



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

**REPORT WITH RECOMMENDATION
OF THE OMBUDSPERSON OF THE REPUBLIC OF KOSOVO**

Concerning the case A.no.674/2018
Freedom of Association

Addressed to:

Mr. Ramush Haradinaj, Prime Minister, Government of the Republic of Kosovo
Mr. Mahir Yagcilar, Minister of Public Administration

Copies to:

Ms. Afërdita Bytyçi, President of the Basic Court in Prishtina
Mr. Shpend Maxhuni, Director, Kosovo Intelligence Agency

Prishtina, on 1st of March 2019

PURPOSE OF THE REPORT

1. This Report with Recommendation (hereinafter “the Report”) aims to analyse the exercise of the freedom of association in non-government organizations, and current practices with regard to the suspension of activities of Non-Government Organizations in the Republic of Kosovo based on the request submitted by the relevant security body.
2. This Report is based on two complaints received by the Ombudsperson with regard to the suspension of activities of Non-Government Organization by the Department on Non-Government Organizations within the Ministry of Public Administration based on the requests submitted by the relevant security bodies.¹

LEGAL GROUNDS

3. The Constitution of the Republic of Kosovo (hereinafter “Constitution”), namely Article 135, paragraph 3 stipulates that: *“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”*.
4. According to the Law No. 05/L-019 on the Ombudsperson, the Ombudsperson has the following powers and responsibilities:
 - *“The Ombudsperson has the power to investigate complaints received from any natural or legal person related to assertions for violation of human rights envisaged by the Constitution, Laws and other acts, as well as international instruments of human rights, particularly the European Convention on Human Rights, including actions or failure to act which present abuse of authority.”* (Article 16, par. 1).
 - *“to investigate alleged violations of human rights and acts of discrimination, and be committed to eliminate them; and; to draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases and when necessary to express his/her opinion on attitudes and reactions of the relevant institutions relating to such cases”* (Article 18, par 1, subpar. 1 and 2).
 - *“to make recommendations to the Government, the Assembly and other competent institutions of the Republic of Kosovo on matters relating to promotion and protection of human rights and freedoms, equality and non-discrimination”* (Article 18, par. 1, subpar. 5).
 - *“to publish notifications, opinions, recommendations, proposals and his/her own reports”* (Article 18, par. 1, subpar. 6).
 - *“to recommend promulgation of new Laws in the Assembly, amendments of the Laws in force and promulgation or amendment of administrative and sub-legal acts by the*

¹ A number of NGO have been suspended or prohibited to exercise activities under suspicions of terrorism financing, which were also reported by the U.S Department of State, Country Reports on Terrorism 2016 <https://www.state.gov/documents/organization/272488.pdf> (accessed on 15 January 2018)

- institutions of the Republic of Kosovo*” (Article 18, par. 1, subpar. 7).
- *“to recommend to the Assembly the harmonization of legislation with International Standards for Human Rights and Freedoms and their effective implementation”* (Article 18, par. 1, subpar. 9).
 - *“The Ombudsperson can advise and recommend to the institutions of the Republic of Kosovo for their programs and policies to ensure the protection and advancement of human rights and freedoms in the Republic of Kosovo”* (Article 18, par. 3).
5. Upon submitting this report to competent institutions, and its publication, the Ombudsperson aims to fulfil such legal responsibilities.

LEGAL INSTRUMENTS APPLICABLE IN THE REPUBLIC OF KOSOVO AND LEGAL ANALYSIS

6. The Constitution of the Republic of Kosovo (hereinafter: the Constitution) Article 22 [Direct Applicability of International Agreements and Instruments] states that: *“Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions”*.
7. Furthermore, Article 53 of the Constitution [Interpretation of Human Rights Provisions] stipulates that: Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.
8. Also, Article 44 of the Constitution [Freedom of Association] defines the freedom of association as follows: *“The freedom of association is guaranteed. The freedom of association includes the right of everyone to establish an organization without obtaining any permission, to be or not to be a member of any organization and to participate in the activities of an organization. Organizations or activities that infringe on the constitutional order violate human rights and freedoms or encourage racial, national, ethnic or religious hatred may be prohibited by a decision of a competent court”*.
9. The Law No.04/L –057 on Freedom of Association in Non-Governmental Organisations, which has entered into force on 24th of September 2011, Article 1 [Purpose], paragraph 1, provides as follows: *“This Law sets out the establishment, registration, internal management, activity, dissolution and removal from register of legal persons organized as NGOs in Kosovo”*
10. The Ombudsperson has noted that the Law on Freedom of Association, namely Article 19, *inter alia*, has foreseen the suspension of public beneficiary status for NGOs and sets the requirements when such status could be suspended by the Department on Non-

Government Organizations in the Ministry of Public Administration, whereby it is noted that such suspension cannot be imposed on administrative grounds. More specifically, an NGO that enjoys the public beneficiary status may be suspended in the event of failure to present a complete annual report. However, it is noted that such suspension of the NGO is of administrative nature and is not related to suspension under suspicion of having conducted a criminal offence.

