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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

ARMENIA

DRAFT OPINION

**ON THE DRAFT CONSTITUTIONAL LAW
ON THE HUMAN RIGHTS DEFENDER**

on the basis of comments by

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Mr Eirik Holmøyvik (Substitute member, Norway)

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I. Introduction

1. The Minister of Justice of Armenia, Ms Arpine Hovhannisyan, requested an opinion from the Venice Commission, by letter of 3 October 2016, on the draft constitutional law of the Republic of Armenia on the Human Rights Defender (CDL-REF(2016)059, hereinafter “the draft constitutional law”).
2. Mr Bogdan Aurescu, Mr Eirik Holmøyvik, Ms Jasna Omejec and Mr Jørgen Sørensen acted as rapporteurs for this draft opinion.
3. On 21-22 November 2016 two of the rapporteurs, Ms Jasna Omejec and Mr Bogdan Aurescu travelled to Yerevan, Armenia together with a member of the Secretariat, Ms Tanja Gerwien, for meetings on the draft constitutional law with Ms Arpine Hovhannisyan, the Minister of Justice of Armenia; Mr Gagik Harutyunyan, the President of the Constitutional Court; Mr Hrachya Palyan, the Deputy Human Rights Defender; Ms Margrit Esayan, the Deputy Head of the Standing Committee on Human Rights and Public Affairs of the National Assembly of Armenia; representatives of NGOs (Protection of Rights without Borders, Armenian Helsinki Committee, Vanadzor Helsinki Committee and the Open Society Foundation – Armenia); the Delegation of the European Union to Armenia, the OSCE and the UNHCR.
4. This draft opinion is based on an unofficial English translation of the draft constitutional law. Errors may occur in this draft opinion as a result of an incorrect or inaccurate translation. The Armenian authorities informed the Venice Commission that both the original Armenian version and the English translation of the draft constitutional law forwarded to the Venice Commission are missing Article 14 due to a numbering error that has been rectified in the meantime. The draft opinion will refer to the Articles in the draft constitutional law as they appear in document CDL-REF(2016)059.
5. *This draft opinion was drafted on the basis of the rapporteurs’ comments and adopted by the Venice Commission at its ... Plenary Session (Venice, ...).*

II. General Remarks

6. The draft constitutional law was prepared *after* the new Constitution was adopted by referendum on 6 December 2015, so as to be in line with it, as recommended by the *Joint Opinion of the Venice Commission and the Directorate of Directorate General of Human Rights and Rule of Law (DG-1) of the Council of Europe on the draft amendments to the Law on the Human Rights Defender of the Republic of Armenia*, in October 2015 (hereinafter, the “2015 Joint Opinion”).¹ Earlier versions of the Law on the Human Rights Defender had been submitted to the Venice Commission for opinions in 2001,² in 2003³, 2006⁴ and 2008.⁵
7. According to Article 103.2 of the new Constitution, “*the Law on the Human Rights Defender shall be a constitutional law [...] and shall be adopted by at least a three-fifths majority vote of*

¹ See paragraph 6 of the Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DG-1) of the Council of Europe on the draft amendments to the Law on the Human Rights Defender of the Republic of Armenia (CDL-AD(2015)035).

[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)035-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)035-e).

² Opinion on the Ombudsman in the Republic of Armenia (March 2001)

[http://www.venice.coe.int/webforms/documents/?pdf=CDL\(2001\)026-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL(2001)026-e).

³ Opinion on the Draft Law on the Human Rights Defender of Armenia (March 2003)

[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2003\)006-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2003)006-e).

⁴ Opinion on Amendments to the Law on the Human Rights Defender of Armenia (December 2006)

[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2006\)038-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2006)038-e)

⁵ Opinion on draft amendments to Article 23(5) of the Law on the Human Rights Defender of Armenia (October 2008), [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2008\)028-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2008)028-e)

the total number of parliamentarians. The legal provisions of a constitutional law shall not exceed its subject scope.” According to Article 5.1 of the new Constitution (hierarchy of legal norms), the Constitution has “*supreme legal force*” in the Armenian legal system and “[*l*]aws shall conform to the constitutional laws” (Article 5.2). According to Article 210.2 of the new Constitution (harmonisation of Laws with the Amendments to the Constitution), constitutional laws “*shall be harmonised with the Constitution...*”. Hence, a constitutional law does not have the same legal force as the Constitution.

