European Union Kosovo

ERAC
EQUAL RIGHTS FOR ALL COALITION

SAME-SEX MARRIAGE AND OTHER CIVIL UNIONS SUCH AS CIVIL PARTNERSHIPS IN KOSOVO



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Centre for Social Group Development (CSGD)
Centre for Social Group Development (CSGD)is a non-governmental organisation that protects and promotes the rights of LGBT community in Kosovo. CSGD main focus is in: (1) Empowering the LGBT community; (2) Advocating and lobbying for LGBT human rights; and (3) raising awareness in society regarding issues faced by members of the LGBT community.

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Equal Rights for All Coalition
ERAC brings together seven (7) NGOs that work in the domain of rule of law and *fundamental rights* that will work together with an additional *nineteen (19) grass root NGOs*, with a particularfocus on the establishment of a sustainable network of NGOs that are active in the protectionand promotion of the fundamental rights of vulnerable and/or marginalized groups. The project'sspecial focus are the following groups: *all minority communities in Kosovo, women, youth and LGBT community*. Although working on similar topics and issues, these NGOs are often divided onthe basis of the particular target groups they are working with or the region they are active in. Byestablishing structural cooperation between selected NGOs and providing formal opportunitiesfor continuous learning, the action generates the sharing of knowledge and experience betweenNGOs, strengthens their capacities for advocacy with relevant central and municipal institutions,and increases their visibility.

ERAC members are the following organizations:
- European Centre for Minority Issues Kosovo – leader of the Coalition;
- Centre for Social Group Development – member of the Coalition;
- Centre for Equality and Liberty for the LGBT Community in Kosovo – member of the Coalition;
- Kosovo Center for Gender Studies – member of the Coalition;
- Youth Initiative for Human Rights – member of the Coalition;
- Kosovo Glocal – member of the Coalition;
- Centre for Legal Aid and Regional Development – member of the Coalition.

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LIST OF ACRONYMS

ERAC	Equal Rights for All Coalition
EU	European Union
MoJ	Ministry of Justice
CSGD	Centre for Social Group Development
CEL	Centre for Equality and Liberty
LGBTI	Lesbian, Gay, Bisexual, Transgender, and Intersex
ECtHR	European Court of Human Rights
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EUCJ	European Union Court of Justice
EU Acquis	European Union Law
CSO	Civil Society Organizations
WG	Working Group

TABLE OF CONTENT

EXECUTIVE SUMMARY....7
INTRODUCTION....8
BACKGROUND....10
METHODOLOGY....10
TARGET GROUPS....11
Legal Framework on Civil Partnership/Union at National Level....13
Recent Developments on Same-Sex Marriages and Civil Partnerships in Europe..17
Cases of Same-Sex Partnerships/Unions (Life Partnerships) in EU....18
CONCLUSIONS....21
RECOMMENDATIONS....23
CONTRIBUTION....25

EXECUTIVE SUMMARY

This report is conducted in the framework of the Project "Equal Rights for All Coalition-ERAC" and examines current situation of regulating civil unions, with emphasis on same-sex marriages in local, regional and international fora.

When analysing legal framework at the local level main source of this research is the Constitution of Kosovo. We also looked into the Civil Code, a draft that is currently being revised by the Ministry of Justice (MoJ), in order to examine its approximation with the Constitution, EU law and other national laws in force.

The report also includes other regional and international legal sources such as EU Convention on Human Rights, and case laws of European Court of Human Rights (ECtHR) and European Court of Justice (ECJ) which are finalised in favour of same-sex marriages, or other civil unions or partnerships with equal benefits as marriages.

This report aims to provide arguments on the constitutional issues raised by the draft Civil Code provisions relating to the marriage and proposes concrete legal provisions to eliminate the unequal treatment of same-sex couples and eventually challenges anti-constitutional provisions of the Project Civil Code.

Additionally, this document also proposes concrete legal provisions through which it regulates the recognition of partnerships/relationships of the same sex/gender through the legal Institute of civil partnership, in accordance with the practices of the European Court of Human Rights and the recommendations of the organizations on international and regional level.

The research process was conducted through desk research by reviewing primary and secondary laws, and other relevant documents during this time from the existing and publicly available resources. The secondary data is used to give an overview of the cases where same-sex marriage, unions and partnerships are somehow regulated and a revision of court cases that have succeeded to recognize same-sex couples fundamental rights to family life, such as the case of Oliari and Others v. Italy, and the case of Coman v. Rumania. These two cases are a good starting point to give voice to the government in Kosovo that non-recognition of same-sex couples' rights in the draft of Civil Code is discrimination on the grounds of sexual orientation, while knowing that discrimination is prohibited by the Constitution enshrined in art. 24 [Equality before the law] and also in the draft of Civil Code, art. 1128 [Equal treatment].

