ADOPTION OF CHILDREN BY SAME-SEX PARENTS

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Assessment of child adoption provisions of the Serbian Same-Sex Unions Bill in comparison with Croatian legislation and case law

The Serbian authorities have made public the proposed Same-Sex Unions Bill,[1] which, as expected, generated much controversy. On the one hand, the Bill has been criticised as detrimental to traditional views of the family and damaging to it as an institution, whilst, on the other, the SSUB has been justified as strengthening the role of the family in modern-day societies, since same-sex unions are a reality that can no longer be ignored. The SSUB emphasises the wealth of legislation worldwide, international conventions, case law, and legal theory, and notes the Serbian legislator will not be imposing any novel features. In fact, a comparison between the Serbian SSUB and the Croatian Life Partnership Act,[2] which entered into effect in Croatia on 1 January 2020, reveals that the definitions and structure of the provisions in both pieces of legislation are nearly identical. Given that the LPA is already in force, and that Croatian authorities have already been called upon to interpret some of its provisions and rule on the various rights accruing based on it, there seems to be substantial merit in comparing the two countries' approaches to assess how the Serbian administration could construe the provisions and act in similar cases. The SSUB notes that, even though same-sex unions are a departure from the heterosexual family unit model, they are neither detrimental to traditional family values nor conductive to promiscuity, anti-social behaviour, or hesitancy to have children, let alone a negation of the family: quite the contrary, same-sex unions reflect the desire of gay people to not be deprived of a family, parenthood, and all other benefits of a stable union. However, the legislator has not regulated the issue of parenthood in same-sex unions, with the SSUB staying silent on the issue of adoption by same-sex partners. The SSUB does not ban this explicitly, but equally does not unambiguously permit it. This is the exact same approach as adopted in Croatia. Even though this arrangement is not the most fortunate as it leaves much room for varying interpretations and so increases the chance of unequal application of facts to the law in identical cases, it does bespeak the unfavourable societal perception of this issue throughout the region, where different social groups hold completely opposing views. However, it is exactly this vagueness that is expected to give rise to a multitude of applications for interpretation of the legal provisions, which can quite conceivably progress to the European Court of Human Rights as well. This paper presents a comparative assessment of Croatian and Serbian legislation regulating adoption by same-sex unions, seeking to ascertain how authorities of the two countries have acted, and ought to act, in the event a partner in a same-sex union were to apply for adoption. This analysis is made all the more interesting by the fact that the Administrative Court of Zagreb, Croatia was already asked to assume a position on adoption by same-sex partners and that its judgment in the case was the first such ruling anywhere in the region.

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[1] The proposed Same-Sex Unions Bill (SSUB) is available online from the Serbian Ministry of Human and Minority Rights and Social Dialogue at https://minljmpdd.gov.rs/javne-rasprave.php [in Serbian].

[2] Croatian Life Partnership Act (LPA, *Narodne Novine*, Nos 92/14 and 98/19).

1. Definition of 'same-sex union' in the Serbian Same-Sex Unions Bill and Croatian Life Partnership Act

The Serbian SSUB defines same-sex union as a 'family union of two persons of the same gender entered into before a competent public authority'. The SSUB also defines unregistered same-sex union as a 'family union of two persons of the same gender not entered into before a competent public authority between whom there exist no impediments to enter into a family union, provided that they have cohabited for at least three years and that conditions have been met for the same-sex union to be valid'.[1]

The SSUB sets out the key principles of same-sex unions (equality of partners, respect for dignity, requirement for mutual assistance, and due regard of one partner for another)[2] and regulates entry into and dissolution of these unions, registration requirements and procedure, effects and legal consequences of registration, property issues, and safeguards against domestic violence. The Bill envisages application, as appropriate, of the general Family Law (FL) to entry into, registration, and dissolution of same-sex unions, effects and legal consequences of registration, property issues, and domestic violence. As such, many rights conferred by the FL are extended by the SSUB to same-sex couples, which clearly demonstrates the intent is to legally regulate and recognise existing same-sex unions. It ought to be noted, however, that the Bill does not invoke the Family Law when it comes to parent-child relationships, adoption, foster care, and guardianship, which are also governed in Serbia by the FL,[3] nor does it provide separate rules in these areas. This seems to suggest the issues were left unregulated on purpose, given the disapproval of the SSUB expressed by some groups in Serbia and the fears it may damage the traditional view of the family. Article 28 of the SSUB does, however, provide some indication of there being intent to regulate adoption, foster care, and guardianship of minors in the future. The provision stipulates that a same-sex union may be dissolved by the partners making a joint declaration before a civil registrar, provided that no underage children live in the union and that the partners have no jointly owned property. This article likely refers to children of one of the partners, but the wording is equally applicable to minors living in the same-sex union on other grounds (as adopted or foster children or wards).

