

SAME-SEX COUPLES AND MEDIATION IN THE EUROPEAN UNION

EDITED BY MARIA FEDERICA MOSCATI



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Litigious Love – Same-sex couples and Mediation in the European Union

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INTRODUCTION

Maria Federica Moscati

“Marriage as rearrangement of social structure’

(Radcliffe Brown, 1950: 45)

“Disputes are not things: they are social constructs”

(Felstiner, Abel, Sarat, 1980: 631)

“The central quality of the mediation is its capacity to reorient the parties towards each other [...] by helping them to achieve a new and shared perception of their relationship”

(Fuller, 1971: 325)

This book seeks to increase knowledge and understanding of disputes between and the use of mediation by same-sex partners and surrounding issues in selected jurisdictions in the European Union (EU). The jurisdictions analysed are Bulgaria, Croatia, Hungary and Italy. The study also aims to examine the similarities and differences that can be found in mediation between same-sex partners and mediation between opposite-sex partners.

In particular, the study answers the following questions: which are the sources of disputes between same-sex partners? To what extent is mediation used by same-sex couples to resolve their disputes? Which are the main issues involved in same-sex couples mediation? Which are the main differences between mediation involving opposite-sex partners and disputes between same-sex partners? In order to answer these questions the study first investigates the sources of disputes between same-sex partners. Secondly, the research looks at manner in which intra-family disputes are resolved through mediation and other dispute resolution mechanisms. Finally, the project analyses selected issues regarding mediation on: power imbalances; mediatory role and style; compulsory mediation; involvement of children.

The current literature on the use of mediation by same-sex couples concentrates mainly on United States of America and Australia, and has primarily focused on the reasons for same-sex couples to adopt mediation, on the tensions between the family mediation field and LGBT community, on some specific issues that the mediation process presents and on the challenges for the mediator (Hertz et al, 2009; Hanson, 2006; Barsky, 2004; Felicio and Sutherland, 2001; Emmett, 1997; Freshman, 1997; Gunning, 1995; Astor, 1995; McIntyre, 1994; Bryant, 1992). Although more recent attempts have been made to integrate the literature with empirical data regarding issues as sources of disputes, power imbalances and other difficulties that might arise during mediation, and the different methods same-sex partners adopt in resolving their disputes (Moscati, 2015), nevertheless the European perspective has not yet found its way into this discourse.

Overall, the present book intends to fill this gap and aims to contribute to the literature concerned with discourses about dispute resolution and about same-sex unions in the European Union. In doing so, the book responds to the endorsement of mediation by domestic and European legislators. Indeed, the European Union initiatives culminated in the Council of Europe 1998 Recommendation on Family Mediation (Recommendation No. R (98) 1), and European Directive on Certain Aspects of Mediation in Civil and Commercial Matters 2008/52/EC 2008/52 represent significant steps for encouraging national legislators to promote the use of mediation for the resolution of disputes. However, notwithstanding this growing emphasis on mediation, the present study shows that still the recourse to this decision-making process is limited. The reasons for the limited use of mediation include lack of information, monopoly of lawyers over resolution of disputes, issues regarding the enforcement of mediated agreements, and mistrust in the mediator or any other third party who intervenes in the resolution of disputes.

The book shows that social acceptance of homosexuality and legal recognition of same-sex unions have a strong influence on the sources of disputes and on the mediation process (Moscati, 2015; Hertz et al, 2009; Hanson, 2006; Barsky, 2004; Felicio and Sutherland, 2001; Astor, 1995). The lack of legal recognition of same-sex unions influences not only the choice about which dispute resolution mechanism to adopt, but also the nature of the dispute, the mediation process and the enforcement of mediated agreement (Moscati, 2015; Hertz, 2008; Barsky, 2004).

With regard to same-sex partners, mediation presents several advantages. Mediation is indeed a useful tool because it is informal, cheap, parties retain control on the disputes and protects the privacy of the parties. In addition, because of the variety of family structures same-sex partners create, and because the lack of harmonised legal recognition of same-sex unions, mediation offers an arena in which all those involved in the relationship may raise their voice and can reach an agreement accommodating all their need. However, in the event of lack of recognition of same-sex unions, mediation represents in practice a compulsory alternative to courts for same-sex partners – distorting the features of mediation and posing issues of access to justice for same-sex partners.

The Project: *Litigious Love: Same-sex couples and mediation in the EU*

The research which led to this book and the book itself represent key activities developed within the project *Litigious Love: Same-Sex Couples and Mediation in the EU*. The project, which has received funding by the DG Civil Justice of the European Commission started in March 2014 and will end in October 2015.

The project aims at collecting and share information, and training mediators, lawyers, judges and legal scholars on issues surrounding the nature of disputes and the resolution of disputes between same-sex partners and same-sex parents. In addition, the project is inspired by the need to address issues of access to justice in those jurisdictions in which same-sex unions do not receive legal recognition, and

therefore same-sex partners might see mediation as the only mechanism available to resolve their disputes. Overall the project has attempted to raise awareness on the rights of same-sex couples and on the manner in which social disapproval, homophobia and lack of protective legislation all have an impact on sources of disputes between same-sex partners and on the resolution of those disputes.

The project attempts both to renovate theoretical framework on family mediation and to have an empirical impact. In these regards, the project has developed and delivered training for judges, lawyers, and mediators on issues related to intra-family disputes and dispute resolution mechanisms involving same-sex couples; and have contributed to the exchange of information, best practices and networking within the EU in the area of family mediation, including cross-border cases. This practical aspect is matched by a significant contribution to the literature on mediation encapsulated in the present book. Indeed, the present work is the first study on the use of mediation in intra-family disputes, and related issues, between same-sex partners in the European Union.

The results of the project are: first, a comparative analysis of issues regarding the adoption of mediation by same-sex couples as a decision-making process in intra-family disputes, and related domestic, and trans-national, enforcement of mediated agreements; secondly, an international central training for legal professionals and mediators handling intra-family disputes based on sexual orientation and related resolution; thirdly, three national training sessions for judges, practitioners, and mediators on mediation techniques for use in handling intra-family disputes involving same-sex partners; fourthly, a project final conference; fifthly, a book on the issues addressed by the research; sixthly, a handbook for legal practitioners, and mediators on mediation and same-sex couples; and finally a publication of the conference proceedings.

Overall, the project offers a valuable contribution to the knowledge of disputes and dispute resolution in three highly significant fields namely the use of mediation in the EU; problems of transnational enforcement of mediated agreements; and differences in mediation between same-sex and opposite-sex.

Methodology

The methodology informing the research for this book has been mainly qualitative and based on a selective analysis of empirical and non-empirical data on same-sex couples and their disputes in Italy, Hungary, Bulgaria and Croatia during the time under consideration namely from April 2014 to March 2015.

Data have been collected from a number of primary and secondary sources, both legal and non-legal. The research commenced with a literature review, and focused on providing an understanding of the legal framework and the academic discourses on same-sex couples and mediation, and more generally on the use of family mediation in the selected jurisdictions. Each of the contributors to the present

book considered, with reference to their own jurisdiction, the legal framework and literature on same-sex unions (whether and how are legalised), mediation (whether and how is regulated by law), and family mediation (whether and how is compulsory; and which styles are adopted). The research relied on: Alternative Dispute Resolution literature written with a legal focus; legislative developments on same-sex unions; family disputes and mediation in the selected jurisdictions; relevant case law; EU case law; other informal accounts of cases; semi-structured interviews with mediators, lawyers and same-sex couples; and, finally, field observations.

Data obtained from documentary sources are supplemented by records from semi-structured interviews. Two semi-structured questionnaires – one designated for the interviews with same-sex couples, and one for the interviews with lawyers and mediators, were devised in order to guide the interviews (see Appendix I and II). Initially the research aimed at conducting a wide range of interviews with judges. However, various obstacles including the private nature of family disputes, made this difficult and unrewarding. On the other hand, other types of legal and dispute resolution professionals were most helpful. Thus, many of the interviewees were contacted through mediation providers, bar councils, and associations supporting LGBT people.

Although the interviews were based on a list of pre-determined questions, each contributor was encouraged to develop and ask further questions and comments, and to focus on an issue that seemed to them to be especially important. In this sense, the interviews may be said to be ‘semi-structured.’ Each interview was audio taped with the respondent’s permission, transcribed into written text and the mediators and lawyers then checked the text for accuracy. The data thus obtained was then evaluated from a qualitative perspective.

Structure of the book

The book is divided in Chapters. Chapter I introduces the reader to discourse regarding the nature, features, socio-legal development and issues concerning mediation adopted for the resolution of disputes between same-sex partners. Chapter II considers examples of disputes and mediation between same-sex partners in England. England is a jurisdiction which was not included in the original project *Litigious Love*. However, such jurisdiction has experienced significant developments of family mediation, including mediation involving same-sex partners. These developments have been considered as best example within the European Union and represent the premises which the research for this book departs from. The following five Chapters present the findings of the research in each of the jurisdictions involved in the project. Each Chapter is divided in four sections which in turn first introduce the reader to the geopolitical context of the country, then move to analyse the legal framework – if any – protecting the rights of LGBTI people and same-sex couples. Finally each section looks at the role

that mediation plays in each jurisdiction, and then concludes with an exposition of the findings of the fieldwork regarding same-sex partners, their disputes and the resolution of such disputes.

Summary of the findings

- The lack of homogenous legal recognition of same-sex unions in Europe has a direct impact on the sources of dispute and on the mediation process.
- Sources of dispute between same-sex partners include parenting, finance, inheritance, coming out, property (including pets), whether and how to have an open relationship, sexual orientation and gender identity (for instance when one partner is bisexual, or decides to undergo gender reassignment), internalised homophobia, high expectations, domestic abuses, drug and alcohol addictions.
- The recourse to mediation is limited. The reasons for this restricted use of mediation include limited knowledge about the process of mediation, fear of being discriminated against, desire to protect privacy regarding sexual orientation, preference for other mechanisms.
- Same-sex partners adopt mediation not only for the resolution of disputes but also for signing pre-nuptial agreements, and cohabitation agreements.
- Therapy and counselling are often chosen for the resolution of disputes.
- The enforcement and the inter-country recognition of mediated agreement present issues based on the different legal recognition of same-sex unions and public policy.
- In the jurisdictions analysed, there are no specific guidelines for mediators regarding mediation with same-sex partners.
- There is a lack of informative relevant materials focusing on same-sex partners, and the children of same-sex parents.
- Those mediators who have had experience of mediation between same-sex partners tend to adopt the same style of practice and the model of practice as they use for third party intervention in disputes between opposite-sex partners.
- General suggestions to acknowledge bias, avoid assumption and listen to the parties were given by the mediators who had experience of mediation between same-sex partners.

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CHAPTER I

MEDIATION AND SAME-SEX COUPLES: AN OVERVIEW¹

Maria Federica Moscati

This Chapter examines the features and premises of mediation that are commonly adopted for the resolution of intra-family disputes between same-sex partners.² It is argued here that the analysis of the nature of disputes and the recourse to mediation for same-sex partners adds new momentum to the study of family mediation. However, differences in the processes of family mediation as between same-sex and opposite-sex couples must not be overlooked. While it is true that there are similar aspects, especially in the styles and models of practice that mediators adopt, which characterise all mediations, this Chapter will also highlight salient differences. In offering a comprehensive overview of the topic and surrounding issues, this Chapter starts with an analysis of the sources of dispute between same-sex partners, proceeds to a consideration of the mechanisms same-sex partners use to resolve their disputes, and then turns to some specific issues that may occur during mediation between same-sex partners.

Sources of dispute

Together with the ending of love, disputes between same-sex partners may arise from several emotional, practical and social sources. Frequent causes of dispute include disagreement regarding children, finance, coming out, whether and how to have an open relationship, domestic abuse, internalised homophobia and a mix of all the above. More specifically, parenting disputes may occur when partners decide whether and with whom to conceive children, the manner in which parenting roles are performed and financial maintenance for the children.

There are three particular aspects that disputes between same-sex partners present and that contribute to differentiate disputes between same-sex partners from those between opposite-sex partners. First, family structures, in which disputes arise, are wide-ranging. The variety of family structures also includes a diversity of ways in which children are conceived and raised. As a consequence, in same-sex relationships, new types of dispute arise. For instance, a parenting dispute may start between a lesbian mother and a gay father who are not in a relationship but nevertheless decide to have a child; between two biological parents and their current same-sex partners who nevertheless play (or want to play) a full parenting role; between the biological parent and his/her partner of the

¹ The author would like to thank Professor Michael Palmer for his advice on the first draft of this Chapter.

² This Section is based on some of the findings published by the same author in *Same-Sex Couples and Mediation: a Practical Handbook* (2015).

same-sex; between a lesbian couple and the sperm donor; between a gay couple and the surrogate mother; between two sperm-donors who have mixed their semen for the artificial insemination; between the grandparents and parents (biological and/or non-biological) of the child.

As a consequence of the variety of family arrangements, the number of disputants will likely be greater when compared to disputes between opposite-sex couples. For instance, inheritance disputes may involve a former heterosexual married and divorced partner of the deceased, the children of the deceased, the same-sex married or the cohabiting same-sex partner of the deceased, as well as occasional partners. In addition, the perception of roles and expectations of those involved in the family as partners and parents may be somewhat different from the perception carried within the formal legal framework (Hertz, 2008). Thus, for example, in financial disputes same-sex partners who live in jurisdictions that do not recognise same-sex unions, or provide limited financial rights for same-sex partners, may nevertheless feel entitled to financial maintenance at the same levels as opposite-sex divorcing partners (Hertz et al, 2009).

Secondly, regarding the timing of the disputes and the recourse to mediation, same-sex partners often have disputes and use mediation before deciding to live together or conceive a child. In particular, same-sex partners see mediation – together with collaborative law – as instrumental to prevent disputes, to find ways to accommodate the consequences of their relationship or end of relationship, and to agree on how future disputes will be dealt with (Hertz et al, 2009; Moscati, 2015).

Finally, some disputes find their source in the socio-legal framework - or lack of such framework regarding homosexuality, same-sex unions and same-sex parenting (Moscati, 2015; Hertz et al, 2009; Hanson, 2006; Barsky, 2004; Felicio and Sutherland, 2001; Astor, 1995). In particular, social disapproval of homosexuality and lack of homogeneous legal framework protecting the rights of LGBT³ people and the rights of same-sex couples encourage disputes, affect the mediation process, and limit the consequences of a mediated agreement (Barsky, 2004; Hertz et al, 2009; Moscati, 2015).

As a cause of dispute, social disapproval of homosexuality often triggers a lack of self-confidence in the partners and contributes to internalised homophobia, which in turn might exacerbate pre-existing disagreement between the partners, or might itself create disputes. For instance, a dispute may arise because one of the partners does not want to reveal his/her homosexuality for the fear of being discriminated. Alternatively, social stereotypes about the manner in which homosexuality and gender roles are performed may represent a source of dispute. Indeed, during the

³ Lesbian, gay, bisexual, trans-gender.

fieldwork for this book, some same-sex partners, who prefer to remain anonymous, reported that they had disputes because one partner in the couple '*was too gay.*'

Such socio-legal lack of acceptance is likely to have an impact on the mediation process as well. For instance, as Frederick Hertz and Allan Barsky referred during interviews for this study, power imbalances between the partners may well depend on the personal history of social oppression as homosexual, and on the limited legal recognition of parental responsibility of non-biological same-sex parents.

In addition, discrimination and oppression experienced by LGBT people may reduce the positive effects that mediation has on the disputants, thereby raising two main concerns. First, the way in which disputants perform during mediation may change. Disputants may become more aggressive or may on the other hand reduce their demands during mediation. Secondly, some disputants may well manipulate social bias against same-sex marriage. As Hertz and other mediators suggested during our interviews, it may happen that *de facto* same-sex partners who have lived together assuming that their relationship effectively was a marriage, refer and use the absence of legal recognition of same-sex marriage to avoid financial burdens and to limit the role of the non-biological parent.

Two issues deserve clarification when looking at how socio-legal limits to recognition of same-sex couples affect the results of a mediated agreement. First, during the formulation of the agreement particular attention must be given to framing creative solutions according to law or at least that do not infringe the law.

Secondly, the enforcement of the law and inter-country recognition of the mediated agreement will inevitably be limited by national law and public policy regarding same-sex unions. For instance, if the dispute involves two disputants who reside in two EU countries then the Directive of the European Parliament on Certain Aspects of Mediation in Civil and Commercial Matters (2008/52) represents a key instrument for encouraging amicable resolution. However, a barrier to cross-border recognition within the EU may derive from the wording in recital 10 stating that: "However, it [the Directive] should not apply to rights and obligations on which the parties are not free to decide themselves under the relevant applicable law. Such rights and obligations are particularly frequent in family and employment law." In addition recital 21 considers that "Regulation (EC) No 2201/2003 specifically provides that, in order to be enforceable in another Member State, agreements between the parties have to be enforceable in the Member State in which they were concluded. Consequently, if the content of an agreement resulting from mediation in a family law matter is not enforceable in the Member State where the agreement was concluded and where the request for enforceability is made, this Directive should not encourage the parties to circumvent the law of that Member State by having their agreement made enforceable in another Member State." Therefore it appears that because same-sex partners are not free to conclude their relationship in such a way as to ensure legal recognition of the dissolution, in

several EU jurisdictions, their mediated agreements will not necessarily be able to secure cross-border recognition and enforcement.

Dispute resolution mechanisms and same-sex couples

There are several ways by which same-sex partners commonly deal with their family disputes. These ways do not always involve professionals -- indeed it is common for same-sex partners to ask friends for advice and support, either as partisans or as neutral interveners. From the findings presented in other Chapters of this book and current literature it can be inferred that same-sex partners have experienced resolution through community-based mediation, counselling, family therapy, collaborative law and mediation. The disputants' choice regarding the type of intervention to use depends on several factors including the nature of disputes, a felt need to retain control over the dispute, availability of money, and awareness about the characteristics of the process. In particular, my fieldwork has shown that financial aspects may determine the choice in two ways. On the one hand, wealthy partners who have to deal with financial disputes often opt for collaborative law; on the other hand, mediation seems to be generally preferred because is cheaper than collaborative law or court proceeding, and because in several jurisdictions legal aid is provided for mediation.

The wish to avoid discrimination has often encouraged, and continues to encourage, same-sex partners to opt for that form of impartial intervention called community-based mediation.⁴ When structured within a mediation service, the community-based mediation presents the following characteristics: involvement of trained volunteers; free access; funding by public institutions or private donors; and attention to all the differences that the LGBT community can present (Bryant, 1992). This type of intervention has been considered to be instrumental in giving value to LGBT families and the LGBT community (Emnet, 1997; Hanson, 2006) - mediation within the community empowers same-sex couples, their children and the entire LGBT community as well (Hanson, 2006).

During the fieldwork for the preparation of this Chapter some interviewees affirmed that the intervention from the community or from the members of LGBT organisation can also occur informally. In particular, associations (including religious ones) created by LGBT people have weekly meetings during which same-sex partners who have a dispute share their experience with other couples and attempt to find a solution to their problems. A counsellor may assist as well.

Community-based mediation is a creative and a protective environment for all parties: it can also help same-sex couples to feel '*understood*' and more inclined to talk and mediate. At the same time community-based mediation can present

⁴ In particular in 1970s in New York and San Francisco with the San Francisco Community Board. For an account on the San Francisco Community Board see Merry and Milner (1995).

inconvenience. As Freshman (1996) argues, the risk can be that the mediator prioritises the interests, values and ideas of the community instead of those of the parties. Therefore, same-sex disputants might feel that they are compelled to mediate. In addition, the attention to sexual orientation can omit from the analysis other elements, such as culture, social status, or religion that are very important for the resolution of the dispute. Freshman is more inclined to follow the community-enabling mediation which, based on the LGBT community values, stimulates the parties to look for and follow the principles of other communities if they fit better with the couple's needs. Conversely to the enabling mediation model, community-enhancing mediation is strictly linked to the values and rules of a particular community, and does not offer enough autonomy to the parties.

Other instruments chosen by same-sex partners include counselling, family therapy, collaborative law and mediation. A detailed analysis of the features and approaches to counselling and schools of family therapy is beyond of the scope of the present Chapter. Therefore it suffices to say here that counselling is a form of therapeutic intervention developing in meetings during which the partners talk about their issues (Roberts, M., 2014); family therapy considers the family to be the source of pathology and therefore the intervention of the therapist concentrates on the family structure. As pointed out by Roberts, however, both counselling and family therapy are significantly different from mediation.

Collaborative law is another form of intervention that same-sex couples may well be willing to try. Collaborative law, as method for the resolution of family disputes, was created in North America at the beginning of the 2000s. It is based on a four-actor model: the two clients in negotiation are advised and supported by their respective lawyers. According to the characteristics of the dispute, the requests and needs of the parties, other professionals such as child or financial consultants may be involved. At the core of collaborative law there are two agreements: the participation agreement and the disqualification agreement. The participation agreement sets out the aims and principles of the collaborative law process binding the parties to work together to come to an agreement. The disqualification agreement focuses on and limits the role that lawyers will play in future - if any - court proceedings. According to the disqualification agreement, in the event the disputants who attempted the collaborative process will not settle and decide to recourse to court, then the lawyers who were involved in the collaborative process may not represent the same clients during court-proceedings (Roberts, M., 2014; Moscatti, 2014; Lande, 2006).

Several factors may be involved when same-sex partners are choosing between mediation and other mechanisms for resolution of their differences. As David Allison pointed out during one interview:

“Money might be one aspect and, as mediation tends to be cheaper, this may have an influence. It may also depend on the level of legal or other support they might need

during the discussions. Some people feel more supported and hence better able to discuss things with their lawyer present: they would most likely prefer collaborative law” (Moscati, 2015).

As the Chapter on England will show further, it appears that wealthy same-sex partners are often keen to prefer collaborative law to mediation for settling financial disputes.

Mediation and same-sex couples

Same-sex partners tend to choose mediation as typical form of third party intervention. Generally speaking, during mediation a third and impartial party - called the mediator - facilitates the communication between the parties in order for them to find an agreement regarding their dispute (Roberts and Palmer, 2005; Roberts, M., 2014). The level of intervention, the role and the characteristics of the mediator may change according to the context (Roberts and Palmer, 2005). Indeed, the fieldwork for the preparation of this Chapter shows that the third party chosen by same-sex partners may be a professional mediator, a lawyer, a friend, a spiritual consultant, or someone who plays a role as director of charity or association devoted to the support of LGBT people.

There are several general characteristics of family mediation that extend to mediation between same-sex partners. At the same time disputes between same-sex partners require the mediator to be more receptive to a variety of specific aspects that these disputes present.

It is maintained here that as for any other type of mediation, mediation between same-sex partners is essentially based on negotiation. As Gulliver has demonstrated, negotiation is characterised by exchange of information and learning and it is essentially a process that develops throughout six phases (1979). The phases are: an initial search for an arena; a phase of agenda formation in which issues are articulated, communicated and assimilated; a phase in which differences are explored and a field of possibilities reviewed; a phase in which issues are narrowed and prioritised; a phase of bargaining; and finally a phase in which agreement is formulated and ritually affirmed.

The mediator, then will assist the parties to smoothly and successfully proceed through the several phases of the negotiation process (Roberts, M. 2014). With regard to same-sex couples, there are two important tasks that the mediator – during the six phases – is called on to fulfil. First, the mediator will help disputants to describe the nature of their relationship and the role each of the partners plays regarding financial contribution and parenting. Secondly, because of the lack of harmonised legal recognition of same-sex unions, the mediator will accompany the parties to become aware, clarify and understand the contradictions - if any - between their idea of family and what the law provides.

During the six phases, challenges are posed to the mediator regarding the nature of the relationship between the parties, the language he/she will use to address the parties, the sources of power imbalance, and the formulation of the agreement. Regarding the nature of the relationship between the disputants, the mediator may well understand that the relationship created and the roles performed by same-sex partners are very different from the model of marriage based on the union of a man and a woman. In addition, those jurisdictions that have law granting legal consequences to same-sex unions follow several models. There are jurisdictions such as England and Wales in which same-sex couples may marry and divorce in accordance with the same rules as heterosexual couples; there are countries such as Croatia and Hungary in which same-sex unions confer on the parties limited rights only; and there are jurisdictions such as Italy and Bulgaria in which same-sex unions are not protected by law, and therefore same-sex partners create their own arrangements regarding the likely consequences of their relationship.

Therefore, the mediator is encouraged to learn about national and international legal frameworks governing same-sex relationships (Hertz, 2008). Although the mediator is not required to give legal advice, a general knowledge of national and international frameworks will support the mediator in helping the parties to come to an agreement which will not breach the law.

The mediators who agreed to be interviewed for this project, warned against making the mistake of attributing to same-sex relationships the same set of values, expectations and rules that inform and govern opposite-sex relationships. The latter aspects bring us to emphasise the importance for the mediator to use a gender-neutral language and to ask disputants how they prefer to be addressed.

As Allan Barksy suggested during an interview:

“Mediators should be client-centred and ask the clients how they want to be called. They should avoid language that is demeaning such as, “You are the real parent and you are just the adoptive parent or the not real parent.” Mediators should consider how people identify themselves - you may think that a client is gay but he/she prefers to be identified as bisexual. It’s more respectful to use the language preferred by the clients. Often, mediators can simply address clients by their names, and not try to put people in a particular category” (Moscati, 2015).

Moving from one phase of negotiation to another, power imbalances between the parties may become evident. Of course power imbalances characterise all types of relationship. As Ruth Smallacombe and David Allison pointed out during one interview:

“Everything potentially can create a power imbalance: from money to the level of care a person has been giving to children, to who is the more articulate one in the relationship. An important role of the mediator is to address any power imbalance” (Moscati, 2015).

However, some causes of such imbalances between same-sex partners deserve attention (Hertz et al, 2009). If on the one hand power imbalances are based on factors such as a different financial situation, educational background and biological ties with the children. On the other hand, sources of power imbalances may rely on self-confidence about personal sexual orientation, and the support that each of the partners receives from his/her family, friends, and within the LGBT community. In particular, when one of the partners is bisexual additional discrimination and oppression may be experienced even within the LGBT community. Such additional discrimination creates sources of power imbalance. As Frederick Hertz affirmed in an interview:

“There can be a power imbalance in homosexual couples based on history of personal oppression, which is often not visible when you meet the couple. There is a sort of psychological disability caused by a personal history of oppression, and this is an essential part of power imbalance. Another cause of power imbalance is the societal rejection of ‘butch’ lesbians and ‘feminine’ gays – i.e. there are the acceptable homosexuals and the unacceptable homosexuals. And there are power imbalances caused by the socio-economic consequences of oppression and lack of acceptance” (Moscati, 2015).

Looking at similarities that mediation between same-sex and opposite-sex partners present, mediators dealing with same-sex intra-family disputes have the same range of processual choice as in family mediation between heterosexual partners. They may adopt one or more of several styles of practice including evaluative,⁵ facilitative, transformative,⁶ narrative,⁷ or a combination of all. Similarly, a variety of models of practice ranging from pre-mediation, to joint sessions, to caucus, shuttle mediation, online devices, and use of telephone with the parties exchanging messages only through the mediator, are considered. In addition, regardless sexual orientation of the disputants both co-mediation (or two

⁵ In an evaluative mediation, the mediator adopts a pro-active, directive approach, offers recommendations and formulates options for the parties. In a facilitative mediation, the mediator does not take a directive approach. He/she enhances communication between the parties; helps disputants to clarify issues and leave to the parties the control over the output of mediation. As Riskin puts it ‘Each orientation derives from assumption about the mediator’s role. The evaluative mediator assumes that the participants want and need the mediator to provide some direction [...]. The facilitative mediator assumes the parties are intelligent, able to work with their counterparts, and capable of understanding their situation better than either their lawyers or the mediator’ (1994: 111).

⁶ The transformative mediation aims at transforming disputes into positive experience with the consequence that the parties will be empowered and will mutually recognise each other (Bush and Folger, 2005).

⁷ According to Winslade and Monk ‘the narrative approach concentrates on developing a relationship that is incompatible with conflict and that is built on stories of understanding, respect and collaboration. Parties are invited to reflect on the effects that the stories have had on them before they are asked to address the matters that cause separation’ (2000: XI).

mediators, or a mediator and a lawyer) and the involvement of other professionals for technical advice are common.

At this point the reader may well raise questions about the positive aspects of mediation for same-sex partners and the reasons inspiring same-sex partners to choose mediation.

Mediation presents several advantages for same-sex partners. Generally speaking, mediation is an informal process which gives the parties the opportunity to control the handling of their disputes and create the output which better suits their needs. At the same time, mediation protects the privacy of the parties and children involved, and has low costs (Roberts and Palmer, 2005). There are some additional favourable conditions that mediation offers to same-sex partners. For instance, it has been argued that mediation potentially offers a friendlier environment than the courts, as it does not carry the same risks for the partners of discrimination on the basis of their sexual orientation (Hanson, 2004). As McIntyre (1994) points out, offensive stereotypes regarding gay life and homosexuals as parents have infused a number of judicial decisions. However, in the opinion of the author of this paper, discrimination may well also infiltrate into the mediation process, and in addition may contribute to encourage a sense of the *invisibility* of LGBT people (Astor, 1995-1996).

In several jurisdictions, mediation has the key advantage of being the only mechanism same-sex partners may adopt. In jurisdictions where same-sex couples can register their unions, possible disputes can be obviously resolved with recourse to courts. However, in jurisdictions in which same-sex unions are not legally recognised, same-sex partners have very limited access to courts and therefore may feel that they have to choose mediation or some other out of court mechanism in order to deal with all the issues arising from intra-family disputes. This means that mediation may play an important role: those partners and parents who are not legally recognised as such are likely to have an opportunity in the mediation to express their wishes in a way that would otherwise be denied to them.

Motivations encouraging decisions on whether to use mediation are varied. As Dominic Raeside told me during one interview:

"[There are] various motives - a mix of not wishing to go to court because of the costs and timing; because of the need to keep control over the issues and dissolution; because mediation resonates with their culture; because they want to use a private arena" (Moscati, 2014).

Personal choice based on knowledge and awareness of the positive aspects of mediation seems to be the main reason for making the decision to go to mediation. Often personal choice regarding mediation is encouraged by culture, by the wish to avoid further court hearing and to feel protected from discrimination, by lawyers or by the law itself.

The law can direct the decision for the partners to adopt mediation mainly in three ways, and a combination of them. The first option is for the law to make mediation compulsory; the second legal approach consists in providing legal aid only for mediation, and the third legal alternative is to require disputants to attend an information meeting in which they will learn about the several mechanisms available for the resolution of their dispute. As the Chapter on England shows the last two approaches have been adopted in the civil justice system of England and Wales.

In the opinion of the writer of this Chapter none of the three legal ways in which the law encourages disputants to opt for mediation enhance access to justice. All three approaches in reality create limits to the availability of dispute resolution processes and to choice of the parties. In particular, one of the key characteristics of mediation is that it is based on the free decision of the parties. However, cutting legal aid for legal representation in court appears as a coercive - although indirect - way to make mediation compulsory in reality.

Notwithstanding the several advantages of mediation and numerous efforts that national and European legislators do claim for mediation, recourse to the mediatory process by same-sex couples is still limited. Some explanations for this disjuncture between legislative promotion of mediation and its use can be drawn from the fieldwork conducted for the writing of this Chapter. In particular, interviews with same-sex couples disclosed that four main concerns dissuaded partners from trying mediation. A first reason derives from the lack of knowledge about mediation and from a misunderstanding that mediation would be available only for married couples. Secondly, when the dispute was not perceived as serious enough to ask for external help then the partners interviewed preferred to ask friends or a family therapist to help, or to avoid any external help. A third explanation for desisting from mediation is the wish to maintain everything concerning the relationship very private. Finally, in several cases the dispute required some specific and technical knowledge (mostly finance) rendering (as the disputants saw the matter) mediation an unsuitable decision-making process for the dispute.

Conclusions

This Chapter has aimed at offering a comprehensive overview of issues surrounding the resolution through mediation of intra-family disputes between same-sex partners. Based on the current literature and on fieldwork this Chapter has shown that mediation between same-sex couples presents some features that deserve attention from the mediator. In particular, the lack of homogeneous legal recognition for same-sex unions influences sources of dispute and the mediation process. Moreover, regarding the sources of dispute, attention must be put on parenting and inheritance disputes and on disputes based on divergences regarding coming out, high expectations (Hertz 2008), homophobia, and the manner in which

sexual orientation is manifested. Indeed, Allan Barksy has made the following suggestions to mediators:

“Learning about the dynamics in same-sex couples; learning about safety and power imbalances (people often assume that if there are two men or two women there aren’t issues of violence); know what the local law says about same-sex relationships; know how the law treats the non-biological parent; learning about issues regarding grand-parents access; be aware of the high incidence of HIV/Aids with gay men and aware of the issues which can come up; consider whether there is drug abuse and alcoholism in the family which make more complicated to create a plane safe for the family and for the kids” (Moscati, 2015).

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CHAPTER II
THE CASE OF ENGLAND

Maria Federica Moscatti

Developments of family mediation in England¹

Roberts and Palmer point out that the recourse to out-of-court mechanisms for the resolution of disputes can be found in all societies and at all times (2005). Impulses towards informal justice are to be found in England as well as elsewhere. Although the first English legal statute concerning an out of court mechanism can be traced back to 1697 when the Arbitration Act was enacted, it was during the last forty years of twentieth century that much political and legal emphasis was put on mechanisms for the resolution of dispute outside the court-room. It is, however, beyond the scope of the present Chapter to give a detailed account of the literature and issues surrounding the development of Alternative Dispute Resolution (ADR) in England. Therefore, only an outline of the major developments of ADR in England is offered here. In addition, in order to provide a context for the current position of the use of mediation for resolving family disputes between same-sex partners, this section includes an analysis of legal developments of family mediation in England.

Among others, important steps shifting the attention from court to settlement in England were the set up of the Parliamentary Ombudsman in 1967,² the creation of the Advisory, Conciliation and Arbitration Service (ACAS)³ in 1975, the enactment of the Arbitration Act 1996, the issue of the Commercial Court Practice Statement (1993) followed by general Practice Direction in 1995 (Roberts, 2014b, 32) and the launch of a mediation pilot scheme in Central London County Court.

Such developments were accompanied by a growing dissatisfaction for the civil justice system. In particular resolution through court was perceived as too expensive, too complex and too slow. In order to review the rules and procedures of the civil courts in England and Wales Lord Harry Woolf was appointed in 1994. Lord Woolf individuated several barriers to access to justice in England and Wales. In the *Interim Report on Access to Justice*, Lord Woolf identified three main barriers: excessive costs, delay of the proceedings, and complexity of the procedural rules (Lord Woolf, 1995). Such barriers were in contradiction with the principles of the

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² Parliamentary Commissioner Act 1967.

³ ACAS offers conciliation, information and training regarding disputes and resolution of disputes between employers and employees.

civil justice system. Lord Woolf emphasised that the civil just system in order to be accessible must be fair, responsive, proportionate, reasonably speed and understandable. In the final report on access to justice in England and Wales, Lord Woolf developed proposed solutions to the identified issues and encouraged the recourse to settlement.

In particular, following the Lord Woolf's Reports new Civil Procedures Rules (CPRs) were brought into force in 1999 governed by the overriding objective of "enabling the court to deal with cases justly and at proportionate cost" (CPR 1.1). The major reforms included encouragement of early settlement through the Pre-Action Protocols;⁴ allocation of cases to one of the three tracks;⁵ reasonable timescales; active case management;⁶ single set of procedural rules; more economic use of expert evidence; more use of information technology; encouragement to make offers to settle and establishment of a Civil Justice Council.⁷

More importantly for our purpose is the clear recognition, in the CPR, of the role of courts in support a culture of ADR (Roberts and Palmer, 2005). For instance, under CPR r 1.4.2 (e) judges are required to "encourage the parties to use an alternative dispute resolution procedure if the court considers that to be appropriate and facilitating the use of such procedure" and "helping the parties to settle the whole or part of a case."

Courts have contributed to the growth of a culture of ADR not only through judgments⁸, but also through specialist court guides,⁹ and court mediation schemes.¹⁰

⁴ Parties are required to consider ADR before start court-proceedings.

⁵ The three tracks are: the small claims track (CPR 27), the fast track (CPR 28) and the multi-track (CPR 29). Cases are allocated according to the value of the claim, the nature of the remedy sought, the number and circumstances of the parties, the complexity of the issues (CPR 26).

⁶ According to CPR 1.4: "1) The court must further the overriding objective by actively managing cases; 2) active case management includes: a) encouraging the parties to co-operate with each other in the conduct of the proceedings; b) identifying the issues at an early stage; c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily the others; d) deciding the order in which issues are to be resolved; e) encouraging the parties to use alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure; f) helping the parties to settle the whole or part of the case; g) fixing timetables or otherwise controlling the progress of the case; h) considering whether the likely benefits of taking a particular step justify the cost of taking it; i) dealing with as many aspects of the case as it can on the same occasion; j) dealing with the case without the parties needing to attend the court; k) making use of technology; and l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.

⁷ The functions of the Civil Justice Council are: to advise the Lord Chancellor and Judiciary on developments of the civil justice system; to make research proposals; and to review the civil justice system.

⁸ See for instance: *Cowl v Plymouth City Council* [2002] 1 WLR 803; *Burchell v Bullard* [2005] BLR 330; *Egan v Motor Services (Bath) Ltd* [2008] 1 WLR 1589.

⁹ Among others: The Admiralty and Commercial Courts Guide; the Chancery Guide; the Technology and Construction Court Guide.

¹⁰ County courts and the Court of Appeal have mediation schemes. The schemes offer or order the parties to attempt settlement. For instance, the mediation scheme operated by the Commercial Court provides for the court to make an ADR order encouraging the parties to attempt ADR, and giving

In addition, since 1970s as Roberts and Palmer observe legal developments towards the recourse to ADR have inspired the emergence of new professionals - the mediators (2005); the creation of mediation and arbitration training; the involvement of lawyers as mediators; the creation of new ADR mechanisms such as collaborative law¹¹ and the inclusion ADR course within academic curricula.