INTRODUCTION

The report provides a comparative analysis on the developments of various same sex civil unions, including marriage and civil partnership in different countries. The aim is to provide legal recommendations and proposals for the Kosovo specific situation looking at the articles 24 and 37 of the Constitution of Kosovo providing that: ***No one shall be discriminated against on grounds of*** *race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition,* ***sexual orientation****, birth, disability or other personal status;* (article 24 par.2, emphasis added).

Further it examines **Article 37** [Right to Marriage and Family] providing that *"Based on free will,* ***everyone*** *enjoys the right to marry and the right to have a family as provided by law;"* (emphasis added).

The report also outlines challenges of the current Draft Civil Law, which does not allow same sex marriage directly, but refer to a special law to regulate other civil unions. **Article 1138** of the Draft Civil Code stipulates**:** *"1. Marriage is a legally registered union of two spouses of different sexes, through which they freely decide to live together as husband and wife. Marriage is continuous legally regulated live union of husband and wife. Marriage is concluded by given consent of husband and wife and their signature before the official (registrar) of civil status; 2. Other forms of civil unions shall be regulated by a special law; 3. Man and woman, have the right to marry and found a family without any limitation due to race, nationality or religion and they are equal to marriage, during marriage and at its dissolution; 4. According to this law husband and wife enjoy reciprocal rights and obligations."* (emphasis added).

In addition this report emphasizes that the non-regulation of same-sex unions, partnerships and marriages in the Civil Code is discrimination and directly contradicts article 24 of the Constitution and the **Article 1128** [Equal treatment] of the Draft-Code itself, envisaging that ***"All persons*** *enjoy equal treatment of rights and obligations set forth in this Book. There shall be no direct or indirect discrimination against any person or persons based on sex, age, marital status, language, incapacity to judge,* ***sexual orientation****, political affiliation or convictions, ethnic origin, nationality, religion or belief, race, social origin, property, birth or any other status."* (emphasis added).

As a result, based on the research and analysis contained in this report, as will be elaborated below, it is highly recommended to:

- follow the strict legal meaning of the Constitution of the term 'spouse' as stipulated under article 37, and avoid that civil unions need to be regulated by special law
- the civil unions/registered partnership will also be regulated in the Family law contained in Book Four of the Civil Code of Kosovo.

- a communication and outreach programme, with educational elements on same sex marriage and other civil unions, is implemented following the amendments in the civil code as per recommendations given herein.
- clear recommendations are given in order to amend provisions within the civil code that are strictly discriminatory to the citizen of Kosovo and are in direct conflict with the Constitution of Kosovo.

As such, CSGD in partnership with other CSO's have addressed these recommendations to main stakeholders and partners for their consideration during the review of the draft of Civil Code in Government and will do so at a later stage in the Assembly.

An examination of legal frameworks in the region and beyond will show how certain countries have extended and proceeded with recognition of same-sex unions or marriage and same-sex partnership on one hand, and on other how other have failed to do so due to their long-impeded beliefs and traditions. Hence, this comparative research analysis shall serve as a milestone for legal entity and society at large. It provides recommendations on the proposed model of recognition of same-sex couples relationships and further steps to proceed, not only in having a discussion in the discourse of the human rights but also be expanded to a more political decision-making matter. Of course, the Constitutions of various countries have been taken into consideration as the main source for the research, in combination with possible Civil Codes, or special laws touching on the various topics within the frame of this research.

The research provides for an advocacy tool for the CSOs to outreach on a certain model of same-sex partnership recognition on one hand, and a guide for the decision maker on steps they need to undertake for fulfilling their obligation to legally recognize same-sex partnership so that same-sex couples can enjoy their right to family life. A communication and outreach programme is essential to disseminate the outcome of the research and to have a debate with the relevant stakeholders, but also, overall for all people in Kosovo.

The research, will provide recommendations to follow the strict legal meaning of the Constitution of the term 'spouse' as stipulated under article 37, and avoid the need for civil unions to be regulated by special law. Recommendations will be given that civil unions/registered partnership will also be regulated in the Family law. Recommendations will be done that a communication and outreach programme, with educational elements on same sex marriage and other civil unions, is implemented throughout Kosovo for all People in Kosovo.

In addition, the researcher will give recommendations on setting solid legal grounds for equal opportunities in all spheres of life and in all decision-making structures.

METHODOLODY

The research process was conducted via desk research by collecting secondary data during this time from the existing and publicly available resources. The secondary data is used to give an overview of the constitutionality of the draft Civil Code provisions relating to the part of marriage and to the unequal treatment of same-sex couples right to family life. In addition, the use of secondary data will show concrete legal provisions through which it regulates the recognition of partnerships/ relationships of the same sex/gender through the legal Institute of civil partnership, in accordance with the practices of the European Court of Human Rights and the recommendations of the organizations on international and regional level.

