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DISCRIMINATION BASED ON SEXUAL ORIENTATION
AND THE RECOGNITION OF SAME-SEX RELATIONSHIPS
IN THE WESTERN BALKANS. LEGAL AND ECONOMIC ANALYSIS

*by Aleksandar Mihajlović**

SUMMARY: 1. Introduction. – 2. Statistical Data and Policy Documents Related to the LGBTI People in the Western Balkans Countries. – 3. Comparative Legal Analysis of Constitutional and Legislative Prohibition of Discrimination Based on Sexual Orientation in the Western Balkans Countries, and the Case-Law of the ECtHR Regarding the Legal Recognition of Same-Sex Unions. – 4. Law and Economics Approach to Discrimination Based on Sexual Orientation and Regulation of Same-Sex Relationships (Marriages). – 5. Conclusion.

1. Introduction

The subject of this paper is discrimination based on sexual orientation in relation to the non-recognition of same-sex relationships in the Western Balkans countries through the application of the legal and economic analysis. The Western Balkans, as a term in this paper, is used as a political phrase coined by the European Union (EU) for the countries from the Balkans region which are not the EU Member States at the moment, and are still in different positions to become a part of this organization.

The aim of this paper is to present to what extent the process of the legal recognition of same-sex relationships has been done until the moment in these countries and how the economic arguments can support the idea of creating more inclusive and equal societies for same-sex couples. Section 2 will be dealing with an overview of the position of lesbian, gay, bisex, transgender, intersex (LGBTI) people in the Western Balkans, as well as the policy documents, different strategies and action plans, adopted by the governments where they expressed a concrete willingness to combat discrimination based on sexual orientation. For instance, some of the countries, such as Serbia, which then Government recognized as one of the priorities to adopt the Law on the Same-Sex Partnership in the Action Plan for the Implementation of the Government's Program for the period from 2020 to 2022, but this was unsuccessful without parliamentary support. Section 3 will be on the comparative legal analysis with an overview of constitutional and legislative prohibition of discrimination based on sexual orientation in the Western Balkans countries, followed by reviews of marriage definitions in constitutions and family laws. The author will also analyze in this Section concrete judgments of the European Court of Human Rights (ECtHR) where the right of the legal recognition of same-sex relationships was recognized by the ECtHR, within the legal form which is the most suitable in the context of the cultural and sociological background of a concrete country. The Western Balkans countries as member states of the Council of Europe are obliged to assess and adopt their legislative frameworks in accordance with the case law of the ECtHR. At the moment, only the National Assembly of Montenegro adopted the Law on Life Partnership of Persons of the Same Sex in 2020. Section 4 of this article is focusing on the economic side of discrimination based on sexual orientation and the recognition of same-sex relationships. Implementation of the microeconomic theory on same-sex relationships as

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a contract and explanation of economic benefits for its parties will provide very pragmatic argumentation which should support legalization of this kind of relationships. The aim of contracting parties in every contract is maximization of their interests and efficiency. In this context, the author will be using some principles of economics implemented in analysis of contracts and family relations. In general, the improvement of the position of the LGBTI people in the Western Balkans will be an important element for further economic growth of the region.

As a methodology framework, the author will implement legal positivism, comparative legal method and economic analysis of legal institutions (law and economics approach).

2. Statistical Data and Policy Documents Related to the LGBTI People in the Western Balkans Countries

The measurement of discrimination based on sexual orientation is not an easy task, because it is very challenging to approach this group of people who will fulfill a survey or take a part in an interview, and collect relevant data. This problem is obvious in the countries where the LGBTI people are stigmatized and where they are frightened from every action which can potentially disclose their life or make them “suspicious” to the general public about their identity. The author will illustrate the position of the LGBTI people in the Western Balkans through few surveys which were focused exclusively on this part of Europe, or which were investigating European states in general. These data are not comparable because of different methodologies which were applied and different countries which were observed at the same time, but they would present an overview of how these people live.

