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Ombudsman institutions in Europe - the need for a set of common standards

Report[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Lord Richard BALFE, United Kingdom, European Conservatives Group

Summary

Ombudsman institutions, which are tasked with protecting individuals against maladministration and human rights violations, have a crucial role to play in consolidating democracy, the rule of law and human rights. However, there is no standardised model for this institution. The Committee on Legal Affairs and Human Rights believes that it would be useful to establish common standards governing the functioning of Ombudsman institutions and it is concerned that in many Council of Europe member States, Ombudspersons have been subjected to threats.

Therefore, the committee welcomes the Venice Commission's adoption, on 15 March 2019, of the Principles on the Protection and Promotion of the Ombudsman Institution (Venice Principles). It recommends that the Assembly should endorse them, as the Committee of Ministers has done. The Council of Europe member States should ensure that the Venice Principles are fully implemented and take all necessary measures to ensure the independence of Ombudspersons. The Committee of Ministers could also set up a mechanism to monitor the implementation of the principles.

1. Reference to committee: Doc. 14381 Reference 4332 of 13 October 2017.

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A. Draft resolution[2]

1. The Parliamentary Assembly, referring to its Recommendations 757 (1975) and 1615 (2003) and Resolution 1959 (2013), reaffirms that Ombudsman institutions, who are tasked with protecting individuals against maladministration and violations of human rights and fundamental freedoms by the public administration, have a crucial role in consolidating democracy, the rule of law and human rights.

2. The Assembly recalls the Council of Europe's other bodies' work on promoting Ombudsman institutions and national human rights institutions (NHRIs), including the Committee of Ministers' Recommendations No. R (80) 2, No. R (85) 13, No. R (97) 14, No. R (2000) 10, CM/Rec(2007)7 and CM/Rec(2018)11 as well as Recommendations 61 (1999) and 309 (2011) and Resolution 327 (2011) of the Congress of Local and Regional Authorities and the relevant recommendations made by the Council of Europe Commissioner for Human Rights.

3. The Assembly notes that most member States of the Council of Europe have established Ombudsman institutions. States enjoy a wide margin of appreciation with regard to the institutional arrangements of Ombudspersons and therefore there is no standardised model for this institution. It is of great concern, however, that in many Council of Europe member States, Ombudsman institutions have in recent years found themselves confronted with threats to their effectiveness and independence. These have included legislative reforms aimed at weakening the institution, undue delays in the appointment of Ombudspersons by parliaments, parliaments' refusal to consider or rejection of their annual or other reports, unjustified cuts in the budget, unjustified audits, obstacles to accessing files and information, etc. The Assembly is also concerned that in some countries, Ombudspersons have been subject to verbal attacks by politicians, including members of government.

4. For these reasons, there is an urgent need to establish common norms governing the functioning of Ombudsman institutions and in particular ways in which their independence should be ensured.

5. Although some Ombudsman institutions are also national human rights institutions, not all NHRIs are "classical" Ombudsman institutions. The Principles relating to the Status of National Human Rights Institutions (the "Paris Principles"), which were adopted by the United Nations in 1993 and set out minimum standards for the establishment and functioning of NHRIs, are thus not applicable to all types of Ombudsman institutions.

6. The Assembly recognises the important contribution made by the European Commission for Democracy through Law ("Venice Commission") through its opinions to the establishment and development of Ombudsman institutions. It therefore welcomes the Venice Commission's adoption, on 15 March 2019, of the Principles on the Protection and Promotion of the Ombudsman Institution (the "Venice Principles"), drafted in co-operation with major international institutions active in this field, including the Council of Europe's Commissioner for Human Rights and its inter-governmental Steering Committee for Human Rights (CDDH), the United Nations Office of the High Commissioner for Human Rights and the International Ombudsman Institute. The Venice Principles were also endorsed by the Committee of Ministers on 2 May 2019. This is the first international set of standards for Ombudsman institutions, equivalent to the Paris Principles for NHRIs.

7. The Venice Principles recall that independence, objectivity, transparency, fairness and impartiality are the core principles of Ombudsman institutions, which may be achieved through a variety of different models. They contain 25 principles relating to the constitutional guarantee for those institutions, the choice of the institutional model, criteria for office, election, status, immunities, term of office, budgetary independence, competences, powers and accessibility.

8. The Assembly welcomes the fact that the Venice Principles contain minimum standards which are aimed at protecting and promoting the institution of Ombudsman and increasing its efficiency; helping parliaments and governments to establish and consolidate such institutions; and recognising their role in strengthening democracy, the rule of law and human rights. These principles may also provide guidance to Ombudsman institutions themselves, as well as to potential complainants and representatives of civil society acting for the promotion and protection of human rights and fundamental freedoms. This document will also help Ombudspersons in resisting undue interference in their work.

9. The Assembly therefore endorses the Venice Principles and calls on member States of the Council of Europe to:

9.1. ensure that the Venice Principles and other relevant recommendations of the Council of Europe are fully implemented in practice;

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2. Draft resolution unanimously adopted by the committee on 25 June 2019.

9.2. take all necessary measures to ensure the independence of those institutions;

9.3. invite their national parliaments and relevant government bodies to systematically refer to the Venice Principles when assessing the need for and the content of legislative reform concerning Ombudsman institutions;

9.4. refrain from any action aiming at or resulting in the suppression or undermining of the Ombudsman institution and from any attacks or threats against such institutions and their staff, and protect them against such acts;

9.5. promote an "Ombudsman-friendly climate" in particular by guaranteeing easy and unhindered access to the Ombudsman institutions, providing sufficient financial and human resources to those institutions and allowing them to co-operate freely with their peers in other countries and with international associations of Ombudspersons.

