



Strasbourg, 9 October 2023

CDL-AD(2023)038

Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

KYRGYZSTAN

OPINION

**ON THE DRAFT CONSTITUTIONAL LAW
“ON THE AKYIKATCHY (OMBUDSMAN)
OF THE KYRGYZ REPUBLIC”**

**Adopted by the Venice Commission
at its 136th Plenary Session
(Venice, 6-7 October 2023)**

on the basis of comments by

**Ms Sanja BARIĆ (Substitute Member, Croatia)
Ms Adele MATHESON MESTAD (Substitute Member, Norway)
Mr Jørgen Steen SØRENSEN (Member, Denmark)**

Opinion co-funded
by the European Union



Table of Contents

I.	Introduction	3
II.	General observations	3
A.	Applicable International standards.....	3
B.	Scope of the opinion.....	4
C.	Preliminary remarks.....	4
III.	Analysis of the draft constitutional law	5
A.	Legislative technique	5
1.	Structure and coherence	5
2.	Terminology	6
3.	Gender-neutral drafting	6
B.	Substantive analysis.....	7
1.	Constitutional guarantees for the Akyikatchy Institution	7
2.	Mandate of the Akyikatchy	9
C.	Election and termination of powers of the Akyikatchy	12
1.	Eligibility criteria.....	12
2.	Grounds for non-eligibility	14
3.	Procedure of selection of candidates.....	15
4.	Election	15
5.	Term of office	16
6.	Termination of powers	16
D.	Immunity.....	17
1.	Immunity of the Akyikatchy and his/her deputies	17
2.	Immunity of the Akyikatchy's Staff	17
E.	Organisation of the Akyikatchy Institution	18
1.	Deputies	18
2.	Regional institutions	18
3.	Staff.....	19
4.	Budgetary independence.....	19
F.	Reporting.....	20
IV.	Conclusion	20

I. Introduction

1. By letter dated 30 June 2023, Ms Jamila Jamanbayeva, the Akyikatchy (Ombudsman) of the Kyrgyz Republic (hereafter "the Akyikatchy"), submitted a request for an urgent opinion to the Venice Commission and the ODIHR on the draft constitutional law "On Akyikatchy (Ombudsman) of the Kyrgyz Republic" (hereafter "the draft constitutional law") ([CDL-REF\(2023\)042](#)).
2. On 19 July 2023, the Bureau of the Venice Commission decided not to use the urgent procedure for the preparation of the draft opinion.
3. Ms Sanja Barić, Ms Adele Matheson Mestad and Mr Jørgen Steen Sørensen acted as rapporteurs for this opinion.
4. On 16 August 2023, the ODIHR published its Urgent Interim Opinion.¹
5. On 18-19 September 2023, the rapporteurs, along with Mr Mamuka Longurashvili and Ms Caroline Martin from the Secretariat, had online meetings with the Akyikatchy, experts of the Jogorku Kenesh (hereafter "the Parliament"), representatives of the OHCHR Regional Office for Central Asia, as well as with representatives of civil society. The Venice Commission is grateful to the Office of the Akyikatchy and civil society for their support in organising the online meetings.
6. 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.
7. This opinion was drafted on the basis of comments by the rapporteurs and the results of the above-mentioned online meetings. It was adopted by the Venice Commission at its 136th Plenary Session (Venice, 6-7 October 2023).

II. General observations

A. Applicable International standards

8. The draft constitutional law introducing the Akyikatchy as the National Human Rights Institution (NHRI) will be analysed in the light of the United Nations "Paris Principles" and "Venice Principles".
9. The Principles relating to the status of national institutions (Paris Principles) were adopted by the UN General Assembly Resolution 48/134 on 20 December 1993 and form the basis for the mandate and independence of the NHRIs. The Paris Principles require NHRIs to be independent in Law, membership, operations, policy and control of resources, that NHRIs have a broad mandate; pluralism in membership; broad functions; adequate powers; adequate resources; cooperative methods; and engage with international bodies.²
10. The Principles on the Protection and Promotion of the Ombudsman Institution (the Venice Principles) were adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019). The Venice Principles were endorsed by the Committee of Ministers of the Council of Europe (CM) on 2 May 2019,³ by the Parliamentary Assembly of the Council of

¹ See [Urgent Interim Opinion on the Draft Constitutional Law of the Kyrgyz Republic on the Akyikatchy \(Ombudsman\)](#)

² See Paris Principles: <https://ganhri.org/paris-principles/>

³ See [CM/Del/Dec\(2019\)1345/10.5](#).

Europe (PACE) on 2 October 2019⁴ and by the Congress of Local and Regional Authorities of the Council of Europe - on 30 October 2019.⁵

11. On 2 October 2019, the PACE adopted a Recommendation on “Ombudsman institutions in Europe – The need for a set of common standards”.⁶ On 16 October 2019, the CM adopted a Recommendation to member States on the development of the Ombudsman Institution;⁷ on 31 March 2021, it adopted another Recommendation to member States on the development and strengthening of effective, pluralist and independent national human rights Institutions.⁸

12. On 16 December 2020, the UN General Assembly adopted a Resolution⁹ on “The role of Ombudsman and mediator Institutions in the promotion and protection of human rights, good governance and the rule of law”. In its Preamble, the Resolution acknowledged the Venice Principles; in operative paragraph 2, it strongly encouraged the Member States to strengthen Ombudsman Institutions “consistent with [...] the Venice Principles”. In operative paragraph 8, it encouraged Ombudsman and mediator Institutions “to operate, as appropriate, in accordance with all relevant international instruments, including the Paris Principles and the Venice Principles”. In its new Resolution adopted on 15 December 2022 on the same matter, the General Assembly reaffirmed the 2020 Resolution and encouraged Member States to strengthen existing [Ombudsman and mediator] institutions, including by ensuring their independence, consistent with relevant principles, including the Venice Principles”.¹⁰

B. Scope of the opinion

13. In the request for the present opinion, the Venice Commission was informed that the draft constitutional law, initiated by several Members of Parliament and registered in Parliament on 29 June 2023, was published on 30 June 2023 on the Parliament website for public discussion.¹¹ The explanatory note of the draft constitutional law, also available on the website, refers to the “Paris Principles”, the “Belgrade Principles”¹² and the “Venice Principles” as the international standards on which the draft constitutional law is based.

14. The Akyikatchy Institution submitted several versions of the draft constitutional law and a summary table of the recommendations made to the draft constitutional law by international organisations and civil society. The opinion will refer to the Articles in the draft constitutional law as they appear in document [CDL-REF\(2023\)042](#).

15. The opinion focuses on the most important aspects of the draft constitutional law. The absence of remarks on other aspects of the draft constitutional law should not be interpreted as tacit approval.

C. Preliminary remarks

16. The Kyrgyz Republic has been a member of the Venice Commission since January 2004 (and an observer between 1993-2004). The obtention by the Kyrgyz Republic of the observer status with the Venice Commission on 20 January 1993 was also the beginning of its relations

⁴ PACE [Resolution 2301\(2019\)](#).

⁵ See [Resolution 451\(2019\)1](#) of the Congress.

⁶ See [Recommendation 2163 \(2019\)](#).

⁷ See [CM/Rec\(2019\)6](#).

⁸ See [CM/Rec\(2021\)1](#).

⁹ See [A/RES/75/186](#).

