Republika e Kosovës • Republika Kosovo • Republic of Kosovo
Institucioni i Avokatit të Popullit • Institucija Ombudsmana • Ombudsperson Institution

Ex officio

Case No. 441/2018

REPORT WITH RECOMMENDATIONS

OF

THE OMBUDSPERSON OF THE REPUBLIC OF KOSOVO

concerning

Three general principles for the interpretation of normative acts and the implementation of these principles regarding the protection of human rights

Addressed to:

- **Mr. Ramush Haradinaj, Prime Minister of the Republic of Kosovo**
- **Mr. Kadri Veseli, President of Assembly of the Republic of Kosovo**
- **Ms. Albulena Haxhiu, Chairwoman of the Committee on Legislation, Mandates, Immunities, Rules of Procedure of the Assembly and Oversight of Anti-Corruption Agency**
- **Mr. Enver Peci, President of the Supreme Court of the Republic of Kosovo**

Prishtina, September 28th, 2018

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PURPOSES OF THE REPORT

1. In any developed legal system, there are often cases where a factual situation is covered by two or more normative acts. During the work of the Ombudsperson Institution, some of such situations have been encountered. In these situations, it should be decided which normative act should prevail. The Ombudsperson has observed that the way in which normative acts are prioritised entail important implications regarding human rights, and affect the institution's capacity to carry out its mission in protecting these rights.

   This Report has four main purposes:

   (1) Introducing three general principles that guide which normative acts should be prioritised in the case of a factual situation covered by two or more such acts;

   (2) Explaining the importance of these principles regarding protection of human rights, rule of law and democracy;

   (3) Providing two concrete examples from the experience of the Ombudsperson and the explanation of how the three interpretative principles solve these cases; and

   (4) The submission of specific and concrete recommendations to the competent institutions regarding the implementation of these principles.

LEGAL BASIS

2. Pursuant to Law No. 05/L-019 on the Ombudsperson, the Ombudsperson has, inter alia, the following competencies and responsibilities:

   - "The Ombudsperson has the power to investigate. . . on its own initiative (ex officio), if . . . 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." (Article 16, par. 4);
   - "The Ombudsperson may provide general recommendations on the functioning of the judicial system." (Article 16, par. 8);
   - "to investigate alleged violations of human rights and acts of discrimination, and be committed to eliminate them" (Article 18, par. 1, sub-par. 1);
   - "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, sub-par. 2);
   - "to inform about human rights and to make efforts to combat all forms of

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discrimination through increasing of awareness, especially through information and education and through the media" (Article 18, par. 1, sub-par. 4);

- "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, sub-par. 5);
- "to publish notifications, opinions, recommendations, proposals and his/her own reports" (Article 18, par. 1, sub-par. 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, sub-par. 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, sub-par. 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, sub-par. 9).

3. By submitting this report to competent institutions, as well as publishing it in the media, the Ombudsperson intends to perform these legal responsibilities.

LEGAL ANALYSIS

4. This analysis is divided into three parts:

   Part A presents and elaborates the three principles for interpretation of normative acts in cases where two or more acts are applicable under the same factual circumstances. These principles are recognized in the International Law as well as in the legal system of the Republic of Kosovo.

   Under Part B, the analysis continues explaining the importance of these three principles for protection of human rights, rule of law and democracy.

   In part C, two concrete examples are given from the experience of the Ombudsperson Institution, in which the three principles in question provide a solution to the interpretation of normative acts in a way that ensures the protection of human rights at the adequate level.

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A. Three general principles for the interpretation of normative acts

5. The three principles in question are as follows.

   (a) *Lex specialis derogat legi generali*

   (b) *Lex posterior derogat legi priori*

   (c) *Lex superior derogat legi inferiori*

6. The *lex specialis derogat legi generali* (hereinafter: *"lex specialis"*) principle, stipulates that when a given factual situation falls under the scope of two normative acts, priority is given to the ***special act*** over the ***general act.***

7. This principle applies in many different fields of international public law, including the field of international human rights, as reflected in the Case Law of the European Court of Human Rights (hereinafter: "ECtHR").

