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REPORT WITH RECOMMENDATIONS

OF THE OMBUDSPERSON INSTITUTION OF REPUBLIC OF KOSOVO

Regarding

Judicial procedure on complaints against Preliminary Decisions on Expropriation of Immovable Property

For:

Mr. Kadri Veseli, President of the Assembly of Republic of Kosovo

Prishtinë, 16 October 2015

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PURPOSE OF THE REPORT

Law No. 03/L-139 (amended and supplemented by the Law No. 03/L-205) on expropriation of immovable property, determines a specific procedure for judicial complaints against the Preliminary Decision on expropriation issued by the Government or the Municipality. According to this procedure, in case of lodging a claim against the Preliminary Decision, "the Court ….renders the judgement on the case within thirty (30) calendar days after the response from the Expropriating Authority has been delivered [towards the lodged complaint]" (*id.*, Article 35, par. 6, subpar. 3) and, "in case the court fails to actually render a judgment within the thirty (30) day period …., the court shall be deemed to have issued a judgment rejecting the complaint in its entirety immediately upon the expiration of such thirty (30) day period " (*id.*, Article 35, par. 8).

This Report has two main objectives:

(1) To evaluate if the above given procedure comprise human rights violation guaranteed by the Constitution and is in contrary with best international practices on human rights, and

(2) To recommend to the Assembly of Republic of Kosovo further amending and supplementing of the Law 03/L-139, based on these assessment.

LEGAL BASE

According to the Law No. 05/L-019 on Ombudsperson, among others the Ombudsperson has the following responsibilities and competencies:

- "may provide general recommendations on the functioning of the judicial system" (Article 16, par. 8);
- "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 " (Article 18, par. 1, subpar. 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" (Article 18, par. 1, subpar. 5);
- "to publish notifications, opinions, recommendations, proposals and his/her own reports" (Article 18, par. 1, subpar. 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; (Article 18, par. 1, subpar. 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"

(Article 18, par. 1, subpar. 8);

- "to recommend to the Assembly the harmonization of legislation with International Standards for Human Rights and Freedoms and their effective implementation" (Article 18, par. 1, subpar. 9).

Delivering of this Report to the Assembly of Republic of Kosovo, as well as its publication in media, the Ombudsperson aims to accomplish the following legal responsibilities.

LEGAL BACKGROUND

Administrative and judicial procedures on expropriation maters initially have been regulated by the Law No. 03/L-139 on expropriation of immovable property. These procedures have undergone further modifications with the entrance into force of two following laws: Law No. 03/L-205 on amending and supplementing of the Law No. 03/L-139; and Law No. 03/L-199 on Courts.

A. Administrative and judicial procedures on expropriation according to the Law No. 03/L-139 on expropriation of the immovable property

Administrative and judicial procedures determined by the Law No. 03/L-139 (further in the text: *Law of 2009*) are as follows:

1. Administrative procedure on expropriation according to the Law No. 03/L-139 on expropriation of the immovable property

According to the *Law of 2009*, the administrative procedure on expropriation is being developed by "Expropriating Authority", which "implies a Municipality or the Government which is responsible for accomplishing expropriation" (*id.*, Article 2, par. 1). But, authorization of Expropriating Authority for accomplishment of this process is not without limits. On the contrary, Article 4 of the Law determines explicitly some essential conditions of legal expropriation: (1) "the Expropriation is directly related to the accomplishment of a legitimate public purpose "[1]; (2) "the legitimate public purpose cannot practically be achieved without the Expropriation"; (3) "the public benefits to be derived from the Expropriation outweigh the interests that will be negatively affected thereby"; and (4) "the choice of the property to be expropriated has not been made for, or in the furtherance of, any discriminatory purpose or objective".[2] Only after fulfillment of all conditions foreseen with the Article 4, the Expropriating Authority can commence "to exercise the expropriation procedure" (*id.*, Article 7, par. 1).

[1] *Law of 2009* determines a specific list of legitimate public purposes within paragraphs 2 and 3 of Article 4. In order to be legitimate, expropriation should be done only for one of the purposes determined.

[2] Apart these substantial conditions, there is another procedural condition regarding the legality of expropriation, specifically that "the Expropriating Authority has complied with all applicable provisions of this law " as per development of expropriating procedures (*id.*, Article 4, par. 1, subpar. 5).

If terms are met "an expropriation procedure may be initiated by the responsible Expropriating Authority . . . , on its own initiative or pursuant to an application submitted to the Expropriating Authority" (*id.*, Article 7, par. 2). In case when Expropriating Authority is the Municipality, requests for expropriation can be submitted by "a public authority or POE [Publicly Owned Enterprise]", while in cases when Expropriating Authority is the Government, "requests also ought to be submitted by . . . a Public-Private Partnership; a party to an Infrastructure Contract awarded by a Tendering Body; or any lawful heir, successor, assignee or transferee of such a Partnership or party. (*id*., Article 7, par.3). If the Expropriating Authority is acting on its own initiative, "it shall cause one or more of its members or officials to prepare and submit the application." (*id.*).