When the attention on ADR grew in the second half of the twentieth century in the Anglo-American world, mediation received particular consideration from legal experts and other professionals in a way that mediation has been considered a mini-movement within the big ADR movement and the panacea for the dysfunctions of the civil justice system (Roberts and Palmer, 2005). In England, the reforms to the civil justice system proposed by Lord Woolf have been the catalyst of the growth of mediation. Although the CPRs do not make mediation compulsory, case law¹² has developed a system of costs sanctions that can be imposed on the disputants who fail to use or consider mediation (Roberts, M., 2014b) and court-annexed mediation projects have been implemented. Initiatives to promote mediation as a better way to resolve disputes ranging from family, to commercial, to labour have flourished in England since the 1990s.

More specifically for the themes of this book, the suggestion of resolving family disputes through some out-of-court mechanisms was first expressed by three governmental reports investigating the causes and impact of family breakdown.

First, Sir Morris Finer in his Report on *One-Parent Families* (1974) emphasised the importance of encouraging divorcing spouses to use of conciliation¹³ as “the process of engendering common sense, reasonableness and agreement is dealing with the consequences of estrangement” (Finer Report, 1974, para 4.305). As Marian Roberts points out that the inclusion of reference to conciliation in the Finer Report pursued the objective that “parties themselves should take primary responsibility for resolving their own disputes” (Roberts, 2014a: 36). Such objective highlights one of the main advantages of mediation, namely that the parties retain control over their dispute.

Secondly, the Booth Report sustained the importance of conciliation and recommended “it is the essence of conciliation that responsibility remains at all times with the parties themselves to identify and seek argument on all the issues arising from the breakdown of their relationship” (Booth Committee, 1985: para 3.10). Finally, the Law Commission in its report *Family Law and the Ground of Divorce*

parties a deadline for choosing the mediator. If mediation fails, parties will have to write a report explaining the reasons for the failure. For a detailed analysis of the scheme see Genn (2002).

¹¹ See Chapter I in this book.

¹² In particular: *Dunnett v Railtrack* [2002] EWCA Civ 302; *Virani v Manuel Revert* [2004] EWCA Civ 1651; *Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576; *Reed Executive v Reed Business Information* [2004] EWCA Civ 887; *Burchell v Bullard* [2005] BLR 330.

¹³ The term was used as synonymous of mediation.

(1990, No.192) expressly suggested that the aim of conciliation or mediation “is to help the couple to reach their own agreement about the future, to improve communication between them, and to help them to co-operate in bringing up their children” (para 5.30.iii).¹⁴

A subsequent important step for the incorporation of mediation for the resolution of family disputes came with the Green Paper first in 1993 and the White Paper later in 1995 both under the title *Looking to the Future: Mediation and the Ground for Divorce* (1995) which suggested mediation as integrated part of the divorce process. However, both Papers clearly stated that mediation should not be compulsory. Therefore the aim of the proposed reform was to inform disputants and make disputants aware about the advantages and disadvantages of mediation.

Following the recommendations contained in the above mentioned reports, the Government in 1996 introduced the Family Law Act - which was later shelved. For our purposes Part III concerning legal aid for mediation requires attention. The Family Law Act did not provide mediation as compulsory stage for the resolution of family disputes. But at the same time the Act created some opportunities for the mediation to take place. In particular, parties could be directed to mediation after the period of reflection and consideration (section 7),¹⁵ following the compulsory information meeting (section 8),¹⁶ by the court after the court had received a statement from the parties (section 13),¹⁷ or when the parties were eligible for legal aid (section 29, and later included in the Access to Justice Act 1999, section 8).

Although never enacted, the Family Law Act 1996 touched on two important principles of access to justice which should also inform mediation sessions. These principles are access to information and availability of legal aid. Legal developments of mediation in English have to some extent embraced such principles.

In particular, the Practice Direction 12B provides for a First Hearing Dispute Resolution Appointment (FHDRA), which the parties, a Cafcass officer, a mediator and the judge would attend. The aim of the hearing is to assist the parties in

¹⁴ It must be said that English Family Law emphasises the importance for the parties to achieve a common solution and to give priority to private arrangements. For instance the Children Act 1989 was enacted with the aims to balance state intervention and parents’ autonomy; to encourage collaboration between parents; and to improve the use of voluntary arrangements.

¹⁵ According to Section 7 “where a statement has been made a period for the parties a) to reflect on whether the marriage can be saved and to have the opportunity to effect a reconciliation, and b) to consider what arrangements should be made for the future.”

¹⁶ Parties in a marital breakdown were required to attend information aiming at giving information to the parties about marital breakdown and its consequences, counseling, legal advice, and mediation. During the meeting, the mediator would explain to applicants and respondents how mediation could assist them, and assess whether they were suitable for mediation and eligible for public funding.

¹⁷ According to Section 13 “After the court has received a statement, it may give a direction requiring each party to attend a meeting arranged in accordance with the direction for the purpose a) of enabling an explanation to be given of the facilities available to the parties for mediation in relation to disputes between them.”

conciliation and in resolution of all or any issues between them. In addition, the Pre-Application Protocol for Mediation Information and Assessment 2011 stresses the importance for the parties to be informed about the characteristics of alternative dispute resolution mechanisms. This is achieved through a 'Mediation Information and Assessment Meeting' (MIAM), which the parties were expected to attend before commencing court proceedings.¹⁸

Under the Children and Families Act 2014 the Mediation Information and Assessment Meeting' (MIAM)¹⁹ is now compulsory (section 10) for all married opposite-sex, married same-sex partners and civil partners who have a family dispute and wish to divorce or dissolve their relationship. Section 10(1) requires a party, "[b]efore making a relevant family application... [to] attend a family mediation information and assessment meeting"²⁰ (MIAM). Although courts cannot order parties to attempt mediation, the Children and Families Act 2014 reinforces the provisions in the Family Procedure Rules, part 3 which provide that the court must consider at each stage of proceedings whether recourse to ADR is appropriate (s.3.2) and may direct proceedings to be adjourned for the purpose of exploring this option (s.3.3 (1)).²¹ The Practice Direction 3A of the Family Procedure Rules,²² includes the pre-application protocol as regards MIAMs and has the express aim of ensuring "as far as possible, that all parties have considered mediation as an alternative means of resolving their disputes" (s.2.1(c)).

As Mauro Cappelletti pointed out one of the main barriers to access to justice is the availability of funding (1978) and the withdrawal of legal aid for legal representation in court in England affects family disputes and represents an infringement of the principles of access to justice. Significant cuts to legal aid were introduced by the Legal Aid, Sentencing and Punishment of Offenders Act

¹⁸ Para.4.1.

¹⁹ An important aspect of the MIAM is that it allows mediators to evaluate whether the dispute is suitable for mediation and to do a domestic abuse screening. The Family Law Act 1996 required mediators to comply with codes of practice providing for cases of domestic violence. Accordingly, the policy of the College of Mediators provides :

"In all cases, mediators must seek to discover through a screening procedure whether or not there is fear of abuse or any other harm and whether or not it is alleged that any participant has been or is likely to be abusive towards another. Where abuse is alleged or suspected mediators must discuss whether any participant wishes to take part in mediation and information about available support services should be provided (4.8.1) and

"Where mediation does take place, mediators must uphold throughout the principles of voluntariness of participation, fairness and safety and must conduct the process in accordance with this section. In addition, steps must be taken to ensure the safety of all participants on arrival and departure. (4.8.2).

²⁰ <http://www.publications.parliament.uk/pa/bills/lbill/2013-2014/0032/14032.pdf> (accessed on 30th March 2015).

²¹ http://www.justice.gov.uk/courts/procedure-rules/family/parts/part_03(accessed on 30th March 2015).

²² [http://www.justice.gov.uk/courts/procedure-rules/family/practice_directions /pd_part_ 03a](http://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_03a) (accessed 30th March 2015).

2012 (hereafter “LASPO”). LASPO has restricted the availability of legal aid for the resolution in court of family disputes cases - resulting in significant limitation of the right of access to justice.²³ However, the Act now provides the framework for publicly funded mediation and therefore the Mediation Information and Assessment Meeting and family mediation have not been affected by the cuts to legal aid.

In England the study and practice of family mediation has attracted and still attracts professionals from a variety of disciplines. As Marian Roberts (2014c) argues, since the early 1980s four phases of interdisciplinarity have characterised family mediation in England.²⁴ Although the phases overlap to several extents, each of the phases has involved a different group of professionals, and has contributed to a specific debate with regard theory and practice of family mediation. However, the involvement of such different professionals carries the risk for mediation to lose its key features of informality and of a process in which the parties retain control.

A first phase witnessed the interest in particular of social workers and counsellors in family mediation regarding parenting disputes and brought the attention on whether and how children should be involved in mediation.²⁵ The second phase between the end of the 1980s and mid 1990s saw family therapists intervening in mediation and which created a heated and interesting debate between professionals in favour Haynes (1992) and against Roberts (1992) the recourse to family therapy in mediation.

Lawyers were the third group of professionals who asserted interest and involvement in mediation - a controversial participation.²⁶ Lawyers are involved as consultants of the clients during mediation, acting as mediation advocates and as mediators. As consequence both the Law Society and the Bar Council have incorporated mediation as part of the legal practice and established codes of practice for the solicitor mediators and barrister mediators (Roberts, M., 2014c).

The final phase of development of family mediation in England concerns the recent changes to the civil justice system including the cut to legal aid, and the introduction of compulsory MIAM. Therefore this phase does “confirm a growing trend to deny mediation its distinctive dispute resolution status as a genuine alternative to litigation and formal judicial determination and towards mediation

²³ Proven cases of domestic abuse are still covered by legal aid. For the full list of disputes which are publicly funded see Schedule 1 of the LASPO: <http://www.legislation.gov.uk/ukpga/2012/10/schedule/1> (accessed on 30th March 2015). The Legal Aid Agency of the Ministry of Justice provides legal advice and legal aid for civil and criminal disputes.

²⁴ The interdisciplinary approach to family justice as a whole is also at the core of the Family Justice Council which monitors the family justice system.

²⁵ For a detailed analysis of the debate on the involvement of children in mediation see: Roberts, M. (2014b); Parkinson (2011).

²⁶ For an interesting analysis of the issues involved in lawyers in mediation see Clark (2012), Riskin (1982), Roberts S. (1993).

becoming a form of legal process rather than an alternative to legal process, damaging to both judicial authority and party control” (Roberts, M., 2014c: 116). In addition, this latter phase includes the embracement of European initiatives regarding mediation

To some extent these four phases have contributed to the development of regulatory bodies and professional regulations in England where legal requirements for practicing as mediator lack. The first regulatory body for family mediators was the UK College of Family Mediators created in 1996²⁷ and then re-named as College of Mediators²⁸ in order to include mediators with background other than family mediation. The College of Mediators has a regulatory function and approves mediation training providers. In doing so the College ensures that all its members have completed mediation training and abide by its Code of Practice.

The Code of Practice emphasises, among others, the general principles governing mediation such as voluntary participation, neutrality, impartiality, confidentiality and independence. It is commonly accepted that mediators will not give legal advice (Roberts, M., 2014a; College of Mediators, 2014, section 6.7 and 6.9) and will suggest parties to seek legal advice before reaching a final agreement. A mediated agreement²⁹ will be binding only if transformed into a contract or with judicial approval.

The Code poses particular attention to family mediation. When children are involved then according to the Children Act 1989 the paramount welfare’s principle will inform the mediation process (section 1). Mediators “must encourage participants to focus upon the needs of the children as well as upon their own and must explore the situation from the child’s point of view” (College of Mediators, 2014: para 4.7.3).

When created in 1996 the UK College of Family Mediators valued and approved some independent provider bodies which later created the Family Mediation Council³⁰ for the promotion of best practice in family mediation. The

²⁷ The aim of the UK College of Family Mediators were: “ to advance the education of the public in the skills and practice of family mediation; to set, promote, improve and maintain the highest standards of professional conduct and training for those practicing in the field of family mediation; to make available the details of registered mediators qualified to provide family mediation (Roberts, 2014a: 281).

²⁸ The College is managed by a Board of Directors. See <http://www.collegeofmediators.co.uk/> (accessed 30th March 2015). For the Code of Practice of the College see: <http://www.collegeofmediators.co.uk/sites/default/files/CoM%20Code%20of%20Practice.pdf> (accessed on 30th March 2015).

²⁹ At the end of mediation, the mediator prepares an outcome statement or a memorandum of understanding which includes the aspects the parties have agreed on. Such document is not binding and the parties are required to ask legal advice regarding the content of the statement. After the legal consultation or in case the parties decide not to ask for legal advice, the mediated agreement can become binding as contract or as consent order.

³⁰ The member organisations are: National Family Mediation; The Family Mediators Association; Resolution; Alternative Dispute Resolution Group; The Law Society; The College of Mediators.

central aim of the Council is “to ensure the public can confidently access family mediation services that offer high quality mediation provided by mediators who meet our standards.”³¹ All members of the Council must comply with the Code of Practice.

From the codes of practice developed by the College of Mediators and the Family Mediation Council, and from the descriptions of the key features of mediation that the mediation providers advert on the web-sites, it can be inferred that family mediation in England is understood as a form of facilitative intervention to assist the parties in coming to an agreed solution and is based on the voluntary and well-informed choice of the parties. However, if on the one hand the introduction of the information and assessment meeting backups the last aspect, on the other hand the withdrawal of legal aid seems to make mediation and *indirectly compulsory* solution.

Same-sex Couples and Mediation³²

The rules governing the use of mediation for the resolution of intra-family disputes in England, analysed in the previous section, apply to disputes between same-sex partners and disputes between opposite-sex parents. Therefore same-sex couples who wish to dissolve their civil partnership or to divorce, before filing an application to court will have to attend a mediation information and assessment meeting.

During the meeting a mediator will inform the parties about the phases of and the principles governing mediation. After the information meeting the partners will choose the dispute resolution mechanism they consider more appropriate for the resolution of the dispute. However, as explained in the former section, if the partners require legal aid only mediation is available. If the partners are in cohabitation and jointly own property, the Trusts of Land and Appointment of Trustee Act 1996 applies. The parties have to follow the Pre-Action Protocol (under CPR 1998) and the Pre-Application Protocol and attempt mediation or other alternative methods before litigation. Courts cannot refer disputants to mediation but can recommend mediation.

In an effort to present a comprehensive overview of theory and practice of disputes between same-sex partners and the resolution through mediation in England, this Chapter relies on empirical data collected between April 2014 and March 2015 during semi-structured interviews with mediators, lawyers and same-sex couples in England. The process for the recruitment of interviewees developed in three stages.

Some lawyers and mediators collaborated already with me during my previous research in 2010 and therefore were contacted directly via email. A second group of

³¹ <http://www.familymediationcouncil.org.uk/us/aims/> (accessed on 30th March 2015).

³² This Chapter includes some of the findings presented in Moscati (2015).

mediators expressed their interest in the project after a call for interview recruitment was included in the newsletter and mailing list of the College of Mediators, Law Society and Resolution. Finally, a survey of associations and law-firms was conducted and direct request for interviews were sent to lawyers and mediators with experience of disputes between same-sex partners.

However, the response to the invitation for interview was low compared to the number of emails that the author of this Chapter sent and therefore any generalisation about the findings should be avoided. Nevertheless, given the long-term experience of the lawyers and mediators who agreed to participate in the project, it can be sustained here that the number of interviews does not by any means affect the quality of the data collected and the conclusions reached by the research.

Together with interviews, a survey of websites advertising family mediation services in England was initiated. Although still in progress - the survey will end in October 2015 - it shows that many family mediation practices and law firms advert mediation services for same-sex couples in Wales and England. However, the survey did not come across any specific code of practice, guidelines and informative material addressing the specific issues that mediation between same-sex partners and parents arises. In addition, informative material for children of same-sex parents is lacking.

Some same-sex couples were chosen among those who participated in a previous research carried out by the author of this Chapter. The same-sex couples introduced other couples to me. In addition, few same-sex couples were contacted with the help of mediators and lawyers.

A first question, the research for this Chapter addresses, is whether mediation is used by same-sex couples in England. According to the Office of National Statistics³³ the number of civil partnerships formed in the UK in 2013 was 6,276 and the number of dissolutions of civil partnership granted in England and Wales in 2013 was 974. But the number of civil partnerships dissolved through mediation is un-known. However, from my fieldwork it can be inferred that same-sex couples in England - unlike other countries analysed in this book - have been keen to use mediation and other out-of-court dispute resolution mechanisms even before the Civil Partnerships Act 2004 and the Same-Sex Marriage Act 2014. Together with mediation, collaborative law, counselling and negotiation by lawyers are considered. Mediation and negotiation by lawyers are used for signing pre-nuptial or post-nuptial agreements, and for parenting agreements in cases of artificial insemination and surrogacy outside the scope of the Human Embryology and Fertilisation Act 2008. For instance as one lawyer, who prefers to remain anonymous, referred:

³³ http://www.ons.gov.uk/ons/dcp171778_395000.pdf (accessed on 30th March 2015).

“Two lesbian women in a long-term relationship decided to have a child. They wished the child to know the father and did not want to undertake the treatment in a licensed clinic. For these reasons the couple asked a common friend to be the sperm-donor. The common friend, who was in a same-sex relationship himself, accepted and declared to be keen to help the mothers raising the child. Before the birth of the child, all four partners came to see me and ask advice for writing a co-parenting agreement. The agreement included detailed information regarding duties and roles played by each of the parents - they all referred to themselves as parents.”

In addition, *de facto* same-sex partners find mediation a suitable tool for the resolution of disputes or prevention of disputes involving property and finance. It might happen that same-sex couples follow a pathway inclusive of all or several of the above mentioned methods. It appears from research that if the dispute is about finance or other quantitative goals, then collaborative law and negotiation by lawyers are preferable.

Several factors influence the choice between mediation and other mechanisms. As David Allison argued during an interview:

“Money might be one aspect and as mediation tends to be cheaper this may have an influence -- even though it shouldn't be the main reason for choosing mediation. It may also depend on the level of legal or other support they might need during the discussions. Some people feel more supported and hence better able to discuss things with their lawyer present. They would most likely prefer collaborative law.”

Or as former same-sex partners referred to me:

“We were fine with emotions and feelings...love was over and we accepted our separation. But we had a very complicated financial situation and therefore we preferred to leave everything to our lawyers.”

In answering a question regarding the reasons inspiring same-sex couples to choose mediation, mediators and lawyers draw attention to the several advantages of mediation emphasising the possibility that mediation offers to the parties to control the dispute. In addition, unlike the other jurisdictions analysed in this volume, some mediators pointed out that since the introduction of the mediation information assessment meeting (MIAM) in 2011, more couples became aware about mediation and decided to attempt it.

In some cases the choice may be inspired by social factors. Increasing social acceptance of homosexuality and legal developments protecting the rights of sexual minorities have changed attitude towards the choice of the process. For instance as Ruth Smallacombe and David Allison referred:

“Although things have changed over the years in terms of acceptance of same-sex relationships many same-sex couples come to mediation preferring the flexibility

of the process and a more confidential setting in which their families would not [be morally] judged -- in the 1970s, the court system was terribly hostile to such couples and although this has changed the court process can still feel very unfamiliar with the issues they face."

At the same time, as two mediators suggested, two additional factors contribute to decide whether to use mediation. First, preference is linked to the information lawyers offer about mediation and the manner in which mediation is advertised by family mediation practices:

"Couples were directed by their lawyers to attempt mediation and when they came to see me they were very well-informed about mediation" (Anonymous mediators).

"Several couples have come to me after they have seen my website" (Robin ap Cynan).

Overall, the fieldwork has shown that lawyers are keen to suggest mediation unless domestic violence is involved. Although still in progress, the survey of the website advertising mediation services show that information regarding the process of mediation, the principles governing the process, other out-of-court mechanism and the background of mediators range from very accurate to including just basic information.³⁴

Secondly, the availability of legal aid contributes – or indirectly imposes - to choose mediation. The withdrawal of legal aid for legal representation in court introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), persuades partners to resolve family disputes through mediation (Barlow et al, 2014). The interview with same-sex partners supports the argument that cuts to legal aid are making mediation - albeit indirectly - compulsory:

"We could not leave together anymore and we wanted to end our relationship as soon as possible. We were not keen on mediation but it was the only way to get legal aid."

Finally, although it has not been possible to gather quantitative data it appears that collaborative law seems to be increasingly used by wealthy same-sex couples in England.

Sources of dispute

Interviews show that main reason for break up is growing apart because love ends or infidelity. More generally, disputes arise from disagreement about finance

³⁴ Examples of best practice are the website of the Family Law in Partnerships (<http://flip.co.uk/>) and the Mediation Centre (<http://www.themediationcentre.co.uk>) (both accessed on 30th March 2015).

and children. In particular, financial disputes include money, and property, and division of common assets; maintenance of one or more partners; financial support for children (children of one or of both partners).

Other sources of dispute about finance may arise with regard the formulation of will, or about entitlement to inheritance. Same-sex partners, who can be two or more, may have a disagreement in deciding what to include in the will. For instance one of the lawyers interviewed during the fieldwork, referred of a case she/he dealt with in which three women had loved each other and lived together for forty years as *'married partners.'* The three partners decided to ask legal advice in order to make three wills. Each of the wills would set out the two other partners as beneficiaries.

During the fieldwork a lawyer and a mediator gave two examples of disputes regarding inheritance they have dealt with. In the first case the parties involved were three men who all were in a relationship with the deceased and were all financially sustained by the deceased. The second dispute presented legal issues about inheritance law, as well as emotional issues. The dispute arose between the same-sex partner and the parents of the deceased:

*"A lesbian couple had been together for ten years. They bought a house together, and shared all daily expenses. They never signed any agreement dealing with the consequences of their relationship, nor produced any wills. One of the partners suddenly died in a car accident. After her parents learnt about the accident, they met her partner for the first time. A dispute started about the appropriate role of the same-sex partner of the deceased subsequent to the accident, and about financial issues."*³⁵

As far as parenting disputes are concerned, four important findings emerged from the fieldwork in England. First, causes of such dispute over children include making a decision on whether to have a child; who will be the gestational mother, or the sperm donor, and about the quality and time of parenting by non-biological parents or by the sperm-donor. Secondly, few mediators pointed out that disputes between lesbian partners present a main issue namely the insecurity about who is the *better mother* - and not who is better parent. As a mediator told me:

"I recently mediated a dispute between two lesbian parents. They had a child with an anonymous sperm-donor. The biological mother had been the main carer for the child although working part-time. The other parent was working full-time and was very

³⁵ Comment of the lawyer-mediator: This scenario presented legal and emotional issues. During the pre-mediation meetings I helped the parents to deal with their daughter's homosexuality first, and then to get them to understand better the role of her partner and the nature of the couple's relationship. At the same time as supporting the surviving partner in dealing with prejudice I worked hard to get her to accept the differences between her perceptions as a partner entitled to part of her deceased partner's assets and the strict legal position (in which she had no entitlement) (Moscati, 2015).

successful in her career. But she could only spend limited time with the child. Their relationship deteriorated and they decided to separate. They resolved all financial issues including the maintenance of the child very easily. However, they had harsh discussions about the time the child would spend with each of the mothers. The main argument was about who was the better mother - the one looking after the child every day, or the one financially supporting the child."

Thirdly, these disputes may involve several adults who to different extents play a parental role in the life of the child/children. Finally, at moment it seems that parenting disputes are more frequent between lesbian partners, or between lesbian couple and sperm-donor. For instance as a mediator told me:

*"Elva and Maria were in a relationship and their friend Michael agreed to donate his sperm to Elva and father a child. The child is Evan and he was born 12 years ago. A dispute arose in due course over access to Evan between Michael and Elva. Michael was with Robert at the time of the birth. All four parents (biological parents and the partners of the biological parents) participated in Evan's life. In 2007 Elva and Maria separated and through mediation they agreed for Maria to meet Evan every week on Thursdays, and alternate week-ends. In 2008 also the friendly relationship between Elva and Michael deteriorated and court proceedings started because Michael now had no access to Evan. The court issued a contact order for Michael so that he could continue to meet Evan. In 2009 Elva started a new relationship with Joanna and they moved to another city bringing Evan with them, and had a daughter (with the assistance of an unknown sperm donor). Elva refused to comply with the court-order in favour of Michael. In addition Elva limits contacts between Evan and Maria. Maria has filed a case requesting a contact order in respect of Evan for herself. Elva then asked Maria and Michael to attempt mediation."*³⁶

*"Two lesbian partners and two gay partners decided to have children together. They agreed to conceive children, mixing the semen of both men and then artificially inseminating both women. The plan was to have two children born together with four parents. However, only one child was born, and all four adults then played full parenting role in the life of that child. No written agreement regarding contact was signed by the parties. When the child was three the relationship between the four parents deteriorated and the parents decided to attempt mediation in order to resolve the differences between them."*³⁷

³⁶ Comments of the mediator: This dispute presented several important issues to deal with: parenting; children; court-proceeding; distance. This case required several mediation meetings: one-to-one meetings with each of the parents; joint meeting between biological parents; joint meeting with all parents involved. Court proceedings were withdrawn and limited contact (agreed in mediation) has re-started. A review mediation meeting has been arranged in 6 months time.

³⁷ Comments of the mediator: this dispute presented important legal issues regarding the recognition

During the fieldwork two other sources of dispute were considered by the interviewees. The first cause of dispute is addiction to drugs. In particular, the use of a drug called crystal meth within the gay community contributes to creation of disputes. Disputes arise because of disagreement of the partners regarding the use of drugs and from the consequence that the addiction to drug has on the relationship. The other source of dispute can lie in the disagreement partners might have on whether to allow an open relationship; or about the choice and characteristics that the new partner/s must possess. As Robin ap Cynan suggested during an interview:

“Disputes can arise when one partner wants a closed sexual relationship, and the other wants to open it out to involve third parties. Tensions can emerge since one partner may be comfortable remaining monogamous whilst the other looks elsewhere for sex; both may wish to look individually for sex outside their principal relationship (whether or not they continue with their own sexual relationship); both may want group sex together.”

To some extent the increasing socio-legal changes regarding the protection of LGBT persons and recognition of same-sex unions have contributed to reduce sources of dispute based on social disapproval of homosexuality.

In particular, unlike the other jurisdictions analysed in this book, ‘coming out’ does not appear to be a recurrent source of dispute between same-sex partners in England. However, there are three exceptions. First, disclosing homosexuality can be problematic if one of the partners comes from an ethnic or religious community in which homosexuality is condemned. Secondly, as Richard Roberts suggested during an interview, the approach to coming out changes according to generations. For instance for same-sex partners who grew up in the 1960s before the decriminalisation of homosexuality, revealing own homosexuality is still controversial, whereas for the young generations (in particular in London) homosexuality is considered a characteristic of personality as any other. Finally, disputes may still arise in cases in which one of the partners discloses his or her bisexuality or heterosexuality. The following cases, reported by a mediator and a lawyer during the fieldwork, are examples of dispute that arose from disclosure of bisexuality and heterosexuality. In both cases the disputants did not settle:

“Two lesbian partners decided to have child. One of them conceived the child with her former fiancé. According to a non-written agreement between the three adult parties, the child would be raised by the two mothers without knowing who the father was. After the birth of the child the biological mother told her same-sex partner

of parenting rights and duties. The mediator made the disputants aware that their common priority was the best interests of the child, and reminding them of this value helped the parties to agree on shared contact.

that in fact she was in love with the biological father of the child and wanted to start a relationship with him while continuing living with her lesbian partner."

"Gay couple being together for a long while before registering their civil partnership. One partner was much older than the other one. The relationship broke down when the younger partner started a relationship with a woman and declared not being gay anymore."

Following the question regarding the nature of disputes, lawyers and mediators were enquired regarding whether it is possible to individuate differences between gay couples and lesbian couples. All interviewees pointed out that based on current experience any generalisation must be avoided. Nevertheless, it appears that some differences are found with regard sources of dispute where parenting disputes seem to be more frequent between lesbian partners, and issues with drug abuse and open-relationship seem to be more common between gay partners. An interesting opinion regarding differences came from three lawyers who argued that with regard to financial issues gender plays a role more than sexual orientation. In particular, in resolving such disputes gay partners are not very keen in sharing their wealth and show a general - although there are exceptions - practical approach which is the same heterosexual men show during divorce. On the other hand, lesbian women frame financial disputes within the narrative of the entire relationship and - in the words of the lawyers - this is similar to the attitude that several heterosexual women have during divorce or separation. In addition, mediation between lesbian partners presents high level of emotional involvement and awareness regarding legal rights.

The process of mediation

One of the aims of the research developed for this book was to understand some key features of and issues surrounding the process of mediation. In particular three areas of research and debate were investigated. These three areas concern the role of the mediator, the nature of power imbalances between the parties, and the involvement of children in mediation.

With regard to the first issue, as explained in Chapter I, mediation "has not only a *negotiation* logic but a psychological and social coherence too, in moving the parties from hostility, insecurity and anxiety towards a lessening of intense emotion and stress" (Roberts, M., 2014b:105). In facilitating the passage of the parties from hostility to lessening strong emotions, the mediator follows one or more style of practices and employs a variety of structural arrangements. The mediators who kindly shared their experience with me were questioned on whether styles and models of practice change according to the sexual orientation of the disputants. All the mediators answered that the presence of disputants who are of the same-sex does not influence style and models of practice.

However, the mediators interviewed agreed that some additional awareness and preparation are needed during mediation involving same-sex partners. In particular, interviewees emphasised the importance of approaching same-sex disputes without assumption regarding family structures and roles that partners and parents have within the family. As suggested in Chapter I same-sex partners create a variety of family arrangements which do not reproduce the dynamics of heterosexual marriage. In addition, particular attention must be put on the use of language which should be gender-neutral. The following are examples of good practice regarding language:

Raeside: I use their names; or I use the plural: 'mothers'/'fathers'; or I ask them how they want to be called.

Muzalewski: if the same-sex parents refer to themselves as mothers, or fathers the mediator should respect this.

Concerning the mediator, an interesting debate has emerged over the sexual orientation of the mediator. Gunning (2005) has argued that a mediator who is part of the LGBT community will enhance the mediation because there would be a lack of bias. Gunning adds that mediation would involve less animus because LGBT mediators would not be homophobic; the parties will feel they are in a safe environment and can talk freely; and a LGBT mediator will share many of the personal experiences that a LGBT couple has faced. However, it is also possible to argue that a heterosexual mediator proves suitable for such mediation, if the mediator has become familiar with and sensitive to LGBT background and issues. Although the argument that considers a mediator from LGBT community more suitable for disputes involving same-sex couples has been supported by few of the informants of this study, the majority of mediators interviewed pointed out that sexual orientation is less important than knowledge, empathy and technical capacity.

As far as power imbalances are concerned, power imbalances are found in all relationships and may well characterise the relationship between same-sex partners. The interviewees pointed out that sources of power imbalances include age, financial situation, educational background personal success at work and popularity with friends. Additional and more controversial issues arise whether the dispute is about children. In this case, serious power imbalances may arise between biological and non-biological parents concerning the expectations they both have regarding the role they play in the life of the children, about the experience that each of the partners have in bringing up the children, on the time and quality of parenting. It is interesting to note that if on the one hand during the process of deciding whether and how to have a child same-sex partners abandon the assumption of the connection between parenthood and biological ties; on the other hand in the pathologic phases of the end of a relationship, often same-sex partners

are stuck on the biological - non-biological parents divide. Indeed, as referred by several of the mediators interviewed, often biological mothers exercise their power over the non-biological parent.

Another important issue that the research has considered has been the involvement of children during the mediation process. Generally speaking, article 12 of the United Nations Convention on the Rights of the Child (1989)³⁸ provides the rights of children to express a view, to be heard and to be considered. It is beyond the scope of the present Chapter to give a detailed account of the literature and issues surrounding the debate regarding the involvement of children in the mediation process. Marian Roberts (2014) has already addressed many of these issues. Here, the discussion is limited to putting forward the findings of fieldwork conducted for this study. All mediators interviewed said that so far they did not involve children in the process because the children of same-sex partners were too young. However, during the fieldwork it emerged that informative material targeting the children of same-sex parents and guidelines for mediators in working with the children of same-sex partner are missing. It is opinion of the author of this Chapter that the involvement of children of same-sex parents requires mediators to possess accurate knowledge about the variety of same-sex unions and same-sex parenting arrangements. As explained above, these disputes may involve four/five/six parents. More importantly the right of the children to participation includes the rights to be adequately informed. Therefore, informative material for children should include precise information about sexual orientation, gender identity, about the variety of family structures, and parenting roles, and parents' break up. Finally, accurate child-friendly guidelines inclusive of children of same-sex parents must be developed.

Conclusions

This Chapter has aimed at offering an overview of family mediation adopted for the resolution of disputes between same-sex partners in England. Sources of disputes are varied and various the methods adopted for their resolution. Mediation represents a suitable option for same-sex partners and it is more and more encouraged by recent changes to civil justice system in England. The compulsory information and assessment mediation meeting has the potential to raise awareness about mediation and so doing a culture of cooperation will develop. However, the withdrawal of

³⁸ Article 12 rules:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law'.

legal aid for legal representation in court introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) may have the effect of pushing to mediate disputants who do not wish to do so.

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CHAPTER III

BULGARIA

*Vladislav Petkov, Bulgaria*³⁹

Section I: Description of the Country

Republic of Bulgaria is a country, located in southeast Europe. With its population of 7.3 million citizens, the country is a home to 1.4% of the population of the European Union (Eurostat, 2014: 23). Bulgaria has a geographical size of 110 899.7 km,² which makes it the 11th largest European Union member state (right after Greece and before Hungary).

The country borders the Black Sea on the east, Romania on the north, Serbia and Former Yugoslav Republic of Macedonia on the west and Greece and Turkey on the south. Bulgaria remains the poorest country in the European Union, with the lowest Gross Domestic Product per capita (11 900 EUR for 2014) and the lowest minimum wage rate (Eurostat, 2014).

The majority of the Bulgarian population lives in the cities with only 27.51% living in rural areas (National Census 2011, 2012: 26). According to The National Census 2011 final findings, 84.8% of the population is ethnic Bulgarian, 8.8% identified as ethnic Turks, 4.9% claimed they are Roma, 0.8% answered “other” and 0.7 refused to self-identify. The official language in the country is Bulgarian and Bulgaria still operates with its own currency – the Bulgarian lev.

Member of the European Union since January 1st 2007, Bulgaria’s current social, political and economic life is partly determined by its recent history, being a former part of the Ottoman Empire (XIV-XIX century) and the Soviet Bloc (1945-1989). The modern history of the country started in 1878 when as a result of the Russo-Turkish War of 1877-78 Bulgaria was re-established with Sofia as a capital city, which remains a capital up to this date. Established as a monarchy, the new country had a dynamic political life and engaged in four wars (Balkan wars from 1912 and 1913, World War I and World War II), which has led to two National Disasters (1913, 1918).

In the aftermath of World War II Bulgaria appeared to be on the east side of the Iron Curtain and while it was never part of the USSR, it was, like many other countries from Central and Eastern Europe, under the direct influence of Moscow. In this period Bulgaria became a people’s republic, the private property was nationalized and the economy was put under the direct control of the state. The

³⁹ The author would like to thank to all partners and interviewees who have kindly commented the first draft of this chapter. In particular, appreciation goes to the lawyers, judges, mediators and same-sex couples from Bulgaria who agreed to share their experience with me in the process of research and analysis. For reasons of confidentiality their names will remain concealed.

economic life moved from agriculture to heavy industry and the social structures underwent a serious process of urbanisation. Like elsewhere in the Soviet Bloc, the leading role of the Communist Party in the life of the country was recognised in the Constitution (1971).

However, Bulgaria did not experience a tradition of political opposition against the regime (Malinov, 2010: 3). The communist regime ended in Bulgaria on 10.11.1989 with the Communist party dethroning its leader Todor Zhivkov. In the next year the country had its first free elections since 1931 and in 1991 a democratic Constitution was approved, which proclaimed Bulgaria a parliamentary republic. This Constitution is still in force today.

The transition towards capitalism did not go smoothly - it is still in progress - and turbulent years followed, until the late 1990s, when Bulgaria took a strict pro-western course. The country joined NATO in 2004 and became a member of the European Union on 01.01.2007. As this section shows below, joining the EU was extremely important also for developing legislation with regard to the rights of LGBT people. Bulgaria is still not part of the Schengen Area and is under a Mechanism for Cooperation and Verification by the European Commission on the topics of judicial reform and the fight against corruption and organized crime.

Main legislative, political and judicial institutions are the Parliament (National Assembly), the Government (Council of Ministers), the Supreme Judicial Council and the president of the country. The *Parliament* holds the legislative powers. It is a one-chamber body consisting of 240 members. Political parties and coalitions need to receive at least 4% of voters' support to get seats in the Parliament. Parliamentary elections are held every 4 years. The Parliament elects and controls the *Government* (Council of ministers), which holds the executive power. The number of ministers in the Council would vary for each Government (as of March 2015 the Council consists of 1 prime-minister, 4 deputy prime-ministers and 15 ministers). The third pillar, the *Supreme Judicial Council* is a permanent acting body, which represents the judicial power and secures its independence, determines its personnel and the organization of work in the judicial system. It consists of 25 members. The chairperson of the Supreme Court of Cassation, the chairperson of the Supreme Administration Court and the Prosecutor General are members by law. Eleven of the members of the council are elected by the Parliament, and the other eleven members by the bodies of the judicial system.

Finally, the *president* is directly voted by the citizens every 5 years and according to article 92 of the Constitution of Republic of Bulgaria is 'the head of the state', 'representing the unity of the nation'. The president is considered to have 'neutral power.' The president can veto parliamentary decisions, but their veto can be overruled.

The political situation in the country has been very dynamic since the change of the regime in 1989. This process can be conditionally divided in two periods. Up

until 2001 the political system is characterised by strong bipolar political model, dominated by the Bulgarian Socialist Party (former Bulgarian Communist Party) on the left and the Union of Democratic Forces on the right (Karakostov, 2010: 126). As of 2001 this model changed with the emergence of new popular parties. The flat tax of 10% for example was introduced in 2008 when the Bulgarian Socialist Party was a leading player in the governing coalition with its leader being the prime-minister (Ivanov, 2007). As of 2005 (ultra-)nationalist parties were part of all parliaments and in some cases played an important role in sustaining the government.

