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

To

Basic Court in Prishtinë

Concerning the situation of homophobia and transphobia

In compliance with Article 16, paragraph 9 of the Law no. 05/L-019 on Ombudsperson (hereinafter: Law on Ombudsperson), and Article 9 paragraph 2.13 of the Law no. 05/L021 on Protection from Discrimination, the Ombudsperson can appear in a capacity of the friend of the Court (amicus curiae) in judicial processes related to human rights, equality and protection from discrimination.

Prishtinë, 2 May 2017

Scope of action

The Ombudsperson in this *Amicus curiae* will be focused on last developments in the territory of Republic of Kosovo which comprise violation of provisions, which ban discrimination at any ground including sex, sexual orientation and gender identity. It will be focused on the situation that links with homophobia issue by providing an inclusive legal analyses, with the purpose to disclose potential shortcomings, within legal structure at the state level, which in one form hinder implementation of the European Convention on Protection of Fundamental Human Rights and Freedoms and its Protocols (hereinafter ECHR).

The Ombudsperson is appearing in this amicus curiae after investigations conducted on cases A.451/2016, *Ex-officio* 379/2016 and A. 72/2017 according to which the complainants belong to LGBTI community and because of this they have been victims of physical abuse and subject to discrimination.

Legal bases for Ombudsperson's action in the capacity of the Friend of the Court

1. 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."*
2. Article 16 of the Law on Ombudsperson in its 4 paragraph stipulates that: *"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"*.
3. Furthermore, paragraph 8 of Article 16 should be stressed here as well, which foresees that: *"The Ombudsperson may provide general recommendations on the functioning of the judicial system. The Ombudsperson will not intervene in the cases and other legal procedures that are taking place before the courts, except in case of delays of procedures"*.
4. Lastly, what has been stated above, an attention should be given to paragraph 9 of Article 16 as well, which authorizes the Ombudsperson *"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"*.
5. Regardless above given provisions, we should have in mind the fact that with Article 18, paragraph 1.1, the Ombudsperson has 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 the same 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

Case no. 451/2016, against Basic Prosecution in Prishtina

On the 4th of July 2016, complainants jointly with representatives of Non-Governmental Organization- Center for Development of Social Groups (hereinafter CDSG) have come to the Ombudsperson Institution, in order to unveil their concern related to physical violation due to their sexual orientation, suffered from the landlord of the apartment which they have rented for living.

On 20 July 2016, the Ombudsperson has initiated investigation regarding the above-mentioned cases.

On 2 July 2016, when the landlord found that the tenants belong to LGBTI community he exercised violence over them and evicted them immediately from the flat where they have resided. During this fight the complainants were injured.

Complainants with the assistance of Non-Governmental Organization- Center for Development of Social Groups-CDSG have reported the case to the Police on 9th of July 2016, at 19:00 and the case holds the number 2016-AB-2087.

On 12 July 2016, Kosovo Police, through e-mail has notified the complainants that their case of 9 July 2016 has been proceeded for further actions to the Basic Prosecution in Prishtine, with the criminal charges against the possible suspect. Complainants claim that no other information has been served to them by the Basic Court in Prishtina since that day regarding their case.

On 23 February 2017, the Ombudsperson has addressed the Basic Prosecution in Prishtine with the intention to gain information regarding actions undertaken by this Prosecution to proceed with the case within reasonable legal timeframe, in conformity with the Law and Article 6 of the European Convention on Human Rights.

On 7 April 2017, a response has been served to the Ombudsperson from the Basic Prosecution in Prishtine according to which on 15 of February 2017, case prosecutor, related to this case has filed an indictment with the request of issuance of punitive measures for the perpetrator, lenient body injury and intimidation.

Case *Ex-officio* 379/2016, against Kosovo Police

The Ombudsperson has initiated *ex-officio* investigation based on “Express” web portal’s article of 13 of June 2016 with the title: Two homos have been assaulted in Ferizaj. Based on what has been said in this web portal, two persons of LGBTI community have been the victims of an attack that has occurred on Friday evening in Ferizaj. Because of this act of violence, one of them endured face injuries and medical assistance has been requested due to this attack. Attacker, two men, who were unknown for the complainants,

were arrested by the police, was reported. This web portal points out that the incident has started initially with verbal provocations and then with physical attack towards two men of LGBTI community at their place of work, CDSG notifies and at the same time calls upon institutions to undertake mandatory legal steps and condemn the perpetrator with due punishment instead leaving them unpunished and the case, as many others, remains unsolved. At the same time, we expose our deep concern that these attacks prove low level of homophobia and lack of tolerance in our society.

