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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

(VENICE COMMISSION)

**OPINION  
ON THE RANK AND STATUS  
OF THE OMBUDSMAN  
OF THE FEDERATION OF BOSNIA AND HERZEGOVINA**

**Comments by:**

**Mrs Maria de Jesus SERRA LOPES  
(Member, Portugal)**

1. My opinion was asked on the two following points:
  - I. *Whether the rank and status of the Ombudsman of the Federation of BiH should be equated with that of senior civil servants or independent judges of ordinary courts;*
  - II. *Whether the Constitution of the Federation of BiH and the Memorandum of Understanding provide sufficient legal basis to equate salaries of the Ombudsman with those of ordinary court judges.*
2. Taking into consideration, in particular:
  - THE MEMORANDUM OF UNDERSTANDING BETWEEN THE OSCE AND THE FEDERATION OF BOSNIA AND HERZEGOVINA (MoU);
  - THE LAW ON THE OMBUDSMAN OF THE FEDERATION OF BiH;
  - THE CONSTITUTION OF BiH

my opinion is as follows:

- I. *Whether the rank and status of the Ombudsman of the Federation of BiH should be equated with that of senior civil servants or independent judges of ordinary courts*

The first and most important issue concerning the Institution of the Ombudsman is its *independence*.

To guarantee this independence, the Ombudsman must be an institution with financial autonomy and no possible equalization with the public administration.

Indeed, the main reason why this institution was created, more or less all over the world, was to defend people regarding public administration.

So, if the institution of the Ombudsman is intended to monitor, *inter alia*, the activity of the administration, it has to be on the same level as the highest judicial court.

It is both a question of salaries and a question of rights and rank of importance in the structure of the State, always with this crucial aim —*guaranteeing the independence of the Ombudsman*.

This is the guiding principle we can find in most similar institutions in most other countries.

Even the European Union Ombudsman has "the same rank in terms of remuneration, allowances and pensions as a judge at the Court of Justice of the European Communities" (article 10.2 of the Decision of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman's duties).

Equalizing the Ombudsmen and the judges of the Supreme Court — as far as salaries and status are concerned — is essential in order to guarantee this institution the utmost independence and to prevent any pressure that would always be possible if the Ombudsman had the role and status of civil servants.

So, it is my opinion that *the rank and status of the Ombudsman should be equalized to that of independent judges of ordinary courts.*

II. *Whether the Constitution of the Federation of BiH and the Memorandum of Understanding provide sufficient legal bases to equate salaries of the Ombudsman with those of ordinary court judges*

1. The first sentence of the MoU between OSCE and the Federation of BiH says

*"Considering the vital role the independent Ombudsman Institutions must play ..."*

This means that the Institution of the Ombudsman is **vital**, as **vital** is its **independence**.

Article 4 (2) states

*"Ombudsmen, Deputies and Assistants will receive salaries and compensation in accordance with the salary structure introduced for the judiciary in Federation of Bosnia and Herzegovina. The Ombudsmen shall each receive a salary equal to that of the President of the Supreme Court. Deputy Ombudsmen shall each receive a salary equal to that of a judge of the Supreme Court. Assistant Ombudsmen shall be granted a salary equal to that of a judge at a District Court."*

This Agreement, as it says *"in fine"*, was

*"Done in two authentic copies in the English and Serbian languages, of which each party shall retain a copy of each. In any instance of doubt as to textual interpretation, the English version will prevail."*

So, in case of deficient translation or any doubt as to textual interpretation, due to the possible use of equivocal words or to any other reason, the English version prevails.

And, regarding the English version, there is no possible doubt as to textual interpretation.

2. The Constitution of the Federation of Bosnia and Herzegovina says, in the English version,

***"Article 1***

.....

*(3) The terms of service of the Ombudsmen and their Deputies shall be the same respectively as those of the President and of the judges of the Supreme Court."*

This text causes no possible doubt. It means that the rank, salaries and other conditions of the Ombudsmen are the **same** as those of the President of the Supreme Court, and that the rank, salaries and other conditions of the Deputies of the Ombudsmen are the same as those of the judges of the Supreme Court.

This is corroborated by what is stated in other articles of the Constitution regarding the institution of the Ombudsman :

a) **"Article 2**

.....

*In carrying out their functions, the Ombudsmen must be **guided by law and by principles of morality and justice.**"*

b) **"Article 4**

*The Ombudsmen **are independent** in carrying out their functions, and **no person or governmental organ may interfere with such functions.**"*

c) **"Article 7**

*(1) In carrying out his functions an Ombudsman **may examine all official documents, including secret ones, as well as judicial and administrative files and require any person (including any official) to cooperate, in particular by providing relevant information, documents and files.** Ombudsmen may also attend court and administrative hearings, as well as meetings of other organs, and may [\*749] enter and inspect any place where persons deprived of their liberty are confined or work."*

None of these obligations could be accomplished by the Ombudsmen if their role and status was equalized to those of civil servants.

3. If the Bosnian version of the Constitution considered the expression "*terms of service*" as if it was "*term of service*", then there was a misunderstanding of words, because the word "*term*" in English has not the same meaning as the word "*terms*".

*"Terms" means conditions, clauses, as equals. In this case it meant the same conditions regarding rank, status, remuneration, etc., as [the judges].*

And "*term*" is used only in singular and means "*duration*".

For this reason, the word "*term*" and the word "*terms*" both appear in dictionaries, as they have **different** meanings.

Nevertheless, the word used in the MoU was "*terms*" and not "*term*".

The same mistake may have occurred here as in the Bosnian version of the Washington Agreement which says "*trajanje mandata*" as if the word used in English was "*term*" instead of "*terms*", as it really was.

4. Moreover, if the expression "*terms of service*" meant "*trajanje mandata*", it would be ludicrous as it would say that the duration of the functions of the Ombudsmen would last until they reach the age of 70 years, whereas the Ombudsmen are appointed for a period of five (four) years and may be re-elected only once.

This interpretation would not make any sense and would be in contradiction with the text of the Constitution as a whole.

So, according to the interpretation of the Constitution of the Federation of Bosnia and Herzegovina *it is my opinion that both this Constitution and the Memorandum of Understanding provide a sufficient legal basis to equate salaries of the Ombudsmen with those of ordinary court judges.*

**MARIA DE JESUS SERRA LOPES**