Ombudsman, the deputies and the decision-making staff shall be immune from legal process in respect of activities and words, spoken or written, carried out in their official capacity for the Institution (functional immunity). Such functional immunity shall apply also after the Ombudsman, the deputies or the decision-making staff-member leave the Institution.»

«States shall refrain from taking any action aiming at or resulting in the suppression of the Ombudsman Institution or in any hurdles to its effective functioning, and shall effectively protect it from any such threats.»

CDL-AD(2019)005 - Principles on the Protection and Promotion of the Ombudsman Institution (“The Venice Principles”), adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019), Principles 23, 24.

«Under the wording of Article 3 which reads “*The Commissioner shall have immunity during his term of office*”, immunity does not appear to be only functional; it also appears to apply to the private sphere. This should not be the case. Ombudsmen are responsible under the law as anyone else for actions not within their official capacity.»

CDL-AD(2021)049 - Opinion On the Draft Law “On the Commissioner for Human Rights” adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §42.

«According to the letter of Art. 3.1 of the draft law, criminal liability is unlimited in case “*of a) detention at the scene of the crime, b) commission of a “serious or particularly serious crime” or “c) agreement of the Public Prosecutor*”.»

«The part of the provision concerning the agreement of the Public Prosecutor is not appropriate when it comes to activities in a professional capacity. This part effectively seems to indicate that the Public Prosecutor can cancel the immunity of the Commissioner in any case. This part of the provision should be deleted. It can be replaced by involving the Parliament to decide whether or not to remove the Commissioner's immunity in accordance with the conditions set by international standards for removal of office (see below under §§ 68-79).»

«With regard to the commission of a “*serious or particularly serious crime*”, under b), this is a very unclear definition. Specifying minimum sentences would clarify the definition.»

«The Commission recommends revising Article 3.1 in order to better circumscribe unlimited criminal liability, and hence the Commissioner’s immunity, by clarifying the notion of serious crime and by providing that it will be up to the Parliament and not to the Public Prosecutor to withdraw the immunity of the Commissioner.»

CDL-AD(2021)049 - Opinion on the Draft Law “On the Commissioner for Human Rights” adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §§43-46.

«As such, the legislation pertaining to the Commissioner should comply with the relevant provisions of the Optional Protocol to the Convention Against Torture and other cruel, Inhuman or Degrading Treatment or Punishment (hereafter OPCAT) that Kazakhstan has ratified in 2008, particularly its Article 35 which states that “[m]embers [...] of the national preventive mechanisms shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions”.»

«In its Guidelines on National Preventive Mechanisms (2010),¹³ the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has specified that both the members of the NPM and its staff shall enjoy such privileges and immunities as are necessary for the independent exercise of their functions.»

CDL-AD(2021)049 - Opinion on the Draft Law “On the Commissioner for Human Rights” adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §§48, 49.

«According to Principle 23 of the Venice Principles, the functional immunity granted to the Ombudsman and extended to the staff must be extended in its temporal aspect in order to continue to be accorded after the end of the Ombudsman’s mandate or after the staff cease their employment with the Ombudsman Institution. The draft law doesn’t foresee the temporal aspect of the immunity. Immunity must apply also after leaving the institution, and this should be specified in the draft.»

CDL-AD(2021)049 - Opinion on the Draft Law “On the Commissioner for Human Rights” adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §51.

«In order to make the content of immunity even stronger and to meet good practice in this area, the draft law should also include official documents and the premises of the Institution in the scope of the protection. It is suggested to make it clear that this protection applies to all documents of the Institution, including correspondence and internal notes, as well as to the baggage and means of communication belonging to the Commissioner.»

«To sum up, the Commission recommends circumscribing immunity to functional immunity, bringing the immunity provisions into line with Principle 23 of the Venice Principles by clearly including all the elements of functional immunity described therein and extending functional immunity to all staff of the institution as well as after leaving the institution.»

«The Venice Commission recommends also revising Article 3.1 in order to better circumscribe unlimited criminal liability, and hence the Commissioner’s immunity, by clarifying the notion of serious crime, by conferring to Parliament and not to the Public Prosecutor the withdrawal of the Commissioner’s immunity, in order to meet the requirements of Principle 11 of the Venice Principles. Some specific material aspects of functional immunity could also be further developed in the draft in order to meet good practices in this important subject for the institution.»

CDL-AD(2021)049 - Opinion On the Draft Law “On the Commissioner for Human Rights” adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §§52-54.

«In order to align the draft law with international standards, the Venice Commission recommends: with regard to the Commissioner’s immunity, circumscribing immunity to functional immunity, extending functional immunity to the staff of the institution, including after leaving the institution, providing for the lifting of the by qualified majority in Parliament...»

CDL-AD(2021)049 - Opinion on the Draft Law “On the Commissioner for Human Rights” adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §117.

5.2 Independence from other state institutions / bodies

«Similar to judges, the Protector does not only need to be independent, he or she must also be “seen” to be independent. The perception of the Protector as the “President’s candidate” has to be avoided. Given that the prime task of the Protector is to supervise the executive, the institution should be clearly linked to the Parliament.»

CDL-AD(2009)043 - Opinion on the draft amendments to the law on the Protector of Human Rights and Freedoms of Montenegro, adopted by the Venice Commission at its 80th Plenary Session (Venice, 9-10 October 2009), §12.

«The unamended para. 1 of this Article appropriately provides that “*the Defender shall be independent in executing his or her power and shall be guided only by the Constitution and the Laws of the Republic of Armenia, as well as recognised norms and principles of International Law*”. – The paragraph further contains a second sentence stating that the Defender “*shall not be subordinated to any state or local self-governing official*”. This may perhaps be useful as a clarification for the sake of good order in a first Law on the Defender, but should in fact not be necessary.»

CDL-AD(2006)038 - Opinion on Amendments to the Law on the Human Rights Defender of Armenia adopted by the Venice Commission at its 69th Plenary Session (Venice, 15-16 December 2006), §34.

«The Ministry competent for the protection of human rights and minority rights is granted supervisory duties in relation to the implementation of the draft law. In this respect, the draft law should clarify further the powers and responsibilities the Minister can carry out to perform his supervisory duties. It is important to ensure that this supervisory role of the Minister does not undermine the independence and autonomy of the Ombudsman.»

CDL-AD(2009)045 - Opinion on the draft Law on Prohibition of Discrimination of Montenegro adopted by the Venice Commission at its 80th Plenary Session (Venice, 9-10 October 2009), §111.

«Article 18 of the existing law speaks of the liability for the “intervention into activities of the Defender”. However, the law contains no specific sanctions for hindering the Defender’s work. In particular, it does not specify what happens if the Defender or a competent member of his/her office is not given a reply within the time-limits set in Article 13, or not given access to the prison, or if confidentiality of his/her exchanges is violated by the authorities. Probably, the most important powers of the Defender should be supported by the specific sanctions, directly specified in the law. Those sanctions should also be applicable when the Defender’s work within the NPM mandate is hindered. Indeed, those sanctions should be adequate: not excessive and, at the same time, serious enough to deter State officials from ignoring the Defender’s requests. It may also prove useful to revise other legislation (in particular the legislation establishing the regime of the places of detention and describing the duties of the State officials running them) in order to include corresponding provisions in those other laws.»

CDL-AD(2015)035 - Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Amendments to the Law on the Human Rights Defender of the Republic of Armenia, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), §28.

«In line with a legitimate and widespread practice, article 5.2 provides that “**the Institution and the Ombudsmen**” shall report for their work **only** (emphasis added) to the BiH Parliamentary Assembly. In this case, mentioning both the Institution and the individual Ombudspersons is problematic from the perspective of unified Ombudsman Institution (which remains a key desideratum of the current reform). It is only the institution, and not the individual Ombudsman that should report to the BiH Parliamentary Assembly. It is recommended to delete the terms “and the Ombudsmen” from this provision.»

«It is recalled in this context that neither international standards nor the practice suggest that the parliament or its relevant committee should formally adopt the Ombudsman’s Annual Report. The aim is, as provided in the present draft law, that the recipient body takes note of the

issues raised by the report and takes action to address them; in no case this body should vote or adopt the report. Such a vote would indirectly call into question the independence of the Ombudsman Institution.»

CDL-AD(2015)034 - Opinion on the Draft Law on Ombudsman for Human Rights of Bosnia and Herzegovina, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), §§22,82.

«The Ombudsman shall not be given nor follow any instruction from any authorities.»

«The Ombudsman shall report to Parliament on the activities of the Institution at least once a year. In this report, the Ombudsman may inform Parliament on lack of compliance by the public administration. The Ombudsman shall also report on specific issues, as the Ombudsman sees appropriate. The Ombudsman's reports shall be made public. They shall be duly taken into account by the authorities.

This applies also to reports to be given by the Ombudsman appointed by the Executive.»

CDL-AD(2019)005 - Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles"), adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019), Principle 14, 20.

«Following the same logic in order to maintain the independence and coherence of decision-making, the PA should be able to elect him/herself his/her Deputies, in charge with certain sections and covering certain areas, of course, in accordance with the criteria provided by the law. This is essential to maintain the independence of the institution and to avoid any interference from the outside, even from the Parliament, for example, through the election of Deputies.»

«The same applies to the selection of PAO staff. Indeed, the selection of PAO staff from other institutions outside the PA may create the possibility of inappropriate influence on independent PA decision making process and therefore pose the risk of blocking that decision making. This standard applies to all Ombudsman institutions.»

CDL-AD(2021)017 - Republic of Moldova - Opinion on the draft Law amending some normative acts relating to the People's Advocate, adopted by the Venice Commission at its 126th Plenary Session (online, 19-20 March 2021), §§62, 63.

«The United Nations' Resolution A/RES/75/186 on "The role of Ombudsman and mediator institutions in the promotion and protection of human rights, good governance and the rule of law" stresses the importance of the financial and administrative independence and stability of these institutions. It also praises the efforts of those States that have provided their Ombudsman and mediator institutions with more autonomy and independence"¹². The Resolution encourages Member States to endow Ombudsman and mediator institutions with the necessary constitutional and legislative framework and adequate financial support for staffing and other budgetary needs, in order to ensure the efficient and independent exercise of their mandate.»

CDL-AD(2021)035 - Opinion On the Legislation Related to the Ombudsman's Staff of Armenia adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 December 2021), §16.

«The independence and efficiency of such institutions requires the implementation of policies, which guarantee the autonomy of the recruitment processes, staff members' career evolution and position ranking. Hence, issues related to the staff, such as independent recruitment, career policies, rank, salary, education, and training, are all part of this concept of independence.

«It results from the above that the international standards provide for the independence of the composition of the Ombudsman's office and for the Ombudsman's the capacity to recruit the staff.

CDL-AD(2021)035 - Opinion On the Legislation Related to the Ombudsman's Staff of Armenia adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 December 2021), §§22, 23.

«In all the international standards mentioned above, one of the most important elements of the Ombudsman's independence is his or her right to implement staff policies, not merely in a formal way, but in its very specific substantive sense and without any external influence from any state body.»

«The risk of undermining the independence of the Ombudsman is even greater if the Ombudsman is dependent for his or her policies on the staff of governmental bodies which are otherwise the main object of the Ombudsman's control. The possibility of influencing the policies of the Ombudsman's staff from the outside, especially from the government, can be seen as a tool for putting pressure on the Ombudsman, his or her independence, his or her image, the effectiveness of the institution and the public's confidence in it.»

«From the above it can be concluded that the 2020 amendments significantly reduce the power of the Ombudsman to recruit and implement its own staff policies. This also emerged from the interviews the delegation had, as it seems that several posts have been vacant since 2020 and have not yet been filled, as the decision no longer lies with the Ombudsman.»

«The package of amendments to the HRD's constitutional law constitutes a backward step concerning the independence and autonomy of the HRD institution. Moreover, in key staff policy matters, the Ombudsman is now directly or indirectly (through the Civil Service Office) dependent on government offices. This puts the independence of the institution and its effectiveness at risk.»
 «It is hence strongly recommended that the Ombudsman's legislative and institutional framework be reviewed in order to guarantee its full independence in all aspects and procedures related to staff policies, ranging from recruitment, career, job classification, job descriptions, training, etc. Specific guarantees should be included in the legislation enabling the Ombudsman to make staff appointments and training without such interference.»

CDL-AD(2021)035 - Opinion on the Legislation Related to the Ombudsman's Staff of Armenia adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 December 2021), §§54-58.

«... Article 15 paragraph 1 deals with a sensitive issue for the institution, its composition. The institution of the Ombudsman is a specific institution, dealing for example with the promotion and protection of human rights, whose priorities may change from year to year. The Ombudsman should be able to recruit the most qualified experts according to the priorities of the office in a flexible manner, without being subject to the general rules of the civil service and even less to the decision of a representative of the executive, which falls within the institution's field of competence. The Recommendations of the Council of Europe are explicit in this regard. Due to these characteristics, it must be an independent institution, in all elements of this independence from any other state body and from the public administration as a whole.»

«The required independence of the Ombudsman institution is measured by the independence of its head, its staff, and its budget, both in terms of amount and of management.»

CDL-AD(2021)035 - Opinion on the Legislation Related to the Ombudsman's Staff of Armenia adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 December 2021), §§65, 66.

«The package of the 2020 amendments, even though it was intended to unify the public service system in general, could be seen as significantly reducing the independence of the Ombudsman institution in terms of the independence of the staff, in terms of the independence of the Ombudsman to recruit and implement staff policies in an autonomous manner. The 2020 reform does not recognize the unique position and status of the Ombudsman institution, according both to international standards, as well to Armenian constitutional law previous to the amendments. According to these standards, the Ombudsman institution cannot be treated as part of a "unified" civil service.»

«As it flows from the international standards cited above, the independence and efficiency of the Ombudsman institution requires the implementation of policies, which guarantee the autonomy of the recruitment processes, staff members' career evolution and position ranking. Hence, issues related to the staff, such as independent recruitment, career policies, rank, salary, education, and training, are all part of this concept of independence.»

CDL-AD(2021)035 - Opinion On the Legislation Related to the Ombudsman's Staff of Armenia adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 December 2021), §§88, 89.

«To this end the Venice Commission recommends:

- Revising the Ombudsman's legislative framework in order to clarify and guarantee his or her full independence in staff policies, notably recruitment, career, job classification, job descriptions, etc;
- Ensuring that the Ombudsman's staff system and staff policies are based on clear criteria, linked to the specificities, functions and responsibilities of the institution. It should be avoided that staff-related issues subordinated to any other state body or agency, notably the executive power.»

CDL-AD(2021)035 - Opinion On the Legislation Related to the Ombudsman's Staff of Armenia adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 December 2021), §92.

«...recall that the Ombudsman is an institution taking action independently against maladministration and alleged violations of human rights and fundamental freedoms affecting individuals or legal persons...»

