



Expert Opinion on the Draft Law on Same-Sex Unions of Serbia

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Introduction

On 24 February 2021, the Council of Europe was addressed by the Minister for Human and Minority Rights and Social Dialogue of Serbia, requesting a legal opinion on the Draft Law on Same-Sex Unions following a consultation process with national stakeholders.

To respond to this request, Christian Ahlund and Robert Wintemute were asked to jointly prepare as independent experts an analysis, including comments and recommendations, and any possible proposed amendments to the draft law. This legal opinion takes into consideration the Council of Europe standards in the field of combating discrimination on grounds of sexual orientation and gender identity, as well as on the protection of Social Rights. In particular, it draws on the case law of the European Court of Human Rights (ECtHR), the Council of Europe Committee of Ministers Recommendation CM/Rec(2010)5 to Member States, country monitoring reports and General Policy Recommendations of the European Commission against Racism and Intolerance (ECRI), as well as the latest European Commission Progress Reports on Serbia and the EU acquis.

This document and all comments are based on the English translation, provided by the Council of Europe, of the draft amendments received on 21 April 2021.

Part one - General comments:

1. In the judgment on the case of *Oliari & Others v. Italy* (21 July 2015, para. 185), the ECtHR interpreted Article 8 of ECHR - right to respect for family life - as imposing a “positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions”.
2. According to the above mentioned Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, member states should examine existing legislative and other measures, keep them under review, and collect and analyse relevant data, in order to monitor and redress any direct or indirect discrimination on grounds of sexual orientation or gender identity; ensure that legislative and other measures are adopted and effectively implemented to combat discrimination on grounds of sexual orientation or gender identity, to ensure respect for the human rights of lesbian, gay, bisexual and transgender persons and to promote tolerance towards them.
3. ECRI in its Monitoring Report on Serbia (2017) recommended “that the authorities implement within the planned timelines their anti-discrimination strategies’ measures on introducing registered partnerships for same-sex couples”. On 1 March 2021, ECRI published a “Factsheet on LGBTI issues” which contains

relevant ECRI recommendations. Under the subheading "Legislation on cohabitation and marriage" it says: "The authorities should provide a legal framework that allows same-sex couples to have their relationship formally and legally recognized and protected without discrimination of any kind, in order to address the practical problems related to the social reality in which they live. The authorities should examine whether there is an objective and reasonable justification for any difference in the regulation of married and same-sex couples and abolish any such unjustified differences".

4. By creating "a specific legal framework" for same-sex couples, the Draft Law will bring Serbia into compliance with the ECtHR case law (Case of Oliari & Others v. Italy) by granting a number of core rights relevant to a couple in a stable and committed relationship. This Draft Law is also sufficiently protective of a number of social rights of the partners in a same-sex unions and goes a long way to satisfy the Committee of Ministers (2010) 5 and ECRI's recommendations on the content and quality of a legal framework, which regulates the relationship of same-sex couples. However, there is still some room for improvement.

Part two – Suggested improvements:

5. In the Draft Law, the general term describing a same-sex union should be "a community of private and family life", in order to demonstrate the linkage of the draft law to Article 8 of the ECHR and the case law of the ECtHR.
6. In its Recommendation CM/Rec(2010)5 the Committee of Ministers recommended that, "where national legislation confers rights and obligations on unmarried couples, member states should ensure that it applies in a non-discriminatory way to both same-sex and different-sex couples, including with respect to survivor's pension benefits and tenancy rights"(Appendix, paragraph 23). Article 54 of the draft law satisfies this requirement as far as pension and disability insurance benefits are concerned. But the law appears to lack an explicit guarantee for the right of tenancy continuation of the survivor. Also, in the situation of a dissolution of a same-sex union, the tenancy situation does not seem to be regulated.
7. The draft law appears to lack any provision regulating the right to alimony for an economically disadvantaged partner after the dissolution of a same-sex union.
8. The draft law does not regulate adoption with regard to same-sex relationships.

9. The draft law appears to lack a provision regulating the right of leave for a partner to care for a sick partner.
10. In addition, the Draft Law appears to contain a few provisions which are discriminatory for same-sex couples in comparison to different-sex couples in the same situation. For example, in Article 32 the possibility of unilateral dissolution is problematic as it could be perceived as discriminatory if compared to the same situation in an opposite-sex union.