10. The Assembly encourages all member States of the Venice Commission, whether or not member States of the Council of Europe, that have not yet done so to promptly establish a "classical" Ombudsman institution with a broad mandate, allowing individuals to complain about cases of maladministration and violations of their human rights and fundamental freedoms, in line with the Venice Principles, and to co-operate with the Venice Commission to this end.

B. Draft recommendation[3]

1. Referring to its Resolution … (2019) on "Ombudsman institutions in Europe – the need for a set of common standards", the Parliamentary Assembly recommends that the Committee of Ministers:

1.1. take all necessary measures to promote the Principles on the Protection and Promotion of the Ombudsman Institution ("the Venice Principles") and their implementation by member States of the Council of Europe;

1.2. consider establishing a mechanism of appropriate composition and mandate to which Council of Europe member States would regularly report on the situation and activities of their Ombudsman institutions, including the state of implementation of the Venice Principles;

1.3. condemn any attack or threat against Ombudsman institutions coming from the authorities of a Council of Europe member State;

1.4. streamline its work in relation to the activities of Ombudsman institutions through better co-ordination with the Council of Europe Commissioner for Human Rights, the European Commission for Democracy through Law ("Venice Commission"), the Congress of Local and Regional Authorities and the Assembly;

1.5. adopt without delay the draft recommendation on the development of the Ombudsman institution, ensuring its compliance with the Venice Principles;

1.6. continue its co-operation in this field with other international organisations, in particular the European Union and the United Nations Organisation as well as with international associations of Ombudsman institutions such as the International Ombudsman Institute.

3. Draft recommendation unanimously adopted by the committee on 25 June 2019.

C. Explanatory memorandum by Lord Richard Balfe, Rapporteur

1. Introduction

1.1. Procedure and mandate

1. The present report is based on a motion for a resolution tabled by our former colleague Mr Philippe Mahoux (Belgium, SOC) and others on 30 June 2017 (Doc. 14381) and referred to the Committee on Legal Affairs and Human Rights for report on 13 October 2017. The committee appointed me as rapporteur on 12 December 2017. During its meeting on 25 January 2018, the committee held an exchange of views with Mr Jan Helgesen, member of the European Commission for Democracy through Law ("Venice Commission"). Moreover, on 23 May 2018 the committee held a hearing with the participation of Mr Tryggvi Gunnarsson, the Althing Ombudsman (Iceland) and Ms Catherine De Bruecker, Federal Ombudsman of Belgium and Vice-President for the European Region on the Board of Directors of the International Ombudsman Institute (IOI). Lastly, at its meeting on 29 May 2019, following adoption by the Venice Commission of the Principles on the Protection and Promotion of the Ombudsman Institution (Venice Principles) on 15 March 2019, the committee held an exchange of views with Mr Igli Totozani, former People's Advocate of Albania and expert of the Venice Commission.

1.2. Issues at stake

2. The motion for a resolution asks the Parliamentary Assembly to strengthen the Ombudsman institutions in Council of Europe member States through the creation and promotion of a set of principles, inspired by the Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights (the "Paris Principles"), taking into account the importance of the work of Ombudsman institutions and their specific characteristics, in close co-operation with the Venice Commission.

3. There are over 140 Ombudsman institutions in the world. As stated in the motion for a resolution, they are tasked with protecting individuals against maladministration and have a key role to play in the protection of human rights, the consolidation of democracy and the promotion of the rule of law. Such institutions should therefore have a broad, but clearly defined, mandate and be governed by the principles of independence, impartiality and neutrality. The Council of Europe has consistently promoted the creation and strengthening of Ombudsman institutions. In its Recommendation 757 (1975) and Recommendation 1615 (2003), the Assembly stressed the importance of Ombudsman institutions and invited member States to establish such institutions, highlighting, in the latter, key characteristics of a model Ombudsman. In its Resolution 1959 (2013) on 'Strengthening the institution of ombudsman in Europe',[4] the Assembly further called on member States which have set up Ombudsman institutions to ensure that such institutions fulfil a number of criteria, in particular as regards independence and impartiality, appointment procedure, remit and access. The Committee of Ministers has adopted various texts on the issue of the protection of the individual against maladministration, including on the protection of the individual in relation to the acts of administrative authorities; Recommendation No. R (80) 2 concerning the exercise of discretionary powers by administrative authorities; Recommendation No. R (85) 13 on the institution of the *ombudsman*; Recommendation No. R (97) 14 on the establishment of independent national institutions for the promotion and protection of human rights; Recommendation No. R (2000) 10 on codes of conduct for public officials; Recommendation CM/Rec(2007)7 on good administration and Recommendation CM/Rec(2018)11 on the need to strengthen the protection and promotion of civil society space in Europe. The Council of Europe's Steering Committee for Human Rights (CDDH) is currently working on a draft recommendation of the Committee of Ministers on the development of the Ombudsman institution and on a compilation of national best practices.

4. Furthermore, the Congress of Local and Regional Authorities called for the establishment of, and exchange of good practice among, Ombudsman institutions, at both national and regional/local levels, in its Recommendation 61 (1999) on the role of local and regional mediators/ombudsmen in defending citizens' rights and its Recommendation 309 (2011) and Resolution 327 (2011) on the office of Ombudsman and local and regional authorities. Moreover, the Venice Commission has issued numerous opinions and recommendations on Ombudsman institutions, a compilation of which was adopted in February 2016 (CDL-PI(2016)001). Lastly, the Commissioner for Human Rights is mandated to facilitate the activities of national Ombudsman institutions and other human rights structures.

