

The Ombudsperson in the Constitutional Jurisprudence of Kosovo*

Kosova Anayasa Hukukunda Ombudsman

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Abstract

Human rights and fundamental freedoms, as the core values of a democratic system in any country, are protected by the Ombudsperson and, without any doubt, the Constitutional Court. These two public authorities, established pursuant to constitutional provisions, have a major influence on protecting and promoting fundamental rights and freedoms, but also on consolidating the citizen's trust in them and the improvement of the state's image. Specifically, decisions of the Constitutional Court constitute the ultimate pillar of the rule of law, while the reasoning of such decisions clearly demonstrates the principal and democratic state of constitutional justice.

The Ombudsperson's jurisdiction is defined by constitutional provisions and he/she may take part in Constitutional Court proceedings as an authorized party or as an interested party. In this sense, one can see the interaction between the Ombudsperson Institution and the Constitutional Court not only in the Ombudsperson referring issues/cases to the Court, but also in the Ombudsperson arguing and reasoning referrals submitted to it, in which he/she considers that certain legal acts of public authorities constitute a potential infringement of human rights.

Keywords: Human Rights, Ombudsperson, Constitutional Justice

Introduction

The exercise of public authority by state bodies cannot be viewed in isolation from the perspective of protection of human rights and fundamental freedoms. According to the Constitution, the Ombudsperson makes recommendations and proposes actions to be undertaken, when he observes violations of human rights by the public administration and other authorities in Kosovo. The exercise of such a function consists in investigating all complaints received from any person, claiming that human rights and freedoms have been violated by unlawful or improper action or inaction of state bodies and other public authorities. Also, the Institution of the Ombudsperson is given the competence of an authorized party to refer cases to the Constitutional Court, but only in cases for the review of compliance of legal acts and other public acts with the Constitution, and to protect the rights of complainants.

Background of the Ombudsperson and Legal Basis

The Ombudsperson is a relatively new institution, initially established in Sweden¹, to monitor and protect citizens' rights. Currently, many European and other countries have adopted this institution in their

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1 <http://en.wikipedia.org/wiki/Ombudsman>. A prototype of ombudsman may have flourished in ancient China and Rome, but the notion of Ombudsmen/Ombudsperson is of Swedish, Danish and Norwegian origin, meaning "representative", and as a notion, it dates back to 1241, while the modern use of the term Ombudsman dates back to 1809, when the Swedish Parliament established the institution of Ombudsperson to guard the citizens' rights, as an independent agency. A predecessor of the Ombudsperson Institution was the Supreme Office of the Ombudsperson, established in 1713, when the Swedish King, then in exile in Turkey, needed a representative in Sweden to ensure that judges and civil servants acted in accordance with the laws and with their duties. The Parliamentary Ombudsman is the institution that the Scandinavian countries subsequently developed into its contemporary form, and which subsequently has been adopted in many countries in Europe and wider. There are around 80 countries that have adopted this idea – the institution, assigning it a primary role in protecting civil rights, or defined as a control mechanism to protect the citizens' interests and to ensure that competencies of state bodies are not exercised improperly, thereby improving the action of state bodies vis-a-vis citizens.

systems. More recently, and especially in the most recent years, this institution has become part of the internal structures of many countries, including Kosovo and Turkey. This institution is not always found under the name of Ombudsperson, but under different titles: “*Avokat i popullit*”/”*Halk Avukatı*” in Kosovo, “*Kamu Denetçiliği Kurumu*” & “*Arabulucu*” in Turkey, “*Narodni pravobranilac*” (people’s rights’ protector) in Macedonia, “*Zaštitnik ljudskih prava i sloboda*” (Protector of Human Rights”) in Montenegro, or “*Human Rights Defender*” in Armenia, but the purpose, function and mandate of the institution, related to human rights, is very similar to what was first created and institutionalized in Sweden, namely the Swedish Ombudsman.

Generally, the Institution of Ombudsperson, in any given country, represents and protects human rights infringed upon by legal acts, action or omission of state bodies. Therefore, it bears an identical purpose with state and international human rights bodies, including competent judicial bodies, such as the European Court for Human Rights, and the Constitutional Court in deciding upon individual claims. Nevertheless, the difference between the Ombudsperson and other bodies/institutions, and especially with the Constitutional Court, in protecting human rights and freedoms, is visible in terms of procedure, decision-making and binding power of decisions.

Both in Kosovo and in Turkey, the Institution of Ombudsperson – People’s Advocate, was established following the most recent societal developments, assuming a mandate in protecting individual rights and freedoms against violations by state bodies. This institution also promotes respect for human rights and fundamental freedoms, enshrined in one of the most essential chapters of the constitution in any democratic country, therefore, setting from the very existence of the institution, the Ombudsperson or the People’s Advocate, as called in Kosovo, serves not only to protect, but also to promote rights and freedoms as guaranteed by international treaties. The first indications of such an institution in Kosovo are found during the Socialist regime, in 1974/1975, when Kosovo had acquired the status of an Autonomous Province. Since then, an independent body called the Social Advocate of Self-Government, the mandate of which was to protect rights of employees in the then self-government system, and socially-owned property. Be it as it may, the Ombudsperson of today is not a legacy of such a body and enjoys a wider mandate in protecting human rights and freedoms.

The Ombudsperson in the Republic of Kosovo, since its establishment by a Regulation in 2000, establishing the Institution of Ombudsperson in Kosovo,¹ has passed through a full decade of existence and function. According to this Regulation, the Institution of Ombudsperson provided adequate mechanisms for reviewing and correcting errors and actions which represent an abuse of power by the Interim Civil Administration in Kosovo or any other abuse by any central or local institution, as well as for promoting and protecting rights and freedoms of all natural persons on the territory of Kosovo and even abroad. This institution was given the independent competence to receive complaints, from the introduction of the act, to investigate and provide good services by granting preventive measure and providing recommendations and advice on issues related to the violation of human rights and freedoms.

