



**REPUBLIC OF ALBANIA
THE OMBUDSMAN**

**Special Report of the activity of the Ombudsman on the
rights of LGBT persons in 2012**

23 August 2012

I. Introduction

The community of Lesbians, Gays, Bisexuals and Transgenders in Albania should enjoy rights and freedoms on an equal basis with all other members of society. Human rights are universal and apply to all individuals, and each country should ensure equal dignity for all human beings without discrimination based on sex, race, color, religion, national or social origin.

Many people are stigmatized because of their sexual orientation or gender identity, and can not fully enjoy universal human rights. Some of them are victims of hate crimes and are not protected when attacked in the streets by other citizens, while some organizations that defend and promote their rights, have been denied registration, or have not been allowed the right to peacefully assemble. Recent developments in many European countries show that politicians, responsible state authorities, but also the public itself, have held strong positions against homophobia and transphobic expressions, discrimination and violence against LGBT persons.

Article 15 of the Constitution of the Republic of Albania, defines the rights and fundamental freedoms as "indivisible, inalienable and inviolable, and that they lie at the basis of all legal order", thus sanctioning equality without discrimination of all persons residing in the territory of the Republic of Albania.

The Ombudsman, as a constitutional institution, has set as one of the priorities of his work, the respect for the rights of persons belonging to the LGBT community. In this context, for several months, the institution of the Ombudsman is monitoring the ongoing respect for the rights and freedoms of persons LGBT in Albania, and the measures to be taken by the state institutions responsible for to fully ensure them.

In the EU Progress Report for Albania in 2011, attention was drawn to a range of issues and problems that Albanian society shows in addressing the LGBT community. The report notes that "... there are few reported cases of violence and abuse that have targeted persons of the transgender community, and homophobia remains widespread, even among public service officials."

The provision in the Albanian legislation of fundamental rights for the LGBT community, as well as ensuring their implementation in practice are very important and for this reason they are included in Recommendation 11 of the EU for Albania

"Freedom and Human Rights" , and specifically in the area of non-discrimination against different social groups.

Albania is at an important milestone in the integration process in the European Union in this respect the institution of the Ombudsman considers that the Albanian legislation should match the best international standards, to ensure the implementation of democratic principles of the rule of law the achievement of equality between citizens and respect for human rights and fundamental freedoms.

Gender identity is the way in which a person self-identifies with a gender category, for example, of being female or male, or in some cases none of them, which can be distinguished by the biological gender.¹ Sexual orientation describes a pattern / structure of continued emotional, romantic and sexual , or a combination thereof, attraction - towards the opposite gender, the same gender, both genders or none of the genders.² According to the American Association of Psychology, sexual orientation also refers to the feeling of the "personal and social identity" of a person, that is in itself a different social relation of these individuals compared to other persons.

Relating to persons who have a gender identity different than those of the two known genders (male or female), we estimate that the provisions of the law are inclusive in not explicitly referring to gender types, thus leaving open to interpretation the cases where discrimination is seen due to causes of gender identity or identities other than the biological gender. It should be noted that recently, transgender persons are not regarded as mentally ill and in a historical move the American Psychiatry Association announced in late July of 2012 that it changed the term "Gender Identity Disorder" (a term widely used as a diagnosis in the Manual of Mental Diseases (DSM)).³

On the other hand, in Albania there is lack of full access of transgender persons to medical services, especially if they want to continue to the transitory process of changing their sex to one that suits their gender identity. Even in legal terms it is still unclear how the gender of a person, who went successfully through a gender change procedure in a foreign country, could be changed in the registry with. This problem was also pointed out by representatives of the Council of Europe who are

¹ Definition according to Gross on the Resolution of the CoE "On discrimination on the basis of sexual orientation and gender identity"

² Definition according to Gross on the Resolution of the CoE "On discrimination on the basis of sexual orientation and gender identity"

³ citation: <http://dot429.com/articles/1119>

assisting the Ministry of Social Affairs in Albania to implement the recommendations of the Council of Europe on LGBT issues.

Albania has signed and ratified several international acts, which are basically dealing with the protection and respect of human rights in general, but also the rights of the LGBT community in particular. Albania has also drafted its own national legislation in line with international convention, but practical application shows that international conventions or national legislation are not always applied.

To implement an International Convention or national law, these acts need to be known and understood by those who must implement them, as well as human rights defenders who constantly monitor and speak out in defense of those rights.

Albania has signed or ratified international acts as follows:

- Convention on the Prevention and Punishment of the Crime of Genocide. Paris, 9 December 1948
- International Convention on the Elimination of All Forms of Racial Discrimination. New York, 7 March 1966
- Amendment of Article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination. New York, 15 January 1992
- International Covenant on Economic, Social and Cultural Rights. New York, 16 December 1966
- Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. New York, 10 December 2008
- International Covenant on Civil and Political Rights. New York, 16 December 1966
- Optional Protocol to the International Covenant on Civil and Political Rights. New York, 16 December 1966
- Convention on the non-applicability of legal limitations to war crimes and crimes against humanity. New York, 26 November 1968
- International Convention on the Suppression and Punishment of the Crime of Apartheid. New York 30 Nov 1973
- Convention on the Elimination of All Forms of Discrimination against Women. New York 18 December 1979

The UN Declaration on Sexual Orientation and Gender Identity of December 2008 has been designed with the aim of further approval in the form of a resolution which in fact triggered a contradictory statement of the Arab League. Both

statements remain open for signature and none of them has been officially approved by the General Assembly of the United Nations.

