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

**OPINION**

**ON THE DRAFT LAW  
ON OMBUDSMAN FOR HUMAN RIGHTS**

**OF BOSNIA AND HERZEGOVINA**

**Adopted by the Venice Commission  
at its 104<sup>th</sup> Plenary Session  
(Venice, 23-24 October 2015)**

**on the basis of comments by:**

**Mr Latif HUSEYNOV (Member, Azerbaijan)**  
**Mr Jean-Claude SCHOLSEM (Substitute Member, Belgium)**  
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## I. Introduction

1. On 29 July 2015, the Minister of Human Rights and Refugees of Bosnia and Herzegovina requested the opinion of the Venice Commission on the Draft Law on Ombudsman for Human Rights in BiH (hereinafter: "the draft law")<sup>1</sup>.
2. Mr L. Huseynov, Mr J.S. Sørensen and Mr J.Cl. Scholsem have been invited to act as Rapporteurs for this opinion.
3. On 10-11 September 2015, a delegation of the Commission visited Sarajevo. It held a number of meetings with State authorities, including the Minister of Human Rights and Refugees and the relevant Parliamentary Committees, as well as with representatives of the Ombudsman Institution and of the civil society. The Venice Commission is grateful to the various stakeholders for their cooperation during the visit.
4. The present opinion was adopted by the Commission at its 104<sup>th</sup> Plenary Session (Venice, 23-24 October 2015).

## II. Preliminary remarks

### A. Background

5. The Ombudsman Institution for BiH (hereinafter: "BiH") was established under Annex 6 of the Dayton Peace Agreements as one of the two branches of the Commission on Human Rights (Article II, Para. 1 of the Constitution of B&H and Annex 6 of the Dayton Agreements, Chapter II, Part A)<sup>2</sup>. In accordance with Annex 6 of the Dayton Agreement, the first Ombudsman was to stay in office for five years, until the transfer of responsibility has taken place. He or she could not be a citizen of BiH or of any neighbouring state.
6. On 3 January 2001, the Law on the Human Rights Ombudsman of BiH came into force, replacing the relevant part of Annex 6 of the Dayton Peace Agreements. A new law was adopted in 2002 and then amended in 2004 and 2006. The law, as amended, provides the current legal basis for the organization of the institution, its powers and its operation.
7. In this framework, the first domestic Ombudspersons<sup>3</sup> were appointed in November 2003 and the new institution started its work on 1 January 2004. The Ombudsman institutions in BiH have gone through a complex and complicated reform process aimed at unifying them into a single Ombudsman at the State level. The process of merger was finalized in 2010, when Entity Ombudsman institutions ceased to operate.
8. Currently, in line with the law in force, the functions of the unified institution are being exercised by three Ombudspersons appointed in 2008 (from the ranks of the three constituent peoples) for a term of six years. Pending the election of three new Ombudspersons by the National Assembly of BiH, their term was extended.
9. The Commission was informed that, in accordance with the BiH Council of Ministers Plan of Activities for 2014, the Ministry of Human Rights and Refugees of BiH formed a working group tasked with drafting amendments to the Law on Ombudsman, with a view to ensuring its

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<sup>1</sup> CDL-REF(2015)037, Draft Law on Ombudsman for Human Rights in Bosnia and Herzegovina, Strasbourg, 24 September 2015

<sup>2</sup> The other one being the Human Rights Chamber

<sup>3</sup> In the present Opinion, the term *Ombudsperson* is used without prejudice of the term « ombudsmen », used in the draft law under examination. It is noted however that, as indicated in article 3 of the draft law, the term *Ombudsmen* shall equally apply to male and female gender.

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conformity with the applicable standards (in particular the Paris Principles<sup>4</sup>). Indeed, the institution currently enjoys the status „A“ granted by the International Coordination Council of National Institutions for Human Rights (ICC), but a re-evaluation of that status was foreseen for 2015.

10. As indicated in the request letter, “*Recommendations of the ICC<sup>5</sup> and the Council of Europe bodies to the authorities of BiH indicate the necessity to intensify their efforts in reorganizing and strengthening the Institution of the Human Rights Ombudsman of BiH, in the manner that the Member State shall:*

- a) *Adopt an open, more consultative process for the selection and appointment of Ombudsmen, guaranteeing independence of the Ombudsmen in accordance with the Paris Principles;*
- b) *Ensure adequate human and material resources;*
- c) *Develop capacities of Institution of the Human Rights Ombudsman of BiH;*
- d) *Ensure that the Institution of the Human Rights Ombudsman of BiH enjoys financial independence, including adequate financial and human resources in proportion to the additional tasks assigned.*

*The CESCR<sup>6</sup>’s recommendation outlines concerns with regards to the lack of independence of the Institution of the Human Rights Ombudsman of BiH, which is managed by Ombudspersons appointed by the BiH Parliamentary Assembly, representing three constituent peoples of BiH and which does not express a unique, common approach to protection of human rights for the Member State.”*

11. Although the Venice Commission already assessed a previous version of the current law and related draft amendments<sup>7</sup> and repeatedly provided assistance to the authorities of BiH in the process of reforming the Ombudsman Institution, it was considered necessary to request its opinion on the current text of the law, as a way to assist the authorities in drafting the new amendments. Subsequently, in view of the important number of the amendments, it was decided, as required by the domestic regulations, to draft an entirely new law on the Ombudsman Institution.

12. The aim of the present opinion is not to address in an exhaustive manner all provisions of the draft law, but to address the main issues which, in the view of the Venice Commission, require further consideration and improvement. The present opinion is based on the English translation of the draft law, as provided by the authorities of BiH. Since the translation may not accurately reflect the original version on all points, some of the issues raised may find their cause in the translation rather than in the substance of the provisions concerned.

13. It should also be noted that the Commission was provided several successive versions of the draft law. The text under examination in the present Opinion<sup>8</sup> having been submitted to the Rapporteurs after their visit to BiH, it was not possible to discuss certain proposed amendments, in their last version, with the authors of the draft or other concerned stakeholders. These include *inter alia* the new proposed concept for the organization, composition and functioning of the Ombudsman institution and the provisions governing the

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<sup>4</sup> Principles relating to the Status of National Institutions (The Paris Principles), adopted by General Assembly Resolution 48/134 of 20 December 1993,

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

<sup>5</sup> International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights

<sup>6</sup> UN Committee on Economic, Social and Cultural Rights

<sup>7</sup> See CDL-AD(2004)031, Opinion on the Draft Law on Amendments to the Law on Ombudsman for Human Rights in Bosnia and Herzegovina; see also CDL-AD(2004)006, Opinion on the Status and Rank of the Human Rights Ombudsman of Bosnia and Herzegovina

<sup>8</sup> CDL-REF(2015)037, Draft Law on Ombudsman for Human Rights in Bosnia and Herzegovina, Strasbourg, 24 September 2015

operation of the Institution as national prevention mechanism under the OPCAT<sup>9</sup>. Moreover, the process of election of three new Ombudspersons, currently taking place in the framework of the existing law, might impact on the interpretation and application of the provisions of the draft law in a way which was difficult to assess at the date of the adoption of the present opinion.

