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

To the

Court of Appeals

Appeal no. 215/2018

on the

Initiation at the Constitutional Court of Law no. 03/L-179 on the Red Cross of the Republic of Kosovo and on assessing compliance with the constitutional provisions

Prishtina, 4 July 2018

Purpose

1. This opinion given by the Ombudsperson, in the capacity of the friend of the court (*amicus curie*) aims at informing the Court of Appeal on the possibility of this court to initiate proceedings for assessment of compliance with Law no. 03/L-179 on the Red Cross of the Republic of Kosovo at the Constitutional Court.

Legal scope of the Ombudsperson

2. The Constitution of the Republic of Kosovo, Article 132, paragraph 1, stipulates that: *“The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities”*.
3. Article 135, paragraph 3, stipulates that: *“The Ombudsperson is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed”*.
4. Law no. 05/L-019 on the Ombudsperson, Article 16, paragraph 9, stipulates that: *“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. Article 18, paragraph 1, sub-paragraph 1.6, stipulates that the Ombudsperson is responsible: *“to publish notifications, opinions, recommendations, proposals and his/her own reports”*.

Case description

6. On 22 March 2018, the Ombudsperson has received a complaint from Mr. Sami Mazreku, representative of eight (8) insurance companies, regarding the contestation of Article 14, paragraph 1, sub-paragraph 1.7 of Law no. 03/L-179 on the Red Cross of the Republic of Kosovo.
7. Similarly, on March 30, 2018, the Ombudsperson has received a complaint from Ms Vjosa Misini - Qehaja and Mr Ardian Rexha, representatives of the insurance company "Illyria" regarding the objection to Article 14, paragraph 1, sub-paragraph 1.7 of the Law no. 03/L-179 on the Red Cross of the Republic of Kosovo.
8. The Ombudsperson, inter alia, notes that the case Misini - Qehaja and Rexha is at the Court of Appeal, which is reviewing the complainants' appeal objecting the Judgment of the Basic Court in Prishtina, C. no. 546/13, which obliged complainants to fulfil the obligations for the Red Cross of Kosovo, deriving from the provisions of Law no. 03/L-179 on the Red Cross of the Republic of Kosovo, namely Article 14, paragraph 1, subparagraph 1.7.

Legal analysis and findings of the Ombudsperson

9. The Ombudsperson's assessments and findings on this issue are based on the rights guaranteed by the Constitution of the Republic of Kosovo (the Constitution), the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols (ECHR).

10. The Constitution of the Republic of Kosovo, Article 24, paragraph 1, stipulates that: *“All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.”*
11. Article 46, paragraph 1 stipulates that: *“The right to own property is guaranteed”*.
12. Article 113, paragraph 8 stipulates that: *“The courts have the right to refer questions of constitutional compatibility of a law to the Constitutional Court when it is raised in a judicial proceeding and the referring court is uncertain as to the compatibility of the contested law with the Constitution and provided that the referring court’s decision on that case depends on the compatibility of the law at issue”*.
13. The European Convention on Human Rights and Fundamental Freedoms, Protocol 1, Article 1 stipulates that *“Every natural or legal person is entitled to the peaceful enjoyment of his possessions”*.
14. Law No. 03/L-179 on the Red Cross of the Republic of Kosovo, Article 14, paragraph 1, sub-paragraph 1.7 stipulates that:

” For the purpose of fulfilling its tasks and objectives stipulated by this Law, the Red Cross of Kosovo shall acquire means from the following sources:

[. . .]

“obligatory insurance of the vehicles 1% (one percent) from gross prim of the value of vehicle insurance”.
15. The Ombudsperson states that the Constitution and the ECHR, with their provisions, guarantee the right to property to every natural and legal person.
16. Under the legal provisions of the Law on the Red Cross of the Republic of Kosovo, the Red Cross provides financial means from obligatory insurance of the vehicles, respectively 1% of the gross premium of the value of vehicle insurance.
17. The Ombudsperson notes that in a completely similar case, the Constitutional Court of Croatia has issued the decision no. U-I-2441, U-I-1107/2002 of 12 February 2003, pursuant to which Article 12, paragraph 3 and Article 24, paragraph 1, item 1 of the Law on the Red Cross of Croatia have been repealed. The provisions repealed by the Constitutional Court of Croatia have an entirely similar content to Article 14, paragraph 1, subparagraph 1.7 of the Law on the Red Cross of the Republic of Kosovo.
18. The Constitutional Court of Croatia had stated that in case the lawmaker considered that it is in the interest of the society to improve the conditions of the Red Cross of Croatia, then the obligation to support the Red Cross should be fulfilled by all economic entities, in accordance with their capabilities. Constitutional Court of Croatia hereby makes reference to Article 52 of the Constitution of Croatia according to which; *“Everyone shall participate in the defrayment of public expenses in accordance with his or her economic capabilities”*.
19. The Constitution of the Republic of Kosovo, Article 119, paragraph 2, stipulates that: *“The Republic of Kosovo shall ensure equal legal rights for all domestic and foreign investors and enterprises”*.

