

HELLENIC REPUBLIC
GREEK NATIONAL COMMISSION FOR HUMAN RIGHTS

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| <p>Comments on the Bill titled: “Reforms for the Family, the Children and the Society”</p> |
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Chapter One: “Civil Union Pact”

I. History

In December of 2004, the NCHR adopted a decision regarding discrimination on the basis of sexual orientation and the legal recognition of homosexual couples. On 26/3/2008 the NCHR’s President communicated a letter to the Minister of Justice reminding him of the Commission’s views and asking him to reconsider the provisions of the bill titled: “Reforms for the Family, the Children and the Society”, which excludes couples of the same sex from its *ratione personae*. In his letter, the President noted that the bill, by excluding same sex couples from its scope, fails to take into account the prevailing factual social needs, nor does it comply with the State’s obligation to non-discrimination on the basis of sexual orientation. The Minister of Justice replied by issuing a press release stating that the Ministry does not intend to act discriminatorily and that the Minister adopts the recommendation of the NCHR for the establishment of a working group which will examine all aspects of the legal recognition of homosexual couples.

The NCHR then replied to the Minister of Justice with a letter underlying the need for setting a concrete time-frame by the end of which the working group will have completed its work and submitted its recommendations; it also underlined the need for gay community representation within the working group and that the inclusion of all couples

irrespective of their sexual orientation in the civil union provisions, prevents any discrimination.

It needs to be stressed that up to today the Ministry of Justice has not informed us regarding the establishment of the working group.

On 27/5/2008 a new version of the bill was communicated to the NCHR, which includes two chapters: the “Civil Union Pact” and “Amendments to the Civil Code regarding Adoption, Divorce, Surname of Spouses and Parental Custody”.

II. General Observations

The NCHR cannot comprehend the reasons for which the provisions regulating the civil union pact are included in the same bill introducing amendments to family law, nor the reasons for which the provisions of the pact are not incorporated into the Civil Code.

III. Comments on the part of the Explanatory Report regarding the Civil Union Pact

The NCHR notes that the provisions for the Civil Union Pact (hereinafter CUP) are not comprehensive and do not ensure the required certainty of law. The Explanatory Report perceives and presents the CUP as inferior compared to the religious and/or civil marriage, whereas at the same time it seems to have an apologizing tone by using phrases such as: “the CUP will facilitate couples’ decision to get married”. Furthermore, it continuously presents the religious marriage as the “best” option for couples.

III. Comments on the provisions

a. Exclusion of homosexual couples

As already mentioned, in 2004 the NCHR underlined the need for legal recognition of homosexual couples on the basis of international human rights law prohibiting discrimination based on sexual orientation. The NCHR’s decision of 2004 underlined all international and national provisions which

per se or/and in combination prohibit discrimination against lesbians, bisexuals, gays and transsexuals and provide for the basis of instituting for them the CUP: articles 2, 7 & 16 UDHR, articles 8, 12 & 14 ECHR, article 2 para 1 of 12 Protocol to the ECHR, article 17 paras 1 & 2, articles 23 & 26 ICCPR, articles 2 para 1, 4 para 1, 5 & 9, 25 para 1 of the Constitution. The fact that the Greek legislator introduces a new institution from which it expressly excludes homosexual couples constitutes direct discrimination on the basis of sexual orientation which runs contrary to articles 8 & 14 ECHR. The ECtHR has held that sexual orientation falls under article 14, and also that “the notion of the ‘family’ is not confined solely to marriage-based relationships and may encompass other *de facto* ‘family ties’ where the parties are living together outside of marriage”.

Legal recognition of homosexual couples varies in other European countries, whereas in some of them there is more than one type of legal recognition.

The Fundamental Rights Agency in a recent report noted that the equal protection of LGBT in the EU is still not complete and stressed the need for improvements in all areas emphasizing, though, the legal recognition of homosexual couples.

