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*Ex officio*

**No. 129/2018**

## **Report with Recommendations of the Ombudsperson of Republic of Kosovo**

Related to the

*Effective solution of delays of judicial proceedings – violation of the right on  
trial within reasonable time*

**For: Mr. Ramush Haradinaj, Prime Minister  
Government of Republic of Kosovo**

**Mr. Abelard Tahiri, Minister  
Ministry of Justice**

**Copy for: Mr. Enver Peci, President  
Supreme Court**

**Mr. Aleksandër Lumezi, Chief State Prosecutor**

**Mr. Sahit Sylejmani, President  
Special Chamber of the Supreme Court**

**Mr. Hasan Shala, President  
Court of Appeals**

**Presidents of the Basic Courts**

Prishtinë, 6 March 2018

## **THE PURPOSE OF THE REPORT**

1. The purpose of this Report is Ombudsperson's request addressed to respective authorities for establishing a mechanism which would provide citizens of Republic of Kosovo with legal protection of the right to trial within reasonable time frame.
2. Starting from the European Convention on Human Rights (hereinafter ECHR) as well as the practice of the European Court on Human Rights (hereinafter ECtHR) in harmony of which the ECHR is interpreted, according to the Constitution of Republic of Kosovo (hereinafter Constitution), this Report will analyze the possibility of damage compensation for the victims of violation of the right to trial within reasonable time and the room that the domestic legislation leaves so that provisions of ECHR and practice of the ECtHR are better implemented in the Republic of Kosovo.
3. The number of complaints lodged with the Ombudsperson Institution (hereinafter OI) concerning lengthy judicial proceedings is extremely high. Only during 2017, approximately 26% of the complaints filed with the OI are related with allegations on delays of judicial proceedings. Main reason of raising this issue by the Ombudsperson is the lack of legal mechanisms on prevention of the violation of the right on trial within reasonable time or citizen's compensation who might be victims of such violation. Thus this Report aims to analyze the notion of "effective solutions", in compliance with ECtHR practice.

## **LEGAL AND CONSTITUTIONAL BASE**

4. According to Article 135, paragraph 3 of the Constitution of Republic of Kosovo (hereinafter "Constitution"). , "The Ombudsperson is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed".
5. According to the Law No. 05/L-019 on Ombudsperson, Article 16, par. 4, "The Ombudsperson has the power to investigate...on its own initiative (ex officio), if from findings, testimonies and evidence presented by submission or by knowledge gained in any other way, there is a base resulting that the authorities have violated human rights and freedoms stipulated by the Constitution, laws and other acts, as well as international instruments on human rights".
6. Also, Law No. 05/L-019 on Ombudsperson, Article 18, par. 1 stipulates that the Ombudsperson, among others, has the following responsibilities :
  - "to draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases and when necessary to express his/her opinion on attitudes and reactions of the relevant institutions relating to such cases;" (point 2);
  - "to make recommendations to the Government, the Assembly and other competent institutions of the Republic of Kosovo on matters relating to promotion and protection of human rights and freedoms, equality and non-discrimination" (point

- 5);
- “to publish notifications, opinions, recommendations, proposals and his/her own reports” (point 6);
  - “to recommend promulgation of new Laws in the Assembly, amendments of the Laws in force and promulgation or amendment of administrative and sub-legal acts by the institutions of the Republic of Kosovo” (point 7);
  - “to prepare annual, periodical and other reports on the situation of human rights and freedoms, equality and discrimination and conduct research on the issue of human rights and fundamental freedoms, equality and discrimination in the Republic of Kosovo” (point 8); and
  - “to recommend to the Assembly the harmonization of legislation with International Standards for Human Rights and Freedoms and their effective implementation” (point 9).
7. By delivering this Report to the responsible authorities the Ombudsperson aims to accomplish the following legal and constitutional responsibilities.

## ASSESSMENT

8. The right to a fair and impartial trial within a reasonable timeframe is guaranteed by the Constitution. According to Article 31, par. 2 of the Constitution: “Everyone is entitled to a fair and impartial public hearing ...as to the determination of one’s rights and obligations or as to any criminal charges **within a reasonable time**” (emphases added).
9. Furthermore, Article 6, par. 1 of the ECHR determines that: “*everyone is entitled to a fair and public hearing... **within a reasonable time** ... on disputes regarding his civil rights and obligations or of any criminal charge against him*” (emphases added). Similarly, Article 14, par. 3, sub-par. c of the International Convention on Civil and Political Rights, stipulates that: “Everyone charged with a criminal offence shall have the right . . . [*t]o be **tried without undue delay***” (emphases added). The right determined by these provisions, similarly as International Convention on Civil and Political Rights “are guaranteed by this Constitution” (Constitution, Article 22).
10. In determination of the constitutional rights of the right to a trial within a reasonable time, including the possibility of effective solution of violations of this right, Article 53 of the Constitution should be taken into account, which guides that “Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights”.
11. Since rendering of the case law judgment *Kudla v. Poland* (Application No. 30210/96, 26 October 2000), ECtHR jointly with the Committee of Ministers of the Council of Europe, which is vested with the power to supervise enforcement of ECtHR judgments (*see* ECHR, Article 46, par. 2), has set strict standards, which requires from each States establishment of mechanisms for effective solution of delayed cases and injuries caused