¹⁰ See [A/RES/77/224](#).

¹¹ See the initial version of the [draft constitutional law and the explanatory report](#) (in Russian).

¹² Belgrade Principles on the relationship between national human rights institutions and parliaments are annexed to the UN Secretary General’s 2012 Report to the UN General Assembly on National institutions for the promotion and protection of human rights ([A/HRC/20/9](#)).

with the Council of Europe,¹³ leading to broader cooperation through the Neighbourhood Policy established in 2011 and later to “Neighbourhood Cooperation Priorities for the Kyrgyz Republic (2015-2019).¹⁴ The Venice Commission is implementing the Project “Promoting Efficient Functioning of State Institutions and Public Administration in Central Asia 2020-2023”.¹⁵ The Project allows Kyrgyzstan, together with four other Central Asian countries,¹⁶ to benefit from the Venice Commission’s expertise in developing and adopting legislation in the field of rule of Law, separation of powers, the judiciary and administrative Law.

17. The Akyikatchy Institution was created in 2002 when the Parliament adopted the Law “On the Ombudsman (Akyikatchy) of the Kyrgyz Republic”, currently in force. The Akyikatchy also has the mandate as the NHRI in the Kyrgyz Republic and enjoys status “B”, defined as “partially compliant with the Paris Principles”.¹⁷

18. During the online meetings, the Venice Commission delegation was informed that public discussions on the draft constitutional law took place on 18-19 September 2023, involving the representatives of the Akyikatchy, the authorities, civil society and international organisations. Overall, the interlocutors of the Venice Commission delegation assessed the discussions positively. The delegation was also informed about the readiness of the Akyikatchy and Kyrgyz authorities to take its recommendations into account. The Venice Commission welcomes such a constructive attitude and the readiness to involve all the relevant actors, including civil society, in a constructive and mutually beneficial dialogue concerning this important matter. The Commission encourages the Kyrgyz authorities to continue such consultations on a regular basis.

III. Analysis of the draft constitutional law

19. The initiative of the Kyrgyz authorities to adopt a new constitutional law concerning the Akyikatchy Institution is to be welcomed, as is their wish to seek the Venice Commission’s expertise before the adoption of the Law by the Parliament.

20. The Venice Commission finds that overall, the draft constitutional law provides a detailed framework and reflects a number of international standards. However, a number of improvements still need to be made in order to provide all the necessary guarantees for independence, impartiality, accessibility and efficiency to the Akyikatchy Institution – a new constitutional body – in line with international standards.

A. Legislative technique

1. Structure and coherence

21. The draft constitutional law submitted to the Venice Commission is divided into six chapters and contains 27 articles.

22. According to Article 1.1 of the draft constitutional law, in the exercise of his/her mandate, the Akyikatchy is guided by the Constitution, this (draft) Constitutional Law, other regulatory legal acts of the Kyrgyz Republic, general principles and norms of international Law, international treaties that are in force in accordance with the legislation of the Kyrgyz Republic, as well as international human rights standards. Article 2 of the draft constitutional law defines

¹³ See [CM\(2015\)22](#), Kyrgyz Republic: Neighbourhood Co-operation Priorities for 2015-2017, Introduction.

¹⁴ See [CM/Del/Dec\(2018\)1328/2.3b](#).

¹⁵ See [Description of action](#).

¹⁶ See [Central Asia Rule of Law Programme 2020-2023](#).

¹⁷ See [OHCHR | GANHRI, Sub-Committee on Accreditation \(SCA\).F](#)

key concepts, including “Akyikatchy Institution”, mostly repeating the wording of Article 1 as regards the legal basis. Further down, Article 4, paras 1 and 4, indicate the same list of legal sources by which the Akyikatchy should be “guided”/to which s/he should “comply”. The reference to “international human rights standards” is missing in those provisions. Article 3 concerns the scope of the draft constitutional law. The powers/mandate of the Akyikatchy are provided under a different Chapter 3 (Articles 11-16).

23. It appears that Akyikatchy’s field of competence is dealt with in different parts of the draft constitutional law. The Venice Commission notes that the reference to “international human rights standards” has been added to Article 1 following the revision (see [CDL-REF\(2023\)042](#)), which is commendable. The Commission recommends that care be taken to ensure a more coherent structure of the draft constitutional law, in particular as regards its scope, main concepts and the jurisdiction of the Akyikatchy. In addition, the Venice Commission recommends that the reference to “International human rights standards” be added to the list of the legal sources by which the Akyikatchy “shall be guided” or to which s/he “shall comply”.

24. For the sake of coherence, the Venice Commission also recommends moving Article 3 (Scope of the Constitutional Law) as Article 1, followed by the current Article 2 (Key concepts) and then by the current Article 1 (Parliamentary oversight) as Article 3. Given the importance and content of Article 1, which represents the rationale of the Akyikatchy Institution exercising its main functions through parliamentary oversight, the Venice Commission would recommend the drafters reconsider the title of the provision to better reflect its importance and extent.

2. Terminology

25. The Venice Commission notes that the draft constitutional law uses the term “citizen” in places where the proper term should be “applicant” or “person”. According to Article 3, “the scope of the constitutional law shall include Kyrgyz citizens, regardless of their location, foreign nationals or stateless persons in the Kyrgyz Republic”.

26. Beneficiaries of human rights and fundamental freedoms are all persons under the jurisdiction of the Kyrgyz Republic, be they citizens or not;¹⁸ according to Article 24, para 1 of the Constitution, “the Kyrgyz Republic shall ensure to all persons within its territory and subject to its jurisdiction the protection of their rights and freedoms”. Therefore, with a view to widening the scope of the draft constitutional law and aligning the terminology, the Venice Commission recommends using the word “persons” instead of “citizens”¹⁹ and providing for the jurisdiction of the Akyikatchy to all natural and legal persons within the jurisdiction of the Kyrgyz Republic. Such wording would then include, for instance, individuals under the jurisdiction of authorities such as Embassies and Consulates. It would also include individuals residing in other countries but in need of, e.g., applying to domestic authorities for certain permissions, etc.²⁰

3. Gender-neutral drafting

27. The Venice Commission notes that the draft constitutional law uses the male gender (such as reference to “he” or “his”) even though it foresees a gender balance in Article 7, para. 13 on the election of the Akyikatchy deputies, the prevention of any form of

¹⁸ Venice Commission, [CDL-AD\(2004\)041](#) - Joint Opinion on the Draft Law on the Ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe adopted by the Venice Commission at its 61st Plenary Session (Venice, 3-4 December 2004), para.10.

¹⁹ Venice Commission, [CDL-AD\(2003\)007](#) - Opinion on the Draft Law on the Public Attorney of “The former Yugoslav Republic of Macedonia” adopted by the Venice Commission at its 54th Plenary Session (Venice, 14- March 2003), B I. Article 2.3 and B III. Articles 17 and 22.

²⁰ Venice Commission, [CDL-AD\(2021\)049](#) - Opinion On the Draft Law “On the Commissioner for Human Rights” adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), para. 33.

discriminatory practices in exercising human rights and freedoms as one of the aims of the Akyikatchy (Article 1, para 2(6)) and prohibits *inter alia*, gender-based discrimination in the communication with the Akyikatchy (Article 24, para.1). Referring to its 2016 recommendation²¹ made to the Kyrgyz Republic concerning the amended Constitution, the Venice Commission invites the authorities to consider replacing the respective provisions by relevant wording with, as appropriate, the plural or other gender-neutral formulation (“he” by “s/he” or “his/her”).

