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OPINION ON CERTAIN PROVISIONS OF THE CONSTITUTIONAL LAW ON THE HUMAN RIGHTS DEFENDER, THE LAW ON THE PUBLIC SERVICE AND THE LAW ON THE CIVIL SERVICE

ARMENIA

This Opinion prepared by Alice Thomas, International Human Rights and Legal Expert, and has benefited from contributions made by Mr. Yves Doutriaux, Member of the French Council of State.

Based on official English translations of the relevant legal provisions provided by the Office of the Human Rights Defender of Armenia



OSCE Office for Democratic Institutions and Human Rights

Ul. Miodowa 10, PL-00-251 Warsaw
Office: +48 22 520 06 00, Fax: +48 22 520 0605
www.legislationline.org

EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

The Human Rights Defender is the main national human rights institution in Armenia, with an independent and wide-ranging mandate to promote and protect human rights. Following amendments to the Constitutional Law on the Human Rights Defender in January 2020, the staff of the Office of the Human Rights Defender, previously considered to be a special type of state service, is now again part of the civil service.

These recent changes appear to have created numerous challenges for the Office of the Human Rights Defender, in particular in relation to the staff lists and rankings, promotions, as well as the questions of who may determine the maximum number of staff and how new staff can be hired. Notably, the key challenge appears to lie in certain contradictions between the Constitutional Law on the Human Rights Defender and legislation on the public and civil service respectively. Although the Armenian Constitution stipulates that constitutional laws shall take precedence over other legislation, information provided by the Human Rights Defender indicates that legislation on the public and civil service is being applied in practice, which appears to limit the autonomy of the Human Rights Defender with respect to the recruitment, appointment, and promotion of staff members.

The relevant legislation thus should be harmonized. The respective roles of the Human Rights Defender and the relevant executive bodies should be defined in a coherent manner that is in line with the requirements of international norms and constitutional provisions. The authorities should in particular ensure that legislation safeguards the autonomy of the Office of the Human Rights Defender, and does not compromise the ability of this important human rights institution to perform its role independently and effectively.

More specifically, and in addition to what is stated above, OSCE/ODIHR makes the following recommendations to further enhance the independence and effectiveness of the Office of the Human Rights Defender:

- A. to specify, in both the Constitutional Law and the Law on the Civil Service, whether the Human Rights Defender has full discretion over the ranks and list of staff of his/her Office or whether he/she requires the acquiescence of the Civil Service Office, and ensure that the ranking of staff of the Office of the Human Rights Defender and the methodology that it follows takes into account the specificities of the Office, and does not compromise the autonomy of this national human rights institution; [pars 31-33]
- B. to clarify the legislative provisions regulating the decision-making power of the Human Rights Defender, in particular with respect to the overall number of staff working for the Office, while ensuring that the Human Rights Defender has sufficiently wide discretion to determine the overall number of staff in the Office, within the financial limits of the yearly approved budget allocations; [par 39]

- C. to let the Human Rights Defender recruit his/her staff following the Office's internal procedures, bearing in mind the requisite principles of pluralism, gender equality and open, transparent and merit-based selection processes; also, while it may be legitimate to establish uniform recruitment processes for all public offices, the Human Rights Defender should retain final decision-making authority with regard to recruitment, appointments and/or promotions of staff; [pars 45 and 46] and
- D. to ensure that the current Constitutional Law and possible future amendments to the Constitutional Law are subjected to a proper impact assessment, as well as inclusive, extensive and effective consultations, including with the Office of the Human Rights Defender in particular, and civil society organizations. [pars 51-52]

These and additional Recommendations are included throughout the text of this Opinion, highlighted in bold.

As part of its mandate to assist OSCE participating States in implementing OSCE commitments, the OSCE/ODIHR reviews, upon request, draft and existing legislation to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.

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I. INTRODUCTION

1. On 17 March 2021, the Human Rights Defender of Armenia sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”) a request for a legal review of legislative changes that had been introduced in 2020 to the Constitutional Law on the Human Rights Defender (hereinafter “the Constitutional Law”), the Law on the Public Service and the Law on the Civil Service, respectively. By way of this legal reform, the staff of the Office of the Human Rights Defender, which had hitherto been considered a special type of state service, became part of the civil service of Armenia again, as had been the case before the current Constitutional Law was adopted in 2016.
2. On 6 April 2021, OSCE/ODIHR responded to this request, confirming the Office’s readiness to prepare a legal opinion on the Constitutional Law, in particular on the compliance of the 2020 amendments with international human rights standards and OSCE human dimension commitments.
3. On 23 June 2021, OSCE/ODIHR and its experts held an online meeting with staff of the Office of the Human Rights Defender, to clarify the meaning and impact of the relevant legislation, and the accuracy of the English translations.
4. This Opinion was prepared in response to the above request. OSCE/ODIHR conducted this assessment within its mandate to assist OSCE participating States in the implementation of their OSCE commitments.

II. SCOPE OF THE OPINION

5. The scope of this Opinion covers only the amended legislation submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework regulating the Office of the Human Rights Defender in Armenia.
6. The Opinion raises key issues and indicates areas of concern. In the interest of conciseness, it focuses more on issues that require amendments or improvements than on the positive aspects of the relevant legal provisions. The ensuing legal analysis is based on international and regional human rights and rule of law standards, norms and recommendations as well as relevant OSCE human dimension commitments. The Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field. When referring to national legislation, OSCE/ODIHR does not advocate for any specific country model; it rather focuses on providing clear information about applicable international standards while illustrating how they are implemented in practice in certain national laws. Any country example should always be approached with caution since it cannot necessarily be replicated in another country and has always to be considered in light of the broader national institutional and legal framework, as well as country context and political culture.

