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## OMBUDSMAN

### 1. INTERNATIONAL STANDARDS

#### 1.1. Introduction

The institution of the Ombudsman, as a strong factor for strengthening the democratic processes and the concept of the state as a provider of public services, today exists in over 130 countries. Although its evolved form that exists today is traditionally linked to the Swedish Constitution from 1809 (which recognised *Justitieombudsman*), and its roots go as back as the early 18<sup>th</sup> century, this institution saw rapid expansion only in the second half of the 20<sup>th</sup> century. Most of all thanks to Denmark, this institution became prosperous, and, over time, it escalated to the extent that some authors now speak of “ombudsmania.”<sup>2</sup>

Although there is still no consensus about the definition of the Ombudsman institution in the published sources,<sup>3</sup> it can be argued that the Ombudsman institution is established to fight for the protection of human rights, increase transparency, and

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<sup>2</sup> D. Milkov, „Zaštitnik građana Republike Srbije“, *Zbornik radova Pravnog fakulteta u Novom Sadu*, 1-2/2008, p. 200.

<sup>3</sup> The difficulties relating to a precise and comprehensive definition of the term “ombudsman” reflect both the natural differences in the nature and powers of this institution in different countries, and the notable evolution and expansion of the aforementioned powers. A frequently cited definition is that of the Canadian author Donald Rowat, stating that the Ombudsman is an independent and impartial officer of the legislature whose establishment is usually stipulated by constitution, and who supervises the administration, investigates citizens’ complaints about bureaucratic wrongdoings, criticises, and discloses bureaucratic actions, without cancelling them. – D. Simović, „O potrebi ustanovljavanja policijskog ombudsmana u Republici Srbiji“, *Policijska u funkciji zaštite ljudskih prava*, Kriminalističko-policijska akademija, Beograd, 2011, p. 84. This dated definition from 1968, although still true, is incomplete, as it fails to take into account special care of human rights protection by the Ombudsman that is insisted upon today (“hybrid ombudsman”).

ensure adequate performance of public authorities, fight against “maladministration”<sup>4</sup> and prevent corruption. Therefore, the Ombudsman is a sort of an arbitrator between the state apparatus and the individual, an independent corrective of the bureaucratic apparatus that takes care of the citizens’ rights and good administration, and, by virtue of its actions, it has an important role in the prevention of corruption. In addition to the National Ombudsmen with general competencies, there are also Specialised Ombudsmen dealing with a narrower field of action (military, police, education etc.), Supranational (European Ombudsman), but also Regional and Local Ombudsmen. An important role of the Ombudsman is to ensure the prevention of corruption by drawing attention to the weaknesses in the system that could cause it.

Defence and security sector falls under the competence of the national Ombudsman in countries whose Ombudsman has general competencies, i.e. the military Ombudsman in countries whose law recognises such specialised institutions. Due to the undemocratic, distinctly hierarchical, and non-transparent nature of the army itself, in the domain of the Military Ombudsman the specificities are, in fact, much more common than in other types of Specialised Ombudsmen. Only one of the countries covered by this study (Bosnia and Herzegovina) recognises the institution of the special Military Ombudsman.

## 1.2. Sources of Law

The development of the international ombudsman standards and best practice began in 1960s. There is a large number of international acts which provide guidelines and specify the fundamental principles that should support operation of this institution. Although they are, as a rule, of advisory and unbinding nature, by virtue of their authority, these acts are incorporated by the states into their national legislation. Organisations including United Nations, European Union, Council of Europe and its European Commission for Democracy through Law (the Venice Commission) adopted ombudsman recommendations and guidelines. In terms of importance, one has to note the so-called *Paris Principles*, defined at the first *International Workshop on National Institutions for the Promotion and Protection of Human Rights* (held in Paris, in 1991), which were soon accepted by the United Nations and the Council of Europe.

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<sup>4</sup> Maladministration can be defined as any illegal, inappropriate, unfair, unethical adoption of administrative acts, and performance of administrative actions, including any negligent action, procrastination, and discretionary conduct, i.e. administrative action that is not fair, efficient, and cordial. S. Jugović, „Zaštitnik građana i kontrola policije i bezbednosno-informativne agencije u Republici Srbiji“, *Pravna riječ*, 29/2011, pp. 733-734. The 1998 Annual Report of the European Ombudsman states that “Maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it.” <http://www.Ombudsman.europa.eu/activities/annualreports.faces>, 11.2.2013.

The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights<sup>5</sup> monitors the compliance of national human rights institutions with the Paris principles<sup>6</sup> and accredits UN member states granting them one of the following statuses: A (country fully complies with the Paris principles), B (country partially complies with the Paris principles) or C (country does not comply with the Paris principles). Among the researched states, in the last accreditation<sup>7</sup> (December 2011) Bosnia and Herzegovina, Croatia and Serbia were granted A status, Bulgaria and Macedonia B status, whilst Montenegro and Kosovo were not covered by the report.<sup>8</sup>

All the analysed countries, with the exception of Kosovo,<sup>9</sup> are members of both the United Nations and the Council of Europe, and at the time this paper is being written Bulgaria and Croatia are members of the European Union.

There is a series of other documents dealing with the protection of human rights, which partially or indirectly touch upon the institutions of ombudsman - such as the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which as an addition to the UN Convention Against Torture, which as accepted in all countries covered by the research (except Kosovo). The United National General Assembly has adopted a series of resolutions dealing with the protection of human rights, the most relevant of which in view of the ombudsman are the A/RES/65/207 and A/RES/63/169 resolutions, which encourage member states to take certain steps towards strengthening the integrity of the ombudsmen and human rights protection. Coupled with the guidelines of some other relevant institutions, such as the European Ombudsman<sup>10</sup>, the International Ombudsman Association (IOA), the European Ombudsman Institute (EOI) and the like, they constitute sound principles of the quality work of this institution.

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<sup>5</sup> This body was formed at a conference in Tunisia in 1993 with the aim to ease the coordination of national institutions for protection of human rights. Its work is supported by the High Commissioner of the UN for Human Rights.

<sup>6</sup> In the researched countries, the ombudsman is such a body.

<sup>7</sup> <http://nhri.ohchr.org/EN/Documents/Chart%20of%20the%20Status%20of%20NHRIs%20%28DIC%202011%29.pdf>, 11.2.2013.

<sup>8</sup> Kosovo is not a UN member state and hence cannot be ranked.

<sup>9</sup> According to the UN Resolution 1244.

<sup>10</sup> At the time this paper is being written, amongst the states being researched, only Bulgaria and Croatia are members of the European Union, and hence the institution of the European Ombudsman is available only to their citizens. However, the guidelines of the European Ombudsman by the sheer force of their authority have a considerably wider impact and are a part of the general international principles concerning ombudsman.

### 1.3. Content of Standards

In spite of the lack of international normative that would ensure a clear division of these categories (principles), in this paper we opted to organise the international standards relating to Ombudsman around the following five categories: establishment by constitution or law; adequate powers; independence; transparency, reporting and confidentiality; efficiency and competence.

#### 1.3.1. Establishment by constitution or law

The way in which the institution of the Ombudsman is defined in the legal system determines the degree of its independence, and, in turn, the quality of its work. As the constitution is the highest legal act of a country, it is advisable to have the issues relating to the Ombudsman, his/her selection, powers, and activities stipulated by the constitution.<sup>11</sup> If the Ombudsman is not established in the constitutional text, in that case it is preferable to have it established by law, rather than by a bylaw. The published sources emphasise also that an institution established by constitution is less vulnerable and less prone to discretionary pressures and more sustainable over time.<sup>12</sup>

#### **The Paris Principles: the Ombudsman established by constitution or law**

##### Article 2

A national institution (national human rights institution, more specifically - the Ombudsman) shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.

The Venice Commission was also of the opinion that it would be preferable to have the institution of the Ombudsman guaranteed by the constitutional provisions that would stipulate the core characteristics and powers of the Ombudsman office and

<sup>11</sup> Thus, for example, in the Opinion on the Draft Law on the Ombudsman of Serbia by the Venice Commission from 6 December 2004, it is stated that, in order to protect it from political influences, it would be preferable to have the institution of the Ombudsman and its main principles guaranteed not only on the legislative but also on the constitutional level. CDL-AD(2004)041 Joint Opinion on the Draft Law on the Ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe.(Strasbourg,6 December 2004) n. 9. [http://www.venice.coe.int/site/main/texts/CDL\\_2010\\_OMBUD\\_e.pdf](http://www.venice.coe.int/site/main/texts/CDL_2010_OMBUD_e.pdf), 11.2.2013.

