



**IS LOVE EQUAL BEFORE THE LAW?**  
SAME-SEX RELATIONSHIPS IN THE  
SERBIAN LEGAL FRAMEWORK

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### Coordinators

Vladimir Pavlovic  
Vuk Raicevic

### Authors

Aleksandar Mihajlovic  
Emina Muminovic  
Veronika Vasilic

### Proofreading

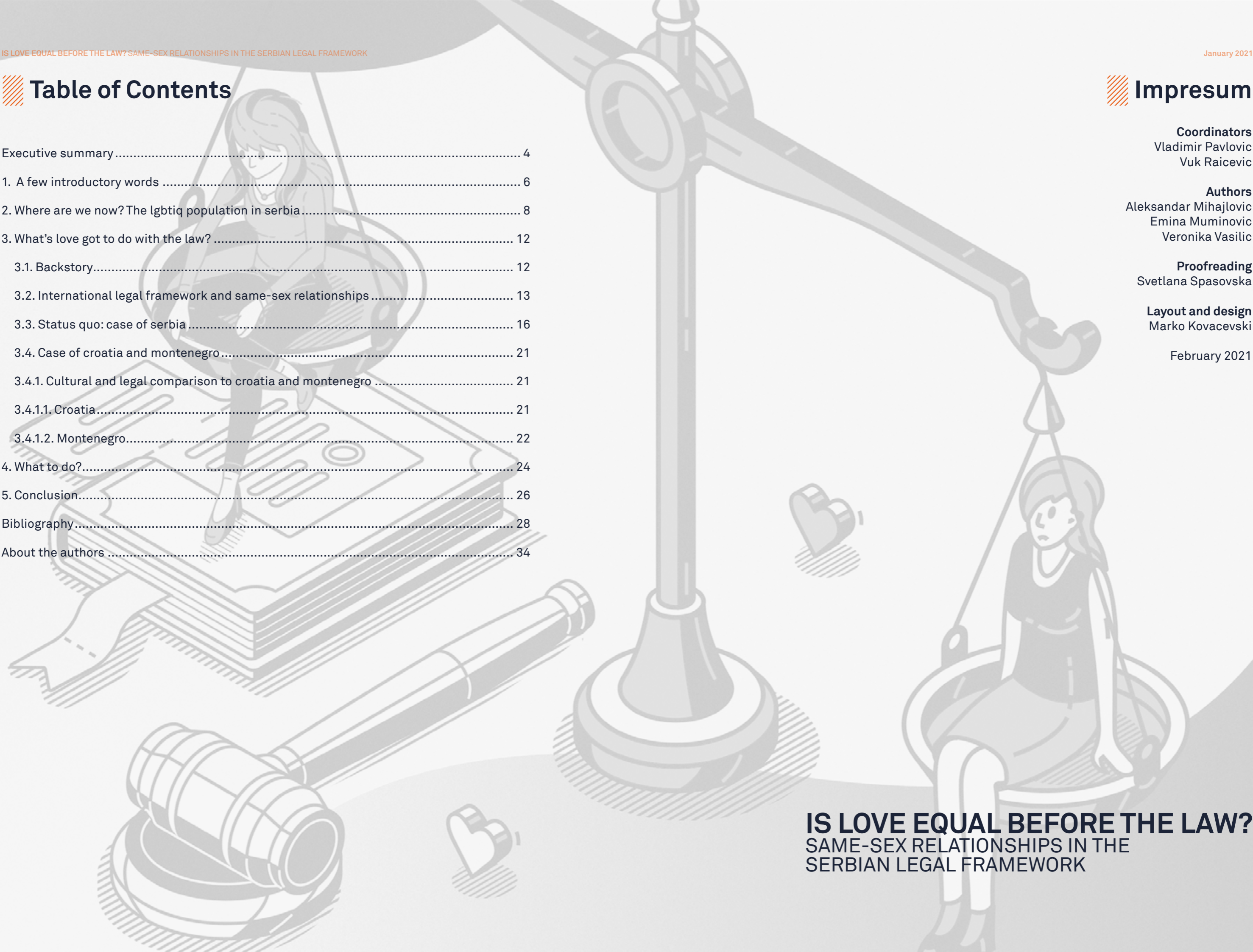
Svetlana Spasovska

### Layout and design

Marko Kovacevski

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## Executive Summary

The purpose of this policy paper is to *advocate for the improvement* of the position of the LGBTIQ<sup>1</sup> community in Serbia *through the legal recognition of same-sex relationships*<sup>2</sup>, by approaching decision-makers, precisely, the Serbian government, the newly established Ministry of Human and Minority Rights and Social Dialogue (MHMRSD) and other relevant stakeholders, as well as the Delegation of the European Union to the Republic of Serbia. Only in collaboration with the relevant authorities, the Republic of Serbia (RS) will fully follow its international human rights obligations and ensure legal status to same-sex couples.

Although the relevant domestic framework prohibits discrimination based on sexual orientation and gender identity, the LGBTIQ population is still stigmatized and subjected to hate crime and hate speech. The last survey, conducted by the Serbian Commissioner for Protection of Equality in 2019, shows a *very high percentage of social distance* towards the LGBTIQ population. The respondents were asked a question: “Would you have anything against you or your children being married to an LGBT person?”, and 63% gave a positive answer.<sup>3</sup> On the other side, there are some very notable improvements when it comes to the respect of the LGBTIQ rights in Serbia. The Pride Parade has been held since 2014 without any serious incidents. The Pride Info Centre was opened in the city centre of Belgrade in 2018. Probably, the most important is the fact that the RS is the first country in the Western Balkans to have an openly lesbian Prime Minister. All the aforementioned developments have contributed to the increasing visibility of the LGBTIQ community in Serbian society.

Same-sex couples exist *de facto* in the RS and establish stable life unions which are not in contrast to opposite-sex couples. *De jure*, they are legally invisible before Serbian authorities and this status results in their *unequal treatment* in comparison to opposite-sex relationships. This form of discrimination is illustrated through the inability, for instance: to regularly visit their partners in hospitals, to give consent for medical treatment of their partner, to exercise inheritance rights based on applicable laws, to exercise different economic, social and civil rights.

There is *no official policy option in Serbia* which regulates this area. Thanks to the initiative of the CSO *Labris*, the *Model Law on the Civil Partnership*<sup>4</sup> has been developed and presented several times to Serbian authorities, last in June 2020.<sup>5</sup> The comparative legal analysis shows the existence of *varieties of legal models* which provide the legal recognition of same-sex relationships, depending

on the socio-cultural background of each country introducing such laws. We decided to focus, *first*, on the *international legal framework* which is the source of the clear obligation of the RS to introduce this law, through the analysis of the judgement *Oliari and Others v Italy*, where the European Court of Human Rights (ECtHR) has established *the legal precedent* regarding the necessity of the recognition of same-sex relationships within the Council of Europe (CoE) member states; and, *second*, on the *comparative analysis of Croatia and Montenegro*, which passed laws regarding the legal recognition of same-sex couples. The emphasis on these two countries is significant because both share the similar legal tradition, culture, religion, language, and patriarchal characteristics of societies with Serbia, and both did such legal changes successfully, while Serbia is still struggling to do so.

We support the proposal submitted by the CSO *Labris* on the legal solution for legalization of *registered partnership*. This proposal presents a sensible and realistic option because the current Serbian Constitution and the Family Law define marriage as a union between a man and a woman. By introducing a law on same-sex registered relationships, there will be no necessity for changing the current Constitution and same-sex couples will be protected within the Serbian legal system.

The policy paper also provides a *detailed list of recommendations* for Serbian authorities. The successful implementation of recommendations would improve the protection of the LGBTIQ community and tackle discrimination based on sexual orientation, which is still very persistent in the country. We separated recommendations into the three groups, based on the three branches of power (the executive, legislative and judiciary), which will have the authority to participate in the process of drafting, passing or implementing the law on same-sex relationships. CSOs in Serbia are recognized as a very important partner in these processes which will work with each of the above-mentioned stakeholders. The accent is on the Ministry of Human and Minority Rights and Social Dialogue which should propose a draft of the law, as well as other relevant ministries which should propose changes of other relevant laws, thus ensuring the full implementation of the law on the legal recognition of same-sex relationships. The National Assembly has been recognized as very important for the process of debating and holding public hearings through its relevant committees, as well as the judiciary, which will be responsible for resolving different types of disputes in civil or criminal cases potentially related to same-sex relationships.

<sup>1</sup> The authors have chosen to use the abbreviation LGBTIQ to encompass all varieties of human sexuality (Lesbian, Gay, Bisexual, Trans, Intersex and Queer). When quoting particular texts and reports, the authors retain the abbreviations used in the quoted text.

<sup>2</sup> The legal terminology used for same-sex couples recognized by the different laws varies. There are terms which are used in practice: “common law partners”, “common law spouses”, “de facto partners”, “de facto spouses”, “domestic partners”, “eligible partners”, “life partners”, “members of or parties to a “civil union” or “community of life” or “confirmed cohabitation” or “de facto relationship” or “de facto union” or “domestic relationship” or “lasting joint household” or “stable couple” or “stable union”, “partners”, persons cohabiting “as spouses” or “in a spousal relationship”, “reciprocal beneficiaries”, “registered partners”, “same-sex partners”, “spouses”, and “statutory cohabitants”. In: Robert Wintemute, ‘Conclusion’ in Robert Wintemute and Mads Andenæs (eds), *Legal Recognition of Same-Sex Partnerships – A Study of National, European and International Law* (1st edn, Hart Publishing 2001) 760.

<sup>3</sup> Izveštaj o istraživanju javnog mnjenja “Odnos građana i građanki prema diskriminaciji u Srbiji”, Poverenik za zaštitu ravnopravnosti, Beograd 2019, p. 55 <http://ravnopravnost.gov.rs/wp-content/uploads/2019/11/izvestaj-o-istrazivanju-javnog-mnjenja.pdf> accessed 22 January 2021

<sup>4</sup> The Model Law on Civil Partnership, see more: Saša Gajin, “Model Zakona o građanskom partnerstvu”, *Labris – organizacija za lezbejska ljudska prava*, april 2020. <http://labris.org.rs/sites/default/files/Model%20zakona%20o%20gra%C4%91anskom%20partnerstvu.pdf> accessed 24 January 2021

<sup>5</sup> Labris predstavio Model zakona o građanskom partnerstvu, 3 July 2020 <http://labris.org.rs/sr/labris-predstavio-model-zakona-o-gra%C4%91anskom-partnerstvu> accessed 24 January 2021

LABRIS predstavio model zakona o istopolnom partnerstvu u Srbiji, 25 June 2020 <https://rs.n1info.com/vesti/a613342-labris-predstavio-model-zakona-o-istopolnom-partnerstvu-u-srbiji/> accessed 31 January 2021

## 1. A few introductory words

Sexual minorities are victims of discrimination based on their sexual orientation in different spheres of life in every society. It is related to the workplace, education, health care protection, access to justice, private and family life and many other fields. In this policy paper, we are dealing with one aspect of discrimination based on sexual orientation related to *the lack of the legal recognition of same-sex relationships in Serbia*. As members of the Serbian society, same-sex couples exist *de facto*, but are not recognized *de jure* in the Serbian legal framework, and this results in an unequal treatment in exercising different social, economic and civil rights in comparison to opposite-sex couples.

