Organization for Security and Co-operation in Europe
MISSION IN KOSOVO

Evidentiary Procedure in Civil Cases in Kosovo

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EXECUTIVE SUMMARY

This report highlights serious shortcomings in the conduct of evidentiary procedure in civil cases before courts in Kosovo. The report focuses on three procedural areas where shortcomings were observed: the hearing of witnesses in oral testimony, the adducing of documentary evidence, and the management of expert evidence, both written and oral. Included in the report is a detailed analysis of six case examples; each illustrates a different facet of the shortcomings observed by the OSCE in these three procedural areas.

The report concludes that while the legal framework regulating civil evidentiary procedure is – for the most part – compliant with fair trial standards, its implementation by the courts has been at best uneven. In all too many cases, the report concludes, deficiencies in evidentiary procedure are sufficiently serious that it cannot be said that the parties received a fair trial.

The report makes a number of recommendations such as to the Kosovo Judicial Institute (KJI) to consider providing training to judges on issues related to children as witnesses, parties testifying as witnesses, the adducing of documentary evidence and expert evidentiary procedure. These recommendations, if implemented, will assist in bringing the conduct of evidentiary procedure in civil cases into line with the requirements of both domestic law and international human rights standards and jurisprudence.

1. INTRODUCTION

Evidentiary procedure is one of the cornerstones of the trial process. Without sufficient evidence, probative of the matters at issue in the case, a judge will be unable to make the findings of fact which must underpin a clearly and carefully reasoned judgment. This is key to ensuring that the right to a fair trial is not compromised. The Organization for Security and Co-operation in Europe Mission in Kosovo (OSCE) is concerned that serious shortcomings in the way evidentiary procedure is conducted in civil cases before courts in Kosovo violate both domestic law and international human rights standards.

This report canvasses both the international human rights standards and the domestic legal framework relevant to the conduct of evidentiary procedure in civil cases. It then analyses, in terms of their compliance with those standards, six examples from cases monitored by the OSCE. The cases which are analysed focus on three areas of evidentiary procedure where the shortcomings observed are particularly acute. The first of these concerns the procedure for the hearing of witnesses, including special cases which include child witnesses or parties who testify as witnesses. The second concerns submission of documentary evidence. The third concerns expert evidentiary procedure. The report concludes with several recommendations to the Assembly of Kosovo, the courts and the KJI. Specifically, the report recommends amending the law to more closely regulate expert evidentiary procedure and to provide for the right of parties to be heard as witnesses; additionally, the report recommends that the KJI consider providing training to civil judges on these and other related civil evidentiary issues.

2. THE LEGAL FRAMEWORK

A) International and Regional Human Rights Standards

(1) European Convention on Human Rights (ECHR)

Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) provides that, in the determination of his or her "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." The European Court of Human Rights (ECtHR), in interpreting this provision, has held that, while Article 6 guarantees the right to a fair trial, it does not regulate matters such as admissibility or the probative value of evidence, viewing these as matters best regulated by domestic law.[1] The ECtHR has also held that it is for domestic courts "to assess the evidence before them as well as the relevance of the evidence" which the parties seek to adduce. The ECtHR held that:

> "The Court must, however, determine […] whether the proceedings considered as a whole, including the way in which [the] evidence was taken, were fair as required by Article 6[1]."[2]

The ECtHR will not, as a rule, review the assessment of evidence by a domestic court. However, where it can be shown that the domestic court has drawn "arbitrary or grossly

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1 *See Schenk v. Switzerland,* ECtHR Judgment of 12 July 1988, para. 46; and *X. v. Belgium,* ECtHR Commission Decision of 16 October 1980, p. 235.

2 *Barberà, Messegué and Jabardo v. Spain,* ECtHR Judgment of 6 December 1988, para 68. See also *Wierzbicki v. Poland* ECtHR Judgment of 18 June 2002, para. 45.

unfair conclusions" from the evidence, grounds for re-assessment may exist.[3] Similarly, Article 6 does not grant litigants "an unlimited right to secure the appearance of witnesses in court", noting that it "is normally for the national courts to decide whether it is necessary or advisable to call a witness".[4] Concerning expert witnesses, the ECtHR has observed that as a general rule it is for domestic courts to assess the evidence before them, including the means to ascertain the relevant facts […].[5]

A fair trial under Article 6(1) requires equality of arms. This principle, as elucidated by the ECtHR, requires "each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent"[6]. The right to "adversarial proceedings" is an integral part of the principle of equality of arms. The ECtHR has held that this right:

> "means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, […] with a view to influencing the court's decision […]."[7]

The right to adversarial proceedings also "means that the hearing of witnesses must in general be adversarial" and that "all the evidence must in principle be produced in the presence of the [parties] at a public hearing with a view to adversarial argument."[8]

The ECtHR has ruled on a wide variety of evidentiary matters in the context of the right to adversarial proceedings. Where witness statements and documentary evidence were simply read into the court record, without the parties being given the chance to comment on them, the ECtHR has held that the right to adversarial proceedings was violated.[9] Where, in a claim against a hospital arising out of the death of their daughter, the claimants were deprived of the opportunity to participate in the procedure leading to the preparation of an expert medical report that the ECtHR described as the "main piece of evidence in the case", this was found to constitute a violation of the right to an adversarial hearing.[10] Where, in a case involving a child who had been placed in protective care, the failure to provide the child's parents with

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3 *Waldberg v. Turkey No 22909/93,* ECtHR Commission Decision of 6 September 1995, para. 2. See also *Camilleri v. Malta No 51760/99,* ECtHR Decision of 16 March 2000.