8. The new Constitution’s entry into force is being phased in and most of its provisions will be in force by the beginning of April 2017 (Article 209 of the new Constitution).

9. The Venice Commission’s delegation was informed in Yerevan that a public hearing on the draft constitutional law took place on 10 November 2016, organised by the Standing Committee on Human Rights and Public Affairs of the National Assembly.

10. In the request for the present opinion, the Venice Commission was informed that the draft constitutional law was prepared by the Ministry of Justice in close co-operation with the Human Rights Defender’s Office.

11. This opinion is based on relevant European and international standards, including in particular the Optional Protocol to the Convention against Torture (OPCAT), adopted in 2002 and entered into force in 2006; the Guidelines on National Preventive Mechanisms, Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT); the Compilation of Venice Commission Opinions concerning the Ombudsman Institution (CDL-PI(2016)001); the Principles relating to the Status of National Institutions (Paris Principles of 1993); Recommendations 1615(2003) on the Institution of Ombudsman and 1742(2006) on Human rights of members of the armed forces of the Parliamentary Assembly of the Council of Europe (PACE), as well as the Venice Commission’s previous opinions and reports on the matter.

12. This opinion presents the relevant constitutional provisions alongside an analysis of the draft constitutional law.

III. Remarks on specific articles

Chapter 1 – General Provisions

13. Article 2.1 of the draft constitutional law sets out that “*The Defender shall be the official provided for by Article 191 of the Constitution*”, and Article 191.1 of the Constitution sets out that the Defender is “*an independent official, who shall follow the respect for human rights and freedoms by state and local self-government bodies and officials, as well as by Organisations in cases stipulated by the Law on the Human Rights Defender, and shall facilitate the restoration of violated rights and freedoms and the improvement of the normative legal acts related to human rights and freedoms.*” This definition is largely in line with the concept of ombudsman endorsed by the Venice Commission in its opinions.⁶

14. 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

⁶ See for instance paragraph 12, Opinion on the possible reform of the Ombudsman Institution in Kazakhstan ([http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)020-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)020-e)); paragraph 22, Opinion on the Law on the People’s Advocate (Ombudsman) of the Republic of Moldova ([http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)017-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)017-e)).

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 the Optional Protocol to the Convention against Torture's (OPCAT) Guidelines on NPMs.⁷ 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.⁸ 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).

15. Article 2.3 of the draft constitutional law prescribes that the Human Rights Defender "*shall conduct monitoring of the application of the provisions of the UN Convention on the Rights of the Child adopted on 20 November 1989, as well as carry out the prevention of violations of the rights of the child and the protection thereof.*" However, unlike the competences of the Defender prescribed in Article 2.1 and 2.2, this third scope of the Defender's activity has not been mentioned anywhere else in the text. This specific competence should be defined/developed in the body of the draft constitutional law.

16. Article 3 of the draft constitutional law provides that "*In the course of exercising his or her powers, the Defender shall be guided by the principles of lawfulness, legal equality, impartiality, publicity, democracy, humanism and social justice.*" The principle of transparency should also be added to this list. During the Venice Commission delegation's visit in Yerevan, the Armenian authorities have agreed with this suggestion.

17. Article 4 sets out the "*restriction on the Defender to engage in other activities*", which takes up the wording of Article 193.2 and 193.3 of the new Constitution regarding the incompatibilities of the Human Rights Defender and Article 95 of the new Constitution on the incompatibilities of parliamentarians to which Article 191.2 of the new Constitution refers. These provisions are reasonable.

18. As resulted from the meetings in Yerevan with both the authorities and the NGOs, the Venice Commission recommends that the draft constitutional law should include provisions that introduce 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.