The RS was granted the status of a candidate country by the European Council in 2012 and started negotiations for European Union (EU) membership in January 2014. Since then, 18 out of 35 negotiation chapters have been opened, from which two were provisionally closed. The negotiation process includes the harmonization of the Serbian legal system with the EU *acquis*. The RS is a member of the CoE, which means that it has accepted to follow and respect the CoE human rights standards and the case law delivered by the ECtHR. As a member of the United Nations (UN), the RS is a contracting state to the core human rights treaties, such as: the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) etc. All these facts create a variety of legal obligations for the Serbian state to harmonize its legal norms in accordance with the UN and regional human rights standards.

In the domestic legal framework, *the Law on the Prohibition of Discrimination of the RS*<sup>6</sup>, as the main anti-discrimination law, prohibits discrimination based on sexual orientation and gender identity (SOGI). *The Constitution of the RS*<sup>7</sup> and *the Family Law of the RS*<sup>8</sup> only recognize *marriage* as a legal institution *between a man and a woman*, while marriage and extramarital unions are equalized in some respects.<sup>9</sup> There is no law that recognizes same-sex relationships in Serbia like *de jure* or *de facto* unions, as it has been done with opposite-sex couples. There are also two national human rights institutions, the Protector of Citizens (Ombudsman) and the Commissioner for Protection of Equality (Commissioner), whose mandates also include the protection of rights of sexual minorities. They can review evidence of alleged cases of discrimination and provide opinions and recommendations regarding such acts.<sup>10</sup>

6 The Law on the Prohibition on Discrimination, Official Gazette of RS, 22/09

7 The Constitution of the Republic of Serbia, Official Gazette of RS, 98/06 art 62.

8 The Family Law, Official Gazette of RS, 18/05, 72/11-state law and 6/15 art 3.

9 Extramarital union, also known as common law marriage, informal marriage, non-ceremonial marriage, means that opposite-sex partners are not registered in the official state registrar, but they create a *de facto* union which is recognized by the Serbian legal system. Although the Serbian Constitution and the Family Law equalize marriage and extramarital union, there are still some legal gaps where partners from extramarital union cannot exercise some rights in the full legal capacity as opposite-sex partners who form marriage and who are registered officially. For instance, extramarital partners do not have the same inheritance-related rights automatically after the death of a partner as opposite-sex spouses do.

10 The Protector of Citizens (Ombudsman) and the Commissioner for the Protection of Equality can deal with the cases submitted by individuals or civil society organizations. On some occasions they can also intervene on their own initiative when they are informed through the media or other channels of communication about alleged violations of human rights, including cases of discrimination. The Commissioner for the Protection of Equality has an additional power to initiate strategic litigations before the Serbian courts in cases where she/he estimates that the specific case can contribute to the elimination of systemic discrimination from the Serbian society. Both institutions deliver annual reports to the National Assembly with concrete recommendations which should contribute to the improvement of human rights protection in Serbia.

The Government of the RS passed *the Anti-Discrimination Strategy for 2013-2018*<sup>11</sup> and *the Action Plan for the Implementation of the Anti-Discrimination Strategy for the Period 2014-2018*<sup>12</sup>. Their aim was to develop a working text (model) of the Law on Registered Same-sex Unions and the working text (model) of the Law Amending and Supplementing the Law on Inheritance. This should have provided equal status to marital and non-marital unions and recognize the right of same-sex partners to inheritance as first-degree heirs.<sup>13</sup> The Strategy expired in January 2018 without any realization of the concrete tasks which were planned regarding the legal recognition of same-sex relationships. Until now, the new anti-discrimination strategy and action plan have not been passed. In the *Working Plan of the Government of the RS for 2020* dated January 2020, in the part related to the activities of the Ministry of Labour, Employment, Veterans and Social Affairs, more specifically in the section named *Acts which the Government submits for approval to the National Assembly*, the model Law on Registered Same-sex Unions was designated as *not completed yet*.<sup>14</sup>

After the national elections took place in June 2020, *the Program of the Government of the RS*, submitted by the Candidate for the Position of the Prime Minister at the time, Ana Brnabic, on 28 October 2020, in the part 2.5. - *Rule of Law and Acceleration of the Reforms on Our European Path*, recognized the importance of social inclusion of the marginalized social groups in Serbia, including LGBTI persons.<sup>15</sup> In the Program it is also emphasized that all citizens of the Republic of Serbia should be equal and should exercise their rights equally. The newly elected Serbian government has introduced a few new ministries, and one of them is the Ministry of Human and Minority Rights and Social Dialogue (hereinafter referred to as MHMRSD).<sup>16</sup> Some of the priorities in the future work of the newly established MHMRSD include the work on the preparation of models of relevant laws which will regulate same-sex relationships, legal gender recognition, gender equality legal framework, as well as amendments to the current Law on the Prohibition on Discrimination.<sup>17</sup>

The policy paper aims to analyse the socio-economic reasons behind the non-recognition of same-sex relationships in Serbia and its legal implications. It also intends to recognise key stakeholders, such as the Government of the RS, relevant ministries and the Delegation of the European Union to the Republic of Serbia, all of which can contribute and influence substantial changes leading to the legal recognition of same-sex relationships. We believe that human rights should be universal, and the non-discrimination principle should be at the heart of every society, as a precondition for peaceful and prosperous development.

11 The Anti-Discrimination Strategy for 2013-2018

[https://www.ljudskaprava.gov.rs/sites/default/files/dokument\\_file/ad\\_strategy\\_eng\\_ut.pdf](https://www.ljudskaprava.gov.rs/sites/default/files/dokument_file/ad_strategy_eng_ut.pdf) accessed 24 January 2021

12 The Action Plan for the Implementation of the Strategy for Prevention and Protection against Discrimination for the Period 2014-2018

[https://www.ljudskaprava.gov.rs/sites/default/files/dokument\\_file/ad\\_action\\_plan\\_eng\\_pdf.pdf](https://www.ljudskaprava.gov.rs/sites/default/files/dokument_file/ad_action_plan_eng_pdf.pdf) accessed 24 January 2021

13 The Action Plan for the Implementation of the Strategy for Prevention and Protection against Discrimination for the Period 2014-2018 p. 67-68

[https://www.ljudskaprava.gov.rs/sites/default/files/dokument\\_file/ad\\_action\\_plan\\_eng\\_pdf.pdf](https://www.ljudskaprava.gov.rs/sites/default/files/dokument_file/ad_action_plan_eng_pdf.pdf) accessed 24 January 2021

14 The Working Plan of the Government of the Republic of Serbia for 2020 [Plan rada Vlade za 2020. godinu], January 2020, p. 720 [https://www.srbija.gov.rs/extfile/sr/370541/plan-rada-vlade-srbije-za-2020\\_cyr.pdf](https://www.srbija.gov.rs/extfile/sr/370541/plan-rada-vlade-srbije-za-2020_cyr.pdf) accessed 24 January 2021

15 The Program of the Government of the Republic of Serbia of the Candidate for the Position of the Prime Minister Ana Brnabić [Program Vlade Republike Srbije kandidata za Predsednika Vlade Ane Brnabić], 28 October 2020, p. 22 [https://www.srbija.gov.rs/view\\_file.php?file\\_id=2428&cache=sr](https://www.srbija.gov.rs/view_file.php?file_id=2428&cache=sr) accessed 24 January 2021

16 The Law on Ministries, Official Gazette of RS, 128/20 art 12.

This news regarding the new ministry is very promising, especially because the former Government Office for Human and Minority Rights was elevated to the rank of a ministry, which signals the readiness of the current government to deal with issues of human and minority rights, including the LGBTIQ people, on higher political level.

17 The Law on Same-sex Partnerships is being drafted: Serbian MPs will soon discuss it, 30 November 2020 <https://www.telegraf.rs/english/3269858-law-on-same-sex-partnerships-is-being-drafted-serbian-mps-will-soon-discuss-it> accessed 24 January 2021 Up until the moment of writing and publishing this policy paper, there was neither a MHMRSD website available nor any relevant sources with the drafts of the concrete laws which were mentioned in the news by the government officials.

The methodology used in this policy paper includes the analysis of the relevant comparative legal perspectives on the topic of legal recognition of same-sex relationships through the prism of both international and regional legal frameworks. The numerical data was taken from relevant secondary sources. The limitation of the applied methodology is the fact that data from the primary research, such as: surveys, interviews with same-sex couples in Serbia and representatives of civil society organizations (CSOs), as well as government officials, was not used. There are two reasons for this: first, the time constraints the authors faced in the preparation of this policy paper, which prevented them from conducting such a sociological research; second, there are plenty of studies conducted by international and national human rights organizations and CSOs which will suffice to support our statement regarding the necessity to legalize same-sex relationships in Serbia.

## 2. Where are we now? The LGBTIQ population in Serbia

LGBTIQ people in Serbia face many challenges since most of the Serbian population has negative attitudes towards this minority. The reasons behind this situation are diverse, such as traditionalism and conservatism which are still very persistent, the patriarchal society, and the strong influence of religion. Unfortunately, it is still fairly common for the members of the LGBTIQ community to experience discrimination or even violence. Discrimination occurs daily, whether in educational institutions, at work, at home or in the public sphere.

The Commissioner for the Protection of Equality conducted two surveys in 2019 and 2016 to examine the citizens' attitudes towards discrimination in Serbia using the same methodology, and the findings showed that the highest level of social distance is towards the LGBT population.<sup>18</sup> In the 2019 survey, 63% of the participants responded that they would not like to be married to a person belonging to the LGBTI population, and they share the same opinion when it comes to their children.<sup>19</sup> There was some kind of a decrease of social distance towards the LGBT people in the 2019 survey in comparison to the one from 2016. The former (2016) survey showed the highest level of social distance towards LGBT people, while in the latter survey (2019) LGBT people came in second after migrants and asylum seekers.<sup>20</sup> This change can be explained by the fact that the Prime Minister of the RS is a member of the LGBTIQ community. She has increased the visibility of this group of people in everyday life and this has resulted in a decrease of social distance towards this group of people in general. On the other side, there was a massive propaganda against migrants and asylum seekers in the last few years, and it has changed the perspective towards these vulnerable people for the worse.