Crucially, partners in same-sex unions are entitled to procedural rights and standing in all civil and administrative proceedings equal to those enjoyed by traditional spouses. A registered same-sex union is also made equal to marriage in terms of other rights and freedoms accruing to spouses, especially those derived from employment, as well as access to public services, entitlement of a foreign national partner to a Serbian residence permit, recognition of same-sex unions registered or entered into abroad, cross-border protection and entitlement to naturalisation,[4] and entitlement to mandatory health insurance, healthcare, and social and child protection.

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[1] SSUB Arts. 2 and 66.
[2] SSUB Art. 4.
[3] Family Law (*Official Gazette of the Republic of Serbia*, Nos 18/2005, 72/2011, and 6/2015).
[4] SSUB, Arts. 52 and 53.

An unregistered same-sex union (also referred to as 'informal same-sex union' in the SSUB) produces the same consequences as a registered one in terms of partners' personal rights, obligations to support partners' children, responsibility for making decisions that affect partners' children in emergencies, child visitation rights, and property-related issues. With regard to inheritance, taxation, pension insurance, social protection, and mandatory health insurance and healthcare, informal same-sex unions produce the same consequences as non-marital opposite-sex unions, as governed by specific regulations.[1]

Similarly, the Croatian LPA regulates life partnerships of same-sex individuals, defined as a 'family union of two persons of the same gender entered into before the appropriate authority pursuant to the law', and the principles, entry into, and dissolution of life partnerships, maintenance of a register of life partnerships, and legal consequences of these unions.

The Croatian legislator also regulates informal life partnership as a 'family union of two persons of the same gender not entered into before the appropriate authority but lasting for at least three years and meeting the validity requirements for a life partnership'. As in Serbia, life partners are guaranteed the right to jointly and consensually make decisions about all issues relevant for their cohabitation, and are mutually entitled to privacy, solidarity, care and assistance, and rights and standing in all civil and administrative proceedings equal to those enjoyed by married spouses.[2] Child adoption, fostering, and guardianship issues are not governed by either the LPA or by reference by the Croatian Family Act (FA),[3] in all likelihood due to the same reasons as in Serbia, namely the absence of social consensus that those questions ought to be regulated legally.

However, both Serbia and Croatia have left these questions open, which permits differing interpretations and application of the rules. This assessment seeks to examine whether the Croatian LPA does allow same-sex partners to apply for adoption and potentially successfully adopt a child, as well as whether this option may be available in Serbia. Reference will be made to the first court ruling in this matter, Uszp-43/20-7, adopted by the Administrative Court of Zagreb, Croatia, on 21 April 2021.

2. Child adoption procedures in Serbian and Croatian law

Under the FL, the prospective adoptive child must meet a set of requirements (birth; minority; legal standard of the best interests of the adoptive child; absence of obstacles such as consanguinity or relationship by adoption or legal guardianship; appropriate family status and/or consent of biological parents to adoption; and consent of adoptive child if older than 10 years of age and able to make reasoned decisions). The prospective adoptive parent must also fulfil a number of conditions in connection with age; having contractual capacity; personal characteristics that make it apparent the individual will exercise parental duties in the best interest of the child; and marital status, where the general rule is for spouses or unmarried partners to

[1] SSUB, Arts. 67 and 68.
[2] LPA, Art. 37.
[3] Croatian Family Act (*Narodne Novine*, Nos. 103/15 and 98/19).