8. In this regard, the Ombudsperson recalls that, according to the Constitution of the Republic of Kosovo (hereinafter: "the Constitution"), "The Republic of Kosovo shall respect international law" (*ibid.*, Article 16, paragraph 3) and "human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights" (*ibid.*, Article 53).

9. For the purpose of demonstrating the extensive implementation of the *lex specialis* principle in international law, we can refer to an example of an important judgment in the field of international criminal law issued by the International Criminal Tribunal for the Former Yugoslavia (hereinafter: "ICTY") in the case of *Prosecutor v. Kupreškić et al.*, Case no. IT-95-16-T, T.Ch. II, 14th of January 2000.

10. In this case, the Prosecutor requested that the accused be charged with criminal liability for two offenses (*inter alia*): murder ***as a war crime*** and murder ***as a crime against humanity***, based on Article 3 and Article 5(a) of the ICTY Statute, respectively.

11. However, taking into consideration that the criminal offense of murder as a crime against humanity includes additional elements not included in the offense of murder as a war crime, the Court decided as follows: "The prohibition of murder as a crime against humanity is *lex specialis* in relation to the prohibition of murder as a war crime" (*ibid.*, § 701).

12. According to the Court, in such a case, "the more specific or less sweeping provision should be chosen" (*ibid.*, § 683), due to, "if an action is legally regulated both by a general provision and by a specific one, the latter prevails as most appropriate, being more specifically directed towards that action" (*ibid.*, § 684).

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13. In particular, the Ombudsperson emphasizes that the Court has linked the justification of the *lex specialis* principle to the ***will of lawmakers***: "Particularly in case of discrepancy between the two provisions, it would be logical to assume that the law-making body intended to give pride of place to the provision governing the action more directly and in greater detail" (*ibid.*, § 684).

14. The *Lex specialis* principle appears not only in international criminal law, but also in the field of international human rights.

15. In this regard, we can refer to the connection between Article 6, par. 1 and Article 13 of the European Convention on Human Rights (hereinafter: "ECHR"), according to the ECtHR case law.

16. Article 6, par. 1 of ECHR provides that: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

17. While Article 13 of the ECHR provides that: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

18. The ECtHR's practice, in general, is to address Article 6, par. 1 as *lex specialis* in relation to Article 13. The reason being that, in a case where the right, for whose violation an effective remedy is sought, is considered a "civil right", then Article 6 par. 1 provides, in particular, which is the "national body" that should provide "effective solution" to the victim. Namely, the "national body", in such a case, can only be an "independent and impartial tribunal established by law".

19. In the words of the Court: "where the Convention right asserted by the individual is a "civil right" recognised under domestic law – such as the right of property . . . , the protection afforded by Article 6, par. 1, implying the full panoply of a judicial procedure, are stricter than, and absorb, those of Article 13"; therefore, "in the circumstances Article 6, par. 1 was deemed to constitute a lex specialis in relation to Article 13". (*Kudla v. Poland* [GC], Application No. 30210/96, ECtHR, October 26, 2000, § 146). Thereupon, "In such cases there is no legal interest in re-examining the same subject matter of complaint under the less stringent requirements of Article 13." (*ibid.*).

20. Therefore, similar to the *Kupreškić* case, the ECtHR practice follows the *lex specialis* principle: the normative act addressing the factual circumstances more specifically shall prevail over the act of a more general nature.

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21. The second interpretation principle is *lex posterior derogat legi priori* (hereinafter: "*lex posterior*"). This principle stipulates that the normative act that has been approved more recently shall have priority over the one that was approved earlier.

22. This principle is well known by the laws approved by the Assembly of the Republic of Kosovo, which often include abolishing provisions. When a new version of a previous law is approved, at the end of the new law is usually included a provision that abolishes in its entirety the ***previous version of the law.*** For example, on 15 March 2018, the Assembly approved Law no. 06/L-016 on Business Organizations. At the end of this law, it is stipulated that: "This Law repeals Law no.02/L 123 on Business Organizations and Law no.04/L-006 on Amending and Supplementing the Law no.02/L-123 on Business Organizations" (*ibid.*, Article 269).

