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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
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COMPILATION
ON THE OMBUDSMAN INSTITUTION¹

¹ This document will be updated regularly. This version contains all opinions and reports/studies adopted up to and including the Venice Commission's 87th Plenary Session (17-18 June 2011).

Introduction

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

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

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

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

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

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

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

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

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

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1. Constitutional guarantee for the institution of the Ombudsman

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

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

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

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

«According to current European and international standards, therefore, a constitutional guarantee for the Ombudsman is distinctly considered as preferable. It has been advocated in such declarations of the organs of the Council of Europe as the Recommendation 1615 (2003) 1 of the Parliamentary Assembly on the Institution of Ombudsman. And in opinions of the Venice Commission relating to constitutions and/or to rules on the Ombudsman or Human Rights Defender in various countries, the provision for a constitutional guarantee has been consistently proclaimed as the preferable solution as compared with provision for the institution by ordinary legislation or statute.»

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

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), paragraphs 7, 9, 10 and 12.

2. Criteria for office

2.1 General criteria

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

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

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

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

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

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

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

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

and the former requirements for the person having a university degree and having knowledge and experience in the field of human rights and fundamental freedoms have also been deleted.

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

In recent opinions of the Venice Commission on the Ombudsman institution (such as CDL-AD(2004)041 concerning Serbia), the view has been expressed that the criteria for his or her eligibility should not be too restrictive, and that e.g. a university degree in law is not a necessary prerequisite (although that criterion is widely relied on, e.g. among the Nordic countries). At the same time, it may be noted that the conditions of eligibility as stated in the original Article 3.1 of the Law were favourably commented on in the above opinion CDL-AD(2003)006. There is no uniform approach to this issue among the Council of Europe's member states.

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

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

2.2 Incompatibilities

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

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

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

«...The drafters might consider to allow the ombudsperson [and] his or her deputies to pursue teaching activities. However it would be preferable to replace the list of public offices, which cannot be held by an ombudsperson, with a more comprehensive provision stating that the ombudsperson shall not hold any position which is incompatible with the proper performance of

his or her official duties or with his or her impartiality and public confidence therein. It is noted that a more general formula is used by the drafters in Article 9 (reasons for dismissal).»

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

3. Election of the Ombudsman

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

«Article 3 provides for the appointment of the ombudsperson by the National Assembly by simple majority. However, a broad consensus for the choice of the ombudsperson is important in order to ensure public trust in the independence of the ombudsperson. Consequently, a

qualified majority in Parliament for the appointment of the ombudsperson is appropriate (2/3 or 3/5 of votes cast). If existing constitutional provisions render the fulfilment of such requirement impossible, other possibilities should be explored, which would allow to come to the same result. However, such modalities would have to be safeguarded on the level of law.»

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

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

CDL-AD(2007)020 - Opinion on the possible reform of the Ombudsman Institution in Kazakhstan adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007), paragraph 11.

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

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

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

4.1 Status

4.1.1 Rank and salary

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

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

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

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

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

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

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

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

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

4.1.2 Immunities

«After having studied the first draft the Rapporteurs recommended that the Azerbaijani authorities clarify certain provisions of Article 6 on immunities of the Ombudsman. The original wording did not specify what majority was required in the Parliament to lift the immunity of the Ombudsman and did not foresee the Ombudsman's immunity for opinions held or action taken while in office after the expiry of the term of office. The Commission is satisfied that the draft adopted in the third reading solves both problems. It establishes a requirement of 83 votes in *Milli Mejlis* for lifting the immunity and includes a special paragraph on immunity for opinions held or action taken while in office.»

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

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

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

«In general terms, both the Human Rights Defender and his or her staff should have immunity from legal process in respect of words spoken or written and acts performed by them in their official capacity. Such immunity should continue to be accorded even after the end of the Human Rights Defender's mandate or after the staff cease their employment with the Human

Rights Defender institution. This immunity should also include baggage, correspondence and means of communication belonging to the Human Rights Defender. One could consider a different scope of immunity with regard to the staff (e.g. waiving by the Defender for his or her staff).»