7. Moreover, in accordance with the *Convention on the Elimination of All Forms of Discrimination against Women*¹ (hereinafter “CEDAW”) and the *2004 OSCE Action Plan for the Promotion of Gender Equality*² and commitments to mainstream gender into OSCE activities, programmes and projects, the Opinion integrates, as appropriate, a gender and diversity perspective.
8. This Opinion is based on an official English translation of the relevant legislation provided by the Office of the Human Rights Defender of Armenia, excerpts of which are attached to this document as Annexes. Errors from translation may result. Should the Opinion be translated in another language, the English version shall prevail.
9. In view of the above, OSCE/ODIHR would like to stress that this Opinion does not prevent OSCE/ODIHR from formulating additional written or oral recommendations or comments on respective subject matters in Armenia in the future.

III. LEGAL ANALYSIS AND RECOMMENDATIONS

1. RELEVANT INTERNATIONAL HUMAN RIGHTS STANDARDS AND OSCE HUMAN DIMENSION COMMITMENTS

10. National Human Rights Institutions (hereinafter “NHRIs”) are independent bodies with the mandate to protect and promote human rights. They are “a key component of effective national human rights protection systems and indispensable actors for the sustainable promotion and protection of human rights at the country level”.³
11. The United Nations Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights, also known as the “Paris Principles”, contain internationally recognized rules on the mandates and competencies of NHRIs.⁴ The Paris Principles also set out minimum standards on the establishment and functioning of NHRIs, and promote key principles of pluralism, transparency, guarantees of functional and institutional independence and effectiveness of NHRIs. The implementation of the Paris Principles and evaluation of NHRIs against these principles is undertaken by the Global Alliance of National Human Rights Institutions (hereinafter “GANHRI”) Sub-Committee on Accreditation (hereinafter “SCA”).⁵ The SCA publishes reports on the accreditation applications of states, reviews their status and provides them with status accreditation every five years.⁶ The status of NHRIs may also be reviewed if the

¹ *UN Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter “CEDAW”), adopted by General Assembly resolution 34/180 on 18 December 1979. Ukraine deposited its instrument of ratification of this Convention on 12 March 1981.

² See *OSCE Action Plan for the Promotion of Gender Equality*, adopted by Decision No. 14/04, MC.DEC/14/04 (2004), par 32.

³ See UN High Commissioner for Human Rights, *Report to the UN General Assembly* (2007), A/62/36, par 15.

⁴ The UN Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights (hereinafter “the Paris Principles”) were defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris (7-9 October 1991), and adopted by UN General Assembly Resolution 48/134 of 20 December 1993.

⁵ The Global Alliance of National Human Rights Institutions (GANHRI), formerly known as the International Coordinating Committee for National Human Rights Institutions (hereinafter “ICC”), was established in 1993 and is the international association of national human rights institutions (NHRIs) from all parts of the globe. The GANHRI promotes and strengthens NHRIs in accordance with the Paris Principles, and provides leadership in the promotion and protection of human rights.

⁶ See Article 15 of the GANHRI Statute (version adopted on 22 February 2018). Accreditation is the official recognition that an NHRI meets the requirements of or continues to comply with the Paris Principles. The SCA awards A, B or C status to NHRIs. Status A means that an NHRI is fully in compliance with the Paris Principles and a voting member as regards the work and meetings on NHRIs internationally; Status B means that the NHRI does not yet fully comply with the Paris Principles or has not yet submitted sufficient documentation in this respect,

- legislation regulating them is amended.⁷ The SCA additionally develops “General Observations”, which clarify and further explain the Paris Principles.
12. The Paris Principles state that NHRIs need to have an infrastructure at their disposal that is suited to the smooth conduct of their activities, which particularly includes adequate funding and staffing. The purpose of such funding is, among others, to ensure that NHRIs have their own staff and premises, so that they may be independent from Government and will not be subject to financial control that may affect their independence.⁸ With respect to staffing in particular, the SCA has confirmed, in its 2018 General Observations, that salaries and benefits awarded to an NHRI’s staff need to be comparable to those of civil servants performing similar tasks in other independent institutions of the State.⁹
 13. The SCA has further noted that NHRIs should be legislatively empowered to determine their staffing structure and the skills required to fulfil their mandates, to set other appropriate criteria (e.g. to increase diversity), and to select their staff in accordance with national law. Staff should be recruited according to an open, transparent and merit-based selection process that ensures pluralism (including in the context of gender, ethnicity and persons with minority status) and a staff composition that possesses the necessary skills required to fulfil the NHRI’s mandate, and that also ensures the equitable participation of women in the NHRI.¹⁰ This process should lie within the sole discretion of the NHRI. While stressing that the Paris Principles do not rule out that an NHRI may hire a public servant with the requisite skills and experience through a prescribed procedure, the SCA has nevertheless reiterated the importance of an NHRI being, and being perceived as being, able to operate in a manner that is independent of government interference. The recruitment process should always be open to all, clear, transparent, merit-based and at the sole discretion of the NHRI.¹¹
 14. The UN General Assembly and the UN Human Rights Council have also issued various general resolutions on NHRIs.¹² Additionally, the United Nations Development Programme (hereinafter “UNDP”) and the Office of the United Nations High Commissioner for Human Rights (hereinafter “OHCHR”) have published a Toolkit for Collaboration with National Human Rights Institutions. The toolkit explains the various models of NHRIs and provides guidance on how to support NHRIs in the different phases

while status C institutions are not seen as being compliant with the Paris Principles. The Armenian Human Rights Defender currently holds Status A (see the most recent SCA recommendations in this regard, SCA Report and Recommendations of March 2019, pages 13-15).

