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**Opinion no. 193/2002\_bih**

**OPINION**

**on**

**THE STATUS AND RANK OF THE OMBUDSMAN  
INSTITUTION  
IN THE FEDERATION OF BOSNIA AND  
HERZEGOVINA**

**Based on comments by**

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

**and**

**Mr Hans-Heinrich VOGEL  
(Substitute Member, Sweden)**

**Introduction:**

*On 30 January 2002, the Commission received a request from the Ombudsmen of the Federation of Bosnia and Herzegovina for an opinion on the following two points:*

- *Whether the rank and status of the Ombudsman of the Federation of Bosnia and Herzegovina should be equated with the rank and status of senior civil servants or independent judges of ordinary courts*
- *Whether the Constitution of the Federation of Bosnia and Herzegovina and the Memorandum of Understanding provide a sufficient legal basis to equate salaries of the Ombudsman of the Federation of Bosnia and Herzegovina with those of ordinary court judges*

*The Commission set up a working group composed of Ms Maria de Jesus Serra Lopes and Mr Hans-Heinrich Vogel.*

*Moreover, the Commission undertook a comparative study on the specific issue of the rank and status of Ombudsman institutions in Council of Europe member states. It asked the different institutions to reply to the following two questions:*

- *What is the rank of the ombudsman in your system? For example, does the ombudsman have a rank equivalent to a president or judge of the supreme or constitutional court, a member of parliament or a senior civil servant? Is this reflected in the level at which the ombudsman is remunerated?*
- *Are there deputy ombudsmen in your system? If yes, what is the rank of a deputy ombudsman? Is this reflected in the level at which the deputy ombudsman is remunerated?*

*The Commission is very grateful to all those institutions which provided responses to these two questions.*

*The Commission's rapporteurs provided written comments on this matter. At its 50<sup>th</sup> Plenary Session, held in Venice on 8-9 March 2002, the Commission endorsed the comments made by the rapporteurs and asked the Secretariat to prepare, in co-operation with the Rapporteurs, a consolidated opinion on the basis of these comments and of the responses received by the various Ombudsman institutions.*

**A. Background**

1. The institution of the Ombudsman of the Federation of Bosnia and Herzegovina was created under the Washington Agreements of 18 March 1994 and by the Constitution of the Federation of Bosnia and Herzegovina, which was adopted by the Constitutional Assembly of the Federation of Bosnia and Herzegovina at the session held on 24 June 1994. For the period 1995-2001, the Ombudsman of the Federation of Bosnia and Herzegovina was fully funded by the Organization for Security and Co-

operation in Europe (OSCE). The Law on the Ombudsman of the Federation of Bosnia and Herzegovina, which entered into force on 7 September 2000, established that the Federation of Bosnia and Herzegovina would take over full responsibility for the financial and operational functioning of the Ombudsman on 30 September 2001. In order to facilitate this transfer of responsibility, a Memorandum of Understanding was concluded on 9 October 2001 between the OSCE Mission to Bosnia and Herzegovina and the Government of the Federation of Bosnia and Herzegovina.

2. The Memorandum sets out the obligations of the Federation of Bosnia and Herzegovina and includes a provision on the salaries of the Ombudsman, their Deputies and Assistants, stating that they should be at the level of the salaries of judges of ordinary courts.

3. However, some representatives in the Parliament of the Federation of Bosnia and Herzegovina consider that the status of the Ombudsman should rather be equated with civil servants and wish to determine the level of Ombudsman salaries accordingly.

***B. A comparative perspective on the status and rank of Ombudsmen institutions in Council of Europe member States: results of the study***

4. It appeared to be of interest in the context of the present opinion to examine how different countries or regional entities establish the status, rank and salary levels of their Ombudsman and to ascertain whether there was a preference at a European level for any particular approach.

Accordingly, the Ombudsmen of the member States of the Council of Europe were asked to indicate what their rank is and whether this is equivalent to other categories of senior public officials, such as judges, members of parliament or civil servants. They were also asked whether their rank is reflected in their level of remuneration. The same questions were asked in respect of Deputy Ombudsmen, where this position exists.

***i) Ombudsmen:***

5. The responses received<sup>1</sup> showed that the status, rank and salary levels of the Ombudsman are established in a variety of ways.

6. Some of the countries which responded establish the status, rank and subsequently remuneration of their Ombudsman with reference to the judiciary. This is the case in *Malta*, where the Ombudsman is remunerated at the level of a judge of the Superior Courts; in *Norway*, where the Parliamentary Ombudsman is remunerated 20% more than a Supreme Court judge; and in *Sweden*, where the rank of the Parliamentary Ombudsman is the same as a Supreme Court judge or a judge of the Supreme Administrative Court and the remuneration is 20% higher.