23. The third interpretation principle of normative acts is *lex superior derogat legi inferiori* (hereinafter: *lex superior*). According to this principle, a normative act that is higher in the hierarchy of a legal system has priority over an act that is lower in the hierarchy.

24. Same as the *lex posterior* principle, the *lex superior* principle is well-known in the legal system of the Republic of Kosovo. For example, Article 16, par. 1 of the Constitution stipulates that "The Constitution is the highest legal act of the Republic of Kosovo. Laws and other legal acts shall be in accordance with this Constitution".

25. Also, similar to almost all national legal system, the laws approved by the Assembly are recognized as the highest and have priority over ***sub-legal*** acts, such as regulations, administrative instructions, decisions, circulars, etc. These sub-legal acts are usually issued by institutions and agencies of the Government, which "makes decisions and issues legal acts or regulations necessary for the implementation of laws" (the Constitution, Article 93, par. 4), although in some cases, even independent institutions and agencies are assigned with the responsibility of issuing sub-legal acts. *See for example*, Law No. 05/L-019 on the Ombudsperson, Article 37, par. 1 ("The Ombudsperson issues the Rules of Procedure, Regulation for internal organization and systematization of job positions, decision making processes and other organizational issues in accordance with the Law").

B. The importance of three interpretative principles regarding the protection of human rights, rule of law and democracy

26. Considering the elaboration of part A of the three principles for the interpretation of normative acts, we are in a good position to ask about the importance of these three principles, especially in the legal system of the Republic of Kosovo.

27. The Ombudsperson considers that the three principles in question are indispensable for the protection of human rights, the rule of law and the values of democracy.

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28. Initially, one can observe that in cases where more than one normative act covers the same factual circumstances, such a situation immediately raises concerns regarding ***legal certainty***.

29. According to the European Commission for Democracy through Law (hereinafter: "Venice Commission"), "the principle of legal certainty is essential to the confidence in the judicial system and the rule of law. . . . To achieve this confidence, the state must make the text of the law easily *accessible*. It has also a duty to respect and apply, in a *foreseeable* and consistent manner, the laws it has enacted" (Report on The Rule of Law, approved by the Venice Commission at its 86th plenary session. (Venice, 25-26 March 2011), par. 44; emphasis in original)

30. What does it mean for a law to be "foreseeable"? According to the Venice Commission, "Foreseeability means that the law must where possible be proclaimed in advance of implementation and be foreseeable as to its effects: it has to be formulated with sufficient precision to enable the individual to regulate his or her conduct" (*ibid.*).

31. Legal certainty, and especially the foreseeability element, is of high importance not only to the rule of law but also to the human rights.

32. The foreseeability value of the law is constantly repeated in the ECHR, whose rights and freedoms "guaranteed by . . . the Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions" (Constitution, Article 22).

33. For example, Article 8, par. 2 of ECHR: "There shall be no interference by a public authority with the exercise of this right [i.e., right to respect for private and family life] except such as is ***in accordance with the law***" (emphasis added).

34. Likewise, the Convention expressly refers to the foreseeability of the law in Article 4 (Prohibition of slavery and forced labour), Article 5 (Right to liberty and security), Article 9 (Freedom of thought, conscience and religion), Article 10 (Freedom of expression), Article 11 (Freedom of assembly and association), Article 1 of Protocol No. 1 (Protection of property) and Article 2 of Protocol No. 4 (Freedom of movement).

35. Particular emphasis on legal certainty in the interpretation and application of the ECHR is also given in the case law of the ECtHR. According to the Court, "the principle of legal certainty . . . is implicit in all the Articles of the Convention and constitutes one of the fundamental aspects of the rule of law . . . . This principle guarantees a certain stability in legal situations and contributes to public confidence in the courts" (*Lupeni Greek Catholic Parish and others v. Romania* [GC], Application No. 76943/11, ECtHR, 29 November 2016, § 116(a)).

36. However, what is the link between the three interpretative principles and the value of

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legal certainty?

