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Institucioni i Avokatit të Popullit • Institucija Ombudsmena • Ombudsperson Institution

**KOSOVO REPUBLIC OMBUDSPERSON'S LEGAL OPINION IN THE CAPACITY
OF FRIEND OF THE COURT (AMICUS CURIAE)**

Addressed to
Basic Prosecution in Prishtinë

C.No.529/2019 Hamdi Hoxha
and
C.No.530/2019 Flurim Kurtishaj

With respect to the

*Lawsuits no. 2338/19, submitted on 1 October 2019 by Mr. Hamdi Hoxha and by
Mr. Flurim Kurtishaj, regarding the Draft-Regulation No. ATK 13/2019 on Internal
Organization and Systematization of Job Positions in Tax Administration of Kosovo (TAK)
as well as the individual lawsuits of each complainant, the Lawsuit with the case number
2452/19, of Mr. Hamdi Hoxha and the Lawsuit no.2451 / 19, of Mr. Flurim Kurtishaj, filed
on 14 October 2019 in the Basic Court in Prishtina versus the Tax Administration of Kosovo*

Prishtinë, 9 July 2020

The purpose of the Legal Opinion

1. The Ombudsperson presents to the Basic Court in Prishtina this Legal Opinion in the capacity of a friend of the court (*amicus curiae*), which aims to indicate the legal basis and provides a legal analysis with regard to the cases, the Lawsuit no. 2338/19, submitted on 1 October 2019 by Mr. Hamdi Hoxha and by Mr. Flurim Kurtishaj, concerning the Draft Regulation No. TAK 13/2019 on Internal Organization and Systematization of Jobs Positions in TAK; as well as the individual Lawsuits of each complainant: Lawsuit no. of case 2452/19, of Mr. Hamdi Hoxha and the Lawsuit of Mr. Flurim Kurtishaj with no. 2451/19, filed on 14 October 2019 with the Basic Court in Prishtina against Tax Administration of Kosovo.
2. This Legal Opinion focuses on clarifying of the legal procedures regarding complainants' allegations with regard to discrimination on the basis of political affiliation and political opinion.

Legal bases concerning the actions undertaken by the Ombudsperson in the capacity of friend of the Court

3. Article 132, paragraph 1 of the Constitution of Republic of Kosovo authorizes the Ombudsperson to: *“monitor, defend and protect the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities ”*
4. Article 16 of the Law No. 05/L-019 on Ombudsperson, in paragraph 4, foresees: *“The Ombudsperson has the power to investigate, either to respond to complaint filed or on its own initiative (ex officio), if from findings, testimonies and evidence presented by submission or by knowledge gained in any other way, there is a base resulting that the authorities have violated human rights and freedoms stipulated by the Constitution, laws and other acts, as well as international instruments on human rights.”*
5. Article 16, paragraph 9, of the Law No. 05/L-019 on Ombudsperson determines: *“The Ombudsperson may appear in the capacity of the friend of the court (amicus curiae) in judicial processes dealing with human rights, equality and protection from discrimination.”*
6. Furthermore, it should be taken in consideration that the Article 18, paragraph 1.1, of the Law on Ombudsperson, the Ombudsperson has the responsibility: *“to investigate alleged violations of human rights and acts of discrimination, and be committed to eliminate them;”* and, according to paragraph 1.2, of this Article : *“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.”*

