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Case Study

The Treatment of LGBTI cases by Kosovo's Justice System

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Researcher:

Kushtrim Palushi, Lawyer

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TABLE OF ACRONYMS

CCK – Criminal Code of Kosovo

CPCK – Criminal Procedure Code of Kosovo

CSGD – Center for Social Group Development

ECHR – European Convention for Human Rights

LGBTI – lesbian, gay, bisexual, transgender and intersex

I. INTRODUCTION

The European Commission's Progress Report for 2016 for Kosovo recognizes that some progress has been made with regards to the rights of LGBTI persons in Kosovo.¹ It recognizes the march to mark the international day against homophobia, transphobia and biphobia held on 17 May 2016 as peaceful and successful.² The report calls for proper investigations of verbal and physical assault cases against persons belonging to the Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) community in Kosovo.

Kosovo's Constitution and legal framework provide a good basis for protection of LGBTI persons. However, lack of implementation and the lack of clear definitions of crimes hinders this protection. Persons belonging to LGBTI community in Kosovo face homophobia, discrimination, verbal and physical attacks which leads to stigmatization and isolation. More often than not, verbal and physical attack cases are not reported to law enforcement authorities. This happens either as a result of fear of retaliation, fear of exposure, or fear of no proper investigation and treatment of the case by law enforcement authorities. To date, there were numerous reported cases and incidents, but they either did not end up in Court for lack of proper investigations or were not concluded with a final court ruling on the case.

One case of verbal and physical attack, however, ended with a final court ruling. As such it provides a good basis for analysis and to draw conclusions and policy recommendations. In June 2016, two persons belonging to the LGBTI community were verbally and physically attacked in a town in Kosovo.³ The Basic Court of that town found two defendants guilty for the criminal offence of Light Bodily Injury contrary to article 188 of Criminal Code of Kosovo (CCK) and one for the criminal offence of Inciting national, racial, religious or ethnic hatred, discord or intolerance contrary to article 147 of CCK.

This report examines this case and the way it was handled by law enforcement institutions. Further, the report examines the legal framework for the protection of LGBTI persons and

¹ European Commission, Progress Report for 2016 for Kosovo, page 26.

²*Id.*

³ For reasons of privacy, the name of the town and the identity of the victims and of the defendants will not be disclosed and discussed.

whether or not this legal framework provides for an effective protection of persons belonging to LGBTI community in Kosovo. Finally, this report, in light of the experience drawn from the case study, provides conclusions and recommendations for law enforcement institutions and other public institutions for better protection of the LGBTI persons in Kosovo.

II. METHODOLOGY OF THE REPORT

This report examines an actual court case in which two persons of the LGBTI community in Kosovo were victims of a verbal and physical attack motivated on their sexual orientation. The victims were offered legal aid by Center for Social Group Development (CSGD) and were represented by a lawyer throughout the criminal procedure. This report is based on the files of the case, in particular the Judgment of the case. In addition, the report examines the legal framework which provides for the protection of persons belonging to LGBTI community in Kosovo, in particular the criminal and criminal procedure laws.

III. FACTS AND CIRCUMSTANCES OF THE CASE

On June 2016, two employed persons in CSGD were conducting outreach activities focused to LGBTI community. As one of the victims was conducting the activities in public spaces he was approached by two persons who asked him of what he was doing and started immediately with verbal and physical attacks against him. The other victim was dining in a fast food store nearby at the time of the attack of his colleague. The victim was called numerous insulting words used for gay people in Kosovo and was physically attacked by one of the perpetrators. The other perpetrator, standing nearby prevented the victim from escaping.

The victim managed to escape from the crime scene and went immediately for his colleague explaining what had happened. The two went into a bar near there trying to escape the perpetrators. Nonetheless, they were followed by the two perpetrators into the bar. The two started attacking them verbally by insulting and threatening them. The victims were able to call the Police which came in to help. One of the suspects handed himself over to the Police, while the main suspect tried to escape the Police but was later arrested.

The main victim of the case faced physical injuries and was immediately transferred to the Emergency which treated him. Both victims were treated with respect by medical personnel of the Emergency, by the Police on the night of the attack, by the Prosecutor's office during the investigation phase and by the Judge during the main trial. The declarations and testimony of the victims were taken immediately by the Police. Around one week after the attack their declarations were taken also by the Prosecutor's office. The suspects were both

ordered house arrest for a period of one month on the grounded suspicion that they had committed the criminal offences suspected of and on grounded belief that they may repeat the crime or try to influence witnesses or otherwise obstruct the criminal procedure.

