**Draft Amendment XXXIII – Protection of Marriage or Limiting the Right**

**to Private and Family Life?**

Defining the union (marriage and civil union) between one man and one woman as the only form of shared life producing legal effects violates the right to family life; the principle of equality of all citizens; the principle of justice; the rule of law; the principle of plurality; the right of citizens to be the bearers of sovereignty, dignity, and individual autonomy guaranteed under the Constitution of the Republic of Macedonia; and by that violates the right to protection against discrimination, as well as other rights that guarantee equal treatment of all citizens.

Additionally, these amendments to the Constitution violate the democratic, secular, and civil structure of the constitutional order of the Republic of Macedonia, replacing it with a tradition and a system of values​​ contrary to it, leading to the exclusion of justice and the inclusive practices that this structure once provided.

The European constitutional precedent defining a civil union exclusively as the union between one man and one woman and the consequences that this definition of marriage and civil union will have on the right to family life, collide with ratified international documents which are a part of the national legal system of the Republic of Macedonia and are superior to national legislation (see Article 8 of the ECHR, COE recommendations on the right to respect for private and family life). In this way, the legislator risks creating a flagrant contradiction and practical conflict between constitutional provisions and the provisions of ratified international documents. Also, if this effort of the Macedonian Government gets voted by the Macedonian Parliament, it will create precedence in European law on restricting the right of family life through the use of Constitutional mechanisms. This presents a danger to the development of human rights in Europe, because it is a model that can easily be later applied in other national contexts. To be more specific, the constitutional restriction of international human rights standards is not regulated equally among states in Europe. Some countries, like Belgium and the Netherlands clearly state the supremacy of international treaties over national constitutional law, others, like Austria and Italy equalize them. Few states, like Romania, Slovakia and the Czech Republic clearly predict the supremacy only of international human rights standards and *ius cogens* norms over domestic constitutional law. Most countries however, either clearly state or they imply trough jurisprudence that international law is inferior to domestic constitutional law, despite it being superior to other (non-constitutional) law. Among those are Estonia, France, Germany, Greece, Lithuania, Poland, Macedonia, Bosnia and Herzegovina and others. In these countries, there are only two international remedies that can be applied in case of constitutional violation of human rights. First, the Venice Commission can assist and advise individual countries in constitutional matters in order to improve functioning of democratic institutions and the protection of human rights, but its Opinions, although influential, are not obligatory to Member States. Second, the European Court for Human Rights can rule on any case of individual violation of human rights by member states, but only after the victim would have exhausted all judicial remedies available in the state concerned. If the restrictions of any specific right is regulated by a Constitution, instead of a national Law, that means that the entire domestic legal system is restrictive to that particular right as well, and the exhaustion of all judicial remedies can become a nearly impossible task. Furthermore, because of the supremacy of constitutional law over international law in most countries in Europe, the implementation of court rulings that reefer directly to constitutional norms can be questionable. And final but not least, Constitutions are much more rigid to change than national laws are, and future national governments (even those that will be oriented to the progression of LGBTI rights in Europe) will have a much more difficult task reaching the national political consensus needed to change their Constitutions, then they would need for the change of any individual national Law.

In national legal context, the difficulties that same-sex partners face as parties in court proceedings related to the Criminal Code, the Law on Criminal Procedure, the Law on Misdemeanors, the Law on Protection from Domestic Violence, the Law on Labor Relations, the Law on Health Protection, the Law on the Protection of Patients' Rights, the Succession Act, the Law on Health Insurance, the Law on Social Protection, the Law on Civil Procedure, the Law on Foreigners, the Law on Asylum, the Citizenship Act, the Law on Property and Other Real Rights, must not be disregarded. Should the amendments be accepted the relationship between the (same-sex) parties in such cases would be ignored, even if it is a constitutive element of the case (e.g. domestic violence between same-sex partners), which brings into question the access to justice for LGBTI people. What is more, such constitutional formulation will only further solidify the exclusory and discriminatory attitude of the national legal system towards LGBTI people in the country.

From a legal perspective, the proposed constitutional definition of marriage is completely unnecessary and the definition of civil unions is absolutely exclusory and discriminatory. Marriage in the Republic of Macedonia is already defined exclusively as the union between one man and one woman. This is done not in one but in two laws – the Family Law and the Law on Prevention and Protection against Discrimination.