11. On the other hand, the Administrative Instruction No. 02/2014 on Registration and Functioning of Non-Governmental Organizations, approved in the 195th meeting of the Government of Kosovo via Decision no. 01/195 dated 03.09.2014 (hereinafter referred to as: AI on the Registration and Functioning of NGOs), in Article 18, paragraph 1, regulates the suspension of an NGO's activities as follows: *“Upon written request and justification of an authorized security institutions, the Department shall issue a decision to suspend the operation of the NGO, alleging that their activity does not coincide with the legal and constitutional order of the Republic of Kosovo and international legislation”*; while paragraph 5 states the following: *“the NGO whose activity is suspended shall have the right to complain to the Commission for reviewing complaints of NGOs, in accordance with Regulation no. 02/2012 MPA”*.
12. The Ombudsperson has noted that the new Draft Law on the Freedom of Association in Non-Governmental Organization, has been processed to the Assembly of the Republic of Kosovo (which is expected to replace the existing law), and Article 14 [Principle of proportionality of limitation and prohibitions], inter alia, has foreseen that: *“Limitations and prohibitions to the exercise of the freedom of association shall be applied by means of a Court ruling and only to organizations or activities that violate the constitutional order, violate human rights and freedoms or incite racial, national, ethnical or religious hatred”*.

CONCLUSIONS AND RECOMMENDATIONS OF THE OMBUDSPERSON

Conclusions of the Ombudsperson Institution

13. The Constitution safeguards the freedom of association, and furthermore refers to a particular Article in international law that regulates the protection of human rights, thereby granting this international instrument priority over domestic legislation. Consecutively, any law drafted by domestic institutions, and adopted by the Assembly of the Republic of Kosovo, must be in line with the standards enshrined in international instruments that have been listed under Article 22 of the Constitution.
14. Article 44, paragraph 1 of the Constitution guarantees the freedom of association and grants any person the right to establish an organization without first requesting permission. This implies that the first rule that applies for the purpose of discharging the right of association is related to the fact that any person has the right to establish an organization without asking for permission, which enshrines the idea of exercising the

right of association. This however does not mean that the right of association is an absolute right, considering that the same can be limited by law, and such determination has been foreseen by the Constitution under Article 44, paragraph 2.

15. It is worth noting that any limitation to a right foreseen by the Constitution can only be imposed by law and based on the criteria determined under Article 55 of the Constitution.
16. This specific case is not related to limitations set under the Law on the Freedom of Association in Non-Governmental Organizations. The Law itself, i.e. the Law on Freedom of Association, Article 22, stipulates that: *“Institutions of the Republic of Kosovo support, but do not interfere in the activities of NGOs, and make public all forms of cooperation and support”*. The key problem here derives from Article 18, paragraph 1 of the AI on Registration and Functioning of NGO because, while the law ascertains that state authorities have positive obligations of enabling an easier functioning of NGOs, the AI on Registration and Functioning of NGO, on the other hand, foresees something is not determined by law.
17. In a comparative research on the Laws on the Freedom of Association in the countries of the region, and the applicable law in the Republic of Kosovo, it is noted that there are no provisions referring to interference, suspension or prohibition of NGOs. This is because, as it was mentioned above, states have positive obligations in terms of creating favourable conditions for exercising the right to the freedom of association and negative obligations when it comes to the prohibition or interference in the functioning of NGO established under the law, with the exception of situations when the NGO themselves fail to comply with the obligations determined by law.
18. Recommendation issued by the Committee of Ministers of the Council of Europe, i.e. Recommendation CM/Rec2007/14². One of the basic principles of this Recommendation is that NGOs, with legal personality, should have the same capacities as are generally enjoyed by other legal persons and should be subject to the administrative, civil and criminal law obligations and sanctions generally applicable to those legal persons. It must be emphasised that it is essential that rights and obligations are not applied in an erroneous and inadequate manner.
19. In contrast to the existing law, the Draft-Law on the Freedom of Association in Non-Governmental Organization, which is expected to be adopted, foresees the suspension and prohibition of NGOs. Furthermore, the concerned draft-law, in its current phase before the Assembly, stipulates that: *“Limitations and prohibitions to the exercise of the freedom of association shall be applied by means of a Court ruling and only to organizations or activities that violate the constitutional order, violate human rights and freedoms or incite racial, national, ethnical or religious hatred”*.