4 *Accardi v. Italy No 30598/02,* ECtHR Decision of 20 January 2005, para. 1.

5 *Sommerfeld v. Germany,* ECtHR Judgment of 8 July 2003. In this case, the ECtHR, at para. 71 held that, in a case involving access to a child by the non-custodial parent, "[i]t would be going too far to say that domestic courts are always required to involve a psychological expert on the issue […], but this depends on the specific circumstances of each case, having due regard to the age and maturity of the child concerned." However, in another case involving access to a child by the non-custodial parent, the ECtHR found that the failure of a domestic court to order an expert psychological report violated the rights of the parent; the ECtHR noted that the Youth Office involved in the case recommended obtaining an expert opinion: *Elsholz v. Germany,* 2000-VIII; ECtHR Judgment of 13 July 2000, paras 52-52.

6 *Walston (No. 1) v. Norway,*EctHR Judgment of 3 June 2003, para. 56.

7 *Vermeulen v. Belgium* EctHR Judgment of 22 January 1996, para 33.

8 *Barberà, Messegué and Jabardo v. Spain,* supra, note 4, para 78. See also *Walston (No. 1) v. Norway,* supra note 8, para. 58, wherein the ECtHR held that it did not need to determine whether the omission to communicate the evidence caused the applicants prejudice: "the existence of a violation is conceivable even in the absence of prejudice […]. It is for the applicants to judge whether or not a document calls for their comments. […] In the present case, the mere fact that the applicants were unable to respond meant that they were placed at a disadvantage *vis-à-vis* [the respondents]."

9 Ibid. See also *Feldbrugge v. Netherlands* ECtHR Judgment of 29 May 1986, para. 33.

10 *Mantovanelli v. France,* ECtHR Judgment of 17 February 1997, paras. 30-36. This violation cannot be remedied simply by later providing the completed expert's report to the claimant.

copies of confidential social work reports was found to have violated their right to an adversarial hearing. The ECtHR held that:

> "The lack of disclosure of such vital documents as social reports is capable of affecting the ability of participating parents not only to influence the outcome of the [hearing] but also to assess their prospects of making an appeal […]".[11]

(2) Convention on the Rights of the Child (CRC)

The Convention on the Rights of Child (CRC)[12] contains provisions applicable to the conduct of evidentiary procedure in cases involving children. Article 12 provides that authorities:

> "shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child",

and that:

> "the child shall **in particular** be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law." [Emphasis added.][13]

In 2009, the Committee on the Rights of the Child (the Committee) issued a General Comment on the right of the child to be heard. The objectives of the General Comment are to strengthen understanding of the meaning of Article 12 and to propose "basic requirements for appropriate ways to give due weight to children's views in all matters that affect them".[14] Concerning "the child's right to be heard in civil judicial proceedings", the Committee notes that children should in particular be heard in cases involving separation and divorce of their parents.[15]

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[11] *McMichael v. United Kingdom*, ECtHR Judgment of 24 February 1995, para. 80.

[12] Convention on the Rights of the Child, UN General Assembly Resolution 44/25, 20 November 1989, entered into force 2 September 1990 (CRC).

[13] Ibid, Article 12.

[14] Committee on the Rights of the Child (Committee), General Comment No. 12 on the Right of the Child to be Heard (2009), CRC/C/GC/12, 20 July 2009, para. 8.

[15] Ibid, paragraphs 51-52. In such cases, the Committee notes, "the children of the relationship are unequivocally affected by decisions of the courts. Issues of child maintenance as well as custody and access are determined by the judge either at trial or through court-directed mediation. Many jurisdictions have included in their laws, with respect to the dissolution of a relationship, a provision that the judge must give paramount consideration to the 'best interests of the child'. For this reason, all legislation on separation and divorce has to include the right of the child to be heard by decision makers and in mediation processes. Some jurisdictions, either as a matter of policy or legislation, prefer to state an age at which the child is regarded as capable of expressing her or his own views. The Convention, however, anticipates that this matter be determined on a case-by-case basis, since it refers to age and maturity, and for this reason requires an individual assessment of the capacity of the child." The Committee also notes that children should be heard in adoption and child protection proceedings; see paragraphs 53-56.

(3) Council of Europe Recommendations

The Council of Europe's Committee of Ministers recommends that courts should have the authority to summon witnesses, and to impose appropriate sanctions "in cases of unjustified non-attendance of such witnesses".[16] Dealing with expert witnesses, the Committee of Ministers recommends that:

> "[i]f an expert appointed by the court fails to communicate his report or is late in communicating it without good reason, there should be appropriate sanctions. These might take the form of reduction of fees, payment of costs or damages, as well as disciplinary measures taken by the court or by a professional organisation, as the case may be."[17]

The Committee of Ministers recommends that courts "play an active role in ensuring the rapid progress of the proceedings, while respecting the rights of the parties, including the right to equal treatment.

