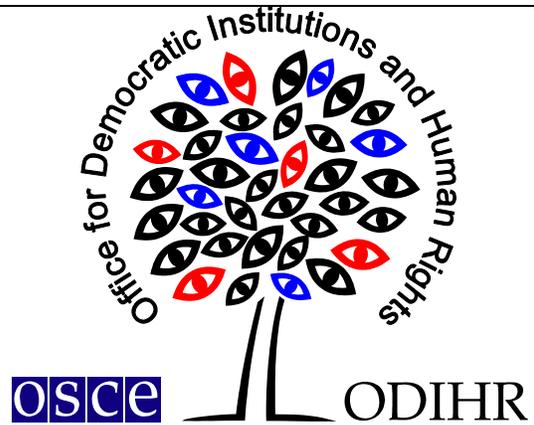


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COMMENTS
ON THE DRAFT AMENDMENTS
TO THE FAMILY CODE
OF THE REPUBLIC OF ALBANIA

1. SCOPE OF REVIEW

This is not a comprehensive review, but rather a comment on the Draft Law on an Amendment to Law No 9062 On the Family Code of the Republic of Albania (hereinafter referred to as the Draft).

The analysis intends to (a) assess the compliance of the draft legislation with international standards pertaining to the protection of civil rights of persons with disabilities, in particular the right to marry and found a family, and the prohibition of discrimination, and (b) to propose recommendations considering both the relevant international standards and other countries' best practices.

2. RECOMMENDATIONS

1. The proposed restrictions concerning the right of persons with disabilities to marry and to found a family are arbitrary and unjustified in the light of international human rights standards concerning the prohibition of discrimination.
2. It is recommended that the law retain the current scope of restriction of the right to marry, lack of mental capacity to consent to marriage being the sole ground for barring marriage to an individual.
3. It is recommended that the relevant legislation be amended to include provisions outlining the procedure for assessing the mental capacity to consent to marriage.
4. It is recommended that the law does not impose any restrictions on the right to marry of persons affected by genetically determined disorders.
5. Premarital medical certification should not amount to be more than a limited version of partner notification – a traditional public health tool used to identify and contact individuals who may have been exposed to HIV infection or another infectious agent. It is important that the results of medical tests are kept strictly confidential and be only disclosed to the privileged persons such as the potential marital partner.
6. It is recommended that, should the Albanian legislator introduce mandatory medical certification as a precondition for marriage, the law expressly state that the

marriage license be issued irrespective of the results of the medical tests. Genetic tests should not be performed as part of mandatory premarital medical certification. In addition, necessary amendments should be made in the relevant legislation to ensure confidentiality of the results of medical tests.

7. It is recommended that in the long term the Albanian policymakers consider the following options when reforming the public health related legislation:
 - a) Improved access to health counseling, including genetic counseling, and to voluntary testing, including prenatal diagnostic testing.
 - b) Improved access to contraception, including introduction of mandatory insurance coverage for contraception; and allowances for indigent population belonging to the risk groups.
 - c) Liability for medical malpractice, including in cases when medical malpractice has led to wrongful birth (cause of action when negligent medical treatment deprives parents of the option to terminate a pregnancy to avoid the birth of a child with a serious disorder).

3. INTRODUCTION

The draft amendments under consideration in this analysis pertain to the right to marry and to found a family as it concerns certain groups of population, including persons with mental and intellectual disabilities, persons living with HIV/AIDS, and persons affected by genetically determined blood disorders. The proposed amendments have far-reaching implications for the internationally recognized right to marry and to found a family, and for the prohibition of discrimination.

The right to marry and to found a family is well established under the international human rights law. Article 23 of the International Covenant on Civil and Political Rights (ICCPR)¹ recognizes the important role of family in society and extends the right to marry and to found a family upon the free and full consent of the intending spouses to all men and women of marriageable age. ICCPR General Comment 19 on protection of the family, the right to marriage and equality of the spouses specifically mentions that the domestic legal

¹ Acceded to by Albania on 4 January 1992.

provisions regulating marriage “must be compatible with the full exercise of the other rights guaranteed by the Covenant.”² Compatibility with the prohibition of discrimination³ should therefore be ensured.

Article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)⁴ guarantees the right to marry to men and women of marriageable age, although providing that this right shall be exercised in accordance with the laws of the country. However, in the light of the prohibition of discrimination as provided for by Article 14 of the ECHR, this limitation on the exercise of the right to marry cannot be interpreted as to preclude marriage for certain individuals because of the group they belong to. The limitation introduced by the reference to the domestic legislation, as interpreted by the caselaw of the European Court of Human Rights, “must not... restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired.”⁵ Arbitrary denial of the right to marry to a vast category of individuals would certainly amount to undue and discriminatory restriction of the right.