⁷ United Nations Development Programme (hereinafter “UNDP”) and the Office of the United Nations High Commissioner for Human Rights (hereinafter “OHCHR”), *Toolkit for Collaboration with National Human Rights Institutions* (hereinafter “UNDP-OHCHR Toolkit”), December 2010), page 241.

⁸ See Paris Principles, B.2 (Composition and guarantees of independence and pluralism).

⁹ See the latest revised General Observations of the Sub-Committee on Accreditation, as adopted by the GANHRI Bureau (hereinafter “SCA General Observations”) at its meeting held in Geneva on 21 February 2018, General Observation 1.10, p. 27.

¹⁰ See SCA General Observation 1.7 of 21 February 2018, p. 20.

¹¹ General Observation 2.4 of 21 February 2018, p. 39.

¹² See e.g., UN General Assembly, *Resolution no. 70/163 on National Institutions for the Promotion and Protection of Human Rights*, A/RES/70/163, adopted on 17 December 2015; *Resolutions nos. 63/169 and 65/207 on the Role of the Ombudsman, Mediator and Other National Human Rights Institutions in the Promotion and Protection of Human Rights*, A/RES/63/169 and A/RES/65/207, adopted on 18 December 2008 and on 21 December 2010 respectively; *Resolutions nos. 63/172 and 64/161 on National Institutions for the Promotion and Protection of Human Rights*, A/RES/63/172 and A/RES/64/161, adopted on 18 December 2008 and 18 December 2009 respectively; and *Resolution no. 48/134 on National Institutions for the Promotion and Protection of Human Rights*, A/RES/48/134, adopted on 4 March 1994. See also *Resolution no. 27/18 on National Institutions for the Promotion and Protection of Human Rights of the UN Human Rights Council*, A/HRC/RES/27/18, adopted on 7 October 2014.

of their existence, from their establishment to supporting their development into more mature NHRIs.¹³

15. In the 1990 Copenhagen Document, OSCE participating States have committed to facilitate “the establishment and strengthening of independent national institutions in the area of human rights and the rule of law”.¹⁴ Other OSCE commitments have further emphasized the important role that NHRIs play in the protection and promotion of human rights, in particular, the Bucharest Plan of Action for Combatting Terrorism, which tasks the OSCE/ODIHR with continuing and increasing “efforts to promote and assist in building democratic institutions at the request of States, inter alia by helping to strengthen [...] ombudsman institutions”.¹⁵
16. At the Council of Europe (hereinafter “CoE”) level, Parliamentary Assembly Recommendation 1615 (2003) lists certain characteristics that are essential for the effective functioning of ombudsperson institutions specifically.¹⁶ The European Commission for Democracy through Law (hereinafter “Venice Commission”), in addition to numerous opinions on NHRI legislation, published Principles on the Protection and Promotion of the Ombudsman Institution (“the Venice Principles”) in 2019.¹⁷

2. BACKGROUND

17. The Human Rights Defender is the main NHRI in Armenia and currently holds SCA A accreditation. The institution of the Defender was first established in 2004, and the most recent Constitutional Law dates from 2016, with adaptations to ensure its compliance with the 2015 Constitution; it has since been amended several times, most recently in January 2020.
18. Based on Article 2 of the Constitutional Law, the Human Rights Defender is also Armenia’s National Preventive Mechanism under the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The same provision also specifies that the mandate of the Human Rights Defender shall include monitoring of the State’s implementation of the UN Convention on the Rights of the Child and of the UN Convention on the Rights of Persons with Disabilities, as well as protecting and preventing violations of the rights of children and persons with disabilities.
19. Article 191 par 1 of the Constitution describes the Human Rights Defender as “an independent official who observes the maintenance of human rights and freedoms on the part of state and local self-government bodies and officials”, and in certain cases prescribed by the Law on the Human Rights Defender, “also on the part of organizations” and “contributes to the restoration of violated rights and freedoms and improvement of

¹³ UNDP-OHCHR, *Toolkit for Collaboration with National Human Rights Institutions* (hereinafter “UNDP-OHCHR Toolkit”), December 2010), page 241.

¹⁴ See OSCE Copenhagen Document (1990), par 27.

¹⁵ See *Bucharest Plan of Action for Combating Terrorism* (2001), Annex to OSCE Ministerial Council Decision on Combating Terrorism, MC(9).DEC/1, 4 December 2001, par 10.

¹⁶ Parliamentary Assembly of the Council of Europe (PACE), *Recommendation 1615 (2003) on the Institution of Ombudsman*, 8 September 2003; see also other CoE documents of relevance, e.g., CoE Committee of Ministers, *Recommendation Rec(97)14E on the Establishment of Independent National Institutions for the Promotion and Protection of Human Rights*, 30 September 1997; PACE, *Recommendation 1959 (2013) on the Strengthening the Institution of Ombudsman in Europe*, adopted on 4 October 2013.

¹⁷ European Commission for Democracy through Law (Venice Commission), *Principles on the Protection and Promotion of the Ombudsman Institution (“the Venice Principles”)*, 3 May 2019.

the regulatory legal acts related to human rights and freedoms”. Article 193 of the Constitution contains a specific list of activities that are incompatible with the position of Human Rights Defender and guarantees for the activities of the Human Rights Defender, such as immunity, incompatibility requirements, as well as special provisions on funding. Thus, par 4 of this provision specifies that “the State shall ensure due financing of the activities of the Human Rights Defender”.