Legal acts of the most recent years, which have only repeated, reinforced and restructured the Institution of Ombudsperson to a special legal category, as provided by constitutional and legal provisions, namely the Constitution of the Republic of Kosovo and the Law on the Ombudsperson, regulating the role, relevance and status of this institution. According to

1 UNMIK Regulation no. 2000/38, of 30 June 2000, on the Establishment of the Ombudsperson Institution in Kosovo, Sections 1, 3.2 and 4.1. the first ombudsperson appointed in Kosovo was not a Kosovo citizen, since Section 6 of the Regulation provided that the Ombudsperson shall be an eminent international figure of high moral character, impartiality and integrity, who possesses a demonstrated commitment to human rights and the rights of minorities and who is not a citizen of the Federal Republic of Yugoslavia, of a state that was part of the former Yugoslavia or of Albania, appointed by the Special Representative of the Secretary-General (SRSG) for a term of two years. Upon proposal of the Ombudsperson, the Special Representative of the Secretary-General appointed one international and two local Deputy Ombudspersons. This Regulation was amended on 15 April 2003, only in relation to competencies and positions of Deputy Ombudspersons, entering into force on 11 July 2003. Further, the two Regulations were superseded by UNMIK Regulation no. 2006/06, on the Institution of Ombudsperson in Kosovo, of 16 February 2006. According to this Regulation, the name was changed from Ombudsperson to People’s Advocate (in Albanian), and the protection and promotion of human rights and freedoms of permanent citizens of Kosovo and natural persons was further extended to rights of legal persons acting in the territory of Kosovo. The Regulation 2006/6 was further amended by UNMIK Regulation no. 2007/15, of 19 March 2007, only relating to the composition of the Institution of Ombudsperson (Ombudsperson and four deputies), and mandate as well as their selection.

constitutional provisions of the Republic of Kosovo², this institution is an independent state body, which is independent in exercising its duties, in the sense that it does not allow any instruction or intervention by other bodies, institutions or authorities which exercise powers, thereby monitoring and protecting individual rights and freedoms against unlawful and improper actions or omissions of public bodies. All other bodies, institutions and authorities exercising legitimate powers in Kosovo are bound to respond to demands of the People's Advocate and present all documents and information required by Law. Constitutional provisions further provide that the Ombudsperson is entitled to issue recommendations and propose measures, if it notes violations of human rights and freedoms by public administration bodies and other state bodies.³ According to the Law on the Ombudsperson⁴, these "*provisions apply to protect the rights, freedoms and interests of all persons in the Republic of Kosovo and abroad from illegal actions or failure to act of the bodies of public authorities of the Republic of Kosovo*". The purpose, scope and detailed powers and responsibility of the Ombudsperson, including the Ombudsperson's competency to refer cases to the Constitutional Court, are provided by legal provisions. Nevertheless, one may argue that the competencies of the Ombudsperson in relation to referring cases to the Constitutional Court are best determined by constitutional provisions and the Law on the Constitutional Court, since they provide in detail the cases or issues in which the Ombudsperson enjoys jurisdiction, and in which the Ombudsperson may appear as an authorized party before the Constitutional Court. All issues that are not related to cases, when it is required to review and decide on "*the issue of compliance of laws, President decrees and Prime*

2 The Constitution of the Republic of Kosovo, entered into force on 15 June 2008. See Chapter XII, Independent Institutions, Articles 132-135. In its Article 135.4, the Constitution also provides for the right of the Ombudsperson to refer cases to the Constitutional Court, in compliance with provisions of the Constitution.

3 Constitution of the Republic of Kosovo, entered into force on 15 June 2008, see article 132-135.

4 Law Ombudsperson no. 03/ L-195, 22 July 2010, a law which superseded all legal rules related to the Ombudsperson Institution in force before the entry into force of this Law. This Law repelled UNMIK Regulation no. 2000/38 establishing the Ombudsperson Institution in Kosovo, of 30 June 2000, UNMIK Regulation no. 2006/6 on the Ombudsperson Institution in Kosovo, of 16 February 2006, and UNMIK Regulation no. 2007/15 amending the UNMIK Regulation 2006/6 on the Ombudsperson Institution in Kosovo, of 9 March 2007, and all other provisions in contradiction to this Law.

Minister's Orders, Government Regulations, with the Constitution; and compliance of Municipal Statutes with the Constitution"⁵, for the Constitutional Court, represent a legal ground for finding a referral of the Ombudsperson inadmissible.

Comparative Aspects of the Ombudsperson's Mandate

The idea of establishing the Ombudsperson Institution was embraced by a number of countries. Also the functions, authorizations and competencies are more or less similar in these countries. The Ombudsperson Institution in Turkey is one of the youngest institutions, since its establishment was provided by constitutional amendments and the Law on the Ombudsman Institution⁶; independently of the legal basis and establishment of the Institution by law, it appears that the implementation of the Law was delayed even in appointing the first Ombudsperson in Turkey to lead this important institution for rights and freedoms.

Generally, legal provisions on the mandate of the Ombudsperson in Turkey are very similar, or essentially not very different from legal provisions determining the mandate of the Ombudspersons in Kosovo, Macedonia, Albania and Montenegro. Therefore, as one may deduct from the legal provisions on the mandate of the Turkish Ombudsperson, it is safe to conclude that the institution is vested with the role of guarding the citizens' rights and fundamental freedoms, thereby ensuring the highest possible extent of accountability and responsibility of public and state bodies, in case such human rights and freedoms are violated or infringed upon by such bodies. The role of the Ombudsman is to examine, investigate and make recommendations on all kinds of abuses of human rights as it is known that the Ombudsman is dedicated to doing justice based on human rights. Yet, being relatively a young institution, the efficiency of the Ombudsperson in the protection of human rights in Turkey is subject to the test of time.