For instance, based on the survey “*Life on the Margins: Survey Results of the Experiences of LGBTI People in Southeastern Europe*”, the following percentages of respondents were not open about their sexual orientation: Albania, 69%; North Macedonia, 59%; Bosnia and Herzegovina, 58%; Montenegro, 51%¹. An another survey “*A Long Way to Go for LGBTI Equality*” conducted by the European Union Agency for Fundamental Rights from 2020 showed the following results: 60% of respondents in North Macedonia and 53% in Serbia are almost *never open* about being LGBTI, and among the different groups, bisexual men are more likely than other groups to almost never be open with 82% people in North Macedonia²; 16% in Serbia and 13% respondents in North Macedonia felt discriminated against when looking for work³; very high rates of physical or sexual attacks motivated by the victim being LGBTI were observed in North Macedonia (19%) and Serbia (17%)⁴. ILGA Europe periodically publishes a Rainbow

¹ *Life on the Margins: Survey Results of the Experiences of LGBTI People in Southeastern Europe*, World Bank Group, in cooperation with IPSOS Strategic Marketing, ERA – LGBTI Equal Rights Association for the Western Balkans and Turkey and the Williams Institute – UCLA School of Law, September 2018, p. 2015, available at <https://lgbti-era.org/wp-content/uploads/2023/01/0354-Life-on-the-Margins-Survey-results-of-the-living-experiences-of-lgbti-people-in-south-eastern-europe-ilovepdf-compressed.pdf>.

² European Union Agency for Fundamental Rights, *A Long Way to Go for LGBTI equality*, EU-LGBTI II, 2020, p. 25, available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbti-equality-1_en.pdf. This report presents select findings from the 2019 survey on LGBTI people in the EU, including also North Macedonia and Serbia.

³ *Id.*, p. 32.

⁴ *Id.*, p. 39.

Map and ranks European countries on how they protect the LGBTI rights⁵. Based on its map from May 2023, the Western Balkans countries were ranked in the following order: North Macedonia, 29%; Serbia and Albania, 35%; Bosnia and Herzegovina, 40%; and Montenegro, 61% (the scale is the following: 0% represents the gross violations of human rights and discrimination, and 100% represents full equality and respect of human rights)⁶.

The importance of the improvement of the LGBTI rights in the Western Balkans countries has been recognized as a policy matter by the governments, and, until now, different policy papers have been adopted, some of them are exclusively related to this group of people, or the LGBTI issue is recognized as a part of general anti-discrimination strategies. The Albanian Government adopted the *National Action Plan for LGBTI people 2021-2027*, which recognized three goals: 1) improving the access of LGBTI+ people to public services and specialized support services that are effective, of good quality, and available throughout the country, in accordance with their specific needs and national standards harmonized with European/international ones; 2) ensuring protection and security for LGBTI+ people through improving the legal framework, its effective implementation, as well as increasing the access of LGBTI+ people to the justice system; 3) creating an inclusive, accepting and non-discriminatory society against LGBTI+ people in Albania⁷. The *2021-2024 Action Plan to Improve the State of Human Rights and Fundamental Freedoms of LGBTI People in Bosnia and Herzegovina*⁸ recognized three general goals: 1) equal opportunities and prohibition of discrimination; 2) equal rights in all areas of life; and 3) a society of respect for diversity. *The Strategy for Improving the Quality of Life of LGBTI People in Montenegro* was adopted for the period 2019-2023⁹. The Serbian Government adopted the *Strategy for Prevention and Protection against Discrimination for the period 2022-2030*¹⁰ which recognized the LGBTI community and concrete measures for the improvement of their position in the Serbian society. It is interesting to mention that the *Action Plan for the Implementation of the Government's Program for the period from 2020 to 2022*¹¹, which was prepared on the basis of the Government's Program from 2020¹², recognized as one of the priority aims the adoption of the *Law on the Same-Sex Partnership*, which has not happened until the present time.

⁵ ILGA Europe is a European branch of the International [Lesbian, Gay, Bisexual, Trans and Intersex Association](#) which advocates for the improvement of the LGBTI people's rights on the global level. The Association has a consultative status at the United Nations Economic and Social Council and participatory status at the Council of Europe.

⁶ ILGA *Rainbow Europe Map and Index 2023*, 2023, available at <https://www.ilga-europe.org/report/rainbow-europe-2023/>.