## B. Standards

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

15. Notwithstanding 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.

16. 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*”. As to date, these Principles represent the most widely followed guidelines outlining the basic elements of any national human rights institution. Various typical features of Ombudsman institutions have also been listed, in its bylaws, by the International Ombudsman Institute (“IOI”).<sup>10</sup>

17. The Venice Commission has on various occasions assessed legislative provisions regulating the operation of Ombudsman institutions in Council of Europe member states<sup>11</sup>. As already indicated, the Commission has adopted several opinions on the legal framework pertaining to the Ombudsman Institution in BiH and accompanied the authorities of BiH in their efforts to improve the organization and functioning of this institution, unify it and bring it in line with the European and international standards.

18. More generally, the Council of Europe has always paid particular attention to the ombudsman and national human rights institutions (‘NHRIs’) and 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. These include various recommendations of the Committee of Ministers and of the Parliamentary Assembly of the Council of Europe, such as the *Recommendation No. R (97) 1412 of the Committee of Ministers, encouraging member States to consider the possibility of establishing effective national human rights institutions*, and the *Recommendation no. 1615(2003) of the Parliamentary Assembly on the Institution of Ombudsman, in which the Parliamentary assembly highlighted certain characteristics which are essential for any Ombudsman institution to operate effectively*.

19. More recently, in its *Resolution 1959 (2013) on Strengthening the institution of ombudsman in Europe*, the Parliamentary 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.<sup>13</sup>

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<sup>9</sup> Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted on 18 December 2002 by the General Assembly of the United Nations by resolution A/RES/57/199, entered into force on 22 June 2006

<sup>10</sup> See <http://www.theioi.org/the-i-o-i/by-laws>.

<sup>11</sup> See (CDL(2011)079), Venice Commission, *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>12</sup> <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&%20InstranetImage=567349%20%20&SecMode=1&DocId=578706&Usage=2>

<sup>13</sup> See *Resolution 1959 (2013) on Strengthening the institution of ombudsman in Europe*, paragraph 3

### III. Specific remarks

#### A. Independence and operation principles

20. Article 5 of the draft law lays down the institutional and individual independence of “the Institution and the Ombudsmen” (organisational, administrative and financial<sup>14</sup>) as a founding principle for the Institution, and specifies how this must be translated into practice: “the Institution and the Ombudsmen shall be independent and autonomous in their work”, free from any form of influence, instructions or order by any authorities of BiH. Their activity should moreover be governed, as operational principles, by the respect for justice, equality, morality, and impartiality.

21. The distinct mention of the Institution *and* the individual Ombudspersons may be understood, in view of the particular setting of this institution in BiH, as a (necessary) additional safeguard for their independence. Further, more specific independence guarantees may be found in the rules on immunity, incompatibilities, staffing and funding of the institution.

22. In line with a legitimate and widespread practice, article 5.2 provides that “**the Institution and the Ombudsmen**” shall report for their work **only** (emphasis added) to the BiH Parliamentary Assembly. In this case, mentioning both the Institution and the individual Ombudspersons is problematic from the perspective of unified Ombudsman Institution (which remains a key desideratum of the current reform). It is only the institution, and not the individual Ombudsman that should report to the BiH Parliamentary Assembly. It is recommended to delete the terms “and the Ombudsmen” from this provision.

23. Also, it would be advisable to harmonize this provision and those of article 42 of the draft law, dealing with the reporting obligations, under which **the Institution** should submit its annual report not only to the House of Representatives of BiH and the House of Peoples of BiH, but also to the Presidency of BiH, to the Parliament of the FBiH, to the National Assembly of the Republika Srpska and the Assembly of Brcko District of BiF. Presumably, the report will be transmitted to other institutions than the BiH Parliamentary Assembly for information purpose only. It is true, however, that an obligation to discuss the report in a special session is only imposed on the Joint Committee on Human Rights of the Parliamentary Assembly (see article 43.4).

24. The reference (in article 5.3) to the international acts on human rights and freedoms, as part of the Institution’s work frame, is a welcome provision.

#### B. Mandate

25. As stipulated in article 6 of the draft law, the Ombudsman Institution “shall have jurisdiction”<sup>15</sup> for: a) protection of human rights; b) promotion of human rights; c) preventive mechanism. According to article 7.2, the Ombudsman Institution has also the status of central institution for the protection against discrimination in accordance with the 2009 *Law on Prohibition against discrimination* (“Official Gazette BiH” no. 59/09). However, no indication is provided with regard to its competences under this framework. One may infer that, as for the function of “preventive mechanism”, the anti-discrimination powers of the Ombudsman and related procedures will be regulated by the Institution itself in its “Rulebook” (to be adopted by the Lead Ombudsman within 180 days following his/her appointment).

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<sup>14</sup> See article 5.4

<sup>15</sup> It is suggested, from a technical point of view, to reconsider the term “jurisdiction”, which seems to be confused with the competences/powers or the mandate of the Ombudsman. This seems to be confirmed by article 6.2, stating that the Institution may also exercise other functions and competencies required by other laws.

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26. As it results from articles 6 to 11, the competences of the Institution also include the right to legislative initiative and to provide opinion on draft legislation, public policies and other regulations in the area of human rights, and the right to initiate constitutionality review by referring to the entities entitled to file requests with the Constitutional Court. In the view of the Venice Commission, it would be advisable to reconsider the structure of the draft law with a view to including all Ombudsman powers under one specific chapter devoted to its mandate.

27. As already indicated, the draft law now also provides a legal basis for the activities of human rights promotion (article 8) carried by the Ombudsman and its functions as a preventive mechanism under the OPCAT<sup>16</sup> (article 9), activities and functions that are not expressly provided for in current law. This is to be welcomed as an illustration of the authorities' commitment to implement the recommendations addressed to the Institution in the process of re-accreditation as NHRI, as well as the most recent *ICC General observations regarding the mandate of Human Rights Institutions*<sup>17</sup>, stressing that "a national Institution shall be vested with competence to promote<sup>18</sup> and protect human rights", and „shall be given as broad a mandate as possible“. Separate and detailed sections are devoted to these functions.

