

**Department of Human Rights and Communities**

**Legal System Monitoring Section**

**THE CENTRES FOR SOCIAL WORK IN CIVIL PROCEEDINGS**

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## The Centres for Social Work in civil proceedings

The Organization for Security and Co-operation in Europe Mission in Kosovo (OSCE) is concerned that the courts' failure to request expert advice from the Centres for Social Work (CSW) in cases where their expert opinion is crucial and required by the law may violate Kosovo's legal framework as well as international human rights standards. Conversely, the OSCE is also concerned with the CSW's occasional failures to respond within a reasonable time to the courts' requests for expert advice.

In addition to potentially violating the legal framework, this practice may also negatively affect parties' enjoyment of the right to trial within reasonable time as contained in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

The United Nations Convention on the Rights of the Child (CRC), mandates that the best interests of the child be a primary consideration in all judicial proceedings involving children.<sup>1</sup> Furthermore, in all judicial proceedings affecting children, they must be provided with the opportunity to be heard, either directly or through a representative or an appropriate body.<sup>2</sup>

Kosovo's legal framework addresses these normative legal requirements in part through the Law on Social and Family Services,<sup>3</sup> which requires each municipality in Kosovo to establish and maintain a CSW.<sup>4</sup> A CSW is a public institution "staffed by appropriately trained and qualified professionals (social service officers)" who are responsible for exercising the powers set out by law and providing social and family services on behalf of the Ministry of Labour and Social Welfare.<sup>5</sup> Moreover, the CSW functions as the custodian body and perform the duties required of this function as set

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<sup>1</sup> Article 3 (1) stipulates that "[I]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

<sup>2</sup> Article 12, CRC. The full text of the CRC is available at: <http://www2.ohchr.org/english/law/crc.htm>. Further, child victims should also have access to effective assistance by professionals who have received relevant training. See the *United Nations Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime*, in ECOSOC Resolution 2005/20, 22 July 2005, paragraph 22 *et sequentes*.

<sup>3</sup> Article 9.1. This law requires the best interests of the child to be "the first and paramount consideration" in "all matters concerning the provision of services to children and to families." Law No. 02/L-17, on Social and Family Services promulgated by UNMIK Regulation No. 2005/46 on 14 October 2005, (hereinafter, Law on Social and Family Services).

<sup>4</sup> Article 7.1, Law on Social and Family Services.

<sup>5</sup> Article 7.1 and Article 2, Law on Social and Family Services. Article 1.3, Law on Social and Family Services defines the custodian body as "the function within the Centre for Social Work that is responsible for protection of children." The Albanian language text refers to the custodian body as "organi i kujdestarisë," a phrase which is translated into "guardianship authority" and "custodian body" seemingly interchangeably in the Kosovo legal framework. Article 6, of Law No. 2004/32, Family Law of Kosovo, promulgated by UNMIK Regulation 2006/7 (hereinafter Family Law) states "(1) Protection and family assistance shall be governed by the competent body of the municipal administration which is responsible for issues of social assistance. (2) The Custodian Body is an administrative municipal body competent for social issues. It shall be comprised of a group of experts with professional work experience in the specific field of duty. (3) The Custodian Body may also be a body (group of experts as mentioned above) of a specific social institution which is established by the Municipal Assembly to carry out such obligations.[...]."

out in the relevant Kosovo laws.<sup>6</sup> In the cases foreseen by relevant laws the CSW must also provide expert advice to the courts upon request.<sup>7</sup>

The Kosovo legal framework foresees certain types of civil proceedings in which the court should request expert advice from the relevant CSW.<sup>8</sup> In these cases, the court requests the CSW “to conduct inquiries and to provide an expert assessment regarding the social circumstances of the person in question and make recommendations for their future well-being.”<sup>9</sup> Under specific conditions foreseen by law, the court may request the CSW to conduct the reconciliation procedure of spouses in marital disputes.<sup>10</sup> In each case, the CSW should submit a report to the court.<sup>11</sup> Moreover, according to the law, in a case for which such a report (expert advice) is requested from the CSW, the court may not make a final decision until it has given due consideration to its content and recommendations.<sup>12</sup>