The research was carried out within the premises of the Centre for Social Group Development (CSGD) focusing on properly analyzing certain laws in the country and abroad, comparing good and bad examples in order to establish strong argumentation before actors involved in the process of law drafting and implementation, thus suggesting proper legal implementation of requirements stipulated in the Constitution of Kosovo. The information collected based on desk research was used to provide a comparative analysis on the developments of various same sex civil unions, including marriage and civil partnership in different regional and international countries. Hence, legal recommendations and proposals for the Kosovo specific situation looking at the articles 24 and 37 of the Constitution of Kosovo were proposed. The research will also outline the challenges of the current Draft Civil Law, which does not allow same sex marriage directly, but refer to a special law to regulate other civil unions.

The main source of the research is the Constitution. However, the research addresses the court decisions of EUCJ and ECHR rulings onsame-sex partnerships to compare with the case of Kosovo. This research takes into consideration the EU noting that Kosovo has the aspiration to become an EU member state. Thus, the EU legal frameworks and EU cases are the main source of information to build respective arguments towards legislators while drafting, amending and establishing acts providing legal basis for same sex unions and marriage. Each specific is thoroughly examined in order to see the specificities used and endorsed and what can be taken from those cases that can easily be applied in the case of Kosovo.

TARGETED GROUPS

Apart from understanding better the outcome of the WG, the first target group approach would be to interview certain key members of the WG and to understand why the WG came to the conclusion that Spouse is not gender neutral and why marriage between persons of same sex is not possible based on article 37 Constitution and the outcome of the Coman case in April 2018.

There will also be a need of conducting desk research on the work of certain Governmental Institutions and line Ministries such as Ministry of Justice (in process of drafting Civil Code of Kosovo - which embodies the Family Law, Property Law, and Inheritance Law – crucial for recognition of the rights of LGBTI people to marriage, partnership and civil union).

In addition, the work of the Advisory and Coordination Group within the Prime Minister's Office will be the main target as to examine the progress of having proper implementation of laws in place. Other work of the comparative research will be focused on certain good examples of the regional and international countries that have regulated same-sex marriages, civil unions and partnerships.

At the end, there will be a need that the Assembly be informed about the outcome of the research and to ensure that the research will become a part of the overall debate and adoption process of an revised Civil Code based on the outcome of the research.

A COMPARATIVE VIEW ON THE ISSUE OF MARRIEGE BETWEEN PERSONS OF SAME SEX

As of 29 March 2019, same-sex marriage is legally performed and recognized (nationwide or in parts) of the followingcountreies:

Argentina, Australia, Austria, Belgium, Brazil, Canada, Colombia, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, Mexico,Netherlands, NewZealand, Norway, Portugal, South Africa, Spain, Sweden, the United Kingdom,the United Statesand Uruguay.

Looking at Europe alone, as of January 2019, sixteen European countries legally recognize and perform same-sex marriages as seen above. Israel recognizes same-sex marriages entered into abroad as full marriages. Estonia recognizes foreign same-sex marriages to some degree, and a ministerial decision decreed that Armeniashall as well, though as of February 2019 there had been no actual cases. Same-sex marriage is also due to become legal in CostaRica and Taiwan.

Furthermore, the Inter-American Court of Human Rights has issued a ruling which is expected to facilitate recognition in several countries in the Americas.[1]

A **civil union/civil partnership** is a legally recognized arrangement similar to marriage, created primarily as a means to provide recognition in law for same-sex couples. Civil unions grant most or all of the rights of marriage except the naming itself. Around the world, about 44 countries have some form of civil union for same sex couples where from 22 countries in Europe.

Developed democracies began establishing civil unions in the late 1990s, often developing them from less formal domestic partnerships, which grant only some of the rights of marriage. In the majority of countries that established these unions in laws, they have since been either supplemented or replaced by same-sex marriage. Civil unions are viewed by LGBTI rights campaigners as a "first step" towards establishing same-sex marriage, as civil unions are viewed by supporters of LGBTI rights as a "separate but equal"[2]or "second class" status. While civil unions are often established for both opposite-sex couples and same-sex couples, in a number of countries they are available to same-sex couples only.

Beginning with Denmark in 1989, civil unions under one name or another have been established by law in several, mostly developed, countries in order to provide legal recognition of relationships formed by unmarried same-sex couples and to afford them rights, benefits, tax breaks, and responsibilities similar or identical to those of legally married couples. In Brazil, civil unions were first created for opposite-sex couples in 2002, and then expanded to include same-sex couples through a Supreme Court ruling in 2011.

Many jurisdictions with civil unions recognize foreign unions if those are essentially equivalent to their own; for example, the United Kingdom lists equivalent unions in the Civil Partnership Act 2004 Schedule 20. The marriages of same-sex couples performed abroad may be recognized as civil unions in jurisdictions that only have the latter.