<sup>12</sup> B. Milosavljević, *Ombudsman – zaštitnik prava građana*, Centar za antiratnu akciju, Beograd 2001, p. 31.

the terms of appointment of the Ombudsman, and which would be further specified in legal provisions. That is why it is recommended that constitutional provisions should not be too extensive, and that the constitutional framework should not be too narrow, which would prevent the reasonable development of the institution. Particularly, the provision in the constitution for an Ombudsman at the national level should not be seen as preventing the establishment of similar institutions at a local or regional level or within specific fields.<sup>13</sup> Therefore, it can be concluded that the ideal situation would be to have this institution established in a flexible way by the constitution, to a reasonable degree of detail that would cover all its essential aspects, with further elaboration under legislation and bylaws.

### 1.3.2. Adequate powers

The main function of Ombudsman is to draw attention to “maladministration” in all spheres of the state, and also within the military domain. The International Ombudsman Association (IOA) Standards of Practice in Article 4, Para. 4, state that “the Ombudsman supplements, but does not replace, any formal channels.”<sup>14</sup> Thus, the Ombudsman is “a body that does not act by way force, threats, or sanctions, it does not issue orders or implement sanctions on its own. On the contrary, it is a body that proposes initiates, participates in, and coordinates the activities of other state authorities in order to find the best solutions to ensure the satisfaction and protection of individual’s rights.”<sup>15</sup>

The Ombudsman institution may act on a voluntary basis (the Ombudsman monitors *ex officio* the status of human rights and the performance of administration), and on the basis of citizens’ complaints, which is much more common in practice. These standards were further specified by international ombudsman institutions, and, with that respect, the practice of the European Ombudsman is also valuable. The desired competencies of the Ombudsman are specified in detail in the Paris Principles and provided in the Box below.

<sup>13</sup> CDL-AD(2007)020 - Opinion on the possible reform of the Ombudsman Institution in Kazakhstan adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007) No. 7. [http://www.venice.coe.int/site/main/texts/CDL\\_2010\\_OMBUD\\_e.pdf](http://www.venice.coe.int/site/main/texts/CDL_2010_OMBUD_e.pdf), 11.2.2013.

<sup>14</sup> [http://www.ombudsassociation.org/sites/default/files/IOA\\_Standards\\_of\\_Practice\\_Oct09.pdf](http://www.ombudsassociation.org/sites/default/files/IOA_Standards_of_Practice_Oct09.pdf) 11.2.2013.

<sup>15</sup> B. Marković, „Ombudsman i uprava u procesu zaštite ljudskih prava i sloboda“, *Eseji o upravi*, Kragujevac 2001, p. 175. However, there are some exceptions, and thus, in Sweden the Ombudsman may even take over criminal prosecution if he/she is convinced that there are grounds to do so.

### **The Paris Principles: Ombudsman's Powers**

In accordance with the Paris Principles,<sup>16</sup> the Ombudsman's powers should include:

- The right to investigate potential irregularities in the work of the state apparatus (including the ministry of defence), i.e. investigate whether the institutions perform their activities in compliance with the law and standards of ethics;
- The right to submit recommendations to the government and other state institutions in order to prevent "maladministration", and potentially eliminate its consequences;
- The right to submit applications to the state institutions if he/she is convinced that human rights are violated;
- The right to make the results of his/her activities available to the public;
- The right to propose amendments and new legislation, if the violation/breach of human rights or "maladministration" is a result of inadequate normative framework, with the aim to promote good administration and institutional integrity (and, in turn, reducing corruption);
- The right to propose removal of public officers from office (in the event of documented inappropriate, illegal or corruptive actions);
- It is advisable that the Ombudsman advocates the implementation into the national legislation of all the standards and best practices of the international bodies to which the state has acceded and which deal with human rights protection and promotion of good administration. The Ombudsman is also encouraged to cooperate with international organisations, particularly the United Nations;
- It is also advisable that the Ombudsman assists in the formulation and implementation of human rights, and, to that end, implements scientific and research programmes, and raises public awareness about the importance of human rights through information and education.

### **1.3.3. Independence and neutrality**

Considering the nature of the Ombudsman institutions itself, it is clear that one of the highest priorities is its independence. Thus, for example, the European Ombudsman Statutes, in Article 9, stipulates:

<sup>16</sup> <http://www2.ohchr.org/english/law/parisprinciples.htm>, 11.2.2013.

“The Ombudsman shall perform his duties with complete independence, in the general interest of the Communities and of the citizens of the Union. In the performance of his duties he shall neither seek nor accept instructions from any government or other body. He shall refrain from any act incompatible with the nature of his duties.”<sup>17</sup>

To ensure complete independence and neutrality, several conditions have to be satisfied, including the aforementioned constitutional guarantee of this institute, and adequate procedures for appointment and removal of the Ombudsman, incompatibility of this function with the state apparatus functions, reasonable financial security (ensuring undisturbed operations), and financial independence from the executive.

With respect to the appointment of the Ombudsman, considering both its establishment as a parliamentary trustee, and the nature of the activity it performs, it appears that the most logical solution is that it is appointed by parliament. While that is usually the case, comparative law includes also several alternative models stipulating a broader or narrower participation of the executive in the procedure for appointment of the Ombudsman.<sup>18</sup> To ensure a higher degree of independence, it appears that a much better solution would be that the appointment is done by parliament, possibly without any participation of the executive, as the executive is most frequently the target of the Ombudsman’s actions.

Comparative law recognises two main methods of financing of the Ombudsman. One is through parliament, and the other one is through the government and its bodies. Considering that to ensure its independence it is important to avoid financing originating from a body that does not fall under its jurisdiction, the most frequent solution is that the institution’s budget is decided by parliament.<sup>19</sup>

Good guidelines on the issue of financing of the Ombudsman were provided also by the Venice Commission, which assumes that, in order to ensure a complete, independent and efficient performance of the Ombudsman’s duties, the law establishing the Ombudsman needs to prescribe that the institution itself should submit a proposal for its budget.<sup>20</sup>

Finally, with respect to incompatibility and neutrality, it is clear that the Ombudsman cannot be connected in any way to any interested party. The International Ombudsman Association in their Standards (Article 2.4) defines it very simply, “... The Ombudsman should have no personal interest or stake in, and incur no gain

<sup>17</sup> <http://www.Ombudsman.europa.eu/resources/statute.faces>, 11.2.2013.

<sup>18</sup> B. Milosavljević, *Ombudsman – zaštitnik prava građana*, Centar za antiratnu akciju, Beograd 2001, pp. 39-42.

<sup>19</sup> D. Radinović, *Ombudsman i izvršna vlast*, Službeni glasnik, Beograd 2001, p. 167.

<sup>20</sup> CDL-AD(2007)020 - Opinion on the possible reform of the Ombudsman Institution in Kazakhstan adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007) n. 30. [http://www.venice.coe.int/site/main/texts/CDL\\_2010\\_OMBUD\\_e.pdf](http://www.venice.coe.int/site/main/texts/CDL_2010_OMBUD_e.pdf), 11.2.2013

or loss from, the outcome of an issue.”<sup>21</sup> Furthermore, it should not interfere with the regular procedure of the state authority, as it presents a corrective that, as stated above, “supplements, but does not replace, any formal channels,” i.e. draws attention to irregularities and acts proactively to prevent their reoccurring.

#### 1.3.4. Transparency, reporting and confidentiality

As the Ombudsman is an institution that strengthens modern society and transparency of the public administration, the public plays an important role in its actions. Unbinding recommendations adopted by the Ombudsman often serve to mobilise the public, creating a public opinion that in turn leads to a commitment, i.e. standardisation of the recommendation contents. In addition to disclosing its findings and recommendations to the public, the Ombudsman is obligated to report over a specified period (usually annually) to its appointing authority (in most cases – parliament). In these reports, the Ombudsman indicates the details on the numbers of received complaints, conducted investigations, closed cases, etc. While the results of the Ombudsman’s actions are, as a rule, clear, there are certain specificities with respect to the Military Ombudsman (naturally, in countries which have such Ombudsman), due to the very nature of the defence and security sector, which allows transparency and civilian control only to a certain degree. The Ombudsman is obligated also to protect the confidentiality of information relating to complainants, etc.,<sup>22</sup> increasing the citizens’ confidence in this institution, and in turn its efficiency.

#### 1.3.5. Efficiency and competence

In addition to a good normative framework, the success of the Ombudsman depends to a large extent on the moral, professional, and other personal qualities of the individual performing that function. Therefore, of the utmost importance is for the right person to be appointed to this function, which is why this issue is given special attention in the national legislation.<sup>23</sup> The requirements prescribed for the candidatures for the Ombudsman office normally relate to individual’s moral qualities, academic legal background, and the required professional experience (years of service) in the

<sup>21</sup>[http://www.ombudsassociation.org/sites/default/files/IOA\\_Standards\\_of\\_Practice\\_Oct09.pdf](http://www.ombudsassociation.org/sites/default/files/IOA_Standards_of_Practice_Oct09.pdf) 11.2.2013.

