

YEARBOOK

HUMAN RIGHTS PROTECTION

PROVINCIAL PROTECTOR
OF CITIZENS - OMBUDSMAN

FROM UNLAWFULNESS TO LEGALITY

ГОДИШЊАК
ЗАШТИТА ЛЉУДСКИХ ПРАВА
“ОД ПРОТИВПРАВНОСТИ ДО ЗАКОНИТОСТИ”

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Republic of Serbia
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Provincial Protector of Citizens – Ombudsman

Institute of Criminological and
Sociological Research



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ON BEHALF OF THE PUBLISHERS:

Prof. Zoran Pavlović, PhD, Provincial Protector of Citizens – Ombudsman
Ivana Stevanović, PhD, Institute of Criminological and Sociological Research

EDITOR:

Prof. Zoran Pavlović, PhD, Provincial Protector of Citizens – Ombudsman

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Zorica Mršević*

UNMARRIED COUPLES IN SERBIA BETWEEN THE CONSTITUTION AND THE LAWS¹

The object of the paper is to point out that the Constitutional equalization of the marital and extra-marital unions is not followed by the legal provisions of several laws. The differences cause unequal treatment in use of existential human rights of unmarried couples. Namely, the Constitution of the Republic of Serbia stipulates that the unmarried couples are equal to the marital ones, and that the family, mother, single parent and child in the Republic of Serbia enjoy special protection. Therefore, marital and extra-marital unions are not only recognized by the Constitution, but also equalized as such. Also, the Constitution provides the family with special protection, whereby the Constitutional Court points out that, when it comes to the family the Constitution makes no distinction between marital and extra-marital unions. But the status of the extramarital partners is not recognized by the Labor rights Law, the Inheritance Law, the Law on Pension and Disability Insurance the Law on Personal Income Tax the Law on Property Tax. For example, Law on Pension and Disability Insurance do not recognize the right to family pension to the survived partner of the deceased insured partner, thereby violating and changing the essence of the Constitution of the guaranteed right to equality of marital and extramarital unions in front of law. The aim of the paper is to indicate the necessity of legal changes that would take into account the modalities that allow the surviving spouse to protect human rights in the form of enjoyment of family pension and legal inheritance in analogy to marital partners. Comparative legal solutions point to criteria such as the duration of the extramarital unions, common children, the absence of a marital union, neither the deceased nor the surviving spouse, etc.

Keywords: *unmarried couples, human rights, surviving spouse, inheritance, family pension, constitution, laws, Constitutional Court decision, unmarried couples in comparative law*

* PhD, Senior research fellow, Institute of Social Sciences, Belgrade zmrsevic@idn.org.rs

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1. Preface

It is estimated that more than 200,000 people live in an extramarital unions² in Serbia, and every fourth child is born out of this partnership relationship (Avalić, 2018)³. The increasing number of such communities is present everywhere today. There are now more than 2.3 million unmarried couples in the UK; a figure that is set to rise to 4 million by 2033 (The Law Commission, 2011). The topic of extramarital unions concerns the apparently quite a number of citizens of Serbia, so this is a matter of practical and not only a theoretical significance. The existence of extramarital partners living together in community is the first and basic qualification circumstance of the legal concept of the extramarital union (Lazić, 2016). The community of life should be real, complete, so that it can be portrayed as a marital relationship. It is a community that involves meeting the emotional, sexual, ethical, cultural and other needs of one woman and one man. The duration partnership is essential for the formation of the legal concept of an extramarital union. The community must last so long that it is easy to establish a similarity with marriage. In Serbian law, the duration of the extramarital union was raised through a demand that it be a "lasting" community, which means that it does not necessarily have to be long-lasting, but that partners living in an extramarital union had the intention to establish a community of life whose duration was not temporary or limited. The lack of marital obstacles to legal concept of the extramarital community is the third element that refers to the requirement that there was no marital obstacles between the spouses at the time of the establishment of the extramarital union.