CDL-AD(2021)041 - Opinion On the Possible Exclusion of the Parliamentary Commissioner for Administration and Health Service Commissioner from the "Safe Space" Provided for by the Health and Care Bill adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021), §54.

«As the Venice Commission has had occasion to state recently, the independence of the staff is a key element of the Ombudsman institution required by international standards, whether the Paris or the Venice Principles.»

«This independence should be reflected in the composition and rank of the staff.»

CDL-AD(2021)049 - Opinion On the Draft Law "On the Commissioner for Human Rights" adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §§108, 109.

6. Features of the Ombudsman's term of office

6.1. Term of office

«...Moreover, it is obvious that any provision concerning the length of the Ombudsman's mandate becomes superfluous if by virtue of another provision the Parliament is allowed to dismiss the Ombudsman by simple majority.»

«The Working Group is of the opinion that a five year mandate would better respond to the need for independence, the four-year term provided for in the Law being too short. It would recommend to amend Article 11 of the Law so as to provide for a five year term....»

CDL-INF(2001)007 (English only) – Memorandum on the Organic Law on the Institution of the Ombudsman of the Federation of Bosnia and Herzegovina, approved by the Venice Commission at its 46th Plenary Meeting (Venice, 9-10 March 2001), §§3,4.

«The Commission welcomes the provision in Article 4 extending the Ombudsman's mandate to seven years and the provision according to which the Ombudsman cannot be re-elected. The first draft presented to the Rapporteurs stipulated that:

«The Ombudsman shall be appointed for a period of 5 years. While in office, he or she shall not be replaced.

The same person may not hold the post of Ombudsman more than twice [...].»

The Rapporteurs expressed their concern that such a provision could endanger the independence of the institution of the Ombudsman. If this provision were kept there could be a great risk that the independent action of the person holding the post is compromised by considerations of future re-election.»

CDL(2001)083 - Consolidated Opinion on the Law on Ombudsman in the Republic of Azerbaijan (Strasbourg, 7 September 2001), §11.

«The term of six years of tenure for the Human Rights Defender seems reasonably chosen. It was so determined in the Law and is now guaranteed in the Constitution as above noted. In §3 of this Article in the original Law, the possibility of re-election/appointment for a second term (but no more) was allowed for, but that provision has now been deleted, presumably in view of the fact that the possibility is not referred to in the Constitution. There may be reason to question whether the Constitution is to be interpreted so as to exclude a further term, but the principle of a single term does in any case provide a safeguard contributing to the Defender's independence and precluding the risk of accusations to the effect that his or her activities or recommendations might be influenced by an interest for gaining re-election. On the other hand, since the Defender is neither a member of the judiciary nor an official of the executive power, there may be technical problems with offering him security of employment on an objective basis after the end of this term, and this is not dealt with in the Law.»

CDL-AD(2006)038 - Opinion on Amendments to the Law on the Human Rights Defender of Armenia adopted by the Venice Commission at its 69th Plenary Session (Venice, 15-16 December 2006), §§29.

«It might be preferable for the sake of independence that the People's Advocate and Deputies serve a longer term, but which would then not be renewable.»

CDL-AD(2007)024 - Opinion on the draft law on the People's Advocate of Kosovo adopted by the Venice Commission at its 71st Plenary Meeting (Venice, 1-2 June 2007), §40.

«The Commission welcomes the provision in Article 5 establishing the term of 7 years for the tenure of the PA, without possibility for re-election/appointment. The principle of a single term indeed provides a safeguard contributing to the PA's independence and precluding the risk of accusations that his/her decisions/recommendations might be influenced by an interest in being reappointed. At the same time, as already pointed out by the Commission in relation to the status of Ombudspersons, since the PA "is neither a member of the judiciary nor an official of the executive power, there may be technical problems with offering him security of employment on an objective basis after the end of this term, and this is not dealt with the Law".

CDL-AD(2015)017 - Opinion on the Law on the People's Advocate (Ombudsman) of the Republic of Moldova, adopted by the Venice Commission at its 103rd Plenary Meeting (Venice, 19-20 June 2015), §45.

«The existing law does not specify whether the Defender may be re-elected. It is understood that the possibility of re-election is not excluded by the current law; if so, it should be specified in the Draft Law explicitly. In principle, the Venice Commission considers that it would be preferable to have the Defender elected for one single term, without the possibility for the re-election. Thus, in its recent opinion on the People's Advocate of Moldova, the Venice Commission observed as follows: "The principle of a single term indeed provides a safeguard contributing to the [People's Advocate's] independence and precluding the risk of accusations that his/her decisions/recommendations might be influenced by an interest in being reappointed". This position echoes earlier observations made by the Venice Commission in respect of the existing law on the Defender. In an opinion on the draft law on the People's Advocate of Kosovo the Venice Commission expressed its preference for a longer non-renewable term for the ombudsperson. That being said, since there is no hard standard on this matter, the final choice as to whether or not the Defender's mandate should be renewable belongs to the Armenian authorities.»

CDL-AD(2015)035 - Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Amendments to the Law on the Human Rights Defender of the Republic of Armenia, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015); §14.

«Although not in breach of the applicable standards, the possibility of renewing the mandate carries the risk that the action of the person occupying the post of Ombudsman is influenced by an interest in being reappointed. In the opinion of the Venice Commission, the principle of a single term provides a safeguard contributing to the Ombudsman's independence and precluding such risks. It is recommended to consider providing for a longer term of office (7-8 years) combined with a non-renewable mandate.»

CDL-AD(2015)034 - Opinion on the Draft Law on Ombudsman for Human Rights of Bosnia and Herzegovina, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), §65.

«The term of office of the Ombudsman shall be longer than the mandate of the appointing body. The term of office shall preferably be limited to a single term, with no option for re-election; at any rate, the Ombudsman's mandate shall be renewable only once. The single term shall preferably not be stipulated below seven years.»

CDL-AD(2019)005 - Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles"), adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019), Principle 10.

«Under Article 50.5 of the Constitution the term of the Senate is 6 years which is longer than the term of office of the CHR which is fixed by Article 4.1 at 5 years. This underlines that the term of five years is too short, not only with regard to the Venice Principles but also with regard to the term of office of the Senators. The term of office should be fixed not below 7 years.»

«The draft should preferably also provide for a specific provision preventing re-election. Indeed, the principle of a single term provides a safeguard contributing to the CHR's independence and precluding the risk of accusations that his/her decisions/recommendations might be influenced by an interest in being reappointed.»

«The Commission recommends providing for a longer term of office, not below 7 years and preferably for a specific provision of no re-election.»

«To sum up, the Commission recommends revising the provisions concerning the election of the Commissioner in order to comply with those enshrined in the Venice Principles, in particular providing for a public and transparent selection procedure, comprising public call, testing and shortlisting, an election by qualified majority, a longer term of office and preferably a non-renewable term of office.»

CDL-AD(2021)049 - Opinion on the Draft Law "On the Commissioner for Human Rights" adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §§64-67.

6.2. Termination of the Ombudsman's term of office

«The Public Attorney is discharged: 1) if he/she so requests; 2) if he/she is sentenced for a criminal offence to an unconditional prison term of at least six months; 3) if he/she permanently loses the psychophysical capability of carrying out the office of Public Attorney, which is determined on the basis of documented findings and the opinion of a competent medical institution; 4) if he/she fulfils the conditions for retirement. Each one of the situations described in 1), 2), 3) and 4) of this article is enough to discharge a Public Attorney. »

CDL-AD(2003)007 - Opinion on the Draft Law on the Public Attorney of "The former Yugoslav Republic of Macedonia" adopted by the Venice Commission at its 54th Plenary Session (Venice, 14- March 2003), II Article 9.

«Article 3: It should be the Committee for Constitutional Issues that deals with the election and the dismissal of the ombudsperson because the institution of the ombudsperson is fundamental in the State and because the work of this Committee is more likely to be geared toward human rights question (Article 3). (Accordingly, Article 9 should state that it is this Committee of the Assembly that is empowered to make a proposal for dismissal of the ombudsperson.) All candidates should be heard in a public session. All political groups in Parliament should have the right to present candidates to the Committee.»

«Article 9: Even more important for the independence of the ombudsperson at the time of appointment is the issue of the majority required for the removal of the ombudsperson from office. Here, a qualified majority is desirable in order to guarantee that the ombudsperson cannot be removed from office because of his or her acts which were disliked by the governmental majority [i]n Parliament. This solution may be limited by the provisions of the current Constitution and could be envisaged at a later stage. If indeed the guarantee of dismissal by qualified majority were introduced, on the other hand, the reasons for dismissal need not be stated in Article 9 given that as the ombudsperson needs also the trust of Parliament. In order to guarantee transparency in the process of the dismissal of the ombudsperson it is necessary to provide for a public procedure. The ombudsperson whose dismissal is envisaged, must be heard in public prior to the vote on the dismissal. A prior consultation of the Constitutional Court could be envisaged.»

CDL-AD(2004)041 - Joint Opinion on the Draft Law on the Ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe adopted by the Venice Commission at its 61st Plenary Session (Venice, 3-4 December 2004), §§12 and 19.

«Seen together, the ground and the procedure appear to pose a potential threat on the independence of the PA (and CPA). 3/5 is a moderate qualified majority and, as recommended above, the qualified majority required for termination should be at least equal to (and preferably higher than) the qualified majority required for election. This is fundamental for protecting the legal status of the PA, particularly his or her independence, and for preventing the politicisation of his or her possible dismissal. It is recommended to amend the Law so as to clearly state that the PA can only be dismissed by a 2/3 majority of the members of the Parliament.

Another concern related to the issue of dismissal of the PA is that the Law does not provide for the right of the PA whose dismissal is envisaged to be heard prior to the vote on the dismissal in Parliament. It is recommended that a procedure be prescribed ensuring a public hearing so that the case, as well as the views of the PA (and CPA), are made public. In addition, although the decision on early termination should rightly be made by the Parliament, there should be a procedure for challenging this decision in courts (presumably the Constitutional Court).»

CDL-AD(2015)017 - Opinion on the Law on the People's Advocate (Ombudsman) of the Republic of Moldova, adopted by the Venice Commission at its 103rd Plenary Meeting (Venice, 19-20 June 2015), §§60,61.

«...provides for those specific events or instances by or upon which the Defender's mandate may be terminated prior to the expiry of its term, by listing them in an exhaustive manner. In the original Law, the list provided for seven grounds, of which two have been deleted by the Amending Law. The former of these related to a breach by the Defender of Article 4 of the Law (providing restrictions against his or her engaging in other activities and forbidding membership of a political party and engagement in elections), while the latter referred to prolonged absence from duty for reasons of health. Both deletions are to positive effect as regards security of tenure, although the removal of the grounds without other adjustment may perhaps result in a certain lack of clarity or remedy, such as in the case of failing health, where the remedy of having a Deputy Defender is now not provided for (cf. Article 22).»

CDL-AD(2006)038 – Opinion on Amendments to the Law on the Human Rights Defender of Armenia adopted by the Venice Commission at its 69th Plenary Session (Venice, 15-16 December 2006), §38.

«After expiration of the Protector's term, and prior to selection of a new Protector, the current Protector should continue in office until the successor takes office – as opposed to the solution proposed in the draft. This would help to avoid a situation where no Protector holds an office -as

happens sometimes for up to several months - with only a deputy as an acting ombudsman filling in temporarily. This is also important due to the need for the proper transfer of Protector's duties between the old and the new office holder. The solution proposed in the draft should be used in situations where, due to objective circumstances (e.g. death, illness, etc.) the Protector is unable to perform his or her duties.»

CDL-AD(2009)043 – Opinion on the draft amendments to the Law on the Protector of Human Rights and Freedoms of Montenegro, adopted by the Venice Commission at its 80th Plenary Session (Venice, 9-10 October 2009), §16.

« In its 2015 second opinion on the draft amendments to the Constitution of the Republic of Armenia, the Venice Commission found the identical provision in the draft Constitution to be excessively broad.²⁷ Grounds for dismissal of the Defender should be carefully construed in order to balance the legitimate need to terminate the Defender's mandate in cases of incapacity or serious ethical misconduct,²⁸ with the Defender's independence in performing his or her function. The disqualifying conviction should, as suggested by the Venice Commission in the above-mentioned opinion, exclude minor convictions, e.g. minor traffic offences. Alternatively, the law might adopt – as grounds for dismissal due to criminal offences – a qualification that these offences must amount to “serious ethical misconduct” as suggested in PACE Recommendation 1615 (2003) on the Institution of Ombudsman, p. 7.5. A future constitutional amendment might be required to introduce such a limitation.»

CDL-AD(2016)033 - Armenia - Opinion on the draft Constitutional Law on the Human Rights Defender, adopted by the Venice Commission at its 109th Plenary Session (Venice, 9-10 December 2016), §39.

«The Ombudsman shall be removed from office only according to an exhaustive list of clear and reasonable conditions established by law. These shall relate solely to the essential criteria of “incapacity” or “inability to perform the functions of office”, “misbehaviour” or “misconduct”, which shall be narrowly interpreted. The parliamentary majority required for removal – by Parliament itself or by a court on request of Parliament- shall be equal to, and preferably higher than, the one required for election. The procedure for removal shall be public, transparent and provided for by law.»

CDL-AD(2019)005 - Principles on the Protection and Promotion of the Ombudsman Institution (“The Venice Principles”), adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019), Principle 11.

«This principle [Principle 11] needs to be seen in the context with the situation in each individual country. Conditions as well as procedures appear to be of fundamental importance as they constitute strong guarantees for the independence of the Commissioner.»

«As stated in Principle 11 of the Venice Principles, the draft should provide for a required majority for termination which should be at least equal to (and preferably higher than) the qualified majority required for election. This is fundamental for protecting the legal status of Commissioner, particularly his or her independence, and for preventing the politicisation of his or her possible dismissal.»

CDL-AD(2021)049 - Opinion On the Draft Law “On the Commissioner for Human Rights” adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §69, 77.

«Conditions 1) “*failure to comply with requirements and restrictions established by this law and the laws of the Republic of Kazakhstan*”. This sentence is *a priori* vague and open for many interpretations particularly in the light of the listed seven reasons for early dismissal which follow further down. This sentence should be deleted or at least narrowed down to “serious” failures in order to exclude petty infractions, such as minor traffic offences or a failure to pay parking tickets on time.»

CDL-AD(2021)049 - Opinion on the Draft Law “On the Commissioner for Human Rights” adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §73.

«In order to be in line with the Venice Principles, the draft should provide for a public and transparent procedure. The dismissal procedure should take place in Parliament, with a public hearing of the Commissioner. It is therefore recommended that a procedure be prescribed ensuring a public hearing so that the case, as well as the views of the Commissioner are made public.»

CDL-AD(2021)049 - Opinion On the Draft Law “On the Commissioner for Human Rights” adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §76.