⁷ *National Action Plan for LGBTI people 2021-2027*, Tirana, December 2021, available at <https://rm.coe.int/lgbti-nap-2021-2027-en-final-2022/1680a584cf>.

⁸ *2021-2024 Action Plan to Improve the State of Human Rights and Fundamental Freedoms of LGBTI People in Bosnia and Herzegovina*, 2020, available at <https://arsbih.gov.ba/wp-content/uploads/2023/06/AP-LGBTI-ENG-27.09.pdf>.

⁹ *Strategy for Improving the Quality of Life of LGBTI People in Montenegro was adopted for the period 2019-2023*, 2018, available at <https://www.gov.me/dokumenta/b78cc299-7d34-4338-af1e-e6effc866986>.

¹⁰ *Strategy for Prevention and Protection against Discrimination for the period 2022-2030*, in Official Gazette of RS no. 12/2022, available at <https://pravno-informacioni-sistem.rs/SIGlasnikPortal/eli/rep/sgrs/vlada/strategija/2022/12/2>.

¹¹ *Action Plan for the Implementation of the Government's Program for the period from 2020 to 2022*, available at <https://rsjp.gov.rs/wp-content/uploads/APSPV-2020-2022.pdf>.

¹² *Program of the Government of the Republic of Serbia by the candidate for the Prime Minister Ana Brnabić*, available at <https://rsjp.gov.rs/wp-content/uploads/Ekspoze-2020.pdf>.

We can conclude that governments of the Western Balkans countries recognized the importance of the LGBTI rights within their societies and took concrete policy actions which should be guidelines for their different actions. The approach differs from country to country. Some of them adopted concrete policy documents which target only the LGBTI people, while the others incorporated the LGBTI rights component in general anti-discrimination strategies.

3. Comparative Legal Analysis of Constitutional and Legislative Prohibition of Discrimination Based on Sexual Orientation in the Western Balkans Countries, and the Case-Law of the ECtHR Regarding the Legal Recognition of Same-Sex Unions

The Constitution of the Republic of Serbia forbids discrimination on different grounds by a formulation of an *open clause* without mentioning explicitly sexual orientation¹³. The same legal language has been adopted by the Montenegrin Constitution in art. 8¹⁴ and in art. 4 of the Constitution of Bosnia and Herzegovina¹⁵. The Constitution of the Republic of North Macedonia contains a slightly different legal provision, where is stipulated in art. 9 that “*Citizens of the Republic of North Macedonia are equal in their freedoms and rights, regardless of sex, race, color of skin, national and social origin, political and religious beliefs, property and social status*”. The second part of the same article can be understood as a general clause of prohibition from discrimination on *any personal characteristic*, because it is formulated that “*All citizens are equal before the Constitution and law*”¹⁶. The Constitution of the Republic of Albania stipulates in art. 18, paras. 1-2 that “*All are equal before the law. No one may be unjustly discriminated against for reasons such as gender, race, religion, ethnicity, language, political, religious or philosophical beliefs, economic condition, education, social status, or parentage*”¹⁷. This formulation of recognizing different personal characteristics is written as a *numerus clausus* without recognizing sexual orientation.

The Constitution of the Republic of Serbia¹⁸ and the Constitution of Montenegro¹⁹ define a marriage as a union between a man and a woman. The Constitution of the Republic of North Macedonia²⁰ stipulates that the legal status of marriage, family relations and cohabitation (extramarital union) will be regulated by law. The right to marry is guaranteed by the Constitution of Bosnia and Herzegovina²¹ in accordance with the European Convention on Human Rights and its protocols which are directly applicable within the legal system of Bosnia and Herzegovina. The Constitution of the

¹³ Art. 21 of the Constitution of the Republic of Serbia, in Official Gazette of RS no. 98/2006 and 115/2021.

¹⁴ Art. 8 of the Constitution of Montenegro, Official Gazette of MN nos. 1/2007 and 38/2013 – Amendments I-XVI.

¹⁵ Art. 4 of the Constitution of Bosnia and Herzegovina, in Annex IV of the General Framework Agreement for Peace in Bosnia and Herzegovina and Official Gazette of B&H no. 25/2009 – Amendment I.