The problem is that the constitutional equalization of the marital and extra-marital unions is not accompanied by the legal provisions of several laws that make a difference in terms of the use of the existential rights of members of these unions. Namely, the Constitution of the Republic of Serbia stipulates that the non-marital union is equal to the marital, in accordance with the law (Article 62, paragraph 5), and that the family, mother, single parent and child in the Republic of Serbia enjoy special protection, in accordance with the law (Article 66, paragraph 1). This is why both marital and non-marital unions are not only recognized by the Constitution, but are, as such, even equal. The constitutional equalization of the marital and extra-marital unions sounds modern, democratic, open and tolerant, very European. But the problem is that there is no real

² In literature written in English are used various terms, among which the most frequently in use are, extra marital unions/communities and non-married unions/partners. Bot are used in this article.

³ More than 200,000 Serbs live in an extramarital community, but they do not know that they have no rights: there is no inheritance of property and pension.

legislative will for the marital and extra-marital unions to be equalized or at least be made similar. In the whole set of regulations, the existing gap (almost fear) of equalization is very clear (Reljanović, 2018).

2. Legal distinction between marital and non-marital unions

A number of laws are certainly still far from recognizing an extramarital union as an equal to marital union of two people's lives. For too long, discriminatory provisions that do not recognize the existence of the extramarital unions and their formal equality have been proclaimed (but not introduced into legal life) since 2006.

Family law is the only one who however recognizes and gives but only some rights to unmarried couples. A marital union is defined as a lasting community of life of a woman and a man, among whom there are no marital obstacles (extramarital partners) (Article 4). Marriage is a marital obstacle for establishment of an extramarital union. If there was a marital obstacle at the time of acquisition of property in an extramarital union, life in an extramarital union can not be the basis for the acquisition of the property of an extramarital partner. (From the Judgment of the Appellate Court in Kragujevac, GZ 2213/2011 of 19 June 2012). (Porodično pravo, 2012). An unmarried partner has the rights and duties of a spouse under the conditions specified by that law, but which relates solely to the obligation to support. Namely, the provisions of article 152 foresee that a spousal partner who does not have sufficient means of subsistence, is incapable of work or is unemployed, has the right to be supported by other spouse in proportion to his or her abilities. In this respect, the marital and extra-marital unions are equalized because the provisions of this law on the maintenance of spouses are appropriately applied to the maintenance of a spousal partner. The legal equality of extra-marital and marital communities ends at this point.

The Law on Obligations (Article 201, paragraph 4) provides the right to a fair financial compensation for the suffering of mental illness due to death or serious disability, which is also entitled also to an unmarried partner, if there was a durable community of life between him and the deceased or injured.

The Law on Inheritance under the provisions of Article 8 provides that, on the basis of the law, there are hereditary orders. The deceased is to be inherited by: his descendants, his adoptive parents and their descendants, his spouse, his parents, his adoptive parents, his brothers and sisters and their descendants, his descendants and grandmothers and their descendants and his other ancestors. The first hereditary order is made by the

deceased's descendants and his spouse. Resident children and the spouse inherit equally (Article 9). The second hereditary order is made by the deceased's spouse and the deceased's parents and their offspring. The surviving spouse inherits half of the legacy, and the second half to equal parts is inherited by the deceased's parent (Article 12). Finally, the necessary heirs (those who can not be completely excluded by the will) are deceased's: descendants, adoptive parents and their offspring, spouse, parents, adopter, brothers and sisters, grandfathers and babies and other ancestors. A necessary successor can be only one who is called upon to inherit by the legal order of inheritance (Article 39).