Chapter 2 – Guarantees for the Activities of the Defender

19. 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 Commission⁹ 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. The recommendation concerning correspondence is probably covered by draft Article 6.4 ("documents"), but the means of communication used by the Human Rights Defender should also be included. The Venice

⁷ "32. Where the body designated as the NPM performs other functions in addition to those under the Optional Protocol, its NPM functions should be located within a separate unit or department, with its own staff and budget."

See <http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/NationalPreventiveMechanisms.aspx>

⁸ See CDL-AD(2015)035, paragraph 52.

⁹ But also in previous opinions, such as in paragraph 76 of the 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).

Commission recommends that an explicit provision be added to the draft constitutional law on these issues.

20. Article 6.2 and 6.3 of the draft constitutional law (regarding the criminal prosecution and deprivation of liberty of the Defender) must be read in conjunction with Article 193.1 of the new Constitution, which provides that *“The immunity right stipulated for parliamentarians shall apply to the Human Rights Defender”*, which refers to Article 96 (The Immunity of a Parliamentarian) – Article 6.3 largely reproduces Article 96.2 of the new Constitution.

21. The text of Article 193 of the new Constitution also provides that *“The National Assembly shall solve the question of consenting to the initiation of criminal prosecution against the Human Rights Defender or to depriving him of liberty by at least a three-fifths majority vote of the total number of parliamentarians.”* This qualified majority is the same as the one required for the appointment of the Human Rights Defender, which – apart from the level of the respective qualified majority which is different from the one recommended by the Venice Commission – is in line with European and international standards.¹⁰ The content of Article 193.1 of the new Constitution should be repeated in Article 6 of the draft constitutional law in order to allow the reader to get a full grasp, when reading the law, of all the provisions that apply to the Defender.

22. 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).

23. A certain level of financial autonomy is required for the Defender to carry out his or her functions in general and as NPM.¹¹ Article 8.2 not only sets out that the Defender shall be financed in a separate line of the State Budget, but also that the Defender’s activities as NPM shall be specifically financed. This is a welcome improvement, addressing in part the issue raised in paragraph 48 of the 2015 Joint Opinion.¹²

24. However, it is not entirely clear from Article 8.2 whether these specific activities are financed in an entirely separate manner (i.e. in a separate line of the State Budget from the budget line for the Defender’s core activities) or whether they are financed separately, but within the budget line of the Defender’s activities. This issue should be clarified in the text.

25. In addition, the Defender’s budget request is still subject to the Government’s approval in order to be included in the draft State Budget. The draft constitutional law does not guarantee that sufficient funds in the budget proposal are allocated to the Defender for him or her to carry out his or her functions in general and his or her functions as NPM. However, this might be remedied by Article 193.4 of the new Constitution, which requires the state to ensure *“proper financing”* of the activities of the Defender.

26. Nevertheless, the Defender’s functional independence could be further improved by introducing into the draft constitutional law certain safeguards against unwarranted budgetary cutbacks. In this respect, the Venice Commission’s recommendations in its 2006 Opinion on

¹⁰ See the Venice Commission’s previous opinions on Ombudsman institutions in the Compilation on the Ombudsman institution, CDL-PI(2016)001.

¹¹ See PACE Recommendation 1615 (2003) p. 7.7, OPCAT Article 18.3, Articles 12 and 8 of the SPT Guidelines to OPCAT and CDL-AD(2015)035, paragraph 47.

¹² Paragraph 48 of the 2015 Joint Opinion states that: *“The issue of financial independenc[e] of the NPM should be improved. Apart from having a separate budget line dedicated to the fulfilment of the NPM mandate, it is also necessary to underline that the allocated resources should be adequate for the implementation of the NPM Annual plan. This is very well formulated in Article 25 of the SPT Guidelines which state the NPM is able to carry out visits in the manner and with the frequency that the NPM itself decides.”*

amendments to the Law on the Human Rights Defender of Armenia should be reiterated here:¹³

“80. 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.

81. 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.”