¹⁶ Art. 9 of the Constitution of the Republic of North Macedonia, in Official Gazette of RNM nos. 52-1991, 1/1992, 31/1998, 91/2001, 84/2003, 107/2005, 3/2009, 13/2009-correction and 49/2011.

¹⁷ Art. 18, paras. 1-2 of the Constitution of the Republic of Albania, in Official Gazette of the Republic of Albania nos. 8417/1998, 9675/2007, 9904/2008, 88/2012/ 137/2015, 76/2016 and 15/2020.

¹⁸ Art. 62 of the Constitution of the Republic of Serbia, in Official Gazette of RS nos. 98/2006 and 115/2021.

¹⁹ Art. 71 of the Constitution of Montenegro, in Official Gazette of MN no. 1/2007 and 38/2013 – Amendments I-XVI

²⁰ Art. 40 of the Constitution of the Republic of North Macedonia, in Official Gazette of RNM nos. 52-1991, 1/1992, 31/1998, 91/2001, 84/2003, 107/2005, 3/2009, 13/2009-correction and 49/2011.

²¹ Art. 2, the Constitution of Bosnia and Herzegovina, in Annex IV of the General Framework Agreement for Peace in Bosnia and Herzegovina and Official Gazette of B&H no. 25/2009 – Amendment I.

Republic of Albania contains a gender-neutral marriage definition formulated that everyone has the right to marry and have a family²².

The Western Balkans countries adopted general anti-discrimination legislation which recognized sexual orientation explicitly as a discriminatory ground, and all of the laws stipulate an open clause list of personal characteristics which enjoy protection against discrimination²³.

Regarding the conditions for concluding a lawful marriage, family laws from all the Western Balkans countries stipulate as a condition opposite sexes of spouses²⁴.

The evolution of the case law of the ECtHR has established a solid ground for the legal recognition of same-sex unions within the Council of Europe Member States. The European Convention on Human Rights (ECHR) stipulates a definition of marriage in a strict heteronormative way, but the case law of the ECtHR, as an interpretation of the ECHR as a *living instrument*, has evolved in this field.

The first cases related to gay rights before the ECtHR were those about the decriminalization of homosexuality. In *Dudgeon v The United Kingdom*²⁵, the ECtHR found the violation of art. 8 ECHR, because the homosexual activity was still criminalized in the Northern Ireland, but did not analyze the criminalization in the relation to the prohibition of discrimination. This approach was explained that “*Where a substantive Article of the Convention has been invoked both on its own and together with Article 14, and a separate breach has been found of the substantive Article, it is not generally necessary for the Court also to examine the case under Article 14, though the position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case*”²⁶.

In the case *Schalk and Kopf v Austria*²⁷, the ECtHR was very explicit in the interpretation of marriage as a union between a man and a woman, and it also used the linguistic interpretation of art. 12 ECHR. The judgment stated that “*The Court observes that, looked at in isolation, the wording of Article 12 might be interpreted so as not to exclude the marriage between two men or two women. However, in contrast, all other substantive Articles of the Convention grant rights and freedoms to “everyone” or state that “no one” is to be subjected to certain types of prohibited treatment. The choice of wording in Article 12 must thus be regarded as deliberate. Moreover, regard must be*

²² Art. 53, the Constitution of the Republic of Albania, Official Gazette of the Republic of Albania nos. 8417/1998, 9675/2007, 9904/2008, 88/2012/ 137/2015, 76/2016 and 15/2020.

²³ Art. 2 of *Law on the Prohibition of Discrimination*, in Official Gazette of RS nos. 22/2009 and 52/2021; art. 2 of *Law on the Prohibition of Discrimination*, in Official Gazette of B&H nos. 52/2009 and 66/2016; art. 2 of *Law on the Prohibition of Discrimination*, in Official Gazette of MN nos. 46/2010, 40/2011-other laws, 18/2014 and 42/2017; art. 1 of *Law on Protection from Discrimination*, in Official Gazette of the Republic of Albania nos. 10 221/2010 and 124/2020; art. 5 of *Law on Prevention and Protection against Discrimination*, in Official Gazette of RNM no. 258/2020.

