THE ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN JUDICIAL PROCEEDINGS: LESSONS FROM THE REPUBLIC OF KOSOVO

Hilmi Jashari
Ombudsperson of the Republic of Kosovo

—

ABSTRACT

The conventional view of National Human Rights Institutions ("NHRIs") tends to emphasize their general lack of executive powers. In the absence of such powers, the persuasive force of reason is thought to be the most important tool available to them. Specifically, by publishing reports and issuing recommendations, the hope is that NHRIs can apply persuasive pressure on other state institutions to take whatever steps are necessary to comply with domestic and international human rights standards. In this Article, the Ombudsperson of the Republic of Kosovo argues for a modification of the conventional view of NHRIs, in favor of a more nuanced understanding of their role. In particular, the experience of the Republic of Kosovo shows that the power to initiate or to participate in judicial proceedings can serve as an invaluable tool for NHRIs in fulfilling their mandate. Litigation through the courts should, of course, not be considered a substitute for the NHRI's more conventional functions; rather, it should be seen as a useful tool that complements and strengthens these functions, by providing an enforcement mechanism and additional incentives for compliance with NHRI recommendations. The Article argues that NHRIs should enjoy at least four specific powers vis-à-vis judicial authorities: (1) the power to refer laws and other normative acts to the Constitutional Court for abstract review; (2) the power to request the annulment of administrative acts; (3) the power to file amicus curiae *briefs in cases pending before the courts; and (4) the power to participate in monitoring the execution of judicial decisions. Finally, the Article argues that in countries with relatively new or less well-established democratic traditions, it is even more important that NHRIs be granted these powers.*

—

INTRODUCTION

One of the chief functions of National Human Rights Institutions (henceforth: "NHRIs") is to submit opinions and recommendations to state authorities on a purely advisory basis. Thus, for example, the so-called "Paris Principles" ("Principles relating to the Status of National

Institutions," adopted by General Assembly resolution 48/134 of 20 December 1993) indicate that NHRIs have the responsibility "[t]o submit to the Government, Parliament and any other competent body, ***on an advisory basis*** . . . opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights" (Paris Principles, "Competencies and responsibilities," para. 3(a); emphasis added). Notably, none of the Paris Principles' provisions indicate that NHRIs should have any enforcement competencies or responsibilities.

This conception of the role of NHRIs is also shared by the European Commission for Democracy through Law (henceforth: "Venice Commission"), which has stated that "the key to the success of the Ombudsman institution among the nations lies in his/her power to convince by reasoning on the basis of law and equity, rather than a power to hand down orders or issue directives" (CDL-AD(2007)020 – Opinion on the possible reform of the Ombudsman Institution in Kazakhstan, adopted by the Venice Commission at its 71st Plenary Session, Venice, 1–2 June 2007, para. 19).

In that same Opinion, the Commission used its conception of NHRIs as fundamentally lacking in enforcement powers to argue that they should have a strictly limited role in judicial proceedings. At one point in the Opinion, the Commission writes (seemingly categorically) that "the institution should not involve itself in litigation or intervention in court cases" (*id.*, para. 12), though two paragraphs later it allows that "the mandate of the Ombudsman or Human Rights Defender should include the possibility of applying to the constitutional court of the country for an abstract judgment on questions concerning the constitutionality of laws and regulations or general administrative acts which raise issues affecting human rights and freedoms" (*id.*, para. 14).

Aside from this limited power, however, the Venice Commission, along with the Organization for Security and Cooperation in Europe (henceforth: "OSCE"), has taken a generally skeptical view of the involvement of NHRIs in judicial proceedings in individual cases. *See, e.g.*, CDL-AD (2011)034 – Joint opinion on the protector of human rights and freedoms of Montenegro by the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights, adopted by the Venice Commission at its 88th Plenary Session, Venice, 14–15 October 2010, para. 39 ("in general, it would seem preferable to . . . exclude the power to intervene in individual cases") (citing CDL-AD(2007)024 – Opinion on the Draft Law on the People's Advocate of Kosovo, adopted by the Venice Commission at its 71st Plenary Session, Venice, 1–2 June 2007, para. 19).

This Article argues for a modification of the conventional view of NHRIs, in favor of a more nuanced understanding of the role they can play in judicial proceedings. In particular, the experience of the Republic of Kosovo, in the decade following the nation's founding, shows that the power to initiate or to participate in judicial proceedings, at multiple levels of the court system, can serve as an invaluable tool for NHRIs in fulfilling their mandate for the protection and promotion of human rights. Litigation through the courts should, of course, not be considered a substitute for the NHRI's more conventional advisory functions; rather, it should be seen as a useful tool that complements and strengthens these functions, by

providing an enforcement mechanism and additional incentives for compliance with NHRI recommendations.

Going beyond the more limited view expressed by the Paris Principles, the Venice Commission, and the OSCE Office for Democratic Institutions and Human Rights, this Article argues that NHRIs should enjoy at least four specific powers or competencies vis-à-vis judicial authorities: (1) the power to refer laws and other normative acts to the Constitutional Court for abstract review; (2) the power to request the annulment of administrative acts; (3) the power to file *amicus curiae* briefs in cases pending before the courts; and (4) the power to participate in monitoring the execution of judicial decisions. These four points will be developed in four respective sections, with detailed references both to concrete cases and to the constitutional and legislative framework of the Republic of Kosovo. For each of these four powers, the Article will cite its constitutional or legal basis, describe at least one illustration of the exercise of that power, and use these illustrations to show how the Ombudsperson's involvement in judicial proceedings was essential to furthering the goal of promoting and protecting human rights. The Article then concludes by arguing that, in countries with relatively new or less well-established democratic traditions, it is even more important that NHRIs be granted these powers.