The Law on Pension and Disability Insurance according to the provisions of Article 28 as members of the family of the deceased insured person shall be considered of: 1) spouse; 2) children (born in marriage or out of wedlock or adopted, stepchild supported by the insured person, or beneficiary of rights, grandchildren, brothers and sisters and other children without parents, or children with one or both parents who are completely incapable of work, and which the insured, that is the beneficiary of the rights, has maintained); 3) parents (father and mother, step-father and step-mother and adoptive parents) that the insured person, or the beneficiary of the law, supported. It is interesting that a divorced spouse can also be enjoyed under the right to a family pension if the court decided that he/she has the right to be supported. Therefore, the criterion is only the existence of a formal marriage, although it has long been divorced (not mentioned when). This gives an absolute priority over, for example, by the fact that at the time of the death of the insured person he may have been living in an extramarital union for decades. According to the provisions of Article 34, members of the close family of a deceased insured person, i.e. beneficiaries of rights, are considered spouse and children (born or unmarried, stepchild and grandchildren) in the sense of this law. A un married spouse has no place, nor among members of the extended family of a deceased insured person, that is, the beneficiary of the right, who in the sense of this law are parents (father, mother, stepfather, stepmother and adopter), brothers, sisters and other children without parents, one or both parents who are completely incapable of work, which the insured, that is, the beneficiary of the law, has endured. The spouse of a professional military person, according to the regulations on the Serbian Army that died during the official activities, acquires the right to family pension regardless of the prescribed years of his life, provided that he did not make a marriage again, that is, if he / she has children, that the children have completed their education 30a).

The Labour Law, Article 77. which regulates paid leave, mentions only the delivery to a spouse, and not partners in an extramarital union. When it comes to paid leave due to

the severity of the illness or death of a close family member, the Law recognized only a married spouse, children, brothers, sisters, parents, adopters, adoptive parents and guardians who only are identified as a narrow family. There is no extra marital partner. However, the legislator has left the possibility that by a general act (collective agreement, rulebook on work) or a contract of work with employees, other persons will be foreseen - where the unmarried partner could be found. Paragraph 5. of the same article states that the employer may authorize the absence of an employee and relatives not explicitly listed as well as for other persons living in a joint family household with an employee for the duration of the determined employer's decision. So, the employer can do so but does not have to do so. In Article 79, which regulates the suspension of employment, among other things, it is stipulated that the employment relationship is suspended if he is absent from work for being sent to work abroad from the employer or within the framework of international technical or educational-cultural cooperation, diplomatic, consular and other representative offices. Paragraph 3 of the same article stipulates that the same rights as an employee who is being sent abroad also has his / her spouse. The unmarried spouse is not mentioned, so it can only be stated that he / she has none of these rights. A unmarried spouse / partner is left without work in Serbia and without the right to complain about such an act by the employer. In Article 119 of the Labour Law, which regulates the so-called "other employee benefits", it is stipulated that the employer is obliged to pay the employee compensation for the costs of funeral services in the case of the death of a close family member, and as members of the close family in case of death of an employee is only a spouse. Unlike paid leave, and as in the case of a standstill, there is no attempt to correct a discriminatory provision by a general act or employment contract - a provision of imperative character and the employer must respect it - for example, it will mean that it will not have a legal basis to pay off compensation of funeral expenses to an unmarried partner in the case that the employee dies, while it will have to do so if the behind the died employee remains a spouse behind.

The Law on Income Tax is considered as family members a spouse, and the parents, children, adoptive parents and the adopter of the taxpayer (Article 10). Notwithstanding the provisions of the Family Law that provides for the obligation to support non-marital partners, the Law on Income Taxes in taxable household dependent family members implies only a spouse but not an unmarried partner. Namely, to the dependents of the family, in the sense of this law, the following persons are considered as persons who are dependent: minors, or adoptees; children, that is, adoptees in regular education or during unemployment, if they live with a taxpayer in the same household; grandchildren, if the

parents do not support them and if they live in the household with the taxpayer; a spouse; parents, or adopters. The right to tax exemption in the sale of rights. Capital gains or losses in terms of this Law shall not be deemed to be resulting from the transfer of rights, shares or securities when: 1) they were acquired by inheritance in the first inheritance order; 2) transfer between spouses and blood relatives in the right line (Article 72a).

