

The Rights of Intersex Persons to Establish a Family under Albanian Law. Practice of the ECHR

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Abstract

Gender identity is the way in which a person is self-identified with a gender category, as for example to be female or male, or in some cases intersex, which is none of the distinguishable biological sexes. In principal, intersex persons are part of the society with their rights and obligations, which are not the same with those of the other members of society, in special areas of life.

This paper aims to treat the right of intersex persons to marriage and to establish a family. The paper begins with an overview of definition of intersex persons, their rights, and focuses primarily on the right to establish a family.

The right for a family life has found protection in the Albanian national legislation. The Constitution of the Republic of Albania of 1998 in its Article 53 stipulates that "everyone has the right to marry and have a family" establishing the principle of equality before the law, closely linked to the principle of non-discrimination. The legal provisions set a controversial position on the right to get married and to establish family relationships of the intersex persons, which is based on different arguments.

For the purposes of the research, we aim also to compare the national legislation with the European principles and practice of the European Court of Human Rights (hereinafter referred as ECHR). The paper also includes the opinions and

recommendations of Albanian institutions, as well as those of foreign ones, mainly European, in the area of human rights protection, and especially regarding the rights of the intersex persons.

Key Words: intersex persons, marriage, family, practice of ECHR

1. Introduction

Intersex is used in this paper as an overall term to denote a number of different variations in a person's bodily characteristics that do not match strict medical definitions of male or female. Referring to the Intersex Society of North America, the term intersex describes "*human beings who have naturally occurring differences of sex anatomy and whose biological sex cannot be classified as clearly male or female*" (ISNA, 30 Jun 2008). Many variants of sex characteristics (these characteristics may be chromosomal, hormonal and/or anatomical and may be present to differing degrees) are immediately detected at birth, or even before.

Sometimes these variants become evident only at later stages in life, often during puberty. While most intersex people are healthy, a very small percentage may have medical conditions which might be life-threatening, if not treated promptly. According to the Resolution on Children's right to physical integrity (Parliamentary Assembly of the Council of Europe, 2013), an intersex person may have the biological attributes of both sexes or lack some of the biological attributes considered necessary to be defined as one or the other sex.

Often this term is confounded with the mythological term "hermaphrodite", which implies that a person is both fully male and fully female (Domurat Dreger, 2001). This is a physiologic impossibility. Unfortunately, these persons are still subjects of a wrong sex classification, further from the personnel of the medicine system. They refer them as people with certain sex conditions, based on an outdated terminology about anatomy using general classification based on sex.

Gender identity (Parliamentary Assembly of the Council of Europe, 2012) is one of the 'sex binary' fundamental aspects of a human's life. It is based on the gender binary, which is a type of gender system derived from the idea of the opposite of two biologically classified sexes, to whom are traditionally attributed different biological and social roles and functions (Council of Europe Commissioner for Human Rights, 2015). When basic

aspects of a person's legal status (e.g. birth or death registration), social status (e.g. access to services) or health conditions are frequently defined by the so-called classification of being either 'male' or 'female', intersex people are often stigmatised. This is because their sex characteristics cause them to not belong in any of these classification. It can also lead to grave violations of their rights to physical and psychological integrity as well as other fundamental rights.

Intersex people are presented in different ways by different cultures and legislations. In some cultures, such people were included in larger "third gender" or gender-bending social roles along with other individuals. In most societies, intersex people are faced with their expectations to be consistent with either a female or a male gender role (Gagnon and Simon, 1973)

Currently, worldwide the only country, who guaranties the equal rights for the intersex people is South Africa through a constitutional provision (Act 22 of 2005). While, Germany became the first country in Europe who has intentionally recognized the rights of this marginalized group and who allow the designation of the intersex people by a third category, marked by indeterminate or intersex. Australia has introduced a similar measure, too. In other parts of the world, are granted the rights of the human beings, which are clearly classified as male or female. The intersex people are tenuously included and profit subsequently the rights of one of the legal predicted sex binary, as long as they are truly male or female. There is a complete lack of human rights protection for intersex people, and anti-discrimination laws, which are generally inadequate to protect them from violations. The legal definition of a third category of sex – binary, for this kind of natural sex deformations, would solve the dilemma of newborn's parents faced with the doctors urge to perform sex-assignment on their children. In the European Union intersex issues have progressively emerged as relevant to fundamental rights protection. However, they are still largely treated as medical issues falling outside the scope of public scrutiny.