37. The Ombudsperson considers that the importance of the aforementioned principles in guaranteeing legal certainty is very clear. In the absence of these principles and their consistent implementation, it would not be possible for a court or governmental institution or an independent agency, etc., to determine the normative act that should be implemented on a factual situation regulated by more than one such normative act.

38. Even more important in such factual situations, it could not be said that the law "has to be formulated with sufficient precision to enable the ***individual*** to regulate his or her conduct" (Venice Commission, Report on the Rule of Law, par. 44, emphasis added), if there were no such interpretative principles that give an accurate answer as to which normative act should be given priority in a given situation.

39. In addition to the rule of law and human rights, the three interpretative principles are also indispensable to ensure the values of democracy.

40. One of the most important elements of a democratic society is respecting the will of the people, who, in the Republic of Kosovo, as well as in any parliamentary democracy, is expressed through elected representatives of the Assembly.

41. Considering this fact, there are several reasons why the three interpretative principles are indispensable to ensure the sound functioning of such a democracy.

42. Firstly, in order to respect the will of the Assembly, there should be as much consistency and certainty as possible in the way the approved laws are interpreted. The three interpretative principles are intended precisely to guarantee such a thing.

43. With the strict application of these principles, lawmakers would know more precisely how the laws they approve would be interpreted in cases where more than one law applies. Equally important, the Government, institutions, independent agencies and the courts, while interpreting and implementing the laws, would also know that the Assembly has adopted laws while taking into due account these interpretative principles.

44. In other words, if the process of drafting, adopting, interpreting and enforcing laws is seen as a complicated communication game between the Assembly on one side and the Government, courts and independent agencies and institutions on the other side, and the three interpretative principles serve as the game rules to ensure, as much as possible, that communication between the parties is as accurate and consistent. And ultimately, accuracy and consistency in this game are indispensable for the smooth functioning of democracy, because the communication ***content***, in this context, is nothing but the expressed will of the people's representatives.

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45. Moreover, the specific content of the three principles in question reflects democratic values. For example, as noted above in the ICTY Judgment, regarding the *lex specialis* principle, "Particularly in case of discrepancy between the two provisions, it would be logical to assume that the lawmaking body intended to give pride of place to the provision governing the action more directly and in greater detail" (*Kupreškić*, § 684).

46. What is implied in the ICTY judgment is that the lawmakers' will is expressed more clearly in cases where they have regulated a particular case in detail, because in such cases, lawmakers would have had placed more attention to the specific issue in question, rather than in cases where they have regulated a general field that already includes that particular issue. Therefore, the application of *lex specialis* principle will serve to democratic values.

47. The same applies for the second principle, the *lex posterior* and the third principle *lex superiori*.

48. With regard to the *lex posterior* principle, the Ombudsperson considers it apparent that when the Assembly approves a new version of an old law, it is the last version that reflects more exactly the will of the MPs.

49. As for the lex superior principle, this principle also ensures that the will expressed through the ***laws*** should have priority over other ***sub-legal*** acts which, according to this principle, are not allowed to go beyond the framework established by the laws, on the basis of which they are issued.

C. Two examples of implementation of three interpretative principles from the experience of the Ombudsperson Institution

50. This Report is concluded with an analysis of three examples that have been observed during the work of the Ombudsperson Institution. These examples serve (1) to illustrate the application of three interpretative principles and (2) to cite two cases in which the application of these principles has an impact on the protection of human rights and the effectiveness of the Ombudsperson.

51. The first example is the interpretation of Law No. 05/L-019 on the Ombudsperson and the Law No. 03/L-149 on the Civil Service of the Republic of Kosovo. Both laws have the Ombudsperson Institution within its scope.

52. Law on the Civil Service "regulates the status of Civil Servants, and their employment relationship with the institutions of the central and municipal administrations" (*ibid.*, Article 1, par. 1), where "the institutions of the central and municipal administrations that are subject to this law include: . . . independent agencies" (*ibid.*, Article 1, par. 3). Law on the Ombudsperson, also confirms that: "The other employees of the Institution of Ombudsperson shall be subject to the legal provisions in force for civil servants" (*ibid.*, Article 32, par. 1).