In case of Kosovo, legislative changes are needed for recognizing same sex partnerships (civil unions such as partnerships).As discussed above, in Kosovo the legal basis for recognizing of same sex unions and/or marriage is provided under article 37 of the Constitution of Kosovo.

[1] See: State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017)

[2] A wording that unfortunately reminds of status of black citizens after the Slavery was abolished.

Croatia and Slovenia have legalized the same sex partnerships in 2014 and in 2017 respectively, which benefits unions of same sex couples, but does not allow adoption of children. Montenegro's recent developments see the same steps as Croatia and Slovenia with respect to partnership registration.

Marriage as a concept is mostly understood as a union of a man and a woman. Similar formulation is found in most of the laws in Kosovo and the region, and also within the narratives of legal and societal community. Same-sex partnerships, unions and relationships are ignored if not forgotten in most of these countries although their aspiration is to join EU. The Constitution of Kosovo states that any two people can marry, without specifying sex or gender, suggesting legal protection for same sex marriage, and the rights of LGBTI people are provided and well protected.

Legal Framework on Civil Partnership/Union at National Level

Marriage between persons with the same sex/gender is allowed by the Constitution of Kosovo. The Constitution of Kosovo, explicitly or implicitly allows marriage between persons of the same sex/gender. In principle, marriage and the right to marriage and family should be a fundamental right[3]. It is protected by modern constitutions as a way of guaranteeing that all have the opportunity to enjoy such a right.

The Constitution of Kosovo is no exception. Rather, as we will see below, the Constitution has set a very modern and advanced framework for the protection of the human rights. Therefore, it is foreseen by the Constitution that: *Article 37 [The right to Marriage and Family] 1. Based on free will, everyone enjoys the right to marry and the right to have a family provided by law. 2. Marriage and divorce are regulated by law and are based on the equality of spouses. 3. Family enjoys special protection by the state, in a manner provided by law.* Three elements are noted in paragraph 1 of Article 37 which establishes the protection of the right to marriage and family.

- The element of free will – that marriage and family are protected as rights only when they are established on the basis of free will.
- Everyone enjoys this right – so the constitution has not set an exclusionary and categorical definition and,
- The creation of marriage and family should be in accordance with the law.

It can be said that in principle the Assembly has full authority to make laws. However, the Court has found in one case that *"there are some limitations on the right or the authority of the Assembly to adopt legislation: (1) Legislation should be in accordance with the Constitution and its principles. (2) Legislation affecting individuals, corporations*

[3] This conclusion is based on the fact that on article 56 of the Constitution is also defined that *Derogation of the fundamental rights and freedoms guaranteed by Articles 23, 24, 25, 27, 28, 29, 31, 33, 34, 37 and 38 of this Constitution shall not be permitted under any circumstances.*

or persons should be legitimate and should be proportionate to the rights of all citizens of Kosovo ... "(Ko 119/10, par.54).

When making laws, the Assembly is limited on at least two levels. First, the laws must be in accordance with the Constitution. Second, when a law restricts any constitutional right, that restriction is constitutional only if it is proportionate. Therefore, since the Constitution has also provided that ***each person and body in Kosovo is subject to the provisions of the Constitution*** (Article 16, paragraph 4), we should analyse the provisions of the Constitution regarding the manner of protection of such fundamental rights as the right for marriage and family.

This is necessary because according to Article 16 the Government, the Assembly and each body in Kosovo is obliged to comply with the constitutional provisions in the performance of their respective functions as proposers or adopters of laws. Thus, we note that, the Constitution, since its preamble it to create a state of equal citizens, which will guarantee the rights of each citizen, civil liberties and the equality of all citizens before the law as an ideal intended to be achieved through constitutional and legal protection of rights. Shortly thereafter, the basic provisions stipulate that the equality before the law is the principle upon which public authority will be exercised in Kosovo. Article 3, paragraph 2of the Constitution defines the following: Article 3[Equality before the Law] *"2. The exercise of public authority in Kosovo shall be based upon the principles of equality of all individuals before the law..."*

Further, respect for human rights and freedoms and non-discrimination are set out as the values and principles upon which the constitutional order of Kosovo is built (Article 7, paragraph 1). Equality before the law, except that it is established as a principle and the ideal sought to be achieved, set forth in Article 3, is also regulated as a specific right in Chapter II governing the Fundamental Rights and Freedoms. It is stipulated that: Article 24 [Equality before the law]"[1]. *All are equal before the law.* ***Everyone enjoys the right to equal legal protection without discrimination.*** *2.* ***No one shall be discriminated against on grounds of*** *race, colour, 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."*(emphasis added).