Despite the CSW’s clear obligations under both Kosovo’s legal framework and international human rights law,<sup>13</sup> the OSCE has monitored cases involving juveniles in which the CSW failed to act to protect the best interests of the child. The OSCE has previously reported on the role and performance of the CSW in judicial proceedings involving juveniles, noting domestic violence cases where the courts failed to summon a representative from the CSW, or a properly summoned CSW representative failed to appear at a hearing and the court nonetheless continued with the proceedings.<sup>14</sup>

### **Role and performance of the CSW**

Whenever the court deals with children in civil proceedings, the court may request the CSW to provide an expert assessment.<sup>15</sup> Such a report should be submitted to the court within 21 days of the request being made, unless otherwise specified in the request.<sup>16</sup> The CSW, in the capacity of the custodian body participating in family law

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<sup>6</sup> Article 7.2, Law on Social and Family Services. On specific duties of the CSW with regard to civil proceedings see also the: Articles 80-83, 140, 143, 148.3, 150-154, 161, of the Family Law; Article 7.2, UNMIK Regulation 2003/12 on Protection Against Domestic Violence; Articles 73-78 and 82.2, Law No. 03/L-006 on Contested Procedure, Kosovo Official Gazette, 20 September 2008 (2008 Law on Contested Procedure); and Article 4.3 (among others), Law No. 03/L-007 on Non-Contested Procedure, Kosovo Official Gazette, 20 September 2008.

<sup>7</sup> Article 14, Law on Social and Family Services.

<sup>8</sup> See above at footnote 6.

<sup>9</sup> Article 14.1, Law on Social and Family Services.

<sup>10</sup> Article 80, Family Law.

<sup>11</sup> Article 14.2, Law on Social and Family Services and Article 83.2, Family Law.

<sup>12</sup> Article 14.3, Law on Social and Family Services.

<sup>13</sup> Article 9.5, Law on Social and Family Services, requires the Centre for Social Work, in fulfilling its responsibilities under the Juvenile Code, and in its role as custodian body, to ensure that the services it provides under this mandate are “[...] in keeping with its obligations to children as set out in the United Nations Convention on the Rights of the Child.” See also Article 12, Law on Social and Family Services,

<sup>14</sup> See the OSCE Legal System Monitoring Section’s monthly reports *Judicial Proceedings Involving Domestic Violence* (November 2009); and *Courts’ failure to involve the guardianship authority in divorce proceedings breaches the applicable law* (December 2005): see also the public *Report on Domestic Violence Cases in Kosovo* (July 2007).

<sup>15</sup> Article 14, Law on Social and Family Services.

<sup>16</sup> Article 14.2, Law on Social and Family Services.

procedures, has a more active role. The custodian body is authorized to present motions for the protection of children's rights and interests, to present facts that parties have left out, to suggest administration of necessary evidence, to exercise legal remedies, and undertake other contentious actions. The court is obliged to summon the custodian body to all court sessions, and serve it with all the decisions.<sup>17</sup> Furthermore, in domestic violence cases, when reviewing a petition for a protection order, the court may hear a CSW representative when the petitioner is under 18 years of age, if the alleged acts of violence impact persons under 18 years of age, or if a person lacks legal capacity.<sup>18</sup>

The OSCE has monitored cases when the CSW fell short in carrying out their role, as well as cases when the court failed to request the CSW's expert opinion or participation in civil proceedings, as provided by law. For instance:

On 17 September 2008, in a court in the Pejë/Peć region, the plaintiff filed a claim requesting contacts with her child who was born in an extramarital relationship. On 21 October 2008, through written response, the respondent proposed to the court to refuse the plaintiff's claim as ungrounded, since the child did not know his mother. On 12 November 2008, in a hearing the court requested a CSW expert report. A hearing was scheduled for 14 January 2009. The CSW report reached the court on 22 January 2009, over a week after the hearing date. Moreover, the court summoned and requested the presence of the CSW representative at the 14 January 2009 hearing. The CSW representative was not present at this hearing and the court never received any justification from the CSW explaining the reasons for not responding to the courts request.

