

LEGAL OPINION FROM THE OMBUDSPERSON

IN THE CAPACITY OF AMICUS CURIAE

for

THE BASIC COURT IN PRISHTINA

R. No. 175/2024

*Regarding discrimination and violation of the dignity of members of the LGBTIQ+ community,
as well as the lawsuit C.nr 2993/2024 filed on 1 March 2024 at the Basic Court in Prishtina*

Prishtina, on 17 October 2024

The Aim of the Legal Opinion

1. This legal opinion of the Ombudsperson in the capacity of Amicus Curiae has two purposes:
 - a. Its first part focuses on the legal grounds and judicial protection in cases of discrimination.
 - b. The second part focuses on and analyzes the statements of several members of parliament regarding the LGBTIQ+ community, expressed in the plenary session of 16 March 2022, in which the Draft Civil Code, no. 08/L-124 was discussed.

Competences and responsibilities of the Ombudsperson Institution

2. Article 132, paragraph 1, of the Constitution of the Republic of Kosovo authorizes the Ombudsperson to “*supervise and protect the rights and freedoms of individuals from illegal and irregular actions of public bodies.*”
3. Article 16 of Law No. 05/L-019 on the Ombudsperson, in its paragraph 4, states 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.*”
4. Article 16, paragraph 9, of Law No. 05/L-019 on the Ombudsperson, stipulates: “*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. In addition, it is worth mentioning paragraph 8 of Article 16, which stipulates 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.*”
6. It should also be noted that under Article 18, paragraph 1.1. of the Law on the Ombudsperson, the Ombudsperson has the responsibility to: “*1.1. to investigate alleged violations of human rights and acts of discrimination, and be committed to eliminate them. 1.2. 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.*”

JUDICIAL PROTECTION FROM DISCRIMINATION

7. The Ombudsperson considers it important to take into account the procedural aspect of handling a case of discrimination by the courts, based on the provisions of the Law on The Protection from Discrimination no. 05/L-021 (LPD), which in some aspects differs from ordinary procedures, and which in cases of discrimination represents a special law.
8. LPD Article 13, states that:
 1. *Any person or group of persons, who claim that they have been discriminated on the grounds mentioned in Article 1 of the Law, may submit a lawsuit in the competent court.*
 2. *Associations, organizations or other legal entities may initiate or support legal procedures on behalf of the claimants, with their consent, for the development of administrative or judicial procedures foreseen for the implementation of obligations set in this law.*
9. Article 14, paragraph 3 of LPD determines that:

“The subjects may submit lawsuits on discrimination pursuant to this law, not later than five (5) years from the day the damaged party becomes aware of this violation.”

10. Article 16, paragraph 9 of The LPD provides that:

"Judicial procedures in the cases of discrimination should be dealt urgently."

11. Although judicial protection from discrimination can be achieved through constitutional protection of rights, civil, administrative, criminal, or minor offense procedure, in a comparative perspective, protection through civil procedure is most often envisaged.

12. The court, in civil proceedings, when it finds that the legal conditions for protection have been met, is obliged to offer protection to the victim of discrimination. LPD Article 16, paragraph 2 states that: *The Court after receiving relevant facts and arguments, verifies that the respondent has committed discrimination actions or non-actions towards the plaintiff, may decide to:*

- 2.1. prohibit performing discriminating activities which violate or may violate the right of the defendant, or to compel the defendant to eliminate all discriminatory actions from the plaintiff;*
- 2.2. compensate the material or non-material damage caused by the infringement of the rights protected by this Law according to compensation on lawsuit;*
- 2.3. order temporary measures in accordance with the provisions of the relevant Law on Contested Procedure (if the plaintiff has proven credible, that his/her right for equal treatment is violated, and if deemed necessary to order a measure with the aim of eliminating the risk of irreparable damages, especially for severe violations of the right on equal treatment, or with the aim of preventing violence);*
- 2.4. order a shorter deadline of execution than defined in the Law on Enforcement Procedure;*
- 2.5. publish in the media the court decision, through which it is proven the violation of the right for equal treatment;*

13. Any person who claims to be a victim of discrimination is entitled to filing a lawsuit against the defendant and to take all legal actions in the competent court. According to Article 16, paragraph 4 of the LPD:

Requirements from paragraph 1. of this Article may be submitted together with the requirements for protection of other rights, on which is established a contested procedure, if all requests are mutually related and if the court has the same competence regarding thereto, notwithstanding whether for those requirements is determined a decision-making in a general or particular contested procedures.

