

SAME SEX UNIONS BETWEEN INVISIBILITY AND LEGALLITY

UDC 347.628-055.3

347.18:613.885

Zorica Mršević

Faculty of European Legal and Political Studies,
University Business Academy, Novi Sad, Republic of Serbia

Abstract. *The subject matter of this paper is the analysis of the social and legal status of same-sex unions in the Republic of Serbia. In practice, they function although there is still no legislation on this matter. The right to legal regulation of same-sex unions as an alterity to marital and extramarital unions is presented in light of the importance of the legitimate right to diversity and the right to guaranteed civil rights which are recognized to those who are a minority in number and/or social influence. The main idea is the need to respect the union which is different from the majority heteronormative one. The paper aims to develop the social capacity for perception and to facilitate a dialogue and establishing relationships with this family alterity. The need to develop understanding that the legal recognition of same-sex unions is much more than the legal regulation of their property relations and civil status. It is a sign of democratization of society, its openness and tolerance. The paper is organized in several thematic parts presenting the scientific and current social context in Serbia, affirmative views of the Protector of Citizens as an independent institution, and the European context, with special reference to recent documents of the Parliamentary Assembly of the Council of Europe and relevant judgments of European human rights courts. The author notes that the position of the LGBTI+ people in Serbia is slowly changing for the better and advocates for legal regulation of this matter.*

Key words: *sex unions, social alterity, scientific context, European context, deconstruction of heteronormativity, legal security of "rainbow" unions*

Received June 6th, 2022 / Accepted August 16th, 2022

Corresponding author: Zorica Mršević, LL.D., Associate Professor, Faculty of European Legal and Political Studies in Novi Sad, Narodnog fronta 53, 21000, Novi Sad, Republic of Serbia. E-mail: zorica.mrsevic@gmail.com

1. INTRODUCTION

When homosexuality was decriminalized and removed from the list of mental illnesses,¹ i.e. when homosexuals stopped being treated as criminals and “sick” people, there was nothing left but bare prejudices which fueled discrimination and hindered the legal regulation of same-sex family communities. Same-sex unions are a part of reality that can no longer be ignored, especially considering that the dynamics of their legal recognition and regulation on a global scale is a consequence of their existence and one of the most intensive legal changes today. Obviously, Serbia is not in the legal vacuum. There are comparative legal solutions and initiatives in a large number of European and non-European countries, international conventions, judgments of domestic and international courts, theories and practices of human rights that have already addressed this issue. Nowadays, legally regulated same-sex unions are not just an interesting legal alterity which is available exclusively to “others”. The legal regulation of same –sex unions has reached our state borders by becoming part of the positive legal systems in the neighboring countries: Hungary, Croatia, and Montenegro. This gives new hope to millions of homosexuals in the Western Balkans that they will be able to legally regulate their family unions, which may contribute to the normalization of their social status.

2. THE SCIENTIFIC CONTEXT

Critical analysis of the legal position of LGBTI people² is part of Gender Studies,³ an academic discipline whose examination relies on traditional jurisprudence and feminist critical analysis of legal theory, law and their application as essentially patriarchal, discriminatory institutions. Jurisprudence (legal theory) and feminism⁴ came into a collaborative, allied relationship in the second half of the 20th century, when (seemingly) neutral legal theory and very openly engaged feminism became the closest allies and collaborators in joint critical reflection on women's legal status and efforts to improve it. At the same time, feminist jurisprudence finally finds its true academic ally in left-wing (general) jurisprudence with which it articulates common arguments advocating the necessity of legal sanctions of sexism, misogyny, racism, speech and hate crimes, xenophobia, homophobia, anti-Semitism, islamophobia (Mršević, 2019: 253-254).

¹ In Serbia, male homosexuality was decriminalized in 1994 and removed from the list of psychiatric illnesses in May 2008.

² The commonly used term “queer” includes all people of non-heterosexual orientation or gender identity different from the biological one attributed to them at birth.

³ Gender Studies is a teaching and scientific discipline which examines the existence and functioning of the basic legal and political principles (such as: justice, equality, conditions and situations of possession or deprivation of rights, etc.) which are relevant to all areas of society, viewed through the prism of specific differences between women's and men's needs and requirements, as well as the relationship between women and men in the social, institutional and legal environment.

⁴ Feminism is a teaching that advocates for the expansion of women's rights and roles in society. It entails both theory and practice which, starting from the equality of women and men, strives for social change with the aim of ending social, political and economic discrimination against women. Feminism is a social movement, theory and personal commitment based on the fact that women in society are disadvantaged, which can be changed by systematic activities to make women's issues specific and visible, recognized and adequately valued, by identifying violence against women and pointing to discrimination and favoritism of women as well as through the struggle for equal opportunities in all aspects of human life (Mršević, 1999: 44).

Gender Studies point to intersectionality and analyze the phenomena of double and multiple legal discrimination resulting from the existence and simultaneous consequences of multiple discriminatory factors. From the outset, Gender Studies have dealt with the rights of lesbians and the general LGBTI community, pointing out that the previously non-existent legal regulations in this area do not mean that there are no problems; on the contrary, it shows a lack of a large anti-discrimination package, based on sexual orientation and gender identity.

It is a mistake to assume that all people are heterosexual. One of the typical types of discrimination against same-sex oriented people is called heterosexism (Mršević, 1999:50) or heteronormativism (Mršević, 2011:162). The assumptions that LGBTI people do not have permanent partners, that they probably lead a promiscuous life, that some "shameful or abnormal" things happen among them, that such relations are not "decent" and socially acceptable, or that these issues have no place in academic research are part of the heteronormativism, which has been abandoned for being anachronistic and inaccurate. Homosexuals have a vivid emotional and sexual life and, in their relationships, they experience the same ups and downs, uncertainties and challenges that are encountered by typical heterosexual partners. Their problems are only more complex and difficult due to the negative attitude of society towards them, as well as the inability to legally formalize and officially regulate their long-lasting emotional communities, often including parenthood.