The proposed statement includes the condemnation of violence, intimidation, discrimination, exclusion, stigmatization and prejudice because of sexual orientation and gender identity. It also includes condemnation of killings and executions, torture, arbitrary arrest and deprivation of economic, social and cultural rights on those grounds. The proposed statement is regarded as a milestone for human rights, breaking the taboo of silence for LGBT rights in the United Nations. Its opponents criticized it as an attempt to legitimize same-sex partners or their marriage, adoption by same-sex couples, pedophilia and reducing the freedom of religious expression against homosexual behavior.

Montreal Declaration "On human rights of Gay, Lesbian, Bisexual and Transgender persons" This is a document adopted in Montreal, Quebec, Canada, on July 29, 2006, at the International Conference on LGBT Human Rights. The Declaration suggests that the rights and freedoms related to LGBT persons be proposed to be universally guaranteed. It includes all aspects of Human Rights, by guaranteeing basic freedoms to prevent discrimination against LGBT people in health, education and immigration. The statement also addresses various issues that threaten the global promotion of LGBT rights.⁴

According to this declaration, states should undertake measures for health education, employment, family rights of persons belonging to the LGBT community. Thus it is noted that in education, the curriculum should include human rights for LGBT persons and that schools should take action against homophobic labeling. Also this statement calls upon the media to help break stereotypes and to portray LGBT people in realistic ways. In its content, the need for access to health care in general and the specific needs of LGBT persons is also emphasized.

On the other hand, in our country, there is very little information about the situation of intersexual persons. While many of the world's LGBT activists have including recently intersexual persons in their lobbying platforms (becoming LGBTI), in Albania it is reported that these persons not only exist, but are numerous and are kept hidden by their families.⁵

⁴ PINK Embassy/ LGBT Pro Albaniapublication in partnership with COC Netherlands and CRCA, financed by the MATRA program, MFA of the Kingdom of the Netherlands

⁵ Shekulli newspaper: <http://agjencia.info/2012/03/31/te-rritesh-mashkull-nje-dite-te-ndihesh-femer/>

Through this report we would like to present some of the interventions and actions undertaken during 2012 by the Ombudsman's Institution, to promote, protect and guarantee the rights of LGBT persons.

II. Recommendation of the Ombudsman regarding the right to employment and vocational training

The institution of the Ombudsman in accordance with Article 60 of the Constitution of the Republic of Albania and the Law 8454/1999 "On the Ombudsman", performs all its functions and powers to protect the rights and freedoms of the individual, because of actions or inactions of illegal and improper administration or third parties associated with it. In this context, the promotion, protection and guaranteeing of human rights and fundamental freedoms of the individual, deserves the same attention and importance to the Ombudsman, regardless of whether the individual is part of a social minority group, or is part of the majority of society.

The community of Lesbians, Gays, Bisexuals and Transgender (LGBT) in Albania, according to the legislation in force, should enjoy equal rights and freedoms to all other members of society.

The Constitution establishes the principle of equality before the law, closely linked to the principle of non-discrimination. Article 18 of the Constitution says and guarantees the principle of equality of all citizens before the law, regardless of their gender or sexual orientation they have.

So, based on the provisions of Article 18 of the Constitution of sexual orientation or gender identity of individuals may be cause to differentiate and treat unequally the LGBT community, which for various reasons has or may have a social composition irrespective of its characteristics, or has a gender identity different from that of both genders (masculine or feminine).

The principle of equality before the law and non-discrimination are sanctioned by the Constitution as a general principle underlying all human rights and fundamental freedoms, so it must find its expression in all Albanian legislation and be implemented by everyone, both by institutions and individuals. This principle

pervades Article 49 of the Constitution which provides that "Everyone has the right to earn their means of living by lawful work that they have chosen or accepted themselves. They are free to choose their profession, workplace, as well as their professional qualification system." The constitutional provision guarantees every person the right to work, regardless of gender, racial, ethnic, linguistic, political, religious, etc. The right to work under the present Constitution includes the choice of profession, workplace and vocational training system in order to ensure livelihood in a lawful manner. The provision of article 49 of the Constitution "... should be understood in two ways. It is a positive obligation that requires government commitment to create conditions for the realization of such a right, but a negative obligation, which requires state non-interference which could impinge this right."⁶

Also, The Constitution, in Article 15 calls in particular upon public authorities stating that: "Public power authorities, in fulfilling their duties should respect human rights and fundamental freedoms, as well as contribute to their realization."

Albania has signed and ratified several international instruments, which basically deal with equal treatment, non-discrimination, protection and respect of human rights and fundamental freedoms in general, but also with the rights of the LGBT community in particular. Among the most important international acts, the European Convention on Human Rights, the UN Declaration on "sexual orientation and gender identity" signed by our country on December 18, 2008, Protocol no. 12, of the Convention for the Protection of Human Rights and Fundamental Freedoms "For a general prohibition of discrimination", signed and ratified in 2010, Convention 111 of the International Labour Organisation (ILO) "Discrimination in employment and the profession."

According to Article 122 of the Constitution, any ratified international agreement constitutes part of the internal legal system after its publication in the Official Journal, and it is applied directly, unless it is not self-executed and its implementation requires the adoption of a law. Furthermore, according to paragraph 2 of Article 122 of the Constitution an international agreement ratified by law has supremacy over national laws that do not agree with it. Also, regarding international acts that are signed, the Albanian state at the time of their signing has made a commitment to its policies and legislation in the relevant field, from the

⁶ Decision of the Constitution Court Nr.20/2006

moment of signing and ratification until it is aligned, or approximated with the provisions of the act signed.