B. Substantive analysis

1. Constitutional guarantees for the Akyikatchy Institution

a. “A firm legal foundation”

28. According to Principle 2 of the Venice Principles, “The Ombudsman Institution, including its mandate, shall be based on a firm legal foundation, preferably at the constitutional level, while its characteristics and functions may be further elaborated at the statutory level”. On the basis of this principle, there should preferably be a constitutional provision to establish, e.g., the existence, the basic mandate and the basic procedure for election and dismissal of the Ombudsman. These three main elements should preferably be found at the constitutional level in order to preserve the Akyikatchy Institution from political fluctuation.²² As the Venice Commission considered previously, a constitutionally defined mandate and status are essential, especially in a young democracy, for the consolidation and strengthening of this Institution and its efficiency, stability and independence.²³

29. The Akyikatchy Institution has been reflected in the Constitution of Kyrgyzstan. However, the only constitutional provisions which refer to the Institution are under Section II - Parliament, Article 80, indicating that the Parliament shall elect, dismiss and give its consent to bringing the Akyikatchy and/or his/her deputies to criminal liability (para. 3 (8 and 9)), hear the annual reports of the Akyikatchy (para. 5 (2)), and under Section III - Public authorities with special status providing that the Akyikatchy Institution exercises parliamentary oversight over the observance of human and civil rights and freedoms in the Kyrgyz Republic (Article 109) and that the organisation and procedure of its activities, as well as guarantees of its independence, are determined by constitutional laws (Article 110).

30. In the hierarchy of legal norms of Kyrgyzstan, the Constitution has the highest legal force and direct effect, followed by 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.²⁴ Hence, a constitutional law does not have the same legal force as the Constitution. The constitutional provisions enjoy a higher level of protection against possible political instability or other circumstances, as it appears from the comparison of the procedure of adoption of constitutional laws, which requires three readings and a 2/3 majority to be adopted (Article 86, para. 5 of the Constitution) and the procedure for constitutional amendments requiring prior validation by the Constitutional Court (Article 116, paras 4 and 5 of the Constitution). No constitutional amendments can be adopted in a state of emergency or during martial Law. Article 18, paras 2 and 3, of the draft constitutional law provides for certain guarantees in case of emergency or martial Law (the activities of the Akyikatchy and his/her authorised representatives shall not be terminated, restricted or suspended in the event of an

²¹ Venice Commission, [CDL-AD\(2016\)025](#), Kyrgyz Republic - Endorsed joint opinion of the Venice Commission and the ODIHR on the draft law "on Introduction of amendments and changes to the Constitution", adopted by the Venice Commission at its 108th Plenary Session (Venice, 14-15 October 2016), para. 117.

²² Venice Commission, CDL-AD(2004)041, op. cit. para. 9.

²³ Venice Commission, [CDL-AD\(2015\)017](#) - Opinion on the Law on the People's Advocate (Ombudsman) of the Republic of Moldova, adopted by the Venice Commission at its 103rd Plenary Meeting (Venice, 19-20 June 2015), para. 22.

²⁴ See Article 6 of the [Constitution](#) and Article 6 of the [Law “On Normative Legal Acts”](#).

emergency or martial Law; they have the right to freely move in areas where emergency and/or martial Law is enforced or during a curfew without any special permit). However, these guarantees concern the activities and do not cover the very existence of the Institution or the possibility of amending the Constitutional Law.

31. It follows that the Constitution does not provide a “firm legal foundation” for the overall guarantees for institutional independence, terms of office and grounds for dismissal of the Akyikatchy, as it was already recommended in the 2021 Joint Opinion of the ODIHR and the Venice Commission on the Draft Constitution of the Kyrgyz Republic.²⁵

32. Therefore, welcoming that the new legislation on the Akyikatchy is given the status of Constitutional Law, the Venice Commission reiterates its 2021 recommendation that in addition to the current provisions on the Akyikatchy’s election and dismissal, “at least the overall competencies, guarantees of institutional independence, term of office and grounds for dismissal of the Ombudsman should be specified at the constitutional level”.²⁶

b. Institutional independence of the Akyikatchy

33. Article 2, para. 1 of the draft constitutional law further specifies that the Akyikatchy Institution is the NHRI whose activities “shall contribute to the other existing human rights mechanisms at the national level, shall not replace them or lead to a revision of the competences of the public authorities responsible for protection and restoration of violated rights and freedoms” (Article 4, para 3 of the draft constitutional law).

34. The Venice Commission notes that the National Center for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment²⁷ serves as the National Preventive Mechanism (NPM)²⁸. There are also a number of other human rights mechanisms operating at inter-agency, ministerial, parliamentary and other level.²⁹

35. The Venice Commission finds Article 4, para. 3 restrictive and raising a number of concerns about the effective functioning and institutional independence of the Akyikatchy Institution. The Commission sees several risks stemming from the multiplicity of actors and the absence of clear modalities of interaction/coordination between them to avoid overlapping. It is the understanding of the Venice Commission, however, that none of those bodies enjoys constitutional guarantees and special status contrary to the Akyikatchy (Section III of the Constitution). According to Article 2, para. 5 of the draft constitutional law, the Akyikatchy monitors the entities specified in Article 3 (i.e. public authorities, including those with special status, local self-government and their officials, and legal entities, including their management, regardless of their ownership) regarding human and civil rights and freedoms observance through investigations, monitoring, analyses, relevant decisions and recommendations.

36. The Venice Commission recommends clarifying whether the human rights mechanisms concerned by Article 4, para 3 and operating within the remit of the authorities mentioned in Article 3 are also concerned by such monitoring and specifying the modalities of interaction between the Akyikatchy Institution and other national human rights mechanisms.

²⁵ Venice Commission, [CDL-AD\(2021\)007](#), Joint Opinion of the OSCE/ODIHR and the Venice Commission on the Draft Constitution of the Kyrgyz Republic adopted by the Venice Commission at its 126th Plenary Session (online, 19-20 March 2021), para. 107.

²⁶ *Ibid.*

²⁷ Kyrgyzstan acceded to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) on December 29, 2008. In July 2012, the Law “On the National Center for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” was adopted.

²⁸ See <https://www.ohchr.org/en/treaty-bodies/spt/national-preventive-mechanisms>

²⁹ See ODIHR [Opinion](#), paras 24 and 25.

2. Mandate of the Akyikatchy

37. According to Article 1 of the draft constitutional law, the Akyikatchy “1. A shall exercise parliamentary oversight over human and civil rights and freedoms in the Kyrgyz Republic and within its jurisdiction, will be guided by the Constitution, this constitutional Law, other regulatory legal acts of the Kyrgyz Republic, general principles and norms of international Law, as well as international treaties that are in force in accordance with the legislation of the Kyrgyz Republic, as well as international human rights standards. 2. Parliamentary oversight of the Akyikatchy shall be aimed at: 1) protecting human and civil rights and freedoms as proclaimed by the Constitution, laws and other regulatory legal acts of the Kyrgyz Republic and universally recognised international legal principles and norms, as well as international treaties entered into force in accordance with the Kyrgyz Republic law; 2) ensuring compliance and respect for human and civil rights and freedoms by entities referred to in this Law, Article 3; 3) preventing violations of human and civil rights and freedoms or assisting in their recovery; 4) providing support to harmonise the Kyrgyz Republic laws in the field of human and civil rights and freedoms with the Constitution of the Kyrgyz Republic, international standards, and universally recognised international legal principles and norms in this field; 5) further developing and improving international cooperation in the field of human and civil rights and freedoms protection; 6) preventing any form of discriminatory practices in exercising human rights and freedoms; 7) encouraging and promoting human rights and freedoms; and contributing to legal awareness and protecting confidential personal information”.

