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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

**KAZAKHSTAN**

**DRAFT OPINION**

**ON THE DRAFT CONSTITUTIONAL LAW  
"ON THE COMMISSIONER FOR HUMAN RIGHTS"**

**On the basis of comments by**

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*\*This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

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## I. Introduction

1. By letter of 11 August 2022, the Commissioner for Human Rights of Kazakhstan (hereafter "the CHR"), Ms Elvira Azimova, requested an opinion from the Venice Commission on the draft constitutional law "On the Commissioner for Human Rights of the Republic of Kazakhstan" (CDL-REF(2022)035), followed on 6 October 2022 by a revised version (CDL-REF(2022)044, (hereafter "the draft constitutional law").
2. Mr Jørgen Steen Sørensen, Mr Dimitris Christopoulos and Mr Jan Helgesen acted as rapporteurs for this Opinion.
3. On 29-30 September 2022, the rapporteurs, along with Mr Mamuka Longurashvili and Mr Serguei Kouznetsov from the Secretariat, had online meetings with the Office of the CHR, Members of Senate and Mazhilis (Upper and Lower Houses of Parliament, respectively), the Chairman of the Human Rights Commission under the President of the Republic of Kazakhstan, representatives of the Ministry of Justice, as well as with representatives of civil society. The Venice Commission is grateful to the Commissioner for Human Rights and the authorities of Kazakhstan for having organised the meetings and for the excellent level of co-operation during the preparation of the opinion.
4. This opinion was prepared in reliance on the English translation of the draft constitutional law. The translation may not accurately reflect the original version on all points.
5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the online meetings on 28 and 29 September 2022. The draft opinion was examined by the Sub-Commissions on Democratic Institutions and Ombudsman Institutions at their joint meeting on XXX XXX 2022. Following an exchange of views with \*\*\*, it was adopted by the Venice Commission at its XXX Plenary Session (Venice, XXX2022).

## II. General observations

### A. International standards

6. This opinion is based on relevant European and international standards.
7. The draft constitutional law introducing the CHR as the National Human Rights Institution will be analysed in light of the United Nations' "Paris Principles" on National Human Rights Institutions<sup>1</sup>. The current Commissioner enjoys status B<sup>2</sup>.
8. On 16 December 2020, the UN 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".<sup>3</sup> In its Preamble, the Resolution "*acknowledges the principles on the protection and promotion of the Ombudsman institution (the Venice Principles)*"; in operative paragraph 2, it strongly encourages the Member States to rend Ombudsman institutions "*consistent with [...] the Venice Principles*". In operative paragraph 8, it "*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*".

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<sup>1</sup> See, UN General Assembly, Principles relating to the Status of National Institutions (The Paris Principles), Resolution 48/134 of 20 December 1993, available at <https://www.ohchr.org/en/professionalinterest/pages/statusofnationalinstitutions.aspx>

<sup>2</sup> See, [OHCHR | GANHRI Sub-Committee on Accreditation \(SCA\)](#).

<sup>3</sup> See, UN General Assembly, The Role of Ombudsman Institutions in the Promotion and Protection of Human Rights, Good Governance and the Rule of Law, Resolution adopted by the General Assembly on 16 December 2020 [based on the report of the Third Committee (A/75/478/Add.2, para. 89)].

9. The Venice Commission adopted the Principles on the protection and promotion of the Ombudsman Institution (the "Venice Principles") at its 118<sup>th</sup> Plenary Session (Venice, 15-16 March 2019). The Venice Principles were endorsed by the Committee of Ministers of the Council of Europe at the 1345<sup>th</sup> 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.<sup>4</sup>

10. The General Observations of the International Coordinating Committee of National Human Rights Institutions for the Promotion and Protection of Human Rights (ICC, which became the Global Alliance of National Human Rights Institutions (GANHRI)<sup>5</sup>), which serve as interpretive tools of the Paris Principles and the Optional Protocol to the Convention against Torture (OPCAT) and the Guidelines on National Preventive Mechanisms<sup>6</sup>, will also serve as references.

11. At the level of the Council of Europe:

- on 31 March 2021, at the 1400<sup>th</sup> meeting of the Ministers' Deputies, the Committee of Ministers adopted 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;<sup>7</sup>
- on 16 October 2019, at the 1357<sup>th</sup> meeting of the Ministers' Deputies, the Committee of Ministers adopted Recommendation CM/Rec(2019)6 of the Committee of Ministers to member States on the development of the Ombudsman institution to member States on the development of the Ombudsman institution.<sup>8</sup>

## **B. Previous Venice Commission's opinions concerning the CHR of Kazakhstan**

12. Kazakhstan has been a member of the Venice Commission since March 2012 (and an observer since 1998). The relationship between the Kazakh authorities and the Venice Commission paved the way to broader co-operation with the Council of Europe through the implementation of the Neighbourhood Policy established in 2011. The Neighbourhood Co-operation Priorities for Kazakhstan for 2019-2023 aim to facilitate the establishment of a common legal area between Europe and Kazakhstan, encouraging the authorities to bring Kazakh legislation further into line with European and international standards and to consolidate the constitutional and public administration reforms.