18 Izveštaj o istraživanju javnog mnjenja "Odnos građana i građanki prema diskriminaciji u Srbiji", Poverenik za zaštitu ravnopravnosti, Beograd 2019, p. 49 <http://ravnopravnost.gov.rs/wp-content/uploads/2019/11/izvestaj-o-istrazivanju-javnog-mnjenja.pdf> and Izveštaj o istraživanju javnog mnjenja "Odnos građana i građanki prema diskriminaciji u Srbiji", Poverenik za zaštitu ravnopravnosti, Beograd 2016, p. 51 [https://drive.google.com/file/d/1w5UfenxRlyMNzIbAd\\_bLZMBxoJ6JhdLc/view](https://drive.google.com/file/d/1w5UfenxRlyMNzIbAd_bLZMBxoJ6JhdLc/view) accessed 22 January 2021

19 Izveštaj o istraživanju javnog mnjenja "Odnos građana i građanki prema diskriminaciji u Srbiji", Poverenik za zaštitu ravnopravnosti, Beograd 2019, p. 55 <http://ravnopravnost.gov.rs/wp-content/uploads/2019/11/izvestaj-o-istrazivanju-javnog-mnjenja.pdf> accessed 22 January 2021

20 Ibid p. 49.

LGBTIQ people are victims of different forms of violence, attacks and illegal acts which are all motivated because of their sexual orientation, gender identity and gender expression (SOGIE). The Serbian CSO *Da se zna!* reported 63 survivors of SOGIE motivated illegal acts which were committed and recorded in 2019, and which constitutes a 50% increase compared to the previous year.<sup>21</sup> However, most of the documented incidents are still reported only to the *Da se zna!* Association and not to the official institutions.<sup>22</sup> This data also confirms the findings from one 2015 survey that the Serbian LGBTIQ community's number one priority is to achieve adequate levels of personal security.<sup>23</sup>

There were also 11 attacks on the Pride Info Centre in the city centre of Belgrade, during 2019 and 2020.<sup>24</sup> The Centre was opened in 2018 as the first venue of this kind in the country, created as a safe space for the LGBTIQ community. These happenings illustrate the hatred stirred up against LGBTIQ people, and violence breaking out in the space where the LGBTIQ community is gathering - a space decorated by rainbows and other visible signs. It is important to emphasize that hate crime was included in the Serbian legislation in 2012, but the first court decision to consider Article 54a of *The Criminal Code of RS*<sup>25</sup> and bring the punishment into relation to the sexual orientation of the victim of domestic violence was reached on 2 November 2018. The proceedings were led by a YUCOM's lawyer before the First Basic Court in Belgrade.<sup>26</sup> This case is just one of many examples of *delayed implementation* of existing legislation.

The European Union Agency for Fundamental Rights (FRA) conducted an online survey<sup>27</sup> in 2019 among 139,799 persons aged 15 or older who identified themselves as the LGBTI persons in all the EU member states and the candidate countries of North Macedonia and Serbia. The results were published in 2020, and they showed the following facts regarding the situation in Serbia: 53% of respondents from Serbia are almost never open about being LGBTI; 76% avoid going to certain places; 16% felt discriminated against when looking for work; about one in four felt discriminated against at work for being LGBTI; 17% of respondents were victims of physical or sexual attacks motivated by their sexual orientation or gender identity, which is a much higher rate than the results from the EU member states.<sup>28</sup>

Although there have been some positive changes in relation to the freedom of assembly of the LGBTIQ community, such as the Pride Parade in Belgrade which has been taking place without any incidents since 2014, "the overall situation of LGBTI persons in Serbia remains broadly the same as in

21 The publication also shows some not very promising data, such as that in 2019, 27 physical attacks were committed and documented, 12 of which implied bodily injuries inflicted to the survivors. The share of the physically violent incidents in the total number of documented incidents is by 28.1% higher compared to the previous year. In: Miloš Kovačević, Nikola Planojević, "Grasp the truth based on facts!" Report on hate-motivated incidents against LGBT+ people in Serbia from January 2017 to June 2020 p. 23 <https://dasezna.lgbt/attachments/podaci-3-ENG.pdf> accessed 23 January 2021

22 Ibid.

23 BEING LGBTI IN EASTERN EUROPE: SERBIA COUNTRY REPORT - A participatory review and analysis of the legal, institutional, policy and socio-economic environment for lesbian, gay, bisexual, transgender and intersex people, and civil society, 2017 p. 15 [https://www.eurasia.undp.org/content/rbec/en/home/library/democratic\\_governance/being-lgbti-in-eastern-europe-albania-country-report.html](https://www.eurasia.undp.org/content/rbec/en/home/library/democratic_governance/being-lgbti-in-eastern-europe-albania-country-report.html) accessed 8 February 2021

24 Red Star fans reported to have attacked Belgrade Pride Info Centre, police deny, 2 October 2019 <https://rs.n1info.com/english/news/a530958-red-star-fans-reported-to-have-attacked-belgrade-pride-info-center/> Attack on Pride Info Centre and Violent Protest Signal Worrying Trend for LGBTI+ Community in Serbia, 4 March 2020 <https://crd.org/2020/03/04/attack-on-pride-info-centre-and-violent-protest-signal-worrying-trend-for-lgbti-community-in-serbia/>, accessed 23 January 2021

25 The Criminal Code, Official Gazette of RS, 85/05, 88/05-corr., 107/05-corr., 72/09, 111/09, 121/12, 104/13, 108/14, 94/16 and 35/19 art 54a.

26 See more: Criminal verdict for a hate crime reached for the first time, 7 November 2018 <http://en.yucom.org.rs/criminal-verdict-for-a-hate-crime-reached-for-the-first-time/> accessed 23 January 2021

27 EU-LGBTI II, A Long Way to Go to LGBTI Equality [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-lgbti-equality-1\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbti-equality-1_en.pdf) accessed 24 January 2021

28 Ibid p. 25, 32, 39.

previous years”<sup>29</sup>, as is stated in the European Commission Report on Serbia for 2020.<sup>30</sup> The findings issued in the European Commission Report regarding hate crime and violence towards LGBTIQ people in Serbia are similar to those presented in the publication from the *Da se zna!* Association.<sup>31</sup> The European Commission adopted the *LGBTIQ Equality Strategy 2020-2025* which is grounded on four pillars: 1. tackling discrimination against LGBTIQ people; 2. ensuring LGBTIQ people’s safety; 3. building LGBTIQ inclusive societies; and 4. leading the call for LGBTIQ equality around the world.<sup>32</sup> The strategy, in paragraph 3.2. – *Improving the legal protection for rainbow families in cross-border situations*, aims to push the mutual recognition of rainbow families in all of the EU member states because, “if one is a parent in one country, one is a parent in every country”, and for that purpose the European Commission will propose a horizontal legislative initiative to support *the mutual recognition of parenthood between Member States*, as well as “to support *the mutual recognition of same-gender spouses and registered partners’ legal status* in cross border situations”.<sup>33</sup> Although the strategy is addressing the EU member states, it represents a very important document which should be seen as a *clear guidance of the EU vision* towards same-sex relationships and families – an example which should be followed by the EU candidate countries, including Serbia, which is harmonizing its laws in accordance with the EU *acquis*.

Taking into account *the socio-economic position* of LGBTIQ people in Serbia, the findings of *the Comparative Analysis of the Socio-economic Dimensions of LGBTI Exclusion in Serbia*, published by the World Bank in 2019, show that certain socio-economic outcomes of the LGBTI population are worse than those of the general population. For example, the median household income for the LGBTI sample (€489) is less than for the comparable sample of the general population (€628).<sup>34</sup>

Moreover, negative opinions and statements about the LGBTIQ population, *given by public figures*, have a *huge negative impact* on the LGBTIQ community. These types of statements can often be heard from politicians, especially those who are members of right-wing parties or church representatives. For instance, recently the Serbian Orthodox cleric and current Bishop of Backa, Irinej Bulovic, declared that homosexual behaviour is unacceptable, in response to Gordana Comic, the current Minister for Human and Minority Rights and Social Dialogue, who said that by the end of 2020, the laws on gender equality and same-sex partnership would be prepared.<sup>35</sup> In reference to the same topic there was another homophobic statement made by Djuradj Jaksic, a member of the Serbian Radical Party.<sup>36</sup> However, it is the responsibility of the state and its government to ensure that all its citizens have the same rights, especially if the state claims to be secular.

29 The European Commission, Serbia 2020 Report

[https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/serbia\\_report\\_2020.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/serbia_report_2020.pdf) p. 38 accessed 24 January 2021

30 The Report also emphasized the following facts: first, the implementation of the hate crime legislation, including on grounds of sexual orientation, remains inadequate; second, centralised official data on hate crimes broken down by bias motivation is still lacking; third, due to lack of trust in institutions and the fear of stigmatisation and victimisation, cases of violence and discrimination towards the LGBTI persons are often unreported; fourth, human rights defenders, together with the LGBTI persons, often face hate speech, threats and violence. Ibid p. 36, 38.

31 See the Publication from the footnote 21.

32 The European Commission LGBTIQ Equality Strategy 2020-2025 p. 5 [https://ec.europa.eu/info/sites/info/files/lgbtiq\\_strategy\\_2020-2025\\_en.pdf](https://ec.europa.eu/info/sites/info/files/lgbtiq_strategy_2020-2025_en.pdf) accessed 24 January 2021

33 Ibid p. 17.

34 A comparative Analysis of the Socioeconomic Dimensions of LGBTI Exclusion in Serbia, World Bank Group Washington DC, 2019, p. 2 <https://openknowledge.worldbank.org/bitstream/handle/10986/32395/A-Comparative-Analysis-of-the-Socioeconomic-Dimensions-of-LGBTI-Exclusion-in-Serbia.pdf?sequence=1&isAllowed=y> accessed 2 February 2021

35 Episkop Irinej: Homoseksualno ponašanje je neprihvatljivo, zakon ministarke Čović je direktiva Brisela, 1 January 2021 <https://www.021.rs/story/Info/Srbija/262444/Episkop-Irinej-Homoseksualno-ponasanje-je-neprihvatljivo-zakon-ministarke-Covic-je-direktiva-Brisela.html> accessed 2 February 2021

36 RADIKALA RAZBESNEO ČOMIČKIN PREDLOG - NIJE BIRAO REČI: Kakve istopolne zajednice p\*\*ka vam materina?!, 17 Novembar 2020 <https://www.pravda.rs/lat/2020/11/17/radikala-razbesneo-comickin-predlog-nije-birao- reci-kakve-istopolne-zajednice-pka-vam-materina/> accessed 2 February 2021

It is still unclear whether there will be sufficient political support among the members of the National Assembly to adopt a law that will legalize same-sex relationships. This is because of the negative attitudes expressed by some of the government officials and MPs from the former and current Parliament composition. For instance, Nenad Popovic, a Minister without Portfolio in charge of innovations and technological development, who is still a member of the new government, was very loud on his Twitter account posting a homophobic comment regarding a children’s book on rainbow families which were published by the Croatian CSO *Dugine obitelji*, and which translation into Serbian was expected at that time.<sup>37</sup>

After the event involving Minister Popovic, two Serbian CSOs submitted a complaint to the Commissioner for the Protection of Equality. The Commissioner conducted a procedure and found that the Minister violated Article 12 of the Law on the Prohibition on Discrimination and issued a recommendation to the Minister to publish a written apology to the members of the LGBT community and to refrain himself from making future statements, thus spreading ideas and views which demean the members of the LGBT population and encourage prejudice towards marginalized social groups.<sup>38</sup> The Minister refused to follow these recommendations.<sup>39</sup>

The daily newspaper *Danas* conducted a short survey among the MPs from the former Parliament composition in 2019, asking them about their attitudes on the legalization of same-sex marriage, and, from the 19 interviewees, 13 were against and 5 were in favour of it.<sup>40</sup> Similar attitudes come from some current MPs and representatives of the Serbian Orthodox Church who denied the rights of same-sex couples, and gave very explicit statements at the beginning of 2021 when the topic emerged in the public discourse.<sup>41</sup> On the other hand, the CSO *Belgrade Pride* initiated the online petition “Šta nas žulja?” [“What is bothering us?”] last September, when a lot of people supported the initiative for passing the law on the legal recognition of same-sex relationships.<sup>42</sup> The business community in Serbia has also launched a public appeal to the government and the National Assembly to introduce a law which will recognize same-sex couples and guarantee equal treatment of the LGBTIQ community before the law.<sup>43</sup>

