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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DRAFT OPINION**  
**ON**  
**THE LAW**  
**ON THE PEOPLE'S ADVOCATE (OMBUDSMAN)**  
**OF**  
**THE REPUBLIC OF MOLDOVA**

**on the basis of comments**

**by**

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## I. INTRODUCTION

1. On 23 April 2015, the newly elected People's Advocate (Ombudsman) of the Republic of Moldova requested the opinion of the Venice Commission on the Law no. 52 of 03.04.2014 on the People's Advocate (Ombudsman) of the Republic of Moldova (CDL-REF(2015)018), hereinafter "the Law".
2. Ms Lydie Err, Mr Latif Huseynov and Mr Jørgen Steen Sørensen acted as rapporteurs on behalf of the Venice Commission.
3. This Opinion is based on the English translation of the Law provided by the author of the request. The translation may not always accurately reflect the original version on all points, therefore certain issues raised may be due to problems of translation.
4. *This Opinion was adopted by the Venice Commission at its ...t Plenary Session (...)*

## II. GENERAL REMARKS

### A. Background

5. The Ombudsman institution has been operating in the Republic of Moldova since April 1998 as an important non-judicial mechanism of protecting human rights in the Republic of Moldova. Under the Law on Parliamentary Advocates no.1349-XIII of 17 October 1997, four Parliamentary Advocates, including one specialised in children's rights, hosted by the Centre for Human Rights of the Republic of Moldova (CHRM), had been tasked with the functions of an Ombudsman institution. Territorial branches have been opened by decision of the Moldovan Parliament throughout the country's territory, including the Territorial-Autonomous Unit "Gagauz-Yeri".
6. Following the ratification by the Republic of Moldova, in July 2006, of the Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment (OPCAT), the institution of Parliamentary Advocates was also vested with the function of national mechanism for preventing torture.
7. Furthermore, in 2008 the Law on Parliamentary Advocates was amended to establish the Parliamentary Advocate for the Protection of Children Rights.
8. The Centre of Human Rights of the Republic of Moldova has been accredited by the Sub-Committee on Accreditation of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (with "B" status) and is a member in the International Ombudsman Institute (IOI), the Institute of European Ombudsman, the "Association des Ombudsmen et Médiateurs de la Francophonie" (AOMF).
9. According to the request for opinion, the elaboration of a new legal and institutional framework for the Moldovan Ombudsman was initiated upon the initiative of the Centre for Human Rights of the Republic of Moldova, with a view to strengthening the capacity and efficiency of this institution, as recommended by relevant international institutions in recent years.
10. This opinion will ascertain whether the Law is in line with the applicable European and international standards in the field. It is not the purpose of this opinion to provide a detailed and exhaustive review of the Law. The analysis of the text is made according to the importance of the provisions of the law and will focus on the provisions raising issues that are more critical.

11. The present opinion will not address the chapter of the Law dealing with the National Preventive Mechanism function of the Ombudsman established under OPCAT. A detailed analysis of that Chapter of the Law will be provided, based on the request received from the Moldovan Ombudsman, by the Human Rights Directorate of the Council of Europe within the cooperation facilities under the National Human Rights Implementation Division.

## B. Standards

12. The Venice Commission has examined the Law in the light of the key texts on the Ombudsman institution, as well as of existing good practices in the field.

13. Despite a wide use of the terms “Ombudsman”, “Ombudsperson” and “Human Rights Commission” etc. to refer to institutions in charge of human rights at the domestic level, it is a fact that such bodies vary over the world in nature, mandate and responsibilities.

14. Although there are no binding international standards applicable to such institutions, most of these bodies have been established on the basis of the United Nations *Principles relating to the status of national institutions*, adopted by the General Assembly in its *Resolution 48/134 of 20 December 1993*, commonly known as “*the Paris Principles*”.<sup>1</sup> As to date, these Principles represent the most widely followed guidelines outlining the basic elements of any national human rights institution.

15. The International Ombudsman Institute (“IOI”) has also listed, in its bylaws, various typical features of Ombudsman institutions.<sup>2</sup>

16. The Venice Commission has on various occasions given opinions on legislative provisions regulating the operation of Ombudsman institutions in Council of Europe member states<sup>3</sup>.

