

# SIMILAR SEX – UNNATURAL CONDITION FOR MARRIAGE

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## Abstract

*Existence of different sex-es between future partners is considered a part of family law doctrine as the most important natural condition for entering into marriage. In this sense, the dominant legal opinion support the fulfillment of this condition even in cases when this is not expressly foreseen with the legal disposals. Natural goal of marriage was and remains to be wedlock and raising children as well as committing sexual relations. According to the Kosovo Constitution regarding this issue, it is stated “based on the free will, every one enjoys the right to marriage, to create family in accordance with the law”. This sentence however doesn’t mention gender or sexual orientation and in this way it could be interpreted as very comprehensive. However Family Law in the Republic of Kosova, in its article 28, paragraph 1 foresees that to enter into marriage this could be done by two persons of different gender. Difference of sexes is the natural element which differentiates marriage from other forms of communion of people. This element means that marriage is set up only by two persons with opposite gender – thus a man and a woman. Failure of meeting this criteria represents marriage absolute obstacle for entering into the marriage. Nevertheless, based on changes that legislations had undergone , which enable “homosexual marriage” or recognize legal consequences of cohabitation between person of the same sex, we should admit that the condition of sex difference doesn’t represent a principle of global public order.*

## Introduction

Marriage as the most important institution of the family law creates a set of rights and obligations between spouses themselves so husband and wife have reciprocal rights and obligations and exactly today marriage is built up upon the moral and legal equality within determined limits by the law, without any discrimination on the religion, national, race or between persons of different sex basis.<sup>3</sup> Existence of different sexes between future spouses is considered from a part of family law doctrine as most important natural condition for entering into marriage. In this sense the biggest part of legal opinion has supported opinion according to which this condition should be fulfilled also in cases when legal disposals do not regulate this expressly.<sup>4</sup> Natural goal of marriage was and remains to be set up of marriage and raising children as well as conduction of sexual relations<sup>5</sup>. In article 37 of the Kosovo Constitution regarding this issue it is stated “based on the free consent everybody enjoys the right to marriage and the right to create family in accordance with the law”. This sentence however doesn’t mention gender or sexual orientation and as such it could be interpreted as very comprehensive. However Family Law of Kosovo in article 28 paragraph 1 foresees that in order to enter into the marriage there is a need of two persons of different gender. Difference of sexes is natural element that distinguishes marriage from other forms of people communions<sup>6</sup>. This element means that marriage could be set up by two persons of different sex – thus a man and a woman<sup>7</sup>. Failure to meet the condition of different sex represents an absolute obstacle on entering into the marriage. However based on changes that legislations entered into which enable “homosexual marriage” or recognize legal consequences of communion between persons of similar sex, we should admit that the condition of changes on sex doesn’t mean any more a principle of global public order<sup>8</sup>.

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<sup>3</sup> Hamdi Podvorica, Family Law - E drejta familjare, Universiteti Iliria, Prishtinë, 2006, pg 101

<sup>4</sup> Giovanni Bonilini, Manuale di diritto di famiglia, UTET, Torino, 2002, pg. 40;

<sup>5</sup> Hamdi Podvorica, cited, pg. 73.

<sup>6</sup> Gani Oruçi, Family Law - E drejta familjare (authorised lectures - ligjërata të autorizuara), Prishtinë, 1994, pg. 41.

<sup>7</sup> Ibid, pg. 41.

<sup>8</sup> Sonila Omari, Family Law - E drejta familjare, Tiranë, 2012, pg. 54.