> "In particular, [courts] should have *proprio motu* powers to order the parties to provide such clarifications as are necessary; to order the parties to appear in person; to raise questions of law; to call for evidence, at least in those cases where there are interests other than those of the parties at stake; to control the taking of evidence; to exclude witnesses whose possible testimony would be irrelevant to the case; to limit the number of witnesses on a particular fact where such a number would be excessive. These powers should be exercised without going beyond the object of the proceedings."[18]

B) Domestic Law

The conduct of the evidentiary phase of civil trials is regulated primarily by the Law on Contested Procedure (LCP).[19] Other laws containing provisions relevant to evidentiary

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[16] Recommendation No. R (84)5 of the Committee of Ministers of the Council of Europe to Member States on the Principles of Civil Procedure Designed to Improve the Functioning of Justice, 28 February 1984, Principle 1(3). Further, the Committee of Ministers noted, "when a witness is absent, it is for the court to decide whether the case should continue without his evidence."

[17] Ibid, Principle 1(4).

[18] Ibid, Principle 3.

[19] Law No. 03/L-006 on Contested Procedure, 20 September 2008, which courts in Kosovo began applying on 6 October 2008. See also Official Gazette of the Socialist Federal Republic of Yugoslavia 4/1977, 36/1980, and 66/1982 of 12 February 1982, with amendments from 1998 (1982 law on contested procedure). Many provisions in the LCP remain substantially similar to those in the 1982 law..

procedure include the Law on Non-Contested Procedure (LNCP),[20] the Family Law,[21] the Law on Social and Family Services[22] and the Anti-Discrimination Law.[23]

(1) General Provisions

Litigants in civil cases must assert "all the facts on which they base their claim" and must adduce sufficient evidence to establish each of these facts.[24] A party must adduce the evidence necessary to support the facts he or she alleges, and also, where necessary, to respond to evidence adduced by the opposing party.[25] The Court must assess each piece of evidence adduced both "individually and collectively"; it must decide on the admissibility of the evidence "truthfully and cautiously and based on the results of the entire proceeding".[26] Except in certain narrowly defined circumstances, evidence must be adduced in court, during the course of a hearing session.[27] Evidence may include oral testimony from witnesses (including the parties), documentary or material evidence, and expert opinion. The court may take judicial notice, without the necessity of evidence being adduced to prove them, of "facts that are widely known" as well as "facts that have been proved in previous court verdicts".[28] Facts may also be admitted.[29] The party alleging a fact bears the burden of proving it, unless provided otherwise in a specific enactment.[30] The judgment issued following the conclusion of a civil case must be in writing, must be reasoned, and must include an explanation of the facts established by the court, why they did so, and how. Where facts were found as a result of evidence adduced during the course of the trial, the judgment should specify which evidence established which facts, and how it did so.[31]

(2) Hearing of witnesses

The party proposing a witness must advise the court beforehand of the testimony the witness is expected to give.[32] In certain narrowly defined circumstances, the witness may refuse to

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[20] Law on Out Contentious Procedure, No. 03/L-007, 13 December 2008, which courts in Kosovo began applying on 28 January 2009. See also the Law on Non Contested Procedure, No. 42/1986, Official Gazette of the Socialist Autonomous Province of Kosovo. Many provisions in the LNCP remain substantially similar to those in the 1986 law..

[21] Law No. 2004/32 on Family Law, as promulgated by UNMIK Regulation 2006/7, 16 February 2006 (Family Law). Article 84(2), for instance, provides that where spouses submit a proposal for divorce by mutual agreement, the court may "investigate the facts and conduct evidentiary proceedings relating to that part of the proposal of spouses dealing with the safekeeping, education and provision on financial maintenance for the children, if it concludes that the proposal of the parents regarding these issues offers no necessary guarantee that the interests of their minor or disabled children shall be properly protected through such agreement."

[22] Law No. 2005/02-L17 on Social and Family Services, as promulgated by UNMIK Regulation 2005/46, 21 April 2005.

[23] Law No. 2004/3 on Anti-Discrimination, as promulgated by UNMIK Regulation 2004/32, 20 August 2004. Article 8(1) of this law creates a reverse evidentiary burden, providing that where a claimant establishes "facts from which it may be presumed there has been direct or indirect discrimination", the burden then shifts to the respondent to prove that "there has been no breach of the principle of equal treatment."

[24] Article 7(1), LCP. See also Article 319.

[25] Article 428(1), LCP.

[26] Articles 8(1) and 8(2), LCP. See also Article 320.

[27] Article 324(1), LCP. See also Articles 326-327 and 427.

[28] Article 321(1), LCP.

[29] Article 321(2), LCP.

[30] Article 322, LCP.

[31] Article 160(4), LCP.