### **Promotion of human rights and Preventive mechanism**

28. It is recommended to specify, in article 6, that the mandate of the Ombudsman Institution covers not the "[national] preventive mechanism" as such, but prevention of torture and other cruel, inhuman or degrading treatment or punishment. As stated in article 9, the Ombudsman Institution will itself perform tasks of the preventive mechanism. Moreover, article 9 should also stipulate one of the essential features of a national preventive mechanism foreseen in the OPCAT, i.e that it visits places of deprivation of liberty on a regular basis. Also, the reference to the participation of representatives of civil society organizations and the academia in the work of the preventive mechanism should be further specified, in particular as regards the manner in which this participation is expected to take place.

29. Moreover, article 8 dealing with the promotional function of the Institution should be redrafted in such a way as to ensure that the list of activities by which this function is carried out is not exhaustive.

30. Finally, while welcoming that the draft law now provides a legal framework for the Ombudsman activities' in the two above areas, it is important to stress that this will necessarily have implications for important aspects of the Institutions' work, including funding, staff recruiting or reporting. Adequately addressing these and other related aspects, both at practical and at legislative level, is essential for the Institution's ability to perform its role independently and effectively in these spheres of competence.

### **Legislative initiative**

31. Article 10 provides a wide range of actions enabling the Ombudsman Institution to play an active role in ensuring compliance of laws, public policies and other regulations of BiH with the Constitution, as well as with international human rights legal instruments. These include monitoring of the legislation and policy in the field, the right to propose adoption or amendment of legislation or policies, to provide opinion on draft legislation and to participate in the work of the legislative bodies and their structures when human rights issues are at stake. For the reasons explained in relation to article 5.2, it is recommended to replace the word "Ombudsman" in article 10.1, with "The Institution".

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<sup>16</sup> Optional Protocol of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

<sup>17</sup> International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights - ICC *Sub-Committee on Accreditation General Observations*, Geneva, May 2013

<sup>18</sup> Emphasis added

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32. The obligation, in article 10.3, on the relevant legislative bodies to consider the initiatives submitted by the Ombudsman, and to report on the follow-up given to them, is a welcome provision, likely to help to increase the impact the Ombudsman intervention and to enhance public trust in this Institution.

33. It is positive also, in view of the specialized expertise of the Ombudsman, that the Institution may exercise its right to legislative initiative any time *“when in the course of the exercise of their jurisdiction it deems necessary”*, without being under the obligation to wait for the annual report to make use of this right, as in previous drafts. This will undoubtedly help the Institution to more timely act to respond to new needs in society and, more generally, to more effectively fulfil its mandate.

34. The formulation of the right of “legislative initiative”, described in article 10.2 as encompassing also “public policies and other regulations” might be too broad. The Ombudsman right to initiate or make amendment proposals regarding public policies of relevance to its work may be regulated in other provisions of the draft law (for example, those regulating the recommendations issued by the Ombudsman Institution or its annual or special reports). It is recommended to redraft article 10.2 to define in a more precise manner the Ombudsman’s right to legislative initiative.

35. Further, as foreseen in the Paris Principles, the law should specify that the Ombudsman is authorised to encourage the Government to ratify or accede to relevant international instruments and to ensure their implementation.

#### ***Initiative for abstract control of constitutionality***

36. Provision is made in article 11 for the possibility for the Ombudsman Institution, within the scope of its competences, to refer to the entities authorised by the Constitution of BiH<sup>19</sup> to bring matters before the Constitutional Court, with the request to initiate a constitutionality review, by the Constitutional Court, of laws and other regulations that raise issues affecting human rights and freedoms. This provision, providing the Ombudsman with a kind of “indirect access” to the Constitutional Court, is a welcome step forward. However, the Venice Commission has repeatedly stated that, from the perspective of human rights protection, the Ombudsman should be granted the right to refer itself to the Constitutional Court and should be able to do this of his or her motion or triggered by a particular complaint made to the Institution<sup>20</sup>.

37. The Commission therefore recommends that, in the context of a future amendment of the Constitution of BiH, the constitutional provisions regulating the access to the Constitutional Court be amended to enable the Ombudsman Institution to initiate proceedings before the Constitutional Court. As regards the current draft law, it is recommended that article 11.2, obliging the entity that receives the Ombudsman’s proposal to issue a response, also envisage the deadline for such a response.

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<sup>19</sup> According to article VI.3.a of the BiH Constitution, “[d]isputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.”

<sup>20</sup> See CDL-AD(2010)039rev, Venice Commission, Study on individual access to constitutional justice, § 64; See also: 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, § 7; CDL-AD(2007)020, Opinion on the possible reform of the Ombudsman Institution in Kazakhstan, §§ 14 and 19; CDL-INF(2001)007, Memorandum on the Organic Law on the Institution of the Ombudsman of the Federation of Bosnia and Herzegovina, §7 and CDL-INF(2000)9, Opinion on *Locus Standi* of the Ombudsman of the FBiH before the Constitutional Court of BiH



## C. Composition, division of duties, appointment and term of office

### 1. Composition

38. The draft law, while maintaining the current system of a multiple Ombudsman under one single (unified) Institution, tries to propose a solution to address current issues of pluralism and discrimination, as well as of independence and efficiency, having raised criticism on domestic and international levels. The above concerns are *inter alia* linked to the fact that the composition of the Institution has so far never included an Ombudsman elected from among the "Others".

39. It is recalled that, under the current law, "[t]he Ombudsmen shall be appointed from the ranks of the three constituent peoples (Bosniaks, Serbs and Croats), which does not preclude the possibility of appointing an ombudsman from the ranks of "others"". This poses a challenging organizational problem. Within the present system, although the law is silent on the decision-making method, there has been agreement between the three Ombudspersons to take each of their decisions by consensus, a choice which makes the adoption of decisions long and cumbersome. In practice, files considered too politically sensitive (as for example that of the segregation in schools) are not treated at all, for lack of consensus. Although such files constitute a very small part of the Institution's work, this type of "denial of justice" tarnishes the prestige of the Institution, as well as the public confidence in its ability to address more controversial issues impartially. It is true at the same time that, should the Ombudspersons agree to freely decide individually on all issues, according to a pre-established competency framework, the consistency and stability of the Institution's "case law" might have to suffer.