Within 15 days of receiving the request, "Expropriating Authority will do its *prima facie review*" mainly to ascertain if legal conditions determined by Article 4 of the Law has been or not satisfied. (*id.*, Article 8, par. 5). In case Expropriating Authority decides that the request *does not* satisfy *prima facie* conditions, reverses the request to the Applicant Body jointly with written justified refusal. In case Expropriating Authority decides that the request meets *prima facie* conditions, than it issues a decision with formal acceptance of the request for further review. (*id.*).

In the case when formal request is admitted, owners of the immovable property are notified as well as other parties involved in the decision on admission; this decision is published jointly with request details in the Official Gazette and "the newspaper enjoying wide circulation in Kosovo". (*id.*, Article 8, par. 7-8). After these notices and announcements, a thirty days period is set during which "Interested persons shall have the right to submit to the Expropriating Authority written comments on the requested Expropriation" (*id.*, Article 9, par. 1) and subsequently another fifteen (15) day period during which the Expropriating Authority is obliged to have "a public hearing on the requested expropriation in each Municipality where concerned property is located" (*id.*, Article 9, par. 2).

The Expropriating Authority has thirty days on disposal to review admitted comments and verbally expressed thoughts during the public hearing. Within this thirty day period, it "will adopt a written decision, herein referred to as the "Preliminary Decision", specifying whether - and to what extent – the expropriation requested in the application has been determined by the Expropriating Authority to satisfy each of the conditions specified [on lawfulness of expropriation] in …. Article 4 of this law"(*id.*, Article 10, par. 1, subpar. 1). Then within ten (10) business days after adopting a Preliminary Decision, the Expropriating Authority shall publish such decision in the Official Gazette of Kosovo and in a newspaper enjoying wide circulation in Kosovo." (*id.*, Article 10, par. 4). On the date when Preliminary Decision is published, the decision will enter into force.

2. Judicial procedure for the complaints against Preliminary Decisions on expropriation according to the Law No. 03/L-139 on expropriation of the immovable property

Within the context of the *Law of 2009*, Preliminary Decision is named "preliminary" because it can be challenged with the regular judicial system: In case "a Person or an Interest Holder with

respect to immovable property that is the subject of an expropriation procedure" considers that the Preliminary Decision is opposite to at least one of conditions determined with the Article 4 on the legality of expropriation, such Person shall have the right to file a complaint with a court of competent jurisdiction challenging such Preliminary Decision, in whole or in part." (*id.*, Article 35, par. 1).[3] In this contest, "competent court" for each complaint, according to *Law of 2009*, depends from the status of the Expropriating Authority. "If the Expropriating Authority is the Expropriating Authority of a Municipality, the complaint shall be filed with the concerned municipal court. If the Expropriating Authority is the Government, the complaint shall be filed with the Supreme Court of Kosovo" (*id.*, Article 35, par. 2).

But, regardless of the "competent court" in specific case, *Law of 2009* determines clearly that the complainant has thirty calendar days upon entrance into force of the Preliminary Decision to prepare the complaint: " If the complaint is filed upon expiration of this thirty (30) calendar days, the court shall reject the complaint" (*id.*, Article 35, par. 3). At the same time, after receiving the copy of complaint the Expropriating Authority shall have only forty-five (45) calendar days to submit its response (*id.*, Article 35, par. 5).

After filing the complaint as well as the response of the Expropriating Authority towards the complaint, the competent court initiates case review with the accelerated procedure. *Law of 2009* determines that: "the court shall handle the entire case as a matter of extreme urgency; prioritize such case over all other cases and matters pending before the court; issue its judgment on the case within thirty (90) calendar days after receiving the Expropriating Authority's response; schedule all proceedings in the case in a manner that will enable the court to issue its judgment within the above given period" (*id.*, Article 35, par. 6). Expropriation proposed by the Preliminary Decision cannot be implemented in this phase of the procedure, remaining pending: "The Expropriating Authority shall not issue a Final Decision with respect to any property or rights…until the court where such complaint was filed issues a judgment on that complaint (*id.*, Article 35, par. 8).

Law of 2009 foresees the right to appeal against the judgement of the first instance Court, if one or both sides are unsatisfied. In such cases, the complaining party has thirty calendar days to file a claim with the second instance Court (*id.*, Article 35, par. 10), after which other party has thirty calendar days to submit its response on the complaint filed (*Law of 2009*, Article 35, par. 10).[4]

[3] This Report deals only with judicial procedures on complaints against legality of expropriation, which are adjusted according to Article 35 of the *Law of 2009*. Complaints challenging the amount of compensation of the expropriated property, complaints concerning compensation of the damage caused from the partial expropriation and complaints challenging the legitimacy of a decision authorizing the temporary use of property, namely is regulated by 36, 37 and 38 of the *Law of 2009* and do not suffer from problems that are disclosed in this report.