38. The Commission considers that the new draft constitutional law represents a unique opportunity to provide all the necessary guarantees for independence, impartiality, accessibility and efficiency of the Akyikatchy Institution – a new constitutional body – to empower it with both the NHRI functions and the classis ombudsman functions that are core to protect human rights and freedoms in Kyrgyzstan. In light of the Venice Principles, the following possibilities should be explored in this context.

a. Prevention and correction of maladministration

39. The Venice Commission is mindful that “the Ombudsman Institution may be organised at different levels and with different competences” (Principle 4). However, this important point should be clarified in the sense of other Venice Principles: “12. The mandate of the Ombudsman shall cover prevention and correction of maladministration and the protection and promotion of human rights and fundamental freedoms. 13.1. The institutional competence of the Ombudsman shall cover public administration at all levels. The mandate of the Ombudsman shall cover all general interest and public services provided to the public, whether delivered by the State, by the municipalities, by State bodies or by private entities”.

40. The Venice Commission recalls that “the model most widely followed for the institutions of Ombudsman or Human Rights Defender may be briefly described as that of an independent official having the primary role of acting as intermediary between the people and the state and local administration, and being able in that capacity to monitor the activities of the administration through powers of inquiry and access to information and to address the administration by the issue of recommendations on the basis of Law and equity in a broad sense, in order to counter and remedy human rights violations and instances of maladministration”.³⁰

41. Among the aims of parliamentary oversight exercised by the Akyikatchy (see para. 32 above), Article 1, para. 2 refers to “2) ensuring compliance and respect for human and civil

³⁰ Venice Commission, [CDL-AD\(2007\)020](#) - Opinion on the possible reform of the Ombudsman Institution in Kazakhstan adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007), para. 12.

rights and freedoms by entities referred to in this Law, Article 3 and 3) preventing violations of human and civil rights and freedoms or assisting in their recovery”.

42. The Venice Commission recalls that “The scope of powers of the ombudspersons should not cover only outright violations of rights, but also of the principles of good administration. The availability of a legal remedy should not prevent a person from filing a complaint with the ombudsperson, but the latter should have the obligation to advise the complainant about legal remedies and about the fact that the complaint to the Ombudsman does not prevent the expiry of deadlines for such remedies”.³¹

43. In addition, according to Principle 13.1, the Ombudsman shall have jurisdiction over public services provided to the public, whether delivered by the State, by the municipalities, by State bodies or by private entities. The draft does not mention any private entities which deliver public services into the Akyikatchy’s mandate. The Venice Commission recommends the draft be aligned with Principles 12 and 13.1.

b. Complainants

44. According to Article 14, para. 15 of the draft constitutional law, “officials, employees, and heads of the entities specified in Article 3 of this Constitutional Law shall not submit communications on matters within their jurisdiction to the Akyikatchy”.

45. The Venice Commission notes that limiting the right of state officials to file complaints on human rights violations, appear questionable. Handling complaints from employees of public agencies is an important part of an Ombudsperson’s mandate. In some cases such employees even act as whistleblowers, calling the attention of the Ombudsperson to potential irregularities. “It is obvious that State officials maintain their rights as individuals. ... If these rights (which may include social rights) are under threat or violated, they must be entitled to receive assistance from the Human Rights Defender, as all other people”.³²

46. In addition, the draft constitutional law does not provide for anonymous complaints. According to Principle 16.2 of Venice Principles, “the Ombudsman shall have the power to interview, or demand written explanations of officials and authorities and shall, furthermore, give particular attention and protection to whistleblowers within the public sector”. Therefore, the Commission recommends that the applicants (for example, whistleblowers) should be given the possibility to request that their identity is kept confidential by the Akyikatchy.³³ In any event, it is important that rejection of anonymous complaints does not prevent the Akyikatchy from acting *ex officio* in the matter.

c. Preventing any form of discriminatory practices

47. Article 1, para. 6 of the draft constitutional law provides that Akyikatchy is mandated to prevent “any form of discriminatory practices in exercising human rights and freedoms”. The Venice Commission considers that the Akyikatchy should not only *prevent* but also *combat* all forms of discrimination - monitor activities of the organs specified in Article 3, detect facts of direct/indirect discrimination and address recommendations to the organs concerned. The drafters are, therefore, invited to supplement the provision with “... and combatting”.

³¹ Venice Commission, CDL-AD(2004)041, op. cit. para. 27.

³² Venice Commission, [CDL-AD\(2006\)038](#) - Opinion on Amendments to the Law on the Human Rights Defender of Armenia adopted by the Venice Commission at its 69th Plenary Session (Venice, 15-16 December 2006), para. 55.

³³ Venice Commission, [CDL-AD\(2007\)024](#) - Opinion on the draft law on the People’s Advocate of Kosovo adopted by the Venice Commission at its 71st Plenary Meeting (Venice, 1-2 June 2007), para. 50.

d. Akyikatchy's competence relating to the judiciary

48. Article 11 of the draft constitutional law provides that the Akyikatchy shall have the right to "attend" the meetings of the Supreme Court and the Constitutional Court (para. 2), and to participate in the Council of Judges Disciplinary Commission sessions in an advisory capacity, including when considering cases in closed session (para.13). Article 14, para. 16 provides that the Akyikatchy has a role in ensuring that appeals received by the judiciary "are reviewed within a specified time frame".

49. Section III of the Constitution concerns Public Authorities, including the President, Parliament, Government, Judiciary and the Akyikatchy Institution as a public authority with special status. Therefore, the current wording of Article 3, "public authorities", would seem to cover also the judiciary, which is contrary to Principle 13.2 of the Venice Principles: "The competence of the Ombudsman relating to the judiciary shall be confined to ensuring procedural efficiency and administrative functioning of that system".

50. The Venice Commission considers that this important point should be clarified in the sense of Principle 13 of Venice Principles to avoid various interpretations of the provision concerned. The Venice Commission recommends aligning the draft constitutional law with Venice Principles 13.2 and 19³⁴ and clarifying the wording of Article 3 of the draft constitutional law so as to confine the competence over the judiciary to ensure "procedural efficiency and administrative functioning of that system" and remove any ambiguity. This does not preclude the Akyikatchy, according to Principle 19, from assisting the applicants by, e.g., intervening before relevant adjudicatory bodies and courts. The official filing of a request to the Akyikatchy may have a suspensive effect on time limits to apply to the court, according to the Law.

e. Akyikatchy's international mandate

51. Article 12 of the draft constitutional law declares the activities of the Akyikatchy to promote international cooperation in the field of human and civil rights and freedoms as an "integral part of the government foreign policy efforts aimed at safeguarding the rights of its nationals abroad and enhancing relations with compatriots residing overseas". According to Article 25, para. 8 (2) of the draft constitutional law, the Akyikatchy shall have the right to establish "representative offices abroad".