On 21 June 2016, representatives of Ombudsperson Institution have addressed regional Police station in Ferizaj in order to obtain information about the case and were informed that the indictment have been filed with the Basic prosecution in Ferizaj. On that day representatives of Ombudsperson Institution were informed by the Basic Prosecution in Ferizaj that, on 14 of June 2016, a ruling has been rendered for initiation of investigations regarding this case.

On 17 July 2016, Basic Prosecution in Ferizaj has filed an indictment against persons involved in this case of criminal offence and inciting hatred based on Article 147 and 187 of Criminal Code of Kosovo. On 26 of September 2016, Basic Court in Ferizaj has ascertained that the accused were guilty and convicted them, the first with 5 months of effective imprisonment, while the second one was also found guilty but was punished with four (4) months on bail. Written decision has not been delivered yet by this Court up to this period. On 31 October 2016, Basic Court in Ferizaj has delivered written decision, where NGO CDSG was uninterested in opposing it, but the Prosecutor and the accused have appealed this decision and on 14 February 2017, a judicial proceedings has been set in Courts of Appeal in Prishtina, but the same has been suspended for indefinite time period due to absence of the parties in the procedure.

Case A. 72/2017, against Private Company

On 10 February 2017, the complainant jointly with CDSG representatives have come to the Ombudsperson Institution in order to disclose their concern regarding termination of working contract, due to his sexual orientation, as well as violation of the right to be remunerated for the work accomplished in Private Company, where the complainant worked in 2015.

On 18 January 2017, the complainant has lodged a complaint in the Labor Inspectorate in Lipjan.

Arguments

The Constitution of Republic of Kosovo in Article 21 states that “*protects and guarantees human rights and fundamental freedoms*”. This Article, respectively paragraph 3 stipulates that “*Everyone must respect the human rights and fundamental freedoms of others.*” Direct applicability of International Agreements and Instruments, including but not limited to the ECHR and the Universal Declaration on human rights is guaranteed by Article 22 of the Constitution: “*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.” Furthermore, Article 24 refers to equality before the law, while the paragraph 2 cites prohibition of discrimination, based on any grounds, including here but not limited to sex or sexual orientation, specifically: *“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”*. More ever, freedom of expression is guaranteed by article 40, which stipulates that: *“Freedom of expression is guaranteed. Freedom of expression includes the right to express oneself, to disseminate and receive information, opinions and other messages without impediment.”* And in this way rights of a person are guaranteed to express own thoughts in whatever field. Finally, the Constitution of Republic of Kosovo foresees Freedom of Association, guaranteeing it through the meaning of Article 44 which foresees: *“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.”*

Law no.05/L-021 on Protection from Discrimination (hereinafter: Law on Protection from Discrimination) institutes general framework on prevention and combating discrimination through making concrete provisions against discrimination foreseen with international instruments and Constitution of Republic of Kosovo. The scope of this Law, in the meaning of Article 1 foresees prevention and combating of discrimination on the base of: *“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”*. Furthermore, Law on Protection from Discrimination in its Article 5 defines the Severe Forms of Discrimination, even though: *“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.”*

Also, in relation with Article 17 of the Law on Protection from Discrimination: *“Violations of the provisions of this Law, in cases of criminal offenses are punished according to the Criminal Code of the Republic of Kosovo.”* Finally, Criminal Code no.04/L-082 of Republic of Kosovo (hereinafter Criminal Code) in Article 74 lists General rules on mitigation or aggravation of punishments, by emphasizing applicability of aggravation, in paragraph 2.12,: *“if the criminal offence is committed against a person, group of persons or property because of ethnicity or national origin, nationality, language, religious beliefs or lack of religious beliefs, color, gender, sexual orientation, or because of their affinity with persons who have the aforementioned characteristics;”*.

Article 6 of the European Convention on Protection of Human Rights and Fundamental Freedoms (further in the text “European Convention on Human Rights”, or “Convention”) in paragraph 1, determines: *“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal [...]”*. Article 13 of the European Convention on Human Rights determines that *“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”*. Article 14 of the European Convention on Human Rights determines that: *“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”*. Article 25 of the Law no. 05/L-019 on Ombudsperson, par. 1 and 3, stipulates: *“All authorities are obliged to respond to the Ombudsperson on his requests on conducting investigations, as well as provide adequate support according to his/her request..”* and *“In case when the institution refuses to cooperate or interferes in the investigation process, the Ombudsperson shall have the right to require from the competent prosecution office to initiate the legal procedure, on obstruction of performance of official duty.”*

