

## Same-sex partnership – a sleeper in BiH’s EU integration process

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## Status quo of LGBTI rights in Bosnia and Herzegovina

For Bosnia and Herzegovina, 2015 has indicated a new approach by the legislative and executive branch at state and entity levels; a shift from institutional ignorance towards working on improving the legal and policy frameworks for protection of LGBTI people's rights. On May 19, 2015, LGBTI rights were discussed for the first time in parliament, and governments began including specific measures for the protection of LGBTI people's rights. However, these measures stop short of addressing the issues of discrimination and inequality in areas of private and family life of LGBTI people, especially the rights of same-sex couples.

LGBTI persons and same-sex couples are a reality of Bosnian and Herzegovinian society. Unfortunately, the existing legal framework does not engage in protecting or recognising these relationships in any way, which means that individuals in same-sex partnerships that are rooted in an emotionally stable family life cannot claim their constitutional rights to freedom and security, private and family life and home, to forming a family, protection of property, or freedom of movement and residence, solely on the basis of their sexual orientation. LGBTI people in same-sex couples, left outside the realm of law, are interdicted numerous economic and social rights. They don't have any access to benefits heterosexual couples enjoy, which are given to them by their employers, no protection for the assets they have jointly acquired nor the rules of separations in cases where the partners don't want to stay together any longer. Unlike their heterosexual fellow citizens, homosexual citizens' life unions are not entitled to legally regulated mutual support of partners when needed or to mutual care and support when one of them is sick; they cannot count on the pension or social support in case their partner passes away; they are not entitled to tax exemptions that the state awards for mutual maintenance of family members in order to strengthen the social security of the society; they do not have access to the benefits employers provide to support family life as a form of compensation for the work employees perform; the property they acquired together during the course of their family life is not protected and there are no rules that apply to resolve matters in case of separation of partners.

As a member state of the Council of Europe, and a state wanting to accede to the EU, BiH will have to establish a legal framework which would regulate family rights of same-sex couples. The European Court of Human Rights has ruled on multiple occasions, including the latest decision Oliari vs. Italy, that the same-sex partnerships are covered by the provision on protection of family life and that states have to guarantee at least the same level of legal protection to same-sex partnerships that they offer to heterosexual civil partnerships, in order to ensure compliance with this right.

*In Oliari vs. Italy, the European Court of Human Rights decided that a state which fails to draft and vote on legislation that would recognize the status of family life union to stable emotional unions of same-sex couples through a civil form of union with relevant rights and obligations, violates the rights protected by Articles 14 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.*

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The lack of even the minimum level of protection for their family life makes it difficult for them, if not impossible, to freely move within Bosnia and Herzegovina or abroad as this lack of protection means that any decision to move causes uncertainty in terms of the survival of the union - something heterosexual couples do not have to face.

Since the European Convention on Human Rights and Fundamental Freedoms is directly applicable in BiH, through its ratification in the BiH Constitution, it legally binds the state and the entities, and therefore the Institutions at all levels are bound to regulate same-sex partnerships by updating their legal frameworks to better protect the citizens' human rights.

In summary, stable same-sex emotional unions of family life do not have the possibility of enjoying the constitutionally guaranteed *rights to personal liberty and security of person, private and family life and home, to found a family, protection of acquired property or freedom of movement and residence* only because of their sexual orientation and not because these rights are less important or less necessary. By failing to protect the listed fundamental rights and freedoms, Bosnia and Herzegovina discriminates its same-sex citizens by violating the guarantee of equality referred to in the Constitution breaching thus the promise given in the Constitution that Bosnia and Herzegovina and both entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms.

<sup>1</sup> Final judgement is available at. [http://hudoc.echr.coe.int/eng?i=001-156265&sa=X&ved=0CDUQ9QEwD2oVChMIwICr1bn2xgIVI75yCh186Qh-#{"itemid":\["001-156265"\]}](http://hudoc.echr.coe.int/eng?i=001-156265&sa=X&ved=0CDUQ9QEwD2oVChMIwICr1bn2xgIVI75yCh186Qh-#{)

## ECHR rulings on same-sex partnerships

As the European Convention on Human Rights is a part of the BiH's Constitution, the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols should apply directly in Bosnia and Herzegovina and these should have priority over all other law.