13. The Institution of the CHR has been the subject of two Venice Commission opinions: the Opinion on the possible reform of the Ombudsman Institution in Kazakhstan adopted by the Venice Commission at its 71<sup>st</sup> Plenary Session (Venice, 1-2 June 2007) (hereafter "the 2007 Opinion")<sup>9</sup> and the Opinion on the draft law "On the Commissioner for Human Rights", adopted by the Venice Commission at its 129<sup>th</sup> Plenary Session (Venice and online, 10-11 December 2021) (hereafter "the 2021 Opinion").<sup>10</sup>

14. In its 2021 opinion, the Venice Commission welcomed strengthening the Institution's legal basis, shifting from a Presidential Decree to a law. At the same time, noting that the only constitutional provision referring to the CHR was Article 55.1-1, under Section IV Parliament (which indicated as competence of Parliament: the "*election of the [CHR] for a five-year term and his release from office upon the recommendation of the President of the Republic*"), the Venice

<sup>4</sup> CDL-AD(2019)005, Principle 3.

<sup>5</sup> <https://ganhri.org/>

<sup>6</sup> <https://www.ohchr.org/en/treaty-bodies/spt/national-preventive-mechanisms>

<sup>7</sup> Available at [https://search.coe.int/cm/pages/result\\_details.aspx?objectId=0900001680a1f4da](https://search.coe.int/cm/pages/result_details.aspx?objectId=0900001680a1f4da).

<sup>8</sup> Available at [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=090000168098392f](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168098392f)

<sup>9</sup> CDL-AD(2007)020.

<sup>10</sup> CDL-AD(2021)049.

Commission recommended that at least three main elements, notably, the definition, the basic mandate and the basic procedure for election and dismissal of the CHR, should be established at the constitutional level.

15. Furthermore, to align the provisions of the draft law with international standards and earlier Venice Commission recommendations, the 2021 Opinion provided the following key recommendations:

- 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;
- 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;
- 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;
- 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;
- with regard to the Commissioner's own investigations powers, removing limitations;
- 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;
- 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;
- with regard to the annual report, providing for the Commissioner to report to Parliament.

### **C. Subsequent developments**

16. The previous draft law "On the Commissioner for Human Rights in the Republic of Kazakhstan" submitted to the Venice Commission for opinion was adopted on 29 December 2021.

17. Following the constitutional referendum held in Kazakhstan on 5 June 2022, a draft constitutional law was prepared and submitted to the Majlis. It will replace the above-mentioned ordinary Law.

18. The Venice Commission's delegation was informed during the online meetings that the Majilis approved the draft constitutional law with a series of additional amendments. On 30 September 2022, the draft constitutional law was submitted to the Senate for consideration within 60 days.<sup>11</sup> The CHR/authorities provided the latest version of the draft constitutional law on 6 October 2022.<sup>12</sup> Therefore, this opinion concerns the draft constitutional law as it appears in the document CDL-REF(2022)044.

19. The initiative of the Kazakh authorities to adopt a new constitutional Law "On the Commissioner for Human Rights" is to be welcomed, as is their wish to revise the draft constitutional law further on the basis of recommendations provided in the 2021 opinion. The Venice Commission is grateful to the CHR and the authorities for their rapid reaction at each stage of the preparation of the present opinion.

<sup>11</sup> See Article 18§1 of the [Constitutional Law "On the Parliament of the Republic of Kazakhstan and the status of its deputies"](#).

<sup>12</sup> See draft law No. 3517 under the examination by the Senate: <http://senate.parlam.kz/ru-RU/lawProjects/index>

#### **D. Scope of the present opinion**

20. The existing Law "On the Commissioner for Human Rights in the Republic of Kazakhstan" and the draft constitutional law "On the Commissioner for Human Rights in the Republic of Kazakhstan" are similar to a great extent. The Venice Commission finds that several key recommendations made in its 2021 Opinion have not been followed. Therefore, they remain valid and would still merit consideration by the authorities.

21. Consequently, the draft constitutional law is analysed in light of the Venice Commission's 2021 Opinion. The Commission will also address specific questions raised in the CHR's request and during the online discussions.

### **III. Analysis of the draft constitutional law**

#### **A. Structure**

22. The draft constitutional law is divided into six chapters and contains 23 articles.

23. In its 2021 Opinion, the Venice Commission recommended improving the quality of the (previous) draft law by defining the CHR's jurisdiction in a single Article or Section. In the draft constitutional law, the competences of the CHR are presented under the new Chapter III, while the procedure of handling complaints has been moved into the new Chapter IV. Some specific articles/paragraphs have also been restructured. The Venice Commission remarks that despite some improvements in the draft constitutional law structure, the CHR's jurisdiction is still addressed in different parts of the text.

