

SAME-SEX RELATIONSHIPS – THE ABSENCE OF LEGISLATIVE FRAMEWORK IN THE REPUBLIC OF KOSOVO

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Abstract. According to the Constitution of the Republic of Kosovo, all persons are equal before the law and no one shall be discriminated against on the grounds of sexual orientation, or any other personal status. Furthermore, the Kosovo Constitution leaves open the possibility that members of the LGBT+ community can even use their right to marry, as it provides that everyone has the right to marry and create a family. However, this provision refers to Family Law in all matters relating to marriage and divorce. On the other hand, the Family Law of the Republic of Kosovo recognizes only the marriage of two persons of different sexes. Related to this, the law provides that marriage is a legally registered community of two persons of different sexes. Moreover, the Family Law does not recognize civil unions or domestic partnerships, and these are not regulated by any special law here. In contrast to Family Law, the Criminal Law of Kosovo includes articles that protect persons of the LGBT+ community. This paper will also consider a comparative approach towards the legislative framework of other former Yugoslav States regarding same-sex relationships.

Keywords: LGBT+, same-sex, Constitution, family law, Kosovo, former Yugoslavia.

Introduction

According to the survey presented at the end of this study, in Kosovo, the acceptance of the rights of the LGBT+ community seems to be medium. However, according to a report by the World Bank Group (2018), the rates of discrimination based on sexual orientation in Kosovo fare among the worst compared to other countries in the region. Such an unjust reality, where LGBT+ persons are not accepted as normal, is considered present even within their close friends and families. Some still think homosexuality to be a disease, which is demonstrated by the fact that some individuals of the LGBT+ community have been forced into hospitals for treatment.

The Kosovo Progress Report of the European Commission (hereinafter – the Kosovo Report) for 2019, 2020, and 2021 found that, despite progress in the position of the LGBT+ community, much needs to be done because the level of awareness of the general population continues to be very low (Directorate-General for Neighbourhood and Enlargement Negotiations, 2019, 2020, 2021). On the other hand, these reports did not elaborate on the rights of this community according to civil laws; they only recommended legal developments to work towards

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eliminating discrimination. However, from an analysis that could be made of the legal framework in Kosovo, it can be freely stated that Kosovo's Constitution of 2008 protects all persons from discrimination, regardless of their sexual orientation. In addition, the Law on Protection from Discrimination (Law No. 05/L-021) and the Criminal Code (Code No. 06/L-074, 2019) contain concrete provisions that guarantee the protection of rights for all persons, regardless of their sexual orientation or gender identity. Moreover, based on the Kosovo Report 2020, the LGBT+ Advisory and Coordination Group developed a new 2019–2022 action plan (Directorate-General for Neighbourhood and Enlargement Negotiations, 2020, p. 36). Still, this program is not progressing as planned according to the Kosovo Report 2021.

The Constitution is considered the supreme law of the land in Kosovo, and all laws and bylaws must be made in pursuance thereof. This supreme law came into force in 2008, and, as such, it is considered a very advanced act by constitutional experts and to be relatively “modern” in terms of protecting the rights of LGBT+ persons. However, most laws and codes in Kosovo came into force before 2008, and all of them continue to be implemented today as positive legislation. The complication is that some of them are not entirely harmonized with the Constitution.

The Family Law of Kosovo (Law No. 2004/32) entered into force in 2006, just before the date when the Constitution came into effect (in 2008). The lawmakers drafted this law when the country did not have a constitution, the result of which is that it is not harmonized with this supreme Act of the land. Therefore, some articles of this law discriminate against persons of the LGBT+ community. For example, this law did not recognize the marriage, civil union, or domestic partnership of two persons of the same sex. This discrimination is also present despite the articles of the Constitution and the Law on Protection from Discrimination which call for equality for all regardless of the sexual orientation of persons. Set side by side, many of the former Yugoslav States stand in the same position according to same-sex relationships and legal framework regulation. However, three of these countries⁴ (Croatia, Slovakia, and Montenegro) recognize civil unions or registered partnerships; while, Serbia, Bosnia and Herzegovina, North Macedonia, and Kosovo are in the process but still do not enshrine this right in their legislative frameworks (Kuźelewska, 2019, p. 15). When we look further back in time, Yugoslavia's Criminal Code criminalized the sexual activity of homosexuals. In contrast, Kosovo's Criminal Code Act was listed as aggravated if a crime motivated by sexual orientation was committed against a person.

This situation brings many misrepresentations and misinterpretations of this community's rights. Such misrepresentations and misconceptions have been particularly present concerning the issue of same-sex relationships, even by public persons or legal experts, which has created misunderstandings about the rights of same-sex relationships. However, religious leaders here in Kosovo take a united stand against registered civil unions between same-sex persons (Bashkësia Islame ne Kosove, 2022).⁵ They call the legislative body to stop any change, redefinition, or reinterpretation of any article regulating family relations. On the other hand, high-level politicians in Kosovo have supported the LGBT+ community, and continue to do so through their speeches or by attending Pride Parades. For instance, the former President of Kosovo, Hashim Thaçi, has taken part in many parades, and the current President of Kosovo, Vjosa Osmani, observed in a speech that “love is love, no one should discriminate this.” Moreover, Albin Kurti, the Prime Minister of Kosovo, made a speech in a parliamentary debate on same-sex relationships, declaring: “human rights are the rights of every person because everyone is the creature of God or nature; this is what our constitution and ECtHR case law stated” (The Prime Minister Office, 2022). Thus, unlike religious leaders, some politicians have an attitude towards recognizing the rights and relationships of the LGBT+ community; still, in general, their interests are not represented by politics here in Kosovo (Freedom House, 2022).