17. More generally, the Council of Europe has always paid particular attention to the ombudsman and national human rights institutions (‘NHRIs’). Thus, it has produced a number of documents reflecting on the best practices for establishing NHRIs in member states and calling for sufficient mandate and resources for these bodies, such as various recommendations of the Committee of Ministers and of the Parliamentary Assembly of the Council of Europe. These include in particular the Recommendation No. R (97) 144 of the Committee of Ministers, which recommends member States to consider the possibility of establishing effective national human rights institutions, the *Recommendation no. 1615(2003) of the Parliamentary Assembly on the Institution of Ombudsman* and, more recently, the Parliamentary Assembly’s *Resolution 1959 (2013) on Strengthening the institution of ombudsman in Europe*.<sup>5</sup>

18. In 2003, the Parliamentary Assembly had highlighted in its Recommendation no. 1615(2003), certain characteristics which are essential for any Ombudsman institution to operate effectively, including notably:

- a constitutional framework for its establishment and status;
- effective guarantees and conditions for its functional independence;
- exclusive and transparent procedures for its appointment and dismissal by parliament by a qualified majority of votes;
- prohibition of other remunerated activities and any personal involvement in politics;

<sup>1</sup><http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>

<sup>2</sup>See <http://www.theioi.org/the-i-o-i/by-laws>.

<sup>3</sup>See Venice Commission, (CDL(2011)079), *Compilation on the Ombudsman Institution*, 1 December 2011, ([http://www.venice.coe.int/webforms/documents/?pdf=CDL\(2011\)079-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL(2011)079-e)).

<sup>4</sup><https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&%20InstranetImage=567349%20%20&SecMode=1&DocId=578706&Usage=2>

<sup>5</sup>See *Resolution 1959 (2013) on Strengthening the institution of ombudsman in Europe*, paragraph 4.1.6

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- immunity from any disciplinary, administrative or criminal proceedings or penalties relating to the discharge of official responsibilities;
- guaranteed adequate resources allocated independently of any possible interference and complete autonomy over budget and staff;
- prompt and unrestricted access to all information necessary for the investigation;
- public accessibility (in terms of both availability and comprehensibility) and wide and effective publication of information on the institution's activities, findings, opinions and recommendations;
- easily and widely accessible application procedures (free of charge), and guaranteed confidentiality;
- the authority to give opinions on proposed legislative or regulatory reforms and to make proposals for improving administrative standards and respect for human rights;
- the requirement that the administration provides within a reasonable time full replies on the implementation of its findings and recommendations or reasons why they cannot be implemented;
- presentation by the Ombudsman of an annual report to parliament, as well as of specific reports on matters of particular concern;
- in relation to the judiciary, at most strictly limited powers, confined to ensuring the procedural efficiency and "administrative propriety of the judicial system".

19. In its 2013 Resolution, the Assembly recalls the Council of Europe's previous work on promoting Ombudsman institutions, including the related Venice Commission Opinions, and calls on its member States to implement them.

### III. ANALYSIS

#### A. General comments

#### 1. Constitutional and legal framework

20. There is no specific provision in the Moldovan Constitution dealing with the Ombudsman Institution. Yet, there a number of constitutional provisions of relevance for the operation of this institution: article 1 on the State of the Republic of Moldova<sup>6</sup>, Article 4 on Rights and freedoms<sup>7</sup>, Article 16 on Equality<sup>8</sup>, Article 52 on the Right to Lodge Petitions<sup>9</sup> and Article 54 on Restrictions on the Exercise of Certain Rights or Freedoms.<sup>10</sup>

<sup>6</sup> "1.3. The Republic of Moldova is a democratic and governed by the rule of law State, in which human dignity, his/her rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values and shall be guaranteed";

<sup>7</sup> "(1) Constitutional provisions on human rights and freedoms shall be interpreted and are enforced in accordance with the Universal Declaration of Human Rights, with the conventions and other treaties to which the Republic of Moldova is a party.

(2) Wherever disagreements appear between the conventions and treaties on fundamental human rights to which the Republic of Moldova is a party and its domestic laws, priority shall be given to international regulations."

<sup>8</sup> "(1) The respect and protection of the individual shall constitute the foremost duty of the State.(2) All citizens of the Republic of Moldova are equal before the law and public authorities, regardless of the race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, property or social origin."

<sup>9</sup> "(1) All citizens shall be entitled to refer to public authorities by way of petitions formulated only on behalf of the signatories.

(2) Legally established organizations shall have the right to lodge petitions exclusively on behalf of the bodies they represent."

<sup>10</sup> (1) In the Republic of Moldova no law may be adopted which might curtail or restrict the fundamental rights and freedoms of the individual and citizen.

(2) The exercise of the rights and freedoms may not be subdued to other restrictions unless for those provided by the law, which are in compliance with the unanimously recognised norms of the international law and are requested in such cases as: the defence of national security, territorial integrity, economic welfare of the country, public order aiming at preventing mass riots and crimes, protection of the rights, freedoms and dignity of other persons, prevention of disclosing confidential information or the guarantee of the power and impartiality of justice.

(3) The provisions under paragraph (2) does not allow the restrictions of the rights laid down in Articles 20-24.

(4) The restriction has to be proportionate to the situation that caused it and shall not affect the existence of the right or freedom".

