



Strasbourg, 16 October 2021

**CDL-AD(2021)035**

**Opinion No. 1038 / 2021**

Or. Engl.

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

**ARMENIA**

**OPINION**

**ON THE LEGISLATION**

**RELATED TO THE OMBUDSMAN'S STAFF**

**Adopted by the Venice Commission  
at its 128<sup>th</sup> Plenary Session  
(Venice and online, 15-16 October 2021)**

**on the basis of comments  
by**

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## I. Introduction

1. By letter dated 17 March 2021, Mr Tatoyan, the Human Rights Defender of Armenia, requested an opinion of the Venice Commission on the Armenian legislation related to the independence of the Ombudsman's staff (CDL-REF(2021)074) vis à vis international standards on national human rights institutions. The document CDL-REF(2021)074 contains extracts from the relevant legislation as provided by the Ombudsman's office.
2. Mr Jan Helgesen, Mr Panayotis Voyatzis and Mr Igli Totozani acted as rapporteurs for this opinion.
3. On 3 June 2021, the Bureau of the Venice Commission authorised the postponement of the adoption of the draft opinion to the 128<sup>th</sup> plenary session due to the great difficulty in organising virtual meetings during the election period and military threats at the borders.
4. On 7 and 23 September 2021 the rapporteurs, along with Ms Caroline Martin from the Secretariat, had online meetings with a representative of the Human Rights Defender's Office, representatives of the Civil service Office of the Prime Minister Office and of the Prime Minister's Administration. The delegation would like to thank the Permanent Representation of the Republic of Armenia in Strasbourg for having organised the meetings with the authorities and the Office of the Council of Europe in Yerevan for having contributed to this end.
5. This draft Opinion is based on an English translation of extracts of the relevant legislation. The translation may not always accurately reflect the original version on all points, therefore certain issues raised may be due to problems of translation.
6. This Opinion was drafted on the basis of comments by the rapporteurs and the results of the virtual meetings. Following an exchange of views with Mr Tatoyan, Human Rights Defender of Armenia and Mr Vache Khalashyan, Acting Head of the Civil Service Office in the Prime Minister's Office, this Opinion was adopted by the Venice Commission at its 128<sup>th</sup> Plenary Session (Venice/online, 15-16 October 2021).

## II. General remarks

7. The Armenian Human Rights Defender (hereafter "the HRD") was established in 2004. Since the constitutional amendments of 2005 provisions on the HRD have been included in the Constitution<sup>1</sup>. In 2016, the constitutional law on the HRD was approved. The HRD is thus an independent constitutional institution mandated to protect and promote human rights and fundamental freedoms, to act as the national preventive mechanism under the OPCAT<sup>2</sup> and to monitor the UN conventions on the rights of the child and the rights of persons with disabilities. The HRD is the National Human Rights Institution in the country, and enjoys status A.
8. The Venice Commission at different occasions, respectively in 2006<sup>3</sup>, 2015<sup>4</sup> and 2016<sup>5</sup>, gave its opinion on the Constitutional Law on the HRD.
9. This opinion aims to clarify the compatibility of Armenia's current legislation with regard to the independence of the staff of the HRD with relevant international standards. In particular, specific

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<sup>1</sup> See Chapter 10 of the Constitution.

<sup>2</sup> UN Optional Protocol to the Convention Against Torture.

<sup>3</sup> CDL-AD(2006)038, CDL-AD (2015)035, CDL-AD (2016)033.

<sup>4</sup> See CDL-AD(2015)035.

<sup>5</sup> CDL-AD(2016)033.

changes made to the HRD legislation by the package of amendments introduced on 21 January 2020 and related to the independence of the institution will be addressed.

10. On 16 December 2020, the United Nations General Assembly adopted Resolution A/RES/75/186 on “The role of Ombudsman and mediator institutions in the promotion and protection of human rights, good governance and the rule of law”.<sup>6</sup>

11. The HRD of Armenia being also the National Human Rights Institution, the amendments will also be analysed in the light of the United Nations “Paris Principles” on National Human Rights Institutions<sup>7</sup>.

12. At the level of the Council of Europe:

- on 31 March 2021, at the 1400<sup>th</sup> meeting of the Ministers' Deputies, the Committee of Ministers adopted Recommendation CM/Rec(2021)1 of the Committee of Ministers to member States on the development and strengthening of effective, pluralist and independent national human rights institutions<sup>8</sup>;
- on 16 October 2019, at the 1357<sup>th</sup> meeting of the Ministers' Deputies, the Committee of Ministers adopted Recommendation CM/Rec(2019)6 of the Committee of Ministers to member States on the development of the Ombudsman institution to member States on the development of the Ombudsman institution<sup>9</sup>;

13. The Venice Commission adopted the Principles on the protection and promotion of the Ombudsman Institution (the “Venice Principles”) at its 118<sup>th</sup> Plenary Session (Venice, 15-16 March 2019). The Venice Principles were endorsed by the Committee of Ministers of the Council of Europe at the 1345<sup>th</sup> Meeting of the Ministers' Deputies, on 2 May 2019; by the Parliamentary Assembly of the Council of Europe, Resolution 2301(2019), on 2 October 2019; by the Congress of Local and Regional Authorities of the Council of Europe, Resolution 451(2019) on 29-31 October 2019<sup>10</sup>. The UN Resolution A/RES/75/186 in its Preamble acknowledges the principles on the protection and promotion of the Ombudsman institution (the Venice Principles); in operative §2, strongly encourages Member States to lend Ombudsman institution “consistent with the principles on the protection and promotion of the Ombudsman institution (the Venice Principles)”; in operative § 8 “Encourages Ombudsman and mediator institutions, where they exist, (a) To operate, as appropriate, in accordance with all relevant international instruments, including the Paris Principles and the Venice Principles...”.