[4] Since "towards the judgement of the Court [first instance]…. a complaint can be filed in compliance with applicable Law governing such appeals" (*Law of 2009*, Article 35, par. 9), it remains mystery to which court can an appeal be lodged against the judgement in case the Government is Expropriating Authority and consequently the first instance Court happens to be the Supreme Court. In such cases, it is unclear where a complaint against the judgement of the court can be filed since according to the Constitution of Republic of Kosovo, Article 102, paragraph 5, …[The law may allow the right to refer a case directly to the Supreme Court**, in which case there**

As in the first instance Court, the *Law of 2009* determines an accelerated procedure in the second instance Court as well, but only if the complaint against the judgement of the first instance is filed from the Expropriating Authority: "the appellate court shall handle such appeal as a matter of extreme urgency; shall prioritize such appeal over all appeals being handled by the appellate court; shall issue its judgment on the appeal within ninety (90) days after receiving the appeal; and shall schedule all proceedings in the appeal in a manner that will enable the appellate court to issue its judgment within above given time period" (*id.*, Article 35, par. 13, subpar. 3 and 4).

Furthermore, it should be noted that there is a significant difference between the procedure in the first instance court and the proceedings in the second instance court, in terms of legal status and legal power of Preliminary Decision during case review. We have noticed above that while the case is under review **in the first instance Court**, the Expropriating Authority is not authorized to issue Final Decision and consequently implementation of expropriation is suspended until judgement is issued. While, in **the second instance Court**, *Law of 2009* determines the opposite rule: "If a judgement [in the first instance court] is positive for the Expropriating Authority . . . , filing of such appeal [in the second instance court] shall in no way impair the power or authority of the Expropriating Authority to take any action that is consistent with such judgment, including continuing with the conduct of the expropriation procedure, issuing a Final Decision on the expropriation and implementing such decision " (*id.*, Article 35, par. 11). Thus, even though a judgement can be appealed against the complaint in the first instance Court, such judgement has an important judicial consequence: after its issuance the Expropriating Authority has no legal obstacles to continue with expropriation of the property as per the certain case.

B. Administrative and judicial procedures according to the Law No. 03/L-205 on amending and supplementing of the Law No. 03/L-139

Less than two years after entered into force of the *Law of 2009* , the Assembly of Republic of Kosovo endorsed another Law, *Law No.* 03/L-205 on amending and supplementing of the previous law (further in the text : *Law of 2010*). *Law of 2010* brought some important alterations in administrative and judicial procedures for expropriation. In general these amendments have facilitate as well as enable more prompt action of the Government or the Municipality to issue or implement decisions on expropriation but have make much more difficult for the Owners or Interest Holder with respect to immovable property to repudiate proposed expropriation.

First category of amendments in the *Law of 2010* has set a dramatic shortage of deadlines in administrative and judicial procedures for issuance of Preliminary Decisions as well as for the review of complaints against them. Therefore, procedures which have been accelerated with the *Law of 2009* have become even hastier in *Law of 2010*. Respectively:

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would be no right of appeal "(emphases added). However, there is no need to focus on this problem, since it has been solved with entrance into force of the Law 03/L-199 on Courts. See Legal Background, part C of this Report.

- According to the *Low of 2009*, there is a thirty (30) calendar day period during which "any interested Person shall have the right to submit to the Expropriating Authority written comments on the requested Expropriation" (*id.*, Article 9, par. 1), while *Law of 2010* this period is shortened up to ten calendar day period (see *id.*, Article 2, par. 1, subpar. 1; Article 9, par. 1 of the amended and supplemented Law).

- According to the *Law of 2009*, the Owner or the Interest Holder with respect to immovable property has on disposal to submit complaint within thirty calendar day period in the first instance court against the lawfulness of the Preliminary Decision (*id.*, Article 35, par. 3), while with the *Law of 2010*, this period has been shortened up to fifteen calendar day period (see *id.*, Article 2, par. 1, subpar.. 7; Article 35, par. 3 of the amended and supplemented Law).
- According to the *Law of 2009*, Expropriating Authority has on its disposal forty-five calendar days to file its response to the respective Court (*id.*, Article 35, par. 5), while with the *Law of 2010*, this period is shortened up to fifteen calendar day period (see *id.*, Article 2, par. 1, subpar. 7; Article 35, par. 5 of the amended and supplemented Law).
- According to the *Law of 2009*, the first instance Court is obliged "to render the judgement within nineteen (90) calendar day period after delivery of the response from the Expropriating Authority" (*id.*, Article 35, par. 6, subpar. 3), while with the *Law of 2010*, this period has been shortened up to thirty calendar days (see *id.*, Article 2, par. 1, subpar. 7; Article 35, par. 6, subpar. 3 of the amended and supplemented Law).
- According to the *Law of 2009*, there is a period of thirty calendar days within which the unsatisfied party with the first instance judgement can submit an appeal with the second instance Court and another period of thirty calendar days during which the other party has the right to respond to the complaint lodged (*id.*, Article 35, par. 10). Then the "appellate court ….renders judgement on the appeal within ninety (90) day period after receiving the appeal and schedule all proceedings in the appeal in the manner that will enable the appellate court to issue its judgement within the above given time period" (*id.*, Article 35, par. 13, subpar. 3 and 4). While in the *Law of 2010*, the period for filing appeal and preparing of the response towards the appeal actually is shortened up to fifteen calendar days (see *id.*, Article 2, par. 1, subpar. 7; Article 35, par. 11 of the amended and supplemented Law). Then the second instance Court "issues its judgment on the appeal within thirty (30) calendar day period following the date on which it received the other party's response or the date on which the fifteen (15) day period for filing a response expires, whichever occurs earlier" (see *id.*, Article 2, par. 1, subpar. 7; Article 35, par. 13, subpar. 3 and 4 of the amended and supplemented Law).