3. THE FEMINIST CONTEXT

Since the mid-1990s, the feminist movement in Serbia has raised the question of whether and why the legal regulation of same-sex unions should be part of the feminist political agenda, and if so, whose jurisdiction it actually is, and what are the arguments in favor of that (Mršević, 2009:23). The feminist movement has also raised the additional question of the role of women's activism and women's needs. Namely, most women do not "need" activism because they have other problems; on the other hand, each person perceives one's current problems as the most serious and important ones. In that context, do we need any legal regulation of same-sex communities, particularly considering that such an "extravagant" request may satisfy the needs of only some homosexuals (lesbians and gays) but certainly not all or even most members of the LBGTIQA communities. Considering everything that women may wish in terms of legal changes in our country, in various historical moments, the legal regulation of same-sex communities seemed to be the most distant, the most difficult to achieve, and the most impossible option. But the symbolic and moral significance of the legal recognition of same-sex union, as the right of people to love and live with another person of the same sex, is a much greater issue than merely enabling several same-sex couples to formalize their relationship. The legal regulation of same-sex unions gives a completely different dimension to a range of political, social, economic and other issues (e.g. the right to abortion, domestic violence, sexual harassment and mobbing at work and in educational institutions, women's poverty and unemployment, women's right to get organized, their public and political activities, including the right to disagree with mainstream political and academic trends, etc.). The legalization of same-sex unions entails the legal recognition of women's right to autonomy, independence, independent existence, the right to choose, financial autonomy and emancipation, and many other things that women need but do not have enough or do not have at all.

The legal regulation of same-sex unions also implies the legal recognition of alterity (“otherness”). It entails the legalized right to diversity, as well as the right not only to be tolerated for being different but also the right to active legal protection of alterity. It also entails the observance of guaranteed civil rights recognized for members of minority groups which are marginalized in number or social influence. The legal regulation of same-sex unions also implies much more than mere legal regulation of property relations and the civil status of persons that it directly refers to; in effect, the legalization of same-sex unions is a sign of democracy, openness and tolerance in society. It is also a sign of social welfare (in both material and moral sense); in fact, the states that recognize or pursue the recognition of same-sex union are among the states with the highest living standard (measured by material criteria). In short, the feminist movement in Serbia has never had a dilemma regarding the right to same-sex unions as a necessary human right of same-sex partners. Serbian feminists have always unequivocally supported this right, hoping that the issue would finally be removed from the political agenda after the adoption of a legislative act regulating same-sex unions.

4. THE SOCIAL CONTEXT: THE CURRENT POSITION OF THE LGBTI+ PEOPLE IN SERBIA

Three basic problems have characterized the position of the LGBTI+ population in Serbia for years (Mršević, 2019:619): a threat to personal security due to the occurrence of unauthorized (or rarely sanctioned) phobic violence which is still the biggest problem of the queer community (Kovačević, Planojević, 2021:31); tolerated phobic hate speech in public discourse (Commissioner, 2022); and a lack of possibility to establish a legally regulated unions and family relations. Despite significant developments and obvious changes in citizens’ attitudes across the region, violence and discrimination continue to pose a major challenge to the community (Gavrić, Čaušević, 2021:8). Many important issues (such as: registration of same-sex unions, rights of trans and intersex persons, civil and other rights related to inheritance, pensions, etc.) are still unregulated (GayEcho, 2020). Yet, after two decades of legislative changes, improved access to justice, increased visibility and the rise of several prominent activists and organizations in Serbia, the endeavor to improve the legal position of LGBTI+ people has culminated in advocating for equality in marriage (by enacting same-sex laws).

In the absence of any legal solution, same-sex partners use all existing legal and non-legal mechanisms and resort to finding alternative ways to at least partially compensate for the rights enjoyed by spouses in a traditional family. This status, in cooperation with the pressure created by the conservative environment, leads to a complete lack of legal and physical security. This generates revolt in the LGBTI+ community, resulting in growing mutual animosity between the LGBTI+ community and the majority heterosexual population, which ultimately leaves less and less room for a lasting solution. On the other hand, when the LGBTI+ community raises the issue of legalizing same-sex partnerships through its representatives, these initiatives are often misunderstood by the public as a requirement to ensure the enjoyment of some basic human rights, human and minority rights and social dialogue (Ministry, 2021b: 2).

However, the position of LGBTI+ people in Serbia is slowly but surely changing for the better. In 2021, the Pride Parade was successfully held in Belgrade for the eighth time, as well as the 13th Merlinka Queer Film Festival and numerous other events organized for

by members of the queer community. The United Nations Office in Serbia organized a promotional campaign aimed at supporting the adoption of the legislative act on same-sex communities, which included participation of diplomats, public figures, and representatives of the Ministry for Human and Minority Rights and Social Dialogue. The Rulebook on Conditions, Criteria, Manner of Selection, Testing and Assessment of Reproductive Cell and Embryo Providers has been amended, thus ending the direct two-year discrimination against queer persons by the Ministry of Health. The first regional platform ("You are heard") for reporting hate crime and incidents motivated by prejudice against LGBT+ people was launched in 2021, which enables more systematic and comprehensive monitoring and reporting on the safety of queer people.

In terms of directions for improvement, opinions, attitudes, suggestions, etc., come from different sources, such as: regular annual and special thematic reports of independent institutions, published research, the views of civil society organizations, etc. A common denominator in all of them is the observed need to reduce stereotypes and prejudices towards groups at risk of discrimination and to promote a positive public image of these groups. For years, the reports of independent institutions have been highlighting the need for more active participation of the state and relevant activities of state institutions at all levels.