52. These provisions raise several concerns in terms of the independence of the Akyikatchy and the general principle of separation of powers and checks and balances. It is recalled that according to international standards, "the State shall support and protect the Ombudsman Institution and refrain from any action undermining its independence" (Venice Principle 1). "During his or her term of office, the Ombudsman shall not engage in political activities incompatible with his or her independence or impartiality" (Venice Principle 9) and "shall not be given nor follow any instruction from any authorities" (Venice Principle 14). "Similar to judges, the [Ombudsman] does not only need to be independent, he or she must also be "seen" to be independent".³⁵ "Members of the public should have confidence that there exists an independent Ombudsman holding government and public administration to account, (...). In addition, Ombudsman institutions should be both impartial and neutral".³⁶

³⁴ "The Ombudsman shall preferably be entitled to intervene before relevant adjudicatory bodies and courts. The official filing of a request to the Ombudsman may have suspensive effect on time-limits to apply to the court, according to the law".

³⁵ Venice Commission, [CDL-AD\(2009\)043](#) - Opinion on the draft amendments to the law on the Protector of Human Rights and Freedoms of Montenegro, para. 12.

³⁶ PACE, [Doc. 14953](#), Explanatory Memorandum to Resolution 2301(2019) and Recommendation 2163(2019) 20 August 2019, para. 14.

53. According to the Constitution, the Kyrgyz Republic conducts its foreign policy (Article 1, para. 3). The President of Kyrgyzstan determines the main directions of foreign policy and represents the Kyrgyz Republic in international relations (Article 66). The Cabinet of Ministers implements the main directions of domestic and foreign policy of the State (Article 91).

54. The Venice Commission is respectful of the fact that bilateral contacts and dialogue between the ombudspersons of two countries is current practice. This includes cooperation on specific human rights issues of mutual interest/concern, the exchange of information and experience, joint events, working visits, etc. Depending on the circumstance, such cooperation has sometimes been formalised through the signing of cooperation agreements, memoranda of understanding, etc. Concluding (technical) cooperation agreements between an ombudsperson and an international human rights organisation is also current practice. In this regard, Article 12 para. 5 of the draft constitutional law provides for the possibility of receiving “technical, financial, and other assistance from international organisations to implement strategies and projects in the field of protection of human rights and freedoms”, which is positive.

55. The Venice Commission welcomes and encourages such bilateral dialogue and cooperation to protect human rights. However, defining the conduct of the ombudsman mandate outside the state borders as part of “foreign policy”, is contrary to the good practices and established international standards on ombudsman institutions. This also applies to establishing representative offices abroad if this is also considered part of “foreign policy”.

56. The Venice Commission, therefore, recommends amending Article 12 and Article 25, para. 8 (2) in the sense of the above-mentioned Venice Principles and considerations in order to ensure that the Akyikatchy Institution is not part of the State's foreign policy. It is, however, important to indicate that it falls within the Akyikatchy mandate to cooperate with both international inter-governmental and international non-governmental organisations. The drafters are therefore invited to supplement Article 12, para. 1 in this regard.

57. In the same context, it is recalled that under Article 3, the scope of the constitutional law “shall include Kyrgyz citizens, regardless of their location, foreign nationals or stateless persons in the Kyrgyz Republic”. Referring to its recommendation concerning citizens as formulated in para. 26 above, the Venice Commission recommends replacing the clause “in the Kyrgyz Republic” with a reference to “within the jurisdiction of the authorities of the Kyrgyz Republic”. Such wording would then include, for instance, individuals under the jurisdiction of authorities such as Embassies and Consulates. It would also include individuals residing in other countries but in need of, e.g., applying to domestic authorities for certain permissions, etc.³⁷

C. Election and termination of powers of the Akyikatchy

1. Eligibility criteria

58. Article 5 of the draft constitutional law sets the following eligibility criteria for the Akyikatchy: be a citizen of the Kyrgyz Republic, be proficient in the state language, be aged at least 30 years and not older than 65 years, have a higher education degree and experience working in human rights.

59. The Venice Commission notes that two very important characteristics - high moral character and integrity - are not included in the eligibility criteria. The Venice Principles offer clear guidance in this regard: “The criteria for being appointed Ombudsman shall be sufficiently broad as to encourage a wide range of suitable candidates. The essential criteria are high

³⁷ Venice Commission, CDL-AD(2021)049, op. cit., para. 33.

moral character, integrity and appropriate professional expertise and experience, including in the field of human rights and fundamental freedoms.” (Principle 8). It is also recalled that “the criteria for office of Ombudsman institutions should not be too restrictive. Ombudspersons should have expertise and competence in the subject matter of the Institution (although a university degree in Law is not a necessary prerequisite); and should be credible and respected by both the government and the public, thus enhancing the effectiveness and authority of the Ombudsman institution. (...) High moral character, integrity and appropriate professional expertise and experience, including in the field of human rights and fundamental freedoms, shall be the essential criteria for this position”.³⁸ “The process of selection and appointment of the head of an Ombudsman institution should promote its independence. Candidates should be of high moral authority and possess recognised competence in the field of the rule of Law, democratic governance and human rights. Arrangements should be in place so that the post of the head of any Ombudsman institution does not stay vacant for any significant period of time”.³⁹

60. Keeping in mind that Section III of the Constitution designates the Akyikatchy Institution as a public authority with special status together with the President, Parliament, Government and Judiciary (see paras 29, 35 and 49 above), the Venice Commission notes that some countries establish the status and rank of their Ombudsman with reference to the judiciary (Malta, Norway, Sweden) or the Parliament, the President, the Government, the Constitutional Court, a minister, Public Prosecutor, etc. (Croatia, Czech Republic, Estonia, the Netherlands, North Macedonia).⁴⁰ High moral character, including integrity, is among the most important eligibility criteria for ombudspersons, judges, and members of various electing, selecting, vetting, supervisory, etc. bodies.

61. The Venice Commission considers that these qualities are highly important in carrying out the duties of the Akyikatchy and go beyond the eligibility criteria for the Akyikatchy given the Akyikatchy’s status and the examples of other countries mentioned above. Therefore, the Commission will refer to the criteria established by highly reputed international advisory expert panels: 1. On Candidates for Election as Judge to the European Court of Human Rights (ECtHR) and 2. for the Court of Justice of the European Union which will be quoted below.

- **Fifth activity report of the Advisory Panel of Experts on Candidates for Election as Judge to the ECtHR for the attention of the Committee of Ministers, 27 October 2022**⁴¹

“Sources of information

28. In addition to the curricula vitae and any further information provided ... the Panel on occasions receives unsolicited material from various sources (for example, non-governmental organisations and individuals...). The Panel does not actively seek information from such sources; and, more importantly, it will not reject a candidate as not qualified on the basis of information and representations received from them. However, the Panel does not exclude putting questions ... in the light of unsolicited information or representations insofar as that appears appropriate in order to fully confirm that a candidate has the requisite competences and qualifications The Panel’s final assessment of a candidate’s suitability ... will be based only on material supplied ... and, ... on relevant notorious facts in the public domain

The condition of “be[ing] of high moral character”

35. In previous Activity reports, qualities such as integrity, a high sense of responsibility, courage, dignity, diligence, honesty, discretion, respect for others and the absence of conviction for crimes have been mentioned as key components of this requirement, as well as (obviously) independence and impartiality. 36. ... A candidate’s character is hardly ever open to being assessed on the basis of what appears in the curriculum vitae. In particular, it will only be when something is manifestly apparent

³⁸ PACE, [Doc. 14953](#), Explanatory Memorandum, para. 31.

