Novaković Uroš[*]
https://orcid.org/0009-0002-9749-7369
Milojević Goran[**]
https://orcid.org/0000-0003-3752-9883

UDC: 347.232(347.68:347.6-055.3)
Original scientific paper
DOI: 10.5937/ptp2504078N
Received on: September 26, 2025
Approved for publication on:
November 4, 2025
Pages: 78–98

PROPERTY RELATIONS BETWEEN PARTNERS IN NON-MARITAL AND SAME-SEX UNIONS

ABSTRACT: By defining the concept of a non-marital union in the Family Law of the Republic of Serbia, the legislator highlights the key similarities and differences between non-marital and marital unions, particularly in terms of their formation and the evidentiary standards required to establish their existence—factors that directly impact the exercise of property rights. The authors' intention is to present, through an analysis of broader scholarly literature and relevant judgments of the European Court of Human Rights, the nature and various approaches concerning property relations in non-martial and same-sex unions. The study employs a comparative legal method, analysis of statutory provisions, legal doctrine, and case law. By examining relevant legislative provisions and judicial decisions, the aim is to assess the legal framework, identify challenges in its application, and explore potential avenues for extending the protection of these relations within the existing legal system, taking into account the practice of the European Court of Human Rights and the principles of non-discrimination.

Keywords: *non-marital union, same-sex union, registered partnership, joint property, tenancy rights.*

[*] LLD, Associate Professor, University of Belgrade, Faculty of Law, Belgrade, Serbia, e-mail: uros.novakovic@ius.bg.ac.rs

[**] LLD, Assistant Professor, University Business Academy in Novi Sad, Faculty of Law for Commerce and Judiciary in Novi Sad, Novi Sad, Serbia, e-mail: milojevic@pfbeograd.edu.rs

1. Introduction

When observed in relation to the type of relationship between family members or individuals in intimate and personal partnerships, we can distinguish the following categories of property relations: those arising in marriage, in non-marital unions, and, finally, in same-sex unions. A key question is whether individuals in same-sex unions fall within the scope of family law or should be regulated by other branches of law. Same-sex unions share certain characteristics with relationships between individuals living in non-marital partnerships. Although marriage and non-marital unions are treated as legally equivalent under the Family Law, notable differences exist in the regulation of property relations. Our intention is to present and analyze the legal status of individuals in non-marital and same-sex unions, as well as the similarities and differences that arise between them.

2. Non-Marital Union

In accordance with the provisions of the Family Law, a non-marital union is defined as a stable and enduring relationship between two individuals between whom there are no legal impediments to marriage. The literature identifies three essential elements that constitute a non-marital union: cohabitation of the partners, the duration of such cohabitation, and the absence of legal impediments to marriage between the partners (Draškić, 2021, p. 51). In this respect, the non-marital union is equated with marriage in terms of the conditions that must not exist between the individuals entering into such a union, that is, between non-marital partners at the time the union is formed. Unlike marriage, where spouses are expected to enter into matrimony with the intention of forming a shared life (based on emotional, economic, sexual, or procreative reasons) and are not required to live together, cohabitation is a necessary condition, *a conditio sine qua non* for the existence of a non-marital union. Without shared life in the same household, there can be no non-marital union. While one issue concerns the formation of the union, a separate and equally important issue is its proof. A non-marital union is formed through joint life over a prolonged period, the length of which is subject to judicial assessment in each specific case. On the other hand, the question of proving the existence of a non-marital union often proves to be just as important, if not more so. This issue typically arises in proceedings concerning the division of jointly acquired property. The question of whether a non-marital union existed does not emerge automatically, not even upon its termination. If the

partners did not acquire any property during the course of their union (which is unlikely in relationships lasting three years or more) there will be no need for court involvement once cohabitation ends. No state authority will issue a decision, judgment, or declaration establishing or confirming the termination of the non-marital union. However, where joint property exists, the preliminary question in property division proceedings will be to prove the existence of the non-marital union. If non-marital partners reach an agreement on the division of property, the agreement is submitted to a notary, who merely certifies it after verifying that the movable and immovable assets listed in the agreement have indeed been transferred to one of the partners. Subsequently, the other non-marital partner is registered in the Land Registry as a contractual party to the agreement. The other partner, as a contracting party, is then registered in the land registry. In the absence of an agreement, the partner initiating legal proceedings bears the burden of proving the existence of the non-marital union and that the assets in question were acquired during that union.

This is where the issue of evidentiary proof arises. A non-marital union is typically proven through evidence such as shared residence, witness testimony, common (non-marital) children, payment of household bills, lease agreements, and subscriptions to telecommunication or cable services. In contrast, proving the existence of a marriage is not a contentious issue, as an extract from the marriage registry serves as a simple and straightforward means of proof. The process of establishing the existence of a non-marital union is significantly different, and it is at this point that a clear distinction between marriage and non-marital union must be acknowledged.