Defining marriage under the Constitution is completely over the top and nothing short of an opportunity to score cheap political points. Namely, Croatia did the same last year. Recently, they adopted the Life Partnership Act. This was done because there was a real need of legally regulating the rights of LGBTI people, and this need is pressing in every modern society, including ours. Marriage is just one form of shared life through which one’s rights are being realized.

**International Experiences and Practices**

*Regional Experiences*

In order to suitably compare constitutional and legal treatment of marriage and civil unions in the context of the legal system of the Republic of Macedonia, the sexual orientation and gender identity, we ought to analyze relevant provisions of the Constitutions, the laws on family and on prevention and protection against discrimination of Montenegro, Serbia, Bulgaria, Kosovo, and Albania as a group of countries on a strategic course toward Euro-Atlantic integration. In other words, our national legislation should be analyzed and compared to the legislation regulating marriage, civil unions, and family in the countries of the region.

Articles of the Kosovo and Albania Constitution relating to family life stipulate that *everyone* has the right to marry, without specifying the sex of spouses. The Constitutions of Montenegro, Serbia, and Bulgaria state that marriage can be concluded between one man and one woman. On the other hand, none of the said Constitutions defines the civil union in any way, much less exclusively as a union between one man and one woman. No other Constitution in the region or in Europe prevents defining the forms of shared life that might occur in the future, as it is done with the proposed constitutional amendments. This would make the Republic of Macedonia the only state, not only in the region but also in Europe, envisaging current and future forms of life partnerships exclusively as unions between one man and one woman.

Family Laws of Albania and Bulgaria have no precise limitations regarding the sex of spouses. The Albanian law defines marriage as a union between two spouses, and the Family Law of Bulgaria states that every person has the right to marry. Conversely, the family laws of Serbia, Montenegro, and Kosovo besides defining marriage exclusively as the union between one man and one woman, apply the same definition to the civil unions (registered partnerships).

The laws for protection against discrimination of Albania, Montenegro, and Serbia include sexual orientation and gender identity as discrimination grounds. The same laws of Bulgaria and Kosovo only include sexual orientation. Macedonia thus remains the only country in the region and in Europe whose anti-discrimination law not only lacks these discrimination grounds but also contains a definition of *marriage*.

If an example is to be singled out from the review of the legislation in the region, it would surely be the modern and liberal logic of Albania legislation, where a) there either is a respect for the individual and their rights or sex is not emphasized in legal stipulation and b) all three levels at which marriage is being defined and protected (Constitution, Family Law, and the Law on Prevention and Protection against Discrimination) do not impose any restrictions on family life of partners regardless of their sex and sexual orientation.

*Practice of the European Court of Human Rights*

When it comes to the treatment of marriage in ECHR practice, the situation is clear enough. Article 12 of the European Convention on Human Rights states that ‘Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.’ However, stipulations related to *family life* in Art. 8 of the Convention (where the sex of the right holders is not specified) offer a much broader framework than the right to marry and the right to a family. Legally, this definition includes all other rights, freedoms, and obligations under the national legal system, arising from the voluntary entry of two adults in a particular form of union (marriage or civil union), such as the right to inheritance, housing, health protection and so on.

In the case of *Schalk and Kopf v. Austria* (No. 30141/04, ECHR 2010), according to the Court the relationship of a cohabiting same-sex couple living in a stable *de facto* partnership is falls into the category of ‘family life’, just as would be the case with different-sex couples in a comparable situation. Consequently, they are in a relatively similar situation to different-sex couples in terms of their needs for legal recognition and the protection of their relationship.

In the case of *Goodwin v. The United Kingdom* (App. No. 28957/95) ‘The Court considers that Article 12 secures the fundamental right of a man and woman (1) to marry and (2) to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as per se removing their right to enjoy the first limb of this provision.’ Furthermore, the Court stated that ‘The exercise of the right to marry has social, personal, and legal consequences. This is subject to the national laws of the Contracting States. The limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired.’