40. At the level of principles, the Venice Commission has always advocated the diminution of the number of Ombudspersons, the final goal being a single Ombudsman. However, the particularities of the situation in the country concerned do not always allow the implementation of this solution in the short-term and a multiple Ombudsman - or even a plurality of Ombudsman institutions - is in some cases unavoidable.

41. In this connection, the Commission pointed 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.*"<sup>21</sup>

42. Article 12 of the draft law provides for the appointment, by the Parliamentary Assembly of BiH, of a Lead Ombudsman and three Ombudspersons "*from the constituent peoples and others*", instead of three Ombudspersons, within the present system. The Lead Ombudsman cannot be appointed from the same constituent people or "Others" for two consecutive mandates (article 12.3).

43. Although not in line with the position of principle of the Venice Commission, in view of the specific conditions prevailing in BiH, the proposed system may be seen as an improved model, likely to help to address the main shortcomings facing the current system. In particular, by increasing the number of Ombudspersons from three to four, it provides opportunities for persons belonging to the category of "Others" to be appointed as Ombudsman or Lead Ombudsman and an incentive (if not an indirect obligation) for the Parliamentary Assembly to make use of this option when electing the Ombudspersons. In order for the future law to truly

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<sup>21</sup> See CDL-AD(2015)017, Opinion on the Law on the People's Advocate (Ombudsman) of the Republic of Moldova, § 25

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achieve this goal, it would however be advisable to specify that there cannot be more than one person, among the four Ombudspersons, from the same constituent people or from the ranks of the "Others". It is recalled in this connection that, if issues of pluralism and discrimination have been raised with regard to the composition of the Ombudsman institution, these are not due to the current law, which "*does not preclude the possibility of appointing an ombudsman from the ranks of "others"*" (article 7 of the current law).

44. Finally, whether the proposed model will prove suited to the situation in BiH will very much depend on other key elements concerning the organisation and the operation of the Ombudsman Institution. These include: the criteria for selecting the four Ombudspersons, the guarantees provided for individual and institutional independence of the Ombudspersons, the duration of the mandate, the cooperation modalities (distribution of duties) between them, the respect for the principle that the assignment of files should not be made on ethnic basis, the cooperation with the various public institutions etc.

45. In practical terms, the appointment of the future Lead Ombudsman could prove to be very difficult, in the light of the significant powers assigned to this function, and taking account that the requirements for being elected to this function do not differ from those for the position of Ombudsman (see article 13). How to choose the most suitable person for this very specific function among the best four candidates? One way out could be to elect four Ombudspersons and leave it to them, once appointed, to elect the Lead Ombudsman among them, and perhaps also to provide for dead-lock solutions should these be needed.

46. Difficulties could also arise if, before the adoption of the future law, three Ombudspersons will have already been elected under the current law (see comments under Transitional and Final Provisions).

## **2. Division of duties**

47. The division of duties between the Lead Ombudsman and the three Ombudspersons under the proposed system is set out in Chapter IV of the draft law, dealing with the management, the strategy and the internal organisation of the Institution. For a better understanding of the whole concept of the newly shaped Institution, it might be preferable that the respective roles of the Lead Ombudsman and the three Ombudspersons and the way in which the powers are distributed between them be regulated together with the composition of the Institution, under the same section.

48. The draft makes a clear distinction between the Lead Ombudsman and three Ombudspersons. The Lead Ombudsman is entrusted, for the entire duration of the mandate (5 years), in contrast with previous drafts envisaging even rotation within the mandate, with the general direction of the Institution. The vast authority of the Lead Ombudsman is described in article 19.1 and 2. The Lead Ombudsman represents and manages the Institution at the highest level and takes initiatives, either on its own authority or on the proposal of another Ombudsman. His/her role is so important that this position cannot be held by a person within the same ethnic group or category of "Others" for two consecutive terms (Article 12.3).

49. The three Ombudspersons share the "operational" tasks. They always act individually, either by acts of decision ("Independently investigate complaints" - article 19.3.f), or proposals ("proposes initiatives for adoption of laws and amendment to laws and other regulations to the Lead Ombudsman" - Article 19.3.c). The division of tasks is detailed in Article 20. The three pre-established "areas of competence" are meticulously described and the Ombudspersons must consensually distribute them among themselves. Should they fail to agree, the Lead Ombudsman will decide (Article 20.4).

50. This system is an innovative proposal. In a way, although it might be hard to accept politically, it approximates a single Ombudsman, with a Lead Ombudsman operating here as a commanding head of three operational Ombudspersons, concentrating in his hands the main

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lines of the Institution's policy. This may prove an efficient way to eliminate the decision by consensus and to ensure that the distribution of files among them does not rely on the criterion of ethnic origin of the complainant.

51. Two comments can be made, however. First, as mentioned above, nothing seems to prohibit in the current text of the draft law two Ombudspersons belonging to the same ethnic group (or from the category of "Others"), or that the Lead Ombudsman and another Ombudsman be part of the same ethnic group (or from the ranks of the "Others"). What is forbidden is that the Lead Ombudsman function be exercised two consecutive terms by a representative of the same ethnic group (or of the group of "Others") (Article 12.3). How can this be reconciled with article 13.3 providing that "[d]uring the appointment procedure of the Ombudsman, equal representation of the constituent peoples and 'others' shall be ensured ..."? Could this mean that the four positions (in total) are to be distributed among the three ethnic groups, on one side, and that of the "Others", on the other side? Providing clarity in this respect is crucial.

52. Second, the division of tasks is described in a very meticulous way in article 20.2. Even more detailed internal rules, will be provided by the "Rulebook" (on internal organisation) of the Institution (article 20.5). This being so, doubtful or mixed cases on the border of different areas of responsibilities will emerge. In these cases, after consultation between the Ombudspersons involved, the Lead Ombudsman should, logically, have the last word.

53. The manner in which joint decisions will be adopted (should such collegial decisions be envisaged) also calls a comment. As previously noted, according to article 19, the Lead Ombudsman will take the most important decisions (on the annual report, the Institution's strategy or the opportunity of special reports or legislative initiatives) "*upon the proposal of the Ombudsman or independently*", whereas the three Ombudspersons will "*independently issue recommendations following investigation of complaints of human rights violation*" (see also article 33.4). No mention seems to be made, in the draft law, of joint decisions.

54. Article 33.1 indeed states that "*upon completion of the investigation procedure, **the Institution** shall issue a recommendation to the competent authority and shall deliver it to the complainant*", as opposed to article 33.4 dealing with recommendations adopted "*independently*" by **the Ombudsman** (emphasis added). However, it does not result clearly from these provisions whether there is also envisaged to allow the possibility for the Ombudspersons to investigate and adopt decisions together where appropriate.