#### **B. Constitutional guarantees**

24. Further to Article 55.1-1 (cited in §2 above), a new Article 83.1 has been added to the Constitution: *"1. The [CHR]... shall contribute to the restoration of violated rights and freedoms of a human and a citizen, promote the rights and freedoms of a human and a citizen. 2. When exercising his/her powers, the [CHR]... shall be independent and not accountable to state bodies and officials. 3. During the term of his/her powers, the [CHR]... may not be arrested, brought to justice, subjected to administrative penalties imposed in court, brought to criminal responsibility without the consent of the Senate, except for cases of detention at the scene of a crime or committing serious crimes. 4. The legal status and organisation of activities of the [CHR]... shall be determined by the constitutional law".*

25. According to Article 62.4 of the Constitution, *"constitutional laws shall be adopted on issues stipulated by the Constitution by a majority of at least two-thirds of the votes of the total number of deputies of each Chamber"*. In the hierarchy of legal norms of Kazakhstan, the Constitution has the highest legal force, followed by laws amending the Constitution, constitutional laws, codes and other laws. Each of the normative legal acts of the subordinate level should not contradict the normative legal acts of the higher levels.<sup>13</sup>

26. The Venice Commission welcomes the definition, the basic mandate and the basic procedure for the election of the CHR at the constitutional level, which is partly in line with its 2021 recommendation and explanation given in its 2007 Opinion. Furthermore, the Venice Commission welcomes that the new legislation on CHR is given the status of Constitutional Law.

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<sup>13</sup> See Article 10 of the Law "On Legal Acts": <https://adilet.zan.kz/eng/docs/Z1600000480>

### C. Jurisdiction

27. According to Article 1 of the draft constitutional law, the CHR ensures *"the state guarantee of the protection of human and civil rights and freedoms, their observance and respect"*. The mission of the CHR is to *"contribute to the restoration of violated human rights and freedoms and to promote human and civil rights and freedoms"*.

28. In its 2021 opinion, the Venice Commission made several specific recommendations regarding Article 1, in particular, including private entities which deliver public services, limiting the exemptions of jurisdiction, clarifying the jurisdiction over the judiciary (confining the CHR's competence relating to the judiciary to ensuring procedural efficiency and administrative functioning of that system"<sup>14</sup>) and adding the promotion of Human Rights in the mandate of the CHR.

#### a) Private entities which deliver public services

29. Private entities which deliver public services are still not included in the CHR's jurisdiction. Although a new category of *"other organisations"* has been added to *"state bodies, local state administration and self-government and officials"*, it is unclear whether this term refers to private entities. The Venice Commission considers that *"other organisations"* should include private entities delivering public services or at least refer to a relevant legal act where such a definition is to be found.

#### b) Exemption from the CHR's jurisdiction

30. The recommendation related to the exemption of the President and the First President of Kazakhstan from the CHR's jurisdiction has been partly followed. Although the First President is no longer mentioned, the exemption of the President has been maintained in Article 13.2 of the draft constitutional law. The Venice Commission reiterates its recommendation to consider limiting the exemption from the CHR's jurisdiction of activities of the President to an exceptional/political nature, as specified in §30 of its 2021 Opinion: the activities of the President, unless they fall into the realm/area of sovereignty exercised by the Head of State, should fall within the monitoring competence of the CHR.<sup>15</sup> The exception provided for in Article 7.2 should be reconsidered in this respect.

31. In the same context, no clarifications were made to the term *"state bodies"*, which would seem to also cover the judiciary. This important point should be clarified in the sense of Principle 13 of Venice Principles *"the competence of the Ombudsman relating to the judiciary shall be confined to ensuring procedural efficiency and administrative functioning of that system"* and to avoid various interpretations of the provision concerned (see §31 of the 2021 Opinion).

#### c) Promotion of human rights and freedoms

32. In its 2021 Opinion, the Commission recalled that the promotion of human rights and fundamental freedoms is an important element of the ombudsperson's basic mandate, in addition to prevention, correction of maladministration and the protection of human rights and fundamental freedoms (§29). The Venice Commission hence recommended adding the promotion of human rights and fundamental freedoms into the CHR's mandate.

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<sup>14</sup> See Principle 13 of Venice Principles.

<sup>15</sup> See Venice Commission, CDL(2001)083, Consolidated Opinion on the Law on Ombudsman in the Republic of Azerbaijan, §§ 6, 7 and 18.

33. The promotion of human rights and freedoms was added to the CHR area of competence in Article 1 of the draft constitutional law. The Venice Commission welcomes the improvement of the CHR's mandate in this respect.

d) Principles of activity

34. Despite the 2021 recommendation, Article 2 of the draft constitutional law (principles and legal basis of the CHR's activity) does not include the concept of rule of law. Instead, it introduced, together with "*legality, fairness, impartiality, objectivity, publicity, openness and transparency*", the term "*other principles enshrined in the Constitution*".

35. According to Article 1.1 of the Constitution, "*the Republic of Kazakhstan proclaims itself as a democratic, secular and social state based on the rule of law*". For the sake of clarity, the Venice Commission advises, once again, revising the provision to align it with the corresponding Constitutional Article in light of its 2021 recommendation.

e) New/improved powers

36. The CHR can initiate proceedings before the Constitutional Court<sup>16</sup> for the assessment of the constitutionality of "*normative legal acts affecting the rights and freedoms of a person and citizen enshrined in the Constitution*" (Article 7.15). This new prerogative is particularly welcomed as it empowers the CHR's human rights protection and prevention powers with standing rights before the Constitutional Court (see also details concerning the ombudsman's access to constitutional justice in §82 below).