³⁹ See Appendix to Recommendation [CM/Rec\(2019\)6](#), para.3.

⁴⁰ Venice Commission, [CDL-AD\(2002\)008](#) - Opinion on the Status and Rank of the Ombudsman in the Federation of Bosnia and Herzegovina , paras 6-7.

⁴¹ See [Fifth activity report](#) for the attention of the Committee of Ministers, 27 October 2022.

from the curriculum vitae (for example, if there is mention of the Commission of a criminal or disciplinary offence) that a negative judgement as to character can be made”.

- **Seventh Activity Report of the panel provided for by Article 255 of the Treaty on the Functioning of the European Union, 14 July 2022**⁴²

“The panel attaches particular importance to the integrity and probity of candidates for the posts of Judge and Advocate-General of the Court of Justice and Judge of the General Court. The fulfilment of this requirement, which is essential, is undoubtedly difficult to assess solely on the basis of candidates’ files as submitted ...and hearings conducted by the panel where appropriate. The panel does, however, endeavour to establish whether there are factors of any kind which are likely to lead it to express reservations as to the ability of candidates to perform the duties ... with independence, impartiality, integrity and probity. The panel may therefore need to question a candidate ... on one or more aspects of an application which might give rise to doubts as to whether the candidate concerned would be able to perform the duties ... completely independently and impartially, or doubts as to the candidate’s integrity or probity”.⁴³

62. In light of the above, the Venice Commission invites the Kyrgyz authorities to add “high moral character and integrity” to the Akykatchy’s eligibility criteria and align them to the Venice Principles and the above-mentioned international standards.

2. Grounds for non-eligibility

63. The grounds for non-eligibility are listed in Article 5, in para. 2: “Having a criminal record for serious or particularly serious crimes, regardless of whether it has been cancelled or expunged, or there is an investigative body or court decision to terminate criminal prosecution for the above crimes on non-rehabilitation grounds; a person declared legally incapable or incapacitated by a court decision; a person who is a foreign national”.

64. Article 19 of the Criminal Code⁴⁴ provides four categories of crimes: crimes of minor gravity, less grave crimes, grave crimes and particularly grave crimes. Grave crimes are intentional crimes punished by imprisonment for a term of more than five years but not more than ten years; particularly grave crimes are intentional crimes punished for a term of more than ten years or life imprisonment. The Venice Commission considers that if a criminal record has been cancelled in the sense that a conviction has been revoked or annulled, etc., it should not have the consequence that the person in question is ineligible. The Commission recommends softening the wording of the provision by aligning it with Article 95 of the Criminal Code, which sets statutory limitation: seven years in case of a grave crime and 10 years – in case of a particularly grave crime, and which specifies that expungement of a criminal record eliminates the criminal legal consequences of committing a crime.

⁴² See [Seventh Activity Report](#), page 19.

⁴³ The Commission also refers to the [Methodology](#) for assessing the compliance of a candidate to the position of the member of the High Council of Justice and members of the High Council of Justice of Ukraine with the criterion of professional ethics and integrity: “Compliance with the criterion of professional ethics and integrity shall be established based on documents submitted by candidates, information received or requested by members of the Ethics Council, information from open sources, as well as based on the results of the interview with candidates Indicators for the criterion of professional ethics and integrity are independence, honesty, impartiality, incorruptibility, diligence, compliance with ethics norms and impeccable behavior in professional activities and personal life, as well as absence of doubts regarding legality of the sources of origin of property, conformity of the candidate’s ... level of life or that of his family members with declared incomes, conformity of the candidate’s ... lifestyle to his status”.

Finally, GRECO’s [“Revised Questionnaire on Corruption Prevention in respect of Members of Parliament, Judges and Prosecutors”](#) might also serve as a valuable source of information as regards the integrity criterion.

⁴⁴ See [Criminal Code of the Kyrgyz Republic](#).

3. Procedure of selection of candidates

65. According to Article 6 of the draft constitutional law, the procedure for the nomination of the candidates consists of the following steps: Interested candidates submit their applications to the Parliament; after the expiry of the application deadline, parliamentary hearings with the participation of the civil society shall be held for all the applicants; following the hearings, parliamentary factions, deputy groups, deputies elected in single-mandate districts and those who are not included in factions submit to the Parliament a maximum of three candidates shortlisted from the total number of applicants.

66. The Venice Commission considers that the sequence presented in Article 6 reveals several shortcomings. The current wording of the provision lacks transparency; it shows that only parliamentary factions and MPs can submit a list of three shortlisted candidates to Parliament. However, the provision does not clarify what procedural steps are to be taken between the submission by the candidates of their applications to Parliament and the submission by the MPs of the list of three shortlisted candidates to Parliament. It is unclear how the parliamentary hearings are organised and conducted, what is the impact of those hearings on the shortlisting process, and to what extent the recommendations of the CSOs formulated during such hearings are taken into account at the stage of shortlisting three candidates.

67. According to Principle 7 of the Venice Principles, “the procedure for selection of candidates shall include a public call and be public, transparent, merit-based, objective, and provided for by the law”. Therefore, for the sake of transparency and objectivity in the selection process, the Venice Commission recommends adding detailed procedural steps from the application process to the pre-selection decision, as described above. The Commission also recommends that CVs of candidates should be available on the website of the Parliament in order to allow the CSOs to evaluate the suitability of each candidate and submit their recommendations to Parliament.

4. Election

68. According to Article 7, para. 2 of the draft constitutional law, the Akyikatchy and his/her deputy shall be considered elected by the simple majority of votes of the total number of deputies. According to Article 76, para. 2 of the Constitution, the Parliament is composed of 90 members. A simple majority is also used for adopting laws (Article 86, para. 4 of the Constitution). According to Principle 6 of the Venice Principles, “... The Ombudsman shall preferably be elected by Parliament by an appropriate qualified majority.” It follows that the draft constitutional law does not provide for a qualified majority election procedure since it is the same, simple majority which is used in any other “regular” legislative voting.

69. Paras 3 and 4 of Article 7 establish a long and convoluted procedure consisting of several rounds and “sub-rounds” of voting and re-voting. For the Venice Commission, the risk in this system is that the Akyikatchy Institution could be captured by political dynamics, with the paradoxical result of increasing rather than neutralising the political elements in the selection of the Akyikatchy.⁴⁵ In the Commission’s view, given the importance of filling the Akyikatchy’s vacancy in a timely manner, the draft constitutional law should contain an anti-deadlock mechanism for situations where a candidate does not obtain the necessary majority of votes in the Parliament. The purpose of such a mechanism would be to create incentives for both the

⁴⁵ Venice Commission, [CDL-AD\(2022\)054](#), Opinion on the draft law “On Amendments to Certain Legislative Acts of Ukraine on improving the procedure for the selection of candidates for the position of judge of the Constitutional Court of Ukraine on a Competitive Basis”, adopted by the Venice Commission at its 133rd Plenary session (Venice, 16-17 December 2022), paras 37 and 40.

majority and the opposition in Parliament to find a reasonable compromise (or, rather, to create disincentives to prevent situations where they are not capable of finding a compromise).⁴⁶

70. The Commission recommends bringing Article 7 in conformity with the Venice Principles by providing for an election of the Akykatchy by a qualified majority and providing for an anti-deadlock mechanism to avoid paralysing the process in Parliament.