In this political environment none of the political parties with MPs in the Parliament has openly declared support for LGBT people, and have in reality given negative signals in supporting the rights of LGBT people. For example, the leader of political party GERB (32.67% voters' support, 84 seats in the Parliament)⁴⁰ and current prime-minister Boyko Borisov stated in a TV interview on Channel 3: "In our party we are normal," and "gayness should not be manifested in a nasty way" (Gayrightsbg, 2011).

On the other hand, the Bulgarian Socialist Party (15.4% voters' support, 39 seats in the Parliament in coalition Leftist Bulgaria) was criticised for its position in a parliamentary voting procedure for criminalising "manifestation of homosexual orientation."⁴¹ Fifty-four members of the coalition abstained from the vote and two voted in favour (National Assembly, 2014). While the suggestion was turned down, the huge number of abstainers was commented in media as 1/3 of the members of parliament being "passive homophobes" (Angelov, 2014).

It must be noted that GERB (see above) was the only party to condemn the suggested legislation (National Assembly, 2014). GERB is currently in a governing coalition with the Reformist bloc (8.89% voters' support, 23 seats in the parliament). During a recent parliamentary procedure for including "sex reassignment" in the Protection against Discrimination Act (2003) Martin Dimitrov, a member of the Reformist bloc, stated that "someone is trying to negate us from traditional Christian values" (Rilska, 2015). One of the co-leaders of the Reformist bloc, Radan Kanev, sent a letter of support for Sofia Pride in June 2010, which was first perceived as a position of the party he chairs (Democrats for Strong Bulgaria). He later confirmed that it was his personal position and not the position of the party (Yonkova, 2010).

Two more political parties and coalitions, who are currently in Parliament, have shown that they do not support legal protection of LGBT people. The first one is the Patriotic Front (7.28% voter support, 19 seats in the parliament). This is a

⁴⁰ The percentage of voters' support reflect the results of the national parliamentary elections from October 2014 and the seats in Parliament concern the 43rd National Assembly, as constituted on 27.10.2014.

⁴¹ The voting procedure took place on 30.01.2014.

coalition between two nationalist parties – NFSB and IMRO,⁴² both of which have taken strong positions against LGBT rights. For example, in 2014 NFSB members of the Municipal Council in the city of Bourgas suggested to introduce a ban on *manifestation of homosexual acts in public*. While the suggestion was declined by the Council, homophobic statements were made on several occasions (Elenova, 2014). In addition, IMRO publicly condemn the Sofia Pride (Dnevnik, 2008). Angel Dzhambazki, MP and now member of the European Parliament, commented on the 2014 Eurovision winner Konchita Wurst as follows: “This bearded creature (...) is like genetically modified organism and won the Eurovision. And I wonder, if the vice of our time is that we tolerate the perversity” (Kosharevska, 2014).

Another nationalist party in the current National Assembly is Attack (4.52% voter support, 11 seats in the parliament). Together with publicly opposing to Sofia Pride, the party has attempted to introduce a legislative proposal for the criminalisation of “public manifestation of one’s own or somebody else’s homosexual orientation or belonging through organising or participating in meetings, marches and parades or through mass media and internet” (Tsiridis, 2014). Suggestions for including this text in the Criminal Code was brought up in the National Assembly by Attack in September 2013 (Pencheva, 2013), January 2014 (Angelov, 2014) and in January 2015.

Open support to the LGBT community has been expressed by parties which do not have seats in the Parliament: the Greens (0.61% voter support), Bulgarian Leftist (0.21% support) and the newly-established DEOS (Gil, E., Todorova, G. and Ivanova, T., 2014).

LGBT organisations in Bulgaria do not have a long history but recently have become an important source for raising awareness about the violation of rights of LGBT people. The first organisation was established in 1992 and started as a gay men initiative (rather than LGBT), focusing mainly on HIV-prevention. The association expanded its scope to include protection for the rights of all LGBT people until its closure in 2010.

Recently more LGBT organizations have been created– the Youth LGBT organisation Deystvie, Bilitis, Queer Bulgaria, Glass Foundation. Thanks to the joint efforts of these associations a number of initiatives and events have taken place including the Sofia Pride.

The first Sofia Pride took place in September 2008. The participants were attacked with Molotov cocktails by neo-nazis and nationalist groups. The event has been organised annually since then and although it is often accompanied by counter-protests, no serious provocations and clashes have emerged (Sofiapride).

⁴² NFSB stands for National front for the Salvation of Bulgaria. The full name of IMRO is ‘IMRO – Bulgarian National Movement.’

org). No other town in Bulgaria holds a similar event. In general, the LGBT civil society develops, but remains ‘uneven and volatile’ (Roseneil and Stoilova, 2011).

As the following section shows, the few legal developments towards the protection of the rights of LGBT people, have been encouraged by the process of accession of Bulgaria to the European Union (Roseneil and Stoilova, 2011). For instance, when the members of Parliament were called to vote whether to include sex reassignment as a ground for protection under the Protection against Discrimination Act (2003) a deputy prime-minister encouraged the supporting vote emphasising that the amendment to the law was due, because of the commitment of Bulgaria to the policy of the European Commission (Rilska, 2015).⁴³

Section Two: Legal Protection of LGBT People

According to the ILGA-Europe Rainbow Map (2014) on the protection of the rights of LGBT people, Bulgaria scores 30 % (where 100% is “rights fully respected”, 0% is “violations, discrimination”) and in the previous year 18% (ILGA-Europe, 2013). After becoming member of the European Union, Bulgaria has taken some measures to address discrimination against LGBT people, but the political agenda does not prioritise equality for this group of people. LGBT people still face discrimination and receive very limited legal protection (Bulgarian Helsinki Committee, 2015).

The Protection against Discrimination Act (PDA, 2013) is the only legal statute that explicitly provides protection for LGBT people.

Article 4 (1) of the Act states:

Any direct or indirect discrimination on the grounds of sex, race, nationality, ethnic origin, citizenship, origin, religion or belief, education, opinions, political belonging, personal or public status, disability, age, sexual orientation, marital status, property status, or on any other grounds, established by the law, or by international treaties to which the Republic of Bulgaria is a party, is forbidden.

The Constitution of Republic of Bulgaria (CRB) includes an overall non-discrimination principle, but does not specifically mention sexual orientation and gender identity as grounds for protection from discrimination.

Article 6 of CRB states:

(1) All persons are born free and equal in dignity and rights.

⁴³ According to Roseneil and Stoilova (2011) policy changes are introduced top down instead of bottom up (not based on changing attitudes and social pressure), which makes a difference on the impact of these policies have in everyday life.

(2) All citizens shall be equal before the law. There shall be no privileges or restriction of rights on the grounds of race, national or social origin, ethnic self-identity, sex, religion, education, opinion, political affiliation, personal or social status or property status.

In 1992 the Constitutional Court⁴⁴ interpreted the list of grounds for discrimination included in article 6 as being exhaustive. Later, the Constitutional Court⁴⁵ emphasised that the Bulgarian Parliament may well expand the grounds for equality. However, article 6 has not been amended yet.

There is no law that specifically criminalises homophobia or/and trans-phobia. The Criminal Code (CC, 1968) in Chapter three, Unit I considers “crimes against the equality of the citizens” but it does not include sexual orientation or gender identity as specific ground for protection from hates crimes. While the current Criminal Code does not criminalise same-sex sexual activity, there are some crimes, however, in which being of the same-sex of the victim is considered aggravating circumstance.⁴⁶

On March 25th 2015, the Parliament approved an amendment to the PDA, introducing paragraph 17 which states: “The ground ‘sex’ in art. 4 (1) also includes the cases of sex reassignment.” The amendment passed during the second vote and was surrounded by heated debate within the Parliament with some MPs arguing that the amendment was against Christian values. On the other hand, the Bulgarian Helsinki Committee expressed concern about the lack of definition of sex reassignment in the Act. The words, according to the Bulgarian Helsinki Committee, may be interpreted as aiming at protecting only people who have already undergone sex reassignment surgery, while leaving unprotected pre-surgery and gender queer people (Bulgarian Helsinki Committee, 2015: 103).

The PDA sets up the Commission for Protection against Discrimination (art. 40 and following PDA). The Commission considers proceedings against discriminatory acts. The proceedings can start with individual claims or on a claim made by legal persons. In addition, the Commission is entitled to initiate every time it appears that the PDA has been infringed upon. The proceedings before the Commission are free of charge (art. 53 PDA) and the burden of proof is reversed – the defendant must prove that the right to equal treatment has not been infringed upon (art. 9 PDA).

⁴⁴ Decision 14/10.11.1992

⁴⁵ Decision 3/05.07.2004

⁴⁶ One example is article 155 (4) CC: ‘A person who persuades or forces another person to using drugs or analogues thereof for the purposes of practising prostitution, to performing copulation, indecent assault, intercourse or any other acts of sexual gratification with a person of the same sex, shall be punished by deprivation of liberty for five to fifteen years and by a fine from BGN 10,000 to BGN 50,000.’

In literature these set of crimes are called ‘criminal homosexual activities’ (Stoynov, 2013).

The claimant has to provide facts from which it can be *assumed* that discrimination has occurred. The Commission has the power to impose administrative sanctions but it cannot order compensation in favour of the victim of discrimination. Only court can order financial compensation.

The legislation in Bulgaria concerning legal gender reassignment is limited (Karjeva T. and Georgiev I., 2014). Gender is a characteristic of the civil status and therefore legal gender reassignment is governed by the Civil Registration Act (CRA, 1999). Recognition of legal gender reassignment on documents can occur only after a court decision. There is no specific court procedure, and courts have discretion about the rules to apply.

Karjeva and Georgiev (2014) have identified three different types of procedures⁴⁷ courts might adopt. Dobreva (2014) has pointed out that courts ask for medical advice before deciding whether to grant legal gender reassignment. In addition, the Sofia Regional Court states: “The Civil Registration Act does not require surgery gender reassignment as prerequisite for the recognition of the new gender in legal documents.”

Bulgarian law does not recognise same-sex unions. A new Family Code (FC) was voted in 2009, but civil partnerships were not included in the reform. Marriage is left only to different-sex couples. Article 49 (1) of the Constitution of Republic of Bulgaria states: “*Matrimony shall be a free union between a man and a woman. Only a civil marriage shall be legal.*” The rule that marriage is only possible between a man and a woman is then reconfirmed in the Family Code, article 5: “*Marriage is concluded by a mutual, free and explicit agreement of a man and a woman, given personally and simultaneously in front of an office of the civil status.*”

A first draft of the Family Code included provision to legalise ‘*factual spouse’s cohabitation*’ for opposite-sex couples. However, pressured by the Bulgarian Orthodox Church, other religious bodies and non-governmental organizations (Veselinova, 2009), the whole institute of cohabitation was not included in the new approved Family Code. Even if not defined in terms of content or procedure, the factual spouse’s cohabitation is still mentioned in various legal statutes including cases of compensation for crimes, and protection against domestic violence.

It needs to be noted that in some cases the term used is ‘*factual spouse’s cohabitation*’, while in others it is just ‘*factual cohabitation.*’ It is supported in literature that since ‘*factual cohabitation*’ is a marriage-like institute (the partners treat each other as if they were in marriage), it can only apply to opposite-sex partners (Stavru, 2012). Although during our research, one judge stated that depending on the case,

⁴⁷ The three types of procedure are: contentious proceedings, non-contentious proceedings and court administration proceedings.

same-sex partners might be considered as factual cohabitants, case law supports the thesis that '*factual cohabitation*' only applies to opposite-sex couples.

For instance, in 2014 Sofia Regional Court dismissed a petition for protection order under the Protection against Domestic Violence Act (PDVA, 2005). The claimant was in a same-sex relationship and sought protection from the abusive partner. According to article 3 of PDVA: "Protection under this act can be sought by any person who suffered domestic violence done by: 1. A spouse or a former spouse; 2. A person with which they are or used to be in a factual spouse's cohabitation (...)." The court found that the claimant was not entitled to the protection provided by PDVA. The court stated: "From the statements of the plaintiff it is clear that she and the defendant are of the same sex. Our legislation recognises only a marriage between a man and a woman. Factual spouse's cohabitation can only exist between a man and a woman" (Injection 26/07.10.2014, Sofia Regional Court).

It is argued here that denying same-sex couples recognition as factual cohabitants is not only harmful for same-sex couples, but also affects the public interest. Some of the provisions regulating factual cohabitation are meant to protect the public interest – as for example the rules regarding the recusal of a judge under article 22 (1) Civil Proceedings Code (2007).

Same-sex partners are currently denied the possibility to be parents to the same child. Article 81 (1) FC states: "Nobody can be adopted by two persons unless they are in a marriage." And as marriage is only possible for opposite-sex couples, it is clear that same-sex partners cannot be legally parents to the same child.

Furthermore, same-sex couples cannot fully inherit from each other. Bulgarian inheritance law provides the institute of inheritance by will, but also imposes the rule of the reserved part in favour of living children (or grandchildren), parents or a spouse (article 28 (1) Inheritance Act). Thus if one of the partners in a long-term same-sex relationship dies and his/her parents have survived to him/her, 1/3 of the asset will go to the surviving parents and not to the surviving same-sex partner, even if the deceased had signed a will leaving his/her asset to the same-sex partner.

Section Three: Developments of Mediation in Bulgaria

The Mediation Act (MA) was adopted in 2004 and last amended in 2011. Mediation is defined legally in article 2 as "a voluntary and confidential procedure for out-of-court resolution of disputes, whereby a third party mediator assists the disputants in reaching a settlement."

Mediation, arbitration and court settlement are legally defined mechanisms for resolving disputes out of court. Arbitration is governed by the International Commercial Arbitration Act (1988) and is adopted for the resolution of property and commercial disputes. Court settlement agreement can be used when the court trial has already started (article 234 from the Civil Proceedings Code, 2007).

In regards to the subject of mediation, article 3 (1) of the Mediation Act states:

“Subject of mediation can be civic, commercial, labour, family and administrative disputes, connected to the rights of the consumers, and other disputes between persons and/or legal entities, including when they are transnational.”

The recourse to mediation is not compulsory. According to article 5: “the parties have equal opportunities to participate in the mediation procedure. They participate in the procedure with free will and can withdraw at any moment.”

In family disputes (Chapter 26 of Civil Proceedings Code, 2007) the judge has the duty to encourage the parties to consider mediation or other alternative mechanisms. If parties decline, then court proceedings continue. If the parties agree to mediate, the proceeding is withheld, but either party may request a resumption of the case in court within six months. If there is no such request, the case is dismissed.⁴⁸

Legal statutes govern principles and practice of mediation. Neutrality and impartiality of the mediator are established as overarching principles of mediation by the Mediation Act. Article 6 states “a mediator shall not display partiality and shall not impose a resolution of the dispute.”

In relation to the procedure, mediation can be performed by one or more mediators, selected or approved by the parties. In the beginning of the first meeting the mediator explains to the parties the procedure and its rules, and the role of the mediator. During the mediation meetings the mediator is expected to create a friendly environment where the disputants feel comfortable and talk, based on mutual respect for their interests. On request of the parties the mediator can be replaced at any time. Finally, the mediator shall undertake the necessary measures to insure that the parties fully understand the conditions of the agreement that has been reached.

Mediators are expected to follow a number of ethical rules and principles. Competency is a leading principle as mediators should be competent and well-informed in the mediation procedure. Appropriate training is obligatory for a person to be accredited as mediator and additional training is encouraged. Mediators are also expected to be independent and are not allowed to offer legal advice regarding the dispute. A mediator has the right to terminate the procedure if he/she feels that fairness has been affected.

This leads to the principle of impartiality, which demands that during the procedure the mediator should restrain from prejudices and bias, based on the personal characteristics of the parties, their life-style or their performance during

⁴⁸ There have been recent attempts to encourage the use of mediation in Bulgaria. In September 2014 the Supreme Judicial Council nominated a committee of experts to develop a ‘Strategy for the promotion of mediation as a method for alternative resolution of disputes.

mediation meetings. In additional mediators have duty to protect the confidentiality of information shared during the meetings.

The Ministry of Justice provides the Uniform Register of Mediators. Data show that 1341 mediators were listed in the Register in 2014 (Dimitrova, 2014). There is no centralised statistics on the number of mediations in Bulgaria, but it is suggested that they are less than 500 annually (Palo et al, 2014: 6). That means there are more mediators than disputes to mediate. For instance an evaluation of mediation programmes of the Sofia Regional Court and the Sofia City Court, shows that the number of mediators increases but the number of mediations is still low (Shahter, 2014: 4).

The Mediation Act does not mention any specific rules regarding the involvement of children in mediation. According to article 15 of the Protection of Children Act, if a child is ten years old or older and his/her participation would not harm his/her interests, the child must be listened to in proceedings concerning his/her rights and interests. A younger child might still participate but the decision must be motivated by the court. The law does not mention if these rules extend to alternative dispute resolution mechanisms. In literature it is supported that there is now legal requirement for involving children but that should depend on the mediator and the agreement of the parents (Kotseva, 2011: 26).

As far as the enforcement of mediated agreement is concerned, the Mediation Act at article 18 provides that regional courts may approve an agreement reached through mediation and such approval will give the mediated agreement the force of a court settlement agreement. The court will consider whether the agreement complies with the law and good morals before approving. As pointed out by Palo et al (2014), under the Bulgarian Mediation Act, the court-approved mediated agreement will be enforceable, similarly to a court settlement agreement, and will preclude appeal. In addition, the issues at the core of the mediation cannot be represented in court proceeding. The enforceability of the mediated agreement can only apply to legal disputes as provided by art. 18 (1) MA.

Section Four: Same-Sex Couples and Mediation

As it became clear from the previous sections, same-sex unions are not legally recognised in Bulgaria. This means that any disputes emerging in a same sex-couple, can be brought to court not as family or family-like disputes, but should take the form of other civil dispute between two parties. The intimate relationship between the partners will be irrelevant.

Article 1 of the Mediation Act states that the Act “governs the relations, connected to mediation as an alternative mechanism for resolving legal and non-legal disputes.” Literature shows that a legal dispute is a disagreement between two or more parties about the establishment, the content or the existence of a legal relationship (Stalev, 2012). Since the legislation does not recognise same-sex unions

as legal relationships then a dispute between same-sex partners would be a *non-legal* dispute. Although same-sex couples can use mediation as a mechanism for resolving such disputes, nevertheless a mediated agreement it is unlikely to be approved by the courts.

For the purpose of this research a field work was carried out between April 2014 and February 2015, outreaching to lawyers, judges, mediators and (former) same-sex couples. The research started with an expectation that same-sex couples would use mediation. However, the field work and the literature analysis have shown that there is very limited knowledge and use of mediation. All the same-sex couples interviewed during the fieldwork did not attempt mediation. Furthermore, the fieldwork has shown that there is a general reluctance within the LGBT community to ask external intervention in resolving disputes. The reasons for that will be further discussed below.

Not all of the interviewed lawyers, mediators and judges have had previous experience with disputes between same-sex partners, and the interviewed couples did not undergo mediation. Below, we will review first the answers of lawyers, judges and mediators, and then the answers same-sex couples gave.

Lawyers, Mediators and Judges

The lawyers interviewed during the fieldwork share the opinion that the current legislation limits the recourse to courts for same-sex partners. Because a lack of full socio-legal approval of homosexuality and same-sex unions, same-sex partners are reluctant to reveal their sexual orientation even with lawyers. One lawyer, argued:

“I assume I might have had same-sex couples as clients, but this has not been openly stated. Probably because... so what... why would they come out to me if this would not help me with their case?”

Other interviewees argued that since same-sex unions are not legally recognised in Bulgaria and therefore family disputes between same-sex partners cannot be dealt with in court, there is no need for the couple to disclose sexual orientation to their lawyer. For instance one lawyer argued:

“This is a vicious circle. We would expect the community to be visible, but they have no reasons to be.”

Some of the lawyers interviewed referred that clients may fear homophobic attitude of lawyers:

“And they have a good reason for that. The legal profession is not particularly gay-friendly. You never know what type of a person you would bump into.”

Regarding sources of dispute, lawyers, suggested financial issues regarding the contribution to the *family budget*, or division of common assets after the end of

the relationship. In particular issues arise regarding properties which were bought with the contribution of both partners but resulted officially owned by one of the partners. In addition, conflicts about parenting rights, and the role of the non-biological parent may arise.

One lawyer referred of a dispute between lesbian partners who were seeking to attempt a second-parent adoption. The law in Bulgaria does not recognise second-parent adoption to same-sex partners but the lawyer found a possible way for an application. However the couple decided not to proceed.

According to the interviewees, power imbalances between same-sex partners can be rooted in age difference, financial situation, legal ownership of common property (especially the estate they would live in), legal parenthood of jointly-raised child, domestic abuse.

When asked whether lawyers try to persuade clients to adopt mediation, our interviewees answered that lawyers do not have the legal obligation to encourage mediation, and therefore not only such mechanism is not very popular among lawyers, but also legal professionals are not very well informed about mediation - mediation is not extensively taught in law schools. One lawyer pointed out:

"It would depend on the case, but I am not sure that I would encourage mediation. I think I would only do it if there is a mediator I can recommend."

Therefore, many of the interviewees suggested that it would be important for lawyers, judges and mediators to attend training about disputes and mediation between same-sex partners. In addition, guidelines and code of practice for professionals dealing with same-sex couples and their disputes should be developed.

It seems to be disagreement about the dispute resolution mechanisms same-sex couples have to deal with their disputes. One lawyer argued:

"Mediation was introduced as alternative mechanism and the disputants who choose mediation usually know that if they do not settle, they can go back to court. For same-sex couples it will be different because cannot go to court."

Another lawyer pointed out that the fact that same-sex couples are not recognised legally does not mean that partners have no legal means to resolve disputes through mediation or court. However, there are limits to resolution of disputes involving parenting rights.

Bulgarian law does not recognise same-sex parenting. Therefore, if same-sex partners raise a child together, only one of the partners will have a legal claim to parenting rights. Judges and mediators interviewed suggested that there are two main issues that arise in parenting disputes. First, power imbalances would be particularly strong. If the breakup has left the couple in disrupted relations, there

is a chance that the second partner is completely isolated from the child. Secondly, because law does not recognise co-parenting of same-sex partners, a mediated agreement concerning parenting will never be enforced. A further concern of the research for the preparation of this book was to ask judges, lawyers and mediators whether and how their approach would be influenced by the sexual orientation of the partners. Almost all interviewees - who were all well-informed about LGBT issues - responded that they approach same-sex and opposite-sex partners with same professional advice and care. As one lawyer stated:

"We treat all our clients with respect and same-sex couples would not make a difference."

No specific remark on language was made, as the terminology used is anyway mostly neutral. One lawyer admitted however his/her difficulty in addressing somebody who is transgender or intersex. Other lawyers have already had experience with transgender people on sex change cases and felt completely comfortable with it.

Respondents were sceptical about having to know more about gay culture to successfully work with same-sex couples. The lawyers interviewed agreed that a lawyer or a mediator should have the sensibility to understand that same-sex disputes involve legal and emotional issues, but such sensibility does not depend on the knowledge about LGBT culture. One lawyer pointed out:

"In our work it is important to know the legislation and not gay culture."

All lawyers and mediators interviewed, except for one, expressed their scepticism about the idea that a mediator working with same-sex couples should be homosexual/bisexual. One mediator referred:

"Sexual orientation does not guarantee professional competence, neither understanding of the specific case."

One lawyer (no experience with same-sex couples) suggested that the same-sex partners may feel more comfortable with a mediator who is homosexual; however it would be not ethical to ask mediators to disclose their orientation and to announce it publicly to potential clients.

The same-sex couples

Since same-sex unions are not legally recognised in Bulgaria, we have approached couples in family-like relationships with the following criteria: 1) long-term relationship (more than 6 months), 2) former cohabitation. In few interviews only one of the partners was interviewed because he/she was no longer in the relationship. Some interviewees who were currently in a relationship talked about disputes with former partners.

Interviewed couples were asked to consider reasons for breakup. Answers include loss of sexual attraction and interest, infidelity, general disagreements, pressure from families (particularly in *the closet* relationships), partner pressure to come out (in the case where one of the partners is out and the other is not), age difference, moving to another place, jealousy. The couples interviewed did not refer to cases of domestic violence.

One common reason for a dispute is represented by division of common property. The interviewees referred to disputes concerning properties (a flat, a house, and car) which were jointly purchased but, officially owned by only one of the partners. Often the reason not to create titles of joint ownership is based on the need to protect privacy regarding sexual orientation. As confirmed by all interviewees, after breakups such disputes are resolved between the partners and often one of the partners is unfairly compensated. One interviewee shared:

"You can never make a separation completely fair, but this is with all couples and all breakups, this is not specific for us gays."

Another interviewee told:

"I had to move out, because I was living in his apartment. I invested money in this place, but we shared all expenses and when our relationship ended it was impossible to understand who paid what and how much ... We just left it like this."

Another interviewee pointed out

"I never actually thought about consequences of sharing all expenses... we would like to buy a flat and now I think we should understand how to protect our property rights for the future."

Finally, one couple said:

"Both of us had no money, so we just shared the rent and that's it."

Disputes also arise regarding property over pets. Like in the previous examples, after breakups such disputes were resolved between the partners. One respondent said:

"Arguing over the dog was really painful. She was crying over this and such argument made the last week of living together really tough. We decided she would come to play with the dog almost every week."

A couple of respondents shared that usually even before the break-up the pet belongs to one of the partners. As one ex-partner referred:

"I loved the dog and took care of it, but it was always his dog, so we didn't really discuss it. It was somehow clear the dog would stay with him."

In answering the question regarding the method used for the resolution of property dispute about pets, none of the interviewees considered the recourse to external intervention. According to Bulgarian law pets are moveable property and can be co-owned or rented and a mediated agreement could define arrangement about property and possession of pets. Such agreement could be approved by the court and thus enforced.

Three interviewees talked about the following parenting disputes:

Case 1: Gay couple. One of the partners had a child. The child did not live with the couple, but visited on regular bases and gradually built a strong relationship with the partner of his/her biological parent. After the end of their relationship both same-sex partners continued to meet with the child even if only one of the partners (the biological father) had a legal right to contact. The dispute about contact was easily resolved because of a good relationship of both same-sex partners with the biological mother of the child.

Case 2: Lesbian couple. One of the partners conceived a child through assisted reproduction with an anonymous donor. Both partners travelled to the United Kingdom (UK) where they registered a civil partnership. The baby was born in the UK and both partners were included on the birth certificate. However, when in Bulgaria only the biological mother of the child was entitled to include her name on the birth certificate. The child is now 5 years old and the couple is breaking up. The partners are in good relationship and so far the informal agreement of shared contact with both parents works. The child lives mainly with the biological mother, but all decisions are made jointly. *"So far it works,"* the mother said.

Case 3: Lesbian couple. One partner is the biological mother and also the only one recognised as legal parent by the law. Both partners played full parental role with the child. When the relationship deteriorated the biological mother denied contacts between the child and the ex-partner. The situation is still unresolved.

Cases 1 and 2 reported above were resolved by the parties without any third party intervention. In both cases an agreement was reached because of the cooperative and positive relationships the parties shared. The biological mother in Case 2 pointed out during the interview:

"We all want to have some kind of insurance that connect the child with both of us. My insurance is the birth certificate received in the UK. Maybe that certificate is not recognised here, but at least I have something."

Another couple (still together) has also tried to connect the child to both partners but with a different strategy. One of the partners (partner A) undertook an artificial insemination, gave birth and was named on the birth certificate.

In order to create a formal connection between the child and the same-sex partner of the biological mother (partner B), the father of the partner of the biological mother claimed that he was the biological father of the child and was named as such on the birth certificate. Therefore the legal parents of the child are the biological mother and the father of the partner of the biological mother. Under the law partner B is half-sister of the child. In accordance with Bulgarian law the child receives the family name of the legal father, which in this scenario is also the family name of partner B.

Partner B told us:

“Because we [the child and the non biological mother] have the same surname and he calls me ‘mommy’, I hope to be able to have some legal rights to make decisions for him in emergency situations.”

In answering the questions about the choice of the mechanism adopted to resolve the dispute, all the couples had difficulties answering the question and always firstly answered that they would solve the issues by themselves. The couples interviewed suggested they would ask friends to help if needed; or that they might try with therapy; or as one couple suggested that there might be LGBT organizations helping to resolve conflicts between same-sex partners. Recourse to court was hardly mentioned, but two respondents pointed out that asking for legal advice would help.

The majority of the couples interviewed were not aware of mediation. Only two couples confirmed that they heard about it, but were not completely aware about the features of mediation. Therefore, the author of this Chapter explained interviewees the characteristics of mediation.

After the explanation, some interviewees argued that there is no trust in involving others in a very private matter. However, if a third party should be chosen, the interviewees were more keen on asking the help of a mediator rather a lawyer. Other interviewees referred that they could consider mediation because the dispute would be handled with respect and confidentiality. Some others pointed out that mediation could represent an option because is not expensive.

Conclusions

In conclusion, it can be said that there is limited protection for LGBT people in Bulgaria. Improvements have been made, mainly inspired by the accession of the country and its further integration in the European Union, while strong political support among the national political actors is lacking. Strengthening the role of the LGBT organisations seems crucial for taking this process further.

Legal protection against discrimination is slowly developing, but Bulgaria is far behind in granting rights to same-sex partners. The poorly-legislated institute of *factual spouses' cohabitation* currently applies to opposite-sex couples only.

Both legislation and legal practice are not favourable for same-sex couples to resolve disputes in their full complexity. The issue of raising children in a same-sex couple stands out as one of the most problematic areas.

Partly due to lack of legal provisions and an overall unwillingness to take issues of sexual orientation to court, legal professionals don't have much experience in handling disputes between same-sex partners. Mediation as an alternative method for resolving disputes is not particularly popular in general and specifically among same-sex couples.

All couples interviewed agreed that mediation seems in general less abusive, more confidential and easy-to-understand than court proceedings. However, with the current state of legislation in Bulgaria there are cases, as seen above, which mediation cannot help with. The fieldwork has shown that there is a general lack of awareness about mediation. As one of the interviewees pointed out:

"I would be willing to try mediation, but I would like to know what it is and whether mediation worked for someone."

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CHAPTER IV: CROATIA

Natalija Labavić and Marko Jurčić

Section One: Description of the Country

The Republic of Croatia (Croatian: *Republika Hrvatska*) is a sovereign unitary state and a parliamentary constitutional republic located in between Central Europe and South-Eastern Europe. Its capital and the largest city is Zagreb with the population of 795 500 inhabitants while larger Zagreb metropolitan area includes conurbation of several cities and about 1,110,500 inhabitants.⁴⁹

Croatia is divided in twenty counties (Croatian: *županije*) with the City of Zagreb having the legal status as a county (art 2 Local and Territorial (Regional) Self-Government Act). The counties are subdivided into 127 cities and 428 municipalities.⁵⁰ Besides political division, historical and cultural regions (such as Slavonia, Istria, Dalmatia, Lika) of Croatia have a strong role in defining local identity and culture.

Croatian Parliament (Croatian: *Hrvatski sabor*) declared independence October 8, 1991 by adopting The Decision of the Parliament of the Republic of Croatia on the termination of all state and legal ties with other republics and provinces of Socialist Federative Republic of Yugoslavia. Croatia was accepted for the membership in the United Nations on May 22, 1992.⁵¹ In 1996, Croatia joined the Council of Europe⁵² and in 2013 the European Union.⁵³ The Constitution of the Republic of Croatia (CRH) adopted on December 22, 1990 describes Croatia in article 1 as “*unitary and indivisible democratic welfare state.*”

Croatia covers 56,594 square kilometres and has a population of about 4.28 million, according to the 2011 national census.⁵⁴ According to Constitution Historical Foundations (paragraph 15 CRH), the Republic of Croatia is “*established as the nation state of the Croatian nation and the state of the members of its national minorities*”, listing 22 of them: Serbs, Czechs, Slovaks, Italians, Hungarians, Jews, Germans,

⁴⁹ Croatian Bureau of Statistics, official website: http://www.dzs.hr/Hrv_Eng/publication/2012/SI-1469.pdf (accessed 30th March 2015).

⁵⁰ Ministry of Public Administration official website: <https://uprava.gov.hr/o-ministarstvu/ustrojstvo/uprava-za-politicki-sustav-drzavnu-upravu-te-lokalnu-i-podrucnu-regionalnu-samoupravu/lokalna-i-podrucna-regionalna-samouprava/popis-zupanija-gradova-i-opcina/846> (accessed 30th March 2015).

⁵¹ United Nation Member States, official website: <http://www.un.org/press/en/2006/org1469.doc.htm> (accessed 30th March 2015).

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⁵³ Ministry of Foreign and European Affairs official website <http://www.mvep.hr/en/croatia-and-the-european-union/negotiation-process/> (accessed 30th March 2015).

⁵⁴ Croatian Bureau of Statistics, official website: http://www.dzs.hr/Hrv_Eng/publication/2012/SI-1469.pdf (accessed 30th March 2015).

Austrians, Ukrainians, Rusyns, Bosniaks, Slovenians, Montenegrins, Macedonians, Russians, Bulgarians, Poles, Roma, Romanians, Turks, Vlachs and Albanians. The Constitutional Law on the Rights National Minorities (art 19 CLRNM) guarantees parliamentary representation for all 22 national minorities, though 8 members of Croatian Parliament elected in special electoral districts.

The Croatian language is the sole official language, however other languages and alphabets are used in some cities or municipalities, including public schools, judiciary, official bi-lingual state documents, public TV programs and all local government affairs (art 7 CLRNM).

Since 1995 and the end of the civil war in Croatia (Official name: *Domovinski rat*, Engl: "Homeland War"), which lasted for 4 years and 7 months, Croatia become ethnically homogeneous. In 2011 national census 90.42% persons declared their ethnicity as Croats while other ethnic groups included: Serbs (4.36%), Bosniaks (0.73%), regional identity – mostly Istrian (0.64%), do not identify ethnically (0.62%), Italians (0.42%), Albanians (0.41%) Romani (0.40%), Hungarians (0.33%), Slovenes (0.25%), Czechs (0.22%) and others and/or unknown (0.79 %).⁵⁵ In 2013, the Ministry of Interior reported 16.497 foreigners permanently lived in Croatia while 3.333 persons were found in Croatia illegally.⁵⁶

Croatian Constitution guarantees freedom of religion and separation of the state and religious institutions which are all of equal legal status (art 41 CRH). A large majority of the Croatian population declares themselves to be a member of the Roman Catholic Church (86.28%) while there is only 3.81% non-believers and/or atheists and/or agnostic combined. Other religious groups larger than 1% are Christian Orthodox – mostly members of Serbian Orthodox Church (4.44%) and Muslims – mostly members of Islamic Community in Croatia.⁵⁷

Croatia has re-enforced a multi-party political system in 1990, which ended a 45 years of domination of the communist party - the Communist League of Yugoslavia. Since the first post-communist elections, only two political parties have had a dominant role in forming a Government, most of the times in coalition with other minor parties. The two dominant parties are the centre-left Social Democratic Party (SDP) and the centre-right Croatian Democratic Union (HDZ). The Croatian Parliament is composed of 151 members elected to a four-year term. Usually 2/3 of them are members of the HDZ or SDP.

⁵⁵ Croatian Bureau of Statistics, official website: http://www.dzs.hr/Hrv_Eng/publication/2012/SI-1469.pdf (accessed 30th March 2015).

⁵⁶ ¹⁴ Ministry of Interior, official website: <http://www.mup.hr/UserDocsImages/statistika/2014/Statisticki%20pregled2013.pdf> (accessed 30th March 2015)

⁵⁷ Croatian Bureau of Statistics, official website: http://www.dzs.hr/Hrv_Eng/publication/2012/SI-1469.pdf (accessed 30th March 2015).

The members of Croatian Parliament are elected in 10 electoral districts (art 1-13 Act on Constituencies, AC). Each district elects 14 MPs, calculating votes using the standard D'Hondt formula (art 14 The Act on Election of the Representatives to The Croatian Parliament, ERCP). Eight MPs are reserved for "national minorities" (art 16 ERCP) and 3 MPs are elected in a special electoral districts for Croatian citizens living abroad (including Bosnia-Herzegovina) (art 8 ERCP).

Human rights and fundamental freedoms in Croatia are protected by the Constitution of Croatia (chapter three, art 14 – 70 CRH). The principles of the constitutional order of the Republic of Croatia (art 3 CRH) are freedom, equal rights, national and gender equality, peace-making, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law and a democratic multiparty system. There are several government institutions and specialised independent public equality bodies established to protect human rights in Croatia. These are: Government's Office for Human Rights and Rights of National Minorities, Government's Office for Gender Equality, The General Ombudsman, Ombudswoman for Gender Equality, Children's Ombudsperson and The Disability Ombudsman.

During the procession of accession (2005 - 2011) to the European Union, Croatia has made important steps towards legal protection of LGBT persons. According to the LGBT index published annually by International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), in 2014 LGBT rights in Croatia were ranked 12th out of 49 in Europe.⁵⁸ In Croatia, homosexual acts were decriminalised in 1977 (Vuletić, D. 2003, 114). Age of consent was equalised in 1998 (Hodžić, A. 2010,271). The first LGBT organization was created in 1992, and since 2015 10 active LGBT organizations have been established and Pride Marches were held in 3 cities: Zagreb, Split and Osijek.

There are still strong prejudices against LGBT persons. According to the survey conducted by agency PULS on behalf of Centre for Peace Studies, Office for Human Rights and General Ombudsperson Office (2009) on discrimination in Croatia, 24.7% of population in Croatia would feel extremely unpleasant to know that their neighbour or colleague at work is gay or lesbian. At the same time, the survey shows that only 14% of population have a friend or colleague who is gay or lesbian. This survey corroborated by the results of the more recent survey conducted by agency IPSOS PULS for CESI and Zagreb Pride in November 2014 that which show that only 10% of the general population stated they have LGBT person as a close friend or a family member, while 60% do not personally know a LGBT person. In addition, a 2010 research conducted by GONG and Political Science Faculty has shown that 68% of high school students agree with the statement "*Homosexuals should be banned*

⁵⁸ ILGA-Europe, official website: http://www.ilga-europe.org/home/publications/reports_and_other_materials/rainbow_europe (accessed 8th April 2015).

from public appearances since they can have bad influence to youth” and 44% thinks that homosexuality is “some kind of disease.”