«As the Venice Commission had previously stated in other occasions, a procedure for challenging the dismissal decision in courts (presumably the Constitutional Court) should be prescribed in the draft law.»

«To sum up, with regard to the terminations of powers of the Commissioner, the Venice Commission recommends deleting the vague set of conditions set in Article 5.1 or at least narrowing them down in a clear manner. With regard to the procedure of dismissal, it should be brought in line with the Venice Principles by foreseeing public and transparent procedures as well as a qualified majority by the Parliament, preferably higher than the one required for the election. Providing for a mechanism for appeal to the judiciary should probably be prescribed and would reflect best practices in this area.»

CDL-AD(2021)049 - Opinion on the Draft Law “On the Commissioner for Human Rights” adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §§78, 79.

«In order to align the draft law with international standards, the Venice Commission recommends: with regard to the Commissioner’s term of office, the procedure of dismissal should foresee public and transparent procedures as well as a qualified majority by Parliament...»

CDL-AD(2021)049 - Opinion on the Draft Law “On the Commissioner for Human Rights” adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §117.

7. Budgetary independence

«The budgetary independence provided for in Article 33 is a very positive element. In addition, explicit reference should be made in the first paragraph to *adequate* provision of funds for the effective and efficient functioning of the office. In addition, (this may be a question of translation,) it seems that the Government is obliged to include the ombudsperson draft proposal into the global draft budget submitted to Parliament without any change.»

CDL-AD(2004)041 - Joint Opinion on the Draft Law on the Ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe adopted by the Venice Commission at its 61st Plenary Session (Venice, 3-4 December 2004), §35.

«In order to increase the financial independence of the Defender it might be appropriate to consider additional safeguards such as the principle that the budget for the Defender could be reduced in relation to the previous financial year only by a percentage not greater than the percentage the budget of the Parliament, President and Government is reduced.

Considering its exceptionally sensitive nature and the significance of this provision for the independence of the institution, a provision could be added stating that public authorities shall not use the budgetary process for allocating funds from the budget in a manner that interferes with the independence of the institution of the Human Rights Defender.»

CDL-AD(2006)038 – Opinion on Amendments to the Law on the Human Rights Defender of Armenia adopted by the Venice Commission at its 69th Plenary Session (Venice, 15-16 December 2006), §§80,81.

«Thus the law or statute regulating the Ombudsman could prescribe that the budgetary allocation of funds for the operations of the institution should be adequate to the need to ensure full, independent and effective discharge of the responsibilities and functions of the institution,

and take into account such matters of reference as the number of complaints lodged with the institution in the previous year. The law or statute could also provide for a relative budgetary independence of the Ombudsman, by prescribing that the institution itself should submit a proposal for its budget to the governmental authority responsible for presentation of the national budget to the parliament, and that this proposal should be included within the national budget without changes, either as a proposal of the government or for purposes of comparison with the eventual proposal of the governmental authority, if the government should find it necessary to make reductions in the allocation requested. Finally, if the Human Rights Ombudsman is constituted as a parliamentary ombudsman in the ordinary sense (i.e. appointed by the legislature and reporting to the legislature), this may serve to strengthen the assumption that the parliament will in fact regularly provide the institution with financial means adequate to ensure its proper functioning.»

«The legislation on the Ombudsman should provide that the budgetary allocation should be adequate to the need to ensure full, independent and effective discharge of the responsibilities and functions of the institution taking into account such matters of reference as the number of complaints lodged with the institution in the previous year. The law or statute could also provide for a relative budgetary independence of the Ombudsman by prescribing that the institution itself should submit a proposal for its budget.»

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 (Venice, 1-2 June 2007), §§28 and 30.VI.

«Also, Article 37.5 of the Law provides that the PA's Office may be financed from other sources than the State budget, on the sole condition of not being prohibited by law. While there are no International or European standards prohibiting the funding of Ombudsman institutions from sources other than the state budget, this may be seen as detrimental to the independence and the appearance of independence of the PA. It is strongly recommended that the Law explicitly stipulate that the budgetary allocation should be adequate to the need to ensure full, independent and effective discharge of the tasks of the institution, based on indicators such as the number of complaints lodged with the PA in the previous period of reference. The Law should also provide for the autonomous management, by the Office, of the budgetary allocation at its disposal.

It is also noted that, under Article 37.3 of the Law, "*the reduction of the approved costs related to the Office activity is allowed only by the Parliament decision*". Given the particular significance of the financial provision of the PA's Office for the independence of the institution, it would be important to add a clause in the Law stating that the public authorities should not use the budgetary process for allocating/reducing funds from the budget in a manner that interferes with the independence of the PA institution.»

CDL-AD(2015)017 - Opinion on the Law on the People's Advocate (Ombudsman) of the Republic of Moldova, adopted by the Venice Commission at its 103rd Plenary Meeting (Venice, 19-20 June 2015), §§ 74,75.

«Thus the law or statute regulating the Ombudsman could prescribe that the budgetary allocation of funds for the operations of the institution should be adequate to the need to ensure full, independent and effective discharge of the responsibilities and functions of the institution, and take into account such matters of reference as the number of complaints lodged with the institution in the previous year. The law or statute could also provide for a relative budgetary independence of the Ombudsman, by prescribing that the institution itself should submit a proposal for its budget to the governmental authority responsible for presentation of the national budget to the parliament, and that this proposal should be included within the national budget without changes, either as a proposal of the government or for purposes of comparison with the eventual proposal of the governmental authority, if the government should find it necessary to make reductions in the allocation requested. Finally, if the Human Rights Ombudsman is constituted as a parliamentary ombudsman in the ordinary sense (i.e. appointed by the legislature and reporting to the legislature), this may serve to strengthen the assumption that the parliament will in fact regularly provide the institution with financial means adequate to ensure its proper functioning.

The above question secondly refers to the issue whether there might be reason to establish regional offices for human rights protection in Kazakhstan. In view of the size and population of the country, this clearly would seem desirable, at least in order to facilitate the investigative and monitoring functions of the national Ombudsman and the personal access to the institution. Referring again to the comments under Question V. above, it is to be noted that the alternative of appointing regional or local ombudspersons who are not subordinated to the national Ombudsman is preferred in many countries and has advantages of its own. Unless specific conditions in certain regions otherwise indicate, however, it would seem preferable in Kazakhstan to organise regional or local offices manned by representatives of the national Ombudsman, with or without being designated as Deputy ombudspersons.

[...] The six questions raised by the Human Rights Commissioner (Ombudsman) of Kazakhstan can be answered as follows:

The institution of the Human Rights Commissioner (Ombudsman) should be guaranteed at the constitutional level, setting out the essence of the characteristics and powers of the office of Ombudsman or Human Rights Defender and the basic terms of his/her appointment providing for an election by a qualified majority in parliament. »

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 (Venice, 1-2 June 2007), §§28 and 30.VI.

«In view of the particular significance of its financial resources for the independence of the Institution, it would be important to redraft these provisions in such a way as to avoid any risk of undue cuts to the Ombudsman Institution's budget through an extensive interpretation of the clauses allowing its amendment. It is also strongly recommended that the Law includes, as an additional guarantee in this regard, a clause stating that the public authorities should not use the budgetary process for allocating/reducing funds from the budget in a manner that interferes with the independence of the Ombudsman Institution. In any event, it is essential to ensure that any necessary budgetary restraints should not be applied to the Ombudsman Institution in a disproportionate manner.

Finally, the law should explicitly stipulate, as a general principle, that *“the budgetary allocation should be adequate to the need to ensure full, independent and effective discharge of the tasks of the Institution, based on indicators such as the number of complaints lodged with the PA in the previous period of reference”*. The law should also expressly provide for the autonomous management, by the Ombudsman Institution, of its budget.»

CDL-AD(2015)034 - Opinion on the Draft Law on Ombudsman for Human Rights of Bosnia and Herzegovina, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), §§88,89.

« Article 8 is about “Financing of and social guarantees for the activities of the Defender”. Article 8.2 provides that “The budget of the Defender and the Staff thereto shall constitute a part of the State Budget, which is financed in a separate line.” This is in line with the standard of budgetary independence of the institution. The Defender should also be able to defend, in person, the adoption of his or her budget in Parliament (Article 8.4). = budgetary independence »

CDL-AD(2016)033 - Armenia - Opinion on the draft Constitutional Law on the Human Rights Defender, adopted by the Venice Commission at its 109th Plenary Session (Venice, 9-10 December 2016), §24.

«The 2015 opinion also commented on Article 37.5 of the Law that provides that the People's Advocate Office may be financed from other sources than the State budget, on the sole condition of not being prohibited by law. While there are no International or European standards prohibiting the funding of Ombudsman institutions from sources other than the state budget, the opinion underlined that this may be seen as detrimental to the independence and the appearance of independence of the Institution. It was therefore strongly recommended that the Law explicitly stipulate that the budgetary allocation should be adequate to the need to ensure full, independent and effective discharge of the tasks of the institution, based on indicators such as the number of

complaints lodged with the People's Advocate in the previous period of reference. The Law should also provide for the autonomous management, by the Office, of the budgetary allocation at its disposal.»

«It was also noted that, under Article 37.3 of the Law, “the reduction of the approved costs related to the Office activity is allowed only by the Parliament decision”. Given the particular significance of the financial provision of the People's Advocate Office for the independence of the institution, the opinion considered that it would be important to add a clause in the Law stating that the public authorities should not use the budgetary process for allocating/reducing funds from the budget in a manner that interferes with the independence of the People's Advocate institution.»

«The Venice Commission has consistently recommended in its opinions that the budgetary allocation of funds for the operations of the institution of the Ombudsman should be adequate to the need to ensure full, independent and effective discharge of the responsibilities and functions of the institution. The Commission has further recommended that given the exceptionally sensitive nature and particular significance of the finance provisions for the independence of the Ombudsman Institution, provision should be made in the relevant laws that the public authorities shall not use the budgetary process for allocating funds from the budget in a manner that interferes with the independence of the institution of the Ombudsman»

«Indeed, the wording within the limits of budget allocations approved through annual budget law may be interpreted as an additional limitation, which does not exist under the current law. The explicit need for the People's Advocate to present his or her own budget proposal should not be removed from Article 37. Even assuming that such need may be derived from other general legislation, it is an important guarantee which has its place in the specific legislation on the process of budgetary allocation to the Ombudsman. Assuming that it may be legitimate for the government to have a say as regards the correspondence between the requested budget and the needs and expected results of the institution, it is for parliament to decide upon the final allocation of the Ombudsman's budget. It is then up to the Ombudsman him or herself to live up to the general principles of economy, effectiveness and efficiency. It should be underscored that this is a precondition to the “complete autonomy over issues relating to budget and staff” recommended by the Parliamentary Assembly.⁴ In this sense, the Venice Commissions has in previous occasions suggested that the government be obliged to include the ombudsman's draft proposal into the global draft budget submitted to Parliament without any change.⁵ It seems that this has been the case in Moldova since 2014.»

CDL-AD(2017)032 - Republic of Moldova - Proposed New Article 37 of the Law on the People's Advocate Finance Provisions, adopted by the Commission at its 113th Plenary Session (Venice, 8-9 December 2017), §§11, 12, 26, 34.

«Sufficient and independent budgetary resources shall be secured to the Ombudsman institution. The law shall provide that the budgetary allocation of funds to the Ombudsman institution must be adequate to the need to ensure full, independent and effective discharge of its responsibilities and functions. The Ombudsman shall be consulted and shall be asked to present a draft budget for the coming financial year. The adopted budget for the institution shall not be reduced during the financial year, unless the reduction generally applies to other State institutions. The independent financial audit of the Ombudsman's budget shall take into account only the legality of financial proceedings and not the choice of priorities in the execution of the mandate.»

CDL-AD(2019)005 - Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles"), adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019), Principle 21.

«The Paris Principles had also provided guarantees for NHRIs in the following terms: “2. The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.” Recommendation CM/Rec (2019) 6 and CM/Rec(2021)1 of the Council of Europe Committee of Ministers to member States provide for the same guarantees.»

«The standards relating to the independence of the Ombudsman have thus given importance to the notion of the need for "sufficient resources" for the institution, which is an essential condition for the institution to be able to fulfil its mandate.»

«The term “sufficient resources” covers three main elements: the institution's budget, its staff and its infrastructure. Reducing even one of its elements, may eventually lead to an overall reduction in the effectiveness of the institution and consequently to a loss of legitimacy and public confidence in it.»

CDL-AD(2021)035 - Opinion on the Legislation Related to the Ombudsman's Staff of Armenia adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 December 2021), §§17-19.

«With regard to the budget of the institution, the Principle 21 of “the Venice Principles” provides that “Sufficient and independent budgetary resources shall be secured to the Ombudsman institution. The law shall provide that the budgetary allocation of funds to the Ombudsman institution must be adequate to the need to ensure full, independent, and effective discharge of its responsibilities and functions. The Ombudsman shall be consulted and shall be asked to present a draft budget for the coming financial year. The adopted budget for the institution shall not be reduced during the financial year, unless the reduction generally applies to other State institutions. The independent financial audit of the Ombudsman's budget shall take into account only the legality of financial proceedings and not the choice of priorities in the execution of the mandate.”»

«The Paris Principles on the NHRIs also give an important place to this aspect. Thus, in paragraphs 2 and 3 of the chapter "Composition and guarantees of independence and pluralism" it is provided that “The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence” and also “in order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.”»

CDL-AD(2021)035 - Opinion on the Legislation related to the Ombudsman's Staff of Armenia adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 December 2021), §§28, 29.

«It is evident that the rank and number of staff is an important issue that directly affects the budget of the institution. As mentioned above (§§**) international standards place great importance on the budgetary independence of the institution.»

«As an "authorised state body", it seems that the Ombudsman is obliged to "negotiate" with the government for the following budget year the budget of the institution, including the number of employees. This concern was raised by the Venice Commission in its 2016 opinion in paragraph 27, which states that "Moreover, the Defender's budget request is always submitted to the government for approval in order to be included in the draft state budget. The draft Constitutional Law does not ensure that sufficient funds in the budget proposal are allocated to the Defender to perform his functions in general and his NPM (National Protection Mechanism) functions. However, this situation could be remedied by Article 193.4 of the new Constitution, which requires the state to ensure "adequate funding" for the Defender's activities.”»

CDL-AD(2021)035 - Opinion on the Legislation Related to the Ombudsman's Staff of Armenia adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 December 2021), §§70, 74.

«However, since the negotiation with the government potentially could have an impact on the independence of the institution, it would be advisable for the Ombudsman to negotiate the budget of the institution rather in Parliament.»

«Explicitly providing for negotiating the budget within the Parliament rather than with the executive power would prevent the budgetary process from being used in a way that undermines the Ombudsman's independence. This was one of the recommendations of the Venice Commission in 2006, which was reiterated in the 2016 opinion.³² It seems that the current situation mirrors this concern. Indeed, the Venice Commission's delegation has learned that the Ministry of Finance has not included additional funds for an increase in the Ombudsman's staff, although the Ombudsman has requested this, as the increase in staff was not foreseen in the Prime Minister's decree. If so, the above-mentioned recommendation of the Venice Commission seems to be still valid.»

