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Institucioni i Avokatit të Popullit • Institucija Ombudsmana • Ombudsperson Institution

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*Ex officio*

Case No.44/2017

## **REPORT WITH RECOMMENDATIONS**

### **OF THE OMBUDSPERSON OF THE REPUBLIC OF KOSOVO**

*concerning*

*Procedural delays in treatment of cases by the Special Chamber of the Supreme Court*

addressed to:

Mr Isa Mustafa, Prime minister  
Government of the Republic of Kosovo

Mr Nehat Idrizi  
Chair of Kosovo Judicial Council

Mr Sahit Sylejmani  
President Judge of the Special Chamber of the Supreme Court

Prishtina, 31 January 2017

## **Purpose of report**

1. The purpose of this report is to draw the attention of relevant state authorities to human rights violations committed by the procedural delays in treatment of cases by the Special Chamber of the Supreme Court (Special Chamber) and making recommendations for the elimination of these violations.

## **Powers and responsibilities of Ombudsperson**

2. In conformity with Constitution of the Republic of Kosovo (Constitution), Article 135, paragraph 3: *“The Ombudsperson is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed.”*
3. Based on Article 16, paragraph 8 of Law on Ombudsperson No. 05/L-019, Ombudsperson: *“may provide general recommendations on the functioning of the judicial system. The Ombudsperson will not intervene in the cases and other legal procedures that are taking place before the courts, except in case of delays of procedures.”*
4. Based on Article 18, paragraph 1.2 of Law on Ombudsperson, Ombudsperson is responsible *“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.”*
5. Based on Article 18, paragraph 1.7 of Law on Ombudsperson, Ombudsperson is responsible: *“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.”*

## **Description of the case**

6. This report is based on 49 (forty-nine) separate complaints, which are currently initiated with the Ombudsperson Institution (OI) regarding the delay of treatment of cases by Special Chamber, by not including here the complaints filed against Privatisation Agency of Kosovo, which relate to the issues dealing with Special Chamber and which according to their nature are similar to the complaints filed against Special Chamber, as these complaints too, depend on final decisions taken by Special Chamber. Complaints received with OI are dating from 2012, the list of which is attached as an annex to this Report with Recommendations.
7. Taking into consideration that in addition to delays made by Special Chamber, complainants’ cases have preliminary gone through a procedure within Privatisation Agency of Kosovo, which impact even more on the delay of resolution of these cases.

## **Actions of the Ombudsperson, cooperation and attitudes of the Special Chamber**

8. Following the receipt of complaints in accordance with admission procedures and investigation of complaints, Ombudsperson addressed Special Chamber regarding the allegations deriving from the complaints filed for each complaint individually and Ombudsperson received a response to almost all the requests addressed to the Special Chamber.
9. In almost all responses received by the Special Chamber, Ombudsperson was informed that a number of cases pending trial have been prolonged in the procedures of the Special Chamber.

10. In the beginning of December 2016, Ombudsperson met the President Judge of the Special Chamber, who informed him regarding challenges and difficulties faced by Special Chamber. President Judge of Special Chamber admitted that there is a delay in the proceeding of cases and informed that 21.640 cases in the both instances of Special Chamber remained unfinished until 18 November 2016, stressing that the average number of the workload of cases for a judge in the Special Chamber of first instance is about 1390 cases, while in the second instance 130 cases. President Judge of Special Chamber further stressed that Special Chamber has constantly felt lack of legal advisors and translators, pointing out that there are 30.000 pages of documents awaiting translation, which are indispensable for proceeding with cases.
11. Ombudsperson observes that President Judge of Special Chamber prepared a report for Kosovo Judicial Council *on Situation, difficulties and problems as well as on measures to be taken to resolve the problems in Special Chamber*. According to the claims of President Judge of the Special Chamber, he also informed relevant authorities on the situation in Special Chamber and requested the undertaking of measures for resolving the backlogged cases, but to date, there is no positive development regarding the requests filed.