[32] Article 340, LCP. The party must also provide the full name and address of the witness.

testify[33], or to answer certain questions put to him or her[34]. Witnesses under the age of 14 years must be summoned via a parent or legal guardian.[35] Witnesses unable to attend at court due to "illness, old age or any disability" may be heard elsewhere.[36] Where there is more than one witness in a case, the witnesses shall be heard separately from one another.[37] Witnesses shall be questioned first by the party on behalf of which they were summoned, and then by the opposing party.[38] Witnesses should always be asked how they have come to know the matters on which they testify.[39] Witnesses may refer to notes where "something that has to be calculated is discussed" or if they are testifying "about something that is difficult to remember".[40] A translator shall be provided "[if] the witness does not speak the language".[41] Witnesses are entitled to be compensated for travel costs, meals, lodging and "loss of profit".[42]

Although there is no automatic entitlement to do so, a party may, at the discretion of the court, be permitted to testify as a witness in his or her own case.[43] Where the party lacks "procedural capacity", a legal representative may testify in his or her place.[44] In cases where the party is a "legal person", then "the person that is specified by law to represent him/her will be heard" as a witness.[45] A party who testifies shall be examined first by his or her own lawyer and then by the opposing party.[46] Concerning the hearing of children as witnesses, the Family Law provides that where the court must make a decision on the "exercise of parental rights and obligations", it shall take into consideration "the opinion of the child who is capable of forming his/her [own] views".[47]

(3) Documentary and material evidence

Parties should adduce any documents necessary to establish statements they assert in relation to the case.[48] Where a party alleges that the opposing party is in possession of any "relevant document", the court may order the opposing party to produce that document.[49] The court

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33 Articles 341-342, LCP.
34 Article 343, LCP.
35 Article 345(2), LCP.
36 Article 346(3), LCP.
37 Article 347(1), LCP.
38 Article 348(1), LCP. Where necessary, the party which summoned the witness may be permitted to further question the witness following the cross examination: Article 431(2). Additionally, the court may pose questions to the witness at any time: Article 348(2) (see also Article 432, which provides that the court may question "parties, witnesses or experts at any time of the trial.")
39 Article 348(3), LCP.
40 Article 353, LCP.
41 Article 354(1), LCP. If the witness is hearing-impaired and/or cannot speak, he or she may answer questions in writing, or alternatively, through an interpreter: Article 354(2)
42 Article 355(1), LCP. The court is obliged to inform witnesses of this entitlement, which will be lost if not exercised "as soon as [the] hearing is over": Article 355(2).
43 Article 373, LCP.
44 Article 375(1), LCP. However, the court may decide that, in addition to the testimony of the legal representative, "the party itself has to be questioned if it is possible": Article 375(2).
45 Article 375(3), LCP.
46 Article 430(1), LCP. Where the party testifying is not represented by a lawyer, he or she shall be first questioned by the court: Article 430(2). As is the case with other witnesses, a party who testifies may be questioned by the court "at any time of the trial: Article 432.
47 Article 140(5), Family Law. "Such opinion shall be given due weight in accordance with the age and the ability of the child to understand."
48 Article 331, LCP.
49 Article 333, LCP.

may also order third parties to produce documents in their possession, where such documents are relevant to a case.[50] In certain non-contested proceedings, parties are obliged to attach the necessary documentary evidence to their filed claim, or, alternatively, to bring it with them when they come to court.[51]

(4) Expert evidence

On the application of the parties, the court may order that expert opinion evidence be adduced in a case. The court will make such an order "any time if there is a need to specify facts or circumstances that the judge does not have sufficient knowledge for".[52] The party bringing the application for expert opinion evidence must make a case for why the expertise is needed and must put forward the name of an expert. The opposing party must be given the opportunity to respond to the application.[53] Except in certain specified areas of expertise, experts must be chosen from a list maintained by the court.[54] An expert witness, once summoned, must "appear in court and state his/her opinion and conclusion"[55] and must give his or her opinion honestly "and in accordance with the scientific rules".[56]

Experts must be briefed regarding the matter on which their expertise is sought, and be given the opportunity to "take part in the sessions, to question, give explanations, and to ask from parties specific data within the set boundaries" of the matters in question.[57] Unless the court rules otherwise, the expert must provide his or her opinion in writing "before the main hearing session". The written opinion must be "explained and justified".[58] Where more than one expert witness is involved in a case, the experts may "submit their opinion together if there are no contradictions." However, where their opinions contradict one another, the experts must submit separate reports.[59] The parties are entitled to receive a copy of the expert's report "at least seven (7) days before the main hearing session."[60]

The LNCP makes specific provision regarding use of expert opinion evidence in proceedings involving the removal of an individual's legal capacity. In such cases, the individual who is the subject of the proceedings must be assessed "by three medical experts of appropriate specialization who will give written ascertainment and opinion for [psychiatric] condition and

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[50] Articles 337-338, LCP. The third party may claim compensation if it incurs expenses in connection with the production of such documents.

[51] See, inter alia, Article 198(2), LNCP, which requires that parties filing a joint proposal for the severance of jointly held property attach to their proposal "the evidence on the right of property, the right of servitude and the other thing rights, and also on the real estate possession." See also Article 207, LNCP, which provides that, with the aim of arranging a property boundary agreement, the court may "instruct" the parties to "bring all the documents, sketches and other important proofs for arranging the boundary."