37 Zoran Glavonjić and Enis Zebić, “Ministar ne voli LGBT slikovnice”, 4 May 2018 <https://www.slobodnaevropa.org/a/ministar-srbija-slikovnica-lgbt-hrvatska/29208950.html> accessed 25 January 2021

38 Opinion – Reference no. 07-00-368/2018-02 <http://ravnopravnost.gov.rs/en/reference-no-07-00-368-2018-02/> accessed 25 January 2021

Mišljenje po pritužbi R.i.c. i G.L. protiv ministra bez portfelja zaduženog za inovacije i tehnološki razvoj Nenada Popovića na osnovu seksualne orijentacije u oblasti javna sfera-opšta javnost – Br. 07-00-368/2018-02 <http://ravnopravnost.gov.rs/rs/r-i-c-i-g-l-protiv-ministra-bez-portfelja-zaduzenog-za-inovacije-i-tehnoloski-razvoj-nenada-popovica-na-osnovu-seksualne-orijentacije-u-oblasti-javna-sfera-opsta-javnost/> accessed 25 January 2021

39 Public Notice – Nenad Popovic discriminated members of the LGBT population <http://ravnopravnost.gov.rs/en/public-notice-nenad-popovic-discriminated-members-of-lgbt-population/> accessed 25 January 2021

40 Selena Kosorić, “Poslanici oprečno o ozakonjenju istopolnih brakova, ali većina protiv”, 24 February 2019 <https://www.danas.rs/drustvo/poslanici-oprečno-o-ozakonjenju-istopolnih-brakova-ali-vecina-protiv/> accessed 25 January 2021

41 Iva Martinović, “Glasovi iz Crkve, ali i vlasti protiv Zakona o istopolnom partnerstvu u Srbiji”, 4 January 2021 <https://www.slobodnaevropa.org/a/godina-za-zakon-o-istopolnom-partnerstvu-u-srbiji/31025074.html> accessed 25 January 2021

Beta, “Episkop Irinej: Homoseksualno ponašanje je neprihvatljivo”, 1 January 2021 <https://www.danas.rs/drustvo/episkop-irinej-homoseksualno-ponasanje-je-neprihvatljivo/> accessed 25 January 2021

42 Peticija za usvajanje Zakona o registrovanim istopolnim partnerstvima <http://parada.rs/peticija-za-usvajanje-zakona-o-registrovanim-istopolnim-partnerstvima/> accessed 25 January 2021

J. Diković, “Za tri dana 4.000 potpisa za istopolna partnerstva”, 23 September 2020 <https://www.danas.rs/drustvo/za-tri-dana-4-000-potpisa-za-istopolna-partnerstva/> accessed 25 January 2021

43 Za jednaka prava svih građana Srbije [https://jednaka-prava.com/?fbclid=IwAR2qB1c4sj1eshxWX4sNgn7IMqs9ioPTvzTGUS9ssDRVlJpnmz\\_WEoB0Er0](https://jednaka-prava.com/?fbclid=IwAR2qB1c4sj1eshxWX4sNgn7IMqs9ioPTvzTGUS9ssDRVlJpnmz_WEoB0Er0) accessed 25 January 2021

## 3. What's love got to do with the law?

### 3.1. Backstory

There is no single legal framework for regulating same-sex relationships in national laws around the world. The legal practices of how the legislature is designed *vary among countries*. Different factors affect the variety of legal approaches, such as legal tradition, cultural background of societies, religion, economy, etc. The issue of family relations is part of private law, which is usually treated as a field that states have sovereignty to regulate. For example, the EU Charter of Fundamental Rights of the European Union (CFREU) does not recognize same-sex relationships and states very explicitly that the right to marry and the right to found a family should be regulated *in accordance with national laws of member states*.<sup>44</sup> On the other hand, international and domestic human rights institutions, such as the ECtHR, the European Court of Justice (ECJ) or national constitutional courts, have, by *interpreting laws*, shaped and recognized this right through the lens of *the universality of human rights*.

The first steps regarding the improvement of LGBTIQ human rights were related to *the declassification of homosexuality as a mental disorder* and the process of *decriminalization of homosexual activity*.<sup>45</sup> The end of 20<sup>th</sup> and the beginning of 21<sup>st</sup> century represented a period when human rights movements began to vigorously advocate for LGBTIQ equality. Although the current situation of LGBTIQ people looks more promising, there are still countries which treat homosexual activity as a crime and/or punish it with the death penalty.<sup>46</sup> The legal recognition of same-sex relationships varies worldwide, and so far, there are 29 countries which have legalized same-sex relationships in the form of *same-sex marriage*. European countries are the most progressive, especially those located in Western Europe. So far, 29 European countries have recognized same-sex relationships in *different legal forms* (same-sex marriage, registered partnership with similar rights to marriage or with limited rights, or in the form of cohabitation).<sup>47</sup> Twenty-two (22) out of twenty-seven (27) member states of the EU have recognized same-sex relationships by law.

44 The European Union, Charter of Fundamental Rights of the European Union (26 October 2012, 2012/C 326/02; Published in the Official Journal of the European Communities, 18 December 2000 (2000/C 364/01); The Charter became legally binding when the Treaty of Lisbon entered into force on 1 December 2009, as the Treaty confers on the Charter the same legal value as the Treaties) (CFREU) art 9. [https://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](https://www.europarl.europa.eu/charter/pdf/text_en.pdf) accessed 2 February 2021

45 In 1973, the American Psychiatric Association (APA) removed homosexuality as the diagnosis from the second edition of its Diagnostic and Statistical Manual (DSM). The World Health Organization declassified homosexuality as a mental disorder on 17 May 1990. This day has been celebrated as the International Day against Homophobia, Transphobia and Biphobia.

46 The criminalization of homosexuality still occurs in 69 countries, while homosexuality is punishable with death penalty in 9 countries. The so-called anti-propaganda laws inhibit LGBT advocacy in 3 countries (Nigeria, Lithuania, Russia).

Source of data: Human Rights Campaign Foundation, Criminalization around the World [https://assets2.hrc.org/files/assets/resources/Criminalization-Map-042315.pdf?\\_ga=2.13765872.610353925.1596980890-1523613112.1596980890](https://assets2.hrc.org/files/assets/resources/Criminalization-Map-042315.pdf?_ga=2.13765872.610353925.1596980890-1523613112.1596980890) accessed 2 February 2021

47 Same-sex marriage is legal in the following countries worldwide: Argentina, Australia, Austria, Belgium, Brazil, Canada, Colombia, Costa Rica, Denmark, Ecuador, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, Mexico, the Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, Taiwan, the United Kingdom, the United States of America and Uruguay.

The process of legalization varied across these countries: 1. '20 countries have legalized same-sex marriage nationally through legislation. Among these, Australia and Ireland legalized same-sex marriage through legislation only after nation-wide votes.'; 2. '7 countries have legalized same-sex marriage nationally through court decisions — Austria, Brazil, Colombia, Costa Rica, Ecuador, Mexico, South Africa, Taiwan and the United States of America.'; 3. '2 countries, South Africa and Taiwan, enacted legislation legalizing same-sex marriage after courts mandated them to do so.'

Source of data: Human Rights Campaign, Marriage Equality around the World <https://www.hrc.org/resources/marriage-equality-around-the-world> accessed 2 February 2021

The ILGA Europe, as an international non-governmental human rights organization, monitors LGBT+ rights in European countries. There are 29 European countries which recognized same-sex relationships legally - 22 of these countries are member states of the European Union. Sixteen European states have legislation on marriage equality, while 30 among those 49 European countries do not have a constitutional limitation on marriage, but it does not mean that all of them have introduced marriage equality legislation or even recognized same-sex relationships in any legal form.

Source of data: ILGA Europe Rainbow Map <https://rainbow-europe.org/#0/8682/0> accessed 2 February 2021

### 3.2. International Legal Framework and Same-Sex Relationships

International and regional human rights treaties *do not explicitly recognize* the right to same-sex marriage or the right to legal recognition of same-sex relationships. This is because at the time the ICCPR, the ICESCR or the European Convention on Human Rights<sup>48</sup> (ECHR) were created, the international community had no interest to deal with sexual minorities. This situation changed at the end of the 20<sup>th</sup> and the beginning of the 21<sup>st</sup> century. The most important support to the LGBTIQ community comes from the relevant UN interpretative bodies that monitor the implementation of different international instruments on the part of states as contracting parties, as well as from regional human rights institutions.

In this part, our aim is to explain that although the right to legal recognition of same-sex relationships is not explicitly formulated, existing international and CoE human rights standards create *an obligation for the RS* to include it in its legal framework. Our focus will be on the Universal Periodic Review (UPR) of the RS, implemented by the United Nations Human Rights Council (UN-HRC) through its recommendations. We will also discuss some of the CEDAW Committee's recommendations. The Committee monitors the implementation of the Convention on the Elimination of All Forms of Discrimination against Women<sup>49</sup> (CEDAW). On the regional level, we focus on the ECHR and the ECtHR, which provides the interpretation of the ECHR's norms through its case law. The case law must be followed and implemented in the national legal systems by all CoE member states, including the RS. At the same time, the recommendations of the European Commission against Racism and Intolerance (ECRI) for Serbia will be analysed. Some judgements of the European Court of Justice (ECJ) will be also covered. Although they are not binding for the RS, the RS, as a candidate country, should follow recent human rights protection standards established by the ECJ and other EU institutions.

According to *the Universal Declaration of Human Rights*, all human beings are born free and equal in dignity and rights.<sup>50</sup> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>51</sup> All are equal before the law and are entitled without any discrimination to the equal protection by the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.<sup>52</sup>

*The International Covenant on Civil and Political Rights* guarantees that all persons are equal before the law and are entitled without any discrimination to the equal protection by the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other

48 Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by protocols Nos 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) ETS No 005 (European Convention on Human Rights – ECHR)

49 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 1 (CEDAW Convention)

50 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 1. [https://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf)

51 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 2.