4. See the report by our former committee colleague Mr Jordi Xuclà (Spain, ALDE), Doc. 13236.

5. The Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights (the "Paris Principles"), adopted by the United Nations General Assembly in 1993,[5] set out minimum standards for the establishment and functioning of national human rights institutions (NHRIs), ensuring, *inter alia*, that such institutions are independent and have a clearly defined mandate based on universal human rights standards. At the time when the said motion for a resolution was moved, similar principles at the international level specifically relating to Ombudsman institutions were still lacking. At the same time as my report was being prepared, the Venice Commission started drafting Principles on the Protection and Promotion of the Ombudsman Institution, in co-operation with major international institutions active in this field, including the Council of Europe Commissioner for Human Rights, CDDH, the IOI and the United Nations Office of the High Commissioner for Human Rights. This instrument, also known as "the Venice Principles", was finally adopted by the Venice Commission on 15 March 2019.[6] It was endorsed by the Committee of Ministers at the 1345th meeting of the Ministers' Deputies in Strasbourg on 2 May 2019 and will probably be endorsed by the Congress of Local and Regional Authorities in the near future. The Principles on the Protection and Promotion of the Ombudsman Institution contain 25 principles referring to the independence of the Ombudsman, the features of his/her term of office, his/her powers, competences and accountability as well as the accessibility to the Ombudsman institution.

6. The history and the evolution of Ombudsman institutions in Council of Europe member States has already been extensively described in the report of our former colleague Mr Jordi Xuclà on "Strengthening the institution of Ombudsman in Europe".[7] In this report, I shall therefore define the purpose and role of Ombudsman institutions, considering both the "classical" and "human rights" models, and examine the content and relevance of the "Paris Principles" on national human rights institutions. I shall then discuss the Venice Principles in greater depth and identify their importance for Ombudsman institutions, taking into account concrete examples of threats against Ombudsman institutions. In conclusion, I shall make some proposals concerning further work of the Council of Europe in this field.

2. Ombudsman Institutions

2.1. Definition and role

7. The Ombudsman institution, in its classical form, has been defined as "an office provided by the constitution or by action of the Legislature or Parliament and headed by an independent high-level public official, who is responsible to the Legislature or Parliament, who receives complaints from aggrieved persons against government agencies, officials and employees, or who acts on his [or her] own motion and who has the power to investigate, recommend corrective action and issue reports."[8]

8. This classical model of Ombudsman institution primarily has the authority to investigate claims of maladministration by public sector authorities. "Maladministration" is a broadly defined term which covers breaches of law, as well as types of conduct such as undue delays, failure to give information, rudeness or insensitivity.[9] The Charter of Fundamental Rights of the European Union explicitly provides for good administration as a fundamental right in its Article 41: "Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time". Principles of good administration include the principles of lawfulness; equality; impartiality; proportionality; legal certainty; taking action within a reasonable time; participation; respect for privacy; and transparency.[10] Ombudsman institutions therefore play an important role in enhancing democratic accountability.

9. Classical Ombudsman institutions today undertake additional roles such as freedom of information, privacy protection, child protection, anti-corruption and health service monitoring, which may give them jurisdiction over some parts of the private sector. While narrowly-defined classical Ombudsman institutions do not have an express human rights mandate, their work can increasingly also involve resolving complaints with human rights aspects.[11] In the European context today, nearly all Ombudsman institutions use human rights

5. UNGA Res 48/134, UN Doc. A/RES/48/134 (1993).
6. Venice Commission, Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles"), CDL-AD(2019)005-e.
7. Ibid, see in particular paras. 5-7.
8. Ombudsman Committee, International Bar Association Resolution (Vancouver: International Bar Association, 1974), pp. 1-2.
9. Doc. 13236, para. 5.
10. See Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration, adopted 20 June 2007; and European Ombudsman, The European Code of Good Administrative Behaviour, European Ombudsman, 2015.

standards, alongside other normative sources.[12] With human rights principles increasingly permeating public life, respect for and protection of human rights is increasingly recognised as forming part of good administration.

10. Human rights Ombudsman institutions, on the other hand, have explicit human rights protection and, increasingly, promotion mandates. Such institutions may also have other additional mandates, for example the classical role of investigating maladministration, or environmental protection. Moreover, some human rights Ombudsman institutions have been given the role of human rights preventive and monitoring bodies, as required by United Nations human rights treaties and soft law instruments,[13] as well as European Union law.[14] In addition to the traditional Ombudsman's soft powers of investigation, recommendation and reporting, many human rights Ombudsman institutions have supplementary powers, such as bringing actions before courts and tribunals, prosecutions, and inspections and monitoring of detention facilities.[15]

11. Thematic or specialised Ombudsman institutions have also been established, including those with an explicit human rights mandate, such as children's and equality Ombudsman institutions, and those without, such as defence force, police and prisons Ombudsman institutions.

12. States have a wide margin of discretion in choosing the model of Ombudsman institution,[16] with there being no standardised model, as such. In the European context, States sometimes have more than one Ombudsman, with each covering a specified area, including regional and/or local Ombudspersons (as is the case in Sweden, for example). On the other hand, States are also free to opt for the model of a general Ombudsman with over-arching functions (as is the case in France, for example, although the Defender of Rights is assisted by four deputies, each active in a different field).

13. According to the Venice Commission, the most widely followed model is that of "an independent official having the primary role of acting as intermediary between the people and the State and local administration, and being able in that capacity to monitor the activities of the administration through powers of inquiry and access to information and to address the administration by the issue of recommendations on the basis of law and equity in a broad sense, in order to counter and remedy human rights violations and instances of maladministration."[17] For the purposes of this report, the term "Ombudsman institution" or "Ombudsperson" will be taken to include all of the instances described above, regardless of the variations in terminology used by member States of the Council of Europe.

14. "[T]he independence of the Ombudsman is a crucial corner stone of this institution."[18] As can be seen from the definition of an Ombudsman institution, the most significant element, to ensure the proper functioning of such institutions, is their independence from the executive. The independence of Ombudsman institutions can be subdivided into three categories: institutional; personal; and functional independence. Ombudsman institutions do not only need to be independent but must also be "seen" to be independent. Members of the public should have confidence that there exists an independent Ombudsman holding government and public administration to account, to whom they can submit complaints without fear of reprisals. In addition, Ombudsman institutions should be both impartial and neutral.