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<sup>6</sup> See, United Nations, General Assembly, The Role of Ombudsman Institutions in the Promotion and Protection of Human Rights, Good Governance and the Rule of Law, Resolution adopted by the General Assembly on 16 December 2020 [based on the report of the Third Committee (A/75/478/Add.2, para. 89)

<sup>7</sup> See, United Nations, General Assembly, *Principles relating to the Status of National Institutions (The Paris Principles)*, Adopted by General Assembly resolution 48/134 of 20 December 1993, available at <https://www.ohchr.org/en/professionalinterest/pages/statusofnationalinstitutions.aspx>.

<sup>8</sup> See Council of Europe: Committee of Ministers, *Recommendation CM/Rec(2021)1 of the Committee of Ministers to member States on the development and strengthening of effective, pluralist and independent national human rights institutions* (Adopted by the Committee of Ministers on 31 March 2021 at the 1400<sup>th</sup> meeting of the Ministers' Deputies), available at [https://search.coe.int/cm/pages/result\\_details.aspx?objectid=0900001680a1f4da](https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a1f4da).

<sup>9</sup> See Council of Europe: Committee of Ministers, *Recommendation CM/Rec(2019)6 of the Committee of Ministers to member States on the development of the Ombudsman institution* (Adopted by the Committee of Ministers on 16 October 2019 at the 1357<sup>th</sup> meeting of the Ministers' Deputies), available at <https://rm.coe.int/090000168098392f>

<sup>10</sup> CDL-AD(2019)005, Principle 3.

14. In addition, the opinions that the Venice Commission has given in the past will also serve as a basis for the present analysis. The Venice Commission has indeed provided several opinions<sup>11</sup> on various legislative provisions aimed at regulating the Ombudsman's activity.

### **III. Applicable international standards**

15. Before analysing the 21<sup>st</sup> January 2020 amendments, it is necessary to present the international standards that make the independence of the institution's staff a crucial element of its independence.

#### **A. The independence of the staff: a key element of the Ombudsman institution**

16. The United Nations' Resolution A/RES/75/186 on "The role of Ombudsman and mediator institutions in the promotion and protection of human rights, good governance and the rule of law" stresses the importance of the financial and administrative independence and stability of these institutions. It also praises the efforts of those States that have provided their Ombudsman and mediator institutions with more autonomy and independence"<sup>12</sup>. The Resolution encourages Member States to endow Ombudsman and mediator institutions with the necessary constitutional and legislative framework and adequate financial support for staffing and other budgetary needs, in order to ensure the efficient and independent exercise of their mandate.

17. The Paris Principles had also provided guarantees for NHRIs in the following terms: "2. The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence." Recommendation CM/Rec (2019) 6 and CM/Rec(2021)1 of the Council of Europe Committee of Ministers to member States provide for the same guarantees.

18. The standards relating to the independence of the Ombudsman have thus given importance to the notion of the need for "sufficient resources" for the institution, which is an essential condition for the institution to be able to fulfil its mandate.

19. The term "sufficient resources" covers three main elements: the institution's budget, its staff and its infrastructure. Reducing even one of its elements, may eventually lead to an overall reduction in the effectiveness of the institution and consequently to a loss of legitimacy and public confidence in it.

##### **a. The structure of the Ombudsman's institution staff**

20. With regard to the structure or the composition of the staff, the Principle 22 of "the Venice Principles" provides that "The Ombudsman Institution shall have sufficient staff and appropriate structural flexibility. The Institution may include one or more deputies, appointed by the Ombudsman. The Ombudsman shall be able to recruit his or her staff". Through this principle, the Venice Principles refer to one of the essential elements of the Ombudsman's independence, namely that of recruiting his or her deputies and staff.

21. The Recommendation CM/Rec(2019)6 of the Committee of Ministers to Member States on the development of the ombudsman institution goes in the same direction. In its paragraph 6, it

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<sup>11</sup> See, CDL-AD(2015)017; CDL-AD(2017)032,

<sup>12</sup> United Nations General Assembly, Resolution adopted on 16 December 2020, « The role of Ombudsman and mediator institutions in the promotion and protection of human rights, good governance and the rule of law », pp. 3 and 4.

is provided that “...Ombudsman institutions should be able to appoint their own staff and to ensure that they receive adequate training.” Also, Recommendation CM/Rec(2021)1 of the Committee of Ministers to member States on the development and strengthening of effective, pluralist and independent national human rights institutions provides that “NHRIs should have the authority to determine their staffing profile and recruit their own staff, as well as sufficient resources available, in order to fulfil their mandate, so as to permit the employment and retention of staff and to ensure that they receive adequate training.”