THE NHRI AS LITIGANT BEFORE THE CONSTITUTIONAL COURT

Let us begin with the most uncontroversial of the ways in which an NHRI may assert itself in judicial proceedings: as a litigant before the domestic Constitutional Court, initiating challenges to the constitutionality of laws and other normative acts. As we saw above, even the Venice Commission, despite its generally negative view of NHRIs' involvement in judicial proceedings, has suggested that "the mandate of the Ombudsman or Human Rights Defender should include the possibility of applying to the constitutional court of the country for an abstract judgment on questions concerning the constitutionality of laws and regulations or general administrative acts which raise issues affecting human rights and freedoms" (CDL-AD(2007)020 – Opinion on the possible reform of the Ombudsman Institution in Kazakhstan, *op. cit.*, para. 14).

In spite of the fact that the ability to challenge laws and other normative acts before the Constitutional Court is a relatively established and internationally recognized competency of NHRIs, the extensive experience of the Ombudsperson of the Republic of Kosovo in this arena may provide some useful lessons on how NHRIs in other countries can leverage this power with maximum effectiveness.

To provide the necessary background, I briefly cite the constitutional basis in Kosovo for the Ombudsperson's litigation before the Constitutional Court. Article 135, para. 4 of the Constitution of the Republic of Kosovo (henceforth: "Constitution") provides that: "The Ombudsperson may refer matters to the Constitutional Court in accordance with the provisions of this Constitution." The qualifier "in accordance with the provisions of this Constitution" is important: it indicates that the Ombudsperson cannot bring just ***any*** case before the Constitutional Court, but only in accordance with constitutional limitations. What are these limitations? They are to be found in Article 113 of the Constitution, which outlines the jurisdiction of the Constitutional Court. Specifically in regard to the Ombudsperson,

Article 113, para. 2 provides that "the Ombudsperson [is] authorized to refer . . . to the Constitutional Court (1) the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government [and] (2) the compatibility with the Constitution of municipal statutes." Thus, as the Court established in one of the Ombudsperson's first cases (Case no. KI 98/10, Constitutional Review of Decisions no. 06/837, dated 16 April 2009, and Npi-01/132, dated 30 April 2009, of the Municipal Assembly of the Municipality of Shtime), the Ombudsperson "is only . . . authorized to submit a request for abstract control to this Court, pursuant to Article 113.2.2 of the Constitution" (*id.*, para. 34), and not on behalf of an individual in a concrete case.

With this background in mind, let us now turn to examine two different cases in which the Ombudsperson's participation in litigation before the Constitutional Court has played an essential role in furthering the goal of protecting and promoting human rights.

In the first case the Ombudsperson challenged a law by which the deputies of the Kosovo Assembly attempted to secure for themselves supplementary pensions that would have been far out of proportion to the pensions enjoyed by ordinary Kosovo citizens (Case no. KO119/10, Constitutional Review of Article 14, paragraph 1.6, Article 22, Article 24, Article 25 and Article 27 of the Law on Rights and Responsibilities of the Deputy, No. 03/L-111, of 4 June 2010). The supplementary pension provided for in the law was set out as follows: "[I]f a deputy has practiced his/her task for at least one mandate and is fifty-five (55) years of age," he or she "realizes a supplementary pension in amount of fifty percent (50%) of the compensation of the deputy. The deputy that has served two (2) mandates . . . realizes a supplementary pension of a deputy in amount of sixty percent (60%) of the basic compensation and the one who served in three and more mandates in amount of seventy percent (70%) of the basic salary" (Law No. 03/L-111 on Rights and Responsibilities of the Deputy, Article 22, paras. 1 and 2).

Following passage of this law, eleven NGOs (see para. 21 of the Court's judgment) petitioned the Ombudsperson, urging him to exercise his right to challenge the constitutionality of the Law before the Constitutional Court. The Ombudsperson accepted their petition and filed the challenge, arguing that the Law in question "enable[s] deputies of Kosovo Assembly to realize pensions that are more favorable than any other pension benefit for the other citizens, and that they are inconsistent with constitutional principles of equality, rule of law, non-discrimination and social justice" (cited in para. 30 of the Court's judgment). The Ombudsperson's complaint was not simply that the pensions that the deputies awarded to themselves were somewhat higher than those of ordinary citizens, but that they were ***disproportionately*** higher. As the Court noted, the Law attempted to "set pensions that will be 8-10 times higher than basic pensions that are also paid by Kosovo Budget" (*id.*, para. 79). This, the Court concluded, was unacceptable from the standpoint of equality before the law, and it therefore annulled the relevant provisions.

