



MEMORANDUM

TO: The Honorable Deputies of the Assembly of Kosovo
FROM: Glen Lavy, Senior Vice President
RE: Constitution of the Republic of Kosovo
DATE: April 8, 2008

The proposed Constitution of the Republic of Kosovo goes into amazing detail and does an admirable job of balancing the interests of the various communities. The Constitutional Commission is to be commended for its thorough work. From the perspective of American constitutional law, however, there are a number of provisions that could have consequences that the Assembly and other Kosovo leaders never intended. The protection of “gender” instead of “sex” could result in special rights for transsexuals, even though they suffer from a mental disorder, Gender Identity Disorder; subjecting Kosovo to international law and decisions by the European Court of Human Rights could ultimately remove any ability of Kosovo to determine its own moral values relating to sexual behavior; giving “sexual orientation” the same status as race, religion, etc. is likely to result in a claim that the Constitution requires same-sex “marriage”; even with the removal of the phrase “from birth” in Article 25, Article 26 may still lead to a claim of a right to abortion; the limitation on freedom of conscience relating to the “health or rights of other persons” would allow for the violation of the rights of conscience of many Kosovar professionals; and the limitations on speech, media, assembly, and association appears to be designed to prevent any public expression of unpopular viewpoints – the viewpoints that most need constitutional protection.



We do not believe that any of the provisions with the potentially negative consequences addressed in this memo are required by the Comprehensive Proposal for Kosovo Status Settlement, dated 26 March 2007 (“Status Settlement”). Moreover, some of the provisions, such as those subjecting Kosovo to international law and decisions of the European Court of Human Rights, are not generally included in the Constitutions of other independent European countries. We respectfully recommend that the Assembly consider revising the provisions addressed below to better insure the liberty of all of the Kosovo communities.

Articles 7, 71, Protection of “Gender” vs. “Sex”

Article 7 protects “gender” instead of “sex.” Although section 2 expressly refers to “female and male,” thereby clarifying Article 7, Article 71’s reference to recognizing “internationally recognized principles of gender equality” does not. In order to avoid inadvertently creating a claim of constitutional status for transsexuals, the Constitution should protect “sex” instead of “gender,” or at least clarify in Article 71 that it is referring to male and female equality. That could be accomplished by changing Article 71 to refer to “internationally recognized principles of female and male equality.”

Articles 16, 19, Subjecting Kosovo to International Law

Article 16, section 3 requires “respect” for “international law.” That alone is not problematic, despite the uncertainty of what it means, because it does not subject Kosovo to “international law.” Nevertheless, Article 19 section 2 subjects Kosovo to “legally binding norms of international law.” This is not a provision normally included in European Constitutions. The Assembly should be aware that the ambiguity of this provision makes it impossible to know for certain in advance what all laws might be found to be superior to the Constitution.



Article 20, Transfer of Kosovo Sovereignty

Although Article 2 declares the sovereignty of the Kosovar people, Article 20 provides a constitutional mechanism for transferring that sovereignty to foreign organizations that have no accountability to the Kosovar people. That is not required by the Status Settlement.

Article 24, Creating Legal Status for “Sexual Orientation”

Section 2 adds “sexual orientation” to the list of statuses for which the Status Settlement requires protection in Article 2.2. Including “sexual orientation” in the Constitution could have at least two unintended consequences. First, the inclusion of legal status for “sexual orientation” in the South Africa Constitution was the basis for the South Africa Constitutional Court redefining “marriage” to include same-sex couples in *Fourie v. Minister of Home Affairs*. (South Africa Constitutional Court 2005) Const. Case No. 60/04. And a Canadian Supreme Court ruling that the Canadian Charter of Human Rights protected sexual orientation was the basis for the British Columbia Court of Appeals redefining marriage in *EGALE Canada, Inc. v. Attorney General*, 13 B.C.L.R.4th 1 (B.C. Ct. App. 2003). Thus, the inclusion of legal status for “sexual orientation” may well result in a claim, and a potential ruling by the Constitutional Court, that this Constitution requires allowing same-sex couples to “marry.”