27. Article 10 sets out the “*Liability for obstructing the activities of the Defender*”. The 2015 Joint Opinion recommended that specific sanctions for hindering the Defender’s work be included in the law.¹⁴ The Venice Commission indicated that: “*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.*”¹⁵

28. The draft constitutional law only partly follows these recommendations by referring to “*liability as prescribed by law*” for obstructing the Defender’s work or failing to provide the requested information (see Article 10.2 and 10.3). Article 10.4 refers to “*disciplinary liability*” in relation to Article 10.3. The Venice Commission therefore maintains its recommendation. The Venice Commission’s delegation was informed in Yerevan, however, that sanctions were provided for in other laws (Article 10.2 is covered by the Criminal Code and Article 10.3 by the Administrative Offences Code). These other laws should be specifically mentioned in the draft constitutional law in order to provide a complete overview of the applicable provisions in the draft constitutional law, and to ensure the efficiency of the preventive purpose of Article 10.

Chapter 3 – Procedure for Election of the Defender and Termination of the Powers thereof

29. 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*

¹³ CDL-AD(2006)038.

¹⁴ See CDL-AD(2015)035, paragraph 28.

¹⁵ See Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DG-1) of the Council of Europe on the draft amendments to the Law on the Human Rights Defender of the Republic of Armenia (October 2015), paragraph 28.

[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)035-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)035-e).

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.¹⁶

30. The 2015 Joint Opinion recommended that the *"vetting process should be transparent, include a sufficient number of independent external experts representing the civil society, academia, etc., and be entrusted to a parliamentary committee where all main political fractions are fairly represented. Such vetting committee should ensure the plurality of candidates presented to the Parliament for voting."*¹⁷ Article 12.2 sets forth that *"The Defender shall be elected by the National Assembly of the Republic of Armenia, upon recommendation of the competent standing committee of the National Assembly of the Republic of Armenia, by at least three fifths of votes of the total number of Deputies, for a term of six years."* This leaves it to the competent standing committee of the National Assembly to recommend a candidate to be elected. This means that the plenary of the Parliament has to cast its vote on only one candidate put forward by the standing committee, thus allowing for no competition. The draft constitutional law has no further provisions on the selection process, apart from the personal requirements for the position of Defender considered above.

31. 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.

32. In addition, the draft constitutional law should expressly provide that, according to current practice, candidates present their intended programme to Parliament during a public hearing. It would also be helpful – as resulted from the meetings of the Venice Commission with NGOs – if the draft constitutional law's provisions (or the Rules of Parliament) could specify which standing committee is in charge of the procedure.

33. 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.¹⁸ 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 Recommendation 1615 (2003) of the Parliamentary Assembly of the Council of Europe (PACE) 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

¹⁶ Article 192.2 of the Constitution: *"Anyone who is held in high esteem among the public, has higher education, and meets the requirements stipulated for a parliamentarian may be elected as the Human Rights Defender."* Article 48 (2) of the Constitution: *"Anyone who has attained the age of 25, for the preceding four years has been a citizen of only the Republic of Armenia, has permanently resided in the Republic of Armenia for the preceding four years, has voting right, and has a command of the Armenian language may be elected as a member of the National Assembly."*

¹⁷ See Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DG-1) of the Council of Europe on the draft amendments to the Law on the Human Rights Defender of the Republic of Armenia (October 2015), paragraph 11.

[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)035-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)035-e)

¹⁸ See CDL-AD(2015)035, paragraph 12 and CDL-AD(2015)037, paragraph 192.

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 “*as the broadest possible consensus on the person elected should be ensured, the election by a two-third majority should be considered*”.¹⁹ 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.²⁰

34. It should be pointed out that a qualified-majority requirement increases the risk of a parliamentary deadlock in the election of the Defender. For this reason, the Venice Commission, in its previous opinions on Ombudsman laws, including the 2015 Joint Opinion, has recommended anti-deadlock mechanisms to create incentives for both the majority and the opposition in Parliament to find a reasonable compromise.²¹ This suggestion was not followed in the draft constitutional law. 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.

35. 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*”.²² 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.²³ This would further consolidate the Defender’s impartiality and independence. However, a constitutional amendment might be required to introduce such a limitation.