Part three - Comments on specific Draft Law provisions

Articles 2, 20, 39, 74

In Articles 2, 20, 39, 74 the phrase “community of life” should be replaced by “community of private and family life”.

11. “Community of private and family life” would better reflect the case law of the ECtHR, which declared in *Schalk & Kopf v. Austria* (24 June 2010, para. 94) that: “the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of “family life”, just as the relationship of a different-sex couple in the same situation would”.

Article 5

Article 5 looks out of place at the start of the Draft Law for the reasons explained below. We would suggest that this Article be moved to the end of the Law.

12. Article 5 looks out of place at the start of the Draft Law, because it is the first topic that is mentioned. Same-sex unions are about mutual love. Violence should be presumed to be exceptional, and should not be mentioned at the start. We would suggest that this Article be moved to the end of the Law. The Family law and the laws on domestic violence should be amended so that they refer to partners in registered and unregistered same-sex unions.

Article 17

Article 17, third paragraph, should be removed or amended to require the consent of the foreign national.

13. The partner in a same-sex union who is a foreign national might have good reasons not to want their government to know about their registered same-sex union in Serbia. There is not yet sufficient social acceptance of same-sex relationships in Europe

and outside Europe to justify treating notification of a registered same-sex union as equivalent to notification of an opposite-sex marriage. Unlike opposite-sex spouses, same-sex partners still need to be concerned about having their sexual orientation disclosed (being “outed”) without their consent. Different treatment of same-sex partners, who are in a different situation, would be justifiable under the Case of Taddeucci & McCall v. Italy (30 June 2016). Failure to treat them differently could violate Article 14 of the ECHR combined with Article 8.

Articles 29 and 30

Article 29, should be amended to regulate also the situation in case of a disagreement between the parties regarding the dissolution of a same-sex union or the terms for such a dissolution.

14. There is nothing in these articles which regulates the situation in case of a disagreement between the parties regarding the dissolution of a same-sex union or the terms for such a dissolution. And when/if the court in such a situation delivers a decision/judgment in favour of one of the parties, the other party must have the right to appeal, both concerning the dissolution as such and the division of property. Perhaps, in such a situation one could apply Article 33, paragraph 5, which stipulates that “the partners in a same-sex union shall have the same procedural rights and procedural status in all court and administrative proceedings as spouses”. But this needs to be clarified (see below under Article 33).

Articles 29, 30, 31

Articles 29, 30 and 31 should be amended to provide for an obligation of financial support where one partner in the registered same-sex union is financially dependent on the other.

15. These provisions do not mention an obligation to provide ongoing financial support where one partner in the registered same-sex union is financially dependent on the other.

Article 33

Article 33, paragraph 5 should be moved to the beginning of the article.

16. A provision so important and far-reaching as paragraph 5 of Article 33, which would seem to be applicable to very important aspects of the legal status of the partners, should be moved to the beginning of the article, instead of being placed at the end of it.

Article 39

Article 39 needs to be clarified and revised because it appears to be discriminatory if compared to the same situation in an opposite-sex union.

17. This article is confusing as the first paragraph seems to stipulate that it is not the partners in a same-sex union, who have the primary obligation of support for a minor child of one of the partners, but rather the "relatives" of that child. This appears to be discriminatory as it would hardly be the situation in an opposite-sex union. It needs to be clarified and revised. The subsequent paragraphs need to be revised accordingly.

Article 40

Article 40, first paragraph, needs to be revised as it creates a legally prescribed imbalance between the parents/same-sex partners in relation to the child.

18. Family decisions affecting the life of a child should ideally be made in agreement by the parents/partners and in the best interest of the child. Such decisions should not expressly require the permission/consent by the biological parent, which the wording of the provision seems to imply. This would seem to create a legally prescribed imbalance between the parents/same-sex partners in relation to the child. Custody regulations in the relevant family law framework would of course also be of relevance here.

Article 74

In Article 74, first paragraph, the three-year "community of life" requirement needs to be removed because it is discriminatory as it is not required by the law on common-law marriage of an opposite-sex couple.

19. The three-year "community of life" requirement for the recognition of an unregistered same-sex union is discriminatory and contrary to the ECtHR judgments in the Cases of Karner v. Austria (24 July 2003) and Vallianatos & Others v. Greece (Grand Chamber, 7 November 2013), if it does not also apply to the common-law marriage of an opposite-sex couple.