55. It is recommended that the distribution of duties be reconsidered with a view to determining, and clearly specifying in the law, the responsibilities of the Institution for which collegial decisions would be more appropriate. In the view of the Venice Commission, strategies, programmes of activities or financial issues, but also annual and/or special reports and general recommendations may be endorsed collectively, as a way to ensure homogeneity and coherence, but also exchanges and cohesion within the Institution.

### 3. Appointment

#### i. Requirements for appointment

56. According to article 13, only persons with a law degree, who have passed the bar examination and have "*at least ten years of prominent working experience in the field of law*", have proven experience in the protection of human rights, are known for their moral standing and have not been convicted for criminal offences may be elected as Ombudsman.

57. The Venice Commission has always been opposed to such restrictive requirements. In particular, the requirement to be a law graduate, to have passed the bar exam and to have 10 years' experience in legal practice (article 13.1.b) seems excessive. In the Commission's view, although the mandate of the Institution extends beyond human rights issues, including also

matters of good governance, the Ombudsman is not a judicial body. Therefore, it is the person's good reputation in the society and a recognized expertise in the field of human rights that should be essential for this position.

58. The Commission acknowledges that, as stressed during the meetings held by its Rapporteurs in Sarajevo, the issues to be addressed by the BiH Ombudsman are essentially legal, especially difficult and complex in this country. However, this does not justify imperatively reserving the Ombudsman position to law graduates having passed the bar examination. Management, communication and other skills should also be taken into account, especially in respect of the Lead Ombudsman (see comments before). In addition, one of the aims of the current reform is to give increased importance to the Ombudsman's promotional function, where qualities other than those revealed by the practice of law may be required. Besides that, the necessary legal knowledge could be provided by the staff and the "advisor" appointed by each Ombudsman according to his or her area of responsibility<sup>22</sup>. Finally, the current text would lead, for example, to refusing the application of a law professor, specialized in human rights, who has not passed the bar examination and has no legal practice. The Venice Commission recommends reconsidering the eligibility criteria with a view to making them more inclusive.

## **ii. Appointment procedure**

59. Article 14 regulating the appointment procedure is crucial for the independence and credibility of the Ombudsman Institution. As under the current system, it is for the Parliamentary Assembly of BiH to elect the Ombudspersons, by a simple majority of the two Houses, in accordance with the rules of procedure of each House. An "open and transparent process" of selection of candidates, following a public call for the four positions, shall precede the election. A ranking list of candidates, established in accordance with "*pre-defined, objective relevant and public criteria*" and following consultations with competent international organizations and NGOs, will be submitted to the two Houses by Parliamentary Assembly's Joint Committee for Human Rights.

60. By entrusting the Joint Committee (instead of, under the present law, a "special *ad hoc*, temporary committee") with the candidates' selection, a radically new solution is proposed. This definitely represents a step forward, in line with previous recommendations of the Venice Commission and relevant international reports. The proposed solution has at least two advantages. First, it involves a standing committee which deals with human rights in a systematic manner and collaborates by definition with the Ombudsman. Second, it is for the benefit of the transparency of the procedure - and of the credibility of the Institution - that the composition of the Joint Committee is stable and known, usually including a proportional number of representatives of the ruling and the opposition parties, and not formed for the express purpose of selecting candidates for the Ombudsman function.<sup>23</sup>

## **iii. Majority required (for appointment and early termination of mandate)**

61. Under article 14.7, the Ombudspersons are elected by a simple majority vote by the House of Representatives and the House of Peoples, the current rule being maintained. This contradicts a long-standing "case law" of the Venice Commission recommending a qualified majority as a way to provide the Institution with a politically and socially broad base. In the opinion of the Commission, a broad consensus of all tendencies in the Parliament in the election of the Ombudsman has a particular value in terms of enhanced independence and legitimacy of the Institution and improved public perception of its impartiality.<sup>24</sup>

<sup>22</sup> According to Article 22.8, such an "advisor" must be a "person who has completed a four-year degree in law, has excellent knowledge of at least one of the official languages of the United Nations, and at least 5 years of working experience in the field of human rights and freedoms".

<sup>23</sup> See CDL-INF(2001)007, Venice Commission, Memorandum on the Organic Law on the Institution of the Ombudsman of the Federation of Bosnia and Herzegovina, §2.

<sup>24</sup> See e.g. CDL-INF(1999)10, Report of the Working Group of the Venice Commission and the Directorate of Human Rights on Ombudsman institutions in Bosnia and Herzegovina; CDL-INF(2001)007, Venice Commission,

62. In respect of the termination of office, the draft law only provides for a two-thirds majority rule (in the two Houses) for two particular cases: “*non-performance of duties for a period longer than six months*” (article 16.1.e) and “*inability to perform duties for medical reasons*” (article 16.1.f). As for the appointment, the Commission has repeatedly emphasised that a qualified majority (preferably even higher than for the appointment) is essential when deciding on the early termination of the mandate, both for protecting the legal status of the Ombudsman, particularly his or her independence, and for preventing the politicisation of his or her possible dismissal<sup>25</sup>. One might however wonder whether a certified medical inability to perform duties should still require a vote in Parliament.

63. The Venice Commission acknowledges that, in the particular context of BiH, the decision-making in parliament, which can be subject to multiple vetoes, is extremely difficult to achieve. Introducing a qualified majority requirement would create additional difficulties and further complicate the procedure, notably in the appointment of the Ombudspersons<sup>26</sup>. In the light of these considerations, the Commission believes that it belongs to the authorities of BiH to assess whether a qualified majority rule may be successfully introduced and implemented or, from a more pragmatic perspective, a joint decision of the two Houses could serve as a sufficient guarantee for the “broad consensus” needed both to appoint an Ombudsman or to decide on the early termination of his/her mandate.

#### 4. Duration of mandate

64. Article 15.1 of the draft law reduces the duration of the mandate from six to five years, which differs from the law in force and all previous drafts. At the same time, the draft limits the renewal to one further mandate, which is a step in the right direction.

65. Although not in breach of the applicable standards,<sup>27</sup> the possibility of renewing the mandate carries the risk that the action of the person occupying the post of Ombudsman is influenced by an interest in being reappointed.<sup>28</sup> In the opinion of the Venice Commission, the principle of a single term provides a safeguard contributing to the Ombudsman's independence and precluding such risks. It is recommended to consider providing for a longer term of office (7-8 years) combined with a non-renewable mandate.