### 1. The marriage bond between opposite – sex couples

It could be precisely said that marriage bond between similar - sex couples is not allowed because this is against the natural goal of marriage as a continual communion between two persons with opposite sex<sup>9</sup>. Therefore there could not be a marriage between persons of similar gender. An eventual such communion could not be considered marriage but it is considered unnatural communion.<sup>10</sup> With all of this it could happen that two persons of similar sex or bisexual could enter into marriage. Notably when mediator mediated marriage whereas bridegroom and bride did not know each other even they did not see each other until the first night of marriage. Thus there were no possibilities to verify bisexuality of the other spouse<sup>11</sup>. If it is verified that one to one spouse there dominates quality of sex that is similar to the other spouse, in that case marriage will be absolute null<sup>12</sup>. However if a person gets married to a person called hermaphrodite<sup>13</sup>, to whom dominates opposite sex, marriage will be relatively null because spouse of good faith has the right to raise the case in court to annul marriage because of error on essential qualities<sup>14</sup>. Verification of fulfillment of this condition will be done through the birth certificate of subjects that enter into marriage where there is a room which covers sex of each person. Verification represents practical interest of two hypotheses: the case of persons whose sex is not duly differentiated and the case of persons that changed their sex<sup>15</sup>.

### 2. Persons with not differentiated sex hermaphrodite or intersexual

Hermaphroditism is one of cases where determination of sex of a person that enters into marriage represent a difficulty – as such sex difference is done through forensic expertise. Hermaphroditism phenomenon is faced in those cases when genital organs of a person, sexual chromosomes of sexual characteristics, being primary or secondary could not determine gender as male or female<sup>16</sup>. In medical doctrine it remains controversial precise definition of this pathology. Characteristic of hermaphroditism is existence of two types of sexes within a person. This phenomenon is divided into two types:

- a) **quasi hermaphroditism**, where one sex is dominant even though it is a conclusion that there exist two sexes and
- b) **versus hermaphroditism** to this type dominate both sexes by which it is almost impossible to determine the sex of a person.

In the registry books in these cases sex of the person is not reflected. In these circumstances if it is concluded that sex of a person is not determined with the birth act, this person cannot enter into marriage since he is not in the situation to prove the different sex from his/her partner as the future spouse. When sex is noted in the birthdate formal act, thus this column is not filled up, the column can be filled out based on the medical report or by a court verification<sup>17</sup>, and for this the interested person with a recognition lawsuit can raise the case in court in order to determine precisely sex of the person. With filling out the birth formal act he can enter into marriage with the other person of different sex.

### 3. Change of sex

Differently from the case of hermaphrodite where sex physically is not determined in cases of transsexualism person is born with the determined sex but this case is accompanied with continual social and psychological turbulences which makes the person feels psychologically different from the physical sex a person has<sup>18</sup>. In essence of this pathology<sup>19</sup> stands the discrepancy between psyche and physical of a person. Currently treatment of this pathology is

<sup>9</sup> Hamdi Podvorica, cited, pg, 73.

<sup>10</sup> Gani Oruçi, cited, pg, 42.

<sup>11</sup> Hamdi Podvorica, cited, pg, 73.

<sup>12</sup> Ibid, pg. 73.

<sup>13</sup> Person to whom at the same time are developed male and female organs, person that has two sexes, bi - sexual

<sup>14</sup> Gani Oruçi, cited, pg. 42.

<sup>15</sup> Sonila Omari, cited, pg. 54.

<sup>16</sup> To identify these persons actually there is used notion “intersexual” or “cosexual”, broader term which is used only in medicine but it is preferred from groups of these persons, which term hermaphrodite consider as discriminatory and not suitable for identification.

<sup>17</sup> Sonila Omari, cited, pg. 55.

<sup>18</sup> Ibid, pg. 55.

<sup>19</sup> Branch of medicine that studies causes, birth signals and development of illnesses as well changes in organism deriving from these illnesses so first signs of an illnesses, causes and its development.