In terms of the general public attitudes towards the LGBTI+ population in Serbia, Geten's research (2021) on the degree of social integration of the LGBTI populations in Serbia⁵ indicates that the respondents largely opt for inclusive egalitarian social relations (Mršević, 2021:15-18). A vast majority of respondents in the general population believe that all people should be treated equally (95.9 %), that social equality is needed because we would have fewer problems if we really treat people equally (94.2 %), and that everything possible must be done to ensure equal conditions for different groups of people (90.4 %). Notably, most respondents expressed a clear position that LGBTI+ persons should be able to legally regulate same-sex unions as a form of establishing family relation (two thirds or 65.4% fully agreed with this statement and 16.7% partially agree, which makes a total of 82.1 % of respondents from the general population. This is one of the important findings of this research in a situation when there is a common perception in general public that the legalization of same-sex unions cannot "pass" in Serbia because "the majority of the population does not agree" with it. This research results refute the accuracy and authenticity of that allegedly widespread negative attitude of the majority, which is neither measured nor exactly documented. Due to the prevailing presence and loud rhetoric of the opponents of same-sex unions in the public discourse, they are likely to develop a misconception that their views are the views of the majority, whereas the much quieter majority actually has nothing against such unions and considers that it the duty of the state to provide the necessary legal context. Moreover, 75.6% of respondents in the general population believe that LGBTI+ people should be allowed to adopt or foster children under the same terms as traditional families (57.1% fully agreed with the statement and 18.5 % partially agreed, which makes a total of 75.6% of respondents).

⁵ The research was organized by Geten (Centre for LGBTIQA people's rights) from 1 February to 30 April 2021.

5. THE LEGAL PROTECTION CONTEXT: ONGOING OMBUDSMAN'S SUPPORT

The Protector of Citizens (Ombudsman) is one of the independent institutions in Serbia⁶ which has been providing explicit support to the LGBTI+ community since 2009. The Ombudsman's Special Report (2012) and regular annual reports (from 2009 to 2022) include concrete proposals for improving the position of the LGBTI+ persons in Serbia since 2009 and tackling a number of observed problems: inadequate response of institutions to cases of violence; hate speech against LGBTI+ people; attacks on LGBTI+ activists and their groups and associations supporting LGBTI+ rights, etc. Since 2016, the Protector of Citizens has regularly and continuously pointed out (through public announcements, recommendations, educational activities, opinions, mediation activities, engagement in legislative initiatives, as well as in regular annual reports) that there is a need for legal regulation of same-sex communities. At the same time, the Ombudsman does not refrain from submitting a request for legal regulation of this issue to the highest bodies of the legislative and executive power. Namely, according to Article 17 (para. 3) of the Ombudsman Act, the Protector of Citizens is not authorized to control the work of the National Assembly and the Government. However, the Ombudsman believes that it would be useful for (policy design purposes) if these bodies would take into consideration the Ombudsman's proposals on the legal regulation of same-sex unions and many other issues.⁷

It is important to highlight the Ombudsman's continuous commitment to raising public awareness about respect for and observance of the LGBTI+ rights: "The government, autonomous province bodies and local self-government units should ensure continuous implementation of measures and activities aimed at raising public awareness of the need to respect LGBTI rights." (Protector of Citizens, 2018:37-39). This affirmative and proactive strategy may reduce the presence of public resistance to all legal changes aimed at regulating same-sex unions. The Ombudsman's Annual Report for the year 2015 states that it is crucial to ensure the respect for and the exercise of the LGBTI persons' rights in the field of education, employment, health care, social security, legal regulation of same-sex unions, legal consequences of sex and gender reassignment surgery, as well as the protection of their physical and mental integrity (Protector of Citizens, 2016:22). In the Annual Report for 2016, it is noted (*inter alia*) that the full exercise of the LGBTI persons' rights in the field of legal regulation of same-sex unions has not been ensured yet (Protector of Citizens, 2017:18). The Annual Report for 2017 states that the full exercise of the LGBTI persons' rights has not been observed in the area of education, employment, health care, social welfare, legal regulation of their cohabitation, the legal consequences of gender change and gender identity, and protection of their physical and psychological identity (Protector of Citizens, 2018:6). Reports sent by the Protector of Citizens to the United Nations bodies and treaty bodies point to shortcomings in the exercise and legal protection of the LGBTI persons' rights, such as: the lack of laws regulating same-sex unions, the lack of a national campaign to raise public awareness of LGBTI status and rights, the lack of laws regulating gender identity and legal consequences of sex reassignment, the lack of law on free legal aid for vulnerable social groups (including LGBTI population), etc. (Protector of Citizens, 2018:38).

⁶ It should be noted that all independent institutions (Commissioner for the Protection of Equality, Commissioner for Information of Public Importance and Personal Data Protection) are supportive in terms of the LGBTI+ rights.

⁷ Some of these issues are: the freedom of expression and peaceful assembly, protection of their physical and mental integrity, education, employment, health, social protection and legal consequences of gender adjustment.