The difficulty of proving the existence of a non-marital union is reflected in growing efforts to allow such unions to be registered before a competent state authority. In recent years, practice in the Republic of Serbia has shown that non-marital unions are sometimes registered before a notary public for the purpose of exercising certain health or social rights. Registration of a non-marital union emerges as an option available to partners who wish to establish its existence. However, such practice stands in direct contradiction to the provisions of the Family Law, which requires the element of duration as a constitutive condition of a non-marital union. This precludes the possibility of creating a non-marital union merely by a declaration of intent, thereby constituting it contrary to the statutory requirements of the Family Law. Such registration may be acceptable when it serves to exercise certain health-related rights or rights related to parenthood, but not for the purpose of acquiring joint property. The reasoning behind this position is the following: if a non-marital union could be registered before a notary public in matters relating to joint

property, then two individuals who, for example, have been in an emotional relationship for only a month or even without such a relationship, could, by a simple declaration before a notary, place themselves in a position whereby, within the following year, any assets acquired through joint effort (including real estate, movable property, shares, bonds, copyrights) would be subject to division under the legal regime of joint property of non-marital partners. At first glance, this argument may seem justified, after all, if two individuals genuinely wish to affirm that they are in a non-marital union, they should be allowed to do so, in accordance with the principle of freedom of contract. According to the Law on Public Notaries, agreements on the division of joint property between spouses or common-law partners must be executed in the form of a notarial deed (Stanić, 2012, p. 92). On the other hand, individuals who do not register a non-marital union, bearing in mind that the Family Act does not provide registration procedure for such unions, but only for the procedure of establishing their existence, particularly in the context of dividing joint property would be placed in a less favorable position. In such cases, the court decides, within the proceedings, whether a non-marital union existed, and consequently, whether jointly acquired property exists. Therefore, the court cannot treat a mutual declaration of intent by two persons stating that they are in a non-marital union as proof that such a union began from that moment, as long as the provisions of the Family Act require that the existence of a non-marital union be established in each individual case. Only after the existence of a non-marital union is established does the procedure for determining the shares in the jointly acquired property commence. At this stage, there is a presumption of equal shares between the non-marital partners, just as with spouses. The partner who has proven the existence of the union is thereby entitled to one-half of the jointly acquired property, and it is up to the other party to prove that their share in the acquisition was greater. In marriage, during property division proceedings initiated by a lawsuit, the court immediately proceeds to determine unequal shares (greater or lesser than the statutory 50/50), since the existence of marriage is proven by an extract from the marriage register. Unlike a marital union, for which a formal termination procedure is prescribed, a non-marital union does not require any formal act for its formation, and thus none for its dissolution. The competent authorities do not maintain any official records on the formation or existence of such unions, and therefore no deregistration is required (Ranđenović, 2017, p. 138).

However, the question arises as to the purpose for which such registration is performed, that is, which rights arising from the non-marital union it is

intended to serve. To that end, it would be necessary to provide that only after a certain period, e.g., two years, which is one year less than the period generally required by judicial practice (three years) to consider a non-marital union as lasting, and the parties may submit a joint declaration, and only with respect to joint property. Such a mechanism would avoid the lengthy and complex process of proving the existence of a non-marital union, which is a prerequisite for any property acquired during the course of shared life to be treated as joint property. The act of registration would serve as evidence for the court that, after the expiration of the two-year period, both parties declared that they were in a non-marital union, and that neither party could subsequently contest the existence of that union once it has ended. The evidentiary procedure for establishing the existence of a non-marital union, in addition to proving cohabitation, typically involves witness statements, the existence of children born from the union, and similar elements, and it often requires a significant amount of time to resolve.

The issue of shared life is one of the essential elements for the existence of a non-marital union. However, cohabitation at the same address, when considered as an isolated condition, does not automatically imply the existence of such a union. For instance, the relationship may be purely friendly or resemble a roommate arrangement, which does not satisfy the criteria for a non-marital union, and consequently, does not give rise to joint property.

A practical issue arises from the fact that the concept of a non-marital union has, in practice, been interpreted differently from the definition provided in the Family Law. This divergence is a result of legal practice allowing individuals to declare the existence of a non-marital union before a notary public, primarily for the purpose of exercising the right to in vitro fertilization, which carries broader legal implications. In the context of assisted reproduction, the term “non-marital union” is used to refer to persons who are not married. If the individuals are in a non-marital union, they are required to make a formal declaration stating that they are in such a relationship and that there are no legal impediments to marriage. This declaration is valid for a period of 12 months. The notarized statement includes a clause in which the partners confirm that they have been in a non-marital union for at least two years, which contradicts the provisions of the Family Law. In the context of exercising certain other rights derived from a non-marital union, such as the right to in vitro fertilization-this two-year requirement should not be mandatory, and the non-marital union may be registered, though not legally constituted, at any time. Notaries do not examine whether the individuals are actually in a non-marital union or whether they have cohabited during

the relevant period. They merely certify the parties' signatures, and the only verification the notary can conduct is to confirm that both individuals are registered at the same address, based on the information in their personal identification documents. There is a possibility of establishing the factual credibility of cohabitation over the previous two years if the notary were to request data from the Ministry of Internal Affairs regarding the date from which both individuals have been registered at that address. In such a case, the factual existence of a non-marital union lasting two years could be verified. This method of verification could also be applied in the context of registering a non-marital union for the purposes of determining joint property ownership.

However, the necessity of requiring a declaration that individuals are in a non-marital union for the purpose of in vitro fertilization raises a certain legal dilemma. This is because people who are neither married nor in a non-marital union may still be eligible to exercise this right, provided they cohabit. From the state's perspective, the question arises whether a minimum period of cohabitation should be required before individuals can be recognized as entitled to free or subsidized in vitro fertilization. If such a period is required to demonstrate the stability of the relationship, which may be a reasonable condition, it would be necessary for the notary public to verify that the parties have shared the same residence for the two years preceding the date on which the declaration of the existence of the non-marital union is made.