21. The Recommendation 1615(2003) of the Parliamentary Assembly lists at first place, among the characteristics which are essential for any Ombudsman institution to operate effectively, its “*establishment at constitutional level in a text guaranteeing the essence of the characteristics [...], with elaboration and protection of these characteristics in the enabling legislation and statute of office*”. Regrettably, there is no such constitutional basis for the Moldovan PA.

22. However, a constitutionally defined mandate and status are essential, especially in a young democracy, for the consolidation and strengthening of this institution and its efficiency, for its stability and its independence, as well as for its appearance of independence and impartiality. Previous recommendations of the Venice Commission<sup>11</sup> and the AOMF resolution adopted in Dakar in November 2013<sup>12</sup> go in the same direction.

23. In view of the importance of this institution, instrumental in the protection of human rights in the Republic of Moldova, it is recommended to introduce such constitutional guarantees for the status and the essential elements of the Ombudsman institution in the context of a future revision of the Moldovan Constitution. These guarantees may be included either in the chapter on institutions or in that on human rights<sup>13</sup>.

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

24. The Venice Commission notes that, based on the Law n°52 of 2014, the Republic of Moldova switched from the previous system, with several Parliamentary Advocates, to the model of one single Ombudsman with general competence and, within the same office, a special - autonomous - Ombudsman for the protection of children’s rights. There are voices in the Republic of Moldova, supported by the Ombudsman Institution itself, claiming that, in the current socio-political context of the Republic of Moldova, the most suitable solution would be to replace the system of multiple ombudsmen by one single ombudsman, while strengthening the operational capacity of the institution with increased and more adequate resources.

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

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

<sup>11</sup> See 2011 Compilation, add reference

<sup>12</sup> Add reference

<sup>13</sup> See, for ex., Chapter IV of the Romanian Constitution on the ‘Advocate of the People’ under the Title II on Fundamental Rights, Freedoms and Duties, as well as the case of France, which Constitution provides in Article 71.1 that: “*Referral may be made to the Defender of Rights, in the manner determined by an Institutional Act, by every person who considers his rights to have been infringed by the operation of a public service or of a body mentioned in the first paragraph [...]* ».

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Republic of Moldova will be addressed in the specific comments relating to individual provisions of the Law.

## **B. Specific comments**

### **1. Chapter I. General Provisions**

#### ***a. The mandate of the People's Advocate***

##### *Competence of the People's Advocate over the private sector*

27. Under Article 1.1, the PA “*ensures the protection of all human rights and freedoms by the public authorities, by the organizations and companies, no matter of the type of property and the legal organizational form, by the non-commercial organizations and by decision-makers at all levels*”. This would mean that the PA is competent towards, in principle, any legal person in Moldova. This interpretation appears to be confirmed by Article 18.3 concerning the review of complaints.

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

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

30. In contrast, under Article 1.3, the competence of the special PA for children's rights (hereafter the CPA) appears to be confined to “*ensure the protection of child rights and freedoms, at the national level, by the central and local public authorities, by the decision making officials at all levels.*” This seems to suggest a far narrower jurisdiction than that of the “general” PA. This is not easy to understand since, in this particular area, there might actually be good reasons in some cases to extend jurisdiction to the private sector (private institutions with responsibility for children).

31. It is recommended that the issue of competence in relation to the private sector be sorted out and clearly specified in the law, both for the PA and the CPA.

##### *Relationship between the People's Advocate and the judiciary*

32. Also, at an initial reading, Article 1.1 seems to mean that the courts (the judiciary) are under the full jurisdiction of the PA. This would raise serious concerns, as it would be contrary to the requirement of independence of both the judiciary and the Ombudsman. However, this seems to be contradicted by Article 21.5 which includes among non-receivable complaints those under court trial for substantive examination (except those concerning “actions and/or inactions of the judge”) and those concerning “a tried matter, for which there is a sentence or a substantive court decision”.

33. It is therefore assumed, as it is understood also from Article 18.3 dealing with the competence for the review of complaints, that jurisdiction over the courts is not the intention of the Law. However, a clarification on this important issue in the text of the Law is strongly recommended, by more clearly stating that courts are excluded from the jurisdiction of the PA. At most, the Law should allow for a claim to the PA for questions relating to the administration of justice and, where appropriate, the execution of final judicial decisions. It is

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recalled that Recommendation 1615(2003), mentioned above recommends this separation in the following terms: “*ombudsmen should have at most strictly limited powers of supervision over the courts. If circumstances require any such role, it should be confined to ensuring the procedural efficiency and administrative propriety of the judicial system*”

***b. Functional independence and independence from other institutions***

34. Article 3.3 of the Law stipulates that the People’s Advocate shall not be obliged to provide explanations or to make statements in relation to cases that have been or are being examined, except for cases where such explanations or statements are necessary in the interests of the party whom he or she represents, or contain information of public interest. Article 36 .3 of the Law extends this clause to the staff of the PA’s Office.<sup>14</sup>

35. If the request refers to public explanations of his/her actions or non-actions in specific cases, imposing on the PA an obligation “to provide explanations or to make statements” other than the explanations provided by the PA himself/herself would indeed not be compatible with the unconditional independence of the Ombudsman institution as laid down in Article 3(1)<sup>15</sup> of the Law, or with Article 3(4), which categorically prohibits any interference with the PA’s activities.

