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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT MEMORANDUM

ON THE ORGANIC LAW ON THE INSTITUTION OF THE OMBUDSMAN OF THE FEDERATION OF BOSNIA AND HERZEGOVINA

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of the Federation of Bosnia and Herzegovina

The Venice Commission Working Group on the Ombudsman institutions in Bosnia and Herzegovina held a meeting, on 12 January 2001, in Strasbourg, to consider the Organic Law on the institution of the Ombudsman of the Federation of Bosnia and Herzegovina adpted on 29 July by the House of Representatives of the Federation (CDL (2001) 2). It is recalled that the Venice Commission approved, at its 38th Plenary Meeting (Venice 22-23 March 1999) a preliminary draft organic law for the Ombudsman of the FBH and that this draft was introduced to the House of Representatives of the FBH for adoption. Moreover, the Parliamentary Assembly of the Council of Europe found, in the framework of the procedure for accession of Bosnia and Herzegovina to the Council of Europe, that the FBH should adopt a law on the Ombudsman of FBH, following the recommendation of the Venice Commission and guarantee the institution's independence.

The Working Group welcomes the adoption of the organic Law (hereafter "the Law") as an important step for the implementation of the Constitution of FBH and the protection of human rights in this entity.

The Working Group notes however that several provisions of the Law, as finally adopted by the House of Representatives, may give rise to interpretations that could jeopardise the independence of the institution and the effectiveness of its functioning.

In particular:

1. As regards the **composition of the institution of the FBH Ombudsman**

Article 9 para 1 of the Law follows the proposal by the Venice Commission and provides that "three persons shall compose the institution of the Federation Ombudsman". It adds however the following: "*one Bosniak, one Croat and one representing the others*".

The Working Group understands that the origin of this provision is Article 1 of Chapter II B. of the Constitution of FBH which reads : "There shall be three Ombudsman, one Bosniak, one Croat and one Other". It finds however that this provision in the Constitution need not to be repeated in the Law. This is all the more so since in a recent decision of the Constitutional Court of BiH, provisions concerning "constituent peoples" in the entities' Constitutions were found to be incompatible with the Constitution of BiH.

The Working Group recalls that it has itself opted for a "multi-ethnic" composition of the Ombudsman institution, because it considered this to be an important element of the visible independence and impartiality of the institution. The practical need for a multi-ethnic composition of the institution in a post-conflict period was clearly set out in the final report presented to the Venice Commission in June 1999 (see CDL-INF (99)10). This is however different from a <u>legal</u> requirement of belonging to a specific ethnic group to be eligible for FBH Ombudsman.

Moreover, the sentence according to which an Ombudsman is "representing the others" is not compatible with the nature of the institution and the functions of the Ombudsman. The latter is not - and should not be perceived as a - representative of a group of persons, be it an ethnic group or any other group. The Ombudsman should perform his/her duties in his/her personal capacity and not as a representative. The contrary would be incompatible with the independence that should characterise the institution.

Consequently, the Working Group would recommend to amend the Law in order to delete the words "one Bosniak, one Croat and one representing the Others"

2. As regards **the procedure for designation of the Ombudsman**, the Working Group observes the following :

Article 10 of the Law provides that the Ombudsman "*shall be appointed and dismissed by the House of Representatives and the House of Peoples following a joint proposal by the competent body of the House of Representatives and the House of Peoples. The competent body shall adopt the proposal by a majority of two thirds of its members*".

The Working Group's preliminary draft provided for a two-thirds majority at all stages of the appointment procedure, i.e. in the competent joint committee, in the House of Representatives and in the House of Peoples. As indicated by the Working Group in its final report on the Ombudsman institutions in Bosnia and Herzegovina, the provisions in the draft laws regarding the composition and the appointment of Ombudsman "are intended to ensure the broadest possible consensus on the persons concerned. This is the only way of making the institution's impartiality an objective fact, recognisable in the eyes of all citizens" (CDL-INF(99)10). The appointment of the Ombudsman as provided for in Article 10 of the Law, i.e. by a simple majority of members present in the two Houses, seems to be inadequate. Simple majority does not require a broad consensus of all tendencies in the Houses and appointment of Ombudsman without such a consensus may compromise the institution's credibility.

The Working Group would therefore recommend that the Law be amended in such a way as to require for the appointment of the Ombudsman a two thirds majority in both Houses.

Similarly, the draft approved by the Venice Commission provided for a "permanent joint committee" of the two Houses whereas the Law now provides for a "competent body". The Working Group finds this wording too vague. The importance of a body composed of members of the two Houses, competent to deal with various aspects of the Ombudsman's functioning should not be overseen. It is recalled in this respect, that the Ombudsman in FBH are primarily a parliamentary Ombudsman institution and that therefore it would be advisable to set up a specific parliamentary committee to deal with all aspects of the Parliament's relations with the Ombudsman.

It is also important that the joint committee's composition be fixed *ab initio* in the Law or in the Rules of procedure of the two Houses. It would be detrimental to the transparency of the procedure - and consequently to the credibility of the institution - if the composition is fixed) *ad hoc* with a view to proposing the appointment of specific Ombudsman.

The Working Group would therefore recommend that the relevant provision be amended to clearly provide for a joint committee of the House of Representatives and the House of Peoples, whose composition should be regulated in a transparent way (by law or by the Rules of Procedure of the Houses).