only adopt children together,[1] excepting where only one spouse or partner is seeking to adopt the other's child, or where the cabinet minister responsible for families permits adoption by a person living alone if particularly justified reasons exist for doing so; undergoing specific pre-adoption orientation; and being a Serbian national (foreign nationals may adopt children only under special circumstances). Adoption follows the rules of administrative procedure and is pursued by the relevant centre for social work, which is legally the body exercising guardianship duties, either sua sponte or at the application of the prospective adoptive parent or the legal guardian of the child whose adoption is sought. The first step is to assess whether both the prospective adoptive parent and the child are suitable candidates for adoption; if this is determined, both are registered with the Single Personal Adoption Register. Only after registration can the child and the prospective adoptive parents be selected for a period of getting to know one another (which may last for up to six months), after which the child will either formally be adopted or the adoption application will be rejected.

The Croatian FA envisages similar requirements for both the child and the parents, including absence of consanguinity or adoptive relationship; the procedure follows the legal standard of ensuring the best welfare of the child. Married and non-married couples may adopt jointly, and spouses or unmarried partners may also do so individually where the other partner is the biological or adoptive parent of the child. One spouse or partner may adopt individually with the consent of the other, and so may an individual that is neither married nor in a non-marital union.[2] The procedure includes a suitability and fitness assessment performed by the relevant centre for social work at the application of the prospective adoptive parent. If the assessment is positive for the applicants, and if they meet the statutory conditions for adoption, the applicants are inducted in a pre-adoption orientation programme and registered with a register of prospective adoptive parents, from which the best candidates for a particular child will be selected with reference to all criteria envisaged by the FA. The child then undergoes orientation and is familiarised with the future adoptive parents, followed ultimately by the enactment of a formal adoption decision.

As such, adoption is in both countries an administrative proceeding conducted by centres for social work and has a fairly similar course. According to both nations' legislation, compliance with substantive requirements for adoption and preconditions that must be met by both the adoptive parent and the child is assessed immediately before registration with the register of prospective adoptive children and parents, in a process referred to as 'suitability assessment' (Serbia) or 'suitability and fitness assessment' (Croatia). This means that individuals who do not meet the substantive requirements for adoption may apply to have their 'suitability' and 'fitness' assessed by the body administering the proceedings.

3. Croatian case law

A same-sex couple who applied to have their suitability and fitness for adoption assessed and were denied by the responsible centre for social work. The couple then lodged an appeal with the

[1] FL, Art. 101[1].
[2] FA, Art. 185.

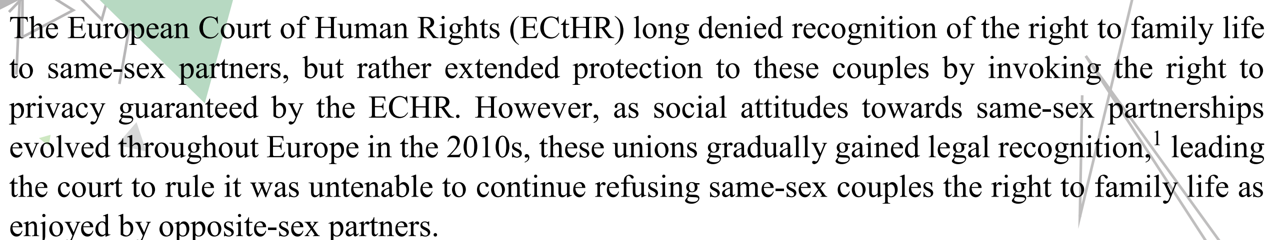
Ministry of Population Policy, Family Affairs, Youth, and Social Policy, which was rejected with the explanation that the complainants had failed to demonstrate sufficient standing to be approved for adoption. The statement of justification noted that all bodies administering the adoption procedure had to put the best interests of the prospective adoptee above those of any other party, and that the LPA did not regulate either the adoption procedure or the suitability and fitness assessment process, which meant that the complainants lacked standing to apply for adoption. The prospective adoptive parents brought an administrative complaint against this ruling, claiming that the case involved inappropriate application of facts to the law, and that they had been discriminated against as their application had not been processed lawfully and promptly. The plaintiffs claimed infringement of the Croatian Constitution, European Convention on Human Rights (ECHR), Anti-Discrimination Act, and Gender Equality Act, asserting their equality before the law had been infringed upon due to their being same-sex partners, and invoking case law of the European Court of Human Rights.