realized through “therapy of re-determination of sex” which corrects physical sex by equating it with the psychological one<sup>20</sup>. Transsexuals<sup>21</sup>, otherwise are known also as transgender<sup>22</sup> persons. This phenomenon of surgery intervention on changing the nature humans from a gender to the other belongs to the modern technological advancement in the field of medicine. It is important to mention that to this phenomenon the reproduction ability of human loses therefore such sterile marriages do not also fulfill natural and social goal for what they are evident. According to the France doctrine such marriages should not be allowed due to the lack of different genetic sexes as a necessary condition and presumption to enter into the valid marriage. This because with the surgery the different sexual organs can be imitated, since in reality, in the biological aspect it remains to be the same genetic organ as it was before.<sup>23</sup> Organ that is competent to conclude marriage data regarding future spouses takes from the act of civil status. In order to have a legally valid marriage spouses should figure in the document as persons of different sexes. Taking into the consideration the fact that for concluding a legal marriage spouses should be of different sexes and this consists a cause for dissolution of marriage even if one of them changes sex after the marriage was concluded. Jurisprudence of the Strasbourg Court considers violation of article 8, 12 and 14 of the European Convention of the Human Rights the legal obstacle to change sex in the act civil status. There also international mechanisms have proposed changes in the state legislations regarding this issue.

#### 4. Persons that have changed sex or transsexualism

One of the important aspects of life is the gender identity which is determined immediately after the birth by becoming social and legal fact. Nevertheless for a relatively small number of people being a member of person with changed sex after the birth consist a problem. This may happen also for intrasexual persons whose bodies contain male and female forms in some cases also genital anatomies of them. For such persons problems appear because of perception they have for themselves doesn't comply with the sex determined after birth. These persons are called “transgender” or “transsexual”. Despite the fact that the number of transgender persons is small, their community is diverse including transgender before and after surgery but also persons that decide not to undergo surgery or that cannot undergo through it. They can be identified as male or female and they may have undergone or may have not undergone surgery or hormonal therapy. Part of the community are also persons that dress differently from the gender they belong to, transvestites and others which do not belong to either “male” or “female”. Many legislations use term transsexual. Despite differences that exist between notions of “sex” and “gender”. “Sex” refers to biologic difference between men and women whereas “gender” apart of biologic aspect covers social aspect of identification between gender. Notion “gender identity” gives us possibility to understand that sex is determined after birth could not comply with the gender identity developed when child grows up. “Gender identity” refers to deep inner experiencing that every person and that may not comply with the sex determined after birth and extremely personal experience of body and other reflections of gender as clothing, speaking and behaviour.<sup>24</sup> Transgender persons do not develop this complementary gender identity and could witness to change their legal status, social, physical or part of them in a way they comply with their gender identity. Legislations of some states characterize be mistake gender identity under sexual orientation no matter of existence of differences between these two concepts. Sexual orientation as capacity of each person for deep emotional, affective and sexual withdrawal and to have sexual relations with the persons of the same gender or with opposite gender or even with more of one gender (homosexuality, heterosexuality and bisexuality)<sup>25</sup>. Under this context many national and international medical reports impose diagnosis of mental disorder for transgender persons. Such diagnosis is obstacle in realising complete human rights of transgender persons and especially when diagnosis is implemented in a way that limits legal capacity as well as possibilities for medical treatment. European Court of Human Rights has implemented European Convention in important trials that have decided that states should give to transgender persons

<sup>20</sup> Sonila Omari, cited, pg. 55.

<sup>21</sup> Differently as it was thought, transsexualism doesn't represent a phenomenon of modern society, since it existed at all times. In the ancient world this was accepted and respected but due to the low level of development of science this pathology was not cured. By passing the time there were attempts for correction or cure by impact in the psyche of people to accommodate with physical. When this didn't bring results it was seen as necessary the application of opposite method- interference in physical to accommodate with psyche. In new era and technology, a chance is offered to this persons so a correction of natural defect is made. No matter that there is a series of genetic, hormonal and genetic theories there still remains unknown the reason of transsexualism.

<sup>22</sup> Transgender, is a notion used in all languages. It represents connection of Latin words: trans-beyond and gender.

<sup>23</sup> Hamdi Podvorica, cited, pg. 74.

<sup>24</sup> Determination as it is used by Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, could be found at: [www.yogyakartaprinciples.org](http://www.yogyakartaprinciples.org).