52 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 7.

opinion, national or social origin, property, birth or other status.<sup>53</sup> The Human Rights Committee (HRC) as the monitoring and interpretative body of the ICCPR delivered a communication in reference to a case from 1994, *Toonen v Australia*<sup>54</sup>, in which it found that a law which criminalized homosexuality represented a violation of the right to privacy. This case is important because the HRC concluded that “sex” covered “sexual orientation” as a personal characteristic.<sup>55</sup>

*The Universal Periodic Review (UPR)* is a mechanism of the UN Human Rights Council which periodically examines the state of human rights in all of the UN member states (193). Its advantage is the regular monitoring of all human rights in a country, which provides an overall picture of what should be improved. *The Third Cycle of the UPR for Serbia* was done in 2018, when the RS received 190 recommendations from the UN member states.<sup>56</sup> It accepted 175 recommendations in total.<sup>57</sup> Among the accepted recommendations are those which aim: to implement the Strategy for the Prevention of and Protection from Discrimination and the corresponding Action Plan; to strengthen anti-discrimination mechanisms, including such mechanisms for lesbian, gay, bisexual, transgender and intersex persons...; to continue efforts towards promoting and protecting human rights, especially those of vulnerable groups; to strengthen efforts to eliminate discrimination on the basis of sexual orientation and gender identity; to strengthen measures to combat all forms of social stigmatization, discrimination and violence against persons based on their sexual orientation, gender identity and HIV status; etc.<sup>58</sup> All of these accepted recommendations prove that *the RS has accepted the obligations to implement particular legislative changes and improve the position of the LGBTIQ community*. This includes also *the necessity for legal recognition of same-sex relationships*, and after almost three years from the completion of the Third Cycle of the UPR, partners in such relationships still live in a legal vacuum unrecognized and without dignity.

For instance, *the CEDAW Committee* which monitors the implementation of the CEDAW Convention, ratified by the RS, delivered *General Comment No. 27* in which it emphasized, among specific areas of concern, the multidimensional discrimination of elderly women connected with sexual orientation and gender identity.<sup>59</sup> In relation to Article 2 of the CEDAW Convention, the Committee delivered *General Comment No. 28*, in which it emphasized the need for contracting states to take into account that discrimination of women is followed not just by their sex and gender, also by other personal characteristics such as sexual orientation and gender identity.<sup>60</sup> These are some of the examples where *the RS*, as a contracting state, *is obliged to make all necessary legal changes* which will improve the protection and social security of women who are often victims of discrimination

53 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 26. <https://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>

54 Toonen v Australia (488/1992), CCPR/C/50/D/488/1992 (1994) <http://hrlibrary.umn.edu/undocs/html/vws488.htm> accessed 2 February 2021

55 Elizabeth Baisley, 'Reaching the Tipping Point: Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity' (2016) 38 1 Human Rights Quarterly 134, 140.

56 UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Serbia, 18 April 2018, A/HRC/38/17 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/113/90/PDF/G1811390.pdf?OpenElement> accessed 2 February 2021

57 UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Serbia, 8 June 2018, A/HRC/38/17/Add.1 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/172/81/PDF/G1817281.pdf?OpenElement> accessed 2 February 2021

58 UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Serbia, 18 April 2018, A/HRC/38/17 We extracted some of the recommendations accepted from the RS which target the LGBTIQ community concretely: 113.8; 113.10; 113.12, 114.29; 114.32. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/113/90/PDF/G1811390.pdf?OpenElement> accessed 2 February 2021

59 UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendations No. 27, adopted at the Forty Seventh Session, 2010, CEDAW/C/GC/27 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/472/53/PDF/G1047253.pdf?OpenElement> accessed 2 February 2021

60 UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendations No. 28, adopted at the Forty Seventh Session, 2010, CEDAW/C/GC/28 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/472/60/PDF/G1047260.pdf?OpenElement> accessed 2 February 2021

based on *multiple personal characteristics*. The legal recognition of same-sex relationships can additionally improve the position of members of the LGBTIQ population, who may be forced to enter into opposite-sex marriage, trying to *hide their sexual orientation*, and *suffer violence* because of their sexual identity. It is very common for lesbian, bisexual and transgender women.

So far, the most progressive ECtHR decision regarding the legal recognition of same-sex couples was related to the case *Oliari and Others v Italy*<sup>61</sup>. Although the ECtHR has repeated its view on *marriage as a heteronormative institution*, it has created a *positive obligation for states under Article 8* (the right to respect for private and family life), to provide some legal framework for the legal recognition of same-sex relationships.<sup>62</sup> It means that CoE member states still have *the margin of appreciation*<sup>63</sup> (MoA) to decide which legal format will be introduced, because the social acceptance of same-sex couples *varies around Europe*, but *a lack of legal recognition will constitute a violation of the right to respect for private and family life*. Andy Hayward in the case comment highlighted three key points from this decision: *first*, the positive obligation for states to introduce a legal scheme which will grant the legal status to same-sex relationships; *second*, the criteria which should be used for assessing if a state has breached the MoA in relation to this positive obligation; and, *third*, because of the fact that the ECtHR introduced the new positive obligation for the member states, it refused to analyse the right to marry and the right to freedom from discrimination.<sup>64</sup> The concrete judgement has established a very clear legal standard regarding the legal protection of same-sex relationships in the CoE member states. Based on the ECtHR interpretation of the ECHR, *the RS is obliged to recognize same-sex couples legally and decide which legal form such recognition will take*, based on the socio-cultural context of its society.

It is also important to mention *the European Commission against Racism and Intolerance (ECRI)*, as the CoE's independent human rights monitoring body specialised in combating antisemitism, discrimination, racism, religious intolerance, and xenophobia. The ECRI issued a *recommendation for the RS during the third Report in 2017*, stating that the RS should implement its anti-discrimination strategy and introduce a legal framework which will recognize same-sex relationships in the form of registered partnership.<sup>65</sup> To date, the RS has not implemented the Anti-Discrimination Strategy or the concrete recommendation.

All of the international human rights standards listed in this paragraph represent a *concrete obligation of the RS* to pass a law which will legalize same-sex relationships without any further delay.

61 Oliari and Others v Italy App nos 18766/11 and 36030/11 (ECtHR, 21 July 2015) <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22%3A%22CASE%20OF%20OLIARI%20AND%20OTHERS%20v.%20ITALY%22%22%22documentcollectionid%22%3A%22GRANDCHAMBER%22%22CHAMBER%22%22item%22%3A%22001-156265%22%22%7D> accessed 2 February 2021

62 Oliari and Others v Italy App nos 18766/11 and 36030/11 (ECtHR, 21 July 2015)

“... the Court considers that in the absence of marriage, same-sex couples like the applicants have a particular interest in obtaining the option of entering into a form of civil union or registered partnership, since this would be the most appropriate way in which they could have their relationship legally recognised and which would guarantee them the relevant protection – in the form of core rights relevant to a couple in a stable and committed relationship – without unnecessary hindrance.” at para 174.

“... the Court finds that the Italian authorities have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions.” at para 185.

63 The margin of appreciation (MoA) represents a doctrine of the limitation of human rights used by the ECtHR. It means that the ECtHR provides the CoE member states a discretion power to limit some rights of its citizens and adjust their exercise in practice in accordance with the socio-cultural specificities of each CoE member state. In the case of legal recognition of same-sex relationships, the ECtHR has the approach that all member states are not ready to introduce same-sex marriage but, they are still obliged to recognize same-sex couples in an appropriate legal form which will provide them legal security and dignity within a society.

64 Andy Hayward, 'Same-Sex Registered Partnerships – A Right to Be Recognized' (2016) 75 1 Cambridge Law Journal 27, 29-30.

65 ECRI Report on Serbia, fifth monitoring cycle <https://rm.coe.int/third-report-on-serbia/16808b5bf4> p. 41 accessed 2 February 2021



It is worth mentioning some legal instruments which are *not binding* for the RS, but represent very *important guidance* on the Serbian path to the legal recognition of same-sex relationships.

*The Yogyakarta Principles and The Yogyakarta Principles plus 10*,<sup>66</sup> as *soft law instruments*,<sup>67</sup> recognize rights which support the legalization of same-sex relationships: the rights to equality and non-discrimination; the right to recognition before the law; the right to privacy; the right to establish a family etc. Regarding the right to establish a family, the principles emphasize that states should recognize diverse forms of families which exist in every society and prevent any form of discrimination against them.

*The Treaty on the Functioning of the European Union*<sup>68</sup> and *Charter of Fundamental Rights of the European Union*<sup>69</sup> prohibit discrimination based on sexual orientation. It is important to mention the judgment of the ECJ in the case of *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne of Romania*<sup>70</sup> in which the ECJ determined that an EU member state must acknowledge same-sex marriages from another EU member state even though its national legislature has not legalized same-sex marriages and that it must respect the right of same-sex spouses to reside on its territory. Although the RS is not an EU member state, and is still in the accession process, this judgment is a *revolutionary step* in the case law of the European Court of Justice, which should trigger further changes in the EU member states which have not yet legally recognized same-sex unions in any legal form. Following these changes, Serbia, as a future member state, should harmonize its legal system and confirm *its readiness to follow the EU approach to human rights and diversity* together with the whole Union.

### 3.3. Status quo: Case of Serbia

The Constitution of the RS and the Family Law define marriage explicitly as *a union between a man and a woman*. The cohabitation of opposite-sex partners is compared to marriage, and almost all the rights from marriage are transferable to opposite-sex cohabiting partners. However, the current legal system does not recognize same-sex couples in any existing legal format in the comparative legal perspective, such as civil partnerships, same-sex unions, cohabiting partners or (same-sex) marriages. This represents a situation of *de facto* and *de jure* opposing states. Same-sex partners exist in Serbian society, but on the other hand, *de jure*, they are invisible. Thus, same-sex couples cannot exercise a variety of rights on an equal basis as their opposite-sex counterparts. It means

66 The Yogyakarta Principles are a set of principles on the application of international human rights law in relation to sexual orientation and gender identity. The Principles affirm binding international legal standards with which all States must comply. They promise a different future in which all people born free and equal in dignity and rights can fulfill that precious birthright. About the Yogyakarta Principles <http://yogyakartaprinciples.org/principles-en/about-the-yogyakarta-principles/> accessed 2 February 2021

The full text of the Yogyakarta Principles can be found here: [http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles\\_en.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf) accessed 2 February 2021

The Yogyakarta Principles plus 10 (Adopted on 10 November 2017, Geneva) can be found here: [http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5\\_yogyakartaWEB-2.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf) accessed 2 February 2021

67 Soft law documents mean that they cannot be enforced by a concrete authority. Opposite to them are legal documents which have a mandatory legal power, with a concrete mechanism which can be used as a legal pressure to provide their implementation.

68 The Treaty on the Functioning of the European Union art 10. [https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC\\_2&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_2&format=PDF) accessed 2 February 2021

69 The European Union, Charter of Fundamental Rights of the European Union (26 October 2012, 2012/C 326/02; Published in the Official Journal of the European Communities, 18 December 2000 (2000/C 364/01); The Charter became legally binding when the Treaty of Lisbon entered into force on 1 December 2009, as the Treaty confers on the Charter the same legal value as the Treaties) (CFREU) art 21. [https://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](https://www.europarl.europa.eu/charter/pdf/text_en.pdf) accessed 2 February 2021

70 Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne of Romania App no C-673/16 (ECJ, 5 June 2018) <http://curia.europa.eu/juris/document/document.jsf?text=&docid=202542&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=6088511> accessed 2 February 2021

that they cannot: exercise their right to tax exemptions; take a loan from a bank using couples' benefits; visit each other as family members in hospitals or give consent to doctors, if necessary, for life-saving interventions; enjoy social security benefits through the medical or pension insurance based on their relationship (in the event that a same-sex partner dies, the other cannot inherit the family pension or cannot be medically insured based on the insurance of their partner); inherit on the basis of law, except on the basis of a will which includes all persons no matter what their relationship is, etc. All of these examples illustrate a *direct form of discrimination* against same-sex couples compared to opposite-sex couples *based on their sexual orientation*. There is *no policy framework* for legal recognition *in Serbia*.