The NCHR asks once more for no discrimination against LGBT and the safeguard of their fundamental rights on the basis of supranational rules prescribing the eradication of stereotypes and social prejudices.

b. Article 1: Conclusion of CUP

The NCHR noted that the CUP should enter into force not when the contract is signed by the two parties in the presence of the notary but after the contract is catalogued at the registry office in order for the appropriate publicity to be ensured.

c. Article 2: Requirements

Para 1: The NCHR criticized the provision of the bill requiring full capacity for the conclusion of the CUP, given especially the fact that a person

may contract marriage, which entails more serious legal consequences, even if he has diminished capacity. The NCHR took the view that individuals of diminished capacity should be able to conclude CUP under the conditions set by the Civil Code for the case of marriage.

d. Article 4: Termination

The NCHR took the view that when the CUP is terminated by an agreement of both parties drafted by a notary, the entry into force of the termination should begin after it is catalogued at the registry office.

The NCHR noted that in the case the CUP is terminated unilaterally via a declaration by one of the parties before a notary and then served to the other party, the entry into force of the termination should start three months after the declaration has been catalogued at the registry office in order for the other party to have some time to adapt to the new situation.

Para 2 provides for the *ipso jure* termination of the CUP when one of the parties contracts marriage with a third party. *Ipso jure* termination without any notification of the other party runs contrary to the principle of good faith, since the other party may be under the impression that the CUP is still valid. Therefore, the NCHR took the view that in order for the certainty of law to be ensured, para 2 needs to provide for the marriage certificate to be catalogued where the CUP has been previously catalogued and to be served to the other party of the CUP.

e. Article 6: Financial relations

According to article 6 the parties to the CUP may regulate their financial relations when they conclude the CUP before the notary by including the relevant provisions in the CUP and not at a later stage. The NCHR held the view that the contracting parties should have the possibility to regulate at a later stage their financial relations if they wish to, by amending the original CUP and submitting it to the registry office.

f. Article 7: Alimony

A) According to article 7 para 1 the parties when they conclude the CUP they may include an agreement regarding alimony in case one of the two parties cannot support themselves after the CUP is terminated. However, it is not clear whether there can be a claim for alimony if no relevant agreement has been included in the CUP. Therefore, the NCHR took the view that the provisions of the Civil Code regarding alimony after divorce should apply *mutatis mutandis* after the termination of the CUP in case no previous agreement has been reached.

B) According to the bill the agreement regarding alimony will not be valid in case the CUP is terminated *ipso jure*. The NCHR held the view that the need for alimony should not depend on the way the CUP is terminated. The need for alimony is an objective fact and by rendering it dependent upon the way the CUP is terminated, the legislator violates the principle of equality since the same situation -the need for alimony- is regulated differently on the basis of how the CUP was terminated. Therefore, the alimony agreement should remain valid irrespective of how the CUP is terminated.

g. Article 8: Presumption of paternity

The NCHR recommended the addition of a provision according to which children who are born inside or outside of CUP are assimilated to those born inside marriage irrespective of whether the CUP is terminated or annulled.

The NCHR also recommended that the provisions of Civil Code regarding artificial insemination be applied *mutatis mutandis* to couples having concluded CUP.

h. Article 9: Children's surname

According to article 9 children's surname will consist of the surnames of both parents, unless they have agreed otherwise when concluding the CUP. The NCHR agrees with the phrasing of the provision in question and

proposes the amendment of article 1505 of the Civil Code, according to which a child takes automatically the surname of the father if the parents have not declared otherwise at the registry office.

i. Article 11: Inheritance

According to article 11 of the bill the partner of the deceased inherits 1/6 of the inheritance if the deceased has children and the 1/3 if the deceased has other relatives (parents, siblings etc). The percentages for spouses are $\frac{1}{4}$ and $\frac{1}{2}$ respectively. This differentiation is not reasoned. The CUP might be a form of union more 'loosen' than marriage, but any differentiation in legal provisions must serve a real need. Derogations that are simply introduced just to emphasize the difference between CUP and marriage and the implicit preference for the latter are not acceptable. Therefore, the NCHR recommended the change of the percentages to $\frac{1}{5}$ and $\frac{1}{2}$ respectively.