20. The Constitutional Law contains more specific provisions on the funding of the NHRI, notably in Article 8, which guarantees the Human Rights Defender and his/her Office appropriate funding from the state budget, in a separate budget line, to ensure the smooth operation of the work of the Human Rights Defender and his/her staff. According to this same provision, the Human Rights Defender proposes a budget estimate for his/her Office to the Government, which will, if it approves, include the budget request in the draft State Budget. If the Government rejects the Defender’s budget proposal, it is submitted to the National Assembly along with the draft State Budget. The Government shall then present a justification of its objection to the proposal to the National Assembly and the Human Rights Defender. Based on Article 8 par 6, the Defender shall participate in the hearings at the National Assembly on the draft Law on the State Budget insofar as they concern the budget for his/her Office. According to Article 8 par 5, funding allocated from the State Budget to the Defender and his/her staff “cannot be less than the amount provided the year before”.¹⁸
21. Following reforms introduced in 2020, the staff of the Office of the Human Rights Defender, along with staff of other independent state agencies, is part of the civil service of Armenia (previously, it was considered a special type of state service). From information gathered during the online meeting with staff of the Office of the Human Rights Defender, it was confirmed that these legal changes aimed to ensure the uniformity of legislation of all public services. Thus, Article 34 of the Constitutional Law specifies that “the service” in the Office of the Human Rights Defender is the civil service, which is regulated in the Law on the Civil Service, unless the Constitutional Law provides otherwise.
22. The Human Rights Defender still approves the statutes and structural subdivisions of the Office (Article 38 par 3), approves and changes the number of employees and the staff table of the Office (Article 39 par 1 (3)), and approves and changes the list of civil service positions and the job descriptions of other positions as prescribed by law (Article 39 par 1 (4)). According to Article 39 par 1 (5), the Human Rights Defender also appoints and dismisses civil servants and persons holding other positions in the Office, applies “incentive measures” and imposes disciplinary measures. The Human Rights Defender also establishes procedures for training, performance evaluation criteria and rules of conduct for persons holding positions in the Office, as well as internal disciplinary rules and rules for case management (Article 39 par 1 (6)) and defines the procedure of the competition held for civil service vacancies in the Office of the Human Rights Defender, based on the Law on the Civil Service (Article 39 par 1 (7)).

3. ANALYZING THE LEGISLATIVE CHANGES INTRODUCED IN 2020

23. In his letter of request, the Human Rights Defender raised a number of concerns relating to the implementation of the new legislation. He noted that the Civil Service Office had

¹⁸ In the first half of 2021, a draft amendment was introduced to the Law aiming to abolish this provision, which was the subject of a separate OSCE/ODIHR Opinion (see OSCE/ODIHR Opinion on the Draft Law Amending Article 8 of the Law on the Human Rights Defender, 12 May 2021). This draft amendment was later withdrawn.

repeatedly rejected his proposals on ranks and lists of positions for staff members, meaning that the Human Rights Defender is not able to change existing posts, or modify or independently take decisions on the promotion of staff members. According to the Human Rights Defender, this, along with a number of inconsistencies between the Constitutional Law and the Law on Civil Service and other legislation, has affected the organizational integrity of the Human Rights Defender's Office and the smooth conduct and effective performance of its activities, which threaten the autonomy and independence of the Office.

3.1. The Relationship Between the Law on the Human Rights Defender and Other Legislation

24. The Constitutional Law is, as indicated in its title, a “constitutional law”, which means that, as opposed to other laws, it requires at least three-fifths of the votes of the total number of deputies in order to be adopted (Article 103 par 2 of the Constitution). According to Article 5 par 2 of the Constitution, this means that it has a higher rank than other laws and secondary legislation. This is also reflected in Article 34 of the Constitutional Law, which states that for matters concerning the staff of the Office of the Human Rights Defender, as members of the civil service, the Law on the Civil Service shall apply, unless the Constitutional Law provides otherwise. Article 2 of the Law on the Civil Service on the subjects regulated in that law likewise states that as regards, among others, the Office of the Human Rights Defender, the relations of public service are governed by the Law on Civil Service if other laws do not “establish features” (par 2 of this provision). Consequently, the Constitutional Law takes precedence over the Law on the Civil Service, which will only apply in relation to matters that have not already been regulated in the Constitutional Law.
25. Similarly, again as per the hierarchy of laws established in Article 5 par 2 of the Constitution, the Constitutional Law takes precedence over the Law on the Public Service in cases of conflict between the two laws, as well as over secondary legislation.

3.2. The Competences of the Human Rights Defender in Relation to Staff

3.2.1 Ranks and Lists of Staff of the Human Rights Defender's Office

26. According to Article 38 of the Constitutional Law, the Human Rights Defender approves the statutes and structure of his/her Office. Article 39 of the Constitutional Law stipulates that the Human Rights Defender shall also approve and change the number and the staff table of the Office (par 1 (3)) and may change the descriptions of civil service and other positions in his/her Office (par 1 (4)). The Constitutional Law does not indicate that the Human Rights Defender is required to obtain the confirmation of other public bodies before taking or implementing such decisions.
27. At the same time, Article 5 of the Law on the Civil Service states that the descriptions of civil service positions in public bodies need to be confirmed by the Civil Service Office, which is under the Office of the Prime Minister and is responsible for maintaining the management and unity of the civil service according to the procedure established by this law and other legal acts (Article 38 of the Law on the Civil Service). The Civil Service Office also conducts “methodical management and control of human resources management of relevant organs”. Thus, “within a month from the moment of emergence of the legal basis for modification and amendments of the nomenclature of positions of civil service”, the chief secretary of the relevant public body shall submit to the Civil Service Office a proposal, drafted in accordance with the approved methodology and