<sup>22</sup> The comprehensive standards in this sphere are provided in the International Ombudsman Association Standards in Article 3. [http://www.ombudsassociation.org/sites/default/files/IOA\\_Standards\\_of\\_Practice\\_Oct09.pdf](http://www.ombudsassociation.org/sites/default/files/IOA_Standards_of_Practice_Oct09.pdf), 11.2.2013.

<sup>23</sup> B. Milosavljević, *op. cit.*, p. 36.



field of administration or law implementation. Another frequent requirement for candidatures for the Ombudsman office is the human rights protection experience.

Although it is quite desirable for the person in the Ombudsman office to have high moral and professional qualities, such requirements should not be too restrictive, as it can cause problems in the course of their implementation.<sup>24</sup> Therefore, the requirements concerning the candidatures for this office should be reasonable, but also high enough. Thus, for example, Article 6, Para. 2, of the European Ombudsman Statute specifies the following requirements:

“The Ombudsman shall be chosen from among persons who are Union citizens, have full civil and political rights, offer every guarantee of independence, and meet the conditions required for the exercise of the highest judicial office in their country or have the acknowledged competence and experience to undertake the duties of Ombudsman.”<sup>25</sup>

Such defined requirements are more than enough to ensure the gate that would prevent unqualified, incompetent persons from being appointed to the Ombudsman office. In the context of the Ombudsman’s efficiency, it can be added only that the European Ombudsman, which was appointed in accordance with such requirements, has one of the highest numbers of the accepted recommendations in the world (as high as 82% in 2011).<sup>26</sup>

## 2. COMPARATIVE LEGAL ANALYSIS

To ensure that the Ombudsman institution serves its purpose and achieves the results in practice, i.e. assist in ensuring human rights and protect citizens from maladministration, its work should be regulated and its independence should be guaranteed by a solid legal framework. In addition, adequate financing and the competence of the person performing this function in practice often makes a difference between an efficient and inefficient. This comparative law review of the Ombudsman institution in the countries of former Yugoslavia (with the exception of Slovenia) and Bulgaria will focus on several requirements that are *conditio sine qua non* for due operations of the Ombudsman institution, including: adequate legal framework (stipulated by constitution and by law), procedures for appointment and removal of the Ombudsman, its powers, financing, and reporting.

<sup>24</sup> CDL-AD(2004)041 Joint Opinion on the Draft Law on the Ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe. (Strasbourg, 6 December 2004) n. 13 [http://www.venice.coe.int/site/main/texts/CDL\\_2010\\_OMBUD\\_e.pdf](http://www.venice.coe.int/site/main/texts/CDL_2010_OMBUD_e.pdf).

<sup>25</sup> <http://www.Ombudsman.europa.eu/resources/statute.faces>, 11.2.2013.

<sup>26</sup> <http://www.euractiv.rs/eu-prioriteti/5081-u-eu-prihvajeno-82-preporuka-Ombudsmana> , 11.2.2013.

## 2.1. Institutional Framework

Institutional framework implies primarily that this institution is governed by constitution, law and secondary legislation. In accordance with the international standards, as discussed above, it is preferred that the Ombudsman institution is guaranteed by the ultimate legal act - the constitution, as the best way to protect its integrity. Also, it is good that the constitutional law protection is of considerable volume, but that is not too restrictive by nature, to leave the possibility for the establishment of various special, regional, and local ombudsmen. A sound constitutional and legal framework is by all means a precondition for the Ombudsman best practice, but, as it will be seen, it does not necessarily guarantee it. Inadequate financing, incompetent personnel, and weak state of law in practice result in weak performance of the Ombudsman institution, notwithstanding the solid legal framework.

### 2.1.1. Constitution

In all the countries included in this review, with the exception of Bosnia and Herzegovina, the Ombudsman institution is governed by the constitution and further set out by law.

The Croatian Constitution from 1990 (which was subsequently revised on several occasions, and most recently in 2010<sup>27</sup>), in Article 93, stipulates the Ombudsman institution (people's attorney or "pučki pravobranitelj" in Croatian) as a representative of the Croatian Parliament responsible for the promotion and protection of human rights and freedoms stipulated by the Constitution, laws, and international legal acts on human rights and freedoms adopted by the Republic of Croatia.<sup>28</sup> It is further stipulated that anyone who believes that his/her constitutional or statutory rights have been breached by an inadequate action of the public authorities or other authorities with public mandate may submit a complaint to the Ombudsman. The Constitution stipulates also the Ombudsman's term of office, independence and immunity, leaving other matters to be regulated by law.

The Republic of Serbia in its 2006 Constitution<sup>29</sup> stipulates this institution in Article 138. In accordance with this Constitution, the Ombudsman (protector of citizen or "zaštitnik građana") is "an independent state body who shall protect citizens' rights and monitor the work of public administration bodies, body in charge

<sup>27</sup> The most recent revision of the Croatian Constitution that related to the Ombudsman institution was adopted in 2001. <http://www.usud.hr/uploads/Redakcijski%20prociscen%20tekst%20Ustava%20Republike%20Hrvatske,%20Ustavni%20sud%20Republike%20Hrvatske,%2023.%20ozujka%202011.pdf>, 11.2.2013.

<sup>28</sup> Croatian Constitution (Ustav Republike Hrvatske), Article 93.

<sup>29</sup> [http://www.parlament.rs/upload/documents/Ustav\\_Srbije\\_pdf.pdf](http://www.parlament.rs/upload/documents/Ustav_Srbije_pdf.pdf), 11.2.2013.

of legal protection of proprietary rights and interests of the Republic of Serbia, as well as other bodies and organisations, companies and institutions to which public powers have been delegated.”<sup>30</sup> That is immediately followed by the provision that the Ombudsman’s powers do not extend to the President of the Republic, National Assembly, Government, Constitutional Court, courts of law, and the public prosecutor’s offices. It is stipulated that the ombudsman has immunity and that it is appointed by the National Assembly (and is accountable to the Assembly for his/her work), but the details relating to his/her appointment, and other matters are left to be regulated by law.

The Montenegrin Constitution from 2007<sup>31</sup> stipulates rather briefly in Article 81 that “[t]he protector of human rights and liberties of Montenegro shall be independent and autonomous authority that takes measures to protect human rights and liberties”.<sup>32</sup> The Constitution further stipulates that the Ombudsman is appointed for a period of six years, and all detailed regulation of the matter is left to be stipulated by law.

In Bosnia and Herzegovina (hereinafter: B&H), the Ombudsman institution (“Bosnia and Herzegovina Ombudsman for Human Rights”) is not stipulated in the Constitution<sup>33</sup>, and it is regulated in Annex VI of the Dayton Peace Agreement (“Human Rights Agreement”<sup>34</sup>). Articles 4, 5 and 6 regulate in considerable detail the Ombudsman’s term of office, appointment procedure, independence and powers, and all other matters are left to be regulated by law. While the lack of Ombudsman in the constitutional act at first glance diverges from the international standards, one has to take into account the historical circumstances of the constitution of B&H as an independent state in 1995, and the fact that Annex VI of the Dayton Peace Agreement has the same legal weight as the Constitution (which was also adopted as Annex IV of that same Peace Agreement). In addition, a specificity of the B&H system is the existence of a special - military ombudsman (parliamentary military commissioner - parlamentarni vojni poverenik), modelled after the German military ombudsman and governed by the 2009 Law on the Parliamentary Military Commissioner of the B&H. This special ombudsman is not mentioned in the Constitution and is only regulated by statute.

<sup>30</sup> Serbian Constitution (Ustav Republike Srbije), Article 138.

<sup>31</sup> [http://www.skupstina.me/cms/site\\_data/ustav/Ustav%20Crne%20Gore.pdf](http://www.skupstina.me/cms/site_data/ustav/Ustav%20Crne%20Gore.pdf), 11.2.2013.

<sup>32</sup> Montenegrin Constitution (Ustav Crne Gore), Article 81.

<sup>33</sup> Adopted in 1995 as Annex IV of the Dayton Peace Agreement.

<sup>34</sup> <http://www.ombudsmen.gov.ba/materijali/o%20nama/Annex%20VI%20-%20bosnian.pdf>, 11.2.2013.

Kosovo<sup>35</sup> in its 2008 Constitution,<sup>36</sup> in Articles 132 to 135, regulates in great detail the Ombudsman institution<sup>37</sup> (in Serbian version “Ombudsman”, and in Albanian version “Avokati i Popullit” or people’s lawyer and “Ombudsperson.”)<sup>38</sup> The Constitution stipulates that the Ombudsman oversees and protects individual rights and freedoms from illegal and irregular actions by the public authorities. It further stipulates that this institution is independent in the discharge of its duties, and that all other authorities and institutions in Kosovo that have legitimate powers are obligated to provide, at the request by the Ombudsman, all the requested documentation and information.<sup>39</sup> Article 133 specifies that the Ombudsman has its office and a separate budget, as well as the issue of its deputies, while Article 134 deals with the issues of the Ombudsman’s qualifications, appointment and removal from office.