CDL-AD(2021)035 - Opinion On the Legislation Related to the Ombudsman's Staff of Armenia adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 December 2021), §§76, 77.

«Given that the budget of the institution, to which the staff of the institution is linked, is a key element of the independence of the institution, it is obvious that the role of the Parliament is decisive in this respect, and that it is up to the Parliament to also guarantee this independence.»

«Therefore, the role of the Parliament in supporting the budget of the Ombudsman institution, and thus in supporting the independence of the institution, is crucial. In this respect, the budgetary demands made by the Ombudsman should be supported by the Parliament, which guarantees the independence of the institution. The financial elements related to the staff of the institution should therefore be included in the budget law (discussed and approved by the Parliament) rather than in regulatory acts, such as decrees of the Prime Minister, as is the case today.»

«The financial aspect of the Ombudsman institution's staff, is reflected in the budget, which should not only be sufficient but should not be subject to external pressure, particularly from bodies that fall within the Ombudsman's remit.»

«The Commission reiterates its previous recommendations on the institution's budget and recommends that they be implemented, bearing in mind the fundamental role of the Parliament.»

CDL-AD(2021)035 - Opinion on the Legislation Related to the Ombudsman's Staff of Armenia adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 December 2021), §§79-82.

«Moreover, issues relating to the institution's staff and rank have budgetary consequences and are therefore linked to the institution's budget. International standards are again consistent in this respect and require to secure guarantees of independence for the budget of the institution.»

CDL-AD(2021)035 - Opinion on the Legislation Related to the Ombudsman's Staff of Armenia adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 December 2021), §91.

«Article 16 "*Financial and logistical support*" of the draft law contains general provisions according to which the budget of the institution is provided for in the state budget, which must provide for a separate budget programme for the functioning of the institution. It is specified in Article 16.3 that the Commissioner may engage organisations and experts on a contractual basis.»

CDL-AD(2021)049 - Opinion on the Draft Law "On the Commissioner for Human Rights" adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §101.

«The provisions of the article are welcome. However, it is worth underlining that the budget must be administered in accordance with Principle 21 of the Venice Principles and that it would be appropriate to provide for legislative provisions to this effect. The Law should also provide for the autonomous management, by the Office, of the budgetary allocation at its disposal.»

CDL-AD(2021)049 - Opinion on the Draft Law "On the Commissioner for Human Rights" adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §102.

«The draft could make explicit that the Commissioner shall propose his/her budget for the coming year²¹, as provided for in Venice Principle 21.3.»

«The Commission, while referring to the above-mentioned international standards and to its previous opinions, can only underline that the required independence of the institution is measured by the independence of its head, its staff, and its budget, both in terms of amount and administration.»

«The Commission recommends the draft clearly specifies that the budget should be administered in an autonomous way and make explicit that the Commissioner should propose the budget of the institution for the coming year.»

CDL-AD(2021)049 - Opinion on the Draft Law "On the Commissioner for Human Rights" adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §103-105.

«In order to align the draft law with international standards, the Venice Commission recommends: with regard to the budget of the institution, providing that the budget is administered in an autonomous way and that the Commissioner proposes the budget of the institution for the coming year...»

CDL-AD(2021)049 - Opinion on the Draft Law "On the Commissioner for Human Rights" adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §117.

8. Competences and powers of the Ombudsman

«As all general Principles on the Ombudsman state, the Ombudsman has a major role in protecting the fundamental rights of individuals.»

«If the institution of Ombudsman benefits from such Principles as those developed by the Venice Commission, it is also and above all because these institutions protect the rights of individuals in the end.»

CDL-AD(2021)041 - Opinion on the Possible Exclusion of the Parliamentary Commissioner for Administration and Health Service Commissioner from the "Safe Space" Provided for by the Health and Care Bill adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021), §§84, 86.

«The recently adopted international standards were an opportunity to recall the importance of the Ombudsman Institution in a democracy and in the protection of human rights.»

«These texts were also an opportunity to remind States of their duty to support the institution and not to hinder or diminish its missions and mandates.»

«In terms of international standards, the exclusion of the PSHO from the safe spaces possibly created by the Bill would be at odd with Principle 16 of the Venice Principles, which were established as the new global standard for the ombudsman institutions by UN Resolution A/RES/75/186.»

CDL-AD(2021)041 - Opinion on the Possible Exclusion of the Parliamentary Commissioner for Administration and Health Service Commissioner from the "Safe Space" Provided for by the Health and Care Bill adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021), §§90 – 92.

8.1. Scope of the monitoring competence of the Ombudsman

«The Commission considers that, except for matters of internal functioning of the Government, the Ombudsman should have the power to control acts of the executive. The deletion of the

Prime Minister from the list of persons whose activities are outside the Ombudsman's investigation powers (Article 1 par. 3) is an important positive amendment to the new draft. The President remains in this list. The Commission hopes that activities exercised by the President and/or the Presidential administration in his/her capacity as head of the executive are not out of reach for the Ombudsman. Activities of the President, unless they are of an exceptional nature (e.g. declaration of war) or of a political nature (e.g. appointment of the Prime Minister) should fall within the monitoring competence of the Ombudsman.»

CDL(2001)083 - Consolidated Opinion on the Law on Ombudsman in the Republic of Azerbaijan (Strasbourg, 7 September 2001), §§6,7,18.

«This Article corresponds to Article 12 of the previous draft. §1.3 now requires the complainant's consent prior to referring a claim to the competent authorities, which is a positive innovation. §8 maintains the possibility for the Defender to take up certain issues upon its own initiative – though unfortunately only in limited cases – but, and this is positive, does not require any longer that the relevant decision be made public.»

CDL-AD(2003)006 - Opinion on the Draft Law on the Human Rights Defender of Armenia adopted by the Venice Commission at its 54th Plenary Session (Venice 14-15 March 2003), Article 11.

«Particularly welcomed are provisions on the ombudsperson's mandate to the promotion, in addition to the protection, of human rights and fundamental freedoms, the ombudsperson's right to appeal to the Constitutional Court, his or her right of unhindered access in private to persons deprived of their liberty and the ombudsperson's budgetary independence.»

«This Article should be consistent with Article 1 empowering the Ombudsperson with a broad based mandate to promote and protect human rights and fundamental freedoms. In view of the necessity for the executive to follow principles of good administration, it may be useful to empower the ombudsperson to intervene not only when there are irregularities, i.e. violation of legal norms but also when such principles have been disregarded (e.g. humiliating behaviour in relation to individuals, ostentatiously slow processing of affairs) and control the objectivity and impartiality of the work of administrative bodies. In this respect, the European Code of Good Administrative Behaviour of the European Ombudsman can be a source for inspiration. Only general, "political" decisions of the Government as a whole should be excluded from the scope of the competence of the ombudsperson; ministerial and governmental decisions directly affecting individuals should be open to control by the ombudsperson. The work of Parliament, its committees and its members should be excluded from the control of the ombudsperson.»

CDL-AD(2004)041 - Joint Opinion on the Draft Law on the Ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe adopted by the Venice Commission at its 61st Plenary Session (Venice, 3-4 December 2004), §§7,13.

«In order to facilitate the necessary broad interpretation of the mandate of the Human Rights Defender, it would be of advantage to have the Law include not only the term «protection» but also «monitoring» and «promotion». However, the term «protection» does not stand alone in the text but is preceded by the verb «implement», which already has a wide connotation. At the same time, the function of monitoring the administration by way of being able to issue recommendations is so basic to the role of the Ombudsman institution as generally perceived among nations that it clearly must be seen to belong to the mandate of the Defender as now declared in the Armenian Constitution.»

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

«The general mandate of the Defender is stated primarily in terms of implementing protection against violations of human rights and freedoms by the executive power. The question may be raised whether his or her authority to monitor the administration and promote the observance of human rights might be expressed in stronger terms, such as by using those exact words. As in

the opinion CDL-AD(2003)006, it also may be asked whether the Defender's mandate could be strengthened by listing his or her fields of action in more specific terms than in the Law. Also, the mandate should also explicitly refer to violations by omission. However, the straightforward description of the Defender's general mandate and purpose embedded in the Constitution and now followed in the Law clearly invites a broad interpretation ensuring that the essential function of monitoring is in fact included. Under the assumption of such broad interpretation, the role envisaged for the Armenian Defender does appear fully acceptable.»

CDL-AD(2006)038 – Opinion on Amendments to the Law on the Human Rights Defender of Armenia adopted by the Venice Commission at its 69th Plenary Session (Venice, 15-16 December 2006), §§18, 19,89.

«...the powers are intended to protect individuals against the government, this must be done in full impartiality, taking into account also the powers and responsibilities of the government body concerned.»

CDL-AD(2007)024 – Opinion on the draft law on the People's Advocate of Kosovo adopted by the Venice Commission at its 71st Plenary Meeting (Venice, 1-2 June 2007), §6.

«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. »

CDL-AD(2011)034 – Joint opinion on the protector of human rights and freedoms of Montenegro adopted by the Venice Commission at its 88th Plenary Session (Venice, 14-15 October 2010), §11.

«It is not unusual for an Ombudsman's competence to cover certain parts of the private sector (e.g. in anti-discrimination matters); however, the main focus of an Ombudsman's competence is, by tradition and purpose, the public administration. An overall jurisdiction with the private sector therefore seems quite unusual.

Although no applicable standards appear to prevent such an arrangement, in view of general experience, it should be considered whether the PA enjoys sufficient authority for such a far-reaching jurisdiction to be feasible. It should be borne in mind that the PA's opinions might be disregarded by the private sector to an extent that would affect its general authority also towards the public sector. The Venice Commission considers it advisable to include private bodies in the jurisdiction of the PA only to the extent that these agencies are entrusted with a public service mission or, where applicable, co-financed by the state. »

CDL-AD(2015)017 - Opinion on the Law on the People's Advocate (Ombudsman) of the Republic of Moldova, adopted by the Venice Commission at its 103rd Plenary Meeting (Venice, 19-20 June 2015), §§28,29.

«Ombudsman Institutions have an important role to play in strengthening democracy, the rule of law, good administration and the protection and promotion of human rights and fundamental freedoms.»

«The mandate of the Ombudsman shall cover prevention and correction of maladministration, and the protection and promotion of human rights and fundamental freedoms.»

«The institutional competence of the Ombudsman shall cover public administration at all levels. The mandate of the Ombudsman shall cover all general interest and public services provided to the public, whether delivered by the State, by the municipalities, by State bodies or by private entities.»

CDL-AD(2019)005 - Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles"), adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019), Principles 1, 12, 13.

«Secondly, a difficulty could arise from the relationship between two principles, that of access to the Ombudsman and that of his or her competencies. For instance, if, on the one hand, legal persons, in this case entrepreneurs, have the right to submit complaints to the Ombudsman for violation of their rights or legitimate interests, and if, on the other hand, the competence of the Ombudsman is also extended to all "organisations and enterprises, irrespective of the type of ownership and legal form of the organisation" (which is not in compliance with Principle 13 of the Venice Principles), this could result in the Ombudsman dealing with "conflicts" between private sector entities. In such a case, the Ombudsman would go beyond his usual jurisdiction of conflict resolution.»

«Finally, it should be recalled that the competences of the PA and the PAER (but not those of the PAC), include the supervision of the private sector. This broad competence for an Ombudsman is generally not in line with Recommendation CM/Rec(2019)6 of the Committee of Ministers to member States on the development of the Ombudsman institution nor with the Principle 13 of the Venice Principles according to which the mandate of the Ombudsman shall cover all general interest and public services provided to the public, whether delivered by the State, by the municipalities, by State bodies or by private entities. In its 2015 Opinion, the Venice Commission had already recommended that the competence of the institution in relation to the private sector and the courts shall be reconsidered and clearly specified.⁹»

«The Venice Commission reiterates its recommendation of reconsidering the competence of the institution in relation to the private sector and of clearly specifying it in line with Principle 13 of the Venice Principles»

CDL-AD(2021)017 - Republic of Moldova - Opinion on the draft Law amending some normative acts relating to the People's Advocate, adopted by the Venice Commission at its 126th Plenary Session (online, 19-20 March 2021), §§40, 41, 42.

«Principle 1 states: "1. Ombudsman Institutions have an important role to play in strengthening democracy, the rule of law, good administration and the protection and promotion of human rights and fundamental freedoms. While there is no standardised model across Council of Europe Member States, the State shall support and protect the Ombudsman Institution and refrain from any action undermining its independence.»

This principle does not call for any particular comment other than to assess whether in this case the undue effects of the Bill on the PSHO can be considered to reduce the PSHO's independence or even mandate. It will be seen below (§§ 77-83) whether the independence of the PSHO is affected as such by the provisions of the Bill, and whether other aspects of the PSHO may be also affected.»

CDL-AD(2021)041 - Opinion On the Possible Exclusion of the Parliamentary Commissioner for Administration and Health Service Commissioner from the "Safe Space" Provided for by the Health and Care Bill adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021), §59.

«... First, Principle 13.2 includes in the jurisdiction of the Ombudsman all public services provided to the public both by public and by private entities. The draft should include private entities which deliver public services into the Commissioner's jurisdiction. Second, activities of the President and First President, unless they fall into the realm/aera of sovereignty exercised by the Head of State should fall within the monitoring competence of the Ombudsman.⁶ The exception provided for in Article 7.2 should be reconsidered in this respect.»

CDL-AD(2021)049 - Opinion On the Draft Law “On the Commissioner for Human Rights” adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §30.

«In order to improve the legislative quality of the draft law, it would be preferable that the jurisdiction of the Commissioner be clearly defined in a single article or section and not addressed in different parts of the draft law, as is currently the case.»

CDL-AD(2021)049 - Opinion On the Draft Law “On the Commissioner for Human Rights” adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §28.

«Article 7 of the draft law, “Consideration of a complaint”, stipulates” 1. *The Commissioner, within the limits of his competence, considers complaints of citizens of the Republic of Kazakhstan and foreigners and stateless persons in the territory of the Republic of Kazakhstan (hereinafter referred to as the applicants)*”.»

«The Venice Commission recommends providing for the jurisdiction of the Commissioner to applicants under the jurisdiction of all natural and legal persons within the jurisdiction of the Republic of Kazakhstan. Instead of the clause “*in the territory of the Republic of Kazakhstan*” it would be better to refer to any natural or legal person within the jurisdiction of the authorities of the Republic of Kazakhstan. Such a wording would then include for instance individuals under the jurisdiction of authorities such as Embassies and Consulates. It would also include individuals residing in other countries, but in need of, e.g., applying to domestic Kazakhstan authorities for certain permissions etc.»