There are two important lessons to draw from the Ombudsperson's success in this case. First, the case shows that the power of NHRIs to refer cases to the Constitutional Court can provide a powerful focal point for their cooperation with NGOs in civil society. This cooperation is mutually reinforcing, and it helps both NGOs and NHRIs to achieve results that neither could

have achieved acting alone. Thus, on the one hand, according to the Kosovo Constitution, the eleven NGOs could not themselves have submitted the complaint to the Court, for lack of jurisdiction. They therefore needed the Ombudsperson in order to successfully pursue the annulment of the challenged provisions. This is plainly shown by the factual record of the case. The Court's judgment reveals that at various stages of the legislation's progress through the Assembly, various stakeholders attempted to get the challenged provisions removed or revised. Thus, for instance, as the legislation was working its way through the Assembly, the OSCE submitted comments to the Commission on Legislation and Judiciary recommending that the supplementary-pensions provision be deleted (see para. 14 of the Court's judgment). This effort was unsuccessful. Then, after the law was approved, four of the eleven NGOs mentioned above requested that the President of the Republic not promulgate the law, as would have been his right under Article 80, para. 3 of the Constitution. But this effort was also unsuccessful (see para. 17 of the Court's judgment). It seems, then, that there would have been no way to stop this law from going into effect without the Ombudsperson's having the power to challenge the law before the Constitutional Court: the NGOs could not have achieved this alone.

But on the other hand, NHRIs also need NGOs in cases like these. NHRIs generally receive thousands of complaints from ordinary citizens every year, and are in many countries underfunded and understaffed. Under these conditions, and given the rapid pace with which laws and other normative acts are constantly being approved, it is clear that, without civil society playing the role of evaluating these acts for their compliance with constitutional principles, NHRIs might not even notice the need to file a constitutional challenge in the first place. Organizations in civil society therefore can serve as the eyes and ears of NHRIs in helping them determine when it is necessary to exercise their right to challenge these acts before the Constitutional Court. The case we have been discussing shows that, together, NHRIs and civil society can achieve great results for the promotion and protection of human rights, results that neither could achieve on their own.

The second important lesson to be drawn from this case is that, through their ability to challenge the constitutionality of laws, NHRIs can serve as an effective bulwark against self-dealing by legislators and other institutions charged with issuing normative acts. Of course, neither the Kosovo Constitution nor the constitutions of other states with NHRIs establish the NHRI as the ***only*** party authorized to challenge the constitutionality of statutes and other acts. In Kosovo, for example, this competency is held not only by the Ombudsperson but also by the President of the Republic and the Government. But in cases such as the one we are discussing, in which the members of the Parliament have a close personal interest in the passage of a law, the NHRI is in the best position to file a constitutional challenge. Due to his legally guaranteed independence and to the fact that he operates largely outside the political arena, the NHRI—more so than the President and the Government—would be both more publicly credible and less subject to retaliation by the Assembly for challenging a law that benefits the Assembly's members. In such cases, the NHRI is the best-placed institution to file a constitutional challenge.

The issue of NHRIs' independence is at the heart of the next case we shall discuss. In order to effectively carry out their human-rights mandate, NHRIs must enjoy budgetary, organizational, and functional independence from the Government, and from other state institutions as well. This independence was the main issue in Case No. KO73/16, Constitutional Review of Administrative Circular No. 01/2016 issued by the Ministry of Public Administration of the Republic of Kosovo on 21 January 2016. The Circular in question attempted to subject independent institutions—including the Ombudsperson Institution—to a standardized classification of jobs under the civil service regime. This classification established a unified system of job titles, job descriptions, and pay grades, to be applied to nearly all positions paid for out of the Kosovo budget. The Ombudsperson's view was that this one-size-fits-all approach did not and could not do justice to the unique needs and functions of the Institution he leads, and furthermore, that the Circular unconstitutionally interfered with his constitutionally guaranteed independence (see Constitution, Article 132, para. 2: "The Ombudsperson independently exercises his/her duty and does not accept any instructions or intrusions from the organs, institutions or other authorities exercising state authority in the Republic of Kosovo").

Therefore, the Ombudsperson contested the Circular before the Constitutional Court, arguing that the Constitution guarantees that "independent constitutional institutions [such as the Ombudsperson Institution] have their own budget, which is administered independently in accordance with the law. . . . [I]t is noted that the constitutional independence of an independent institution, is defined as a decision-making, organizational and financial independence" (cited at para. 33 of the Court's judgment). By attempting to require the Ombudsperson to conform to the civil service's jobs-classification scheme, the challenged Circular prevented the Ombudsperson from implementing his own internal organizational scheme, one that, in his judgment, was better tailored to the special needs and functions of an NHRI.

The Court ruled in favor of the Ombudsperson, emphasizing that "[t]he personnel working in the Ombudsperson Institution . . . have different work responsibilities compared to similar positions in other institutions and this explicit differentiation is reflected in their job descriptions and remuneration and is to be preserved" (*id.*, para. 88).

What is the main lesson to be drawn from this case? The lesson is that the Ombudsperson's power to make purely advisory recommendations may not, in the absence of any enforcement capabilities, be enough to protect its own independence. Upon receiving the Circular from the Ministry of Public Administration, the Ombudsperson noted his objection on constitutional grounds and attempted to resolve the matter outside the courts. But the Ministry refused to back down (see paras. 24–26 of the Court's judgment). Without the ability to challenge the Circular before the Constitutional Court, the Ombudsperson would have been powerless to ensure his own constitutional independence. This case can therefore serve as a model for how NHRIs worldwide can also use their authority before the Constitutional Court to safeguard their independence when the mere persuasive force of reason does not suffice.