Summary of facts

7. On 17 May 2019, TAK General Director approved the "Draft Regulation No. 13/2019 on Internal Organization and Systematization of Job Positions in the Tax Administration of Kosovo".
8. On 5 June 2019, TAK announced a vacancy for three positions of Deputy General Directors. According to the complainants' allegations, on 10 June 2019, TAK appointed several Acting Directors and did not systematize the current directors, whom TAK considered as redundant employees, including the complainants.
9. On 13 June 2019, the General Director of TAK, with Decision no. 334, removed Mr. Hoxha from his work place, from the position of Deputy General Director for Special Functions, to the position of Head of Risk Management Division. On the same day, on 13 June 2019, Mr. Kurtishaj's has been removed from his post, from the position of Director of the Gambling Department was assigned to the position of Leader of the Compulsory Collection Team, in the Regional Directorate Prishtina 2.
10. On 19 June 2019, the Ombudsperson, pursuant to Article 16.1 of Law no. 05 / L-019 on the Ombudsperson, admitted the complaint of Mr. Hamdi Hoxha and Mr. Flurim Kurtishaj filed against TAK, with allegations of discrimination, in the course of reassignment to another job positions. According to the complainants, in the present case, official authorizations were exceeded by the director of TAK that are in contradiction with the Law no. 06 / L-113 on Organization and Functioning of the State Administration and Independent Agencies; with Regulation no. 08/2012 on Redundant Civil Servants and with Law no. 05 / L-021 on Protection from Discrimination.
11. Furthermore, complainants have asserted that the demotion on their job positions was conducted under Regulation no. TAK 13/2019 on Internal Organization and Systematization of Job Positions in TAK, of 17 May 2019. According to the complainants, this Regulation has not been approved by the Prime Minister of the Republic of Kosovo, as defined in Law no. 06 / L-113 on Organization and Functioning of State Administration and Independent Agencies in Kosovo, which, in Article 28, par. 3, determines: "**Internal organization of ministries and *executive agencies shall be approved, with a sub-legal act by the Prime Minister, upon proposal of the responsible minister and prior approval of the minister responsible for public administration and opinion of the minister responsible for finance.***" Complainants claim that no legal provision entrusts TAK itself to approve regulations, as it has been acted with the present case for Regulation no. TAK 13/2019 on Internal Organization and Systematization of Jobs in TAK.
12. The complainant Mr. Hoxha stated that he has filed a complaint with the Commission for Settlement of Disputes and Complaints in TAK against Decision no. 334, of 13 June 2019, issued by TAK, through which he was reappointed from the position of Deputy General Director for Special Functions for the position of Head of Risk Management Division at TAK. On 8 July 2019 and on 7 August 2019, this Commission, through Decision no. 168, has rejected the complaint of the complainant Mr. Hoxha as unfounded. The Commission for Settlement of Disputes and

Complaints in TAK has also rejected as ungrounded the complaint of the complainant Mr. Kurtishaj. Both complainants, against the decisions of the given Commission, on 4 September 2019, filed a complaint with the Independent Oversight Board for the Civil Service of Kosovo (IOBCSK). On 14 October 2019, the IOBCSK, through a letter, informed the complainants that in the absence of members of this council it was impossible to issue a decision regarding complainants' case and through the legal advice provided has directed the complainant to use legal remedies in litigation.

13. OI according to the information received by MPA notification of 10 September 2019, with protocol no. 278, addressed to TAK representative, among others, has stated that the Regulation on Internal Organization of TAK of 17 May 2019, was approved by TAK's own decision by evading the procedures set out in Law no. 06 / L-113 on the Organization and Functioning of the State Administration and Independent Agencies for approval of the same Regulation. Furthermore, in this MPA notification it is emphasized that the representatives of this Ministry had met recently with TAK representatives, on 4 September 2019, where again the impossibility of approving new positions was emphasized as a result of dilemmas that exist in the internal organization of TAK.
14. According to the complainants' allegations and the documents submitted to the OI, for the same issue, the complainants alleged that they had filed three separate Lawsuits with the BCP in connection with the case. The Lawsuit with case no. 2338/19, filed on 1 October 2019, by both complainants, concerns their claims against the Draft-Regulation No. ATK 13/2019 on Internal Organization and Systematization of Jobs in TAK, as well as two other Lawsuits, which are individual lawsuits of each complainant, Lawsuit no. of case 2452/19, of the complainant Mr. Hoxha, and Lawsuit no.2451 / 19, of the complainant Mr. Kurtishaj, both submitted to the BCP, on 14 October 2019, relate to the reassignment of their job positions in TAK.
15. In the meeting held on 22 January 2020, the Government of the Republic of Kosovo issued Decision No. 05/117, through which was approved the Regulation on Standards for Internal Organization, Systematization of Jobs and Co-operation in State Administration Institutions and Independent Agencies. According to the complainants, in the absence of this sub-legal act as well as due to the failure to give due concern to other legal procedures, TAK has made the internal reorganization in this institution.