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11. Linda Reif, *The Ombudsman, Good Governance and the International Human Rights System,* Brill, 2004, p. 2.
12. See Milan Remac, "Standards of Ombudsman Assessment: A New Normative Concept?" (2013) 9 *Utrecht Law Review* 62, at p. 69; and Victor Ayeni, "Ombudsmen as Human Rights Institutions" (2014) 13 *Journal of Human Rights* 498, at p. 498.
13. For example, National Preventive Mechanisms (NPMs) under the UN Optional Protocol to the Convention Against Torture (OPCAT); and National Monitoring Mechanisms (NMMs) under the UN Convention on the Rights of Persons with Disabilities (CRPD).
14. For example, Directive 2000/43/EC on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Directive 2004/113/EC on implementing the principle of equal treatment between men and women in the access to and supply of goods and services and Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).
15. Linda Reif, "Transplantation and Adaptation: The Evolution of the Human Rights Ombudsman" (2011) 31 *Boston College Third World Law Journal* 269, at pp. 302-307.
16. Venice Commission, *Opinion on the Law on the People's Advocate (Ombudsman) of the Republic of Moldova,* CDL-AD(2015)017, para 25.
17. Venice Commission, *Opinion on the possible reform of the Ombudsman Institution in Kazakhstan*, CDL-AD(2007)020, para 12.
18. Venice Commission, *Opinion on the Draft Law of the Public Attorney of "The former Yugoslav Republic of Macedonia",* CDL-AD(2003)007, B.II Article 5.1.

2.2. National human rights institutions (NHRIs)

15. A national human rights institution has been defined by the United Nations as "a body which is established by a Government under the constitution, or by law or decree, the functions of which are specifically designed in terms of the promotion and protection of human rights."[19] This term includes Ombudsman institutions. However, not all ombudsman institutions are NHRIs.

16. The Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights, produced as a result of a United Nations International Workshop on National Institutions on the Promotion and Protection of Human Rights, and adopted by the General Assembly in 1993, set out minimum standards for the establishment and functioning of NHRIs. The Paris Principles list the essential characteristics of an NHRI: independence from government; a broad mandate to both promote and protect human rights, established in the constitution or by legislation; a pluralist representation of society in the choice of commission members and adequate financial and human resources.[20]

17. The Paris Principles are only applicable to national level human rights Ombudsman institutions; other forms of Ombudsman institutions are excluded from the definition of an NHRI. Classical and thematic Ombudsman institutions are therefore not considered to be NHRIs, and, as a consequence, cannot achieve full compliance with the Paris Principles. Moreover, it is nearly impossible for more than one NHRI in a State to obtain the accreditation of the Global Alliance of National Human Rights Institutions (GANHRI). A number of national human rights Ombudsman institutions are therefore also not eligible for accreditation.

18. Furthermore, the structure, powers and human rights activities of the classical Ombudsman institutions are not reflected adequately in the Paris Principles. The latter consider the investigation of complaints to be an optional power for NHRIs, whereas they should be an essential component of the Ombudsman institution's mandate.[21] The Paris Principles therefore do not provide a sufficiently relevant framework as far as regulation of Ombudsman institutions are concerned. In this context, the adoption by the Venice Commission of its "Venice Principles" is even more welcome.

2.3. Examples of threats against Ombudsman institutions

19. In many countries in the world, Ombudspersons are exposed to various threats and attacks because of their role in combating maladministration and protecting human rights and fundamental freedoms. Sometimes these attacks can have fatal results: for example, the Mexican Ombudsman for Baja California, Mr Silvestre de la Toba Camacho, was murdered in 2017.

20. Although the situation is not so dramatic in Council of Europe member States, there have been many cases showing certain States' ambivalence towards the institution of Ombudsman and their attempts to discredit Ombudspersons or limit their powers. Here are a few examples: legislative amendments aimed at weakening the institution (in Croatia[22]); threats to annul the appointment of the Ombudsman (in Ukraine[23]); downsizing the Ombudsman's budget (in Poland[24]); launching unjustified audit (in Cyprus[25]); denial of access to files or information (in Croatia, the border police recently denied the Ombudsman access to its files, in a clear violation of her investigative powers[26], and in Malta, the Venice Commission has noted "widespread refusal by the administration to provide the information needed for the work of the Ombudsman"[27]), parliament's rejection of Ombudsman annual reports (in Croatia in 2016[28]) or politicians' public statements criticising Ombudspersons (in France,[29] Georgia, Serbia[30], Poland[31] or Slovakia[32]) or unjustified lawsuits lodged against them (in Poland[33]). Because of lack of political consensus, the election of the Spanish

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19. United Nations Centre for Human Rights, *National Human Rights Institutions: A Handbook on the Establishing and Strengthening of National Institutions for the Promotion and Protection of Human Rights,* Professional Training Series No. 4, UN Doc. HR/P/PT 4 1995, at p. 6.
20. See also Paris Principles, "Methods of operation", adopted by UNGA Res 48/134, UN Doc. A/RES/48/134 (1993).
21. Linda Reif, supra note 11, pp. 96-97.
22. Commissioner for Human Rights, statement of 11 July 2017 "Croatian government should reconsider the draft law on the Ombudsman for Children".
23. Council of Europe Office in Ukraine, The SASG expresses concern on the threat to the independence of the Ukrainian Parliament Commissioner for Human Rights, 5 June 2015.
24. Commissioner for Human Rights, Paris Principles at 25: Strong National Human Rights Institutions Needed More Than Ever, 18 December 2018
25. IOI, Annual Report 2017/2018, p. 24.
26. Supra note 24.
27. Venice Commission, *Opinion on Malta's constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement*, CDL-AD(2018)028.
28. See report by the Commissioner for Human Rights, CommDH(2016)31, p. 8.