The mandate of the Montenegrin Ombudsperson, who is entitled 'Defender of Rights and Freedoms',

5 See Article 113, items 1 and 2, the Constitution of the Republic of Kosovo.

6 Law on the Ombudsman Institution in Republic of Turkey, adopted on 14 June 2010, (The original name of the law: "Kamu Denetçiliği Kurumu Kanunu"-No:6328). The first Ombudsman in Turkey was elected by the Parliament on November, 27, 2012.

is laid down in the Constitution of the Republic of Montenegro, Article 81⁷, which provides that the Defender of Rights and Freedoms is an independent body, competent to take all measures to protect human rights and freedoms. This body is also entitled to initiate proceedings before the Constitutional Court in reviewing the constitutionality of laws, other legal acts and international treaties, in accordance with Article 19 of the Law.⁸ The Defender of Human Rights and Freedoms, according to Article 49.3 of the Law on the Constitutional Court of Montenegro⁹, is entitled to refer cases being proceeded by it to the Constitutional Court, if agreed by the applicant. As one may see, as per legal provisions, the Montenegrin Ombudsperson enjoys a wider competency in comparison with the Kosovo Ombudsperson.

In Macedonia, the Ombudsperson Institution is entitled “*Narodni Pravobranilac*”, and its mandate is provided for by constitutional provisions, Article 77 and Amendment XI of 2001¹⁰, stipulating that the People’s Advocate shall protect constitutional and legal rights of the citizens, when violated by state administrative bodies and other public bodies and organizations. Also, the Law on Ombudsperson¹¹ foresees that this institution shall be independent and mandated to protect citizens and other persons against acts, actions and omissions of state bodies, organizations and public authorities, by taking measures for the protection of such rights. Article 12 of the Rules of Procedure of the Constitutional Court of Macedonia¹² provides that any person (including the People’s Advocate) may initiate proceedings before the Constitutional Court, while Article 55.2 provides that the Constitutional Court may invite the People’s Advocate to hearing sessions for reviewing the protection of human rights and freedoms.

Hence, as one may derive from the relevant legal provisions, in Montenegro and Macedonia, special powers of the People’s Advocate to put in motion the Constitutional Court are larger. While the Ombudsperson Institution is an authorized party to refer issues of compliance of legal acts with the Constitution in Kosovo, or in Albania to refer cases to the Court if legal acts are suspected of violating human rights, in Macedonia and Montenegro, the competency of this institution includes also the authorization to refer a constitutional violation to the Constitutional Court on behalf of individuals.

As to the People’s Advocate in the Republic of Albania, the legal status and constitutional and legal provisions, and the mandate are more or less similar. Constitutional provisions – Articles 60-64 - provide for the mandate of the People’s Advocate, and the procedures for appointment and dismissal, while Article 134, item dh), lays down the competency to initiate proceedings before the Constitutional Court¹³. The internal organization, powers and other details are provided for by the Law on the People’s Advocate.¹⁴ According to this Law, the People’s Advocate protects individual rights, freedoms and legitimate interests against improper and unlawful actions and omissions of public administration bodies, or third parties acting on their account, meaning that it exercises its activities to protect human rights and freedoms. Article 25 of this Law provides for the entitlement of the People’s Advocate to make legislative recommendations in cases in which the People’s Advocate notes that the content of a law or other normative acts and their non-implementation create a possible violation of human rights as recognized by the Constitution or other laws, and to make recommendations to bodies with a legislative function to propose amendments to such laws and acts. It is important to emphasize the competency of the People’s Advocate, which is directly related to the Constitutional Court, to put in motion the Constitutional Court by filing a request for abrogating legal acts, if their content or even their non-implementation may create conditions amounting to a violation of human rights.

7 Decision on Promulgation of the Constitution of Montenegro, published in the “Official Gazette of Montenegro”, no. 1/2007, of 25.10.2007 (Odluka o proglašenju Ustava Crne Gore, objavljena u «Službenom listu Crne Gore», br. 1/2007 od 25.10.2007 godine).

8 Law on Defender of Human Rights and Freedoms of Montenegro, of 29 July 2011; no. 01- 966/2.

9 Law on the Constitutional Court of Montenegro, published in the Official Gazette of Montenegro”, no. 64/2008 of 27.10.2008.

10 Constitution of the Republic of Macedonia & Amendments to the Constitution of the Republic of Macedonia, V, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII and XVIII, 16 November 2001, Official Gazette No. 91/ 2001.

11 Ombudsman Law of the Republic of Macedonia, 10 September 2003, No. 07-4502/1.

12 Rules of Procedure of the Constitutional Court of the Republic of Macedonia (Delovnik na Ustavniot sud na Republika Makedonija), on 9 nwntr 1992, no. 394/92. See Article 12.

13 Constitution of the Republic of Albania, amended by Bill no. 9675, dated 13.1.2007 and Bill no. 9904, dated 21.4.2008, see Articles 60-64 and Article 134.

14 Law on the People’s Advocate, Law no. 8454, dated 4.2.1999, amended by Law no. 8600 dated 10.04.2000, amended by Law no. 9398, dated 12.05.2005.