- substantiated by documents, together with the descriptions of civil service positions (Article 5 par 5 of the Law on the Civil Service). The Civil Service Office then officially approves or rejects the proposal.
28. According to Article 5 par 7 of the Law on the Civil Service, the Deputy Prime Minister is responsible for designing a “methodology of assessment, classification, titles of position of civil service, description of public service positions and their place in the common system of positions, rights and obligations, maintaining the nomenclature, and also establishment of requirements imposed to the civil servant for replacement of this position of civil service from the point of view of ownership of professional knowledge and competences”.
 29. According to the information provided by the Human Rights Defender in the letter of request, and as also confirmed during the online meeting with the representatives of the Office of the Human Rights Defender, the Human Rights Defender submits requests for the approval of ranks and lists to the Civil Service Office, in order to comply with the requirements and procedure described in Article 5 par 5 of the Law on the Civil Service. It is, however, unclear whether the Human Rights Defender is in fact obliged to do this, given that, based on Article 5 par 2 of the Constitution, the Constitutional Law takes precedence over ordinary legislation, including the Law on the Civil Service. Thus, Article 34 of the Constitutional Law specifies that the Law on the Civil Service shall apply in matters pertaining to the staff of the Office of the Human Rights Defender, unless the Constitutional Law itself provides otherwise. Given that the Constitutional Law indicates that the Human Rights Defender approves ranks and lists of staff for his/her Office, without mentioning that the Human Rights Defender shall in turn request approval for this from the Civil Service Office, it is quite possible that by law, the Human Rights Defender is free to determine the ranks and lists in his/her Office as he/she sees fit.¹⁹
 30. The Paris Principles, as interpreted in the General Recommendations of the SCA, stress that NHRIs should be legislatively empowered to determine their staffing structure and the skills required to fulfil their mandates.²⁰ Moreover, it should be borne in mind that the Civil Service Office operates under the auspices of the Office of the Prime Minister. Giving this Civil Service Office too large a role in the determination of the ranks and list of staff of the Office of the Human Rights Defender could well raise concerns with respect to the independence of the latter. As stated by the SCA, NHRIs need to be, and need to be perceived as being, able to operate in a manner that is independent of government interference. If the Prime Minister’s Office, via the Civil Service Office, has the possibility to approve or disapprove of the ranks and lists of staff of the Office of the Human Rights Defender, then it is not to be excluded that this power could be used, or could be seen as being used, to curtail the work of the Human Rights Defender for political reasons.
 31. At the same time, if the Government of Armenia wishes to maintain a certain uniformity in matters pertaining to civil servants, including ranks and staff lists or competitive procedures for vacant positions, then such an approach would not automatically be at odds with the Paris Principles. Indeed, the SCA has noted that, in the context of recruiting

¹⁹ This seems to be the case in other OSCE participating States, such as Estonia, where the domestic NHRI, the Chancellor of Justice, establishes the statutes, structure and staff positions of the Office and the structural units thereof and may establish the classification of the staff positions into staff groups (see Section 36 par 2 of the Chancellor of Justice Act).

²⁰ General Observation 2.4 of 21 February 2018, p. 39.

and hiring civil servants as staff of NHRIs, uniform government recruitment processes are not problematic *per se*, provided that the process is independent and objective, and ensures open, transparent and merit-based selection,²¹ while guaranteeing the necessary pluralism and gender equality and a staff cadre that possesses the skills required to fulfil the NHRI's mandate. Such approaches should also not compromise NHRIs' ability to perform their roles independently and effectively; in particular, administrative requirements imposed on NHRIs must be clearly defined and should not be more onerous than those applicable to other independent state agencies.²² The same would apply in the context of ranks and list of staff of the Office of the Human Rights Defender, meaning that a uniform approach requiring him/her to submit proposals for ranking and staff lists to the Civil Service Office would be in line with the Paris Principles if the rules governing these processes are clearly defined and formulated in a manner that safeguards the Office's independence vis-à-vis the executive.²³

32. Based on the above considerations, **it is recommended to enhance legal certainty and foreseeability in this case and to clarify, in both the Constitutional Law and the Law on the Civil Service, whether the Human Rights Defender has full discretion over the ranks and list of staff of his/her Office or whether he/she requires the acquiescence of the Civil Service Office.** Given the importance of maintaining the Human Rights Defender's independence, the relevant provisions should either reflect the former approach or ensure that proceedings following the latter approach do not unduly encroach upon the independence of the Human Rights Defender. At the same time, while safeguarding these powers of the Human Rights Defender, the Constitutional Law could still specify that the Human Rights Defender needs to follow the methodology designed by the Deputy Prime Minister under Article 5 par 7 of the Law on the Civil Service (insofar as it does not contradict the Constitutional Law, which as stated above, takes precedence over the Law on the Civil Service). **This methodology of assessment, classification, names of position of civil service, and place in the common system of positions would then, however, need to be adapted to the specific staffing structure and skills required by the Office of the Human Rights Defender to adequately fulfil its mandate.**
33. In this context, it should be recalled that in his letter of request, the Human Rights Defender has also stated that that while by law, the position of the Human Rights Defender is equated to the President of the Court of Cassation "in the sense of financial guarantees of independence", the Constitutional Law does not provide a ranking system for the staff of the Human Rights Defender's Office that would be equivalent to the staff regulations of the highest judicial institution. **It is recommended to address this issue, in cooperation with the Human Rights Defender, in a manner that takes into account the independence and specificities of this Office.**

²¹ SCA, Report and Recommendations of the Session of 14-18 November 2016, Specific Recommendations for Tanzania: Commission for Human Rights and Good Governance of (CHRAGG), p. 52.