Many human rights instruments do not address their provisions to intersex people as rights holders, rather protecting "men" and "women". Even where their rights are explicitly predicted and guaranteed by law, intersex people are not identified as their subjects, so those rights are not applied to them. So, they are subjected to many forms of discrimination in many aspects of life, including their family life.

Same-sex marriage is currently being debated in Republic of Albania, as elsewhere. Albania has advocated strongly for marriage to be defined as a consensual relationship between two people, and if it succeeds, then intersex people will assign for marriage under that definition. If, however, it is framed in terms of the sex binary, so that marriage needs to be between a man and a woman, or in other sex binary combinations, they would be excluded. It is almost impossible to live an intersex life and have a family, because it is only possible for intersex people to have a family life if the erasure of their differences is accepted. Under our current family law regulation, these inequalities cannot be clearly rectified.

The Constitution of the Republic of Albania from 1998 (Article 15) considers the rights and fundamental freedoms as "indivisible, inalienable, inviolable and stand at the basis of the entire juridical order", sanctioning unbiased without discrimination to all persons living in the Republic of Albania. Relating to persons who have a gender identity opposite to the two popular genders (female or male), we estimate that the provision is inclusive by not setting explicitly the gender types and being exposed to the involvement of discrimination based on the gender identity which differs from one of the classic biological sex.

One of the areas that require attention in international and national level is the marriage between people of this category. During the discussion of the Ombudsman's report, government representatives and members of the Commission on Human Rights expressed their commitment to making improvements to legislation. This proposal is viewed with a critical eye, because it is interpreted as a violation of family values (Special Report of the Ombudsman activities, 2012).

2. Legal recognition of intersex people

Since the gender identity is fundamental to our sense of self, it represents a deeply held and highly personal "conviction of maleness or femaleness (Money, 1994).

In the European level, apart from the legislation on anti-discrimination based on gender identity, birth registration legislation tends to consider all individuals as either male or female. Most national-level legislation in the EU is similar - laws in Germany and Scotland are the only ones to make explicit mention of intersex people (Ebels, 2012). Consequently, in most

Member States it is required, but not always possible, to assign the sex of newborns as intersex.

The moment when birth certificates and registration takes place is frequently the first instance in which intersex people are confronted with a legal issue. This is very problematic for intersex children as it forces those involved in certifying and registering birth to legally choose between the 'male or female' options. In addition, parents frequently lack psychological support services. Legal instruments establish the categorization of person into two distinct sex binary, and this gender classification has significant legal consequences.

In Republic of Albania a person's sex classification is determined at birth and remains the legal sex of an individual's long life. For most of people, the coverage under one of the legal sex determination does not constitute a harmful issue but, for intersex people the assignment of a fixed legal sex classification at birth can cause great privation. It may have an effect on issues as the pension and insurance payments, the ability to state a cause of action for a constitutional equal protection, the sex designation on official documents and in particularly the ability to marry in a particular gender role. Of all of these legal consequences, the one that most profoundly alters an intersex person's fundamental rights relates to the prerogatives that flow from the marital relationship. Marital status dictates a wealth of economic rights, including inheritance rights, spousal support awards, social security benefits, and employee health-related benefits. Equally important, however, are the non-economic rights that come from the marital relationship, including the ability to be declared a legal parent.

Sex determination, in one of the categories mentioned above, is critical condition for purposes of marriage because of the widespread legal prohibition on same-sex marriages. In all the related cases it is required to be determined the legal sex of the parties to ascertain whether the relationship is an illegal same-sex union or a valid heterosexual marriage. Medical establishment of the people with intersex conditions usually is a process of alignment of their physical appearance and biologic criteria with one of the assigned binary sexes.

Currently, Albania does not ensure any legislative framework for gender recognition. Hence, there is not resolved the possibility of introduction of another gender classification in civil status documents, alternative to the male or female binary, or the possibility of medical treatments or surgeries performed on intersex children.