This paper is structured as follows: initially, the concept of LGBT+ rights will be described according to the general legal framework here in Kosovo, followed by same-sex relationships based on Kosovo's Constitution, Family Law, and the Draft Civil Code; same-sex relationships will then be analyzed and compared with the legislations of former Yugoslavian States; and, at the end of this paper, conclusions will be presented.

⁴ Former Yugoslavian countries.

⁵ Leaders of Muslims, Catholics, Protestants, and Jews have made public statements declaring their opposition to the registered civil unions stipulated in the Draft Civil Code of the Republic of Kosovo.

Furthermore, we have prepared a questionnaire to display the conviction of heterosexuals according to the members of the LGBT+ community, as well as to show whether these persons (including the LGBT+ community themselves) support the recognition of same-sex relationships through the legal framework here in Kosovo. To achieve these results, it was necessary to use descriptive, analysis, synthesis, and comparative methods.

1. LGBT+ rights according to the legal framework in Kosovo compared to other former Yugoslavian States

As a young State that has existed for less than ten years, Kosovo has a legal system based on traditional sources of law, which constitutional experts (Shala, 2016, p. 165) consider to be quite advanced in terms of human rights. Human rights in the domestic legal system are harmonized with other international agreements and instruments. These are primarily stipulated by Kosovo's Constitution, which strongly supports the principles of equality and non-discrimination. These principles are also stated clearly in Kosovo's Declaration of Independence of 2008.

The principles of non-discrimination and equality are defined as international obligations under Kosovo's Declaration of Independence.⁶ According to point 2 of this Declaration, "Kosovo is declared a democratic, secular, and multiethnic republic, guided by non-discrimination and equal protection under the law" (Bajrami et al., 2019, p. 42). The Constitution of Kosovo also establishes these principles in Art. 3 and 7 of Chapter One, titled "Basic Provisions," and in Art. 24 of Chapter Two, titled "Fundamental Rights and Freedoms."

Discrimination refers to treating a person with any distinction, exclusion, limitation, or preference to deny a right or equal protection. In Kosovo, this issue has also been addressed through the Law on Protection from Discrimination (Art. 3, 4, and others), which explicitly defines sexual orientation as a potential target for discrimination. Moreover, this law follows the rules of the Constitution in terms of forms of discrimination, and, in this way, it is harmonized with the supreme Act of the land. However, despite these legal provisions prohibiting discrimination, according to the World Bank's report of 2018, "Kosovo is considered the country with the highest percentage of discrimination against the LGBT+ community" (World Bank Group, 2018, p. 37). Furthermore, the Law on Civil Status (Law No. 04/L-003) in Kosovo and its bylaws do not even address the process of a sex change; this seems to be another way of discriminating against this community.⁷ Various organizations have requested that this issue be addressed on several occasions, but without success (Center for Social Group Development, 2017, pp. 54, 55).⁸ More importantly, some members of the LGBT+ community have even been abused and threatened because of their sexual orientation or gender identity; "Hence, our community continue to be discriminated against and abused because of their sexual orientation. However, we all will continue to seek the realization of our constitutionally guaranteed rights through parades and protests" (interview by Egzonis Hajdari with Blert Morina). However, this discrimination against this community still continues to be present despite the organization of many national conferences, parades, and protests held at the national level to protect their rights.

Kosovo's Criminal Code has recognized sexual orientation as a circumstance where a crime could be committed. The court should consider this an aggravating circumstance in any criminal case in this situation. According to Art. 141 of the Criminal Code, "everyone *who publicly incites or spreads hatred, discord, and intolerance based*

⁶ Two members of the LGBTQ community were verbally and physically attacked in one of Kosovo's cities in June of 2016. Following this incident, two of the attackers were found guilty of criminal activity categorized under Art. 188 of the Criminal Code of Kosovo (Palushi, 2016, p. 5).

⁷ On April 4, 2018, Mr. Blert Morina, a transgender man, requested permission from the Gjakova Civil Status Office to change his name and gender in identification documents. When the request was denied, Morina filed a lawsuit for organizational conflict with the Basic Court in Pristina and submitted a request for a constitutional review to the Constitutional Court of Kosovo. On September 5, 2019, the Constitutional Court dismissed the appeal and marked it as unsuitable and premature (Case AA. No. 244/2019). However, in December 2019, the Basic Court of Pristina affirmed Morina's right to change his name and gender category in his identification documents (Halili, 2020; Directorate-General for Neighbourhood and Enlargement Negotiations, 2020, p. 36). This was the first case in which a Kosovo citizen was granted permission to exercise this right.