Discrimination based on sexual orientation and gender identity is prohibited by the Anti-discrimination Act 2008. The Penal Code (2013) protects from discrimination based on sexual orientation and gender identity of the victim. Despite the legal prohibition of discrimination against LGBT persons, general awareness of this legislation is rather low, which is coupled by widespread homophobia and transphobia, as well as institutional homophobia and transphobia (Zagreb Pride, 2014, 60). According to the most recent report of the Ombudsperson for Gender Equality in 2013, there were a total of 324 reported cases of discrimination, related to discrimination on the grounds of sex/gender (78%), family status (2%) and sexual orientation or gender identity (7%).⁵⁹

According to the results of the research conducted by Zagreb Pride and LORI in 2013, as many as 73% of the respondents experienced some form of violence due to their sexual orientation or gender identity. As much as 17% of this percentage involves physical violence. Discrimination was experienced by 29% of the respondents (Zagreb Pride, 2014). This field survey is corroborated by the online survey of the Fundamental Rights Agency (2012).⁶⁰

Due to widespread homophobia and transphobia, many LGBT persons do not reveal their homosexuality and live with strong fear of rejection, bullying, mobbing, discrimination and violence.

Section Two: Legal Protection of LGBT People

The Constitution of the Republic of Croatia does not explicitly prohibit discrimination based on sexual orientation and gender identity.⁶¹ However, the list of protected grounds in the Constitution is open-ended and therefore, it may well be extended to include several other grounds such as sexual orientation and gender identity.

Besides the Constitution, international treaties⁶² that are a part of the Croatian legal system ban discrimination against LGBT persons in Croatia. The European

⁵⁹ Gender Equality Ombudsperson annual report <http://www.prs.hr/index.php/izvjesca/izvjesce-oradu-za-2013> (accessed 30th March 2015).

⁶⁰ Fundamental Rights Agency, official website: <http://fra.europa.eu/en/survey/2012/eu-lgbt-survey> (accessed 30th March 2015).

⁶¹ Article 14 of the Croatian Constitution stipulates that all persons in the Republic of Croatia shall enjoy rights and freedoms, regardless of race, colour, gender, language, religion, political or other conviction, national or social origin, property, birth, education, social status or other characteristics.

⁶² The Universal Declaration of Human Rights, 1948; International Covenant on Civil and Political Rights, 1966; International Covenant on Economic, Social, and Cultural Rights, 1966; Convention on the Elimination of All Forms of Racial Discrimination, 1965; Convention on the Elimination of All Forms of Discrimination Against Women, 1979; Convention Against Torture and other Cruel Inhuman or Degrading Treatment or Punishment, 1984; Convention on the Rights of the Child, 1989;

Court of Human Rights (ECtHR) has been called to pronounce on two cases of discrimination concerning Croatian LGBT people. Although judgements in these cases have not been delivered, it is important for our purposes to discuss the facts.

In the first case, *Sabalić v. Croatia*,⁶³ the applicant claimed that she was brutally attacked in front of a bar by a man after she had disclosed her homosexual orientation to him. The applicant additionally claimed that the Croatian police authorities did not properly respond to this case of violence. The police filed only a misdemeanour report to Zagreb misdemeanour court instead of a criminal report to a Public Prosecutor for the case to be heard before a criminal court. The applicant further claimed that she did not have any redress or compensation concerning her complaints because she was discriminated against on the basis of her sexual orientation.

In another case, *Pajić v. Croatia*,⁶⁴ the applicant, who was a citizen of Bosnia and Herzegovina, in her application claimed that when applying for a residence permit in Croatia she was discriminated because her sexual orientation. The Croatian Foreigners' Act allows only married hetero-sexual couples and hetero-sexual couples living in an extramarital relationship to apply for a residence permit on the grounds of family reunification. The applicant in *Pajić v. Croatia* requested a residence permit claiming that the police authorities should act in accordance with the ECHR, which bans discrimination based on sexual orientation. All authorities (Police, Ministry of Interior, Administrative Court and Constitutional Court) involved somehow in the case dismissed her request. The alleged victim of discrimination filed a complaint before the ECtHR.

In both cases the Croatian Government, when requested by the ECtHR to furnish further information, argued that the recourse to the European Court was premature because the national remedies have not been exhausted.

The national legal framework

Since 1990s, with the adoption of the Labour Act (1995), several other statutes were introduced to protect LGBT people from discrimination such as: Gender Equality Act (2003), State Officials Act (2005), National Minorities Act (2002), Criminal Procedure Act (2009), Electronic Media Act (2003), Asylum Act (2007) and Volunteers Act (2007).

However full protection from discrimination based on sexual orientation and gender identity came in 2008 with the Anti-discrimination Act (ADA).

Convention on the Rights of Persons with Disabilities, 2007; International Labour Organization Equal Remuneration Convention (no. 100) on equal remuneration for work of equal value, 1951; International Labour Organization Convention (no. 111) on Employment and Occupation Discrimination, 1958.

⁶³ Application No. 50231/13.

⁶⁴ Application No. 68453/13.

The ADA came into force on 1st January 2009. It implemented four European Union directives: Council of Europe Directive 2000/43/EC of 29th June, 2000 on applying the principle of equal treatment regardless of racial or ethnic origin; Council of Europe Directive 2000/78/EC of 27 November, 2000 on the general framework for equal employment and occupation treatment; Council of Europe Directive 2004/113/EC of 13th December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services and Directive 2006/54/EC of the European Parliament and of the Council of Europe of 5th July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

The ADA recognises different forms of discrimination: direct and indirect discrimination (art 2 ADA),⁶⁵ harassment and sexual harassment (art 3 ADA),⁶⁶ segregation (art 5 ADA),⁶⁷ prohibition of failure to make reasonable adjustments⁶⁸ and prohibition of encouragement to discrimination (art 4 ADA),⁶⁹ victimization (art 7 ADA),⁷⁰ multiple discrimination,⁷¹ repeated discrimination⁷² and continued discrimination (art 6 ADA).⁷³

⁶⁵ Direct discrimination is a treatment based on any of the grounds referred to in the ADA whereby a person is, has been, or could be placed in a less favourable position than other persons in a comparable situation.

Indirect discrimination shall be taken to occur when an apparently neutral provision, criterion or practice places or could place a person in a less favourable position on the grounds referred to in Article 1 paragraph 1 of this Act, in relation to other persons in a comparable situation, unless such a provision, criterion or practice may be objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

⁶⁶ Harassment is any unwanted conduct caused by any of the grounds referred to in the ADA with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading or offensive environment.

Sexual harassment is any verbal, non-verbal or physical unwanted conduct of sexual nature with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading or offensive environment.

⁶⁷ Segregation is a forced and systematic separation of persons on any of the grounds referred to in the ADA.

⁶⁸ A failure to make reasonable adjustments is a failure to enable disabled persons with the use of publicly available resources, participation in the public and social life, access to workplace and appropriate working conditions, by adapting the infrastructure and premises, by using equipment and in another manner which does not present unreasonable burden for the person that is obliged to provide for it.

⁶⁹ Encouragement to discrimination, if conducted intentionally, shall be deemed to be discrimination.

⁷⁰ Victimization means that no person shall be placed in a less favourable position because he/she has reported, in good faith, discrimination, witnessed discrimination, refused an instruction to discriminate or participated in any manner in proceedings based on discrimination in line with provisions of the ADA.

⁷¹ Multiple discrimination is discrimination against a certain person on more than one of the grounds from the ADA.

⁷² Repeated discrimination is discrimination committed several times.

⁷³ Continued discrimination is discrimination which lasted a longer period of time.

The ADA prohibits discrimination based on gender identity and sexual orientation.

Discrimination is forbidden in the area of employment law; education, science and sport; social security; health protection; jurisdiction and administration; housing; public information and media; access to goods and services; access to trade unions, or organizations of civil society, or political parties; contribution in cultural and art creation (art 8 ADA). However, with regard to LGBT persons, some aspects of family and other relationships are excluded from the prohibition of discrimination (art 9 para 2 ADA).⁷⁴

Based on article 16 of the ADA, a victim of discrimination can ask protection in two ways. First, a victim of discrimination can file a lawsuit to a municipal court seeking protection for a specific right (e.g. labour right) which has been infringed upon. In addition, a victim of discrimination can apply for protection before a special court. In this case the applicant can request determination of the existence of discrimination, prohibition of further discrimination, elimination of discrimination or its effects, compensation for the harm caused by discrimination and publication of the decision determining the existence of discrimination (special individual anti-discrimination action) (art 17 ADA).

A significant number of individual lawsuits based for discrimination based on sexual orientation of the victim have been filed before municipal courts in Croatia. Most of these cases concern harassment; and direct discrimination in the area of housing and employment.⁷⁵

For instance, in a first case, the victim of harassment filed a civil lawsuit to Zagreb Municipal Court claiming that she was physically attacked and offended because her sexual orientation. She further claimed that such behaviour violated her dignity and created an intimidating, hostile and offensive environment. The court decided that discrimination occurred and ordered the perpetrator to pay compensation to the victim.⁷⁶

A second civil lawsuit concerning violation of housing rights based on sexual orientation was filed before the Zagreb Municipal Court. The applicant, in a same-sex de facto relationship, decided to rent a flat she had previously viewed with her

⁷⁴ LGBT persons may be excluded from the prohibition of discrimination in relation to occupational activities, entering into membership and acting in conformity with the canon and mission of a church and religious congregation entered into the Register of Religious Congregations of the Republic of Croatia, if this is required by the religious doctrine, beliefs or objectives. Additionally, LGBT persons may be placed in a less favourable position regarding the rights and obligations arising from family relations, particularly with the aim to protect the rights and interests of children, which must be justified by a legitimate aim, protection of public morality and favouring marriage in line with Family Act provisions.

⁷⁵ Municipal Civil Court Zagreb, *T. v. B.*, no. Pn-4727/2012; Municipal Civil Court Zagreb, *B. v. A.*, no. Pr-8886/2014.

⁷⁶ The final decision was delivered in the Municipal Civil Court Zagreb case *Š. v. C.*, no. Pn-906/2013.

same-sex partner. The landlord asked questions regarding the sexual orientation of the applicant, and once acknowledged her homosexuality, refused to rent the flat. The applicant claimed that she was directly discriminated against because her sexual orientation. The court ruled that the applicant was discriminated against, and ordered the respondent to pay compensation.⁷⁷

A third civil lawsuit was filed for direct discrimination on workplace. The applicant claimed to be victim of mobbing by employer and to have been fired because his sexual orientation.⁷⁸ The judgment in this case has not been delivered yet.

In addition to individual anti-discrimination protection, the ADA explicitly prescribes that “associations, institutions or other organisations having a legitimate interest in protecting collective interests of a certain group, or those which within their scope of activities deal with the protection of the right to equal treatment may bring a legal action” (art 24 para 1 ADA). The significance of class or collective action lies in the opportunity that lawsuits can be filed on behalf of the victims of discrimination (Grgić et al 2009, 106).

In Croatia, a group of non-governmental associations filed a lawsuit against Vlatko Marković, the then acting president of the Croatian Football Association (CFA). Vlatko Marković publicly stated that until the end of his mandate as president of the CFA, gay people would not play in the national football team because *only healthy people play football*.

Zagreb County Court, as the court of first instance, did not find the statement by Marković to constitute (direct) discrimination.⁷⁹ Further, Zagreb County Court concluded the associations which filed the legal action did not present enough evidence supporting the claim that the statement of Marković would encourage discrimination and intimidating behaviour against LGBT people.

However, the Supreme Court annulled the first decision and ruled that Vlatko Marković (directly) discriminated against LGBT persons. The Supreme Court argued that Marković was in the position to decide who would play in the national team and as well-known public figure he would have great influence on Croatian football, limiting in the way the employment of gay football players. The Court recognised that the plaintiffs were not obliged to prove negative consequences of the statement. In contrary, based on article 20 of the ADA,⁸⁰ it was Vlatko Marković who had to prove that the statement he made was not discriminatory - but he

⁷⁷ Municipal Civil Court Zagreb, *T. v. B.*, no. Pn-4727/2012.

⁷⁸ Municipal Civil Court Zagreb, *B. v. A.*, no. Pr-8886/2014.

⁷⁹ Zagreb County Court, no Pnz-7/10.

⁸⁰ According to the article 20 of the ADA, if a party in court or other proceedings claims that his/her right to equal treatment pursuant to provisions of the ADA has been violated, he/she shall make it plausible that discrimination has taken place. In this case, it shall be for the respondent to prove that there has been no discrimination.

failed to prove so. In addition to determining discrimination and harassment, the Supreme Court ordered Vlatko Marković to publicly apologise and to pay for the publication of the judgement in newspapers.⁸¹

With regard to misdemeanour liability, the ADA includes two acts of discrimination: harassment and sexual harassment.

The ADA provides misdemeanour liability for harassment for everyone who, with the aim to intimidate another person or to create a hostile, degrading or offensive environment on any of protected grounds, hurts another person's dignity (art 25 ADA).

The ADA also provides misdemeanour liability for sexual harassment for everyone who, with the aim to intimidate another person or to create a hostile, degrading or offensive environment, hurts another persons' dignity by performing an act of sexual nature (art 26 ADA).

However only very few cases of discrimination based on misdemeanour have been considered.⁸² A reason for such a low number of prosecuted misdemeanour cases lies on the fact that most of misdemeanour acts occurred via internet and therefore investigations regarding the identity of the perpetrators (who usually use nickname only) are difficult.

In the process of implementation of the Directive 2000/43/EC, Croatia had an obligation to create an institution for the suppression of racial discrimination. Accordingly, the ADA created the (general) Ombudsman for the suppression of discrimination.⁸³ In addition to ADA, specialised laws provide specialised ombudsmen for the suppression of discrimination. Thus the Gender Equality Act (GEA 2008) at article 19 considers the Ombudswoman for Gender Equality as an independent body for the suppression of discrimination based on gender identity.

One of the fundamental tasks of the general Ombudsman and specialised ombudsmen is dealing with citizens' complaints concerning discrimination. Citizens who believe they have been discriminated against by public authorities, companies or by individuals in all areas of private and public sector can approach the Ombudsman (or the specialised ombudsmen) who will then undertake all necessary measures for the elimination of discrimination (art 12 ADA).

In addition, the Ombudsman provides information to natural and legal persons that have filed complaints for discrimination, can file criminal reports with data regarding cases of discrimination, and collect and analyse statistical data on discrimination cases. With the parties' consent, the Ombudsman can conduct

⁸¹ Supreme Court of the Republic of Croatia, no Gž 25/11.

⁸² The case no. PpJ-2156/2014 against S. N. is now on-going before Misdemeanour Case Zagreb. In March 2015 was the first hearing in the case.

⁸³ The ADA put the Ombudsman in charge not only of racial or ethnic origin discrimination, but of all the grounds of discrimination named in the ADA.

mediation. Additionally, the Ombudsman informs the Croatian Parliament on the occurrence of discrimination, gives opinions and recommendations, and suggests appropriate legal and strategic solutions to the Government.

Regarding LGBT rights, in 2014 the special Ombudswomen for Gender Equality examined some individual complaints filed by the victim of discrimination and gave recommendations to employers to eliminate discrimination on the workplace.⁸⁴

Recently the special Ombudswoman for Gender Equality considered a complaint for discrimination. A student, who changed gender identity and name from male to female, requested her school to provide a new certificate of graduation with indication of the new gender. The school refused to issue a new certificate and the student filed a complaint for discrimination. The Ombudswoman for Gender Equality gave recommendation to the high school to issue a new certificate of graduation with indication of the new gender of the applicant.⁸⁵

During proceedings for discrimination, the (general) Ombudsman and the specialised ombudsmen can intervene on behalf of the claimant (art 21 ADA). The (general) Ombudsman intervened in the above mentioned case filed against the head of the Croatian Football Association. And, the specialised Ombudswoman for Gender Equality intervened in a proceeding filed by Dario Krešić.⁸⁶

Dario Krešić filed a civil action before the Varaždin Municipal Court against the Faculty of Organisation and Informatics of Varaždin, where he worked, claiming to be the victim of discrimination. Krešić argued that he was not promoted due to his sexual orientation. The courts ruled that Dario Krešić was discriminated on the workplace because of his sexual orientation. The Faculty appealed against the judgment; and the County Court of Varaždin upheld the Municipal Court's decision and made it final.

The Labour Act (LA) provides further protection against harassment and sexual harassment on workplace, as forms of discrimination (art 134). The protection of discrimination in the LA extends to LGBT persons as well (art 7 LA).

The LA, under article 134 paragraph 2, states that an employer employing more than 20 employees shall appoint a person who will deal with complaints related to the protection of workers' dignity. If an employee files a complaint, it must be examined within 8 days. If it is established that harassment has occurred all necessary measures must be taken in order to stop the harassment (art 134 para 3 LA). If the employer fails to take measures for the prevention of harassment or sexual harassment within the time limit or if the measures are clearly inappropriate,

⁸⁴ Recommendation no. PRS 03-06/14-03 of 18th July 2014.

⁸⁵ Recommendation no. PRS 02-04/14-04 of 1st September 2014.

⁸⁶ Public report from the official gender identity ombudswoman website: <http://www.prs.hr/index.php/priopcenja-prs/294-priopcenje-povodom-sudske-odluke-u-predmetu-kresic-protiv-fakulteta-organizacije-i-informatike-sveucilista-u-zagrebu> (accessed 28th March 2015).

the employee who is a victim of harassment or sexual harassment has the right to stop working until he or she is offered further protection (art 134 para 4 LA). During the period of interruption of work the worker is entitled to full salary (art 134 para 6 LA).

The above mentioned legal mechanism is rarely used in practice. Victims of discrimination on workplace file discrimination claims according to ADA, as explained above.

With regard to the protection of LGBT persons by Criminal Law, the Criminal Code (CC) explicitly defines hate crime in article 87 as “any crime committed out of hatred for someone’s race, skin colour, religion, national or ethnic background, disability, sex, sexual orientation or gender identity. Such behaviour is considered as aggravating factor if the law does not prescribe more severe penalty.”

Criminal offences for which the law specifically prescribes more severe punishment if committed out of hatred are, for instance, bodily injury (art 117 CC), aggravated bodily injury (art 118 CC) and public disorder (art 324 CC).

A victim of hate crime in Croatia can report the hate crime to the Police or to the Public Prosecutor. Hate crimes are always subject to public prosecution whereas misdemeanours are subject to police prosecution.

Recognition of same-sex unions

In Croatia, same-sex unions were legalised in 2003 by the Same-Sex Unions Act (SSUA), which was repealed by the Life Partnership Act for Persons of Same Sex.

Pursuant to the SSUA, a same-sex union was defined in article 2 as a cohabitation of two persons of the same gender who were not married, did not live in an extramarital union or another same-sex union and which lasted at least three years based on the principle of equality, mutual respect and assistance as well as an emotional relationship. Registering such unions was not allowed. Legal effects of the same sex civil unions, according to article 5 of the SSUA were: the right to support one of the partners, the right to acquisition and regulation of mutual relations regarding property and the right to mutual assistance.

As far as the extension of marriage to same-sex couples is concerned, on 1st December 2013 a constitutional referendum was held. As a result, marriage was defined in the Constitution as a union between a man and a woman - creating a constitutional prohibition against same-sex marriage (art 62 CRC). However, since 2014 LGBT persons are granted a right to register life partnership under the Life Partnership Act for Persons of Same Sex (LPA) that came into force and has replaced the SSUA since then (art 81 LPA).

The life partnership is defined in article 2 as a family union of two persons of the same sex registered before the official authority. The LPA extends legal consequences to informal life partnerships (art 3 LPA). In order to have legal effects,

an informal life partnership needs to last for at least three years and needs to meet other requirements for the life partnership (art 3 LPA).

In terms of rights, privileges and obligations, life-partnership is placed at the same level as marriage, except for access to adoption. It additionally gives to informal life partners the principal rights and obligations of an extramarital relationship.

Although the LPA does not allow life partners to adopt, the Act provided the right to become a partner-guardian (art 42 LPA). A life partner can become a partner-guardian and accordingly be granted parental rights over the child of his/her same-sex partner, when the other parent of his/her partner's child is not alive, is unknown or parental rights had been taken away from because of child abuse (art 42 LPA).⁸⁷ A life partner can be granted a right to make decisions about his/her partner's child, with the other parent's permission, together with a partner who is a parent (art 40 LPA).

Property relations between life partners are regulated by the Family Act (art 50 – 54 LPA) or by private agreements. This means that life partners can have joint property and separate individual property. Joint property is a property, which partners had acquired during the life partnership. Partners are co-owners by equal parts in joint property. Property, which partner possessed at the moment of entering the life partnership, is not included in the common asset. Additionally, according to the LPA, life partners are entitled to inherit one another (art 55), to tax immunity (art 56), pension benefits (art 61), social benefits (art 64.), health care benefits (art 66), temporary residence and citizenship on the grounds of family reunion (art 73) and many other benefits.

To conclude, while several rights of LGBT persons have been legal recognised in recent years in Croatia, however, full equality is yet to come.

Section Three: Developments of Mediation in Croatia

The interest in mediation as a dispute resolution mechanism in Croatia is increasing among lawyers and judges, which does not surprise given its positive effects such as speed, confidentiality, low costs and the fact that the settlement in the mediation satisfies both parties.

Nonetheless, although becoming more accepted, mediation is still underestimated by lawyers.⁸⁸ The legal community still shows much more affection for resolving disputes in the court (Vukmir, 2012, 299).

⁸⁷ The request for the partner-guardianship needs to be filed to the municipal court by both life partners – the partner who is a parent and the other partner that wants to become a partner-guardian. During the case, the social welfare centre will give its opinion regarding the request taking child's best interests into account.

⁸⁸ The judge and the mediator Ms. Tanja Hučera in its article (2011: 944) claims that education and

The history of a mediation system in the Republic of Croatia dates back to 2000, when the training of a first group of mediators under the administrative and financial support of the USA and EU member states was organised (Vukmir, 2012). The first formal step in the recognition of mediation in Croatia started with the adoption of the Mediation Act in October 2003 (MA 2003). The enactment of the Mediation Act was encouraged by the recommendation of the Council of Europe on Mediation in Civil and Commercial Disputes (Rec (2002)10) and European Commission's *Green Paper* on alternative resolution of disputes in civil and commercial law (COM (2002)196).

The first Croatian mediation centre within the Croatian Chambers of Commerce and the Croatian Mediation Association (CMA) were established in 2002 (Tepeš, 2007, 130) and in following years other mediation centres were founded.⁸⁹ The Anti-discrimination Act (ADA) is contributed to the growth of mediation providing that the (general) Ombudsman has authority to carry out a mediation procedure. Specialised Ombudswoman for gender equality has the same authority based on article 19 of the Gender Equality Act.

Mediation practice was introduced through a pilot programmes, at the Commercial Court of Zagreb first, and later in the Croatian High Commercial Court and many Commercial and Municipal Courts (Vukmir, 2012, 300). Including mediation training and programmes within the courts have contributed to shape Croatian courts as multi door courthouses, offering disputants several dispute resolution mechanisms - adjudication as one option and mediation as the other.

In 2009 the second Croatian Mediation Act came into force, which implemented the Directive 2008/52/EC of the European Parliament and Council of Europe on certain aspects of mediation in civil and commercial matters.

A last legal development of mediation in Croatia was concluded by the third Mediation Act in 2011 (MA 2011) that is currently binding. With regard to family mediation as a special type of mediation, the Family Act 2014 (FA) introduced it into Croatian legal system.

The Mediation Act (2011) and the Family Act (2014)

The MA 2011 stipulates in articles 1 and 5 that mediation can be conducted in civil, commercial, labour and other disputes wherein the parties are free to dispose of their claims regardless of whether the matter in dispute is being resolved in judicial, arbitration or other proceedings.

Mediation, according to Croatian law is a voluntary dispute resolution mechanism unless specifically provided otherwise by law. However, if the parties

training of mediation lacks in Croatia.

⁸⁹ Croatian Bar Association – Mediation Canter; Croatian Employers' Association – Mediation Centre; Croatian Chamber of Trade and Crafts – Mediation Centre.

agree to submit their dispute to mediation and not to initiate or continue any court proceeding, arbitration or other proceedings, such agreement will have a binding effect (art 18 MA 2011).

Article 19 of the MA 2011 provides that during judicial and administrative proceedings parties in civil and administrative disputes are invited to attempt mediation. In addition, the Civil Procedure Act sets forth in article 186 that the court may during the entire civil procedure propose to the parties to solve the dispute in in-court and out-of court mediation procedure. Judges can transform a judicial hearing into an informal mediation session. Such sessions can be turned into productive private discussions and can serve as a powerful introduction of communication to the damaged relations of the parties to the dispute (Vukmir, 2012, 315).

Mediation is compulsory in labour disputes. The Labour Act (LA), in article 206 stipulates that in case of a dispute, which could result in a strike or other form of industrial action and non-payment of salary or salary compensation (*collective labour dispute*), mediation must be conducted except when the parties have reached an agreement on an alternative method for its resolution.

The second legal act that provides mediation as compulsory procedure is the FA. Family mediation is newly established and it has not been recognised in the law until the last Family Act was delivered in 2014. It does not mean that prior to 2014 mediation in family cases was not a possible solution. However, it was regulated with general rules of mediation law and it was quite a common way of resolving family issues (Hučera, 2011).

Prior to 2014, the law prescribed that spouses were obliged to attempt to solve the family dispute before the Social Welfare Centre in the procedure now known as obligatory advisory.

As its name suggests, obligatory advisory is an obligatory procedure. Family mediation is, on the other hand, a process in which family members participate voluntarily. Only in case of divorce, attending a first mediation meeting is compulsory (art 320 FA).

Article 331 of the FA stipulates that family mediation is a procedure during which the parties attempt to solve the family dispute consensually with one or more family mediators assisting parties in reaching an agreement.

The main purpose of a family mediation is to reach a plan regarding issues relevant for a child; however, parties are free to settle property and other disputes during family mediation as well (art 331 para 3 FA). In particular, family mediators will check that the parties possess all the information necessary to make a joint custody plan so their decisions can be based on sufficient factual data.

Pursuant to article 332 of the FA, a family mediation procedure is not carried out in cases such as domestic violence, if one or both spouses have been pronounced legally incompetent or if one or both spouses are mentally incapable. Article 333 of

the FA stipulates that provisions of the Mediation Act, including confidentiality, are binding during family mediation. Article 339 of the FA points out that throughout family mediation the best interests of the child is paramount. The family mediator will, with the parents' permission, enable a child to indicate its opinion, as the FA in article 88 stipulates that children have right to express their opinion and to be acquainted with circumstances of the case that concerns them.

Parties may consensually propose mediation during the judicial procedure and the judge may suggest the same (art 338 para 2 FA). In both cases the mediation procedure must be concluded in three months (art 338 para 2 FA) but if the best interests of the child would be compromised then mediation will be avoided (art 338 para 4 FA).

The Family Law Act was meant to enter into force in January 2015. However the Act is under constitutional scrutiny and therefore the rule on family mediation have not been applied.

Regulation of mediatory role

Special guidelines for family mediation and family mediators do not exist. However, MA 2011 applies. For instance, article 7 of the MA sets forth that mediators shall be appointed in accordance with the rules agreed upon by the parties and the parties shall mutually agree on whether mediation will be conducted by one or more mediators and who will be appointed as a mediator.

The question left unsolved is whether the mediator has a duty to mediate once the parties have chosen him/her. Generally speaking, it would be ethical to help parties to resolve their dispute and at the same time if a mediator feels uncomfortable to mediate he/she should be free to withdraw (Vukimir, 2012). This dilemma is not often seen in the practice and accordingly such issue can be solved on case-by-case basis only, once it appears.

The Rules on the Mediation Registry (RMR) define who can be appointed as a mediator. According to the Rules, a mediator is a person trained to be a mediator by an accredited institution and consequently included in the Mediation Registry at the Ministry of Justice. The Croatian Mediation Association is authorised to deliver trainings required for mediators' certification by the Ministry of Justice of the Republic of Croatia.

The Commission for Alternative Dispute Resolution has approved the Ethical Code for Mediators, which provides that mediators should conduct themselves in accordance with the rules of independency, confidentiality and respect the autonomous will of the parties.

As determined by article 8 of the MA 2011, a mediator in a mediation procedure must act competently, effectively and impartially. The person who is offered to be appointed as a mediator has to disclose all circumstances that may give rise to a justified doubt regarding his/her impartiality and independence (art 8 MA 2011).

Additionally, in conducting the mediation procedure, the mediator must maintain a fair and equal relationship to the parties. Article 10 of the MA 2011 determines that a mediator may hold separate meetings with the parties, keeping all information confidential. Article 14 of the MA 2011 further stipulates that unless otherwise agreed by the parties, a mediator may disclose information or details received from one party to another party only upon consent of the disclosing party.

The mediator may contravene to the duty of confidentiality only if obliged by law or necessary for enforcing the mediated agreement (art 15 of the MA 2011). In case of violation of the duty of confidentiality the mediator will be liable for damages in breach of his/her duty. The rules on confidentiality of the Mediation Act also apply to all parties who have been involved in the mediation process in whatever capacity (art 15 para 4 of the MA 2011).

In the process of mediation, more than one mediator can be involved. Co-mediation is important in order to avoid power imbalances, where different identity and background of co-mediators can be decisive in building up a parallel relationship among each of the parties in the dispute (Vukmir, 2012: 310).

As determined by article 16 of the MA 2011, a mediator cannot act as a judge or an arbitrator. However, the parties may authorise the mediator to issue a reward as an arbitrator based on the settlement agreement.

Pursuant to article 11 of the MA 2011, a mediator may contribute in the drafting of the settlement agreement proposing outcome and content. Neither mediators nor those involved in the mediation process in some other capacity are compelled to testify in arbitration, judicial or other proceedings, in regard to information and details arising from/or in connection with the mediation process (art 15 para 2 MA 2011).

According to article 13 of the MA 2011, the mediated agreement is binding for the parties. A settlement agreement resulting from a mediation process is enforceable if stipulates a specific obligation to enforce and if contains the consent of the parties to direct enforcement (enforceability clause) (art 13 para 2 MA 2011). The enforceability clause may be contained in a special document.

A mediated agreement which is contrary to the law or public order will not be enforced. (art 13 para 4 MA 2011).

The parties may agree for the settlement agreement to be formulated as a notarial deed, a court settlement or an arbitration award based on a settlement, but it is not essential (art 13 para 5 MA 2011).

In disputes involving children, article 336 of the FA stipulates that the joint custody plan or any other agreement concluded in the course of mediation shall be binding only if it is in the written form and signed by all participants in the mediation and will be enforced by court order.

Section Four: Same-Sex Couples and Mediation

The Croatian legal system does not recognise special rules for mediation between same-sex couples. However, all acts that regulate mediation, as described in the previous Section, apply respectively to mediation between same-sex couples, which makes mediation a possible solution to problems that arise between same-sex couples.

For the course of this project many lawyers, judges, social welfare workers, mediators and couples were invited to share their experience regarding the same-sex mediation and disputes between the same-sex couples in general.

Only five lawyers and mediators had experience with disputes between same-sex couples. Two of the lawyers used mediation in order to prevent dispute. Two other lawyers mediated disputes, which did not settle. One lawyer tried to reach the settlement during the same-sex litigation about assets, however the disputants did not settle.

None of the interviewed couples had been involved in a mediation or pre-mediation procedure and preferred to ask the help of friends.

The interviews conducted for this Chapter show that common triggers of dispute and causes of separation between same-sex couples are domestic violence, coming out, open relationships, drug abuse and alcoholism and disputes mainly arise about finance.

Interviewees told that sources of power imbalance are based on the different financial situation of the partners, or on who has stronger character or communication skills, and who has significant support from family and friends.

All interviewed mediators pointed out that in their view substantial differences between same-sex mediation and mediation between heterosexual couples do not exist. The interviewed mediators did not use any special style, language and methods during mediation with same-sex couples. Mediation is considered not suitable in cases of domestic violence between same-sex or opposite-sex partners.

However the mediators interviewed did agree that the approach adopted by mediators to same-sex couples during mediation should be different due to a fact that LGBT persons are more vulnerable part of the society and their life in Croatia is more complicated than the life of heterosexual couples. In addition, particular attention should be posed on the terminology to use during mediation which should be neutral.

Interviewed mediators did not notice any differences between lesbian and gay couples in same-sex mediation.

None of the mediators thought that the mediator should be homosexual, bisexual or trans-gender in order to mediate disputes between same-sex partners. However, it was suggested during the interviews the mediator should not have

prejudice against LGBT persons - unfortunately many experienced mediators in Croatia have prejudices toward LGBT persons.

While in Croatia mediation in general is not a widespread dispute resolution mechanism, mediation between same-sex couples is not usual either.⁹⁰ During the fieldwork for the preparation of this chapter, two lawyers referred that they used mediation techniques in order to prevent dispute regarding assets after separation between same-sex partners.

The lawyers explained to their clients, who in each case were gay couple, that a judicial process is long, the outcome of it is uncertain and that it is expensive. After such explanation, parties decided to sign an agreement regarding their assets and accordingly mediation, and any further process, was stopped.

Very few cases of disputes between same-sex partners were reported by the interviewees, and they are analysed below.

Case H. vs. N. – litigation and mediation

Only one judicial proceeding involving dispute between same-sex couples has been found for the purpose of this project. It is case no. P-38/13 decided by the Municipal Court in Rijeka. The judgement in this case is not final yet as H. filed an appeal against the first decision. The case concerned a dispute between two women H. and N., one of whom (H.) was claiming that they were a lesbian couple. At the time, same-sex couples were regulated by the SSUA that did not recognise registration of same-sex couples.

H. and N. had been undoubtedly living together in the N.'s apartment for four years. N. even gifted H. an engagement ring. After they ended to live together, H. was claiming joint property over all the assets, which among other property included a dog and a cat. All property in question was in the possession of N. Before initiating litigation procedure H. tried to settle with N. in out-of-court procedure and in order to achieve that goal, H. was sending her letters through a lawyer. However, N. refused to communicate with H. Consequently, H. filed a civil action against N. claiming that all property acquired during their cohabitation were meant to be jointly owned.

Because at the time registration of same-sex union was not possible and in order to be granted a right for separation of joint assets, H. firstly had to produce evidence that the relationship she had with N was such to produce legal effects. In particular, H had to show that the relationship lasted at least three years based on the principles of equality, mutual respect and assistance as well as being an emotional relationship. During the court hearing, N. claimed that they were not a

⁹⁰ As mediation between same-sex couples is rare, academic literature regarding this issue had not been found.

couple and they did not live together. According to N., H. was 'just' a roommate who used to spend more time in other accommodation than in the flat owned by N. In addition, N. asserted that she was not a lesbian and was married with a man before meeting H.

During the court proceeding, H. failed to prove the existence of a *de facto* same-sex relationship with N. as required by the Same Sex Unions Act and accordingly, her assets claim was dismissed. The court did recognise that the relationship between H. and N. was of an emotional nature. However, the court considered, H. and N. had one break up during a four-year period of their relationship, which made their relationship non-continuous and therefore not eligible under the Same-Sex Unions Act. Currently, the appeals court ruling is pending since H. filed an appeal.

The case demonstrates the limits same-sex partners face because the impossibility to register their relationship. Namely, at the time when H. and N. were in the relationship, registration was not prescribed by the law. Accordingly, H. and N.'s relationship was not registered and in order to gain joint assets, H. firstly needed to prove that her relationship with N. existed. As H. failed to prove all the elements of the same sex union based on the Same Sex Unions Act, she lost legal protection in the area of a right to join assets.

H. tried to settle with N. in the out-of-court procedure before the litigation started and was sending her letters through a lawyer in order to achieve that particular goal. However, N. refused to settle.

During the court proceeding H. proposed mediation, again with the same goal of trying to settle with N. Although N. refused to communicate with H. at the beginning of procedure at any level, as time went by, they did manage to establish basic communication.

Although a process of mediation between parties was not officially held, parties did informally discuss about their dispute during litigation and accordingly unveiled their real interests and talked about the cause of their separation. Both parties cared much about a dog and a cat they purchased during the relationship. The reason for N. to refuse to give the pets to H. laid firstly in H.'s unhealthy lifestyle and her bad habits such as irresponsibility and alcoholism, which also turned out to be a reason why they separated.

The parties easily settled regarding all other properties but could not agree on who should own the cat and the dog. As a consequence, negotiation failed and the parties involved in the court proceeding analysed above.

X. and Y. were gay couple living together in an informal relationship for ten years.

After ten years they decided to separate because some disagreement on whether to have an open relationship. A certain point of their life together, X and Y decided to have an open relationship. However soon they both realised that an open relationship was not what they wanted. Although they both agreed that they do not want open relationship, their relationship was damaged to such extent that the separation was the only option.

X and Y decided to attempt mediation in order to resolve financial issues involved in the separation. The couple asked help to one of the mediators of the Mediation Centre of the Croatian Mediation Association. The mediator was a woman and a professional judge with great experience in family mediation matters.

Two sessions of mediation were organised. However, the partners did not settle.

An interview with the mediator unveiled that the basic reason for the parties not coming to an agreement was the nature of their relationship involving professional partnership as well as intimate relationship. After using all mediators' techniques in order to investigate the case, such as posing open questions, closed questions, paraphrasing, reconstructing, active listening and many others, mediator realised that X. was not emotionally ready for separation. X refused to negotiate because he actually did not want the relationship to end. X. and Y.'s interest were completely opposite. While X.'s interest was to renew the relationship, Y.'s interest was money.

The mediator did not notice any significant difference in mediation between same-sex and heterosexual couples. The partners did show respect towards each other and towards their former relationship. Although high emotional involvement the partners never yelled at each other nor humiliated each other. They cried and sweated, but did not humiliate each other. Because of the high level of understanding and respect the parties demonstrated, the mediator did not have to set separate meetings with parties.

The mediator did not use any special terminology in dealing with the couple. She did however pointed out that she has no prejudice at all toward LGBT persons and that she attended a workshop in the scope of project *Litigious Love: Same-sex Couples and Mediation in the European Union*, organised by non-governmental organization Zagreb Pride, Croatian Mediation Association and Gender-equality Ombudswoman. The training helped her to better understand the situation and the position of LGBT persons in Croatia and accordingly the position of the parties in the mediation.⁹²

⁹¹ In order to protect the privacy of the parties their names have been changed.