The sex of the child, in the new birth certificate, should be mentioned based on a medical statement. At least four EU Member States allow a sex neutral identification to be registered in birth certificates, such as 'unknown sex' in the United Kingdom (European Commission, 2012). Other forms of practices are known with non-conclusive solutions. So, in Latvia, sex is not included on the birth certificate, but 'unclear sex' is allowed in medical certificates issued by medical staff. In the Netherlands, if the sex of a child is unclear, the birth certificate can state that the sex could not be determined. Within three months of the date of birth, a new birth certificate should be drawn up and the first one destroyed.

The development of best practices for gender recognition will avoid the inaccuracies made in general by European countries in implementation of the European Convention on Human Rights. The ways how other Council of Europe member states have treated gender recognition may be classified as follows:

- a. no provisions for official acknowledgment
- b. provisions for gender recognition without an obligation to go through hormonal treatment or their legal acknowledgment upon verification of gender dysphoria or gender identity disorder (gender dysphoria is the normal diagnosis by psychologists and physicians to describe people who are subjects to a considerable discontent) with their gender, assigned at birth institutions.

In most Council of Europe member states, gender reassignment is made only after the applicant has undergone a supervised medical process.

Based on the legal developments on this issue, exists the potential to invalidate the marriages of many intersex people or deny their right to established family relationships derived from the marriage.

3. Inclusion of intersex people in the scope of anti-discrimination legislation

In the context of the international human rights law, we think that discrimination on the ground of gender identity can be recognised as a special form of discrimination. This point of view is also encountered in the Court's case-law.

Actually, there is no requirement by law that males and females are identically treated but there are requirements that any differential

treatment of males and females should be done only on objective differences and in no case based on sex-role stereotypes.

Out of many various forms of sex discrimination, the one against intersex people is of an exceptionally complex form. However, it can be said that until now there have been made vague efforts to explore these issues and attempt to properly address them. It is not clear whether the existing national and European anti-discrimination legislations include directly or indirectly intersex people within their scopes. Such situation may be due to the fact that EU legislation on gender equality does not address the issue, and the definition of gender is still based on the male/female binary sex model.

According to the Universal Declaration of Human Rights everyone is equal before the law and is entitled to enjoy fundamental freedoms without distinction, and sex is included among the grounds of such impermissible distinction. The principles of the Declaration are translated into legally binding form by the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, both of 1966. These Covenants emphasise that the mentioned rights are applicable to all persons without distinction and particularly state sex as such a ground of impermissible distinction. Furthermore, each Covenant obliges the States that have ratified it, to ensure that both sexes have equal right to enjoy all the rights they establish.

It is worth mentioning that despite the above provisions, there is no reference of gender identity in the Universal Declaration of Human Rights. Nonetheless, a resolution that was adopted by Human Rights Council in 2011 condemned any act of violence and discrimination against individuals on the grounds of their gender identity and sexual orientation. Similarly as in the Universal Declaration, also in the European Convention on Human Rights that was adopted in 1950, there is no reference of gender identity or expression. However, the European Court of Human Rights has ruled positively on a number of intersex cases, but no case of discrimination against intersex people has yet reached the Court of Justice of the European Union, to contest the current understanding related to the sex determination.

According to the authors Schiek, Waddington and Bell, there is “a close relation” between intersexualism and gender. So, it would be rational to underline distinctions based on intersexualism or hermaphroditism as gender deformity (Dagmar, Waddington, Bell, 2007).

In one of the important decisions of Court of Justice of EU, *P. v S.* (*P. v S.*, para. 20), and also with the German Constitutional Court decision on trans-sexuality, where it was recognised that not all trans people strive to undergo a full gender reassignment, is stated that the scope of the directive at issue went beyond "the fact that a person is of one or other sex". So, this has become a supportive argument against the discrimination and protection of the intersex people.

The equal and non-discriminatory treatment is one of the essential arguments, which enforces the position of intersex people regarding the right to establish a family and to benefit from all the personal and ownership family rights.

4. Albanian legislation and the right of marriage

Family life has gained a legal guarantee from the Albanian legislation. So, righteously, in the national legislation of the Republic of Albania Constitution of 1998, in its Article 53 is set that "everyone has the right to marry and have a family", while the Family Code of the year 2003 further affirms this principle in its Article 1, among other notes that "marriage and family enjoy special protection of the state".