In August 2009 in a court in Prizren region, a child custody case involving parties that had two juvenile children born in extramarital relationship commenced. The plaintiff, mother of the children, also initiated a domestic violence procedure due to alleged violence suffered by the respondent, father of her children. During the proceeding, the respondent raised issues as to the mental health of the plaintiff. The Family Law provides that in cases when parents have not reached an agreement regarding child custody the court decides after hearing the opinion and proposal of the Custodian Body and investigating all relevant circumstances of the case.<sup>19</sup> However, throughout the entire process no evidentiary procedure took place, and the court never invited or requested an expert opinion from the CSW. This is clearly in contradiction with Kosovo's legal framework and international human rights standards.<sup>20</sup> This is of particular concern when one considers that the parties made serious allegations involving domestic violence and issues as to the mental health of

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<sup>17</sup> Article 6.4, Family Law.

<sup>18</sup> Section 7.2 and 7.3, UNMIK Regulation 2003/12 on Protection Against Domestic Violence. As discussed in the OSCE's 2007 *Report on Domestic Violence Cases in Kosovo*, UNMIK Regulation 2003/12 fails to mandate the involvement of the CSW in such proceedings. Rather, the law stipulates that a representative of the CSW "may be heard."

<sup>19</sup> Article 140.2, Family Law.

<sup>20</sup> Article 3.3 of the CRC states that institutions "shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."

potential custodians<sup>21</sup> of children. If the allegations were grounded, this could affect the development and well-being of the children.

According to Kosovo's legal framework, in both cases, the court should have heard the opinion and proposal of the custodian body and should have investigated all relevant circumstances of the case. Furthermore, the representative of the CSW should have been present in court hearings to represent or testify as to the best interest of the children and make recommendations as to their future well being.

### **Delays in providing the CSW expert assessment**

In cases in which expert advice is requested from the CSW, the court may make no final disposal until it has given due consideration to the content and recommendations of that expert advice.<sup>22</sup> Therefore the law is specific and provides that following submission of the court request, the director of the CSW should order its officials to commence investigations in order to ensure that the court will be provided with the required report, no later than 21 days after the request is made, unless otherwise specified in the request.<sup>23</sup> However, the deadline is extended in cases when the CSW conducts the reconciliation procedure in marital disputes. The law states that "reconciliation procedures in front of the Custodian Body may not last longer than three months but can be extended, if the spouses agree [...]" and without delay the CSW should submit a report on the results of the reconciliation procedure to the court.<sup>24</sup>

The OSCE has monitored cases when the CSW was not expeditious when submitting written reports requested by the courts within legal deadlines, thus delaying the civil proceedings. For instance:

On 31 January 2008, in a court in Pejë/Peć region the plaintiff filed a claim for dissolution of marriage due to serious deterioration of marital relations. The court through written submission transferred the reconciliation procedure to the custodian body on 31 January 2008. On 12 June 2008, the CSW submitted to the court the reconciliation report that stated that the reconciliation failed because no contact could be established to the plaintiff, who lived abroad. The CSW report arrived six months after the submission of the court request, causing considerable delays in the court proceedings.

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<sup>21</sup> Article 236, The Family Law states that "(1) The custodian is appointed to the person under custody by the Custodian Body. (2) As a custodian can be appointed any person who has the personal capacity and necessary ability to fulfill the obligations of a custodian and who accepts in advance to become a custodian. (3) The custodian shall be in the first place appointed from among persons in the family of the person under custody. The Custodian Body shall decide whether this is in the interest of the person under custody." Article 244, Family Law, lists obligations of the custodian, "(1) The custodian is especially obliged to take care in good faith of the personality and the rights and interests of the person under custody and to administer his property with care, as well as to inform the Custodian Body of the course of custody. (2) The custodian is especially obliged, with the assistance of the Custodian Body, to make use of all necessary means of social welfare in order to ensure the material requirements needed for the enforcement of custody measures."

<sup>22</sup> Article 14.3, Law on Social and Family Services.

<sup>23</sup> Article 14.2, Law on Social and Family Services.

<sup>24</sup> The reconciliation procedure can be extended if the spouses agree to continue such procedure after the expiry of the deadline. Article 83, Family Law.