² Found at: <https://www.osce.org/odihr/33742?download=true>

20. In addition to the legal limitation, the Ombudsperson draws attention to Article 17 of the ECHR [Prohibition of abuse of rights], which explicitly defines that: *“Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention”*.
21. The Ombudsperson considers that the way how the activities of the NGOs were suspended is erroneous and inadequate, considering that they were suspended by means of administrative decisions, while there was suspicion of a criminal offence. The Ombudsperson considers that there was no genuine investigation, which could potentially result with charges being raised, and on which the court would ultimately decide upon.
22. The Ombudsperson is aware that one of the NGOs, whose activity has been suspended, has initiated an administrative dispute, thus making use of the sole legal remedy at its disposal, against the Decision of the Department on Non-Government Organizations. The legal remedy used by this NGO has resulted to be ineffective considering that the case has been under review for 5 years by the Basic Court in Prishtina – Department of Administrative Matters. The Court has approved the suspended NGO’s statement of claim, thus annulling the Decision of the Department on NGOs and returning the case for review to the Department for NGO’s.
23. The Ombudsperson has noted that in one of the Decisions of the Basic Court in Prishtina (A.no.2345/2014) dated 09.11.2017, the Court has, *inter alia*, pointed out that the Decision of the Department for NGO has not specifically clarified and has not proved how the activities conducted by the NGO, whose activities have been suspended, do not comply with the legal and constitutional order of the Republic of Kosovo. However, the Court failed to decide regarding the legality of the act, thus returning the case to the administrative body for review.
24. Under such circumstances, the Ombudsperson considers that the rights of the entity, whose activities have been suspended, to a fair and impartial trial have been violated due to delays in the adjudication of the case, as foreseen under Article 31 of the Constitution and Article 6 of the European Convention on Human Rights (ECHR), along with the right to an effective legal remedy provided under Article 54 of the Constitution of the Republic of Kosovo, and Article 13 of the ECHR. Article 54 of the Constitution and Article 13 of ECHR guarantee an effective legal remedy before a domestic authority for any alleged violation of requirements of Article 31 of the Constitution and Article 6 of the ECHR in terms of having the case reviewed within a reasonable time limit. Since this case has to do, among other things, with a delay of procedures, Article 13 of ECHR

is applicable as well, because in this case one cannot claim that the complainant has been granted an effective legal remedy³.

25. The Ombudsperson considers that the suspension of the NGO's activities has caused not only a violation of the rights of the entity, whose activities has been suspended, but rather has jeopardized the rule of law in the country.
26. The Ombudsperson considers that if competent security bodies, in this specific case, had reasonable doubt that the criminal offence has been committed, they should have presented such doubts before the prosecution bodies, in accordance with the provisions of the Criminal Procedure Code, without involving the Department for NGO in the Ministry of Public Administration at all. The Law No. 03/L-063 on the Kosovo Intelligence Agency, Article 25, paragraph 2, stipulates: *“If in the performance of its functions, the KIA establishes that grounds exist for suspicion that a certain person or entity has committed or is committing a criminal offense, or is preparing or organizing a criminal offense subject to public prosecution, it is bound to notify the General Director of the Kosovo Police and the competent public prosecutor”*.
27. The suspension of the NGO's activities solely on the suspicion that their activities do not comply with the legal and constitutional order of the Republic of Kosovo and international legislation, without any genuine investigation by the prosecution bodies, represents a direct interference in the freedom of association and pose the risk of the state interfering, at any given time, in the activities of any other NGO.

Based on the above, the Ombudsperson:

Recommends

To the Government of the Republic of Kosovo

1. To amend the Administrative Instruction No.02/2014 on the Registration and Functioning of Non-Government Organizations, approved in the 195th meeting of the Government of Kosovo with the Decision No. 01/195 dated 03.09.2014, specifically to delete Article 18.

Pursuant to Article 132, paragraph 3 of the Constitution of the Republic of Kosovo (“Every organ, institution or other authority exercising legitimate power of the Republic of Kosovo is bound to respond to the requests of the Ombudsperson and shall submit all requested documentation and information in conformity with the law”) and Article 28 of the Law No. 05/L-019 on Ombudsperson (“Authorities to which the Ombudsperson has addressed recommendation, request or proposal for undertaking concrete actions, . . . must respond within

³ Ombudsperson *Ex officio* Report No. 425/2015 regarding the lack of effective legal remedies, addressed to MLSW and GJTHP, dated 22 August 2016

thirty (30) days. The answer should contain written reasoning regarding actions undertaken about the issue in question”), please inform us of actions you will take with regards to this issue.

Respectfully,

Hilmi Jashari
Ombudsperson