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<sup>1</sup> Austria, Belgium, Croatia, Czech Republic, Denmark, Estonia, France, Germany, Greece, Lithuania, Malta, Netherlands (national ombudsman and ombudsman of Amsterdam), Norway, Russian Federation (Saratov Region), Spain (Defensor del Pueblo and the Ombudsman of Catalonia), Sweden, Switzerland (Canton of Basel-Stadt and City of Berne), former Yugoslav Republic of Macedonia and United Kingdom

7. In some countries, the Ombudsman's status, rank, and/or salary is established with reference to a number of different institutions or functions on a similar level. This is the situation in *Croatia*, where the National Ombudsman has a rank and remuneration equivalent to that of the president of a working body of the Parliament, a judge of the Constitutional Court, a minister and the head of the State Audit Office; the *Czech Republic*, where the Public Defender of Rights is entitled to a salary equivalent to that of the President of the Supreme Control Office; *Estonia*, where the Legal Chancellor, who performs the functions of Ombudsman, has the highest rank, equivalent to the Parliament, the President, the Government, the Courts and the State Audit Office and is remunerated at the level of the average wage multiplied by a coefficient of 5.5; the *Netherlands*, where the National Ombudsman is remunerated at a level equivalent to the Vice-President of the Council of State and the President of the Chamber of Audit, these three institutions together being called the High Councils of State; and the *former Yugoslav Republic of Macedonia*, where the Ombudsman's rank is at the same level of a minister, the President of the Supreme Court, the Public Prosecutor, a judge of the Constitutional Court and the Governor of the National Bank.

8. In *France*, the Ombudsman's rank is ascertained according to the order of protocol for official ceremonies, where he is placed after members of Parliament and the President of the Court of Cassation. The French Ombudsman receives a salary which is more or less the same as a member of Parliament. Similarly, in *Spain*, it is the order of protocol which establishes the rank of the Ombudsman (Defensor del Pueblo) close to that of Secretaries of State and the Fiscal General del Estado.

9. One of the countries which responded, *Austria*, provides the Ombudsman Board with an extraordinary rank, equivalent only to members of Parliament. The three members of the Ombudsman Board are remunerated at a level comparable with Secretaries of State, which is lower than for ministers or presidents of the Supreme Court.

10. A number of countries do not formally provide for the rank of the Ombudsman. In *Belgium*, the rank of the Federal Ombudsmen with respect to protocol has not yet been determined, some arguing that it should be given a special position to reflect its independence while others consider that it is a body of Parliament and needs no special position. The financial status of the Federal Ombudsmen is identical to that of the counsellors of the Court of Audit and judges of the Council of State. The Parliamentary Ombudsman in *Denmark* has no formal ranking in the public administration system, although several factors indicate a very high ranking, such as the fact of being appointed by Parliament. The Danish Parliamentary Ombudsman's remuneration is the same as the permanent secretary at the Ministry of Justice. In *Greece*, the Ombudsman also has no formal ranking but enjoys the rank of the head of an independent administrative authority and the privileges of higher level state officials and is remunerated the same as the Chairman of the Legal Council of State and the Chairman of the Supreme Court. In *Lithuania*, the Seimas Ombudsman is paid a salary in the amount of five average wages of the national economy. In the *United Kingdom*, the Ombudsman is regarded as being equivalent to the civil service head of a major government department and is remunerated at the level of a judge of the High Court.

11. At a sub-national level, there are also variations. In Spain, the remuneration of the Ombudsman in *Catalonia* (Síndic de Greuges) is equivalent to that of a Minister in the Catalan regional Government. In Germany, the regional Ombudsmen in *Mecklenburg-Pommerania*, *Rhineland-Palatine*, *Schleswig-Holstein* and *Thuringia* are remunerated at the level of a senior civil servant or judge of the Supreme Court. In the Netherlands the Ombudsman in *Amsterdam* has the rank and remuneration of an alderman, who is a member of the board of governors of the city. In the Russian Federation, the Ombudsman in the *Saratov Region* has a rank and remuneration which corresponds to senior public officials, which is equivalent to the Vice-Governor of the region. In Switzerland, the Ombudsman of the *City of Berne* has a rank and is remunerated at the level of a senior civil servant, although there are some civil servants (the heads of certain important offices) who have a higher rank. The Ombudsman in the *Canton of Basel-Stadt* has the rank of the president of the superior court and is remunerated accordingly.