36. Article 13.1 (Termination of Powers of the Defender) appears to provide an exhaustive list of grounds for the termination of the Defender’s mandate (including early termination). This provision mirrors Article 193.5 of the new Constitution in allowing for an exceptional recall of the Defender’s mandate before the expiry of the term due to the loss of his or her citizenship, the acquisition of citizenship of another state, the loss of legal capacity, his or her death or “*the entry into force of a criminal judgement of conviction rendered against him or her*”.

37. 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.²⁴ 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,²⁵ 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

¹⁹ CDL-AD(2015)037, paragraph 192.

²⁰ Article 192.1 of the Constitution: “*The National Assembly shall, upon nomination by its competent standing committee, elect the Human Rights Defender for a six-year term by at least a three-fifths majority vote of the total number of parliamentarians.*”

²¹ See CDL-AD(2015)035, paragraph 13 and 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, paragraphs 8.1 and 11 .

²² PACE Recommendation 1615 (2003) p. 7.3.

²³ Ibid, paragraph 14; CDL-AD(2015)017, paragraph 45 , CDL-AD(2006)038, paragraph 29 and CDL-AD(2007)024, paragraph 40.

²⁴ CDL-AD(2015)038, paragraph 62.

²⁵ See PACE Recommendation 1615 (2003) p. 7.5.

these offences must amount to “*serious ethical misconduct*” as suggested in PACE Recommendation 1615 (2003) on the Institution of Ombudsman, p. 7.5.

38. On the other hand, there is no provision for the dismissal by Parliament in cases of misconduct or unethical behaviour etc. While this is unusual, and paragraph 7.5 of PACE Recommendation 1615(2003)²⁶ specifically allows Parliament to have such competencies, the Constitution does not provide for such grounds.

39. At the same time, the Venice Commission recommends that the draft constitutional law provide that, at the termination of the Defender’s mandate, a report on the activity of the Defender be presented to Parliament and be published.

Chapter 4 – Procedure for Consideration of issues within the Competence of the Defender

40. 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.²⁷ Certain provisions of the draft constitutional law (e.g. Article 22(3)) may aim to express this principle, however, the draft constitutional law should be very clear in this important respect.

41. As to the Defender’s material jurisdiction, Article 16 refers to “*violation of human rights and freedoms*”, while Article 17 (Applying to the Defender) refers to violation of “*rights and freedoms enshrined in the Constitution and the laws of the Republic of Armenia*”. The former notion appears to set a higher threshold than the latter. It would seem useful to harmonise the two provisions. The wider definition of Article 17 is preferable.

42. At the same time, the Venice Commissions recommends that the terms “mass” and “exceptional” be deleted from Article 16.1.2,²⁸ since they introduce unnecessary limitations to the possibility of the Defender to act.

43. Article 17.4 provides that “*For the purpose of protecting the rights and freedoms of another person, the representative, legal representative, legal successor, heir of that person may apply to the Defender.*” It is not entirely clear what the difference between the “*representative*” and the “*legal representative*” is, since the same paragraph defines, in the next sentence, the representative as follows: “*Persons authorised as prescribed by law, including advocates, may act as a representative.*” This should be clarified.

²⁶ <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17133&lang=en>

²⁷ See paragraph 6 of PACE Recommendation 1615(2003) “*The Assembly believes that 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; in consequence, the ability to represent individuals (unless there is no individual right of access to a particular court), initiate or intervene in proceedings, or reopen cases, should be excluded.*”

²⁸ Article 16.1.2: “issues concerning violations of human rights and freedoms by organisations operating in the field of public service where there is information about mass violations of human rights or freedoms or it is of exceptional public importance or it is connected with the protection of interests of persons who cannot make use of legal remedies for protection of their rights and freedoms on their own.” (emphasis added).