36. On the other hand, the PA should obviously always be open to explain issues of public interest in relation to the activity of the institution. Therefore, this is without prejudice to the reporting obligations of the PA as foreseen in Article 29 of the Law as well as to the obligations resulting from the public’s right to information. Since Article 3.3 refers to explanations or statements on specific cases reviewed or under review, it is recommended, in order to avoid a too extensive interpretation of the exception foreseen by this provision (the cases where such explanations or statements are necessary in the interests of the party represented by the PA or contain information of public interest), to limit the scope of this exception.

37. Under Article 29, dealing with the PA’s obligation to issue an annual report on the protection and promotion of human rights and freedoms, the draft annual report must be subject to public debate at least a month prior to its submission to Parliament. In the request submitted to the Venice Commission, this requirement is considered to “*affect the independent opinion of the Ombudsman, and considerably prejudice the independence and credibility of the institution, but also the perception of the independence of the Ombudsman in society.*”

38. It is indeed a fundamental part of the functions of most Ombudsman institutions to present an annual report to Parliament (cf. also Recommendation 1615(2003)), and one of the purposes of this is usually to spark public debate on the work of the Ombudsman. The arrangement provided by the Law is purportedly aimed at improving the final report to be submitted to the Parliament as a result of a public debate, in other words at ensuring the quality and comprehensiveness of the report. While it appears somewhat unusual to make the draft report public prior to its submission to the Parliament since the Parliament is actually the recipient of the report (Article 29(1)), there are no European standards - or otherwise strong arguments - against such a practice. Since there is no obligation for the People’s Advocate to introduce amendments to the draft report before it is submitted to the Parliament, it would be difficult to consider that its prior publication could undermine the independence and credibility of the Ombudsman institution. It belongs to the PA alone to decide to what extent and how to reflect the issues raised by the public in the final report, paying all due attention to, amongst other considerations, the independence and the credibility of the institution.

<sup>14</sup> “*The Office staff can’t be obliged to submit explanations on matters reviewed by the People’s Advocate or under review.*”

<sup>15</sup> “*The People’s Advocate institution is autonomous and independent from any public authority, legal entity, no matter of the type of property and legal organization form, and any individual in the decision making position at all levels.*”



### ***c. Inviolability***

39. According to Article 4.1 of the Law, when performing their duties the People's Advocate and his or her Deputies shall not be prosecuted or held legally liable for opinions expressed and actions taken in conformity with the law. The Venice Commission has already stated that not only the Ombudsman and his/her Deputies, but also his/her staff should enjoy immunity from legal process in respect of words spoken or written and acts performed by them in their official capacity<sup>16</sup>. It is positive that Article 36.3 of the Law extends this functional immunity, as well as the above-mentioned clause in Article 3.3, to the staff of the PA's Office. Yet, it is recommended that the inviolability guarantee also include correspondence and means of communication of the Ombudsman, Deputies or the staff.

40. Furthermore, under Article 4.2, “[d]uring his/her mandate, the People's Advocate and his/her deputies may be under criminal investigations and trial for other deeds except those provided by Para. (1), but the People's Advocate cannot be apprehended, searched or arrested without the prior consent of the Parliament.” It is recommended that the same immunity applies to both the PA and the CPA and the two Deputies.<sup>17</sup>

41. In addition, to be in line with applicable standards, the immunity of the Ombudsman, Deputies or the staff shall also apply after the end of the Ombudsman or Deputies' mandate or after the members of staff cease their employment with the Ombudsman institution but only for acts performed during their time in office<sup>18</sup>. In the opinion of the Venice Commission, immunity is little worth if the PA should fear for arbitrary prosecution etc. as soon as his/her mandate expires. Hence, the immunity provided by Law should extend beyond the term of the PA. It is recommended that Article 4.1 and 4.2 be amended in line with the above recommendations.

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

## **2. Chapter II. People's Advocate Status**

### ***a. The establishment and functionality of the People's Advocate for the rights if the child***

43. According to Article 5.1 of the Law, the Parliament appoints two People's Advocates, “autonomous among them”, one of which being specialised in the protection of children's rights (the CPA). This autonomy presumably means that they exercise their jurisdiction completely independently of each other. However, the position of the CPA appears, in some respects, to be unclear and its declared “autonomous” status does not seem to be backed by institutional and financial independence. Furthermore, the CPA has no right to submit to the Parliament a separate report on his or her activities; rather, a chapter on the situation of the protection of children's rights shall be included in an annual report of the People's Advocate.