4. DISABILITY AND HUMAN RIGHTS: AN OVERVIEW OF RELEVANT STANDARDS

The promotion and protection of the rights and dignity of persons with disabilities is increasingly in the focus of attention by the international community. The recent years have seen the human rights approach evolve from the mere recognition of the necessity to prevent and eliminate discrimination on the basis of disability to a more comprehensive set of measures to promote integration of individuals with disabilities in society.

Although at present no international human rights instrument addresses the specific concerns of persons with disabilities, the existing human rights treaties create a number of protections for this category of individuals. Interpretative guidelines such as the General Comments to the two Covenants and *travaux préparatoires* play an authoritative role as an

² ICCPR General Comment 19, para 4.

³ Article 26, International Covenant on Civil and Political Rights.

⁴ Ratified by Albania on 2 October 1996.

⁵ See European Court of Human Rights, *F. v. Switzerland*, Judgment of the Court, 18 December 1987, para 32.

official interpretation of specific provisions of binding human rights instruments. Specialized soft law standards such as declarations and the U.N. Standard Rules and Minimum Principles can also be viewed as practical guidance in interpreting the provisions of more general human rights instruments. Furthermore, regional instruments from outside the OSCE region and draft conventions, although not legally binding on the OSCE participating States, are still a valuable source of information and advice for the those drafting and implementing domestic legislation concerning disability.

The General Comment 5 to the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁶ on the rights of persons with disabilities **expressly prohibits discrimination on the basis of disability** by stating that “the requirement contained in article 2(2) of the Covenant that the rights ‘enunciated ... will be exercised without discrimination of any kind’ based on certain specified grounds ‘or other status’ clearly applies to discrimination on the grounds of disability.”⁷

In 1993, the World Conference on Human Rights meeting in Vienna adopted a document that came to be known as the Vienna Declaration and Program for Action, which unequivocally states that “all human rights and fundamental freedoms are universal and thus unreservedly include persons with disabilities.”⁸

The United Nations Standard Rules on Equalization of Opportunities for Persons with Disabilities impose a requirement on the States to promote the full participation of persons with disabilities in family life. The Standard Rules expressly mention that the States “should promote their right to personal integrity and **ensure that laws do not discriminate against persons with disabilities with respect to sexual relationships, marriage and parenthood.**”⁹ (Emphasis added.) Moreover, the Standard Rules require that the States “ensure that organizations of persons with disabilities are involved in the development of

⁶ Acceded to by Albania on 4 October 1991.

⁷ ICESCR General Comment 5, para 5.

⁸ Vienna Declaration and Program of Action, World Conference on Human Rights, Vienna, 14-25 June 1993, U.N. Doc A/CONF.157/24, para 63.

⁹ United Nations Standard Rules on Equalization of Opportunities for Persons with Disabilities, Rule 9.

national legislation concerning the rights of persons with disabilities, as well as in the ongoing evaluation of that legislation.”¹⁰

The understanding of the importance of **stakeholder consultation in developing legislation that affects individuals with disabilities** is shared by the Inter-American Convention on the Elimination of all Forms of Discrimination Against Persons with Disabilities¹¹ – the first international treaty to deal specifically with disability issues, and the only such treaty to date, before the draft United Nations Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities is adopted and enters into force. The States Parties to the Inter-American Convention do not only undertake an obligation to prevent and eliminate discrimination against persons with disabilities, but also agree to abide by the requirement to involve “representatives of organizations of persons with disabilities, nongovernmental organizations working in this area, or, if such organizations do not exist, persons with disabilities, in the development, execution, and evaluation of measures and policies to implement this Convention.”

5. SPECIFIC ISSUES THAT REQUIRE PARTICULAR ATTENTION

7.1 *The right to marry of persons with mental or intellectual disabilities.* The extant Family Code provides that lack of mental capacity “to understand the nature of marriage” shall be bar to marriage.¹² This is a legitimate restriction aimed to protect the best interest of the potential marital partner where he or she lacks the capacity to consent. The draft amendments propose to extend the list of impediments to marriage by including some mental disorders and impairments of the intellectual ability which may not necessarily result in reduced capacity to make informed decisions on marriage and family issues. The grouping is rather far-fetched and includes an array of different conditions such as senile psychotic conditions, schizophrenia, bipolar (“manic-depressive”) disorder, reactive psychosis and moderate to profound impairment of intellectual functioning (“profound debility,” “imbecility,” “idiocy”). It is unclear what the criteria for compiling this list have

¹⁰ *Id.*, Rule 15, para 1.