²² SCA, Report and Recommendations of the Session of 9-13 May 2016, Specific Recommendations for Montenegro: The Protector of Human Rights and Freedoms (PHRF), p. 19.

²³ See, in this context, the practice in France, where in a 2014 decision, the *Défenseur des droits* decided on his/her own ranking of staff with 10 ranks of salary, classifying each post category according to the level of responsibility, along with rules for salary increases, for promotion, evaluation of work, professional bonuses and working time.

RECOMMENDATION A.

To clarify, in both the Constitutional Law and the Law on the Civil Service, whether the Human Rights Defender has full discretion over the ranks and list of staff of his/her Office or whether he/she requires the acquiescence of the Civil Service Office, and ensure that the ranking of staff of the Office of the Human Rights Defender and the methodology that it follows takes into account the specificities of the Office, and does not compromise autonomy of this national human rights institution.

3.2.2 The Maximum Number of Staff of the Office of the Human Rights Defender

34. Any NHRI requires an adequate infrastructure and sufficient staff to ensure the smooth conduct of their activities, as also stated in the Paris Principles. According to Article 39 par 1 (3) of the Constitutional Law, the Human Rights Defender approves and changes the number of staff in his/her Office.
35. Presumably, the number of staff is already included in the budget estimate that the Human Rights Defender proposes to the Government every year. The Government itself may not reject this proposal; rather, if it disagrees with the proposal, the Government shall nevertheless submit the proposal to the National Assembly, along with a justification of its objection (Article 8 par 4 of the Constitutional Law). It would appear to follow that the proposal is then discussed before the National Assembly as part of the entire state budget, which means that the final decision on the amount allocated to the Human Rights Defender's Office for staff and a certain number of staff, would then be taken not by the executive, but rather by the National Assembly.
36. At the same time, Article 15 of the Law on the Public Service states that the Prime Minister shall determine the maximum amount of staff positions in state bodies. According to Article 3 par 1 of the Law on the Public Service, "public service is the exercise of powers vested in public bodies by the Constitution and laws of the Republic of Armenia", and includes, among others, state service (including the civil service, see par 3 of the same provision). Article 8 par 12 of the Constitutional Law explicitly states that the Law on the Public Service applies for certain positions within the Office of the Human Rights Defender,²⁴ and based on Article 3 par 3, it is assumed that it also applies to other civil service staff working there. The Prime Minister exercises the right under Article 15 by way of Decree N.706-A on "Determining the Maximum Number of Posts in State Authorities" of 2018; Point 6 of Appendix 6 of this Decree specifies that the Office of the Human Rights Defender is allocated a maximum number of 98 staff members. In his letter of request, the Human Rights Defender has expressed concern that based on this decree, the Ministry of Finance has refused to increase the number of staff of the Office of the Human Rights Defender without the consent or instruction of the Prime Minister.
37. As stated with respect to ranks and lists of staff under *Subsection 3.2.1* above, Article 39 par 1 (3) of the Constitutional Law does not indicate that anyone else but the Human Rights Defender has the right to decide on the maximum number of staff of his/her

²⁴ According to Article 7 par 3, the Human Rights Defender holds an "autonomous" position in the public service. Under Article 8 par 3, the positions of "advisor, assistant, press secretary to the Department of the Staff to the Human Rights Defender, to the Coordinator of the National Preventive Mechanism of the Staff to the Human Rights Defender, to the head of a regional subdivision of the Staff to the Human Rights Defender, to the Human Rights Defender" are considered "state discretionary positions". Based on Article 8 par 12, "The number of discretionary positions in the bodies of the state administration system shall be determined by the Prime Minister according to the bodies".

Office. The fact that the Constitutional Law takes precedence over the Law on the Public Service based on Article 5 par 2 of the Constitution and Article 34 of the Constitutional Law could mean that Article 15 does not apply to the Office of the Human Rights Defender. The Human Rights Defender, and not the Prime Minister, would then determine the number of staff in the Office, within the framework of the national annual budget approved by the National Assembly.

38. This would help ensure that the Office of the Human Rights Defender always has sufficient staff at its disposal, which is necessary so that the Human Rights Defender can address potential new human rights issues as they come up with additional and above all sufficiently qualified staff. This approach would help guarantee compliance with the 2018 SCA General Observations, which state that NHRIs must be provided with sufficient resources to permit the employment and retention of staff with the requisite qualifications and experience to fulfil the NHRI's mandate.²⁵ The 2019 Venice Principles have also highlighted how important it is that an ombudsperson institution²⁶ has sufficient staff at its disposal and the appropriate structural flexibility.²⁷
39. **It is thus recommended to clarify the above legislative provisions regulating the number of staff working for the Office. This is necessary in the interests of legal certainty and to ensure foreseeability of legislation. Given the importance of maintaining the independence of the NHRI also in these matters, it is advisable to provide the Human Rights Defender with the flexibility to decide on the number of staff working in his/her Office, within the financial limits of the yearly budget adopted by the National Assembly.**²⁸
40. In any event, any solution found to this issue would need to ensure that the executive (including the Prime Minister) does not have an undue and disproportionate influence on the number of staff allocated to the Human Rights Defender, to prevent abuse and safeguard the independence and functionality of the Human Rights Defender.