44. The 2015 Joint Opinion recommended (paragraph 22), with reference to the provision of the previous draft law according to which *“public officials may apply to the Defender only in their personal capacity”*, that: *“it may prove quite useful in practice to allow State officials to complain about the general malfunctioning of the system, even where they are not direct victims of such malfunctioning. Public officials know the administration system from the inside, they are better informed and may be more efficient in defending human rights even if their own private interests are not affected. The Armenian authorities are therefore invited to reconsider this provision in order to include this possibility, within the limits set by the legislation on the status of public servants in Armenia.”*

45. However, Article 17.7 of the draft constitutional law remains unchanged and states that officials of state and local self-government bodies shall have the right to apply to the Defender *“only for the purpose of protecting their violated rights and freedoms as natural persons.”* This may be an issue of translation, but it is not sufficiently clear how the clause *“as natural persons”* could be interpreted. One interpretation could be that civil servants must have the right to apply in matters strictly connected to their private lives, not in their professional capacity. 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.

46. As concerns military staff, it should be pointed out that the Parliamentary Assembly of the Council of Europe has called upon member states of the Council of Europe in Recommendation 1742 (2006) on *Human rights of members of the armed forces*, to ensure genuine and effective human rights protection of members of the armed forces, in particular *“to introduce, where such a facility does not already exist, the autonomous civil institution of military ombudsman responsible for promoting the fundamental rights of members of the armed forces, ensuring respect for such rights, providing legal assistance to servicemen, and receiving complaints of violations of their rights, and to whom military personnel can turn in a confidential manner in cases of employment disputes or other questions arising out of the exercise of its duties”*.

47. Article 18.7 refers to the protection of personal data of persons who have submitted a complaint. The Venice Commission recommends that a reference to the Council of Europe’s *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (Strasbourg, 28.I.1981) be added to the explanatory memorandum to this draft constitutional law, which was signed by Armenia on 8 April 2011, ratified on 9 May 2012 and entered into force for Armenia on 1st September 2012.

48. The Venice Commission’s recommendation in its 2015 Joint Opinion to include a mechanism for making the Defender’s consideration of a complaint more foreseeable for the applicant by providing that the Defender *“be required by law to explain to the applicant that judicial legal avenue also exists for his/her complaint and inform the applicant about time-limits for bringing the case before the court”*²⁹ – has been addressed in Article 20.1 (3). This provision lists as one of four possible decisions by the Defender: *“on presenting to the person having submitted the complaint the possible means for the protection of his or her rights and freedoms”*. Article 23 (Presenting to the person having submitted the complaint the possible means for the protection of his or her rights and freedoms) includes an obligation of the Defender to present *“to the person having submitted the complaint the possible means for the*

²⁹ CDL-AD(2015)035, paragraph 24.

protection of his or her rights and freedoms.” This is to be welcomed and follows the Venice Commission’s recommendation in its 2015 Joint Opinion.³⁰

49. It is, however, unclear whether the Defender’s obligations of information under Article 20.1 (3) also extend to decisions in paragraph (1) on “*accepting the complaint for consideration*”. Concerning the latter decision, the 2015 Joint Opinion observed that it was unclear what would happen after a complaint was accepted for consideration and how long the consideration phase would last.³¹ Since bringing a complaint before the Defender does not appear to interrupt the running of time-limits for court proceedings, it is important that the applicant be given adequate information concerning the timeframe of the procedures before the Defender. The draft constitutional law is still not clear on this point despite the Defender’s obligation under paragraph (3). It would therefore be important that the text include the Defender’s obligation to inform the applicant that his or her complaint before the Defender does not suspend the deadlines for bringing a legal action before the courts and that he or she must pay due diligence to the exhaustion of domestic legal remedies.

50. Article 22.1 (Not considering a complaint) sets out that the Defender shall render a decision to not consider a complaint where the issue of the complaint is beyond the scope of its powers. The scope of the Defender’s powers should be set out clearly.

51. 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.

52. This same paragraph provides that “*The complaint shall not be considered and the consideration initiated with regard to the complaint shall be terminated also in case the interested person has filed an action or complaint before the court after having submitted the complaint.*” This issue has been addressed by the Venice Commission in its 2015 Joint Opinion, paragraph 16: “*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.*” The draft constitutional law refers to the situation of non-consideration of a complaint if a court is seized *after* the complaint was submitted to the Defender. The draft constitutional law should also cover situations where the same matter was already dealt with by a court or is being examined by a court when the complaint is submitted to the Defender.