THE NHRI AS LITIGANT IN THE ADMINISTRATIVE COURTS

We have noted that the power of NHRIs to refer cases to the Constitutional Court is relatively uncontroversial and well-established. The competency we now turn to discuss, however, is one that is less commonly granted to NHRIs. In the Republic of Kosovo, the Ombudsperson has the power not only to challenge laws and other normative acts before the Constitutional Court, but also to initiate what are called "administrative conflicts." In Kosovo's legal system, an administrative conflict is a legal challenge filed by a natural or legal person "if he/she considers that by the final administrative act in administrative procedure, his/her rights or legal interests has been violated" (Law No. 03/L-202 on Administrative Conflicts, Article 10, para. 1).

The Constitution does not say anything about the Ombudsperson's authority in this area. However, according to the Law on Administrative Conflicts, "[t]he plaintiff in the administrative conflict may be a natural person, legal entity, Ombudsperson, other associations and organizations, which act to protect public interest, who considers that by an administrative act a direct or indirect interest according to the law, have been violated" (*id.*, Article 18). In the Republic of Kosovo, then, the Ombudsperson has the authority not only to offer recommendations to the Government for the purpose of promoting human rights and good administration, but also to directly contest in the courts administrative acts to which he objects.

This competency was essential to the Ombudsperson's success in one of the most important cases of 2017. In April of last year, the newspaper *Zëri* published an article with the title "KEDS [Kosovo Energy Distribution Services] charges us 8 million Euros per year for the electricity of Serbs in the North," referring to the privately owned company with exclusive distribution rights for electricity throughout Kosovo. The article reported that, since the end of the war, the entire population of Kosovo's four northern communes, most of whose citizens and municipal authorities do not recognize the sovereignty of the Republic of Kosovo, were nonetheless receiving free electricity from Kosovo's electrical grid. Of course, the electricity they used was free only for them: the expenses for their electricity usage were covered by the residents of the rest of the Republic. And to make matters even worse, KEDS had kept the practice completely hidden from the public. The practice's existence was not revealed until *Zëri*'s article was published.

After the article's publication, the Ombudsperson immediately opened an *ex officio* investigation, in order to (1) verify the factual basis for the newspaper's claims; and (2) if the claims turned out to be true, to request from the relevant authorities an explanation for why the practice was allowed to continue.

The Ombudsperson quickly obtained confirmation from the Office of the Energy Regulator (henceforth: "OER"), the state institution with jurisdiction over energy policy, including over the operations of KEDS, that the newspaper's factual claims were correct. The OER, however, attempted to justify the practice in question on the basis of an obscure administrative decision that purported to allow KEDS to spread losses in the electrical system across all paying consumers in Kosovo.

Needless to say, the Ombudsperson was not satisfied with this explanation, and released a report arguing in detail that KEDS's practice constituted a violation of the constitutional and

legal rights of the Kosovo residents who had to cover the costs of free electricity for the North. According to the analysis published by the Ombudsperson, the practice constituted an infringement of the right against discrimination, the right to property, and the rights of the consumer. He recommended that the OER immediately order KEDS to cease the practice in question and to rescind the order that purported to justify it. Despite increasing public pressure, the OER refused to do so.

It is at this point that the Ombudsperson decided to exercise his power to bring the case before the courts. The Ombudsperson filed a lawsuit asking the relevant court (in this case the Department of Administrative Issues of the Basic Court of Prishtina) to annul the OER's illegal decision. And although the case is still being considered on the merits, the Court agreed to the Ombudsperson's request for a temporary injunction to delay the execution of the OER's decision while the case was being considered.

From the description of how this case proceeded, it is easy to notice a certain similarity to the two constitutional cases we have already discussed, that is, the case in which the members of the Assembly attempted to secure for themselves a supplementary pension grossly disproportionate to the pensions of ordinary citizens and the case in which the Ministry of Public Administration attempted to interfere with the independence of the Ombudsperson Institution. In both cases, the institutions against whom the Ombudsperson's petitions were filed (the Assembly and the Ministry of Public Administration, respectively) were adequately forewarned, either by civil society or by the Ombudsperson himself, regarding the unconstitutionality of their actions. But they insisted on proceeding. Only then did the Ombudsperson bring his action before the Constitutional Court.

The case currently under discussion shows that this same strategy can be immensely useful in the administrative realm as well. After the OER rejected the Ombudsperson's recommendation to rescind its decision, the latter had no option but to exercise his authority to file a court challenge to the decision. Indeed, although the Ombudsperson of the Republic of Kosovo has more frequently exercised his power to refer cases to the Constitutional Court than his power to contest the legality of administrative acts, the latter competency may in time prove to be much more important to the Ombudsperson's work. As the Venice Commission has noted, "[t]he model most widely followed for the institutions of Ombudsman or Human Rights Defender may be briefly described as that of an independent official having the primary role of acting as intermediary between the people and the state and local administration" (CDL-AD(2007)020 – Opinion on the possible reform of the Ombudsman Institution in Kazakhstan, *op. cit.*, para. 12). Although the Venice Commission certainly did not foresee NHRIs' having the power to challenge administrative acts directly in court, it has correctly recognized the centrality of administrative acts to the NHRI's mission. It therefore stands to reason that the ability to file lawsuits contesting such acts can be an immensely powerful tool in ensuring that its recommendations in this area are enforced. I would therefore hope that this competency becomes just as widespread and well-recognized among NHRIs as the power to contest laws and other normative acts before the Constitutional Court.