[52] Article 356, LCP. See also Article 358(2), which provides that the court may "assign more experts for different kinds of expertise."

[53] Article 357, LCP. If the parties cannot agree on an expert, the court will decide.

[54] Article 358, LCP. "More complicated expertise" must be "trusted to the professional institutions (hospitals, chemistry laboratories, faculties, etc)." Where there exist "specialized institutions for specific expertise (forged money expertise, manuscripts, dactyloscopy, etc,)" then the expert witness must be drawn from those institutions.

[55] Article 359(1), LCP. The expert may be excused from testifying upon presentation of a justifiable reason why he or she "cannot answer or testify."

[56] Article 362(3), LCP.

[57] Article 363(1), LCP.

[58] Article 364, LCP.

[59] Article 369, LCP.

[60] Article 407(2), LCP. See also Article 367, LCP, which appears to provide that the parties should receive a copy of the expert's report "at least eight (8) days before the main hearing session."

ability […] to judge." Further, these expert assessments must be made "in [the] presence of a judge", except when they are carried out in a "health institution."[61]

In divorce cases, where the parents have been unable to reach an agreement concerning "issues of custody, care and education of minor children", or where the agreement reached does not "comply with the interests of the children", the Family Law requires that the court hears "the opinion and proposal of the Custodian Body" prior to making a decision.[62] In cases involving the removal of a child from parental custody because of alleged abuse or neglect, the Family Law requires that the court, prior to making a decision, hears "the opinion of the Custodian Body".[63] In cases involving the adoption of children, the court may seek the opinion of the Custodian Body.[64] In assessing "the adequacy of the adopting party and the adoptee", the Court must "take into account all reasonable opinions of sociologists, psychologists, doctors, therapists and other experts".[65]

(5) Power to impose sanctions on non-cooperative witnesses and experts

The LCP provides for the imposition of sanctions in circumstances where witnesses, including expert witnesses, fail to comply with court orders. Where a witness who has been summoned fails, without justification, to appear before the court, he or she shall be arrested and brought before the court "with force", and shall be fined 500 Euros.[66] Where a witness appears before the court but refuses, without justification, to testify or to respond to "concrete questions", he or she shall be fined "up to" 500 Euros and may be subject to a term of imprisonment not exceeding 30 days.[67] Where an expert witness fails, without justification, to provide his or her opinion within the deadline imposed by the court, or fails, without reason, to appear before the court, he or she may be fined "up to" 1,000 Euros.[68] The court may also impose a fine of "up to" 1,000 Euros on an expert who "without reason refuses the expertise".[69]

3. EVIDENTIARY PROCEDURE IN CIVIL CASES IN KOSOVO

The OSCE has observed a number of serious shortcomings in the conduct of evidentiary procedure in civil cases tried before courts in Kosovo. These include deficiencies in the

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[61] Article 40, LNCP.

[62] Article 140(2), Family Law. Similarly, Article 143(2) of the Family Law provides that the court must hear the "opinion and proposal of the Custodian Body" prior to making a decision in disputes between a child's parents and a third person to whom the child has been entrusted. See also Article 14, Law on Social and Family Services.

[63] Article 149(3), Family Law.

[64] Article 161(1), Family Law. Note that here, the involvement of the Custodian Body is discretionary rather than mandatory. Article 182(3) of the Family Law provides that the court may also, at its discretion "collect further data and proof from the Custodian Body, Social Services and other experts in the field of child care on conditions of adoption".

[65] Article 184(1), Family Law.

[66] Article 292(1), LCP. Article 294, LCP provides that a witness who fails to pay the fine within the time allowed will be subject to a sentence of imprisonment not exceeding 30 days.

[67] Article 292(2), LCP.

[68] Article 293(1), LCP. In contrast to Article 292, this provision is discretionary.

[69] Article 293(2), LCP. The court may also order, on the request of the affected party, that the expert witness pay any expenses arising out of his or her failure to provide the opinion, or his or her refusal of the expertise: Article 293(3).

manner in which witnesses are heard and evidence adduced, as well as shortcomings in the management of expert evidentiary procedure.

A) The hearing of witness testimony

Common examples of problematic evidentiary issues arise, in particular, in family law proceedings before courts in Kosovo, as seen in the case examples detailed below.

> The claimant brought an action in municipal court seeking custody of two children, then aged four and six years, who were born of her relationship with the respondent. The claimant alleged that the respondent had subjected her to physical violence during the course of the relationship, and that he had compelled her to undergo an abortion. The claimant requested that both she and the children be given the opportunity to be heard. The respondent denied the claimant's allegations, and alleged that the claimant may have suffered from a psychiatric illness; he also alleged that he had been threatened by the claimant's brothers. During the hearing session, only the respondent testified; the claimant, although represented by counsel who was present during the hearing session, was not herself present in court during this session. The court never issued a ruling concerning the claimant's requests that she be permitted to testify and that the children be heard. After the hearing session had concluded, the judge stated that he would contact the police "through the court's official channels" to ascertain whether the police supported the respondent's version of events *vis-à-vis* the alleged threat by the claimant's brothers. In a subsequent judgement which dismissed the claimant's action, the judge noted that the respondent's testimony had been corroborated by "the submission offered from the police station […]".