Ombudsman has been now delayed by nearly two years and the acting deputy Ombudsman has been in charge since July 2017; a similar situation had recently occurred in Greece. In the Czech Republic, there have recently been controversies around the election of a deputy Ombudsman, who was considered to be too close to the authorities.[34] Ombudsman institutions are particularly targeted in countries still undergoing democratic transition. However, even in some countries with long-standing democratic cultures such institutions are subject to challenges and threats. For example, the IOI has reported to me cases of proliferation of institutions with thematic mandates overlapping the powers of the Ombudsman and thus diluting democratic control (in the United Kingdom and Belgium); restrictions on jurisdiction such that key areas of administrative activity are not included (in Ireland); or exclusion of jurisdiction from certain areas of administrative activity following their privatisation (in Austria, Belgium, Ireland, the Netherlands and the United Kingdom).

3. "Venice Principles"[35]

3.1. General comments

21. The Preamble to the Venice Principles recalls that Ombudsman institutions exist at different levels (national, regional or local) and have different competences. Independence, objectivity, transparency, fairness and impartiality are the core principles of these institutions and may be achieved through a variety of different models.

22. According to the Preamble, the Ombudsman is "an institution taking action independently against maladministration and alleged violations of human rights and fundamental freedoms affecting individuals or legal persons". The right to complain to this institution "is an addition to the right of access to justice through the courts". The Ombudsman also "plays an important role in protecting Human Rights Defenders". Moreover, as stressed in Principle No. 1, the institution has "an important role to play in strengthening democracy, the rule of law, good administration and the protection and promotion of human rights and fundamental freedoms".

23. Principle No. 24 refers to situations in which the Ombudsman institution is subject to threats, its work is impeded or the State itself takes direct or indirect action aimed at dismantling this institution. It clearly states that "States shall refrain from taking any action aiming at or resulting in the suppression of the Ombudsman Institution or in any hurdles to its effective functioning and shall effectively protect it from any such threats."

24. It should also be pointed out that the Venice Principles "shall be read, interpreted and used in order to consolidate and strengthen the Institution of the Ombudsman" (Principle No. 25, first sentence), which means that they can be an important source of interpretative guidance in individual cases concerning the mandate and functioning of Ombudsman institutions. Moreover, "taking into consideration the various types, systems and legal status of Ombudsman Institutions and their staff members", Principle No. 25, second sentence encourages States "to undertake all necessary actions including constitutional and legislative adjustments so as to provide proper conditions that strengthen and develop the Ombudsman Institutions and their capacity, independence and impartiality in the spirit and in line with the Venice Principles and thus ensure their proper, timely and effective implementation".

3.2. Constitutional guarantee for the institution of the Ombudsman

25. In order to protect independent Ombudsman institutions from "political fluctuation", the Venice Commission has previously outlined the importance of constitutional guarantees for the existence and basic principles of activity of such institutions.[36]

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29. Rapport sur le maintien de l'ordre : Toubon « oublie l'essentiel » (Castaner), 'Le Figaro', 12 March 2019.
30. Supra note 24.
31. Commissioner for Human Rights letter to the Prime Minister of Poland, 19 January 2018.
32. Ombudswoman: I need to point out human rights violations, the Slovak Spectator, 24 August 2017.
33. See my statement of 18 February 2019.
34. Czech civil society urges MPs not to elect President's nominee for Deputy Public Defender of Rights, romea.cz, 12 March 2019.
35. The main references for this section come from the Compilation of Venice Commission Opinions concerning the Ombudsman Institution CDL-PI(2016)001 of 5 February 2016. See also Linda Reif, *supra* note 10, p. 399; and Marten Oosting, *The Independent Ombudsman in a Democracy, Government by the Rule of Law,* Occasional Paper 66, September 1998.

26. In a number of States, Ombudsman institutions have been established by ordinary legislation or statute, rather than at constitutional level. It may be that the legislation was established at a time when the significance of the role of Ombudsman institutions was not as clearly recognised as it is today. It may also be a result of the difficult process of constitutional revision in many States. However, a constitutional guarantee for Ombudsman institutions is considered the preferable solution, with further elaboration of their characteristics and functions at the statutory level. This has been reflected in the Venice Principle No. 2, which reaffirms that the Ombudsman institution and its mandate shall be based on "a firm legal foundation" and gives preference to the constitutional level.

27. However, constitutional provisions should not be framed in such narrow terms that the reasonable development of Ombudsman institutions is prevented. In particular, the constitutional guarantee of national level Ombudsman institutions should not prevent the establishment of local or regional level institutions, or institutions within specific fields.

3.3. The choice of the model and internal organisation

28. As previously stated by the Venice Commission, "States enjoy a wide margin of appreciation with regard to institutional arrangements, which depend to a large extent on the domestic specific situation. Moreover, one single Ombudsperson or multiple Ombudspersons may be more appropriate at different stages of the democratic evolution of States."[37] Regarding specialisation within Ombudsman institutions, it is possible for a special department within the national Ombudsman institution to be established and/or a Deputy Ombudsperson for a special field to be appointed. The specialisation of deputies can allow them to deal efficiently with the issues attributed to them, while the general mandate of the Ombudsman institution provides for coherence between these specialised areas. Although the alternative of appointing regional or local Ombudspersons who are not subordinated to the national Ombudsman institution is preferred in many countries, the size and population of the country can also be taken into account to establish specialised departments within a single institution. States should not choose or change a model with a view to weakening the institution. As regards the internal organisation of the office, the Ombudsman shall be free to choose his/her deputies and staff and to adapt its structure and functioning to his/her priorities. Such institutional flexibility reinforces the institution's independence from political pressure.