Law no. 03/L-212 on Labor, in Article 5, paragraph 1 foresees that *“Discrimination is prohibited in employment and occupation in respect of recruitment, training, promotion of employment, terms and conditions of employment, disciplinary measures, cancellation of the contract of employment or other matters arising out of the employment relationship and regulated by Law and other Laws into force”*¹

Legal analyses

LGBT community as part of Kosovo society is considered to be a marginalized category despite the fact that there is a legal base which protects their rights. Taking in consideration the current approach of the society towards this problem, it is of great importance to re-emphasize that the human rights are inviolable and indivisible and thus they form the basis for a legal order. Human rights are conceived in this way in the Constitution of the Republic of Kosovo, a legal instrument that guarantees the rights of all its citizens, by guaranteeing and protecting their civil rights and equality of all before the law.

Initially the Ombudsperson emphasizes that human rights and fundamental freedoms guaranteed by the Constitution should be interpreted in accordance with the judicial decisions of European Court of Human Rights, as set forth in Article 53 of the Constitution of the Republic of Kosovo. The legal analysis of the case, notwithstanding the provisions of the abovementioned legal instruments, should start from the practice of

¹ See www.gzk.rks-gov.net

the European Court of Human Rights (hereinafter referred: ECtHR) and their perception of homosexuality, discrimination based on sex and sexual orientation.

The Ombudsperson draws attention to the so-called "Cinderella" clause, Article 14 of the ECHR which prohibits discrimination on any ground, including but not limited only to sex, without mentioning in particular prohibition of discrimination based on sexual orientation. Article 14 guarantees protection against discrimination only for the rights given in the Convention, implying that we may refer to it only if a particular situation falls within the scope of a right of the Convention.²

Article 14 does not refer to discrimination based on sexual orientation as the bases for protection according to ECHR but questions whether the bases for prohibition of discrimination based on sexual orientation falls within the concept of "sex" or "any ground" as mentioned in the Convention. The Ombudsperson states that ECtHR has clarified this issue in the case *Salgueiro da Silva Mouta against Portugal*. In the decision rendered from this Court, prohibition of discrimination based on sexual orientation is a concept undoubtedly covered by Article 14, which in its provision contains *an illustrative and endless list, which clearly derives from the notion "any ground"*³ Based on what has been given above, it derives that Kosovo Constitution, by guaranteeing implementation of the ECHR as well as of ECtHR decisions, bans any kind of discrimination based on sexual orientation.

Moreover, the Ombudsperson states that the provision encompassed in Article 14 of the ECHR is further defined in the Law on Protection from Discrimination, Article 1 of this Law predicts an indefinite list of grounds for which discrimination is forbidden, among which sexual orientation is close to the ground of "sex", including in general term and on "any other ground".

The Ombudsperson considers that, regardless of what has been stated above, it seems that then *Cinderella* provision has a slight possibility of application, especially when the possibility of reasoning the discrimination is taken in consideration as well as the scope of the limit of the assessment⁴. In this regard and in correlation with "*E.B. and the others versus Austria*"⁵ ECtHR has found that "the right no to be discriminated in the aspect of enjoyment of the rights guaranteed with the Constitution is not violated only in the cases

² Rory O'Connell, "*Cinderella comes to ball -*": *Article 14 and the right not to be discriminated in ECHR*, (2009) 29 (2) *Legal Studies: The Journal of the Association of Legal Researchers*, 211-229, p.5

³ GJEDNJ *Salgueiro da Siva Muta against Portugal*, Request no. 33290/96, Ruling of 21 December 1999, para.28

⁴ Rory O'Connell, "*Cinderella comes to ball -*": *Article 14 and the right to nondiscrimination in ECHR*, (2009) 29 (2) *Legal Studies: The Journal of the Association of Legal Researchers*, 211-229, p.3

⁵ ECtHR, *E.B. and the others versus Austria*, Ruling no. 31913/07, 48777/07 and 48779/07, Ruling of 7 November 2013

of different treatment, but also in cases when countries, without any objective and reasonable justification, fail to treat differently people whose position obviously differs.”⁶

The Ombudsperson ascertains beyond any doubt that the domestic legal framework applies the standards set by international instruments as per implementation and protection of human rights in relation to the prohibition of discrimination based on sex and sexual orientation, which implies the implementation of the ECHR and the case law of the ECtHR, with further concretization of the provision of Article 14 of the ECHR in the Law on Protection from Discrimination.