22. The independence and efficiency of such institutions requires the implementation of policies, which guarantee the autonomy of the recruitment processes, staff members’ career evolution and position ranking. Hence, issues related to the staff, such as independent recruitment, career policies, rank, salary, education, and training, are all part of this concept of independence.

23. It results from the above that the international standards provide for the independence of the composition of the Ombudsman's office and for the Ombudsman's the capacity to recruit the staff.

24. Furthermore, the conditions under which the Ombudsman is elected as head of the institution and subsequently appoints his or her staff are also interdependent guarantees of the institution's independence. The entire staff of the institution, beginning with the head of the institution, must function without undue external interference that could compromise its independence.

25. In its 2006 Opinion on the amendments to the law of the HRD of Armenia, the Venice Commission had stated that “Considering the exceptional role of the institution of the Human Rights Defender and its responsibilities, as well as the necessary safeguards for its independence, the staff, if it is not to be included under Civil Service, should have a distinct special status regulated by this Law. A solution merely stipulating that members of the staff should be contract employees is insufficient”<sup>13</sup>.

b. The rank of the Ombudsman’s institution staff

26. With regard to the rank of the institution, the Principle 3 of “the Venice Principles” provides that “The Ombudsman Institution shall be given an appropriately high rank, also reflected in the remuneration of the Ombudsman and in the retirement compensation”. This principle refers to the head of the institution but should be understood as extending to all staff.

27. Issues relating to the institution's staff and rank have budgetary consequences and are therefore linked to the institution's budget. International standards are again consistent in this respect in order to secure guarantees of independence.

c. The budget of the Ombudsman institution

28. With regard to the budget of the institution, the Principle 21 of “the Venice Principles” provides that “Sufficient and independent budgetary resources shall be secured to the Ombudsman institution. The law shall provide that the budgetary allocation of funds to the Ombudsman institution must be adequate to the need to ensure full, independent, and effective discharge of its responsibilities and functions. The Ombudsman shall be consulted and shall be asked to present a draft budget for the coming financial year. The adopted budget for the institution shall not be reduced during the financial year, unless the reduction generally applies to other State institutions. The independent financial audit of the Ombudsman’s budget shall take into account only the legality of financial proceedings and not the choice of priorities in the execution of the mandate.”<sup>14</sup>

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<sup>13</sup> CDL-AD(2006)038, § 78.

<sup>14</sup> CDL-AD(2019)005, Principle 21.

29. The Paris Principles on the NHRIs also give an important place to this aspect. Thus, in paragraphs 2 and 3 of the chapter "Composition and guarantees of independence and pluralism" it is provided that "The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence" and also "in order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured."<sup>15</sup>

30. The Recommendation CM/Rec(2019)6 of the Committee of Ministers to member States on the development of the ombudsman institution<sup>16</sup> goes in the same direction. In paragraph 6, it is provided that "Member States should provide Ombudsman institutions with adequate, sufficient and sustainable resources to allow them to carry out their mandate in a fully independent manner. Ombudsman institutions should be able to appoint their own staff and to ensure that they receive adequate training." Also, Recommendation CM/Rec(2021)1 of the Committee of Ministers to member States on the development and strengthening of effective, pluralist and independent national human rights institutions provides that "NHRIs should have the authority to determine their staffing profile and recruit their own staff, as well as sufficient resources available, in order to fulfil their mandate, so as to permit the employment and retention of staff and to ensure that they receive adequate training."<sup>17</sup>

31. The Venice Commission, in its Opinion on the draft Constitutional Law on the HRD of Armenia, paid special attention to the budget of the institution which is directly related to the ombudsman's staff, its number, its career opportunities, and promotion. Notably, in paragraph 27 of this Opinion, it is stated that "In addition, the Defender's budget request is still subject to the Government's approval in order to be included in the draft State Budget. The draft constitutional law does not guarantee that sufficient funds in the budget proposal are allocated to the Defender for him or her to carry out his or her functions in general and his or her functions as NPM."<sup>18</sup> In the same Opinion, the Venice Commission recalls one of the recommendations formulated in the 2006 Opinion according to which "81. Considering its exceptionally sensitive nature and the significance of this provision for the independence of the institution, a provision could be added stating that public authorities shall not use the budgetary process for allocating funds from the budget in a manner that interferes with the independence of the institution of the Human Rights Defender."<sup>19</sup>

32. The Commission, while referring to the above-mentioned international standards and to its previous opinions, can only underline that the required independence of the institution is measured by the independence of its head, its staff, and its budget, both in terms of amount and administration.

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<sup>15</sup> United Nations, General Assembly, *Principles relating to the Status of National Institutions (The Paris Principles)*, Adopted by General Assembly resolution 48/134 of 20 December 1993, Composition and guarantees of independence and pluralism, paragraphs 2 and 3, available at <https://www.ohchr.org/en/professionalinterest/pages/statusofnationalinstitutions.aspx>.

<sup>16</sup> See Council of Europe: Committee of Ministers, *Recommendation CM/Rec(2019)6 of the Committee of Ministers to member States on the development of the Ombudsman institution* (Adopted by the Committee of Ministers on 16 October 2019 at the 1357th meeting of the Ministers' Deputies), available at <https://rm.coe.int/090000168098392f>.