3. As regards **the termination of the Ombudsman's duties**, the Working Group observes the following :

The Working Group is seriously concerned by Article 13 f) of the Law. This Article provides that an Ombudsman's duties shall terminate when *"he/she is dismissed"*. Moreover, Article 10 provides that the Ombudsman are "*dismissed*" by the House of Representatives and the House of Peoples.

The above provisions may seriously jeopardise the institution's independence as they make the Ombudsman entirely dependant on the Parliamentary majority. They can be regarded as contrary to Chapter II B Article 4 of the Constitution of FBH which reads : "The Ombudsman is independent in carrying out their functions and no persons or governmental organ may interfere with such function". They are also inconsistent with the principle of independence in Article 2 of the Law. Moreover, it is obvious that any provision concerning the length of the Ombudsman's mandate becomes superfluous if by virtue of another provision the Parliament is allowed to dismiss the Ombudsman by simple majority.

The draft proposed by the Venice Commission excluded on purpose "dismissal" from the list of reasons for the termination of the office of an Ombudsman.

The Working group strongly recommends that Article 13 f and the word "and dismissed" in Article 10 para. 1 be deleted.

4. As regards **the length of the Ombudsman's mandate**

The Working Group is of the opinion that a five year mandate would better respond to the need for independence, the four-year term provided for in the Law being too short.

It would recommend to amend Article 11 of the Law so as to provide for a five year term.

5. As regards **the persons entitled to apply to the FBH Ombudsman**

The Working Group notes that Article 17 of the Law provides that *"any natural person claiming a legitimate interest may apply to the Ombudsman"*.

This wording seems to exclude legal persons from seeking protection from the Ombudsman whereas legal persons have fundamental and constitutional rights and freedoms, as well as other rights and legitimate interests and should be allowed to seek the Ombudsman's intervention. Preventing legal persons from addressing the Ombudsman would seriously affect the level of human rights protection granted in the Federation.

It is suggested to amend Article 17, first sentence as follows : "Any natural <u>or legal</u> person claiming a legitimate interest may apply to the Ombudsman".

6. As regards **the appointment of Ombudsman staff**

Article 36 para. 2 of the Law provides that *"each Ombudsman may appoint staff within the budgetary limits approved for that purpose by the Government of the Federation or initially by the Prime Minister"*.

The Working Group finds that the above provision may be construed in such a way as to allow the Government or the Prime Minister to intervene in issues concerning the Ombudsman staff. Such an interference, incompatible with the independent nature of the institution, should obviously be excluded.

The Working Group would recommend to amend the above provision as follows : *"The Ombudsman may, within the budgetary limits, freely staff the institution's offices, in accordance with the Rules of Procedure".*

7. The Working Group further noted some **other points** in the Law that may raise some problems in its implementation.

The Working Group noted that Article 2 of the Law does no longer indicate that the Ombudsman'' activity consists in *"monitoring Government activity of any institution in the Federation"*. The Working group is of the opinion that the above sentence responded to the need to clearly inform both the citizens and the authorities of the activities performed by the Ombudsman institution. Article 2 of the Law, by repeating the Constitution ("the Ombudsman reverses the consequences of human rights violations and ethnic cleansing"), although it clearly indicates the aims of the institution, is too general and fails to indicate what are the means of the Ombudsman's action. The Working Group finds advisable the introduction of the above sentence in the text of Article 2.

Article 7 of the Law allows the FBH Ombudsman to refer cases to the Human Rights Chamber and the Ombudsman of BiH. This seems to conflict with the present situation (as set out in Annex 6 to the Dayton Peace Agreement and the new Law on the Human Rights Ombudsman of Bosnia and Herzegovina) which only allows the Human Rights Ombudsman of Bosnia and Herzegovina to refer cases to the Human rights Chamber. The Venice Commission draft referred to "*the highest judicial authority competent in human rights matters*". The purpose of this less explicit reference was to anticipate the possible merger of the Human Rights Chamber of BiH with the Constitutional Court of BiH. Using the more general wording of the Venice Commission proposal may help avoiding a further amendment of the Ombudsman Law after the envisaged merger.

Article 14 could be reworded as to read "The Ombudsman shall be under no orders". This would bring the provision in line with the corresponding provision in the Law on Human Rights Ombudsman of Bosnia and Herzegovina.

Furthermore, it may be advisable to include a provision on the guaranteeing the Ombudsman's salary by reference to the salaries of other officials (see the corresponding provision in the Law on the Human Rights Ombudsman of Bosnia and Herzegovina).

The Working Group finally understands that due to problems in the translation of the Venice Commission draft into the official languages in BH, some provisions in the preliminary draft may have appeared inaccurate or may have misinterpreted. The Working Group would recommend that problems of that type be looked at with the FBH Ombudsmen who were closely involved in the process of the preliminary drafting. Some of these problems appear in the FBH Ombudsman "Memorandum on Draft Amendments to the Adopted Organic Law" (CDL (2001) 3).

Finally the Working Group recalls that the Venice Commission suggested in June 2000 (CDL-INF (2000) 9) that the Ombudsman of the FBH be given *locus standi* before the Constitutional Court of FBH. These proposals could be taken up in the context of the envisaged revision of the FBH Constitution and in the possible amendments to the Law on the Ombudsman of FBH.