Following the investigation, on July 2016⁴, the Basic Prosecutor's Office filed an Indictment against the two defendants accusing them of two criminal offences: 1) Inciting national, racial, religious or ethnic hatred, discord or intolerance contrary to article 147, paragraph 1 of CCK committed in co-perpetration contrary to article 31 of CCK; and 2) Assault contrary to article 187, paragraph 1 of CCK committed in co-perpetration contrary to article 31 of CCK.

The main trial was held during September 2016. In the main trial the defendants had plead not guilty. Both were not represented by a lawyer as it was not a mandatory defense case pursuant to Criminal Procedure Code of Kosovo (CPCK). During the main trial, in addition to the victims' and witnesses' testimony, the Prosecutor's office presented video evidence from security cameras of the city which had recorded the circumstances of the case from outside the train station.

Following the main trial, the Basic Court found the main defendant guilty of the criminal offence of incitement to hatred and of the criminal offence of light bodily injury after re-qualifying of the criminal offence of Assault into the criminal offence of light bodily injury. The Basic Court found the second defendant not guilty of the criminal offence of incitement to hatred but guilty of the criminal offence of light bodily injury conducted in co-perpetration with the main defendant. The main defendant was sentenced to an effective prison time of five (5) months, whereas the second defendant was sentenced to four (4) months in prison, which was suspended on the condition that the defendant does not commit another criminal offence for a period of one (1) year.

IV. LEGAL FRAMEWORK

This part highlights in general the legal framework which serves as the basis for protection of persons of LGBTI community in Kosovo as well as the legal framework applied in the case study.

⁴ For reasons of privacy, the dates of the Indictment sent to the Court will not be disclosed and discussed.

Kosovo's Constitution provides the highest guarantees and protections for human rights. Article 24 of the Constitution provides that everyone is equal before the law and that everyone enjoys the equal protection of the law without any discrimination. Paragraph 2 of article 24 states "[n]o 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."⁵The European Convention for Human Rights (ECHR) is directly applicable in Kosovo pursuant to article 22 of the Constitution, thus the protections and guaranteed afforded by the ECHR to persons belonging to LGBTI community are applicable in Kosovo as well.⁶ Further, pursuant to article 53 of the Constitution, human rights and fundamental freedoms must be interpreted in line with the case law of the European Court of Human Rights.⁷

Law Nr. 05/L-021 for Protection Against Discrimination affords far reaching protections for minorities and vulnerable groups, including persons of LGBTI community. The law provides it is in line with numerous European Council Directives, including, among others, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Article 1 of the Law for Protection Against Discrimination provides that "[t]he 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, color, birth, origin, sex, gender, gender identity, sexual orientation, language, citizenship..."⁸Article 2 of the Law for Protection Against Discrimination sets the scope as follows, "[t]his 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..."⁹ Further it identifies some key

⁵ Constitution of Kosovo, article 28.

⁶*Id.*, article 22.

⁷*Id.*, article 53.

⁸ Law Nr. 05/L-021 for Protection Against Discrimination, article 1.

⁹*Id.*, article 2.

aspects of life, such as labor, education, access to goods and services, where discrimination in any of the basis is prohibited, either direct or indirect discrimination.¹⁰

CCK contains the definitions of crimes and circumstances justifying criminal responsibility of the persons committing those crimes. Article 74, paragraph 2.12 of CCK provides for an aggravated circumstance in the calculation of the punishment “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”.¹¹

Article 147 of CCK defines the crime of Inciting national, racial, religious or ethnic hatred, discord or intolerance as follows, “[w]hoever publicly incites or publicly spreads hatred, discord or intolerance between national, racial, religious, ethnic or other such groups living in the Republic of Kosovo in a manner which is likely to disturb public order shall be punished by a fine or by imprisonment of up to five (5) years.”¹² Further, article 187 of CCK defines Assault as follows, “[w]hoever intentionally applies force to another person without that person's consent shall be punished by a fine or imprisonment of up to three (3) years.”¹³ Whereas, article 188 defines Light Bodily Injury in the following terms, “[w]hoever inflicts light bodily injury upon another person which results in: 1.1. temporarily damaging or weakening an organ or a part of the body of the other person; 1.2. temporarily diminishing the capacity of the other person to work; 1.3. temporarily disfiguring the other person; or 1.4. temporarily impairing the health of the other person, shall be punished by a fine or by imprisonment of up to one (1) year.”¹⁴ Article 31 of CCK provides for the punishment of two or more persons in case they commit a criminal offence in co-perpetration.