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53. On the other hand, the Law on the Ombudsperson has some specific provisions that regulate, in particular, the rights and obligations of its employees. For example, this Law stipulates that "staff of the Ombudsperson Institution enjoy immunity from prosecution, civil lawsuit and dismissal due to spoken or written statements, for activities or decisions that are within the scope of responsibilities of the Ombudsperson Institution" (*ibid.*, Article 12, par. 1); dhe "the Ombudsperson staff must keep-safe the confidentiality of all information and data they receive, paying special attention to safety of complainants, damaged parties and witnesses, in accordance with the Law on personal data protection" (*ibid.*, Article 18, par. 1, sub-par. 11).

54. Such provisions ensure that the Ombudsperson employees are able to carry out the mission of the Ombudsperson Institution in the most efficient way.

55. Since both laws have the Ombudsperson Institution within its scope, which law should be given priority, the Law on the Ombudsperson or the Law on the Civil Service?

56. All three above mentioned interpretative principles offer a clear and concise answer: The Law on the Ombudsperson should have priority over the Law on the Civil Service.

57. First, the *lex specialis* principle guides us to give priority to ***special*** normative act versus the ***general*** act. It is clear that, by comparing the two laws against each other, the Law on the Ombudsperson is the special law and the Law on the Civil Service is the general one. And as a special law, the Law on the Ombudsperson should have priority according to the *lex specialis* principle.

58. This priority is confirmed by the Law on the Civil Service itself, which stipulates that: "The institutions of the public administration that are regulated by special law shall be subject to the provisions of this law, ***except in cases where the special law contains provisions that are different from this law***" (*ibid.*, Article 1, par. 4; emphasis added).

59. Secondly, the Law on the Ombudsperson enjoys priority even under the *lex posterior* principle, which guides that the later normative act should have priority over the previous one. The Law on the Ombudsperson was approved by the Assembly on 28 May 2015, while the Law on Civil Service was approved more than 5 years ago on 13 May 2010. Therefore, according to the *lex posterior* principle, the Law on the Ombudsperson is given priority over Law on the Civil Service.

60. Again, this priority is confirmed by the text of the law itself, namely the Law on the Ombudsperson, which stipulates that: "With entry into force of this law, the Law no. 03/L-195 on Ombudsperson ***and all other provisions which are in contrary with this Law are repealed***" (*ibid.*, Article 39; emphasis added). The words "other provisions

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which are in contrary with this Law", refer to the contrary provisions of all other laws, except the old Law on the Ombudsperson, e.g. Law on the Civil Service.

61. Thirdly, the Law on the Ombudsperson also has priority based on the *lex superior* principle. This principle stipulates that a normative act that is higher in the hierarchy of a legal system has priority over an act that is lower in the hierarchy.

62. The Law on the Ombudsperson should be considered a higher act compared to the Law on the Civil Service, as the former can be called a "basic" law, in the sense that unlike ordinary laws such as the Law on the Civil Service, is a separate law regulating the organization and the functioning of an institution of the constitutional category.

63. As explained by the Constitutional Court of the Republic of Albania, "basic laws further elaborate and specify more clearly and better the independence of constitutional bodies and institutions that guarantee, as the case may be, special provisions of the Constitution" (Constitutional Court of the Republic of Albania, Decision no. 19, May 3, 2007, p. 9). As a basic law, the Law on the Ombudsperson should be given priority over the Law on the Civil Service, which has the status of a regular law.

64. The second example of the implementation of interpretative principles relates to the relation between Law no. 05/L-020 on Gender Equality and Law no. 03/L-073 on General Elections in the Republic of Kosovo, regarding their respective requirements for gender representation among elected representatives.

65. With regards to this issue, the Law on General Elections defines that "In each Political Entity's candidate list, at least thirty (30%) percent shall be male and at least thirty (30%) percent shall be female, with one candidate from each gender included at least once in each group of three candidates, counting from the first candidate in the list" (*ibid*, Article 27, par. 1).

