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THE VENICE PRINCIPLES AND EUROPEAN RECOMMENDATIONS ON OMBUDS INSTITUTIONS

ABSTRACT

Ombuds institutions are essential to the work of the Council of Europe as they ensure transparency of democratic processes and act as guardians for human rights and good governance in member States. The *Principles on the Protection and Promotion of the Ombudsman Institution* (“the Venice Principles”) are the most comprehensive checklist ever compiled, containing provisions on election, dismissal, mandate, investigative powers, and budgetary and other guarantees that are necessary for the proper functioning and independence of Ombuds institutions. The Venice Commission applies its Principles whenever it is solicited to produce an Opinion related to Ombuds or similar independent bodies. The Parliamentary Assembly has endorsed the Venice Principles, calls out threats to Ombuds institutions and proposes new areas in which they may be useful. The Committee of Ministers issues Recommendations to governments to assist them in the implementation of the Principles. Finally, the Human Rights Commissioner regularly engages with Ombuds institutions and speaks out in their support. For all these activities, the Venice Principles serve as the “gold standard” for securing the active and effective engagement of Ombuds institutions in the field of human rights and good administration.

Keywords : Council of Europe, Venice Commission, Parliamentary Assembly of the Council of Europe.

Summary

I. INTRODUCTION.....	2
II. THE PRINCIPLES FOR THE PROTECTION AND PROMOTION OF THE INSTITUTION OF THE OMBUDSMAN (« THE VENICE PRINCIPLES »).....	4
III. ACTIVITIES OF THE COUNCIL OF THE PARLIAMENTARY ASSEMBLY AND OTHER COUNCIL OF EUROPE BODIES REGARDING OMBUDS INSTITUTIONS.....	8
1. The Parliamentary Assembly of the Council of Europe.....	8
2. The Committee of Ministers of the Council of Europe.....	9
3. The Commissioner for Human Rights of the Council of Europe.....	10
IV. CONCLUSIONS.....	11
REFERENCES.....	11

I. INTRODUCTION

The Council of Europe has just held its fourth Summit of Heads of State and Government in Reykjavik, on 16 and 17 May 2023. In the “Reykjavik Declaration – United around our values”, the leaders of our 46 member States called for “*a review and further reinforcement of the Organisation’s outreach to, and meaningful engagement with, civil society organisations and national human rights institutions*”. This is perfectly in line with the Council of Europe’s core objectives, namely, to foster democracy, the rule of law and respect for human rights on our continent. The human rights protection system established by the European Convention on Human Rights (ECHR) is based on the principle of subsidiarity. This means that it is first and foremost the duty of each member State to uphold the Convention rights at home. The European Court of Human Rights (ECtHR) shall only intervene when something has gone wrong at the national level. National Human Rights Institutions (NHRIs), including Ombuds institutions, are a vital part of the human rights protection system at the country level. We are all aware that NHRIs and Ombuds institutions are not the same. Some Ombuds institutions are also NHRIs but not all NHRIs are “traditional” Ombuds institutions. The *Principles relating to the Status of National 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. For

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this reason, the “Venice Principles” are crucial. The European Commission for Democracy through Law (hereinafter, the « Venice Commission ») has codified in March 2019 several constitutional and legal principles specifically designed to strengthen the institution of the Ombudsperson. The Venice Principles were drafted in co-operation with major international institutions active in this field, including the Council of Europe Commissioner for Human Rights and the Steering Committee for Human Rights (CDDH), the United Nations Office of the High Commissioner for Human Rights and the International Ombudsman Institute. The principles have been endorsed by the United Nations General Assembly,¹ strongly encouraging Members States to render Ombuds institutions “*consistent with the Venice Principles*” as well as “*encouraging Ombudsman and mediator institutions...to operate as appropriate, in accordance with... the Venice Principles*”. It can thus be said that the Venice Principles are the first international set of standards for Ombudsman institutions, equivalent to the Paris Principles for NHRIs.

The Parliamentary Assembly of the Council of Europe, the Committee of Ministers, the Human Rights Commissioner, and other Council of Europe institutions have continuously supported the principles and encouraged States to follow them.

All Council of Europe bodies have consistently held that Ombuds institutions are an important element in a State based on democracy, the rule of law, the respect for human rights and fundamental freedoms and good administration.² The fact that Ombuds institutions exist in at least 140 States³ shows the high international regard for their role as guardians of human rights and protectors of transparency and good administration. At the same time, the very nature of the Ombudsperson’s role oftentimes involves having to antagonize powerful players in the political and administrative sphere, explaining why they must themselves be protected from undue interference and other threats.

