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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

- DRAFT -
OPINION ON *LOCUS STANDI* OF THE OMBUDSMEN OF THE FEDERATION OF BOSNIA AND HERZEGOVINA BEFORE THE CONSTITUTIONAL COURT OF THE FEDERATION OF BOSNIA AND HERZEGOVINA

on the basis of comments by
Mr Franz MATSCHER (Member, Austria)

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By letter dated 29 March 2000, the Ombudsman Institution of the Federation of Bosnia and Herzegovina requested the Venice Commission to draw up a report on the possibility for the Ombudsmen of the Federation of Bosnia and Herzegovina to introduce a claim before the Constitutional Court of the Federation of Bosnia and Herzegovina for abstract constitutional review of laws or legal provisions. The Commission designated Prof. Matscher as its Rapporteur on the question.

At its 43rd Plenary Meeting (Venice, 16-17 June 2000) the Commission, on the basis of the Rapporteur's report, adopted the present opinion.

I Introduction

1. In their work the Ombudsmen of the Federation of Bosnia and Herzegovina are sometimes confronted with the possibility that certain provisions of laws or whole laws, the consequence of which is violations of human rights and fundamental freedoms guaranteed by the Constitution and the various human rights instruments listed in the Annex to the Constitution, may be unconstitutional. The question put to the Commission is whether the Ombudsmen can in such cases introduce a claim before the Constitutional Court of the Federation of Bosnia and Herzegovina for abstract constitutional review of the law or provisions at issue.

II Applicable legal provisions

2. The Ombudsman institution and the Constitutional Court now functioning in the Federation of Bosnia and Herzegovina were established by the Washington Peace Agreements of March 1994. The Constitutional Court is also subject to the provisions of the Law on the Procedure before the Constitutional Court of the Federation of Bosnia and Herzegovina and has adopted its own Rules of Procedure (published in the Official Gazette of the Federation of Bosnia and Herzegovina No. 2/1996) as well as a Decision on the Organisation and Functioning of the Constitutional Court of the Federation of Bosnia and Herzegovina passed at its session on 10 January 1996. A draft law on the Federation Ombudsman, prepared by the working group of the Venice Commission and the Directorate of Human Rights on Ombudsman institutions in Bosnia and Herzegovina, is currently before the legislative bodies of the Federation of Bosnia and Herzegovina. As yet no law has been adopted, however, and the institution remains subject only to the provisions of the Constitution and to its own internal rules.

3. The constitutional provisions governing the Ombudsman institution state, in relevant part:

Article II.B.5

> The Ombudsman may examine the activities of any institution of the Federation, Canton or Municipality, as well as any instruction or persons by whom human dignity, rights or liberties may be negated, including by accomplishing ethnic cleansing or preserving its effects.

Article II.B.6

> (1) An Ombudsman is entitled to initiate proceedings in competent courts and to intervene in pending proceedings, including any in the Human Rights Court.

4. The competence of the Constitutional Court is governed principally by Articles IV.C.10 and 11 of the Federation Constitution.[1] Abstract review of the constitutionality of legal provisions is possible in accordance with the constitutional provisions reproduced below:

> Article IV.C.10
>
> (2) The Constitutional Court shall:
>
> > (a) At the request of the President, of the Vice-President, of the Prime Minister, of the Deputy Prime Minister, or of one-third of the members of either House of the Legislature, determine whether any proposed law that has been adopted by either House of the Legislature, or any law or proposed law that has been adopted by each House of the Legislature, is in accord with this Constitution;
> >
> > (b) At the request of the Prime Minister, of the Deputy Prime Minister, of the Cantonal President concerned, or of one-third of the members of the Legislature of a Canton, determine whether any law or proposed law that has been adopted by that Legislature (including the Cantonal Constitution and any amendments thereto), is in accord with this Constitution.
> >
> > (c) At the request of the President, of the Vice-President, of the Prime Minister, of the Deputy Prime Minister, determine whether any regulation enacted or proposed regulation to be enacted by any organ of the Federation Government is in accord with this Constitution.
> >
> > (d) At the request of the Prime Minister, the Deputy Prime Minister, or of the Cantonal President concerned, determine whether any regulation enacted or proposed regulation to be enacted by any organ of the Cantonal or Municipal government is in accord with this Constitution.
>
> (3) The Constitutional Court shall also decide constitutional questions presented by the Supreme Court or the Human Rights Court or a Cantonal court that arise in the course of a proceeding currently pending before that Court.