In the *Vallianatos and others v. Greece* case (29381/09 and 32684/09), the Court noted that Lithuania and Greece at the time of passing the decision were the only two states in the Council of Europe to have introduced a legal alternative to marriage, both of which were confined to different-sex couples. The applicants inter alia argued that ‘the wish to preserve the ties of the traditional heterosexual family could not constitute substantive grounds such as to justify treating same-sex (cohabiting) couples differently. … Having decided to move away from marriage as the sole formal basis of family life (through the introduction of registered partnerships between different-sex individuals) the legislature had shown a clear disregard for same-sex couples by excluding them from the scope of the Law.’ The court ruled that this legislative discrimination of registered civil same-sex partnerships represents a violation of Article 14 (Prohibition of discrimination) taken in conjunction with Article 8 (Right to respect for private and family life). With this decision Greece will no longer be one of the two Member States of the Council of Europe confining registered (civil) partnerships to different-sex couples. The proposed amendments to the Constitution will make the Republic of Macedonia the second such state in the Council.

Thus, these three cases set forth a few very important matters:

1. Each state is free to define and protect marriage;

2. The concept of *family life* is much broader than the term *marriage*, and the relationship of a cohabiting same-sex couple living in a stable *de facto* partnership falls within the notion of ‘family life’, just as would be the case with different-sex couples in a comparable situation;

3. The exercise of the right to marry shall be subject to the national laws of Contracting States. The limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired; and

4. Any other definition of registered (civil) partnerships with rights inherent in marriage shall not be exclusory and discriminatory to same-sex partners.

Therefore, the logical question that poses itself is how can the state, being free in defining and protecting marriage, at the same time be limited in determining privileges arising from that marriage? The answer is simple – any form of registered partnership. In other words, the state is truly completely free to define marriage as a form of union, but as soon it begins granting rights and privileges inherent in marriage to individuals that are not married under national laws (registered partnerships), the sex and sexual orientation of such individuals must not be an obstacle to the exercise of those rights.

*European Commission for Democracy through Law (Venice Commission)*

In its Opinion on the Fourth Amendment of the Fundamental Law (Constitution) of Hungary, from 14-15 June 2013, the Venice Commission provides a clear view to the constitutional definitions of marriage and civil union that exclude and discriminate against same-sex partners. The document clearly indicates that the state should also protect long-term emotional and economic partnerships between individuals living together (e.g. those relationships in which couples do not or cannot have children). Furthermore, the right of Hungary to define marriage exclusively as the union between one man and one woman is not at all disputed, but at the same time the need for application of the ECHR expanded view of the concept of *family life* under Art. 8 of the Convention (see *Schalk and Kopf v. Austria* (No. 30141/04, ECHR 2010)), as stated above, is clearly indicated.

This means that the Venice Commission has once again confirmed that although states are free to constitutionally define marriage, such definitions should not be contrary to the Convention and the practice of the ECHR in terms of what may constitute *family life* and what the sex of partners should be.

*Other Relevant Experiences*

In its Recommendation CM / Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation and gender identity, the Committee of Ministers of the Council of Europe stresses that discrimination and social exclusion on account of sexual orientation or gender identity may best be overcome by measures targeted both at those who experience such discrimination or exclusion, and the population at large, recommending that Member States:

1. Examine existing legislative and other measures, keep them under review, and collect and analyze relevant data, in order to monitor and redress any direct or indirect discrimination on grounds of sexual orientation or gender identity;

2. Ensure that legislative and other measures are adopted and effectively implemented to combat discrimination on grounds of sexual orientation or gender identity, to ensure respect for the human rights of lesbian, gay, bisexual, and transgender persons and to promote tolerance towards them.

In addition to the recommendation they also state the following:

23. Where national legislation confers rights and obligations on unmarried couples, Member States should ensure that it applies in a non-discriminatory way to both same-sex and different-sex couples, including with respect to survivor’s pension benefits and tenancy rights;

24. Where national legislation recognizes registered same-sex partnerships, Member States should seek to ensure that their legal status and their rights and obligations are equivalent to those of heterosexual couples in a comparable situation;

25. Where national legislation does not recognize nor confer rights or obligations on registered same-sex partnerships and unmarried couples, Member States are invited to consider the possibility of providing, without discrimination of any kind, including against different-sex couples, same-sex couples with legal or other means to address the practical problems related to the social reality in which they live.