⁹² The workshop took place in Zagreb on 6th and 7th December 2014.

Her final remark was that many of her colleagues affirmed that they would not accept to mediate a dispute involving same-sex partners.

Case A. vs. B.⁹³ – mediation

A. and B. were two male partners. After a short relationship they separated and approached a mediator asking to help them to resolve their financial dispute. A.'s assets were in the possession of B. and A. wanted B. to return them.

The mediator was a woman and a social worker.

The mediation was held before the Mediation Centre of the Croatian Mediation Association.

The mediator and the parties had a first session of mediation. Very soon after the mediator started to investigate the case, she understood that the dispute between the partners was more complicated than the one described by the partners. The relationship involved serious episodes of domestic violence of A. against B. A was addicted to drug and has not been sincere with B. regarding his reasons to move to Croatia. In addition, A. was very critical and aggressive with B. because of B. decision not to reveal his homosexuality.

When the mediator learnt that domestic violence was involved, she terminated the session and provided B. with information on how to ask for legal advice and legal aid.

During the interview with the authors of this Chapter the mediator pointed out that, in her opinion, substantial differences between same-sex mediation and mediation between heterosexual couple do not exist. However, the interviewee suggested, that mediators should be aware of some external social factors, such as social disapproval, which characterise the life of same-sex couples and which may have an impact on the mediation process. As explained above LGBT person still face discrimination in Croatia and it should be taken into account during the same-sex mediation. In addition, the mediator explained that for the fear that authorities will learn about their sexual orientation, often same-sex couples avoid methods of assistance such as social welfare or counselling.

A mediator suggested co-mediation of a mediator and a therapist or psychologist as better way to deal with dispute between same-sex partners.

Other cases of disputes between same-sex couples

As explained above although the Life Partnership Act does not allow life partners to adopt, it gives them right to be a partner-guardian. A life partner can become a partner-guardian and accordingly be granted parental rights over a child, when

⁹³ In order to protect the privacy of the parties their names have been changed.

his/her partner's child's other parent is not alive, is unknown or parental rights had been taken away from him/her because of child abuse (art 45).

During the fieldwork, one case of parenting dispute involving same-sex partners was found. The case concerned issues regarding the non-biological parent becoming a partner-guardian.

Two women in life partnership, one of whom was the adoptive mother of the child before they concluded life partnership, were discussing a possibility of the other partner becoming a partner-guardian. They discussed the issue with a lawyer. The lawyer acquainted them regarding the process of adoption and explained that the social welfare centre would have to give its opinion about the partner guardianship during the process. A dispute arose as the partner who wished to become the guardianship did not want to reveal her sexual orientation to the authorities during the proceedings.

However, soon after the meeting with a lawyer, the couple jointly decided to abandon the idea to pursue a request for partner-guardianship. The parties resolved the dispute without the recourse to mediation, because they prioritise the interests of the child - both partners did not want to expose the child to examination by the social workers. They still live in a family union as before the dispute took place.

Conclusions

The fieldwork for this study has shown that mediation is not used much by same-sex couples.

The recommendation that the interviewed mediators gave for more effective same-sex mediation is for co-mediation to be used. Co-mediation involving professionals from different backgrounds may well be decisive in building up a balanced relationship between parties in a dispute.

The interviewed mediators concluded that the mediator does not have to be a member of LGBT community. However, some information regarding the legal framework on sexual orientation and gender identity, and the issues faced by LGBT people would help mediators to become more aware.

Therefore, establishing a same-sex mediation centre in Croatia would be of a high value for the LGBT community. Within the centre, same-sex couples would be able to reach an agreement on financial matters, assets and parenting if this is required, without going to the courts while keeping their personal matters private.

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Table of Legal Statutes

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- Protocol no. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms - opened for signature on 4th November 2000 (in Croatia ratified 3rd February 2003 and came into force 1st April 2005)
- The Constitution of the Republic of Croatia - adopted and came into force on 22nd December 1990 (amended on 1997, 2000, 2001, 2010, 2014)
- The Anti-discrimination Act - adopted on 9th July 2008 and came into force on 1st January 2009 (amended on 2012)
- The Civil Procedure Act - adopted on 26th June 1991 and came into force on 08th October 1991 (amended on 1992, 1999, 2003, 2008, 2011, 2013, 2014)

- The Criminal Code - adopted on 21st October 2011 and came into force on 01st January 2013 (amended on 2012)
- The Criminal Procedure Act - adopted on 26th September 1997 and came into force on 1st January 1998 (amended on 2009, 2011, 2012, 2013, 2014)
- The Electronic Media Act – adopted on 15th July 2003 and came into force 29th July 2003 (amended 2007, 2008)
- The (second) Electronic Media Act – adopted on 15th December 2009 and came into force 19th December 2009 (amended 2013)
- The Family Act 2003 - adopted on 14th July 2003 and came into force on 22nd July 2003 (amended on 2004, 2007, 2011)
- The (second) Family Act 2014 - adopted on 06th June 2014 and came into force on 28th June 2014 (currently out of force since the Constitutional Court examines its legality)
- The Foreigners' Act - adopted on 28th October 2011 and came into force on 01st January 2012 (amended 2013)
- The Gender Equality Act – adopted on 14th July 2003 and came into force 26th July 2003
- The (second) Gender Equality Act – adopted and came into force on 15th July 2008
- The Labour Act - adopted on 15th July 2014 and came into force on 07th August 2014
- The Life Partnership Act for Persons of Same Sex - adopted on 15th July 2014 and came into force on 05th August 2014
- The Mediation Act 2003 - adopted on 01st October 2003 and came into force on 24th October 2003
- The Mediation Act 2009 - adopted on 24th June 2009 and came into force on 16th July 2009
- The Mediation Act 2011 - adopted on 28th January 2011 and came into force on 17th February 2011
- The National Minorities Act - adopted and came into force on 13th December 2002 (amended on 2010)
- The Same-Sex Unions Act - adopted on 14th July 2003 and came into force on 30th July 2003
- The State Officials Act – adopted on 15th July 2005 and came into force on 1st January 2006 (amended on 2007, 2008, 2011, 2012, 2013)
- The State Register Act – adopted on 6th October 1993 and came into force on 26th October 1993 (amended on 2013)

- The Asylum Act – adopted on 13th July 2007 and came into force on 1st January 2008 (amended 2010, 2013)
- The Volunteers Act – adopted on 18th May 2007 and came into force 26th May 2007 (amended 2013)

CHAPTER VI HUNGARY⁹⁴

Tamás Dombos and József Kárpáti

Hungary falls halfway between those countries that offer no recognition to same-sex couples and those that fully abolished discrimination of same-sex couples by opening up the institution of marriage and applying the same legislation to same-sex couples as to different sex-couples. Hungary introduced some form of recognition of same-sex relationships in 1996, when cohabitation was opened up to same-sex couples following a decision of the Constitutional Court.⁹⁵

This pioneer role has somewhat faded over the years: while a growing number of countries⁹⁶ have now legalised same-sex marriage, Hungary only offers registered partnership with limited rights as an alternative to marriage for same-sex couples (Registered Partnership Act). This *in-between* position is also true for mediation: while Hungary has had a legislation on mediation in civil law matters since 2002 (Mediation Act), long before the adoption of Directive 2008/52/EC, the recourse to mediation is still very limited.

The current section aims to analyse the legal framework on the use of mediation in disputes involving same-sex couples and to explore how this legislation is applied in practice. In order to better understand the environment in which these disputes arise and are resolved, the section starts by providing a short introduction to the social situation of lesbian, gay, bisexual and transgender (LGBT) people in Hungary, and the general legal framework offering protection from discrimination on grounds of sexual orientation and gender identity.

Section One: Description of the Country

Hungary is a country located in Eastern and Central Europe, which used to be part of the socialist block until 1989. The first democratic election after the transition was held in 1990, which was followed by the restructuring of the Hungarian socio-economic and legal system to form a market economy. National parliamentary elections are held every four years.

Since 2010 the government is formed by a coalition of conservative parties, the large Fidesz – Hungarian Civic Alliance and its smaller coalition partner the

⁹⁴ The authors of this Chapter would like to thank all mediators, lawyers and other informants who helped us in preparing this chapter by providing information. The names of all informants have been changed or concealed in order to protect the privacy of same-sex couples.

⁹⁵ Constitutional Court decision No. 14/1995. (III. 13.).

⁹⁶ As of March 2015 the following countries: Argentina, Belgium, Brazil, Canada, Denmark, Finland, France, Iceland, Luxembourg, Netherlands, New Zealand: Norway, Portugal, South Africa, Slovenia, Spain, Sweden, the United Kingdom, Uruguay and some states of Mexico and the United States of America.

Christian Democratic People's Party. The 2010 elections were won by this coalition with a landslide victory delivering to the two parties over two thirds of the parliamentary seats, a supermajority that enabled them to change any legislation including the Constitution. The Government did use its parliamentary supermajority to pass a series of reforms including the adoption of a new Constitution (called the Fundamental Law) and a complete restructuring of the country's constitutional and electoral system. Many of these reforms were met with strong criticism from international organizations including the Venice Commission (2013), the Council of Europe Commissioner for Human Rights (2014) and the European Parliament (2013).

These political changes also significantly influenced the social and legal situation of LGBT people in Hungary. For a long time the country was considered one of the most liberal countries with regard to gays and lesbians in Eastern and Central Europe (Merin, 2002: 132). Having decriminalised homosexual relations in 1961, Hungary was among the few socialist countries including Czechoslovakia and Yugoslavia that show certain acceptance for sexual minorities.

The first organisation supporting the right of homosexual people was established in 1988 even before the collapse of the state socialist system in 1989. The country preserved this position throughout the 1990s: looking at sociological research conducted in the middle of the 1990s, one finds that while still strongly lagging behind Western Europe, following the Czech Republic and Slovakia, Hungary and Slovenia clearly stand out as countries with higher acceptance for homosexuality among the former socialist countries (WVSA 2014). This image of the country was further strengthened by opening up cohabitation for same-sex couples in 1996 following a Constitutional Court decision⁹⁷ that declared previous legislation excluding same-sex couples unconstitutional.

Fast forwarding two decades, research conducted in 30 European countries (ESS 2012) shows the social acceptance of gays and lesbians to stagnate in Hungary, while several countries in the region have progressed significantly. Looking at public attitudes in the country more thoroughly one finds discriminatory attitudes towards sexual minorities to be very widespread.

A representative survey in 2011 found that homosexuals are among the most rejected social groups in Hungary: 65% would not like to have a homosexual person as a close friend, 46% as neighbour and 37% as colleague (ELTE 2011). MTA (2011) found that 61% of the population fully or rather agree with homosexuality being a sickness; on the other hand 61% fully or rather agree that choosing a same-sex partner is a basic human right, and 77% that homosexuality is a private matter. The most recent poll (Ipsos 2013) found the support for same-sex marriage at 30%, and

⁹⁷ Constitutional Court decision No. 14/1995. (III. 13.).

the support for same-sex parenting at 42%. The support for registered partnership was at 58% in 2009 soon after its introduction (MTV 2009), and 51% more recently (Ipsos, 2013). Only 8% of the population report knowing a gay or lesbian person in person (EC, 2012).

These findings were confirmed by sociological research conducted with LGBT people. The LGBT Survey of the European Union Agency for Fundamental Rights (FRA, 2013) conducted in 2012 found that 45% of respondents from Hungary felt discriminated or harassed in the previous 12 months due to their sexual orientation. 65% of respondents said they avoid holding hands in public with a same-sex partner for fear of being assaulted, threatened or harassed. Only 4% of the respondents are fully out to their neighbours, 19% to their family members and 30% to their friends. 83% said that expressions of hatred and aversion towards LGBT people in public are very or fairly widespread.

This negative perception of the situation cannot be separated by recent political developments in the country. As mentioned above, in 2012 the conservative majority of the Parliament adopted a new constitution (called the Fundamental Law) that defines marriage as a union between a woman and a man (art. L.). Later that year the Parliament also adopted a law on the protection families (Family Protection Act), which defined family only with reference to marriage and filiation (art. 7), and limited inheritance rights of non-married couples (art. 8).

When the Constitutional Court annulled both provisions,⁹⁸ the legislator responded with including the exclusionary definition of family in the Fundamental Law (art. L) to avoid judicial review. Furthermore, the rights of registered partners were curtailed in criminal law by rewriting bigamy rules to only apply to married couples (Criminal Code 2012, art. 214), as opposed to the old Criminal Code (art. 192) that also covered registered partners.

Symbolic amendments were made in civil law by removing references to registered partners from the Book on Family Law of the Civil Code to signal that same-sex couples are not be treated as family. Homophobic comments by leading government representatives have become everyday practice.⁹⁹ Public support for the extreme right-wing party Jobbik is also on the rise, their official policies include banning pride marches (Jobbik, 2014), abolishing the institution of registered partnership for same-sex couples (Jobbik, 2010) and introducing a Russian-style “propaganda law” including criminal sanctions for portraying sexual minorities in a positive way (Mirkóczki, 2012).

⁹⁸ Constitutional Court decision No. 43/2012. (XII. 20.).

⁹⁹ E.g. Deputy Prime Minister Zsolt Semjén called same-sex marriage an „aberration” in a TV interview on 21 June 2014 (HírTV 2014); special advisor to the Prime Minister Imre Kerényi called for stopping the „faggot lobby” in a public speech at a cultural festival on 21 May 2014 (Sunyo 2013); State Secretary for Church, Ethnic and Civil Affairs Miklós Soltész called the work of LGBT NGOs useless and promoting a lack of values in a public speech on 28 July 2014 (EMMI 2014).

Section Two: Legal Protection of LGBT People

Compared to the low level of social acceptance and increasing political homophobia in the country, Hungary still has a relatively progressive legislation on the rights of LGBT people, especially taking into consideration its Eastern European location: it ranks 14th based on its laws of the 49 European countries surveyed by ILGA-Europe in May 2014 (ILGA-Europe 2014).

Protection against discrimination and violence

The current Hungarian constitution called the Fundamental Law of Hungary contains an open ended clause on the prohibition of discrimination, which reads as follows:

Article XV. (2) Hungary shall guarantee the fundamental rights to everyone without discrimination and in particular without discrimination on grounds of race, colour, sex, disability, language, religion, political or other opinion, national or social origin, property, birth or any other status.

According to the consistent practice of the Constitutional Court, discrimination based on sexual orientation is included in the category of discrimination based on other status.¹⁰⁰ For example, in 1999 the Court found¹⁰¹ that by criminalising all sexual activities between same-sex siblings, while criminalising only sexual intercourse between different-sex siblings, the Criminal Code employed unconstitutional discrimination based on sexual orientation. Similarly, the Court opined in 2002¹⁰² that setting an unequal age of consent for same-sex and different-sex sexual activity (18 and 14 respectively) is discrimination based on sexual orientation. In this decision the Court also laid down that:

As both heterosexual and homosexual orientations form part of the essence of human dignity, there must be exceptional grounds for making a distinction between them and treating differently the dignity of the persons concerned.

This principle guided the argument of the Court in its decisions on the constitutionality of registered partnership¹⁰³ and inheritance rights of same-sex couples.¹⁰⁴ There has been no cases at the Court to consider whether gender identity would also be covered under “other status.”

¹⁰⁰ See decisions on the criminalisation of incest among same-sex siblings (20/1999. (VI. 25.)); on the age of consent (37/2002. (IX. 4.)); on registered partnership (154/2008. (XII. 17.)); and inheritance rights of same-sex couples (43/2012. (XII. 20.)).

¹⁰¹ Constitutional Court decision No. 20/1999. (VI. 25.).

¹⁰² Constitutional Court decision No. 37/2002. (IX. 4.).

¹⁰³ Constitutional Court decision No. 154/2008. (XII. 17.).

¹⁰⁴ Constitutional Court decision No. 43/2012. (XII. 20.).

A recent Court decision¹⁰⁵ clarified what characteristics are protected under the “other status” provision:

The prohibition of discrimination in Article XV (2) of the Fundamental Law only covers situations in which people face discrimination and social exclusion based on an important characteristic that defines their self-identity. The constitutional provision on the prohibition of discrimination first and foremost provides protection for groups of society that differ from each other based on a characteristic that is inherent to the person and cannot be arbitrarily changed.

Besides the constitutional protection against discrimination, the Equal Treatment Act adopted in 2003 specifically prohibits discrimination and harassment on the grounds of sexual orientation and gender identity in the fields of employment, education and training, health and social services, housing, and access to goods and services. Victims of discrimination can choose to take their cases to the court or to the Equal Treatment Authority (*Egyenlő Bánásmód Hatóság*), a public body specifically mandated to investigate cases of discrimination.

The procedure before the Authority is relatively fast and free of charge, however, the Authority cannot award compensation to victims of discrimination: it can only impose fines on the perpetrators. In order to receive compensation, the victim of discrimination has to bring his/her case to court. It is also possible to first have the Authority investigating the case and issue a decision, and then take the case to court. The number of complaints for discrimination based on grounds of sexual orientation and gender identity remained relatively low: varying between 0 to 13 a year during the decade of activity of the Authority.

This low number of cases might be explained with the low level of awareness Hungarian LGBT persons have regarding their rights. According to FRA (2013) only 31% of Hungarian respondents knew that Hungary has a law protecting from discrimination in the workplace based on sexual orientation. Another reason for the limited number of complaints filed before the Authority might be the low level of trust in the legal system: Takács et al. (2008) found the trust in the legal system to be significantly lower in the LGBT sample than in the general Hungarian population. In addition, Dombos et al. (2011) show that underestimating the significance of the discriminatory action, fear of being victimised again and worries about coming out are also reasons that limit the decision to file a complaint before the Authority.

The Criminal Code includes some protection for victims of crimes motivated by sexual orientation and/or gender identity of the victim. In particular since July 2013 the Criminal Code includes explicit reference to sexual orientation and gender identity in its hate crime provision (art. 216: violence against a member of a community).

¹⁰⁵ Constitutional Court decision No. 3206/2014. (VII. 21.), par. 27.

Article 216 covers assault, coercion and disorderly conduct committed with a bias motive. In case of other crimes (such as homicide with a bias motive) bias motivation is recognised as base motive (*aljas indok*). For crimes that do not contain base motive as a qualifying circumstance, courts have to take into consideration such motivation as an aggravating circumstance.

Courts have recognised homophobic bias as base motive in several cases of bias motivated assault and homicide.¹⁰⁶ In principle the provision on hate speech in the Criminal Code (art. 332: incitement against a community) allows for prosecuting homophobic and transphobic speech as hate speech. However, the application of article 332 has been limited by the case law. Courts have interpreted incitement only to include cases where there is a clear and present danger of violating the rights of other persons.¹⁰⁷

A recent amendment to the Civil Code (art. 2:54:5.) makes it possible to initiate civil proceedings in cases of public statements damaging a community's reputation. However, this opportunity is limited to communities recognised for nationality, ethnicity, race or religion. The so called Media Constitution provides that media service providers respect human dignity, and that media content may not incite hatred against or exclude any minority (art. 17).

While sexual orientation and gender identity are not specifically mentioned, there have been a few cases where the Media Council of the National Media and Infocommunications Authority (*Nemzeti Média és Hírközlési Hatóság Médiatelepülése*) (or its predecessor the National Radio and Television Commission (*Országos Rádió és Televízió Testület, ORTT*)) sanctioned broadcasters for homophobic media content.¹⁰⁸

The Asylum Act includes a specific reference to persecution based on sexual orientation (art. 64). While gender identity is not explicitly included, Hungary has granted international protection to several transgender applicants extending to gender identity the protection provided for sexual orientation.

As far as legal protection of trans-gender people is concerned, the law in Hungary does not provide a procedure for gender reassignment, but there is a well established practice to change the gender marker (the official record of sex) in birth certificates (IRM 2009). Acquiring a medical diagnosis is required for legal gender recognition, but sterilisation or any other form of medical interventions are not. Married / registered partnered trans persons are required to divorce before they can apply for legal gender recognition (Registry Act, art. 69/B:4).

¹⁰⁶ See e.g. Debrecen City Court decision No. 25.B.48/2013/23.

¹⁰⁷ Constitutional Court decisions No. 30/1992. (V. 26.) and 18/2004 (V. 25.).

¹⁰⁸ ORTT Decisions No. 23-3-1197/2001 and 23-3-1296/2001, Media Council Decision No. 1337/2013 (VIII. 28).

Recognition of same-sex partnerships and parenting

Same-sex marriage is not legal in Hungary (CivCode, art. 4:5:1), and marriage is defined in the constitution as a union between a woman and a man (Fundamental Law, art. L.). On the other hand cohabiting same-sex couples have been recognised since 1996 (CivCode, art. 6:514), and since 2009 same-sex couples can enter into registered partnership (Registered Partnership Act).

Cohabitation was limited to different-sex couples until 1996. Following the petition of an organization supporting the rights of LGBT people the Constitutional Court declared that while the Constitution does not grant the right to marriage to same-sex couples, as the legal and cultural heritage of Hungary interprets marriage only as a union between a woman and a man, some form of recognition should be afforded to same-sex couples, since:

*An enduring union of two persons may realise such values that it can claim legal acknowledgement on the basis of the equal personal dignity of the persons affected, irrespective of the sex of those living together.*¹⁰⁹

In 1996 the Parliament introduced a gender neutral definition of cohabitation in the Civil Code (CivCode Am. 1996). Since then, a new Civil Code has been adopted, but the definition remains the same with slight modifications and currently reads as follows:

Article 6:514. (1) *Cohabitation means when two persons are living together outside wedlock in an emotional and financial relationship in the same household, provided that neither of them is engaged in wedlock or partnership with another person, registered or otherwise, and that they are not related in direct line, and they are not siblings.*

Recognising cohabitation was an important step in the struggle for the legal equality of same-sex couples, but it did not provide a full-fledged solution. Proving the existence of cohabitation can be difficult; and cohabiting couples only enjoyed a limited set of rights compared to married couples: for example, they did not automatically inherit from each other and were not recognised as family members for immigration purposes. The legislator, then, was encouraged to legalise same-sex unions some-how.

The first draft of the new Civil Code (IRM 2016) proposed an optional registration scheme for both same-sex and different-sex couples, that would have solved the issue of proving cohabitation, but left untouched the gap in the rights and duties of cohabiting couples as opposed to married couples. Following a failed

¹⁰⁹ Constitutional Court decision No. 14/1995. (III. 13.).

attempt of a small liberal party, the Alliance of Free Democrats (SZDSZ)¹¹⁰ to first introduce registered partnership with some rights (Gusztos et al 2005) and then to introduce same-sex marriage (Gusztos et al 2007), upon the Government's initiative the Parliament adopted a law introducing registered partnership (*bejegyzett élettársi kapcsolat*) (Registered Partnership Act 2007).

According to the first version of the law on registered partnership, such partnership would have been available for both same-sex and different-sex couples, and would have granted most rights and duties afforded to spouses. One important difference from marriage would have been that in case both parties agree on all aspects of the divorce, a divorce could have been acquired through the public notaries, rather than through the courts. However, a few weeks before its expected entry into force on January 1, 2009, the Constitutional Court found the law unconstitutional,¹¹¹ as it duplicated the institution of marriage for different-sex couples, which – according to the Court – violated the principle of the protection of marriage as enshrined in the 1989 Constitution (art. 15). On the other hand, the Court affirmed that limiting registered partnership to same-sex couples would be constitutional.

The Parliament acted swiftly, and in just three months, it adopted a new version of the law (RPA), now limiting registered partnership to same-sex couples. According to the law:

Article 1. (1) Registered partnership is created when two persons of the same-sex above the age of 18 jointly present in front of the registrar, declare in person that they wish to enter into registered partnership with each other.

The second version of the law follows the same approach as the previous version adopted in 2007. In particular, rather than providing detailed provisions on the establishment, dissolution and legal effects of registered partnership, the law simply states that except for the exceptions specifically listed in the act, all rules that apply to marriage and spouses shall apply to registered partnership and registered partners. This – so called general reference rule (*sommás or általános utalószabály*) – reads as follows:

Article 3. (1) Unless this act stipulates otherwise or this act forecloses its application
a) all rules that apply to marriage shall apply to registered partnership,
b) all rules that apply to spouse or spouses shall apply to registered partner or registered partners,
c) all rules that apply to widow shall apply to surviving registered partner,

¹¹⁰ The party was the junior coalition partner of the governing Hungarian Socialist Party between 2002 and 2008.

¹¹¹ Constitutional Court decision No. 154/2008. (XII. 17.).

- d) all rules that apply to divorced person shall apply to registered partner whose registered partnership was dissolved,*
- e) all rules that apply to unmarried person shall apply to person who has not been married or who has not entered into registered partnership,*
- f) all rules that apply to married couple shall apply to registered partners.*

This means that same-sex registered partners are entitled to all the rights afforded different-sex spouses in any legislation including among others in the field of inheritance, taxation, immigration and social benefits. The same article follows with the list of exceptions where the general reference rule does not apply:

- (2) Rules on adoption by spouses shall not apply to registered partners. Rules on presumption of paternity shall not apply to registered partners.*
- (3) Rules on spousal names shall not apply to registered partners. Upon entering into registered partnership a person shall no longer be entitled to bear the name of her former husband with the spousal marker, and this right shall not resume upon the dissolution of her registered partnership. If a registered partner has been using the name of her former husband with a spousal marker until the time of establishing registered partnership, she is not entitled to change her name to any other spousal name, but shall use her birth name.*
- (4) Rules about procedures aimed at human reproduction shall not apply to registered partners.*

Paragraph 2 is straightforward, and means that the registered partner of a child's biological mother is not automatically recognised as the parent of the child, and registered partners cannot adopt jointly. In addition, neither second parent adoption, nor consecutive adoption is available for them either. It is worth noting that individual adoption regardless of family status and sexual orientation is available for any suitable candidate. This has opened the possibility for gay and lesbian people who live with their partners to adopt children. In these cases only the adoptive parent will be recognised as legal parent of the child.

Paragraph 3 reads that unlike spouses, registered partners cannot take their partner's name. However, this does not mean that registered partners (or even cohabiting same-sex couples) are completely excluded from expressing their togetherness via their names: because the general rules on changing one's name (Registry Act, Chapter 6) apply. Therefore any person may change his/her name and has the option to take the partner's surname or to hyphenate the two surnames.

However, and this represents a difference with married partners, in case of spousal names the person retains his/her birth name, but bears a different name while being married. In case of registered partners, the only option is to obtain permission from the Ministry of Justice in order to change the birth name in the birth registry.

Paragraph 4 also needs some further explanation. According to the Health Care Act, assisted reproductive technology (ART, termed as “procedures aimed at human reproduction” in the law, which includes artificial insemination, in vitro fertilisation and embryo implantation) are available to spouses, different-sex cohabiting couples and single women. The relevant provisions read as follows:

Article 167. (1) Reproduction procedures may be performed on married couples or cohabiting couples of different sexes if, for reasons of health existing among either party (infertility), it is highly probable that a healthy child cannot be produced through natural means. Among common-law spouses, the procedures only may be conducted if neither of the partners is married to another person.

(...)

(4) In the case of a single woman reproduction procedures may be performed if by way of her age or medical condition (infertility) it is highly probable that she cannot produce a child through natural means.

The law clearly defines “single woman” to mean “a woman of majority age, who at the time of the start of the reproduction procedure is not married or in a cohabitation” (art. 165 d). This means that while single lesbian women can undertake assisted reproduction, lesbian women who live with the partner (either as cohabiting or registered partners) are excluded from the scope of the law.

The Civil Code provides legal mother is the woman who gives birth to the child (art. 4:115:1). Legal father is presumed to be the one married to the mother of the child (presumption of paternity), or the men who applied for ART together with the mother. In addition, legal fatherhood can be recognised by written statement in front of a public authority, or by court decision (art. 4:98). Adoption will grant legal parenthood to both heterosexual partners (art. 4:119). Since all above options are foreclosed by the Registered Partnership Act (arts. 3:2, 3:4), two persons of the same-sex cannot both be recognised as legal parents of a child in Hungary.

On the other hand, the Civil Code does recognise the partner of the parent of a child as step parent (*mostohaszülő*) or *de facto* parent (*nevelőszülő*). On the one hand, the spouse (and thus through the general reference rule the registered partner) of the biological parent of the child is considered step parent (Art. 4:198:1). On the other hand, *de facto* parent is any person (except for biological, adoptive or step parents) who raises the child in his or her own household for a longer period of time without monetary compensation (Art. 4:199:2), which also includes the cohabiting partner of the child’s parent.

Step parents and *de facto* parents are recognised to a varying degree in various fields of law. Step parents have the duty to support the child during the partnership (CivCode, Arts. 198:1 and 200 a) and to cover the expense of the child’s upbringing and education. The Civil Code is not clear whether *de facto* parents have such duty

(cf. Art. 4:198 v. 4:200 a). The new Civil Code – in force since 15 March 2014 – also explicitly acknowledges that:

Article 4:154. Where a child is raised in a home of a person other than the parents, or in a home maintained by such person and the parents together, this person may be involved – by agreement of the parent having the right of custody – in exercising certain rights and obligations relating to caring for and raising the child.

It is important to note, that the introduction of registered partnership has not affected the recognition of cohabitation among same-sex couples: just as different-sex couples can choose to marry or live together as cohabiting partners, same-sex couples can also choose to enter into registered partnership or live together as cohabiting partners.

The rights and obligations of cohabiting partners in comparison to spouses / registered partners differ from legislation to legislation. It is out of the scope of this chapter to analyse all differences, but it suffices to mention that for example, a cohabiting partner can decline to testify against his/her partner in a criminal proceeding (Criminal Procedure Act, art. 82:1 a and art. 459:1:14). In addition, a cohabiting partner can take over the role of the aggrieved party in criminal proceeding in case his/her partner has passed away (CrimCode, art. 31:4 and art. 459:1:14), and cannot be held accountable for failing to report a crime committed by his/her partner or for harbouring his/her partner as a criminal (CrimCode, art. 282:4 and art. 459:1:14).

A cohabiting partner is entitled to receive medical information about his/her partner (Healthcare Act 11:2 and art. 3 r), and can make medical decisions in case the partner is incapacitated (Healthcare Act 16:2 ba) and art. 3 r), and has the right – and obligation – to organise the funeral for his/ her deceased partner (Funeral Act, art. 20:1 c). A cohabiting partner is entitled to care allowance if he/she takes care of his/her ill partner (Social Benefits Act, Art. 41, together with CivCode, Art. 8:1:1:2), and the income of cohabiting partners have to be taken into consideration together when calculating income for means based social benefits (Social Benefits Act, 4:1 c)-d).

On the other hand, cohabiting partners are not statutory heirs (CivCode, art. 7:55-66), and can only inherit if nominated in a will. While a surviving cohabiting partner is entitled to survivors' pension, 10 years of cohabitation has to be proven (there is no minimum period for spouses and registered partners) (Pension Act, art. 45:2 a). A cohabiting partner can only move in to an apartment rented by his/ her partner from the local government with prior permission from the local government, and the surviving cohabiting partner cannot continue such a lease upon the death of his/ her partner (Rent of Apartments Act, srts. 21:2 and 32:2 respectively). There is no preferential naturalisation of cohabiting partners: they have to reside in Hungary for at least 8 years before they can apply for Hungarian

citizenship, which is only 3 years for spouses/registered partners of Hungarian citizens (Citizenship Act, srt. 4:2 a).

The default matrimonial property regime for spouses / registered partners is community of property (CivCode, art. 4:34:2). Thus in case the parties cannot agree on the division of the asset, the court will split the joint property 50-50% between the partners. On the other hand, the default property regime between cohabiting couples is based on their contribution to acquiring the property (CivCode, art. 6:516). This means that in case the parties cannot agree, the court will disregard who the registered or contractual owner of the property is. The court will base its decision on an evaluation of the contribution each partner has made to purchase the property. It is worth noting, that not only financial contribution is taken into consideration, but also contribution via (unpaid) domestic labour or participation in raising children (CivCode, art. 6:516:2).

Finally, there is one more legal institution worth mentioning: besides introducing registered partnership for same-sex couples, the RPA also introduced the registration of cohabitation (Notary Procedures Act, Arts. 36/E–36/G). Registration of cohabitation should not be confused with registered partnership.

The Registry of Cohabitation Statements (*Élettársi Nyilatkozatok Nyilvántartása*) is a registration scheme maintained by public notaries. A cohabiting couple can appear in person at a public notary and request their cohabitation to be entered into the system. This option is available for both same-sex and different-sex couples. Registering a cohabitation does not grant any additional rights or duties to cohabiting couples, but makes the proof of cohabitation easier. Upon the end of the partnership either parties can submit a new statement to the registry stating that the partnership has terminated.

The number of registered partnerships remains very low: between 1 July 2009 and 31 December 2014 301 couples entered into registered partnership (KSH 2015). The census also provides data on the number of cohabiting same-sex couples. In 2011 3,514 persons declared in the census that they live together as cohabiting partners with a person of the same-sex (0,6% of all cohabiting couples),¹¹² a sharp increase from the previous year (507 persons).¹¹³

From data on the registration of cohabitation by public notaries it is not possible to make a distinction between the number of same-sex and the number of different-sex couples. It has to be noted that the number of cohabiting couples making use of this opportunity remained quite low in general: between 1 January 2010 and 31 December 2014 3,979 different-sex and same-sex couples registered

¹¹² Letter no. KSH/ADKI/1513-2/2014 dated 26 June 2014 of the Central Statistical Office, on file with the authors.

¹¹³ Letter no. 5910–12/1/2010 dated 13 January 2010 of the Central Statistical Office, on file with the authors.

the cohabitation.¹¹⁴ In comparison, in the same period the number of couples who entered into marriage or registered partnership was 183,413.¹¹⁵

Divorce and separation of same-sex partners

The Registered Partnership Act and the general rules of the Civil Code on the separation of jointly-owned property provide the legal basis for the divorce of registered partners and the separation of cohabiting partners. Concerning the divorce of registered partners, the general reference rule (RPA, Art. 3:1) also applies, so – by default – same-sex registered partners have to undergo the same divorce procedure as spouses.

This means that divorce can be granted via the court in two cases: if requested by both spouses based on their mutual agreement (CivCode, art. 4:21:2–3); or if requested by either of the spouses, in the event of the breakdown of the marriage due to irreconcilable differences (CivCode, art. 4:21:1). In case the parties cannot agree on the separation of property, on spousal support or the use of the common apartment, the court will decide on these issues as well pursuant to dissolving the marriage / registered partnership.

As described above, the default matrimonial property regime for spouses / registered partners is community of property (CivCode, art. 4:34:2), so the court will split the joint property 50-50% between the partners if they cannot agree. Former spouses and registered partners in need are entitled to spousal maintenance (CivCode, 4:29:1).

Besides judicial divorce, the Notary Procedure Act allows registered partners to acquire divorce at public notaries in the following case:

Article 36/A. (1) A registered partnership can be dissolved by a public notary if:

- a) requested by the registered partners based on their mutual agreement reached without undue influence;*
- b) neither registered partners has a child whose support is the mutual duty of the registered partners;*
- c) the registered partners have agreed on the statutory spousal support, on the use of the common apartment, and – except for terminating joint property on immovable property – on the separation of joint property and have included that agreement in a notaries document, or in a private document countersigned by a lawyer.*

The divorce procedure at the public notary starts by joint request of the partners (art. 36/A:1 a). The public notary convenes a hearing with both partners within 30

¹¹⁴ Email dated 11 February 2015 of the Hungarian Chamber of Public Notaries, on file with the authors.

¹¹⁵ Data combined from KSH (2015a) and KSH (2015b).

days from the reception of the request (art. 36/B:1). If the legal requirements are met, the public notary dissolves the registered partnership by issuing a decision (art. 36/C:1). The same public notary can also participate in preparing the written agreement required to initiate the proceeding before him/her, (NPA, art. 36/A:2) thus making the procedure even simpler. The use of the simpler divorce procedure is optional, so registered partners can still decide to apply for divorce in court.

Since cohabitation is a *de facto* relationship, the cohabitation ends when the partners move to separate homes or live in the same household, but no longer form a couple. If the partners cannot agree on the separation of their jointly owned property, either of them can file a civil law-suit. There are no specific rules concerning this type of proceeding in the Civil Procedure Act, and therefore the general rules governing property disputes apply.

If the cohabitation was registered in the Registry of Cohabitation Statements by a public notary, either partner or the partners jointly can submit a new statement declaring that the partners are no longer cohabiting (art. 36/E:1 b). If the statement is submitted by one of the partners, the public notary informs the other partner that they are no longer registered as cohabiting partners in the Registry (art. 36/F:5).

As far as parenting issues are concerned, because the law recognises only the biological or adoptive parent as legal parents of the child, then only the biological parent or adoptive parent will have parental authority over the child. The former partner of the child's parent (former step parent in case the parents had entered into registered partnership or former *de facto* parent if they had only been cohabiting) has no duty to pay child maintenance after the partnership ends (CivCode, 4:213–218).

On the other hand the new Civil Code affords contact rights to former partners after the partnership ends:

Article 4:179. (3) Upon his or her request, visitation rights may be granted to the former stepparent, de facto parent or guardian, and any person whose presumption of paternity for the child was rebutted by the court, if the child was raised in their home for a longer period of time.

Since this provision is relatively new (it entered into force on 15 March 2014), there is no case law to assess whether the courts grant such visitation right to former same-sex partners of the parent.

Section Three: Developments of Mediation in Hungary

Mediation is a relatively new dispute resolution mechanism in Hungary. The first mediators started to practice their profession in the beginning of the 1990s following the country's transition to democracy and market economy.

The first step in institutionalising this form of dispute resolution took place in 1996 with the creation of the Labour Mediation and Arbitration Service¹¹⁶ by the National Council for the Reconciliation of Interests. This was a tripartite cooperation forum established by law that included trade unions, employers' associations and representatives of the government.

The following development was the adoption of a specific legislation on mediation in 2002 regulating the mediation procedure as well as the basic requirements to becoming a mediator (Mediation Act). In recent years most scholarly discussions focused on mediation in criminal cases for which a separate legislation exists (Criminal Mediation Act), but since the current paper focuses on family law disputes, the legislation and practice of mediation in criminal cases will not be discussed here.