as a result of violation of the right on trial within a reasonable time. These standards are based on Article 13 of the ECHR which reads that: “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority” (*see also Constitution*, Article 54 (“Everyone enjoys the right ...to an effective legal remedy if found that such right [guaranteed by this Constitution or the law] has been violated”).

12. But, in order to analyze ECHR specific requirements regarding the effective solution of a violation of the right to a trial within a reasonable time, various types of violations of this right ought to be taken in consideration. In general, there are two main forms of violating the right to a trial within a reasonable time, which interlink with the relevant phases of a court case. Firstly, this right may be violated due to the *delay of judicial proceedings until the final decision is taken in a particular case* and, secondly, it may be violated due to the *delay in the enforcement of the final, binding decision after such decision is taken*. ECHR requirements concerning effective solution of these two types of violations, even though similar, are not entirely equal.

#### **Effective solutions of the delay of judicial proceeding until final decision of a certain case is taken**

13. In cases of delays of judicial proceedings, ECHR has initially ascertained that, in order to be “effective” as foreseen with Article 13 of the ECHR, an effective solution ought to “*prevent* alleged violation [of the right to trial within a reasonable timeframe] or its continuation, or to foresee a *compensation* for each violation that has occurred” (*Kudla*, ECtHR, op. cit., par. 158).

#### **General standards for effective solution of the delay of judicial proceedings until final decision of a certain case is taken**

14. In the next years, the Committee of Ministers has thoroughly explained the standards for the effective solution of the delay of the proceedings, referring as well to the best practices of different countries of the European Union.
15. Approximately after four years of *Kudla* case judgment, the Committee of Ministers, in its 114 session, of 12 May 2004, issued Recommendation Rec (2004) 6 on, “improvement of solutions on national level”. As a part of this Recommendation the Committee of Ministers pointed out several possible solutions of delay of the procedure, which have been applied by different member States of the Council of Europe. Three solutions were pointed out in this direction.
16. Initially, in laws in certain member states, a maximum length is specified for each stage in criminal, civil and administrative proceedings. (see *ibid*, par. 21).
17. Secondly, if these excessive time limits in judicial proceedings – particularly in criminal proceedings – are not respected or if the length of proceedings is considered unreasonable, the national law of many member states provides that the person concerned may file a request to accelerate the procedure. If this request is accepted, it may result in a decision fixing a time limit within which the court – or the prosecutor, depending on the

case – has to take specific procedural measures, such as closing the investigation or setting a date for the trial. (*see ibid*, par. 22).

18. Thirdly, in most member states, there are procedures providing for redress for unreasonable delays in proceedings, whether ongoing or concluded. A form of redress which is commonly used, especially in cases already concluded, is that of financial compensation. In certain cases, the failure by the responsible authority to issue a decision within the specified time limit means that the application shall be deemed to have been granted. Where the criminal proceedings have exceeded a reasonable time, this may result in a more lenient sentence being imposed. (*ibid*, par. 23).
19. Six years later, Committee of Ministers issued another Recommendation related with the effective solutions for unreasonable lengthy delays of the proceedings (*see* Recommendation CM/Rec (2010)3, adopted at 24 February 2010 in its 1077 session of the deputy ministers). The document entails more specific and particular recommendations than those of 2004 regarding this theme.
20. Among others, the Committee has recommended that the governments of the member states ensure mechanisms for *identification* of the proceedings that risk becoming excessively lengthy as well as the underlying causes of such lengthy delays, with a view also to prevent in the future violations of such nature (*ibid*, Recommendation No. 2), as well as to ensure *accelerating* of identified cases (*ibid*, Recommendation No. 4).
21. Further, the Committee has recommended that each State reveal if underlying systemic problem is the result of systematic problem, which means not occasional and if it is really *systematic* problem, to take measures to address this problem (*ibid*, Recommendation No. 3);
22. The Committee has recommended that each State member undertake all necessary steps to ensure that effective remedies before national authorities exist for all arguable claims of violation of the right to trial within a reasonable time; (*ibid*, Recommendation No. 5), in respect of all stages of proceedings in which there may be determination of civil rights and obligations or of any criminal charge (*ibid*, Recommendation No. 6);
23. In those specific cases, where proceedings have become excessively lengthy, violation of the right to trial within a reasonable time occurs, the Committee of Ministers recommends (a) that the procedures are expedited, or (b) redress is afforded to the victims for any disadvantage they have suffered; or, preferably (c) allowance is made for a combination of the two measures. It has been stated that the final solution is most preferable (*ibid*, Recommendation No. 7).
24. Also, member States are recommended that requests for expediting proceedings or affording redress to be dealt with rapidly by the competent authority and that they represent an effective, adequate and accessible remedy; (*ibid*, Recommendation No. 8).
25. In those cases when compensation is provided, member States should ensure that amounts of compensation awarded are reasonable and compatible with the case law of the Court and recognize, in this context, a strong but rebuttable presumption that excessively long proceedings will occasion non-pecuniary damage (*ibid*, Recommendation No. 9) and,