This case reveals three serious deficiencies in the conduct of the evidentiary procedure. The first involves the court's failure to consider the claimant's request that she be heard as a witness in the case. Given what was at stake – the custody of two small children – and given further the serious allegations made by the parties, it is difficult to imagine how the case could have been properly decided in the absence of detailed testimony from both the claimant and the respondent concerning those allegations. The court heard evidence from only one of the two parties – the respondent – and ultimately decided the case in his favour.

The second shortcoming involves the court's failure to consider the claimant's request that the children be heard. Given their young ages, it is perhaps unlikely that the court would have decided to hear either of them as witnesses; nonetheless, the court was obliged to have considered the request and made a ruling on it, and it failed to do so.

Thirdly, of most serious concern was the judge's unilateral action – carried out *after* the evidentiary portion of the trial had concluded - to contact the police and seek their evidence regarding a matter at issue in the case. The issue was one which the judge considered important in making his decision; in fact, it proved to be the issue that was determinative of the outcome of the case as a whole. As such, the parties clearly had the right to be confronted with this evidence and to respond to it.

Deficiencies in evidentiary procedure were also noted in the case below:

> The claimant filed a claim in a district court seeking the dissolution of his marriage to the respondent, and requesting that the court entrust the care of the couple's four

> daughters, ages 14 to 18 years, to the respondent. The respondent opposed the divorce and requested that the court undertake a reconciliation procedure. She also filed a counterclaim, seeking alimony in the amount of 500 Euros per month for the support of herself and her daughters, retroactive to the date the claimant left the respondent. At the main hearing session, the claimant's lawyer advised the court that the claimant was living in Austria in an extramarital relation in which he had fathered four more children; therefore the claimant could not, his lawyer argued, afford to pay the amount of alimony requested by the respondent, but was willing to pay 200 Euros per month. The respondent argued that the claimant should be required to submit evidence in support of these assertions. She also requested that she be allowed to testify as a witness, and that her father and cousin be summoned to give evidence in the case. The court granted her requests and issued summons to the father and cousin. When the main hearing session reconvened for the purpose of adducing evidence, the respondent and her cousin appeared and testified. The respondent's father, although summoned, did not appear, and no explanation was provided to justify his absence. Immediately after this hearing, the court issued a judgment dissolving the marriage and entrusting care of the children to the respondent. The court ordered the claimant to pay the respondent alimony in the amount of 350 Euros per month.

The claimant in this case made certain assertions which were of potential relevance to his ability to pay alimony. However, these assertions were not supported by any evidence; the claimant neither submitted documentary evidence nor appeared in court to testify. As a result, the court only had before it the respondent's evidence when deciding the amount of alimony the claimant should be compelled to pay. The court could have adjourned the proceedings and ordered that the claimant either submit documentary evidence or appear to testify, but did not do so. Despite the lack of any evidence supporting the claimant's version of events, the court ultimately decided to in effect "split the difference" between the amount offered by the claimant and the amount requested by the respondent. The court in this case also failed to make use of any of the tools available to it to deal with the non-appearance of the respondent's father as a witness.[70]

B) Documentary evidence

The OSCE has noted that shortcomings in evidentiary procedure frequently relate to submission of documentary evidence. In particular, the case examples demonstrate the failure of the courts to adequately manage the process by which documentary evidence is adduced, the failure to assess the relevance of documentary evidence at the time the parties seek to adduce it, and sometimes, the failure to properly distinguish between documents which have been adduced in evidence and those which have merely been filed by the parties and form part of the court file.

> The claimant brought an action against his employer for wrongful termination of his employment. The parties, as well as several witnesses, testified over the course of three hearing sessions. The court file contained a large number of documents which had been filed by the respondent. These documents, which were never adduced as evidence in the proceedings, included employment contracts, witness statements, a warning letter from the employer to the claimant, minutes of a report written by the

[70] As noted at pages 8-9 of this report, the LCP provides that a witness who fails without justification to appear before the court despite being summoned shall be brought before the court by force and fined 500 Euros.

> Education Inspectorate, an evaluation report by the employer, a decision to annul grades given by the claimant to his pupils, a decision by the Inspectorate to initiate disciplinary proceedings against the claimant, and the employer's decision in support of the termination of employment. A judgment was issued in December 2010 rejecting the claim. In it, the court refers to "having assessed all the evidence" though, the judgment does not specify what evidence the judge assessed, and makes no specific reference to any of the documents in the court file. However, it is apparent from a reading of the judgment that the judge took at least some of these documents into account in deciding the case, despite the fact that none of them had ever been formally adduced as evidence.

ECtHR jurisprudence makes clear that all evidence must "be produced in the presence of the [parties] at a public hearing with a view to adversarial argument".[71] The documents in this case example were never adduced as evidence in the presence of the claimant; he was, as a result, deprived of the opportunity to respond to them during the course of the proceedings, either in evidence or in his closing arguments. It is likely that the fact he was unable to so respond placed him at a disadvantage *vis-à-vis* the respondent. As such, his right to an adversarial hearing may have been compromised.