Not just in case of Oliari vs. Italy, but as well in others, the European Court of Human Rights interpreting Article 8 of the ECHR in its judgments, consistently takes the view that stable emotional unions of same-sex couples constitute an equally valued form of family life. The Court's judgments were equally influenced by provisions of European Union law that reflect a growing tendency to include same-sex couples in the notion of "family" as well as the positive changes in social attitudes towards same-sex couples in numerous member states. Parallel to that, considerable number of member States have afforded legal recognition to same-sex couples. Consequently, ECHR views the relationship of a cohabiting same-sex couple living in a stable de facto partnership to fall within the notion of "family life", just as the relationship of a different-sex couple in the same situation would.

In its later rulings, the European Court of Human Rights clearly specified the obligation of the states, parties to the Convention to ensure in their legal orders equal dignity for same-sex unions by a form of legal recognition of family life to stable emotional unions of same-sex couples. It became clear that states parties to the Convention, and particularly those constituting a part of the common space of European Union which is founded on the freedom of movement, have the obligation to legally recognize stable emotional unions of same-sex couples as family life unions and to protect them by rights and obligations pertaining to a civil institute that the states are to decide on.

## Acquis Communautaire and ECJ rulings regarding same-sex partnerships

The case law of the Court of Justice of the European Union and the relevant views of the European Commission and the European Parliament clearly indicate that the European Union expects from current and future member states to ensure legal recognition of same-sex family unions and to guarantee them all the rights, benefits, and obligations that the European Union legal order guarantees to all its citizens and their families.

The Charter of Fundamental Rights of the European Union, equivalent by its legal power to the constitutional status of the European Union founding treaty, explicitly stipulates that „the right to (...) found a family shall be guaranteed in accordance with the national laws“, provided that member states respect the principle of equality which explicitly includes sexual orientation as the prohibited ground for discrimination.

The European Union does not have the competence to regulate issues of family relations. However, the jurisprudence of the Court of Justice of the European Union showed that member states still have to comply with EU law, in particular, with the provisions relating to the principle of non-discrimination, including discrimination on grounds of sexual orientation when deciding on the issues falling within the area of the family law. This view of the Court indicates that the member states of the European Union and the European Economic Area, but also countries candidates for EU membership, must ensure all rights and benefits provided by EU regulations to all EU citizens regardless of their sexual orientation.

From the ECJ judgments, a clear obligation arises for member states to ensure all rights stemming from employment and labor relations, occupational training and health, social, and pension protection, as well as employment related tax exemptions to same-sex family life unions as they are guaranteed to married couples.

Having in mind the importance the freedom of movement of EU citizens has for the legal order of the European Union, all member states, states of the European Economic Area and countries candidates have the obligation to ensure free entry and residence at its territory for citizens of other EU states and their families and to enjoy all rights guaranteed by the Treaty on the Functioning of the European Union. This specifically means that those member states that failed to recognize in their domestic legal orders marital or extramarital family unions of same-sex couples must nevertheless recognize the validity of such unions registered in other members states in line with their respective legislations and ensure all rights guaranteed within the EU legal order in the manner identical to domestic marriage in the given state. Commission Vice President Timmermans announced in June

2015 legal actions against states not respecting this principle saying that „The commission should go forward and try to get all member states in the EU to unreservedly accept same-sex marriage as other marriages. Even if they don't have same-sex marriage yet in their own country, to at least to have the decency to respect the decision of other countries to have same sex marriage. The fact that when people move to another country they run into all sorts of idiotic problems that married couples who aren't from the same sex never run into, I think that is a disgrace.“<sup>2</sup>

In accordance with the views of the Court and the European Commission, the European Parliament in one of its resolutions<sup>3</sup> also called to the members states for an end to unequal treatment of persons of a homosexual orientation under legal and administrative provisions, in aspects of social security, services, laws on adoption and inheritance, housing, as well as criminal codes and all other relevant laws.

### Lessons learned: the synergy of EU enlargement process and actions of civil society organisations in the case of same-sex partnership (Croatia)

After the violence at the first Split pride parade, the pressure coming from the European Union which was in finishing negotiations with Croatia was crucial, exactly before closing Chapter 23 Judiciary and Fundamental Rights. That was a clear sign for Croatian politics that it was necessary to take decisive action in order to protect the human rights of LGBTI people. Great progress was made in the legislative and institutional framework in the context of respecting and protecting human rights of LGBTI persons in that period. The activists' persistence and commitment was additionally accelerated through a favourable political moment in which the main ally to the LGBTI movement was the European Union and its member states, imposing the adoption of high standards of protecting and respecting human rights as a condition of accessing to the Union.

A string of legal changes in the process of adjusting Croatian legislation with the European and the harmonization of the work of Croatian institutions in accordance with the new norms started in 2003.