**ii) Deputy Ombudsmen:**

12. There were a number of countries or regional entities which indicated that they did not have Deputy Ombudsmen<sup>2</sup>. In *Greece*, deputy ombudsmen exist but receive no special privileges, whilst in the *United Kingdom*, they are an internal appointment made by the Ombudsman within his office.

13. A particular situation exists in *Sweden*, where deputy ombudsmen are elected by Parliament but only work on an occasional basis, such as when there is a vacancy. They do not have a specific rank, but as only persons who have earlier served as Parliamentary Ombudsman may be elected deputy ombudsman, it could be argued that they have the same rank.

14. In *Estonia*, one of two Deputy Legal Chancellor-Advisers exercises the powers of deputy ombudsman and has a rank comparable with that of the Legal Chancellor and is remunerated in accordance with laws governing the salaries of state and public servants.

15. In the other countries where the institution of Deputy Ombudsman exists, the Deputy Ombudsman's rank, status and remuneration follows the system established for the Ombudsman. Thus, in *Catalonia*, the Deputy Ombudsman's remuneration is equivalent to a Director General of the Catalan Government; in *Croatia*, the Deputy Ombudsman's rank and remuneration level is placed after the deputy of the Secretary of the House of Representatives of the Parliament, a district-prefect and the mayor of Zagreb, the deputy Secretary of the Government and the head of the State Treasury; in the *Czech Republic*, the Deputy Defender is entitled to a salary equal to that of the Vice-President of the Supreme Control Office; in Germany, deputy ombudsmen in *Mecklenburg-Pommerania*, *Rhineland-Palatine*, *Schleswig-Holstein* and *Thuringia* are remunerated 25% less than the Ombudsmen; in the *Netherlands*, where the rank and remuneration of the deputy ombudsman is comparable to that of a member of one of the High Councils of State; in *Spain*, where the rank and remuneration of the deputy ombudsmen comes immediately after that of the Ombudsman; and in the

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<sup>2</sup> Austria, Belgium, Denmark, France, Lithuania, Malta, Norway as well as in Amsterdam, the Canton of Basel-Stadt and the City of Berne.

*former Yugoslav Republic of Macedonia*, where the deputy ombudsmen have a rank and are remunerated at the level of deputy ministers, judges of the Supreme Court, Deputies of the Public Prosecutor and Deputies of the Governor of the National Bank.

**iii) Conclusion:**

16. The responses demonstrate that there are a variety of ways of establishing the status of the Ombudsman. Different countries or regional entities equate<sup>3</sup> the Ombudsman's status with that of civil servants, judges, ministers or members of parliament, for example.

17. However, irrespective of the status which the Ombudsman is assimilated to, in the countries and regional entities which responded, the Ombudsman institutions are given an appropriately high rank, which is reflected in salary levels. For instance, where the Ombudsman is assimilated to the judiciary, the rank and/or salary level is fixed with reference to the higher courts. Similarly, where the Ombudsman is assimilated to civil servants, he or she has the rank and/or salary of a senior civil servant, such as a permanent secretary or the head of an independent administrative authority or institution.

18. The rank and salary level are of crucial importance in order to guarantee the Ombudsman's independence and to enable him or her to properly carry out the functions with which he or she has been entrusted. In particular, an appropriate rank and salary level are vital if the Ombudsman is to be in a position to investigate complaints by individuals against the public administration, especially if the Ombudsman's status is equated with that of a civil servant. But it is also important that the Ombudsman should be perceived by the public in general as a person who is independent and of high standing, both in terms of personal integrity and ability to carry out the functions of Ombudsman. An appropriate rank, which is reflected in the level of remuneration, will help to secure this.

**C. Situation in the Federation of Bosnia and Herzegovina**

19. As regards the constitutional and/or legal bases for equating the Ombudsmen of the Federation of Bosnia and Herzegovina to judges of the Supreme Court, the Venice Commission has examined a) the Constitution of the Federation of Bosnia and Herzegovina; b) the Law on the Ombudsmen of the Federation of Bosnia and Herzegovina; and c) the Memorandum of Understanding which was concluded between OSCE and the Federation of Bosnia and Herzegovina (see paragraph 1 above).

**a) Constitution of the Federation of Bosnia and Herzegovina**

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<sup>3</sup> It should be emphasised that where the term equation is used, it conveys the meaning of two levels being comparable or equivalent. For example, where it is stated that the Ombudsman's status, rank and/or remuneration is equated with that of a judge, it does not mean that the Ombudsman is a judge, rather that he or she is treated as a judge. In particular, where the Ombudsman's status is equated with that of a civil servant, this does not imply that the Ombudsman is subordinate to any hierarchy in the fulfilment of his or her duties.