<sup>25</sup> Ibid.

so they undergo surgery procedures which lead in redefining gender<sup>26</sup>. Court has decided also that states should recognize changes of sex in documents of identification<sup>27</sup>. Nevertheless European Court of Justice has decided expressly that “discrimination” which derives from redefining gender of person is considered discrimination on the basis of sex in the case P against S and Council of Cornwall County.<sup>28</sup>

Recognition of gender identity as a basis for discrimination defended universally is raised from the High UN Commissioner for Human Rights<sup>29</sup>. Neither existence of national laws nor domination of customs cannot justify abuse, attacks, torture even killings that gay persons, bisexuals and transsexuals suffer because of that there is thought that they are. In 2007 Principles of Jakarta on implementing Laws on Human Rights were published regarding the sexual orientation and gender identity as international efforts in promoting international standards over sexual orientation and gender identity. It is of special importance the Jakarta Principle number 3<sup>30</sup>. Article 8 of European Convention underlines the fact that: “all have the right for private and family life, house and communication”. European Court for Human Rights has decided that failure of a state to change birth certificate of a person in accordance with the preferred gender contains violation of article 8 of Convention.<sup>31</sup> Therefore legal member states are obliged to recognize the changed gender of transsexual persons. Access in the procedures for changing sex and name in the documents of identification is crucial for a person to live in accordance with the preferable gender identity<sup>32</sup>. Conditions of recognition change of sex in the official documents change a lot from a state to the other. However there could be noted three categories of states:

**First:** there are no measure for official recognition<sup>33</sup>;

**Second:** it is not required a person to be subject of hormonal treatments or surgery procedures in order to get official recognition of preferable gender<sup>34</sup> (legal recognition of gender is made possible by providing prove about gender dysphoria<sup>35</sup> before a competent authority as it is the expert from Ministry of Health in Hungary, Panel for redefining Gender in UK.

**Third:** person should prove that :

- a) He/she has undergone a process of redefining gender supervised by medical profession.
- b) He/she is sterilised surgically in irrevocable way and/or

<sup>26</sup> ECHR, Van Kuck vs. Germany, trial of June 12, 2003.

<sup>27</sup> ECHR, B. vs. France, trial of March 25, 1992 and Christine Goodwin v. UK of July 11, 2002.

<sup>28</sup> ECHR, Issue C-13\94, P.v.S. and Council of Cornwall County, trial of April 30, 1996. ECHR (1996) I-2143, ECHR, Case C-117\01, K.B. v. Pension Agency of National Medical Services, State Secretary for Health, trial of January 7, 2004, ECHR, Case C-423\04, Sarah Margaret Richards v. State Secretary for pensions and labor, trial of April 27, 2004. For an explanation of advanced nature of trials see at: EU Agency for Fundamental Rights, Homophobia and Discrimination on the basis of sexual orientation of EU, Why, in the legal analysis, pg.124.

<sup>29</sup> www.commissioner.coe.int.

<sup>30</sup> Everyone is entitled to be called a person before the law. Persons of different sexual orientations and gender identities join legal capacity in every aspect of life. Sexual orientation self determined of each person and gender identity is an essential part of its personality and one of the basic aspects of self dependence, dignity and freedom. Nobody will be obliged to undergo medical procedures including surgery, sterilization or hormonal therapy for redefining sex as a precondition for gender legal recognition of a person. No status as marriage or being parent cannot be used as a condition to prevent legal recognition of gender identity of a person. Nobody shall be put under the pressure in order to hide, or to neglect sexual orientation or identity based on gender.

<sup>31</sup> See, ECHR, B. v. France trial March 25, 1992 (serie A nr. 232-C) (that differs between trials Rees dhe Coqey), ECHR, Sheffield dhe Horsham v. UK, trial July 30, 1998, ECHR, Christine Goodwin v. UK, Appel nr. 28957\95, trial July 11, 2002. ECHR (article 4), Grant v. UK, Appel nr. 32570\03, trial May 23, 2006.

<sup>32</sup> www.commissioner.coe.int.

<sup>33</sup> See, European Union Agency for Fundamental Rights, Homophobia and Discrimination on the grounds of sexual orientation in the eu Member States, Part I-Legal Analysis, f. 131-133.