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

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

“74. In general terms, both the Human Rights Defender and his or her staff should have immunity from legal process in respect of words spoken or written and acts performed by them in their official capacity. Such immunity should continue to be accorded even after the end of the Human Rights Defender's mandate or after the staff cease their employment with the Human Rights Defender institution. This immunity should also include baggage, correspondence and means of communication belonging to the Human Rights Defender. One could consider a different scope of immunity with regard to the staff (e.g. waiving by the Defender for his or her staff).

75. In the Amending Law, the first two paragraphs of this Article have been joined in a single paragraph with some changes in wording. A change which is clearly positive and important is that the immunity of the Human Rights Defender from prosecution or criminal proceedings is now expressed as persisting not only during his or her term of office, but also thereafter. This accords with the principle of the Constitution that the Defender shall be endowed with the immunity envisaged for a Deputy of the National Assembly (Article 83.1.6 of the Constitution), and the new phrasing of the Article appears to have been modelled in most part upon the constitutional provision regarding Deputies (Article 66). However, it may be questioned whether the extent of the immunity is sufficient. There is no reference here to the staff of the Defender, but under Article 23.5, they are endowed with immunity during their period of tenure in respect of their conduct while performing their responsibilities under the Defender's instructions. This immunity should be more extensive. The Law also lacks sufficiently precise provisions on the procedure for waiving immunity.»

«The Venice Commission thus expressed a positive view of the extension of the immunity to the staff of the Human Rights Defender's office. The Commission even called for its extension in temporal respect. All those remarks remain relevant and are in line with other opinions of the Commission on this issue (see for example CDL-AD(2004)041 on the draft Law on the Ombudsman of Serbia and CDL-AD(2007)024 on the draft Law on the People's Advocate of Kosovo).»

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

«The Human Rights Defender, as every other ombudsman, performs most of his/her duties assisted by and through his/her staff. Each member of the staff acts within their official authority on behalf of the Human Rights Defender under the latter's authority. In consequence, the aforementioned guarantees and protection, including the immunity, must be obviously granted to such persons as well....»

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

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

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

« ... Not only the Protector and his/her Deputies, but also his/her staff should have immunity “from legal process in respect of words spoken or written and acts performed by them in their official capacity.” Such immunity shall continue to be accorded even after the end of the Protector’s mandate or after the members of staff cease their employment with the Protector’s institution. This immunity should also include baggage, correspondence and means of communication belonging to the Protector.»

CDL-AD(2009)043 – *Opinion on the draft amendments to the law on the Protector of Human Rights and Freedoms of Montenegro, adopted by the Venice Commission at its 80th Plenary Session (Venice, 9-10 October 2009), paragraphs 12, 27 and 29.*

4.2 Independence from other state institutions / bodies

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

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

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

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

5. Features of the Ombudsman’s term of office

5.1 Term of office

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

«The Working Group is of the opinion that a five year mandate would better respond to the need for independence, the four-year term provided for in the Law being too short.

It would recommend to amend Article 11 of the Law so as to provide for a five year term....»

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

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

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

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

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

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

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

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

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

CDL-AD(2007)024 (English only) – 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), paragraph 40.

5.2 Termination of the Ombudsman's term of office

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

Each one of the situations described in 1), 2), 3) and 4) of this article is enough to discharge a Public Attorney. »

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

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

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

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

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

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

«After expiration of the Protector's term, and prior to selection of a new Protector, the current Protector should continue in office until the successor takes office – as opposed to the solution proposed in the draft. This would help to avoid a situation where no Protector holds an office - as happens sometimes for up to several months - with only a deputy as an acting ombudsman filling in temporarily. This is also important due to the need for the proper transfer of Protector's duties between the old and the new office holder. The solution proposed in the draft should be used in situations where, due to objective circumstances (e.g. death, illness, etc.) the Protector is unable to perform his or her duties.»

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

6. Budgetary independence

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

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

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

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

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

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

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

CDL-AD(2007)020 - Opinion on the possible reform of the Ombudsman Institution in Kazakhstan adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007), paragraphs 28 and 30.VI.