53. Article 25 deals with the Defender in the course of examination or consideration of a complaint. Article 25.1.1 follows the Venice Commission’s recommendation in its 2015 Joint Opinion to use the formula “*deprivation of liberty*” instead of “*restriction of liberty*”, which is to be welcomed.

54. 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

³⁰ Ibid, paragraph 24 (“*Defender may also be required by law to explain to the applicant that judicial legal avenue also exists for his/her complaint and inform the applicant about time-limits for bringing the case before the court. It would then be for the applicant to decide whether to wait until the end of the procedure before the Defendant or to go directly to a court*”).

³¹ Ibid, paragraph 23.

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.

55. Article 25.1.9 continues – as in the previous draft law – to provide that the Defender is authorised to “*submit a communication on initiating disciplinary proceedings against a judge*”. This is contrary to the recommendation made in the 2015 Joint Opinion (paragraph 18), according to which “*to set disciplinary proceedings in motion is quite unusual and appears to contradict [the] otherwise ancillary role of the Defender vis-à-vis the judiciary. The Armenian authorities should consider removing [this] power...*” The Venice Commission therefore reiterates this recommendation. In any case, such a communication cannot relate to the substance of a judgment, at most only to the behaviour of a judge in court. Allegations of corruption of a judge should be transmitted to the competent prosecutor and should not be dealt with by the Defender him or herself.

56. 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.

57. Article 27.1 and 27.3 (Decisions rendered by the Defender as a result of consideration of a complaint or consideration upon own initiative) refer to the capacity of filing an action before the court, but do not mention the possibility provided in the new Constitution under Article 169.1.10 for the Human Rights Defender to apply to the Constitutional Court “*concerning the conformity of the normative legal acts listed in Paragraph 1 of Article 168 of the Constitution with the provisions of Chapter 2 of the Constitution*”. Article 168.1 of the new Constitution refers to “*the conformity with the Constitution of laws, decisions of the National Assembly, orders and decrees of the President of the Republic, decisions of the Government and the Prime Minister, and sub-legislative normative legal acts*”, while Chapter 2 of the new Constitution sets out the “*Fundamental rights and freedoms of the human being and citizen*”. The competence of the Human Rights Defender to appeal to the Constitutional Court is of course also covered in the Law on the Constitutional Court, but it should also be explicitly referred to in the draft constitutional law in order to provide a coherent overview of the Defender’s competences in that law.

58. It is to be welcomed that Article 27.5 also refers to the liability of an official for breaching human rights and freedoms by way of omission. This is in line with Venice Commission’s recommendations in previous opinions on the matter.³²

Chapter 5 – Activities of the Defender in separate fields

59. The Defender’s powers as the NPM listed in Article 29 of the draft constitutional law now include all powers required by OPCAT, which is welcome.³³ In accordance with Article 20(c) of the OPCAT, Article 29.1.1 of the draft constitutional law on the Defender’s right to visit places of

³² See 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), paragraph 89.

³³ See CDL-AD(2015)035, paragraphs 45-46. With explicit reference to OPCAT, Article 29.1(8) explicitly grants the Defender all powers required by OPCAT.

deprivation of liberty now also extends to “*buildings or structures adjunct thereto*”. Yet, in relation to the State’s obligation to grant the NPM information, the recommendations to use the word “access” as in Article 20 of OPCAT instead of “*receive*” (Article 29.1.4 and 29.1.5) and “*get familiar with*” in Article 29.1.6 should be followed.

60. 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.).

61. Article 29.4 states that for the purpose of professional assistance, the Defender “*may engage independent specialists and representatives of non-government organisations, who gain the status of an expert of the National Preventive Mechanism*”. This does not, however, guarantee the institutional participation of NGOs in the NPM’s work, because it leaves their participation at the Defender’s discretion.

62. Article 31 (Annual communication and reports of the Defender) provides in its paragraph 5 that, “*as the National Preventive Mechanism, the Defender shall, during the first quarter of each year, submit a separate annual communication on the activities undertaken during the previous year*”. The Venice Commission recommends that the text provide to whom – probably Parliament and Government – this separate annual communication must be submitted. The report should, of course, also be published.