66. There are no provisions in the draft law to regulate the exercise of the duties of the Lead Ombudsman following the end of his/her mandate or in case of early termination of his/her office. The draft only envisages the case of an “ordinary” Ombudsman whose term has expired or is terminated for other reasons (article 15). In the latter case, a remaining Ombudsman would perform his/her duties on a temporary basis until a new Ombudsman is appointed. Similarly, the draft makes no provision for the replacement of the Lead Ombudsman when he or she is on leave or temporarily unable to exercise his duties. While these latter situations may be addressed through the Institution's Rulebook, it would be advisable to provide in the law the solutions envisaged for cases of vacancy of the function of Lead Ombudsman.

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Memorandum on the Organic Law on the Institution of the Ombudsman of the Federation of Bosnia and Herzegovina, §2; see CDL-AD(2008)009, Opinion on the Constitution of Bulgaria § 81; 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 Office for Democratic Institutions and Human Rights (OSCE/ODIHR), § 16; see also Recommendation 1615(2003), §7.3.

<sup>25</sup> See Memorandum on the Organic Law on the Institution of the Ombudsman of the Federation of Bosnia and Herzegovina, CDL-INF(2001)7.

<sup>26</sup> For example, the election of Ombudsman in 2007/2008 took more than 20 months, following a disagreement between parties. Although an earlier text required a two third majority, since then, both the law in force (the 2002 Law, as amended) and the various drafts assessed by the Venice Commission have opted for the simple majority rule.

<sup>27</sup> Such a system is expressly accepted in paragraph 7.3 of Recommendation 1615(2003) and may be found in many countries.

<sup>28</sup> See, CDL-AD(2015)017, § 45; see also CDL(2001)083, Consolidated Opinion On the Law on Ombudsman in the Republic of Azerbaijan, §11; CDL-AD(2007)024, Opinion on the draft law on the People's Advocate of Kosovo, § 40.

## 5. Immunity

67. According to article 17 of the draft law, the Ombudsman and the staff of the Institution “shall not be prosecuted, arrested or detained in custody, nor tried in civil proceedings” for opinions expressed or decisions taken within their official duties. This provision is in line with international standards and the best practices in the field. In particular, it is positive that this functional immunity granted to the Ombudsman is extended to the staff and that it continues to be accorded after the end of the Ombudsman’s mandate or after the staff cease their employment with the Ombudsman Institution<sup>29</sup>. Also, the draft law rightly includes the official documents and the premises of the Institution in the scope of the above protection.

68. It is suggested to make it clear that this protection applies to all documents of the Institution, including correspondence and internal notes, as well as to the baggage and means of communication belonging to the Ombudsman. More generally, the immunities provided should also include protection from any administrative action.

69. At the same time, the law should also provide for the possibility (and specific modalities) of withdrawal of the immunity of the Ombudsman, as well as of his/her staff, in specific cases.

## 6. Conflict of interest and incompatibilities

70. Article 18 of the draft law rightly provides that the Ombudsman may not perform any other public or professional duty, except teaching, scientific, cultural or humanitarian activities. Such activities are allowed as long as they are not in conflict with the Ombudsman’s duties and prevent or restrict their effective and timely exercise. This clause may be supplemented so as to require that the accessory activity shall in no way undermine the impartiality or the appearance of impartiality of the Ombudsman.<sup>30</sup>

### D. Investigation procedure of complaints

#### 1. Persons entitled to apply to the Ombudsman

71. With regard to the intervention of human rights NGOs, it should be taken into account that in certain cases it might prove difficult, if not impossible, to obtain consent of the alleged victim(s) of a human rights violation. Therefore it is recommended to insert, in article 25.2, the words „where possible“. Further, such consent should also be received, where possible, when the Ombudsman decides to launch an *ex officio* investigation.

#### 2. Action in cases subject to Courts

72. Article 29 dealing with the Ombudsman’s action “*in cases subject to court proceedings*” states that the Institution should not act in such cases, “*except in cases of unnecessary delays*”. This provision appears in line with the Recommendation no. 1615(2003) stating that “*ombudsmen should have at most strictly limited powers of supervision over the courts. If circumstances require any such role, it should be confined to ensuring the procedural efficiency and administrative propriety of the judicial system; in consequence, the ability to represent individuals (unless there is no individual right of access to a particular court), initiate or intervene in proceedings, or reopen cases, should be excluded.*”<sup>31</sup> Like the Parliamentary Assembly, the Venice Commission has made it clear, in its opinions, that the Ombudsman may be authorised to make general recommendations about the functioning of the court system, but he or she should not have the power to intervene in individual cases<sup>32</sup>. In any

<sup>29</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, § 29.

<sup>30</sup> See CDL-AD(2015)017, § 52.

<sup>31</sup> See Recommendation Rec 1615(2003), § 6.

<sup>32</sup> See CDL-AD(2007)024, § 19.

case, it is essential that the law explicitly stipulates which actions and measures may be taken by the Ombudsman in the context of monitoring the administration of justice<sup>33</sup>.

73. It is noted at the same time that, in article 29.3, the drafters envisage situations where the Institution would “*establish a violation of human rights and freedoms by the court*”, for which it is foreseen that “*the recommendation shall also be submitted to the High Judicial and Prosecutorial Council of BiH*”. This provision might be interpreted as giving rise to undue interference by the Ombudsman with the judiciary, which is in breach with the requirement of independence of both the judiciary and the Ombudsman. Here again, it is strongly recommended to clarify this important issue in the text of the law, by more clearly stating that courts are excluded from the jurisdiction of the Ombudsman Institution<sup>34</sup>.

#### **E. Obligation to co-operate with the Ombudsman**

74. Some of the provisions in the draft law concern the relation between the Ombudspersons and individual civil servants (see for example articles 35, 38 and 39). It is important to point out that, in the relations between the Ombudsman and the various public institutions, it is the authority, and not the civil servant, that is answerable to the Ombudsman. To prevent any improper interpretation and application of the above provisions, these provisions should be re-drafted in such a manner as to make this principle more explicit.

75. Under article 39.2, in case of failure to co-operate on the part a civil servant, the Ombudsman shall approach that person’s superior or the competent prosecuting authorities for the appropriate disciplinary or penal action to be taken. Paragraph 3 of the same article goes much further by stipulating that “*[w]here the competent BiH authority fails to take action, the Ombudsman may, in substitution for this authority, institute disciplinary proceedings against the official responsible or, where appropriate, bring the case before a criminal court*”. This provision appears problematic and to some extent contradicting paragraph 2. Although paragraph 3 may be seen as a remedy to the inaction of the authorities mentioned in paragraph 2, enabling the Ombudsman, acting in the place of these authorities, to initiate disciplinary proceedings or even criminal proceedings against an official for violating a duty to cooperate, seems excessive.