As another comparison, a special competency of the People's Advocate in Kosovo is connected to the authorization as authorized party to refer cases to the Constitutional Court. In an effort to interpret and clarify professionally and legally this competency of the Ombudsperson in Kosovo, one must emphasize that the referral of such cases to the Constitutional Court is always related to laws, decrees or regulations which are suspected to reduce the human rights and fundamental freedoms guaranteed by the Constitution. In such cases referred to the Constitutional Court by the Ombudsperson, there cannot be a claim of a direct factual violation of human rights and there cannot be an individual referral, but only a referral by the Ombudsperson in relation to the non-compliance of a Law, Presidential Decree and Governmental Regulation which are suspected of reducing the human rights and freedoms guaranteed by the Constitution, and any violation/infringement thereof in the future. This kind of procedure before the Constitutional Court, and such a review pertains to a category of preliminary/preventive measures in protecting human rights, and is considered to be an abstract control of constitutionality of legal acts. Such abstract control is defined otherwise by legal theory and science as "ex post" control of legal provisions.

More precisely, these are cases in which the legal act is issued and approved, but to ensure that the legal act does not limit or violate human rights and freedoms, or in the worst case, when the legal act does violate human rights and freedoms, the Ombudsperson, by referring the case to the Constitutional Court, protects rights and freedoms, and informs that implementation of pertinent legal provisions is in violation of human rights guaranteed by Constitution.

Constitutional Jurisprudence and the Ombudsperson of Kosovo

For a complete and clear overview of the participation of the Ombudsperson in legal practices of Constitutional Courts, we have used the records and analysis of cases before the Constitutional Court of the Republic of Kosovo. According to the study, in the four, or respectively three, years of its performance, despite the relatively modest number of cases, the Ombudsperson has been involved in the Constitutional Court proceedings. Cases referred by the Ombudsperson to the Constitutional Court in total are 4, while in 6 ot-

her cases, it appears as an interested party.¹⁵ It must be stated that the constitutional practice in Kosovo has not only consolidated the role of the Constitutional Court, which is the guardian of the Constitution and compliance of legal provisions therewith, but in every case of deciding upon the constitutionality of legal provisions, it has also demonstrated its ability of influencing the transformation of legal provisions from inadequate and negative provisions to positive provisions, always in interfering with the temporal effects of existing legislation".

Ombudsperson: Applicant Referring Cases to the Constitutional Court

In four cases which the Ombudsperson has referred to the Constitutional Court, or has referred the relevant claims further, they were registered by the Constitutional Court as Case KO98/10, Case KO119/10, Case KO148/11 and Case KO97/12. The Constitutional Court of the Republic of Kosovo had rendered a decision, namely a Judgment in Case KO119/10¹⁶. The referral was filed by the Ombudsperson, thereby demanding the constitutional review of Article 14, paragraph 1.6, Articles 22, 24, 25 and 27 of the Law on Rights and Responsibilities of Assembly Members, no. 03/L111 of 4 June 2010. The circumstances of the referred case, or the object of the case was the demand of the applicant to review the constitutionality of relevant articles and the demand to annul certain articles of the Law on Rights and Responsibilities of Assembly members, no. 03/L-111. The applicant claimed that the provisions of this Law allowed the Kosovo Assembly Members to enjoy pensions which are more favourable than any other pension benefits, and guaranteed supplementary pensions to certain categories of Members of Assembly, and allowed them the possibility of returning to their previous employment, allowing them security in terms of employment. According to the applicant, all these legal provisions first and foremost violate the constitutional principles of equality and non-discrimination, thereby deviating in the largest extent possible from the general principles of issues related to pensions.

¹⁵ Cases: KO 98/10, KO 119/10, KO 148/11, KO 97/12, in which the Ombudsperson is the Applicant; and cases: KI 39/11, KO29/12 and 48/12, KO 61/12 and KO 58/12 and KI 39/11, in which the Ombudsperson is party to the procedure, upon notification by the Constitutional Court.

¹⁶ Judgment, No. KO 119/10, of 8 December 2011 Ref.no.: AGJ 165/11, Constitutional Court of the Republic of Kosovo.

The reasoning of the Constitutional Court was extended in this case KO119/10, not only in terms of admissibility of the referral/case, analysis of legislation and analysis of decisions of other constitutional courts, but also in reasoning about the substance of the referral. In relation to the substance of the case in Judgment KO11/10, the Constitutional Court had grounded its reasoning on the legal premise that the whole legislation is assumed to be constitutional, until proven otherwise. While the competency of the Constitutional Court was the constitutional review of a decision or legal act, in this case a legislative act, or, respectively, provisions of the Law no. 03/L-111, judges of the Constitutional Court grounded their interpretation on the constitutional principle of full independence without political interference. Therefore, the impression of the people of a country, but also elaborated in legal theory, that constitutional courts are generally political courts, was struck down in this case, because the Court did not decide in favour of daily politics, or in favour of the political elite. According to the review and conclusions of the Constitutional Court, Article 14, paragraph 1.6, Articles 22, 24, 25 and 27 of the Law no. 03/L-111, the law challenged by the Applicant, were not in compliance with constitutional provisions, since public authorities, in this case the Assembly of Kosovo, should respect the constitutional norms, which determine the principles of equality before the law for all persons, and fully observe human rights and fundamental freedoms, while, at the same time, protecting them.