The Parliamentary Assembly of the Council of Europe has therefore endorsed the Venice Principles and adopted Resolutions and Recommendations to strengthen their respect in all Council of Europe member States. The Committee of Ministers of the Council of

¹ A/RES/75/186.

² Preamble of the « Venice Principles », PACE Res. 2301(2019).

³ Ibid.

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Europe has also addressed Recommendations to member States urging them to strengthen the protections afforded to Ombuds institutions. Furthermore, the Council of Europe Human Rights Commissioner is mandated to collaborate with Ombudspersons.

II. THE PRINCIPLES FOR THE PROTECTION AND PROMOTION OF THE INSTITUTION OF THE OMBUDSMAN (« THE VENICE PRINCIPLES »)

The Venice Principles are the first and most comprehensive “checklist” ever compiled to consolidate and empower ombuds institutions. They invite States to undertake a series of actions to protect, promote and implement their work.

The Venice Principles underline that, under all circumstances, the State “*shall support and protect the Ombudsman Institution and refrain from any action undermining its independence*”.⁴

In the Preamble, the Venice Commission expressed “serious concern with the fact that the Ombudsman Institution is at times under different forms of attacks and threats, such as physical or mental coercion, legal actions threatening immunity, suppression reprisal, budgetary cuts and a limitation of its mandate”.

In view of these threats, the Venice Principles outline how States may best support these valuable institutions. The essence of these recommendations will be recalled in the following five points. The Principles reflect basic common sense.

Firstly, “*the Ombudsman institution, including its mandate, shall be based on a firm legal foundation, preferably at constitutional level, while its characteristics and functions may be further elaborated at the statutory level.*” The Venice Commission leaves the choice of a single or plural Ombuds model up to each State depending on the State’s organisation, particularities and needs”.⁵

⁴ Principle 1.

⁵ Principle 4.

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Secondly, “*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*”, preferably through an election by Parliament by a qualified majority.⁶ Naturally, the procedure for the selection of candidates shall be transparent, merit-based and provided for by law – very much like the national selection procedures to establish the shortlists for the election of judges of the European Court of Human Rights by the Parliamentary Assembly. The Committee of Ministers’ Guidelines for the national selection procedures are a treasure trove of good practices also for other selection procedures for high-profile posts. However, the criteria for appointment as Ombudsperson should be sufficiently broad as to encourage a wide range of suitable candidates. The Ombudsperson shall not, during their term of office, engage in political or other activities incompatible with their independence and impartiality. As is the case with judges, Ombudspersons must be independent and impartial as well as be *seen* to be independent and impartial.

According to the Venice Principles, an Ombudsperson’s term of office should be longer than the mandate of the appointing body, preferably a single term no shorter than 7 years. At any rate, an Ombudsperson’s mandate shall be renewable only once.⁷ The procedure for the dismissal of an Ombudsperson, which should only be possible according to an exhaustive list of clear and reasonable conditions established by law, shall be as rigorous and transparent as the election procedure. For instance, at least the same qualified majority should be required for the termination of the mandate as for the election by parliament.⁸

Thirdly, the Venice Principles stress that the Ombudsperson should be granted an “*appropriately high rank*”,⁹ accompanied with functional immunities,¹⁰ so that they may exercise their functions without fear of legal repercussions. States shall also provide appropriate funding that render the institution financially independent.¹¹ As Secretary

⁶ Principle 6.

⁷ Principle 10.

⁸ Principle 11.

⁹ Principle 3.

¹⁰ Principle 23.

¹¹ Principle 21.

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General of an international institution, I am well aware of how difficult it is to secure sufficient funding in these times of inflation, debt crisis and many competing and equally compelling demands for the taxpayers' money. But we must insist that human rights and good administration are not luxuries, but necessities. Human rights violations and maladministration have a cost, too, for the individual victims as well as society as a whole.

Fourthly, the mandate of the Ombuds institution shall be broad enough to cover prevention and correction of maladministration and the protection and promotion of human rights and fundamental freedoms.¹² The Ombudsperson's competence shall cover public administration at all levels, including all public services, whether delivered by State bodies, municipalities or by private entities.¹³ The last issue is particularly important, in view of today's trend to "outsource" public services such as garbage collection, drinking water etc. to private companies.