The Constitution establishes the principle of equality before the law, closely linked to the principle of non-discrimination. The Constitution says and guarantees, in its Article 18, the principle of equality of all Albanian citizens before the law, i.e. regardless of their gender or sexual orientation. So, based on the provisions of Article 18 of the Constitution, the sexual orientation and gender identity of individuals is subject to differentiated and unequal treatment. Law no. 10221, dated 04.02.2010 "On protection against discrimination" is a framework law governing the application and observance of the principle of equality, and defines the grounds on which one person may be directly or indirectly discriminated. According to Article 1 of the law, the causes of discrimination can be related to gender, race, colour, ethnicity, language, gender identity, sexual orientation, political opinions, religious or philosophical beliefs, economic, educational or social, pregnancy, parenting, parental responsibility, age, family or marital condition, civil status, residence, health status, genetic predispositions, disability, affiliation with a particular group, or for any other reason.

The European Convention on Human Rights, which Albania has

ratified, in its Article 8 stipulates the right to respect for private and family life. Specifically:

1. "Everyone has the right to respect for his private life and family life, his home and correspondence.
2. The public authority cannot interfere with the exercise of this right except in cases when in accordance with the law and is a necessity in terms of public safety, for the protection of public order, health or morals or for the protection of the rights and freedoms of others."

It is clear that Article 8 is fractionated into two parts (Kilkelly, 2001). The first paragraph lays down precise rights of the individual guaranteed by the State and more specifically, the right to respect for private life, family life, home and correspondence. The second part of the second paragraph formulates clearly that these rights are not absolute for public authorities to intervene in certain circumstances.

The right to establish family relationships was recognized and guaranteed in other national and international instruments, in addition to the ECHR. In this respect the Universal Declaration of the Human Rights in its paragraph 3 of the Article 18 provisions that: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State". Also, the Article 10 of the International Covenant on Economic, Social and Cultural Rights guarantees the "protection and assistance as should be provided to the family, which is the natural and fundamental group unit of society, especially for the formation of it and for as long as it has responsibility for the care and education of dependent children".

All these normative acts referred above, internal and external to the juridical system of our country, provide guarantees ensuring family life and the rights arising from it. These acts are part of the Albanian legal system and the legal source for claiming those rights. One of the positive conditions that must exist at the moment when two people wish to marry is that they belong to different sexes. (Omari, 2010). Considering the importance of this condition, the Albanian Family Code provides under Article 7 that "*Marriage can be concluded between a man and a woman who are 18 years or older...*". Based on this provision, we can say that our Family Code prohibits marriage between persons who at the time of marriage have the same gender. The existence of a different sex between spouses is

considered by some family law doctrine as the most important natural condition for marriage. However, the principle of changing the sex between the two spouses does not represent the new world order for the recognition of such marriages (Omari, 2010).

This law applies to all transplants performed within the same individual from one body part to another (article 3 of Law no. 10454, dated 07.21.2011 "Transplant tissue cells and bodies in the Republic of Albania"). In these conditions we see that there isn't any legal obstacle to a person who wants with one's free and complete will to change one's sex, therefore on the same grounds, there should not be any obstacle to bond into marriage. Officer registrar must refer the situation of sex only when that person would enter into a marriage.

It makes sense to assume that any initiative of lawmakers to tackle discrimination against transgender people, may naturally extend to tackling discrimination against intersex people as well. It should be shown utmost care not to confuse intersex people as a subcategory of transgender people, therefore any lawmaking initiative on extending protection to intersex people should not be entangled with that of transgender people. Still it is necessary to make an important remark: intersex people face sex discrimination (as it is mainly deriving from the individuals' biological make-up that is neither exclusively male nor female) rather than discrimination on the grounds of gender identity and expression (the individual's experiencing and manifestation).

5. The European Court of Human Rights' decisions on intersex cases

This section of the paper is entirely dedicated to judicial practice. It is focused mainly on the practise of the European Court of Human Rights and violations of "The right to respect for private and family life" and "The right to marry", stipulated respectively in Article 8 and Article 12.

Intersex court cases, as part of the LGBTI community are seldom encountered. It results that until now only two cases have been reviewed by European courts, and both of them in Germany.