When it comes to documents aimed at combating discrimination in society, *the Anti-Discrimination Strategy for 2013-2018* and *the Action Plan for the Implementation of the Anti-Discrimination Strategy for the Period 2014-2018*, expired without any concrete actions being taken to improve the status of LGBTI people. The Strategy was aimed at developing a working text (model) of the Law on Registered Same-sex Unions and the working text (model) of the Law Amending and Supplementing the Law on Inheritance. This should have provided equal status to marital and non-marital unions, thus recognizing that same-sex partners would have a right to inheritance as first-degree heirs.<sup>71</sup> Many activities were listed in the Strategy, but many of them have not been implemented. Some of the objectives were creating a safe environment for members of vulnerable social groups, improving the level of tolerance towards them, suppressing hate speech and acts of violence and bringing to justice the perpetrators of such acts - all of those objectives are aimed at the improvement of the position of LGBTI persons. Other activities listed in the Strategy, aimed at ensuring effective prevention of acts of violence and intolerance against LGBTI persons, included running a media campaign and supporting production of media content for the purpose of achieving the principle of equality and equal rights for the LGBTI people, active promotion of cooperation, communication, and collaborative work with the LGBT community, and many more. Aside from *the poor practical implementation* of the Strategy, the other major problem was *the lack of a new one* after the previous expired. This created a *legal vacuum* in the protection of the rights of LGBTI people, and other strategies or any other legal framework that would improve their position has not been introduced or implemented so far.

Several CSOs have made recommendations regarding this issue. In its *Recommendations of the Civil Sector for the Development of a New Strategy for Prevention and Protection against Discrimination and an Accompanying Action Plan*<sup>72</sup>, Labris pointed out the shortcomings of the Strategy and the Action plan. They also called for the urgent adoption of *the Law on Civil Partnership*, and insisted on the implementation of all activities envisaged by the Strategy and the Action Plan that have not been implemented yet, which would have to be prioritised and introduced in the following year.

There are other CSOs dealing with LGBTIQ rights, such as ERA - LGBTI Equal Rights Association for the Western Balkans and Turkey, which have also called for the urgent adoption of the *Same-Sex Partnership Law*.<sup>73</sup>

71 The Action Plan for the Implementation of the Strategy for Prevention and Protection against Discrimination for the Period 2014-2018 p. 67-68 [https://www.ljudskaprava.gov.rs/sites/default/files/dokument\\_file/ad\\_action\\_plan\\_eng\\_pdf.pdf](https://www.ljudskaprava.gov.rs/sites/default/files/dokument_file/ad_action_plan_eng_pdf.pdf) accessed 24 January 2021

72 Vuk Raičević, Milena Vasić, "Preporuke civilnog sektora za izradu nove Strategije prevencije i zaštite od diskriminacije i prateći Akcioni plan", Labris - Organizacija za lezbejska ljudska prava, October 2020 <http://labris.org.rs/sites/default/files/preporuke%20civilnog.pdf> accessed 2 February 2021

73 ERA - LGBTI Equal Rights Association for Western Balkans and Turkey, "LGBTI Enlargement Review 2019", p. 29. <https://www.lgbti-era.org/sites/default/files/pdfdocs/Annual%20LGBTI%20Enlargement%20Review%202019.pdf> accessed 9 February 2021

In 2019, the Ombudsman Zoran Pasalic explained that the adoption of *the Law on Same-sex Relationships* is a way to regulate the legal and property rights of same-sex couples, which would significantly improve the position of LGBTIQ persons.<sup>74</sup> In 2020, the Deputy Ombudsman Jelena Stojanovic noted that the Action Plan for the Implementation of the Strategy for Prevention and Protection against Discrimination for the period 2018-2021 had not been implemented and that the plan ceased to have effect in 2019, while the new one had not been adopted at the time.<sup>75</sup>

In December 2020, the Ombudsman recommended to the MHMRSD to draft a law that would enable legal recognition of same-sex relationships as soon as possible.<sup>76</sup> He has ascertained that same-sex relationships have not been legally regulated, nor have the amendments to the *Law of Inheritance* that would regulate the inheritance of same-sex partners been adopted. The same also applies to other measures and activities contained in the Action Plan for the implementation of the Strategy. The Commissioner for the Protection of Equality also noticed the legal absence of protection of same-sex relationships. In their 2019 Regular Annual Report of the Commissioner for the Protection of Equality, the Commissioner recommended the adoption of regulations that enable the registration of same-sex relationships, and regulate actions, legal consequences and manner of termination of registered partnerships, in accordance with the recommendations made by the CoE, as well as implementation of measures aimed at eliminating discrimination and stigmatization of LGBT people.<sup>77</sup>

The CSO *Labris* drafted *the Model Law on Civil Partnership*<sup>78</sup>. The proposed law model defines and regulates same-sex partnerships. There are several reasons why *Labris* has decided to advocate for the legal recognition of same-sex partnerships instead of same-sex marriages in the RS. *First*, the Constitution of the RS does not recognize same-sex marriages. The procedure for making constitutional changes is lengthy procedure and it takes even more time for such changes to be adopted. *Second*, in addition to the constitutional prohibition of same-sex marriage, the civil partnership, as a legal form, grants individuals most of the marriage rights. This could be a crucial challenge in a patriarchal society such as Serbia, in which same-sex relationships are, to some extent, still taboo. Therefore, advocating for the legal recognition of same-sex civil partnerships is *the most plausible option* that could serve as a stepping stone for the future legal recognition of same-sex marriage.

The draft law makes the difference between *registered civil partnerships* and *non-registered* ones, drawing a parallel to the legally regulated institution of marriage. This model is based on the principles of the prohibition of discrimination and domestic violence, and it serves the purpose of raising awareness of the importance of a gender-sensitive language. The legal steps of formalizing same-sex civil partnerships are the same as the ones of formalizing heterosexual marriage.

<sup>74</sup> Ombudsman of Serbia, "Adopting laws on same-sex partnerships and the status of trans persons is crucial to the improvement of the position of LGBTI persons" 15 August 2019 [https://www.ombudsman.org.rs/index.php?option=com\\_content&view=article&id=153:adopting-laws-on-samesex-partnerships-and-the-status-of-trans-persons-is-crucial-to-the-improvement-of-the-position-of-lgbti-persons&catid=15:information&Itemid=18](https://www.ombudsman.org.rs/index.php?option=com_content&view=article&id=153:adopting-laws-on-samesex-partnerships-and-the-status-of-trans-persons-is-crucial-to-the-improvement-of-the-position-of-lgbti-persons&catid=15:information&Itemid=18) accessed 2 February 2021

<sup>75</sup> Ombudsman of Serbia, "Law amendments necessary to improve LGBTI persons' position" 17 May 2020 [https://www.ombudsman.org.rs/index.php?option=com\\_content&view=article&id=210:law-amendments-necessary-to-improve-lgbti-persons-position-&catid=7&Itemid=16](https://www.ombudsman.org.rs/index.php?option=com_content&view=article&id=210:law-amendments-necessary-to-improve-lgbti-persons-position-&catid=7&Itemid=16) accessed 2 February 2021

<sup>76</sup> Ombudsman of Serbia, "Pass laws on same-sex communities and adjusting gender to gender identity as soon as possible" 15 December 2020 [https://www.ombudsman.org.rs/index.php?option=com\\_content&view=article&id=306:pass-laws-on-samesex-communities-and-adjusting-gender-to-gender-identity-as-soon-as-possible&catid=44:opinions-and-views&Itemid=4](https://www.ombudsman.org.rs/index.php?option=com_content&view=article&id=306:pass-laws-on-samesex-communities-and-adjusting-gender-to-gender-identity-as-soon-as-possible&catid=44:opinions-and-views&Itemid=4) accessed 2 February 2021

<sup>77</sup> Redovan godišnji izveštaj Poverenika za zaštitu ravnopravnosti za 2019. godinu <http://ravnopravnost.gov.rs/wp-content/uploads/2020/03/FINAL-RGI-2019-ZA-NARODNU-SKUPSTINU.pdf> accessed 2 February 2021

<sup>78</sup> The Model Law on the Civil Partnership, see more: Saša Gajin, "Model Zakona o građanskom partnerstvu", *Labris* – organizacija za lezbejska ljudska prava, april 2020. <http://labris.org.rs/sites/default/files/Model%20zakona%20o%20gra%C4%91anskom%20partnerstvu.pdf> accessed 24 January 2021

According to the draft Law on Civil Partnerships, in practice registered civil partnerships are given the same "benefits" as marriage, the only difference there being in the name itself.

The proposed law even refers to marriage law in some of the provisions that are not explicitly specified. The proposal contains provisions on family law, children's rights, property rights, inheritance law, the right to compensation, the right to tax exemption, rights in the event of illness, pension, health, and social security rights, as well as on criminal law. Taking these into consideration, the proposed legislation draws its provisions from multiple sources of law that regulate the institution of marriage in Serbia.

As we have seen, there are quite a few shortcomings, when it comes to the status of the LGBTIQ population in Serbian society and the fact that they are not able to exercise their rights as the rest of the population. The RS is not taking the necessary steps that would gradually improve the situation.

So far, there have been no public debates on the legal recognition of same-sex relationships, which should have been done with the support of the MHMRSD. In addition to this, there is no relevant research on this topic, which would provide the necessary information regarding the position of same-sex couples. Another step, which should precede the creation of the law and its entry into force, is holding consultations with CSOs working on the improvement of LGBTIQ rights. In order to portray a better picture of the LGBTIQ population in society, there should be a campaign aimed at improving the visibility of this group, which also currently does not exist.

With the implementation of the law which would regulate same-sex relationships, changes should be made to other laws, such as the Law on Social Protection, the Law on Pension and Disability Rights, the Tax Law, the Law on Inheritance, the Family Law, etc. These changes in the legal system should improve the position of the LGBTIQ population. Additionally, the RS should address the issue of changing the existing negative attitudes towards this minority. There needs to be a consistent promotion of the importance of equality, dialogue and respect for diversity. Unfortunately, there is no such existing strategy in Serbia today which would primarily focus on young adolescents. In the Serbian elementary and secondary schools there is no sex/health education as a mandatory subject, an elective course or an extra-curricular activity. When it comes to the field of education, there are no trainings, that would prepare government officials and administrative staff for the legal changes which would come into force. In the end, the main issue, as it has been stressed many times by now, is the lack of a law which would give same-sex couples the same rights that opposite-sex couples enjoy.

### 3.4. Case of Croatia and Montenegro

#### 3.4.1. Cultural and legal comparison to Croatia and Montenegro

It is worth noting that these three countries, namely Serbia, Croatia and Montenegro, have *similar cultural and socio-economic features*, and it could be said that they share the same background in that regard. Their societies are patriarchal, conservative and the influence of the church is extremely high. So, the fact that Croatia and Montenegro adopted legislation regulating same-sex relationships, which improves the quality of life of the LGBTIQ population and their social status, shows that the same goal could be reached in Serbia, as well.