63. Article 31.2 provides that it is at the Defender’s discretion whether or not to submit the annual communication to the competent state bodies and NGOs and to publish it, whereas Article 31.4 provides that the Defender shall ensure the publicity of its communications and reports. There seems to be a contradiction between the two provisions that should be harmonised. All communications and reports should be made public. It is therefore recommended that the reference in Article 31.2 to “*his or her discretion*” be deleted.

64. In Article 33 (Council adjunct to the Defender), it would be very important to involve members of NGOs. To that end, a council of NGOs might be set up on a permanent basis under the NPM. The selection of council members should be clearly regulated by the draft constitutional law and members of the council should be appointed through a transparent competition. There should be no more than one member per organisation involved in the NPM and the work and co-operation between the council and the NPM should be regulated by the draft constitutional law and strike a balance between the Defender and the NGOs. This would increase accountability and the transparency of the NPM and strengthen the NPM’s mandate and credibility.

65. In addition, NGOs can play a key role in following up the Defender’s recommendations and address systemic shortcomings.

Chapter 6 – Peculiarities of State Service within the Staff to the Defender

66. Article 40 regulates the issue of the remuneration of the Defender’s staff, but, contrary to the recommendation made by the Venice Commission in its 2015 Joint Opinion,³⁴ the draft constitutional law does not regulate the salary of the Defender, which is an important component of the independence of the Defender.³⁵ However, the Venice Commission’s

³⁴ Ibid, paragraph 29.

³⁵ See subsection 4.1.1 of the Compilation of Venice Commission Opinions concerning the Ombudsman Institution (CDL-PI(2016)001).

delegation was informed in Yerevan that this is dealt with by the Law on Remuneration of State Officials, according to which the coefficient used to calculate the Defender's remuneration is 15 (has to be multiplied by the basic salary) and is equivalent to that of the Chairman of the Court of Cassation. A reference to this Law might be included in the draft constitutional law.

67. Article 41 (Final Part) and Article 42 (Transitional Provisions) should not be included in Chapter 6 (*Peculiarities of State Service within the Staff to the Defender*), but in a separate (new) chapter entitled "*Final Provisions*".³⁶

IV. Conclusion

68. The draft constitutional law, like the previous draft law on the Human Rights Defender, largely complies with European and international standards, is detailed, well-structured and deals with most of the major issues that a law on the Ombudsman should regulate. It has taken most of the recommendations made by the Venice Commission in its previous opinions into account.

69. Nevertheless, there are a number of important recommendations that the Venice Commission would like to make and these include, *inter alia*:

- *Candidates*: providing for a transparent competitive selection of the Human Rights Defender, include proposals from civil society and from political parties in order to enable the selection of highly qualified candidates so as to provide legitimacy to the process;
- *Powers*: It should be made clear that the Human Rights Defender has no competence over the judiciary as concerns individual cases;
- *Budget*: Consider introducing safeguards against unwarranted cutbacks to improve the Defender's functional independence;
- *Grounds for dismissal*: a disqualifying conviction should, as grounds for dismissal due to criminal offences or other acts incompatible with the position of Defender, exclude minor convictions (e.g. minor traffic offences);
- *Regional presence*: Consider introducing a regional presence of the Human Rights Defender or regional ombudspersons in order to provide effective accessibility to human rights protection across the country;
- The Human Rights Defender as the National Prevention Mechanism should:
 - Have access to all private and public institutions where persons are held against their will, including "semi-closed" institutions;
 - Guarantee the institutional participation of NGOs in its work;
 - Consider setting up an "adjunct council" of NGOs on a permanent basis.

70. The Venice Commission remains at the disposal of the Armenian authorities for any further assistance they may need on the legal framework pertaining to the Human Rights Defender of Armenia.

[http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2016\)001-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2016)001-e).

³⁶ The term "Closing Provisions" can be found, for example, in the official translations of the Armenian Credit Organisations Act, Civil Procedure Code, Criminal Code, Criminal Procedure Code, etc., at <http://www.parliament.am/legislation.php?sel=alpha&itype=3&lang=eng> (Last access: 16 November 2016).