Apart radical shortage of procedural deadlines the *Law of 2010* brought another change as well. According to the new Law "if the Court [the first instance] fails actually to issue a judgment within the thirty (30) day period ….the court shall be deemed – as a matter of law - to have

issued a judgment rejecting the complaint in its entirety immediately upon the expiration of such thirty (30) day period., " (*id.* Article 2, par. 1, subpar 7; Article 35, par. 8 of the amended and supplemented Law).

It is worth mentioning that the phrase "to have issued a judgment rejecting the complaint in its entirety "will mean that failure of the Court to render judgement within thirty day time period has precisely the same judicial consequences that would result if judgement on refuse of complaint will be actually issued. From one hand this will mean that automatic rejection of the complaint due to expiring of deadline can be appealed with the second instance Court, same as a real judgement: "any judgment on - ***or rejection of - a complaint by a court under the previous paragraphs of this Article shall be appealable***" (*Law of 2010*, Article 2, par. 1, subpar. 7, added emphases; Article 35, par. 10 of the amended and supplemented Law).

But, on the other hand, automatic rejection of the complaint due to deadline expiring, allows the Expropriating Authority to issue Final Decision on expropriation and undertaking of steps for implementation of the decision. As given in the *Law of 2009*, the *Law of 2010* determines that "The Expropriating Authority shall not issue a Final Decision with respect to any property or rights that are the subject of a complaint …. until the court [of first instance] where such complaint was filed issues a judgment on that complaint ***or is deemed, under paragraph 8 of this Article, to have issued such a judgment***" (*id.*, Article 2, par. 1, subpar.. 7, added emphases; Article 35, par. 9 of the amended and supplemented Law). After an automatic rejection of the complaint due to deadline expiring, nothing could hinder the work of Expropriating Authority to continue with the expropriation procedure: "Filing of an appeal shall in no way impair the power or authority of the Expropriating Authority to take any action that is consistent with the judgment being appealed, including …. continuing with the conduct of the expropriation procedure, issuing one or more Final Decisions on the expropriation and implementing such decision(s)." (*Law of 2010*, Article 2, par. 1, subpar.7; Article 35, par. 12 of the amended and supplemented Law). In this way, *Law of 2010* creates the possibility that a complaint against the legality of a Preliminary Decision on expropriation be dismissed and that the expropriation be conducted without reviewing of complaint from any judicial body.

C. Amending of judicial procedure for complaints against the lawfulness of Preliminary Decision on expropriation according to the Law No. 03/L-199 on Courts

Judicial procedure on complaints against the lawfulness of the Preliminary Decisions on expropriation has undergone a final amending by the Law No. 03/L-199 on Courts, majority of which entered into force on January 1st, 2013.[5] As noticed above, *Law of 2009* foresees that the first instance competent court for review of such complaints is either concerned municipal court if Expropriating Authority if Municipality or the Supreme Court in case the Expropriating Authority is Government (*id.*, Article 35, par. 2). Upon the entry into force of the Law on Courts

[5] Some provisions of the Law on Courts, respectively Articles 29, 35, 36, 38 and 40 of this law, have entered into force earlier, actually on January 1st, 2011.

"any reference in any Law, ... vesting first instance jurisdiction .... Municipal Court ....or Supreme Court shall be construed to mean the Basic Court" and " any reference in any Law ... vesting second instance jurisdiction in the High Minor Offenses Court, District Court, or Supreme Court shall be construed to mean the Court of Appeals." (Law on Courts, Article 42, par. 2).

Based on this provision, it can be considered that, regardless who the Expropriating Authority is, the Government or Municipality, all complaints against the lawfulness of Preliminary Decision for expropriation are filed with the Basic Court and that all complaints against the judgement issued (or considered as issued) from Basic Court, are handled by the Court of Appeals.