6. THE EUROPEAN ENVIRONMENT CONTEXT

In terms of the legal regulation of same-sex unions, Serbia is constantly lagging behind, not only in relation to the western and northern European countries but also in relation to southern European countries (Spain, Portugal, Italy and Greece). Serbia is also lagging behind Hungary, governed by the conservative and homophobic Orban's administration; however, it should be noted that registered unions of same-sex couples have been legally recognized in Hungary since 2009 and regulated by the Registered Partnership Act no. XXIX.⁸ According to the Hungarian Central Statistical Office (STADAT), on the average, there are 75.3 registered same-sex unions in Hungary per year (48.7 by male partners and 26.7 by female partners), while the average age of partners is 38.7 years (STADAT, 2022).⁹ Serbia is also lagging behind the neighboring countries: Croatia and Montenegro.¹⁰ All three Western Balkan countries (Serbia, Croatia and Montenegro) have similar cultural and socio-economic characteristics and could be said to share a similar social context in this regard. All these societies are patriarchal, conservative and the influence of the church is extremely high. Thus, the fact that Croatia and Montenegro have adopted legislative acts regulating same-sex unions (registered partnerships)¹¹, which aim to improve the quality of life of LGBTI+ people and their social status, shows that the same goal could be achieved in Serbia.

Same-sex marriage is legally regulated in 19 European countries¹²: Andorra 2023, Austria 2019, Belgium 2003, Denmark 2012, Finland 2017, France 2013, Germany 2017, Iceland 2010, Ireland 2015, Luxembourg 2015, Malta 2017, Netherlands 2001, Norway 2009, Portugal 2010, Slovenia 2022, Spain 2005, Sweden 2009, Switzerland 2022, and United Kingdom 2020. Although they do not recognize same-sex unions, Bulgaria, Latvia, Lithuania and Romania are bound by a ruling by the European Court of Justice to recognize same-sex marriages performed within the EU and including an EU citizen for the purposes of granting legal residence (Wikipedia, 2022).¹³

Civil unions is regulated by law in 10 countries: Croatia 2014, Czech Republic 2006, Cyprus 2015, Greece 2015, Hungary 2009, Italy 2016, Liechtenstein 2011, Monaco 2020, Montenegro 2021, and San Marino 2019. Unregistered cohabitation¹⁴ exists in 2 countries: Slovakia and Poland (Wikipedia, 2022).

There is no recognition of same-sex marriages or partnerships in 8 countries: Albania, Azerbaijan, Bosnia and Herzegovina, Kazakhstan, North Macedonia, Romania (but part of the

⁸ The Hungarian Act No. XXIX on Registered Partnerships and related legislation and on the amendment of other statutes to facilitate proof of Cohabitation (*Törvény, amely szabályozza a bejegyzett élettársi kapcsolatokról szóló*), governing same-sex relationships, entered into force on 1 July 2009. See: Jurisdiction and Rule of Law Network; <https://net.jogtar.hu/jogszabaly?docid=a0900029.tv>. Also see: Háttér Support Society for LGBT People and Hungarian LGBT Alliance (2021:2):

⁹ See: The official data of the Hungarian Central Statistical Office (STADAT) on Registered partnerships (22.1.1.18. *Bejegyzett élettársi kapcsolatok*, Központi Statisztikai Hivatal), last updated 15 July 2022.; https://www.ksh.hu/stadat_files/nep/hu/nep0018.html

¹⁰ The legal regulation of same-sex unions is the responsibility of the member states of the Council of Europe.

¹¹ In Croatia, the Life Partnership Act was adopted in 2014. In Montenegro, the Same-sex Partnership Act was adopted in July 2020. (ERA – LGBTI Equal Rights Association for Western Balkans and Turkey (2022): <https://www.lgbti-era.org/blog/same-sex-unions-%E2%80%93-overview-europe-and-balkans>

¹² Other types of partnerships are also available in eleven countries that have enacted same-sex marriage laws.

¹³ Wikipedia (2022): Recognition of same-sex marriages; https://en.wikipedia.org/wiki/Same-sex_marriage

¹⁴ This is private contractual cohabitation of two persons (regardless of sexual orientation or relationship type - including non-sexual non-intimate relationships) for limited purposes.

EU, it is legally bound to recognize same-sex unions contracted abroad in compliance with C-673/16 of the European Court of Justice), Turkey, and Vatican City (Wikipedia, 2022).

7. JUDGMENTS OF THE EUROPEAN COURTS IN STRASBOURG AND LUXEMBOURG

An important element of the European legal environment pertaining to same-sex unions are the judgments of European courts, primarily the European Court of Human Rights (ECtHR) in Strasbourg but also the Court of Justice of the European Union (CJEU) in Luxembourg.

7.1. Case *Vallianatos and Others v. Greece*, ECtHR Judgment 7.11.2013 [GC]¹⁵

The applicants filed an application with the European Court of Human Rights in Strasbourg (on 7 November 2013), under Article 14 (Prohibition of discrimination) in conjunction with Article 8 (Right to respect for private and family life) of the European Convention on Human Rights (ECHR), claiming that the Greek State had discriminated them by excluding same-sex couples from the scope of the legislative act (Law no. 3719/2008), which officially regulated the partnership of unmarried couples of different sex. The legally established "civil unions" provided a more flexible legal framework for unmarried couples but it was only applicable to heterosexual couples while same-sex couples were excluded. In light of the legitimate aims invoked by the law when introducing civil unions, the Court ruled that Greece had failed to prove that it was necessary to ban same-sex couples from entering "civil unions" and that the reasons for such exclusion were not convincing and justifiable.

7.2. Case *Oliari and Others v. Italy*, ECtHR Judgment 21.10.2015¹⁶

The applicants were six Italian men (three same-sex couples) who filed their applications with the ECtHR in 2011, claiming discrimination on the basis of sexual orientation, after Italian courts had rejected their marriage requests. In Italy, same-sex marriages are not legal and the Italian law (at the time) did not provide for the recognition of any other union alternative to marriage, either for heterosexual or for homosexual partners. Thus, Italy remained among the last Western European countries that had no legislation on civil partnerships. The Court found that Italy had violated Article 8 of the ECHR (Right to respect for private and family life) by failing to legally recognize their stable same-sex unions and established a positive obligation of member states to provide relevant legal framework which would ensure the legal recognition and protection of same-sex couples.