#### **Law No. 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters**

12. Functioning of the Special Chamber is regulated by Law No. 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters (Law). According to Article 3, paragraph 1 of Law:  
*“The Special Chamber shall be composed of up to twenty (20) judges, twelve (12) of whom shall be citizens of Kosovo and eight (8) of whom shall be international judges. At least two (2) of the judges who are citizens of Kosovo shall be from minority communities.”*
13. It seems that this provision limits the number of judges of Special Chamber and this number of judges was foreseen in 2002, when Special Chamber was established by UNMIK Regulation 2002/13 for the review of disputes deriving from the privatisation process.

#### **Findings of Ombudsperson**

14. Ombudsperson draws the attention of state authorities to Article 22 (2) of Constitution, according to which human rights and fundamental freedoms guaranteed by the following international agreements and instruments, and in particular according to European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols (ECHR), which according to this Article 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.
15. Ombudsperson also draws the attention of state authorities to Article 53 of Constitution, according to which human rights and fundamental freedoms guaranteed by Constitution shall be interpreted consistent with the court decisions of ECtHR.
16. Subsequently, assessments and findings of Ombudsperson regarding the issue are based on Constitution, ECHR and ECtHR case-law.

17. Based on responses received from Special Chamber on individual cases and from the claims of President Judge of Special Chamber, Ombudsperson considers that we generally have to do with procedural delays. Due to a considerable number of complaints received by OI, Ombudsperson will assess the situation on the systematic context. This is so because in order to assess whether there were violations in each individual case, an assessment should be made according to the criteria established by ECtHR, including the complexity of cases, the conduct of complainants and the conduct of state authorities.
18. Based on responses that Ombudsperson received from Special Chamber, it clearly seems that we have to do with a backlog of cases and that such a situation has become common for Special Chamber which seems to be a result of a limited number of judges by law, frequent substitution of judges, in particular of international judges and the lack of legal advisors and translators. Ombudsperson, therefore, considers that above all, we have to do with the conduct of state authorities regarding the situation in Special Chamber.
19. ECHR determines the obligation of states in the organisation of their justice systems, in order for courts to comply with the obligation to review cases within a reasonable time, irrespective of the expenses that may arise for this organisation. Otherwise states will be held accountable not only for delays in the resolution of any special cases but also for the failure to build resources for the resolution of the backlog of cases and for structural absence in justice system causing such delays.
20. When the backlog of cases pending review is in question, ECtHR make a difference between situations when we have to do with the backlog of cases for a definite time, where state may not be held accountable if it has timely undertaken proper actions for improvement of situation and the continuous backlog of cases for which the state is held accountable. Despite the requests made by President Judge of Special Chamber and numerous citizens' complaints, which are party to the proceedings within the Special Chamber, it seems that relevant authorities have taken no actions for improving the situation regarding the resolution of the backlog of cases.
21. According to ECtHR case-law, it is the obligation of states to organise their legal systems in order to guarantee the right to take a final decision for each citizen regarding their rights and civil obligations, within a reasonable time (*Scordino v. Italy (no.1)*, § 183), where the overload with cases cannot be taken into consideration (*Vocaturro v. Italy*, § 17; *Cappello v. Italy* § 17). In case the delay in the settlement of cases is an issue of structural organisation, the state must provide the adoption of efficient measures for the resolution of backlogged cases, (*Zimmermann and Steiner v. Switzerland*, § 29; *Guincho v. Portugal*, § 40). The fact that backlogging of cases has become common does not justify extraordinary delay of procedures (*Unión Alimentaria Sanders S.A. v. Spain*, § 40).
22. Taking of measures by relevant authorities of the Republic of Kosovo, concretely amendment of Law on Special Chamber, namely of legal provisions limiting the number of judges of Special Chamber is an urgent measure to increase efficiency of Special Chamber. While, a long-term, stable and indispensable measure for the efficient functioning of courts in general which are obliged to take a decision within a reasonable time according to requirements deriving from Constitution, ECHR, and

ECtHR case-law is the adoption of the Law which sets forth deadlines for resolution of court cases and the reimbursement of parties when it is concluded that there were delays in court procedures. Lack of such a Law setting forth deadlines and reimbursement for extraordinary delays of procedures directly impacts on the right for legal effective remedies, a right which is also guaranteed by Constitution and ECHR.