ASSESSMENT

Judicial procedure against Preliminary Decisions on expropriation, as determined by the laws discussed above, may risk occurrence of two human rights violation:

(1) right to property, guaranteed by Article 46 of the Constitution of Republic of Kosovo and Article 1 of the Protocol One to the European Convention on Human Rights Protection; and;

(2) right to fair and impartial trial, guaranteed with Article 31 of the Constitution of Republic of Kosovo and Article 6 of the European Convention on Human Rights Protection.

A. Assessment of the judicial procedure on complaints against Preliminary Decision on expropriation, on the base of property right, guaranteed with Article 46 of the Constitution of Republic of Kosovo and Article 1 of Protocol One to the European Convention on Human Rights Protection.

Article 46, par. 1 of the Constitution of republic of Kosovo (further in the text: *Constitution*) determines that: "The right to own property is guaranteed". This does not mean that expropriation of property is categorically forbidden. On the contrary, the Constitution expressively states that "Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate a property" (*id.*, Article 46, par. 3). However, constitutional authorizing on expropriating of property is not without limits. Specifically, according to *Constitution,* expropriation can be conducted only if "**it is authorized by law**" (Article 46, par. 3, added emphases).

The request that expropriation is conducted only in accordance with the law is supported by other two constitutional sources. Initially, Article 1 of Protocol One to the ECHR determines that: "No one shall be deprived of his possessions except ….***to the conditions provided for by the law***" (added emphases). The right determined with this provision, similarly as all rights set forth with the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, "are guaranteed with the Constitution" (Constitution, Article 22). Secondly, Article 55, par. 1, of Constitution determines also all other human rights in general

that: “Fundamental rights and freedoms guaranteed by this Constitution may **only be limited by law”**.

In interpretation of these provisions, consideration should be given to, “Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights. ” (further in the text: “ECtHR”) (Constitution, Article 53). Thus, for interpretation of constitutional request that deprivation and limitation of the property right be authorized by law, should be mainly based on the judicial decisions of the ECtHR.

According to ECtHR, decisions or authorizations for expropriation comprise limitation of the right to property, even in cases when such decisions and authorizations are not actually been executed. See *Sporrong and Lonnroth against Sweden*, ECtHR, Applications no. 7151/75 and 7152/75 (1982), par. 60 (“Even though authorizations for expropriation have left intact, in law, the owners’ right to use and exploit their possessions, those again in practice have diminished the possibility of exercising this right ”). And, whereas the thirty-days deadline, after which a complaint against the lawfulness of a Preliminary Decision is automatically refused, enables the Government or Municipality to smoothly conduct expropriation of the property, which consequently means that this aspect of the procedure determined by *Law of 2010* comprise a clear restraint of the property right. Thus, in order to comply with the Constitution, this procedure, as an obvious limitation of the right to property, ought to be “prescribed by law” or “authorized by law”.

At least in one aspect it is apparent that the above given procedure fulfills this constitutional request: the source of this procedure is the *Law of 2010* itself. It is thus “prescribed by law” and “authorized by law”. However, our assessment cannot end in this way. Based on ECtHR decisions, phrases like “prescribed by law” and “authorized by law” imply the **principle of legal certainty** and, in order a judicial or administrative procedure be in compliance with this principle, it is not enough simply to follow requests determined with the national law. There is another one very strict request: the procedure mentioned above ought to be “fair and proper “and “**ought not to be arbitrary**” (*Winterwerp against Holland*, ECtHR, Application No. 6301/73 (1979), par. 45, added emphases). Thus, phrases “prescribed by law” and “authorized by law” embody basic principles of the rule of law.

Taking in consideration this rigorous standard, judicial proceedings determined by *Law of 2010* ***cannot*** be considered “prescribed by law” and “authorized by law”. As noticed above, stipulating that the complaint submitted by the applicant will be automatically dismissed in case Basic Court fails to decide within thirty day period, the *Law of 2010* leaves room for the possibility of arbitrary complaint refusal, without any review of substantial merits of complaint. Thus, the procedure determined by *Law of 2010* does not respect the principle of legal certainty.

Judicial arbitrariness enabled by the *Law of 2010*, becomes even more dangerous when other two aspects of the procedures mentioned above are taken in consideration. Initially, *Law of 2010*, by decreasing the deadline for issuance of judgement up to 30 calendar days, leaves to the court very little time to review four substantive conditions on lawfulness of the Preliminary Decision

on expropriation. These conditions, identified above — that expropriation is done for reaching of the legal public purpose; that this purpose cannot be achieved practically without accomplishment of the expropriation; that public benefit from expropriation is greater than the interests that would be adversely affected by expropriation; and that the object of expropriation is not chosen to achieve a discriminatory intent or purpose - are factual complex issues that may request more time to be carefully considered. This may result with an increase of the possibility that deadline from thirty day period to be disregarding from the Basic Court and consequently the complaint against the Preliminary Decision to be arbitrary dismissed.