«In conclusion, regarding the jurisdiction of the Commissioner, the Venice Commission recommends aligning the draft law with Venice Principles 13.2 and 13.3 of the Venice Principles. The promotion of Human Rights should be added in the jurisdiction of the CHR. Exemptions of jurisdiction to the activities of the President should be limited to those of an exceptional nature or of a political nature. The Commissioner's jurisdiction should be defined in one place and not scattered throughout the draft. The jurisdiction of the CHR should cover applicants under the jurisdiction of the Kazakh authorities. The competence over the judiciary should be confined to ensuring procedural efficiency and administrative functioning of that system jurisdiction.»

CDL-AD(2021)049 - Opinion On the Draft Law “On the Commissioner for Human Rights” adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §§32-34.

«Article 1.4 of the draft law reads as “*The Commissioner, within the framework of his activities, takes part in the work of international human rights organizations, other non-governmental human rights organizations*”.»

«Yet, in principle the CHR cannot take part in the work of civil society or international bodies, unless (s)he is invited to do so. Such a provision would be very intrusive, particularly with regard to civil society. It is therefore recommended rephrasing this paragraph.»

«Article 2 of the draft law reads: “*Principles of the Commissioner 's activities*” *The activities of the Commissioner are based on the principles of: 1) legality; 2) objectivity and fairness; 3) openness; 4) independence, responsibility and impartiality in the interests of human and civil rights and freedoms*”.»

«Ombudsman activities are based on the principles of the rule of law. The Venice Commission welcomes that the principles listed in the article represent the normative pillar of the rule of law. Furthermore, it would be appropriate to include the concept of the rule of law as such in this article.»

CDL-AD(2021)049 - Opinion On the Draft Law “On the Commissioner for Human Rights” adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §§35-38.

«In order to align the draft law with international standards, the Venice Commission recommends: with regard to the Commissioner's jurisdiction, including private entities which deliver public services, limiting the exemptions of jurisdiction, clarifying the jurisdiction over the judiciary and adding the promotion of Human Rights should be added in the mandate of the Commissioner...»

CDL-AD(2021)049 - Opinion On the Draft Law "On the Commissioner for Human Rights" adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §117.

8.1.1 Conflicts and risks regarding the division of competence inside the Ombudsman institution

«It results from these provisions that the PAER, like the PAC, has only functional autonomy but no other role of an administrative, institutional or financial nature, or even over the human resources of the subdivision he or she heads.»

«This division of roles seems to have been the expression of the will of the legislator, but it may, over time, be a cause of fragmentation of the institution and thus of its weakening, creating difficulties and contradictions, even blockages, between the constituent entities of the PA institution. The Venice Commission had already expressed concerns about the lack of clarity of the division of roles between the PA and the CPA in its 2015 opinion.»

«The Venice Commission considers therefore necessary to clarify the relations between the PAO, the PAC and the PAER.»

«The risk of internal conflicts between the PA, the PAC and the PAER when fulfilling their different and sometimes contradictory or overlapping tasks is obvious.»

«Moreover, due to this overlapping of competences, conflicts between the three Ombudsman are bound to arise and need to be resolved. Since the PA and the PAC are already competent for cases concerning certain fundamental rights involving in one way or another physical persons also being entrepreneurs, the competence of the PAER may easily collide. One solution would be to ensure that the PA has the final say in case of conflict and that it is responsible for resolving any conflicts of jurisdiction.»

To sum up, the introduction of the protection of the rights of entrepreneurs as such by a special PA and entrusted to a constitutional institution, in charge of dealing with cases concerning human rights and freedoms, will inevitably give rise to conflicts of competence between the three defenders within the same institution. A case concerning both aspects of human rights on the one hand and legitimate rights and interests on the other hand, with an entrepreneur or other plaintiff opposing another private company or organisation on the other hand, cannot be excluded.»

«Furthermore, it is worth considering that the fact that there are three defenders with different competences, which sometimes overlap with certain tasks provided for in the constitution and other tasks outside this constitutional framework, also risks compromising the legitimacy of the institution for the general public.»

CDL-AD(2021)017 - Republic of Moldova - Opinion on the draft Law amending some normative acts relating to the People's Advocate, adopted by the Venice Commission at its 126th Plenary Session (online, 19-20 March 2021), §§55-58; §§77, 79, 80.

8.2. Powers of investigation

« The People's Advocate should have the discretion to continue the investigation of a case even if the complainant shows lack of interest, if he or she deems that it is in the general interest to do so. In this case, however, the case should not be treated as an individual one and the original complainant should no longer be required to appear. »

CDL-AD(2007)024 – Opinion on the draft law on the People's Advocate of Kosovo adopted by the Venice Commission at its 71st Plenary Meeting (Venice, 1-2 June 2007), §58.

«One of the shortcomings of the first draft was the investigation procedure. The Commission welcomes the new wording of Article 12 remedying to the problems indicated by the Rapporteurs. The investigative powers of the Ombudsman are exhaustive and include, for example, the right to request all necessary information from any state or municipal body and officials (par. 2.2), to be received without delay by heads and other officials of state and municipal bodies (par. 2.7) and “*may on his/her own initiative investigate the cases of special public importance or where the interests of persons who are unable to protect their rights themselves had been affected*” (par. 3).»

CDL(2001)083 - Consolidated Opinion On the Law on Ombudsman in the Republic of Azerbaijan (Strasbourg, 7 September 2001), §18.

«Article 18: The ombudsperson should be able also to interview officials of administrative authorities and should, in general, have investigative powers.»

«...providing for unhindered access of the ombudsperson to persons deprived of their liberty, is another provision that is particularly welcomed. In order to make the scope of this access clearer and broader, the draft should provide for “free access to all places where persons are deprived of their liberty by a public authority”. This should include not only penal institutions but also prisons, police detention centres, military prisons, psychiatric institutions and other similar sites (e.g. centres for the detention of foreigners pending expulsion). The wording of the last part of the sentence could be amended to read: “and interview these persons in private”.»

CDL-AD(2004)041 - Joint Opinion on the Draft Law on the Ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe adopted by the Venice Commission at its 61st Plenary Session (Venice, 3-4 December 2004), §§24-25.

«Finally, this Article should also explicitly refer to violations by omission in the light of the decision of the European Court of Human Rights in the case of Egmez v. Cyprus (Reports of Judgments and Decisions 2000-XII), in which the Court recognised that the complaint to the Ombudsman for allegation of ill-treatment by the police would have to be considered as an effective remedy for the purposes of Article 13 ECHR. The fact that the referral of the complaint by the Ombudsman to the Prosecutor did not lead to an investigation by the latter was held to be a violation of Article 13 ECHR.»

«In this Article (which has not been amended), §1 provides for the Human Rights Defender’s access to all places where individuals deprived of their liberty are detained in order “*to get/receive complaints from the applicants*”. However, the Human Rights Defender should be guaranteed free access at any time, without the need to receive consent from any agency and without prior warning. The Defender should be guaranteed the opportunity to visit and inspect such places in connection with concrete complaints or on his or her own initiative. This is one of the most important safeguards for the effective operation of this type of institution and it should be written explicitly in the Law.»

CDL-AD(2006)038 – Opinion on Amendments to the Law on the Human Rights Defender of Armenia adopted by the Venice Commission at its 69th Plenary Session (Venice, 15-16 December 2006), §§20,52.

«The Protector - and every person acting on his or her behalf - should be guaranteed free access at any time to all places where individuals deprived of their liberty are or may be detained, without the need for consent from any agency and without prior notification. S/he should have the right to visit and inspect such places in connection with concrete complaints or on his or her own initiative. This is one of the most important safeguards for the effective operation of this type of institutions and it must be clearly written in the law, especially also because the prevention of torture and other inhuman and degrading treatments will be one of the main tasks of the Protector.

The provisions on access to detained persons should be phrased both as a competence of the Protector or persons acting on his/her behalf to have unconstrained contact with detainees and as a right of the individuals detained to seek such visits without constraints.

Consequently, a detained person should have the opportunity to freely communicate, without any supervision, with the Protector or his/her representatives. The law should clearly state that this is not limited to conversations, but that it also covers all other means of communication, e.g. telephone or electronic communications, where applicable. A statement that “individuals deprived of their liberty shall be entitled to file their complaint in a sealed envelope” is not sufficient in this respect.»

«Is important for the Protector to be able to meet without delay with state representatives and officials enumerated in the proposed provision. However, this provision should be made wider to make clear that not only highest officials but every state or local official should have such an obligation.

The protector should not only be obliged to inform the complainant of the «commencement and conclusion of the procedure» but also to do so without delay.»

CDL-AD(2009)043 – Opinion on the draft amendments to the law on the Protector of Human Rights and Freedoms of Montenegro, adopted by the Venice Commission at its 80th Plenary Session (Venice, 9-10 October 2009), §§17-19 and 21-22.

«The Ombudsman shall have discretionary power, on his or her own initiative or as a result of a complaint, to investigate cases with due regard to available administrative remedies. The Ombudsman shall be entitled to request the co-operation of any individuals or organisations who may be able to assist in his or her investigations. The Ombudsman shall have a legally enforceable right to unrestricted access to all relevant documents, databases and materials, including those which might otherwise be legally privileged or confidential. This includes the right to unhindered access to buildings, institutions and persons, including those deprived of their liberty.

The Ombudsman shall have the power to interview or demand written explanations of officials and authorities and shall, furthermore, give particular attention and protection to whistle-blowers within the public sector.»

CDL-AD(2019)005 - Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles"), adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019), Principle 16.

«It is a very fundamental principle that an ombudsman must have a legally enforceable right to unrestricted access to all relevant documents, databases and materials, including those which might otherwise be legally privileged or confidential. There is no evidence to support that access for the PHSO (the institution itself being covered by provisions guaranteeing confidentiality) to the safe space will jeopardize the purpose of the general concept. The impact is on HSSIB conduct, but also on investigations where both bodies are investigating the same matter which require access to overlapping evidence.»

CDL-AD(2021)041 - Opinion On the Possible Exclusion of the Parliamentary Commissioner for Administration and Health Service Commissioner from the “Safe Space” Provided for by the Health and Care Bill adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021), §70.

«Since prevention and correction of maladministration and provided that the mandate of an Ombudsman shall cover public administration at all levels as prescribed by Principles 12 and 13, complaints about malfunctioning within a body as the HSSIB require full and immediate investigatory powers of PSHO according to Principle 16.»

CDL-AD(2021)041 - Opinion On the Possible Exclusion of the Parliamentary Commissioner for Administration and Health Service Commissioner from the “Safe Space” Provided for by the Health and Care Bill adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021), §71.

«In the Commission’s view, the proposed arrangement by the Bill, if it resulted in a limitation of the PSHO’s investigatory powers in respect of complaints directed against HSSIB, would be in conflict with the letter of Principle 16. The PSHO would then not have “unrestricted access “ to all

relevant documents, databases and materials, including those which might otherwise be legally privileged or confidential.”»

«The Venice Commission would hence recommend revising this aspect of the Bill in order to grant the PHSO “unrestricted access” to the HSSIB in order to avoid any restrictions in the investigatory powers of the PHSO, as provided for in Principle 16 of the Venice Principles.»

CDL-AD(2021)041 - Opinion On the Possible Exclusion of the Parliamentary Commissioner for Administration and Health Service Commissioner from the “Safe Space” Provided for by the Health and Care Bill adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021), §§72, 73.

«Under Article 9.3 of the draft law reads “Materials received during the consideration of the complaint before the Commissioner’s final decision are not subject to disclosure”.»

«Within usual principles of confidentiality concerning private information etc, it is up to the ombudsman to decide which information can be disclosed in connection with the publication of ombudsman’s findings. Unless there is a particular background to this provision, it should be probably deleted.»

CDL-AD(2021)041 - Opinion On the Possible Exclusion of the Parliamentary Commissioner for Administration and Health Service Commissioner from the “Safe Space” Provided for by the Health and Care Bill adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021), §§90, 91.

«Under Article 9.4 “the Commissioner has no right to disclose information that has become known to him in the process of considering the complaint, about the private life of the applicant and other persons without their written consent”.»

«Publication of the Ombudsman’s findings is an essential part of the execution of the mandate. As said above, it is up to the Ombudsman to decide which information can be disclosed in connection with such publication, and it will often be necessary to publish the facts of the case. The Ombudsman has no right to disclose information that has become known to him/her if to do so would involve a violation of the right to respect for private and family life of any person concerned. That would allow for appropriate and proportionate disclosures in the public interest.»

«The Commission recommends revising the deadlines fixed under paragraph 2 and the limitations in paragraphs 3 and 4 of Article so as to give the Commissioner a free choice as to what information he or she may disclose publicly with due respect for private and family life of any person concerned.»

CDL-AD(2021)041 - Opinion On the Possible Exclusion of the Parliamentary Commissioner for Administration and Health Service Commissioner from the “Safe Space” Provided for by the Health and Care Bill adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021), §§92-94.

«Under Article 8.2 of the draft, it appears that the Commissioner can investigate on his/her own initiative only based on information “from official sources or the media”.»

«This is an inappropriate limitation. For example, whistle-blowers are usually a very important source of information for own initiative investigations.»

«The Commission recalls that is quite unusual to have any limitations at all with regard to own initiative investigations and recommends bringing the own initiative investigations powers of the Commissioner in line with Principle 16 of the Venice Principles.»

CDL-AD(2021)041 - Opinion On the Possible Exclusion of the Parliamentary Commissioner for Administration and Health Service Commissioner from the “Safe Space” Provided for by the Health and Care Bill adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021), §§84-86.

«Article 1.1 refers to “state bodies, local government and self-government bodies, officials and civil servants of the Republic of Kazakhstan”. Further down the draft in Article 7.2 exempts certain institutions (the President of the Republic of Kazakhstan, the First President of the Republic of

Kazakhstan - Elbasy) from the Commissioner's jurisdiction. Lastly, specific institutions are mentioned in Article 8 which deals with the "*Rights of the Commissioner when considering a complaint*" who has the right to under Article 1.1 of the draft: "*request and receive information from state bodies, local government and self-government bodies, officials and organizations necessary for consideration of the complaint. At that, cases and materials in the proceedings of the court cannot be claimed;*"»

CDL-AD(2021)041 - Opinion On the Possible Exclusion of the Parliamentary Commissioner for Administration and Health Service Commissioner from the "Safe Space" Provided for by the Health and Care Bill adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021), §24.

«In order to align the draft law with international standards, the Venice Commission recommends:
- with regard to the Commissioner's own investigations powers, removing limitations...»

CDL-AD(2021)041 - Opinion On the Possible Exclusion of the Parliamentary Commissioner for Administration and Health Service Commissioner from the "Safe Space" Provided for by the Health and Care Bill adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021), §117.