76. More generally, it is important to make clear that, if the Ombudsman may recommend disciplinary measures, it will be up to the competent bodies to apply such measures. In any case, such measures should only be applied to persons who have clearly violated the legislation and refuse to remedy their act. Less drastic measures should be foreseen for minor cases and more severe penalties for no-cooperation with the Ombudsman should be applied only as a last resort measure.<sup>35</sup>

77. The provisions regulating the Ombudsman’s access to confidential data are spread in several articles: article 31.5 stating, as a general principle, that the Ombudsman Institution shall be granted access to acts and documents designated as confidential or classified, but also article 31.8 on the corresponding duty of confidentiality, or articles 34, 35 and 37 dealing with the different aspects of providing, accessing and processing confidential and secret data.

78. For the sake of legal clarity, it would be advisable to better systematise this provisions and specify more clearly, on the one side, the obligation of the Institutions concerned by an investigation conducted by the Ombudsman Institution to allow access to documents and data, including those classified as secret or confidential, and on the other side, the obligations of the Ombudsman in handling such information. For example, article 35.4 stating that “*[t]he information or personal records provided by a civil servant or employee during an investigation*

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<sup>33</sup> See CDL-AD(2003)007, Opinion on the Draft Law on the Public Attorney of “the former Yugoslav Republic of Macedonia”, § B III Article 13(1).

<sup>34</sup> See CDL-AD(2015)017, § 33

<sup>35</sup> See CDL-AD(2004)041, § 13

*is confidential, without prejudice to their liability according to criminal legislation in BiH*” would deserve increased clarity.

### **1. Reporting obligation (annual report)**

79. The draft law devotes three detailed provisions - articles 42, 43 and 44 - to the “reporting obligations” of the Ombudsman Institution. These consist of an annual report to be prepared, made public on the website of the Institution and submitted (not later than on 31 March) to the Presidency of BiH, the two Houses of the BiH Parliamentary Assembly, as well as to the Parliament of the Federation of BiH, the National Assembly of the Republic of Srpska and the Assembly of Brcko District of BiH. A detailed annual financial report shall be published and submitted at the same time (see article 51). In addition, special reports may be drawn on issue of “public prominence or urgency”.

80. It is positive that the draft law provides guidance on the expected content of the Annual Report, and requires the Joint Committee on Human Rights of the Parliamentary Assembly of BiH to organize a thematic session to debate it. Moreover, it expressly requires the Joint Committee to adopt, following the debate, conclusions and, where appropriate, recommendations to the competent Institutions. These may relate to systematic violations of human rights but also to previous recommendations the Ombudsman Institution which have not been implemented.

81. The attention paid to the follow-up given to the Ombudsman’s recommendations is commendable. The obligation imposed, in article 43, on the Council of Ministers of BiH to define specific measures (not later than on 30 September of each year) to address human rights violations and other shortcomings raised in the Annual Report, should also be commended as a welcome legislative tool for strengthening the impact of the Ombudsman’s work and the attention given to it by the state authorities, at their highest level.

82. It is recalled in this context that neither international standards nor the practice suggest that the parliament or its relevant committee should formally adopt the Ombudsman’s Annual Report. The aim is, as provided in the present draft law, that the recipient body takes note of the issues raised by the report and takes action to address them; in no case this body should vote or adopt the report. Such a vote would indirectly call into question the independence of the Ombudsman Institution.

### **F. Cooperation with civil society and promotion function**

83. A special chapter (Chapter VIII, articles 45-49) in the draft law regulates the Institution’s cooperation with the civil society and its responsibilities in terms of promotion of human rights and freedoms. This new Chapter constitutes a welcome follow-up to the relevant international recommendations and introduces specific obligations<sup>36</sup> on the Ombudsman in these fields.

84. In its 2009 Recommendations addressed to BiH Ombudsman Institution in the framework of the re-accreditation process as National Human Rights Institution under the Paris Principles, the Subcommittee on Accreditation (SCA) of the ICC, while commending the BiH Ombudsman Institution for its *„concrete efforts to implement a regular consultation mechanism with civil society organisations“*, recommended that this cooperation be formalised. The ICC also emphasised that the engagement with civil society must be broad based, to ensure the pluralistic representation of social forces as required by the Paris Principles.<sup>37</sup>

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<sup>36</sup> See in particular articles 45 and 47.1.

<sup>37</sup> See [http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/2009\\_November%20SCA%20REPORT.pdf](http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/2009_November%20SCA%20REPORT.pdf)



85. To implement the above recommendations, a *Standing Advisory Body for Cooperation with Civil Society* is set out by the draft law to assist the Ombudsman Institution in developing and implementing its strategy of protection and promotion of human rights and freedoms and to act as a facilitator of the Institution's relations with civil society organisations, academia, media and other stakeholders active in this field. It is in particular positive that the new body will be established, following a public call, through an appointment procedure which should be "*public and transparent*" (article 46.4).

### G. Funding and salary

86. As stipulated in article 50, the draft proposal for the annual budget of the Ombudsman Institution is made by the Lead Ombudsman and submitted for adoption to the Budget Committee of the BiH National Assembly. This is a welcome provision, in line with previous recommendations of the Venice Commission<sup>38</sup>.

87. It is noted however that, under Article 50.3, three state authorities (the Ministry of Finance and Treasury, the Council of Ministers and the Presidency of BiH) are entitled not only to provide opinions on the draft budget already adopted by the Budget Committee of the BiH parliament, but also to adjust it when is "*in conflict with the obligations or limitations of spending in accordance with international agreements or if the draft budget causes a budget imbalance whose rebalance would lead to a decrease in the draft budget of another budget user, or when the draft budget is not in accordance with the provisions of the Law on Fiscal Council of BiH.*"

88. In view of the particular significance of its financial resources for the independence of the Institution, it would be important to redraft these provisions in such a way as to avoid any risk of undue cuts to the Ombudsman Institution's budget through an extensive interpretation of the clauses allowing its amendment. It is also strongly recommended that the Law includes, as an additional guarantee in this regard, a clause 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 Ombudsman Institution.<sup>39</sup> In any event, it is essential to ensure that any necessary budgetary restraints should not be applied to the Ombudsman Institution in a disproportionate manner.<sup>40</sup>

89. Finally, the law should explicitly stipulate, as a general principle, that "*the budgetary allocation should be adequate to the need to ensure full, independent and effective 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>41</sup> The law should also expressly provide for the autonomous management, by the Ombudsman Institution, of its budget.