Even more concerning is the fact that, after such automatic complaint rejection, there is no obstacle for the Expropriating Authority to continue with implementation of the expropriation, even if this refusal is disputed from Court of Appeal. This means that the *Law of 2010* creates the possibility for a person be deprived from his/her property, of an arbitrary and unreasoned rejection of his complaint against the Preliminary Decision on expropriation.

Due to the high risk of arbitrary rejection of complaint against Preliminary Decisions on expropriation, jointly with severe judicial consequences of such denial, the Ombudsman ascertains that the *Law of 2009,* amended and supplemented by the *Law of 2010,* does not fulfill constitutional request for the legal certainty and consequently represents violation of the right to property.

B. Assessment of the judicial procedures on complaints against Preliminary Decisions on expropriation, on the base of the right to fair and impartial trial, guaranteed with Article 31 of the Constitution of Republic of Kosovo and Article 6 of the European Convention for the Protection of Human Rights

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 .....within a reasonable time by an independent and impartial tribunal established by law". Similarly, ECHR stipulates that: "In the determination of his civil rights and obligations ....everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." (*id.*, Article 6, par. 1).

Judicial decisions of the ECtHR have ascertained that the "the right to property is undoubtedly 'civil right'" which is involved within the scope of "civil rights and obligations" with regard to which everyone is entitled to a fair and impartial trial according to Article 6, par. 1, of ECHR (*Sporrong and Lonnroth against Sweden*, ECtHR, Application No. 7151/75 and 7152/75 (1982), par. 79). See also *Kudla against Poland*, ECtHR, Application No. 30210/96 (2000), par. 146 ("where the right of Convention quoted by a person is 'a civil right' recognized by the national law — **such as *the right to property*** —guaranteed right by Article 6, par. 1, will be on disposal also", added emphases).

As ascertained above, judicial procedure stipulated by the *Law of 2010* comprise an obvious restriction of the property right, since enables the Government or Municipality to smoothly do expropriation of the property. Thus, determination of expropriation issues is included in the

category "determination of civil rights and obligations" and is the subject of requirements of Article 6 par. 1, of ECHR.

At least in Basic Court, the procedure set with the *Law of 2010* does not fulfill criteria of Article 6, par. 1 of the ECHR. According to ECtHR "the right to fair trial, as is guaranteed with the Article 6, par. 1 of the Convention, include the right of parties in the procedure to file any remark which they consider relevant for the case" (*Perez against France*, ECtHR, Application No. 47287/99 (2004), par. 80). But, "this right may be considered as effective only if remarks are really 'heard', which 'obliges the tribunal' to appropriately undertake review of submissions, facts and proves filed by the parties" (*id.*, par. 80, citing *Van de Hurk against Holland*, ECtHR, Application No. 16034/90, par. 59). Additionally, on expropriation issues as well as other issues 'related to the human rights and freedoms' guaranteed by the Convention and its Protocols, liabilities of the National Courts is to review these [submissions, facts and proves] ***with particular attention and carefulness***" (*Wagner and J.M.W.L. against Luxembourg*, ECtHR. Application 76240/01 (2007), par. 96) (emphases added).

The procedure determined by *Law of 2010* does not respect the rights of parties that their submissions, facts and proves be really heard, since as we have stated several times, the applicant's complaint is automatically dismissed in case the Basic Court fails to take decision within thirty-days period. In this way the *Law of 2010* leaves open the possibility for the complaint to be rejected without any review, even less "with particular attention and carefulness".

In this aspect, case circumstances of the case *Ruiz Torija against Spain*, ECtHR Application No. 18390/91 (1994) are relevant. In this case ECtHR has found violation of Article 6 of the Convention due to the fact that National Courts have overruled complainant's allegations without reviewing **one** of his arguments. If disregarding of **a single argument** of a complainant by the national courts can be considered violation of the right to fair and impartial trial, in that case, *a fortiori*, disregard of **full complaint** submitted by the National Courts will comprise much graver violation of this right.

But, apart from the failure of the *Law* to fulfill the criteria of Article 6 of ECHR for review of complaint against the legality of the Preliminary Decisions for expropriation in the **Basic Court**, the analyses cannot end now, since ECtHR states explicitly that the liability to respect Article 6 is responsibility of **"national courts"** ***considering as overall system***, not the liability of each administrative or judicial body that is involved into the procedure. On contrary, "needs of flexibility and efficiency, which are fully in compliance with protection of human rights, can justify inclusion ….of administrative or professional bodies and, *a fortiori*, judicial bodies, that do not fulfill requests [of Article 6, par. 1] in each aspect" (*Le Compte, Van Leuven and De Meyere against Belgium*, GJEDNJ, Application No. 6878/75, 7238/75 (1981), par. 51). In such cases, "no violation of Convention can be found in case prior review [of such bodies] is a subject of further control by a judicial body that has a full jurisdiction and offers the guarantees of Article 6, paragraph 1" (*Sigma Radio Television Ltd. Against Cyprus* , ECtHR, Application No.