5. Term of office

71. According to Principle 10 of Venice Principles, “the term of office of the Ombudsman shall be longer than the mandate of the appointing body. The term of office shall preferably be limited to a single term, with no option for re-election; at any rate, the Ombudsman’s mandate shall be renewable only once. The single term shall preferably not be stipulated below seven years”.

72. According to Article 5, para. 3 of the draft constitutional law, the Akyikatchy is elected for a five-year term; s/he can be re-elected for a second term. Under Article 76, para. 2 of the Constitution, the term of the Parliament is five years, which is the same as the term of office of the Akyikatchy. This underlines that the term of five years is too short, not only with regard to the Venice Principles but also with regard to the term of office of the parliament members. The Commission recommends aligning the provision with Principle 10 by providing for a longer - not below seven years - and preferably non-renewable term of office.

6. Termination of powers

73. Article 10, paras 2 and 3 of the draft constitutional law contains the list of conditions for early termination of the Akyikatchy’s powers: “1) submission of a written application for early release at his/her own request; 2) entry into force of the court judgment of conviction; 3) enforceable guilty verdict imposing coercive measures of a medical nature; 4) enforceable judicial ruling declaring absence or death; 5) enforceable judicial ruling declaring limited capacity or incapacity; 6) inability to exercise powers on medical grounds, by medical decision; 7) in case of failure to comply with the provisions set forth in Article 9 (2) of this Constitutional Law; 8) termination of citizenship of the Kyrgyz Republic or foreign citizenship establishment; 9) fact of death”. The submission for early termination of Akykatchy’s powers shall be made by MPs to the Parliament. With regards to his/her deputies, the Akyikatchy makes such a submission to the Parliament. The decision to terminate the powers requires a simple majority.

74. According to Principle 11 of the Venice Principles, “the Ombudsman shall be removed from office only according to an exhaustive list of clear and reasonable conditions established by law. These shall relate solely to the essential criteria of “incapacity” or “inability to perform the functions of office”, “misbehaviour” or “misconduct”, which shall be narrowly interpreted. The parliamentary majority required for dismissal – by Parliament itself or by a court on request of Parliament- shall be equal to, and preferably higher than, the one required for election. The dismissal procedure shall be public, transparent and provided for by law”.

75. The Venice Commission finds that while the reasons for early termination of office are, in principle, in accordance with international standards, both the procedure (Article 10, para. 2) and the outcome (Article 10, para. 3) are questionable. The list of subjects (MPs) who are entitled to submit the proposal of early termination of powers of the Akykatchy, raises concerns as to impartiality. The decision to remove the Akyikatchy and his/her deputies is taken by the

⁴⁶ Venice Commission, [CDL-PI\(2023\)018](#), Compilation of Venice Commission Opinions and Reports Relating to Qualified Majorities and Anti-Deadlock Mechanisms, and the quoted opinions.

same, simple majority, although it is recommended to provide for a higher majority than the one demanded during its election.

76. The Venice Commission recalls that “even more important for the independence of the ombudsperson at the time of appointment is the issue of the majority required for the removal of the ombudsperson from office. Here, a qualified majority is desirable in order to guarantee that the ombudsperson cannot be removed from office because of his or her acts which were disliked by the governmental majority [i]n Parliament”.⁴⁷

77. Based on Principle 11 referred to above, the Venice Commission recommends foreseeing public and transparent procedures; the parliamentary majority required for removal of the Akyikatchy shall be equal to, and preferably higher than, the one required for his/her election – in this particular case, referring to its recommendation in para. 70 above to provide a qualified majority for electing the Akyikatchy, the Commission recommends that the parliamentary majority required for the removal of the Akyikatchy shall be at least 2/3. Finally, as the Venice Commission had previously stated on other occasions, a procedure for challenging the dismissal decision in courts (presumably the Constitutional Court) should be prescribed in the draft law.⁴⁸

D. Immunity

1. Immunity of the Akyikatchy and his/her deputies

78. Under Principle 23 of the Venice Principles, “the Ombudsman, the deputies and the decision-making staff shall be immune from legal process in respect of activities and words, spoken or written, carried out in their official capacity for the Institution (functional immunity). Such functional immunity shall also apply after the Ombudsman, the deputies, or the decision-making staff member leave the Institution”.

79. Immunity of the Akyikatchy is dealt with in Article 17 of the draft constitutional law. Functional immunity is not applicable “in case of committing a particularly grave crime” or when the Akyikatchy or his/her deputies are “found at the scene of the commission of a particularly grave crime”.

80. As referred to in para. 64 above, Article 19 of the Criminal Code of Kyrgyzstan provides four categories of crimes: crimes of minor gravity, less grave crimes, grave crimes and particularly grave crimes. Particularly grave crimes are intentional crimes punished for a term of more than ten years or life imprisonment. Therefore, the Venice Commission invites the drafters to consider the possibility of adapting the sentence as follows: “particularly grave crime according to the Criminal Code of the Kyrgyz Republic”. The Venice Commission recommends the draft constitutional law be also aligned with Principle 23.

2. Immunity of the Akyikatchy’s Staff

81. The functional immunity provided for the Akyikatchy and his/her deputies in Article 17 does not cover the staff.

82. The Venice Commission recalls that the functional immunity of the staff of an ombudsman/ NHRI is essential to protect the independence of the Institution. The Commission recommends

⁴⁷ Venice Commission, CDL-AD(2004)041, op. cit., para. 19.

⁴⁸ Venice Commission, CDL-AD(2015)017, op. cit., para. 61

supplementing Article 17 of the draft constitutional law to expressly refer to the functional immunity of the Akyikatchy's staff.

E. Organisation of the Akyikatchy Institution

1. Deputies

83. According to Article 7, para 13 of the draft constitutional law, "the Akyikatchy shall have no more than two deputies to be elected for a five-year term".

84. Principle 22 of Venice Principles stipulates in this regard that "the Ombudsman Institution shall have sufficient staff and appropriate structural flexibility. The Institution may include one or more deputies, appointed by the Ombudsman. The Ombudsman shall be able to recruit his or her staff".

85. Given the extent of powers/mandate of the Akyikatchy listed in Article 11 of the draft constitutional law (NHRI status, competences as regards equality matters, dealing with "whistleblowers", human rights/legal educational activities, national and international cooperation, etc.), the Venice Commission finds that a maximum of two deputies is far too little for all the subject-matters within the Akyikatchy's jurisdiction. Therefore, the Commission recommends providing for more than two deputies, each active in a different field, providing for a longer - not below seven years – term of office (see para. 72 above) to further improve the efficiency of the Institution, in particular at the regional level.

2. Regional institutions

86. Article 16 of the draft constitutional law provides that the Akyikatchy shall have the right to establish a Regional Human Rights Institution aiming at enhancing the quality and effectiveness of knowledge-based approaches in legislative activities, promoting public legal culture and human rights education. The Akyikatchy determines their organisational and legal form, structure and staff.