With superficial research, it is noticed that the Constitutional Court cited "sexual orientation" under Article 24 in at least sixteen (16) cases[4]. The Court, although has talked about this issue in other contexts, nevertheless gives a signal that in the future it might use Article 24 and the basis of sexual orientation as a basis for discrimination in any case that might come before this Court to assess the constitutionality of any law. In one case the Court has found, *inter alia*, that *when a law restricts constitutional rights ... such a constraint is constitutional if it is proportional.*

[4] See cases: KI 96/17; KI 55/17; KO 01/17; Ki 82/16; KI 11/16; KI 10/15; KI 03/16; KI 58/15; KO 130/15; KO 100/14; KI 89 13; KO 108/13; KI 163 11; Ko 45 and 46/12; KO 02/09.

Proportionality test is described in Article 55 of the Constitution. (KO 131/12, par.127). There the Court elaborates on two conditions for restricting a right: 1. That the restriction is made by law; and 2. To the extent of necessity in an open and democratic society. (see KO 131/12, par.128-131). Regarding the "necessary part of an open and democratic society" the Court lists these elements that must be assessed in any limitation: (a) The essence of constitutional law; (b) The importance of Limiting Purpose; (c) The nature and degree of restriction; (d) The link between the limitation and the goal that it is to be achieved; and (e) Possibility to achieve the goal with the smallest limitation.

Being a fundamental right, the right to marriage and family should be allowed to enjoy all without discrimination in accordance with Article 24 of the Constitution. In accordance to Article 55 of the Constitution, this right can be regulated at the legislative level only in accordance with the provisions set out in the Constitution. Apart from the aforementioned guarantees, the Kosovo Constitution establishes another level of protection and constitutional advancement of rights. Article 22 of the Constitution provides that: Article 22 [Direct Applicability of International Agreements and Instruments] *"Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions:*

(1) Universal Declaration of Human Rights;
(2) European Convention for the Protection of Human Rights and its Protocols;
(3) International Covenant on Civil and Political Rights Protocols;
(4) Council of Europe Framework Convention for the Protection of National Minorities;...

In the following, we will briefly dwell only on the analysis of the level of protection defined by the ECHR. This also in conjunction with Article 53 of the Constitution, which stipulates *that* ***human rights and fundamental freedoms guaranteed by this Constitution are interpreted in harmony with the decisions of the European Court of Human Rights.*** Article 1 of Protocol 12 to the Convention provides that the enjoyment of any right protected by law will be ensured [by states] *without any discrimination based on sex, race, color, language, religion, political opinion or other, national or social origin, association with a national group, property, birth or other status.* This article is of crucial importance because it establishes the principle of enjoyment without discrimination of rights not only to those protected by the Convention but also to all the rights that States protect by their own laws. Therefore, since the European Convention on Human Rights and its Protocols are directly applicable, the Laws that are initiated by the Government and approved by the Assembly should be in accordance with it. Being a fundamental right, the right of family and marriage should be enjoyed by all without discrimination. In any other case, we will have a law that is in not in consistence of Article 22 of the Constitution, which is contrary to the protection afforded by the Convention and consequently according to the power of Article 22 of the Constitution in that case would prevail the Convention.

Recent initiative on drafting the Civil Code

The most recent draft Civil Code, does not contain any provision that enables same-sex couples to recognize any form of their relationships and as such does not enable same-sex couples' to enjoy their right to family life. The main argument for non-recognition of same-sex relations given by the working group and the MoJ is that Kosovo's society is not ready for this step.. The draft Civil Code, under article 1138 paragraph 2, stipulates that a special law will regulate civil unions. Meaning that same-sex relationships (marriage and/or partnership registration) will need to be regulated with a special law.

Art. 1138, paragraph 1 hedraft Civil Code, under the responsibility of the MoJ, supported by an EU funded project provides several definitions of marriage, such as: *"marriage is a legally registered union of two spouses of different sexes…., …marriage is continuous legally regulated live union of husband and wife…",.*

Paragraph 2 of art.1138 stipulates that *"Other forms of civil unions are regulated with a specific law."* The purpose of the Civil Code is codification of the civil law, therefore it should be more inclusive. Leaving open the possibility to regulate other issues with the special law, is in contradiction with the sole purpose of codifying the civil law in Kosovo.

Paragraph 4, of art. 1138 lists only three protected grounds from discrimination (race, nationality and religion) which is less than what art 24 of the Constitution of Kosovo guarantees *(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).*The protected grounds explicitly mentioned in the Kosovo Constitution are the minimum of guarantees that the Civil Code can provide. Whereas, the maximum of guarantees that can be the same provided by the Law on protection from discrimination *(nationality or affiliation with any community, social and national origin, race, ethnicity, color, birth, origin, sex, gender, gender identity, sexual orientation, language, citizenship, religion or belief, political affiliation or conviction, social or personal status, age, marital or family status, maternity, maternity leave, wealth status, health status, mental or physical disability, kinship inheritance or any other status,* with the purpose of implementing the principle of equal treatment).