66. Whereas the Law on Gender Equality has a stricter requirement: "Legislative bodies . . . shall be obliged to adopt and implement special measures to increase representation of underrepresented gender, until equal representation of women and men according to this Law is achieved", adding that: "Equal gender representation in all legislative bodies . . . is achieved when ensured a minimum representation ***of fifty percent (50%) for each gender***, including their governing and decision-making bodies" (*ibid*, Article 6, par. 7 and 8; emphasis added).

67. Which law should be given priority for governing this issue, Law on General Elections or Law on Gender Equality?

68. In this case, two of the interpreting principles are relevant. Both these principles give priority to the Law on Gender Equality.

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69. With regards to the *lex specialis* principle, it may initial appear ambiguous as to which law should be considered special and which general. It may seem that each law governs a different specific field and therefore none of them enjoys priority over the other.

70. However, according to ECtHR's logic in the *Kudla* case mentioned above, the Law on Gender Equality should be considered as a special law. As shown above, ECtHR considers that in most cases, Article 6, par. 1 is *lex specialis* in relation to Article 13, because "protection afforded by Article 6, par. 1, implying the full panoply of a judicial procedure, ***are stricter*** than, and absorb, those of Article 13" (*Kudla*, § 146; emphasis added).

71. Based on the same logic, the stricter requirement of the Law on Gender Equality that all genders are to be represented 50%, it may be considered *lex specialis* compared to the lower requirement of the Law on General Elections, which requires a representation of only 30% of each gender. Therefore, according to the *lex specialis* principle, the stricter requirement of the Law on Gender equality enjoys priority over that less strict of the Law on General Elections.

72. Also, the *lex posterior* principle is relevant in this case. Law on Gender Equality was adopted by the Assembly on 28 May 2015, whereas the Law on General Elections was adopted much earlier, namely on 5 June 2008. Based on this, we can consider that the requirement set out in the Law on Gender Equality reflects more accurately the will of people representatives in relation to this issue and should therefore enjoy priority over the Law on General Elections.

73. As the last example, the Ombudsperson seeks to analyse in details the relations of priority between (1) Law No. 04/L-192 for Blind Persons, (2) Law No. 05/L-028 on Personal Income Tax, and (3) Administrative Instruction MoF-No. 02/2018 on the Use of Fiscal Electronic Devices and Systems.

74. Relations between these normative acts are relevant in the context of this Report, for two reasons.

75. Firstly, these acts prove once again how important are all three interpreting principles for efficient protection of human rights.

76. Secondly, by analysing these facts, we can respond to an important question: how to act in cases when three interpreting principles contradict one-another, i.e. when one of the principles instructs us to give priority to an act, whereas the other principle instructs us to give priority to another act? In such cases, which of three principles should enjoy priority over the others?

77. The baseline for analysing the four abovementioned normative acts is Article 6 of the Law for Blind Persons, a part of which defines that: "Blind persons shall be exempted

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from any tax and direct taxes. In case of self-employment they shall be exempted from any fiscal obligation".

78. Let us start by analysing the relation between the Law for Blind Persons, namely abovementioned provisions, and Law on Personal Income Tax.

79. Pursuant to the Law on Personal Income Tax, "The taxpayers are resident and non-resident natural persons, personal business enterprises, partnerships and associations of persons who receive or accrue gross income . . . during the tax period" (*ibid*, Article 3) and "taxable income for a tax period shall mean the difference between gross incomes received or accrued during the tax period and the deductions allowable under the present law with respect to such gross income" (*ibid*, Article 5).

80. Based on the abovementioned provisions of two relevant laws, it is clear that there is a conflict between them:

81. On the one hand, the Law on Personal Income Tax defines that all natural persons receiving or generating gross incomes are considered taxpayers and that taxable incomes of a taxpayer include gross incomes, following the application of allowable deductions. Here are included blind persons that are in employment relationship, or who have other sources of incomes, e.g. rents (*see ibid*, Article 7, par. 1, sub-par. 2) and "capital gains resulting from sale of a capital asset" (*see ibid*, Article 7, par. 1, sub-par. 6).

82. On the other hand, the Law for Blind Persons defines that persons under this category are exempted from any type of direct tax. Personal income tax is included here.