<sup>34</sup> www.commissioner.coe.int.

<sup>35</sup> This is phenomenon that shows discontent that persons have with their biological sex with what they were born.

- c) He/she has undergone other medical procedures e.g. hormonal treatment<sup>36</sup>.

Such conditions as sterilization or any other surgical procedure as conditions to ensure gender legal recognition is in contradiction with the respect of physical integrity of a person.

There exist two international systems of classification of mental illnesses:

**First:** Diagnosis and statistical manual of mental disorders (dms) that includes the term of gender identity disorder as a mental disorder which is used to describe persons that experience a considerable gender dysphoria which means dissatisfaction with the biologic sex with what he/she was born<sup>37</sup>.

**Second:** International Statistical Classification of illnesses and other medical problems (kns) of ICD-10 classifies transsexualism as a disorder and mental disorder and behaviour. It is important to stress out that in this way transgender persons are stigmatised as persons with mental disorder<sup>38</sup>. These classifications are problematic and are being questioned quite a lot by the civil society<sup>39</sup> and by health care professionals<sup>40</sup>.

## 5. Conclusion

Wedlock after birth and after death is one of the most important moments in the life of human. It is one of the oldest institutions and socially and legally important. There have existed dilemmas and objections views in the family law theory as well as in the legal regulatory of marriage. Its goal derives from its content itself as life communion of a man and a woman because it has as the objective creation of family, birth of children and conducting sexual relations, therefore it is rightfully said that legal doctrine has three main goals, e.g.: natural, moral and social goal. Opposite sexes contain biologic, cultural and civilised component because the natural goal of marriage is birth of children and conduction of sexual relations. From all of this it could be said that the conclusion of marriage between person of similar gender is not allowed because it stands against the natural goal of it as the continual communion of two persons with opposite sexes. But there are cases in practice when marriage is concluded between bisexual persons and with similar sexes even though the current level of culture development, emancipation and education of female similarly to male has reduced maximally possibilities of concluding marriage between persons with similar gender. In some cases of the contemporary world where we live there are taken into the consideration and they are regulated with legal norms- sexual rights are human rights connected to sexuality having as the basis the right to equity, equal protection before the law and freedom from all forms of discrimination on sex, sexuality or gender with the argument that all people are born equal and free, in dignity and in the rights therefore they should enjoy equal protection by law against discrimination in sex or gender.

At the end we could say that one man that manages to fulfil in the allowable way his sexual needs is a little bit less distracted in spiritual journey because faith and love for each other or interlinked between them.

<sup>36</sup> Moreover, people may have to prove that they live in a new gender for a long period of time in the so-called life experience. "Life experience" leads hormonal treatments and surgery on redefining gender which contains three elements of three-five therapy that is often a condition for recognition of gender in new member states.

<sup>37</sup> Diagnostic and statistical manual of mental diseases, fourth edition classifies disorders of gender identity to minors and adults (category 302.85) under chapter gender and sexual disorder of identity and the disorder of identity of children (category 302.6). See: [www.icd9data.com/2009/Volume1/290-319/300-316/302/302.85.htm](http://www.icd9data.com/2009/Volume1/290-319/300-316/302/302.85.htm).

<sup>38</sup> kns could be found at: [www.who.int/classifications/icd/en/](http://www.who.int/classifications/icd/en/). Transsexualism is classified in chapter 5 (mental disorder and behaviour) category F64.

<sup>39</sup> Statement on the Reform to the DSM, Transgender Europe (TGEU), 2 November 2008. TGEU is an European network of groups and transsexual persons in Europe.

<sup>40</sup> Many professionals specialised in healthcare have observed that treatment consists basically in physical modifications that has as a goal to bring body in accordance with perception of person regarding his mental identity (psychological or emotional) gender and not vice versa. This is line of World Professional Association for Transgender Health. However Professional Association of Transgender Health has not updated still standards since 2001 and still qualifies transsexualism as mental disorder. On the other side there are discussions being developed about possible changes.

**6. Literature**

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