In Macedonia, the Ombudsman (people’s attorney or “народен правобранител“ in Macedonian) was established and fairly generally regulated by the 1991 Constitution<sup>40</sup> (Article 77), while the subsequent amendments XI and XII defined in more depth its role and competencies. In accordance with the Constitution, the Ombudsman is responsible to protect the constitutional and statutory citizens’ rights if they are breached by the public administration authorities and other authorities and organisations with public mandate. The Constitution specifies the Ombudsman’s term of office, appointment procedures, as well as his/her special duty to take special care of the prevention of discrimination and equal representation of all communities in the public authorities and public life. Other matters are left to be regulated by law.

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<sup>35</sup> In accordance with the UN Resolution No. 1244.

<sup>36</sup> [http://www.kushtetutakosoves.info/repository/docs/Ustav.Republike.Kosovo.Srpski\\_cyr.pdf](http://www.kushtetutakosoves.info/repository/docs/Ustav.Republike.Kosovo.Srpski_cyr.pdf), 11.2.2013.

<sup>37</sup> In Kosovo the Ombudsman was established in 2000 by the UNMIK Regulation No. 2000/38, which gave the Ombudsman institution the mandate to examine complaints against the UNMIK and the local public administration. Subsequent Regulations from 2006 and 2007 included considerable changes, and all these Regulations were rendered ineffective after the adoption of the Law on Ombudsman in 2010.

<sup>38</sup> The term “*ombudsperson*” that is used also at the Kosovo Ombudsman web site [www.ombudspersonkosovo.org](http://www.ombudspersonkosovo.org) is not correct and is not used for official purposes by any other country in the world, except in Kosovo (even though in the UNMIK Regulation No. 2007/15 this term was replaced with the term “ombudsman”, it is still in use). It was formulated in an attempt of some authors to take into account gender equality, based on the erroneous assumption that the word *ombudsman* was compound word comprised of the words *ombuds* and *man*, which is, however, not true. This term does not derive from the English language, but from the Swedish language, and ombudsman is not a compound word, but a simple word denoting a commissioner, both male and female. For more details see: D.Milkov, “Zaštitnik građana Republike Srbije”, *Zbornik radova Pravnog fakulteta u Novom Sadu*, 1-2/2008, pp. 203 - 204.

<sup>39</sup> Kosovo Constitution, Article 132.

<sup>40</sup> [http://www.uni-graz.at/opv1www\\_ustav\\_makedonija\\_mak.pdf](http://www.uni-graz.at/opv1www_ustav_makedonija_mak.pdf), 11.2.2013.

The Bulgarian Constitution from 1991<sup>41</sup> is still in force, with several considerable revisions (from 2003, 2005, 2006 and 2007). The amendments to the Constitution from 2006 introduced, in Article 91a, the Ombudsman institution, leaving all the matters relating to this institute to be regulated by law. The Constitution stipulates only that the Ombudsman is appointed by the National Assembly and that his/her objective is to protect citizens' rights and freedoms. This is by all means the poorest constitutional law provision relating to the Ombudsman in all the countries analysed in this review. In the case of Bulgaria, it is interesting to note also that this country (and Serbia) adopted its Ombudsman Law before the constitutional regulations (the Law came into effect in January 2004 while the revision of the Constitution and the introduction of the Ombudsman in the Constitution took place, as stated above, more than two years later, in March 2006). The democratic changes and the 1991 Constitution initially left Bulgaria without the Ombudsman institution. Only in 1998, for the most part thanks to the Bulgarian non-governmental organisation "Centre for Democratic Studies," efforts were made to initiate drafting the Ombudsman Law in spite of the fact that at that time this institution did not have its constitutional frame.<sup>42</sup> The Ombudsman Law was adopted in 2003 (and came into effect on 1 January 2004), and in the following year, in 2005, the Rulebook on Ombudsman's Organisation and Competencies was adopted as well. That is how in Bulgaria the constitutional framework stipulated by the 2006 amendments was regulated under law and a bylaw, and that is maybe why the constitutional law regulations were left too general, without any detailed provisions (which is not, however the case in Serbia).

### 2.1.2. Laws

All the countries included in this review adopted their Law on Ombudsman, stipulating in more depth the issues relating to this institution. Despite the fact that various special ombudsmen are envisaged in certain countries, only B&H envisages special military ombudsman (parliamentary military commissioner).<sup>43</sup> Hence, all defence - related issues in all the analysed countries are in the competence of the general, national ombudsman, except in B&H, where this competence is vested both with the general ombudsman and the special ombudsman - the Military Commissioner (the B&H Law on the Human Rights Ombudsman expressly states in Article 3 that the ombudsman is competent with regards to "any and all appeals concerning violations of human rights and freedoms allegedly committed by the military power).<sup>44</sup>

<sup>41</sup> <http://www.parliament.bg/en/const>, 11.2.2013.

<sup>42</sup> For more details see: "The Ombudsman institution in South-eastern Europe", p. 50. <http://unpan1.un.org/intradoc/groups/public/documents/untc/unpan014896.pdf>, 11.2.2013.

<sup>43</sup> Hereinafter: B&H Military Commissioner.

The current laws which govern Ombudsman institution in the countries in the region are presented in the table below:

Croatia	Law on People's Attorney ( <i>Zakon o pučkom pravobranitelju</i> ) <sup>45</sup>	from 2012
Serbia	Law on Protector of Citizens ( <i>Zakon o zaštitniku građana</i> ) <sup>46</sup>	from 2005
Montenegro	Law on Montenegrin Protector/ Protectress of Human Rights and Freedoms ( <i>Zakon o zaštitniku ljudskih prava i sloboda CG</i> ) <sup>47</sup>	from 2011
Bosnia and Herzegovina	Law on Bosnia and Herzegovina Ombudsman for Human Rights ( <i>Zakon o ombudsmenu za ljudska prava Bosne i Hercegovine</i> ) <sup>48</sup>	from 2004
	Law on Parliamentary Military Commissioner of Bosnia and Herzegovina ( <i>Zakon o parlamentarnom vojnom povereniku BiH</i> ) <sup>49</sup>	from 2009
Kosovo	Law on People's Lawyer ( <i>Zakon o narodnom advokatu</i> ) <sup>50</sup>	from 2010
Macedonia	Law on People's Attorney ( <i>Закон за народниот правобранител</i> ) <sup>51</sup>	from 2003
Bulgaria	Law on Ombudsman ( <i>Закон за омбудсмана</i> ) <sup>52</sup>	from 2004

In addition to the above laws, all the above countries adopted also the supporting bylaws that for the most part regulate technical issues and implementation mechanisms. Thus, Croatia adopted the Rulebook on People's Attorney's Activities (*Poslovnik o radu pučkog pravobranitelja*), Macedonia adopted the Rulebook on Ombudsman Procedures (*Pravilnik o procedurama ombudsmana*), B&H adopted the

<sup>44</sup> The mutual relation between these two institutions is regulated by a secondary act - Guidelines on the Basis of Cooperation of the B&H Parliamentary Military Commissioner with the B&H Human Rights Ombudsman [https://www.parlament.ba/sadrzaj/komisije/ostalo/vojni\\_povjerenik/ostale\\_aktivnosti/default.aspx?id=22158&langTag=bs-BA&pril=b](https://www.parlament.ba/sadrzaj/komisije/ostalo/vojni_povjerenik/ostale_aktivnosti/default.aspx?id=22158&langTag=bs-BA&pril=b), 10.5.2013.

<sup>45</sup> <http://www.zakon.hr/z/128/Zakon-o-pu%C4%8Dkom-pravobranitelju>, 11.2.2013.

<sup>46</sup> [http://www.paragraf.rs/propisi/zakon\\_o\\_zastitniku\\_gradjana.html](http://www.paragraf.rs/propisi/zakon_o_zastitniku_gradjana.html), 11.2.2013.

<sup>47</sup> [http://www.ombudsman.co.me/docs/izvjestaji/Zakon\\_o\\_zastitniku\\_ci\\_ljudskih\\_prava\\_i\\_sloboda\\_Crne\\_Gore.pdf](http://www.ombudsman.co.me/docs/izvjestaji/Zakon_o_zastitniku_ci_ljudskih_prava_i_sloboda_Crne_Gore.pdf), 11.2.2013.