37. Another significant improvement in the CHR's monitoring power is the possibility to make "*film, photo and video filming, interviewing, including using audio, video equipment*" when visiting "*organisations and institutions providing special social services, providing temporary isolation from society or intended for the execution of punishment*", with the consent of the persons concerned (Article 7.19). The Venice Commission welcomes these developments.

## D. Immunity

a) Scope of the CHR's immunity and criminal liability

38. In the 2021 Opinion, the Venice Commission made several remarks regarding the content of the CHR's immunity. In particular, the Commission considered that in Article 3 of the previous draft law "*The Commissioner shall have immunity during his(her) term of office*", immunity did not appear to be only functional but also to apply to the private sphere. The Venice Commission recalled that Ombudsmen are responsible under the law as anyone else for actions not within their official capacity. Therefore, the Venice Commission recommended circumscribing the CHR's immunity to functional immunity.

39. The above-mentioned sentence has been deleted, and Article 3 of the draft constitutional law provides functional guarantees for the CHR's professional activities. The Venice Commission welcomes this development.

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<sup>16</sup> According to the constitutional amendments of 8 June 2022, the Constitutional Council will be replaced by the Constitutional Court. The provisions of the Constitution, which determine the activities of the Constitutional Court, shall come into force on 1 January 2023. see Note under Article 4 of the Constitution: <https://adilet.zan.kz/eng/docs/K950001000>



40. Another aspect under the focus of the 2021 Opinion was an unlimited criminal liability in cases of "a) *detention at the scene of the crime*, b) *commission of a "grave or particularly grave crime"* or "c) *agreement of the Public Prosecutor*". The Venice Commission recommended replacing the Public Prosecutor by Parliament to decide whether or not to remove the CHR's immunity in accordance with the conditions set by international standards. With regard to "grave or particularly grave crimes", the Commission considered their definition to be "very unclear" as lacking the specification of minimum sentences.

41. Article 3.2 of the draft constitutional law stipulates that consent of the Senate is required for "arrest, detention, house arrest, summoning, measures of administrative punishment imposed by a court and the criminal liability of the CHR during his/her term of office. The Venice Commission welcomes the replacement of the Public Prosecutor with the Senate, in line with its 2021 recommendation.

42. Regarding the exceptions from the above-mentioned grounds "*in cases of apprehension at the scene of a crime or committing grave or particularly grave crimes*", the Venice Commission, recalling its previous recommendation to clarify the minimum sentence for grave or particularly grave crimes, notes that Article 11 of the Criminal Code of Kazakhstan provides four categories of crimes: crimes of less gravity, crimes of medium gravity, grave crimes and particularly grave crimes. Grave crimes are punished by imprisonment for up to 12 years; particularly grave crimes are punished by imprisonment for more than 12 years or life imprisonment.<sup>17</sup> Therefore, the drafters are invited to consider the possibility of adapting the sentence as follows "... or committing grave or particularly grave crimes according to the Criminal Code of the Republic of Kazakhstan".

b) CHR staff's immunity

43. The Venice Commission recalls that the functional immunity of the staff of a National Human Rights Institution is essential to protect the independence of the Institution. This is all the more important since the CHR is also entrusted with the mandate of the National Preventive Mechanism. As such, the legislation pertaining to the Ombudsman should comply with the relevant provisions of the OPCAT, particularly its Article 35: "*[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), the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has specified that both the members of the National Preventive Mechanism and its staff shall enjoy such privileges and immunities as are necessary for the independent exercise of their functions.<sup>18</sup>

44. The draft constitutional law still does not foresee the temporal and material aspects of the immunity, meaning that the CHR's immunity should continue after the end of his/her term of office. This immunity should not only concern the person of the CHR and his/her staff but should also cover baggage, correspondence and means of communication belonging/used by the Commissioner and his/her staff in their professional capacity.<sup>19</sup>

45. The Venice Commission reiterates its recommendation to supplement Article 3 of the draft constitutional law to expressly refer to the functional immunity of the CHR's staff.

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<sup>17</sup> See Criminal Code of the Republic of Kazakhstan (in English): <https://adilet.zan.kz/eng/docs/K1400000226>

<sup>18</sup> CDL-AD(2021)049 - Opinion On the Draft Law "On the Commissioner for Human Rights" adopted by the Venice Commission at its 129<sup>th</sup> Plenary Session (Venice and online, 10-11 December 2021), §§ 47-50.

<sup>19</sup> CDL-AD(2016)033 - Opinion on the draft Constitutional Law on the Human Rights Defender, adopted by the Venice Commission at its 109<sup>th</sup> Plenary Session (Venice, 9-10 December 2016), §20.

## E. Election and Termination of Powers of the Commissioner

### a) Election

46. In its 2021 Opinion, the Venice Commission recommended foreseeing a public and transparent selection procedure comprising public call, testing and shortlisting, followed by an election by a qualified majority by the Parliament, as well as a longer term of office and preferably a non-renewable term of office.