Law on Property Tax. The tax on inheritance and gift is not to be paid: by the successor of the first order, the spouse and the parent of the deceased, or gift receiver of the first hereditary order and the spouse of the donor, Article 21. The tax on the transfer of absolute rights is not to be paid for the transfer of property right to an apartment to a physical person who buys the first apartment, Article 31a. The family household of the buyer of the first apartment, in the sense of paragraph 1 of this Article, shall be considered a community of life, business and spending of the income of the buyer of the first apartment, his spouse, the buyer's children, the buyer's adoptees, the children of his spouse, and the other. Despite the existence of a community of life.

3. Decision of the Constitutional Court in respect of non-recognition of rights on family pension to extra-marital partners

The provisions of Articles 28, 29, 30 and 34 of the Law on Pension and Disability Insurance are challenged before the Constitutional Court because they do not recognize the right to family pension to the deceased partner of the deceased insured, thereby violating and changing the essence of the Constitution of the guaranteed right to equality of marital and extra-marital union before the law. In the process of assessing the constitutionality and legality of the IUz-90/2008 Law on Pension and Disability Insurance 30.06.2011. the Constitutional Court concluded that, in accordance with the provisions of Article 105 of the Law on the Constitutional Court, the Court will send a letter to the National Assembly indicating the need for the disputed provisions of Article. 28, 29, 30 and 34 (but also by the provisions of Articles 28a and 30a) of the Law on Pension and Disability Insurance, which regulates the right to family pension, which is recognized only to the spouse of the insured person, recognize the rights of extra-marital partners, and widows, in accordance with the Constitution and recognized international acts. Such a decision was made because the initiator did not request the annulment of the controversial legal provisions but the adoption of the different ones. Since the Constitutional Court does not have a positive legislative right, but only a negative one, it could only initiate the adoption of legal provisions harmonized with the Constitution.

4. About extra-marital unions

Extra-marital unions are also referred to as cohabitation in the literature, and are defined as the union of life of two persons of the opposite sex, who are not in formal, legally-sanctioned marriage. Based on a set of demographic data, surveys and other sources, it can be concluded that extra marital unions are the most prevalent among young people, which is usually completed by marriage, as in the form of a permanent community or alternative to life in couples (Bobić, 2003). Many couples avoid marriage so that they do not bother with papers and administration, but only later realize that bureaucracy is even more an enemy of extramarital communities.⁴

The problem is the stereotypical view of extramarital communities as a phenomenon that is the result of individualism and the realization of mostly “selfish” personal aspirations, which happen in the conditions of material security, so these values are present among members of educated and financially safer categories of society. This presupposes the traditionalism of the existence of extramarital unions as a form of “marriage on trial” as well as long-term, lifelong unions with children. It is assumed that this form of anachronistic type of cohabitation exists in the form of open exploitation of women by men who in extra-marital partnerships in their (most often) rural households receive practically free female labor. After cease of love, or a need, after a couple of years, a man simply releases a woman, replacing her by the other one, without any obligation to none of them. Such unions may take a longer period of time, perhaps practically for the rest of the life of one of the spouses. If a woman survives, she is in an extremely unfavorable situation, having spent all her life working on her husband's property, building together the house and raising children with him, nursing a mother-in-law and a father-in-law, and finally inheriting nothing, and even not being entitled to family pension. She remains therefore, without a roof over her head and without any remuneration, just because the union with all the characteristics of marriage, in which she lived her entire life, was not formally concluded. She is practically on the street, if the children (who may not be mutual with the already deceased partner) do not allow to stay in the house.