14. According to Article 12, paragraph 4 of LPD:

“Associations, organizations or other legal entities may initiate or support complaints on behalf of the claimants, with their consent, to develop procedures at the Ombudsperson.”

15. According to Article 13, paragraph 2 of LPD: *"Associations, organizations or other legal entities may initiate or support legal procedures on behalf of the claimants, with their consent, for the development of administrative or judicial procedures foreseen for the implementation of obligations set in this law."* Whereas, according to Article 18 of the LPD *“Cases of discrimination affecting groups of people may be treated through a group actions undertaken on*

their behalf by a non-governmental organization or by the Ombudsperson, in such cases, the consent of the members of the group is not required."

16. According to Article 16, paragraph 3 of LPD: "*Unsatisfied party may file a complaint from the first instance decision within seven (7) days in the Court of Appeal according to the Law on Contested Procedure.*"
17. According to Article 20, paragraph 1 and paragraph 2 of LPD:
 - a. *When persons who consider that the principle of equal treatment has not been applied to them, submits before an administrative authority or a competent court, proofs from which it may be presumed that there has been direct or indirect discrimination.*
 - b. *Burden of proof shall be upon the respondent, who should prove that there has been no breach of the principle of equal treatment.*
18. The Ombudsperson emphasizes the shifting of the burden of proof as one of the characteristics that sets the procedure apart in cases of discrimination in civil proceedings and that distinguishes it from ordinary judicial procedures in terms of who is responsible for establishing the facts in a case. As a rule, in court proceedings, the burden of proof lies with the claimant (the person bringing the case before the court) to prove his/her claims. However, in discrimination cases, once the claimant has presented a *prima facie* case (sufficient initial evidence) of discrimination, the burden of proof shifts to the respondent. The claimant must first present evidence suggesting that discrimination has occurred. This may include the facts that the claimant has a protected characteristic defined in Article 1 of the LPD, that he/she has suffered an adverse action by the authorities (such as dismissal or demotion), and that there are some indications that such action is related to the protected feature (such as sexual orientation). Once the claimant presents a *prima facie* case, the burden of proof shifts to the respondent. Next, the respondent must provide a legitimate reason for the action taken against the claimant. The respondent must show that the action taken was based on factors unrelated to discrimination. This shift in the burden of proof is designed to make it easier for claimant to challenge discriminatory practices and for courts to uncover the true reasons behind certain actions. It is often difficult to find direct evidence of discrimination, so once the claimant provides sufficient evidence to allege discrimination, the onus is on the respondent to prove otherwise.

FACTUAL BACKGROUND

19. The Ombudsperson, based on Article 16, paragraph 1, of the Law on the Ombudsperson, no. 05/L-019. on 1 March 2024 received a complaint against the Assembly of the Republic of Kosovo related to the discrimination and violation of the dignity of LGBTIQ+ persons during the plenary session of the Assembly of the Republic of Kosovo held on 16 March 2022. The complaint was filed on behalf of the following non-governmental organizations: Youth Initiative for Human Rights in Kosovo (YIHR), Center for Equality and Freedom, Center for the Development of Social Groups, Defenders of Civil Rights. Kosovo Center for Gender Studies, which is represented by Marigona Shabiu from the Youth Initiative for Human Rights in Kosovo.
20. Considering that the complainants, on 1 March 2024, the same day they filed a complaint with the Ombudsperson, also filed a lawsuit (C.nr. 2993/2024) with the Basic Court of Prishtina. The Ombudsperson, after analyzing the circumstances of the case, has decided to present his opinion to this court in the capacity of a friend of the court.

21. On 16 March 2022. The Assembly of the Republic of Kosovo held a plenary session where, among others, it was conducting the first deliberation of the Draft Civil Code, no. 08/L/124. The provision that sparked the controversial discussion among members of the Kosovo Assembly was Article 1138, paragraph 2, of the Draft Civil Code, which provides that "*Registered civil partnerships between persons of the same sex are permitted. The conditions and procedures are regulated by a special law.*"
22. In this hearing, negative statements were made against LGBTIQ+ people by several MPs, who not only openly propagated the "natural family" and the "preservation of the species and "tradition", but also verbalized prejudices against same-sex couples. According to them, the new Code would endanger "public morals" and represent ¹⁴"sexual insatiability", "moral degeneration", "disease", "destruction", behavior that is "contrary to human nature", "violation of the sanctity of the family", "represents an act that seriously harms public health, causing serious and incurable diseases, such as HIV/AIDS", and which ultimately results in "social trauma".
23. Before the parliamentary discussion, several MPs appeared in public with statements and claims about why the Civil Code Draft should not be voted on. These stances sparked negative comments on social media and in public opinion, which further exposed homophobic narratives and attitudes.
24. Civil society organizations reacted against the language used towards the LGBTIQ+ community during the debate on the Draft Civil Code. In their reactions, they emphasized that discrimination and social stigmatization harm the psychological, physical, social, and economic well-being of LGBTIQ+ people.