Judgement Uszp-43/20-7 of the Administrative Court of Zagreb, issued on 21 April 2021, annulled the decision of the Ministry of Population Policy, Youth, and Social Policy. The Court ruled in favour of the plaintiffs, noting that the authorities ought to have applied the facts to the LPA, the FA, and the Constitution of Croatia, and re-iterated the principles of equality, social justice, rule of law, and respect for human rights. The Administrative Court highlighted a provision of the LPA that guarantees same-sex partners equal rights and standing in all civil and administrative proceedings as those enjoyed by opposite-sex spouses, finding that the plaintiffs in the case had been deprived of the right to a duly justified court ruling, and ordered that the matter be remitted to the decision-maker for reconsideration.

There is currently no Serbian case law in these issues, and none is expected to appear for some time since the SSUB is yet to be enacted. Nevertheless, given the similarities between the Serbian FL and the Croatian FA in terms of their child adoption provisions, as well as the definitions of same-sex unions and other related issues in the SSUB and the LPA, in a potential administrative dispute a Serbian court would in all likelihood have to render the same ruling as that adopted by its Croatian counterpart, as described above.

Serbia is also a signatory of the ECHR; the Serbian Constitution enshrines the rule of law and gender equality, bans discrimination, and entitles everyone to equal protection before the law and legal relief; and the SSUB guarantees equal rights to same-sex partners in civil and administrative disputes as granted to opposite-sex couples. Therefore, if same-sex partners in a registered union were to apply for registration with the adoption register as prospective adopters, pursuant to the FL, the relevant centre for social work would in all probability have to assess their suitability and compliance with substantive requirements of the FL, and rule on whether they can be formally registered as adopters. Whether the same-sex couple would indeed be found in compliance with requirements for adoption exceeds the scope of this paper, which aims only at highlighting that, in accordance with the SSUB, same-sex partners could not be a priori denied the adoption suitability assessment.

4. Case law of the European Court of Human Rights



The European Court of Human Rights (ECtHR) long denied recognition of the right to family life to same-sex partners, but rather extended protection to these couples by invoking the right to privacy guaranteed by the ECHR. However, as social attitudes towards same-sex partnerships evolved throughout Europe in the 2010s, these unions gradually gained legal recognition,[1] leading the court to rule it was untenable to continue refusing same-sex couples the right to family life as enjoyed by opposite-sex partners.

On multiple occasions, the ECtHR was also called upon to rule whether same-sex partners could adopt children and whether they had been discriminated against on grounds of sexual orientation when adoption decisions were made.

The ECtHR's case law has not been consistent in this regard. For instance, the Court found there was no common position between Council of Europe members when it came to same-sex couples' right to adopt children. The ECtHR ruled that it was impossible to detect a set of shared principles in member states' legal and social systems and that national authorities were better placed to assess local needs and requirements. By contrast, in a case where an adoption application was denied on the grounds that the child would clearly lack a paternal referent (the applicant was a woman in partnership with a woman who herself had not applied for adoption but did not oppose it either), the ECtHR found and penalised violations of the right to respect of private and family life in the treatment of gay people.[2] Common to both decisions was the Court's assertion that the scientific community remained divided as to the effects of adoption by same-sex partners on a child, and that there was much divergence in opinion nationally and internationally, which made the ECtHR reluctant to take a firm stance in this regard and align case law to send a clear message to ECHR signatories that they had to permit same-sex couples to adopt children. Nevertheless, the Court found differences in treatment of same-sex individuals were discriminatory in the absence of reasonable justification, meaning unless they sought to achieve a lawful objective or if there was no reasonable proportionality between the means employed and the desired end.[3] Therefore, the same as with the recognition of the right to private and family life, case law of the ECtHR can be expected to evolve to ultimately recognise the de facto right of same-sex couples to adopt children (albeit perhaps not under that name) to ensure non-discrimination and the right to private and family life in cases where the child is already living with the same-sex couple. In its rulings the ECtHR takes the view that the ECHR is a living document that evolves with society, and that the Court's interpretation must consider current developments and attitudes rather than those prevailing before the Convention was enacted. What may have been acceptable at that time need not necessarily remain so with the passage of time.