Albania as a member state of the Council of Europe, should take measures for the implementation of paragraph V of the recommendation of the Resolution of the Council of Ministers, the Council of Europe, CM / Rec (2010) 5, which addresses issues on employment, which states *"Member States shall ensure the establishment and implementation of appropriate measures that provide effective protection against discrimination in the private or public sector, on the basis of sexual orientation or gender identity in employment and occupation. These measures should cover the conditions for access to employment and dismissal, remuneration and other conditions of work, including the prevention, combating and punishing harassment and other forms of victimization. Particular attention should be paid to ensure the effective protection of privacy rights of transgender individuals in the context of employment in specific applications related to employment, to avoid any detection of insignificant history of their gender or name former employer and other employees. "*

Albania has a domestic legislation which regulates in detail, and fills in those cases where it is necessary under the Constitution, matters which are provided for in international acts on equal treatment and non-discrimination.

Law no. 10221, dated 4.02.2010 "On the protection against discrimination" is a framework law that regulates the implementation and observance of the principle of equality, as well as determines the causes under which a person may be discriminated against, directly or indirectly. According to Article 1 of the Law, causes of discrimination may be related to gender, race, color, ethnicity, language, gender identity, sexual orientation, political opinions, religious or philosophical beliefs, economic condition, educational or social status, pregnancy, parental affiliation parental responsibility, age, family or marital status, marital status, residence, health status, genetics, disability, belonging to a particular group, or for any other reason.

Also in Article 12 of Law 10221/2010 stipulates that prohibits discrimination of a person in connection with employment law, for the reasons set out in Article 1, which include sexual orientation. According to Article 14 of this Law, the Minister of Labour, Social Affairs and Equal Opportunities, among other authorities is responsible for the positive measures to combat discrimination in relation to employment law.

The previous provision of the law is in accordance with the provisions of Article 199 of the Labor Code, which provide that "the Minister of Labour is the administrative body responsible for the preparation and implementation of legislation and policies.

Law 10221/2010 is a framework law, which sets out the principles, rules and measures for the protection from discrimination, while other legal acts in force specifically regulate discrimination regarding the right to employment, the right to education the right to access to goods and services, etc.

In terms of the above, the special legal regulation which we refer to regarding the prohibition of discrimination with respect to employment law is law 7961/1995 "The Labour Code of the Republic of Albania" (as amended).

Article 9 of the Labour Code (as amended) provides that discrimination is prohibited in the area of employment and occupation. In paragraph 2 of Article 9 of the Labour Code, the definition of discrimination as well as the reasons on the basis of which discrimination can occur are provided, such as race, color, sex, age, religion, political beliefs, national origin, social origin, family ties , physical or mental.

In the above mentioned reasons under Article 9 of the Labor Code, the prohibition of discrimination because of sexual orientation or gender identity is not included. Although there are no legal restrictions expressed explicitly for the right to employment in the Labour Code, no specific provisions prohibiting discrimination based on sexual orientation and gender identity in employment and vocational training are provided. Such a gap in labor legislation may provide the chance to impinge on the right to work of the LGBT community in equal terms with the rest of society. So in this case, legal deficiencies in special legislation can lead to problems of implementation in practice of the principle of equality before the law and non-discrimination in the exercise of the right of work, and therefore to non-fulfillment of the purposes of the law against discrimination, impunity discriminatory behavior and the establishment of the Ministry responsible for the enforcement of the law.

In the context of Albania's EU integration process, Article 70 of the Stabilisation and Association Agreement between Albania and the EU, has determined the general obligation for the approximation of legislation with the European Union. According to this article, the parties recognize the importance of the approximation of the Albanian legislation with the Acquis and its effective implementation.

Albania shall endeavor to ensure that its existing laws and future legislation will be gradually made compatible with the Community acquis, and it will ensure that existing and future legislation will be properly implemented.

In paragraph 3 of this Article of the Agreement, it is determined that this approximation shall start on the date of signing of this Agreement and will gradually extend to all the elements of the Community acquis. During the first phase as defined in Article 6 of the MSA, the approximation will focus on the fundamental elements of the internal market acquis, as well as in other important areas such as competition, intellectual property rights, industrial and commercial property, public procurement, standards and certification, financial services, land and maritime transport - with special emphasis on safety and environmental standards, as well as social aspects - commercial companies law, accounting, consumer protection, data protection, health and safety at work and equal opportunities .

Moreover, the European Commission Opinion 2010 for Albania stated that it has begun the process of approximation of legislation with the EU acquis communautaire in the field of labor law, equal treatment of women and men and anti-discrimination, but further efforts are needed for full compatibility on these issues.

Based the above, it can be seen that for both the Stabilisation and Association Agreement between Albania and the EU, but also the opinion of the European Commission, the implementation of the principle of equal treatment in employment legislation, is regarded as an essential element for the approximation of the law and the Ministry of Labour, Social Affairs and Equal Opportunities, should increase its efforts to take legal initiatives aimed at full compliance with the EU acquis communautaire.

Moreover the provisions of Directive 2000/78 EC "Establishing a general framework for equal treatment in employment and occupation", we suggest that Article 9 of the Labour Code should include the grounds on which discrimination is prohibited, namely sexual orientation and gender identity.

Article 1 of Directive 2000/78 EC provides that its purpose is to define a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view that Member States shall apply the principle of equal treatment. So the framework Directive provides the causes of sexual orientation discrimination.

Moreover, in order to guarantee the implementation of the principle of equal treatment in Article 10 of the Directive it states that "Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that persons who consider themselves wronged because the principle of equal treatment has not been applied to them, to present before the court or other competent authority facts from which it may be presumed that the person has been direct or indirect discrimination, while the defendant (in this case the employer) must prove that he has not committed a breach of the principle of equal treatment."