Ombudsperson's Opinion

25. The relevant legislation on protection from discrimination stipulates that everyone is equal before the law and that no one should be discriminated against on the basis of personal status, such as, among others, sexual orientation, which means that sexual orientation is a protected characteristic defined in Article 1 of the LPD.
26. Considering the subject matter of this complaint, the Ombudsperson emphasizes that it is necessary to determine whether the positions and statements made by the aforementioned deputies on 16 March 2022, at the plenary session of the Assembly of the Republic of Kosovo, during the first reading of the Draft Civil Code, no. 08/L-124, constitute a violation of the provisions of the LPD. Respectively, whether the positions and statements made by these deputies constitute a violation of the dignity of persons or groups of persons on the basis of their personal characteristics, specifically sexual orientation, and whether these statements create a hostile, humiliating and offensive environment for members of the LGBTIQ+ community and whether these statements can be considered hate speech.
27. The Constitution of the Republic of Kosovo, in Article 3, guarantees equality before the law, in Article 7 it defines values, which, among other things, lists human rights and freedoms and non-

discrimination, and in Article 24 it guarantees that all are equal before the law and no one may be discriminated against, among other things, on the basis of sexual orientation.

28. The Ombudsperson recalls the solemn oath of Members of Parliament stipulated in Article 10 of the Rules of Procedure of the Assembly, with the following text:

"I, a member of the Assembly of the Republic of Kosovo, swear that I will perform my duty with honor and dedication and represent the people with dignity, I will work in the interest of Kosovo and all its citizens, I will commit myself to the protection and respect of constitutionality and legality, to the protection of the sovereignty, territorial integrity and institutional integrity of Kosovo, to guarantee freedoms and human rights, in accordance with the laws of the country. I swear!"

29. The oath to respect constitutionality and legality and to guarantee human rights and freedoms in accordance with the laws of the country obliges members of parliament to implement and respect the Constitution and legislation for the protection from discrimination of citizens of the Republic of Kosovo who belong to the LGBTIQ+ community.
30. Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity (adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies), makes a number of recommendations: recalling that, among other things, lesbian, gay, bisexual and transsexual persons have for centuries been and continue to be subject to homophobia, transphobia and other forms of intolerance and discrimination, including within their own families, including criminalisation, marginalisation and violence, on grounds of sexual orientation or gender identity, and recognising that specific measures are needed to ensure the full enjoyment of human rights by these persons; Considering that the case law of the ECtHR and other international jurisdictions which consider sexual orientation a prohibited ground for discrimination and which have contributed to advancing the protection of the rights of transsexual persons; Recalling that in accordance with the case law of the Court, any difference in treatment in order not to be discriminatory must have an objective and reasonable justification, that is to say it must pursue a legitimate aim and must use instruments that are proportionate to the aim pursued; Bearing in mind that neither the principle of cultural, traditional or religious values, nor the rules of a "dominant culture" can be used as grounds for justifying hate speech or any other form of discrimination, including sexual orientation or gender identity;
31. The Ombudsperson, in the context of the case, takes into account the importance of freedom of thought and expression. In this context, the Ombudsperson emphasizes that every individual has the right to express his or her personal opinion and positions, which constitutes the basis of every free democratic society. However, the right to freedom of speech, regardless of the manner of expression and publication of ideas and positions, should not be a justification for discrimination. Therefore, the expression of attitudes and beliefs that violate the dignity of persons or groups of persons and damage the reputation, as well as the guaranteed rights of others, cannot be justified by the right to freedom of expression.