7. Competences and powers of the Ombudsman

7.1 Scope of the monitoring competence of the Ombudsman

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

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

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

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

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

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

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

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

among nations that it clearly must be seen to belong to the mandate of the Defender as now declared in the Armenian Constitution.»

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

«The general mandate of the Defender is stated primarily in terms of implementing protection against violations of human rights and freedoms by the executive power. The question may be raised whether his or her authority to monitor the administration and promote the observance of human rights might be expressed in stronger terms, such as by using those exact words. As in the opinion CDL-AD(2003)006, it also may be asked whether the Defender's mandate could be strengthened by listing his or her fields of action in more specific terms than in the Law. Also, the mandate should also explicitly refer to violations by omission. However, the straightforward description of the Defender's general mandate and purpose embedded in the Constitution and now followed in the Law clearly invites a broad interpretation ensuring that the essential function of monitoring is in fact included. Under the assumption of such broad interpretation, the role envisaged for the Armenian Defender does appear fully acceptable.»

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

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

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

CDL-AD(2007)024 (English only) – 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), paragraphs 6 and 58.

Prioritising human rights issues may be justified in a young democracy. However, it should be made clear that the Protector is obliged to react not only to individual human rights violations but also to general patterns of action which he/she considers endangering human rights. Articles 18 and 19 of the law, which grant the Protector the power to “*initiate the adoption of laws, other regulations and general acts for the reason of harmonization with internationally recognized standards in the area of human rights and freedoms*” (Art. 18(1)), and to “*initiate a proceeding before the Constitutional Court of Montenegro for the assessment of conformity of laws with the Constitution and confirmed and published international treaties or the conformity of other regulations and general acts with the Constitution and law* (Art. 19)”, already imply that the Protector is also expected to address more general issues than merely individual human rights violations. In addition, Art. 21 explicitly states that “*the Protector deals with general issues of importance for the protection and promotion of human rights and freedoms and cooperates with organizations and institutions dealing with human rights and freedoms*”. The more general responsibilities of the Protectors should have also been explicitly mentioned in Article 2.

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

7.2 Powers of investigation

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

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

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

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

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

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

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

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

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

because the prevention of torture and other inhuman and degrading treatments will be one of the main tasks of the Protector.

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

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

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

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

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

7.3 Power of recommendation / proposition

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

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

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

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

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

7.4 Relations with courts

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

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

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

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

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

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

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

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

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

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

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

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

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

CDL-AD(2007)020 - Opinion on the possible reform of the Ombudsman Institution in Kazakhstan adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007), paragraphs 12, 14 and 20.

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

CDL-AD(2007)024 (English only) – 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), paragraphs 19.

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

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

A different issue is the relationship between the Protector and the ordinary courts. As stated by the Venice Commission in former opinions, “*in general, it would seem preferable to give the People's Advocate the power to make general recommendations about the functioning of the court system, and exclude the power to intervene in individual cases (...)*” (CDL-AD (2007)024, para. 19). (...)

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

8. Applicants and formalities for application

«The Working Group notes that Article 17 of the Law provides that “*any natural person claiming a legitimate interest may apply to the Ombudsman*”.

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

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

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

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

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

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

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

It is also true that the *Basic Principles* of the same Agreement refers to «*citizens*». Anyhow, some provisions of Annex A have references to the word «*person*» like in Article 7 (4) «*Any person living in*» or Article 8 (1) «*equitable representation of persons belonging*». Maybe it could be possible, with a view to widening the scope of the Law, to use the word «*persons*» instead of «*citizens*».

The petition addressed to the Public Attorney shall be signed and contain personal data about the petitioner and contain the circumstances, facts and evidence on which the petition is founded. The petition shall contain the body, organization, institution or person to which the petition refers; it shall also be noted whether the petitioner has already submitted legal remedies and which legal remedies have been submitted. The petition to initiate a procedure is submitted in writing or orally in minutes. There is no prescribed form for the petition initiating a procedure. The petitioner is exempt from paying fees for the procedure before the Public Attorney.