29. The Venice Principles reaffirm the State's margin of appreciation in choosing the single or plural model of the Ombudsman institution: according to Principle No. 4, this choice "depends on the State organisation, its particularities and needs" and the institution "may be organised at different levels and with different competences". The adopted model shall "fully comply" with the Venice Principles, "strengthen the institution and enhance the level of protection and promotion of human rights and fundamental freedoms in the country" (Principle No. 5).

30. As regards the internal organisation of the Ombudsman's institution, Principle No. 22 reaffirms that the latter may include one or more deputies, appointed by the Ombudsman. It also stipulates that it shall have sufficient staff and appropriate structural flexibility. The Ombudsman shall be able to recruit his or her staff.

3.4. Criteria for office

31. The criteria for office of Ombudsman institutions should not be too restrictive. Ombudspersons should have expertise and competence in the subject matter of the institution (although a university degree in law is not a necessary prerequisite); and should be credible and respected by both the government and the public, thus enhancing the effectiveness and authority of the Ombudsman institution. Principle No. 8 states that the criteria for the post of Ombudsman "shall be sufficiently broad as to encourage a wide range of suitable candidates". High moral character, integrity and appropriate professional expertise and experience, including in the field of human rights and fundamental freedoms, shall be the essential criteria for this position.

32. Avoidance of incompatibilities is important for the independence and impartiality of Ombudsman institutions. As previously stated by the Venice Commission, an Ombudsperson "shall not hold any position which is incompatible with the proper performance of his or her official duties or with his or her impartiality and public confidence therein"[38] and his/her function would be incompatible with another remunerated function or

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36. Venice Commission, *Joint Opinion on the Law on the Ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe,* CDL-AD(2004)041, para 9. See also Assembly's Recommendation 1615 (2003), para. 7.1.
37. Venice Commission, *Opinion on the new Constitution of Hungary,* CDL-AD(2011)016, para 115. See also para 29.
38. Venice Commission, supra note 36, para 16.

profession, either public or private; or with membership of a political party, for example.[39] This is reflected in Principle No. 9, which states that an "Ombudsman shall not, during his or her term of office, engage in political, administrative or professional activities incompatible with his or her independence or impartiality". Moreover, he/she and his/her staff shall be bound by self-regulatory codes of ethics.

3.5. Election

33. The way according to which an Ombudsman is appointed is of the utmost importance for ensuring the independence of that institution. Although it is not always the case, the Venice Commission and the Assembly had previously recommended that the procedure for the appointment of an Ombudsman should be election by parliament by a qualified majority of all of its members.[40] This would provide the institution with a politically and socially broad base, and would strengthen the Ombudsman's "impartiality, independence and legitimacy and contribute to public trust in the institution."[41]

34. Principle No. 6 reaffirms that "the Ombudsman shall be elected or appointed according to procedures strengthening to the highest possible extent the authority, impartiality, independence and legitimacy of the institution". He or she shall preferably be elected by parliament by an appropriate qualified majority. According to Principle No. 7, candidates for the position of Ombudsman shall be selected in a public, transparent, merit based and objective procedure; the latter shall be provided for by law and include a public call for candidates.

3.6. Status and immunities

35. Although there is no European standard as to the status of Ombudspersons, they should always be given an appropriately high rank, this being "one of the essential factors that guarantee the Ombudsman's independence from political interference and enable that institution to function effectively and efficiently"[42] Principle No. 3 reaffirms that the Ombudsman institution shall be given "an appropriately high rank", which should be also reflected in his/her remuneration. Moreover, Principle No. 14 stresses once more the need to ensure this institution's independence, by stating that "the Ombudsman shall not be given nor follow any instruction from any authorities."

36. Ombudsman institutions should also enjoy functional immunity.[43] This is reflected in Principle No. 23, according to which the Ombudsman, the deputies and the decision-making staff shall enjoy functional immunity, i.e. be immune from legal process in respect of activities and words, spoken or written, carried out in their official capacity for the institution. It shall also apply after they have left the institution.

3.7. Term of office

37. The procedure for dismissal of Ombudsman institutions should be as rigorous and transparent as that for appointment: provided for by law, requiring a broad consensus of parliament and based on criteria exhaustively provided for in the Constitution or in the law. The qualified majority for termination of the Ombudsperson's term of office should be at least equal to (and preferably higher than) the qualified majority required for election. After the expiration of the Ombudsperson's term, and prior to the election of a new Ombudsperson, the current incumbent should continue until the successor takes office, in order to avoid a situation where no Ombudsperson holds office.

38. These considerations are reflected in Principle No. 11: "the Ombudsman shall be removed from office only according to an exhaustive list of clear and reasonable conditions established by law", relating solely to the essential criteria of "incapacity" or "inability to perform the functions of office", "misbehaviour" or "misconduct", which shall be narrowly interpreted. It also results therefrom that the Ombudsman's dismissal may take place on the basis of the decision of the parliament or, if the latter has requested so, of a court. This principle does not explicitly impose the qualified majority for the Ombudsman's removal but requires at least the same majority as the one required for his/her election ("the parliamentary majority required for removal – by Parliament itself or by a court on request of Parliament – shall be equal to, and preferably higher than, the one required for election"). It also states that this procedure "shall be public, transparent and provided for by law".

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39. Venice Commission, supra note 18, B.II Article 8.
40. Venice Commission, supra note 17, para 11, and Assembly's Recommendation 1615 (2003), para 7.3.
41. Venice Commission, supra note 16, para 50.
42. Venice Commission, *Opinion on the status and rank of the human rights ombudsman of Bosnia and Herzegovina,* CDL-AD(2004)006*,* para 10.
43. See, for instance, Venice Commission, supra note 36, para 18.