Case KO119/10 is a specific case, in terms of its review, because it is connected to repeated reviews of the special feature of imposing an interim measure, which was extended three times in a row. This interim measure was imposed by four decisions of the Constitutional Court¹⁷, until the matter was decided on its merits by rendering a judgment. The decisions on interim measures were aimed at the immediate suspension of the application of the challenged articles. The reasons for extending the interim measure were given by the Constitutional Court, in consideration of the fact that the Assembly of Kosovo was dissolved at the time when the interim measure was imposed, and

17 Decisions of the Constitutional Court of the Republic of Kosovo regarding case KO 119/10: Decision on application of Interim Measure, dated 17 December 2010, Ref.no.MP79/10; Decision extending interim measure, of 21 March 2011, Ref. no. MP 102/11; Decision extending interim measure, 15 June 2011, Ref.no. MP 102/11; and Order extending interim measure, 20 October 2011, ref.no. 144/11.

pending the establishment of the new legislature, the short timeline in terms of giving the Assembly time to provide its replies, and the time needed by the KCC in reviewing the replies of the Assembly. Despite the time given to the Assembly to review the relevant articles, and since the challenged articles were not reconsidered by the Assembly, the Constitutional Court reviewed the case, and reached a merit-based judgment, thereby finding Articles 14 (1.6), 22, 24, 25, 27 of the Law on Rights and Responsibilities of Assembly Members no. 03/L-111 null and void. Thus, the Constitutional Court had left in force the provisions of the last decision on the interim measure, namely it provided that the Interim Order of the Constitutional Court shall be a Permanent Order of the Constitutional Court. This order provided for the suspension of the challenged articles as mentioned above. In essence, the decision on the referral was concentrated on the claims of the applicant, the insufficient reasoning of the Assembly, and the Assembly exceeding its discretionary power to approve the relevant articles as a legislative authority. Also, the Constitutional Court of Kosovo made a comparison with MP pensions in other countries, and the general social and economic conditions in such countries. More specifically, social and economic circumstances in Kosovo were those ignored by the Assembly, while failing to argue the compensation of such supplementary pensions, other types of pension and financial and material benefits of Members of Assembly. These circumstances were found to be closely related to social justice which is proclaimed in essential constitutional provisions as a value of the state which, amongst others, include equality, non-discrimination and respect for human rights and freedoms. In this manner, the merit-based ruling of the Constitutional Court clearly concluded that the Articles approved by the Assembly were not in compliance with the constitutional principles, and that such legislation may affect individuals, without having a legitimate aim, and without being proportionate to the rights of other citizens of Kosovo. Considering that the replies of the Assembly to the Constitutional Court were insufficient and failed to provide any additional argument, the Constitutional Court also concluded that “*the legislation providing direct special benefits to the Members of Parliament must be based on reasons supported by clear and legitimate public aim.*”¹⁸ It was this decision of the

18 JUDGMENT in case no. KO 119/10, Applicant Ombudsperson of the Republic of Kosovo, dated 08.12.2012, for more see paragraph 52-59.

Constitutional Court that clarified that the legislative authority of the Assembly always has limitations, if it fails to exercise its legislative function in the best interests of the state. The decision also drove to the surface the fact that the Ombudsperson has an active role in referring cases to the Constitutional Court in relation to legal provisions which violate the human rights and fundamental freedoms, and provisions which fail to protect the interests of the state. This was a “good case” to prove “*locus standi*” – testing the legal capacity of the Ombudsperson in filing a referral. Furthermore, the message of each paragraph of the Constitutional Court was that legal acts of the Assembly must correspond with essential constitutional principles/provisions, and provisions guaranteeing human rights and fundamental freedoms.

Another case, KO97/12 is a referral similar to the above mentioned KO119/10, in which the Ombudsperson demanded from the Constitutional Court to review the constitutionality of Articles 90, 95 (1.6), 110, 111 and 116 of the Law on Banks, Micro-Financial Institutions and Non-Banking Financial Institutions, no. 04/L-093, of 12 April 2012, thereby demanding annulment and to impose an interim measure to suspend the application of the Law. In this case, the claims of the Ombudsperson were that the challenged articles are not in compliance with the constitutional provisions of Article 44 – Freedom of Association, Article 46 – Protection of Property, Article 10 – Market Economy and Free Competition. The Constitutional Court, before reaching a merit-based decision, rendered a Decision on Interim Measure¹⁹, thereby emphasizing the importance of civil society and NGOs as essential components of democratic development, and thereby assuming that the application of the above mentioned Articles of Law no. 04/L-093 may cause irreparable damages to the functioning of civil society and democracy in the country. The suspension of the challenged articles was conditioned by the interim measure imposed until 31 January 2013, without prejudicing the final outcome of the case/referral.

In this discourse, this case also matches with the conclusion that “The Constitutional Court has the competence to suggest possible ways in order to overcome the unconstitutionality which has been identified; the public authorities and institution (as in

this case, the Assembly of Kosovo), as the addressees of this decision, must react within the time-limit set by the Court for the enforcement and observance of its decisions”.²⁰ Another conclusion, which is very appropriate in the circumstances of the case, is the assistance provided by the Constitutional Court to the legislator, defined as follows: “in all systems, in accomplishing their functions, constitutional courts have always in some way, assisted the Legislator. Subsequently, they broadly interpreted the constitution and the statutes in conformity with it, giving directives or guidelines to the Legislator to correct legislative defects”.²¹

The two other cases filed by the Ombudsperson, Cases KO148/11 and KO98/11, were inadmissible cases, because they were resolved by the Constitutional Court by a decision on inadmissibility.

One case, KO148/11²², is a case in which the matter before the Constitutional Court was referred to it by an authorized party, but was not raised in a lawful manner, and the case was found incompatible “*ratione temporis*” with the Constitution. The Court found that the referral of the People’s Advocate was made before the Constitutional Court after six months of entry into force of the challenged Law. The object of Case KO148/11 was constitutionality review of Article 11, paragraph 1, Article 32, paragraphs 1 and 2, Article 34, paragraph 2, and Article 38, in connection with Articles 11, 32 and 34 of the Law on the Ombudsperson, Law no. 03/L-195, of 27 August 2010 and their annulment, thereby demanding the application of an interim measure to suspend the application of Article 32, paragraph 1 of the same Law.

20 Puskas Valentin Zoltan, & Benke Karoly., “Enforcement of the Constitutional Court Decisions, page, 38.

21 Brever –Carrias, Allan R., “Constitutional Courts as Positive Legislators” –A Comparative Law Study, Chapter 3, Constitutional Court’s interference with the Legislator or existing legislation, page 44.