47. The recommendation of the Venice Commission was not taken into consideration. Article 4.1 and 4.2 (Election of the CHR) and Article 5 (Removal from office) of the draft constitutional law provide for the same eligibility criteria and election and dismissal procedures as analysed in §§ 56-67 of the 2021 Opinion: the CHR is elected by the Senate for five years and is dismissed upon recommendation of the President of the Republic. The requirements of the Venice Principles, such as public call, testing and shortlisting, were not included among the eligibility criteria either.

48. The draft constitutional law does not specify whether the CHR may be re-elected. It mirrors Article 55.1-1 of the Constitution (five-year term). However, Article 5 introduces a new ground for the termination of powers of the CHR: "*10) the expiry of the term of office established by the Constitution*". Read together, Article 5.10 of the draft constitutional law and Article 55.1-1 of the Constitution appear to limit the CHR term of office to a single term.

49. Referring to the Council of Europe Committee of Ministers 2021 Recommendation, the Venice Commission recalls that "*the process of selection and appointment of the leadership of a NHRI should be competence-based, transparent and participatory, in order to guarantee the independence and pluralist representation of these institutions. It should also be based on clear, predetermined, objective and publicly accessible criteria. The duration of the appointment should be clearly set out in the founding legislation so that the leadership posts of the NHRI do not stay vacant for any significant period of time*".<sup>20</sup> Therefore, the Venice Commission suggests indicating clearly in Article 4 of the draft constitutional law that the CHR's term of office is non-renewable.

### b) Incompatibilities

50. In its 2021 Opinion, the Venice Commission recommended inserting the ground foreseen in Article 6 ("*For the period of exercising his/her powers, the Commissioner suspends his membership in political parties*") in addition to the requirements of Article 4.2 of the previous draft law. Notably, the Commission pointed out that the Commissioner must not be a member of any political party for a period of two years before his/her appointment.

51. This recommendation was not followed in Article 4.2 of the draft constitutional law. Instead, a new sentence was added to Article 6, mentioning that "*if the CHR is a member of a political party or trade union at the time of his/her election to office, he/she must cease to be a member of such a party or trade union within ten days of his/her appointment*". The Venice Commission is of the opinion that this sentence contradicts "*the duration of his/her term of office*". It should be at least clarified that in the first place, ten days following the election is the period prior to taking office, and, secondly, that failure to respect the obligation must be the suspensive condition.

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<sup>20</sup> CM/Rec(2021)1, Op. cit. §9.

c) Grounds for early dismissal

52. The sentence "grounds for early dismissal" in Article 5.3 of the previous law has been replaced by the following "grounds for dismissal" in the Article 5.2 of the draft constitutional law: "1) non-compliance with the requirements and restrictions established by this Constitutional Law and other laws of the Republic of Kazakhstan; 2) the entry into force of a court conviction against CHR; 3) entry into force of a court ruling declaring the CHR legally incompetent or of diminished capacity, or imposing compulsory medical measures on him/her; 4) death; 5) the CHR has been declared missing or deceased by an enforceable court decision; 6) termination of citizenship of the Republic of Kazakhstan; 7) appointment, election to another post or transfer to another job; 8) leaving for permanent residence outside the Republic of Kazakhstan; 9) submitting a letter of resignation at his or her own request; 10) the expiry of the term of office stipulated by the Constitution of the Republic of Kazakhstan".

53. The Venice Commission finds that certain grounds in the above-mentioned list (In particular, conditions 4), 5) and 10)) are rather related to the early termination of powers, not dismissal. Therefore, the drafters are invited to clarify the wording of the provision by adding "grounds for early dismissal and early termination of powers".

54. The Venice Commission notes that its previous recommendation to remove specific grounds in the former draft law: "3) the state of health of the Commissioner, which prevents further performance of professional duties and 8) committing misdemeanours incompatible with being in office and diminishing the authority of the Commissioner", was followed.

55. Article 5.2 introduces several new conditions for early dismissal and early termination of powers: 4) death; 5) being declared missing or deceased by an enforceable court decision; 10) the expiry of the term of office established by the Constitution". The Venice Commission considers these new conditions are in line with international standards and its recommendations.

56. However, as noted in the 2021 Opinion, "non-compliance with the requirements and restrictions established by this Constitutional Law and other laws of the Republic of Kazakhstan" which remains the first reason for early dismissal, is a priori vague and open for many interpretations, particularly in the light of other reasons which follow further down. The Venice Commission reiterates its previous recommendation to delete or at least narrow down this sentence to "serious" failures in order to exclude minor infractions (see §73 of the 2021 Opinion).

57. The 2021 recommendation of the Venice Commission to foresee public and transparent dismissal procedures, as well as a qualified majority by Parliament, was not followed. It is recalled (§§ 76-77 of the 2021 Opinion) that in order to be in line with the Venice Principles, the draft constitutional law 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 corresponding procedure be foreseen, ensuring a public hearing so that the case, as well as the views of the Commissioner, are made public.

58. Finally, as the Venice Commission had stated in its 2021 Opinion (§78), judicial review of the dismissal decision should be added in the draft constitutional law.

## F. Reporting

59. Similarly to the previous draft law, Article 8.1 of the draft constitutional law provides that the CHR submits annual activity reports to the President of the Republic.