Another important issue highlighted by the Venice Principles is that with regard to the judiciary, the Ombudsperson's competence shall be confined to ensuring procedural efficiency and administrative functioning of the court system. There must be no interference with the courts' judicial functions. This is a delicate issue in countries with particularly strong Ombuds institutions, which to some extent play a role similar to that of administrative courts in other countries. In the Preamble of the Principles, the Venice Commission stresses that "*the right to complain to the Ombudsman is an addition to the right of access to justice through the courts.*" In my view, there is room both for strong Ombuds institutions and efficient and accessible administrative courts. Courts with their formalised and sometimes cumbersome procedures are not always the most appropriate instrument to address issues such as maladministration and issues of abuse of power by State representatives.

The Venice Commission clearly values the Ombudsperson's task of alerting Parliament and public opinion when a law violates human rights. In order to have such laws amended or removed from the national legal system, the Ombudsperson should be allowed to seize the constitutional court. In their – public – report to Parliament, at least once a year, the

¹² Principle 12.

¹³ Principle 13.

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Ombudsperson shall inform Parliament on lack of compliance by public administration and report on specific issues as the Ombudsperson sees appropriate. They should also include alerting the legislature to deficiencies of laws, concerning for instance the difficulty of their implementation or the absence of sufficient guarantees for the respect of individual rights.¹⁴ Another key function of the Ombudsperson is to contribute to the dissemination of an administrative culture that encourages the protection of human rights. The Venice Commission stresses, in this context, that the Ombudsperson shall give particular attention and protection to whistleblowers within the public sector.¹⁵ On the latter topic, following a series of high-profile reports by the Assembly, the Council of Europe has established progressive guidelines for the protection of whistleblowers that have successfully fed into the recently adopted EU Directive on Whistleblower protection.

Finally, the Ombuds institution shall have considerable powers as regards interviewing or demanding written explanations by officials, including the legally enforceable right to reply within a reasonable time set by the Ombudsperson. The Ombudsperson shall also have “*a legally enforceable right to unrestricted access to all relevant documents, databases and materials, including those which might otherwise be legally privileged or confidential.*”¹⁶ They shall also have unhindered access to buildings, institutions and persons, including detainees.¹⁷

When the Venice Commission is solicited to issue Opinions concerning Ombuds institutions or similar “independent regulatory bodies”, it uses its Principles as the standard by which to assess the institution in question. In 2022, for example, the Venice Commission issued three relevant Opinions, concerning Kazakhstan¹⁸, Andorra¹⁹ and Azerbaijan.²⁰

¹⁴ Principle 18.

¹⁵ Principle 16.

¹⁶ Principle 16.

¹⁷ Ibid.

¹⁸ Opinion, CDL-AD(2022)028.

¹⁹ Opinion, CDL-AD(2022)033.

²⁰ Joint Opinion, CDL-AD(2022)009.

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III. ACTIVITIES OF THE COUNCIL OF THE PARLIAMENTARY ASSEMBLY AND OTHER COUNCIL OF EUROPE BODIES REGARDING OMBUDS INSTITUTIONS

1. The Parliamentary Assembly of the Council of Europe

The Parliamentary Assembly of the Council of Europe has oftentimes referred to the importance and value of Ombuds institutions, starting with a 1974 Report entitled “Conclusions of the meeting with the ombudsmen and parliamentary commissioners in Council of Europe member States”. Two more relevant reports were adopted in 2003 and 2011. Most recently, the Assembly adopted Resolution 2301 (2019), on “Ombudsman institutions in Europe – the need for a set of common standards”. In this Resolution, the Assembly endorsed the Venice Principles and called on member States to ensure their implementation in practice and to take all necessary measures to ensure the Institutions’ independence. The Assembly also invited national parliaments and government bodies to refer to the Venice Principles when considering legislative reforms of Ombuds institutions. Drawing attention to situations where Ombuds institutions have been undermined, the Assembly urged States to refrain from any action aiming at or resulting in the suppression of the Ombuds institution and from any other attacks. It urged states to promote an ‘Ombudsman-friendly climate’ by guaranteeing unhindered access to the institutions, providing sufficient financial and human resources, and permitting unimpeded cooperation with other institutions and international associations (Resolution 2301 (2019):9.1 – 9.5).