Second, the inclusion of “sexual orientation” could ultimately lead to a claim that persons with certain “sexual orientations” constitute communities protected by Article 57. Demands for that interpretation would be consistent with arguments being advanced world-wide by advocates of homosexual behavior.

Article 26, Reproductive and Other Decisions

Article 26 may lead to a claim of a constitutional right to abortion in sections 1 and 2. Creating a claim to that right inadvertently can be avoided by changing Article 25 to make it



protect the right to life “from conception.” In addition, proponents of physician assisted suicide could misinterpret section 2 of Article 26 to claim that it creates a right to choose physician assisted suicide. It is not clear that there is any real need for this provision, since Article 29 provides for personal liberty. Thus, section 2 should be deleted to avoid confusion and unnecessary litigation.

Article 37, Marriage and Family

Article 37 appears to be an effort to emulate the marriage provisions in Article 16 of the Universal Declaration of Human Rights (“UDHR”) with slightly modified language. When the UDHR was adopted in 1948, it was clear that “marriage” meant the union of a man and woman. In the current context, however, given the inclusion of legal status for “sexual orientation” in Article 24, the current language almost assures an ultimate claim of a right to same-sex “marriage.” This inadvertent consequence could be avoided by replacing the current language in section 1 with slightly modified language from the UDHR Article 16(1): “Men and women of full age without any limitation due to race, nationality or religion, have the right to marry someone of the opposite sex and to found a family.” This change may be necessary to protect traditional marriage even if “sexual orientation” is removed from Article 24.

Section 3 could likewise be misconstrued to create a claim of a right to recognition of new “family” forms in Kosovo if it is not modified. This potential unintended consequence can be avoided by inserting “natural” in between “The” and “family,” to read as follows: “The natural family enjoys special protection by the state in a manner provided by law.”

Article 38, Limitations on Freedom of Conscience

Section 4 of Article 38 is incompatible with freedom of religion and conscience. Indeed, this provision is inconsistent with the rights of communities, as set forth in Annex II, Article 3.1a



of the Status Settlement, which provides for communities to preserve the essential elements of their religious identity. It is unnecessary to include such a provision to prevent things such as murder or child sacrifice – no freedom of religion or conscience provision has ever been construed to protect such behavior. The only point of this section is to require persons to violate their consciences in order to satisfy a prevailing political agenda.

Freedom of conscience is currently a hotly contested issue in the United States. Advocates of homosexual behavior are suing persons who are unwilling to treat same-sex couples the same as married couples because of a religious belief (examples include a refusal to place a child for adoption, a refusal to give a lesbian fertility treatments, a refusal to allow a hospital to be used for sex reassignment surgery, or a refusal to rent an apartment to a same-sex couple). Abortion advocates are trying to mandate that all obstetricians and gynecologists perform abortions or refer patients for abortions. And a number of states are requiring pharmacists to dispense the so-called “morning after pill” to cause abortions, or lose their licenses. The Alliance Defense Fund is currently involved in at least four lawsuits involving such issues, all of which would undoubtedly be decided against freedom of conscience if a provision like section 4 were in the United States Constitution. The Assembly should delete section 4 in its entirety unless it intends to place such severe restrictions on freedom of conscience.

Articles 40, 42, 43, 44, Limitations on Freedom of Speech, Media, Assembly, Association

These Articles include provisions allowing for a state mandate of what is known as “political correctness” in the United States. The idea behind political correctness is that only thoughts and speech that are consistent with the views of the intellectual elite (or the prevailing



political party) are entitled to full constitutional protection. There can be no true freedom where a standard of political correctness determines constitutional rights.