87. The provision needs more clarity, in particular as regards the definition ("Institution" or "Office"?), the legal status of such regional institutions and their mandate. Although the Akyikatchy approves the statute of regional institutions, their restructuring/liquidation procedure is subject to the Civil Code (para. 4). Consequently, regional institutions are legal persons; they produce separate analysis, monitoring and reporting on human rights. They are funded from various sources (including international funding, grants, donations, etc.). There is no clarity as to the heads of regional institutions and their status. The facilitation of investigation and monitoring functions of the Akyikatchy does not seem to be part of their mandate; it is unclear whether the methodology and guidelines they develop would be binding for NHRIs (the Akyikatchy is the NHRI).

88. Given the above recommendation concerning the number of deputies, further options might be explored as to whether regional institutions will be manned by representatives of the Akyikatchy, with or without being designated as deputy Akyikatchys. The Venice Commission recommends clarifying the above-mentioned aspects in the draft constitutional law, and specify that the regional institutions are covered by the Akyikatchy's mandate.

3. Staff

89. Article 4, para 6 (6) of the draft constitutional law stipulates that the Akyikatchy and his/her Office shall operate independently. However, according to Article 2, para. 4, "The Akyikatchy Office staff are persons holding special government positions and civil servants who support the Ombudsman in exercising his/her mandate". Although it was underlined during the online meetings that the reference to civil servants was to include them in the Law "On State Civil Service and Municipal Service", the provision still makes a blurred impression of the independent status of the Akykatchy staff, and including them in the Law could be achieved in another way. It also follows from Article 25 that the maximum number of the Akyikatchy staff shall be determined by the Akyikatchy in consultation with the Parliament. This is questionable in relation to Venice principle number 22 on the importance of appropriate structural flexibility of the Ombudsman and the right to recruit his/her staff.

90. As the Venice Commission had stated on 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".⁴⁹ 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.⁵⁰

91. The Commission recommends that the draft constitutional law be aligned with the requirements of Principle 22 of the Venice Principles ("The Ombudsman Institution shall have sufficient staff and appropriate structural flexibility. The Ombudsman shall be able to recruit his or her staff") and particularly that it provides that the Akyikatchy is able to recruit his or her staff.

4. Budgetary independence

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

93. Article 26 of the draft constitutional law provides that "adequate and uninterrupted funding" from the national budget shall be provided to the Akyikatchy Institution to ensure the full and independent exercise of parliamentary oversight over human and civil rights and freedoms observance. "No delays or changes in the amount of funding shall be allowed". The Akyikatchy Institution develops and implements its budget independently. The national budget shall include a dedicated line for funding to support the Akyikatchy Institution's activities. Para. 4 allows the Akyikatchy to receive funding from international and other organisations, as well as from other sources that do not contradict the Law of the Kyrgyz Republic – the Venice Commission welcomes the existence of such a possibility in the draft constitutional law.

⁴⁹ Venice Commission, CDL-AD(2006)038, *op. cit.*, para. 78.

⁵⁰ Venice Commission, [CDL-AD\(2021\)035](#), Armenia - Opinion on the legislation related to the Ombudsman's staff, paras 25-26.

94. The Venice Commission welcomes that Article 26 presents the necessary guarantees for budgetary independence. During the discussion with the Akyikatchy, the Venice Commission delegation was informed that once the draft annual budget is prepared, the Akyikatchy Institution transmits the draft to the Ministry of Finance; at the next stage, the Ministry submits the draft State Budget to the Parliament for adoption. However, the Commission recommends codifying this practice, so the Law explicitly provides that the Akyikatchy Institution shall be consulted during the budget preparation process until its adoption by Parliament.

F. Reporting

95. Article 15 of the draft constitutional law refers to annual and special reports that the Akyikatchy shall submit to the Parliament. Following the review of the annual and special reports, the Parliament shall accept them by a majority vote and adopt a resolution including recommendations to the entities specified in Article 3. The Akyikatchy shall supervise the implementation of the Parliament's resolutions.

96. The Venice Commission welcomes that the draft constitutional law explicitly refers to the annual and special reports of the Akyikatchy as well as to the fact that the Akyikatchy can supervise the implementation of the Parliament's resolutions. At the same time, the provision stating that the Parliament shall "accept it by a majority vote" and issue a resolution with recommendations seems problematic in relation to the general requirement that "the Ombudsman's reports ... shall be duly taken into account by the authorities" (Principle 20).

97. The Venice Commission delegation was informed that in April 2023, the Parliament voted not to accept the annual report of the previous Akyikatchy, which led to her early dismissal. The Commission was also informed that the disapproval of the Akyikatchy's annual report by Parliament was among his/her early dismissal grounds, but such a provision was removed from the draft constitutional law. However, this does not fully alleviate the risks in case of the absence of a majority vote. In order to strengthen the institutional independence of the Akyikatchy, it is recommended to specify in Article 15 that the Akyikatchy cannot be removed from office due to discussions of the content of the annual/special report.

IV. Conclusion

98. The Venice Commission welcomes the intention and efforts of the Kyrgyz authorities to confer constitutional status upon the Akyikatchy. The Commission also welcomes the ongoing comprehensive dialogue involving civil society concerning the draft constitutional law and encourages the Kyrgyz authorities to continue such dialogue on a regular basis.

99. The Commission notes that overall, the draft constitutional law provides for a detailed framework and reflects a number of international standards. Nevertheless, a number of improvements still need to be made in order to provide all the necessary guarantees for independence, impartiality, accessibility and efficiency to the Akyikatchy Institution – a new constitutional body – in line with international standards. The Commission considers that before the adoption and promulgation of the draft constitutional law, the analysis and recommendations of this opinion should be taken into account in the further legislative process.

100. The Venice Commission makes the following key recommendations and notes that further detailed recommendations are to be found in the text of this opinion.

- Constitutional guarantees:
 - establishing the existence, the basic mandate and the basic procedure for the election and dismissal of the Akyikatchy in the Constitution;

- clarifying the modalities of interaction between the Akyikatchy Institution and other national human rights mechanisms.
- Mandate:
 - *extending the mandate to* public administration at all levels and private entities which deliver public services, complainants (for example, whistleblowers), combatting all forms of discrimination, and cooperation with international non-governmental organisations;
 - *confining the mandate to* procedural efficiency and administrative functioning of the judiciary, ensuring that the Akyikatchy Institution is not part of the State's foreign policy.
- Election and Termination of Powers:
 - adding “high moral character and integrity” to the eligibility criteria;
 - softening the requirement as regards expungement/cancellation of criminal record;
 - providing transparent and detailed selection procedure; a qualified majority for the election and at least 2/3 majority for dismissal; an anti-deadlock mechanism to avoid paralysing the process in Parliament as well as a judicial remedy for challenging the dismissal decision;
 - providing for a longer and non-renewable term of office.
- Immunity: ensuring the same functional immunity for the Akyikatchy staff.
- Organisation of the Akyikatchy Institution:
 - providing for more than two deputies;
 - clarifying the legal status and mandate of the regional institutions;
 - providing that the Akyikatchy is able to recruit his or her staff;
 - specifying that the Akyikatchy Institution shall be consulted during the budget preparation process.
- Reporting: specifying that the Akyikatchy cannot be removed from office due to discussions of the content of the annual/special report.

101. The Venice Commission remains at the disposal of the Ombudsman and the authorities of the Kyrgyz Republic for further assistance in this matter.