<sup>17</sup> Council of Europe: Committee of Ministers, *Recommendation CM/Rec(2021)1 of the Committee of Ministers to member States on the development and strengthening of effective, pluralist and independent national human rights institutions* (Adopted by the Committee of Ministers on 31 March 2021 at the 1400th meeting of the Ministers' Deputies), available at [https://search.coe.int/cm/pages/result\\_details.aspx?objectId=0900001680a1f4da](https://search.coe.int/cm/pages/result_details.aspx?objectId=0900001680a1f4da).

<sup>18</sup> See CDL-AD(2016)033-, § 27.

<sup>19</sup> See CDL-AD(2016)033, § 28.

#### **IV. The legal situation of the staff of the institution before the introduction of the 21<sup>st</sup> of January 2020 amendments**

33. The HRD's Institution of Armenia is a Constitutional institution. It is an Ombudsman and at the same time NHRI, it is provided for in Article 52 (Right to Apply to the Human Rights Defender), 103 (Adoption of Laws, National Assembly Decisions, Statements and Addresses), 169 (Applying to the Constitutional Court), 191 (Functions and Powers of the Human Rights Defender), 192 (Election of the Human Rights Defender), 193 (Guarantees for the Activities of the Human Rights Defender), 210 (Bringing Laws into Compliance with the Amendments of the Constitution) and 218 (Holding Office on the Part of the Human Rights Defender) of the Constitution of this country<sup>20</sup>. The activity, functioning and organisation of human rights defenders are more specifically regulated by the Constitutional Law on Human Rights Defenders of 16 December 2016.

34. The 2016 HRD's Constitutional Law provides for a separate chapter regarding the HRD's staff. The 2016 version of this law stipulated that the HRD's staff is included in a special category of public service and precisely as State service.

35. Article 35 paragraph 1 of the Law provides that "State service within the Staff of the Defender shall be considered a professional activity performed for the purpose of ensuring the exercise of powers reserved to the Defender by the Constitution of the Republic of Armenia and this Law. State service within the Staff of the Defender shall be a special type of state service prescribed by the legislation of the Republic of Armenia."<sup>21</sup>

36. Also in article 35 paragraph 3 the classes and ranks according to the positions of state servants were foreseen according to this scheme:

- "(1) state servants holding highest positions — class ranks of the 1st and 2nd class state counselor of state service within the Staff of the Defender;
- (2) state servants holding chief positions — class ranks of the 1st and 2nd class counselor of state service within the Staff of the Defender;
- (3) state servants holding leading positions — class ranks of the 1st and 2nd class leading servant of state service within the Staff of the Defender;
- (4) state servants holding junior positions — class ranks of the 1st and 2nd class junior servant of state service within the Staff of the Defender."<sup>22</sup>

37. The legislator had also provided in Article 35 paragraph 4 that "Class ranks of state service to all state servants within the Staff of the Defender shall be conferred, their class rank shall be lowered, as well as they shall be deprived of the class rank by the Defender."

38. Article 39 also provided some of the prerogatives of the Defender regarding the staff of the institution. Thus, in paragraph 1 of this article is provided that the Defender shall:

- "(1) manage, co-ordinate and supervise the current activities of the subdivisions of the Staff of the Defender, ensure the performance of the objectives and functions thereof;
- (2) issue orders, assignments subject to compulsory implementation, render decisions;
- (3) approve and make changes to the number of employees and the staff table of the Staff of the Defender;
- (4) approve the list of positions of state service within the Staff of the Defender and the job descriptions for the positions of state servants;

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<sup>20</sup> See Constitution of the Republic of Armenia, available at <https://www.president.am/en/constitution-2015/>.

<sup>21</sup> Constitutional Law of the Republic of Armenia on the Human Rights Defender, adopted on 16 December 2016, article 35, paragraph 1, available at [https://www.ombuds.am/en\\_us/site/AboutConstitution/79](https://www.ombuds.am/en_us/site/AboutConstitution/79).

<sup>22</sup> *Ibidem*, article 34, paragraph 3, available at [https://www.ombuds.am/en\\_us/site/AboutConstitution/79](https://www.ombuds.am/en_us/site/AboutConstitution/79).



- (5) appoint to and dismiss from position the state servants and persons holding discretionary offices within the Staff of the Defender, as well as apply incentive measures and impose disciplinary sanctions thereon;
- (6) define the procedure for training, performance evaluation of state servants, the criteria and reference form, code of conduct of state servants, procedures for conducting official investigation, case-management (document circulation), keeping the personal files of state servants;
- (7) prescribe the procedure for organizing a competition for filling vacant positions of state service within the Staff of the Defender, for the formation of selection boards, as well as the rules of procedure thereof;
- (8) upon his or her decision, send on an official trip and grant a leave to state servants and persons holding discretionary offices within the Staff of the Defender;
- (9) issue powers of attorney for acting on behalf of the Defender, including powers with the right of substitution;
- (10) exercise other powers reserved thereto by the Constitution of the Republic of Armenia and this Law.”