An important step forward, beside including sexual orientation and gender identity into anti-discrimination legislation happened that same year when the Proposal for the Act on Same-Sex Unions, which was a solid law in its

<sup>2</sup> Keynote speech of First Vice-President Frans Timmermans at the Equality Gala, organized by ILGA-Europe, Brussels: [https://ec.europa.eu/commission/2014-2019/timmermans/announcements/keynote-speech-first-vice-president-frans-timmermans-equality-gala-organized-ilga-europe-brussels\\_en](https://ec.europa.eu/commission/2014-2019/timmermans/announcements/keynote-speech-first-vice-president-frans-timmermans-equality-gala-organized-ilga-europe-brussels_en)

<sup>3</sup> European Parliament Resolution of 08 February 1994 on equal rights for homosexuals and lesbians in the European Community (No A3-0028/94); available at: <http://aei.pitt.edu/49350/1/A10612.pdf>.

initial proposal, became a matter of discussion in the parliament. Due to great pressure from the parliament opposition and the Catholic Church, as well as the weakness of the coalition government of January 3, the final and the adopted text of the act was mutilated beyond recognition due to the accomplished political compromise. That act could have never been used in practice because of its inherent inapplicability. LGBTI activist often called it the act on gay divorce. Essentially, the Act enabled the dissolution of same-sex unions, without the union ever being formally concluded. Actually, its formal conclusion was never defined or predicted anywhere in the act. If the same-sex union was dissolved, the right to the distribution of jointly acquired assets was guaranteed, as well as the right of the financially weaker member of the union to an alimentation by their same-sex partner. A very likely reason why the Act was not used was that the dissolution of the union was preceded by a very unpleasant and inhuman court proceeding which proved cohabitation, thereby irrefutably violating and disrespecting the dignity of LGBTI persons.

With Croatia entering the European Union as a full member, the society in Croatia was freed from the pressure of Europeanization and European integrations. The outer pressure to the political elites stopped with the immediate closing of the negotiations that released the society off the hook. The referendum about the constitutional definition of marriage as a union between a man and a woman which prevents same-sex partner from entering a marriage in the foreseeable future would have never happened if Croatia was still at the door of the European Union. At the referendum, 65% of Croatians voted to change the definition of marriage in the constitution to apply exclusively to “a living union of a woman and a man”.

On the other hand, having tackled the issue of same-sex partnership during the accession process, and having the Act on Same-Sex Unions adopted, however inapplicable, it showed how EU pressure can be instrumental in setting this issue on the agenda of political elites in Croatia, sensitized the general public on the issue, opened the public debate, and prepared the ground for the adoption of the new same-sex partnership act in the Croatian Parliament in 2014, with 89 votes for and 16 votes against.

## Recommendations

*BiH should adopt and implement laws on same-sex partnership in all three jurisdictional units in charge for marital and family affairs (Republika Srpska, The Federation of BiH and Brčko District) which would legally recognize same-sex partnerships and define the rights and obligations arising from cohabitation of two persons in a same-sex partnership (with a particular focus on social and economic rights).*

*EU should address the issues of same-sex partnership in accession countries in the early stages of the process since the EU’s leverage is the highest during the pre-accession period.*

LGBTI people in BiH will continue being second-class citizens if the only emphasis is being put on the issues of tackling only the issues of discrimination and violence on the grounds of sexual orientation, gender identity and sex characteristics. The focus on these issues will not solve the problems of social exclusion, and institutional discrimination in the area of private and family life. There are around one hundred rights and obligations that different-sex couples have access to because their partnership/union is recognized by the BiH laws. Since the European Commission asks accession countries to not only adopt and implement the *acquis* but also to respect and implement the international human rights treaties, in the accession process, BiH should adopt and implement laws on same-sex partnership in all three jurisdictional units in charge for marital and family affairs (Republika Srpska, The Federation of BiH and Brčko District) which would legally recognize same-sex partnerships and define the rights and obligations arising from cohabitation of two persons in a same-sex partnership (with a particular focus on social and economic rights).

Having in mind that recognized unions are not part of the EU *acquis*, because marital law is a national competence, the ECHR, ECJ rulings, as well as the position of EU Commission and EU Parliament mean that the right to a recognized union is a human right that needs to be respected in the EU as well as in accession countries, who are all member states of the Council of Europe. Having in mind the lessons learned from Croatia, the EU should address the issues of same-sex partnership in accession countries in the early stages of the process since the EU’s leverage is the highest during the pre-accession period, thus making it clear that the EU will be firmly committed to the protection of fundamental rights of LGBTI persons in its future member states.

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