7.3. Case *Orlandi and Others v. Italy*, ECtHR Judgment 14.03.2018¹⁷

In their application submitted in 2012, six same-sex couples complained about the Italian authorities refused to register their marriages which had been contracted abroad. Given that Italian law did not allow same-sex marriage, nor did it provide for the legal

¹⁵ Case App. 29381/09 and 32684/09 *Vallianatos and Others v. Greece* [GC], Judgment 7.11.2013 [GC], Retrieved 5 March 2022 from <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%7B%22002-9224%22%7D>

¹⁶ Case App. 18766/11 and 36030/11 *Oliari and others v. Italy*, Judgment 21/10/2015, Retrieved 5 March 2022 from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%7B%22001-156265%22%7D>

¹⁷ Case App. 26431/12; 26742/12; 44057/12 and 60088/12, *Orlandi and others v. Italy*, Judgment 14/03/2018, Retrieved 5 March 2022 from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%7B%22001-179547%22%7D>

recognition of any other type of alternative union, they could not have their marriage legally recognized and protected in Italy. With reference to Articles 8 (Right to respect for private and family life), Article 12 (Right to marry), and Article 14 (Prohibition of discrimination) of the ECHR, the Court found that the rights of applicants' rights were violated, and urged the member states to legally recognize and protect same-sex unions. In effect, following the decision in *Oliari* (2015), Italy enacted a legislative act (Law no. 76/2016) providing for the legal recognition, registration and protection of civil unions, which has been effective since 2017.

7.4. Case C-673/16 *Coman and Others v. Romania*, CJEU Judgment 5 June 2018¹⁸

In 2016, the EU Court of Justice received a request for a preliminary ruling from the Constitutional Court of Romania concerning the interpretation of Article 2 (Definition of 'spouse', Same-sex marriage), Article 3 (Family members of EU citizens), and Article 7 (Right of residence for more than three months) of Directive 2004/38/EC on the right of EU citizens and their family members to move and reside freely in the territory of an EU Member State. In 2010, a Romanian national (Coman) and a US national (Hamilton) got married in Brussels. In 2012, the same-sex spouses requested from the Romanian authorities to issue relevant documents to enable the couple to permanently reside in Romania. The request was based on the Directive 2004/38/EC, which allows a spouse of an EU citizen to get residence in the country of residence of the EU citizen. Romania refused to grant the right of residence to Hamilton because Romanian law did not recognize same-sex marriages; thus, he was not the 'spouse' of an EU citizen. In light of the freedom of movement and residence of EU citizens and their family members, the Court held that the term "spouse" equally refers to same-sex and different-sex marriages. Thus, family members of EU citizens, including same-sex spouses/partners who are aliens, have the right to reside longer than three tourist months in the country of residence of the EU citizen (European Sources Online, 2022).¹⁹

8. CONCLUSION

During 2021, when there was preparatory process leading to a possibility of adopting the Act on Same-Sex Unions in Serbia, the views of the opponents of same-sex unions prevailed. They were determined to preserve the *status quo* by inducing an irrational sense of loss of "privilege", creating a mental fog of distortion, overemphasis and mystification, and constructing the illusion of otherwise non-existent significant symbolic differences between the pros and cons of legal regulation of same-sex unions. Insisting on conventional "family values", they insult LGBTI people in various ways, blame them for lack of sensibility for family life, accuse them of declining birth rates, etc. Same-sex orientation is presented as an immoral phenomenon, a disease to be medically treated. It is also unjustifiably concluded that more extensive LGBT rights may threaten the rights of the

¹⁸ Case C-673/16 *Coman, Hamilton and Others v Romania*, Judgment 5 June 2018, Retrieved 6 February 2021 from <https://curia.europa.eu/juris/document/document.jsf?text=&docid=202542&doclang=EN>

¹⁹ European Sources Online (2022): C-673/16 Case summary; Retrieved 6 February 2021 from <https://www.europeansources.info/record/judgement-in-case-c-673-16-reu-adrian-coman-and-others-v-inspectoratul-general-pentru-imigrari-and-others/#:~:text=The%20Court%20argues%20that%2C%20while,a%20derived%20right%20of%20residence>

heterosexual majority and, thus, lead to "ruining" the family and the society as a whole (Kovačević, Planojević, 2021:110).

Although they depart from the model of heterosexual family community, same-sex unions are not a detrimental phenomenon for traditional family values, nor are they a reflection of promiscuous, antisocial behavior, avoidance of parenthood, and denial of family existence. On the contrary, they are a reflection of the efforts of homosexuals not to be deprived of their partners/spouses, families, parenthood and all other features that are commonly associated with a stable, emotionally/sexually, socially and legally regulated conventional (monogamous) community. The legal recognition of same-sex unions as families is also the result of the need and interest of every society to legally enable as many people as possible to live in stable family environments, in legally recognized and regulated unions, with due respect for various *de facto* family modalities. Therefore, the legal regulation of same-sex communities as alternative family units would not undermine the existence of different-sex families nor the traditional family values; in fact, the family values may be much more undermined by efforts to delimit family legislation, impose boundaries on family law institutes, and make legal provisions exclusively accessible to heterosexual couples.