⁸ In this regard, the Center for Social Groups Development offered two best practices in Europe: a case-report of the European Court on Human Rights (*YY v. Turkey*, 2015), and a resolution on the protection of transgender persons from discrimination by the Council of Europe; but still without any progress. It should be noted that European Human Rights Law cannot force any state to legalize same-sex marriage; rather, it leaves this to the individual discretion of each member state.

on sexual orientation should be punished by imprisonment up to five years” (emphasis added).⁹ Moreover, if a person deprives another person of their life because of motivation based upon sexual orientation, this would be penalized with imprisonment of not less than 10 years; hence, the Criminal Code categorizes this as aggravated murder. Further, sexual orientation is also mentioned in criminal offenses such as assault, light bodily injury, grievous bodily injury, destruction, or damaged property as an aggravating circumstance. The recognition of hate crimes based on sexual orientation is orientated towards the protection of the LGBT+ community.

It should be noted here that the Family Law of Kosovo, which came into force in February 2006 (before the Constitution was approved), does not align with the principles of equality and non-discrimination as stipulated by the Constitution of 2008. Specifically, this law disagrees with the Constitution concerning discrimination on sexual orientation, where the provisions for certain rights seem to be unequal. These rights include engagement, marriage, and domestic partnerships. However, the final draft of the Civil Code of the Republic of Kosovo, which is expected to enter into force this year, does provide some rights for the LGBT+ community; according to Art. 1138 par. 2 of this code: “Registered civil unions between persons of the same sex is allowed. A special law regulates conditions and procedures.”¹⁰ Based on this article, we considered that this final draft of the civil code had stepped forward by allowing civil unions between people of the same sex. Likewise, Slovenia has recognized same-sex partnerships since 2006 (Two Bad Tourists, 2016). Croatia also legalized life partnerships between two persons of the same sex in 2014 by entering into force the Same-Sex Life Partnership Act. According to Art. 7 of this Act, a life partnership could be considered if two persons of the same sex declare their free consent before the registrar; otherwise, the life partnership shall not be concluded (Art. 7 of the Same-Sex Life Partnership Act). On the other hand, Montenegro was the last country in this area that recognized civil unions between same-sex partners in 2021 by the Law on the Same-Sex Life Partnership.¹¹ Otherwise, other States of the former Yugoslavia, such as Bosnia and Herzegovina, Serbia, and North Macedonia, have no legislation in favor of same-sex alliances in the same manner as Kosovo.

1.1. Same-sex relationships according to Kosovo’s Constitution – a comparative approach between the former Yugoslavian States

The Constitution of the Republic of Kosovo is considered a constitutive act to create the State of Kosovo. Kosovo’s Constitution is based on the Ahtisaari Package,¹² which constitutes an act promoting high democratic standards and visions for the Euro-Atlantic path of the country (Bajrami et al., 2019, pp. 29–30). Constitutional experts consider Kosovo’s Constitution to be quite advanced in human rights and freedoms, which are regulated within two chapters (see: Constitution of the Republic of Kosovo, 2008). The drafting process of this constitution was characterized by the participation of international and national experts, who were involved from the beginning of the process (Hay, 2014, p. 157). In the meantime, the framers of the Constitution drafted the Constitution with great importance placed on international human rights by attaching a particular clause (Hanski & Markku, 1999, p. 516).

Consequently, the Constitution is longer – it contains 162 articles. Within it, human rights and fundamental freedoms are guaranteed through Art. 22. This article guarantees the international agreements and instruments directly applicable in Kosovo, such as: “... (1) The Universal Declaration of Human Rights; (2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, etc.” (Marko, 2008, p. 17). Moreover, the 2008 Constitution of Kosovo makes particular reference to the European Convention on Human Rights (ECHR); this served as one of the essential international safeguards. Hence, according to Art. 22 of the Constitution, the principles of non-discrimination and equality are among the international and

⁹ If this criminal offense was committed by taking advantage of position or authority, it shall be punished by imprisonment up to 8 years.

¹⁰ According to Art. 1133 of the final draft of the Civil Code, “Engagement is the mutual promise of two persons of opposite sexes to get married in the future”; Art. 1138 “Marriage is a legally registered union of two spouses of different sexes, through which they freely decide to live together as husband and wife...”.

¹¹ Law No. 868 of July 1, 2020; according to Art. 8, 9, 10, and 11 of Law No. 868, the same-sex partners must be 18 years old, have total legal capacity, and should not be blood relatives. Neither of the partners should have an active marriage or be in another civil partnership.

¹² The *Ahtisaari Package* conditioned the drafters of Kosovo’s Constitution to make a particular reference to the ECHR.

constitutional obligations that Kosovo has assumed in exchange for citizenship; this article constitutionalizes ECHR and its Protocols.¹³ According to this constitutional provision, one must not use sexual orientation to discriminate against anyone, including the LGBT+ community. As a result, every domestic law must be in harmony with the ECHR and its Protocols; otherwise, it should be ruled out as an unconstitutional act (de Hert & Korenica, 2016, pp. 154, 156). Moreover, all public institutions and courts should implement the ECHR and its Protocols. However, Kosovo is not a member of CoE due to not having the capacity to be a signatory of the ECHR (Bajrami et al., 2019, p. 157).¹⁴ On the other hand, following Art. 53¹⁵ of the Constitution of Kosovo, European Court of Human Rights (ECtHR) case law does not have a direct effect or appliance in Kosovo as the ECHR. Accordingly, ECtHR case law is not considered the source of law in Kosovo.