44. In addition, the internal arrangements within the PA Institution in the relation between the PA and the CPA seem to be unclear. Under Article 17.6, the CPA is “assisted by a special subdivision within the People's Advocate Office.” There seem to be no provisions otherwise to regulate the “internal” competences of the CPA in relation to staff administration, budgetary issues etc. For example, in Chapter VI on the PA's Office, it seems unclear whether “People's Advocate” means only the PA or the PA and the CPA. While this may not

<sup>16</sup> See CDL-AD(2011)034, *Joint opinion on the law on the protector of human rights and freedoms of Montenegro by the Venice Commission and the OSCE/ODIHR*, para. 12

<sup>17</sup> See e.g. CDL-AD(2009)043 – *Opinion on the draft amendments to the law on the Protector of Human Rights and Freedoms of Montenegro*, Venice, 9-10 October 2009, paragraphs 12, 27 and 29

<sup>18</sup> *Idem*

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be a practical problem (or it may be regulated elsewhere, for example in the *Regulations for the organization and operation of the Office*), it would be important to provide increased clarity in this respect.

***b. The People's Advocate mandate***

45. The Commission welcomes the provision in Article 5 establishing the term of 7 years for the tenure of the PA, without possibility for re-election/appointment. The principle of a single term indeed provides a safeguard contributing to the PA's independence and precluding the risk of accusations that his/her decisions/recommendations might be influenced by an interest in being reappointed. At the same time, as already pointed out by the Commission in relation to the status of Ombudspersons, since the PA "is neither a member of the judiciary nor an official of the executive power, there may be technical problems with offering him security of employment on an objective basis after the end of this term, and this is not dealt with the Law".<sup>19</sup>

***c. The selection and appointment procedure of the People's Advocate***

*Appointment criteria*

46. In addition to requirements such as the citizenship of the country, the knowledge of the state language, a clean criminal record and an excellent reputation, Article 6 stipulates, among the selection criteria for the PA function, that the candidate must have at least 10 years work experience and recognized activity in the area of promotion and protection of human rights. This criteria, as the requirement of a university degree or equivalent, without further specification, is appropriate and in accordance with the Venice Commission recommendations<sup>20</sup>.

47. A question arises however in relation to the age of the candidate for the PA function, i.e. whether it would be appropriate to specify an age limit for the beginning and/or the end of term for the PA. In this case a subsequent question would arise, namely that of the possibility for a candidate to be elected for a term when he/she reaches the age limit before the statutory term of office.

*The role of the Special Parliamentary Commission*

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

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

<sup>19</sup> CDL-AD(2006)038, *Opinion on Amendments to the Law on the Human Rights Defender of Armenia*, Venice, 15-16 December 2006, paragraph 29.

<sup>20</sup> See for ex. CDL(2001)083, *Consolidated Opinion on the Law on Ombudsman in the Republic of Azerbaijan*, Venice, 6-7 July 2001, paragraph 9 (see Compilation, page 5)

parliamentarians with decisive influence on the election of the PA.

*Majority of members of Parliament required for election of PA and CPA*

50. According to Article 8(2) of the Law, in order to be elected as People's Advocate, a candidate is required to get the majority of votes in the Parliament. This provision is not in line with the European standards. Recommendation 1615(2003) requires "*qualified majority of votes sufficiently large as to imply support from parties outside government.*" Also, the Venice Commission has repeatedly stressed that the election of an Ombudsman by a broad consensus in the Parliament would certainly strengthen the Ombudsman's impartiality, independence and legitimacy and contribute to the public trust in the institution<sup>21</sup>. Article 8.2 should therefore be amended in such a way as to require for the appointment of the People's Advocate a qualified majority in the Parliament. This may require a constitutional amendment.

*People's Advocate Oath*

51. The wording of the oath provided for in Article 9 of the Law includes, in addition to the classic sworn of civil servants, the commitment of the PA to be impartial in the exercise of his/her functions, which, in view of the nature of the function, is particularly welcome. At the same time, to avoid an interpretation that the People's Advocate should protect human rights in accordance "only" with the domestic law, it would have been advisable to include also a reference to the international human rights treaties in the text of the oath, as it is laid down in Article 2.1 of the Law on the principles underlying the activity of the People's Advocate and with Article 12 on his/her obligations.