20. The Ombudsperson notes that the Constitutional Court of the Republic of Kosovo is the only institution to have been granted, by the Constitutional System in the Republic of Kosovo, the right to declare a legal norm as incompatible with the Constitution.
21. The Ombudsperson also noted that a court procedure has been conducted regarding the case in question in the ECHR, and a court procedure is currently underway at the Court of Appeals. Thus, in such a situation the referring court has the right to refer to the Constitutional Court cases regarding the constitutional compatibility of a law, since this consistency has derived during the course of court proceedings, and the decision to be taken by the court depends on the compliance of the law in question with the Constitution.
22. Prior to providing an explanation of the eligibility criteria of such a request before the Constitutional Court, the Ombudsperson shall remind the Court of Appeals that the constitutional practice recognizes the right of the party, that during proceedings, before the case is resolved on the merits, to require the Court to refer the request for constitutional review.
23. Consequently, in accordance with the eligibility criteria set forth in the Decision of the Constitutional Court of the Republic of Kosovo KO126/16 dated 27 March 2017, published on 1 June 2017, the Court of Appeal should be reminded that the term "Referring Court" in the sense of Article 113, paragraph 8 of the Constitution of Kosovo implies a judge or a panel of judges who is competent to decide on the case at the court in question.
24. In addition, in order to prevent the request from being declared as procedurally inadmissible, the panel of judges must process the request for referral as a judicial body and not simply as a presiding judge. For this reason the Ombudsman proposes to the Court of Appeals to issue a Decision which:
 - Approves the Applicant's request for referral of the case to the Constitutional Court for the assessment of compliance with Article 14, paragraph 1, subparagraph 1.7 of the Law on the Red Cross of Kosovo, with the Constitution of the Republic of Kosovo.
 - Suspends the decision-making procedure in the concrete case until the decision of the Constitutional Court of the Republic of Kosovo is taken
 - Informs the Constitutional Court that the decision of the Court of Appeal in the present case depends on the direct application of the disputed legal norm and that the latter cannot decide on the case by not applying other legal norm.
 - Decides that the original case file be transferred to the Constitutional Court in order for the latter to have evidence that there is a concrete case before the Court of Appeal and that its decision depends on the decision of the Constitutional Court regarding the compliance of the legal norm with the Constitution.
25. Further, the Court (in the light of Article 113, paragraph 8 of the Constitution, i.e. the Panel of Judges) must clarify to the Constitutional Court that the eligibility criteria have been met as follows:

- the case at the referring court must be under review;
 - the disputed law must be implemented directly by the referring court in the case under review;
 - compliance with the Constitution of the contested law is a prerequisite for the decision on the pending case; and
 - the referring court should specify which provisions of the contested law are considered incompatible with the Constitution.
26. Specifically, the Court of Appeals must inform the Constitutional Court that the case, the file of which was submitted together with the request for constitutional review (the aforementioned decision) is related to a case on which the Court has not taken a decision yet. Secondly, that the panel of judges referring the case is competent to take a decision on the case. Thirdly, the decision of the referring court depends precisely on the application or non-application of Article 14, paragraph 1, sub-paragraph 1.7 of the Law on the Red Cross of Kosovo.
27. The justification for the direct application of the contested legal norm in the present case should serve as evidence to the Constitutional Court that the decision of the Court of Appeal is related only to the application of the specific article. There is no provision in any of the other laws in the Republic of Kosovo that would resolve the dispute between the parties. Therefore, there is a need to interpret the compliance of the legal norm with the Constitution.

CONCLUSION

28. The Ombudsperson Institution, upon reviewing the Applicant's complaint, notes the presence of substantial justifications which raise serious doubts that the legal norm that depends on the decision-making of the Court of Appeal in the present case may be incompatible with the Constitution of the Republic of Kosovo.
29. The Ombudsperson Institution recalls that the principle of the rule of law obliges public authorities, including the courts, to pay particular attention and care to the supremacy of the Constitution to the laws and to the protection of human rights and freedoms, in procedures that take place in the relevant court.
30. Consequently, given that serious doubts have been raised, which are also based on the constitutional court practice of the Constitutional Court of the Republic of Croatia, given that the legal norm may be incompatible with the Constitution, and aiming to prevent the implementation of an invalid norm at a constitutional level, the Court of Appeal of the Republic of Kosovo should refer the case to the Constitutional Court of the Republic of Kosovo pursuant to Article 113, paragraph 8 of the Constitution of Kosovo.
31. Furthermore, Article 113, paragraph 8 serves as a guarantee for protection of the individual's fundamental freedoms and rights, and in democratic societies is included as a mechanism of individual protection by arbitrary court proceedings, which would be such if a norm that is not in accordance with the country's constitution was applied.

Respectfully,

Hilmi Jashari

Ombudsperson