¹⁰*Id.*

¹¹ CCK, article 74, paragraph 2.12.

¹²*Id.*, article 147, paragraph 1.

¹³*Id.*, article 187, paragraph 1.

¹⁴*Id.*, article 188, paragraph 1.

V. ANALYSIS OF THE JUDGMENT

This part analyzes the judgment of the Basic Court in light of the above facts and legal basis.¹⁵ Most importantly, this part examines the judgment on whether or not it dealt with the crime as motivated from the sexual orientation of the victims or as a random crime. Further, it looks at how the Court justified and reasoned the commission of the criminal offence of incitement to hatred and whether it referred to the sexual orientation of the victims as an aggravated circumstance for the calculation of the punishment.

The Basic Court in its Judgment does not consider in much detail the motive of the crime, *i.e.*, that the incitement to hatred as well as assault or light bodily injury were committed by the defendants motivated on the sexual orientation of the victims. The Court notes that the victims were insulted based on their sexual orientation, but not that the criminal offences were also committed based on the sexual orientation of the victims. Further, the court cites to the insults made by the defendants based on the declaration of the victims but does not analyze them further and does not give them relevance for the motivation of the defendants. The Court fails to establish that the criminal offences were committed due to the sexual orientation of the victims.

The Basic Court justifies or reasons the commission of the criminal offence of incitement to hatred on the fact that the main defendant openly insulted the victims in a public space calling him various insulting words due to his sexual orientation as well as incited his friend – the other defendant to join him in committing the criminal offences. The Court does not analyze the scope of article 147 of CCK of whether it protects persons belonging to LGBTI community within the term “other such groups living in the Republic of Kosovo”. Further, the Court does not analyze whether the second condition of article 147 is met, *i.e.*, whether the words, insults or actions of the main defendant were likely to disturb public order.

Most importantly, the Basic Court did not consider the sexual orientation of the victims as an aggravated circumstance for the calculation of punishment of the defendants. The Court only refers to article 73 and 74 and states that it takes into account all the relevant circumstances which influence the type and level of punishment. Further, the Court notes that it took

¹⁵ Basic Court in Ferizaj, Judgment P.nr.620/16, date 26.09.2016.

mitigating circumstances into account, in particular the fact that the perpetrators are young and that they did not have not committed any criminal offences before. As an aggravated circumstance, the Court says that it took into account the level of criminal responsibility of the defendants and the nature of the criminal offence committed. The Court, could at least take into account the sexual orientation of the victims as an aggravated circumstance when deciding about the punishment of the defendants.

VI. CONCLUSIONS AND RECOMENDATIONS

Kosovo has a good legal basis which provides legal guarantees and protection of persons belonging to LGBTI community. The implementation of this legislation, however, remains a challenge. The Law on Protection Against Discrimination provides far reaching protections which need to be utilized by the LGBTI community on the one hand as well as respected, observed and actively implemented by public and private institutions.

The case we just analyzed showed that there are guarantees and protections that work, however, there are reluctance on the part of institutions to openly spell that the protections are afforded precisely because of the sexual orientation of the victims. This case showed that the victims were respected, however, we cannot conclude that this respect has established itself as a rule in the justice system across Kosovo and in particular with law enforcement institutions, like the Police.

The Basic Court had a unique opportunity to establish an example and provide for a good court practice on the treatment of cases where persons of LGBTI community are involved as victims in a criminal procedure. However, the Court failed in this direction. The Court failed to refer to the constitutional and human rights of the victims to live freely in Kosovo without the fear of being insulted, attacked or discriminated by any one.

The following legal and policy recommendations may increase the protections provided to persons belonging to LGBTI community in Kosovo:

1. Criminal Code of Kosovo should either foresee a particular criminal offence when committed against persons of LGBTI community or amend the definition of the criminal offence of incitement to hatred to include specifically the LGBTI community as protected from this article.
2. Organize trainings or workshops with judges, prosecutors, police and advocates on how to deal with cases of LGBTI community.
3. Establish standard operating procedures or policies for judges, prosecutors, police and other law enforcement agencies on how to deal with cases of LGBTI community.