<sup>48</sup> <http://www.ombudsmen.gov.ba/materijali/o%20nama/zakon%20o%20ombudsmenu%20BiH.pdf>, 11.2.2013.

<sup>49</sup> [https://www.parlament.ba/2006\\_2010/komisije/ostalo/vojni\\_povjerenik/default.aspx?id=31259&langTag=en-US&pril=b](https://www.parlament.ba/2006_2010/komisije/ostalo/vojni_povjerenik/default.aspx?id=31259&langTag=en-US&pril=b), 10.5.2013.

<sup>50</sup> [http://www.ombudspersonkosovo.org/img/images/content/other/706296\\_Zakon%20o%20Ombudsmanu%202010-195-ser.pdf](http://www.ombudspersonkosovo.org/img/images/content/other/706296_Zakon%20o%20Ombudsmanu%202010-195-ser.pdf), 11.2.2013.

<sup>51</sup> <http://www.ombudsman.mk/ombudsman/upload/NPM-dokumenti/Pravna%20ramka%20NPM/Zakon%20za%20Naroden%20Pravobranitel%20mkd.PDF>, 11.2.2013.

<sup>52</sup> <http://www.ombudsman.bg/regulations/ombudsman-law>, 11.2.2013.

Rules of Procedure for B&H Institution of Ombudsman for Human Rights (*Pravila postupka institucije ombudsmana za ljudska prava u BiH*) along with a couple of bylaws concerning Parliamentary Military Commissioner, while Bulgaria adopted the Rulebook on Ombudsman's Organisation and Activities, etc.

### 2.1.3. Institutional Framework Analysis

While the comparison of the ombudsman institution in these countries shows many similarities, as all these countries have adopted the same model, on the other hand, there is also a large number of differences in terms of both the legal framework and practice.

In terms of the tradition of the Ombudsman institution, out of the countries listed above, Croatia and Macedonia have the longest tradition and almost a continuity of this institution dating back to the former Yugoslavia's quasi-ombudsman institution of the social protector of self-management. Following the line of sovereignty, Serbia, with Montenegro and Kosovo, was left without the ombudsman institution for more than ten years after the fall of the communist regime (which, ironically, had the above quasi-ombudsman institution, the social protector of self-management).

The analysis of the constitutional law frameworks and their contents shows similarities between all the countries, with the exception of B&H and Bulgaria. Thus, Bulgaria is the example of the worst solution according to which the Constitution guarantees only the most essential element – the existence of the institution. Everything else was left to be regulated by law. This is in contradiction to the international standards in this area, according to which constitution type regulations should determine the essential characteristics and competencies of the Ombudsman's office and the terms for appointment, in order to protect better the integrity of this institution. However, the situation in B&H is completely different. Annex VI of the Dayton Peace Agreement – “Human Rights Agreement” (an act of the constitutional weight and character), regulating the Ombudsman matter is much more comprehensive in volume than that in the other countries included in this review. At first glance, it could be concluded based on the international standards, that such a solution is not adequate, as too comprehensive regulation may on the other hand hinder the development of the Ombudsman institution and its adjustment to new demands. Here, however, that is not the case, considering that the provisions are quite flexible and that they are not restrictive. Similar, comprehensive regulations exist also in Kosovo, whose Constitution in three Acts stipulates in detail the Ombudsman's activities. As in the case of B&H, this is not a case of violation of the international standards by stipulating too comprehensive and restrictive regulations.

With respect to Serbia, Montenegro, Macedonia, and Croatia, the constitutional law framework is set up in a similar way. In the case of Serbia, Croatia, and Macedonia, it is somewhat more comprehensive, while the Montenegrin Constitution regulates this matter rather briefly, which is not exactly in accordance with the international recommendations. In addition, in specifying the Ombudsman's powers, some countries focus more on the human rights protection (Croatia, Montenegro), while others focus on the action against maladministration (Serbia, Macedonia). All the analysed countries, with the exception of Serbia and Bulgaria, specify in their constitutions the Ombudsman's term of office.

The only constitution of the above constitutions that explicitly stipulates that the Ombudsman has its office and a separate budget, which he/she proposes and manages independently, is the Constitution of Kosovo.<sup>53</sup> Ironically, the reasons for the inefficiencies of the Kosovo Ombudsman in practice include *inter alia*, as will be later seen, the problems relating to inadequate financing and space. This is one example that illustrates how a sound legal (constitutional) solution can stay a dead letter on a paper if the rule of law is not observed.

It can be concluded that in all the countries included in this review, with the exception of Bulgaria, and maybe Montenegro, the constitutional law framework for the Ombudsman institution is in accordance with the international standards. It is by all means preferable to have the Ombudsman, as well as his/her duties, appointment and powers stipulated by constitution. The detailed regulation of the operating procedures of this institution in the countries included in this review is left to be regulated by laws, and our further discussion will focus on the specific aspects of the Ombudsman's activities as stipulated in the above countries' law.

## 2.2. Procedures for Appointment and Removal of Ombudsman

### 2.2.1. Appointment

All the countries included in this review stipulate that the Ombudsman is appointed by the National Assembly.

Thus, the Croatian Ombudsman (people's attorney or "pučki pravobranitelj") is appointed by the Croatian Parliament ("Sabor") by a simple majority, for a period of eight years.<sup>54</sup> The Law on People's Attorney additionally stipulates the possibility for his/her reappointment.<sup>55</sup> A motion for appointment of at least two candidates is prepared by the Parliamentary Constitutional Committee,<sup>56</sup> subject to prior opinion of the Committee for Human Rights and Minorities. The Croatian Ombudsman has

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<sup>53</sup> Kosovo Constitution, Article 133.

<sup>54</sup> Croatian Constitution (Ustav Republike Hrvatske), Article 93.



three Deputies. Appointing the Ombudsman by a simple majority vote is not the best solution from the aspect of the international standards, but on the other hand it makes is easier to appoint him/her. Notwithstanding such regulations, the appointment of the Ombudsman in Croatia was deferred on several occasions (for both political and practical reasons), and consequently the EC recommendation was to strengthen this institution.

In Serbia, the Protector of Citizens is appointed by a majority vote of all members of parliament, also at the motion of the Committee for Constitutional Issues.<sup>57</sup> The Serbian Ombudsman is appointed for a period of five years, and one person may be reappointed to this office for maximum two consecutive times.<sup>58</sup> The Ombudsman has four Deputies.

The Montenegrin Constitution, in the part pertaining to the competencies of the National Assembly,<sup>59</sup> stipulates that this body appoints “the Protector of Rights and Freedoms” (with simple majority). Article 81 of the Constitution stipulates that the Ombudsman’s terms of office is six years, and the Law on Montenegrin Protector of Human Rights and Freedoms (Zakon o zaštitniku ljudskih prava i sloboda Crne Gore) further specifies that the Assembly decides on the number of his/her Deputies (at least one), and that one of the Deputies must be responsible for the protection against discrimination. The Deputies are appointed at the motion by the Ombudsman.

The B&H Law on Ombudsman for Human Rights stipulates that this institution comprises three persons, including a Chairman who is responsible for the coordination of the activities of the institution (the Ombudsman’s term of office is six years, and the Chairman is rotated every two years, ensuring that by the end of their term all three persons have presided the institution once). The Ombudsmen are appointed by the House of Representatives and the House of Peoples of the B&H Parliamentary Assembly from the list of candidates for appointment as Ombudsman, which is submitted by an *ad hoc* commission established especially for that purpose.<sup>60</sup> The Ombudsmen’s term of office is six years, with a possibility of reappointment. The solution of the three-person Ombudsman institution results from the fact that human rights violations for ethnic and religious reasons are still frequent. That is why the Law, in Article 8, stipulates that the Ombudsmen cooperate in the discharge of their duties, adding that “...the allocation of duties between them will not depend

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<sup>55</sup> The Law on People’s Attorney of the Republic of Croatia (Zakon o pučkom pravobranitelju Republike Hrvatske), Article 10.

<sup>56</sup> The full title is the Committee for Constitution, Rules of Procedure and Political Composition of the Croatian Parliament (Odbor za Ustav, poslovnik i politički sustav Hrvatskoga sabora).

<sup>57</sup> The Law on Protector of Citizens of the Republic of Serbia (Zakon o zaštitniku građana Republike Srbije), Article 4.

<sup>58</sup> *Ibid.*

<sup>59</sup> Montenegrin Constitution, Article 82, para. 12.