These protections are necessary when considering the ways in which Ombuds institutions have been undermined in some Council of Europe member States. In the report accompanying the above Resolution, the Assembly noted that, for instance, in Croatia Ombuds institutions faced legislative amendments aimed at weakening them; their budget was downsized in Poland; unjustified audits were launched in Cyprus; their investigative powers were violated by denying access to files in Malta and Croatia; unjustified lawsuits were lodged against them in Poland; and politicians publicly criticised Ombudspersons in France, Georgia, Serbia, Poland and Slovakia, thus undermining public trust. Ombuds

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institutions are particularly at risk in countries undergoing democratic transition, yet we have also seen several examples of threats in countries with long-standing democratic cultures such as the United Kingdom, Austria, Belgium, Ireland, the Netherlands (Explanatory memorandum, : 19, 20).

The Assembly has also proposed new areas in which the work of an Ombuds institution could come into play, for example in the 1999 Recommendation on “Setting up a European Ombudsman for children” and in its 2020 Resolution “Towards an Internet Ombudsman Institution”²¹. The Assembly also invited the European Union to consider setting up such an institution at a European level, and invited major internet technology platforms to support the creation of such an institution.

2. The Committee of Ministers of the Council of Europe

The Committee of Ministers, in October 2019, issued its own Recommendation²² on the development of the Ombudsman institution, expressing « *grave concern about the challenging working conditions, threats, pressures and attacks which Ombudsman institutions and their staff are at times exposed in member States* ». It agreed on a set of « Principles for the development of the Ombudsman institution », which are based on the Venice Principles and highlight some crucial aspects, such as the need for Ombuds institutions to be accessible in particular for vulnerable persons such as migrants, persons in detention, disabled or older persons as well as children. Recalling that it is for member States to choose how many Ombuds institutions to set up, the Committee of Ministers also highlighted the need for effective collaboration and co-ordination between different Ombuds institutions within the same State and for dialogue with regional and international institutions dealing with the same issues, including the Council of Europe, in order to encourage knowledge-sharing. In its February 2020 reply to the Assembly’s Recommendation, the Committee of Ministers stated that the development of the Ombuds institution would be examined within five years. Meanwhile, the Committee of Ministers

²¹ Res. 2334 (2020).

²² CM/Rec(2019)6.

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adopted a Recommendation on the establishment of independent national institutions for the promotion and protection of human rights.²³ This Recommendation promoting the creation of NHRIs is largely based on the earlier Recommendation on Ombuds institutions.

3. The Commissioner for Human Rights of the Council of Europe

The Commissioner for Human Rights of the Council of Europe is mandated to *«facilitate the activities of national ombudsperson institutions and other human rights structures »*²⁴. Therefore, the Commissioner regularly collaborates with Ombuds institutions and reports on threats to their activities, as detailed in her annual Activity Reports. During her country visits, she consistently meets with Ombuds institutions and NHRIs and, most recently in the Czech Republic, Serbia and Denmark (in 2023) and in Spain, Moldova, Hungary, Slovakia, Poland Romania and Kosovo* (in 2022). In the same period, she also met, in Strasbourg, Ombudspersons from Ukraine, France, Georgia, Armenia, Bulgaria and the Netherlands. Finally, she participates regularly in network events of Ombudspersons at the European level, such as in Reykjavik last September and in Zagreb last November. This impressive list illustrates the strength of the Commissioner's engagement with Ombuds institutions all over Europe. Ms Mijatovic and her future successor, whom the Assembly will elect next January, can be counted upon as a staunch ally.

To conclude this section, I should like to draw your attention to the publication on "Protection, Promotion and Development of the Ombudsman Institution", a collection of all standards produced by the Council of Europe's Directorate General on Human Rights and the Rule of Law.²⁵

²³ CM/Rec(2021)1.

²⁴ CM/Res 99 (50).

²⁵ <https://rm.coe.int/protection-promotion-and-development-of-the-ombudsman-institution/1680a13325>.

* All reference to Kosovo in this text, whether to the territory, institutions or population, shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo

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IV. CONCLUSIONS

In summary, the Reykjavik Summit strongly supports the Council of Europe's engagement with National Human Rights Institutions, which include Ombuds institutions. Similarly, the strategic framework of the Council of Europe for the next four-year period agreed at the 2021 Ministerial meeting in Hamburg "*reiterated the importance of further strengthening the role and meaningful participation of civil society organisations as well as national human rights institutions in the Organisation*" (Committee of Ministers, 2021a : 12).

The Council of Europe and its member States have thus reaffirmed their present and future commitment towards supporting and protecting the work of Ombuds institutions. Their work has been and will always remain an indispensable element of states built on democracy, the rule of law and respect for human rights – which are also the three "pillars" of the Council of Europe's mission.

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