Legislation on mediation

The Mediation Act provides the general legal framework for mediation in Hungary:

Article 2. Mediation is a special negotiation, conflict and dispute resolution procedure conducted according to this Act whose aim is to prevent litigation, or helping the termination of proceedings in front of a court or public authority, and where the parties involved voluntarily submit the case to a neutral third party (hereinafter referred to as 'mediator') in accordance with Subsection (1) of Section 1 in order to reach a settlement in the process and lay the ensuing agreement down in writing.

The law covers civil law disputes between natural or other persons. However, some civil disputes, including disputes concerning paternity, are listed as exceptions and mediation cannot be used, and disputes can only be solved via court proceedings (art. 1:3).

The law provides the minimum (training) requirements for mediators (arts. 5, 12/A),¹¹⁷ creates a registry of mediators in which all natural persons and companies offering mediation services have to register (arts. 4, 6–12), and sets the principle of confidentiality as governing the mediation process (art. 26). The law also authorises the Minister of Justice to conduct investigations concerning the activities of mediators (arts. 17–22).

¹¹⁶ Decision of the National Council for the Reconciliation of Interests (*Országos Érdekegyeztetési Tanács, OÉT*) on 16 February, 2016.

¹¹⁷ Further details about the training requirements is laid down in the Mediation Training Decree. Mediators have to have a higher education degree (the field is not specified) and have to complete a 60 hour long accredited training program on mediation and participate in practical training as well. Furthermore, mediators also have to participate in a certain amount of further training courses or attend professional conferences on mediation every 5 years.

The law sets out the basic rules concerning the mediation procedure. The mediation procedure starts with a written (including via email or fax) request of both parties involved (art. 23). If only one party initiates the procedure the mediator will invite the other party to join the mediation (art. 23:1). The mediator holds a first meeting where both parties have to appear in person, and sign an agreement to participate in the mediation (art. 28–30). The agreement must contain the fee for the mediator and can include any other provisions the parties find appropriate.

Further joint or separate meetings can be held according to the needs of the parties (art. 32:3). Unless agreed otherwise the parties have to appear in person at the meetings (art. 32:2). Mediation meetings (including the first meeting) can be held via videoconferencing (art. 35:5). The parties can request the participation of experts or other third persons in the procedure (arts. 34–35).

Mediation ends a) if the parties jointly inform the mediator that they no longer wish to continue the mediation, b) if either party informs the mediator and the other party that no longer wish to continue the mediation, c) if four months have passed without an agreement being reached (unless the parties agree on a longer mediation procedure), d) if the parties reach an agreement and put it in writing (art. 35:1). The written agreement has to be signed by both parties as well as the mediator (art. 35:2).

Since June 2012, the law also contains a specific section on judicial mediation (art. 38/A–38/B). In case of judicial mediation, the mediators may be judges, former judges (*rendelkezési állományba helyezett bíró*) and assistant judges (*bírósági titkár*) who have completed the necessary mediation training. Judicial mediation is available in all cases in which general mediation would be available, including mediation in family disputes and can be requested after the parties have already submitted their case to the court.

In case of judicial mediation, the general rules on court jurisdiction do not apply (art. 38/B:1), so the parties can choose any judicial mediator in any court. The law contains specific conflict of interest rules for this kind of mediation: a judge who participated as mediator in the procedure cannot later on serve as a judge in the same case (art. 38/B:5).

Provisions of the Civil Procedure Act (CPA) concerning court settlements (art. 148) provide the general framework for mediation of disputes that have already reached the courts or those that by law need the involvement of a court (such as divorce and child custody cases). According to the law, According to the law, at any time during the court proceeding the judge can encourage parties to attempt mediation (art. 148:1). If the settlement is in line with the law, the judge approves the settlement (art. 148:3) and it has the same binding force as a court decision (art. 148:4). The provision on settlements include a specific reference to mediation:

Article 148. (2) The court – if there is a chance for success, especially if either of the parties requests it – informs the parties about the nature of mediation, on how to use it and on rules of the suspension of the court procedure (...)

In principle, mediation is left to the choice of the parties, but the new Civil Code in force since 15 March 2014 makes mediation compulsory for disputes concerning parental supervision of the child, child custody and contact rights. The relevant provisions are the following:

Article 4:172 [Mediation in court proceedings regarding child custody]

The judge may order parents to attempt mediation and to cooperate regarding parental supervision and direct contact between the child and the non resident parent.

Article 4:177 [Mediation in case of guardianship]

The guardian may - upon request or ex officio if it is considered necessary for the protection of the child's best interests - order the resident parent and non resident parent to attempt mediation and cooperate in order to protect the interests of the non resident parent and his/her contact with the child.

Furthermore, the new Civil Code supports mediation in divorce procedures by specifically providing that judges can recommend mediation to divorcing couples:

Article 4:22 [Mediation]

Before filing for divorce, or during the divorce action the spouses shall have access to mediation – on their agreement or by recommendation of the court – attempting to reconcile their differences or to settle any disputes they may have in connection with the divorce by way of an agreement. The agreement reached in conclusion of the mediation process may be recognized in a court settlement.

The detailed rules of compulsory mediation are laid down in the Civil Procedure Act and the Mediation Act. In case the court refers the parties to mediation, the court proceeding is suspended until a mediated agreement is reached or the mediation fails (CPA, arts. 152:3–4). The parties will have to choose a mediator within 15 days following the order of the court (MA, arts. 38/C:2 a) and 38/E:1) and must attend at least the first meeting with the mediator (MA, art. 38/C:2 b). The parties, however, are not obliged to continue with the mediation. If the parties do not nominate a mediator or do not appear at the first introductory meeting to mediation, a fine applies (CPA, art. 8:6).

The parties have two months to mediate (CPA, art. 152:4 c) and depending on the case an extension can be allowed (CPA, art. 152:5). If only one of the disputants will be keen to mediate, the other disputant will pay the legal fees regardless of who wins the case in the end (CPA, art. 80:4 b).

The recourse to mediation is encouraged by several measures. For instance, court fees will be reduced by 90% if the parties settle or drop the case at the first hearing, by 70% if they drop the case after the first hearing, and by 50% if they settle later on in the proceedings (Duties Act, art. 58:1 and 58:3 respectively). Furthermore, in case of mediated agreements, the cost of mediation (but max. 50.000 HUF (160 EUR)) can also be reduced from the already reduced court fee.

As described above, in case a mediated agreement has been approved by the court, it has the same binding force as a court decision (CPA, Art. 148:4). On the other hand the enforcement of mediated agreements not approved by a court is not directly regulated. In principle mediated agreements can be enforced as any other written agreement with the intervention of the court (CivCode, art. 6:27). Some specific rules, however, do apply.

The Mediation Act provides that by signing a mediated agreement parties do not lose their right to recourse, adjudication or arbitration (art. 36:1). Furthermore, the law also provides that unless the parties agreed otherwise, statements (such as statements of acceptance or disclaimers) made during the mediation process cannot be referred to in any subsequent legal procedures (art. 36:2).

During the interviews, and during the training organised within the project *Litigious Love: Same-Sex Couples and Mediation in the EU*, an interesting debate involved the participants on whether the provision of article 36:2 would apply to mediated agreement. According to one opinion, the provision only refers to statements made during the mediation, and thus the mediated agreement can be referred to in court and is thus enforceable. The other interpretation holds that unless there is a clear clause in the agreement that forecloses the application of that provision, the mediated agreement cannot be referred to in court, so either a separate written agreement has to be signed or the mediated agreement has to contain a clause stating that the parties agree to the agreement being referred to in subsequent legal procedures.

The parties can also decide to notarise the mediated agreement (Judicial Enforcement Act, art. 23/C), in which case the agreement becomes directly enforceable. While not prescribed by law, public notaries often require that the agreement to be notarised is first signed by a lawyer, which makes this enforcement mechanism quite complicated and costly.

The Mediation Act provided that even if the parties agreed to divorce in a mediated agreement, the court (or a public notary in case of registered partnership) has to approve their decision (art. 1:3 and 1:4, respectively). In this case if approved by court the mediated agreement is binding (CPA, art. 148:4). In case of agreements on separating jointly owned property after cohabitation, marriage, or registered partnership have been dissolved, the law does not require the approval of the court and therefore issues of enforceability arise.

The law encourages the respect of mediated agreements through the provision of application of legal fees for the party who initiates a court proceeding without considering the existence of mediated agreement (CPA, art. 80:3).

The practice of mediation

Notwithstanding a detailed legal framework, mediation in family law disputes is not adopted much in Hungary. According to the Ministry of Justice¹¹⁸ the number of disputes in which mediation was adopted is very low especially compared to the number of mediators registered in the registry of mediators. In January 2015 the registry includes 971 mediators, 502 of whom work in Budapest. Supposing there has been no sharp increase in the number of mediators registered, this means on average a mediator has less than one mediation case a year.

Interviews with mediators have confirmed the low use of mediation. A member of the leadership of the National Mediation Association claimed that there is widespread mystification about the number of cases mediators handle, estimating that active mediators have 2-3 mediation cases a year. A mediator and trainer working at one of the oldest mediation practice organisation in Hungary asserted that the number of mediation cases is very low in the country as this dispute resolution mechanism is not very well-known.

Nevertheless, the National Judicial Office (*Országos Bírósági Hivatal*) has a special page on its website (OBH, nd) devoted to promote mediation (especially judicial mediation), a flyer and a video has also been prepared. Since many of the legislative changes to encourage mediation (compulsory mediation for child custody cases, the possibility of judges to suggest mediation to divorcing partners) only entered into force on March 15, 2014, it is still too early to assess whether these activities will be successful in making mediation an appealing dispute resolution mechanism for family law disputes.

Section Four: Same-sex couples and mediation

Legislation

The legislation on mediation of disputes involving same-sex couples in principle does not differ from those involving different-sex couples. The legislation on cohabitation equally applies to same-sex and different-sex couples, and while registered partnership for same-sex couples and marriage for different-sex couples are two separate legal institutions, via the general reference rule the rules that apply to marriage also apply to registered partnership, including also rules on mediation.

On the other hand, because a child cannot have two legal parents of the same-sex there is, indeed, a difference between same-sex and different-sex couples with regard

¹¹⁸ Letter no. V/17/2/2015 dated 12 February 2015 of the Ministry of Justice, on file with the authors.

to mediation. Compulsory mediation is only provided for proceedings concerning parental authority, child custody and visitation rights of parents (CivCode, 4:172, 4:177), not including former step parents and former *de facto* parents. Thus, both same-sex partners cannot be legal parents of the child and thus do not have joint parental authority over the child, they cannot be compelled to participate in mediation.

A further difference, between same-sex and different-sex couples, is the existence of simple divorce for registered partners at the notaries. This procedure in itself can be regarded as an alternative dispute resolution mechanism. In particular, public notaries approve the already existing written agreement between the divorcing partners, and may also facilitate the partners to formulate the agreement. However, the Hungarian Chamber of Public Notaries (*Magyar Országos Közjegyzői Kamara*) maintains the position¹¹⁹ that such an activity cannot be considered mediation even in its broadest sense, because the public notary will only get involved in the procedure if there is already an agreement between the partners and would not help the partners reach such an agreement if there was not any.

Empirical research

In order to explore the nature of disputes between same-sex partners and the use of various dispute resolution mechanisms especially mediation, an interview and case file research was conducted.

The interview research aimed at collecting data information from same-sex couples, mediators, lawyers, and judges. In order to recruit professionals with relevant experience we contacted 12 public bodies and professional associations. The public bodies contacted included the National Judicial Office, the National Chamber of Public Notaries, the Budapest Chamber of Public Notaries and the Hungarian Bar Association.

The professional bodies included the National Mediation Association, Partners Hungary Foundation, the Hungarian “Judges for Mediation” Association, the Hungarian Mediation Society, the National Alliance of Hungarian Mediators, the Mediation Training and Information Centre Association, Consensus Humanus Mediation Centre Association and the Mediators’ College of the Budapest Bar Association.

The authors of this Chapter contacted the LGBTQ Centre, a for profit counselling centre in Budapest that also offers mediation services for same-sex couples. Of the 12 bodies contacted five agreed to cooperate (National Mediation Association, Partners Hungary Foundation, the Hungarian “Judges for Mediation” Association,

¹¹⁹ Letter no. 302/3/2014 MOKK dated 30 July 2014 of the Hungarian Chamber of Public Notaries, on file with the authors.

Budapest Chamber of Public Notaries, National Judicial Office, LGBTQ Centre), one rejected cooperation (National Chamber of Public Notaries), one re-routed us to another body (included in the list above) and the remaining 5 did not respond to our request.

Semi-structured interviews were held with the National Mediation Association, Partners Hungary Foundation, the Hungarian “Judges for Mediation” Association, the National Judicial Office, the Budapest Chamber of Public Notaries and the LGBTQ Centre.

Only four mediators - two of whom were also lawyers - had experience of mediation with same-sex couples. The interviews lasted from 50 to 96 minutes long, and followed the interview guide developed by the lead researcher of the project. All interviewees were asked to provide contact details for same-sex couples from their clientele who would agree to participate in the research. We received one such contact, and identified one other person who attempted mediation to solve a dispute with her former partner. Altogether 2 interviews were conducted with persons involved in legal disputes. The interviews lasted from 41 to 76 minutes.

To complement this data an analysis of the cases handled by the Legal Aid Service of Háttér Society was carried out in attempt to identify patterns of disputes involving same-sex couples. The Legal Aid Service of Háttér Society is the only legal aid service specialised in sexual orientation and gender identity in Hungary. The service offers free legal advice and representation to victims of discrimination, violence and harassment based on sexual orientation and gender identity. In addition, the service functions as a dispatcher for people in search of an LGBT-friendly lawyer when the legal issue that do not fall within the mandate of the Legal Aid Service. In the period between 2010 and 2014, the Legal Aid Service dealt with 461 cases, of which 14 (3%) could be included in the category of legal disputes involving same-sex couples understood very broadly.

Of the 14 cases handled by the Legal Aid Service of Háttér seven concerned financial dispute between partners, one dealt with divorce of a binational couple, one concerned one of the partners trying to change her guardian who was her former partner, and the others concerned several aspects of abuse and harassment.

In none of these cases the clients specifically inquire about mediation. In few cases mediation was suggested to the clients as a possible solution, but there is no information whether it was actually used in solving the dispute.

Sources of dispute

Of the four professionals interviewed three had experience of dispute resolution involving same-sex couples, while the fourth one was only involved in drafting cohabitation contracts for same-sex couples.

The mediators and the lawyer interviewed pointed out that the answers they provided during the interviews cannot be taken for any generalisation. Indeed, the cases the mediators interviewed dealt with were 8 in total.

Mainly, cases involved financial disputes. In particular disputes include division of common property when the relationship ends, financial maintenance, how to pay back financial support provided by one of the partners to the other during the partnership, or how to share the use of the car. Two cases concerned children.

Many property disputes concerned property of pets and in one case a collection of stuffed toys. One of the same-sex partners we interviewed described the dispute he/she was involved in:

Case 1: The weekend dog

Petra and Paula were a lesbian couple, and they have been together for a year and a half. During this period Petra was unemployed for half a year and Paula supported her financially. The relationship deteriorated: Paula had been verbally abusing Petra since the beginning of the relationship, but: lately Paula often sworn and shouted at Petra, criticising her all the time, and was often unjustifiably jealous. Petra felt her self-confidence dropping significantly.

The conflict escalated to physical violence once when Petra responded to the verbal abuse by pushing Paula to the wall. They had separated several times with Petra moving out of the apartment, but she always returned following the promises of Paula to change. After one of the repeated conflict scenes Petra decided to put the relationship to an end. Paula insisted on Petra paying back the money Paula spent on supporting her when she was unemployed.

Paula suggested Petra to ask a mediator to help them to end the relationship and come to an agreement regarding the financial situation. On the first mediation meeting Petra found it very difficult to talk about her private life in front of a third person. By the second session Petra felt more relaxed. After normalising the tone of the discussion, they started talking about the amount owed and how to schedule payments. Petra felt that Paula used hair-splitting technique to humiliate her. Finally they arrived to a reasonable agreement, but then found out they had another issue to settle as well: Peter, Paula' Hungarian Vizsla dog to which both of them were emotionally attached. They agreed that Paula would become the sole custodian of the dog, but that Petra would have visitation rights. They discussed the arrangements as if talking about a child: they set down in writing the frequency, the time frame and meeting places for the dog.

The mediation took all together four or five sessions with both partners present. The first two sessions were devoted to overcoming the high level of tension that developed between the couple, who were at the point of not speaking to each other. After the tone of the discussions was normalised they focused on discussing the financial questions and finally the question of the dog. The mediation was successful and all issues were settled. Until the time of the interview both parties had respected the agreement.

It is worth noting that in only one of the eight cases reported by the interviewees the partners were in a registered partnership, and in all other cases the partners were in cohabitation.

The mediators and the lawyer interviewed pointed out that general conclusions regarding the differences between different-sex and same-sex couples cannot be proposed. However, after prompting for further discussion, the interviewees did identify several specific issues involved in disputes and dispute resolution between same-sex partners.

All four interviewees mentioned that since same-sex couples do not have access to marriage and full parenthood couples are affected adversely. Some also noted that while some opportunities for legal recognition of same-sex relationships exist (cohabitation and registered partnership), most couples do not make use of them, and thus protection in case of disputes is very limited:

“Registered partnership exists, but only very few people make use of it. I have not met at all any clients or even friends who entered into registered partnership. In case of registered partnership dissolution will be governed by law. I am not even sure gays know about this opportunity. Maybe they do know that it exists, but that it is basically the same as marriage that they don’t know.”

Several mediators also mentioned that in case the partners do not enter into registered partnership, even the separation of property might be problematic. Interestingly, none of the interviewees considered that there is legislation governing separation of property between cohabiting partners. The fact that even practitioners did not mention this opportunity is indicative of the limited level of awareness about the options available to same-sex couples. One mediator for example mentioned how such informal partnerships make her work more difficult:

“Neither of the parties is obliged to do anything. In mediation I use the fact that they have to arrive to an agreement, because sooner or later a decision will be made by the court. (...) There is a rope around the neck of the partners to agree. [In case of informal partnerships] neither of the partners have anything to lose, there is nothing to oblige them – besides their own consciousness. (...) They do not feel that if they do not agree here, they will lose something in court. (...) I cannot use the technique I usually use, that both of them will lose something if they go to court.”

All mediators reported that in mediation of different-sex couples they always mediated married couples, none of them had experience mediating cohabiting different-sex couples. Thus what the mediators perceived as a difference between same-sex and different-sex couples, might have actually been a difference between mediating married and cohabiting partners.

This difficulty is well demonstrated in the following case cited by one of our interviewees.

Case 2: The humble homemaker

János and Jakab were a gay couple, they met when János was 17 and Jakab was 28. János was at his first relationship, and never had a sexual contact with anyone else. They had been living together in Jakab's apartment for 8 years, although János was officially not residing in the apartment. Jakab owned a company that had become very successful over the years, making Jakab very rich.

János used to work for the company in its early years contributing significantly to its success, but had to leave the company as Jakab did not want other employees to find out he was gay. At the time of the dispute János worked for another company in a low paying job, he earned a lot less than Jakab, and took care of the household. János had been travelling a lot around Europe.

By accidentally opening a dating website profile, János found out that Jakab had been cheating on him regularly when he travelled abroad. He felt like his whole life had been built on a lie, he had suicidal thoughts and they started couple's counselling. At one point in the therapy János decided he cannot trust Jakab anymore, and wanted to separate.

János and Jakab decided to simulate a divorce proceeding during the therapy, helped by the therapist who was also a mediator. They involved a lawyer in the procedure, and discussed all the questions that would arise in a real divorce. János wanted to buy an apartment where he could live after leaving Jakab's flat. Jakab was also willing to give him money, but they could not agree on the location and size (the price) of the apartment:

Jakab wanted to pay more. János felt like Jakab only wanted to pay him off to ease his bad conscience regarding the cheating. He would rather not accept money from Jakab. According to the assessment of the lawyer, it was doubtful whether the court would recognise their relationship as cohabitation as János did not officially reside in the apartment throughout the 8 years they were together.

During the mediation they agreed that Jakab will fully pay for the apartment János picked, but that János will pay part of the money back to Jakab.

The most severe dispute arose about the custody of the fish they had bought together and a large collection of stuffed toys that both partners wanted to keep and did not want to share. At the time of the interview the situation had not been resolved, the couple asked for a break from the mediation process to settle in with their new life and wanted to get back to the issue of the fish and toys at a later time.

During the interviews the interviewees referred about parenting disputes, and power imbalances that the law creates between biological and non-biological parents by not recognising the parental rights of the non-biological same-sex parent. As suggested by two of the interviewees:

“When same-sex partners [with an adopted child] separate, the non biological or non adoptive parent does not have rights. There is no child maintenance, no visitation rights. If they [same sex couples] do not settle, the non adoptive partner will be clearly disadvantaged.”

“Concerning children it is only a question of goodwill or persuasion for the partners to be ethical to each other. This is partly because the court is out of question, but also because a partner can come up with a claim that has no legal basis, but is still justified: we raised the child together, we were one family.”

The vital importance of both partners to treat their family as if it was fully recognised by law is shown well in the following example recounted by one of the mediator interviewed:

Case 3: The big-hearted stepmother

Ella was married for several years to a man and they had two children. The children were 3 and 6 when Ella decided to leave her alcoholic, abusive husband.

Soon after, she met Éva and they established a lesbian relationship. They lived together for 7 years bringing up Ella's two children together. They lived in an apartment that Éva owned, although she bought it after they got together. Éva earned a lot more than Ella. They also owned a car together. Ella and Éva treated the two children as if they were their common children, the children also recognised Éva as their mother.

The relationship between the two women arrived to a dead end and they decided to separate. Éva was ready to pay child maintenance, even though by law she was not obliged to. The partners could not agree on the destination of the flat, which wished to keep, and on the amount of child maintenance Éva would pay. Éva and Ella decided to attempt mediation.

During the mediation, they agreed that Éva would buy the Ella's part of the apartment, and thus she paid half the price of the apartment according to an estimate of an expert.

Regarding the child maintenance Ella originally asked for 130,000 HUF, and Éva was only willing to pay 80,000 HUF. They agreed for Éva to pay 105,000 HUF, and decided to share the tuition fee for the children's private school.

The challenge for the mediator was represented by helping the parties to deal with child's maintenance. Legally Éva did not have any duty to financially maintain Ella's children. Therefore the mediator paid much attention in facilitating the communication of the parties when Ella asked for a higher sum of money than the one Éva was keen to pay.

The mediator used the same model of practice she used in similar disputes with heterosexual couples. The mediator asked Ella to write on a piece of paper all the costs she wanted to share with Éva and then each cost was evaluated and discussed by the parties. This method worked, and in a few sessions they managed to agree on the amount.

The desire to overcome restrictive adoption legislation, encourages same-sex partners to create financial arrangements which in case of separation might lead to serious financial disputes. A case described by one of the mediators interviewed provides a remarkable example of this.

Case 4: No house, no child?

Zita and Zoé were a lesbian couple who had been living together for nearly a decade when they decided to adopt a child. Since the Hungarian legislation only makes it possible for persons living in a same-sex partnership to adopt individually, they decided that Zita would adopt the child. In order to have better chances with the Public Guardianship Authority, Zita was recorded in the real estate register as the sole owner of the house they had bought together.

The adoption procedure ran smoothly, and after a few months Zita adopted Zsófi, a three year old girl. A year after the adoption, Zoé decided to leave Zita and start a new life. Zoé was, however, attached to Zsófi and wanted to keep a regular contact with the child.

Zita felt hurt, and was worried she would not have enough money to maintain the child if Zoé did not pay child maintenance. Zita thought Zoé left her family, so Zoé had to bear the costs of her decision. Zita also feared she would have to sell the house if she wanted to pay back Zoé's contribution to the purchase of the flat. Under the law Zoé was not required to pay child maintenance, and although provided for by law, it was not obvious that the court would provide her with contact rights.

Zita and Zoé decided to attempt mediation. During the mediation the order of issues the parties dealt with followed the typical structure of a divorce procedure. First Zita and Zoé agreed on contact with the child and child maintenance, and then the parties moved on to consider financial issues.

The agreement regarding contact between the child and Zoé was similar to agreements heterosexual parents have. Zoé would take the child every second weekend from Friday afternoon to Sunday evening. The agreement was very detailed including information on the location where Zoé would pick Zsófi up and where to hand her back to her mother. The agreement included specific provisions for holidays and summer vacations.

Zita first asked to include in the agreement a clause by which in the event Zoé would enter in a new relationship, the new partner would not be allowed to meet the child. After discussion, Zita accepted that this represented an unrealistic request.

Zita and Zoé also agreed that Zoé would not pay child maintenance, but that Zita could keep the whole house in return. The agreement regarding contact with the child and the destination of the flat was reached in the first session. At the time of the interview a second meeting was pending to discuss the separation of all other properties owned by the partners.

The mediation in this case was successful because parties were willing to cooperate. Both partners were motivated to settle because several important opportunities could vanish without the agreement. Without an agreement Zoé would have lost

the possibility to see the child, and Zita would have been put in a very difficult financial situation.

In this regard the recent introduction of contact rights for former step parents and *de facto* parents might have negative consequences on future settlement. Under the new provisions, the non-biological parent is entitled to recourse to court and ask to have contact with the child. However, the biological parent will still not be able to enforce his/her claim to child maintenance. This creates a power dynamic favouring the non biological parent.

It is however, not only the legislative framework that is different, but also social attitudes towards same-sex relationships are different when compared to different-sex relationships. As the interviewees pointed out:

“It is a lot more difficult for a same-sex couple to live in a committed relationship in contemporary Hungary. Stereotypes and bias wrongly suggest that a committed same-sex relationship does not exist.”

“Same-sex partnerships are not socially accepted. Therefore, in case of a divorce a lot of people enter into the picture. (...) When same-sex partners separate, usually only friends are involved, and relatives are out of the picture. There are only very few gay relationships in which the families of the partners participate. I had divorce cases [of different-sex couples] where the parents also came to mediation. (...) I cannot imagine this to happen for a gay couple.”

“[For different-sex couples] they all know what a divorce is, there is a clear script. (...) It is fully accepted if someone is married, end if it's over, how it will be solved. There are socially accepted solutions.”

The lack of socially accepted solutions was considered by some mediators who emphasised that the lack of clear paths to follow can put one of the partners in a vulnerable position:

“In a dispute involving a gay couple, one of the partners pushed the other partner into the position of a homemaker (...) I strongly felt that a woman would have raised issues regarding her rights. In a man-woman couple, each of the partners knows what he/she is entitled to.”

“Same-sex couples should be very motivated to come to mediation. Different-sex couples have this duty [because of the children], and also for them to divorce they have to go through this procedure. Different-sex couples can decide either to solve the dispute in this three hours (...) or they can go to court for three years.”

On the other hand, as some interviewees suggested, the lack of legal and social patterns has its positive aspects:

“Same-sex couples are free to decide whether and how they want to solve their dispute. There are no frames they are expected to respect.”

“If we take off the heterosexual glass, all arguments like “because men or women are like this or like that” or that “a normal person would do this or that” disappear. The reliance on “it has to be done like that and that’s it” is a lot less present. Partners talk in a lot more relativistic way. (...) It is easier for same-sex couples to talk in such relativistic terms.”

Several interviewees noted that same-sex partners find it more difficult to talk about their partnership and especially their sexual life, so the mediators have to be more considerate:

“Rather than talking more freely on sex, it was more difficult for them. Maybe because there is a common language and references on how to discuss male-female sexuality. (...) For all of them it was so hard to talk about sex.”

“It is a lot more difficult to talk about these issues; it’s a taboo even for those living in it for ages. Talking about emotions and attractions is a lot more difficult. (...) Maybe they talk about the fact that he/she is my partner with their family, but I only met very few [same-sex couples] who said that they talk about emotional questions with their family and close friends. Heterosexual couples grow up to discuss their emotional life, that “I love you” or that “I don’t love you anymore.” So the mediator has to be more conscious and considerate. Even the most innocent question can make a person very tense if they never talked about emotions and sexuality before. If a person has never talked about his/her emotional life to a third person before, he/she will not talk to the mediator about it either.”

Mediators were even more reluctant to describe differences among gay and lesbian couples. Only one of the mediators dared to discuss this issue, emphasising the literature he/she has read, not his/her practical knowledge:

“A lesbian relationship works differently, emotions dominate a lot more there. (...) This is a very broad generalisation, which is risky, but all the things I have read on how to handle lesbian relationships, the way lesbian partners like to end the relationship, the questions that need to be settled – all of these were confirmed by the cases I had. (...) The literature says that relationships between men are more fluid and ephemeral, and this is in line with my personal experience. [Lesbian relationships] are more saturated with emotions, so more attention should be paid to closing these emotional ties. (...) I partly base this on my experience with heterosexual couples: of course for women very different things were important.”

“The agreement between the lesbian partners included things I’ve never thought of before. For example how they would related to each other after separation. How to communicate their relationship and the end of their relationship to their environment, what to exclude from those discussions.”

Dealing with prejudices and stereotypes

Of the four practitioners interviewed two declared to be gay or lesbian themselves, one said to be straight, while the fourth one did not make a clear statement.

All interviewees emphasised the importance of acknowledging that all human beings have stereotypes and prejudices, and agreed that it is important to be self-reflective regarding the existence of bias and prejudices. In addition, the interviewees pointed out the importance of having gay and lesbian friends.

One of the questions asked to the interviewees was whether the mediator should be gay or lesbian. The interviewees considered that being gay or lesbian might be an advantage in dealing with mediation between same-sex partners. While emphasising that in an ideal world sexual orientation should make no difference, interviewees agreed that those sharing an identity with clients might have more knowledge as well as sensitivity to the issues affecting such couples. Furthermore, LGBT clients might have more trust in LGBT mediators, and trust is crucial for mediation.

On the other hand, disadvantages were also mentioned. A gay mediator for example argued that being gay carries the risk that the mediator will generalise based on his own experience and will lose objectivity and neutrality:

“As young gay man, I do have the personal experience that gay men cheat on their partners more easily, or that relationships are more ephemeral. This is a very totalising statement, but I did experience this. This might lead to problems, e.g. that I always presume that people cheat on their partners.”

The mediator who did not reveal her sexual orientation also noted that in case the mediator and the client share same sexual orientation, there might be a higher risk that the mediator will recognise his/her own situation in the dispute to be resolved, which might make him/her too personally involved and thus biased towards one of the partners:

“One of the greatest risks for a mediator is to mediate a dispute which is similar to his/her own situation. He/she will feel like “Oh my God, this is my problem.” That is why it is good to mediate with a co-mediator.”

Advantages of mediation

Both the practitioners and LGBT people interviewed emphasised the often cited advantages of mediation: that it is fast and cheap, and that parties are more likely

to abide by a mediated agreement. Furthermore, some interviewees pointed out that rather than solving only legal issues mediation offers the possibility to deal with all emotional and personal issues the parties consider important and wish to investigate. As one mediator suggested:

“Mediation helps to close the emotional ties, to solve a complex life situation.”

During the interviews some further advantages which are specific for same-sex couples were considered by the interviewees. For instance, issues, such as parenting disputes, which cannot be considered by legal procedural means, may well be resolved in mediation.

In addition, according to the interviewees, mediation offers the opportunity to same-sex partners to choose the mediator they trust and thus they can avoid being subjected to discrimination or humiliation in court. A further advantage is that mediation is confidential, so the parties may maintain their sexual orientation private.

Finally, one mediator mentioned that during mediation the partners have all time they need to become familiar with the mediator, and gradually talk about their relationship according to their needs and wishes -there is not enough time in the courtroom.

Concerning the number of disputes which were settled, all interviewees favourably answered that in the majority of cases the mediation proceeding was closed with a written agreement. Mediators did not have data on whether mediated agreements were respected by the partners.

Conclusions

This Chapter aimed at providing an overview of the legal framework and practice of mediation adopted for the resolution of disputes involving same-sex couples in Hungary.

The research carried out for this Chapter has shown that while Hungary has a relatively progressive legislation on the recognition of same-sex relationships, same-sex couples do not use this legislation. Therefore specific difficulties for mediators arise. In addition issues arise when same-sex partners are involved in parenting disputes because the lack of legal recognition of same-sex parenting limits the enforcement of mediated agreement.

Our empirical research also confirmed the widely shared view that mediation is still a quite uncommon dispute resolution mechanism in Hungary. While in recent years several legislative steps have been taken to encourage the use of mediation and to facilitate access to it, and remarkable activities have been taken to raise awareness about mediation, not enough time has passed yet to assess the impact of such initiatives.

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CHAPTER VII

ITALY¹²⁰

Anna Lorenzetti and Giacomo Viggiani¹²¹

Section One: Description of the country

Historical overview

The House of Savoy was responsible for the first official unification of the entire Italian territory under one Kingdom. The Italian peninsula was previously fragmented into several political entities dominated or strongly influenced by other European powers such as Austria and France. The unification process, which began in 1848, went further with the conquest of Lombardy in 1859 and the addition of the Kingdom of the Two Sicilies in 1861. The same year the Sardinian government was able to declare the Kingdom of Italy as officially born for the first time. The process was ultimately completed following the conquest of Venice in 1866 and the final addition of the Papal State in 1870.

Following the devastation caused by World War I, turmoil and anarchy spread throughout Italy, preparing the ground for the rise of Benito Mussolini's National Fascist Party. Following the so called "March on Rome," a successful *coup d'état*, Mussolini led the country from 1922 all the way to 1943 into World War II.

Italy was eventually freed by the Allied Forces in 1945. In 1946 monarchy was finally abolished following a constitutional referendum in which the Italian people voted in favour of the establishment of a parliamentary constitutional republic. The Constituent Assembly started drafting the new Constitution short after that, coming eventually into force on January 1st 1948. A provision stating that the form of Republic shall not be a matter for constitutional amendment was also inserted (art. 139).

The constitutional system

The Italian Constitution is a rigid one and its provisions cannot be altered by ordinary legislation. It is structured into three main parts. The first is devoted to the Fundamental Principles (arts 1-12). The second one handles the Rights and Duties of Citizens.¹²² The third part is devoted to the Organisation of the Republic, which

¹²⁰ The authors would like to thank all the people who helped and supported this fieldwork, in particular the mediators Paola Barletti, Giovanna Di Bartolo, Francesca Fabbri, Ana Maria Sanchez Duran, Silvia Carcasci, Serena Biagini, and Vania Rigoni.

¹²¹ Giacomo Viggiani is the author of Section One and Section Four. Anna Lorenzetti is the author of Section Two and Section Three.

¹²² This is the "Part I" which is divided in four titles devoted to Civil Relations (Title I), Ethical and Social Rights and Duties (Title II), Economic Rights and Duties (Title III), Political Rights and Duties (Title IV).

states rules on the Parliament (Title I, divided in two Sections on The Houses and on the Legislative Process), The president of the Republic (Title II), the Government (Title III, with three Sections on the of Ministers, Public Administration and Auxiliary Bodies), the Judicial Branch (Title IV, with two Section on the Organisation of the Judiciary and on Rules on Jurisdiction), Regions, Provinces, Municipalities (Title V) and Constitutional Guarantees (Title VI, on the Constitutional Court, Section I, Amendments to the Constitution and Constitutional Laws).

Influenced by anti-fascist views the Italian Constitution is very anti-authoritarian. It doesn't follow in fact the traditional concept of separation of powers, preferring instead the balancing and interaction of the three branches rather than their rigid separation. The Parliament is set as a bicameral entity formed by the Chamber of Deputies and the Senate of the Republic. These are elected by direct and universal suffrage, with the same powers and duties, but with different election rules (art. 55).¹²³ The Chamber of Deputies is composed by six hundred and thirty deputies (twelve of whom are elected abroad), while the Senate is composed by three hundred and fifteen members (six of whom are elected in the overseas constituency). The Senate is elected on a regional basis, with the exception of the seats assigned to the overseas constituency.

The Chamber of Deputies and the Senate of the Republic are both elected for five years and the term for each House may not be extended, except by law and only in the case of war. The legislative function is exercised collectively by both Houses (arts 70 ff). Legislation may be introduced by the Government, by a Member of Parliament and by those entities and bodies so empowered by constitutional amendment law. The people may initiate legislation by proposing a bill, drawn up in sections, and as long as it's signed by at least fifty thousand voters.¹²⁴

As this chapter explains further, the first provision under the title on Ethical and Social Rights and Duties is the article on family which states that "The Republic recognises the rights of the family as a natural society founded on marriage. Marriage is based on the moral and legal equality of the spouses within the limits laid down by law to guarantee the unity of the family" (art. 29).

¹²³ A significant reform is now crossing the political debate, with a deep reform of the Senate.

¹²⁴ A Bill introduced in either House of Parliament will be scrutinised by a Committee and then by the whole House, which will consider it section by section and then put it to a final vote. The Rules may establish shorter procedures to consider a Bill that has been declared urgent. They may also establish when and how the consideration and approval of bills may be notified to Committees, including Standing Committees, so as to reflect the proportion of the Parliamentary Groups. Even in such cases, if the Government, or one-tenth of the members of the House, or one-fifth of the Committee request that the bill be debated and voted on by the House itself or that it be submitted to the House for final approval (following explanation of vote), a bill may be referred back to the whole House until the moment of its final approval. Laws are promulgated by the President of the Republic within one month of their approval. If the Houses, each by an absolute majority of its members, declare a law to be urgent, the law is promulgated within the deadline established therein. A law is published immediately after promulgation and comes into force on the fifteenth day following publication, unless such a law establishes a different deadline.

The President of the Council of Ministers of the Italian Republic and the Council of Ministers, which hold effective executive power, are appointed by the President of the Republic, but must pass a vote of confidence in Parliament to become in office. The President of the Council conducts and holds responsibility for the general policy of the Government.¹²⁵ Contrary to the pattern of separation of powers, the government has some legislative powers. However, these powers are only for a limited time and for specific purposes established in cases of necessity and urgency. Temporary measures lose in fact effect from the beginning if they are not transposed into law by the Parliament within a fixed term of sixty days.