***d. Incompatibilities with the position of People's Advocate***

52. Article 10.1 of the Law provides that in principle, the PA and his Deputies may not hold any other public or private professional activity, except a teaching, scientific or artistic activity. It would be important to ensure that the accessory activity shall in no way prevent or restrict the exercise of the main function or undermine the impartiality or the appearance of impartiality of the PA.

***e. People's Advocate Rights***

53. Articles 11 and 22 of the Law confer broad powers on the PA relating sometimes to more sensitive areas, access to institutions and officials dealing with such issues as well as related premises and documents (see Article 11.b on the right to "get the audience immediately from heads of institutions" including military bases, placement centres for immigrants and asylum seekers, police inspectorates and their detention places, penitentiary institutions, criminal isolators", Article 11. i and j on the free access to such institutions and places or Article 11.k on access to all levels of information including the state secret category). These powers (designated in the Law as "rights" of the PA) should be read in connection with the People's Advocate "duties" listed under Article 16.

54. The PA is entitled to give its opinion on the legislation in force in the Republic of Moldova in the field of fundamental rights and to make recommendations aiming at improving this legislation, to represent individuals or groups in courts and before other public institutions in complex cases concerning fundamental rights or on issues of public interest. The PA is entitled to appeal to the Constitutional Court, to seek for amicable solutions, to make recommendations to the Parliament and the Government, to present an annual report and special reports on particularly problematic issues as well as to ask for the creation of special parliamentary commissions to investigate cases of "mass or severe violations of human rights and freedoms" (Article 22.2).

<sup>21</sup> See CDL-AD(2011)034, paragraph 16

55. Furthermore, as provided by Article 11.g, the PA has the right “to act *ex officio* in cases provided by law”. The scope of this important right is specified in Article 22.1, stipulating that such action may be taken “[i]n the case of having information on the mass or severe violation of the human rights and freedoms, in the cases of special social importance or in the case when is needed the protection of the interests of people who cannot use on their own legal defence means”. (See more specific comments under the Chapter IV below).

56. In view of the wide range of tasks of the PA institution (including the protection of the rights of the child and that of national prevention mechanism under OPCAT), it is essential on the one hand, to ensure that the Office is provided with sufficient financial and human resources to fulfil these tasks and, on the other hand, to create the conditions necessary for it to develop constructive institutional relations and co-operation with the various public institutions concerned by its activities.

#### ***f. Rank and remuneration of the People’s Advocate***

57. Article 13.2 of the Law implies that the status and remuneration of the PA are equivalent to those of a judge of the Supreme Court. This provision provides for an appropriately high rank for the Moldovan Ombudsman and is in line with the European practice in this field. In this regard, the concern raised in the request for opinion that a pending draft law (on amendment and completion of some legislative acts) would provide a lower remuneration for the PA than that of a Supreme Court judge appears to be legitimate; such an arrangement would undermine the letter and the spirit of the above-mentioned Article 13.2 of the Law. In this connection, the Venice Commission recalls the general principles laid down in relation to the status, rank and remuneration of the Ombudsman in its previous opinions dealing with this institution. As noted by the Commission, “[t]here is no European standard as to the status of the Ombudsman, besides as concerns its independence. Indeed, there are a variety of ways of establishing such status in Europe. However, whatever status the Ombudsman institution is assimilated with - the judiciary or public officials – it is always given an appropriately high rank, which is also reflected in salary levels. The issue of setting the ombudsman’s remuneration is an issue both of public respect and of independence of the institution.”<sup>22</sup>

#### ***g. Early termination of the mandate of the People’s Advocate***

##### *Grounds for early termination of the mandate*

58. Article 14.4 of the Law specifies several grounds for the PA’s revocation: one of such grounds is “*actions incompatible with the People’s Advocate’s status*”. This is a very vague criterion for early termination of the PA mandate. This formulation should be better specified and narrowly interpreted so as to cover only serious misconduct by the People’s Advocate.

##### *Termination procedure*

59. Beyond the vagueness of the above-mentioned revocation ground, a serious concern is raised by the procedure of dismissal of the PA as foreseen in the Law: according to Article 14.3, the People’s Advocate can be removed from office by a majority of 3/5 of the total number of parliamentarians, upon a proposal backed by 20 deputies only (out of 101 parliamentarians in the current legislature).

60. Seen together, the ground and the procedure appear to pose a potential threat on the independence of the PA (and CPA). 3/5 is a moderate qualified majority and, as recommended above, the qualified majority required for termination should be at least equal

<sup>22</sup> See CDL-AD(2004)006, *Opinion on the Status and Rank of the Human Rights Ombudsman of Bosnia and Herzegovina*, Venice, 12-13 March 2004, paragraphs 9, 10, 16.

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to (and preferably higher than) the qualified majority required for election<sup>23</sup>. This is fundamental for protecting the legal status of the PA, particularly his or her independence, and for preventing the politicisation of his or her possible dismissal. It is recommended to amend the Law so as to clearly state that the PA can only be dismissed by a 2/3 majority of the members of the Parliament.