On 9 June 2009, a plaintiff in Prizren region court filed a claim for divorce due to alleged physical and mental abuse she and her three children (one of whom juvenile) suffered from the respondent. On 30 June 2009, the court in the main hearing decided to request from the CSW a reconciliation procedure and asked them to provide an opinion on child custody. Five months later, on 2 December 2009, the next hearing took place. During the hearing the presiding judge stated that the delay was a direct result of the CSW's late reply which arrived on 9 November 2009. The 2008 Law on Contested Procedure states that the "the main trial hearing cannot be postponed indefinitely" and it further specifies that "main session cannot be postponed for more than 30 days, except in cases determined by law."<sup>25</sup> The fact that the court had to wait five months before receiving the CSW's report which delayed the scheduling of the new hearing is a clear example of how the CSW's failure to act had a direct impact on the length of the proceedings. In addition despite this delay, the court failed to fine the CSW for failing to submit the report within the deadline provided by law.

The European Court of Human Rights (ECtHR) noted that the ECHR imposes on the authorities "the duty to organise their judicial systems in such a way that their courts can meet each of its requirements"<sup>26</sup> and reaffirmed that "the Convention underlines the importance of administering justice without delays which might jeopardise its effectiveness and credibility."<sup>27</sup> In the above examples, despite explicit statutory deadlines, the courts obtained expert reports from the CSW only after considerable delay. The ECtHR has held that it does not matter to which subsidiary authority a violation of the right to trial within a reasonable time is attributable; the primary authority is still responsible for upholding this right.<sup>28</sup> Periods of prolonged inactivity on the part of relevant authorities is a violation of the right to a trial within a reasonable time. Thus, the courts' failure to request timely expertise from the CSW or the CSW's failure to provide expertise in due time, prolonged the proceedings and thus affected the right to trial within a reasonable time.

The OSCE further notes that according to the law, the court can fine experts in cases when experts fail to submit written reports within the statutory deadlines without justified reason.<sup>29</sup> However, the OSCE has not yet monitored a case where a CSW had been fined according to this provision.

Kosovo's legal framework requires that the expert opinion of the CSW be part of its procedural safeguard designed to provide special care and protection for children involved in civil proceedings. Any delay in reviewing the CSW's expert assessment not only affects the child's rights but also the rights of other persons directly involved in the case. These unnecessary delays may also exacerbate already substantial backlog

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<sup>25</sup> Article 441 paragraph 1 and 2, 2008 Law on Contested Procedure.

<sup>26</sup> *Salesi vs. Italy* judgment of 26 February 1993, Series A No. 257-E, page 60, paragraph 24.

<sup>27</sup> *Katte Klitsche de la Grange v. Italy*, judgment of 27 October 1994, Series A no. 293-B, page 39, paragraph 61. See also, *H. v. France*, Application No. 10073/82, judgment of 24 October 1989, paragraph 58.

<sup>28</sup> *Zimmermann and Steiner v. Switzerland*, Application No. 8737/79, judgment of 13 July 1983, paragraph 32.

<sup>29</sup> Article 293.1 of the 2008 Law on Contested Procedure states that: "The court can fine up to 1000 Euro the expert who without justified reason does not hand his opinion within the deadline set [...]."

of civil cases in the courts by impeding the court's ability to adjudicate new cases in a timely manner.

### **Confusion over the role of the CSW**

The role of the CSW in civil proceedings is essential in protecting the best interest of the child. In matters falling under the competency of civil courts, the CSW is limited by law to only provide expert opinion and recommendations. Nevertheless, the OSCE has monitored civil proceedings where parties, their legal representatives, and the CSW expressed confusion as to the role and responsibilities of the CSW. Moreover, in these cases there was no intervention by the court to clarify the CSW's functions. For example:

In a court in the Prizren region, the plaintiff asked for custody over a minor child as well as alimony. The plaintiff requested the court to obtain an opinion of the CSW. The request was also supported by the authorized representative of the respondent. However, during a hearing on 21 October 2009, the authorized representative of the respondent stated that the CSW decided that custody of the child should go to the respondent, the father. The authorised representative of the respondent further stated that the CSW's decision regulated the contacts between mother and child. Clearly, there was confusion as to the role of the CSW. According to the law, in cases where parents are separated and cannot agree on who the child shall live with, it is for the court to decide where the child should reside, not the CSW.<sup>30</sup> Similarly, with regard to preserving personal contacts with a child in cases when child lives with only one parent or a third person or institution, if parents cannot reach agreement the decision is taken by the court, not the CSW.<sup>31</sup> The CSW is not a court, but can only provide an expert opinion and recommendations to the court. Despite this, in the above referenced case, the judge, did not intervene to explain the court's exclusive competency in the subject matter.<sup>32</sup>