²⁴ Art. 3 of *Family Law*, in Official Gazette of RS nos.18/2005, 72/2011-other laws and 6/2015; art. 3 of *Family Law*, in Official Gazette of MN nos. 1/2007, 53/2016 and 76/2020; art. 6 of *Family Law of the Federation of Bosnia and Herzegovina*, in Official Gazette of B&H nos. 35/2005, 41/2005-correction, 31/2014 and 32/2019-decision by the Constitutional Court; art. 4 of *Family Law of the Republic of Srpska*, in Official Gazette of the Republic of Srpska nos. 17/2023 and 27/2024; art. 15 of *Family Law*, in Official Gazette of RNM no. 153/2014; art. 7 of the *Family Code*, in Official Gazette of the Republic of Albania no. 9062/2003.

²⁵ European Court of Human Rights, Judgment of 22 October 1981, Application no. [7525/76](#), *Dudgeon v The United Kingdom*.

²⁶ European Court of Human Rights, Judgment of 22 October 1981, Application no. [7525/76](#), *Dudgeon v The United Kingdom*, para 67.

²⁷ European Court of Human Rights, Judgment of 24 June 2010, Application no. 30141/04, *Schalk and Kopf v Austria*.

had to the historical context in which the Convention was adopted. In the 1950s marriage was clearly understood in the traditional sense of being a union between partners of different sex”²⁸. Concurrently, the ECtHR did not find the violation of art. 14 ECHR taken in conjunction with art. 8, and we can say that this decision also cemented the interpretation of marriage in the sense as a heteronormative institution. Something positive in this judgment is the fact that it recognized that same-sex couples who lived in *de facto* stable unions could establish the family life in accordance with art. 8, in the same way as different-sex couples did it²⁹. In one much older case *Rees v The United Kingdom*³⁰, the ECtHR interpreted the traditional marriage as a union of two persons of opposite *biological sex*, and the purpose of art. 12 to protect marriage as a basis of family. This approach was followed in *Schalk and Kopf v Austria*, but same-sex couples were confirmed that they had the capacity to form *the family life*. The ECtHR had the same legal reasoning toward same-sex marriage in the case *Chapin and Charpentier v France*³¹, finding no violation of arts. 8 and 12 in conjunction with art. 14 ECHR.

The case *Vallianatos and Others v Greece*³² was “a breath of fresh air”³³ in the ECtHR’s approach toward the legal recognition of same-sex couples. This case confirmed the violation of art. 14 taken in conjunction with art. 8, because same-sex couples in Greece were not allowed to enter civil unions which were available only to opposite-sex couples. The ECtHR stated that “*same-sex couples are just as capable as different-sex couples of entering into stable committed relationships. Same-sex couples sharing their lives have the same needs in terms of mutual support and assistance as different-sex couples. Accordingly, the option of entering into a civil union would afford the former the only opportunity available to them under Greek law of formalizing their relationship by conferring on it a legal status recognized by the State. The Court notes that extending civil unions to same-sex couples would allow the latter to regulate issues concerning property, maintenance and inheritance not as private individuals entering into contracts under the ordinary law, but on the basis of the legal rules governing civil unions, thus having their relationship officially recognized by the State*”³⁴.

The fact that marriage is not available for same-sex couples, the ECtHR has not seen until now as a form of discrimination based on sexual orientation. The heteronormative approach was also confirmed in several cases related to transsexual people who wanted to marry a person of an opposite sex to them after their transition. In the case *C and L M v The United Kingdom*³⁵, the ECtHR found that there was no right for the female transsexual applicant to marry her lesbian partner, because it was not in accordance with

²⁸ *Id.*, para. 55.

²⁹ *Id.*, para. 94.

³⁰ European Court of Human Rights, Judgment of 17 October 1986, Application no. 9532/81, *Rees v The United Kingdom*, at para. 49.

³¹ European Court of Human Rights, Judgment of 9 June 2016, Application no. [40183/07](#), *Chapin and Charpentier v France*.

³² European Court of Human Rights, Judgment of 7 November 2013, Application nos. 29381/09 and 32684/09, *Vallianatos and Others v Greece*.