8.3 Power of recommendation / proposition

«The Commission welcomes the introduction in Article 1 par. 5 of the provision that «*the Ombudsman shall have the right to propose to the Milli Mejlis of the Republic of Azerbaijan to adopt or to revise the legislation with the purpose of ensuring the human rights and freedoms*» and to propose that the Milli Mejlis announces an amnesty.»

CDL(2001)083 - Consolidated Opinion On the Law on Ombudsman in the Republic of Azerbaijan (Strasbourg, 7 September 2001), §§6,7,18 (see CDL(2001)PV 47, §6).

«...provides that the ombudsperson can "launch initiatives with the Government for the amendment of laws or other regulations or general acts". Given the fact that Parliament is the legislator and also the nature of the ombudsperson as a parliamentary institution, recommendations for the amendment of laws should also be directed to Parliament. Likewise, the Parliament should be obliged to consider such recommendations. The reference to "citizen's rights" should be replaced with the "rights and fundamental freedom of all persons".»

«The clause «is obliged to proceed» is too far reaching. From the very nature of the institute of ombudsperson, it follows that he or she can only make recommendations. There cannot be a direct obligation to follow these recommendations. However, there should indeed be an obligation for the administrative authority to react within a given time span to the ombudsperson's recommendation, either by accepting it and redressing the situation, or by giving a motivated refusal. The 15 days time span for reaction seems unrealistic and should only apply to exceptional cases where irreparable harm to a human right of the claimant is to be feared. In normal cases the administrative authorities should be given between one and two months for reaction.»

CDL-AD(2004)041 - Joint Opinion on the Draft Law on the Ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe adopted by the Venice Commission at its 61st Plenary Session (Venice, 3-4 December 2004), §§21, 32.

«It is positive also, in view of the specialized expertise of the Ombudsman, that the Institution may exercise its right to legislative initiative any time "*when in the course of the exercise of their jurisdiction it deems necessary*", without being under the obligation to wait for the annual report to make use of this right, as in previous drafts. This will undoubtedly help the Institution to more timely act to respond to new needs in society and, more generally, to more effectively fulfil its mandate.»

CDL-AD(2015)034 - Opinion on the Draft Law on Ombudsman for Human Rights of Bosnia and Herzegovina, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), §33.

« Under Article 25.1.2, the Defender may request and receive "necessary" materials relating to the investigation. As such, provisions are often interpreted differently by the ombudsman and by the administration, two issues should be clarified: It should be up to the ombudsman, and not the administration, to decide which material is "necessary". If the Defender requests access to a certain document, the administration should not be allowed to argue that such material is not

“necessary”. It should also be clear that the obligation to provide material for the Defender applies regardless of whether that material is labelled “state secret” or otherwise considered confidential under domestic legislation (see Article 25.3). In addition, it is important that the materials, documents and information be sent to the Defender – its staff should not have to go and fetch it.»

CDL-AD(2016)033 - Armenia - Opinion on the draft Constitutional Law on the Human Rights Defender, adopted by the Venice Commission at its 109th Plenary Session (Venice, 9-10 December 2016), §56.

«The Ombudsman shall have the power to address individual recommendations to any bodies or institutions within the competence of the Institution. The Ombudsman shall have the legally enforceable right to demand that officials and authorities respond within a reasonable time set by the Ombudsman.»

«In the framework of the monitoring of the implementation at the national level of ratified international instruments relating to human rights and fundamental freedoms and of the harmonization of national legislation with these instruments, the Ombudsman shall have the power to present, in public, recommendations to Parliament or the Executive, including to amend legislation or to adopt new legislation.»

«Following an investigation, the Ombudsman shall preferably have the power to challenge the constitutionality of laws and regulations or general administrative acts. [...]»

CDL-AD(2019)005 - Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles"), adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019), Principles 17, 18, 19.

«Maintaining jurisdiction of the PHSO over the HSSIB while at the same time limiting its access to relevant evidence would lead to wrong conclusions and would in any event seriously undermine public confidence in these conclusions. In time, this may lead to a more general undermining of the PHSO’s credibility. Ombudsman institutions do not have powers to make binding decisions, and the “real” power of the ombudsman lies in persuading and convincing the authorities, the media and the public at large that he/she is right. This is a quite demanding task for the ombudsman if opponents can argue that the ombudsman’s findings are not based on all relevant evidence. When generally investigatory powers of an Ombudsman are affected it will also harm the general perception of the mandate of the Ombudsman.»

«Moreover, the mandate may thus be seen as lacking a core element of the concept of an Ombudsman. If such restrictions of access are introduced also in other fields it would undermine the independence of the institution.»

CDL-AD(2021)041 - Opinion on the Possible Exclusion of the Parliamentary Commissioner for Administration and Health Service Commissioner from the “Safe Space” Provided for by the Health and Care Bill adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021), §§77, 78.

«Article 9.2 of the draft law reads as follows: *“Recommendations and petitions of the Commissioner are subject to consideration within fifteen calendar days from the date of their receipt, following which the Commissioner is informed of the results of their consideration. In cases where it is necessary to conduct additional study, the period for consideration of the recommendation and petition of the Commissioner is extended by the subject to which they were sent, no more than for thirty calendar days, as reported to the Commissioner within three working days from the date of extension of the consideration period.”*»

«The Commission suggests introducing realistic deadlines that can be respected. Replacing the “fifteen calendar days” with a month and the “thirty calendar days” with sixty calendar days would seem more realistic.»

CDL-AD(2021)049 - Opinion on the Draft Law “On the Commissioner for Human Rights” adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §§88, 89.

8.4 Relations with courts

«...Provision is made in §1 for the possibility for the Defender (after modification of the Constitution on this point: see Article 27) to apply to the Constitutional Court in respect of violations of human rights and freedoms. This new prerogative of the Defender is in line with the recommendation of the Commission and the European standards. »

CDL-AD(2003)006 - Opinion on the Draft Law on the Human Rights Defender of Armenia adopted by the Venice Commission at its 54th Plenary Session (Venice 14-15 March 2003), Article 15.

«The Public Attorney undertakes actions and measures to protect from unjust delay of court procedures or from the work of the court services, as well as actions and measures to protect from tardy performance of other administrative tasks and jobs defined by law. ...

Paragraph 1 of Article 13 touches a rather delicate matter, as it is generally understood that the activity of the Ombudsman should not interfere with the judiciary. »

CDL-AD(2003)007 - Opinion on the Draft Law on the Public Attorney of "The former Yugoslav Republic of Macedonia" adopted by the Venice Commission at its 54th Plenary Session (Venice, 14- March 2003), B II Article 6 and B III Article 13(1).

«It is therefore assumed, as it is understood also from Article 18.3 dealing with the competence for the review of complaints, that jurisdiction over the courts is not the intention of the Law. However, a clarification on this important issue in the text of the Law is strongly recommended, by more clearly stating that courts are excluded from the jurisdiction of the PA. At most, the Law should allow for a claim to the PA for questions relating to the administration of justice and, where appropriate, the execution of final judicial decisions. It is recalled that Recommendation 1615(2003), mentioned above recommends this separation in the following terms: "ombudsmen should have at most strictly limited powers of supervision over the courts. If circumstances require any such role, it should be confined to ensuring the procedural efficiency and administrative propriety of the judicial system".»

CDL-AD(2015)017 - Opinion on the Law on the People's Advocate (Ombudsman) of the Republic of Moldova, adopted by the Venice Commission at its 103rd Plenary Meeting (Venice, 19-20 June 2015), §33.

« ...The legislation on the Constitutional Court may have to be amended accordingly to enable the Court to accept these requests. This article could be reformulated to state that the ombudsperson can initiate proceedings before the Constitutional Court for the assessment of the constitutionality of laws, and the constitutionality and legality of other regulations and general acts which govern issues related to the rights and freedoms of all persons.»

«The scope of powers of the ombudspersons should not cover only outright violations of rights but also of the principles of good administration (see above). The availability of a legal remedy should not prevent a person from filing a complaint with the ombudsperson but the latter should have the obligation to advise the complainant about legal remedies and about the fact that the complaint to the ombudsman does not prevent the expiry of deadlines for such remedies. In Article 22.5 of the draft it could be specified that the rejection of anonymous complaints does not prevent the ombudsperson to act *ex officio* in a matter.»

CDL-AD(2004)041 - Joint Opinion on the Draft Law on the Ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe adopted by the Venice Commission at its 61st Plenary Session (Venice, 3-4 December 2004), §§22,27.

«The access of the Public Defender to the Constitutional Court in respect of court decisions could be reconsidered as in European practice judicial decisions are open to control usually only upon request by the parties. On the other hand, the right to request the control of norms as referred to in Article 89.1.f seems to be an appropriate competence for the Public Defender.»

CDL-AD(2005)005 - Opinion on draft constitutional amendments relating to the reform of the judiciary in Georgia adopted by the Venice Commission at its 62nd Plenary Session (Venice, 11 – 12 March 2005), §26.

«The model most widely followed for the institutions of Ombudsman or Human Rights Defender may be briefly described as that of an independent official having the primary role of acting as intermediary between the people and the state and local administration, and being able in that capacity to monitor the activities of the administration through powers of inquiry and access to information and to address the administration by the issue of recommendations on the basis of law and equity in a broad sense, in order to counter and remedy human rights violations and instances of maladministration. To achieve this, it is imperative for the institution to preserve its neutrality, and accordingly, the institution should not involve itself in litigation or intervention in court cases, although it certainly should have the power to advise those who seek its assistance as to the legal remedies which may be available to them.»

«Consequently, it is recognised as desirable that the mandate of the Ombudsman or Human Rights Defender should include the possibility of applying to the constitutional court of the country for an abstract judgment on questions concerning the constitutionality of laws and regulations or general administrative acts which raise issues affecting human rights and freedoms. The Ombudsman should be able to do this of his/her own motion or triggered by a particular complaint made to the institution. In the latter case, it will be appropriate to observe the distinction that the issues raised by the complaint are in fact suitable for being dealt with by a constitutional court, and that the position of the complainant is not such as to indicate a recourse to the courts of law as the primary solution, which may or may not result in the court of law submitting the question of constitutionality to the constitutional court.»

«The key to the success of the Ombudsman institution among the nations lies in his/her power to convince by reasoning on the basis of law and equity, rather than a power to hand down orders or issue directives. In the course of such reasoning, the Ombudsman will be able to express opinions as to the meaning of legislative provisions and the proper interpretation of ratified treaties, whether in connection with the handling of complaints brought before the institution or with matters which the Ombudsman may be able to take up on his/her own motion. On balance, the preferable view is that the ability to state such opinions is appropriate and sufficient to the general purposes of the Ombudsman, and that endowing them with binding authenticity would go beyond the scope of the ideal role for the institution. At the same time, it would raise the possibility of conflict with the competences and independence of the Constitutional Court and of the judicial power in general.»

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 (Venice, 1-2 June 2007), §§12, 14, 20.

«In general, it would seem preferable to give the People's Advocate the power to make general recommendations about the functioning of the courts system, and exclude the power to intervene in individual cases (not even as regards their length); this should be left to the judiciary itself.»

CDL-AD(2007)024 – Opinion on the draft law on the People's Advocate of Kosovo adopted by the Venice Commission at its 71st Plenary Meeting (Venice, 1-2 June 2007), §§ 19.

«From the perspective of human rights protection, the Venice Commission recommends that “the mandate of the Ombudsman or Human Rights Defender should include the possibility of applying to the constitutional court of the country for an abstract judgment on questions concerning the constitutionality of laws and regulations or general administrative acts which raise issues affecting human rights and freedoms. The Ombudsman should be able to do this of his/her own motion or triggered by a particular complaint made to the institution.” It is the ordinary courts' primary task to provide remedies against illegal acts. However, when a constitutional court is also competent to control the constitutionality of individual acts, it seems logical to also give the ombudsman (or ombudsperson) a right to bring individual cases to the court. In any case, as access to the constitutional court *via* an ombudsman only offers indirect access to it, this mechanism cannot replace direct access, but has to be seen as a complementary process. The choice made between the different mechanisms or whether to create parallel options will depend on the legal culture of any given country.»

CDL-AD(2010)039rev – Study on individual access to constitutional justice adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), §§64.

«Provision is made in article 11 for the possibility for the Ombudsman Institution, within the scope of its competences, to refer to the entities authorised by the Constitution of BiH to bring matters before the Constitutional Court, with the request to initiate a constitutionality review, by the Constitutional Court, of laws and other regulations that raise issues affecting human rights and freedoms. This provision, providing the Ombudsman with a kind of “indirect access” to the Constitutional Court, is a welcome step forward. However, the Venice Commission has repeatedly stated that, from the perspective of human rights protection, the Ombudsman should be granted the right to refer itself to the Constitutional Court and should be able to do this of his or her motion or triggered by a particular complaint made to the Institution.»

CDL-AD(2015)034 - Opinion on the Draft Law on Ombudsman for Human Rights of Bosnia and Herzegovina, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015); §36.

«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). (...))»

CDL-AD(2011)034 – Joint opinion on the protector of human rights and freedoms of Montenegro adopted by the Venice Commission at its 88th Plenary Session (Venice, 14-15 October 2010), §39.

«Article 7 p. 1 of the existing law stipulates that the Defender is entitled to consider complaints “regarding the violations of human rights and fundamental freedoms”. At the same time Article 10 p. 1 stipulates that “the Defender shall not consider those complaints that must be settled only by Court”. In the opinion of the Commission, Article 10 p. 1 needs to be reformulated in order to be reconciled with Article 7 p. 1. It is sometimes difficult to draw a proper line between the powers of the ombudsperson and the role and functions of the courts of law. Judges often examine cases concerning alleged violations of human rights; therefore, chances are that a case referred to the Defender may also be introduced before a court. In essence, these are complementary legal mechanisms, not mutually exclusive. As the Commission put it in its previous opinion on the Armenian law on the Human Rights Defender, “the existence of a legal remedy should not prevent a person from filing a complaint with the Defender».

The purpose of Article 10 p. 1 is perfectly understandable: to prevent forum shopping and ensure the supremacy of adjudication process (which takes place in the courts) over the mediation process (which takes place before the Defender). However, that does not mean that the Defender should refuse dealing with a case solely because there is a theoretical possibility that this case might end up in a court. Otherwise the Defender would have no cases to deal with. The supremacy of the adjudicative process should be ensured by procedural means: the Defender should be able to take any human rights case unless that case has already been decided by a court or is being examined by a court. It is thus recommended to reformulate Article 10 p. 1 by removing the first phrase which is somewhat misleading.

It is also recommended to specify that the Defender should refuse to accept a case for consideration if an identical case has already been introduced by another person before a court. For example, if a decision of the municipality to build a road which affects a large number of residents of a town has been contested by some residents before the courts of law, the Defender should not accept complaints from other residents, even if the latter are not parties to the court proceeding.»

CDL-AD(2015)035 - Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Amendments to the Law on the Human Rights Defender of the Republic of Armenia, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), §15-17.