22 DECISION ON INADMISSIBILITY, Case no. KO148/11, Applicant: Ombudsperson of the Republic of Kosovo, Assessment of Constitutionality of Article 11, paragraph 1, Article 32, paragraphs 1 and 2, Article 34, paragraph 2, and Article 38, in connection with Articles 11, 32 and 34 of the Law on Ombudsperson no. 03/L-195, of 27 August 2010, and Request for Interim Measure.

19 Decision of the Constitutional Court of the Republic of Kosovo; Decision on Interim Measure, regarding the case KO 97/12, dated 24 December 2012.

In the next case, KO98/11²³, the Ombudsperson had failed to refer the case in conformity with the requirement of being an authorized party. The Court found that the challenged decision of the Municipal Assembly does not represent a Municipal Statute, according to Article 113.2.2 of the Constitution, because such decision was an individual act rendered specifically for the individual. The Constitutional Court rendered a decision on the inadmissibility of the referral, because the case was not lawfully referred to it by an authorized party.

The Ombudsperson claimed that the individual was denied his rights to use the apartment. This denial, according to the Ombudsperson, was a violation of the rights under Article 36 (Right to Privacy) in connection with Article 8 (Right to Family Life) of the Constitution, Article 14 (Prohibition of Discrimination) ECHR, in connection with Decision no. 01/132, of the Municipal Assembly of Shtime, of the complainant. The violations alleged by the Ombudsperson could not be reviewed by the Constitutional Court, because it considered and concluded that not only was the applicant an unauthorized party, but also the issue raised for review was not under the jurisdiction or authorization of the Ombudsperson to refer to the Constitutional Court. Despite the aim of the Ombudsperson to raise a constitutional claim, in which the violations claimed and individual interests of the person were presented, the Constitutional Court could not find any reason why the individual could not file a referral before the Constitutional Court for claimed allegations, and therefore did not review the contents of the violations claimed.

Ombudsperson as a Party to the Conflict

Other cases in which the Ombudsperson was involved in Constitutional Court procedures were cases in which the Ombudsperson was invited to participate by the Constitutional Court on these cases. The Constitutional Court, in accordance with legal provisions, can allow natural and legal persons, namely individuals and public authorities, to comment on pertinent issues relating to them and the referral – the case before the Constitutional Court. Also, the inte-

23 DECISION ON INADMISSIBILITY in the case KI 98/10, Applicant Ombudsperson of the Republic of Kosovo: Constitutional Review of decisions 01 no. 06/837, of 16 April 2009, and Npi-01/132, of 30 April 2009, of the Municipal Assembly of Shtime. For more, see paragraphs 29 – 36 of the Decision.

rested parties invited by the Constitutional Court are allowed to provide their opinions and comments to the case. From the possibilities mentioned above, the participation of the Ombudsperson in Constitutional Court proceedings is evident, while the statistics of cases proceeded by the Constitutional Court during the period 2009-2012, show a total of seven (7) cases, four out of seven are already decided: decision of joined cases KO29/12 & KO48/12, decision regarding case KI39/11 and decision regarding case KO61/12, while three joined cases KI58/12, KI66/12, KI94/12 were in process of deliberation till the end of the year 2012.²⁴ More over two of the cases/referrals were joined (KO29/12 & KO48/12), since they concerned the same issue and the same party/person filing the referrals, while three cases were joined because the subject matter and the violations claimed by the three applicants were similar. It is important to emphasize that the replies or remarks and comments of the Ombudsperson were reviewed by the Constitutional Court of Kosovo and appreciated only for as much as they served the purposes of the Constitutional Court.

Two referrals filed with the Constitutional Court by the President of Assembly of the Republic of Kosovo to assess whether the proposed constitutional amendments limit the rights and freedoms guaranteed by Constitution, were reviewed by the Constitutional Court as joined and registered as Cases KO29/12 and KO48/12, and were decided by a single judgment.²⁵ This judgment had its specific features, in terms of: a) the participation of interested parties in the proceedings, including the Ombudsperson; b) the joining of referrals; c) the abstract *ex ante* constitutional control; d) *extended constitutional control and other constitutional provisions and e)* an extensive reasoning.

24 Cases registered with the Constitutional Court of the Republic of Kosovo: Cases KO29/12, KO48/12, KO61/12, KI39/11, KI39/11, KI48/12, KI58/12, KI66/12, and KI94/12. Records were extracted from the CDMS system of the Court. Cases KO29/12 & 48/12 and Case KO61/12, decided by Judgment.

25 Judgment, Ref.no. AGJ284/12, dated 20 July 2012, of the Constitutional Court of the Republic of Kosovo, Cases KO29/12 and KO48/12, in relation to proposed constitutional amendments, submitted by the President of the Assembly of the Republic of Kosovo, on 23 March 2012, and 4 May 2012, for more, see paragraphs 12, 14, 57 and page 42, under II-quote "...this Judgment refers only to Annex B", which in fact is only the referral registered as Case KO48/12 by the Constitutional Court of the Republic of Kosovo.

Participation of the Ombudsperson

Participation of the Ombudsperson was requested by a notification letter addressed to him by the Constitutional Court. The Ombudsperson replied by providing remarks and comments to the subject matter of the case, which was related to constitutional amendments as proposed by the Constitutional Committee of the Assembly.