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

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

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

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

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

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

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

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

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

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

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

«In paragraph 2, the right of legal entities to lodge a complaint to the Ombudsman should also include situations where the rights of those very entities are being violated (e.g. right to property). The existing provision appears to provide for this possibility only indirectly if the owners of the legal persons are natural persons. In this respect, one should also regulate the situation of groups of individuals as a separate question.»

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

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

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

CDL-AD(2007)024 (English only) – 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), paragraph 50.

9. Organisation of the Ombudsman institution

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

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

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

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

CDL-AD(2007)020 – Opinion on the possible reform of the Ombudsman institution in Kazakhstan, Adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007) paragraphs 25 and 29.

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

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

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

CDL-AD(2007)024 (English only) – 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), paragraphs 61 – 63.

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

«The amendment proposed to Article 9 provides for a division of labour between the deputy protectors. The deputies would have “*special functions for the protection of persons deprived of liberty, protection of people belonging to minority nations and other minority national communities, protection of the rights of child, protection of gender equality, protection of disabled persons and protection from discrimination*”. The specialisation of the deputies is welcomed because it allows the deputies to deal efficiently with the issues attributed to them whereas the general mandate of the Protector provides for coherence between these specialised areas.»

CDL-AD(2009)043 – Opinion on the draft amendments to the law on the Protector of Human Rights and Freedoms of Montenegro, adopted by the Venice Commission at its 80th Plenary Session (Venice, 9-10 October 2009), paragraphs 9 et 14.

«The Venice Commission acknowledges that states enjoy a wide margin of appreciation with regard to such institutional arrangements, which depend to a large extent on the domestic specific situation. Moreover, one single ombudsperson or multiple ombudspersons may be more appropriate at different stages of the democratic evolution of states. This being said, it considers it important that the above-mentioned re-organisation does not entail a lowering of the existing level of guarantees for the protection and promotion of rights in the fields of national minority protection, personal information protection and transparency of publicly relevant information. More generally, it deems important to ensure that the decrease in the number of independent institutions does not have a negative impact on the Hungarian system of check and balances and its efficiency.»

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

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

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

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

The Ombudsman has no powers in respect of private persons, which he or she would need to combat discrimination. The wording of the present draft and the Law on the Protector of

Human Rights imply that the area of competencies of the Protector is limited to the public sphere. However, according to the ECRI's Recommendation, the institution in charge of the protection of and fight against discrimination should cover the private sphere as well.

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

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

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

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

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

Concerning the specialisation within the Ombudsman institution, the Venice Commission has stated previously that when the Ombudsman is "*in a stage of consolidation and development*", it is possible "*to organise the functions for the specialised ombudsperson within the overall institution of the national Ombudsman, by way of establishing a special department and/or appointing a deputy ombudsman for the special field*" (CDL-AD(2007)020, *Opinion on the possible reform of the Ombudsman institution in Kazakhstan*, adopted by the Venice Commission at its 71st Plenary session, June 2007). Although "*the alternative of appointing regional or local ombudspersons who are not subordinated to the national Ombudsman is preferred in many countries and has its advantages of its own*" (*ibidem*, para. 29), the size and population of the country can also be taken into consideration to establish the specialised departments under the monitoring of the national Ombudsperson. Concerning the Human Rights Protector in Montenegro, the Venice Commission stated in 2009 that the specialisation of the deputies (on people deprived of liberty, people belonging to minorities, the rights of the child, gender equality, disabled and discrimination) "*is welcome because it allows the deputies to deal efficiently with the issues attributed to them whereas the general mandate of the Protector provides for coherence between these specialised areas*" (CDL-AD(2009)043, para. 14).

In the opinion concerning the Draft Law on Prohibition of Discrimination of Montenegro, the Venice Commission further stated that "*whereas the creation of a specialised body is considered as the best solution, transferring the same competences to an already existing institution, which would benefit from the competencies described above [the ones detailed by the ECRI General Policy Recommendation No. 7] would be equally adequate*" (CDL-AD(2009)045, para. 38). Article 9 par 3 of the Law established that one of the Deputies will deal specially with discrimination issues

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

10. Reference documents

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

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

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

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