The Article 40 and 42 provisions for freedom of expression by individuals and the media contain a limitation that would justify what is called a “heckler’s veto” in American free speech jurisprudence. In other words, if a listener objects strongly enough to speech, the person will claim that the speech is provoking or creating “hostility” toward the person. This is currently a controversial issue in America, and is being litigated in the courts. For example, on October 10, 2004, eleven demonstrators were arrested for protesting at a “gay pride” event in Philadelphia, Pennsylvania. They were charged with the crime of “ethnic intimidation” because they were trying to tell people that persons with same-sex attraction can change. If convicted, they would have spent many years in prison. The charges were ultimately dropped on the ground that the free speech provisions in the United States Constitution protected the speech for which they were arrested. But if the United States Constitution contained the provision in Article 40, section 2 about provoking “hostility” on grounds of “ethnicity,” which Philadelphia believes includes “sexual orientation,” the protestors likely would have been convicted. The Alliance Defense Fund is currently representing the protestors in *Startzell v. City of Philadelphia* in an effort to recover damages from the City of Philadelphia for the unconstitutional arrest.

In addition, the concept of encouraging violence should be limited to immediate threats of violence. Advocates of homosexual behavior in America repeatedly claim that those who teach that people can change their sexual attraction are encouraging and provoking hatred and



violence against persons who practice homosexual behavior.¹ Article 40, section 2 would be used to outlaw such politically incorrect speech in America.

In order to avoid creating a right to arrest citizens for politically incorrect speech, the Assembly should remove the phrases “or provocation” and “and hostility” from Article 40, section 2 and Article 42, section 2, and add the term “immediate” before the term “violence.” The phrase in both sections would then read: “it is necessary to prevent encouragement of immediate violence on grounds of race, nationality, ethnicity or religion.”

Article 43 has the same problem as articles 40 and 42 when it refers to “the protection of the rights of others.” For example, advocates of homosexual behavior constantly claim that arguments by opponents infringe their personal dignity, which is protected by Article 23. If the Assembly does not wish to create a “heckler’s veto” of peaceful gatherings, it should delete the reference to “the protection of the rights of others.” The Article would then read:

“Freedom of peaceful gathering is guaranteed. Everyone has the right to organize gatherings, protests and demonstrations and the right to participate in them. These rights may be limited by law, if it is necessary to safeguard public order, public health, or national security.”

Section 3 of Article 44 has even greater potential for mischief than Articles 40, 42, and 43. If this provision were in the United States Constitution, activist homosexual organizations like Lambda Legal, the Human Rights Campaign, the National Gay and Lesbian Task Force, and others would use it to argue that politically incorrect organizations like the Alliance Defense Fund have no right to exist. The basis for that argument would be their untenable assumption that all opposition to homosexual behavior, redefining marriage, same-sex adoption, special

¹ For a San Francisco Board of Supervisors resolution asserting that several organizations that seek to minister to persons who engage in homosexual behavior were responsible for a man’s death, see *American Family Ass’n, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1119-20 (9th Cir. 2002).



rights for transsexuals, etc., are the result of hate. To prevent that result, section 3 should preferably be deleted in its entirety. At a minimum, it should be revised to read as follows: “Activities that infringe on the constitutional order or violate human rights and freedoms may be prohibited by a decision of a competent court.”

Article 53, Meaning of Constitution Subject to European Court of Human Rights

Article 53 may have the unintended consequence of subjecting Kosovo to decisions of the European Court of Human Rights that the Assembly did not foresee. For example, if the European Court of Human Rights were to rule that “sexual orientation” is an “other status” under Article 2 of the Universal Declaration of Human Rights or Article 14 of the European Convention on Human Rights, it would make no difference what the Kosovo Constitution says. In addition, this sort of provision is not typically included in other European Constitutions. Because this provision is not mandated by the Status Settlement, the Assembly is free to reject it.

Article 55, Ability to Limit Rights Granted in Constitution

Article 55 is inconsistent with the existence of constitutional rights. Its purpose is difficult to determine, but it clearly gives the Assembly the right to infringe rights identified in the Constitution. The defects of this Article are not eliminated by the provision in Article 56 precluding the elimination of certain fundamental rights. Other fundamental rights, like freedom of speech and assembly, remain subject to infringement by a political majority. There is no obvious reason to retain the provision if the Assembly intends to give constitutional protection to the rights enumerated in the Constitution.