The Ombudsperson replied with two documents, thereby commenting on the two amendment packages, while the Court reviewed both documents containing the replies of the Ombudsperson, related to the constitutional amendments in the Case KO48/12. The replies were also connected to the amendments pertaining to the status of the Ombudsperson as well. Nevertheless, a specific feature of the Ombudsperson's replies were the amendments related to the powers of the President, which may in certain cases be transferred to the Acting President. The Ombudsperson considered that the rights and duties assigned to the President should be transferable to the Acting President, since, if that would be the case, it would mean a limitation of the rights and fundamental freedoms.

Considering the mandate of the Ombudsperson in exercising his/her functions, one of which is to provide recommendations in cases in which he/she considers that public authorities have violated human rights and fundamental freedoms, we consider that his/her role is not confined to that. Comments and remarks given on the proposed constitutional amendments are an example of the fact that protection of human rights and fundamental freedoms may extend further, even in cases in which such rights and freedoms have not been violated yet, as was the case in the replies addressed to the Constitutional Court, in the Ombudsperson's status as interested party in the Constitutional Court proceedings.

Joining of Referrals

Joining of referrals is a court practice applied in regular courts, but also in the Constitutional Court. In such occurrences, each court reviews the contents of each joined referral individually, but reaches a single decision for joined referrals. The case law of the Constitutional Court of Kosovo also recognizes the occurrence of joining referrals, as one can see in this case. Independently of the practice, only one referral from the two joined referrals was essentially reviewed as to its contents. In simple terms, only the amend-

ments proposed in the second group, registered as Case KO48/12, the so-called "Annex B", were reviewed by the Constitutional Court of Kosovo as to their contents.²⁶ In reality, these two cases registered by the Constitutional Court constitute only one single case, since the registration of additional evidence as Case KO48/12 should have been attached to the file of Case KO29/12, and not have been registered as a new case. Furthermore, both cases or referrals were filed by the same authorized party, namely the President of the Assembly of Kosovo, and concerned the same subject matter – review, namely, whether the proposed amendments limit the rights and freedoms guaranteed by Chapter II of the Constitution; nevertheless, the "error" may have occurred during the registration of additional documents as part of the internal procedure of the Court. The files forwarded by the Assembly of Kosovo may have contributed to this "error", since there were no indications that these files consisted of documents related to the case previously referred to the Constitutional Court.

Case KO29/12 was factually and legally reviewed only in terms of the admissibility criteria, related to the "*ratione personae*" and "*ratione temporis*" criteria, while the "*ratione materiae*" issue or the contents of the amendments in this referral, or the first group of amendments, were not reviewed. Only the second group of amendments, i.e. Annex B, so called by the Constitutional Court, was submitted by the Applicant for review and registered as Case KO48/12.

Furthermore, the registration of the two cases, although emanating from the same applicant, and concerning the same subject matter, was decided by a single decision of the Constitutional Court.

Abstract "Ex Ante" Constitutional Control

Abstract "ex ante" constitutional control exercised by the Court in reviewing the referral by the President of the Assembly is an obligation derived from constitutional provisions. The Constitution holds that the President of the Assembly may refer constitutional amendments proposed by the Assembly before their approval by it, with a view to concluding whether the amendments proposed limit the rights and fundamental freedoms.²⁷ It is worth emphasizing the role

26 Ibid (Judgment, Ref.no. AGJ 284/12, dated 20 July 2012), paragraph 72, "The Court shall now review each amendment proposed in the second group, as referred in Annex B".

27 Constitution of Kosovo, cited, Article 113.9.

of constitutional control of the Constitutional Court exercised regarding legal acts, in this case constitutional amendments, since “a state of law is a product of a codified constitution, but also of judicial control of constitutionality, hence a constitutional court, rather more than it is believed, is able to exercise constitutionality control and consolidate the constitutional democracy”²⁸. In this case, the Constitutional Court once more secured the guarantee of democracy, in the sense that it did not allow the proposed constitutional amendments to be inconsistent with the essential principles of the Constitution and the fundamental principles of human rights and freedoms as guaranteed by international treaties. It did not allow the amendments to be incoherent with the recent development of the Kosovo society. Not only did the Constitutional Court exercise judicial control of the constitutionality of the proposed amendments, but it went further, not only confining itself to the constitutional control of the amendments’ compliance with Chapter II on rights and fundamental freedoms, but in fact, the Constitutional Court exercised an extended constitutional control on other constitutional provisions on human rights and freedoms as well, thereby preserving the so-called “constitutional spirit”.

Extended Constitutional Control

Extended constitutional control is related to *other constitutional provisions related to rights of communities and their members*. This was reflected also in the reasoning of the Judgment, in which apart from the human rights and freedoms as provided in Chapter II of the Constitution, the Court took into consideration the Rights of Communities and their Members, and other rights that may apply in the process, because they were not necessarily all provided in Chapter II only.²⁹

By this decision, the Constitutional Court strongly preserved its role as a protector and guardian of the Constitution. The decision clearly expressed the extensive assessment of amendments which may affect not only the rights and fundamental freedoms of citi-

zens, but also specific rights of communities and their members. The Court did not confine itself to those, it went further to assess the constitutionality of the proposed amendments regarding rights and fundamental freedoms.

Extensive And Voluminous Reasoning

Extensive and voluminous reasoning was also another special feature of the constitutional jurisprudence of Kosovo. In its decision the Court reflected extensively and in an elaborated manner on each amendment, and repeated each conclusion. The Judgment contained 274 paragraphs and a total of 42 pages, including as attachments Annexes A and B, all amendments referred for review by the Constitutional Court. In this context, the judgment contained also detailed replies of interested parties, including the Ombudsperson. The decision also included and emphasized the consideration of views of the Ombudsperson on the constitutionality of the new Article proposed, relating to the “flaw” of the amendment which provided for the duty of the Acting President to appoint Judges and Prosecutors which, according to such views, would affect the administration of justice and would limit the rights and freedoms.