We would somewhat agree that the dispersion of extramarital unions in Serbia reflects well-founded norms of marriage, as the most suitable ambience for raising children. They can be in many cases also the stage of the marital process and most often make an

⁴ More of about 200.000 Serbs living in extra marital union do not know that they have no rights at all: not inheritance, neither pensions. (Avalić 2018).

introduction to marriage, "marriage on trial", but rarely alternative to marriage (Penev & Stankovic, 2012). But our disagreement begins with the view that informal unions in Serbia end after a birth of a child or the desire to get offspring because this is not always the case. Marriage also is a reflection of well-founded norms of marriage, but as a union in which a man is traditionally provided by a dominant position with the right to form this community according to his needs. This makes the community the stage of gender-based violence and exploitation. When a hegemonic man dictates an outright community, then there is no longer a community of equal partners (Mršević, 2014:20). Hegemonic masculinity is a model of practicing full male domination over women. The term "hegemonic" refers to the contextually tolerated ways in which men practice masculinity, which includes violence to subjugate women, deny the victim the right to leave the community with a hegemonistic man, or have possibility to change the conditions of a mutual life (Mršević, 2013:55).

From the statistics we find out that the number of persons in extramarital unions is higher in urban than in other settlements, in both sexes. The differences are less pronounced in women than in men. The percentage of men living in extramarital unions is larger in urban settlements than in women, and in other settlements, the share of men and women is almost identical. In statistics are practically invisible all these discriminatory, exploitative models of extra marital unions.

The percentage of persons living in extramarital communities in the total population in younger age groups is higher in women, in the youngest four and a half times, and in the group of 20 to 24 years it is twice as high. The largest share in women is in the group of 25 to 29 years and with increasing age it is continuously decreasing. In the age group of 30 to 34 years, in which the proportion of men is greatest, full differences are almost disappearing. In the 35-39 age group and in all of the following, the proportion of men is constantly higher, by up to half the share of women's share, except in the oldest group of 75 years or more, where the difference is almost triple (Negovanović, 2017).

Whenever there is a difference in the number of women and men who live in not married (but also in marital) unions, the question arises how is it possible, i.e. who lives with that surplus of persons, (since statistical data do not include same-sex communities). It is clear that this is about giving socially desirable answers that do not always reflect the actual situation. Thus, for a young woman, life in a non-marital union might be seen as a desirable category from the point of view of the expected offspring and perspective of a formal marriage. Both are seen as stereotypical understanding of favorable and desirable outcome of women's ambitions. But their partners, men of the

same or similar age, would prefer to be represented as unmarried guys without obligation. Elderly men, however, may feel that the life of a lonely old man is "proof" of his life's failure. If they are not already formally married, they might prefer to declare themselves as to live in extramarital unions, although they may have only sporadic informal relationships. As there is obviously tinkering with fact in responding with intention to their own positioning in the domain of social acceptability, the negative forms of extramarital communities collared by gender-based discrimination and exploitation are not included in the statistics. Namely, few men would volunteer said to exploit women through extramarital communities, nor exploited women are willing to plead to be victims of such extramarital practices.

The Family Law of the Republic of Serbia regulates the extramarital community as a lasting community of life of a woman and a man, among which there are no marital obstacles, which is formed by the commencement of a common life. Regarding property relations and mutual duties of support, the same terms apply to marriage, and the most important difference between marriage and non-marital unions is the lack of legal inheritance between spouses.

The National Strategy for Gender Equality for the Period from 2016 to 2020 as the main strategic document of the Republic of Serbia does not contain anything at all about non-marital unions, partnerships, cohabitations, informal marriages, informal partnerships, coexistence, informal union or anything similar, not even in the chapter named as Gender equality in partner and family relationships - the economy of aging and the distribution of time, or anywhere else. But nevertheless, it is correct to assume that, formally speaking, women and men in the Republic of Serbia have equal rights. However, the indicators show that the overall socio-economic status of women is in a much worse position than men and that there is a deep gap between the proclaimed principles and concrete practice in the implementation of policies. This is the main and common conclusion of a series of research on the position of women conducted by the Ministry of Labour, Employment, Veterans' Affairs and Social Issues during 2014.