As the supreme Act of the land, the Constitution sets out the basic principles of the country, the governmental system, and the human rights and freedoms recognized (Bajrami & Muçaj, 2018, p. 93). In this regard, equality before the law is one of the basic principles of Kosovo's Constitution. Furthermore, this principle clarifies that Kosovo's citizens have the right to equal legal protection, which shall be realized without any discrimination based on any circumstances. Moreover, this Constitution expressly prohibits discrimination based on gender identity and sexual orientation (Rexhepi, 2016, p. 35).¹⁶ However, Professor Louis Aucoin (2008, pp. 123–128), involved as an expert in the working group on the drafting of the Kosovo Constitution, points to the difficulties encountered by locals in presenting discrimination based on sexual orientation as a form of discrimination.

According to Art. 24 para. 2 of the Constitution of Kosovo, “no one shall be discriminated against on the grounds of ...sexual orientation... or another personal status” because all are equal before the law. Here, among the grounds on which discrimination is prohibited, sexual orientation is explicitly mentioned. Based on this provision and the power of the Constitution as the highest legal act of the land, which requires all other laws and bylaws to be harmonized with it, the principle of non-discrimination on the above-mentioned grounds and according to the spirit of the Constitution should be present in all other laws and bylaws in the country. Regarding this, Enver Hasani, Professor of the University of Prishtina and former President of the Constitutional Court of Kosovo, states that “everyone has the right to marry or to coexist with a partner of their own volition or sexual orientation” (Bajrami et al., 2019, p. 52). Unfortunately, however, the principle of non-discrimination based on sexual orientation has not been adopted in some of the country's laws, including the Family Law. Hence, the current legislative framework does not support any same-sex relationships or same-sex marriage.

Art. 37 para. 1 of Kosovo's Constitution stipulates that, “based on free will, everyone enjoys the right to marry and the right to have a family as provided by law.” This constitutional provision does not contradict Art. 24 para. 1 of the Constitution, which prohibits discrimination on the grounds of sexual orientation. The statement that “everyone enjoys the right to marry” thus removes any restrictions on the possibility of same-sex marriage. However, the Constitution also instructs that marriage and family formation shall be conducted under the Family Law. Like all laws in this country, the Family Law must respect the constitutional principle of non-discrimination; however, this principle is not well applied in this law. Moreover, Art. 37 para 2. of the Constitution of the Republic of Kosovo, it is stipulated that “Marriage and divorce are regulated by law and are based on the equality of spouses.” However, this provision is contradicted by the stipulation that marriage and divorce are regulated under the Family Law.

The Constitution enshrines the right to marriage and family in Art. 38. Under this constitutional solution, everyone has the right to marry and have a family, but they must do so following the law. Moreover, para. 2 of this article instructs that marriage shall be concluded and terminated by the Family Law. Thus, the Constitution does not

¹³ As such, the citizens of the Republic of Kosovo could not use the right to initiate cases in the ECtHR.

¹⁴ Hence, the Constitution respects the spirit of Art. 8 of the ECHR, which stipulates that: “Everyone has the right to respect for his private and family life, his home and his correspondence.”

¹⁵ “Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.” This leaves the choice and option to apply the ECtHR case law for the courts here in Kosovo.

¹⁶ “Kosovo is the only country in the Balkans that include provisions against discrimination based on sexual orientation in its constitution”; some developing countries, e.g., Turkey, do not present sexual orientation as a possible form of discrimination in its Constitution.

address the issue of marriage between same-sex persons, as it leaves this issue to the Family Law, which stipulates that marriage can only be between two persons of opposite sexes. Hence, the spouses are equal in rights and obligations, and no article in Kosovo's Constitution mentions the opposite sex as a condition for marriage. Thus, the spouses should be considered a married couple, regardless of their gender (Bajrami et al., 2019, pp. 52–53). Based on the relevant provisions of this law, the Center for Social Group Development,¹⁷ in its 2017 report, states that the LGBT+ community is prohibited from having a legal marriage (Center for Social Group Development, 2017, pp. 10–16).

The principle of non-discrimination, which is embodied in the Constitution of Kosovo, also occupies an important place in the final draft of the Civil Code. Specifically, this final project of the Civil Code of Kosovo, which is expected to be approved this year by the parliament,¹⁸ addresses the issue of equality in Art. 1128 of the fourth Book. This article states: "all persons enjoy the equal treatment of rights and obligations outlined in this Book. There shall be no direct or indirect discrimination against any person based on ...sexual orientation... or any other status." Thus, the final project of the Civil Code has embodied the constitutional principle of non-discrimination within its structure.