Actions of the Ombudsperson Institution

16. On 6 September 2019, pursuant with Article 20 of Law 05 / L-021 on Protection from Discrimination, the Ombudsperson, through an official letter, requested information from the TAK representative regarding complainants' allegations for discrimination.
17. On 24 September 2019, the Ombudsperson, through an official letter was notified by TAK representative that a new organizational structure has been drafted in TAK, based on the legal authorizations defined by Law no. 03 / L-222 for TAK, in order to

successfully fulfill the mission and increase efficiency at work, adding that in this case complainants' allegations for discrimination are not accurate.

18. On 5 March 2020, the Ombudsperson, through an official letter requested additional information regarding the complainants' case and requested information from TAK with specific justifications on complainants' allegations of discrimination as well as the legal basis for issuing the Regulation on the basis of which TAK has been restructured.
19. On 16 March 2020, the Ombudsperson received an official response from the TAK representative, where he stated that, apart from the information stated in the previous letter of 5 March 2020, there was nothing more to add. TAK representative pointed out that in the absence of vacant positions, in order to maintain complainants' status of the TAK employees, TAK has issued decisions for their placement in job positions, otherwise, as if they were not assigned to the current positions, based on the provisions of Article 4 of Regulation No. 08/2012 on Redundant Civil Servants, they would be redirect to the Ministry of Public Administration as redundant staff, in which case this Ministry would deal with them, making an effort to place them within one year in any of the vacant positions within the civil service institutions.
20. Furthermore, in TAK representative's response delivered to the OI on 16 March 2020, it was stated that all actions taken by him, including approval of the new Organizational Structure, approval of the Regulation on Internal Organization of TAK, placement of position holders who have been removed to other positions within TAK, have been taken always paying due concern to the legal provisions at effect and the interest of the institution to successfully carry out the mission entrusted to it by the Law on TAK at effect. Also, in this TAK representative's response, complainants' performance evaluations were attached, although, according to him, complainants have not been moved from their positions due to performance, but, according to him, due to TAK reorganization.

Legal Bases

21. Constitution of Republic of Kosovo, in Article 23, determines: "*Human dignity is inviolable and is the basis of all human rights and fundamental freedoms.*", while in Article 24, par. 1, defines: "*All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.*"; and par. 2, which stipulates: "*No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.*"

Article 53 [Interpretation of Human Rights Provisions]

Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.

Article 49 [Right to Work and Exercise Profession]

- 1. The right to work is guaranteed.*
- 2. Every person is free to choose his/her profession and occupation.*

22. The European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) and Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (henceforward: the Convention) is a legal document which is directly applicable in accordance with the Constitution of the Republic of Kosovo and prevails, in case of conflict, over the provisions of laws and other acts of public institutions.

23. Law No. 05/L-021 on Protection from Discrimination

Article 1

1. The purpose of this law is to establish a general framework for prevention and combating discrimination based on nationality, or in relation to any community, social origin, race, ethnicity, colour, birth, origin, sex, gender, gender identity, sexual orientation, language, citizenship, religion and religious belief, political affiliation, political or other opinion, social or personal status, age, family or marital status, pregnancy, maternity, wealth, health status, disability, genetic inheritance or any other grounds, in order to implement the principle of equal treatment.

Article 2

1. This law applies to all acts or omissions, of all state and local institutions, natural and legal persons, public and private sector, who violate, violated or may violate the rights of any person or natural and legal entities in all areas of life, especially related to:

[...]

1.3. conditions of employment and working conditions, including discharge or termination of the contract and salary;

[...]

Article 3

1. The principle of equal treatment shall mean that there shall be no discrimination, direct or indirect in the sense of any of the grounds set out in Article 1 of this Law.

2. Discrimination is any distinction, exclusion, restriction or preference on any ground specified in Article 1 of this law, which has the purpose or impact of depreciation or violation of the recognition, enjoyment or exercise of human rights and fundamental freedoms guaranteed by the Constitution and other applicable legislations of the Republic of Kosovo.

Article 4 – Types of unequal treatment

[...]

1.5. *Victimization is deemed discrimination on the grounds set out in Article 1 of this Law, and occurs when a person suffers an adverse or negative consequences in response to a complaint or non-complaint (started procedures) or actions in order to apply the principle of equal treatment or when such person provides information, evidence or assistance in relation to the complaint procedure in case of discrimination;*

[...]

2. *Violation of the principle of equal treatment of basis mentioned in Article 1, of this Law shall be deemed to be discrimination.*

Article 5 – Severe forms of discrimination

Discriminatory behaviour that is motivated by more than one ground or which is committed more than once, or which has lasted for a long period of time or had harmful consequences especially for the victim, is considered severe form of discrimination.