Providing explicitly the party that is required to prove that there is no violation of the principle of equal treatment (in this case the employer), we believe, will guarantee the implementation of this principle in practice, will clarify the procedures for the violation claimed, and will help restore the right by judicial bodies or other competent bodies, in cases where it affected persons who claim to have been discriminated against (regardless of the cause of discrimination).

At the conclusion of the review of this matter by the Ombudsman, we concluded that Article 9 of the Labor Code does not guarantee equal treatment of LGBT persons in the exercise of the right to employment and vocational training. The Code is not in accordance with the constitutional principle of equality of citizens before the law guaranteed by Article 18 of the Constitution, which provides that: "All are equal before the law", as well as a series of acts of international human rights ratified by the Albanian state, cited above, including Article 1 of the "Universal Declaration of Human Rights", adopted and proclaimed by the General Assembly in its resolution 217 A of 10 December 1948, which suggest that: "*All human beings are born free and equal in dignity and rights.*"

To put in place this right of LGBT persons, based on paragraph 3 of article 63 of the Constitution which reads: "*The Ombudsman has the right to make recommendations and propose actions when it observes violations of human rights and freedoms by the public administration*"; under Article 24 / a of Law No. 8454, dated 04.02.1999 "On the Ombudsman" that says: "*When the Ombudsman notes that it is the content of the law or other legal act and not its application that leads to the violation of human rights recognized by the Constitution or other laws, he has the right to recommend that the law-making bodies make proposals to amend and improve the laws*"; and Article 199, paragraph 2 of Law 7961/1995 "The Labour Code of the Republic of Albania", which states that "the Minister of Labour is the administrative body responsible for the preparation and implementation of legislation and policies", it has been recommended:

1. Involvement in paragraph 2 of Article 9 of Law 7961/1995 "The Labour Code of the Republic of Albania", of "sexual orientation and gender identity" as grounds for discrimination.

2. Include at the end of Article 9 of Law 7961/1995 "The Labour Code of the Republic of Albania", a new paragraph in which to determine which party bears the burden of proof, in cases when it is alleged that there has been discrimination against a person. The paragraph shall be formulated in accordance with the provisions of Article 10 of Directive 2000/78 EC, thus placing the burden of proof on the employer.

Following the recommendation sent to the Minister of Labour, Social Affairs and Equal Opportunities, in his response, he accepted the proposal made by the Ombudsman and in the changes that will be made to the Labour Code, proposals for the amendment to Article 9 of the Labour Code will also be proposed.

III. Recommendation of the Ombudsman for the completion of the Criminal Code of the RA

In the framework of the objectives of the protection of human rights, but also engagement in the implementation of the 12 recommendations that the European Commission has decided in the integration process, the Ombudsman has undertaken several initiatives to protect and guarantee the rights of LGBT community. On the basis of proposals coming from the community, but also the international community following the completion of Recommendation 11 of the European Commission, the Ombudsman undertook a comparative study of criminal law concerning the protection granted to the members of this community.

The changes made to the Penal Code in 2007, Article 50, which provides for aggravating circumstances, letter "j" was added which provides for the "the commission of the offense driven by motives related to gender, race, religion, nationality, language, political opinions, religious or social."

From the study of the criminal law in other countries it can be shown that they have developed the concept of the so-called "hate crime", by including it in the Penal Code as a criminal offense, or as an aggravating circumstance.

Hate crimes are criminal offenses motivated by prejudice. It is the motive which distinguishes hate crimes from other crimes. "Hate crimes" describes a particular concept and not simply a legal term.

Hate crimes always contain two elements: a criminal offense committed and a biased or discriminatory motive.

The *first element* relates to the commission of an act that constitutes a criminal offense provided for in the Penal Code. In this case, the criminal act will be referred to as "the basic act." In the case of hate crimes there is always need for the existence of an offense. Without this basic offense, there can be no hate crime.

The *second element* of hate crime has to do with the fact that the offense is committed with a special motive which we refer to as "prejudice or discrimination." It is precisely the existence of this discriminatory motive that distinguishes hate crimes from other crimes. This means that the perpetrator chooses his crime target due to some specific characteristics that put him on the defensive.

Objects may consist of one or more people, or may be part of or members of a group with common characteristics.

A protected characteristic is the one feature that is common to the whole group, such as race, religion, ethnic origin, nationality, or any other common factor.

Hate crimes differ from ordinary crimes not only because of the motive of the perpetrator, but also because of the impact on the victim. The author selects the victim based on his or her membership in a certain group. This means that no matter which member of the group they pick, each member is equally at risk. In contrast to all other criminal offenses, victims of hate crimes are selected for what they represent and not for what they are. The message given in the case of such acts is aimed not only the victim, but also the community where he / she is a part. Therefore, hate crimes are described as symbolic crimes.

Hate crimes are intended to intimidate the victim and the community of which he / she is part of based on their common characteristics. Such crimes pass on a message to the victim and through him / her to the entire community that they are unwanted, by communicating to them the denial of their right to participate fully in society. Through the victim, other members of the community who have the same traits are shown that they are not like everyone else, and that they may as well be

the next victim. Consequently hate crimes threaten social cohesion and disrupt communities.

In this sense three main arguments for having an added punishment for hate crimes are presented:

Firstly, the symbolic value of the law can be used to demonstrate rejection of society of crimes based on discrimination.

Second, criminal laws punish for the damage done. Hate crimes have a greater impact on the victim than ordinary crimes and also affect other members of the same group. Added sentence is justified by the harm caused to individuals and the community at the same time.

Thirdly, the specific motive makes the crime more serious than the same crime without the added reason of discrimination. For this reason, criminal laws impose stiffer penalties for these crimes, based not only on the impact, but also criminal intent.