³³ M. SHAHID, *The Right to Same-Sex Marriage: Assessing the European Court of Human Rights’ Consensus-Based Analysis in Recent Judgments Concerning Equal Marriage Rights*, in *Erasmus Law Review*, Vol. 10, No. 3, 2017, p. 187.

³⁴ European Court of Human Rights, Judgment of 7 November 2013, Application nos. 29381/09 and 32684/09, *Vallianatos and Others v Greece*, para. 81.

³⁵ European Court of Human Rights, Judgment of 9 October 1989, Application no. 14753/89, *C and L M v The United Kingdom*.

the legal nature of art. 12³⁶. In the case *Cossey v The United Kingdom*³⁷, the ECtHR did not recognize the right of the applicant Cossey who was registered as a man in the birth certificate, but later transitioned to a woman, that she could marry an Italian man. The legal reasoning was based on *the biological criteria* for determining a person's sex, and the judgment stated "*that attachment to the traditional concept of marriage provides sufficient reason for the continued adoption of biological criteria for determining a person's sex for the purposes of marriage, this being a matter encompassed within the power of the Contracting States to regulate by national law the exercise of the right to marry*"³⁸. This strict principle of using just the biological approach without taking in consideration *the social criteria* for determining a person's sex was changed in the case *Christine Goodwin v The United Kingdom*³⁹, where the ECtHR stated that "[t]here have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality. The Court has found above, under Article 8 of the Convention, that a test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual"⁴⁰. This judgment was a huge progress in the ECtHR's approach toward transsexual people's rights, but still not enough that same-sex couples could derive their rights for the marriage equality⁴¹. The ECtHR explained that Mrs. Goodwin's right to marry was violated because, after the transitioning process she became a woman and wanted to marry a man, and that was acceptable for the ECtHR's well established legal reasoning about the heteronormative nature of marriage⁴².

The most progressive decision by the ECtHR until now regarding the legal recognition of same-sex couples was related to the case *Oliari and Others v Italy*⁴³. Although the ECtHR repeated again its attitude toward marriage as a heteronormative institution, it created a *positive obligation* under art. 8 ECHR that states should provide some legal framework for the legal recognition of same-sex relationships⁴⁴. It means that member states of the Council of Europe still have wider margin of appreciation (MoA) to decide which legal format will be introduced, because the social acceptance of same-sex couples varies around Europe, but the lack of the legal recognition will establish the violation of the right to respect for private and family life. Andy Hayward in the case comment highlighted *three key points* from this decision: first, *the positive obligation* for states to introduce a legal scheme which will grant the legal status to same-sex relationships; second, *the criteria* which should be used for assessing if a state has breached the MoA in relation to this positive obligation; and, third, because of the fact that the ECtHR introduced the new positive obligation for the member states, it *refused*

³⁶ M. SHAHID, *op. cit.*, p. 186.

³⁷ European Court of Human Rights, Judgment of 27 September 1990, Application no. 10843/84, *Cossey v The United Kingdom*.

³⁸ *Id.*, at para 46.

³⁹ European Court of Human Rights, Judgment of 11 July 2002, Application no. 28957/95, *Christine Goodwin v The United Kingdom*.

⁴⁰ *Id.*, para 100.

⁴¹ M. SHAHID, *op. cit.*, p. 187.

⁴² European Court of Human Rights, *Christine Goodwin v The United Kingdom*, *cit.*, para 101.

⁴³ European Court of Human Rights, Judgment of 21 July 2015, Applications nos. 18766/11 and 36030/11, *Oliari and Others v Italy*.

⁴⁴ *Id.*, at para 185.

to analyze the right to marry and the right to freedom from discrimination⁴⁵. The same approach was confirmed by the latest judgment *Orlandi and Others v Italy* from 2017⁴⁶.

The right to legal recognition of same-sex couples has not been recognized explicitly as a human right guaranteed by a concrete human rights instrument, but through the interpretation of concrete legal norms. In this article the author chose to focus only to the European Convention on Human Rights, because the ECtHR, as a monitoring body of this legal instrument, has shown the highest progress in comparison to the UN system of human rights, or African or American regional systems of human rights protection. It is important to mention the Yogyakarta Principles⁴⁷ as a set of principles on the application of international human rights law in relation to *sexual orientation and gender identity*. The Principles affirm binding international legal standards with which all States must comply. They promise a different future in which all people born free and equal in dignity and rights can fulfill that precious birthright. This soft law document which is not legally binding underlines the importance that states should recognize same-sex marriages or same-sex unions as a human right.