32181/04 and 35122/05 (2011), par. 151, citing *Albert and Le Compte against Belgium,* ECtHR, Application No. 7299/75 and 7496/76 (1983), par. 29).

For example, in case *Zumtobel against Austria*, Application No. 12235/86 (1993), ECtHR has find that, even though the procedure applied from the Government regarding expropriation of complainant's property, did not meet criteria of Article 6, paragraph 1 of the ECHR, however did not comprise violation of the Convention since there was another higher judicial body that reviewed the complainant's case and fulfilled criteria set in Article 6, paragraph 1 (see *id.*, par. 27–32).

Thus, in order to evaluate if *Law* of *2010* is in compliance with Article 6, par. 1 of ECHR, we cannot recline only on evaluation of the procedure designated for complaints in Basic Court, regardless deficiencies it might have. Instead of this, the entire expropriation process should be reviewed, including also the procedures developed from the Expropriating Authorities prior to rendering of Preliminary Decision on expropriation as well as procedures on further complaints against the judgment of Basic Court. In order that the procedure determined by the *Law of 2010* be in compliance with the right on fair and impartial trial, it is sufficient that "jurisdictional bodies themselves comply with requests of Article 6, paragraph 1 or do not comply in this way but are subject to further control from a judicial body that has full jurisdiction and offers the guarantees of Article 6, par. 1" (*Albert and Le Compte*, ECtHR, *op. cit.*, par. 29).

Law of 2009 (altered by the Law on Courts) determines three competent bodies involved on expropriation issue: Expropriating Authority, Basic Court and the Court of Appeals.

We have ascertained that the Basic Court does not fulfill criteria of Article 6, because of possibility of complaint dismiss without any review.

Obvious is the failure of the Expropriating Authority to meet criteria of Article 6. Article 6 requires that the trial be conducted by the independent tribunal "independent and impartial". As per independency, "among other things, consideration should be give ….if [tribunal] reflects independency", while as per impartiality, "the tribunal shall be subjectively free from prejudices and impartiality . . . [and] should be also impartial from objective aspect" (*Kleyn and others against Holland,* Application No. 39343/98, 39651/98, 43147/98 and 46664/99 (2003), par. 190–191).

In deciding on expropriation issues, neither independence nor impartiality criteria are met by Expropriating Authority. As noticed above, "expropriation procedure can be initiated by the responsible Expropriating Authority . . . by self-initiative" (*Law of 2009,* Article 7, par. 2). In such cases, "this Expropriating Authority shall commend one or more of its officials prepare and submit expropriation request]" (*id.,* Article 7, par. 3, subpar. 3), approval or rejection of which the Expropriating Authority has the competency to decide (see *id.*, Article 10, par. 1). But in such cases, when the Expropriating Authority effectively decides for an expropriation initiated on own initiative, it cannot be claimed that this body is an independent and impartial tribunal in terms of Article 6, par. 1 of ECHR.

Notwithstanding, Court of Appeals, by procedures set in the Law of 2010 evades procedural omissions of the Basic Court and the Expropriating Authority. Otherwise from Basic Court, complaint in the Court of Appeal cannot be refused automatically upon expiration of thirty-day period. Thus, the right of the complainant to be "truly" heard is not violated, at least not in the same way. The Court of Appeals also does not suffer from the lack of independency and impartiality found with the Expropriating Authority because the Court does not decide for an expropriation proposed by it.

But, even though the Court of Appeals manages to evade procedural omissions of the Basic Court and Expropriating Authority, it unfortunately has another flaw which hinders fulfillment of criteria of Article 6 of the ECHR: it cannot be stated that the Court of Appeals has full jurisdiction on complaints against Preliminary Decisions on expropriation.

A tribunal with full jurisdiction is considered when "it has a jurisdiction to review all actual and legal facts which are relevant for the dispute presented" (*Terra Woningen B.V. against Holland*, ECtHR, Application No. 20641 (1996), par. 52). Similarly, the Constitutional Court of Republic of Croatia explains that, in order a court to be considered a tribunal with full jurisdiction " the court should have the right and the liability to held a hearing and contestation session for each complaint against an administrative act where is decided on a right or a civil liability, which means it is mandatory to convene and held hearing session whenever a party in the procedure requires that" (Constitutional Court of Republic of Croatia, Case No.CRO-2000-3-017, Assessment of the Constitutionality of the Expropriating Law).

In order to ascertain whether this criterion is fulfilled by the Court of Appeals, we shall start with the Law *of 2010*, which stipulates that "any judgment on - or rejection of - a complaint by a [Basic] Court …. shall be appealable ***in accordance with the generally applicable law governing such appeals***" (Law amended and supplemented, Article 35, par. 10, stress added). Then, in order to identify which is the "applicable law governing such appeals", it should be noted that Preliminary Decisions on expropriation are classified as " administrative acts" in terms of Article 3 of the Law No. 03/L-202 on Administrative Conflicts since they are issued by "central governing bodies " or "local governing bodies" , respectively the Government or the Municipality. Even though, the Law on Administrative Conflicts does not determine precisely complaint review procedures by the Court of Appeals. Instead of this, it foresees that: "If this law does not contain provisions for the procedures on administrative conflicts, the law provisions on civil procedures shall be used." (*id.*, Article 63).