83. It should be stated that Article 8, par. 1, sub-par. 12 of the Law on Personal Income Tax ("wages of persons with disabilities are exempted from personal income tax as foreseen under relevant laws for these categories"), does not completely resolve the conflict between two laws. Even if we take for granted that blind persons are one of the categories of "persons with special needs", which is not expressly mentioned in the law, this provision exempts from tax only "***wages***" of blind persons, but not other forms of incomes.

84. "Wages" is a technical term, with a specific definition, in the Law on Personal Income Tax: "financial and other kinds of compensation, including goods, bonuses, favours, services, or barter, paid in connection with employment in Kosovo" (*ibid*, Article 2, par. 1, sub-par. 8).

85. This means that only incomes of blind persons related to employment will be exempted from taxation, according to the Law on Personal Income Tax. Law for Blind Persons exempts persons of these categories from tax on rent, capital profits, etc., and from all other types of direct tax.

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86. How to solve this conflict between two laws? It can be easily seen that two of interpreting principles provide different solutions.

87. Firstly, *lex specialis* principle gives priority to the provision of the Law for Blind Persons over the provision of the Law on Personal Income Tax. The reason is that Article 6 of the Law for Blind Persons addresses only a certain category in the tax aspect, whereas Articles 3 and 5 of the Law on Personal Income Tax address all taxpayers, including blind persons.

88. Therefore, applying the *lex specialis* principle, the exemption defined in the Law for Blind Persons should enjoy priority over the general rule set out on the Law on Personal Income Tax.

89. However, the *lex posterior* principle leads us to the opposite conclusion. Law for Blind Persons was adopted by the Assembly on 14 June 2012, whereas the Law on Personal Income Tax was adopted after more than three years, namely on 22 July 2015.

90. Therefore, according to the *lex posterior* principle, the provisions of the Law on Personal Income Tax should enjoy priority over the provision of the Law for Blind Persons.

91. And here is raised the question: Which principle should enjoy priority over the other, while they give us opposite responses in the same case?

92. The Ombudsperson considers that, in this case, *lex specialis* principle should apply instead of *lex posterior* principle. The reason is that the Law for Blind Persons contains the Assembly's purpose of establishing, for a special category of persons, an exemption from taxes, ***whatever the general rules of taxes set out in other laws***. While this has been the purpose of lawmakers, logically, even after later amendments of these general rules, the earlier principle determined in the special law remains valid.

93. However, it should be emphasized that this priority for the *lex specialis* principle is not unlimited. If a law that would expressly determine that the exemption mentioned on the Law for Blind Persons is cancelled would be adopted, then, in such case, the later law would have to enjoy priority over the earlier law. In other words, *lex posterior* principle would be given priority over the *lex specialis* principle.

94. Another conflict between interpreting principles is between the Law for Blind Persons, on the one part, and Administrative Instruction on the Use of Fiscal Electronic Devices and Systems, of the other part.

95. As mentioned above, Article 6 of the Law for Blind Persons defines that: "In case of self-employment they shall be exempted from any fiscal obligation".

96. However, the concerned Administrative Instruction does not recognize such an

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exemption. One of the purposes of this Instruction is to determine "rules and procedures for the selection, administration, installation and use of fiscal electronic devices and software during the trade activity in the territory of the Republic of Kosovo" (*ibid*, Article 1). A Fiscal Electronic Device (hereinafter "FED") "is a device or computerised electronic system used for issuing sales receipts "fiscal receipt" for retail transactions" (*ibid*, Article 3, par. 2, sub-par. 1).

97. Pursuant to the Administrative Instruction, among persons obliged to used FEDs are: "All persons who make supplies of goods and/or services or at premises, units or locations accessible for public" and "All those (companies) who work with cash (exchange money in cash)" (*ibid*, Article 4, par. 1, sub-par. 2). Blind persons should be among these persons, who, according to Article 6 of the Law for Blind Persons, should be exempted from any fiscal obligation.

98. As mentioned above, it seems that there is a conflict between the *lex specialis* principle and *lex posterior* principle.

99. According to the *lex specialis* principle, the Law for Blind Persons should enjoy priority. As mentioned above, Article 6 of this Law functions as an exemption for a specific category, from a general rule, in this case, obligation to use FEDs.