If the legislator decides to introduce the registration of non-marital unions, permitting such registration before a designated state authority (such as a municipality or a notary public), the question arises as to which procedure would apply for the division of the so-called "joint" property acquired during the union. Property division may be carried out in two ways: by agreement or by litigation. Disputes arising from these non-marital unions, particularly those concerning property relations, are resolved in accordance with the rules of civil law (Draškić, 2005, p. 416). Unlike parental rights, where non-marital partners cannot regulate parental authority by agreement and proceedings are initiated exclusively by lawsuit even in the absence of any dispute between the partners regarding the children in the case of consensual division of joint property between non-marital partners, this may be performed before a notary public who, based on the agreement, submits the data regarding the (new) owners to the Land Registry for registration. Where there is no agreement between the non-marital partners, the division is carried out by the court under the same rules applicable to spouses, determining each partner's share in the joint property, with the preliminary condition that the existence of the non-marital union is established. Since this is a legal act, non-marital partners

can regulate their property relations only by mutual agreement through the contract, which means that unilateral changes to the contract are not permitted (Novaković, 2019, p. 231).

At this point, at the very end of the section on the division of property between non-marital partners, we emphasize the distinction between the factual and legal concepts of a non-marital union in the context of joint property. This distinction is important because, if legal practice seeks to eliminate the requirement set out in the Family Law – that a non-marital union must be of a lasting nature – this can only be done through amendments to the Family Law, which we do not support, for the following reasons. The legislator's intention in formally recognizing non-marital unions was to acknowledge relationships similar to marriage, which for various reasons do not take the legal form of marriage or do not wish to do so, but nonetheless reflect a serious and long-term commitment. In our view, the requirement of permanence is particularly significant in the area of property rights, precisely to prevent the indiscriminate initiation of legal proceedings for the division of "joint property" by individuals engaged in any form of relationship with emotional and/or sexual elements that does not meet the legal threshold of a non-marital union. One of the constitutive elements of a non-marital union is shared life, which implies cohabitation at the same address. If such cohabitation lasted for five years and subsequently ended, then upon termination of the union, all property acquired from the first day of shared life until its end such as earnings, real estate, movable property, and intellectual property would be subject to division. Conversely, if the same form of cohabitation lasted only eight months, its termination would not give rise to joint property rights, which we consider entirely justified. The duration of an emotional relationship that lacks the necessary legal form entails a more burdensome process of proof compared to a legally formalized relationship, namely, marriage. In order for a non-marital union to give rise to rights in relation to joint property, it must meet the condition of being a lasting union. All shorter-term personal, emotional, or sexual relationships should remain outside the scope of Family Law and be addressed within other branches of law.

3. Comparative Legal Overview

Non-marital unions in the examined legal systems are recognized as stable partnerships between two persons who are not married but are, in many respects, equated with marital unions regarding property and personal rights. In Serbia, a non-marital union is defined as a lasting cohabitation between

two partners without marital impediments, and the law does not prescribe a minimum duration for its recognition. However, judicial practice often considers a period of three years as a relevant timeframe for establishing the existence of a lasting cohabitation.

Unlike this approach, in Croatia and North Macedonia, the laws governing this area stipulate a required duration of cohabitation for it to be legally recognized as a non-marital union. Croatian legislation explicitly provides that such a union must last at least three years to be legally relevant, except when the partners have a child or when the union precedes marriage. It may be observed that this legislative solution ensures greater legal certainty by clearly defining the minimum duration required for recognition.

The Italian legal system introduces the possibility of regulating the relationship between non-marital partners through a cohabitation agreement which allows the partners to define their property relations in advance. The agreement may include provisions on the regime of joint property, each partner's contribution to their shared life, assistance in cases of illness or incapacity, and other elements of cohabitation. Unlike Serbia, Croatia, and North Macedonia, where rights arise from the factual existence of a partnership, the Italian model provides greater legal certainty and flexibility, as partners may contractually regulate property matters and mutual contributions, with the agreement being valid only if cohabitation actually exists.

Similarly, the French legal system allows partners to formalize their non-marital relationship through the *Pacte Civil de Solidarité* (PACS), introduced by Law No. 99-944 of 15 November 1999. The PACS is a formal agreement between two persons enabling them to choose a joint or separate property regime, define mutual obligations, and acquire rights concerning maintenance and social security. Unlike Serbia, where such unions cannot be formally registered, the French PACS provides legal certainty through formal registration, reducing the need to prove the existence of the partnership and clearly defining the partners' property and personal rights.

A comparative analysis of these solutions indicates that legal systems prescribing a minimum duration of cohabitation, such as those in Croatia and North Macedonia, offer greater legal certainty and facilitate the recognition of partnerships and the exercise of rights. Systems that do not require a minimum duration, such as those in Serbia and Italy, although more flexible, introduce uncertainty and increase the burden on courts in property division and proof of partnership existence. At the same time, the formalization of property relations through agreements or registration, as seen in Italy and France, further enhances the security of partners and allows precise regulation of

property and obligations, while Serbia continues to rely primarily on judicial assessment in each individual case. The aim of this comparative legal analysis is to highlight the different approaches to the regulation of non-marital unions and to identify the practical advantages of solutions that combine the element of partnership duration with the possibility of formal regulation of property relations.