Regarding national legislation, some countries like the UK or the Czech Republic, have sanctioned the specific offenses which include discrimination, while other countries have not yet established such provisions.

Article 196 (2) of the Criminal Code of the Czech Republic provides for imprisonment from 6 months to three years for "the use of violence against a group of citizens or an individual, or their threatening with death, damage to health or causing other damage serious because of political beliefs, nationality, race, religion, or lack thereof. "

Sections 29-32 of the Act of the United Kingdom, on Violations of Public Order Crimes introduced new crimes for "serious racial" attacks and "serious crimes because of religious belief," criminal damage, harassment and crimes against public order .

A large number of European countries provide for increasing the penalty if the offenses committed for reasons related to different sexual orientation, by providing this motive as an generic or specific aggravating circumstance.

Article 30.6 of the Criminal Code of Andorra, envisages strengthening penalties for crimes committed for "racist and xenophobic motives, or for reasons related to

ideology, religion, nationality, ethnic origin, sexual orientation, disease, and physical or mental disability of victims."

Articles 33-42 of the Belgian Law of May 10, 2007 provide that "hatred, contempt or hostility to a person because of their skin color, race, ethnic origin, sex, sexual orientation, religion, political convictions, language, disability or social status " are aggravating circumstances that could lead to a doubling of punishment provided for the crimes such as: rape, murder and intentional injuries, failure to provide assistance to a person in danger, violation of personal freedom, violation of private property, slander, arson and destruction of property or personal items.

Articles 132-77 of the French Penal Code, provide as an aggravating circumstance damage "to the honor or reputation of the victim, or a group of persons to which the victims belong because of their sexual identity."

In this regard, the Ombudsman has estimated that it would be expedient in the general part of the Criminal Code, in Article 50, paragraph "j", added as an aggravating circumstance the commission of the act, driven by motives related to sexual orientation. Thus, with the provision of a generic aggravating circumstance, the commission of a crime due to sexual orientation or any crime to be performed under this motive will be automatically an added sanction.

In these circumstances and in order to fulfill this legal vacuum, based on Article 63/3 of the Constitution of the Republic of Albania, which states that: "*The Ombudsman has the right to make recommendations and propose actions when it observes violations of rights and freedoms by the public administration* " and Article 24 / a of the Law No. 8454 dated 04.02.1999 as amended by Law nr.9398 dated 12.05.2005" On The Ombudsman ", which states that: "*When the Ombudsman finds that is the content of the law or other legal act and not their implementation that leads to violation of human rights recognized by the Constitution or other laws, he has the right to recommend that the law-making bodies make proposals for change and improvement*, the Ombudsman has recommended to the Minister of Justice, at the end of July 2012:

1. The addition of Article 50, letter "j" of the Law No. 7895 dated 27.01.1995 "Penal Code of the Republic of Albania", as amended, providing that sexual orientation based motives constitute an aggravating circumstance. Also, letter "j" of Article 50 of the Law No. 7895 dated 27.01.1995 "Penal Code of the Republic of Albania", as amended, after the word "sex" will add the phrase "sexual orientation."

The Ministry of Justice with its document no. 5161/1, dated 21.08.2012 regarding this recommendation stated that:

"The terminology used in the letter" j "of Article 50 of the Criminal Code is consistent with the terminology used in Article 18, paragraph 2 of the Constitution of the Republic of Albania. However, the Ministry of Justice at the earliest opportunity, taking the initiative to revise the Penal Code, will take on the recommendations of the analysis prepared by your side on this issue, taking into account the constitutional principles and developments in legislation on protection from discrimination. "

IV. Recommendation of the Ombudsman for the curricula in schools and treatment of LGBT persons in the education system

Knowing that lesbians, gays, bisexuals and transsexuals have been for centuries, and continue to be, subjected to homophobia, transphobia and other forms of intolerance and discrimination based on sexual orientation or gender identity, specific measures are needed to ensure the full enjoyment of human rights for this category. These rights start from the right to life, security and protection from violence, freedom of expression, employment, health, housing, discrimination, etc... A very important right is, and remains education. This includes the right to education without discrimination because of sexual orientation or gender identity. This includes protection of the rights of children and young people to be educated in a safe environment free of violence, insults, or other degrading forms of social exclusion related to sexual orientation.

Inability to deal with issues of sexual orientation or gender identity can have harmful consequences for society category. The state should address this issue in a respectful manner, providing all the conditions for the drafting of laws and regulations for the protection of their rights.

This is also mentioned in several international acts and recommendations such as those of the Parliamentary Assembly of the Council of Europe since 1981, in terms of discrimination due to sexual orientation and gender identity, and recommendation no. 211 of 2007 of the Congress of Local and Regional Authorities of the Council of Europe, on the "freedom of association and expression for lesbians, gays, bisexuals and transsexuals." The Commissioner for the Protection of Human Rights has played an important role in monitoring the situation of lesbian, gay, bisexual and transgender people in the member states relating to discrimination because of sexual orientation or gender identity.

OSCE ODIHR has recently published several reports and documents that analyze certain aspects of discrimination based on sexual orientation and gender identity in OSCE member states. The United Nations General Assembly in 2008, supported by 66 countries (Albania ranks first in the list), has made a statement condemning rights violations because of sexual orientation and gender identity, such as murder, torture, arbitrary arrest, denial of social and cultural rights, health, etc.

The right to education is expressed in Article 2 of the Protocol to the European Convention "On the Rights of the Child". The United Nations Committee on the Rights of the Child states that human rights should be promoted for adolescents so that they can enjoy the highest standards of health possible. Consequently, States should guarantee the right of children and youth to education in a safe environment free from violence, insult, social exclusion or other forms of discrimination.