The Ombudsperson draws attention to the fact that, as noted in the European Commission's experts' document on Combating Discrimination on Sexual Orientation in the EU, the interpretation of the Convention by the ECtHR has opened a wide area of application for the prohibition of discrimination on grounds of sexual orientation and gender identity, according to the *Cinderella* article. With regard to the legal framework of Kosovo, undoubtedly it can be said that it protects the rights guaranteed by the ECHR and prohibits any kind of discrimination based on sexual orientation and gender identity. Starting from the legal framework and interrelating with ECtHR practice, no gap remains in the existing legislation that requires amendment with regard to further protection of rights based on sexual orientation and gender identity.

Additionally, the criminal offenses committed against members of the LGBT community, are admitted from responsible institutions in the very first phase and are further treated as criminal offenses defined by the Criminal Code but without raising the issue that these offenses are directed against members of LGBTI community, ***motivated and committed on the basis of hatred against sexual orientation and gender identity***, therefore, the Ombudsperson considers that provisions on the ban of discrimination on any grounds, particularly on the basis of sexual orientation, must be reciprocal with Article 74 of the Criminal Code, which defines severity, more precisely in paragraph 2, point 2.12.

The Ombudsperson points out that when considering Article 74 of the Criminal Code of the Republic of Kosovo, which foresees implementation of aggravation, it can be concluded that the criminal offense is aggravated in case it is committed based on the ground of sexual orientation and gender identity, which defined in this way, puts the seal on the issue of protection against discrimination based on sex, sexual orientation and gender identity

Taking in consideration that the definition for homophobia presents “*All negative behaviors leading to the direct or indirect rejection and discrimination of homosexuals, lesbians, bisexuals and transgender (LGBT) or against persons whose appearance or behavior does not conform to male or female stereotype*”, is easy to conclude that

⁶ European experts' network in the field of nondiscrimination, European Commission, Combating Discrimination on Sexual Orientation in the EU, December 2014; p.13

negative behaviors are banned by the Laws and the Convention itself, thus due to this there is no need for intrusion, but emphasizing what has been said so far the Ombudsperson considers that it is important to give due consideration to the factual situation and the reaction exposed by a society with multiple prejudices regarding homophobia. Even though the legal framework has been set taking in consideration the principle *ignorantia iuris nocet*, the country ought to play the main role versus homophobia and transphobia by protecting interests of this community.

The Ombudsperson reiterates that the right to effective legal remedies is guaranteed with the Constitution and the domestic Laws. Article 54, Judicial Protection of Rights of the Constitution of Republic of Kosovo, determines: “*Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated.*” The Ombudsperson raises his concern on the fact that there is still no judicial decision which points out that the offense is committed against a person or group of persons or property because of sexual orientation or gender identity. Furthermore, the Ombudsperson considers that such a position where judicial decisions do not change the applicants' preliminary position force citizens unprotected by the state, to be lost in a circle, without finding solution for his violated right. Article 13 of the ECHR, in particular emphasizes obligation of the state to firstly protect human rights through its legal system, provides additional guarantees to an individual that he or she efficiently enjoys these rights.

As from has been stated above, the Ombudsperson issues the following:

CONCLUSION

1. The Ombudsperson, based on all evidence presented and the facts collected, as well as the Laws at effect, finds that the complaints of the complainants concerning violation of the *rights and freedoms set forth* by domestic laws and international instruments are reasonable and lawful. The Ombudsperson determines that violation of human rights and fundamental freedoms have occurred in the current case, since from the beginning treatment of violent cases at Kosovo Police are not recording as cases to be treated as "*violence exercised due to sexual orientation and identity gender*."
2. The Ombudsperson finds that there is sufficient legal basis for protection of LGBT community but not applicable in concrete cases. Given the sensitivity of the case, Basic Prosecutions in these cases, ought to address criminal charges with priority, in order to ensure legal protection for the LGBT community.
3. The Ombudsperson considers that Courts in none of their procedures do not issue decisions by which persons or group of persons who have exercised violence towards a person or group of persons because of their sexual orientation, are found guilty or are not. This is seen as a failure of the Courts to exploit the legal

responsibility and opportunity and to implement precisely Article 74, paragraph 2, point 2.12 of the Criminal Code No. 04 / L-082 of the Republic of Kosovo.

4. The Ombudsperson also considers that at labor disputes where the parties in the proceedings claim to be victims on the basis of sexual orientation, the Court should handle and decide upon these cases in accordance with Law no. 05 / L-021, on Protection from Discrimination and Article 5, paragraph 1 of the Labor Law no. 03 / L-212, since solely in this manner it will guarantee an equal treatment before the law for every person.

Sincerely

Hilmi Jashar

Ombudsperson