4. Registered same-sex partnership

Same-sex unions, as a phenomenon present since ancient times, only began to gain legal recognition and regulation at the end of the 20th century. A significant shift in the legal approach to this issue occurred with the advent of the new millennium, primarily in European and North American countries. According to some authors, around 90% of countries worldwide do not recognize any form of same-sex partnerships (Wardle, 2015, p. 248). Despite the lack of legal recognition, the cohabitation of same-sex partners involves acquisition and management of property, which in practice raises questions regarding the legal regulation and potential protection of these relationships. First, it is important to distinguish several concepts in the property context that are not and should not be subject to legal regulation, such as permanent or casual same-sex relationships. More permanent same-sex relationships, or same-sex unions, could be subject to legal consideration. Only when two persons of the same sex live together for an extended period, sharing the same address and acquiring property jointly, can they acquire the right to divide such property upon dissolution of the union. The draft Law on Same-Sex Partnerships, which has been anticipated in Serbia for many years, provides for the possibility of registering same-sex partnerships and defines their personal and property rights, as well as rights in the areas of healthcare and social protection and through this Act seeks to regulate the status of rights of same-sex partners. The draft defines a registered same-sex union as a family life community of two persons of the same sex concluded before a competent public authority in accordance with the provisions of this law (Article 2, Draft Proposal of the Law on Same-Sex Unions). If homosexual partners are in a non-marital union, after a prescribed period they may register their same-sex union and acquire the right to divide property under the same rules that apply to non-marital partners. Since partners in a non-marital union may regulate their property relations in advance by agreement based on the principle of autonomy of will, in accordance with the provisions of the Law of Obligations, the content of such agreement may include the

distribution of initial property, methods of acquiring joint property, property management, and rules for division upon termination of the union. In the absence of such agreement or in case of dispute, civil litigation may be initiated before a competent court for the division of joint property, where the contribution of each partner, whether material or immaterial is assessed. On the other hand, although same-sex unions exist de facto, they are not yet recognized by positive law, and their members cannot base their rights on family law norms but must rely on real and obligation law instruments. Subject to mandatory provisions, public order, and good customs, parties in an obligation relationship may regulate their relations according to their own will (Milojević, 2020, p. 479). Therefore, members of same-sex unions may use legal means such as contracts on joint investments, co-investments, registration of co-ownership shares in the cadastre, and seek protection through claims for reimbursement of investments, unjust enrichment, or management without mandate. The draft Law on Same-Sex Partnerships, envisaging the registration of same-sex partnerships and the regulation of their personal and property rights, would require consideration of the relationship between existing principles of family law and new forms of family unions, taking into account that marriage in Serbia is currently defined as a union between a man and a woman.

5. Property Rights of Same-Sex Partners

Domestic judicial practice has not yet taken a stance regarding the property relations of individuals in same-sex partnerships. Potential disputes may arise across a wide spectrum of social, health, tax, and property-related rights, including tenancy rights, the right to a survivor's pension, social insurance entitlements, and tax reliefs. "With regard to the rights enjoyed by family members, under the regulations governing pension insurance, a family member is also considered to be a partner in a same-sex union and any child supported by that partner-Article 51 of the Draft Law (Vuković, 2021, p. 87). In the absence of domestic case law, reference will be made to European standards in this area and the case law of the European Court of Human Rights.

The refusal to apply tax exemption provisions to sisters living in a shared household, the provisions which do apply to persons in homosexual partnerships does not constitute a violation of the right to respect for family life or the right to equality.

The risk of unduly expanding the scope of family law to encompass not only same-sex relationships but also other forms of same-sex cohabitation is illustrated in the case of Burden v. the United Kingdom,[1] case about two sisters who sought to invoke inheritance tax exemptions applicable to same-sex partners living in the same household. Joyce and Sybil Burden, born in 1918 and 1925, had lived together in their family home for their entire lives, including the thirty years following the death of their parents. The sisters claimed that they were being discriminated against in comparison to same-sex couples, arguing that the tax exemption violated their human rights, as same-sex partners were eligible for it while siblings living in identical circumstances were not (Rosenn, 2014, p. 321).[2] If one accepts the functional approach, under which certain rights (such as tenancy rights (Collier, 1995, p. 53), maintenance, and inheritance) are granted to same-sex partners in registered partnerships based solely on the fulfillment of functions similar to those performed by married couples, then it is difficult to justify why all individuals of the same sex who fulfill identical functions, such as siblings or close friends should not also enjoy such rights. Nevertheless, the ECHR, by a narrow majority (four votes to three), held that the Burden sisters had not been subjected to discrimination (Welstead, 2010, p. 120). According to the ECHR, the relationship between siblings is fundamentally distinct from that between spouses, non-marital partners, or same-sex partners (Probert, 2009, p. 21). Blood relation forms the basis of the relationship between siblings, unlike the emotional and often sexual bond characteristic of spousal or same-sex relationships. However, it remains unclear why individuals of the same sex living in long-term family-like cohabitation without a sexual component should be denied tax benefits reserved for both heterosexual and homosexual couples.

The denial of tenancy rights to individuals in non-familial, friendship-based cohabitations does not amount to a violation of the right to respect for family life.

[1] Burden and Burden v. United Kingdom, Application no. 13378/05, judgment of 12 December 2006. In addition to the already noted comparison between non-marital partnerships and cohabitations based on friendship or shared housing, we refer to this case as a notable example. Some authors have advocated for expanding legal recognition of rights granted to individuals in same-sex partnerships to also include relationships between siblings or close friends. See, for example, McClain, 2013, p. 54; Cooper, 2011, p. 1758; Omejec, 2013, p. 509.

[2] A similar legislative approach was adopted in Brazil, where 1996 amendments granted individuals in civil partnerships inheritance rights, access to health and social benefits, survivor's pensions, and the right to adopt children.