60. Based on its 2021 recommendation, the Venice Commission recalls that in order to bring the constitutional law provision into line with international standards, the CHR, appointed by and

primarily responsible to the Parliament, should be reporting to the Parliament. This does not preclude the CHR from reporting to the President as well (see §§ 95-98 of the 2021 Opinion).

### G. National Preventive Mechanism (NPM)

61. In order to coordinate the activities of NPM members, the CHR *"Ensures the establishment of the Coordination Council and its interaction with the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the United Nations Committee against Torture"* (Article 9.1 of the draft constitutional law). The Venice Commission recommends adding *"Optional Protocol to the Convention against Torture (OPCAT) and the Guidelines on National Preventive Mechanisms"*.<sup>21</sup>

62. It should also be noted that the draft constitutional law does not mention civil society in the context of co-operation with the CHR. The Venice Commission recalls that the participation of civil society in the CHR's and NPM's activities is important to ensure the participatory function of the process. The Venice Commission recommends setting up a mechanism for the consultation of NGOs. Such co-operation could be specifically included in the draft constitutional law, in particular concerning Articles 9 (NPM) and 12 (Consultative and advisory bodies).

### H. Handling complaints

63. In its 2021 Opinion, the Commission made the following recommendations concerning Article 9 of the (previous) draft law (peculiarities of consideration of a complaint): revising the deadlines for the consideration of recommendations and petitions of the CHR (replacing *"fifteen calendar days"* with a month and the *"thirty calendar days"* with sixty calendar days) and the limitations concerning the disclosure of information.

64. The above-mentioned provision was transferred to Article 13 of the draft constitutional law. The 2021 recommendation has been partially followed. The initial 15-day period might be extended for sixty days. The delegation understood from the online meetings that every year, the CHR receives a considerable number of complaints. Therefore, it is suggested adapting the initial 15-day period and introduce more realistic deadlines to allow timely consideration of complaints by the CHR office.

#### a) Public associations

65. While public associations<sup>22</sup> may apply to the CHR in order to protect the rights of a citizen with his/her written consent (Article 13.1), the CHR is allowed *"to receive access ... to documents of state organisations and public associations relating to issues of human and civil rights and freedoms"* (Article 14.2). The modalities of access to data at the disposal of civil society organisations (which, in case of such a request, will be under a legal obligation to grant access) and the term *"issues of human and civil rights and freedoms"* are *a priori* vague, open for many interpretations and would seem to leave room for the arbitrary application of that provision toward the civil society organisations, without introducing the necessary safeguards.

<sup>21</sup> Kazakhstan ratified the Optional Protocol in 2008. However, by Declaration of 8 February 2010, it postponed the implementation of its obligations under part IV (National preventive mechanisms) of the Optional Protocol. See <https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-against-torture-and-other-cruel>

<sup>22</sup> According to Article 5 on the [Law "On Public Associations"](#), *"Public associations shall be created and shall operate in order to exercise and protect political, economic, social and cultural rights and freedoms, ... to protect human life and health, environmental protection; to participate in charity; to conduct cultural and educational, ... activities; ... to expand and strengthen international cooperation; to conduct other activities not prohibited by the legislation of the Republic of Kazakhstan."*

66. Referring to Joint Guidelines of the Venice Commission and OSCE/ODIHR on Freedom of Association, the Venice Commission recalls that *"associations should remain free from the interference of the state or other actors. Any limitations imposed should be subject to strict conditions: 1. Restrictions must be "prescribed by law" and in such a manner as to avoid their arbitrary application; the legislation in question must be accessible and sufficiently clear to allow individuals and associations to ensure that their activities comply with the restrictions. 2. Any legal provision restricting the right to freedom of association must serve a legitimate purpose, in that such a provision must be based only on the legitimate aims recognised by international standards, namely: national security or public safety, public order, the protection of public health or morals and the protection of the rights and freedoms of others. 3. Restrictions must be necessary in a democratic society. This means that any restriction must be proportional to the intended legitimate purpose and that there must be a strong, objective justification for the law and its application. In general, the law must be compatible with international human rights instruments. In addition, it is important that any resulting limitations be construed strictly; only convincing and compelling reasons for introducing such limitations are acceptable. In other words, only indisputable imperatives can interfere with the enjoyment of the right to freedom of association. Finally, the law must be clear, in particular in those provisions granting discretion to state authorities. It must also be precise and certain, and must have been adopted through a democratic process that ensures public participation and review".*<sup>23</sup>

67. The authorities are therefore invited to clarify the issue in light of the above-mentioned international standards.

#### **I. Own investigative powers**

68. One of the shortcomings of the previous draft law concerned the limited scope of the CHR's *sua sponte* investigative power only based on information *"from official sources or the media"*. The Venice Commission pointed out that whistle-blowers, for example, are usually a very important source of information for own initiative investigations.

69. The investigative powers of the CHR include, for example, the right to request all necessary information from any state, local and self-government bodies, organisations and their officials who have a legal obligation to submit the necessary materials, documents, information and explanation to the CHR within ten (or, in some cases, not less than two) working days from the date of receipt of the request (Article 18). The CHR, on his/her own initiative, considers issues related to the violation of the rights and freedoms of individuals *"if there exists information about their massive violation or such violation is of public importance or is associated with the need to protect the interests of such persons who cannot independently use legal means to protect their rights and freedoms"*.