On 15 August 2008, in a court in the Pejë/Peć region, the plaintiff filed a claim for dissolution of marriage. Both parties lived abroad and had two minor children living in Kosovo with the grandfather. On 17 October 2008, the grandfather submitted a request to the CSW to place the children under his custody. The CSW issued a decision on 22 October 2008 appointing the grandfather as the custodian. At a hearing held on 20 March 2009, the court approved the plaintiff's proposal to forward the request to the CSW for a detailed report regarding the children's living conditions with their grandfather, as well as to verify the economic and financial condition of the respondent. However, despite requests by the court on 11 June 2009 and 10 September 2009, the CSW failed to provide the relevant case file to the court until 19 October 2009.

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<sup>30</sup> Article 139, paragraph 2, Family Law.

<sup>31</sup> Article 145, Family Law.

<sup>32</sup> Article 11, paragraph 2, 2008 Law on Contested Procedure, "[t]he court should instruct the party being represented by a lawyer on procedural actions, when considers that representative is not performing his/her duty in a professional manner."

The CSW's actions in this case raised many issues with regard to its competencies as opposed to that of the court. First, the custodian body initiated and decided on the custody of children although a trial to determine this issue was ongoing in court.<sup>33</sup> Under the law, the CSW should only provide an opinion and proposal to the court after a request made by the court.<sup>34</sup> Second, the law states that “[e]xcept in the case of short term emergency measures, a child shall not be removed from the care of his parent or parents or care giver without their permission or an Order of the court.”<sup>35</sup> Moreover, the CRC states that authorities “[...] shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.”<sup>36</sup> Despite these clear legal provisions, the CSW decided on the children's custody, and the court never questioned the CSW's competence to do so. The CSW's failure to provide files to the court also caused considerable delays in the proceedings.

## CONCLUSION

The law primarily requires the CSW expertise in cases that relate to children. When courts fail to request expert advice from the CSW in cases where their expert opinion is crucial, or where the CSW neglects to respond or fails to respond within a reasonable time to the courts' request for expertise, the best interest of the child is jeopardized. The rights of other individuals directly involved in the case may also be impacted. Parties' enjoyment of the rights implicit in the right to a fair trial, in particular the right to a trial within a reasonable time, may be negatively affected. Furthermore, confusion over the role and responsibilities of the CSW and the court, respectively, may lead to misapplication of the law.

When it functions as foreseen by Kosovo's legal framework, the relationship between courts and the CSW should be one which fosters the protection and promotion of the best interests of children. The CSW involvement in civil proceedings is designed to function as a safeguard for the rights of children, who are among the most vulnerable members of society. The CSW's presence and expertise is essential to fulfil the requirements of the law and to ensure that Kosovo meets the obligations set forth in the CRC.

## RECOMMENDATIONS

In light of this, the OSCE recommends the following:

- Judges should comply with the relevant laws and submit requests timely to the CSW for expert assessment and attendance at hearings if necessary;

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<sup>33</sup> Article 140.1, of the Family Law states that “[...] in marital disputes the competent court brings judgement on dissolution [...] by this judgment the court also decides on issues of custody [...]. Whereas Article 140.2 of the same law states “[...] the court after hearing the opinion and proposal of the Custodian Body [...] shall decide.”

<sup>34</sup> Article 14.1 Law on Social and Family Services; and Article 140.2, Family Law.

<sup>35</sup> Article 10.3, Law on Social and Family Services.

<sup>36</sup> Article 9, CRC. See also Articles 10.1 – 10.15, Law on Social and Family Services.

- Judges should clarify the role and functions of the court, as opposed to the CSW, in order to avoid confusion;
- Judges should ensure the presence of representatives of the CSW in domestic violence cases relating to proceedings involving juveniles;
- Judges should use their authority by law, if appropriate, to fine the CSW and its expert, for failure to provide written reports in due time;
- Kosovo's legal framework should be clear and specific with regard to the obligation of the courts to request an expert opinion and/or to summon a CSW representative;
- The CSW should ensure that their performance is in accordance with Kosovo's legal framework and international human rights instruments, in particular with regard to statutory deadlines;
- Kosovo's Judicial Institute should continue to train sitting judges and candidates for judges on the CSW expert assessment, statutory deadlines and their role in relevant civil proceedings.