A particularly interesting case is Korelc v. Slovenia[3], involves the potential recognition of tenancy rights for a man who lived in a long-term cohabiting relationship of a non-romantic nature with another man (Federal Constitutional Court of Germany, 2013, p. 319). The European Court of Human Rights held that the applicant was not denied tenancy rights based on the fact that the cohabitation involved two men, but because the relationship lacked emotional and personal elements characteristic of familial life. The Court drew a clear distinction between marital, extramarital, and same-sex unions on the one hand, and other forms of cohabitation such as the applicant's on the other. The applicant could not be considered a "person who was in a long-term stable relationship with the tenant," a category that includes heterosexual and same-sex partners. Although the relationship between the applicant and the deceased might have included emotional aspects in addition to the economic, the Court found it significantly different from relationships between blood relatives (e.g., parent and child) and from those between marital, non-marital, and same-sex partners. The applicant's relationship lacked the essential elements of "family life," being limited instead to the sharing of economic benefits. In line with its reasoning in *Burden*, the ECHR rejected the applicant's claims under Articles 8 and 14 of the Convention, holding that personal or friendly relations, as well as relationships between more distant blood relatives, could not be equated with the notion of "family life" for the purposes of acquiring tenancy rights (Boele-Woelki & Fuchs 2012, p. 62). We argue that recognising the existence of family life in relationships based purely on friendship or shared housing would lead to an undue expansion of the scope of family law.

The inability of a homosexual person to acquire the right to a family pension from their deceased partner does not constitute a violation of the Convention.

[3] Korelc v. Slovenia, Application No. 28456/03, Judgment of 12 May 2009, the applicant, a Slovenian, born in 1946, moved in with his father's friend following his divorce in 1990. From May 1992, the applicant had permanent residence at his father's friend's address and was listed in the tenancy agreement as a person entitled to use the apartment. In April 1993, the father's friend passed away. Domestic authorities informed the applicant that, as he was not a family member, he had no tenancy rights and was therefore required to vacate the apartment.The applicant argued that, given the possibility for persons living in cohabitation or same-sex relationships to inherit tenancy rights, there was no justification for denying him such rights in relation to the deceased. He claimed that a "long-standing stable relationship" had existed between them. The authorities, however, found that the relationship was merely an "economic partnership." The applicant submitted that the differential treatment compared to same-sex partners amounted to a violation of his right to equality in conjunction with the right to respect for private and family life.

The economic effects of same-sex relationships were again the subject of a decision before the European Court of Human Rights in the case of Mata-Estevez v Spain[4] At the outset, the Court noted, referring to its previous case law, that a long-term homosexual relationship between two men does not fall within the notion of family life.[5] Despite an increasing trend towards judicial and legislative recognition of stable homosexual relationships, there is no common ground among member states on this issue, and therefore states enjoy a broad margin of appreciation. Consequently, the relationship between the applicant and his partner could not be regarded as family life but as private life. The Court observed under Article 14 of the Convention that the applicant would have been treated differently regarding the inheritance of the family pension had he been of the opposite sex (Bamforth, 2011, p. 132). Furthermore, marriage was considered a precondition for acquiring the right to a family pension. The Court found that the differential treatment aimed to protect family relationships based on marital ties. No violation of Articles 8 or 14 of the Convention was established. We consider that the family pension should be subject to inheritance by a homosexual partner, given that it represents an economic benefit reflecting the mutual commitment of spouses (including de facto partners) during the course of their shared life, which has effects after the death of one partner.

The refusal to recognize tenancy rights for a surviving homosexual partner constitutes a violation of the Convention. In the case of Karner v

[4] Mata-Estevez v Spain, no. 56501/00, judgment of 10 May 2001. he applicant, a Spanish national born in 1953, had lived for ten years in a same-sex relationship with a man. They were unable to enter into marriage because it was not permitted under domestic law. After the applicant's partner died in 1997, the request for the applicant to inherit the family pension, reserved only for spouses of the deceased beneficiary, was rejected. The domestic court held that Articles 8, 12, and 14 of the Convention do not guarantee equal treatment between de facto homosexual relationships and heterosexual marriages. The Supreme Court dismissed the applicant's appeal and stated that it was the legislature's, not the court's, role to decide on the extension of family pension rights to stable *de facto* relationships, whether heterosexual or homosexual in nature. The applicant complained that the differential treatment of homosexual relationships compared to marital relationships violated his right to equality and the right to respect for private and family life.

[5] X. and Y. v. the United Kingdom, no. 9369/81, judgment of 3 May 1983; S. v. the United Kingdom, no. 11716/85, judgment of 14 May 1986.

Austria[6] The European Court of Human Rights emphasized that particularly compelling reasons must exist to justify differential treatment based on sex and sexual orientation.

Domestic courts found that the purpose of the Tenancy Act provision was to protect both heterosexual and homosexual persons who were not married but had lived together for a long period, so that they would not suddenly be left homeless after the death of their partner. The court could accept the Supreme Court's view that there was an intention to protect the traditional family, which justified the differential treatment of the applicant (McGlynn, 2006, p. 15). However, the goal of protecting the traditional family is abstract, and in all situations where the margin of appreciation of the domestic state is limited, as in this case, the principle of proportionality between the measure taken and the aim pursued must be observed (Herring, 2007, p. 70).[7] In this case, the issue concerned the protection of the applicant's specific right, namely his tenancy right. The European Court of Human Rights was not convinced that the differential treatment was justified and found a violation of Article 14 in conjunction with Article 8 of the Convention (Harper, Downs & Landells & Wilson, 2005, p. 16; Murphy, 2004, p. 257; Probert, 2009, p. 21).