States shall take the necessary measures to ensure that teachers, tutors and academic staff are able to discover, analyze, respond effectively and to combat any discrimination due to sexual orientation or gender identity. They have to address the issue of sexual orientation and gender identity in a respectful and objective manner in the curriculum, or gender and sexual education classes, they should develop initial and ongoing training programs, and support and guide teachers and all education staff to address these issues from the perspective of anti-discrimination. All this should be in a context of methods that does not contain forms of prejudice for social exclusion, discrimination and denial of human dignity, carried on against marginalized groups such as people with non-heterosexual orientation.

The institution of the Ombudsman thinks all actors of society should encourage students' access to information on sexual orientation and gender identity, and adoption of codes of conduct against homophobic or transphobic attitudes, or other forms of discrimination. This should be accomplished by producing and distributing texts for educational staff, encouraging the organization of educational campaigns, cultural activities against homophobia with the participation of representatives of the community. All this with the aim of raising awareness about issues of discrimination due to sexual orientation or gender identity among academic staff, pupils, students and parents.

For this purpose, methods, curricula and educational resources should serve to enhance understanding and respect for different individuals regardless of their sexual orientation or gender identity, including the specific needs of students,

parents, students and other members their families.

All the above are provided for in the European Convention on Human Rights and Fundamental Freedoms. We believe that the Albanian government is and should continue to be committed to the protection of the community, where we note as positive developments the adoption of the Law "On Protection from Discrimination", the capacity raising of the Commissioner Anti-Discrimination, as well as tables and meetings supported of projects and assistance of the Council of Europe in Albania.

The institution of the Ombudsman considers that there is a strong need to review programs and instructional materials, not only in Albania, a need noted also in the Recommendation of 2010 of the Committee of Ministers of the Council of Europe, whereby teaching rules would not be biased, discriminatory and derogatory, but would protect and support the LGBT community, in every country where they live and are organized. In the social and legal report on discrimination based on sexual orientation and gender identity of the Council of Europe, which covers 47 member countries, Albania is ranked on a list of countries that have a high degree of homophobia, so we assess that it is the duty of all state structures, but not only them, to help for the eradication of this phenomenon.

The Ombudsman's Institution, has noted that it will always the rights and freedoms of this category of society as it protects the interests and rights of other vulnerable categories, being open also to any state and institutional cooperation which will bring about the social protection and dignified respect for their gender identity of transgender persons.

Based on the above analysis pursuant to paragraph 3 of Article 63 of the Constitution, which states explicitly that: "*The Ombudsman has the right to make recommendations and propose actions when it observes violations of human rights and freedoms by the public administration,*" The Ombudsman recommended that the Ministry of Education and Science:

1. Inclusion in the curriculum and instructional programs of knowledge and information about the LGBT community, to education in a safe environment free from violence, insult, social exclusion or inhuman treatment on sexual orientation or gender identity.

2. Academic staff training for the prohibition of all forms of discrimination by providing protection and discipline in educational institutions because of their sex.

The Ministry of Education and Science has responded to our recommendation, stating that: "The Ministry of Education has proposed to anticipate these measures in the Draft National Action Plan for the rights of LGBT persons, which is being coordinated by the Ministry of Labour, Social Affairs and Equal Opportunities, measures needed to improve and complete the curriculum in schools and for the training of academic staff.

V. The Institution of Ombudsman addressing the rights of LGBT persons in workshops, various activities and the Media

The Ombudsman's Institution has signed several agreements with civil society organizations which protect and promote the rights of the LGBT community. Some of the organizations with which the Ombudsman has signed cooperation agreements are: "PINK Embassy / LGBT Pro Albania", "Alliance against LGBT Discrimination", "United for the LGBT cause".

Through these agreements the joint commitment of the Ombudsman and civil society organizations is expressed for the:

- a. exchange information and monitoring problems in the implementation of legislation on human rights and fundamental freedoms;
- b. preparation of assessment studies and special reports on the Albanian legislation and its enforcement by public administration bodies;
- c. a. analysis of draft laws proposed to the Assembly, as well as regulations for their implementation, as well as undertaking joint legislative initiatives to improve the implementation of the rights and freedoms in the light of international standards;
- d. Treatment of special cases which arise, such as complaints of unlawful acts or omissions of public administration bodies, against the LGBT community.
- e. promotion and awareness of Albanian society to guarantee rights and freedoms.

Ombudsperson Institution also has been part of a meeting held in the Ministry of Labour, Social Affairs and Equal Opportunities, for the preparation of an Action Plan for the rights of LGBT persons. Following this meeting, in May 2012, we have forwarded to the Minister of Labour, Social Affairs and Equal Shnaseve our comments for the preparation of the first draft of this plan of action.

In general, regarding the establishment of the working group and the object of his

work, the Ombudsman's Institution stated that the working group established by the Minister of Labour, Social Affairs and Equal Opportunities is not responsible for expanding and taking measures against the discrimination of the LGBT community, on the basis of sexual orientation and gender identity. The Ministry of Labour, Social Affairs and Equal Opportunities and the Ministry of Interior, in accordance with Article 14 of the law on protection from discrimination, are each responsible for taking positive measures to *only combat discrimination in relation to employment*. In this context, the Ombudsman estimates that the provisions in the plan of all measures to be taken for non-discrimination of the LGBT community, the working group set up by the Ministry of Labour, all fall outside the above-cited provisions of the law on discrimination.