THE NHRI AS *AMICUS CURIAE*

In Kosovo's legal system, the Ombudsperson has a role to play not only as a litigant but also as an *amicus curiae*—as "friend of the court"—in cases in which he is not one of the litigating parties. This competency is a relatively new addition to the Ombudsperson's toolbox. It did not, for example, appear in the United Nations Mission in Kosovo (UNMIK) Regulation 2000/38, which established the Ombudsperson Institution. Nor does it appear in the Constitution or in the first official law on the Institution, Law No. 03/L-195 on Ombudsperson.

In the current iteration of the law, however, Law No. 05/L-019 on Ombudsperson, it is clearly stated that "[t]he Ombudsperson may appear in the capacity of the friend of the court (amicus curiae) in judicial processes dealing with human rights, equality and protection from discrimination" (*id.*, Article 16, para. 9). Approximately the same words are repeated in Law No. 05/L-021 on the Protection from Discrimination: "Ombudsperson may be presented in the quality of a friend of the court (amicus curiae) in proceedings related to issues of equality and protection from discrimination" (*id.*, Article 9, para. 2, subpara. 13).

Both of these laws were passed relatively recently, in the summer of 2015, and so the Ombudsperson has not had all that many opportunities to exercise his authority in this area. Nonetheless, even in this short period, he has served as *amicus curiae* in four separate instances. One of those instances is discussed here.

The Ombudsperson's *amicus curiae* brief, "Concerning the situation of homophobia and transphobia," was addressed to the Basic Court of Prishtina on the basis of two complaints that the Ombudsperson received, stemming from physical assaults against members of the LGBT community. These assaults were reported to the Kosovo Police and the relevant prosecutors' offices. However, the complainants alleged a failure to adequately investigate the incidents on the part of the Basic Prosecution of Prishtina and the Kosovo Police, respectively.

Even on the basis of this brief summary of the two complaints, it is clear what the Ombudsperson, availing himself of the conventional tools of NHRIs, was supposed to do. As the record shows, the Ombudsperson's staff contacted both the Basic Prosecution of Prishtina and the Kosovo Police to inquire about the status of the respective investigations (see pp. 2–3 of the cited brief). In both cases, the Ombudsperson's inquiries led to a noticeable speeding up of the pace of these investigations. At the time of the brief's issuance, an indictment had been filed in one of the cases, and in the other case the court had already handed down a conviction of the accused persons on the charges of "inciting national, racial, religious or ethnic hatred, discord or intolerance" (see Code No. 04/L-082, Criminal Code of the Republic of Kosovo, Article 147) and assault (see *id.*, Article 187).

What, then, was the need for the Ombudsperson to go beyond merely inquiring about the cases with the requisite authorities and urging them to proceed with the investigations in a timely manner? What was the point of submitting an *amicus curiae* brief? One of the Ombudsperson's main reasons for filing the brief was that he wanted to bring the courts' attention to a little-noted provision in the Criminal Code, namely, Article 74, "General rules on mitigation or aggravation of punishments." In the list of aggravating factors is the following: "if the criminal offence is committed against a person, group of persons or

property because of . . . sexual orientation" (*id.*, Article 74, para. 2, subpara. 12). The Ombudsperson noted that the judge that handed down the guilty conviction did not explicitly consider this provision in determining the convicted persons' sentences. One of the purposes of the *amicus curiae* brief, then, was to urge the courts to consider the provision in future cases involving violence against members of the LGBT community.

This example of the Ombudsperson's exercise of his authority to submit *amicus curiae* briefs in judicial proceedings demonstrates how powerful this tool can be for NHRIs—and also the caution with which the tool must be deployed. Let us consider each of these points in turn. I say that the tool is a powerful one because it allows the NHRI to directly address the courts on issues that are in its area of expertise, such as cases of discrimination and the protection of vulnerable groups. Given the sheer number of complaints that NHRIs receive in these areas, it is likely that their expertise in such matters can serve the courts well in cases in which these matters are litigated, whether in criminal or civil trials. Giving NHRIs the power to address courts directly makes possible a fruitful collaboration between NHRIs and the judicial branch that can lead to higher-quality trials and better-reasoned judgments on the part of the courts. This is a strong reason for other countries to follow the Republic of Kosovo's lead in granting NHRIs the general right to address the courts in individual cases as *amici curiae*.

Now for the note of caution: in exercising this right, NHRIs must be careful not to interfere with the courts' ability to exercise impartial judgment. As the European Court of Human Rights has noted multiple times, "even appearances may be of a certain importance or, in other words, 'justice must not only be done, it must also be seen to be done' . . . . What is at stake is the confidence which the courts in a democratic society must inspire in the public" (*Micallef v. Malta*, ECtHR, Application No. 17056/06 (2009), para. 98; citing *De Cubber v. Belgium*, ECtHR, Application No. 9186/80 (1984), para. 26). There is a danger, then, that an NHRI's weighing-in on a case being litigated before the courts can irreparably damage the court's appearance of impartiality, thereby undermining the public's confidence in the judicial branch.