61. Another concern related to the issue of dismissal of the PA is that the Law does not provide for the right of the PA whose dismissal is envisaged to be heard prior to the vote on the dismissal in Parliament. It is recommended that a procedure be prescribed ensuring public hearings so that the case, as well as the views of the PA (and CPA), are made public. In addition, although the decision on early termination should rightly be made by the Parliament, there should be a procedure for challenging this decision at the courts (presumably the Constitutional Court)<sup>24</sup>.

62. Moreover, the Law does not stipulate whether, in case of dismissal of the People's Advocate, the two Deputies as appointed under Article 15 of the Law may fulfil his or her functions until a new People's Advocate is appointed.

63. Article 1.1.f also raises the potential issue of the need to replace the PA (CPA) during the duration of any judicial proceedings brought against him/her. As the court decision must be final to result in revocation, such legal proceedings may involve several months or even years after their initiation. The Law should address such a situation.

### **3. Chapter IV. The exercise of duties of the People's Advocate**

#### ***a. The right to act ex officio***

64. The basic "duties" (or rather functions) of the PA are listed in Article 16. The launching of own-initiative investigations, an essential feature of an Ombudsman institution (see Recommendation (1615)2003, paragraph 7.2), is not specifically mentioned among these duties. However, as previously mentioned, this important power of the PA is mentioned in Article 11.g among the rights of the PA, and further specified in Article 22.1 of the Law. As already indicated, its scope covers mass or severe human rights violations and complex cases of special social importance, and cases where there is a need to protect interests of people who cannot use on their own legal defence means. In the view of the Venice Commission, the Moldovan Law sets an unusually high threshold for the right of the PA to act *ex officio*, although own-initiative investigations would be relevant in many other situations. It is recommended to reconsider this approach and to amend the Law accordingly.

65. It is on the other hand noted that, under Article 17 of the Law, the CPA is rightly entitled, in order to ensure protection of the rights and freedoms of the child, to act *ex officio* "in order to help the child in difficulty or at risk without seeking the parents' or legal representatives' consent".

#### ***b. Right to complain before the People's Advocate***

66. Article 18.1 of the Law provides that physical persons who have or had permanent or temporary residence on the territory of the Republic of Moldova may submit complaints to the PA.

67. There are two concerns with regard to this provision. First, this provision only refers to complaints by individuals, which means that legal persons cannot complain to the PA (or

<sup>23</sup>See 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*, Venice, 3-4 December 2004, paragraph 19. See also Venice Commission on the Ombudsman Institution, p. 14

<sup>24</sup>Idem, paragraphs 12 and 19

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CPA). Such limitation makes little sense, and it would be a fundamental impediment to exclude legal persons - including NGOs - from the protection of the PA. This limitation should be reconsidered so as to ensure that not only individuals, but also legal persons (e.g. political parties, NGOs) should be entitled to lodge complaints with the PA alleging a violation of their rights and freedoms, as recommended by the Parliamentary Assembly in its *Resolution 1959 (2013) on Strengthening the institution of ombudsman in Europe*.<sup>25</sup>

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

69. Article 21.5.e stipulates that persons declared incapable by a court decision may not submit complaints to the People's Advocate. In November 2014, this provision was found to be unconstitutional by the Constitutional Court of Moldova.<sup>26</sup> The decision of the Constitutional Court should be duly implemented.

### ***c. Reporting on the protection and promotion of fundamental rights***

70. Article 29.7 of the Law provides that the People's Advocate shall contribute to the periodical reports that the Government of the Republic of Moldova is required to submit to international and regional human rights bodies and institutions. As long as it is interpreted and applied in line with the principle 3(d) of the "Paris Principles", in particular the independence related clause contained therein<sup>27</sup>, this provision does not raise any particular problem.

## **4. Chapter VI. People's Advocate Office**

71. As established by Article 35 of the Law, the organisational and administrative activity of the Office is lead by the Office's Secretary General, appointed by the PA following a public selection. The Secretary General has a public servant status and, as indicated by the Law (article 35.1), his duties are provided in the Regulations for the organisation and operation of the Office.<sup>28</sup> At the same time, as established by the Law in its Article 36.6, the staff of the PA's Office operates in the framework of the *Law no. 80 of 7 May 2010 on the Status of the Staff of the Office of High Ranking Officials*.