There is no convincing evidence about the correlation between the decline in heterosexual marriages and the legal provisions allowing homosexuals to legitimize their unions, nor is there any rational reason for such causality. So far, no decline in the number of heterosexual marriages has been observed in any of the countries that legally recognize same-sex unions. Heterosexual people get married for reasons that have nothing to do with what homosexuals do; thus, disappointment, anger, protest or any other negative (or even positive) reaction to the legal regulation of homosexual unions can by no means and in no individual case be a deterrent to establishing heterosexual families. The forewarnings that the institutions of marriage and family may be endangered by the legal recognition of same-sex unions are supported by the presumptions that heterosexual partners may increasingly repudiate the institutions of marriage and family altogether. The social reality does not support such "theories", which have proven to be ill-founded, nor does the social reality include the slightest indication that it could occur in the future (Mršević, 2009:17-22).

Same-sex orientation is not a contagious disease but a minority variety of normal human sexuality. There is also no danger of spreading homosexuality by allowing same-sex unions. Heterosexual people do not become homosexuals for the mere fact that there is no legal ban on homosexuality that same-sex unions are legally recognized, or that homosexuality has become more visible and socially and publicly accepted. The presence of same-sex communities should not be kept secret and out of sight of children and youth, who are highly unlikely to "get infected" or "get some wrong ideas" simply by seeing homosexuals in public life, nor can they "lose" their heterosexual orientation if it is innate. The legal recognition of alternative types of family communities certainly does not imply that the conventional family unit is "destroyed" or "devalued"; on the contrary, it is strengthened as an institution by ensuring legal certainty, stability and benefits of family life to a much larger number of people.

In Resolution 2239 (2018), the Parliamentary Assembly of the Council of Europe is explicit that intolerance towards one's sexual orientation or gender identity can never be used as an excuse for discriminatory treatment, which unacceptably serves to legitimize human rights' violations. On the contrary, "states must work vigorously to combat prejudices that allow such discrimination to persist, in order to fulfill their responsibility to protect and promote the human rights of all those within their jurisdiction and to eliminate

discrimination on all grounds, including sexual orientation or gender identity.” (CoE PA Resolution, 2018). Legal regulation of same-sex unions is the responsibility of each member state of the Council of Europe.

In many countries, homophobia has been significantly reduced by the legal regulation of same-sex family unions because homophobia ceases to be a legitimate reason for “justifiably opposing the illegal LGBT+ communities” and their “unlawful” same-sex unions. Thus, by supporting the social context of reduced homophobia and increased acceptability of same-sex unions, the “Rainbow” family (Mršević, 2020:72) is normalized. Therefore, it is necessary to exert joint efforts (in consultation with independent institutions, academia, civil society and the media, both before and after drafting the same-sex unions legislation) and actively work on combating stereotypes, discrimination and intolerance against LGBTI persons, promoting the acceptance and respect of rainbow family alternatives and ensuring human dignity and gender equality (CoE PA Report, 2021: 2, 10). The ultimate results of this act of social affirmation, without hindering the hetero majority legal rights, would be a greater legal certainty and visibility of the LGBTI+ communities in the social context, which would eventually make their activities aimed at deconstructing stereotypes about LGBTI+ people and their same-sex communities much more impactful.

REFERENCES

- CoE Parliamentary Assembly (2018). Resolution 2239/2018. Private and family life: achieving equality regardless of sexual orientation, 10.10.2018 Session, Council of Europe; Retrieved 9 April 2022 from <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=25166&lang=en>
- CoE Parliamentary Assembly (2018). It's time to end discrimination against rainbow families, posted 19/09/2018, Council of Europe; Retrieved 9 April 2022 from <https://pace.coe.int/en/news/7235>
- CoE Parliamentary Assembly (2021). Report: Combating rising hate against LGBTI people in Europe, 27 September 2021, Council of Europe; Retrieved 9 April 2022 from <https://assembly.coe.int/LifeRay/EGA/Pdf/TextesProvisoires/2021/20210921-RisingHateLGBTI-EN.pdf>
- ERA – LGBTI Equal Rights Association for Western Balkans and Turkey (2022): Same –sex Unions- An overview of Europe and the Balkans, <https://www.lgbti-era.org/blog/same-sex-unions-%E2%80%93-overview-europe-and-balkans> (accessed on 25 August 2022).
- EurActiv (2017). Finska još jednom legalizovala istopolne brakove (Finland has once again legalized same-sex marriage), 24.02. 2017; accessed on 6 February 2021 at <https://euractiv.rs/vesti/ljudska-prava/11040-finska-jo-jednom-legalizovala-istopolne-brakove>
- Gavrić, S.; Čaušević, J. (2021). From Demedicalisation to Same-Sex Marriage: A Contemporary LGBT History of the Western Balkans. Belgrade, Belgrade Pride/Pride Society.
- GayEcho. (2020). Istraživanje: Većina LGBT+ srednjoškolaca u Srbiji trpi nasilje, (Research: Most LGBT+ high school students in Serbia suffer violence), 4 jun 2020; Retrieved 19 January, 2022 <https://gayecho.com/news/istrazivanje-vecina-lgbt-srednjoskolaca-u-srbiji-trpi-nasilje/>
- Háttér Support Society for LGBT People and Hungarian LGBT Alliance (2021): Registered Partnership Guide for Gay and Lesbian Couples; https://en.hatter.hu/sites/default/files/dokumentum/kiadvany/guide-regpartnership-2011jul_1.pdf
- The Hungarian Act No. XXIX (2009) on Registered Partnerships and related legislation and on the amendment of other statutes to facilitate proof of Cohabitation (*Törvény, amely szabályozza a bejegyzett élettársi kapcsolatokról szóló*); Jurisdiction and Rule of Law Network- <https://net.jogtar.hu/jogszabaly?docid=a0900029.tv>
- The Hungarian Central Statistical Office/Központi Statisztikai Hivatal (STADAT, 2022): Official Statistics on Registered Partnerships (*Bejegyzett élettársi kapcsolatok*), last updated 15 July 2022.; https://www.ksh.hu/stadat_files/nep/hu/nep0018.html (accessed on 25.8.2022)
- Kovačević, M.; Planojević, N. (2021). Izveštaj o incidentima motivisanim mržnjom prema LGBT+ Osobama u Srbiji od 2017 – 2020, (Report on hate-motivated incidents against LGBT+ people in Serbia from 2017 to 2020), Udruženje *Da se zna!* Beograd.