It is for this reason that the Ombudsperson, in the case currently under discussion, was careful to say that the courts, in determining the punishment for persons convicted of violence against members of the LGBT community, should only ***consider*** the question of whether the aggravating factor in the Criminal Code is fulfilled, without stating that the courts should actually find the factor to be present in any given case. To comment on whether any particular defendant ought to be given a harsher sentence would be an improper intrusion into the proper domain of the judicial branch, and would do great damage to the appearance of impartiality. For this reason, while NHRIs should be given the right to serve as *amici curiae* as they see fit, they have a duty to exercise this right with the utmost circumspection.

THE NHRI'S ROLE IN MONITORING THE EXECUTION OF COURT JUDGMENTS

We now come to the final role that NHRIs may play in judicial proceedings: the role of monitoring the execution of court judgments. This role is of the greatest importance to the goal of ensuring the protection of human rights. In order for human-rights protection to be ultimately effective, it is necessary not only for the courts to issue just decisions, but also for these decisions to be properly implemented. And as we shall see in the case we are about to

discuss, the connection between judgment and execution, unfortunately, cannot be taken for granted.

The case I wish to discuss under this heading is unique; it is different from the others we have thus far considered. This is because the case does not involve ***domestic*** judicial proceedings within the Republic of Kosovo; rather, it was a case considered and decided by the European Court of Human Rights: *Grudić v. Serbia*, ECtHR, Application No. 31925/08 (2012).

In order to understand the Ombudsperson's involvement in the process of monitoring the execution of the Court's judgment in this matter, it is necessary first to give a brief summary of the factual background of the case, as well as of the court's conclusions.

The applicants in *Grudić* were a married couple living in Kosovo who had been granted disability pensions in 1995 and 1999, respectively, by the Serbian Pensions and Disability Insurance Fund (henceforth: "SPDIF") (*Grudić*, paras. 6–7). In 1999 and 2000, respectively, the SPDIF abruptly ceased paying their monthly installments, without explanation (*id.*, para. 9). Eventually, after the applicants sought to have their pension payments resumed, the SPDIF issued formal decisions in 2005 suspending their pensions retroactively (*id.*, paras. 10–11). The SPDIF's justification for the suspension, according to the Court's judgment, was that "Kosovo was now under international administration" (*id.*, para. 11), and that "since the respondent State has been unable to collect any pension insurance contributions in Kosovo as of 1999, persons who had already been granted SPDIF pensions in this territory could not continue receiving them" (*id.*, para. 13).

The Court unanimously rejected this justification. In doing so, the Court's reasoning relied crucially on an Opinion adopted in 2005 by the Supreme Court of the Republic of Serbia, Civil Division, regarding pension rights in Kosovo: "In response to the situation in Kosovo, this Opinion states . . . that one's recognised right to a pension may only be restricted on the basis of Article 110 of the Pensions and Disability Insurance Act" (*Grudić*, para. 31). See also *id.*, para. 80 ("the Supreme Court, . . . concerning the situation in Kosovo, specifically noted that one's recognised right to a pension may only be restricted on the basis of Article 110").

Article 110, in turn, recognizes only two grounds on which a beneficiary's insurance rights under the Act may be lawfully restricted. First, these rights are to be terminated if "during the exercising of the rights, the conditions for acquiring and exercising the right cease to exist" (Pensions and Disability Insurance Act, Article 110, para. 1)—in the words of the *Grudić* judgment, "if it transpires that one no longer meets the original statutory requirements" for acquiring and exercising those rights (*Grudić*, para. 26). Second, insurance rights are also to be terminated if a beneficiary is already "exercising the rights under such insurance with a mandatory pension and disability insurance organization from a state formed in the territory of the former Yugoslavia" (*id.*, Article 110, para. 2).

The Court found that neither of the two grounds specified in Article 110 for lawful termination of pensions, had been fulfilled in the case of the applicants (*id.*). It thus concluded that "the interference with the applicants' 'possessions' was not in accordance

with relevant domestic law" (*id.*, para. 81), and therefore that Serbia had violated the applicants' rights under Article 1 of Protocol No. 1 of the Convention (*id.*, §83).

Importantly, the Court further noted that the finding of a violation imposed broader obligations on the Republic of Serbia, since there were likely many more Kosovo residents whose pensions had been discontinued by the SPDIF on the same unlawful basis as those of the applicants, and who were therefore—like the applicants—entitled to the resumption of pension payments and the payment of arrears, including statutory interest.

In fact, even the Republic of Serbia, in its own filings before the Court, openly admitted that the number of similarly situated Kosovo residents was considerable: "The Government noted that the total amount of the respondent State's potential debt involving situations such as the applicants' would be very high indeed . . . . [O]fficial data provided by the SPDIF indicat[ed] that the sum in question had been estimated at 1,008,358,614 Euros ("EUR"), whilst the Ministry of Finance had itself set this sum at EUR 1,050,468,312[.] (*Grudić*, para. 71). The Court thus held that "[i]n view of . . . the large number of potential applicants, the respondent Government must take all appropriate measures to ensure that the competent Serbian authorities implement the relevant laws in order to secure payment of the pensions and arrears in question" (*id.*, para. 99).