4. Law and Economics Approach to Discrimination Based on Sexual Orientation and Regulation of Same-Sex Relationships (Marriages)

Law and Economics (L&E) is a scientific discipline and methodological approach which combines two scientific fields: law and economics. The premise is that individuals are rational to maximize their interests, and they do concrete actions to achieve this goal. Of course, rationality is limited, because we have different biases regarding different issues which our rationality makes vulnerable and not constant. L&E uses different microeconomic tools to analyze different legal institutes, not only these which are related to the market, as well as non-market fields of law.

In this paper we are focusing on some of the elements of L&E analysis of discrimination based on sexual orientation, including the sphere of legal recognition of same-sex relationships. For instance, the World Bank research from 2023 showed that the annual gross domestic product (GDP) of North Macedonia and Serbia would increase by an average 0.6% if the labor market would be opened for the LGBTI people⁴⁸. The another example from the USA showed an estimation that after the US Supreme Court's decision *Obergefell v Hodges* was delivered, when the same-sex marriage became legalized, wedding spending by same-sex couples and their guests has boosted state and local economies by an estimated \$3.8 billion and generated an estimated \$244.1 million in state

⁴⁵ A. HAYWARD, *Same-Sex Registered Partnerships – A Right to Be Recognized*, in *Cambridge Law Journal*, Vol. 75, No. 1, 2016, pp. 29-30.

⁴⁶ European Court of Human Rights, Judgment of 14 December 2017, Applications nos. 26431/12, 26742/12, 44057/12 and 60088/12, *Orlandi and Others v Italy*

⁴⁷ Yogyakarta Principles (Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity), adopted in 2006, available at https://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf. Ten years after the adoption of the Yogyakarta Principles, the Yogyakarta Principles plus 10 (Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles) were adopted on 10 November 2017 in Geneva, available at https://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf.

⁴⁸ World Bank, *Enhancing Economic Growth: The Benefits of LGBTI Inclusion in North Macedonia and Serbia*, 26 September 2023, available at <https://www.worldbank.org/en/news/press-release/2023/09/26/enhancing-economic-growth-the-benefits-of-lgbti-inclusion-in-north-macedonia-and-serbia>.

and local sales tax revenue and contributed to an estimated 45,000 jobs for one full year⁴⁹. The economic effects of discrimination of the LGBTI people are mostly observed in the context of labor market, because the effects can be converted in concrete sum of money. For example, the human capital theory in labor economy suggests that the greater inclusion of the LGBTI people in the labor market the greater economic growth⁵⁰. This can be explained that the human capital of each person is accumulated through different activities such as trainings, migration, adequate education, health care protection, etc.⁵¹, and a precondition for all of them is the freedom from discrimination based on sexual orientation and/or gender identity (of course, including also other different personal characteristics). In economic terminology, every kind of identity, including sexual orientation represents an externality which has a meaning not only for a concrete person, as well as for other people and a society in general⁵².

Economy explains marriage as a contract and this approach should be implemented toward same-sex relationships (or same-sex marriages). There are two main reasons why the law interferes within this kind of relations: first, this is a matter of efficiency; second, the equity among the contract parties⁵³. Concurrently, the legalization of same-sex relationships should be observed through the prism of the Agreement on Conditions for Free Access to the Labor Market in the Western Balkans⁵⁴ which was signed by the presidents of the Republic of Serbia, the Republic of Albania and the Republic of North Macedonia. The free movement of workers among the Western Balkans countries where the same-sex unions will be legally recognized can boost economies, increase productivity and competition.