- Ministarstvo za ljudska i manjinska prava i društveni dijalog (2021a). Polazne osnove za izradu Nacrta zakona o istopolnom partnerstvu (The Basic Principles for drafting the Same-sex Unions Act), Ministarstvo za ljudska i manjinska prava i društveni dijalog, Republika Srbija.
- Ministarstvo za ljudska i manjinska prava (2021b). Polazne osnove za izradu Nacrta zakona o istopolnom partnerstvu - *Ex ante* analiza, (The Basic Principles for drafting the Same-sex Unions Act – *Ex-ante* analysis). Br: 011-00-00003/2021-01/februar 2021, Ministarstvo za ljudska i manjinska prava i društveni dijalog, Republika Srbija.
- Mršević, Z. (1999). *Rečnik osnovnih feminističkih pojmova*, (Dictionary of Basic Feminist Terms), Albulj, Beograd; Retrieved 6 February 2021 from; http://zoricamrsevic.in.rs/knjige/Recnik_osnovnih_feministickih_pojmova.PDF
- Mršević, Z. (2009). *Ka demokratskom društvu – istopolne porodice* (Towards a Democratic Society – Same-sex families), Institut društvenih nauka, Beograd; Retrieved 6 February 2021 from http://zoricamrsevic.in.rs/knjige/Istopolne_porodice_-_Zorica_Mrsevic.pdf
- Mršević, Z. (2011). *Ka demokratskom društvu – rodna ravnopravnost* (Towards a Democratic Society – Gender Equality), Institut društvenih nauka, Beograd; Retrieved 6 February 2021 from http://www.zoricamrsevic.in.rs/knjige/Rodna_ravnopravnost_-_Zorica_Mrsevic.pdf
- Mršević, Z. (2019a). Jurisprudencija i feminizam (Jurisprudence and Feminism), In: Vujadinović D, Antonijević Z, (ed.), *Rodna ravnopravnost u visokom obrazovanju*, (Gender Equality in Higher Education), pp. 253-255, Akademska knjiga, Novi Sad; Retrieved 6 February 2021 from <http://zoricamrsevic.in.rs/najnovije/JurisprudencijaFem.pdf>
- Mršević, Z. (2019b). Položaj lezbejki u Srbiji (Position of Lesbians in Serbia), In: Macanović, N. (ed), *Položaj marginalizovanih grupa u društvu* (The Position of Marginalized Groups in Society), pp. 618-625. Fakultet političkih nauka, Banja Luka; Centar modernih znanja, Beograd; Fakultet za specijalnu rehabilitaciju i edukaciju, Beograd; Retrieved 6 February 2021 from http://zoricamrsevic.in.rs/najnovije/BanjalucaZbornik_IV-Mrsevic.pdf
- Mršević, Z. (2020). Izazovi i perspektive „duginih porodica” u Srbiji (Challenges and Perspectives of “Rainbow families” in Serbia), *Temida*, vol. 23 (1), pp. 57-77; Retrieved 6 February 2021 from <http://zoricamrsevic.in.rs/najnovije/Dugine-Temida-1-2020.pdf>
- Mršević, Z. (2021). Stepen društvene integrisanosti LGBTI populacije u Srbiji (Degree of social integration of the LGBTI populations in Serbia), Geten - Centar za prava LGBTIQ osoba, Beograd; Retrieved 6 February 2021 from https://www.transserbia.org/images/2021/dokumenta/Stepen_drustvene_integrisanosti.pdf
- Poverenica za zaštitu ravnopravnosti. (2022). Upozorenje – Izborna kampanja, (Warning - Election campaign), 22 mart 2022; Retrieved 30 March 2022 from <http://ravnopravnost.gov.rs/rs/upozorenja-lat/>
- Raičević, V. (2021). Pravno regulisanje istopolnih partnerstava je obaveza država članica Saveta Evrope, (Legal regulation of same-sex partnerships is the responsibility of the member states of the Council of Europe), 26 maj 2021, *Otvorena vrata pravosuđa*; Retrieved 8 March 2022 from <https://www.otvorenavrataprusudja.rs teme/ostalo/pravno-regulisanje-istopolnih-partnerstava-je-obaveza-srbije-kao-drzave-clanice-saveta-evrope>
- TransSerbia (2020). Nemačka je zabranila konverzivnu terapiju za maloletnike, (Germany has banned conversion therapy for minors), 10 maj 2020; Retrieved 1 July 2021 from <https://transserbia.org/vesti/1692-nemacka-zabranila-konverzivnu-terapiju-za-maloletnike>
- Zaštitnik građana (2016). Redovan Godišnji izveštaj Zaštitnika građana za 2015. godinu (Regular Annual Report of the Protector of Citizens for 2015), Zaštitnik građana, Beograd (pp. 22, 105-106, 113); Retrieved 3 April 2021 from <https://www.ombudsman.rs/index.php/izvestaji/godisnji-izvestaji>
- Zaštitnik građana (2017). Redovan Godišnji izveštaj Zaštitnika građana za 2016. godinu (Regular Annual Report of the Protector of Citizens for 2016), Zaštitnik građana, Beograd (pp. 18, 105-106, 115); Retrieved 3 April, 2021 from <https://www.ombudsman.rs/index.php/izvestaji/godisnji-izvestaji>
- Zaštitnik građana (2018). Redovan Godišnji izveštaj Zaštitnika građana za 2017. godinu (Regular Annual Report of the Protector of Citizens for 2017), Izveštaji za Treći ciklus Univerzalnog periodičnog pregleda Komitetu za ljudska prava UN sa predlozima preporuka, (Reports for the Third Cycle of the Universal Periodic Review to the UN Human Rights Committee with proposed recommendations), Zaštitnik građana, Beograd (pp. 6, 37, 39-40); Retrieved 11 December 2021 from <https://www.ombudsman.rs/index.php/izvestaji/godisnji-izvestaji/5671-2017>
- Zaštitnik građana (2020). Redovan Godišnji izveštaj Zaštitnika građana za 2019. Godinu, (Regular Annual Report of the Protector of Citizens for 2019), Zaštitnik građana, Beograd (pp. 42-50); Retrieved 11 February 2021 from <https://www.ombudsman.rs/attachments/article/6542/Redovan%20godic%20A1niji%20izve%20A1itaj%20Za%20A1titnika%20gra%20C4%91ana%20za%202019.%20godinu.pdf>
- Zaštitnik građana (2022). Redovan Godišnji izveštaj zaštitnika građana za 2021. godinu, (Regular Annual Report of the Protector of Citizens for 2021), Zaštitnik građana, Beograd; Retrieved 17 March 2021 from <https://www.ombudsman.rs/index.php/izvestaji/godisnji-izvestaji>