> The claimant commenced an action to evict the respondent from an apartment he had occupied for 20 years. The claimant argued that the apartment had been allocated to him following the war. The respondent claimed to have had no notification of this allocation, and asserted that he had occupied the apartment – which had been assigned to him by his employer – both before and after the war. During the evidentiary procedure, a considerable number of documents were adduced in evidence by the parties, and several of these were objected to on the grounds of relevance to the case. Despite repeated requests, the judge refused to rule on any of these objections, advising the parties that he would decide on the relevance of the documents at the time he prepared the judgment.

Without knowing whether a particular piece of documentary evidence would ultimately be deemed relevant, both parties in the above case example may have been placed at a significant disadvantage *vis-à-vis* the opposing party. Should they, for example, examine and/or cross-examine other witnesses about the document in question? How should they deal with the disputed document in their closing arguments? The failure of the court to assess the relevance of the evidence as the case proceeded, and to make evidentiary rulings accordingly, may have seriously prejudiced the parties' ability to effectively present their cases.

C) Procedure concerning expert opinion evidence

The need for expert evidence to resolve issues in a civil case presents special challenges for courts. As will be evident from the case example described below, these problems are perhaps best viewed primarily as case management issues. Without a rigorous, proactive approach to the management of expert evidentiary procedure in civil suits, involvement of expertise can potentially contribute to significant delay in the resolution of cases.

> In October 2004, the claimant filed an action in a district court seeking compensation for alleged copyright violations by the respondent. In a judgment issued in November

[71] Supra, note 10.

2005, the district court partially accepted the claim and awarded the claimant damages in the total amount of 44,300 Euros. The claimant appealed to the Supreme Court in respect of parts of his claim which were not accepted by the district court. The respondent cross-appealed on issues of legal and factual interpretation. In December 2007, the Supreme Court issued a judgment allowing both appeals in part, and sent the case back to the district court for retrial. The Supreme Court was of the view that expert witnesses should be appointed by the district court to provide opinions related to both the copyright infringement issue and the question of financial damages. The district court re-convened the hearing session in the case in November 2008 and decided to appoint expert witnesses in accordance with the views of the Supreme Court; the hearing was adjourned until such time as the experts submitted their opinions. In November 2009, the court appointed as expert witnesses in the case, a screenwriter and a financial expert. The screenwriter submitted an expert opinion to the court within several days of being appointed. In June 2010 a new judge was assigned to the case. In July 2010, the financial expert made a submission to the new judge asserting that he was unable to provide the requested expert opinion. In September 2010, the new judge appointed another financial expert and requested that he provide an opinion. This expert witness provided the expert opinion within two months. A hearing session was convened in March 2011, during which the respondent objected to both expert opinions, arguing that the screenwriter's opinion was "indistinct and unprofessional", and that the financial expert's opinion was objectionable since such reports are "normally a reflection of the [opinion of the] copyright expert." The respondent requested leave to summon a further witness to clarify the factual underpinnings of the screenwriter's opinion. The court granted the respondent's request and the hearing was again adjourned.

In the above case, the proceedings have dragged on for almost seven years to date. The delay in resolving the case is attributable to a number of factors. However, issues related to the provision of expert opinion evidence have clearly been a primary factor since November 2008; indeed, the delay between November 2008 and July 2010, a period of some 20 months, is of particular concern. It is not clear, for instance, why the first financial expert refused to provide the expert opinion requested, nor why he did not state his inability in this regard until July 2010. It is not possible to tell from the court record whether the court considered fining this expert for refusing to provide the opinion for which he was appointed.[72] Furthermore, it is not clear why the respondent's objections to the expert opinions were not made in a more timely fashion. By permitting the respondent to lodge objections to these expert opinions for the first time at a hearing session which took place many months after the opinions had been received, the court agreed to delay the proceedings even further. It is likely that a more rigorous, proactive approach on the part of the court to managing the expert evidentiary procedure in this case would have to some extent minimised the delay.

Expert medical evidence is required in proceedings concerning the removal of a person's legal capacity.[73] Because of the particular vulnerability of a person subject to such a proceeding and the enormity of what is at stake, the requirements of the law must be scrupulously observed. However, as the following case example demonstrates, all too often this is not seen in practice.

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[72] As noted earlier in this report, the court may impose a fine of up to 1,000 Euros on an expert who "without reason refuses the expertise": see note 71, supra.

[73] See note 64, supra.