##### 3.4.1.1. Croatia

In 1977 homosexuality was decriminalized in Croatia, and in 1973 it was removed from the Croatian Medical Chamber's List of Mental Disorders. That was seventeen years before the World Health Organization (WHO) did it. Same-sex relationships were first formally recognized in 2003 when the Law on Same-sex Unions was passed by the Croatian Parliament.<sup>79</sup>

In the meantime, homophobic statements were made mostly by right-wing politicians and church representatives, and Lucija Cikes said: "The whole universe is heterosexual, from the atom and the smallest particle; from a fly to an elephant"<sup>80</sup>. Since there were a lot of objections regarding the legal recognition of same-sex relationships, the scenario was the same with lesbian couples. Also, unmarried women's access to *in vitro* fertilisation (IVF) techniques was problematised and finally enabled in 2012, when the new law came into force.

A CSO called *In the Name of the Family* was established in 2013 to limit the definition of marriage to a union only between a man and a woman and to succeed in making such a formulation a part of the Croatian constitution. They began a campaign to hold a referendum, which was eventually held and where 66% of people who participated in the referendum voted for the proposed definition. The turnout rate at the referendum was 38%. The whole time, this advocacy group had the full and open support of the Croatian Catholic Church. As a result, the Constitution was changed.

The biggest step for the improvement of the status of the LGBTIQ population was made on July 15, 2014 when the Croatian government passed the *Life Partnership Act*. Now same-sex couples in Croatia have the same rights as heterosexual couples, with the exception of adoption rights.

##### Public opinion

When it comes to the public opinion, the situation was and still is approximately the same as in Serbia. According to the results of a survey conducted in 2014 by the Ivo Pilar Institute of Social Sciences, 45.4% of respondents were strongly against same-sex marriages, and 15.5% mainly against the legalisation of same-sex marriage in Croatia; 10.1% were strongly in favour of it, 6.9% mostly in favour of it, and 21.2% were neutral.<sup>81</sup>

<sup>79</sup> The Law on Same-Sex Unions, Official Gazette of RHR, 116/03

<sup>80</sup> Nova provala homofobnih izjava u Saboru, 17 March 2006 <http://www.h-alter.org/vijesti/nova-provala-homofobnih-izjava-u-saboru> accessed 2 February 2021

<sup>81</sup> Pilar's barometer of Croatian society <http://barometar.pilar.hr/en/results-2014/relation-to-current-issues/same-sex-marriages.html> accessed 2 February 2021

According to a 2015 Eurobarometer report on *Discrimination in the EU*, 48% of Croatian respondents agree that gay, lesbian, and bisexual people should have the same rights as heterosexual people, while 42% disagree. Fifty-three percent (53%) disagree with the claim that there is nothing wrong in a sexual relationship between persons of the same sex, while 39% agree. Fifty-four percent (54%) do not think same-sex marriages should be allowed across Europe while 37% think they should. Forty percent (40%) of respondents were comfortable with the idea of a gay, lesbian or bisexual person in the highest elected political position, 13% moderately comfortable, 6% indifferent, 38% uncomfortable, and 3% did not know.<sup>82</sup> These results show that society is deeply divided when it comes to attitudes towards the LGBTIQ population.

Research results published by the Pew Research Centre in May 2017 show that 64% of Croatian respondents are against same-sex marriage, while 31% are in favour of it. Support was higher among non-religious people (61%) than among Catholics (29%). Moreover, younger people (33%) are more likely to support same-sex marriage than elderly people (30%).<sup>83</sup> Forty-nine percent (49%) of people see homosexuality as morally wrong.

##### Legal framework

When it comes to the legal framework, Croatia's constitutional provisions also prohibit same-sex marriage, but Croatia bypassed this prohibition through the recognition of life partnerships. This was done this in several stages. First, same-sex couples were recognized in 2003 through *the Law on Unregistered Same-sex unions*. Later on, in 2014, this law was replaced by *the Same-Sex Life Partnership Act*.<sup>84</sup>

The act regulates life partnerships of persons of the same sex, principles, conclusion and termination of life partnerships, procedures of competent bodies related to the conclusion and termination of life partnerships, keeping of a register of life partnerships and legal effects of life partnerships. Like the Family Law that was enacted in 2020, this act makes a distinction between "*life partnership*" and "*informal life partnership*" - the existence of an informal life partnership shall be demonstrated in the same manner and under the same requirements as an extramarital union of opposite-sex couples. This means that an informal life partnership has the same effects in the fields of inheritance, tax system, pension insurance, social welfare system, compulsory health insurance and healthcare, rights and obligations concerning employment relations, access to public and market-related services and legal public status as those granted to an extramarital union relationship by special regulations governing those fields.

Although Croatia has formally made marriage and life partnership legally equal (except in the name), still there are some differences. The main difference is *parenthood*. Full joint adoption for same-sex couples in Croatia is not legal, but a single person regardless of sexual orientation is allowed to adopt. In addition to this, *in vitro* fertilization for same-sex couples is not explicitly prohibited in Croatia. According to *the Law on Medically Assisted Reproduction*, medically assisted reproduction

<sup>82</sup> Discrimination in the EU in 2015, Special Eurobarometer Report p. 48-67 <https://op.europa.eu/en/publication-detail/-/publication/d629b6d1-6d05-11e5-9317-01aa75ed71a1> accessed 9 February 2021

<sup>83</sup> Croatia-LGBTI Equal Rights Association for Western Balkans and Turkey <https://www.lgbti-era.org/countries/croatia> accessed 2 February 2021

<sup>84</sup> The Same-Sex Life Partnership Act, Official Gazette of RHR, 92/14, 98/19

“can be carried out only when the previous treatment of infertility is unsuccessful or hopeless and in order to avoid the transmission of severe hereditary disease to the child at natural conception”<sup>85</sup>. However, the law is not mentioning life partners, only married or unmarried opposite-sex couples, thus indirectly discriminating against life partnerships.

### 3.4.1.2. Montenegro

Montenegro also decriminalized homosexuality in 1977, like Croatia. There is also a law that prohibits discrimination on the grounds of sexual orientation. However, the situation in real life can still be improved. The cultural and socio-economic background of Montenegro is similar to Serbia and Croatia, with the difference that the majority of the population in Croatia identifies as Catholics (86%), while in Serbia and Montenegro as Orthodox Christians, (84%) and (72%) respectively. Montenegro is more religiously diverse than Serbia and Croatia, with 19% of the population being Muslims. The society is also very traditional and conservative, even more than in the other two countries.

When the public in Montenegro started discussing the legal recognition of same-sex relationships in 2012, the Serbian Orthodox Church and the Democratic Front, a right-wing political party, strongly opposed that idea. Three parties representing communities of ethnic minorities - Croats, Bosniaks and Albanians, also opposed the law. Nevertheless, the law came into force in 2020. On 1 July, the Parliament adopted the law, it was signed two days later and entered into force on 15 July. The law will become applicable on 15 July 2021, after regulations have been finalised and the government clerks trained.

#### Public opinion

Balkan Insight in one of its articles claims that “earlier surveys suggests that 71% of Montenegrin citizens consider homosexuality a disease and that every other citizen agrees that homosexuality is a danger to society and that the state should suppress it”<sup>86</sup>.

A 2015 NDI Public Opinion Poll on LGBTIQ Communities in the Balkans shows that upon receiving the question “If you would find out that your child is a homosexual (previously mentioned an LGBTIQ person), how would you react?”, 47% of respondents said that they would try to help him/her to find a cure for that, 12% would accept it but I would try to make sure that no one else finds out that, except our family, 11% do not know what would they do, 9% would stop communicating with him/her, 2% would make him/her leave our family house, and 8% would support him/her completely.<sup>87</sup> The findings of the public opinion survey on LGBTIQ persons, conducted by the Centre for Civic Education within the project “NO to discrimination – YES to diversity” and published in 2019, show that attitudes about LGBTIQ persons are changing in a positive direction. This research compared the data from 2019 to the data from 2016. For example, there is a positive change in the openness of citizens towards their children attending scientific lectures on LGBTIQ people; 73% in 2019

<sup>85</sup> The Law on Medically Assisted Reproduction, Official Gazette of RHR, 86/12

<sup>86</sup> Samir Kajosevic, Montenegro Parliament Narrowly Votes to Legalize Same-sex Unions, BIRN, 2 July 2020 <https://balkaninsight.com/2020/07/02/montenegro-parliament-narrowly-votes-to-legalize-same-sex-unions/> accessed 2 February 2021

<sup>87</sup> NDI LGBTI Public Opinion Poll Western Balkans, June/July 2015 p.15 <https://www.lgbti-era.org/sites/default/files/pdfdocs/LGBT%20Poll%202015%20Western%20Balkans%20NDI%20.pdf> accessed 2 February 2021

compared to 45% in 2016. Also, more people have increased trust in LGBTIQ professionals. However, when asked how they would react if their child were homosexual, the majority (49%) would try to help them find a cure, but there is also an increase (27%) of those who would support them completely. Furthermore, this research found that more people had a positive attitude about the adoption of the Law on Same-Sex Life Partnership.<sup>88</sup>

#### Legal framework

There are some similarities between Montenegro and Croatia in this regard. The Constitution only allows the marriage between heterosexual couples, and therefore, bans same-sex marriage. However, Montenegro, similarly to Croatia, made a compromise and legalized registered same-sex partnerships, which would confer some of the rights, benefits and responsibilities of marriage, but would not include adoption or fostering rights. The law will come into force in 2021.

There is a difference between Croatia and Montenegro *regarding registered and non-registered same-sex partnerships*. While Croatia went one step further by making life partnerships almost equal to marriage, giving the non-registered same-sex life partners equal rights as non-registered heterosexual partners, Montenegro has not made this step. Its law *only guarantees rights to registered same-sex partnerships*.<sup>89</sup>

Taking into consideration the legal regulations in Croatia and Montenegro, and having in mind the draft law proposed by the CSO *Labris*, both similarities and differences can be noted. *First*, the draft law proposed by *Labris* follows the same trajectory as Croatia and Montenegro – they do not advocate for same-sex marriage, but same-sex partnership. *Second*, the draft law acknowledges non-registered same-sex partnership, drawing a parallel to the legally regulated institution of marriage, in the same manner as it is regulated in Croatia. *Third*, the draft law incorporates all rights in the field of inheritance, tax system, pension insurance, social welfare system, compulsory health insurance and healthcare, rights and obligations concerning employment relations, access to public and market-related services, and public law status as those granted to the institution of marriage, just as it is regulated in Croatia and Montenegro.

<sup>88</sup> Istraživanje stavova javnog mnjenja o LGBT osobama – ne diskriminaciji-da različitosti, Centar za građansko obrazovanje i Ministarstvo za ljudska i manjinska prava Crne Gore, 2019 <http://media.cgo-cce.org/2019/02/cgo-istrazivanje-stavova-javnog-mnjenja-o-lgbt-osobama.pdf> accessed 3 February 2021

<sup>89</sup> The Law on Same-Sex Life Partnership, Official Gazette of RCG, 23-3/20-1/4

## 4. What to do?

The legal recognition of same-sex relationships in Serbia should be followed by a variety of activities which would be tailored and implemented by three key actors: the executive, the legislative and judicial branch of power, in collaboration with CSOs which are working on the advancement and implementation of LGBTIQ rights.