The law for protection against discrimination has not provided for a coordinating body, but there are special provisions for state authorities responsible for taking action in certain areas, in addition to respective ministries in specific fields. In addition, it notes that The Council of Ministers has also some obligations. In this context, the Ombudsman in his letter suggested the establishment of an interagency working group with an order from the Prime Minister, which would have members representing all ministries in their field of activity to address issues concerning the LGBT community, but also representatives of the constitutional institutions (Ombudsman) or independent institutions. In our opinion, the action plan drawn up in this way, will not only embrace all the issues that concern the LGBT community, but will also address measures that are comprehensive for all areas.

Whatever form is followed for the approval of this Action Plan, i.e., with a Council of Ministers, the Ombudsman suggested that prior to its adoption, in its design phase, there should be a formal order of the Prime Minister for the inter-institutional workgroup, according to the above-mentioned format. In this way, the representatives of these institutions will assume responsibility for:

- a. measures required and necessary to be provided, but also their cost with budgets and plans for annual budgets, and
- b. implementation based on their deadlines.

In this way, the measures envisaged in the Action Plan will also guarantee their implementation in the future.

Another problem that the letter of the Ombudsman suggested be assessed was plans for the implementation of certain measures by constitutional institutions or independent institutions. We think that in this respect these institutions may be invited as Institutions that can contribute to their implementation.

We think that in the Action Plan two other columns should be added, with those indicators or indicators that define the implementation of the measures, as well as the source of financing the cost of the concrete mass. We estimate that these elements are extremely important, as well as that of the cost or budgeting measures to ensure their implementation.

Also, in general about the measures envisaged in the draft plan of action we have estimated that they are insufficient to achieve a set of objectives and policies. On this matter, comments have been forwarded to the Ministry of Labour, Social Affairs and Equal Opportunities.

Following this notification, the Ministry of Labour, Social Affairs and Equal Opportunities, has not taken into consideration the suggestion given by us for a formal working group at the order of the Prime Minister, so that it would be in line with the provisions of the law on protection from discrimination. We were forwarded us another draft of the Revised Draft Action Plan, which again, although complemented by concrete measures, its contents still lack indicators and that measure the performance of a measure (e.g. . the number of employed persons when it comes to their employment, or the number of persons treated with services, when it comes to providing them with services, etc.), as well as budgetary funds that are necessary for the implementation of any action or activity.

The Ombudsman's institution has participated in the event organized in Vlora on 16 May, organized by the "Alliance against LGBT Discrimination" And "United Pro the LGBT Cause", in the framework of the International Day Against Homophobia and Transphobia.

The Ombudsman's Institution also has been a co-organizer with civil society organizations in the activities organized on May 17, the international day against homophobia and transphobia. On this day a "Diversity Festival" was also organized. For the first time this year, and unlike every other year, a portion of this activity took place in a public environment of the open, near the square "Vëllezërit Frashëri", starting with a Press Conference and followed by of other activities.

Organizations of civil society, major institutions in the country, representatives of the international community, as well as citizens had the option to join the events for the International Day against Homophobia and Transphobia. This event, unlike media sayings, was not a gay parade, or something similar, but a manifestation of

civil society who articulated the needs and concerns of LGBT community in an open social environment.

This event was organized in collaboration with PINK Embassy / LGBT "Pro Albania", in order to develop and promote a debate of human rights in general, and that of the rights of the LGBT community in particular, and for the commitment and effort by the responsible state authorities and the Albanian public, in the promotion and observance of the rights of the community in the country.

Also, on 17 May 2012, an awareness campaign / communication was organized, which placed emphasis not only on the protection of the rights of the LGBT community, but also on their inclusion of diversity as a whole, in order to send messages of tolerance, acceptance and peace for people of all social groups.

A "Diversity Festival" was held on Diversity Information Fair, in which a tent was placed by the Ombudsman. During the Fair, the Institution of Ombudsman, civil society organizations, and other state institutions, distributed flyers for the protection of human rights, activities, functions and powers of these institutions.

The Ombudsman's Institution has issued two press releases, in response to public statements of a senior government functionary (Mr.Spahija), to the LGBT community. Through public statements it asked the Albanian government's top official to apologize publicly and assume responsibility for offensive and derogatory words he said against the LGBT community. It also strongly condemned every statement and expression of this format, which has nothing in common with the spirit of tolerance, coexistence and diversity, the traditional values of the Albanian society. In addition, the press statement noted that such attitudes mislead and misinform Albanian society and affect explicitly the rights and freedoms guaranteed by the Constitution, including the freedom of peaceful assembly.

Moreover the Ombudsman considers these allegations a call and promotion of hatred of a part of the Albanian society to another part, denying the latter, the guarantees and the freedoms enjoyed by the rest of society. Albanian society members are all equal before the law, so everyone, regardless of their belonging to a social group or community, no matter how small, has equal rights and freedoms without any discrimination.

The Ombudsman considers that the Albanian society has no need for such homophobic sentiments, rather, the time has come for it to open a dialogue and

civic debate on the rights and freedoms of the community, thus providing an open message and advanced, which recognizes diversity. Considering this mentality as totally unacceptable, the Ombudsman has mentioned that comments from any public official at any level are grossly incompatible with Albania's EU integration process and European values that this process carries, values which categorically exclude such behavior and mentality.

Another important activity conducted during the month of May has been the regional conference organized and sponsored by the U.S. State Department on "Stop violence: LGBT rights are human rights."

The conference was attended by representatives of 17 countries of the world. The conference opened with a greeting U.S. Secretary of State which stated that: "This month and every other month we confirm our support for any human being. Much remains to be done to respect the rights of the LGBT community. It is important that we support them, to fight and work for equal rights. I am confident, so this month I wish proud and happy. "

In the opening panel of the conference, the Ombudsman, Mr. Totozani, pointed out that there is still much to do in Albania for the rights of LGBT persons, in terms of stopping violence and hate speech against them, non-discrimination in employment and vocational training, health and social service provision, etc.