Compared to other European parliamentary systems,¹²⁶ the Italian *Presidente del Consiglio dei Ministri* proves to have less power than some of his counterparts. The head of government cannot order nor request the dissolution of Parliament or dismiss ministers. He must receive in fact the approval from the Council of Ministers to execute most political activities.

The President of the Republic is elected by Parliament in joint session. Any citizen who is at least fifty years of age and enjoys civil and political rights can be elected President of the Republic. The duration of the President's office term is seven years. Three delegates from every Region elected by the Regional Council shall participate in the election¹²⁷ in order to ensure that minorities are represented. The President of the Republic is the Head of the State and represents national unity. He may send messages to Parliament.

The President will: – authorise the introduction to Parliament of bills initiated by the Government; – promulgate laws and issue decrees having the force of law, and regulations; – call a general referendum in the cases provided for by the Constitution; – appoint State officials in the cases provided for by the law; – accredit and receive diplomatic representatives, and ratify international treaties which have, where required, been authorised by Parliament. The President is the commander-in-chief of the armed forces and as such he shall preside over the Supreme Council of Defence established by law and shall make declarations of war as they have been agreed by Parliament. The President presides over the High Council of the Judiciary and may grant pardons or commute punishments. The President shall

¹²⁵ The President of the Council ensures the coherence of political and administrative policies, by promoting and coordinating the activity of the Ministers. The Ministers are collectively responsible for the acts of the Council of Ministers and they are individually responsible for the acts of their own ministries. The law establishes the organization of the Presidency of the Council, as well as the number, competence and organisation of the ministries. The President of the Council of Ministers and the Ministers are subject to normal justice for crimes committed in the exercise of their duties, even if they resign from office, provided authorisation is given by the Senate of the Republic or the Chamber of Deputies, in accordance with the norms established by Constitutional Law. Bills can be introduced by the Government, but they need to be approved by Parliament.

¹²⁶ For instance, Germany.

¹²⁷ The Valle d'Aosta region has one delegate only.

confer the honorary distinctions of the Republic. Due to his representative role, the President of the Republic is not responsible for the actions performed in the exercise of presidential duties, except in the case of high treason or violation of the Constitution.

The Italian Regions and the Administrative system

The Constitution recognises and promotes local autonomies, and implements the fullest measure of administrative decentralization in those services which depend on the State (art. 5). Thus, the Italian Republic is composed of Municipalities, Provinces, Metropolitan Cities, Regions and the State.¹²⁸ Municipalities, provinces, metropolitan cities and regions are autonomous entities having their own statutes, powers and functions in accordance with the principles laid down in the Constitution. Italy is administratively subdivided into 20 Regions, five of which have special autonomous status due to their geographical and historical development.¹²⁹ The country is further divided into 110 provinces, 8,100 municipalities¹³⁰ and since 2009 in 15 metropolitan cities, even though these are not yet operative.

The governing bodies of each Region are: the Regional Council, the Regional Executive and its President. The Regional Council shall exercise the legislative powers attributed to the Region as well as all other functions conferred by the Constitution and the law, including submitting bills to Parliament. The Regional Executive is the executive body of the Region. The President of the Executive has the task of representing the Region. Among his duties he is responsible for directing the policymaking of the Executive, he promulgates laws and regional statutes and directs the administrative functions delegated to the Region by the State in conformity with the instructions of the Government of the Republic. The Government may question the constitutional legitimacy of a regional law before the Constitutional Court when it deems that the regional law exceeds the competence of the Region. The same applies for Regions.

It is necessary to point out that Italian regions have important legislative power in many legal sectors. A significant reform of Title V of the Constitution was introduced in 2001, dividing legislative powers between the State and the Regions. The Parliament holds exclusive legislative powers in specified matters,¹³¹ while

¹²⁸ We should stress that the Parliament is now discussing a significant reform of local autonomies, with the cancellation of the Provinces.

¹²⁹ According to art. 116, these are Friuli-Venezia Giulia, Sardinia, Sicily, Trentino-Alto Adige/Südtirol and Valle d'Aosta/Vallée d'Aoste. These have special forms and conditions of autonomy pursuant to the special statutes adopted by constitutional law.

The Trentino-Alto Adige/Südtirol Region is composed of the autonomous provinces of Trent and Bolzano.

¹³⁰ Rome is the capital of the Republic.

¹³¹ The Parliament has exclusive legislative powers in the following matters: a) foreign policy and international relations of the State; relations between the State and the European Union; right of asylum

other matters are covered in the so called 'concurrent legislation'; thus, Regions hold legislative power except in the case of certain fundamental principles which are reserved for State law in many significant matters.¹³² In addition, Regions have residual legislative power in all matters that are not expressly covered by State legislation and they are also expressly empowered to contrast gender discrimination by art. 117 Cost. The State is competent in the "determination of the basic standards of welfare related to those civil and social rights that must be guaranteed in the entire national territory," but the power balance between the State and the Regions in such matters remains somewhat unclear.

Administrative functions are attributed to the Municipalities, unless they are attributed to the provinces, metropolitan cities, regions or the State, pursuant to the principles of subsidiarity, differentiation and proportionality in order to ensure their uniform implementation (art. 118). Municipalities, provinces and metropolitan cities carry out administrative functions of their own as well as all other functions assigned to them by State or by regional legislation, according to their respective competences.

The Constitutional Court

In the Italian system, the Constitutional Court¹³³ has four main tasks. First, it shall pass judgment on controversies on the constitutional legitimacy of laws and

and legal status of non EU citizens; b) immigration; c) relations between the Republic and religious denominations; d) defense and armed forces; State security; weaponry, ammunition and explosives; e) currency, savings protection and financial markets; competition protection; foreign exchange system; state taxation and accounting systems; equalization of financial resources; f) state bodies and relevant electoral laws; state referenda; elections to the European Parliament; g) legal and administrative organization of the State and of national public agencies; h) public order and security, with the exception of local administrative police; i) citizenship, civil status and register offices; l) jurisdiction and procedural law; civil and criminal law; administrative judicial system; m) determination of the basic level of benefits relating to civil and social entitlements to be guaranteed throughout the national territory; n) general provisions on education; o) social security; p) electoral legislation, governing bodies and fundamental functions of the Municipalities, Provinces and Metropolitan Cities; q) customs, protection of national borders and international prophylaxis; r) weights and measures; standard time; statistical and computerised coordination of data of state, regional and local administrations; intellectual property; s) environmental protection, the ecosystem and cultural heritage.

¹³² Concurring legislation applies to the following subject matters: international and EU relations of the Regions; foreign trade; job protection and safety; education, subject to the autonomy of educational institutions and with the exception of vocational education and training; professions; scientific and technological research and innovation support for productive sectors; health protection; nutrition; sports; disaster relief; land-use planning; civil ports and airports; large transport and navigation networks; communications; national production, energy transportation and distribution; complementary and supplementary social security; harmonization of public accounts and co-ordination of public finance and taxation system; enhancement of cultural and environmental properties, including promotion and organization of cultural activities; savings banks, rural banks, regional credit institutions; regional land and agricultural credit institutions.

¹³³ *Consulta* is the term often used to refer to the Constitutional Court, and is taken from the name of the Court's official residence at *Palazzo della Consulta* in *Piazza del Quirinale* in Rome.

enactments having force of law issued by the State and Regions;¹³⁴ second, it resolves conflicts arising from allocation of powers of the State and those powers allocated to State and Regions, and between Regions;¹³⁵ third, it charges brought against the President of the Republic in the cases in which the Parliament, in ordinary session, decides to prosecute him for high treason and attempt to the Constitution;¹³⁶ finally, it is also called to evaluate the admissibility of the requests to the abrogative referendums.¹³⁷

The Constitutional Court is composed of fifteen judges who are appointed for nine years. One third of them are nominated by the President of the Republic, one third are elected by Parliament in joint sitting and one third are elected by the ordinary Supreme and administrative Supreme Courts (Cassation Court, State Council and Audit Court).¹³⁸

The judiciary and the civil justice system

Justice is administered in the name of the people. Judges are only subject to the law. Because the Italian judicial system is based on Civil law, within the framework of late Roman law, and not Common Law, its core principles are entirely codified into a normative system which serves as the primary source of law. This means that judicial decisions by the Supreme Court, as well as all those of lower courts, are binding within the frame of reference of each individual case submitted but do not constitute the base for judicial precedent for other future cases.

It is worth noting that, while in civil law jurisdictions the doctrine of *stare decisis* (precedent) does not apply, however on a more practical level the decisions of the supreme court usually provide a very robust reference point of constant jurisprudence. Judiciary is a branch that is autonomous and independent from all other powers. Jurisdiction is implemented through due process regulated by law. All court trials are conducted with adversary proceedings and the parties are entitled to equal conditions before an impartial judge in third party position. The law guarantees the reasonable duration of trials.

¹³⁴ When the Court declares the constitutional illegitimacy of a law or enactment having force of law, the law ceases to have effect the day following the publication of the decision.

¹³⁵ It is essentially a mean to safeguard or maintain intact the spheres of competence that the Court itself attributes to the different Boards and to the different organs that contribute to the exercise of the public power.

¹³⁶ See, art. 134 of the Constitution.

¹³⁷ See art. n° 2 of the constitutional law n° 1 of 1953. This means that it verifies if the laws of which the abrogation is requested can be abridged through a referendum as it is laid out in the art. 75 of the Constitution or if the requests are structurally adequate to allow a free and aware abrogation, and without damaging other formal or substantial constitutional values.

¹³⁸ The President of the Constitutional Court is chosen from the Court itself between its own members and the assignment is three years long.

The judicial safeguarding of rights and legitimate interests before the bodies of ordinary or administrative justice is always permitted against acts of public administration. Such judicial protection may not be excluded or limited to particular kinds of appeal or for particular categories of acts. The law determines which judicial bodies are empowered to annul acts of public administration in the cases and with the consequences provided for by the law itself.

A socio-political overview

Following the coming into force of the Constitution (1948), the political scope of the country manifested a recurring fear of a possible communist takeover that proved crucial for Christian democrats, who ruled the country until the early 1990s. It is then that the Judiciary uncovered an extensive corruption system known as “*Tangentopoli*.”¹³⁹ that involved all major parties. From the 1990s to the late 2000s, the political power was held alternatively by the centre-right and the centre-left, often with a very small parliamentary majority.

In the general elections in April 2013 none of the three major parties (*Partito Democratico*, *Forza Italia* and *Movimento Cinque Stelle*) was able to hold an absolute majority of seats in both Chambers at the polls, causing the birth of a coalition government determined by continuing tensions between the parties involved.

Another matter that requires attention is the role played by the Catholic Church in Italy. The Papacy controlled, up until 1870, a major portion of Italy’s land. Today however, the Papal State extends no further than the borders of Vatican City in the heart of Rome, even though it does still own extensive real estate properties throughout the whole peninsula. On paper,¹⁴⁰ Italy has no official state religion, but in reality and everyday life the Catholic Church has a strong influence on Italian lifestyle and lawmakers, especially when it comes to the issue of ethics. The politics of Italy seem to be intertwined with the teachings preached by the Roman Catholic Church and the policies of the Vatican. Even though the Catholic Church tends to keep politically rather silent on non-ethical issues, it makes its opinion loud and clear. If the Vatican considers an aspect of the Italian government’s policies disagreeable, it will make its stance be considered pretty seriously by friendly Italian politicians who will rush to block any bill which is deemed to go against the Church’s teachings (Beretta, 2006; Mugnaini, 2003).

¹³⁹ This term means “kick back city” and was coined to describe an investigation into a series of episodes involving corruption; then, it was extended to mean the whole system of illegal financing by the government parties which was uncovered in a famous inquiry in 1992-93.

¹⁴⁰ See art. 8, which also states that denominations other than Catholicism have the right to self-organization according to their own statutes, provided these do not conflict with Italian law. Their relations with the State are regulated by law, based on agreements with their respective representatives. Concerning the Catholic Church, art. 7 states that the State and the Catholic Church are independent and sovereign, each within its own sphere. Their relations are regulated by the Lateran Agreements.

Last but not least, religion classes in Italian public schools still reflect the teachings of the Catholic Church and teachers are still appointed by the local bishop.

Section Two: Legal Protection of LGBT People

General protection against discrimination is a fundamental concern of the Italian Republic. Equal treatment is granted to all citizens, who shall be able to enjoy the same rights irrespective of any personal condition. Article 3 of the Constitution states in fact that all citizens “have equal social status and are equal before the law, without distinction of sex, race, language, religion, political opinion, and personal or social conditions” (the so called principle of formal equality).

Furthermore, the second section of article 3 of the Italian Constitution states: “It is the duty of the Republic to remove those economic and social obstacles which, limiting in fact the freedom and equality among citizens, hinder the full development of any human person and the integration of all workers in the political, economic, and social organization of the country” (the so called “principle of substantive equality”). However, contrarily to several foreign Constitutions,¹⁴¹ grounds for discrimination such as sexual orientation and gender identity are not expressly mentioned. Nevertheless, sexual orientation is dealt with in article 19 of the Treaty on the Functioning of the European Union (TFEU).

Nevertheless the absence of sexual orientation and gender identity in the Constitution does not mean that sexual orientation and gender identity are not protected from discrimination. In particular, article 3 is interpreted as including an open formula. Therefore, sexual orientation may be well included in the ‘personal condition’ protected by article 3. In addition, as part of the literature shows, the notion of sex in article 3 has been interpreted as including not only biological sex, but also gender as social construction and sexual orientation. In fact, scholars have provided an extensive interpretation of the notion of sex, in order to include not only gender identity but also sexual orientation. The interpretation follows the direct link between sex as a biological character, gender as its social construction and sexual orientation as the expression of an individual’s sexual preferences (Pollicino, 2005; Montalti, 2007; Pezzini, 2012).

Sexual Orientation

Italy introduced the first national legal statute prohibiting discrimination on sexual orientation with the legislative decree 216 of 2003, implementing the so called EU Framework Directive in the field of labour (2000/78) (Fabeni & Toniollo, 2005). The transposition of Directive 2000/78 presented particular challenges for the lawmaker because Italy did not have any existing general legislation protecting sexual orientation from discrimination.

¹⁴¹ See the Constitution of South Africa (1996), Figi Islands (1997), Ecuador (1998).

As a consequence, the implementation of the Directive operated by simply extending to sexual orientation the exceptions to equal treatment provided by the Directive in cases of discrimination based on disability. For these reasons, Italy suffered an infringement procedure¹⁴² and was requested to amend the original implementing law. Generally speaking, the Decree 216 of 2003 now reproduces several aspects of the Directive. The Decree states that the principle of equal treatment implies that no discrimination is admitted against persons on the ground of sexual orientation and introduces the definitions of direct¹⁴³ and indirect discrimination.¹⁴⁴ The Decree provides the possibility of collective action and gives powers to the court to order the adoption of a plan for the removal of discrimination and harassment.¹⁴⁵ According to the EU definitions, while direct discrimination requires a direct and immediate link with sexual orientation, the definition of indirect discrimination is designed so as to include those cases which at first sight appear neutral, but with a stronger impact according to a specific sexual orientation.

The first court decision based on the antidiscrimination framework of Decree 216/2003, was delivered in 2014¹⁴⁶ following a court proceeding against a famous Italian lawyer who declared to a radio that he would never employ a homosexual lawyer, because “they dress differently, they speak differently” and because “I do not like them at all.” The legal action was filed by *Avvocatura per i Diritti LGBTI*. The Tribunal of Bergamo first and the Court of Appeal of Bergamo later considered the behaviour of the lawyer offensive, as a typical case of hypothetical or potential discrimination and ordered the defendant to pay compensation and judicial expenses.

Same-sex unions in Italy are not legally recognised. Social and political debate has mainly considered whether the Italian Constitution designs the concept of family as based on marriage between a man and a woman. Article 29 of the Constitution states that “the State recognises the rights of the family as a natural society founded on marriage.” It is the use of word “natural” that conservative commentators have claimed to symbolise a natural ‘reality’ and to express the “natural society” composed by a man and a woman aiming at procreating (Dal

¹⁴² The infringement procedure was also against Czech Republic, Estonia, Ireland, Greece, France, Hungary, Malta, the Netherlands, Finland and Sweden.

¹⁴³ Direct discrimination occurs when, for reasons connected to sexual orientation, a person is treated less favorably than another person in a similar situation.

¹⁴⁴ Indirect discrimination occurs when a provision, a practice, an act, a behavior apparently neutral put a person in a position of disadvantage in comparison with other people (“*an apparently neutral provision, criterion or practice would put persons having a particular sexual orientation at a particular disadvantage compared with other persons unless it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary*”).

¹⁴⁵ Harassment, which can be considered as discrimination, is an unwanted behaviour, perpetuated for reasons related to sexual orientation, which infringe upon dignity and liberty of a person because of his sexual orientation, or create an environment of threat, humiliation and hostility in its respect.

¹⁴⁶ Tribunal of Bergamo, ordinance 6.8.2014; Court of Appeal of Brescia, sentence of 23.1.2015.

Canto, 2010). It is clear how same-sex couples fail to match this idea of family and marriage.

The Italian Constitutional Court was called to decide whether the interpretation of articles 93, 96, 98, 107, 108, 143, 143-bis, and 156-bis of the Civil Code (which all include the words 'husband' and 'wife') in a manner that did not allow same-sex couples to marry, represented a violation of articles 2, 3, 29, and 117 (section 1) of the Italian Constitution. The Constitutional Court¹⁴⁷ embraced a conservative idea of marriage and declared that marriage is the union of a man and a woman. At the same time, the Court considered that single specific rights can be granted to same-sex partners, according to article 2 of the Constitution, and called on the Parliament to regulate same-sex unions in Italy. Article 2 specifically grants protection to individuals in social groups, including residence permit to non EU partner of and Italian citizen.¹⁴⁸

At the moment of writing, the Italian legislator has not enacted any reform aiming at legally recognise same-sex unions.¹⁴⁹ Consequently, Italy does not grant any explicit protection or rights to same-sex couples. Scholars wonder whether the lack of any legal/formal recognition and the lawmaker's inactivity could be considered a violation of constitutional rights and freedoms. The lack of legal recognition means in fact that judges all over Italy are obliged to tackle the problem first-hand and with different results.¹⁵⁰

However, some grass-root initiatives have flourished recently. In particular, some municipalities have created registers for same-sex relationships. The

¹⁴⁷ Italian Constitutional court 138/2010 (Pezzini & Lorenzetti 2011; Moscati 2014, 109-115) and 170/2014.

In the decision 138/2010, the Constitutional Court was called to review the constitutionality of those norms of the Civil Code which regulate marriage and family. The facts developed as follows. From 2007 several same-sex couples requested to give notice of their intended marriage to the town hall. The register officers in the town halls refused to allow the publication and the couples filed lawsuits challenging the refusals. Between April and December 2009, the Tribunal of Venice, the Tribunal of Ferrara, the Court of Appeal of Trento, and the Court of Appeal of Florence welcomed the petitions submitted by the same-sex couple petitioners and decided to refer the issue to the Constitutional Court. The Constitutional Court concluded "The Parliament, exercising its full discretion, has to specify the ways in which same-sex unions will be recognised and protected. The Constitutional Court will retain its authority to rule on the protection of specific rights [...] article 29 clearly refers to the notion of marriage as defined in the Civil Code, which establishes that spouses must be of opposite sex [...] same-sex unions cannot be considered similar to marriage."

In the decision, 170/2014, as this Chapter shows further, the Constitutional Court has reiterated its interpretation of marriage as only union of a man and a woman.

¹⁴⁸ Tribunal of Reggio Emilia, 13.2.2012; Tribunal of Pescara of 15.1.2013.

¹⁴⁹ A legislative proposal -called Cirinna' for the name of the MP who has presented it - proposes legal recognition if same-sex unions extending several of the rights different-sex married partners are entitled to. However, right to adoption, parenting rights and inheritance rights remain outside the scope of the proposed law.

¹⁵⁰ Italian Supreme Court, Cass. 4184/2012 (Torino 2013; Pezzini 2013) and 2400/2015 can be considered as the effect of the intense judicial activism. All sentences are available at www.articolo29.it.

registration of same-sex couples in the registers does not grant rights to same-sex partners, but it plays an important symbolic role. Furthermore, there have been attempts aiming at recording same-sex marriages registered abroad into the Italian registers of civil status. Case law shows that when courts have approached cases about the validity of such registration and the nature of same-sex marriage, for a long while courts have considered same-sex marriage as not existent.¹⁵¹ Later, same-sex marriage has been interpreted as contrary to public order and therefore as being null and void.¹⁵² In 2012, the Supreme Court overruled this position and stated that a foreign same-sex marriage although cannot produce any legal effect under Italian legal framework,¹⁵³ is nevertheless to be considered as existent and valid.

More recently, Majors in several municipalities (including Rome) have registered foreign same-sex marriages into the Italian registers. This initiative has fuelled a debate and court proceedings involving Majors, same-sex couples, Prefects, the Ministry of Internal Affairs, civil and administrative courts. The Ministry of Internal Affairs has approved a Circular ordering Prefects to annul the registrations, Majors to stop the registration and public officers to cancel the registration of all same-sex marriages. When lawsuits have been filed, courts in some cases have confirmed that the annulment, ordered by the Ministry, was valid. In other cases, however, courts have declared the annulment as invalid because only civil courts (and not the Prefects or public officers) might withdraw a civil registration. Only one Court has declared the registration to be correct.¹⁵⁴

As far as parenting rights to same-sex couples are concerned, Italy does not allow adoption and IVF techniques¹⁵⁵ for same-sex couples, while it does allow for opposite-sex *de facto* couples.¹⁵⁶ Some courts have recently granted stepparent adoption to same-sex partners.¹⁵⁷ The Court of Appeal of Turin, in 2014, has ordered the inclusion on the birth certificate of both parents even if the child was conceived through in-vitro fertilisation techniques.¹⁵⁸

Gender Identity

Italy introduced regulation on sex reassignment surgery and recognition of gender reassignment in identity documents in 1982.¹⁵⁹ The procedure to change sex on

¹⁵¹ Tribunal of Latina, 31.5.2005, *FD*, 2005, 4, 411 (See Moscati 2014, 115 ff); Tribunal of Treviso, 19.5.2010, *Banca dati De Jure*, 2010.

¹⁵² Court of Appeal of Rome, decree 10.6.2005, *FD*, 2007, 166.

¹⁵³ Court of Cassation: Cass. civ., sez. I, 12.3.2012, n. 4184, *www.personaedanno.it*.

¹⁵⁴ Tribunal of Grosseto, 3.4.2004 and 17.2.2015.

¹⁵⁵ I.e. *In vitro* fertilization techniques.

¹⁵⁶ Law no. 40 of 2004, which states Provisions on assisted procreation.

¹⁵⁷ Juvenile Court of Rome, sentence of 30.7.2014.

¹⁵⁸ Court of Appeal of Torino, family section, decree 29.10.2014. On the issues concerning same-sex parenting in Italy, see Schuster 2011.

¹⁵⁹ Law 164 of 1982 which states Provisions on sex recognition reassignment.

the registration certificate is composed both by legal statutes and clinical medical practice (Lorenzetti, 2013). If a person wishes to undergo gender reassignment several steps should be followed.

National medical standards impose that a person diagnosed with gender identity disorder will be under the care of a psychologist, psychiatrist and medical professionals. Medical protocols require a person, who wishes to undergo gender reassignment, to attend preliminary psychological assessment in order to enter the programme for gender reassignment and begin hormonal treatments.

After few months and further positive assessments, the person is admitted to the so called *real life test* (or cross living) where he/she is asked to live as a person of the opposite sex. If cross living is successful for at least 8 months/one year, the transgender person can seek gender reassignment surgery. Thus, the person may enter into the first judicial phase seeking authorisation to undergo surgical treatment.

The procedure needs to be undertaken at a public health facility because sex reassignment surgery is financially covered by the National Public Health System.¹⁶⁰ After the gender reassignment surgery, the person can start the second judicial phase aimed at obtaining a new official name and new documents in the new gender. The court evaluates that a '*complete*' sex change occurred,¹⁶¹ and only then the court will authorise the change of the name and on official documents. After gender reassignment surgery, the person can change name and gender in official documents and will be granted all the rights according to his/her new gender. For instance, the person will be able to marry someone of the opposite gender to that of the acquired sex (and adopt children as well).

Law 164/82 does not expressly require a complete body change as necessary condition for gender reassignment.¹⁶² However, case law shows the opposite.¹⁶³ Judges often before granting an official new name and sex change, require that the person who asks for gender reassignment should be permanently sterilised - even when the transgender person is not will to do so. The compulsory nature of surgery on primary sex characters may well represent a violation of fundamental rights - indeed the Tribunal of Trento has submitted a request for constitutional scrutiny of

This was amended in 2011 (with the legislative decree no. 150 of 2011) hence going against the declared goal of simplifying the procedure. Now the procedure to change sex is longer and more expensive, since it asks for a double judicial procedure.

¹⁶⁰ The surgeries are not included in the emergency care and therefore the waiting list can often be as long as two years.

¹⁶¹ Usually, with the complete change of primary and secondary sex characters and with sterilisation.

¹⁶² In fact the law provides that surgery must be authorised *when [so, if] necessary* (art. 3, former law 164/1982, now, art. 31, Legislative decree 131/2011).

¹⁶³ Court of Appeal Bologna, 22.2.2013; Tribunal of Rome, 8.7.2014, n. 34.525; Tribunal of Vercelli, 12.12.2014, n. 159; Tribunal Catanzaro, 30.4.2014. *Contra* see Tribunal of Rovereto, 3.5.2013. The decisions are available at www.articolo29.it.

the norms of Law 164/82 to the Constitutional Court and the decision is pending at the time of the writing of this Chapter.¹⁶⁴

The Constitutional Court in the decision, 170/2014 scrutinised the norms of Law 14 April 1982. no. 164 (articles 2 and 4) which provide compulsory divorce when one of the heterosexual married partners has undergone gender reassignment surgery. Such norms aim to avoid, in practice, a same-sex marriage.

The lawsuit was filed by a transsexual woman, who before sex reassignment entered into marriage with a woman. After the gender reassignment surgery the couple was still together and did not plan to divorce. Because the legal framework considers marriage solely as the union between a man and a woman, the marriage was considered invalid and the spouses divorced against their will.¹⁶⁵

The Constitutional Court noted that the norms under scrutiny do not violate the right to marriage as enshrined in article 29 of the Constitution. Indeed, the Court emphasised that the ECHR does not require member states to recognise same-sex marriages, and that the Italian state has an interest in maintaining the heterosexual nature of marriage. Nevertheless, the Court held that the exercise of the right of sexual determination should not be excessively penalised by the complete sacrifice of the protective legal framework provided by marriage. Therefore, the Court found the contested provisions in violation of article 2 of the Constitution and that same-sex unions should be legally framed.

The Court added that if the partners in a marriage wish to continue their relationship after one of them has undergone gender reassignment, the Italian legislator has to enact an appropriate legislation to grant protection to such relationship - called by the Court *registered cohabitation* and which is a relationship other than heterosexual marriage.¹⁶⁶ However, the Italian legislator is still *dragging its feet*.

Contrasting/ Fighting Homophobia and Transphobia

At the moment of writing, Italy does not have a law contrasting homo- and transphobia. Italy currently prohibits and punishes instigation to discrimination and violence based on racial, ethnic, national or religious grounds.¹⁶⁷ Homophobic intent has sometimes been considered an aggravating circumstance in criminal offences. In 2009 the Chamber of Deputies failed to approve a proposal tackling homophobic hate crimes. Some MPs claimed the law would infringe upon the

¹⁶⁴ Tribunal Trento, ordinance 19.8.2014.

¹⁶⁵ Tribunal of Modena, decree 27.10.2010; Tribunal of Modena, 26.5.2011; Court of Appeal Bologna, decree 18.5.2011.

¹⁶⁶ Italian constitutional court, decision 170 of 2014.

¹⁶⁷ So called, Law Mancino-Reale, 13.10.1975, n. 654 and Law-decree 26.4.1993, n. 122, implemented with amendments in Law 25.6.1993, n. 205.

principle of equality, creating a more extensive protection from homophobia than the one provided for other grounds.¹⁶⁸

The Regional Framework

With regard to sub-national level of legislation, we have to stress the possible relevance of rules issued by regions, that have increasing important law-making powers in Italy. Some regions have enacted specific legal statutes aiming at contrasting discrimination based on sexual orientation and gender identity. For instance, in 2004 the Region of Tuscany first enacted a regional law prohibiting discrimination on the ground of sexual orientation and gender identity¹⁶⁹ in regard to employment, education, public services and housing. Other regions such as Marche, Liguria and Emilia-Romagna have taken similar steps by recently enacting specific laws concerning protection from discrimination based on sexual orientation and gender identity.¹⁷⁰ As a result, a considerable number of regional statutes have been modified during the last five years, so that they expressly refer to sexual orientation and gender identity.

Section Three: Developments of Mediation in Italy

Introduction

Even though in past decades mediation has been institutionalised as one of the alternative dispute resolution mechanisms in many countries around the world, in Italy it remains largely underdeveloped. For this reason, it is not recognised as praxis in resolving disputes neither by legal professionals, such as lawyers, nor by common citizens.

Mediation in Italy is only partially regulated and it is fragmented in several specific categories and fields, depending on the type of dispute (civil mediation, commercial mediation, criminal mediation,¹⁷¹ family mediation, etc.). Moreover, while mediation has been considered in literature as an important process because of the principles of voluntariness, transparency and mutual respect, the Italian lawmaker has always considered it only as a way to reduce the high number of court proceedings¹⁷² hence improving the chronic delays of the civil justice system.

¹⁶⁸ Chamber/Parliament Act number A.C. 245 (MP: Scalfarotto, Zan, Tinagli, Chimienti (together with law proposal no. C. 245, C. 280, C. 1071). The proposal has not been approved in the current legislature.

¹⁶⁹ Law issued by the Region of Tuscany, on 15.11.2004, NBo. 63, Rules against discrimination on the grounds of sexual orientation and gender identity.

¹⁷⁰ Marche Regional Law, 11.2.2010, n. 8; Liguria Regional Law 10.11.2009, n. 52.

¹⁷¹ In the Italian context, mediation is implemented in the field of criminal law, and especially in juvenile criminal law, in the so called "justice of peace" (the justice for minor cases), as well as in penitentiary regulation. The context is the one called "Restorative Justice".

¹⁷² The studies refer to 5 million of pending civil disputes; the average duration is almost six years and for 2/3 the value is minor than 3.000 Euro. See Cosi and Romualdi, 2012, 3.

The introduction of mediation in the Italian framework is quite new, dating back to the early 2000s, with a turning point in 2010, when the Government approved a new framework law that regulates the civil process,¹⁷³ implementing the EU Directive number 52/2008 and CEPEJ indications.¹⁷⁴

A recent law has introduced the assisted negotiation (*negoziiazione assistita*)¹⁷⁵ by which the parties in a dispute negotiate with the assistance of their respective lawyers. Assisted negotiation is compulsory in some kind of disputes¹⁷⁶ established by the law and it was introduced with the purpose of unburdening a collapsing civil justice system.¹⁷⁷ It can also be voluntary when it refers to available rights,¹⁷⁸ and is provided for the resolution of family disputes.¹⁷⁹

In order better analyse developments of civil and commercial mediation in Italy, some clarification on the terminology used by the Italian legislation is needed.

As a known leading expert of the field suggested during an interview with the authors of this Chapter, the mediation procedure was more commonly known in the courtroom as “*conciliazione*” (conciliation). *Mediazione* (mediation) traditionally had a different meaning, closer to brokerage and/or to family law.¹⁸⁰ Conciliation was also used in family law procedure. In particular during separation proceedings, the judge attempts conciliation before beginning the divorce procedure.

After the new legislation¹⁸¹ came into force, the word *mediazione* was included in the legal framework, as the Italian Parliament adopted the same word used in the

¹⁷³ See the Law no. 69, June, 18th, 2009, introducing norms on economic development, public simplification, competitiveness and on civil trial matter, and the related Decrees: Legislative Decree number 28, March, 4th, 2010 implementing article 60 of Law 69/2009, Ministerial Decree number 180, October, 18th, 2010 introducing criteria and procedures to enroll in Ministry of Justice Registers and to manage Organisms’ registers including payment rules for mediators and Ministerial Decree number 145, July, 6th, 2011, changing Ministerial Decree number 180, October, 18th, 2010 about criteria and procedures to enroll in Ministry of Justice Registers, introducing the List of professional mediation trainers including payment rules for mediators.

¹⁷⁴ European Commission for effective Justice administration.

¹⁷⁵ Law n. 162 of 2014 (converting the decree 132 of 2014). The assisted negotiation includes an agreement (called “*convenzione di negoziazione*”, i.e. negotiation agreement) which states that parties will cooperate to solve the dispute, with a lawyer’s assistance. The agreement needs a written form.

¹⁷⁶ See article 3, Law 162/2014. The assisted negotiation is compulsory for the recovery of damages caused by: motor vehicles and watercrafts or for other actions under 50,000 euro and which are not included in the compulsory mediation.

¹⁷⁷ This results from the title which refers to “Urgent measures for the de-jurisidification and other measures for the deflation of the delay in civil process” (in Italian: *Misure urgenti di degiurisdizionalizzazione e altri interventi per la definizione dell’arretrato in materia di processo civile*).

¹⁷⁸ The dispute on labour law are excluded.

¹⁷⁹ See article 6, Law 162/2014. These refer to personal consensual separation, divorce, dissolution of marriage, and to modify the condition of divorce and separation.

¹⁸⁰ This results from the interviews with lawyers.

¹⁸¹ Legislative Decree 28 of 2010.

Italian official text of the EU Directive 2008/52 regarding civil and commercial issues. In the Italian law, mediation is described as a procedure whereby a professional devoted to solve the dispute of two or more parties – the mediator – works to find an alternative solution to civil and commercial disputes.¹⁸²

The mediator should try to help the parties to find a mutual and satisfactory solution in their disputes, and avoid the recourse to court. In addition, the mediator must respect the duty of confidentiality and may not be called as witness on the information learnt during the mediation (including the mediation itself among the parties).

The term *conciliation* is on the contrary used to define the agreement reached by the parties.¹⁸³ The same word *conciliation* is now applied on endo-judicial,¹⁸⁴ labour,¹⁸⁵ and consumer disputes.¹⁸⁶ Nevertheless, the two terms *mediation* and *conciliation* tend to be used as synonyms even by legal professionals.

In the Italian legal system, civil and commercial mediation can be exercised in three different patterns. The recourse to mediation imposed by legal statute, disposed by a judge or discretionary/voluntary. The Constitutional Court,¹⁸⁷ has declared *compulsory mediation* as *duty to settle* as being unconstitutional. In the amended law, the word *compulsory* does not mean that the parties must settle, but rather that parties have to make an attempt to mediate before bringing the case to court - the recourse to mediation is compulsory, coming to an agreement is not! For this reason, it is called *ante causam* (i.e. pre-trial) mediation.

In these regards, recourse to mediation is compulsory when the dispute refers to neighbour conflicts (*condominio*); real and personal property; distribution of goods (*divisione*), inheritance and succession; family agreements and family-owned business; bailment; business leases/leasing, loan; leasing of companies (*affitto di aziende*); recovery of damages caused by: motor vehicles and watercrafts, medical responsibility for medical malpractice, libel and slander; defamation by the press or by other means of publicity; trusts and estates; bank, insurance and financial agreements. For other fields that are not directly covered, the lawmaker has tried

¹⁸² Legislative Decree 28 of 2010.

¹⁸³ After the Legislative Decree 28 of 2010, the term conciliation means positive result of the civil mediation.

¹⁸⁴ Article 5 of the Legislative Decree 28 of 2010.

¹⁸⁵ See art. 11, Legislative Decree 124 of 2004; arts. 410 ff of Civil procedural code.

¹⁸⁶ See Legislative Decree 5 of 2003.

¹⁸⁷ With the decision 272 of December, 6th, 2012.

The lawsuit was initiated by the Unitary Bar Association (i.e., *Organismo Unitario dell'avvocatura italiana*), based on the alleged unconstitutionality of the procedure which imposed, for some conflicts, a mandatory mediation process and the non-mandatory assistance of a lawyer for every kind of mediation.

to encourage the use of mediation through some facilities and easier terms,¹⁸⁸ but it remains discretionary.

Mediation can also be ordered by the judge after evaluating the nature of the dispute, the status of the case and the willingness of the parties. If during any stage of the court proceeding, the parties agree to try mediation, the judge refers them to mediation with an accredited mediation provider. The same procedure is followed when for the type of dispute the attempt to mediate is compulsory but the parties involved did not start the mediation.

The Civil and Commercial Mediation Procedure

Lawyers have a duty to inform their clients, in writing, about the availability of mediation as option for the resolution of dispute. In addition, lawyers have to inform the parties regarding the financial incentives that the recourse to mediation offers.¹⁸⁹ If lawyers fail to do so, the power of attorney may be voided. When the name of a mediator is not included in a contract, the parties first select a mediation provider. Thus, the process starts by submitting a request to a mediation provider.

The mediation provider then appoints a mediator and arranges a meeting with the parties within 15 days from the request. The mediation proceeding must be completed within four months from the submission of the request. If one of the parties, without a valid reason, fails to attend a mediation session, this failure may be used against the party in the subsequent trial (if any).

When the parties cannot reach an agreement, the mediator can make a written proposal which the parties are free to accept or decline. Legal consequences might follow declining the proposal of the mediator (for instance, regarding fees shifting in the trial). In addition, both parties can ask the mediator to draft an agreement, and before signing the disputants must receive legal advice.

When the attempt to mediate is included in a contract or required by statute and an attempt to mediate has not been made before filing a case in court, the judge or the arbitrator may set a 15-day deadline for the parties to submit a request for mediation to an accredited mediation provider.

Each of the disputants, or both, are free to send a request for mediation to an independent qualified professional ADR provider accredited by the Ministry of Justice. If the request of the parties is accepted, the ADR Provider will choose an accredited mediator, and will organise an initial meeting between the two disputants. The ADR Provider will communicate the parties information regarding

¹⁸⁸ For instance, the introduction of financial obligations for those who take legal action and tax exemptions for those who resort to mediation.