Despite Serbia's own estimate of the vast amount of pension payments it would have to pay to Kosovo residents if the applicants in *Grudić* were to prevail, Serbian authorities, amazingly, devised a way to deny 96.1% of pension applications from Kosovo residents in the aftermath of the *Grudić* judgment. And it did so in a way that wholly contradicted the Court's judgment. Specifically, despite the *Grudić* judgment's clear statement that "concerning the situation in Kosovo, . . . one's recognised right to a pension may only be restricted on the basis of Article 110 of the Pensions and Disability Insurance Act" (*Grudić*, §80), Serbia based its nearly wholesale rejection of pension applications from Kosovo on a separate statutory provision, Article 119: "According to Article 119 of the Law on Pension and Disability Insurance, *a beneficiary of pension accomplishing the right to two or several pensions in the territory of the Republic of Serbia may only use one of the above pensions according to his/her choice*" ("Follow Up Report in the Case Grudić v. Serbia Concerning the General Measures," submitted to the Committee of Ministers of the Council of Europe on 24 October 2013; emphasis in text).

The Ombudsperson found this justification to be legally spurious and in plain contradiction with the Court's judgment in *Grudić*, and he therefore set out to find a way to relay this information to the body charged with supervising the execution of the judgment: the Committee of Ministers of the Council of Europe. The rules of this body expressly invite NHRIs to submit comments on the adequacy of the execution of judgments of the ECtHR. Specifically, Rule 9.2 of the *Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements* provides: "The Committee of Ministers shall be entitled to consider any communication from . . . national institutions for the promotion and protection of human rights, with regard to the execution of judgments."

However, because the Republic of Kosovo is not yet a member state of the Council of Europe, the Ombudsperson had to submit his comments to the Committee of Ministers via a

domestic NGO, the Pensioners and Work Disabled Union of the Republic of Kosovo. Serbian authorities were invited to respond to the Ombudsperson's comments, but in a departure from its usual practice, they remained silent, offering no response whatsoever to the Ombudsperson's criticisms. This silence was noted explicitly in the 10th Annual Report of the Committee of Ministers, "Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights 2016": "A new communication from an NGO . . . was made available in March 2016, notably emphasising the necessity to reassess all applications from Kosovo residents for the resumption of pension payments. A response from the Serbian authorities to the issues raised in the communication is awaited" (*id.*, p. 249).

Unfortunately, the story does not have a happy ending. In July of last year, the ECtHR handed down a decision in the case of *Skenderi v. Serbia*, ECtHR, Application No. 15090/08 (2017). One of the applicants in this case offered more or less the same argument that the Ombudsperson presented to the Committee of Ministers: that Serbia could not, in line with the *Grudić* judgment, legally deny pension applications from Kosovo residents on any other basis than Article 110 of the Pensions and Disability Insurance Act. The Court, however, expressly did not reach the substance of this argument, dismissing the case on the procedural ground of non-exhaustion of domestic remedies (see *Skenderi*, para. 109).

Following this decision, Serbian authorities sprang into action. Despite the fact that the Court did not rule on the merits of the applicants' claims, Serbia claimed that the *Skenderi* judgment vindicated their nearly wholesale rejection of pension applicants from Kosovo: "The [Serbian] authorities . . . assume from the Court's case-law developed in *Skenderi and Others* that these rejections are in compliance with the Convention requirements and the Court's indications" (Action Report, Grudić v. Serbia, submitted to the Committee of Ministers of the Council of Europe on 26 September 2017). On the basis of this spurious Report, the Committee of Ministers abruptly closed the supervision of the execution of the *Grudić* judgment. See Resolution CM/ResDH(2017)427, adopted by the Committee of Ministers on 7 December 2017.

Despite this unhappy result, this case provides some important lessons. Most relevant for the Republic of Kosovo, the *Grudić* case shows the utmost importance of membership in the Council of Europe. Had Kosovo been given a seat at the table, it could have challenged Serbia's erroneous reading of the *Skenderi* judgment and kept hope alive for the thousands of Kosovo residents who have been denied access to pension funds they themselves contributed to through years of work. But the case also holds another lesson that is more relevant to NHRIs worldwide: Never to take for granted that court judgments protecting human rights will be executed against powerful interests without a fight. As we saw, the Rules of the Committee of Ministers expressly carve out a role for NHRIs to aid the body in monitoring the execution of judgments.

In our discussion of the case involving supplementary pensions for members of the Kosovo Assembly, we noted that NGOs could serve as the eyes and ears of NHRIs in assessing the constitutionality of statutes and other normative acts. But so also can NHRIs serve as the eyes and ears of the European Court of Human Rights, as well as of domestic courts, in raising the

awareness of the relevant authorities, and of the public, when court judgments that are vital to the protection and promotion of human rights are not being adequately enforced.

CONCLUSION

I now turn to offer a few brief words by way of conclusion. We have surveyed four different roles that NHRIs should be able to play in the course of judicial proceedings: they should be able to (1) refer laws and other normative acts to the Constitutional Court for abstract review; (2) request the annulment of administrative acts; (3) file *amicus curiae* briefs in cases pending before the courts; and (4) participate in monitoring the execution of judicial decisions.