having in consideration this fact to consider providing of specific forms of non-monetary redress, such as reduction of sanctions or discontinuance of proceedings, as appropriate, in criminal or administrative proceedings that have been excessively lengthy (*ibid* Recommendation No. 10).

26. Since more than 17 years have passed since ECtHR has rendered the judgment in the case law *Kudla*, an ample fund of decisions of this Court is at place, where different mechanisms for resolution of the lengthy court proceedings were deemed as effective or ineffective. These samples can serve, jointly, as a kind of guidance for implementation and respect of general standards stipulated in the above given paragraphs.

### **Effective solutions on delays in enforcement of final, binding decision, after such decision is taken**

27. Apart cases of lengthy judicial proceedings *before* the final decision is taken in a specific case, ECtHR has ascertained that delays in enforcement of such decision *after* it has been taken, can also represent violation of the right to trial within reasonable time. For example, ECtHR has found that :“ *the right to a court protected by Article 6 would be illusory if a Contracting State’s domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party*” and that “*the effective access to court includes the right to have a court decision enforced without undue delay*” (see *Yuriy Nikolayevich Ivanov v. Ukraine*, ECtHR, Application No. 40450/04, 15 October 2009, par. 51, citing *Hornsby v. Greece*, ECtHR, Application No. 18357/91, 19 March 1997, par. 40 and *Immobiliare Saffi v. Italy*, Application No. 22774/93, par. 66).

### **General standards on effective solutions on delays in enforcement of final, binding decisions**

28. As mentioned above, constitutional principles for effective solutions of unjustifiable delay in enforcement of final, binding judicial decision are similar but not identical, with principles for effective solutions of delays before taking final decision.

## **OMBUDSPERSON’S FINDINGS AND RECOMMENDATIONS**

### **A. Findings of the Ombudsperson**

29. According to the above given assessment, the Ombudsperson finds that the right to a trial within a reasonable timeframe binds the state to primarily protect this right through its legal system by setting guarantees for citizens on exercising of rights effectively. If observing from this point of view, the right of a person to a trial within a reasonable time will not be effective if the possibility of filing an appeal with any State’s authorities concerning possible violations of the right to trial within a reasonable time doesn’t exist.
30. Through case Reports, *ex officio* and annual Reports the Ombudsperson has continuously raised the issue of violation of the right to trial within reasonable time addressed to the responsible authorities. Nevertheless, for any complaint concerning lengthy judicial proceeding, which has affected on the breach of the right to trial within reasonable time, no effective legal remedy was at place towards these complaints, which as a result, would



have had any alleviation in the form of prevention of the offense or in compensation.

## **B. Ombudsperson's Recommendation**

31. Based on these findings as well as in compliance with Article 135, para. 3 of the Constitution of Republic of Kosovo and Article 18 of the paragraph 1, sub-paragraph 7 of the Law No. 05/L-019 on Ombudsperson, the Ombudsperson recommends:

- 1. Undertaking legislative initiative on proposing the Law on protection of the right to trial within a reasonable time, through which judicial legal remedies will be determined for cases dealing with lengthy judicial proceedings, in compliance with international instruments on human rights and fundamental freedoms.*

Pursuant to Article 132, paragraph 3 of the Constitution of Republic of Kosovo (“Every organ, institution or other authority exercising legitimate power of the Republic of Kosovo is bound to respond to the requests of the Ombudsperson and shall submit all requested documentation and information in conformity with the law”) and Article 28 of the Law No.05/L-019 on Ombudsperson, (“Authorities to which the Ombudsperson has addressed recommendation, request or proposal for undertaking concrete actions,... must respond within thirty (30) days. The answer should contain written reasoning regarding actions undertaken about the issue in question”), You are kindly asked to inform us on steps to be undertaken in the future by You regarding this issue.

Respectfully submitted,

Hilmi Jashari  
Ombudsperson