Perhaps, first, one should keep in mind that Kosovo is the only country from the former Yugoslavian States which has to predict "sexual orientation" as a type of discrimination. Considering this conclusion, Croatia,¹⁹ Slovakia,²⁰ Montenegro,²¹ Bosnia and Herzegovina,²² North Macedonia,²³ and Serbia²⁴ have not listed "sexual orientation" as a type of discrimination that shall be prohibited. Hence, these six constitutions do not exclusively regulate the prohibition of discrimination of persons based on sexual orientation, but this does not signify that these countries are against LGBT+ rights. To contextualize the discussion, Croatia, Slovakia, and Montenegro have recognized civil partnerships into their legislative framework.

Finally, comparing Kosovo with the Balkan countries, we can conclude that it is a part of the majority of these countries which does not recognize the civil union, and, consequently, nor same-sex marriage. However, Kosovo has a much more advanced Constitution in terms of addressing LGBT + community rights; this is because it is the only country that in its constitution presents sexual orientation within the principle of anti-discrimination. Moreover, the Constitution of Kosovo does not show the formal condition of the opposite sex for the validity of marriage (Art. 24 / Art. 37, Constitution of RKS).

¹⁷ Center for Social Group Development was officially registered in October 2003 to support, protect, advocate for the rights of the LGBT+ community in Kosovo.

¹⁸ Parliament is the legislative body of jurisdiction here in Kosovo.

¹⁹ "All persons in the Republic of Croatia shall enjoy rights and freedoms, regardless of race, colour, gender, language, religion, political or other opinion, national or social origin, property, birth, education, social status or other status" (Art. 14 of the Constitution of the Republic of Croatia).

²⁰ According to Art. 12 (par. 2) of Constitution of the Slovak Republic: "Fundamental rights shall be guaranteed in the Slovak Republic to everyone regardless of sex, race, colour, language, belief and religion, political affiliation or other conviction, national or social origin, nationality or ethnic origin, property, descent or any other status. No one shall be aggrieved, discriminated against or favoured on any of these grounds."

²¹ "The limitations shall not be introduced on the grounds of sex, nationality, race, religion, language, ethnic or social origin, political or other beliefs, financial standing or any other personal feature" (Art. 25, para. 2 of the Constitution of Montenegro).

²² Following Art. II (para. 4) of Bosnia and Herzegovina's Constitution "...without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

²³ Art. 110 of the Constitution of the Republic of North Macedonia: "...as to the prohibition of discrimination among citizens on the ground of sex, race, religion or national, social or political affiliation" (Komiteti Shqiptar Helsinki, 1998, p. 170).

²⁴ "All direct or indirect discrimination based on any grounds, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability shall be prohibited" (Art. 21 of the Constitution of Republic of Serbia).

1.2. Same-sex relationships according to the Family Law of Kosovo – a comparative approach between the former Yugoslavian States

As noted above, the Kosovo Family Law entered into force in 2006. This Law regulates engagement,²⁵ domestic partnerships,²⁶ and marriage²⁷ in detail as family law institutions in a significant portion of its articles. The provisions of this Law, with some minor amendments made in 2019, are still in force.

First, according to Art. 9 of the Family Law of Kosovo, engagement is defined as “a mutual promise of two persons of the opposite sex to marry in the future.” Thus, for the existence of the engagement to be valid, this Law requires that two persons of different sexes shall make this promise. This provision was made based on the consideration that only marriage between men and women can result in biological reproduction (Gashi, Aliu & Vokshi, 2012, p. 43). Based on this, I argue that the constituent elements of engagement as defined by the Family Law are “the promise of marriage” and “the presence of two persons of opposite sexes” (Podvorica, 2011, p. 73). Thus, disregard for either of these two elements renders the engagement invalid (null). This means that if one of the engaged parties changes their gender following the engagement, the engagement itself becomes invalid (Dural, Oguz, & Gumus, 2016, p. 18).

Second, marriage is considered a union between a man and a woman who voluntarily decide to live together and create and extend their family. Art. 14 of the Family Law defines marriage as “a legally registered union between two persons of different sexes, by which they freely decide to live together for the purpose of establishing a family.” According to this legal definition, the fundamental elements of marriage are as follows: a) the marriage must be between two persons of different sexes; b) the marriage must be conducted in the presence of an official person; and c) both parties must declare their free decision to enter the marriage before the registrar (Dural, Oguz, & Gumus, 2016, pp. 71–77). If a marriage is entered into without these constituent elements in place, it is considered invalid (Helvacı & Erlüle, 2014, p. 159). Thus, according to the Family Law that is in force within the territory of Kosovo, marriage between two same-sex persons is considered invalid (null). It is thus clear that this legal provision of the Family Law goes against the principle of non-discrimination stipulated in Kosovo’s Constitution, as this article of the Family Law clearly discriminates against persons on the grounds of sexual orientation, and Kosovo’s Constitution prohibits this discrimination. Specifically, this discrimination occurs in the stipulation that prevents two people of the same sex (i.e., of a sexual orientation categorized as homosexual) from marrying legally. Thus, in reference to Family Law, members of the LGBT+ community do not have the right to engage, marry, or any civil partnership in accordance with their sexual orientation, whereas in accordance with the provisions of the Constitution, this community is protected against any discrimination against it, including discrimination with regard to the right to same-sex partnerships. Even in cases in which one of the spouses has not developed sexual characteristics according to age and sex (e.g., is missing reproductive organs or possesses other disorders that may lead to dysfunctions in sexual development), the marriage is considered null (Podvorica & Podvorica, 2015, p. 66; Podvorica, 2011, p. 74; IPSOS, 2015, p. 64).²⁸ University Professor Mr. Podvorica, in his book, stipulated that sexual relations between homosexuals are unnatural and that marriages between them are sterile and are defined as existential risks (Podvorica, 2019, p. 44). Such an opinion does not prevail in most European Union countries, where 15 of the 27 States recognize and perform same-sex relationships under their legislation.²⁹