100. However, the concerned Administrative Instruction has been issued much later than the Law for Blind Persons, namely on 18 May 2018. Therefore, according to the *lex posterior* principle, the Administrative Instruction should enjoy priority over the Law.

101. However, for the same reason as above, the Ombudsperson considers that, in this case, the *lex specialis* principle should apply: the purpose of Article 6 of the Law for Blind Persons was to create an exemption from general rules for determining fiscal duties. This exemption remains valid even though these general rules may be amended with later normative acts.

102. The Ombudsperson notices that, in addition to the *lex specialis* principle and *lex posterior* principle, the third interpreting principle, *lex superior* principle, is relevant in this case. According to this principle, a normative act that is higher in the hierarchy of normative acts should enjoy priority over the act that is lower in the hierarchy. According to this third principle, the Law for Blind Persons should enjoy priority because it has higher status than the Administrative Instruction.

103. The Ombudsperson considers that, in such case, the *lex superior* principle should apply instead of *lex posterior* principle, because the Law is the reflection of democratic will, expressed with the votes of members of parliament. In addition, all lower normative acts stem from the law, e.g. regulations, decisions of the Government and administrative instructions. For these reason, a law should enjoy priority over an administrative instruction, even if such an administrative instruction

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has been issued later than the adoption of the law.

104. However, it should once more be mentioned that such priority of the *lex superior* principle over the *lex posterior* is not unlimited: if the concerned Law has been expressly repealed by the Assembly, then it shall no longer reflect the democratic will and, on this occasion, an administrative instruction, if it is based on the applicable law, should enjoy priority.

105. Based on this analysis, the Ombudsperson proposes the following rules to decide which principle should apply in case of conflict:

(1) If a normative act (or provision of a normative act) aims to create an exemption from the general rule, then the *lex specialis* principle is applied even if this general rule is amended from another normative act.

(2) However, if the later act repeals ***expressly*** the established exemption, then the *lex posterior* principle is applied.

(3) In case of conflict between a higher and lower normative act, in general, the *lex superior* principle is applied even if the lower act has been issued later than the higher act.

(4) However, if the higher act is ***expressly*** repealed, then the *lex posterior* principle is applied, provided that the lower act has been issued based on a law that is still in force.

CONCLUSIONS AND RECOMMENDATIONS OF THE OMBUDSPERSON

A. Conclusion of Ombudsperson

106. Based on the abovementioned assessment, the Ombudsperson concludes that state institutions in charge of interpreting and implementing normative acts should interpret these acts according to three interpreting principles (*lex specialis derogat legi generali*, *lex posterior derogat legi priori* and *lex superior derogat legi inferiori*) and apply rules proposed in this Report for cases of conflict between these principles.

B. Recommendations of Ombudsperson

107. Based on this conclusion, and in compliance with Article 135, par. 3 of the Constitution of the Republic of Kosovo and Article 16, par. 4 of the Law No. 05/L-019 on Ombudsperson, the Ombudsperson recommends:

(1) The Supreme Court, pursuant to the Law No. 03/L-199 on Courts, Article 22, par. 1, sub-par. 3 ("Supreme Court . . . defines principled attitudes and legal remedies for issues that have importance for unique application of Laws by the courts in the territory of Kosovo") to provide a legal remedy whereby instructing all regular

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courts to interpret and apply normative acts in compliance with three interpreting principles (*lex specialis derogat legi generali*, *lex posterior derogat legi priori* and *lex superior derogat legi inferiori*) and apply rules proposed in this Report for cases of conflict between these principles; and

(2) Prime Minister, pursuant to the Constitution, Article 94, par. 3 ("Prime Minister . . . ensures implementation of laws"), should issue an administrative acts whereby instructing all government institutions and agencies to interpret and apply normative acts in compliance with three abovementioned principles and apply rules proposed in this report for cases of conflict between these principles.

Pursuant to Article 132, paragraph 3 of the Constitution of the 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"), please inform us of actions you will take with regards to this issue.

Respectfully,

Hilmi Jashari
Ombudsman

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