5. Likely course of potential administrative adoption proceedings applied for by registered same-sex partners in Serbia

[1] I. Krstić, T. Marinković, Evropsko pravo ljudskih prava, Beograd, 2016.
[2] M. Draškić, Porodično pravo i prava deteta, Beograd, Pravni fakultet Univerziteta u Beogradu 2015.
[3] S. Bubić, "Uloga Evropskog suda za ljudska prava u priznavanju istospolnih zajednica", Zbornik radova Dani porodičnog prava - godina 5 broj V, Pravni fakultet Mostar, 2017, pp. 47-67.

As described above, assuming the SSUB becomes law and same-sex partners apply for adoption, the local centre for social work would have to assess their compliance with requirements for registration with the Single Personal Adoption Register, as set out in the FL. Even though the SSUB does not envisage application of the adoption provisions of the FL, the above conclusion is based on the declared guarantee that same-sex partners will enjoy equal standing as their opposite-sex peers in all civil and administrative proceedings.

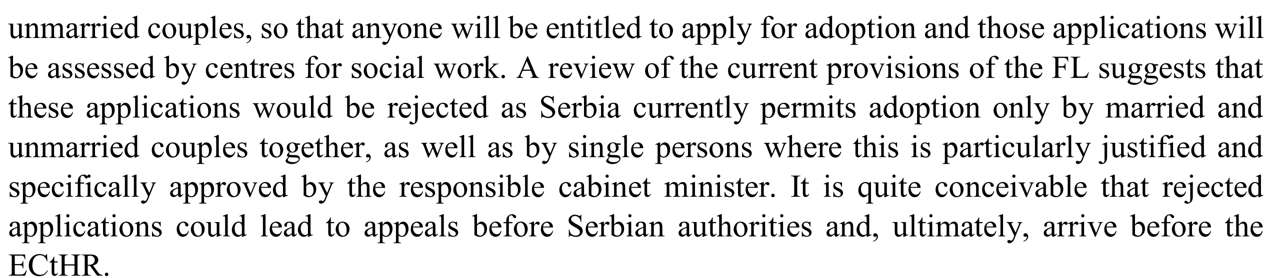
There is, however, one major difference between the Serbian and the Croatian adoption rules. Whilst in Croatia a person who is neither married nor in a non-marital union is able to adopt without having to meet any additional requirements, this is an exception rather than the rule in Serbia and must be specifically approved by the cabinet minister responsible for family affairs, as a rule only in exceptional circumstances. The Serbian legislator, therefore, envisages that spouses and unmarried partners can only adopt children together,[1] whilst adoption can be permitted for a single person only by way of an exception. This substantive requirement of marital status must be met by a prospective adoptive parent, with the provision even titled 'Marital status of adoptive parent'. As the SSUB grants equal procedural rights and standing to same-sex partners as to spouses in all civil and administrative proceedings, and since the Bill does not call for appropriate application of the FL in matters of adoption, the conclusion is that an application by a same-sex couple for registration with the Single Personal Adoption Register would be denied as the substantive conditions would not be met. The same-sex partners could not be granted approval by the relevant minister either as they would not be single. Given that Croatia explicitly approves adoption by a person who is neither married nor in an unmarried union without imposing any additional conditions such as justified reasons or approval by the authorities, it seems that the country's rules will allow more room for different interpretations, and that denials of applications for adoption by same-sex couples are highly likely to be contested before the ECtHR.

As discussed above, if the SSUB were to be adopted as currently worded, applications for adoption by same-sex partners would be rejected as the relevant centre for social work would rule the applicants were not suitable candidates for adoption under Article 101[1] of the FL, where the provision would be construed to allow adoption only by spouses or unmarried partners jointly. Such a ruling could be appealed with the ministry of family affairs and subsequently contested in an administrative dispute, and, ultimately, if all avenues offered by the Serbian legal system were exhausted, before the ECtHR.