70. The Venice Commission considers that lifting the above-mentioned limitation is in line with its 2021 recommendation.

#### **J. Staff and budget**

71. In its 2021 Opinion, the Commission recommended providing for the ability for the Commissioner to recruit his/her staff according to ranks under a distinct special status regulated by the law.

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<sup>23</sup> CDL-AD(2014)046, [Joint Guidelines of the Venice Commission and OSCE/ODIHR on Freedom of Association, adopted by the Commission at its 101st Plenary Session \(Venice, 12-13 December 2014\)](#).

72. These recommendations have been partially followed; the examined text provides that now, together with the head of the National Center, his/her deputies are also appointed and dismissed by the CHR.

a) Rank of the staff

73. Article 20.5 foresees that *"Employees of the National Center are civil servants who carry out their activities on the basis of the legislation on public services"*.

74. As the Venice Commission had stated in different occasions, *"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".<sup>24</sup> The special status of the staff, should reflect Principle 3 of "the Venice Principles" which 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".<sup>25</sup>*

75. The Commission recommends that the draft be aligned with the requirements of Principle 22 of the Venice Principles and particularly that it provides that the CHR is able to recruit his or her staff.

76. Therefore the authorities are invited to consider the Commission's recommendations in full (see §§ 99-114 of the 2021 Opinion).

b) Budgetary independence

77. The Commission recommended providing that the budget is administered in an autonomous way and that the Commissioner proposes the budget of the Institution for the coming year.

78. Budgetary questions are dealt with in Article 21 of the draft constitutional law, which is identical to Article 16 of the previous draft law.

79. The Venice Commission recalls its previous recommendation and, in particular, the fact that the budget must be administered in accordance with Principle 21 of the Venice Principles<sup>26</sup> and that it would be appropriate to provide for legislative provisions to this effect. The Law should also provide for autonomous management, by the CHR, of the budgetary allocation at its disposal.<sup>27</sup> 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.<sup>28</sup>

80. Therefore the Commission recommends taking into consideration its previous recommendation.

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<sup>24</sup> See CDL-AD(2006)038, op.cit. § 78, CDL-AD (2021)35, op.cit §25.

<sup>25</sup> See CDL-AD(2021)035, op.cit §26.

<sup>26</sup> "21. 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".

<sup>27</sup> See CDL-AD(2015)017, op.cit. §74.

<sup>28</sup> See Venice Commission, CDL-AD(2021)35 Armenia - Opinion on the legislation related to the Ombudsman's staff, §86.

#### IV. Specific observations

##### A. Additional questions in the CHR request

81. In the opinion request submitted to the Venice Commission, the CHR asked the Venice Commission to consider the draft constitutional provisions regarding:

1. Filing of lawsuits by the Commissioner to protect the rights and freedoms of an unlimited number of persons violated by decisions or actions (inaction) of state bodies, local government and self-government bodies, officials, and civil servants with an analysis of experience other countries (Article 16.3 of the draft constitutional law).
2. Adding the provision of the accompanying draft law (Article 184 of the Criminal Procedure Code<sup>29</sup>) on the submission of a petition by the Commissioner for pre-trial inspection.
3. Clarifying the competence of the Commissioner to consider complaints after the applicants have exhausted all measures provided by law.
4. Specifying the forms of interaction of the Commissioner with the Parliament and Maslikhats (local representative bodies).

82. Regarding Question 1, following the online discussion on this point, the Venice Commission refers to its Study on Individual Access to Constitutional Justice<sup>30</sup>, which offers a detailed overview of the ombudsperson's standing to apply to ordinary and constitutional courts based on the analysis of various national legal systems:

*"66. In diffuse review systems, the ombudsperson, if it has been vested with the power to initiate judicial proceedings, must do so at the competent ordinary court – not at the Supreme Court (e.g. the specialised Ombudsman in Finland) [...]. 67. In concentrated constitutional review systems, the ombudsperson may have the power to initiate constitutional review proceedings. As examples, Croatia's, Estonia's, Montenegro's, Portugal's, Slovenia's, Spain's and [North] Macedonia's ombudsmen may initiate such proceedings, normally to protect fundamental rights, and may do so without their having to be a concrete case. [...] 106. [...] among those countries which provide [judicial standing rights to ombudspersons] ... the ombudsperson is entitled to act either before ordinary courts (e.g., Finland) or directly before the constitutional court (e.g., Armenia, Austria, Azerbaijan, Brazil, Croatia, Czech Republic, Estonia, Hungary, Portugal, Spain, Moldova, Montenegro, Slovenia, Slovakia, Bosnia and Herzegovina, Latvia, Poland, Russian Federation, [North] Macedonia, Peru, Ukraine, Romania and South Africa). It is also important to note that when the ombudsperson has standing before the constitutional court, the scope of its power can be limited to challenging a norm in the framework of a specific case in which it is acting. However, an ombudsperson is sometimes entitled to challenge a norm in the abstract, as is the case in Azerbaijan, Estonia, Peru and Ukraine. In these systems, ombudspersons provide possible ways of access to individual justice, albeit indirectly. The Venice Commission considers that ombudspersons are elements of a democratic society that secure respect for individual human rights. Therefore, where ombudspersons exist, it may be advisable to give them the possibility to initiate constitutional review of normative acts on behalf of or triggered by individuals".*