39. An analysis of these legal provisions suggests that the constitutional law has provided sufficient guarantees for the independence of the staff of the Ombudsman institution. Indeed, it seems that the staff of the institution has enjoyed a high status in terms of the category of civil service, which must have had a positive impact on the financial and social status of the institution's staff.

40. Similarly, it seems that the Ombudsman has had a significant degree of control over the Ombudsman's personnel policy, in almost all its constituent elements, starting with recruitment procedures, the appointment of civil service positions, the determination of training procedures and the evaluation of civil servants, the code of conduct, etc.

41. On the basis of the above it can be concluded that the former version of the Constitutional law ensured the independence of the Ombudsman in all staff-related proceedings by providing a series of safeguards for discretionary powers of the Ombudsman in all aspects of staff policies.

42. The provisions of the constitutional law appear to have been aimed at ensuring that the Ombudsman's staff was treated fairly and appropriately. Furthermore, it can be noted that all these provisions were meant to ensure compliance with the Paris Principles and would be today in line with the above-mentioned international standards, which is commendable.

## **V. The amendments to the Constitutional Law on the Human Rights Defender of 21 January 2020**

43. The new version of the law, which includes the new amendments of 21 January 2020, leads to substantial qualitative changes in the guarantees of independence of the Ombudsman with regard to staff policies and with regard to the budgetary independence of the institution.

44. Article 35 of the HRD Constitutional Law is repealed, which, among other things, provided that "State service in the Ombudsman's staff is a special type of state service prescribed by the legislation of the Republic of Armenia". The provisions regarding the grades and ranks according to the positions of the state officials were also repealed.

45. Article 34, paragraph 2, according to which "The official relations of civil servants shall be governed by the internal disciplinary regulations approved by the Defender" is also repealed. In addition, Article 34 paragraph 1 includes a new provision according to which "Service in the

Defender's Office is civil service, which is regulated by the Civil Service Act, if particulars are not provided for in this Act."

46. Another important change is found in Article 39 paragraph 7, which in the previous version of the law provided that the Defender "shall establish the procedure for organising the competition for filling the vacancies in the civil service in the Office of the Defender, for the formation of the juries, as well as the rules of procedure for the same", while the new amendments provide that "on the basis of the Civil Service Act, the procedure for the competition for filling the vacancy in the civil service in the Office of the Defender shall be defined".

47. According to the authorities, in accordance with the Law on Civil Service as amended (Article 9 para 5) the organization of competition for filling the vacancies in the civil service in the Office of the Defender is regulated and implemented by the Staff of the Ombudsman. Moreover, Article 10 para 22 of the Law on Civil Service would set forth the following exclusion: the procedure for the competition for filling the vacancy in the civil service in the Ombudsman Institution is defined by the Ombudsman. It is worth recalling that the full text of the Law on civil service was not provided to the Rapporteurs. The Rapporteurs worked on extracts of different pieces of legislation provided for by the Ombudsman's institution, as can be seen in the document of reference CDL-REF(2021)074, which does not included those two articles. At any rate, those provisions should rather be contained in a clearer way in the Constitutional Law on HRD.

48. To sum up: the new amendments to the HRD Constitutional Law consist of three main elements/modifications creating confusion with regard to the status and ranking of the ombudsman's staff and the competence on organizing competition procedures. In particular, it derives from the new amendments to the HRD Constitutional Law that:

- The ombudsman staff's status has changed from "state servants" to "civil servants";
- The law does not provide for the ranks for the Ombudsman staff, since the Ombudsman's staff now belong to the category of civil servants;
- Any competition procedures are now regulated by the law on civil service.

49. According to the authorities, the amendments to the Constitutional law have been part of a broader reform that the Government of the Republic of Armenia has undertaken regarding the public administration in the country. The main purpose of this wide-ranging reform was the creation and consolidation of a unified public service. Specifically, the amendments to the constitutional law on HRD, should be seen as an attempt to unify the HRD's administration with the rest of the administration. The authorities also assured the Venice Commission that during the transition of HRD's staff from state service to civil service, there would be no impact on salaries and bonuses and that the Ombudsman would have the right to prepare job descriptions and training formats. Seen from the point of view of the Venice Commission, this explanation by the Armenian authorities of the "main purpose" of the January 2020 reform, leads directly to the very essence of the main problem with the said reform. The 2020 reform does not recognize the unique position and status of the Ombudsman institution, according both to international standards, as well to Armenian constitutional law previous to the amendments. According to these standards, the Ombudsman institution cannot be treated as part of a "unified" civil service.

#### 1. With regard to staff policies

50. The affiliation to the civil servant status implies that other state institutions, such as the government, the prime minister, the deputy prime minister and the civil service office under the prime minister, will be involved in dealing with HRD staff related issues and staff policies. Indeed, Article 3 paragraphs 1 and 3 of the Law on Civil Service, provide that "The relations with regard to with civil service are regulated by the Constitution of the Republic of Armenia, the current Law, the Law of the Republic of Armenia "On Public Service", the Law of the

Republic of Armenia "About remuneration of persons holding the state positions and civil service positions", the decisions of the Government, Prime Minister and Coordinating Deputy Prime Minister and other legal acts".