The inability to acquire tenancy rights following the death of a partner in a same-sex relationship constitutes a violation of the Convention.

[6] Karner v. Austria [application no. 40016/98, judgment of 24 July 2003], the applicant was an Austrian citizen born in 1955 who had lived with a man in a same-sex partnership since 1989. The applicant's partner was the tenant of the apartment, and they shared the housing costs. The partner passed away in 1994. Austrian law did not provide for the transfer of tenancy rights to a same-sex partner. In 1995, the apartment owner initiated eviction proceedings against the applicant, but both the first-instance and appellate courts rejected the request, reasoning that a same-sex partner, like a spouse or common-law partner, was considered a family member entitled to inherit tenancy rights. The owner's appeal was dismissed.
However, in 1996, the Supreme Court accepted the owner's appeal and held that under the term "life partnership," at the time the 1974 Tenancy Act was enacted, the legislature did not intend to include a same-sex partner as a family member. The applicant died in September 2000, but his lawyer continued the proceedings with the aim that the applicant's heirs acquire the tenancy rights. The applicant complained that the inability to acquire tenancy rights violated his right to equality in connection with the right to respect for family life

[7] According to the dissenting opinion of one judge in this case: "...it is unclear how the refusal to recognize same-sex unions could endanger the right of heterosexual individuals to marry if they so wish..."

In the case of Kozak v. Poland[8] ECHR stated that in cases involving discrimination based on sex or sexual orientation, the margin of appreciation afforded to states is narrow. The Court acknowledged the domestic authorities' observation that there were conflicting claims regarding the existence of a shared household between the applicant and his partner at the time of the partner's death. Under domestic law, tenancy rights could be acquired by a person who had lived with the tenant in a de facto marital relationship. Based on such a provision, same-sex partners were excluded from acquiring tenancy rights, even if they were in a stable emotional and economic relationship. De facto cohabitation was applied exclusively to relationships between a man and a woman. While recognizing the aim of the Polish authorities to protect the family as a union between a man and a woman, the Court held that the Convention must be interpreted as a living instrument, in light of evolving social realities, and that there is no single way in which private and family life may manifest. The Court emphasized that the concept of family life must take into account social developments and changes in the understanding of civil status and personal relationships, recognizing that family life is not limited to one specific form or structure (Boele-Woelki & Fuchs, 2012, p. 66). The subsequent removal of the provision in Polish law that distinguished between marital and other types of unions in relation to the acquisition of tenancy rights indicates unjustified differential treatment of same-sex unions compared to other forms of partnerships. A violation of Articles 8 and 14 of the Convention was established.

In contrast, in the case of Simpson v. the United Kingdom, which concerned the recognition of tenancy rights for a homosexual individual who had outlived her partner, it was found that the distinction between same-sex partners and spouses was justified by the traditional preference for marriage over other forms of unions (Murphy, 2004, p. 257). The starting point in recognizing a violation, primarily of the right to equality for individuals in same-sex unions, was the finding that economic discrimination was not

[8] Kozak v. Poland, application no. 13102/02, judgment of 2 March 2010. The applicant, a Polish national born in 1951, had resided since 1989 in an apartment rented by his homosexual partner. In April 1998, the applicant's partner passed away. The applicant's request to conclude a tenancy agreement based on the existence of a stable same-sex relationship with his partner was rejected. According to the domestic authorities, the relationship between the applicant and his partner had ended before the partner's death. In April 1999, the domestic authorities initiated eviction proceedings against the applicant. His appeal against the eviction order was dismissed in September 2001. The applicant complained that the inability to acquire tenancy rights due to his homosexual orientation violated his right to equality in connection with the right to respect for family life.

justified in relation to the material rights acquired by such individuals, as it is in the case of opposite-sex unions (Boyd, 2013, p. 278). The criterion of economic vulnerability was decisive in recognizing certain rights for individuals of homosexual orientation such as the right to the division of joint property, tenancy rights,[9] maintenance rights (Glennon, 2005, p. 163), right to inheritance, right to a survivor's pension (Eekelaar 2006, p. 43).[10]

Our position, based on the examined case law of the European Court of Human Rights, is that individuals of homosexual orientation may be granted rights such as a survivor's pension and tenancy rights, but not through the right to respect for family life, since the fundamental condition for the existence of this right is not met. Rather, these are property rights of certain individuals, including the right to a survivor's pension, tenancy rights, and the right to marry. Additionally, there is no requirement that the relationship be inter vivos. The right to respect for family life does not encompass property rights such as maintenance or the division of joint property, and even less so tenancy rights or the right to a survivor's pension. This conclusion is supported by an analysis of the European Court of Human Rights' practice, especially in cases like Karner v. Austria and Taddeucci and McCall v. Italy,[11] which show that access to certain property rights may be granted to persons in same-sex unions, but through the protection of the right to private life and the prohibition of discrimination under Article 14 in conjunction with property interests, rather than necessarily through the concept of family life under Article 8 of the Convention. Although the Court in Schalk and Kopf v. Austria

[9] Observing the case law of domestic courts, in the United Kingdom, individuals of homosexual orientation invoked violations of tenancy rights following the death of their partners in the cases of Ghaidan v. Godin-Mendoza (2004) 2 FLR 600 and Fitzpatrick v. Sterling (2000) 1 FLR 271. (Harper & Downs & Landells & Wilson, 2005, p. 17; Boele-Woelki & Sverdrup, 2008, p. 120; Eekelaar, 2006, p. 150).