Law No. 03/L-006 on Contestable Procedure determines that: "Judgement [of the first instance court] can be striked due to the violation of provisions of contestation procedures; due to a wrong ascertainment or partial ascertainment of the factual state; due to the wrong application of the material rights." (*id*., Article 181, par. 1). But, what ought to be stressed in this context is that the Law on Contested Procedure makes clear that convening or not of the hearing in majority of cases rests with the Courts discretion: "The Court of second instance will decide about the complaint in a session of the court body or based on the examination of the subject in a court session" (*id.*, Article 190, par. 1). The court is obliged to convene trial session only "when it

considers the factual state, exactly and completely by verifying new facts and receiving new proofs " or" in the case when the college session evaluates that the verdict against which a complaint is raised was based on essential violation of provisions of contestation procedure, or when the factual state was evaluated wrongly or incompletely (*id.*, Article 190, par. 2 and 3). But, apart these specific circumstances, the Court of Appeals can decide to resolve the case only "in trial panel session" (*id.*, Article 190, par. 1) and is not " ***obliged*** to convene and hold hearing session whenever a party in the procedure (litigant) requests that " (Constitutional Court of Republic of Croatia, *op. cit.*). Furthermore, very tight timeframe that is determined by the *Law of 2010* for case review –thirty-day period following the date on receiving the other party's response (see *Law of 2010*, Article 2, par. 1, subpar 7; Article 35, par. 13, subpar. 3 and 4 of the amended and supplemented *Law*) — risks to further decrease the possibility for the Court of Appeals to set the hearing session on expropriation cases, instead to review the case solely on trial panes session.

Because of this, the Court of Appeals cannot be considered to be a full jurisdiction Court concerning expropriation issues. Thus, neither any level of administrative or judicial procedure, nor for issuance of Preliminary Decision on expropriation or on the complaints against it, does meet requirements of Article 6 of the ECHR.

Thus, the Ombudsperson finds that the *Lawn of 2009*, amended and supplemented by the *Law of 2010*, represents violation of the right to fair and impartial trial.

OMBUDSPERSON'S FINDINGS AND RECOMMENDATIONS

A. Ombudsperson's Findings

Based on above given assessment the Ombudsperson finds that:

(1) Law No. 03/L-139 (amended and supplemented by Law No. 03/L-205) on expropriation of the immovable property, represents violation of the right to property, according to Article 46 of the Constitution of Republic of Kosovo and Article 1 of the Protocol One to the European Convention on Human Rights Protection.

(2) Law No. 03/L-139 (amended and supplemented by Law No. 03/L-205) on expropriation of the immovable property, represents violation of the right to fair and impartial trial, according to the Article 31 of the Constitution of Republic of Kosovo and Article 6 of the European Convention on Human Rights Protection.

B. Ombudsperson's recommendations

Based on these findings and pursuant to Article 135, par. 3 of the Constitution of Republic of Kosovo and Article 16, par. 1 of the Law on Ombudsperson, the Ombudsperson recommends to the Assembly of Republic of Kosovo to:

(1) Fully revoke the Article 35, par. 6, subpar. 3 and 4 of the Law No. 03/L-139 (amended and supplemented by Law No. 03/L-205) on expropriation of the immovable property: "Immediately after receiving the response of the Expropriating Authority, the court shall, …..***issue its judgment on the case within thirty (30) calendar days after receiving the Expropriating Authority's response; and schedules all preceding in the case in a manner that will enable the court to issue its judgement within such thirty (30) calendar day period*** ".

(2) Fully revoke Article 35, par. 8 of the Law No. 03/L-139 (amended and supplemented by Law No. 03/L-205) on expropriation of the immovable property: "***if the court fails to actually issue a judgment within the thirty (30) day period specified in subparagraph 6.3 paragraph 6 of this Article, the court shall be deemed – as a matter of law - to have issued a judgment rejecting the complaint in its entirety immediately upon the expiration of such thirty (30) day period***".

(3) Fully revoke Article 35, par. 13, subpar. 3 and 4 of the Law No. 03/L-139 (amended and supplemented by Law No. 03/L-205) on expropriation of the immovable property: "Upon receipt of such an appeal, the appellate court shall . . . issues its judgement on the appeal within thirty (30) day period following the date on which it received the other party's response or the date on which the fifteen ***(15) day period*** for filing a response expires, whichever occurs earlier***; and schedules all preceding in the case in a manner that will enable the court to issue its judgement within such thirty (30) calendar day period***".

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."), I would appreciate if you could inform me about the actions you are planning to undertake concerning this issue.

Sincerely,

Hilmi Jashari
Ombudsperson