Conclusion

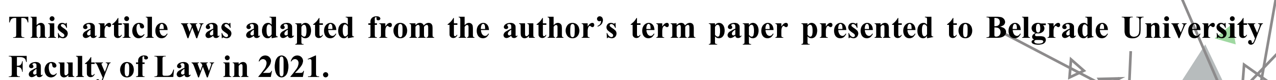
In view of the vocal opposition in Serbia to the SSUB, which recognises basic rights to same-sex partners that place them in a position similar to that of married and unmarried partners, the reasons are clear why the legislator was unable to regulate child adoption in the Bill. Similar examples can be found elsewhere in the region. Nevertheless, as explained above, this lack of

[1] FL, Art. 101[1].



unmarried couples, so that anyone will be entitled to apply for adoption and those applications will be assessed by centres for social work. A review of the current provisions of the FL suggests that these applications would be rejected as Serbia currently permits adoption only by married and unmarried couples together, as well as by single persons where this is particularly justified and specifically approved by the responsible cabinet minister. It is quite conceivable that rejected applications could lead to appeals before Serbian authorities and, ultimately, arrive before the ECtHR.

There currently seems to be no social consensus, either in Serbia or the broader region, that would allow child adoption by same-sex couples to be explicitly permitted by law, so ECtHR case law is set to guide regulation of this matter for the foreseeable future. Even though Council of Europe member states are not in agreement on this issue, more concrete positions are expected to emerge in time. From the perspective of laws that safeguard the right to family life and bans discrimination, as required by the ECtHR, and the Constitution of Serbia, legislation seems on track to become more liberal over time and so allow child adoption by same-sex partners. In Croatia, registered life partners are even more likely to be permitted to adopt, as the country's FA allows adoption by persons who are not married or in an unmarried relationship, and life partners may fall within the scope of this exception.



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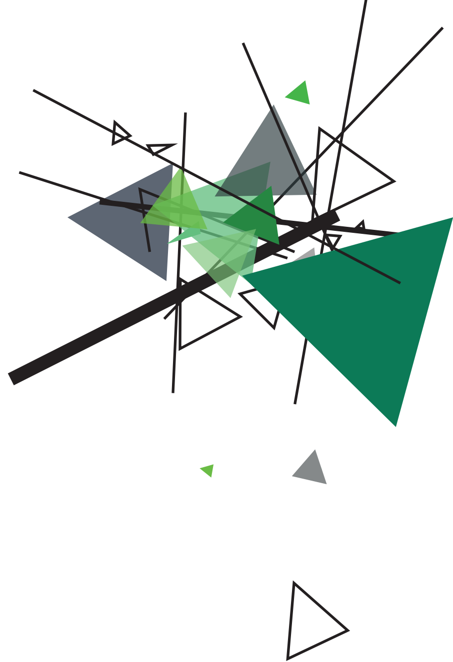
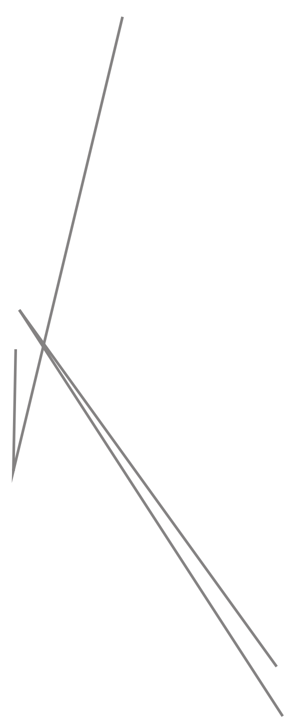
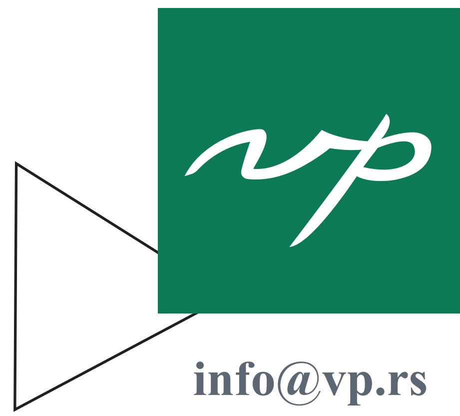

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