[10] The economic aspect is a central element of same-sex couples' demands to acquire the right to marry.

[11] Taddeucci and McCall v. Italy, application no. 51362/09, judgment of 30 June 2016. The applicants, Mr. Daniele Taddeucci (an Italian national) and Mr. Andrew McCall (a New Zealand national), filed the application after Italian authorities refused to recognize the right of residence for the foreign applicant who was in a same-sex relationship with an Italian citizen, on the grounds that they were not married.The European Court of Human Rights found a violation of Article 14 in conjunction with Article 8 of the European Convention on Human Rights. The Court concluded that the distinction in treatment between same-sex and opposite-sex couples regarding family reunification was unjustified and discriminatory, as same-sex couples were denied a right automatically granted to opposite-sex unmarried partners.The Court emphasized that while states are not required to legalize same-sex marriage, they are obliged to respect the principle of non-discrimination in the enjoyment of rights already recognized for other forms of unions, such as the right to family reunification.

acknowledged that same-sex unions may enjoy some degree of protection under the right to family life, it did not establish an obligation for states to equate such unions with marriage, nor to grant them all the rights arising from marriage. In other aspects of the relationships of persons in same-sex unions, the European Court of Human Rights has established different standards, namely, the recognition of the right to respect for family life.[12] In this regard, rights such as maintenance, joint property, or inheritance do not automatically fall under the protection of family life and do not arise from relationships that the domestic legal system recognizes as marriage or its equivalent.

6. Conclusion

Property relations within non-marital and same-sex partnerships represent a distinct category of property and family rights, subject to specific regulation. In both categories of partnerships, there are points of convergence regarding property arrangements, as no formal regulation automatically defines their status; property relations are only governed through a partner agreement or legal action. However, a claim brought by partners in a same-sex partnership seeking the division of joint property would be dismissed due to the lack of legal standing. Under current positive law, partners in same-sex unions cannot be classified as subjects entitled to joint property rights under the provisions of the Family Law.

Legal recognition of property relations in same-sex partnerships directly touches upon public order, as statutory regulation reflects the value system of society. Unlike the regulation of non-marital unions, where establishing the existence of a partnership simultaneously confirms rights to joint property, the absence of normative regulation of same-sex partnerships in the area of property rights reflects the retention of the traditional understanding of family and marriage as exclusively heterosexual categories. Recognition of

[12] For more recent case law of the European Court of Human Rights, see: Oliari and Others v. Italy, applications nos. 18766/11 and 36030/11, judgment of 21 July 2015; Orlandi and Others v. Italy, application no. 26431/12, judgment of 14 December 2017; Chapin and Charpentier v. France, application no. 40183/07, judgment of 9 June 2016; Herman and Mozer v. Austria, application no. 31176/13 and Dic and Sutasom v. Austria, application no. 31185/13, judgment of 30 March 2017; Ratzenböck and Seydl v. Austria, application no. 28475/12, judgment of 26 October 2017; Przybyszewska and Others v. Poland, application no. 11454/17, judgment of 12 December 2023; Maymulakhin and Markiv v. Ukraine, application no. 75135/14, judgment of 1 June 2023; Buhuceanu and Others v. Romania, application no. 20081/19, judgment of 23 May 2023; Fedotova and Others v. Russia, applications nos. 40792/10, 30538/14, and 43439/10, judgment of 17 January 2023.

same-sex partnerships in terms of regulating property relations would involve not only adjustments to legislation but also reconsideration of fundamental constitutional principles and societal perceptions regarding the concepts of family, marriage, and family rights.

Conflict of Interest

The authors declare no conflict of interest.

Author Contribution

Conceptualization, U.N..; methodology, U.N.; formal analysis, U.N. and G.M.; writing -original draft preparation, U.N. and G.M.; writing – review and editing, G.M. All authors have read and agreed to the published version of the manuscript.

Novaković Uroš
Univerzitet u Beogradu, Pravni fakultet, Beograd, Srbija

Milojević Goran
Univerzitet Privredna akademija u Novom Sadu, Pravni fakultet za privredu i pravosuđe u Novom Sadu, Novi Sad, Srbija

IMOVINSKI ODNOSI LICA U VANBRAČNIM ZAJEDNICAMA I ISTOPOLNIM ZAJEDNICAMA

APSTRAKT: Zakonodavac samim definisanjem pojma vanbračne zajednice u Porodičnom zakonu Republike Srbije, ukazuje na ključne sličnosti i razlike sa bračnom zajednicom, što se naročito ogleda u pogledu načina nastanka i dokazivanja postojanja istih, a koje imaju direktnu posledicu po ostvarivanje imovinskih prava. Intencija autora je da analizom šire naučne građe i relevantnih presuda Evropskog suda za ljudska prava predoče pravnu prirodu i različita rešenja po pitanju imovinskih odnosa u vanbračnim i istopolnim zajednicama. U radu je primenjen uporednopravni metod, analiza zakonskih odredbi, pravne doktrine i sudske prakse. Cilj rada je da se analizom relevantnih zakonskih propisa i sudskih odluka

sagleda pravna regulativa, identifikuju izazovi u njenoj primeni i istraže mogućnosti za širu zaštitu navedenih odnosa u okviru postojećeg pravnog sistema, uzimajući u obzir praksu Evropskog suda za ljudska prava i načela zabrane diskriminacije.