j. The omission of the *mutatis mutandis* application provision (former article 12)

The NCHR is surprised by the deletion from the bill of the article according to which provisions of public servants law, labour law and social security law concerning spouses are also applied to parties to CUP. According to the Explanatory Report that provision was deemed necessary in order to provide for equal and fair treatment for individuals, who live in couple without having been married. The NCHR considers necessary for the provision in question to be included in the bill and recommends for the *mutatis mutandis* application to parties to CUP of the relevant provisions, after the CUP has lasted for two years in order for fictitious CUPs to be avoided.

Chapter 2: Amendments to the Civil Code on Adoption, Divorce, Surname of Spouses and Parental Custody

The NCHR is surprised by the decision of the Ministry of Justice to amend provisions of family law without having first organised a public consultation with competent bodies and experts and without having thoroughly studied and evaluated the provisions introduced 25 years ago with the assistance of experts. Furthermore, it would like to note that the bill in question does not take into account previous recommendations of the NCHR regarding provisions that should be amended.

a. Parental custody (article 21)

The introduction of the rule of joint custody after the divorce or annulment constitutes a dangerous repealing of basic family law principles safeguarding the interests of the child. Preserving joint custody, given that basic terms of the provision are unclear, such as “usual acts of the child’s daily life’ will cause harmful tensions for children and more frequent intervention of the courts for disputes to be resolved.

The Explanatory Report acknowledges the fact that the new provision may indeed result in an increase of disputes and that it requires mature parents.

Due to the obvious problems likely to be caused by the provision in question, the NCHR recommends that it be withdrawn from the bill.

b. Adoption (article 14)

The NCHR took the view that should the court substitute for the consent of the parents for their child to be given for adoption -after they have authorized the initiation of the adoption procedure-, there should be proof that they are indeed of unknown residence.

c. Divorce (article 19)

The NCHR holds the view that certain serious acts of domestic violence and any attempt on the spouse's life should constitute irrebuttable presumption of irreparable breakdown of marriage.

d. Spouses surname (article 20)

According to the said article, the wife may take her husband's surname if they both agree to that. The Explanatory Report states that this provision allows spouses to hold the same surname if they so wish so that they are able to prove their relation status easier, especially when involving in any transactions abroad, and given that the surname of the spouse is not included in passports or identity cards.

The NCHR considers this provision not to comply with the safeguard of substantive equality of two sexes and with the continuity of women's personality. Furthermore, this provision may endanger safety of transactions since it does not ensure the continuity of women's identity through potential successive surname changes. Moreover, this provision is not compatible with the principle of equality of sexes as provided for by the Constitution and CEDAW.

e. Article 1532 CC

The NCHR proposed an amendment to article 1532 CC (consequences of improper exercise of custody): the exercise of any kind of violence against a minor to constitute case of improper exercise of custody.

f. Children born outside of marriage

Regarding the custody of children born outside of marriage the article in question provides that the father who has recognized his child may be assigned the custody in whole or in part after he applies to court, if that is in the best interest of the child. The NCHR took the view that the consent of the mother should be required for the assignment of parental custody, in whole or in part, to the father, in order for abusive practices to be avoided.

g. Provisions that should be included in the bill

The NCHR has already stated its position regarding marriage of minors and marriage of minors by proxy, which should be included in the bill in question.

The NCHR also repeats its recommendation for the amendment of para 2 of article 1350 of the CC -which, exceptionally, and for serious reasons, allows for a marriage to take place regardless of age-, and its replacement by a provision of a transitional character stipulating that for a five-year period a marriage between persons of a minimum of 16 years of age, may be permitted for serious reasons and following a judicial decision.

Athens, 14 July 2008