39. There is no hard standard for the term of office of Ombudsman institutions and the decision ultimately lies with the authorities of the State. A mandate of 5 or 6 years has been regarded as sufficiently long. However, the Venice Commission has usually considered it to be preferable that Ombudspersons are elected for a single, longer fixed term of office (7 or 8 years), without the possibility of re-election. The principle of a single term of office provides a safeguard for the independence of the Ombudsman institution, precluding the risk of accusation that the Ombudsperson's activities or recommendations might be influenced by an interest in gaining re-election.

40. These recommendations are reflected in Principle No. 10, which stipulates that "the term of office of the Ombudsman shall be longer than the mandate of the appointing body". This principle also gives preference to a single term of office of at least seven years and with no option for re-election. However, if the mandate is renewable, it can be renewed only once.

3.8. Budgetary independence

41. Financial independence, which is of great importance for the overall independence of the Ombudsman institution, could be ensured by a law or statute prescribing that Ombudsman institutions should submit a budgetary proposal to the governmental authority responsible for the presentation of the national budget to parliament, and that this proposal should be included in the national budget without changes. Whilst accepting that the financial resources accorded to the Ombudsman service cannot be unlimited or subject to increases seriously out of line with public expenditure discipline in the member State concerned it is nonetheless important that the overall level of the budget remains stable from year to year, that it increases broadly in line with public expenditure and importantly that the expenditure within the agreed ceiling is determined by the Ombudsman service and is not subject to outside bodies setting priorities. The Venice Commission previously stated that in any case, "the budgetary allocation of funds for the operations of the institution should be adequate to the need to ensure full, independent and effective discharge of the responsibilities and functions of the institution", based on indicators such as the number of complaints lodged with the institution in the previous year.[44]

42. These considerations are reflected in Principle No. 21, which points out that "sufficient and independent budgetary resources shall be secured to the Ombudsman institution." Moreover, "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." When it comes to the drafting of the budget, the Ombudsman shall be consulted and shall be asked to present a draft budget. The adopted budget shall not be reduced during the financial year, unless the reduction applies to State institutions generally. Principle No. 21, last sentence, also refers to the issue of the financial audit of the Ombudsman's budget, which shall be independent and "shall take into account only the legality of financial proceedings and not the choice of the Ombudsman's priorities in the execution of the mandate".

3.9. Competences and powers

43. Ombudspersons should have the power to control acts of the executive (except for matters of internal functioning of the government), including the Prime Minister or President, unless their activities are of a political or exceptional nature, such as a declaration of war. "Only general, 'political' decisions of the government as a whole should be excluded from the scope of the competence of the Ombudsperson; ministerial and governmental decisions directly affecting individuals should be open to control by the Ombudsperson."[45] Supervision of independent courts should be excluded from the competences of Ombudsman institutions.[46] Ombudsman institutions should have a broad-based mandate, covering violations of the principles of good administration and, where necessary and appropriate, human rights and fundamental freedoms. In cases of maladministration, "the availability of a legal remedy should not prevent a person from filing a complaint with the ombudsperson but the latter should have the obligation to advise the complainant about legal remedies".[47] While the main focus of the competence of Ombudsman institutions is the public administration, it is not unusual for such competence to also cover certain parts of the private sector,[48] in view of the growing privatisation of services of public interest. The scope of the competence of Ombudspersons should include not only *acts* of the executive, but also violations by *omission*.[49]

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44. Venice Commission, supra note 17, para 28.
45. Venice Commission, supra note 36, para 20.
46. See Assembly, Recommendation 1615 (2003). "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."
47. Venice Commission, supra note 36, para 27.

44. These considerations are covered in a general way by Principle No. 12, which stipulates that the mandate of the Ombudsman shall cover prevention and correction of maladministration, and the protection and promotion of human rights and fundamental freedoms. Moreover, Principle No. 13 specifies that the Ombudsman's institutional competence shall cover public administration at all levels. It shall cover all general interest and public services provided to the public, whether delivered by the State, by the municipalities, by State bodies or by private entities. As regards the Ombudsman's powers in respect of the judiciary, they "shall be confined to ensuring procedural efficiency and administrative functioning of that system". In addition, Principle No. 19, third sentence, states that "the official filing of a request to the Ombudsman may have suspensive effect on time-limits to apply to the court, according to the law."

45. It has been generally accepted that Ombudsman institutions should have the power to issue recommendations (including the ability to propose the adoption or revision of legislation) clearly stated in the mandate. The administration should provide within a reasonable time full replies, describing the implementations of findings, opinions, proposals and recommendations or giving reasons why they cannot be implemented. This has been reflected in Principle No. 17, which states that "the Ombudsman shall have the power to address individual recommendations to any bodies or institutions" within his/her competence and shall have the "legally enforceable right to demand that officials and authorities respond within a reasonable time" set by him/her.

46. Furthermore, in respect of violations of human rights and fundamental freedoms, it has been accepted in many countries that Ombudsman institutions should have the power to initiate proceedings before Constitutional Courts. In this respect, Principle No. 19, first sentence, stipulates that "following an investigation, the Ombudsman shall preferably have the power to challenge the constitutionality of laws and regulations or general administrative acts". Moreover, he/she "shall preferably be entitled to intervene before relevant adjudicatory bodies and courts" (Principle No. 19, second sentence). One of the main features of Ombudsman institutions is their independent investigative powers, including the power to decide whether or not to accept claims as admissible, the discretion to continue an investigation even if the complainant shows a lack of interest, as well as the power to take up certain important issues *proprio motu*. Ombudspersons should have the right to request all necessary information and documents, to receive such information without delay and to conduct interviews with officials of administrative authorities. Furthermore, where designated as the national preventive mechanism under the Optional Protocol to the UN Convention Against Torture, they should have unhindered access to inspect all places where persons are deprived of their liberty by a public authority, without the need to give prior warning or obtain consent from any agency, and with the opportunity to interview such individuals in private.