5. Article 9 of the Law on the Procedure before the Constitutional Court of the Federation of Bosnia and Herzegovina provides further that

> The party to the procedure, in the sense of this Law, shall be considered the authorised applicant of a request for dispute resolution, constitutionality evaluation, establishment of the existence of the vital interest of a constitutional nation, replacement of the President of the Federation and Vice-President of the Federation, and the authorised complainant against the decision of the highest Cantonal Court on the existence of the vital interest of a constitutional nation in a Canton with a special regime, on one hand and the body, or the person in respect to which the request has been submitted, on the other hand.

6. The term "authorised applicant" is never explicitly defined in the Law. However, the various chapters of the Law dealing with the different types of applications that may be lodged with the Constitutional Court in accordance with Article IV.C.10 of the Constitution refer to specific persons or institutions by whom the type of application in question is to be introduced (Articles 31, 35 and 42). In particular, Article 35 of the Law, in the part of the Law dealing with the evaluation of constitutionality, states that

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[1] Provision is also made in Articles IV.A.3.18 and IV.B.2.6(1) for an expedited procedure before the Constitutional Court to resolve questions concerning the vital interests of any of the constituent peoples. However, this question does not concern us in the present opinion.

> The procedure for [e]valuation of constitutionality referred to in Article IV.C.10(2) and decision-making on constitutional issues referred to in Article IV.C.10(3) of the Constitution shall be initiated on the basis of a request submitted by the authorised applicant.

Article 39, paragraph 1 of the Law goes on to provide that

> Parties to the procedure of assessment of the constitutionality shall be the authorised applicants as per Article IV.C.10(2) and (3) of the Constitution and the Federal, Cantonal and Municipal body which proposed or passed the Cantonal Constitution, law or other regulation.

7. Article IV.C.10(2) of the Constitution refers, according to the provision of which the constitutionality is at issue, to requests made by the President, the Vice-President, the Prime Minister, the Deputy Prime Minister, one third of the members of either House of the Legislature, a Cantonal President or one third of the members of the Legislature of a Canton. Article IV.C.10(3) refers to requests made by the Supreme Court or the Human Rights Court or a Cantonal court that arise in the course of proceedings pending before that Court. No reference, however, is made to the possibility for the Ombudsmen to request that the Constitutional Court undertake the abstract review of the constitutionality of a provision.

8. Under Article 26 of the Law on the Procedure before the Constitutional Court of the Federation of Bosnia and Herzegovina, "The Constitutional Court…shall decide on the rejection of the request when…the applicant is not authorised to initiate the procedure…". Should there be any doubt as to the precise meaning of the expression "decide on the rejection of the request", the other cases listed in this provision - for example, when the Court is not competent to decide on the request and when the request is submitted out of time - make it apparent that the intention is not that the Court may decide *whether or not* to reject the request but rather that it *must* decide to reject a request when the request is not submitted by an authorised applicant.

9. It appears from the above that, should the Ombudsmen of the Federation of Bosnia and Herzegovina introduce a request before the Constitutional Court of the Federation of Bosnia and Herzegovina for abstract constitutional review of a law or legal provisions, the Court would be obliged to reject it, even when the consequence of such provisions is the violation of human rights and fundamental freedoms guaranteed by the Constitution and the international instruments listed in the Annex to the Constitution.

10. Given the above considerations, it is clear that the Constitutional Court cannot be considered to be a "competent court" before which the Ombudsmen can initiate proceedings under the terms of Article II.B.6(1) of the Constitution. As the Commission has previously indicated in its Opinion on the Reform of Judicial Protection of Human Rights in the Federation of Bosnia and Herzegovina (document CDL (99) 78), the Constitutional Court unquestionably has jurisdiction over questions of abstract constitutional review involving human rights issues, but its competence to undertake such review is limited to situations where such requests are initiated by the persons or institutions provided for in Articles IV.C.10(2) and (3) of the Constitution of the Federation of Bosnia and Herzegovina.