5. Inequality of women in marital and family relations

Women spend considerably more time in unpaid work, and in total they exceed men for one hour a day. Under unpaid activities, the so-called "domestic chores: dealing with food, household maintenance, child or adult care of a household member, making and care of textiles, shopping and services, repairs, gardening, as well as trips related to these activities. In total, 95% of women and only 77% of men participate in unpaid

activities every day. Such a family is a base for reproduction of gender roles and an unequal relationship of power whose consequences can also turn into violence.

Property inequities based on gender are very pronounced. The rural women's homes are in 88% of the cases owned by men, they do not own land in 84% of cases and almost do not own agricultural products. Women make up 55% of the unemployed rural population and 74% of unpaid assisting members of agricultural holdings. There are significant differences in informal employment between men (28.8%) and women (43.4%), while women from rural areas are eight times more represented in informal employment than women from urban areas (5.5%). They are considerably less covered by pension and health insurance schemes than men household members. A total of 12% of women do not have health insurance, and over 60% of women are not covered by pension insurance. In women who are in the status of so-called auxiliary household members, the situation is even more unfavorable - even 93% do not pay pension insurance, mainly due to lack of money. This situation places them at higher risk of poverty.

6. Legal solutions of some European countries

Since the right to inherit the non-married partners seems to be the most controversial, because the hereditary right is more than any other branch of rights painted by tradition and deeply rooted mentality, we present the legal provisions of some European countries. In a large number of EU legislations, in a relatively short period of time, the lawful successor was recognized also a non-married partner, which simultaneously raised the issue of significant differences in the many aspects of the succession legislation of the extramarital unions (Vidić - Trninić, 2014). A non-marital union in most legislations is the basis for calling for inheritance only if it is a same-sex non-marital union. These are the legislations of Sweden, Denmark, Finland, the Czech Republic, Hungary, England, Austria and Germany. In a lesser number of legislations, the extra-marital unions is the basis for invoking inheritance, irrespective of whether it is a heterosexual or same-sex marital union. This is the case in the legislation of Slovenia, Croatia, Belgium, the Netherlands, Ireland and Malta. In Greek law, inheritance is possible only on the basis of heterosexual extramarital unions.

7. Conclusion

If they were equalized, fraudsters could appear that would prove in various ways that they were in an extramarital union with a deceased person and claimed their “rights” to somebody’s property and pension (Avalić 2014). Also, as one civil servant once said (regarding the exercise of one of the rights in the field of social protection): "To equalize them, so that anyone from the street can take someone's hand and claim their rights"? Or how the people might argue, "if she was right, the marriage would be made; women chose it by themselves, they are equal and have the same rights, therefore they themselves have chosen to live in an extramarital union by accepting the disadvantage of such union in relation to marriage; marriage at least today is available to all; why she did not think about the consequences in time." Such a mentality will not take us far, but it is currently quite widespread (Reljanović, 2018).

It is in the interest of every society to recognize what is happening in life and to facilitate these situations, and not to make it more difficult. The facts that are rightfully able to compensate for the lack of a legal form are: the length of life in a non/married union, the fulfilment of rights and duties equivalent to the rights and duties of spouses, the absence of marital obstacles in the establishment of a marital union and the birth of joint children (Lazić, 2016).

As an excellent example of institutionally non-discriminatory treatment of marital and extramarital unions, is the recent Grant Contest issued by the Provincial Institute for Gender Equality calling the couples from the territory of the Autonomous Province Vojvodina to apply for funds with intention to purchase the rural houses with gardens. The subject of the Contest is the deliverance of grants for purchasing of rural houses with gardens, to both, married spouses and non-married partners with permanent residence in the territory of the AP Vojvodina that do not have a residential property owned or co-owned. The objectives of the competition are focused on: encouraging the development of rural environments, increasing the number of women who own the real estate, reviving and rejuvenating Vojvodina villages through the arrival of children and increasing the birth rate, initiating the process of improving the demographic structure as a precondition for initiating economic activities. Although on the paper the Contest is really not discriminative, but is be seen how would it works in practice, would it really include non-married couples on equal stand as the married one.

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