51. The Law "On Public Service" regulates further the binding relations for civil servants deriving from their status on basic rights and obligations, social guarantees, system of discipline and relations under other regulations. The Government adopts the conditions and procedures for the implementation of the rights of persons enrolling in civil service (that derive from the current Law), while the Coordinating Deputy Prime Minister adopts the peculiarities for the organization of the service<sup>23</sup>.

52. Additionally, the Law on Public service provides for a very important role for the Civil Service Office under the authority of the Prime Minister. It is this office which, together with the Deputy Prime Minister, now plays a key role in personnel policies, including those relating to the Ombudsman's staff. For example, if one refers to Article 5 (5), (6) and (7) of the Civil Service Act, the Ombudsman must seek approval on matters related to the description of civil service positions and the index of these positions.

53. Furthermore, in addition to the Civil Service Bureau under the Prime Minister (to whom it is accountable)<sup>24</sup>, the coordinating Deputy Prime Minister also plays an important role in "approving the methodology for setting the requirements for evaluation, classification, titles, drafting of civil service job descriptions, their position in the common job system, rights and obligations, maintenance of the post index, as well as the professional knowledge and skills requirements for occupying a civil service position"<sup>25</sup>. According to the authorities, these are general provisions regulating all Civil Service System, nevertheless, Article 39 of the Law on Human Rights Defender is a *lex specialis* and is an exemption from the General regulations. However, no explicit mention has been provided neither in practice nor in any text to support this interpretation.

54. In all the international standards mentioned above, one of the most important elements of the Ombudsman's independence is his or her right to implement staff policies, not merely in a formal way, but in its very specific substantive sense and without any external influence from any state body.

55. The risk of undermining the independence of the Ombudsman is even greater if the Ombudsman is dependent for his or her policies on the staff of governmental bodies which are otherwise the main object of the Ombudsman's control. The possibility of influencing the policies of the Ombudsman's staff from the outside, especially from the government, can be seen as a tool for putting pressure on the Ombudsman, his or her independence, his or her image, the effectiveness of the institution and the public's confidence in it.

56. From the above it can be concluded that the 2020 amendments significantly reduce the power of the Ombudsman to recruit and implement its own staff policies. This also emerged from the interviews the delegation had, as it seems that several posts have been vacant since 2020 and have not yet been filled, as the decision no longer lies with the Ombudsman.

57. The package of amendments to the HRD's constitutional law constitutes a backward step concerning the independence and autonomy of the HRD institution. Moreover, in key staff policy matters, the Ombudsman is now directly or indirectly (through the Civil Service Office) dependent on government offices. This puts the independence of the institution and its effectiveness at risk.

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<sup>23</sup> Law of the Republic of Armenia "On civil service", article 3.

<sup>24</sup> See Law of the Republic of Armenia "On civil service", article 38, para. 2.

<sup>25</sup> Ibidem, para. 7.

58. It is hence strongly recommended that the Ombudsman's legislative and institutional framework be reviewed in order to guarantee its full independence in all aspects and procedures related to staff policies, ranging from recruitment, career, job classification, job descriptions, training, etc. Specific guarantees should be included in the legislation enabling the Ombudsman to make staff appointments and training without such interference.

59. It should be recalled that the Ombudsman is and remains responsible for the implementation of any legislative provision that would offer the institution such guarantees.

## 2. With regard to the composition of the staff institution

60. Another point of concern touches upon the determination of the size of the Ombudsman's staff.

61. According to Article 39 point 3 of the Constitutional Law on the HRD "[t]he administration of the subdivisions and the Secretariat of the Staff of the Defender shall be carried out by the Defender. The Defender shall approve and make changes to the number of employees and the staff table of the Staff of the Defender", the Ombudsman must "approve and amend the number of employees and the staffing table of the Ombudsman".

62. This provision guarantees the right independence of the Ombudsman related to the staff of the institution. Apparently, this provision was not changed in the amendment package of 21 January 2020.

63. However, simultaneously, Article 15 paragraph 1 of the Law on Public Service provides that "the maximum amount of the number of posts in the state authorities shall be determined by the Prime Minister". According to this provision, it is therefore the Prime Minister who determines the number of employees of the Ombudsman institution by decree.

64. First, at first glance, this provision contradicts the Constitutional Law on the HRD; this should be clarified and, if necessary, corrected.

65. Second, Article 15 paragraph 1 deals with a sensitive issue for the institution, its composition. The institution of the Ombudsman is a specific institution, dealing for example with the promotion and protection of human rights, whose priorities may change from year to year. The Ombudsman should be able to recruit the most qualified experts according to the priorities of the office in a flexible manner, without being subject to the general rules of the civil service and even less to the decision of a representative of the executive, which falls within the institution's field of competence. The Recommendations of the Council of Europe are explicit in this regard. Due to these characteristics, it must be an independent institution, in all elements of this independence from any other state body and from the public administration as a whole.

66. The Venice Commission recommends that care be taken to ensure that applicable legislative provisions subsequent to the Constitutional Law do not contradict it and effectively nullify its applicability, and recommends that specific guarantees should be included in the legislation that the Ombudsman be equipped with sufficient staff commensurate to the needs of the Institution.