11. The Commission recalls, however, that the Ombudsmen may participate in proceedings before the Constitutional Court on the basis of their competence to intervene in pending proceedings under Article II.B.6(1) of the Constitution as well as on the basis of Article 12, para. 3 of the Law on the Procedure before the Constitutional Court of the Federation of Bosnia and Herzegovina, which allows the Court to call other persons to participate in proceedings in order to contribute their expertise. Likewise, the Ombudsmen may continue their current practice of recommending to authorised applicants that they apply to the Constitutional Court for abstract review of the constitutionality of relevant provisions, although the effectiveness of this practice

depends on the willingness of the party concerned to lodge such an application. Finally, where matters of concrete review of human rights arise and even in the absence of the creation of the Human Rights Court, the Ombudsmen may intervene in or initiate proceedings before other competent courts including the Supreme Court, in accordance with the Constitution.

12. Provision for the possibility for the Ombudsmen to initiate abstract constitutional review proceedings may nonetheless be envisaged in the future. As discussed below, this possibility does exist in the Greater European context. However, as the above examination reveals, the introduction of such a possibility would require constitutional amendments in the context of the Federation of Bosnia and Herzegovina.

III Greater European context

13. The question as to whether it is advisable for Ombudsmen to have standing to bring cases for abstract review of constitutionality where they are confronted with the problem of the possible unconstitutionality of laws or provisions thereof has already been dealt with in the legal systems of a number of other European countries. One significant element of consideration may be the fact that Ombudsmen whose competence includes a marked emphasis on human rights are particularly well placed to become aware of legal provisions that are at the root of frequent or systematic violations of human rights.

14. A number of countries in the Greater Europe grant their Ombudsmen or equivalent institutions *locus standi* before the Constitutional Court to initiate cases for abstract review of the constitutionality of legal provisions. This is the case, for example, in Slovenia, where the Human Rights Ombudsman is entitled to bring such an action only in association with individual cases he or she is dealing with, but the effect of the judgment is generally binding and the Constitutional Court may completely or partially abrogate a statute which does not conform with the Constitution (see in particular Articles 22, 23 and 43 of the Law on the Constitutional Court of Slovenia). By contrast, in Spain, the capacity of the *Defensor del Pueblo* to initiate proceedings for abstract constitutional review is not limited to bringing actions in association with individual cases; there is, indeed, a time-limit of three months after the publication of the challenged provisions within which such proceedings must be initiated, which would seem to preclude the possibility of basing such a case on an individual complaint (Articles 32 and 33 of Organic Law No. 2/1979 on the Constitutional Court).

15. Other countries in which Ombudsmen have standing to apply for abstract constitutional review of legal provisions, such as Croatia, Georgia and Portugal, may be cited. Furthermore, in Austria the Ombudsman may currently request the Constitutional Court to review the legality of regulations and a constitutional amendment that would enable the Ombudsman to apply for abstract constitutional review is being examined. However, it is not the Commission's intention to conduct a comprehensive survey in the present context. It is sufficient to note that there is no reason in principle why such a competence should not be attributed to an Ombudsman institution, should the relevant authorities so wish. In the present context an amendment to the Constitution of the Federation of Bosnia and Herzegovina would be required in order to attribute such a competence to the Ombudsmen.

IV Conclusions

16. The Commission finds that:

- only the persons and institutions listed in Article IV.C.10(2) and (3) of the Constitution of the Federation of Bosnia and Herzegovina have standing to lodge

applications with the Constitutional Court of the Federation of Bosnia and Herzegovina for abstract review of constitutionality;

- Article II.B.6(1) of the Constitution is not sufficient to extend the competence of the Constitutional Court to the examination of applications for abstract constitutional review of legal provisions lodged by the Ombudsmen of the Federation of Bosnia and Herzegovina;

- the Ombudsmen of the Federation of Bosnia and Herzegovina therefore do not have standing to request the Constitutional Court to undertake the abstract review of the constitutionality of legal provisions identified by the Ombudsmen as being likely to be unconstitutional;

- there is, however, no reason in principle why the Ombudsmen should not be granted such standing, should the relevant authorities choose to make the necessary constitutional and legal amendments.

17. The Commission remains at the disposal of all parties to collaborate in the drafting and implementation of such amendments, should the parties so request.