For the purposes of this paper we decided to study one of these decisions, which is about an application for the change of sex on civil status documents to an intersex classification, which was declined by the Court. Regarding birth certificates, there has been a case reviewed in Regional Court of Munich in 2003, which has challenged the binary sex model. The

complainant, who was an intersex person, had requested from the Public Registrar to change its sex status to “Zwitter”, which is the old German expression standing for hermaphrodites, but such request was refused by the latter. The court stated that “hermaphrodites” do occur in nature, but argued that the complainant was not a “hermaphrodite” according to the narrow definition that it referred. Therefore, the court deemed unnecessary to “have to decide whether, in the case of genuine hermaphroditism, the sexual designation ‘hermaphrodite’ could be entered into the Register of Births, Deaths and Marriages.” Additionally, the court argued that “the entry of intersexual as a gender identification in the Register of Births, Deaths and Marriages cannot be considered as an option [...]” since according to it “the terms do not indicate any specific gender [...]”. Furthermore, biology and medicine theories assume that human beings belong to one of two sexes, and any form of doubtful gender is considered as exception to the rule [...]. The research for the contrary that was presented by the complainant was dismissed as a “minority opinion.” Finally, the court stated that the request for addition of a third sex category could not be claimed based on fundamental human rights or the German Constitution. Additionally, such addition “would lead to considerable difficulties in the defining of terms and to uncertainties in the law”.

Relying upon this case, which has been treated by ECHR, we understand that the limitation on having a third option of sexual identity will leave this category of people in uncertainty, and consequently in preclusion to exercise their right to marry. As long as in the Family Code of Republic of Albania, sexual identity of prospective spouses is one of the mandatory criteria to bond into marriage, intersex people will continue to be denied this right.

6. Conclusions

Interpreting widely the existing legal ground, discrimination on grounds of gender identity and gender expression are special forms of discrimination. Practically, the discrimination occurring on intersex people derives because of the strict law provisions of the binary sex model, which consist of only two genders, male or female.

It was seen during the study that there are promising signs in the field of international human rights laws related to the fundamental rights of people

despite their gender identity and gender expression. However, there is still space for improvement in terms of both cultural and legal change.

Even though introduction of legal provisions is indispensable in order to protect intersex people, it will be only a stepping stone in what must be a comprehensive social change that accepts diversity of every kind.

Although legal change to protect intersex people is vital, it is only the first step in what must be broad and deep social change that accepts diversity of every kind. Like most countries in the world, Albania is a democratic country that has as its basis the respect of human rights. In itself, democracy is the rule of the majority, while respecting the minority, so at this point it should be included also this part of the LGBTI community.

Mentioned previously, referring to the Article 18 of the Albanian Constitution, all citizens are equal before the law and no one can be discriminated against for reasons such as gender, ethnicity, language, race, religion, political opinions, religious or philosophical beliefs, economic, educational, social or origin. This discrimination can be allowed only for a reasonable and objective justification. Although the Constitution does not explicitly mention non-discrimination founded on sexual orientation, such thing is provisioned under the Law nr. 10 221, date 4.2.2010 on "Protection from discrimination", where is defined the application of the principle of non-discrimination based on sexual identity and orientation. The situation changes when people are in different conditions and cannot enjoy these rights, and then this formal equality remains if it cannot be realized in practice. Although persons under the law should not be discriminated against because of sexual identity and orientation, practice shows different examples.

At the end of this paper, we propose that the solution of this issue that affects these persons, who are precluded from the right to marry, may be focused in the following points:

Firstly, it would be approached through the essential legal changes in the Family Code. As mentioned also above, these changes have been object of many discussions and they are based on the freedom to make life choices. Removal of the positive condition on the diversity of the future spouses' sex will ensure the right to marry to a broad range group of people, amongst which also to intersex people. It is worth to bring to attention that the sexual assignment of these persons is based on medical data which are not dependent on the will or preferences of intersex people.

The second option, and this is the broader one, consists in the application of the material condition for the bond to marriage by giving the opportunity to these persons to position themselves in one of the sexual binaries. After this, they are guaranteed the right to bond into marriage with persons from the opposite sex of the one defined as per their selection.

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