<sup>60</sup> The Law on Amendments to the Law on B&H Ombudsman for Human Rights (Zakon o izmenama i dopunama zakona o ombudsmenu za ljudska prava BiH), Article 3. Available at: <http://www.ombudsmen.gov.ba/materijali/o%20nama/zakon%20o%20izmjenama%20i%20dopunama%20zakona.pdf>, 11.2.2013.

on the complainant's ethnic background."<sup>61</sup> Thus, from 2006 and the adoption of the Law on Amendments to the Law on B&H Ombudsman for Human Rights, the Ombudsmen are appointed from the three constitutive peoples (Bosnians, Croats, and Serbs), which does not preclude the appointment of other ethnic communities.<sup>62</sup> As far as B&H Military Commissioner is concerned, he/she is also appointed by the Parliament for a five-year term (which is one year shorter than the term of office of the general ombudsman), with the possibility of only one re-appointment.<sup>63</sup>

The Kosovo<sup>64</sup> Ombudsman (People's Lawyer) is appointed by the Kosovo Parliament by a majority vote of all members of parliament, for a term of five years.<sup>65</sup> The Law on People's Lawyer stipulates that the Ombudsman has five Deputies (which are also appointed by the Parliament, but by a simple majority), and excludes the possibility of reappointment to this function. The above Law underlines that at least one of the Ombudsman Deputies should be from the Serb community in Kosovo, and at least one from the other minority communities represented in the Kosovo Parliament.<sup>66</sup>

In accordance with the Macedonian Constitution and the Law on People's Attorney, the Ombudsman is appointed at the motion by the Parliamentary Committee by a majority vote of all members of parliament, providing that such majority is secured also among the members of parliaments from the minority communities in Macedonia.<sup>67</sup> The Ombudsman's term of office is eight years, and the number of his/her Deputies is decided by the Assembly, on his/her motion. The terms and procedures for their appointment are identical as those for the Ombudsman. They are allowed one reappointment.

In comparison to all of the other aforementioned countries, Bulgaria has one specific feature relating to the Ombudsman's appointment. More superficially, in Bulgaria, the ombudsman is appointed by the Parliament, but by a secret ballot.<sup>68</sup> The appointment requirement is a simple majority of those present and voting. The term of office is five years, and there is a possibility of one reappointment. The Bulgarian Ombudsman has one Deputy who is appointed in the same procedure. From the aspect of the Ombudsman's future integrity and independence, the solution that he/she is

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<sup>61</sup> The Law on B&H Ombudsman for Human Rights (Zakon o ombudsmenu za ljudska prava Bosne i Hercegovine), Article 8.

<sup>62</sup> The Law on Amendments to the Law on B&H Ombudsman for Human Rights, Article 3.

<sup>63</sup> Interestingly enough, the transitional and final provisions of the Law on Parliamentary Military Commissioner limit the duration of the term of office of the first Military Commissioner to June 30, 2012 (therefore, to three years), with the aim of making this a trial period for the institution before first full-term appointment.

<sup>64</sup> According to the UN Resolution 1244

<sup>65</sup> The Law on Kosovo People's Lawyer, Article 9.

<sup>66</sup> *Ibid.* Article 8, Para. 13.

<sup>67</sup> The Law on Macedonian People's Attorney, Article 5.

<sup>68</sup> The Bulgarian Law on Ombudsman, Article 10.

appointed by a secret ballot appears to be effective. On the other side, appointment by a simple majority is not the ideal solution that can be seen in the international standards, even if it makes the appointment considerably easier, considering, as stated above, the political and practical problems that may occur if the appointment terms and procedures are too rigid. As in Croatia, even such “easy” appointment procedure specified by the legal framework is not always a guarantee that that will be so in practice, and thus, ironically, after the Law on Ombudsman came into effect on 1 January 2004, Bulgaria had to wait for a year and a half for the first Ombudsman to be appointed.

### 2.2.2. Qualification/Competence Requirements

The laws specify also the terms and personal qualities required for a person to be appointed Ombudsman.<sup>69</sup> All the countries included in this review require the candidates to have the citizenship of the country in which they wish to become Ombudsman, as well as high moral and professional qualities. This rather vague standard is further elaborated in some of the countries, while in others it is left generally defined, without specifying explicitly the requirements in terms of qualifications, work experience, etc. With that respect, the most concise regulation is that of B&H, stipulating that any citizen of B&H of legal age, who is fully eligible to enjoy civil and political rights, and who has a proven experience in the human right protection and a recognized high moral status, may be appointed Ombudsman. Bulgaria goes only one step further and, in addition to these very generally specified requirements, it requires also a university degree,<sup>70</sup> while Kosovo, in addition to all the above, requires also a clean criminal record.<sup>71</sup> In addition to all the above, Montenegro requires also fifteen years of work experience (for the Ombudsman), i.e. ten years of work experience (for the Deputy).<sup>72</sup>

Serbia, Croatia, and Macedonia have the most detailed regulation of these issues, and therefore have a much more precise and narrowly specified framework for appointment to the Ombudsman position. In all three countries, the requirement for the Ombudsman is a law degree (which is not required for Deputies, except in Macedonia), and varied minimum work experience, as in Montenegro, for the candidates for Ombudsman and Ombudsman Deputies. In Serbia, the requirement for candidates to be appointed Ombudsman is minimum ten years of work experience in

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<sup>69</sup> Law on B&H Human Rights Ombudsman, Article 11 ; the requirements for the appointment of the B&H Military Commissioner are stricter - prohibition of membership in political parties, prohibition to engage in other paid activity and no previous criminal conviction.

<sup>70</sup> The Bulgarian Law on Ombudsman, Article 9.

<sup>71</sup> The Law on Kosovo People's Lawyer, Article 6.

<sup>72</sup> The Law on Montenegrin Protector of Human Rights and Freedoms, Article 8.

the positions that are relevant for discharging the duties of the Protector of Citizens (five years for the Deputy)<sup>73</sup>; in Croatia, as in Montenegro, candidates to be appointed Ombudsman are required to have as much as fifteen years of work experience,<sup>74</sup> while in Macedonia they are required to have nine years of work experience (seven years for the Deputy position).<sup>75</sup>

Leaving the legal framework too broadly defined, including only the standards that can be interpreted in different ways (“a man of high moral qualities”, etc.) cannot be a good solution, as it allows an incompetent person to be appointed Ombudsman in certain circumstances, based on political will.<sup>76</sup> As his/her duties for the most part pertain to law, it is preferred that the Ombudsman is a certified lawyer by profession, and that he/she has experience in similar duties. However, setting the required years of experience too high can be a double-edged sword, as it can make difficult finding the right candidate willing to assume the Ombudsman’s responsibilities (thus, the word in Croatia was that among the few people who satisfied all the demanding requirements, no one was willing to take up the Ombudsman position considering a rather unattractive pay). Only based on the analysis of the legal provisions in the considered countries, it can be argued that the best legal provisions are those in Serbia and Macedonia, which have found a reasonable balance between the strictness of the requirements for appointment as Ombudsman (and in turn the quality of applicants) and the implementation of these provisions in practice.

### 2.2.3. Early Termination of Powers

The grounds for early termination of Ombudsman’s powers are specified clearly in the relevant laws. If there are too many of these grounds specified and particularly if they are directly or indirectly linked to the will of the executive, that can present a serious problem undermining the Ombudsman’s independence. With respect to the countries included in this review, it can be noted that these terms are set out almost identically. The differences pertain mostly to the legislative technique, with some countries specifying also some natural and logical reasons for the termination of powers (e.g. death, resignation, etc.) and those stipulated by other laws (e.g. eligibility for retirement under the labour regulations), while others fail to specify them explicitly, which naturally does not mean that they are not valid. On the other side, it is always underlined that the Ombudsman’s powers will be terminated if he/

<sup>73</sup> The Law on Protector of Citizens of the Republic of Serbia, Articles 5 and 6.

<sup>74</sup> The Law on People’s Attorney of the Republic of Croatia, Articles 11 and 12.

<sup>75</sup> The Law on Macedonian People’s Attorney, Article 6.

<sup>76</sup> As mentioned earlier, the SFRY had “the social protector of self-management”, a quasi-ombudsman institution, the requirements for appointment to that institution were set too generally on purpose to ensure that any party official could “sneak through” the legal requirements and be appointed.

she is found guilty for a criminal offence, if he/she engages in conflict of interest (e.g. joins a political party or performs another professional activity, which is prohibited by all the laws considered in this review), if he/she is unable to perform his/her duties for a certain period of time (in Croatia and Bulgaria), in the event of permanent physical or mental inability to perform his/her duty, etc. The procedure for removal of Ombudsman on any of the above grounds, as well as on grounds of unprofessional and unconscientious discharge of duty in Serbia is decided by the National Assembly by a majority vote of the total number of members of parliament (i.e. the same majority required for his/her appointment). This is a good mechanism ensuring a higher level of integrity of the Ombudsman and therefore strengthening his/her independence.

### 2.3. Financing

The issue of financing of the Ombudsman's office is of crucial importance, as the practice has shown that often, notwithstanding a sound legal framework, the Ombudsman does not achieve satisfactory results due to lack of funding. That is why it is crucial that the legal text, and if possible also the constitutional text, specifies this matter explicitly, giving the highest possible level of integrity to the Ombudsman's office.