72. According to Article 35.3 of the Law, "the release of duties of the Secretary General, the application of the stimulating and sanctioning measures towards him/her are done by the People's Advocate". The Law provides no indication with regard to the grounds on which such measures may be taken. It is recommended to make sure that the Secretary General is also covered by the guarantees provided by the *Law no. 80 of 7 May 2010* above-mentioned, in particular as regards the revocation measures.<sup>29</sup>

73. Article 37.5 of the Law provides that the PA's Office may be financed from other sources than the State budget, on the sole condition of not being prohibited by law. This provision is inappropriate as the independence and the appearance of independence of the PA may be affected negatively. It is recommended to amend this article so as to exclude financing from other sources than the State budget. In addition, the Law should provide that the budgetary allocation should be adequate to the need to ensure full, independent and effective

<sup>25</sup> See *Resolution 1959 (2013) on Strengthening the institution of ombudsman in Europe*, paragraph 4.1.6

<sup>26</sup> See Decision no.27 of 13.11.2014 for the review of the constitutionality of article 21 alin. (5) lit.e) of the Law no. 52 of 3 April 2014 on the people's Advocate (the Ombudsman).

<sup>27</sup> "To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, **with due respect for their independence**" (emphasis added).

<sup>28</sup> The *Regulations for the organization and functioning of the Office* are approved by the Parliament (Article 34.3 of the Law);

<sup>29</sup> Law No. 158 of 04.07.2008 of the Republic of Moldova (as amended) on the public function and the status of civil servant

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discharge of the tasks of the institution, based on indicators such as the number of complaints lodged with the PA in the previous period of reference.<sup>30</sup>

74. It is also noted that, under Article 37.3 of the Law, “*the reduction of the approved costs related to the Office activity is allowed only by the Parliament decision*”. Given the particular significance of the financial provision of the PA’s Office for the independence of the institution, it would be important to add a clause in the Law stating that the public authorities should not use the budgetary process for allocating/reducing funds from the budget in a manner that interferes with the independence of the PA institution<sup>31</sup>.

#### IV. CONCLUSIONS

75. The adoption in 2014, by the Republic of Moldova, of a new legal framework for the operation of the Moldovan Ombudsman is a step forward in the efforts made to reform this institution, with a view to strengthening it and making it more effective. Deciding for the most suitable model of Ombudsman institution belongs to the national legislator. The Moldovan Parliament has made the choice for a national Ombudsman with overall competence, the People’s Advocate, and, within the same Office, an autonomous People’s Advocate for the protection of the rights of the child.

76. Overall, the provisions of the 2014 Law are in accordance with the applicable standards. The Venice Commission finds it commendable that, when adopting a legislative framework for the newly designed institution, the Moldovan legislator drew on the key internationally recognised principles relating to the status and the activities of Ombudsman-type institutions, as laid down in the *Paris Principles*. The Law therefore contains important guarantees as regards the mandate of the People’s Advocate, its competence (increased with the task of prevention of torture and other cruel, inhuman or degrading treatment) and its operation methods, and reflects a clear effort to strengthen the institution’s independence. Some provisions of the Law being very detailed, they could better find their place in a statutory instrument.

77. Nonetheless, to provide conditions for making the above guarantees more effective, it would be important to adopt, in the context of a future revision of the Moldovan Constitution, specific constitutional guarantees for the status, mandate and competences of the Ombudsman, as recommended by the internationally agreed principles governing the establishment and the functioning of such institutions.

78. As regards the 2014 Law, a number of important issues should be further examined and clarified and relevant provisions of the Law further improved:

- to provide stronger guarantees for the independence of the institution, the qualified majority of the Parliament should be required for the election of the People’s Advocate (and the People’s Advocate for the rights of the child); the early termination decision should be adopted with a higher qualified majority, be based on more clearly specified grounds, preceded by public hearings and involve a challenging procedure in court; wider immunity guarantees should be provided to the People’s Advocate (and the People’s Advocate for the rights of the child), the two Deputies and the staff of the Office; financial and stable resources suited to its responsibilities should be provided solely by the state budget;
- the position of the People’s Advocate for the rights of the child and his/her autonomous status should be further specified, as well as his/her operation within the Office of the People’s Advocate;

<sup>30</sup> See CDL-AD(2007)020, Opinion on the possible reform of the Ombudsman Institution in Kazakhstan, Venice, 1-2 June 21007, paragraph 30.VI

<sup>31</sup> See CDL-AD(2006)038, paragraphs 80-81

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- the competence of the institution in relation to the private sector and the courts should be sorted out and clearly specified in the Law, both for the People's Advocates and the for the protection of the rights of the child. In particular, jurisdiction over courts must be excluded and the related Ombudsman competence limited at most to issues concerning the judicial administration and, where appropriate, the execution of final judicial decisions;
- any person under the jurisdiction of the Republic of Moldova (and not only those residing or having resided on its territory) should be entitled to lodge complaints with the People's Advocate and this right should be extended to legal persons;

79. The Venice Commission remains at the disposal of the Ombudsman of the Republic of Moldova for any further assistance in this issue.