The conference highlighted that even today, in 78 countries homosexuality is considered a criminal offense, so for this reason many interventions from the panelists during the conference underlined the need for legislative reform and taking appropriate measures on this issue in these countries.

At the conclusion of the conference was required in any case to avoid hate speech against LGBT persons and become practical administrative procedures against public statements expressing hatred and discrimination. It was also emphasized that there should be a partnership between NGOs and the Government, and no 'copy paste' laws, but laws that fit the context and the current Albanian society. Special attention should be paid to marriage or partnership for LGBT couples, in order to ensure their equality with heterosexual couples and the benefits it brings, but always framed in the context of the Albanian reality, and not just copying one of foreign "Danish-German-English models."

It was suggested to consider the possibility of creating a cultural center for the promotion of human rights, and the creation of a library for LGBT persons. Taking

into account the problem of child abuse by parents, it was proposed to set up a center where psychologists treated the parents of gay children and vice versa. Conference found that in some countries the law against discrimination and laws in this area do not provide for LGBT issues and just these issues fall through the phrase "etc." There should be more clarity in laws and LGBT issues should be clearly mentioned.

The Conference noted that a special attention should be paid to police training curricula and staff of other institutions, in their activity, dealing with this group of people.

These were some of the most important recommendations of the International Conference organized by the U.S. State Department.

Also during this period, the Ombudsman has been very active in the media, such as audio-visual media, as well as in print, in terms of protecting and guaranteeing the freedoms LGBT community.

The Ombudsman has supported the rights and freedoms of LGBT community in television interviews (interview with journalist Ilva Tare, Tonight show, time-News), interviews and editorial in print (Totozani: LGBT in schools), in an interview given for Balkanweb and Albanian Gazette 19 June 2012, some answers to questions on LGBT editorial by the Ombudsman in Panorama 19 June 2012, Day Against Hate, editorial at century newspaper, 18 May 2012, etc.)

Below you list a complete list of titles that are reflected in the media regarding the protection and the rights and freedoms of LGBT community in Albania:

- Totozani: LGBT in schools, Balkanweb 19 June 2012;
- Some answers to questions on LGBT, Panorama 19 June 2012
- "Subject of the gay community in school curricula", Panorama 13 June 2012
- Day Against Hate, Century 18 May 2012
- Totozani: policy should be to protect the LGBT community from discrimination, Balkanweb 17 May 2012
- Ombudsman: Objections to gay, no EU values. Subject 17 May 2012
- Totozani: accept change without prejudice, RTV Ora News 16 May 2012
- Gay parade dictum, LGBT roundtable on human rights protection, Balkanweb 28 March 2012
- Totozani meets staff of PINK Embassy / LGBT Pro Albania, Balkanweb 21 March 2012

VI. Recommendations

At the conclusion of the above estimates and the problems found for the LGBT community, in the activity of the Institution of the Ombudsman for the period January to July 2012, we think that there is a need for improvement for the situation of the rights and freedoms of the community.

From the above analysis and assessments we recommend:

1. Completion of a National Action Plan for measures to protect the rights of LGBT persons. The Ombudsman suggests that this plan be inclusive in terms of institutions that will develop, but also implement it, and to be more complete in terms of activities, measures, indicators, indicators and budgets that will be programmed to implement of each measure.
2. Change of the RA Labor Code:
 - a. Inclusion in paragraph 2 of Article 9 of Law 7961/1995 "The Labour Code of the Republic of Albania", of "sexual orientation and gender identity" as grounds for discrimination.
 - b. Inclusion at the end of Article 9 of Law 7961/1995 "The Labour Code of the Republic of Albania", of a new paragraph in which to determine who bears burden of proof, in cases when it is alleged that there has been discrimination on a person. The paragraph shall be formulated in accordance with the provisions of Article 10 of Directive 2000/78 EC, thus placing the burden of proof on the employer.
3. Following the completion of the above-mentioned recommendation, the responsible state authorities, the State Labor Inspectorate should control the implementation of the amended provisions for the employer, in order to ensure the practical application of the provision, by public or private employers.
4. Amending the Criminal Code of RA, Article 50, letter "j, foreseeing sexual orientation motivation constitutes an aggravating circumstance. Also, add at the letter "j" of Article 50 of the Law No. 7895 dated 27.01.1995 "Penal Code of the Republic of Albania", as amended, after the word "sex" the phrase "sexual orientation."
5. Inclusion by the Ministry of Education and Science curricula and teaching programs of information about the LGBT community, to educate people in a safe environment free from violence, insult, social exclusion or inhuman treatment on sexual orientation or identity gender.

6. Training by the Ministry of Education and Science of the academic staff for the prohibition of all forms of discrimination by providing protection and respect in educational institution.

In conclusion we wish to emphasize that the conclusions and recommendations cited above will be subject to evaluation and further analysis of the Ombudsman's Institution in collaboration with civil society organizations that cooperate with our institution.

The Ombudsman is aware that the issues addressed in this report, are just some of the concerns and problems that people belonging to the LGBT community experience. In this context, the work of our institution in collaboration with civil society organizations, but also with the responsible state authorities will be to seek to protect and guarantee the rights of LGBT persons, even in other areas or issues.

Also the Ombudsman's Institution in accordance with the functions and powers provided by law, will continue his activity in improving the situation of the implementation of the measures provided for the LGBT community, in recommendation 11 of the EU for Albania.