Ključne reči: *vanbračna zajednica, istopolna zajednica, registrovana zajednica, zajednička imovina, stanarsko pravo.*

References

1. Bamforth, N. (2011). Families but not (yet) marriages? Same-sex partners and the developing European Convention "margin of appreciation". *Child and Family Law Quarterly, 23*(1), pp. 128–143
2. Boele-Woelki, K., & Fuchs, A. (2012). *Legal Recognition of Same-Sex Relationships in Europe: National, Cross-Border and European Perspectives*. Cambridge: Intersentia Publishing Ltd.
3. Boele-Woelki, K., & Sverdrup, T. (2008). *European Challenges in Contemporary Family Law*. Antwerpen: Intersentia
4. Boyd, S. B. (2013). 'Marriage Is More than Just a Piece of Paper': Feminist Critiques of Same Sex Marriage. *National Taiwan University Law Review*, *8*(2), pp. 263–298
5. Collier, R. (1995). *Masculinity, Law and the Family*. London: Routledge
6. Cooper, S. L. (2011). Marriage, Family, Discrimination & Contradiction: An Evaluation of the Legacy and Future of the European Court of Human Rights' Jurisprudence on LGBT Rights. *German Law Journal*, *12*(10), pp. 1746–1763
7. Kovaček Stanić, G. (2014). *Porodično pravo, partnersko, dečje i starateljsko* [*Family law, partnership law, child law, and guardianship law*]. Novi Sad: Pravni fakultet
8. Draškić M. (2005). *Porodično pravo i prava deteta* [*Family law and children's rights*]. Beograd: Čigoja štampa
9. Draškić, M. (2021). Vanbračna zajednica vs istopolna zajednica: različito, ali ravnopravno? [Common-law union vs same-sex union: different, but equal?] In: Lilić, S. (ed.), *Perspektive implementacije evropskih standarda u pravni sistem Srbije – zbornik radova, knj. 11* [*Perspectives of implementation of European standards in the Serbian legal system – proceedings, vol. 11*] (pp. 51–63). Beograd: Pravni fakultet, Centar za izdavaštvo i informisanje

10. Eekelaar, J. (2006). *Family Law and Personal Life*. Oxford: Oxford University Press
11. Federal Constitutional Court of Germany (2013). *Decisions of the Bundesverfassungsgericht, vol. 5: Family Related Decisions 1957–2010*. Karlsruhe: Nomos Verlagsgesellschaft
12. Kovaček Stanić, G. (2012). Ovlašćenja javnog beležnika u bračnim/partnerskim odnosima [Notary public authority in marital/partnership relations]. *Zbornik radova Pravnog fakulteta, Novi Sad*, *46*(2), pp. 87–101. DOI: https://doi.org/10.5937/zrpfns46-2600
13. Glennon, L. (2005). Targeting the Exclusionary Impact of Family Law. In: M. Maclean (ed.), *Family Law and Family Values* (pp. 157–180). Oxford: Hart Publishing
14. Harper, M., Downs, M., Landells, K., & Wilson, G. (2005). *Civil Partnership: The New Law*. Bristol: Jordan Publishing
15. Herring, J. (2007). *Family Law*. Harlow: Pearson Education.
16. Wardle. D., L. (2015). The Future of the Family: The Social and Legal Impacts of Legalizing Same-Sex Marriage. *Ave Maria Law Review*, *13*(2), pp. 237–267
17. McClain, L. C. (2013). A Diversity Approach to Parenthood in Family Life and Family Law. In: McClain, L. C. & Cere, D. (eds.), *What is Parenthood?* (pp. 41–62). New York
18. McGlynn, C. (2006). *Families and European Union Law: Politics and Pluralism*. Cambridge: Cambridge University Press
19. Milojević G. (2020). Odnos stvarnog i obligacionog prava u svetlu kodifikacije građanskog prava u Republici Srbiji [The relationship between property law and law on obligations in light of the codification of civil law in the Republic of Serbia]. *Kultura polisa*, *17*(43), pp. 475–485
20. Murphy, J. (2004). Same-sex Marriage in England: a Role for Human Rights. *Child and Family Law Quarterly*, *16*(1), pp. 245–259
21. Novaković D, (2019). Ugovorni imovinski režim vanbračnih partnera [The contractual property arrangement of unmarried partners]. *Megatrend revija*, *16*(1). pp. 225–236
22. Omejec, J. (2013). *Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Evropskog suda za ljudska prava* [*The Convention for the Protection of Human Rights and Fundamental Freedoms in the Practice of the European Court of Human Rights*]. Zagreb: Novi informator
23. *Predlog nacrta zakona o istopolnim zajednicama* [*Draft Proposal of the Law on Same-Sex Unions*]. 2021. Downloaded 2025, May 15 from https://www.paragraf.rs/dnevne-vesti/080321/080321-vest18.html

24. Probert, R. (2009). *Cretney and Probert's Family Law*. London: Sweet & Maxwell
25. Ranđelović, D. (2017*).* Vanbračna zajednica u Republici Srbiji [Common-law union in the Republic of Serbia]. *Megatrend revija*, *14*(2), pp. 127–144
26. Rosenn, K. S. (2014). Recent Important Decisions by the Brazilian Supreme Court. *University of Miami Inter-American Law Review*, *45*(2), pp. 297–334
27. Vuković, I. (2021). *Istopolne zajednice u Srbiji? Pravne nedoumice i moguće uređenje* [*Same-Sex Unions in Serbia: Legal Uncertainties and Possible Regulatory Approaches*]. Beograd: Dosije studio
28. Welstead, M. (2010). The Family the Law Forgot In: Atkin, B. (ed,), *The International Survey of Family Law* (pp. 113–131). Bristol: Jordan Publishing