Article 6 - Other justified treatments

Notwithstanding Articles 3 and 4 of this law it is not deemed a discrimination a distinction in treatment which is based on differences provided on grounds of Article 1 of this Law, but which as such represents real and determinant characteristic upon employment, either because of the nature of professional activities or of the context in which such professional works are conducted, if that provision, criterion or practice is justified by a legitimate purpose and there is a reasonable relationship of proportionality between the means employed and the targeted aim.

Article 8

All institutions should act in accordance with the principles of this Law during the exercise of their duties and drafting of policies and legislation.

Article 9

1. *The Ombudsperson is state institution for equality, for promotion and protection of human rights. The Ombudsperson shall handle cases related to discrimination under the relevant Law on Ombudsperson.*

2. *the Ombudsperson has the following competencies :*

[...]

2.3. *the Ombudsperson shall have an authority to investigate or act on any claim filed or with self-initiative (ex-officio) when there is reason to suspect that there has been discrimination by public entities;*

[...]

2.6. *monitors the implementation of this law and initiates the amendments of provisions for implementation and advancement of protection from discrimination.*

Article 20 – Burden of proof

[...]

2. *Burden of proof shall be upon the respondent, who should prove that there has been no breach of the principle of equal treatment..*

[...]

24. Law No. 03/L-149 on the Civil Service of the Republic of Kosovo

Article 28 – Transfer of Civil Servants

1. *Transfer of Civil Servants can be performed through **relocation to another job location** and as a temporary transfer to other job location.*

2. *Relocation of Civil Servants, as a non disciplinary measure, entails temporary or permanent re-deployment to other job location, **to exercise the same or different functions, at the same functional category and grade.***

[...]

Article 33 - The Performance Appraisal

1. *Each institution of the public administration shall periodically at the end of each year, conduct a performance appraisal of Civil Servants. The performance appraisal is conducted for the purpose of enhancing work performance and insuring the gradual improvement of the professional capacity and quality of administrative services.*

[...]

Article 43 - Right to Equal Treatment and Career Development Opportunities

1. *Civil Servant have the right to be treated to receive fair and equitable treatment in all aspects of personnel management career development, rewards, compensation and legal protection, without regard to sex, race, religious affiliation or belief, political affiliation, physical disability, conditions, marital status, age and ethnic origin.*

[...]

Article 45 - Right to Remain on Position and Retain Equivalent Position

1. *Civil Servants shall be guaranteed protection against any unjustified or unnecessary removal from their work place or modification of tenure.*

2. *Civil Servants shall be entitled to the right on their post or equivalent position, including the right to take special leave, according to the terms specifically indicated by applicable legislation.*

Article 50 defines:

“Civil Servants shall have the right to appeal against administrative decision or any violation or omission of the general administrative rules or procedures that affect or are related to their working relationship” (paragraph 1).

Civil Servants shall have the right to protect themselves in cases of any violation of their rights as a result of the action of the public administration through internal administrative or judicial procedures” (paragraph 2)

25. Law No.06/L-113 on Organization and Functioning of State Administration and Independent Agencies, Article 28, par. 3, determines: “*Internal organization of ministries and executive agencies shall be approved, with a sub-legal act by the Prime Minister, upon proposal of the responsible minister and prior approval of the minister responsible for public administration and opinion of the minister responsible for finance.*”; and par. 6, defines: “*Government of Kosovo upon the proposal of minister responsible for public administration adopts the Regulation on standards of internal organization of state administration institutions, detailed procedures for preparation, proposal, consultation and adoption of internal organization, as well as contents of the explanatory memorandum of proposal.*”

26. Law No.05/L-031 on General Administrative Procedure, Article 6 [**Principle of equality and non-discrimination**], stipulates:

- “1. Public organs shall abide by the principle of equality and non-discrimination.*
- 2. Persons that are in the same situation shall be treated in a similar manner. Any differences of treatment shall be deemed justified in as much as that they are in conformity with objective differences of the relevant case.*
- 3. The public organ shall in particular avoid any unjust discrimination, as defined in the Law against Discrimination”.*

While in Article 52 defines:

- “1. An administrative act is unlawful when:*
 - 1.1. it was issued without legal authorisation according to paragraph 2. Article 4, of this Law;*
 - 1.2 the issuing public organ acted without having the competence;*
 - 1.3 it came into being through the infringement of provisions regulating the proceeding;*
 - 1.4 it contradicts the provisions regulating the form or the statutory elements of the act;*
 - 1.5 it violates substantive law;*
 - 1.6 is a result of a discretion that was not lawfully exercised, or*
 - 1.7 it does not comply with the principle of proportionality.”*

27. Regulation No.08/2012 on Redundant Civil Servants, Article 3, stipulates:

- “1. In case of reorganization of an institution, the head of the institution shall submit to the relevant oversight body, the program for approval after obtaining the opinion of the ministry responsible for finance and the ministry responsible for public administration.*
- 2. In case of closure of or merger of an institution with an another institution, the supervisory body of relevant institution, by the decision, shall appoint the body or*

working group for drafting and managing the program for redundant civil servants, which shall be approved after obtaining the opinion of the ministry responsible for finance and the ministry responsible for public administration.

3. During the program design, the drafter of the program for redundant civil servants will consult with civil servants affected by this program, and trade unions” while Article 4, determines that: “1. In case of reorganization of an institution, the personnel unit shall have the following responsibilities:

1.3 To try to find a vacant equivalent position for redundant civil servants within the institution”.

28. Law No.06/L-113 on Organization and Functioning of State Administration and Independent Agencies,

Article 28 - Regulation on internal organization

[...]

3. Internal organization of ministries and executive agencies shall be approved, with a sub-legal act by the Prime Minister, upon proposal of the responsible minister and prior approval of the minister responsible for public administration and opinion of the minister responsible for finance.

[...]

Article 41 - Management and organization of independent agencies

1. Independent Agency is managed by the head or by a collegial governing body, in accordance with establishment law.

2. The head or collegial managing body of independent Agency shall be supported by the administration of certain institution.

3. Provisions on organization of ministries as provided in Articles 15, 18, 19, 20 and 21 of this Law shall apply as appropriate also for administrative organization of independent Agency. [...]

Article 42 - Internal organization of independent agencies

1. Regulation on internal organization of independent agencies includes:

1.1. functional structure;

1.2. detailed organizational chart of the institution, including also the class of each job position and group of positions of professional category in accordance with provisions for the classification in the civil service according to the Law on Public Officials.

1.3. mission and job description of each department or division.

2. Regulation shall include the administration of Agency.

3. Regulation on internal organization of an independent Agency is approved by the head or collegial management body.

4. Prior to adoption of the Regulation, the approving body is required to obtain an advisory opinion of the minister responsible for public administration, minister responsible for finances and Auditor General. Minister and Auditor General provide such opinion within fifteen (15) days from submission of request.

5. Regulation on internal organization of independent Agency is published on its official website, in official languages, not later than fifteen (15) days after its approval.

1. Law No.06/L-113 on Organization and Functioning of State Administration and Independent Agencies.

Article 3 - Principle of lawfulness

Public administration shall perform its activity on the basis of Constitution, law and applicable legislation in the Republic of Kosovo”.

Article 15 - Internal organization of the Ministry

“1. Ministry is led by the minister and is organized in the following levels:

1.1. general secretary;

1.2. departments, and

1.3. divisions.

2. Administrative units, provided for in sub-paragraphs 1.2. and 1.3. paragraph 1. of this Article shall be organized into appropriate size pursuant to their function and respective complexity. As a rule, every civil servant or administrative and support staff is part of an administrative unit.

3. Provisions of this Article are also applied, for the organization of the Prime Minister`s Office, unless otherwise provided for in a special law. ”.

Legal Analyses

29. Constitution of the Republic of Kosovo, as the highest legal act, protects and guarantees fundamental human rights and freedoms, therefore their implementation in practice is in the interest of rule of law functioning. Constitution explicitly stipulates that it is the obligation of all bodies to respect the rights and freedoms of others; this principle is imperative and must be respected by all, including TAK.
30. Constitution provides all with guarantees of equal protection before all state bodies and holders of public powers and creates the liability of the state to protect these rights for all, equally without any unreasonable delay, by undertaking and providing all with effective legal measures in case of violation of any given right.
31. Constitutional prohibition of discrimination is elaborated in more detail in the Law on Protection from Discrimination, which, in Article 3, provides for the principle of equality, regulated in such a way that all are equal and enjoy equal status and equal legal protection, regardless of their personal features. Therefore, everyone is obliged to respect the principle of equality, actually prohibition of discrimination.