32. These positions and statements have a special weight when considering that the members of the Assembly of Kosovo are part of an institution that is the highest representative body and bearer of constitutional and legislative power in the country and that is extremely important for the establishment of the democratic system and that represents the basis for establishing the rule of law, oversight of governance processes and respect for international human rights instruments and standards that are directly applicable in the Republic of Kosovo.
33. The Ombudsperson noted that MPs have immunity regarding their statements in parliament, however, this immunity should be reviewed when it comes to statements containing hate speech and discrimination.
34. The European Court of Human Rights (ECtHR) has dealt with cases involving discriminatory speech used by public officials, including politicians and government officials. Here are some key points and principles derived from the case law of the ECtHR:
- a. The ECtHR recognizes the importance of freedom of expression, including freedom of expression for public officials, as a fundamental right under Article 10 of the European Convention on Human Rights (ECHR). However, this right is not absolute and may be subject to limitations, especially when it comes to speech that may harm the rights or interests of others.
 - b. The ECtHR also upholds the principle of non-discrimination under Article 14 of the ECHR, which prohibits discrimination in the enjoyment of the rights and freedoms guaranteed by the Convention.
 - c. The ECtHR distinguishes between legitimate criticism or expression of opinion and hate speech. Hate speech, especially when used by public officials, can undermine social cohesion and violate human dignity and does not enjoy protection under Article 10 if it exceeds the permissible limits of freedom of expression.
 - d. The context in which the discriminatory complaint appears is crucial. Statements made by public officials carry weight and can have a significant impact on public discourse and societal attitudes. Therefore, such statements may be subject to stricter scrutiny and accountability.
 - e. The ECtHR emphasizes the importance of effective remedies for victims of discriminatory statements. The ECtHR expects states to provide mechanisms to address hate speech and ensure accountability, including legal, judicial and administrative measures.
35. In this regard, the Ombudsperson brings to mind several examples that illustrate the ECtHR's approach to hate speech by public officials, emphasizing the balance between freedom of expression and protection from discrimination and incitement to hatred. The ECtHR has consistently upheld convictions and sanctions against public officials whose statements were deemed to constitute hate speech, affirming the importance of promoting tolerance and protecting vulnerable groups from discrimination.
- a. The case of *Eon vs. France* (No. 26118/10) concerns a mayor in France who made anti-Semitic comments during a public meeting. He was convicted under French law of inciting racial hatred. The ECtHR found that the mayor's comments were not protected by freedom of expression and that they constituted hate speech.

- b. The case of *Feldek vs. Slovakia* (No. 29032/95) concerns a Slovak MP who made derogatory comments about the Roma community in a newspaper article. The ECtHR held that the comments constituted hate speech and violated the prohibition of discrimination under Article 14 of the ECHR, read in conjunction with Article 10 (freedom of expression).
 - c. The case of *Ernst vs. Belgium* (No. 33400/96) concerns a Belgian politician who, during a television interview, made statements denying the Holocaust. He was convicted under Belgian law of inciting racial hatred. The ECtHR upheld the Belgian court's decision, emphasizing the importance of combating racism and intolerance.
 - d. The case of *Feret vs. Belgium* (No. 15615/07) concerns the leader of a Belgian political party who distributed leaflets targeting immigrants and containing xenophobic statements. He was convicted under Belgian law of inciting racial discrimination and hatred. The ECtHR upheld the decision of the Belgian court, emphasizing the need to protect individuals from discriminatory speech.
36. The Ombudsperson considers that freedom of speech, expression and information should not be a justification for any kind of discrimination and underestimation of any personal characteristic, nor for promoting prejudice and creating a hostile and offensive environment for a certain group of people. Moreover, freedom of expression cannot be used as an excuse for hate speech.
37. The Ombudsperson assesses that the statements of people's representatives, who convey messages and shape the attitudes of public opinion, are extremely important and therefore their statements should not support prejudices, stereotypes and other socially unacceptable models. For this reason, all state officials and public bodies have a special responsibility and an extremely important role in promoting tolerance, promoting the right to difference and creating a society where the rights of all are respected without discrimination.
38. The Ombudsperson opines that the statements of the deputies made on 16 March 2022, during the debate in the plenary session of the Assembly of Kosovo, during the review of the article of the Draft Civil Code, no. 08/L-124, in relation to Article 1138, paragraph 2, are discriminatory, violate the dignity of LGBTIQ+ persons by creating a humiliating and offensive environment towards them and, based on the case law of the ECtHR, constitute hate speech against the LGBTIQ+ community.

Respectfully,
Naim Qelaj
Ombudsperson
Signed in original