The cases we have surveyed under these four headings suggest two ways in which playing these roles can help further NHRIs' ultimate goal of promoting and protecting human rights. First, as was shown by the two Constitutional Court cases we discussed, and by the case involving the provision of electricity in Kosovo's northern communes, it will inevitably be the case that some NHRI recommendations will not be implemented by the authorities to whom they are addressed. In such cases, the ability to file court challenges against these authorities can be an effective way to ensure that these recommendations are enforced.

Second, as shown by the Ombudsperson's *amicus curiae* brief in the cases involving attacks against the LGBT community, and by the Ombudsperson's involvement in monitoring the execution of the ECtHR's *Grudić* judgment, NHRIs can give a helping hand to the courts by offering their expertise in cases involving human rights. This is especially true in those areas in which NHRIs, due to their handling of thousands of individual complaints, may have a better understanding of the factual and legal issues at stake than the courts. In such cases, NHRIs can enhance the protection of human rights by allowing their judicial counterparts to benefit from this understanding.

I close by coming back to a point mentioned in the Introduction to this Article: I suggested that in countries with relatively new or less well-established democratic traditions, it is even more important that NHRIs be granted the four competencies that have been under discussion here. We are now in a position to understand why this is so: in countries with newer or less well-established democratic traditions, the most conventional tool of the NHRI, the persuasive force of reason, is much less likely to be effective without being backed up by a credible threat of court enforcement. State authorities who shamelessly violate human rights will necessarily feel no shame when they are branded by NHRIs as human-rights violators; and in states without an established democratic tradition, public pressure on the authorities to implement NHRI recommendations is unlikely to be enough. In such countries, granting NHRIs the four competencies surveyed here can help make the "persuasive force of reason" even more persuasive—and even more forceful—to those to whom NHRI recommendations are addressed.

BIBLIOGRAPHY

Constitution of the Republic of Kosovo

Decisions of the Constitutional Court of the Republic of Kosovo

Case no. KI 98/10, Constitutional Review of Decisions no. 06/837, dated 16 April 2009, and Npi-01/132, dated 30 April 2009, of the Municipal Assembly of the Municipality of Shtime

Case no. KO119/10, Constitutional Review of Article 14, paragraph 1.6, Article 22, Article 24, Article 25 and Article 27 of the Law on Rights and Responsibilities of the Deputy, No. 03/L-111, of 4 June 2010

Case No. KO73/16, Constitutional Review of Administrative Circular No. 01/2016 issued by the Ministry of Public Administration of the Republic of Kosovo on 21 January 2016

Decisions of the European Court of Human Rights

De Cubber v. Belgium, Application No. 9186/80 (1984)

Grudić v. Serbia, Application No. 31925/08 (2012)

Micallef v. Malta, Application No. 17056/06 (2009)

Skenderi v. Serbia, Application No. 15090/08 (2017)

Documents of the Committee of Ministers of the Council of Europe

Resolution CM/ResDH(2017)427 on Execution of the judgment of the European Court of Human Rights, Grudić v. Serbia

Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements

Tenth Annual Report of the Committee of Ministers, "Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights 2016"

Documents submitted to the Committee of Ministers of the Council of Europe

Action Report of the Republic of Serbia, Grudić v. Serbia, submitted to the Committee of Ministers of the Council of Europe on 26 September 2017

Follow Up Report of the Republic of Serbia, Grudić v. Serbia Concerning the General Measures, submitted to the Committee of Ministers of the Council of Europe on 24 October 2013

Opinion of the Pensioners and Work Disabled Union of the Republic of Kosovo regarding the execution of the judgment of the European Court of Human Rights in the case of Grudić v. Serbia, submitted to the Committee of Ministers of the Council of Europe on 29 March 2016

European Convention on Human Rights

"KEDS [Kosovo Energy Distribution Services] charges us 8 million Euros per year for the electricity of Serbs in the North," *Zëri*, 7 April 2017.

Legislation of the Republic of Kosovo

Code No. 04/L-082, Criminal Code of the Republic of Kosovo

Law No. 03/L-111 on Rights and Responsibilities of the Deputy

Law No. 03/L-195 on Ombudsperson

Law No. 03/L-202 on Administrative Conflicts

Law No. 05/L-019 on Ombudsperson

Law No. 05/L-021 on the Protection from Discrimination

Ombudsperson's legal opinion in the capacity of friend of the court (*amicus curiae*) to the Basic Court in Prishtinë, Concerning the situation of homophobia and transphobia, 2 May 2017

Opinions of the European Commission on Democracy through Law ("Venice Commission")

CDL-AD(2007)020 – Opinion on the possible reform of the Ombudsman Institution in Kazakhstan, adopted by the Venice Commission at its 71st Plenary Session, Venice, 1–2 June 2007

CDL-AD(2007)024 – Opinion on the Draft Law on the People's Advocate of Kosovo, adopted by the Venice Commission at its 71st Plenary Session, Venice, 1–2 June 2007

CDL-AD (2011)034 – Joint opinion on the protector of human rights and freedoms of Montenegro by the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights, adopted by the Venice Commission at its 88th Plenary Session, Venice, 14–15 October 2010

Principles relating to the Status of National Institutions, adopted by General Assembly resolution 48/134 of 20 December 1993 ("Paris Principles")

Republic of Serbia Pensions and Disability Insurance Act

United Nations Mission in Kosovo (UNMIK) Regulation 2000/38 on the Establishment of the Ombudsperson Institution in Kosovo