32. Discrimination in the field of work is prohibited by the main law on protection against discrimination, through which a comprehensive framework has been created for protection against discrimination, which prohibits direct and indirect discrimination in employment, on any grounds, for all actors who have violated, violate or may violate the rights of any person, especially when it comes to conditions for access to employment, including conditions of employment and selection criteria. Also Article 20, par. 2, determines: ***“Burden of proof shall be upon the respondent, who should prove that there has been no breach of the principle of equal treatment.”*** The Ombudsperson raises his concern on complainants’ allegations that they are discriminated when removed from their job position and considers that TAK, in its response of 24 September 2019, has failed to provide convincing evidence that with new reorganization in TAK, in accordance with the Rules of Procedure, the complainants were treated without discrimination and in accordance with applicable law.
33. The Ombudsperson states that, according to European Court of Human Rights (ECtHR) case law: *“The right not to be discriminated against is violated when states treat people unequally [...] without providing objective and reasonable justifications. For such reasoning to be “objective and reasonable” two steps must be taken: First, there must be a “legitimate purpose” for the inequality in question and, second, there must be a “reasonable ratio of proportionality between means used and purpose, which is intended”.* The Ombudsperson considers that TAK’s response of 24 September 2019, via e-mail, does not contain any reasonable justification or legitimate purpose that the complainants are not discriminated on the grounds raised in the complaint.
34. Law No. 06/L-113 on Organization and Functioning of State Administration and Independent Agencies, in Article 28, par. 3, stipulates: *“Internal organization of ministries and executive agencies shall be approved, with a sub-legal act by the Prime Minister, upon proposal of the responsible minister and prior approval of the minister responsible for public administration and opinion of the minister responsible for finance,”* and par.6, determines that the *“Government of Kosovo upon the proposal of minister responsible for public administration adopts the Regulation on standards of internal organization of state administration institutions, detailed procedures for preparation, proposal, consultation and adoption of internal organization, as well as contents of the explanatory memorandum of proposal..”* The Ombudsperson noticed that TAK has failed to act in accordance with these legal references. In the *“Notification for TAK”*, of 10 September 2019, provided by MPA, based on the review of TAK’s request of 27 June 2019, for approval and inclusion in the Catalogue of job positions of the posts based on the Organizational Structure of 10 May 2019, it is stated that the Department for Public Administration Reform and European Integration of MPA, on 10 July 2019, has notified TAK that the Regulation on Internal Organization of TAK, which this institution has approved on 17 May 2019, has not been subject to the procedures for approval of the Regulations set out in Law no. 06 / L-113 on the Organization and Functioning of the State Administration and Independent Agencies. This notification also states that MPA, regarding this issue, conducted meetings with TAK representatives, the last meeting of this nature was held on 4 September 2019, which also highlighted the impossibility of

approving new positions as a result of dilemmas that exist in the internal organization of TAK.