Of all the countries included in this review only Kosovo specifies explicitly in its Constitution that Ombudsman has a separate budget and that he/she proposes and manages the budget independently.<sup>77</sup> This solution is in line with the international standards according to which it is preferred that the Ombudsman institution is financed by parliament rather than by the executive, through a separate budget, that is proposed by the Ombudsman. If that is supported by the constitutional guarantees – even better. However, this is unfortunately yet another example of reality conflicting with the normative solution. The funds allocated to the Kosovo Ombudsman are low and cannot ensure its adequate and undisturbed operations.<sup>78</sup> The report for 2011 indicates that by direct interfering and undermining the Ombudsman's financial independence, the Kosovo government, or more specifically the Ministry of Finance, has withdrawn considerable funds initially allocated to the Ombudsman.<sup>79</sup> Such serious breaches of the Ombudsman's financial integrity directly cause his/her inefficiency.

The Law on Protector of Citizen of the Republic of Serbia governs the issue of the Ombudsman financing and stipulates that its operations are funded from the Serbian state budget.<sup>80</sup> The Ombudsman proposes his/her budget independently (in

<sup>77</sup> The Kosovo Constitution, Article 134.

<sup>78</sup> Kosovo Ombudsman Report for 2011, pp. 111 – 116, [http://www.ombudspersonkosovo.org/repository/docs/4263\\_RAPORTI%202011%20serbisht.pdf](http://www.ombudspersonkosovo.org/repository/docs/4263_RAPORTI%202011%20serbisht.pdf), 2.3.2013.

<sup>79</sup> *Ibid.*

line with the methodology and criteria applicable to all budget spending units) and submits it to the Government to be incorporated into the budget proposal.

In Montenegro, a request for budget funding (which is provided as a separate line in the Montenegrin budget) is submitted by the Assembly's working body responsible for the human rights sector, at the proposal of the Ombudsman.<sup>81</sup> The Ombudsman has the right to participate in the session in which his/her budget is considered.

Macedonia has a somewhat different solution according to which the funds for financing of the Ombudsman's office are provided as a separate line in the budget, but the budget proposal is prepared in coordination between the Ombudsman's office and the Government, through the Ministry of Finance.<sup>82</sup> Although the Macedonian budget has a separate line for the Ombudsman's budget and although the Law<sup>83</sup> further stipulates that the Ombudsman has full autonomy in using his/her budget, the reason for concern is that the volume of funding is determined in the mandatory agreement with the executive, which is normally the target of criticism in the Ombudsman's recommendations. Such solution does not support the independence of this institution, and is in contradiction with the international standards.

The Law on Amendments to the Law on B&H Ombudsman for Human Rights states that "the funding required for the operations of the Ombudsman institution shall be provided in budget of the B&H government institutions."<sup>84</sup> It is further specified that each year the Ombudsman institution is obligated to submit its budget proposal to the competent ministry of finance and the treasury, based on which the funds will be allocated from the budget of the B&H government institutions.<sup>85</sup> The funds for the operation of the B&H Military Commissioner are provided from a separate budget lines.<sup>86</sup>

Bulgaria and Croatia stipulate in their laws that the Ombudsman institutions is funded from the state budget.<sup>87</sup> The Bulgarian law stipulates further that the Ombudsman may be financed also from other public sources, and that it must be treated as the first line budget allocation priority.

In addition to the provisions relating to financing of the Ombudsman's office, the laws of the above countries contain also the provisions specifying the level of pay of the Ombudsman's and his/her Deputies. Such legal guarantee (naturally, if

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<sup>80</sup> The Law on Protector of Citizens of the Republic of Serbia, Article 37.

<sup>81</sup> The Law on Montenegrin Protector of Human Rights and Freedoms, Article 53.

<sup>82</sup> The Law on Amendments to the Law on Ombudsman (2009), Article 6.

<sup>83</sup> *Ibid.*

<sup>84</sup> The Law on Amendments to the Law on B&H Ombudsman for Human Rights, Article 15.

<sup>85</sup> *Ibid.*

<sup>86</sup> Law on Parliamentary Military Commissioner, Article 12.

<sup>87</sup> The Law on People's Attorney of the Republic of Croatia, Article 33, and the Bulgarian Law on Ombudsman, Article 7.

it implies also a high level of pay in practice) is very important as it contributes to attracting higher-quality staff. It has to be taken into account that, particularly if the requirements for appointment to Ombudsman function are set too high, this function is incompatible with any other business or entrepreneurial activity, and that an attractive pay package is in fact an important motivation to accept this function. Thus, for example, the Serbian Law on Protector of Citizens stipulates that the Protector of Citizens has the right to receive pay equivalent to that of the President of the Constitutional Court, and his/her Deputies' pay is equivalent to that of the Constitutional Court judge.<sup>88</sup>

The Ombudsman financing methods in the countries included in this review include some important differences. If these legal solutions are viewed through the prism of the international standards, it can be argued that the best legal frameworks are those of Serbia and Kosovo, followed by Montenegro. Naturally, as it has already been stated, the lack of efficient state of law in practice can render ineffective even the best legal framework.

#### 2.4. Powers

In all of the countries included in this review, the Ombudsman's powers are stipulated in a similar manner, but there is a number of differences. One of the most important issues is whether the Ombudsman has the right to control also the work of courts, in addition to the administration authorities. Also, a difference can be noted between the laws that focus primarily on the protection of citizens from maladministration, and those that put in the central place the protection of human rights and freedoms. A common feature of all these Ombudsmen is that they cannot amend, abolish or cancel acts adopted by the authorities, and that they can only draw attention to any breach of rights, and criticise the existing and propose new solutions. Another common feature in all the considered countries is that the Ombudsman initiates the procedure for investigation of a potential breach of rights upon a complaint or at his/her own initiative, i.e. *ex officio*.

In Serbia, the Ombudsman's powers are limited to breaches of citizens' rights by the administration authorities. The Constitution and the Law clearly exclude the possibility that the Ombudsman could control the work of courts, public prosecutor's offices, the National Assembly, the President of the Republic, the Government or the Constitutional Court.<sup>89</sup> Apart from the Serbian Ombudsman, such a restrictive provision is not found in the laws of the other countries considered in this review.<sup>90</sup>

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<sup>88</sup> The Law on Protector of Citizens of the Republic of Serbia, Article 36.

<sup>89</sup> The Law on Protector of Citizens of the Republic of Serbia, Article 17, para. 3.

The central duty of the Serbian Protector of Citizens is to control the legality and regularity of the administration authorities' actions. He/she also has the right to propose laws under the scope of his/her competence, launch initiatives for legal changes (if he/she deems that violations of citizens' rights are a result of deficiencies of such regulations), give opinions in the process of drafting regulation, as well as the right to initiate a procedure before the Constitutional Court for the assessment of legality and constitutionality.<sup>91</sup> To ensure that he/she is able to perform his/her functions, the administration authorities are obligated to cooperate with the Ombudsman and to ensure him/her access to their premises and provide him/her all the requested information.<sup>92</sup>

In accordance with the Croatian, Montenegrin, Kosovo, Bulgarian, Macedonian, and B&H laws, the Ombudsman is authorised to interfere in the cases led before courts in the event of unduly delayed procedure or abuse of power. Such solution is potentially dangerous in the countries where the Ombudsman's funding is linked to the executive, as that could result in the executive interfering with the work of the courts, impairing the principle of the division of powers.

The laws in all these countries regulate almost identically the Ombudsman's powers to implement the procedure upon a citizen's complaint or *ex officio*, to have access to the documentation and cooperation between public authorities, etc.

The Law on B&H Ombudsman for Human Rights is the only law that explicitly mentions the Ombudsman's power to examine all complaints for alleged breaches of human rights and freedoms committed by the military authorities.<sup>93</sup> In addition, the central task of the Military Commissioner in B&H is to strengthen the rule of law, i.e. the protection of human rights and freedoms of military personnel and cadets. Each member of the B&H armed forces has the right to directly address the Military Commissioner if he/she finds that his/her fundamental rights have been violated. The Military Commissioner has the right to visit the B&H military force units and commands and the Ministry of Defence organisational units at any time, without prior notice, to demand reports from the Ministry of Defence, to attend the sessions of the Parliament and of the Joint Defence and Security Commission and in case disciplinary proceedings are underway, to have access to documents and evidence etc.<sup>94</sup>

In all the countries included in this review, the law stipulates that the Ombudsman enjoys immunity in his/her work.

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<sup>90</sup> On one hand, it is desirable, as it ensures that the integrity and independence of the judiciary is untouched, but on the other hand, excluding the work of Government from the Ombudsman's scrutiny considerably limits his/her powers.