Resolution 1728 (2010) of the Parliamentary Assembly of the Council of Europe on 29.04.2010, titled ‘Discrimination based on sexual orientation and gender identity,’ urges Member States where national legislation envisages, to provide legal recognition of same-sex partnerships, through the provision of:

  ‘16.9.1. the same pecuniary rights and obligations as those pertaining to different-sex couples;

16.9.2. ‘next of kin’ status;

16.9.3. measures to ensure that, where one partner in a same-sex relationship is foreign, this partner is accorded the same residence rights as would apply if she or he were in a heterosexual relationship;

16.9.4. recognition of provisions with similar effects adopted by other Member States;’

**Conclusion**

In its elaboration of Amendment XXXIII, the Government of the Republic of Macedonia as the proponent of the constitutional amendments explains the need for this Amendment by stating that marriage as a union is faced with the challenges of ‘modern times’, the attempts for its redefinition, deinstitutionalization, and gradual marginalization; stressing the fact that marriage exclusively defined as the union between one woman and one man is an integral part of human history, a constant and centuries-long tradition in this region. Furthermore, the proponent maintains that such definition of marriage will contribute to its further promotion and acknowledgement in our society. Finally, the proponent argues that moral, ethical, and religious principles of all religions in the country define marriage exclusively as the union between one woman and one man.

At the very end of this Explanatory Note, in but one paragraph, the proponent mentions the constitutional definition of a civil union. In doing so they do not offer any specific arguments and as in the rest of this Amendment Explanatory Note they do not present any information resulting from studies, scientific expert debates, etc.

The lack of valid legal reasoning in the Explanatory Note is easily noticeable.

Marriage in Macedonia is not marginalized, nor are there tendencies for its deinstitutionalization. But even if this is so the constitutional definition cannot provide any more protection in practice than what is already provided under national laws. Besides, preventing the deinstitutionalization of marriage with an amendment containing a definition for a union outside marriage, amidst serious efforts to institutionalize it, is contradictory, to say the least. This definition will only result in the consolidation of homophobic and transphobic policies already incorporated in the existing laws of the state.

The fact that the definition of marriage as the union between one man and one woman is a centuries-long tradition in the region, and that moral, ethical, and religious principles of all religions in the country define marriage exclusively as the union between one woman and one man is also lacking legal basis. The Republic of Macedonia is a secular state under its Constitution and, accordingly, the opinions of one, two or all religions in the creation of policies and laws that apply to *all* citizens, and not just the followers of said religions, should be of no significance. Furthermore, although such definition of marriage may have always been the tradition in this region, contemporary experience in exactly the same area indicates that proposed changes are not typical of all the countries in the region, while the constitutional definition of the civil union is a concept not known to any of the countries ‘in the region’.

The wish to preserve the ties of the traditional heterosexual family could not constitute substantive grounds such as to justify treating same-sex (cohabiting) couples differently. The decision to move away from marriage as the sole formal basis of family life by introducing registered partnerships confined to different-sex couples does not protect it. It does not make sense to express readiness to protect marriage as an institution by simultaneously guaranteeing constitutional rights for a union that is outside it. The only thing that is protected by these changes and is being led to an exclusive and dominant position is the heterosexual nature of all other relationships inside and outside the marital union, not marriage itself.

Constitutional protection of the heterosexual nature of all other relationships outside the marital union is discriminatory in itself, as shown by the European Court of Human Rights and the Venice Commission. The freedom of the state to define marriage is one thing, and quite another is to define registered partnerships, which directly violates the right to family life. If in the first case, the state is free to be guided by its tradition, history, and opinions, it cannot do so in the case of civil unions. There, as international practice shows, it should be guided by the principles of non-discrimination, equality, and inclusion of all forms of family life. The European Court of Human Rights acknowledged that the relationship of a cohabiting same-sex couple living in a stable *de facto* partnership falls within the notion of ‘family life’, just as would be the case with different-sex couples in a comparable situation.

These constitutional changes are radically opposed to and completely out of step with the relevant international resolutions and recommendations. Although they are not binding to Member States, this kind of radical opposition to their very essence, however, is a major concern for the future of the Euro-Atlantic integration aspirations of the country.

These constitutional amendments are not only completely unnecessary and superfluous, but discriminatory and undemocratic at their core. The only real effect they could produce would be the enhanced social stigmatization of LGBTI people, further marginalization of this already marginalized community, as well as unnecessary complications of their daily lives in Macedonia.