The working group (WG)assigned to work in the draft of Civil Code consists of representatives from different branches of the government, the judiciary, the notaries, Kosovo Bar Association, professional organisations, and international organisations. The WG met regularly to draft various revisions of the current legislation in the civil field for the purpose of drafting the Civil Code of Kosovo and to integrate contemporary legal standards, principles of the Kosovo Constitution and EU *Acquis*. However, none of the latter seems to be a concern of law makers as they have decided to ignore the spirit of the Constitution that provides the right to

marriage for all and the recent ECtHR practice regard to states positive obligation to legally recognize same-sex relationships.

Recent developments on Same-sex marriages and Civil Partnerships in Europe

The research shows that looking at EU member states where the LGBTI rights have advanced in respect to extending marriage rights to same-couples has lead governments to constitutional convention or referendums to make certain amendments within their constitutions.

The Republic of Ireland has enabled in2011. The government held a constitutional convention in 2013 with a majority voting in favour of amending the constitution in order to extend marriage rights to same-sex couples. The amendment to the constitution provides the following *"marriage may be contracted in accordance with the law by two persons without distinction as to their sex."* 62.1%of the electorate voted in favour of the amendment, thus becoming the first country worldwide to introduce same-sex marriage through national referendum.

Liechtenstein has also legally regulated the registered partnerships through a referendum with 68% of voters voting pro registered partnerships in 2011. The United Kingdom is another example of changing legislation if favour of same-sex marriage by a public consultation in 2012. These changes intend to be applicable in England and Wales and the draft law came into effect the following year. The Scottish government also launched a similar consultation, aiming to legalise same-sex marriages. Same-sex marriages are legalised in France since May 2013, when the French president signed a law authorising marriage and adoption by gay couples. The Parliament of Malta followed suit voting in favour of the Civil Union Act which recognizes same-sex couples and permits them to adopt children on 14 April 2014, same day the parliament also voted to a constitutional amendment to ban discrimination based on sexual orientation and gender identity. Last but not least, the Croatian Parliament, despite having changed the constitution that marriage is between man and woman, passed the Life Partnership Act giving same-sex couples similar rights to married couples, except for adoption.

These are just few good examples of how EU member states have come to recognizing rights of same-sex couples to family life. Yet, there are a number of EU member states that are far from realising full equality of the LGBTI persons. The EU and its member states have been quite critical to foreign countries for not respecting LGBTI rights by viciously attacking them for their outrageous anti-gay legislation like Uganda and Kyrgyzstan.

However, the EU per se has not done sufficiently to impede regression that is taking place on its own soil. The newest EU-state Croatia held a constitutional referendum in which the majority of the population voted in favour of banning

same-sex marriages. Six other EU member states have the same provisions in their constitution, including Poland. Slovakia has already introduced similar restriction to further tighten the legal definition of the family and ban the right to adopt for same-sex couples. Yet, the European Parliament has not passed a single motion condemning these recent developments.

Considering these limits to the recognition of same-sex marriage in EU, yet again it shows some lack of European leadership invested in human rights and more particularly in LGBTI rights. However, one may wish that such marriages be recognised in every single European Country, but the same can't be imposed and the idea is unlikely to be supported by member states that are against same-sex marriages, such as Poland. The only acceptable solution has to come from member states itself. The more legislation pro same-sex marriages and/or civil partnerships is adopted, less discrimination will take place, at least until a consensus emerges. In this case, the positive referendum in Ireland, which is still perceived as a religious state, the favourable vote in Germany in 2017, and the case of Albania trying to pass a law to regulate gay marriage may help to accelerate positive developments in other countries.

Cases of same-sex partnerships/unions (Life Partnerships) IN EUROPEAN UNION

The Charter of Fundamental Rights of the European Union, which was signed on December 7th 2000 and entered into force on December 1st2009, read as follows: **Article 7** *"Everyone has the right to respect for his or her private and family life, home and communications;"* **Article 9** *"The right to marry and to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights;"* and **Article 21** *"1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."* It has been a long fight for homosexual couples in their quest for the right to a civil union. Indeed, they had to wait until 2015 and Oliari and Others v. Italy.[5]

However, they were not deprived of their rights before this case. Indeed, many cases went before the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) to claim the alignment of homosexual rights with heterosexual ones. Thanks to this case law, same-sex couples have seen their rights improve over the last few decades. The first major step in the fight for equality was taken by the ECtHR in *Norris v. Ireland*.[6] In this case, David Norris successfully claimed that Ireland's criminalisation of certain homosexual acts between consenting adult men was in breach of Article 8 of the European Convention on Human Rights (ECHR). This led Ireland to decriminalise homosexuality in 1993. From that moment, the

[5] https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-156265%22]}

[6] ECtHR, *Norris v. Ireland* (6/1987/129/180), 26 October 1988

ECtHR continued to support the development of homosexual rights, as did the ECJ, granting homosexuals the right to succeed a tenancy after the death of a companion for instance.