90. Article 52 aligns the salary of the Lead Ombudsman on that of a minister and the salary of the three Ombudspersons on that of a deputy minister. It is noted in this respect that, under a previous version of the current law, the salary of the Ombudsman had to be equal to that of judge of the Constitutional Court of BiH. It seems however that, in practice, that provision has never been applied. In line with its constant position on this matter<sup>42</sup>, the Venice Commission

<sup>38</sup> See CDL-AD(2004)041, § 35; CDL-AD(2015)017, § 73.

<sup>39</sup> See CDL-AD(2015)017, § 75, CDL-AD(2006)038, §§ 80-81.

<sup>40</sup> See CDL-AD(2006)038, § 80.

<sup>41</sup> See CDL-AD(2015)017, § 74 CDL-AD(2007)020, § 30.VI.

<sup>42</sup>The Venice Commission already considered the issue of the status and rank of Ombudsman institutions in 2002, in the framework of a request for an opinion on the status and rank of the Institution of Ombudsman of the Federation of BiH (see CDL-AD(2002)8). A comparative study undertaken in this context showed that there are a variety of ways of establishing the status of the Ombudsman and that there is no European standard on the matter. However, as noted by the Commission, 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 (See also CDL-AD(2004)006, *Opinion on the Status and Rank of the Human Rights Ombudsman of Bosnia and Herzegovina*, §16).

considers that it belongs to the authorities of BiH to establish the level the Ombudsman's remuneration, according to country's specific conditions. It is essential however to take into account, when setting this remuneration, that this is an important issue of both public respect and independence of the Institution.

#### **H. Transitional and Final Provisions**

91. According to the transitional and final provisions of the draft law, "*following the entry into force of this Law, the Parliamentary Assembly of BiH shall initiate the appointment procedure for only the Lead Ombudsman for the duration of the remaining term of office of the already appointed Ombudsmen*" (article 53). This provision only applies if three new ombudspersons are appointed prior to the entry into force of the new law.

92. In itself, the mechanism in article 53 constitutes a welcome temporary solution aiming at reconciling two equally legitimate processes - electing of three ombudspersons under the conditions laid down by the current law, on the one side, and preparing a new law, on the other side -, without resorting to potentially controversial measures such as the early termination of elected offices. The proposed mechanism has also the significant advantage of ensuring the continuity of the activities of the Ombudsman Institution while enabling its gradual transformation.

93. This being so, several issues would deserve attention and further analysis. First, clarity would be needed on one particular aspect, already raised in relation to article 11 of the draft law, but seen here in the transitional system: if all three Ombudspersons already appointed before the entry into force of the new law are from the three constituent peoples, would this mean that the Lead Ombudsman will necessarily need to be elected from the ranks of the "Others" (strict application of article 13.3) or it may be accepted that the Lead Ombudsman and another Ombudsman belong to the same ethnic group? Whatever the answer, serious difficulties - and hard political negotiations - can be expected in the implementation of these provisions.

94. Second, one may wonder whether the proposed mechanism - with three Ombudspersons elected following a common procedure and based on common criteria, to whom would be added, at a later stage, a particularly strong chief Ombudsman, elected through a different election process involving partly different actors - will be workable in practice. In addition to potential difficulties in the internal functioning and cohesion of the Institution, at least for the duration of the Transitional period, there is also a high risk that the prior election of the three Ombudspersons be distorted by the prospect of a Lead Ombudsman vacancy in the near future.

95. As already suggested in this Opinion, one potential solution could be to simply provide for the appointment of a fourth Ombudsman and leave it to the four Ombudspersons to elect the most suited among themselves to the position of Lead Ombudsman, and perhaps also to provide for dead-lock solutions should these be needed. Such a solution, more balanced and democratic, not only would contribute to greater cohesion and efficiency within the Ombudsman Institution, but would also be beneficial to the independence and transparency of the Institution. A Lead Ombudsman elected by the political representatives would not necessarily be seen as a guarantee of an autonomous management of the Institution. The Venice Commission recommends considering the suggested or other alternative mechanisms, both within the framework of the transitional period, and for the regular organization of the Ombudsman Institution.

#### IV. Conclusions

96. The Venice Commission welcomes the draft law, which proposes significant improvements to the existing legal framework for the organisation and the operation of the BiH Ombudsman Institution. In particular, the proposed new composition of the Institution and the improvements introduced to the appointment procedure reflect the authorities' commitment to address issues of discrimination and lack of pluralism raised in relation to its composition, and to provide increased and more effective safeguards for its independence, transparency and credibility.

97. The widening of the scope of responsibilities of the Ombudsman, to include activities of promotion of human rights, is a positive step, as is the proposed legal and institutional framework for the participation of the civil society and the academia in its work. Specific rules have also been introduced, as a response to relevant international commitments, to formalise the activities of the Ombudsman as a national preventive mechanism under the OPCAT.

98. However, to bring the draft fully in line with the highest standards and best practice in the field, additional consideration and improvements are needed with regard to a number of key issues. The Venice Commission recommends in particular:

- to consider introducing a longer, non-renewable mandate of the Ombudsman and less restrictive eligibility criteria for this position (eliminating the requirement to have passed the bar examination and to have 10 years' experience in legal practice);
- to make sure that the most important functions and organisation principles are regulated and formulated in such a way (by referring systematically to "the Institution" and not "the Institution and the Ombudspersons") as to enhance the unified nature of the BiH Ombudsman Institution; to specify in the law the responsibilities of the Institution for which collegial decisions would be more appropriate;
- to revise the provisions concerning reporting obligations in a way to provide that reporting to parliament is a matter for the Ombudsman Institution itself and not for individual Ombudspersons; to make sure that these reports are taken into consideration and discussed, but not voted on;
- to better clarify and specify the prerogatives of the Ombudsman Institution in relation to courts, with due respect to the principle of independence of the judiciary; in particular, jurisdiction over courts must be excluded and any related Ombudsman's competence limited at most to issues concerning the judicial administration and, where appropriate, the execution of final judicial decisions;
- to provide increased guarantees for the financial independence of the Ombudsman Institution, while ensuring that its funding is suited to the need to ensure full, independent and effective discharge of its functions; specific provisions should be made for the autonomous management of the Institution's budget.

99. The Venice Commission remains at the disposal of the authorities of Bosnia and Herzegovina should they need further assistance in the reform process.