83. Question 2 refers to the possible amendment to Article 184 of the Criminal Procedure Code ("1. Information about a criminal offence shall be the reason for the beginning of the pre-trial investigation"). The delegation was informed during the online discussions that following the developments that occurred after the submission of the CHR request, the draft amendment in question has been revoked as Article 184 of the CPC, read together with Article 1 of the draft constitutional law, already authorises the CHR to be engaged in the pre-trial inspection; the draft

<sup>29</sup> <https://adilet.zan.kz/eng/docs/Z970000206>

<sup>30</sup> 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).

constitutional law "On Prosecutor's Office" includes the obligation to interact with the CHR and assist its activities *"in order to protect and restore violated rights and freedoms of individuals protected by the laws of the Republic of Kazakhstan"*.<sup>31</sup>

84. Regarding Question 3, following the online discussion, the Venice Commission points out that there is no specific requirement in the Venice Principles for the exhaustion of administrative remedies. According to Principle 15, *"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"*. There is no such requirement in the current Law or the draft constitutional law.

85. As regards Question 4, it is recalled that the CHR mandate covers *"state bodies, bodies of local state administration and self-government, other organisations and officials."* Furthermore, the CHR has the right to "attend any, both open and closed, joint and separate meetings of the Chambers of the Parliament and to be heard". s/he can also *"participate by invitation at the plenary sessions of the session of maslikhats of regions"* (Article 7.3 and 7.4, respectively). The delegation was informed during the online discussion that this issue will be addressed given that the CHR becomes a constitutional body on equal footing with the Parliament and Malhkhats, also regulated by the constitutional laws. Finally, the Venice Commission refers to the regularly updated Compilation of its Opinions Concerning the Ombudsman Institution.<sup>32</sup> The recommendations of different opinions included in this document might also serve as a valuable source of information in this regard.

## **B. Access to CHR Premises**

86. The CHR premises are located in the building of the "House of Ministries", together with all the ministries of Kazakhstan. Bearing in mind that *"any individual or legal person, including NGOs, shall have the right to free, unhindered and free of charge access to the Ombudsman"* (Principle 15 of Venice Principles), the question of the access to CHR premises and the possibility of an alternative building outside the governmental district were discussed during the exchanges of views with the CHR and authorities on 30 September 2022.

87. The CHR informed the delegation that citizens enjoyed unhindered access to the CHR premises. Currently, preparations are underway to open the CHR offices in all 20 regions of Kazakhstan. Following the opening of the regional offices, the CHR intends to look for a new office building in Astana.

## **V. Conclusion**

88. The Venice Commission welcomes the intention and efforts of the Kazakh authorities to confer the constitutional status of the Commissioner for Human Rights. The Commission also notes a number of improvements made in the draft constitutional law, in particular as regards the promotion of human rights in the CHR's mandate, the functional immunity of the CHR, partial adjustments regarding the grounds of early dismissal, improvement of CHR's monitoring competence, lifting limitations own investigative powers and granting access to the Constitutional Court.

89. Nevertheless, most key recommendations made in the 2021 Opinion have not been followed and thus remain valid. The Venice Commission invites the Kazakh authorities to make full use of its 2021 and present opinions while the draft law is under consideration by the Senate, in order

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<sup>31</sup> See Article 29 of the draft constitutional law "On the Prosecutor's Office" currently under examination by the senate: <http://senate.parlam.kz/ru-RU/lawProjects/download?fileId=19985>

<sup>32</sup> [CDL-PI\(2022\)022](#)



to provide all the necessary guarantees for independence, impartiality, accessibility and efficiency of the CHR Institution – the new constitutional body – in line with recent political and legal developments in the country and international standards. In particular:

- *Jurisdiction*: including private entities which deliver public services, limiting the exemptions of the jurisdiction (precising whether the term "other organisations" covers private entities), and clarifying the jurisdiction over the judiciary;
- *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;
- *Election*: foreseeing a public and transparent selection procedure comprising public call, testing and shortlisting, an election by a qualified majority by Parliament, a longer term of office and preferably a non-renewable term of office;
- *Term of office*: establishing the procedure of dismissal that should foresee public and transparent procedures as well as a qualified majority vote in the Parliament;
- *National Preventive Mechanism*: adding the reference to OPCAT to the coordination of activities and including the mechanism of consultation with civil society in the draft constitutional law;
- *Handling complaints*: clarifying the modalities of the CHR's access to public associations in line with international standards;
- *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;
- *Budgetary independence*: providing that the budget is administered in an autonomous way and that the Commissioner proposes the budget of the Institution for the coming year;
- *Annual report*: providing for the Commissioner to report to Parliament.

90. The Venice Commission remains at the disposal of the Kazakh authorities for further assistance in this matter.