The Centre for Social Work (CSW) filed an application in a municipal court requesting removal of the legal capacity "of a person without family care", and, as an "urgent measure", his committal to the Centre for Mental Health in Shtime/Štimlje. No written medical assessment or expertise of any kind was attached to the application or later submitted to the case file. The application asserted that the individual was "non suitable", "prevents the work of officials as well as citizens of the neighbourhood", "doesn't wash himself" and "may spread some kind of a disease". The only supporting documentation filed with the application was a request for action from businesses operating in the area. The day after the application was filed the court convened a hearing session. In attendance at the session was the lawyer for the CSW and a neuro-psychiatrist apparently engaged by the CSW. The person who was the subject of the application was not present; the court noted that he could not be brought to the court "due to his health condition". At the session, the neuro-psychiatrist provided oral testimony based on what he described as a "visit" he had made to the person concerned earlier that day, accompanied by a social worker. He testified that the person concerned was:

> "A medium to grave extent mentally retarded person who doesn't have a family and social care. He wanders out in the streets […]. He has long hair not combed, long beard, wearing very dirty clothes, very low personal hygiene. He doesn't want to communicate at all, smokes a lot and sits on the stairs of [a building in the neighbourhood].
>
> "The data from the social worker shows that the inhabitants and shop owners of [the] neighbourhood have requested few times to find a solution and to somehow remove [him] from there so he doesn't scare their children.
>
> "Since [the person concerned] doesn't have the intellectual capacity to take care of himself and to protect his own interests, I propose the Court to remove his acting capacity completely and for good. He needs social care from a Special Institution (social or health)."

At the close of the evidentiary procedure, the court decided to remove the person's legal capacity. In its reasons, the court noted that the decision was "based on the opinion of the neuro-psychiatrist expert and the evidence provided by the […] CSW. Immediately following the decision, the court issued an order to the police to "urgently send the mentally ill [person] to the Special Institute for health in Shtime/Štimlje, as he endangers himself and the people around him."

In a proceeding involving the removal of an individual's legal capacity, the law expressly provides that the person who is the subject of the proceedings must be assessed "by three medical experts of appropriate specialization who will give written ascertainment and opinion for [psychiatric] condition and ability […] to judge." The law is also clear that these expert assessments must be made "in [the] presence of a judge", except when they are carried out in a "health institution".[74] The evidence adduced in the above case fulfilled neither of these requirements: it consisted of the opinion of one medical expert rather than the requisite three, and the assessment was not made in the presence of the judge.

[74] See note 64, supra.

Furthermore, it is apparent from a review of the testimony cited above that the neuro-psychiatrist went well beyond the boundaries of his role as a medical expert. This expert witness at one point offered evidence that should have come from the social worker on the case, and at another point appeared to advocate on behalf of the claimant, pointing out to the court the arguments of the inhabitants and shop owners and repeating their unsupported assertion that, if not removed, the person concerned would "scare their children". Given the obvious vulnerability of the person who was the subject of these proceedings, in addition to the enormity of what was at stake for him – the loss of his liberty – the deficiencies in expert evidentiary procedure in this case are particularly alarming.

4. CONCLUSION

This report highlights three areas of evidentiary procedure where the shortcomings observed are particularly acute. The first area involves the procedure for the hearing of witnesses, including the special cases of child witnesses and parties testifying as witnesses. The second area involves the adducing of documentary evidence, and the third involves the management of expert evidentiary procedure. The case examples reviewed above suggest that, while the legal framework regulating civil evidentiary procedure is – for the most part – compliant with fair trial standards, its implementation by the courts has been at best uneven. In all too many cases, deficiencies observed in evidentiary or expert evidentiary procedure are such that it cannot be said that the parties received a fair trial.

Evidentiary procedure is one of the cornerstones of the trial process. Without sufficient evidence, probative of the matters in issue in the case, a judge will be unable to make the findings of fact that must underpin a clearly and carefully reasoned judgment. This is key to ensuring that the right to a fair trial is not compromised. At the heart of a fair trial is the right to an adversarial proceeding. Where a party has neither knowledge of, nor a right to comment on, evidence adduced by the opposing party, the right to adversarial proceedings is compromised. Where the hearing of witnesses is not adversarial, and where evidence is not adduced in the presence of the parties at a public hearing with a view toward adversarial argument, the parties cannot be said to have received a fair trial.

Courts in Kosovo are under a positive obligation to protect the integrity of their civil judgments by ensuring that such judgments are arrived at following fair and lawful evidentiary procedure. Meeting this obligation will require adopting a rigorous and proactive approach to the management of evidentiary procedure in all civil cases.

5. RECOMMENDATIONS

To the courts:

- Be cognisant of the difference between the assertions made by the parties and the evidence they have adduced in support of those assertions;
- Be cognisant of the need to hear evidence from both sides in a case;
- In proceedings affecting the interests of a child, provide the child an opportunity to be heard directly, through a representative or an appropriate body;

- In proceedings in which the parties seek to adduce documentary evidence, be cognisant of the need to assess and rule on the relevance and/or admissibility of each piece of documentary evidence individually, as it is adduced, during the course of evidentiary procedure;

- Consider making use of sanctions where appropriate to penalise witnesses who, without justification and despite being duly summoned, fail to appear before the court, or who, having appeared, refuse to testify or to respond to specific questions;

- Consider making use of sanctions where appropriate to penalise expert witnesses who fail, without justification, to provide their opinions within the deadline imposed by the court, or who, having provided their opinions fail, without reason, to appear before the court; and

- Make full use of preparatory proceedings to better manage expert evidentiary procedure.

To the Kosovo Judicial Institute:

- Continue to train civil judges in evidentiary procedure; in particular, consider providing training on issues related to children as witnesses, parties testifying as witnesses, the adducing of documentary evidence and expert evidentiary procedure.