RECOMMENDATION B.

To clarify the legislative provisions regulating the decision-making power of the Human Rights Defender, in particular with respect to the overall number of staff working for the Office, while ensuring that the Human Rights Defender

²⁵ SCA General Observation 2.4 of 21 February 2018, p. 39.

²⁶ The Venice Principles recall that an Ombudsman is an institution taking action independently against maladministration and alleged violations of human rights and fundamental freedoms affecting individuals or legal persons (see p. 1); the Human Rights Defender of Armenia has very similar competences.

For the purposes of this Opinion, however, and while acknowledging that the Scandinavian term "Ombudsman" is considered to be gender-neutral in origin, the term "ombudsperson" is generally preferred, in line with the increasing international practice to ensure the use of gender-sensitive language (see e.g., <https://www.unescwa.org/sites/www.unescwa.org/files/page_attachments/1400199_0.pdf>).

²⁷ The Venice Principles, par 22.

²⁸ As also indicated in other laws in OSCE participating States, e.g. Albania, where the People's Advocate designs the structure and organigram of the Office based on the number of employees approved in the annual budget of the institution (Article 35 of the Law on the People's Advocate), or Bosnia and Herzegovina, where the Ombudsman Institution may freely staff its office(s) and appoint advisers, deputies included, as needed, in accordance with its Rules of Procedure and within the budgetary limits (Article 37 of the Law on the Human Rights Ombudsman). The Spanish Organic Act on the Ombudsman contains a similar provision (Article 34). See also Article 48 of the Law on Ombudsman of North Macedonia, which states that the Ombudsman manages independently the utilization, allocation and assignment of the financial resources of the section of the budget allocated to the Ombudsman. The French Défenseur des droits is likewise responsible for his/her own yearly budget – as adopted by the Parliament – and the management of his/her own budget allotted to the salary of staff members. The maximum number of staff members per each administrative state body – including the Défenseur, which is an administrative body – is decided on an annual basis by the Parliament together with the yearly budget. The Défenseur is free to recruit staff members by contract – which is a derogation from civil service legislation, which sets out the principle that permanent posts shall be attributed to statute career civil servants recruited via a state civil service exam – or statute civil servants, but shall respect the annual ceiling for staff members as well as the yearly budget.

has a sufficiently wide discretion to determine the overall number of staff in the Office, within the financial limits of the yearly approved budget allocations.

3.2.3 *Hiring Practices and the Changing of Posts/Promotions*

41. According to Article 39 par 1 (4) of the Constitutional Law, the Human Rights Defender approves and changes job descriptions of staff working for his/her Office. He/she also appoints and dismisses staff and applies “incentive measures” (Article 39 par 1(5)), and adopts procedures for, among others, performance evaluation criteria. Finally, the Human Rights Defender shall also, based on the Law on the Civil Service, establish a procedure for competitions held to fill vacant civil service posts (Article 39 par 1 (7)).
42. As discussed in par 29 *supra*, it is doubtful whether, given the formulation and status of the Constitutional Law, the Human Rights Defender is or should be obliged by law to have his/her ranks and lists approved by the Civil Service Office, as stipulated in Article 5 par 5 of the Law on the Civil Service. The same considerations would appear to apply to promotions, which could be seen as “incentive measures” as set out in Article 39 par 1 (5) of the Constitutional Law.
43. In this context, it is recalled that the SCA has considered that it is not problematic per se if state systems seek to apply uniform rules to the hiring of civil servants, including those working in NHRIs, provided they do not compromise NHRIs’ ability to perform their roles independently and effectively (see par 31*supra*). The same presumably applies to the question of promoting civil servants working for the Office of the Human Rights Defender. Thus, **while it may be permissible to oblige the Human Rights Defender to follow certain criteria and procedures defined by civil service legislation, it is important that these criteria and procedures are clearly defined, in order to ensure legal certainty and the independence of the Office.** Under no condition should the **Human Rights Defender be required to seek the approval of the Civil Service Office for promotions within the Office.** In any event, the final decision on promotions within the Office should never lie with the Prime Minister, even if the Civil Service Office operates under the auspices of his/her Office.
44. Finally, with respect to the recruitment and hiring of new staff to fill vacant civil servant posts in the Office of the Human Rights Defender, Article 39 par 1 (7) clearly states that the requisite procedure shall be prepared and defined by the Human Rights Defender, following the requirements set out in the Law on the Civil Service. This is also reflected in Article 9 par 5 of the Law on the Civil Service, which specifies that for vacancies in the Office of the Human Rights Defender, the competition is organized and conducted by the Human Rights Defender. Article 10 of the Law on the Civil Service contains quite detailed procedures on how vacancies should be filled within the civil service.
45. In this context, it is noted that in his letter of request, the Human Rights Defender has raised concerns that the Government does not allow the Office of the Human Rights Defender to hire and promote staff following internal office procedures, but rather requires the Office to follow government rules of procedure, which appear to not have been adopted yet.

46. Given the extent of detail in Article 10 of the Civil Service Law, and the fact that the Human Rights Defender is, by law, allowed to prepare and define his/her own procedure for recruiting staff, it is unclear why additional procedural rules prepared by the Government would necessarily need to be followed before the Office of the Human Rights Defender could hire new staff.²⁹ In any event, even assuming that such an additional procedure is necessary to ensure a uniform approach to the recruitment of new civil service staff in all public bodies, it would nevertheless appear **excessive to deny the Human Rights Defender the right to recruit new staff following the Office's established internal procedures.** Rather, the ultimate decision-making power with regard to recruitment, appointments and/or promotions in the Office should rest with the **Human Rights Defender.** These procedures should bear in mind the requisite principles of pluralism, gender equality and open, transparent and merit-based selection processes, which could then be adapted once a government procedure is adopted that would apply to the entire civil service, always provided that such a procedure does not compromise the ability of the Human Rights Defender's Office to perform its role independently and effectively.