47. Principle No. 16 reaffirms that the Ombudsman "shall have discretionary power, on his or her own initiative or as a result of a complaint, to investigate cases with due regard to available administrative remedies". He/she "shall be entitled to request the co-operation of any individuals or organisations who may be able to assist in his or her investigations". This principle also reaffirms the institution's "legally enforceable right to unrestricted access to all relevant documents, databases and materials, including those which might otherwise be legally privileged or confidential". This right covers also "unhindered access to buildings, institutions and persons, including those deprived of their liberty". Moreover, according to Principle No. 16 second paragraph, the Ombudsman shall be empowered to interview or demand written explanations of officials and authorities. In doing so, he/she shall, give particular attention and protection to whistle-blowers within the public sector.

48. The Ombudsman's (annual or other) reporting to the parliament has been usually seen as the main tool for relations between the two institutions and a channel through which the Ombudsman is held accountable for their activity to parliament. Moreover, it can also be useful for the exercise of the parliamentary control over the executive, permitting to detect the areas in which specific legislative intervention is needed.[50] Principle No. 20 reaffirms the Ombudsman's duty to report to parliament on the activities of the institution at least annually. It specifies that in such a report the Ombudsman "may inform Parliament on lack of compliance by the public administration". He/she shall also report on specific issues, if he/she finds it appropriate. The reports shall be made public and duly considered by the authorities. The recommendations included in Principle No. 20 also apply to reports to be produced by Ombudsman institutions which have been appointed by the executive. Moreover, Principle No. 18 specifies that "in the framework of the monitoring of the

48. E.g. in anti-discrimination matters. See Venice Commission, supra note 16, para 28.
49. Venice Commission, *Opinion on Amendments to the Law on the Human Rights Defender of Armenia,* CDL-AD(2006)038, paras 20 and 89.
50. Rafael Ribó, Joan Vintró Castells and Ignacio Aragonés Seijo, International Framework of the Ombudsman Institution, Síndic, first edition of May 2014, pp. 25-26.

implementation at the national level of ratified international instruments relating to human rights and fundamental freedoms and of the harmonisation of national legislation with these instruments, the Ombudsman shall have the power to present, in public, recommendations to parliament or the executive**"**; in doing so, he/she shall be entitled to propose amendment of existing legislation or adoption of new legislation.

3.10. Accessibility

49. Any natural or legal person claiming a legitimate interest should be able to submit a complaint to an Ombudsman institution, including foreigners and stateless persons. Complaints may also be lodged by a third person or an NGO, a group of individuals or civil society organisations on behalf of the person concerned, with their consent, or even without such consent in cases where this would be impossible. Ombudsman institutions should be directly and easily accessible via simple and free of charge application procedures. While the decisions and recommendations of Ombudsman institutions should be made public, the confidential nature of the complainant's identity should be guaranteed. Principle No.15 reaffirms that "any individual or legal person, including NGOs, shall have the right to free, unhindered and free of charge access to the Ombudsman, and to file a complaint".

4. Conclusions

50. Although the existence of an Ombudsman is not indispensable in a country where the principle of the rule of law is fully observed and courts are independent, it is always easier for an individual to get in touch with an Ombudsman than with a judge. Thus, most Council of Europe member States (with the exception of Germany and Italy) have now set up Ombudsman institutions, which act as intermediaries, protecting individuals against maladministration and human rights violations by public sector authorities, thereby consolidating democracy and promoting the rule of law. As there are no European rules relating to the functioning of those institutions (the Paris Principles only apply to NHRI), it emerges that there is a need to establish a set of common standards for Ombudsman institutions in order to prevent the undue influence being exerted over, and to contribute to the setting up of adequate legal frameworks to protect, these important institutions. Hence, I welcome the adoption by the Venice Commission of the "Venice Principles". This document reaffirms the main principles relating to the functioning of the institution of Ombudsman: independence, impartiality and neutrality, a broadly defined strong mandate enshrined in the constitution or legislation; powers of unhindered investigation, recommendation and reporting; adequate funding; public accessibility; operational efficiency; and accountability. It contains some minimum standards which are aimed at protecting and promoting the institution of Ombudsman and increasing its efficiency; helping parliaments and governments with consolidating such institutions and recognising their role in strengthening democracy, the rule of law, good governance and the protection and promotion of human rights and fundamental freedoms. These principles give States guidance on how to set up adequate legal frameworks for Ombudsman institutions and can also help Ombudspersons in resisting undue interference in their work. For these reasons, the Assembly should endorse them in the same way as it did the Venice Commission's "Rule of Law Checklist" of 2016 in its Resolution 2187 (2017).[51]

51. One should not forget that an Ombudsman, whose mandate involves examining cases of maladministration and in some cases also protecting and promoting human rights is, in a sense, a human rights defender. For this reason, in certain countries, he/she may be exposed various direct or indirect threats, as indicated above. Therefore, the adoption of the Venice Principles by the Venice Commission, an expert body composed of experts from 62 countries, shows that there is growing acceptance for a global recognition of the role of this institution in ensuring the observance of the rule of law and human rights and fundamental freedoms. In particular, Principle No. 25 of the Venice Principles encourages member States to undertake all necessary action in order to ensure appropriate conditions for the strengthening and development of Ombudsman institutions and the implementation of these Principles. Bearing in mind this recommendation, I would also recommend that the Council of Europe establish a mechanism for monitoring the way in which the Venice Principles have been or are being implemented within Council of Europe member States. This could certainly lead to the elaboration of an extensive list of good practices but would also help with detecting flaws in national laws regulating Ombudsman institutions. The Council of Europe, which has a number of bodies and instances co-operating on a regular basis with national Ombudsman institutions, would be well-placed to ensure such a follow-up to the Venice Principles.

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51. Adopted on 11 October 2017, see "Venice Commission's "Rule of Law Checklist", report by Mr Philippe Mahoux, Committee on Legal Affairs and Human Rights, Doc. 14387 of 17 July 2017.