Wikipedia, the free encyclopedia (2022) Recognition of same-sex unions in Europe; Retrieved 20 August 2022 from https://en.wikipedia.org/wiki/Recognition_of_same-sex_unions_in_Europe

Case law

Case 29381/09 and 32684/09 *Vallianatos and Others v. Greece* [GC], ECtHR Judgment 7.11.2013 [GC] Retrieved 5 March 2022 from [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22002-9224%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-9224%22]})

Case App. 18766/11 and 36030/11 *Oliari and others v. Italy*, ECtHR Judgment 21/10/2015, Retrieved 5 March 2022 from [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-156265%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-156265%22]})

Case App. 26431/12; 26742/12; 44057/12 and 60088/12, *Orlandi and others v. Italy*, ECtHR Judgment 14/03/2018, Retrieved 5 March 2022 from [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-179547%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-179547%22]})

Case C-673/16 *Coman and Hamilton v Romania*, CJEU Judgment 5 June 2018, Retrieved 6 February 2021 from <https://curia.europa.eu/juris/document/document.jsf?text=&docid=202542&doclang=EN>

European Sources Online (2022): C-673/16 Case summaries; Retrieved 6 February 2021 from <https://www.europeansources.info/record/judgement-in-case-c-673-16-relu-adrian-coman-and-others-v-inspectoratul-general-pentru-imigrari-and-others/#:~:text=The%20Court%20argues%20that%2C%20while,a%20derived%20right%20of%20residence>

ISTOPOLNE ZAJEDNICE IZMEĐU NEVIDLJIVOSTI I PRAVNE PRIZNATOSTI

Predmet rada je analiza društvenog i pravnog statusa istopolnih zajednica u Srbiji koje u svakodnevnoj praksi funkcionišu uprkos još uvek nedostajuće pravne regulative. Izlaže se pravo na zakonsko regulisanje istopolnih zajednica kao alteriteta u odnosu na bračnu i vanbračnu zajednicu, u svetlu značaja legitimnog prava na različitost, pravo na zagarantovana građanska prava priznata onima koji su manjinski po broju i/ili društvenom uticaju. Glavna ideja je neophodnost uvažavanja egzistencije drugačije od većinske heteronormativne. Cilj izlaganja je razvijanje društvene sposobnosti za percepciju i za omogućavanje uspostavljanja odnosa i dijaloga sa tim porodičnim alteritetom. Naglašava se potreba razvijanja shvatanja da je pravno priznanje istopolnih zajednica mnogo više od pravnog regulisanja njihovih imovinskih odnosa i građanskih statusa jer je znak demokratizacije društva, njegove otvorenosti i tolerancije. Tematski, rad je organizovan kroz prezentaciju naučnog i aktuelnog društvenog konteksta u Srbiji, afirmativnih stavova nezavisne institucije Zaštitnika građana i evropskog konteksta, sa posebnim osvrtom na nedavna dokumenta Parlamentarne skupštine Saveta Evrope i relevantne presude evropskih sudova za ljudska prava. Tekst se završava zaključkom da se situacija u Srbiji ipak, polako menja u pravcu poboljšanja položaja LGBTI+ osoba. Zaključuje se da se homofobija znatno umanjuje pravnom regulativom statusa istopolnih ("duginih") zajednica, jer gubi legitimitet "opravdanog suprotavljanja ilegalnim" zajednicama kao jedan od svojih značajnih oslonaca. Istovremeno, istopolne zajednice tzv. "dugine" porodice dobijaju pravnom regulativom normalizovan, podržavajuć društveni kontekst suzbijene homofobije i samim tim povećane prihvatljivosti. Posledično, očekivani rezultat je da bi tim činom društvene afirmacije pripadnici LGBTI+ zajednice, ne ometajući ni na koji način većinsku heteronormativnost, imali veću pravnu sigurnost, i neophodne uslove da u društvenom kontekstu postanu vidljiviji i uticajniji na dekonstrukciju stereotipa o LGBTI+ osobama i njihovim istopolnim zajednicama.

Ključne reči: istopolne zajednice, društveni alteritet, naučni kontekst, evropski kontekst, dekonstrukcija heteronormativnosti, pravna sigurnost „duginih“ zajednice.

Proof-reading/copy-editing: Gordana Ignjatović