« Article 16 deals with complaints subject to consideration by the Defender. Under Article 16.1 state and local self-government bodies and officials, as well as organisations exercising the

powers delegated thereto by state and local self-government bodies fall under the Defender's competence. It seems that the judiciary falls within the Defender's competence. This should not be the case because, as a principle, ombudsmen should not (with certain exceptions, notably relating to the overall functioning of the judiciary) have jurisdiction over the judiciary.³³ Certain provisions of the draft constitutional law (e.g. Article 22.3 and Article 25.4) may aim to express this principle, however, the draft constitutional law should be very clear in this important respect.»

« Article 25.4 follows the recommendation made by the Venice Commission in previous opinions on the matter regarding the relationship between the Defender and the judiciary and appears to limit the Defender's supervision of the judiciary to the procedural efficiency and administrative propriety of the judicial system by excluding the supervision of the powers of judges in a specific case. This amendment accommodates the separation of the ombudsman functions from the judiciary, as required by PACE Recommendation 1615 (2003) p. 6. »

CDL-AD(2016)033 - Armenia - Opinion on the draft Constitutional Law on the Human Rights Defender, adopted by the Venice Commission at its 109th Plenary Session (Venice, 9-10 December 2016), §§42, 58.

«[...] The competence of the Ombudsman relating to the judiciary shall be confined to ensuring procedural efficiency and administrative functioning of that system»

«The Ombudsman shall preferably be entitled to intervene before relevant adjudicatory bodies and courts.

The official filing of a request to the Ombudsman may have suspensive effect on time-limits to apply to the court, according to the law.»

CDL-AD(2019)005 - Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles"), adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019), Principles 13, 19.

«It is not sufficient for the PHSO to have access to the High Court. Under principle 16, ombudsman institutions shall have a "legally enforceable right to unrestricted access", and it will generally make the work of the ombudsman very difficult if he/she has to go through the courts to gain access to relevant information.»

«In addition, it does not seem unlikely that courts will take a careful approach, hesitating to overrule an argument that it is imperative to effective investigations that a safe space is preserved.»

«If, moreover, we consider that the Senior Coroner will have full access to information within the "Safe space"¹⁴ without the permission of the High Court but not PSHO, this further weakens the institution of Ombudsman as such but also in the eyes of the public. It is difficult to understand why such a distinction has been made. PSHO is after all a Parliamentary institution on a solid legal base in primary legislation that has had such access to information concerning the whole public sector for its supervision for a long time. Furthermore, the Commission were informed by the PHSO that the Senior Coroner cannot access information held by PHSO as part of investigations.»

CDL-AD(2021)041 - Opinion on the Possible Exclusion of the Parliamentary Commissioner for Administration and Health Service Commissioner from the "Safe Space" Provided for by the Health and Care Bill adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021), §§79-81.

«The Venice Principles... stresses that the right to complain to the Ombudsman is an addition to the right of access to justice through the courts; states that governments and parliaments must accept criticism in a transparent system accountable to the people»

CDL-AD(2021)041 - Opinion on the Possible Exclusion of the Parliamentary Commissioner for Administration and Health Service Commissioner from the "Safe Space" Provided for by the Health and Care Bill adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021), §54.

«Access to the Ombudsman is free of charge and, unlike access to the courts, does not require great financial resources or in-depth knowledge for citizens to see their rights respected.»

CDL-AD(2021)041 - Opinion on the Possible Exclusion of the Parliamentary Commissioner for Administration and Health Service Commissioner from the “Safe Space” Provided for by the Health and Care Bill adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021), §85.

«Last but not least, the current wording of the draft “*state bodies*” would seem to cover also the judiciary, which is not in accordance with Principle 13 of the Venice Principles. With regard to the judiciary, the Venice Principles state clearly that “*the competence of the Ombudsman relating to the judiciary shall be confined to ensuring procedural efficiency and administrative functioning of that system*”. During the discussions with the authorities, the rapporteurs understood that the judiciary was not part of the Ombudsman's remit, but as this is an important point, it would be preferable to make this clear in the draft law to remove any ambiguity. This does not preclude the Commissioner from assisting citizens by, e.g., forwarding their petitions to the courts or representing them in court, as referred to in Venice Principles 19.»

CDL-AD(2021)049 - Opinion on the Draft Law “On the Commissioner for Human Rights” adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §31.

8.5 Prevention Mechanism function of the Ombudsman

«The Armenian authorities should consider adding to the Defender's mandate all the powers of the NPM that are provided by OPCAT. Those powers are prescribed as minimum powers necessary for successful fulfilment of NPM mandate, and as such they should all be included in the Draft Law. Among other, the power to submit proposals and observations concerning existing or draft legislation (from OPCAT 19 (c)) and power to have contacts with the Subcommittee on Prevention, to send it information and to meet with it (from OPCAT 20 (f)) should be mentioned in the Draft Law.

Article 9 of the Draft Law introduces Article 16.1 which gives the Defender the power to issue an opinion on any draft law which touches on human rights before its adoption. The Draft Law should make it clear that the responsibility to send to the Defender any such draft law lies with the Government/Parliament. That being said, it might be difficult to define whether a particular piece of legislation relates to “human rights” and should therefore be assessed by the Defender: on this point the Government/Parliament and the Defender may have different views. For such situations, the Defender should have the right (but not the obligation) to issue an opinion on the draft law *proprio motu* before the adoption of the relevant act.»

CDL-AD(2015)035 - Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Amendments to the Law on the Human Rights Defender of the Republic of Armenia, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), §§45,48.

«It is recommended to specify, in article 6, that the mandate of the Ombudsman Institution covers not the “[national] preventive mechanism” as such, but prevention of torture and other cruel, inhuman or degrading treatment or punishment. As stated in article 9, the Ombudsman Institution will itself perform tasks of the preventive mechanism. Moreover, article 9 should also stipulate one of the essential features of a national preventive mechanism foreseen in the OPCAT, i.e. that it visits places of deprivation of liberty on a regular basis. Also, the reference to the participation of representatives of civil society organizations and the academia in the work of the preventive mechanism should be further specified, in particular as regards the manner in which this participation is expected to take place.»

CDL-AD(2015)034 - Opinion on the Draft Law on Ombudsman for Human Rights of Bosnia and Herzegovina, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), §28.

«Article 2.2 provides that “The Defender shall be the national preventive mechanism prescribed by the Optional Protocol – adopted on 18 December 2002 – to the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” (emphasis added).

This wording does not make a sufficient distinction between the Defender's ombudsman functions and the Defender's special functions as the National Preventive Mechanism (hereinafter, the "NPM"). The wording should reflect the autonomous role of the NPM as emphasised by Article 32 of OPCAT's Guidelines on NPMs.⁸ The wording of Article 28 of the draft constitutional law ("In the capacity of") is better in this respect. Article 2.2 of the draft constitutional law should be amended accordingly to "shall be entrusted with the mandate of" NPM, as recommended in the 2015 opinion.⁹ It should be noted already here that the participation of civil society in the NPM's activities is important to ensure the participatory function of the process (see comments under Article 33, below).»

« Article 29.3 (Powers of the Defender as the NPM) sets out the places of deprivation of liberty that the Defender may visit. The delegation was told in Yerevan that Article 29.3.2, which refers to "penitentiary institutions" would allow for a wide interpretation. However, the draft constitutional law should explicitly cover any place where persons are kept against their will (including police stations, administrative detention centres for foreigners, psychiatric wards, semi-closed institutions etc.). »

CDL-AD(2016)033 - Armenia - Opinion on the draft Constitutional Law on the Human Rights Defender, adopted by the Venice Commission at its 109th Plenary Session (Venice, 9-10 December 2016), §§15, 62.

8.6 Reporting

«Under Article 12.1 of the draft law, the CHR reports to the President of the Republic.»

«To maintain that the CHR is appointed by, and primarily responsible to, the Parliament, reporting should be made to the Parliament. Furthermore, providing for the Commissioner to report to Parliament would bring the provision of the law into line with international standards. The Commissioner can of course also inform the President of his/her report.»

«The Commission recommends that the draft provide for the CHR to report to Parliament, which does not preclude the Commissioner from reporting to the President.»

CDL-AD(2021)049 - Opinion on the Draft Law "On the Commissioner for Human Rights" adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §§95, 97-98.

«In order to align the draft law with international standards, the Venice Commission recommends: with regard to the annual report, providing for the Commissioner to report to Parliament.»

CDL-AD(2021)049 - Opinion on the Draft Law "On the Commissioner for Human Rights" adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §117.

«The Ombudsman also has the power under section 14 of the 1993 Act to lay reports before each House of Parliament, either in relation to a specific case where the injustice sustained has still not been remedied or pursuant to any of his functions.»

CDL-AD(2021)041 - Opinion On the Possible Exclusion of the Parliamentary Commissioner for Administration and Health Service Commissioner from the "Safe Space" Provided for by the Health and Care Bill adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021), §27.

«In order to align the draft law with international standards, the Venice Commission recommends: with regard to the annual report, providing for the Commissioner to report to Parliament.»

CDL-AD(2021)049 - Opinion on the Draft Law "On the Commissioner for Human Rights" adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §117.

9. Applicants and formalities for application

«The Working Group notes that Article 17 of the Law provides that "any natural person claiming a legitimate interest may apply to the Ombudsman". This wording seems to exclude legal persons

from seeking protection from the Ombudsman whereas legal persons have fundamental and constitutional rights and freedoms, as well as other rights and legitimate interests and should be allowed to seek the Ombudsman's intervention. Preventing legal persons from addressing the Ombudsman would seriously affect the level of human rights protection granted in the Federation.

It is suggested to amend Article 17, first sentence as follows: "*Any natural or legal person claiming a legitimate interest may apply to the Ombudsman*".»

CDL-INF(2001)007 (English only) – Memorandum on the Organic Law on the Institution of the Ombudsman of the Federation of Bosnia and Herzegovina, approved by the Venice Commission at its 46th Plenary Meeting (Venice, 9-10 March 2001), §5.

«The Commission takes note, with approval, of the new version of Article 8 on submission of complaints. Among other issues it welcomes the decision to drop from Article 8 par. 1 the requirement for foreigners and stateless persons to live temporarily or permanently in Azerbaijan in order to lodge a complaint.»

«A provision in Article 8 par. 2 that "*a complaint may also be lodged by a third person or a non-governmental organization by consent of the person concerned*" is a positive amendment aimed at protecting of victims of mass violations of human rights. Moreover, the drafters of the Law give additional protection against violations of rights by introducing a very innovative provision stating that "*in cases where it is impossible (because of his/her death, loss of capability, etc.) to get the consent of a person whose rights had been violated, the complaint may be lodged by the third person or a non-governmental organization without a consent of the person concerned*". Fear of reprisals may make people very hesitant to bring a complaint under their name and the above-mentioned norms introduce the possibility of giving them protection even if they are fearful of complaining themselves. These guarantees are further extended in Article 9.»

CDL(2001)083 - Consolidated Opinion on the Law on Ombudsman in the Republic of Azerbaijan (Strasbourg, 7 September 2001), §§15- 16 (see CDL(2001)PV 47, §6).

« "There are two concerns with regard to this provision. First, this provision only refers to complaints by individuals, which means that legal persons cannot complain to the PA (or CPA). Such limitation makes little sense, and it would be a fundamental impediment to exclude legal persons - including NGOs - from the protection of the PA. This limitation should be reconsidered so as to ensure that not only individuals, but also legal persons (e.g. political parties, NGOs) should be entitled to lodge complaints with the PA alleging a violation of their rights and freedoms, as recommended by the Parliamentary Assembly in its *Resolution 1959 (2013) on Strengthening the institution of ombudsman in Europe*.

Second, any person under the jurisdiction of the Republic of Moldova (but not only residing or having resided on the territory of the Republic) should have the right to submit such complaints. The Law should be amended accordingly.»

CDL-AD(2015)017 - Opinion on the Law on the People's Advocate (Ombudsman) of the Republic of Moldova, adopted by the Venice Commission at its 103rd Plenary Meeting (Venice, 19-20 June 2015), §§67,68.

«It is true that Article 77 (2) of the Annex A to the Ohrid Agreement says that "*The Public Attorney protects the rights of citizens when violated*».

It is also true that the *Basic Principles* of the same Agreement refers to «*citizens*». Anyhow, some provisions of Annex A have references to the word «*person*» like in Article 7 (4) «*Any person living in*» or Article 8 (1) «*equitable representation of persons belonging*». Maybe it could be possible, with a view to widening the scope of the Law, to use the word «*persons*» instead of «*citizens*». The petition addressed to the Public Attorney shall be signed and contain personal data about the petitioner and contain the circumstances, facts and evidence on which the petition is founded. The petition shall contain the body, organization, institution or person to which the petition refers; it shall also be noted whether the petitioner has already submitted legal remedies and which legal remedies have been submitted. The petition to initiate a procedure is submitted in writing or orally in minutes. There is no prescribed form for the petition initiating a procedure. The petitioner is exempt from paying fees for the procedure before the Public Attorney.

This Article, as well as the previous one, admits complaints presented by third persons. It is a good provision, as well as it is a good measure not to impose many formalities to the presenting of complaints.

If the Public Attorney initiates a procedure on his/her own initiative or if another person on behalf of the damaged party submits a petition, in order to initiate a procedure it is necessary to obtain the agreement of the damaged party that has had his/her constitutional and legal rights violated or has had the principle of indiscriminate and appropriate and just representation of the members of the communities violated.

The request for "agreement" when the Public Attorney begins a procedure on his own initiative, or when a third person presents the complaint, may represent a severe limitation to the functioning of these two rather good initiatives.

Actually, when the Public Attorney acts on his own initiative, one could presume he knows better, and the agreement should not be necessary.

On the other hand, when a third person presents the claim, it should be possible for the Public Attorney to act without agreement when it is impossible or very difficult to obtain it and he thinks advisable to do without it, as said above in Article 21.2.»

CDL-AD(2003)007 - Opinion on the Draft Law on the Public Attorney of "The former Yugoslav Republic of Macedonia" adopted by the Venice Commission at its 54th Plenary Session (Venice, 14- March 2003), B I. Article 2.3 and B III. Article 17 and Article 22.

«Article 1 and Article 6 of the draft refer to the human rights of citizens. Beneficiaries of human rights and fundamental freedoms are all persons under the jurisdiction of Serbia, be they citizens or not. Consequently, reference needs to be made to persons instead of citizens.»

«...The availability of a legal remedy should not prevent a person from filing a complaint with the ombudsperson but the latter should have the obligation to advise the complainant about legal remedies and about the fact that the complaint to the ombudsman does not prevent the expiry of deadlines for such remedies...»

«The formal requirements for complaints are too rigid and court-like. At least, it should be provided that the staff of the ombudsperson should assist individuals in fulfilling the formal criteria for a complaint (obligation of *manu ducere*).»