Ultimately, if the question is put whether the Ombudsperson has been active in referring cases to the Constitutional Court, the whole-hearted and fully objective answer would be given by the survey of cases referred by the Ombudsperson to the Constitutional Court during the period of research. The conclusion would be: poor activity of the Ombudsperson in referring cases to the Constitutional Court. Referral of four cases does not show any active role of the Ombudsperson in referring cases to the Constitutional Court, or any high representation of cases filed before the Constitutional Court. One must also emphasize that two of such referrals were rejected as inadmissible, as quoted above in the paper. In this context, the conclusions do not cover the participation of the Ombudsperson as an interested party, because that would not reflect the real situation, and it would not be in compliance with the authorizations as per the Constitution. Therefore, it may be concluded that constitutional provisions also have contributed to the poor performance of the Ombudsperson in procedures before the Constitutional Court, since its jurisdiction is limited. Constitutional provisions do not authorize the Ombudsperson to be an authorized party in defending rights and funda-

28 Zaganjori. Prof. dr. Xhezair, Vorpsi. Dr.Arta, Biba.Ma.Denar, Constitutional Principles and Fundamental Rights in the Jurisprudence of the Constitutional Court (Parime Kushtetuese dhe të Drejta Themelore në Jurisprudencën e Gjykatës Kushtetuese), Tirana, 2012, page 16.

29 See paragraphs 62-64 of the Judgment quoted in Cases KO 29/12 and KO 48/12. Also, for more details, see Articles 57-62 of the Constitution of Kosovo on Community Rights, especially the right of representation in local government bodies.

mental freedoms on behalf of individuals. In fact, independently of the possibility that the Constitutional Court grants to the Ombudsperson the opportunity to provide his/her comments and replies on various issues, an amendment to the Law on Ombudsperson would be required. This amendment would be in the sense of providing for additional authorizations, to the effect that the Ombudsperson would be allowed to be an authorized party to refer individual cases to the Constitutional Court with the consent of the individual. This is due to the fact that this is an institution created solely for the protection, monitoring and promotion of rights and fundamental freedoms, and it complies with its mandate on one hand, while on the other hand, constitutional provisions allow the legislator to provide for additional jurisdiction of the Constitutional Court by law. It is clear that in studying the trends of the Ombudsperson's activity in proceedings before the Constitutional Court, this additional authorization would increase his/her activity in effectively protecting human rights, and would reflect in a more frequent participation in proceedings before the Constitutional Court.

Conclusion

All public authorities exercise their authority pursuant to competencies provided by legal acts, while the same legal acts bind them to exercise their authority in due respect of human rights and fundamental freedoms of individuals. Therefore, basic rights and freedoms are guaranteed and protected not only by statements in legal acts, but also with activities and functioning of public authorities.

The triangle between human rights, Ombudsperson and constitutional justice is the core of the topic and elaboration in this paper. One point of the triangle holds human rights and fundamental freedoms guaranteed by the Constitution – core values of the state's democratic system; on another point, we have the Ombudsperson – an independent body monitoring, protecting and promoting human rights and freedoms; while on the top point of the triangle undoubtedly stand the Constitutional Court and constitutional justice. It is from this perspective that the jurisprudence of the Constitutional Court related to cases in which the Ombudsperson is a party to procedure has been unfolded, features that were pointed out in this paper.

The Ombudsperson Institution, a relatively young institution in Kosovo, the mandate of which is to protect human rights and fundamental freedoms against violations by state authorities, is generally built upon legal provisions regulating the mandate of Kosovo Ombudsperson, which are rather similar to those regulating the mandate of the Ombudsperson in Turkey, Macedonia, Albania and Montenegro. In the recent years, the idea and establishment of the Ombudsperson institution has been embraced by a number of countries in the world.

A special competency of the Ombudsperson is about its authority to refer cases to the Constitutional Court. Kosovo Ombudsperson has this competence too. More specifically, the Ombudsperson may appear as an authorized party in cases of issuance and approval of a relevant legal act, to ensure its compliance with the Constitution, thereby focusing on the act's influence on human rights and fundamental freedoms, and in the worst case, when there is suspicion that the legal act violates human rights and freedoms. By referring the case to the Constitutional Court, the Ombudsperson protects human rights and freedoms, and forewarns that implementation of legal provisions may infringe the human rights as guaranteed by Constitution. In this case, the Court engages in abstract control, which is otherwise known as ex post control of legal acts. In compliance with constitutional authorizations of the Ombudsperson, the Constitutional Court case-law has recorded, from the establishment of this Court and until the end of 2012, out of 520 cases referred to the Constitutional Court, only four cases in which the Ombudsperson had referred the case, and six other cases in which it appeared in the capacity of interested party.

Therefore, it may be concluded that constitutional provisions have also contributed to non-participation of the Ombudsperson to proceedings before the Constitutional Court, since its jurisdiction is limited. Constitutional and legal provisions do not allow the Ombudsperson to be an authorized party in protecting individual rights and freedoms, with the consent of such individual, so that the Ombudsperson may file defense on his/her behalf. In Kosovo's constitutional practice, although the Constitutional Court gives the Ombudsperson the possibility of providing comments and replies to relevant cases, amendments to the Ombudsperson law are required. These amendments would be in line with the additional authoriza-

tion that the Ombudsperson should have in referring individual referrals to the Constitutional Court, by consent of the individual.

The constitutional practice in Kosovo has consolidated the role of the Constitutional Court in each case, in deciding on implementation of the Constitution, and in determining constitutional compliance of legal provisions. It has also demonstrated the role of a guardian of the Constitution, and the ability in influencing the transformation of legal provisions with inadequate or negative content, to positive provisions, always by interfering with the temporal effects of existing legislation. In its decisions, the reasoning of the court was extensive – voluminous and elaborate.

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