<sup>91</sup> *Ibid*, Articles 17-19.

<sup>92</sup> *Ibid*, Article 21.

<sup>93</sup> The Law on B&H Ombudsman for Human Rights, Article 3.

<sup>94</sup> Law on Parliamentary Military Commissioner, Article 4.



## 2.5. Reporting

Annual reporting is also a common feature of the Ombudsmen in the countries included in this review. In all of the countries, except in B&H, this obligation is reflected in the submission of annual reports to the National Assembly, while in B&H, in addition to the House of Representatives and the House of People's of the B&H Parliamentary Assembly, this report is submitted also to the B&H Presidency (the report of the Military Commissioner is submitted only to the Parliament, once a year). The reports must be made available to the public (the Croatian Law on People's Attorney specifies that the report must be published on the Ombudsman's web site, while other laws stipulate only that it is "published in the mass media" or use the phrase "must be made public").

The contents of such reports include, as a rule, the statistics on the number of received and handled complaints, the opinion on the general status of human rights and respect of law in the country, recommendations and other measures proposed by the Ombudsman for the elimination of the weaknesses relating to the implementation of rights, etc.

The Ombudsmen also have the right to adopt special reports if needed, i.e. if so required by the matter of public importance and urgency.

## 2.6. An Outlook on Implementation

The institutional frameworks concerning the ombudsman in all the analysed countries, as will be elaborated in more detail further in text, are of good quality and largely in line with international standards and recommendations. However, when it comes to their implementation, the situation is quite different. Derogations from the statutory framework that take place in practice are sometimes worrying, and the common feature in all the countries is the need to strengthen the rule of law. Practical problems are both a consequence of the lack of authority on the part of the institution of ombudsman i.e. failure to have its recommendations acted on and the shortcomings in the functioning of the ombudsman due to insufficient funds at its disposal, and lack of sufficient number of qualified staff, which is a prerequisite for independence and efficiency.

The situations differ considerably from one country to another, but the discrepancy between the institutional framework and its implementation is perhaps most notable in Kosovo, where, despite quality normative solutions, practical results remain barely visible. Despite his efforts, Kosovo Ombudsman often remains powerless, since, as stated in his 2010 report - the concept of the *rechtstaat* in Kosovo

is so alienated that it had become an ironic expression.”<sup>95</sup> The 2011 report further explains that the “institution of ombudsman had constantly drawn attention to the condition of human rights and freedoms in Kosovo, or rather, to the extent of violations of human rights and freedoms by Kosovo institutions, a part of which engages in no effort to improve such a condition. The lack of influence of the Ombudsman’s recommendations addressed at state authorities that are charged with implementing laws and solving citizens’ problems remains evident.”<sup>96</sup>

When it comes to violations of human rights and freedoms on the grounds of nationality or religion, the situation is also complicated in Bosnia and Herzegovina. This country’s ombudsman observes objectively in his 2012 report that, despite the fact that the Division (of the institution of Ombudsman) for following national, religious and other minorities had received the smallest number of complaints in the course of the last year, this “cannot be an objective indicator of the condition of human rights pertaining to national, religious and other minorities, since it is often the case that complaints filed by members of a minority are registered by other divisions.”<sup>97</sup> This also shows that a more comprehensive assessment of the implementation of the regulatory framework requires an extensive study, covering a multitude of social and historical factors alongside official statistics and analysis.

The strengthening of the rule of law must be an imperative for all countries in the region, which need to invest their efforts in strengthening the rule of law and institutional integrity. In his 2012 report, the Serbian Ombudsman states that “weak institutions, the domination of political will and populism over the rule of law, media wars, bureaucracy and formalism are the most serious impediments to more full realisation of human rights and the rule of law in Serbia.”

In addition to this central problem and main obstacle for ombudsmans’ efficiency, a frequent impediment is the lack of satisfactory funds for financing the work of this institution, coupled with too few competent employees. The differences between the countries in this respect are considerable. Thus, in the B&H, over the last three years the ombudsman’s budget was gradually reduced (in 2012 there was a 10% decrease compared to 2010), whilst in Croatia the case is quite different - compared to 2011, in 2012 the ombudsman’s budget was increased by 12%, with seven additional employees (the Human Rights Centre was merged with the institution of the Peoples’ Defender, which resulted in a proportional increase of the ombudsman’s budget in order to satisfy the increased needs). In Kosovo, on the other hand, the number of complaints filed to the ombudsman had considerably increased in 2011, whilst the available funds had remained at the 2010 level (which was also unsatisfactory at that time).

<sup>95</sup>[http://www.ombudspersonkosovo.org/repository/docs/29119\\_Raporti%202010%20-%20serbisht.PDF](http://www.ombudspersonkosovo.org/repository/docs/29119_Raporti%202010%20-%20serbisht.PDF), 11.2.2013.

<sup>96</sup> Kosovo’s Ombudsman Report for 2011, p. 7. [http://www.ombudspersonkosovo.org/repository/docs/4263\\_RAPORTI%202011%20serbisht.pdf](http://www.ombudspersonkosovo.org/repository/docs/4263_RAPORTI%202011%20serbisht.pdf), 10.5.2013.

<sup>97</sup> BiH Ombudsman Report for 2012., p. 5.

[http://www.ombudsmen.gov.ba/materijali/publikacije/GI2012/GI\\_OmbBiH\\_2012\\_srp.pdf](http://www.ombudsmen.gov.ba/materijali/publikacije/GI2012/GI_OmbBiH_2012_srp.pdf), 10.5.2013.

As mentioned before, uncompetitive earnings coupled with strict criteria for being appointed at the position of ombudsman or ombudsman's deputy may result in candidates not being interested to apply for these positions. This had caused delays with regards to the appointment of the ombudsman in Croatia. When it comes to human resources, the case of Montenegro is interesting - after two public announcements for a position within the ombudsman's staff, no candidates have applied, and the position remains vacant.<sup>98</sup>

A deeper analysis of the discrepancies (which vary from country to country) between the quality of the institutional framework and its implementation opens many questions - both theoretical and practical ones. Is it perhaps unrealistic for a highly sophisticated institute, such as the ombudsman, originating from and functioning in far more progressive and wealthier societies in the West, to fall on a fruitful soil, in the very same for, in the Balkans (which are, in historic and cultural terms, considerably different from the countries of origin of the institute)? Would perhaps some form of adaption of the institute of ombudsman to the local circumstances prove to be more feasible and show better practical results? Such questions can be answered only after conducting a more comprehensive, multidisciplinary study. Presently, it is evident that countries analysed herein do not depart much from the ideal statutory model of the ombudsman, which, however, is not the case when it comes to its implementation.

### **3. CONCLUDING REMARKS: ASSESSMENT OF THE INSTITUTIONAL FRAMEWORKS**

If we were to assess the compliance of the institutional frameworks of the analysed countries with accepted international legal standards grading them with an A, B or a C, following the model used by the International Coordinating Committee of National Institutions, the grades would not differ considerably from those awarded by this Committee (although it only takes the Paris Principles into account). It is clear that none of the countries has an ideal legal framework, free of any flaws, but a strictly theoretical analysis shows that the institutional frameworks in Serbia, Montenegro, Kosovo, Bosnia and Herzegovina and Croatia, for the most part, comply with international standards and consequently can be graded with an A. Due to various deviations from international standards, the institutional frameworks of Macedonia and Bulgaria can be assessed as "complying with international standards with certain significant exceptions/deficiencies" and awarded a B. The nature of such deficiencies in the mentioned countries is heterogeneous and varies from the soundness of legal technique governing the matter to the issue of appointment of the ombudsman and his

<sup>99</sup> Montenegrin Ombudsman's report for 2012. [http://www.ombudsman.co.me/docs/izvjestaji/Final\\_Izvjestaj\\_za\\_2013\\_310320131450.pdf](http://www.ombudsman.co.me/docs/izvjestaji/Final_Izvjestaj_za_2013_310320131450.pdf), p. 157, 10.5.2013.

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financing, which can all influence the level of ombudsman's integrity. Grade C, which signifies that a country did not implement international standards in its legislation, cannot be awarded to any of the researched countries (although, interestingly enough, Romania, a country of the region which is also an EU country, was awarded this grade by the International Coordination Committee in the last ranking).

It is important to always bear in mind the fact that quality legislative framework remains only a dead letter on a paper in the absence of the rule of law. If the practical efficiency of the ombudsmen in the researched countries was to be analysed, the results would be quite different from those presented above. The aspiration to create quality legislative solutions that comply with international standards must, as a *conditio sine qua non*, be followed by a constant struggle to strengthen the rule of law, since not even the best solutions can *per se* reduce the violation of human rights or minimise maladministration.