## 3. With regard to the rank of the Ombudsman's staff

67. The move from civil service status to civil servant status by the 2020 amendments to the Constitutional Act also affect the rank of the Ombudsman's staff.

68. In financial terms, as a guarantee of its independence, the rank of the Ombudsman's staff should be proportionate and in direct relation to the rank that the legislator has given to the Ombudsman himself or herself. In this respect, the Venice Principles clearly state that "the institution of the Ombudsman must be given a sufficiently high rank, which is also reflected in the Ombudsman's remuneration and retirement allowance". Principle 3 of the Venice Principles, with the term "ombudsman institution", requires a broad interpretation and, in this sense, it is valid for both the ombudsman and his or her staff.

69. Moreover, in this context, the criteria and classification of staff should also be within the competence of the Ombudsman. It would be preferable that all such guarantees be provided for in the Law on the Ombudsman in order to ensure the stability and sustainability of the Ombudsman's activity in fulfilling his constitutional mandate.

#### 4. With regard to the budget of the institution

70. It is evident that the rank and number of staff is an important issue that directly affects the budget of the institution. As mentioned above (§§ 28-29) international standards place great importance on the budgetary independence of the institution.

71. Article 8 paragraph 2 of the HRD Constitutional Law provides that "The budget of the Defender and the Staff thereto shall constitute a part of the State Budget, which is funded in a separate line. The activities of the Defender as the National Preventive Mechanism shall also be specifically funded from the same budget line"<sup>26</sup>.

72. In Article 8 paragraph 3, it is provided that "The Defender shall - as prescribed by the legislation and within the deadline prescribed by the Law of the Republic of Armenia "On the Budgetary System of the Republic of Armenia" - submit the budget request (estimate) for the activities of the Defender and the Staff thereto for the upcoming year to the authorized state body to be included in the draft State Budget"<sup>27</sup>.

73. According to the terms of the law, the Ombudsman, in addition to determining the number of employees of the institution for the following year, incorporates this figure into its budget proposal for the institution for the following year.

74. As an "authorised state body", it seems that the Ombudsman is obliged to "negotiate" with the government for the following budget year the budget of the institution, including the number of employees. This concern was raised by the Venice Commission in its 2016 opinion in paragraph 27, which states that "Moreover, the Defender's budget request is always submitted to the government for approval in order to be included in the draft state budget. The draft Constitutional Law does not ensure that sufficient funds in the budget proposal are allocated to the Defender to perform his functions in general and his NPM (National Protection Mechanism) functions. However, this situation could be remedied by Article 193.4 of the new Constitution, which requires the state to ensure "adequate funding" for the Defender's activities."<sup>28</sup>

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<sup>26</sup> Constitutional Law of the Republic of Armenia on the Human Rights Defender, article 8, paragraph 2, available at [https://www.ombuds.am/en\\_us/site/AboutConstitution/79](https://www.ombuds.am/en_us/site/AboutConstitution/79).

<sup>27</sup> Constitutional Law of the Republic of Armenia on the Human Rights Defender, article 8, paragraph 3, available at [https://www.ombuds.am/en\\_us/site/AboutConstitution/79](https://www.ombuds.am/en_us/site/AboutConstitution/79).

<sup>28</sup> CDL-AD(2016)033, § 27.

75. In any event, in case of disagreement, ultimately the Parliament decides, and this seems to be the meaning of paragraph 4 of Article 8 of the Constitutional Law on the HRD<sup>29</sup>. Moreover, according to Article 8 paragraph 6, the Ombudsman has the right to participate in the respective hearing session of the discussion of the bill "on the state budget"<sup>30</sup>. A further guarantee that the budget of the institution will not be reduced, nor the staff, is provided in paragraph 5 of the same article<sup>31</sup>. Which is welcomed.

76. However, since the negotiation with the government potentially could have an impact on the independence of the institution, it would be advisable for the Ombudsman to negotiate the budget of the institution rather in Parliament.

77. Explicitly providing for negotiating the budget within the Parliament rather than with the executive power would prevent the budgetary process from being used in a way that undermines the Ombudsman's independence. This was one of the recommendations of the Venice Commission in 2006, which was reiterated in the 2016 opinion.<sup>32</sup> It seems that the current situation mirrors this concern. Indeed, the Venice Commission's delegation has learned that the Ministry of Finance has not included additional funds for an increase in the Ombudsman's staff, although the Ombudsman has requested this, as the increase in staff was not foreseen in the Prime Minister's decree. If so, the above-mentioned recommendation of the Venice Commission seems to be still valid.

78. It is common for draft public budgets to be prepared by the executive, but this phase should not result in the executive being given a means of pressure, interference or even a tool to reduce the effectiveness of the institution.

79. Given that the budget of the institution, to which the staff of the institution is linked, is a key element of the independence of the institution, it is obvious that the role of the Parliament is decisive in this respect, and that it is up to the Parliament to also guarantee this independence.