20. Article 1(3) of Chapter II.B of the Constitution of the Federation of Bosnia and Herzegovina in English provides as follows:

“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.”

21. Although this provision does not specifically refer to salaries, it uses the phrase “terms of service” which undoubtedly means the conditions of employment, including remuneration.

22. There is thus a clear constitutional basis for equating the status, rank and salary levels of the Ombudsmen of the Federation of Bosnia and Herzegovina with independent judges of ordinary courts.

23. It is true that the Bosnian and Croatian versions of the Constitution of the Federation of Bosnia and Herzegovina uses the phrase “trajanje mandata”, which would translate into English as “terms of office”, a phrase which would not include a reference to the Ombudsman’s status, rank or salary levels. However, the Commission considers that there is good reason to assert that it is the English meaning which was intended and that the Bosnian version merely reflects an error of translation. It notes that the proposed Constitution of the Federation of Bosnia and Herzegovina, which is contained in the Washington Agreements, was drafted in English and uses the phrase “terms of service”. The Bosnian version of the Constitution of the Federation of Bosnia and Herzegovina which was discussed and subsequently adopted by the Constitutional Assembly was translated from English. It was at the translation stage that “terms of service” became “terms of office”. There is no evidence that this issue was discussed by the Constitutional Assembly and that it represents a deliberate change.

24. Moreover, “terms of service”, as used in the English version, is consistent with the current legal framework in the Federation of Bosnia and Herzegovina, in particular with the Law on Ombudsmen of the Federation of Bosnia and Herzegovina which provides that the Ombudsmen will be appointed for a four year term. Indeed, it may be gathered from the fact that the House of Representatives of the Federation of Bosnia and Herzegovina endorsed and adopted the Law on Ombudsmen of the Federation of Bosnia and Herzegovina, prepared by the international community, in particular the Venice Commission, that the authorities of the Federation of Bosnia and Herzegovina were following international practice not to have Ombudsmen appointed for life.

b) Law on the Ombudsmen of the Federation of Bosnia and Herzegovina

25. The Commission observes that the Law on the Ombudsmen of the Federation of Bosnia and Herzegovina does not make specific reference to the issue of the Ombudsmen’s rank, status or remuneration.

c) Memorandum of Understanding

26. Article 4(2) of the Memorandum of Understanding which was concluded between OSCE and the Federation of Bosnia and Herzegovina 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.”

27. Furthermore, this Agreement was duly signed, and thus concluded, by competent representatives for the OSCE Mission to Bosnia and Herzegovina on the one hand and by the Government of the Federation of Bosnia and Herzegovina on behalf of the Federation of Bosnia and Herzegovina, on the other. Accordingly, the Federation of Bosnia and Herzegovina is bound by this Agreement.

28. In conclusion, in the light of the analysis of the Constitution of the Federation of Bosnia and Herzegovina and relevant legislation, it is clear that, in the Federation of Bosnia and Herzegovina, a choice has been made in favour of equating the status of the Ombudsmen with that of ordinary judges, the rank with that of the President of the Supreme Court and the salary accordingly.

29. This choice is fully in conformity with European standards and, as shown by the responses received from Ombudsmen in different countries and regional entities, is the position in a number of other European countries. Indeed, it is a choice which unequivocally guarantees the independence of the Ombudsmen.

30. The Commission is therefore of the opinion that in the current legal context of Bosnia and Herzegovina, the Ombudsmen of the Federation of Bosnia and Herzegovina should be equated with judges of ordinary courts.

31. In particular, the Commission finds that the Constitution of the Federation of Bosnia and Herzegovina and the Memorandum of Understanding provide a sufficient legal basis for equating the salaries of the Ombudsmen of the Federation of Bosnia and Herzegovina with those of ordinary judges.

***Summary and conclusions :***

- *The situation in a number of countries which are member states of the Council of Europe shows that there are a variety of ways of establishing the status, rank and/or salary levels of the Ombudsman but that, irrespective of the status (be it judge or civil servant) which the Ombudsman is equated with, Ombudsman institutions are given an appropriately high rank, which is reflected in salary levels.*
- *The Commission notes that in the Federation of Bosnia and Herzegovina a choice has been made in favour of establishing the status, rank and salary level of the Ombudsmen with reference to judges of the Supreme Court.*



- *The Commission considers that this choice is fully in conformity with European standards.*
- *Furthermore, the Commission is of the opinion that the Constitution of the Federation of Bosnia and Herzegovina and the Memorandum of Understanding provide a sufficient legal basis to equate salaries of the Ombudsman of the Federation of Bosnia and Herzegovina with those of ordinary court judges.*