35. Furthermore, the Ombudsperson, in the official letter of 5 March 2020, delivered to the TAK representative, among others, requested information regarding the legal and procedural basis for issuance of Regulation no. 13/2019 on Internal Organization and Systematization of Jobs in TAK, based on which complainants' removal from their job positions were made. In the response received from TAK representative of 16 March 2020, the Ombudsperson was informed that all actions undertaken, including the approval of the new organizational structure, approval of the Regulation on Internal Organization of TAK, systematization of position holders who have been removed into other positions within TAK have been accomplished always in conformity with the legal provisions at force and the interest of the institution to successfully carry out the mission entrusted to it by applicable Law of Tax Administration of Kosovo, however, legal and procedural actions regarding the approval of this Regulation are not explained, pursuant to requirements of the Law no. 06 / L-113 on the Organization and Functioning of the State Administration and Independent Agencies, as mentioned above.
36. The Ombudsperson emphasizes that the observance of legal obligations by public institutions, in the given case by TAK, is mandatory and above all should be ongoing and that legal provisions should not be interpreted in any way depending on the situations that occur in an institution, by anyone and towards any person. TAK decisions, for both complainants (Decision no. 334 of 13 June 2019, for Mr. Hoxha; and Decision no. 333 of 13 June 2019, for Mr. Kurtishaj), through which complainants are reassigned from one job position to another in TAK, in TAK's responses to the OI is stated that despite the efforts that this institution has made to find an equivalent position for placement of the holder of the current job position, **such thing has not been possible**. In the part of Decisions reasoning with regard to complainants it is mentioned that the reassignment of the complainants position has come as a result of suppression and reorganization as well as Institution's need for implementation of the new organizational structure, of 10 May 2019, which was approved by General Director, as well as enforcement of the new Regulation no. 13/2019 on Internal Organization and Systematization of Jobs in TAK. But this Regulation, as mentioned previously, has not been approved according to legal requirements and this is demonstrated through MPA official notification of 10 September 2019. However, whenever the reassignment of civil servants occurs, Law no. 03 / L-149 on the Civil Service of the Republic of Kosovo, in Article 28, determines that *this transfer shall be performed through lateral transfers with assignment to other office in the same or different organization at the same functional level and grade, within the central or municipal administrations and that a Civil Servant, with his/her consent and in agreement with the employer, may be subject to secondment to an international organizations, public enterprises or any other public organization requiring specific skills and certain professional experience*. Furthermore, Law no.03 / L-222 on Tax Administration and Procedures, Article 3, paragraph 3.5, stipulates that the General Director shall have the *power to appoint such persons as may be required to carry out the provisions of this law in conformity with the Kosovo Civil Service rules*.

37. Law No.05/L-031 on General Administrative Procedure, Article 52, par. 1, stipulates cases when an administrative act is unlawful, while in par. 1.6 defines that such administrative act is *a result of discretion that was not lawfully exercised*. In the present case, the decisions regarding the reassignment of the job position of the complainants from one position to another in TAK, in the introductory part of these decisions is stated that in order for the same (complainant) to maintain the status of employee in TAK, the General Director of TAK, in the capacity of the employment body, has decided not to address them to MPA as required by the procedures for the treatment of redundant staff. Such a practice constitutes an exercise of discretion exercised illegally and should result in the declaration of an illegal administrative act.
38. Also decisions regarding reassignment of position where the complainants are demoted to work place, TAK emphasizes that, despite the efforts that the institution has made to find an equivalent position for the placement of the holder of the current position, such a thing has not been possible. In the present case, the official communications of the TAK representative with the Ombudsperson did not provide sufficient information and evidence on TAK's efforts to find an equivalent position for the TAK complainants, despite the fact that Law no. 03 / L-149 on the Civil Service of the Republic of Kosovo, Article 45, paragraph 1, at the part which deals with the **Right to Remain on Position and Retain Equivalent Position**, plainly stipulates that *Civil Servants shall be guaranteed protection against any unjustified or unnecessary removal from their work place or modification of tenure*.
39. The result of the lack of particular actions by TAK to respect procedures in accordance with applicable laws is also justified by the fact that TAK, on 5 June 2019, announced a vacancy for three positions for Deputy General Directors. Consequently, allegations that there are no other vacancies for equivalent positions in complainants' case from TAK are incorrect, in the present case the complainants should be treated equally in relation to the rest of the staff. The Law no. 03 / L-149 on the Civil Service of the Republic of Kosovo, in Article 28, defines the transfer of civil servants, but clearly determines: *"1. Transfer of Civil Servants can be performed through relocation to another job location and as a temporary transfer to other job location 2. Relocation of Civil Servants, as a non disciplinary measure, entails temporary or permanent redeployment to other job location, to exercise the same or different functions, at the same functional category and grade."* The Ombudsperson estimates that in the present case the complainants have not been transferred to exercise the same or different functions, at the same functional category and grade.
40. TAK in its decisions for reassignment of the complainants' positions in this institution claims: *"They didn't want to refer complainants to MPA as redundant civil servants and that the reassignment of their positions was done in the framework of the reorganization of the work in TAK"* The Ombudsperson states that Regulation no. 08/2012 on Redundant Civil Servants, in Article 3, stipulates: *"In case of reorganization of an institution, the head of the institution shall submit to the relevant oversight body, the program for approval after obtaining the opinion of the ministry responsible for finance and the ministry responsible for public administration and that during the program design, the*

drafter of the program for redundant civil servants will consult with civil servants affected by this program, and trade unions, Article 4, defines that in case of reorganization of the institution, the personnel unit, among its responsibilities, has also to make efforts to find a vacant equivalent position for redundant civil servants.” Therefore considers that TAK has failed in this case to act in accordance with this Regulation.