### EXECUTIVE BRANCH OF POWER

1. The Ministry of Human and Minority Rights and Social Dialogue should organize public debates in the four most populated cities in Serbia, namely Novi Sad, Belgrade, Nis and Kragujevac, on the need for legal recognition of same-sex relationships. It should also conduct relevant research regarding the same-sex couples and their needs in collaboration with the Commissioner for the Protection of Equality, the Protector of Citizens, the Social Inclusion and Poverty Reduction Unit of the government of the RS, the Ministry of Labour, Employment, Veterans and Social Affairs, the Ministry of Family Protection and Demography and CSOs which are dealing with LGBTIQ rights. The collected data will be used in the process of drafting laws and creating legal norms which will be the best possible solution for same-sex couples. As a final purpose of these activities, the Ministry of Human and Minority Rights and Social Dialogue should propose a model Law on the Recognition of Same-sex Relationships.
2. The Ministry of Justice should introduce the proposed amendments to the Criminal Code in the section on criminal offences against marriage and the family where same-sex relationships shall be recognized.
3. Proposed amendments to relevant laws which will be necessary to ensure full implementation of the new Law on Same-sex Relationships should be prepared. These include the Law on Social Protection, the Law on Pension and Disability Rights, the Tax Law, the Law on Inheritance, the Family Law. The responsible entities should be the ministries dealing with the concrete fields. If necessary, cooperation should be established between different ministries in the process of preparing the relevant amendments, depending on the concrete legal field. Amendments to the above-mentioned laws should be made in such a way that same-sex couples can exercise all applicable rights related to taxation, inheritance, social protection, and pension and disability on an equal basis as opposite-sex couples.
4. Relevant changes to the curricula for elementary and secondary schools should be made, promoting the existence of varieties of families and emphasizing their equal position and value in Serbian society. The main actor for this purpose will be the Ministry of Education, Science and Technological Development. It is also advisable to start implementing this as pilot projects in a limited number of schools first if there is not enough consent among the wider population regarding such changes in the official curricula.
5. The Ministry of Human and Minority Rights and Social Dialogue, together with CSO experts should design and implement special trainings for social workers from the social welfare centres throughout Serbia. These trainings should focus on different topics, from counselling for future registered same-sex partners, the process of mediation and advice on how to form a functional

family, to possible activities that centres can provide in the process of legal dissolution of a union between two same-sex partners. In addition to this, they should also create different types of trainings for social workers regarding the protection of children's rights in cases when same-sex couples have their children before registering their union.

6. Special registers for same-sex unions in municipalities should be established and trainings with registrars on how to implement the new law should be conducted. The Ministry of Public Administration and Local Self-Government will be responsible for these activities.
7. Legal professionals who have expertise in LGBTIQ rights should conduct trainings with the representatives from the Ministry of Interior who are dealing with cases of domestic violence.
8. Relevant campaigns which will improve the visibility of same-sex couples in Serbian society should be conducted. For this purpose, the responsible ministries may be the Ministry of Youth and Sports and the Ministry of Culture and Information.
9. The Government of the RS in cooperation with the Public Policy Secretariat of the RS should coordinate the process of harmonization of Serbian planning documents (strategies and action plans) where it is necessary to make amendments in accordance with the enacted Law on Legal Recognition of Same-sex Relationships. Depending on the concrete planning document, every responsible ministry will be obliged to inform the Public Policy Secretariat about the changes. After that, the Secretariat will inform the Government of the RS.
10. Trainings for the local public administration on the implementation of relevant legal amendments should be conducted before the adoption of the new Law on Legal Recognition of Same-sex Relationships. The Ministry of Public Administration and Local Self-Government will be responsible for these activities.

### LEGISLATIVE BRANCH OF POWER

11. This branch of power should prepare and conduct relevant procedures during the process of legislative drafting, in cooperation with relevant committees from the National Assembly, such as: the Culture and Information Committee, the Committee on Human and Minority Rights and Gender Equality, the Committee on Education, Science, Technological Development and the Information Society, the Committee on the Judiciary, Public Administration and Local Self-Government, the Committee on Labour, Social Issues, Social Inclusion and Poverty Reduction, the European Integration Committee, the Committee on the Rights of the Child and the Health and Family Committee. The draft Law on Same-sex Relationships should: define what the same-sex partnership is, both registered and unregistered forms; regulate the applicable principles of law; regulate the conditions for the establishment and dissolution of this union; regulate the legal effects of established same-sex relationships and rights and obligations of same-sex partners; regulate property rights, taxation, medical protection and medical insurance, as well as social and child protection. There is an overview of what the law must cover, and other topics should be discussed depending on the debate and conducted research by the relevant authorities mentioned in Recommendation No. 1.

12. Conduct public debates regarding the position of LGBTIQ persons in Serbian society and the importance of legal recognition of same-sex couples.

## JUDICIARY

13. Legal professionals with expertise in LGBTIQ rights together with CSO experts, should conduct training with judges dealing with cases involving family matters where same-sex couples can be parties in judicial proceedings. The Judicial Academy will be responsible for creating and conducting these trainings.

14. Trainings should be conducted with public prosecutors and deputy public prosecutors dealing with cases in which same-sex couples may be parties at different levels of judicial proceedings and processes before the Public Prosecutor. The Judicial Academy will be responsible for creating and conducting these trainings.

## 5. Conclusion

After analysing the socio-economic background and the legal framework in Serbia regarding same-sex relationships, it is evident that their legal recognition should be the next step in improving the status of LGBTIQ persons. Although, as we have seen, the attitudes of the general population towards the LGBTIQ community are still not very positive, in recent years there has been an improvement, and now the LGBTIQ population is in a better situation than a few years ago. It is mostly due to the increase in the visibility of this group of people, which was significantly improved when Ana Brnabic became the Prime Minister - the first woman and first openly lesbian woman to hold office. Also, since 2014, the Pride Parade in Belgrade has taken place without any incidents. Social polls and various reports also show that there has been a positive change in attitudes towards the LGBTIQ population.

However, all that does not mean that there are no problems that LGBTIQ people still face every day. They are still exposed to violence because of their sexual orientation and discrimination, which is quite common. They face discrimination in the workplace, at school, at university, while trying to exercise their rights, etc. Because same-sex relationships have not yet been recognized, same-sex couples cannot exercise different civil, economic and social rights. Therefore, there is an urgent need for the creation of a law which would recognize same-sex relationships.

The ECtHR has established a very clear legal precedent in the case of *Oliari and Others v Italy*, which is binding on all the CoE member states in relation to the legal recognition of same-sex relationships. It means that the RS, as a member state of this regional human rights institution, must follow the delivered judgment and provide protection of same-sex couples through their legal recognition. It is up to the RS or any other the CoE member state to decide which legal form will be introduced, whether it would be civil partnerships, registered or non-registered partnerships or same-sex marriages. The ECtHR left a wider margin of appreciation regarding this topic because the socio-cultural backgrounds and social attitudes towards LGBTIQ people vary among member states in Europe. It is important to emphasize again that the non-recognition of same-sex relationships in accordance with ECtHR case law represents a violation of the right to private and family life, and the RS has an obligation to pass a relevant law. The recommendations of the Universal Periodic Review

for Serbia, the recommendations of the European Commission against Racism and Intolerance and the relevant CEDAW Committee General Comments also create legal obligations for the RS to pass a concrete law, thus providing adequate legal recognition and protection of same-sex relationships. When we look at the legal framework, there is not much to look at. The current legal system has not recognized same-sex couples in any of the existing legal formats, such as civil partnerships, same-sex unions, cohabitating partners or (same-sex) marriage. The documents regarding the fight against discrimination in society, the Anti-Discrimination Strategy for 2013-2018 and the Action Plan for the Implementation of the Anti-Discrimination Strategy for the Period 2014-2018, expired in 2018, without any concrete actions for the improvement of the status of LGBTIQ people and now there is no plan in force. The CSO *Labris* drafted *the Model Law on Civil Partnership*, which defines and regulates the legal status of same-sex relationships. But it is worth noting that a big improvement was made last year with the establishment of the new Ministry of Human and Minority Rights and Social Dialogue of the RS. In the last couple of days, at the end of January 2021, news emerged in the media according to which on January 28 the new ministry announced three public calls for the inclusion of CSOs working groups in the drafting of “three important laws” - the Law on Prohibition of Discrimination, the Law on Gender Equality and the Law on Same-Sex Marriages (the article used the term same-sex marriage, but it is related to the legal recognition of same-sex relationships which will not be a form of same-sex marriage).<sup>90</sup> However, it appears that this information cannot be verified, since the ministry does not have a website and the official announcement is not available, at least not online.

A comparison of the cultural and legal aspects pertaining to this subject has been made among Serbia, Croatia and Montenegro, and it was established that all three countries share a similar background. All of them have traditional, predominantly conservative and patriarchal societies, as well as quite similar legal frameworks. While Montenegro and Serbia had previously defined marriage as a union between a man and a woman in their constitutions, Croatia did the same, but only after a referendum, where the majority voted for such a definition to be put in the Constitution. The referendum was a response to preparations for the legal recognition of same-sex relationships. As it has been shown that both Croatia and Montenegro managed to adopt such a law, despite all the existing opposition, it is evident that Serbia can do the same.

At the end, we provided multiple recommendations targeting various actors, the Government of the RS, ministries, the judiciary, the National Parliament and CSOs, which we believe should make more efforts to adopt this law and improve the overall situation of the LGBTIQ population. All recommendations are related to international human rights obligations that the RS has accepted through the ratification of different human rights instruments and its membership in relevant human rights organizations. In this process, we believe that EU institutions, including the Delegation of the European Union to the Republic of Serbia, should provide the necessary support. The RS, as an EU candidate country, has a goal to become an EU member, and this process includes harmonization of laws in accordance with EU standards and acceptance of the core values of this union, which are universal human rights, diversity and democracy.

<sup>90</sup> Ministarstvo pokreće proceduru da se legalizuju istopolni brakovi u Srbiji, 28 January 2021 <https://rs-lat.sputniknews.com/vesti/202101281124491331-ministarstvo-pokrece-proceduru-da-se-legalizuju-istopolni-brakovi-u-srbiji/> accessed 2 February 2021

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## ABOUT THE AUTHORS

**Aleksandar Mihajlovic** holds a Master degree in the field of International Human Rights Law from the University of Sussex, the United Kingdom. Before this LL.M Programme, Aleksandar completed a Bachelor and a Master degree at the Faculty of Law, University of Niš, Serbia. He passed the Bar Examination before the Ministry of Justice of the Republic of Serbia and the LPC and Training Contract Examination before the Bar Association Niš.

**Emina Muminovic** is Project Coordinator at the Centre for Contemporary Politics and former News Editor of the European Western Balkans. She obtained her LL.M. in Human Rights at the Central European University in Budapest and LL.B. at the John Naisbitt University in Belgrade.

**Veronika Vasilic** has a BA and MA degree in Classical Philology from the University of Zagreb, and a Master's degree in Human Rights and Democracy from the University of Bologna and the University of Sarajevo. In 2020 she enrolled into a PhD programme in Classical Philology at the University of Belgrade. She is an intern at the Centre for Geostrategic Research and Terrorism in Belgrade.

