

LAW 06/L-043 ON FREEDOM OF ASSOCIATION IN NGOS - SUMMARY

MAIN ISSUES WITH THE VERSION ADOPTED ON 7th NOVEMBER 2018

NON FOR PROFIT PRINCIPLE IS GRAVELY ENDANGERED

due to changes to the basis of distribution of NGOs assets after their termination, by enabling the distribution of NGO assets outside the non-governmental sector, including the private sector (Article 41.2, Amendment 31)

- "Institutions" (both public and private) have been added as possible recipients of a terminated NGOs assets;
- The new provision is in direct conflict with the fundamental NGOs principle of non for profit, by enabling the distribution of NGO assets outside the non-governmental sector, including the private sector;
- The new provision is in direct opposition with the Constitutional Court's Judgement KO 97/12 on the Law on Banks, regarding the initiative to allow the transformation of Microfinance NGOs.

DIRECT CONSEQUENCES

Enabling of the transfer of NGO assets to other sectors (including private institutions) will:

1. Allow the capital of Microfinance NGOs to be transferred to private businesses, after these NGOs are closed down voluntarily;
2. Allow every NGO to transfer their assets/capital to private businesses, after these NGOs are initially closed down voluntarily;
3. Allow every governmental grant, or other grants from foreign or local donors, that are given to NGOs to have a legal course for their transfer to private businesses;
4. Cut off donors from the necessary legal guarantees that their donations will be used for non-profit purposes, consequently endangering any support to NGOs in Kosovo.

FACTS

International Principles

All NGOs assets are used only for the NGOs mission. When the NGO is terminated, the remaining assets are transferred to an NGO with the same or similar mission.

(Guidelines of the Venice Commission on Freedom of Association and other similar documents)

Law on NGOs

NGOs do not distribute net gains or revenues to any person. NGO assets, income and revenue are used to support non-profit objectives specified by the organization. NGO assets, income and revenue are not used for a direct or indirect profit of a founder, director, official, member, employee or donor of the NGO, apart from the pay received by persons that work for the organization.

(Article 12, Law 06/L-043 on Freedom of Associations in NGOs)

Constitutional Court of the Republic of Kosovo

The Court reminds that assets that belong to an NGO can be used only to fulfill the aims and objectives for which the NGO has been founded, in accordance with the principle of non-profit distribution. Therefore, the transfer of ownership of the NGOs assets to any physical or juridical person, will be against this principle.

(Point 132, Judgment from 12th April 2013 on the case Nr. KO97/12 for the Law on Banks, Micro-financial Institutions and Financial Non-bank Institutions)

THE ARBITRARY TERMINATION OF NGOs IS MADE POSSIBLE

due to the change in the basis of the termination of an NGO from non-solvent to inactive (Article 41, Amendment 30)

- In the provision that pertains to the termination of NGOs, the word “non-solvent” has been replaced with the word “inactive” (Article 41.1);
- Non-solvency is the inability to pay as defined by the Law on bankruptcy and is of a financial nature;
- Inactivity is a non-financial concept, and is not defined by either Kosovar legislation or international practice, and furthermore cannot be measured or asserted.

DIRECT CONSEQUENCES

Allowing “inactivity” to be a criterion for the termination of NGOs will:

1. Create a legal opportunity for the arbitrary termination of NGOs and it endangers the constitutional right of freedom of association;
2. Allow the state to interpret without any basis which NGOs are active and which are not;
3. Allow the state to have an opportunity to arbitrarily close NGOs based on ungrounded interpretations;
4. Create legal uncertainty and unpredictability for NGOs in Kosovo in regards to their future.

FACTS

International principles

The court’s final decision is the only legitimate basis through which an organization can be terminated.

(Venice Commission on Freedom of Association, Point 242)

An illustration of an arbitrary interpretation of inactivity

An NGO or network of NGOs has been founded with the sole aim of monitoring elections. Normally, this NGO would be expected to be active only when there are elections, every 4 years, whereas in the preceding 3 years there is no reason for them to be active. Based on the new provision, the state can terminate this NGO some months ahead of new elections, with the reason that “they have not been active for 3 years”.

(Illustrative example based on the actual activities of NGOs in Kosovo and beyond)

THE PROCESS

- Drafted during 2016-2017, with broad institutional involvement and that of the civil society and with domestic and international expertise;
- Based on the 2014 *Venice Commission Guidelines on Freedom of Association*;
- Based on extensive analysis of the practices of the implementation of the current law in Kosovo;
- Built upon inter-sectoral consensus created through numerous discussions;
- Approved by the Government of Kosovo on December 2017;
- Approved during the first reading by the Assembly on March 2018;
- Discussed during a public hearing by the Committee for Media and Public Administration on April 2018;
- Approved during the second reading on the 7th of November, with 36 amendments (most of them restrictive);
- Sent back by the President, after requests by KCSF and 76 other NGOs, on the 23rd of November 2018;

CIVIL SOCIETY’S DEMAND

The approval of the Law during its third reading according to the civil society’s demands, namely all the amendments proposed by the President.