23. Ombudsperson considers that procedural delays within Special Chamber may have committed violation of the right to a fair and impartial trial, Article 31 [Right to Fair and Impartial Trial] as well as the right to legal effective remedies, Article 54 [Judicial Protection of Rights] which determines the right to legal effective remedies, of Constitution.
24. The right to a fair and public hearing within a reasonable time is also determined under Article 6 of ECHR [Right to a fair trial], while the right to legal effective remedies is determined under Article 13 of ECHR [Right to an effective remedy].
25. Article 6 and Article 13 of ECHR are two separate rights but which in specific cases are interrelated to one another. ECtHR, in the case *Kudla v. Poland* § 160, observed violation of Article 6 and Article 13 of ECHR due to the fact that the complainant has had no internal legal remedies which would enable the complainant the application of the right “for a trial within a reasonable time” guaranteed under Article 6 of ECHR. Same situation is also in the case of parties waiting for several years for the resolution of cases, while having no legal effective remedies for the application of their right at a trial within a reasonable time.

Based on what was said above, and in conformity with the principle of application of legality and in order to improve and increase authorities’ efficiency, in conformity with Article 135, par. 3 of Constitution of the Republic of Kosovo, Article 16, par. 8, Article 18, par. 1.2 and Article 18, par. 1.7 of Law no. 05/L-019 on Ombudsperson, the Ombudsperson:

#### **Recommends:**

- 1. Government of Kosovo, based on rules and procedures on legislative initiative, should propose the amendment of Law on Special Chamber, namely Article 3.1 of Law in order to provide fair and effective access to the parties in procedure within Special Chamber.***
- 2. Kosovo Judicial Council should provide support to Special Chamber in the organisational and operational aspect in compliance with requirements and needs of adequate functioning of Special Chamber.***
- 3. Special Chamber should draft a Strategy on the resolution of backlogged cases, establishing not only equal distribution of cases to each judge, but also norms and deadlines within which a specific number of cases should be resolved by each judge.***

In conformity with Article 132, paragraph 3 of Constitution of the Republic of Kosovo and Article 28 of Law no. 05/L-019 on Ombudsperson will you kindly inform us on actions to be undertaken in a response to the above-mentioned recommendations.

Expressing our gratitude for the cooperation please be informed that we would like to have your response regarding this issue within a reasonable time, but no later than **3 March 2017**

Sincerely,

Hilmi Jashari  
Ombudsperson

Annex:  
Complaints received in the Ombudsperson Institution

## Complaints received in the Ombudsperson Institution

1. 17/2017
2. 943/2016
3. 939/2016
4. 926/2016
5. 881/2016
6. 745/2016
7. 731/2016
8. 725/2016
9. 677/2016
10. 669/2016
11. 664/2016
12. 663/2016
13. 661/2016
14. 598/2016
15. 595/2016
16. 582/2016
17. 538/2016
18. 460/2016
19. 417/2016
20. 370/2016
21. 350/2016
22. 338/2016
23. 294/2016
24. 290/2016
25. 200/2016
26. 76/2016
27. 44/2016
28. 9/2016
29. 698/2015
30. 661/2015
31. 642/2015
32. 605/2015

33. 601/2015
34. 570/2015
35. 563/2015
36. 504/2015
37. 470/2015
38. 463/2015
39. 449/2015
40. 435/2015
41. 222/2015
42. 81/2015
43. 68/2015
44. 387/2014
45. 386/2014
46. 38/2014
47. 568/2013
48. 284/2013
49. 312/2012