CDL-AD(2004)041 - Joint Opinion on the Draft Law on the Ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe adopted by the Venice Commission at its 61st Plenary Session (Venice, 3-4 December 2004), §§10,27,29.

(As regards the persons entitled to apply to the FBH Ombudsman):

«In §2, the right of legal entities to lodge a complaint to the Ombudsman should also include situations where the rights of those very entities are being violated (e.g. right to property). The existing provision appears to provide for this possibility only indirectly if the owners of the legal

persons are natural persons. In this respect, one should also regulate the situation of groups of individuals as a separate question.»

«The provision of §5 limiting the right of state officials to complain to the Defender to cases of violations of human rights does not seem sufficiently clear. It is obvious that State officials (how about other officials?) maintain their rights as individuals. If these rights (which may include social rights) are under threat or violated, they must be entitled to receive assistance from the Human Rights Defender, as all other people.»

CDL-AD(2006)038 - Opinion on Amendments to the Law on the Human Rights Defender of Armenia adopted by the Venice Commission at its 69th Plenary Session (Venice, 15-16 December 2006), §§54,55.

«While applications to the People's Advocate must not be anonymous, applicants should be given the possibility of requesting that their identity be kept confidential by the People's Advocate.»

CDL-AD(2007)024 - Opinion on the draft law on the People's Advocate of Kosovo adopted by the Venice Commission at its 71st Plenary Meeting (Venice, 1-2 June 2007), §50.

« [...] As the ombudsman's primary function is to be an intermediary between individuals and the State administration, it is acceptable to limit complaints to private individuals personally affected by administrative decisions. At the same time, officials may also wish to complain to an ombudsman in matters pertaining to their service, i.e. on issues concerning their salary or on disciplinary measures or other malfunctions of the system when they are related to human rights (e.g. "whistle-blowers"). Such information is very valuable and enables the Human Rights Defender to carry out his or her tasks effectively. The Venice Commission invites the Armenian authorities to reconsider this restriction. »

« Article 22.3 provides that The Defender shall not consider the complaints which do not contain claims on or do not attest to alleged violation of human rights or freedoms, or it is not clear from the contents of the complaint which state or local self-government body, organisation or the official or representative thereof has violated the right of the person having submitted the complaint. Unless the Defender finds the complaint manifestly inadmissible, it would be important that such complaints are not simply rejected, but that the applicant may be given the opportunity by the Defender to add the necessary missing information or data, within a certain deadline. The draft constitutional law should be modified to this effect. In addition, the wording in the last sentence should be changed from "has filed an action or complaint" to "has applied to a court on the same issue" to make it more concrete.»

CDL-AD(2016)033 - Armenia - Opinion on the draft Constitutional Law on the Human Rights Defender, adopted by the Venice Commission at its 109th Plenary Session (Venice, 9-10 December 2016), §§47, 53.

«Any individual or legal person, including NGOs, shall have the right to free, unhindered and free of charge access to the Ombudsman, and to file a complaint.»

CDL-AD(2019)005 - Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles"), adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019), §15.

10. Organisation of the Ombudsman institution

«There may be valid reasons for having four deputy ombudspersons and to have only one of them who replaces the ombudsperson. While the distribution of work between the ombudsperson and his or her deputies is not specified in the draft, this could of course be provided for in the internal rules of the ombudsperson (Articles 34 and 36). In any case, the draft should reflect the pluralistic nature of Serbian society both as concerns gender and ethnic composition. Concerning Article 5.5, please refer to the comments related to Article 4 on requisites to become an Ombudsperson.»

CDL-AD(2004)041 - Joint Opinion on the Draft Law on the Ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe adopted by the Venice Commission at its 61st Plenary Session (Venice, 3-4 December 2004), §15.

«...it would seem preferable to follow the third-named alternative in Kazakhstan, where the Ombudsman institution is presently in a stage of consolidation and development, and to organise the functions of 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. The special function presumably could then benefit directly from the status and legitimacy of the general Ombudsman, and the connection could in fact lend added strength and efficiency both to the special function and the national institution. If this approach is followed, it would be appropriate to have the deputy ombudsperson or head of department appointed either by the Ombudsman or by the appointing authority (Parliament/President) upon recommendation of the Ombudsman.»

«...whether there might be reason to establish regional offices for human rights protection in Kazakhstan. In view of the size and population of the country, this clearly would seem desirable, at least in order to facilitate the investigative and monitoring functions of the national Ombudsman and the personal access to the institution. Referring again to the comments under Question V. above, it is to be noted that the alternative of appointing regional or local ombudspersons who are not subordinated to the national Ombudsman is preferred in many countries and has advantages of its own. Unless specific conditions in certain regions otherwise indicate, however, it would seem preferable in Kazakhstan to organise regional or local offices manned by representatives of the national Ombudsman, with or without being designated as Deputy ombudspersons.»

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 (Venice, 1-2 June 2007) §§25,29.

«It should be provided that the People's Advocate and his or her staff keep all information and data obtained confidential, unless publicity serves the ratio of the procedure and meets with approval of the complainant.»

The decisions and recommendations of the People's Advocate should be made public, with guarantees for keeping the complainant and witnesses confidential if requested and justified.

There should be guarantees for the protection of complainants and other persons involved, and of witnesses.»

CDL-AD(2007)024 - Opinion on the draft law on the People's Advocate of Kosovo adopted by the Venice Commission at its 71st Plenary Meeting (Venice, 1-2 June 2007), §§61,63.

«The possibility to establish organisational units in places other than the headquarters, foreseen in the amended Article 6, would strengthen the territorial organisation of the Protector's office and is to be welcomed. However, the Protector should have discretion whether to establish such additional units and in what form (including how many) in order to properly perform his or her mandate. There is no need to involve the legislature in such decisions.»

«The amendment proposed to Article 9 provides for a division of labour between the deputy protectors. The deputies would have “*special functions for the protection of persons deprived of liberty, protection of people belonging to minority nations and other minority national communities, protection of the rights of child, protection of gender equality, protection of disabled persons and protection from discrimination*”. The specialisation of the deputies is welcomed 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 – Opinion on the draft amendments to the law on the Protector of Human Rights and Freedoms of Montenegro, adopted by the Venice Commission at its 80th Plenary Session (Venice, 9-10 October 2009), §§9,14.

«The Venice Commission acknowledges that states enjoy a wide margin of appreciation with regard to such institutional arrangements, which depend to a large extent on the domestic specific situation. Moreover, one single ombudsperson or multiple ombudspersons may be more

appropriate at different stages of the democratic evolution of states. This being said, it considers it important that the above-mentioned re-organisation does not entail a lowering of the existing level of guarantees for the protection and promotion of rights in the fields of national minority protection, personal information protection and transparency of publicly relevant information. More generally, it deems important to ensure that the decrease in the number of independent institutions does not have a negative impact on the Hungarian system of checks and balances and its efficiency.»

CDL-AD(2011)016 – Opinion on the new Constitution of Hungary adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011), §115.

«The draft does not provide for the establishment of a specialised anti-discrimination body as it has been widely advocated by ECRI.

Instead, the draft law grants enforcement powers to the Protector of Human Rights and Freedoms (Ombudsman). However, Article 26 of the draft law that envisages these powers is rather short and vague. It only provides that complaints of alleged discrimination may be lodged with the Ombudsman as stipulated in the Law on the Protector of Human Rights and Freedoms (CDL(2009)114). Neither this law, nor the draft amendments to the law (CDL(2009)110) submitted to the Venice Commission for opinion gives full powers to the Ombudsman for the implementation of the anti-discrimination provisions.

The current draft also fails to give the Ombudsman the powers and means the fight against discrimination implies.

The Ombudsman has no powers in respect of private persons, which he or she would need to combat discrimination. The wording of the present draft and the Law on the Protector of Human Rights imply that the area of competencies of the Protector is limited to the public sphere. However, according to the ECRI's Recommendation, the institution in charge of the protection of and fight against discrimination should cover the private sphere as well.

Moreover, neither the current draft nor the law or the amendments to the law on the Protector describe or confer to this institution sufficient powers to fulfil its tasks to combat discrimination, like assistance to victims, investigations powers, right to initiate and participate in courts proceedings, for instance as are recommended in ECRI Recommendation No. 7.

Furthermore, the current law does not empower the Ombudsman to seek an amicable settlement through conciliation, whereas this procedure can be effectively used for the prevention of discrimination, particularly in such areas as employment.

Finally, yet importantly, neither the current draft nor any other proposed legal instrument foresees the necessary supplementary human resources, specialised training in discrimination and financial means for the protection against discrimination that would be necessary for the Office of the Protector of Human Rights.

Consequently, neither the general current legal framework nor the current draft offer sufficient legal guarantees and means for a genuine protection against discrimination by the Protector of Human Rights.»

CDL-AD(2009)045 - Opinion on the draft Law on Prohibition of Discrimination of Montenegro adopted by the Venice Commission at its 80th Plenary Session (Venice, 9-10 October 2009), §§39-46.

«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).

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 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.»

CDL-AD(2011)034 – *Joint opinion on the protector of human rights and freedoms of Montenegro adopted by the Venice Commission at its 88th Plenary Session (Venice, 14-15 October 2010), §§35 and 36.*

« As a result of the meetings in Yerevan with the authorities as well as NGOs, the Venice Commission recommends that the draft constitutional law include provisions introducing the possibility of having a regional presence of the Human Rights Defender or regional offices of the ombudsperson in order to provide effective accessibility to human rights protection across the country. »

« Article 37.7 provides that “The Secretariat shall support the complete and effective performance of the activities of the Defender (...)”. In light of this provision, and in order to ensure institutional memory, the draft constitutional law should include an obligation by the Secretariat to ensure that adequate procedures for filing and storing information and relevant data regarding the Human Rights Defender’s activities are in place. This would help ensure the smooth and continuous operation of the Human Rights Defender’s Office. »

CDL-AD(2016)033 - *Armenia - Opinion on the draft Constitutional Law on the Human Rights Defender, adopted by the Venice Commission at its 109th Plenary Session (Venice, 9-10 December 2016), §§19, 68.*

«According to the Annual Report of the Ombudsman, requests for information are frequently not complied with.⁷¹ This is worrying. Widespread refusal by the administration to provide the information needed for the work of the Ombudsman is inadmissible.⁷² The Ombudsman cannot be made dependent on enforcing his/her requests for information in the courts in each case.⁷³»

«Unless this information concerns the grounds listed in Article 20 of the Act, information held by the administration should be available not only to the Ombudsman but to the public at large. The Freedom of Information Act should be up-dated, using available international models, to guarantee the transparency of the administration vis-à-vis the media and the citizens.»

CDL-AD(2018)028 - *Malta - Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement, adopted by the Venice Commission at its 117th Plenary Session (Venice, 14-15 December 2018), §§99, 100.*

«The Ombudsman Institution may be organised at different levels and with different competences.»

«The Ombudsman Institution shall have sufficient staff and appropriate structural flexibility. The Institution may include one or more deputies, appointed by the Ombudsman. The Ombudsman shall be able to recruit his or her staff.»

CDL-AD(2019)005 - Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles"), adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019), Principle 4, 22.

«With regard to the structure or the composition of the staff, the Principle 22 of "the Venice Principles" provides that "The Ombudsman Institution shall have sufficient staff and appropriate structural flexibility. The Institution may include one or more deputies, appointed by the Ombudsman. The Ombudsman shall be able to recruit his or her staff". Through this principle, the Venice Principles refer to one of the essential elements of the Ombudsman's independence, namely that of recruiting his or her deputies and staff.»

«The Recommendation CM/Rec(2019)6 of the Committee of Ministers to Member States on the development of the ombudsman institution goes in the same direction. In its paragraph 6, it is provided that "...Ombudsman institutions should be able to appoint their own staff and to ensure that they receive adequate training." Also, Recommendation CM/Rec(2021)1 of the Committee of Ministers to member States on the development and strengthening of effective, pluralist and independent national human rights institutions provides that "NHRIs should have the authority to determine their staffing profile and recruit their own staff, as well as sufficient resources available, in order to fulfil their mandate, so as to permit the employment and retention of staff and to ensure that they receive adequate training.»

CDL-AD(2021)035 - Opinion on the Legislation Related to the Ombudsman's Staff of Armenia adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 December 2021), §§20, 21.

«According to the terms of the law, the Ombudsman, in addition to determining the number of employees of the institution for the following year, incorporates this figure into its budget proposal for the institution for the following year.»

CDL-AD(2021)035 - Opinion on the Legislation Related to the Ombudsman's Staff of Armenia adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 December 2021), §73.

«Through Principle 22, the Venice Principles refer to one of the essential elements of the Ombudsman's independence, namely that of recruiting his or her deputies and staff.»

«Therefore, the Commissioner should not only appoint and dismiss the Head of the Center, but the entire staff.»

CDL-AD(2021)049 - Opinion on the Draft Law "On the Commissioner for Human Rights" adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), §§110, 111.

11. Threats

«The Council of Europe's the Parliamentary Assembly Resolution 2301 (2019) on "Ombudsman institutions in Europe - the need for a set of common standards" endorses the Venice Principles and calls on member States of the Council of Europe to: 9.1. ensure that the Venice Principles and other relevant recommendations of the Council of Europe are fully implemented in practice; 9.2. take all necessary measures to ensure the independence of ombudsman institutions; 9.3. invite their national parliaments and relevant governmental bodies to systematically refer to the Venice Principles when assessing the need for and the content of legislative reform concerning ombudsman institutions; 9.4. refrain from any action aiming at or resulting in the suppression or undermining of ombudsman institutions and from any attacks or threats against such institutions

and their staff, and protect them against such acts; 9.5. promote an “ombudsman-friendly climate” in particular by guaranteeing easy and unhindered access to ombudsman institutions, providing sufficient financial and human resources to those institutions and allowing them to co-operate freely with their peers in other countries and with international associations of ombudspersons.”»

CDL-AD(2021)041 - Opinion on the Possible Exclusion of the Parliamentary Commissioner for Administration and Health Service Commissioner from the “Safe Space” Provided for by the Health and Care Bill adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021), §53.

12. Reference documents

CDL-INF(2001)007 - Memorandum on the Organic Law on the Institution of the Ombudsman of the Federation of Bosnia and Herzegovina , approved by the Venice Commission at its 46th Plenary Meeting (Venice, 9- 10 March 2001)

CDL(2001)083 - Consolidated Opinion on the Law on Ombudsman in the Republic of Azerbaijan adopted by the Venice Commission at its 47th Plenary Session (Venice, 6-7 July 2001)

CDL-AD(2002)008 - Opinion on the Status and Rank of the Ombudsman in the Federation of Bosnia and Herzegovina (Strasbourg, 17 May 2002)

CDL-AD(2003)006 - Opinion on the Draft Law on the Human Rights Defender of Armenia adopted by the Venice Commission at its 54th Plenary Session (Venice 14-15 March 2003)

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