RECOMMENDATION C.

To let the Human Rights Defender recruit his/her staff following this Office's internal procedures, bearing in mind the requisite principles of pluralism, gender equality and open, transparent and merit-based selection processes; also, while it may be legitimate to establish uniform recruitment processes for all public offices, the Human Rights Defender should retain final decision-making authority with regard to recruitment, appointments and/or promotions of staff.

4. RECOMMENDATIONS RELATED TO THE PROCESS OF PREPARING AND ADOPTING THE DRAFT AMENDMENT

47. OSCE participating States have committed to ensure that legislation will be “adopted at the end of a public procedure” (1990 Copenhagen Document, par 5.8).³⁰ Moreover, key commitments specify that “[l]egislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives” (1991 Moscow Document, par 18.1).³¹ The Venice Commission's Rule of Law Checklist also emphasizes that the public should have a meaningful opportunity to provide input.³² It is clear that the same applies also, and above all, to persons and institutions directly affected by a law under preparation.
48. While the changes were apparently consulted with the Human Rights Defender prior to being adopted, it is important to ensure that such consultations are meaningful and effective. It is apparent that the problems caused by the implementation of the amendments, as mentioned by the Human Rights Defender in his letter to OSCE/ODIHR, may not have been addressed sufficiently prior to adoption of the legislation. It is thus essential that the concerns addressed in the previous sections of this Opinion undergo in-depth discussions with the Office of the Human Rights Defender, with a view to

²⁹ See, in this context, Article 26 par 2 of the Law on the Public Defender of Georgia, which likewise clearly states that the staff of the Office shall be appointed and dismissed by the Public Defender, and Article 38 of the Law on the Protector of Citizens of Serbia, stating that the Protector shall decide on the employment of staff in his/her Secretariat.

³⁰ Available at <<http://www.osce.org/fi/odihr/elections/14304>><http://www.osce.org/fi/odihr/elections/14304>.

³¹ Available at <<http://www.osce.org/fi/odihr/elections/14310>><http://www.osce.org/fi/odihr/elections/14310>.

³² See Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, Part II.A.5.

introducing the necessary clarifications, as suggested in previous recommendations in this Opinion.

49. The SCA has emphasized that where NHRI laws are amended, an open, transparent and meaningful consultative process should be undertaken, including with the NHRI itself.³³ It is thus essential that an NHRI be involved in meaningful consultations in relation to draft legislation that affects or concerns it, at all stages of the law-making process, from the preparation of the initial draft by the government, to parliamentary debates and up until the adoption, as well as future evaluation of the legislation and related secondary legislation.³⁴ Any future amendments to the Law should undergo in-depth and meaningful public consultations that also involve the Office of the Human Rights Defender, and other interested parties, such as civil society organizations.
50. Moreover, the potential impact of the current Law, as amended in 2020, on the financial independence and function of the Human Rights Defender's Office needs to be assessed in an in-depth manner, as should the impact of any future amendments to the Law. This assessment should contain a proper problem analysis, using evidence-based techniques to identify the most efficient and effective regulatory option.³⁵ In the event that such an impact assessment has not yet been conducted, **the legal drafters are encouraged to undertake such an in-depth review, to identify existing problems, and adapt proposed solutions accordingly. In addition, the legal drafters should explain the reasons why amendments to the existing laws are needed and how these amendments would successfully resolve the identified challenges.**
51. In light of the above, **public authorities, including the National Assembly, are encouraged to ensure that the current Constitutional Law and possible amendments to the Constitutional Law are subjected to inclusive, extensive and effective consultations, including with the Office of the Human Rights Defender in particular, and civil society organizations.**

RECOMMENDATION D.

To ensure that the current Constitutional Law and possible amendments to the Constitutional Law are subjected to a proper impact assessment, as well as inclusive, extensive and effective consultations, including with the Office of the Human Rights Defender in particular, and civil society organizations.

[END OF TEXT]

³³ For example, concerning the development of the NHRI in Norway, the SCA recommended that “[a]n inclusive and consultative process to ensure broad support for a new NHRI should be initiated by the Government without delay”, emphasizing that “[t]he process should include the [existing institution], civil society groups and other stakeholders”; see GANHRI SCA, [2011 Report](#), Norway, October 2011, pages 15-16.

³⁴ See also the [Belgrade Principles on the Relationship between National Human Rights Institutions and Parliaments](#) (2012), which the OHCHR recommends to use as guidelines to strengthen co-operation between NHRIs and parliaments for the promotion and protection of human rights at the national level, especially par 4, which states that “Parliaments, during the consideration and adoption of possible amendments to the founding law of a NHRI, should scrutinize such proposed amendments with a view to ensuring the independence and effective functioning of such institution, and carry out consultation with the members of NHRIs and with other stakeholders such as civil society organizations”.

³⁵ See e.g., OSCE/ODIHR, [Preliminary Assessment of the Legislative Process in the Republic of Uzbekistan](#) (11 December 2019), Recommendations L and M; and Venice Commission, [Rule of Law Checklist](#), CDL-AD(2016)007, Part II.A.5.