¹⁸⁹ Incentives include the exemption from court fee and registration of verbal agreement up to a maximum value of 51,646 Euros. In addition, when appropriation compensation is paid, the law provides a tax credit up to 500 Euros (reduced by half, in case of failure of mediation).

date, location and name of the designated mediator. The appointed mediator is asked to have an appropriate conduct during mediation and to mediate with impartiality.

If parties reach an agreement, the mediator will draft the minutes of the meeting. The parties must then sign the minutes, which will be submitted to the court of the district of the chosen ADR Provider. If the president of the court will approve the mediated agreement, this will be registered into an official record and will become a writ of execution, placing a judicial confirmation on the party's assets. In the case no agreement is reached, the mediator is obligated to issue a non-binding proposal of resolution. If the parties will refuse the proposal, then they will be free start court proceedings.

The Mediation Organisms

In Italy, there is a Register of Mediation Organisms, which includes mediatory interventions only for civil and commercial disputes.¹⁹⁰ The Register is supervised and managed by the Ministry of Justice. In particular, together with the Ministry of Economic Development, the Ministry of Justice regulates the Register institution and supervision, as well as the enrolment, suspension or cancellation of recorded organisms.

Mediation can be provided by public or private organisms as long as they are enrolled in a National Register of the Ministry of Justice. Only those mediators who are enrolled in the Register can conduct mediation.

Every person with a three-year university degree may become a mediator after attending a specific mediation training provided by ADR providers enrolled in the Register of Mediation Organisms. A training of 50 hours is compulsory¹⁹¹ to become a mediator. The subjects taught during the training are national, European and international law regarding mediation and conciliation; methodology and procedures on mediation and negotiation; conflicts management and interactive communication; rules on content, effectiveness and efficiency of mediated and conciliation agreements; professional deontology (responsibility and duties of a mediator).

At the end of training, participants have to attend a final exam to become mediators. Mediators have to attend refresher courses every two years and have to participate in at least 20 mediation cases at organisms enrolled in the Ministry Register (Ministerial Decree 145/2011).

One of the main criticisms of recent developments of mediation in Italy¹⁹² is the absence of a general legislative and professional perspective on mediation.

¹⁹⁰ Article number 16, Decree number 180, of 2010

¹⁹¹ Ministerial Decree 180/2010.

¹⁹² This is the result of the European project Mediation Eirene, financed by Civil Justice programme,

According to the above cited procedure, mediators may come from different professional backgrounds, for instance they can be lawyers,¹⁹³ social workers, counsellors or psychotherapists. This presents a great variety of styles and models of mediation.¹⁹⁴

In addition information on mediation¹⁹⁵ and promotional activities are limited and not accurate with the result that they have not had a relevant impact in raising awareness about mediation.

Mediation: statistical data and practical aspects

As shown in a European project - Eirene Project - on civil justice,¹⁹⁶ mediation had some difficulties entering the Italian socio-judicial context,¹⁹⁷ regardless of the geographical area.¹⁹⁸ The same project highlights an increase in the number of disputes¹⁹⁹ but mediation is largely used only when it is compulsory.²⁰⁰ In addition, the study reported an analysis of the Ministry of Justice in which emerges that the number of mediation which ends without settlement is higher than the number of mediation which ends with an agreement.²⁰¹

The average duration of mediation interventions is 65 days when both parts participate and reach an agreement, and 77 days when the parts attend but do not settle. The duration is significantly lower than that of traditional legal proceedings

<http://www.mediation-eirene.eu/mediation-in-europe/italy/?lang=en>, retrieved 23rd March 2015.

¹⁹³ Mediators can also be lawyers. This seems a paradox, given the potential concurring professional practice.

¹⁹⁴ As in other contexts, there is no existing monopoly of expertise on this field.

¹⁹⁵ There are however few interesting initiatives. For instance, *ADRplus.info* developed within the framework of Civil Justice Program 2007-2013 and with the partnership of the Emilia-Romagna region; mediation web sites and non profit organizations. This collaboration contributed to the creation of a slogan and a logo "*I love civil mediation*".

See also ADR Center, at the website: <http://www.adrcenter.com/procedure/international-procedures/mediation-italian-law/>, (retrieved 23rd March 2015).

See "*ADRplus*", <http://www.adrplus.info>, retrieved 23rd March 2015) On the institutional side, on the web site of Ministry of Justice there is a section on mediation; see https://www.giustizia.it/giustizia/it/mg_1_10.wp, (retrieved 23rd March 2015).

See "*Mediaries*" – a magazine with articles describing mediation interventions in different contexts of human interaction – and "*Il Tecnico legale – IlSole24Ore*" – a bi-weekly journal describing rules, praxis and methodologies for Courts technical consultants, mediators and arbitrators. Regarding the legal context, see "*Temi di mediazione*", "*arbitrato e risoluzione alternative alle controversie*", university reviews/periodicals on the issues.

¹⁹⁶ See Eirene Project, <http://www.mediation-eirene.eu>.

¹⁹⁷ In the web site it is stressed that the mediations in the period March 2011-March 2012 were 164.124.

¹⁹⁸ For instance, the three first regions by number of mediations are Lombardy (in the North of Italy, with 16,3%), Campania (in the South, with 15%), and Lazio (Centre, with 9,4%); then Sicily (8,9%) and Emilia-Romagna (8,4%).

¹⁹⁹ These increased from 93.700 in December 2011 euros to 150.639 of July 2012

²⁰⁰ The study in the Eirene Mediation stresses a 80,9 of percentage. Optional mediation was chosen in 16% percentage and 3% percentage of mediation disposed by the Judge.

²⁰¹ The percentage is 64,2%. The percentage of conciliation with an agreement is 46,4%.

which last an average of 1.066 days. In this framework, it is significant to stress the relevance of some good legal practices which made use of Family mediation in civil proceedings before the introduction of the law.²⁰²

With regard to the attention paid by scholars to issues surrounding the study of mediation, only recently there have been a number of specific legal analyses, while in the past two decades research was mostly focused on social sciences and humanities.²⁰³ We could say that the consolidation and the expansion of legal studies reflect the progressive new legal context and a general growing sensibility on the part of legal scholars.²⁰⁴ However, most studies continue to have a psychological approach and represent the translation of famous English language work without any innovative approach focused on the Italian context.²⁰⁵

Family Mediation

Family mediation in Italy differs deeply from civil and commercial mediation. The recourse to mediation for the resolution of family disputes is not compulsory²⁰⁶ and it is left to the judge to decide whether according to the characteristics of the dispute and with the consent of the parties, the recourse to mediation will be suitable and feasible. As a leading expert in the field suggested during an interview with the authors of this Chapter, the decision about the recourse to mediation is very much influenced by the awareness and appreciation the judge has of mediation and other out-of court dispute resolution mechanisms.

In Italy, the family mediator is emerging as new professional figure.²⁰⁷ There are three main national mediation association providers which participated in the research carried out for the developments of this Chapter.²⁰⁸ This associations

²⁰² See Occhiogrosso, 2007, 34 ff; Chiaravallotti and Spadaro, 2012, 229 ff.

²⁰³ See Haynes and Buzzi, 1995; Parkinson, 1995; *inter alia*, see Ardone, 2000; Canevelli and Lucardi, 2000; Guidone, 2006; Barone, 2007; Corsi and Sirignano, 2007; Giannella and others, 2007; Pupilizio 2007; Di Costanzo and Others, 2010; Calò, 2012.

²⁰⁴ Most relevant Italian legal studies on Family Mediation are concentrated in the 2000s. See, *inter alia*, Battaglini and others, 2001; Marzario, 2003; De Filippis and others, 2009; Villanova, 2010; Corradino and Sticchi Damiani, 2011; Rovacchi, 2011; Cagnazzo, 2012; Chiaravallotti and Spadaro, 2012; Chiaravallotti, 2012; Cosi and Romualdi, 2012, Urso, 2012, 2013.

²⁰⁵ See Parkinson, 2013.

²⁰⁶ For the purpose of clarity, we should admit that it is a vague reference to mediation. See Urso, 2012, 2013; Occhiogrosso, 2007, 42. Article number 1, Law number 54, February, 8th, 2006 on joint custody and separation. The reform of article number 155 of Civil Code through Law number 54/2006, focuses on parents separation and provisions on joint custody of children.

²⁰⁷ At the time of writing, the family mediators are not recognised as professionals. In 2006, a proposal aiming at creating the profession of mediator was presented to Parliament but it was not considered (see the Bill, PDL 1193/2006). V. Provetto and Salaris, 2007, 63-75.

²⁰⁸ These are A.I.M.E.F. (Associazione italiana mediatori familiari), Italian association of family Mediators (www.aimef.it); Again parent Association (Associazione GEA, Genitori Ancora, www.associazionegea.it), S.I.Me.F. (Società italiana di Mediatori familiari, www.simef.net), Italian society of Family mediation; A.I.M.S. (Associazione Internazionale Mediatori Sistemici, www.mediacionesistemica.it); A.N.A.M.E.F. (Avvocati Mediatori Familiari, Lawyer, Family Mediators Association, www.anamef.it).

have autonomous register of family mediators, set deontology rules and deliver professional trainings. Although each of these providers uses different style of practice, most mediators interviewed for this Chapter claim to adopt the so-called *transformative style of mediation*,²⁰⁹ based on the values of empowerment and recognition of each of the parties as much as possible and on the belief that any or all aspects of the relationship may be transformed during the mediation.

Family mediation is not used much in Italy, neither by socio-legal professionals, nor by common citizens. This represents a tough obstacle to the development of mediation as a socio-legal tool to resolve family disputes and conflicts.²¹⁰

As this Section explains further, family mediation can be very important for the resolution of disputes between partners of the same-sex in Italy, where same-sex unions are not legally recognised and therefore same-sex partners cannot enjoy all protection law provides in case of separation.

At the same time, it is argued here that family mediation adopted by same-sex partners could present a twofold problem. On the one hand, family mediators might not be completely ready to face the needs of these *new families*.²¹¹ On the other hand LGBT couples face practical consequences of a breakup in a context where relationships other than heterosexual marriage are not legally recognised. The breakup could be particularly problematic when parenting issues arise because in Italy same-sex parenting is not recognised. Therefore unlike opposite-sex couples, same-sex partners have no choice other than to find an agreement because courts will not always recognise parental rights to non-biological parents.

Section Four: Same-Sex Couples and Mediation

As we pointed out in the previous Sections, in the past 15 years the Italian LGBT community has gained an increased legal visibility in civil society and in court, but Parliament has not approved any law granting same-sex couples the marriage rights enjoyed by opposite-sex couples.

Both the Constitutional Court²¹² and the Supreme Court²¹³ have emphasised that Parliament has the power and the duty to regulate same-sex unions, but the legal framework remains underdeveloped.

²⁰⁹ Folger and Bush, 1994.

²¹⁰ However, family mediation is sometimes used in court praxis. See Occhiogrosso, 2007, 31-44. See the results of field work.

²¹¹ In Italy, this expression is often used to define LGBT families.

²¹² With the decision 138/2010.

²¹³ With the decision 4184/2012. The Italian *Corte di Cassazione* is the Supreme Court in the Italian judiciary system. The two essential aims of the Court of Cassation are to ensure that lower courts correctly follow legal procedure and to harmonise the interpretation of laws throughout the judicial system.

In the recent years same-sex couples have filed lawsuits to have their rights recognised in court and have obtained significant results, as shown by the decision no. 138/2010 of the Constitutional Court. However, there are still many reasons suggesting same-sex couples to avoid judicial proceedings and choose, instead, mediation to settle family disputes.

It is a well-known fact that the Italian civil justice system is an extremely slowly moving process characterised by long delays.²¹⁴ These dysfunctions of civil justice system affect both same-sex and different-sex couples, who are bound to face expensive and particularly long-lasting judicial proceedings. Secondly, same-sex partners often create their own parental arrangements, presenting complex legal dynamics unforeseen by the law in force, hence making mediation a useful instrument (sometimes the only one) to solve intra-family disputes between same-sex partners.

Finally, the *non-out* condition of many same-sex partners may conflict with the exposure that a public judicial proceeding entails, while mediation allows participants to prevent more efficiently the public disclosure of their sexual orientation and to settle the disputes in a more private context.²¹⁵ As previously said, the mediator is bound to confidentiality and may not be called to testify in court.

These considerations about the advantages that mediation can offer to same-sex partners do not mirror the data collected during research regarding the actual use of mediation. According to the numbers it is clear that family mediation is surprisingly not pursued or even known by same-sex couples in Italy. Almost all same-sex couples who took part in the survey tend to confuse family mediation with therapy.

This limited recourse to mediation is mainly caused by a general slow growth of developments of mediation in Italy. It must be said that mediation is scarcely known or used by opposite-sex couples as well. In addition, together with the lack of knowledge and the lawyers' failure²¹⁶ to recommend mediation as a solution,

²¹⁴ See for example Nelken 2005.

²¹⁵ The need for privacy emerges from general studies on same-sex couples in Italy. However, a specific analysis on mediation and same-sex couples in relation to the issue of privacy is missing.

²¹⁶ The tension is demonstrated by some circumstances. For instance, a part of the Italian lawyers associations OUA (Unitarian Body of Lawyers) had organised strikes in order to contrast the introduction of mediation. This organism presented an appeal and it was presented to the Constitutional Court based on the alleged unconstitutionality of the procedure which imposed, for some conflicts, a mandatory mediation process and on the non-mandatory assistance of a lawyer for every kind of mediation. The *Consulta* decided for the violation of the Constitution with the decision 272 of December, 6th, 2012.

Against this trend, we have to stress the activity of the National Bar Association which organised and printed a number of conference proceedings on Family Mediation (See Alpa 2004). See also Roberts 2014, 112, 361, for general competition between lawyers and mediators.

another probable reason for the limited use of mediation by same-sex partners is the fear of being criticised by the mediator.

It can be argued that the confusion between mediation and therapy represents one of the main reasons why couples refuse to consider mediation as a suitable option to solve their disputes. It is interesting to observe that, once informed about what family mediation is, the couples interviewed for this research remained sceptical about the process and were particularly afraid of wasting time and money. The confusion between family mediation and therapy is sharpened by the fact that many mediators are professional therapists as well.

The fieldwork highlighted that it is not uncommon for the same professional to play the role of therapist and mediator when dealing with the same couple at different times, and trying to pay attention to the different aims of the two interventions. While therapy attempts to avoid the dissolution of the relationship, mediation works after the dissolution. The fieldwork has shown that notwithstanding this dual role by the mediator/therapist, most couples have not considered it as conflict of interest and instead felt comfortable with being helped by a third party professionally equipped as mediator and therapist.

According to the fieldwork assisted negotiation (*negoziazione assistita*) results to be more popular than mediation among same-sex couples. As previously explained, in Italy assisted negotiation gives disputants the possibility to try to reach an agreement with the assistance of their attorneys.

Unlike mediation, in assisted negotiations there is no third neutral and impartial facilitator, credible to both parties involved, who can guide the partners through settling their dispute, therefore each party consequently tries to defend his/her interest as much as possible. Nevertheless, the greater popularity of assisted negotiation as opposed to mediation, among both same-sex and opposite-sex partners, does not rely on an increasing rate of success of the process.

Couples often do not choose mediation because are not aware of what mediation really is. Most couples look for a lawyer first, who then recommends assisted negotiation. The very same lawyers are those who assist in the negotiation before the longer judicial proceeding.

Nevertheless there are examples of some good practices aiming at encourage the use of mediation. For instance, the Tribunal of Lamezia in the south of Italy and the Bar Council set up a mediation office in 2007 within the Tribunal itself. The service is completely free of charge and can be used by any person who applied for separation and later divorce at the Tribunal of Lamezia (Chiaravallotti e Spadaro, 2012, 231 ff).

A similar service is offered by the Tribunal of Bari, in addition agreement protocols aiming at enhancing mediation have been signed in Milano, Genova, Firenze and Napoli (Occhiogrosso 2007, 31 ff). The first public service offering

family mediation was created in the Emilia Romagna²¹⁷ region in 1994. The 32 centres for family mediation present today in Italy are completely free of charge and they are coordinated by a public body.²¹⁸

The fieldwork conducted for this Chapter has shown that the relationship between lawyers and mediators remains problematic. Only one of the same-sex couples interviewed decided to attempt mediation without contacting a lawyer or a court first. The partners decided to try mediation and bypass lawyers after some friends talked about mediation and its benefits. The couple looked for a mediator by searching on the internet.

In mediation between same-sex partners, the presence of a lawyer is important in particular during the formulation of the agreement. The interviewees reported of just one lawyer who refused to help the parties to formulate the agreement; however the interviewees were not sure on whether the lawyer refused due to prejudice and bias or to the lack of technical knowledge about LGBT issues.

Mediation has been eventually successful for most of the couples interviewed. However some couples found the mediator biased against same-sex couples with children, with the mediator often using demeaning terms such as '*real parent*' or by tacitly asserting the necessity for a child to have both male and female parents. All the couples who took part in the research have shown a preference toward having a homosexual mediator.

One significant concern expressed by the couples was to have a mediator sympathetic with LGBT issues. The couples interviewed found the formal justice system inhospitable and aggressive, and therefore for the future the partners want to make sure that the mediator will fully understand what they have gone through without judgemental approach.²¹⁹

The asserted preference for a homosexual professional has been harshly criticised by the mediators interviewed for this research. The mediators argued that there is no need to be homosexual in order to understand the issues of two same-sex partners. Indeed the mediators added there is no need to be beaten in order to understand what a heterosexual woman feels like when beaten by her husband. In addition the mediators interviewed argued that same-sex couples should not ostracise straight mediators just because their sexual orientation whereas it is more important that mediator is familiar with and sensitive with regard issues that LGBT people face. Nevertheless, all mediators agree to the fact that in order for

²¹⁷ It deals with more or less 1000 requests every year.

²¹⁸ CREDOMEF, Regional Center of documentation on Family mediation (*Centro Regionale di Documentazione sulla Mediazione Familiare*), available at <http://www.credomef.ra.it/>, retrieved 23rd March 2015.

²¹⁹ The fieldwork showed that opposite-sex couples with children are often sceptical dealing with a mediator who does not have children.

the mediation process to be successful, the choice of the professional has to remain personal and the couple must feel comfortable dealing with him/her.

The concern of same-sex couples regarding heterosexual mediators is not completely arbitrary though, because the model of training to become a mediator in Italy does not include a focus on issues surrounding mediation involving LGBT people. Only two mediators interviewed for this research had experienced dispute resolution with same-sex couples. All other mediators interviewed were not aware of the differences between LGBT and different-sex couples, and the differences between gay and lesbian couples which present diverse dynamics after the dissolution of their relationship.

For example, the fieldwork for this study shows that two women tend to continue to live together, even for a long time, after the dissolution of their relationship, while gay partners do not. Medical practices such as egg donation and surrogate motherhood, which build parenting not necessarily on biology, can make the issue of custody after break-up very complicated.

This lack of specific knowledge on LGBT issues may adversely influence the mediation process, especially if the mediator does not use the appropriate language, accidentally demeaning the role of one partner.

Mediators may face challenges when mediating same-sex couples disputes. The same-sex couples interviewed generally considered legal rules, including those governing property, with distrust and scepticism, thus preferring to manage their affairs very unconventionally, making the dissolution more difficult to settle for a mediator.

In addition, some couples who took part in the research were married abroad. As a consequence of this the two partners seem to have higher expectations about the legal consequences of the relationship. Therefore the mediator is called to handle high level of frustration during dissolution.

With regard to the source of family disputes this section focuses first on disputes between opposite-sex partners who break up because of the homosexuality of one of the partners, and secondly on the cases concerning disputes between same-sex partners.

In the first situation, dispute arises in opposite-sex married couples, when one of the two partners learns that the husband or wife is homosexual or bisexual. This usually causes the immediate break up of the couple. During the fieldwork, one couple decided to remain together in a sort of *double-track* relationship. The solution did not work and the partners eventually broke up.

From the fieldwork emerged that the manner in which the heterosexual partner learns about the homosexuality or bisexuality of his/her partner, strongly influences the hostility and willingness to mediate. A mediator interviewed for this research discussed a dispute in which the wife understood to be lesbian and chose to start a relationship with another woman:

“The husband had a very strong reaction, because he felt his virility represented a issue. This aspect made any agreement with the wife difficult to arrange because any concession requested to the husband was perceived as an attack to his virility.”

The mediator tried to normalise the emotional reaction of the husband by clarifying that the most important issue in the dispute was the best interests of the child and his/her custody, and not the virility of the husband. Later the mediator tried to create mutual consent about the issue and proposed a solution to custody.

As this case shows, the mediator must be ready to deal with the possible hostile attitude of the heterosexual partner towards the ex-partner and the consequence of such attitude on the assessment to be carried out for making decisions regarding child custody. In such cases, a strong opposition by the ex-wife or -husband to let the children live or spend time with the new same-sex cohabitant of the ex-partner is very likely to arise. This is one of the most sensitive issues the mediator has to deal with, especially if the mother or father is willing to take the young children to bed with her/him, in the presence of the same-sex partner.

Even the homosexual mother or father can have difficulties introducing the new same-sex partner to the children. The cases collected during the fieldwork show that the new partner is usually introduced at first as a *friend* together with other friends, later as a flatmate and only eventually as a partner. These different steps occur more slowly or quickly, depending on the age of the child: “the younger the child is the slower the process of disclosure is” a mediator reports.

In these cases the mediator will recommend how to tell children about the homosexuality of the parent. Sometimes, talking about the homosexuality of the parent can be stressful for children, especially for teenagers; in other cases, this represents a positive experience for the child to participate in the family crisis. Moreover, the lawyers interviewed have pointed out that homosexual sexual orientation is often used by the heterosexual partner to frighten the homosexual one when disputes about custody arise. For example by threatening to bring the case to court²²⁰ or call social workers.

Finally, research has underlined some specific power imbalances in same-sex couples, in addition to those found in opposite-sex couples as well. For example, we can suppose that the lack of legal recognition of the relationship between two same-sex partners makes the condition of the weaker partner even weaker as he/she is not as protected as the opposite partner (Hertz, 2008).

²²⁰ See Trib. Napoli, 18.12.1984, *Dir. Fam.*, 1985, 229; Trib. Napoli, 28.6.2006, *Corr. Mer.*, 2006, 8-9, 984, confirmed by App. Napoli, 11.4.2007, n. 1067, *Corr. Mer.*, 2007, 6, 701, confirmed by Cass. Civ. sez. I 18.6.2008, n. 16593, *Giust. civ. mass.*, 2008, 6, 974, in *Foro it.*, 2008, 9, 2446, in *Vita not.*, 2008, 3, 1443. Trib. Min. Catanzaro, 27.5.2008, in *Fam. Min.*, 2008, 10, 86; Trib. Bologna, 7-15.7.2008, in *Fam. Min.*, 9, 78; Cass. Civ., I, sez., 25.7.2007, n. 16417, in *Nuova giur. civ. comm.*, 2, 2008, 271; Trib. Nicosia, ord. pres. 14.2.2010; Cass. Civ. 11.1.2013 n. 601.

The mediators and lawyers interviewed referred of cases in which the stronger partner is the one who financially maintained the household or even owned the building the couple used to live in. Consequently he/she wanted to thrust the partner out after the break up, regardless of the fact he/she had no other place to live.

A recurrent source of power imbalance concerns parenting. As already pointed out, artificial insemination and related medical practices for same-sex couples are not allowed in Italy, but they can easily – even though not cheaply – be done abroad.²²¹ Upon re-entry in Italy, legal problems arise. Only the biological parent is recognised as legal parent and step-parent adoption for the partner of the same sex is not allowed.

Therefore, the non-biological parent has neither rights nor duties toward the child and finds himself/herself at the other partner's *mercy* in case of a break-up and at the court's *mercy* in case of death of the biological legal parent. Even if it could be in the best interests of the child to remain somehow bonded to a non-biological parent, as a lawyer suggested "courts still have very little legal basis for granting custody rights to the survivor partner instead of, for example, to grandparents of the biological parent."

Overall, the fieldwork in Italy has shown that a limited knowledge of what mediation is lack of awareness regarding LGBT issues among lawyers and other professionals, and different social approval of homosexuality contribute to a limited recourse to mediation.

Examples of disputes collected during the fieldwork:

Case 1: An opposite-sex couple has been married for ten years and has hired a female baby-sitter for the two children for almost the same time. One day the husband came home earlier and found the wife in an "unmistakable behaviour" with the baby-sitter. He reacted violently to the unexpected discovery and the police had to intervene to stop the fight between the husband and the baby-sitter. The couple broke up, but the judge instructed them to try mediation to resolve the dispute of child custody. Mediation was conducted by a mediator in five sessions. Finally, the ex-husband agreed to joint custody, but opposed to any future contact between the baby-sitter and the children, regardless of the relationship children have built with her after several years of baby-sitting. The mediation was successful and the ex-husband accepted the baby-sitter to be gradually introduced to the children as the new mother's partner. The baby-sitter was not involved to participate in the mediation meetings because the ex-husband refused to see her again.

²²¹ See case 3 of the Fieldwork.

Case 2: An opposite-sex couple broke up after a few years of marriage because the husband discovered to be homosexual. At the time of separation problems relating to custody of the children arose. The wife argued that the children were not psychologically prepared to understand the father's homosexual orientation and claimed exclusive custody of the children. The couples attempted mediation aiming at resolving the custody issue. However, mediation failed due to the wife's inflexibility. Later, the judge ordered the two ex-partners and the children to see a psychologist in order to assess the parental capacity of the couple and the psychophysical well-being of the kids. The lawsuit ended with the judge forbidding the children to stay their father's flat when the same-sex partner of the father was present. In addition they are instructed to follow an educational programme with a child psychiatrist.

Case 3: Two gay partners in cohabitation for five years decided to have a child. They then travelled to a foreign country looking for a place to do the medical practice of surrogacy motherhood. At the same time the couple did not want to know who the biological father of the child was and decided to mix their seminal fluids before the surrogate mother is impregnated. After coming back to Italy, they decided who of them will be registered in the birth certificate of the child as biological father, since Italian law does not recognise two fathers. The partner who was registered as father of the child had a sister, who was aware of becoming the sole heir in case of death of the brother with no child. In fact, the homosexual partners are not entitled to each other inheritance under Italian law. After the registration in the birth certificate of the child, the sister of the legal father of the child filed a petition to the court requesting a paternity test. Any mediation proposal was refused by both parties due to the incompatible and conflicting positions and therefore a paternity test was ordered by the judge. Eventually, the legal father of the child was the biological father too.

Case 4: Three gay men have been living together for several years when the relationship deteriorates. The apartment where they live together belongs to only one of the three, while the furniture was purchased by all three together. The building owner wanted to continue living with one of the other two, but requested the third to leave immediately together with a third of the furniture. The excluded partner was the weakest of the three, because was currently unemployed and had no other place to live. The building owner and the leaving partner attempted mediation regarding the building management and an agreement was reached. The building owner accepted to let the excluded former partner to remain in the common house while looking for an occupation and another flat.

Case 5: Two women had two children of whom they are the respective biological mothers. One of the children is mentally impaired. Even though step-parent adoption is not allowed in Italy, the other woman was socially recognised by friends and the rest of the family as a co-mother to the biological child of her partner. After some

years one of the two women fell in love with another woman and left the common house taking the healthy child with her, thus abandoning her partner to look after the other child by herself. The two women attempted mediation regarding financial and custody issues. The partner who left refused to financially and materially help the other with the impaired child.

Case 6: Two couples of women lived in different cities, but they meet often because they shared many interests and hobbies. Both couples have one child. Thus the scenario presented two biological mothers and two non-biological mothers. The biological mother of the first couple fell in love with the non-biological mother of the second. Both couples broke up but in the first couple conflicting family disputes arose. The biological mother wanted the co-mother to leave the apartment. However, the co-mother owned a part of the property and had the right to live there. Furthermore, the co-mother was afraid that the biological mother of the child would forbid her to see the child. They attempted mediation on child custody. After a few months of mediation with biweekly meetings, the co-mother left the apartment but refused to sell her part of the property to the biological mother in order to prevent her from selling the apartment and leave the city with the child.

Conclusions

This Chapter has argued that mediation could play a strong role in the Italian judiciary system, thanks to the efficiency, efficacy, low costs, fast and shared solution of disputes. It also represents a step forward in favour of same-sex couples, given their need for privacy and the lack of legal recognition of same-sex unions in Italy. However, this incredible potential is not fully taken advantage of.

While there was limited knowledge and even more limited use of mediation until the '90s, recent legal developments have been remarkable, but at the same time disorganised. The legislator was *forced* to introduce mediation in order to remedy the dysfunctions of the Italian civil justice system and because of pressure by the EU. However, the culture of mediation is still largely missing in Italy.

The introduction of mediation has not been accompanied by a new approach in settling disputes. Thus, in Italy, the spirit at the base of mediation is still one to build (Roberts 2014, 3), as well as a distinctive culture of public disputing and the emergence of a "new world" (Robert and Palmer 2005, 3) of disputes settlement. Most same-sex and opposite-sex couples still consider mediation a pre-trial activity to reach the *real* trial rather than a suitable alternative to resolve disputes.

Mediation is mainly thought of as a practical answer to the delays of the civil justice system (deflation process). Without considering a serious cultural shift to accompany it with, it will be difficult to ever make mediation a considerable option which is instead perceived by couples as an imposition by the lawmaker. This is opposite to the spirit of what mediation really is.

Contrary to the development of mediation in other jurisdictions, the prevailing approach among couples in Italy still remains characterised by a hostile and rule-centered process with little space for alternative dispute resolution methods. Furthermore, the decision of the Constitutional Court to declare compulsory mediation illegitimate was a serious setback for the legal reform introducing mediation in the civil justice system.

Another serious obstacle to the effective use of mediation is represented by the professional conflict between lawyers and mediators as lawyers look to protect their monopoly over legal assistance (Roberts, 2014, 112, 361).

A further critical issue that needs to be considered is the vastness of the number of fields of application of mediation (civil, civic, familiar, commercial, criminal, tributary). This creates a situation where several completely different professionals (mediators, lawyers, jurists, psychologists, counselors) may be involved, creating a high risk for malpractice. A market crowded with inexperienced practitioners with no selection for personal aptitude fuels the confusion between couples therapy and mediation.

We should admit that mediation represents today a challenge and it cannot be a panacea for the Italian civil justice system's difficulty in legally recognising same-sex couples. In order for mediation to be properly and effectively used, Italy needs a cultural shift by both lawmakers and disputants towards out-of court dispute resolution mechanisms. It would be misleading to overestimate the importance and perspective of mediation, also considering its weak points in its Italian development. Before mediation will come to actively represent a turning point, compared to the traditional civil justice and traditional justice administration system, the previously discussed critical aspects need to be faced and resolved.

Regarding more in detail same-sex couples, the lack of knowledge and the lawyers' failure to recommend mediation as a suitable solution for settling family disputes, limit the choice that same-sex couples may do of mediation. In addition, the common confusion between family mediation and couples therapy makes mediation as a dispute resolution mechanism less appealing than therapy, or as a possible waste of time and money.

However, the lack of recurrent use of mediation by same-sex couples is surprising when considering the benefits that mediation can offer to these couples when any legal recognition is missing. For example, mediation may allow participants to prevent more efficiently the public disclosure of their sexual orientation, a very important need for same-sex partners according to the fieldwork. Indeed, mediation has been successful for most of the couples interviewed during the fieldwork for this study, and same-sex couples as a whole should take more in consideration the ADR as a safe and fast way to settle their family disputes.

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APPENDIX I

Questionnaire for lawyers, mediators and judges: Mediation in Same-Sex Couple Disputes

- How many disputes between same-sex partners have you dealt with?
- Why did the couples decide to have their dispute mediated?
- What kind of dispute issues did you deal with?
- What are the main sources of conflict (domestic violence; children; financial issues; 'coming out')? Are there differences between same-sex couples and heterosexual couples? Are there differences between gay couples and lesbian couples?
- What is your style of practice? (This question only for mediators)
- What is your model of practice? (This question only for mediators)
- How much do you encourage couples to mediate? (Question only for lawyers and judges)
- As a judge, can you act as mediator? (Question only for judges)
- When there are children involved, do you consult the child? If no, why? If yes, how? And how do the wishes and ideas of the child influence the final decision?
- In countries where same-sex unions are not legally recognised, same-sex couples sign agreements regarding the effects of their unions. Did you have experience of this?
- Do you think that the mediator of a same-sex partner dispute should be gay or lesbian?
- What are in your view the pros and cons of mediation?
- How can couples legally enforce the agreement reached with mediation?
- What are the main differences and similarities between gay couples and lesbian couples, and between same-sex couples and heterosexual couples?
- Which are in your view the main causes of power imbalance? How do you deal with power imbalances?

- Do you know whether other dispute resolution mechanisms are adopted by same-sex couples? If so, which are they?
- Do you use the same style and model for same-sex couples and heterosexual couples?
- How does your language change?
- How do you manage your bias?
- Have you mediated disputes between opposite-sex couples in which sexual orientation was the cause of dispute? If so, can you describe it?
- What additional comments or observations would you like to make?

APPENDIX II

Questionnaire for same-sex partners: Mediation in Same-Sex Couple Disputes

- What are the reasons for your dispute?
- Why did you decide to have your dispute mediated?
- Did you try other dispute resolution mechanisms?
- Have you consulted a lawyer? If so, did the lawyer suggest mediation?
- Do you think that the mediator should be gay or lesbian?
- What are in your view the positive and negative aspects of mediation?
- Did the mediator use a language respectful of your sexual orientation?
- Do you think the mediator was biased against LGBT people?
- Do you have children? If so, did you involve them in the mediation process?
- Have you thought to use mediation to sign agreement in case of future disputes?
- During the mediation did you ask for separate meetings with the mediator? If so, why?
- Did the mediator have a pre-hearing meeting?
- Did your relationship involve domestic violence? If so, may I ask you whether you can tell me more about the reasons on domestic violence?
- How did you manage financial issues?
- Did you settle? If so can you say more about the agreement?
- Are you respecting the agreement?

Please specify whether the partners are in a de facto relationship; or a civil union; or are in a marriage to each other.

GLOSSARY

Bi-gender – a person who moves between feminine and masculine gender-typed behaviour depending on context.

Bisexual – a person who is emotionally and/or sexually attracted to both male and females.

Cisgender – a term used to describe non-transgender individuals.

Coming out – the process of telling others his/her sexual orientation or gender identity.

Cross-dressing – to wear clothing typically associated with members of the other sex.

Drag King/Queen – a person who dresses like a member of the opposite sex, often with the aim to entertain and/or play with sex roles and/or gender expression.

Female to Male (FtM or F2M) – A transgender person born as female who is living as or transitioning to male.

DSM 5, Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition – is the 2013 update to the American Psychiatric Association's classification and diagnostic tool for mental disorders.

Gay – colloquial term for a person who feels sexual desire exclusively (or predominantly) for individuals of his/her own sex (homosexual).

Gender – a term used in social sciences which defines the social and cultural phenomena associated with biological sex of being male or female.

Gender Dysphoria – the clinical definition of gender identity disorder as to express the negative or conflicting feelings about one's sex or gender roles.

Gender Expression – how an individual chooses to express his/ her gender (dress, behaviour, appearance).

Gender Identity – psychological sense of being male or female (or both or neither).

Gender Identity Disorder – a mental psycho-pathology included in the former Diagnostic and Statistical Manual IV (DSM IV) referring to a gender identity that is inconsistent with one's biological sex.

Gender Queer (GQ; alternatively non-binary) – a catch-all term referring to people who challenge gender norms associated with gender binary and cisnormativity and who are not exclusively masculine or feminine.

Gender Questioning – a term referring to people who are unsure of their sexual orientation or gender identity.

Gender/Sex Reassignment Surgery (GRS or SRS) – a medical procedure for changing one's sex characteristics.

Gender Role – the behaviours, traits, thoughts, and dress expected by a culture to belong to the members of a particular sex.

Gender Variance (or gender nonconformity) – a term referring to people who do not match masculine and feminine gender norms.

Heteronormative/Heteronormativity – a norm that takes for granted that there are two separate biological sexes and that we were born into one of them. According to the heteronormativity, there are certain behaviours and sex stereotypes that everybody has to follow. The norm also takes for granted that everyone is heterosexual.

Heterosexual – a person who is emotionally and/or sexually attracted to people of the opposite sex.

Homonegativity – a negative attitude toward homosexuality or LGBT people. Homophobia – fear of, or anger toward homosexuality and/or homosexual and bisexual people.

Homosexual – a person who is emotionally and/or sexually attracted to people of the same sex.

ICD-10, International Statistical Classification of Diseases and Related Health Problems (Tenth Edition) – is the international standard diagnostic tool for epidemiology, health management and clinical purposes, maintained by the World Health Organization.

Intersexual – a person having ambiguous genitalia.

Lesbian – a woman who is attracted emotionally and physically by another woman.

LGBT – lesbian, gay, bisexual, transgender people.

Out – being openly lesbian, gay or bisexual Queer – originally an English swearword that meant weird, perverse or different. Today the term is partly used as an identity term for LGBT people and partly as a questioning of norms. A person who is queer questions heteronormativity and does not want to follow traditional categorizations.

Male to Female (MtF or M2F) – A transgender person born as male who is living as or transitioning to female.

Outing – the public disclosure that someone who is assumed to be heterosexual is actually homosexual or bisexual.

Polyamory – Being in more than one intimate relationship with the knowledge and consent of all partners involved.

Queer – historically a derogatory term for LGBT people, but 71 adopted as a sexual identity by younger gays and lesbians.

Queer Theory – an academic theory analysing society's views and norms.

Rainbow Family – collective term for same-sex families, generally with children.

Sexual Orientation – sexual attraction to a particular sex (to other sex: heterosexuality; to one's own sex: homosexuality) or to both (bisexuality).

SOGIE, Sexual Orientation and Gender Identity Expression – After Yogyakarta Declaration, this acronym replaced the former expression LGBT.

Straight – colloquial term for heterosexual.

Transphobia – fear of, or anger toward transsexuality and/or transsexual and transgender people.

Transgender – an umbrella term referring to anyone whose behaviour, thoughts, or traits differ from the societal expectations for his/her biological sex.

Transsexual – a person who lives in a gender role consistent with his/her inner gender identity but in contrast with social expectations associated with his/her biological sex.

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