²⁵ “Engagement is a mutual promise to marry in the future, but without the legal obligation to marry. Neither of the engaged parties can force the other to marry. There are different views on the definition of engagement as a legal act; some jurists argue that engagement is a pre-contract, while others consider it a decision or contract in itself.”

²⁶ “An out-of-marriage relationship is the factual relationship between the husband and the wife who live in a couple, characterized by a joint life that represents a character of stability and continuation.”

²⁷ “Marriage is considered to be a legal act whereby two persons freely decide to live together, creating marital rights and obligations for each other. Marriage is considered a legal act, as the validity of the marriage consists of legal registration in the presence of the registrar.”

²⁸ “Confirming bisexuality in one spouse does not foresee immediate cancellation of marriage if the sexual organ is opposite to the other spouse”; “In high proportion, the population in Kosovo (and generally in the Balkans) considers same-sex marriage unacceptable.”

²⁹ EU countries: Denmark (2012), Norway (2009), Finland (2017), Sweden (2009), Scotland (2014), Ireland (2015), England (2014), Netherlands (2001), Belgium (2003), Slovenia (2017), Luxembourg (2015), France (2013), Spain (2005), Germany

Moreover, according to Art. 14 para. 2 of the Family Law, “Men and women, without any limitation due to race, nationality or religion, have the right to marry and found a family...” Thus, with this legal provision, the Family Law stipulates forms of discrimination that are prohibited with regard to the right to marry, as it states that no one can be prevented from marrying on the basis of race, nationality, or religion; however, this provision does not provide for sexual orientation. Thus, same-sex couples are not protected under this provision and are clearly discriminated against in other provisions of the Family Law.

Third, it is worth explaining the concept and some other issues related to the domestic partnership. This type of relationship is considered an out-of-marriage relationship, and such relationships have been very common in Kosovo for the last decade. The Kosovo Family Law, as well as the other laws in the Balkan countries, recognizes domestic partnerships. This law has addressed this issue in Art. 39–41. According to the provisions of this law, an out-of-marriage relationship is defined as a “domestic partnership between a man and a woman who live in a couple, characterized by a joint life that represents a character of stability and continuation” (Art. 39, para. 1). The difference of gender in the domestic partnership is present in order to avoid misinterpretations of this relationship as including same-sex persons, which the law does not allow (Gashi, Aliu & Vokshi, 2012, p. 100). In order to be considered a domestic relationship, out-of-marriage spouses must live as a couple and must be of different sexes. Thus, the Family Law in Kosovo, in terms of engagement, marriage, and domestic partnerships, clearly establishes the opposite sex of the partners as a condition of its validity. Therefore, a domestic partnership between two persons of the same sex is not in accordance with the legal requirements and, as such, cannot create legal effects.³⁰ As we noted above, discrimination against persons belonging to the LGBT+ community is evident in the Family Law’s provisions, which regulate marriage in Kosovo in a way that prohibits any possibility for partnership between two persons of the same sex.

Contrarily, the final project of the Civil Code of Kosovo has taken an essential step in establishing the principle of equal treatment within the family book. Art. 1128 of this final project of the Code forbids direct or indirect discrimination against any person on the basis of several variables, including sexual orientation; from this, we conclude that members of the LGBT+ community cannot be lawfully discriminated against within the provisions of this book. However, in only a few articles below, we can see an example of discrimination in the realization of rights based on sexual orientation. Specifically, in this final version of the Civil Code, engagement or marriage between persons of the same sex is not allowed, but registered civil unions will be allowed. According to Art. 1133 of the final project of the Civil Code, “engagement is a joint promise of two persons of the opposite sex to marry in the future.” Moreover, Art. 1138 defines marriage as a legally registered union between two spouses of different sexes, by which they freely decide to live together as husband and wife.