¹¹ Adopted at Guatemala City, Guatemala at the twenty-ninth regular session of the General Assembly of the Organization of American States, held on 7 June 1999.

¹² Family Code of the Republic of Albania, Article 12.

been. The proposed restrictions seem arbitrary and unjustified in the light of international human rights standards concerning the prohibition of discrimination.

It is recommended that the law retain the current scope of restriction of the right to marry, lack of mental capacity to consent to marriage being the sole ground for barring marriage to an individual.

It is welcome that the current law dictates the application of a test for mental capacity “to understand the nature of marriage” or lack thereof – rather than for legal (in)competence. This approach is fully in line with the international best practices, which increasingly regard legal competence and mental capacity as decision-specific, i.e. require that an assessment of someone's capacity be based on the actual decision to be taken at the time it needs to be taken – as contrasted to a blanket label of incapacity. However, the current Family Code and the Code of Civil Procedure are silent on the procedure for establishing that the person in question lacks mental capacity to consent to marriage.¹³ **It is recommended that the relevant legislation be amended to include provisions outlining the procedure for assessing the mental capacity to consent to marriage.**

7.2 Non-discrimination of persons affected by genetically determined disorders. The European Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine (the Convention of Human Rights and Biomedicine) expressly prohibits “any form of discrimination against a person on grounds of his or her genetic heritage.”¹⁴

Although Albania is not a party to the Convention, the treaty provisions are still a source of guidance for the legislator since they allow to interpret the general prohibition of discrimination that Albania has undertaken to adhere to as a Council of Europe Member State.

¹³ Articles 382-387 of the Code of Civil Procedure provide for the procedure for declaring a person legally incompetent, however, as noted above, legal incompetence and lack of capacity to consent to marriage are not congruent under the Albanian law.

¹⁴ Article 11, European Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine.

It is recommended that the law does not impose any restrictions on the right to marry of persons affected by genetically determined disorders.

7.3 Medical certificates. The law may legitimately require that a medical certificate be filed in order for a marriage license to be issued, however, it should not make the issuance of the marriage license conditional on the results of the medical tests. The objective of mandatory medical certification should be rather to inform the potential marital partner if the person concerned has a sexually transmitted disease, leaving the final decision whether or not to get married to the intending spouses. Premarital medical certification would thus present a more limited version of partner notification – a traditional public health tool used to identify and contact individuals who may have been exposed to HIV infection or another infectious agent. It is important that the results of medical tests are kept strictly confidential and be only disclosed to the privileged persons such as the potential marital partner.

As far as the tests for genetically determined disorders are concerned, the above noted European Convention of Human Rights and Biomedicine introduces an important restriction on the application of genetic tests. Article 12 of the Convention provides that “[t]he tests which are predictive of genetic diseases or which serve either to identify the subject as a carrier of a gene responsible for a disease or to detect a genetic predisposition or susceptibility to a disease may be performed only for health purposes or for scientific research linked to health purposes, and subject to appropriate genetic counseling.” Therefore, any such tests should be strictly voluntary.

It is recommended that, should the Albanian legislator introduce mandatory medical certification as a precondition for marriage, the law expressly state that the marriage license be issued irrespective of the results of the medical tests. Genetic tests should not be performed as part of mandatory premarital medical certification. In addition, necessary amendments should be made in the relevant legislation to ensure confidentiality of the results of medical tests.

7.4 Legislative solutions for disease control. The legislative history of the draft amendments shows that the primary objective of the proposed draft is improved control of β -thalassemia. There is a number of legislative solutions which may significantly improve the management of genetic disorders, while they are fully consistent with the international human rights framework and contribute to the promotion of the right to the highest attainable standard of health.

It is recommended that in the long term the Albanian policymakers consider the following options when reforming the public health related legislation:

- a) **Improved access to health counseling, including genetic counseling, and to voluntary testing, including prenatal diagnostic testing.**
- b) **Improved access to contraception, including introduction of mandatory insurance coverage for contraception; and allowances for indigent population belonging to the risk groups.**
- c) **Liability for medical malpractice, including in cases when medical malpractice has led to wrongful birth** (cause of action when negligent medical treatment deprives parents of the option to terminate a pregnancy to avoid the birth of a child with a serious disorder). The extant Albanian legislation only provides for criminal liability for grossly negligent treatment when it has caused serious harm to health or death of the victim.¹⁵ The legislator may consider introducing a comprehensive system of liability for medical malpractice, including civil and administrative liability.

¹⁵ Criminal Code of the Republic of Albania, Article 96.