Important progress was also made in the *Schalk & Kopf v. Austria.*[7] In this case, while the ECtHR denied the applicants the right to marry, it did recognise that the relationship of cohabiting same-sex couples living in a stable de facto partnership falls within the notion of "family life". That decision took into account the evolution of society and the growing number of countries which had already granted rights to homosexual couples. Moreover, the applicants were a same-sex couple living in Vienna, Austria who were denied the rights to marry because, according to the Austrian Civil Code, *marriage could only be contracted between two persons of opposite sex.* The court noted that *"there is an emerging European Consensus towards legal recognition of same-sex couples."* Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as on of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes. While the ECHR has always given States a wide margin of appreciation to choose whether they want to grant same-sex couples the right to marry, it narrowed the margin regarding the right to enter into a civil union.

In 2000, The Parliamentary Assembly of the Council of Europe issued the Recommendation 1474 on situation of lesbians and gays in Council of Europe member states, recommending to Committee of Ministers to call upon member states *"to adopt legislation which makes provision for registered partnerships."* [8] In the recommendation of 2010 on measures to combat discrimination on grounds of sexual orientation or gender identity, the Committee of Ministers recommended that "member states shall undertake steps to ensure legislative recognition for solid couples, without discrimination, similar to couples of same sex/gender.[9]

Current jurisprudence of the European Court of Human Rights (ECtHR) establishes a solid ground for recognition of the needs of same-sex/gender couples, who should be entitled to enjoy same rights as couples of different sex/genders. It's unquestionable that a relationship of a same-sex/gender couple falls under the notion of "private life" protected with article 8 of the European Convention on Human Rights (ECHR). In the case of Schalk and Kopf[10], and Vallianatos[11], the ECtHR

[7] ECtHR, *Schalk and Kopf v. Austria*, No. 30141/04, 24 June 2010

[8] For more info, see recommendation 1474, available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML-2HTML-en.asp?fileid=16829&lang=en.

[9] For more info, see recommendation Committee of Ministers of the Council of Europe CM/Rec(2010)5, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cf40a.

[10] For more see case of ECtHR Schalk and Kopf against Austria, available at: https://hudoc.echr.coe.int/eng#{%22dmdocnumber%22:[%22870457%22],%22itemid%22:[%22001-99605%22]}.

[11] For more see case of ECtHR Valliantos and others against Greece, available at: https://hudoc.echr.coe.int/

further concluded that the relationship of a same-sex/gender couple who de facto lives in a solid partnership is also included in the notion of "family live" as per article 8.

As mentioned above, in 2015, ECHR issued a decision on the case of Oliari[12], where three couples of same-sex/gender complained of not having any possibility of their relationship be legally recognized in Italy, whether through marriage or a form of registered partnership. ECtHR concluded that Italy violated article 8 of ECHR by failing to offer registered partnership for couples of same sex. In the case of Oliari, ECHR decided on a positive obligation towards states in order to ensure legal recognition for couples of same-sex/gender as a form of protection of their right to family life.

Given the growing recognition of same-sex couples' rights, we can wonder today to what extent the European Courts protect same-sex couples and influence European States. Since Europe has always been at the forefront of recognising the rights of homosexuals, are the ECtHR and the ECJ willing to put same-sex couples on an equal footing with heterosexual couples?

eng#{%22itemid%22:[%22001-128294%22]}.

[12] For more see the case of Oliari and others against Italy, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-156265%22]}.

CONCLUSION

Based on this comparative analysis it can be concluded that the draft of Civil Code of Kosovo is in violation of the Constitution of Kosovo and the practices of the European Court of Human Rights since by any means does not recognize the partnership relations of the same-sex/gender persons. Consequently, the draft of Civil Code does not provide equal access to the right to family life for couples of the same sex/gender. In Kosovo's constitutional rights, the right to marriage and family is a fundamental right reserved for all citizens of Kosovo regardless of sex/gender. Being as such, it enjoys a high constitutional protection. This right is excluded from the prescribed limits even in the event of a state of emergency. This should serve as an indication to the lawmaker on the importance of this right so that during the law making process it is not put in a situation where constitutional concerns may be raised by any proposed or approved law.

The right to marriage and family should be allowed to enjoy all without discrimination in accordance with Article 24 of the Constitution. In accordance to Article 55 of the Constitution, this right may be regulated at the legislative level only in accordance with the provisions laid down in the Constitution.