In contrast to Family Law, Art. 1138 para. 2 of the final project of the Civil Code discussed this: “Registered civil unions between persons of the same-sex are allowed. Conditions and procedures are regulated by a special law.” Following this legal provision, one can conclude that the final project of the Civil Code is going to recognize civil unions.³¹ This is significant progress on human rights and a very important step for the EU accession process, because we believe that there is causality between European Union accession and LGBT+ rights. Moreover, para. 4 of this article stipulates that: “Married people and partners in civil unions enjoy mutual rights and duties under this Code”; this means that married people and partners in civil unions are equal according to mutual rights and duties for caretaking, reciprocal financial support, and property rights. However, Graeme Reid and Evan Wolfson (2022, p. 2) – in their letter sent to Kosovo’s President, Prime Minister, MPs, and Minister of Justice on March 16, 2022 – concluded that: “partners in civil unions do not enjoy equal access to rights and duties in practice”. Otherwise, if the rights and duties would be the same, partners in civil unions would have the right to financial

(2017), Estonia (2016), and Austria (2019). Some non-EU countries that recognize same-sex marriage are as follow: Iceland (2010), Canada (2005), South Africa (2006), some US states (2015), some provinces in Mexico, Columbia (2016), Brazil (2013), Uruguay (2013), Argentina (2010), New Zealand (2013) and Taiwan (2017). Some countries in the EU, such as Croatia, Estonia, Germany, Slovenia, Hungary, Czechia, and Italy, recognized civil unions or registered partnership between persons of same-sex.

³⁰ “In the Southeast Europe countries only Croatia and Slovenia recognize same-sex union, actually Slovenia in 2017 has legalized a gay union” (World Bank Group, 2018, p. 11).

³¹ The ECtHR requires such a legal framework to exist, in *Oliari v. Italy*, *Orlandi v. Italy*, and the most recent *Fedotova, Shipitko v. Russia*; however, ECtHR case law is not considered the source of law in Kosovo.

support and property rights; on the other hand, they would also be obliged by law to be faithful, reciprocally assist, respect, and financially support one another, especially when one partner lacks a sufficient material basis for living. Hence, there is an improvement for the LGBT+ community in this final draft of the Code³² compared to the Family Law which is currently in force. It is therefore essential to harmonize the final draft of the Civil Code with the Constitution as soon as possible to remove all existing dilemmas and ambiguities with regard to same-sex relationships. Moreover, homosexual relationships have always been considered an aspect of private rather than family life (Binaku & Kumbaro, 2017, p. 748).³³

Does any country from the former Yugoslavia recognize same-sex relationships in their legislative framework? Slovenia recognized same-sex partnerships from 2006, and this allowed gay couples to register their relationship and allowed them to adopt children from their previous relationship (Novak, 2017). Same-sex marriage was the subject of a referendum in Slovenia in 2015, where 63.51% voted against it, so same-sex marriage was not accepted (Kuzelewska, 2019, p. 18). Likewise, Croatia recognized civil unions, but it did so in 2014. The Family Law of Croatia in 2009 defined marriage as a homosexual union; still, after the referendum,³⁴ it was stipulated that marriage should be considered valid only between a man and a woman (Kuzelewska, 2019, p. 19). Montenegro has also recognized the civil relationship since 2021; hence, Montenegro is considered the first country in the Western Balkans which is not a member of the EU to allow civil partnerships for same-sex couples (Law on the Same-Sex Life Partnership, 2020). President Milo Djukanovic, after the law came into force, said that Montenegrin society “is maturing.” In retrospect, only three countries mentioned above have recognized same-sex partnerships. Bosnia and Herzegovina, North Macedonia, Serbia, and Kosovo have not allowed the registration of civil unions by their legislative framework. Drawing on this, Serbia,³⁵ which in this aspect encounters many problems based on the internal legal system, even against the fact that there are some initiatives to advance the rights of the LGBT+ community, is still considered far away from recognizing the civil unions of homosexual couples (Knežević & Pavić, 2006, p. 23).

Based on this, there is a clear indication that Slovenia, Croatia, and Montenegro have ratings which are higher than other States from the former Yugoslavia related to LGBT+ rights. Hence, we can conclude that Croatia, Slovenia, and Montenegro, out of four other cases, are the three which recognize same-sex relationships. It is worth noting that Serbia canceled all Pride marches until 2014 under the excuse of public safety, because the 2010 Pride march was marred by violence (Maycock, 2019, p. 41). However, now, all these States (Serbia, Bosnia and Herzegovina, North Macedonia, and Kosovo) promote LGBT+ community rights as necessary for Europeanization. Still, they have far fewer legislative protections for this community than Slovenia, Croatia, or Montenegro. First, we believe that harmonization of the domestic legal framework with European norms on human rights issues is unavoidable, because all these States are in the EU accession process. Second, these necessary upcoming legislative changes around LGBT+ rights will meet resistance from homophobic individuals (including politicians, religious leaders, etc.); but these States should take actions to improve LGBT+ rights and decrease the rates of homophobia.

Beyond norm diffusion, the population in Kosovo is not yet ready to accept recognizing same-sex relationships (including, civil unions, marriage, etc.) in the domestic legal framework; LGBT+ people hide their sexual orientation, bound by social pressure here in Kosovo (Freedom House, 2022, section F4). Therefore, we conducted a questionnaire to assess the opinions of heterosexual and homosexual persons about the possibility of legalizing same-sex relationships. This questionnaire was filled out by 60 participants divided into two groups based on their self-reported sexual orientation. The first group included 30 people who declared themselves heterosexual, while

³² The Civil Code probably will enter into force in 2022.