41. Law no. 06 / L-113 on Organization and Functioning of State Administration and Independent Agencies, Article 28, Regulation on Internal Organization, paragraph 3, stipulates: “[...] *Internal organization of ministries and executive agencies shall be approved, with a sub-legal act by the Prime Minister, upon proposal of the responsible minister and prior approval of the minister responsible for public administration and opinion of the minister responsible for finance.*” On this occasion, the Ombudsperson draws attention to the fact that TAK, regarding the procedures from the drafting to the entry into force of the Regulation on Internal Organization, has not presented any document that supports enforcement of this Article.
42. The Ombudsperson considers that the principle of legal certainty is the basis of the rule of law and ensures citizens’ trust in the state and the constancy of the law through actions of administrative bodies, a principle which, among others, consists in accuracy, clarity and consistency in the entirety of the complete legal order of a state. Therefore, not only the specific norms, but the whole legal order is required to be understandable and predictable and not contradictory. Consequently, according to this it is concluded that the Draft-Regulation No. ATK 13/2019 on Internal Organization and Systematization of Jobs in TAK of 17 May 2019, not only that is unlawful, but is also contrary to the concept of legal certainty.

CONCLUSION

1. Constitution of the Republic of Kosovo, Article 24, guarantees the equality of all before the law, without any discrimination; Article 23 stipulates that human dignity is inviolable and is the basis of all fundamental human rights and freedoms. The Ombudsperson finds that the reassignment of the complainants' job positions by TAK **constitutes a discriminatory act** and is in contradiction with Article 28 of Law no. 03 / L-149 on the Civil Service of the Republic of Kosovo, which, in paragraph 2, stipulates: “*Relocation of Civil Servants, as a non disciplinary measure, entails temporary or permanent redeployment to other job location, to exercise the same or different functions, at the same functional category and grade.*”
2. The Ombudsperson finds that TAK has failed to provide convincing evidence that with the new TAK reorganization, in accordance with the Rules of Procedure, adopted on 17 May 2019, the complainants have been treated without discrimination and in accordance with the legislation in effect. Article 43 of Law no.03 / L-149 on the Civil Service of the Republic of Kosovo, which stipulates: “*Civil Servant have the right to be treated to receive fair and equitable treatment in all aspects of personnel management career development, rewards, compensation and legal protection, without regard to sex, race, religious affiliation or belief, political affiliation, physical disability, conditions, marital*

status, age and ethnic origin.” (par.1). “It is the duty of the public administration to remove those administrative obstacles which limit the freedom and equality of Civil Servants, impede their full professional development and constrain their opportunities to effective participation in the attainment of the scopes set for the Civil Service.” (par. 2). Furthermore, as mentioned above, on 5 June 2019, TAK announced a vacancy for three positions of Deputy General Directors and on 10 June 2019 it appointed several directors, but did not systematize the current directors, whom he considered as redundant workers, including complainants. Consequently, such a practice by TAK in the present case constitutes discrimination, as the complainants were treated differently by TAK, for the fact that they were not assigned to equivalent job positions, which positions were vacant and for which TAK has opened competitions. Also, these TAK’s actions are contrary to the principle of lawfulness and the principle of legal certainty.

3. The Ombudsperson finds that the Regulation on Internal Organization of 17 May 2019 is not in accordance with Law no. 06 / L-113 on the Organization and Functioning of the State Administration and Independent Agencies, respectively Article 28 of the Regulation on Internal Organization, which defines: “[...] 3. *Internal organization of ministries and executive agencies shall be approved, with a sub-legal act by the Prime Minister, upon proposal of the responsible minister and prior approval of the minister responsible for public administration and opinion of the minister responsible for finance.*”
4. The Ombudsperson ascertains that, in accordance with Law no.03 / L-222 on Tax Administration and Procedures, TAK General Director has the power *to appoint persons as needed in order to implement the provisions of applicable law for TAK, but they must always comply with the rules of the Kosovo Civil Service.*

Sincerely,

Hilmi Jashari

Ombudsperson