The prohibition of discrimination in ensuring the enjoyment of the rights protected by law is also a requirement of international standards accepted and directly applicable in Kosovo. Article 22 of the Constitution makes it directly applicable, and even with higher powers than ordinary laws, some instruments and international conventions on human rights. One of them is the European Convention on Human Rights and Freedoms and its Protocols. In accordance to Article 1 of Protocol 12, States are obliged to provide the same protection to all without discrimination in the grounds mentioned above (see above) of all rights, not only those protected by the Convention but also of those protected by local laws.

Since the Constitution of Kosovo provides protection against discrimination, including on the basis of sexual orientation, as mentioned above, it can be said that the Constitution of Kosovo, in its letter and spirit, provides sufficient indications of allowance constitutionally that everyone enjoys the right to marriage (under Article 37) and without discrimination on grounds of sexual orientation (under Article 24).

Finally, same-sex couples have obviously acquired growing protection over the past decades. While they were first considered as criminals in many countries, same-sex couples are today recognised as a family in their own right and therefore benefit from most of the rights derived from Article 8 of the ECHR. Firstly, they were only granted scattered rights, but they have recently been granted a status to guarantee their protection, thanks to the recognition of the right to enter into a civil union. However, same-sex couples' protection will not be completely achieved until the

ECtHR decides to recognise the right for them to marry and forces Member States to change their legislation, but it still seems too early for the ECtHR to take this ultimate step forward.

Based on this desk research, it is recommended that the Ministry of Justice, should take into the account the recommendations that have been delivered on March 2019 by CSGD and CEL proposing redefining the term "spouse" in particular with provisions under marriage, and alternatively proposing to establish civil partnership as a form of legal recognition for couples of same-sex/gender.

RECOMMENDATIONS

As a result, based on this research, we recommend the following:

The strict legal meaning of the term 'spouse' as stipulated under article 37 of the Constitution needs to be followed, and avoid that civil unions need to be regulated by special law. It is highly recommended as well that civil unions/registered partnership will also be regulated in the Family law contained in Book Four of the Civil Code of Kosovo.

- It is highly recommended that a communication and outreach programme, with educational elements on same sex marriage and other civil unions, is implemented following the amendments in the civil code as per recommendations given herein.
- Remove any reference of "man and woman" and "different sexes" in **art. 1138, paragraph 1.** The wording "spouses of different sexes" and "husband and wife" should be replaced with the phrase "two persons".
- Delete **paragraph 2, of art. 1138.** The purpose of this Code is codification of the civil law, therefore it should be more inclusive. If we leave open the possibility to regulate other issues with special law, is in contradiction with the sole purpose of codifying the civil law in Kosovo.
- **Paragraph 4, of art. 1138** is in conflict with **art 24 of the Constitution of Kosovo** as it limits protection grounds from discrimination with paragraph 2, art. 24 of the Constitution of Kosovo.

In case the Ministry of Justice does not take into consideration recommendations on marriage, alternatively we propose to establish civil partnership as a form of legal recognition for couples of same-sex/gender. Therefore, the following legal provisions:

- **Article XXXX - Civil Partnership:** 1) Civil Partnership means legal relation between two persons of same and different sex/gender established on the grounds of this Book; 2) Each person fulfilling requirements stipulated in this book, can register and enter into civil partnership, bound to obligations and reliabilities, and enjoy protection and benefits provided from this book; 3) Couples in civil partnership shall be recognized and respected.
- **Article XXXX - Conditions of concluding Civil Partnership:** 1) Person who has not reached the age of eighteen cannot enter into a civil partnership; 2) There should not be any limitations of concluding civil partnership.
- **Article XXXX - Limitations of concluding civil partnership:** Limitations set forth for concluding marriage and cohabitation shall apply accordingly for the civil partnership.
- **Article XXXX - The rights and obligations of persons in a civil partnership:** Persons in a civil partnership are equal to all personal and property relations.

- **Article XXXX - Asset relations of persons in a civil partnership:** Provisions in regard to asset relations applicable to spouses in marriage and cohabitation apply accordingly to partners in civil partnership.
- **Article XXXX – Adoption:** Persons in civil partnership recognized in this book cannot be adopters.
- **Article XXXX - Registration of civil partnership:** Applicable provisions for conclusion and registration of civil marriage shall apply accordingly for civil partnership.
- **Article XXXX - Dissolution of civil partnership:** Applicable provisions for dissolution of civil marriage shall apply accordingly for civil partnership.

CONTRIBUTION

An analysis of compared cases in the region and EU will enable establishing good basis for further research for the matter in question. Hence, the desk research will not only have the commodity to offer quantitative data for the issue of concern but will also provide qualitative information for parties involved, in particular to actors involved in decision making processes.

Therefore, this research will contribute to an informed decision-making process on the matter of same-sex marriages, and civil unions by providing a comparative report/ paper with conclusions and tangible recommendations to be taken into account and furthermore, be properly implemented.



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