³³ For more see: *Salgueiro Da Silva Mouta vs. Portugal*; to respect the right of private and family life is guaranteed by Art. 8 of ECHR, and Art. 14 for non-discrimination. Mr. Da Silva Mouta claimed that he had been discriminated against because of his sexual orientation from Lisbon Court of Appeal when custody of the daughter was given to the mother, and the court forced him to conceal his homosexuality when he met his daughter.

³⁴ The referendum was held on 1 December 2013, where 65% who voted answered “yes” to the referendum question: “Do you agree that marriage is matrimony between a man and a woman?” Therefore, Croatians banned gay marriage in 2013.

³⁵ President of Serbia Mr. Vučić declared that he would not sign the law to recognize same-sex unions, which is in the drafting process this year! However, now, the President attends Prides and promotes the LGBT+ community as necessary for Europeanization.

the second group included 30 people from the LGBT+ community in Kosovo (33% gay, 20% lesbian, 43% bisexual, and 4% transgender). We understand that this was a small survey, but expanding the participants was almost impossible; this was because heterosexual persons were reluctant to fill out the questionnaire, while members of the LGBT+ community were difficult to contact. Data were analyzed using IBM SPSS version 23.0. We also performed statistical tests including *t*-tests, and used a *p*-value of 0.05 to indicate statistically significant differences between these two social groups.

Table 1. Survey statistics.

jj		N	Mean	Std. deviation	Std. error mean	df
Do you think that Family Law in Kosovo has to recognize same-sex relationships ?	Heterosexual	30	2.9000	1.64736	.30077	58
	LGBT+	30	4.6333	.92786	.16940	45.717

Participants were then asked whether they support recognizing any same-sex relationships by law in Kosovo, with responses rated on a five-point Likert-scale ranging from 1 (*strongly disagree*) to 5 (*strongly agree*). According to the data analysis from SPSS and *t*-tests regarding the legality of the same-sex relationships, the results are as follows: $\mu = 2.90$ of 5.00 of individuals from the heterosexual group indicated support for the recognition of same-sex relationships, while $\mu = 4.63$ out of 5.00 from the LGBT+ group indicated support (see Table 1). Based on these findings, with regard to this question, there was a statistically significant difference between the groups, with a *p*-value of $p < 0.05$ (See: Table 1). Thus, the LGBT+ group strongly supports the recognition of same-sex relationships by law in Kosovo, while the heterosexual group is more hesitant about recognizing this right within Kosovo’s legal framework. From this small survey we can say that heterosexual persons in Kosovo are still not ready to accept same-sex relationships. Therefore, while it can hardly be stated that 60 persons represent the entire population of Kosovo, the lack of readiness to express an opinion on the issue of same-sex relationships from heterosexual persons gives confidence in the result achieved by this small number of participants. For the most part, the differences in views demonstrate a clear divide between heterosexual and homosexual persons according to same-sex relationships and their recognition within the legal framework. This questionnaire was necessary to present the state of perception of heterosexual and homosexual persons according to same-sex relationships; the result appeared within the frame of expectation.³⁶

Conclusions

1. Kosovo’s Constitution does not contain any prohibition on persons belonging to the LGBT+ community in matters relating to engagement, marriage, or domestic partnership. However, according to the Family Law of Kosovo, we can conclude that same-sex couples are not allowed to have any registered relationships under the current legal framework of Kosovo.
2. The ECHR is constitutionalized by Kosovo’s Constitution, without ratifying it; likewise, the ECHR has its applicability within the constitutional system. In contrast, the ECtHR’s jurisprudence is not constitutionalized or incorporated by Kosovo’s Constitution. Thus, the Constitutional Court does not see itself bound by, but is consistent with, ECtHR case law.
3. The Final Project of the Civil Code of Kosovo, which is expected to enter into force this year by the Parliament of Kosovo, recognizes a registered civil union between same-sex persons. Still, it prevents same-sex engagement and marriage, even though this same Code stipulates that all persons should be treated equally under the Code regardless of their sexual orientation. Plus, according to the Criminal Code of Kosovo, if a crime committed was

³⁶ This, of course, should not have a negative impact; according to the ECtHR, popular opinion is not determinate on Convention-rights. That is, even if homophobia is prevalent, human rights must be ensured (see: *Shipitko and others v. Russia*).

motivated by sexual orientation, it may impose a more aggravated punishment on the perpetrator.

4. By comparing Kosovo with other former Yugoslavian States, we concluded that three (Croatia, Slovenia, and Montenegro) recognize civil union, while others do not realize this right for homosexuals; we expect that in Serbia, Bosnia and Herzegovina, North Macedonia, and Kosovo, there should be some movement towards promoting more LGBT+ human rights. On the other hand, Kosovo has advantages over its neighbours because it is only one step away from legalizing civil unions through its new Civil Code. Moreover, Kosovo is the only country from the former Yugoslavia that in its Constitution provides for non-discrimination on the principle of sexual orientation, and also does not define the condition of different sexes as representing the validity of the marriage.

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