80. Therefore, the role of the Parliament in supporting the budget of the Ombudsman institution, and thus in supporting the independence of the institution, is crucial. In this respect, the budgetary demands made by the Ombudsman should be supported by the Parliament, which guarantees the independence of the institution. The financial elements related to the

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<sup>29</sup> See Constitutional Law of the Republic of Armenia on the Human Rights Defender, article 8, paragraph 4: "Where the budget request (estimate) of the Defender and the Staff thereto for the upcoming year is approved by the Government, it shall be included in the draft State Budget, and if there is an objection it shall be submitted to the National Assembly of the Republic of Armenia along with the draft State Budget. The Government shall present to the National Assembly and the Defender the justification for the objection on the budget funding". Available at [https://www.ombuds.am/en\\_us/site/AboutConstitution/79](https://www.ombuds.am/en_us/site/AboutConstitution/79).

<sup>30</sup> See Constitutional Law of the Republic of Armenia on the Human Rights Defender, article 8, paragraph 6: "The Defender shall participate in the hearings at the National Assembly on the draft Law of the Republic of Armenia «On State Budget» in part related to funding of activities of the Defender and the Staff thereto, as well as the Defender as the National Preventative Mechanism. Available at [https://www.ombuds.am/en\\_us/site/AboutConstitution/79](https://www.ombuds.am/en_us/site/AboutConstitution/79).

<sup>31</sup> See Constitutional Law of the Republic of Armenia on the Human Rights Defender, article 8, paragraph 5: "The amount of allocation for funding provided from the state budget to the Defender and the Staff thereto as well as to the Defender as the National Preventative Mechanism cannot be less than the amount provided the year before. The funding from the state budget is implemented in equal monthly installments in the form of pre-payment for every month". Available at [https://www.ombuds.am/en\\_us/site/AboutConstitution/79](https://www.ombuds.am/en_us/site/AboutConstitution/79).

<sup>32</sup> CDL-AD(2016)033, §28 "Considering its exceptionally sensitive nature and the significance of this provision for the independence of the institution, a provision could be added stating that public authorities shall not use the budgetary process for allocating funds from the budget in a manner that interferes with the independence of the institution of the Human Rights Defender."

staff of the institution should therefore be included in the budget law (discussed and approved by the Parliament) rather than in regulatory acts, such as decrees of the Prime Minister, as is the case today.

81. The financial aspect of the Ombudsman institution's staff, is reflected in the budget, which should not only be sufficient but should not be subject to external pressure, particularly from bodies that fall within the Ombudsman's remit.

82. The Commission reiterates its previous recommendations on the institution's budget and recommends that they be implemented, bearing in mind the fundamental role of the Parliament.

## **V. Conclusion**

83. The Human Rights Defender of Armenia is an A-status Ombudsman and NHRI with long experience in the field of protection and promotion of human rights and other specific aspects of the mandate assigned to it by the Constitutional Law. This institution, as a key player in strengthening the rule of law, democracy and human rights, can play a key role in their development and consolidation in Armenia.

84. First and foremost, the 2020 amendments by changing the legal regime of the Ombudsman institution's staff and subjecting it to the civil service regime seems to contradict in the first place Article 39. Paragraph 3 of the Constitutional Law on the Human Rights Defender, from which it follows the Ombudsman enjoyed full independence and autonomy with regard to personnel matters and related policies.

85. The Venice Commission recommends therefore that care be taken to ensure that applicable legislative provisions subsequent to the Constitutional Law do not contradict it and effectively nullify its applicability.

86. The required independence of the Ombudsman institution is measured by the independence of its head, its staff, and its budget, both in terms of amount and of management.

87. The former articles of the HRD constitutional law were in this regard fully in compliance with international standards.

88. The package of the 2020 amendments, even though it was intended to unify the public service system in general, could be seen as significantly reducing the independence of the Ombudsman institution in terms of the independence of the staff, in terms of the independence of the Ombudsman to recruit and implement staff policies in an autonomous manner. The 2020 reform does not recognize the unique position and status of the Ombudsman institution, according both to international standards, as well to Armenian constitutional law previous to the amendments. According to these standards, the Ombudsman institution cannot be treated as part of a "unified" civil service.

89. As it flows from the international standards cited above, the independence and efficiency of the Ombudsman institution requires the implementation of policies, which guarantee the autonomy of the recruitment processes, staff members' career evolution and position ranking. Hence, issues related to the staff, such as independent recruitment, career policies, rank, salary, education, and training, are all part of this concept of independence.

90. These elements are therefore equally important aspects and even indicators of the institution's independence.

91. Moreover, issues relating to the institution's staff and rank have budgetary consequences and are therefore linked to the institution's budget. International standards are again consistent in this respect and require to secure guarantees of independence for the budget of the institution.

92. To this end the Venice Commission recommends:

- Revising the Ombudsman's legislative framework in order to clarify and guarantee his or her full independence in staff policies, notably recruitment, career, job classification, job descriptions, etc;
- Ensuring that the Ombudsman's staff system and staff policies are based on clear criteria, linked to the specificities, functions and responsibilities of the institution. It should be avoided that staff-related issues subordinated to any other state body or agency, notably the executive power.

93. Finally, the Commission invites the legislator to take the opportunity of a possible revision of the constitutional Law on Human Rights Defender not only to implement the previous recommendations formulated in the 2006 and 2016 opinions of the Venice Commission which are still valid but also to fully implement all Venice Principles.

94. The Venice Commission remains available for any further assistance.