5. Conclusion

Discrimination in general is not an action which can bring anything good to individuals and States in general. The Western Balkans countries adopted anti-discrimination legislation which prohibits discrimination based on different grounds, including also sexual orientation. On the other side, a special form of discrimination toward same-sex couples because of their non-recognition still exists in almost all the Western Balkans countries, except Montenegro. The case-law of the ECtHR stipulates clear obligations for the Council of Europe Member States to recognize legally these kinds of union in some legal form. We could see an overview of the ECtHR's case-law regarding the legal recognition of same-sex unions, which still follow the heteronormative understanding of marriage as a union between a man and a woman, but creates a legal obligation for the

⁴⁹ C. MALLORY, B. SEARS, *The Economic Effect of Marriage Equality Five Years After Obergefell v Hodges*, 2020, p. 1.

⁵⁰ M.V. BADGET LEE ET AL., *The Relationship Between LGBT Inclusion and Economic Development: Macro-Level Evidence*, in *World Development*, Vol. 120, 2019, p. 2.

⁵¹ N. WUTTAPHAN, *Human Capital Theory: The Theory of Human Resource Development, Implications, and Future*, in *Rajabhat Journal of Sciences Humanities and Social Sciences*, Vol. 18, No. 2, 2017, p. 242.

⁵² R. GELY, *The Law and Economics of Identity*, in *Duke Journal of Gender Law & Policy*, Vol. 14, No. 1, 2007, p. 235.

⁵³ E. KOS, *The Law and Economics of Marriage*, in *Revija za ekonomske in poslovne vede*, Vol. 7, No. 2, 2020, p. 77.

⁵⁴ Agreement on Conditions for Free Access to the Labor Market in the Western Balkans, signed in Tirana by the Republic of Serbia, the Republic of North Macedonia and the Republic of Albania on 21 December 2021, available at https://en-api.pks.rs/storage/assets/Agreement_on_conditions_for_free_access_to_the_labour_market_in_the_Western_Balkans.pdf.

Council of Europe Member States to legally recognize same-sex couples in some legal form. The ECtHR accepts different socio-political backgrounds among the European States regarding the LGBTI people and in the context of recognition of same-sex unions stipulates a wider MoA, which is not common for some other rights guaranteed by the ECHR.

The economic reasoning also does not leave any space which can justify the ignorance of the non-recognition of same-sex couples. Only inclusive societies can achieve growing economies which bring prosperity for all people no matter of their identities or personal characteristics. In the context of the Western Balkans countries, it is very important to mention the *Agreement on Conditions for Free Access to the Labor Market in the Western Balkans* of 2021 as one additional reason for the States to cooperate among each other and create conditions for inclusive labor markets which will be opened for the LGBTI people and their partners and family Members.

ABSTRACT

The subject of this paper is discrimination based on sexual orientation in relation to the non-recognition of same-sex relationships in the Western Balkans countries through the application of the legal and economic analysis. The aim of this paper is to present to what extent the process of the legal recognition of same-sex relationships has been done until the moment in these countries and how the economic arguments can support the idea of creating more inclusive and equal societies for same-sex couples. The first part of the article will be dealing with an overview of the position of the LGBTI people in the Western Balkans. The second part will be on the comparative legal analysis with an overview of constitutional and legislative prohibition of discrimination based on sexual orientation in the respective countries, followed by an overview of marriage definitions in constitutions and family laws. The third part of the article is focusing on the economic side of the recognition of same-sex relationships. As a methodology framework, the author will implement legal positivism, comparative legal method and economic analysis of legal institutions (law and economic approach).

KEYWORDS

Economic Analysis of Law/Law and Economics, Legal Recognition, Same-Sex Relationships, Sexual Orientation, Western Balkans.

LA DISCRIMINAZIONE FONDATA SULL'ORIENTAMENTO SESSUALE ED IL RICONOSCIMENTO DELLE RELAZIONI OMOSESSUALI NEI BALCANI OCCIDENTALI – ANALISI GIURIDICA ED ECONOMICA

ABSTRACT

Oggetto dell'articolo è la discriminazione fondata sull'orientamento sessuale in relazione al non riconoscimento delle relazioni omosessuali nei Paesi dei Balcani occidentali attraverso l'applicazione dell'analisi giuridica ed economica. Lo scopo del contributo è quello di evidenziare fino a che punto il processo di riconoscimento legale delle relazioni omosessuali sia stato portato avanti fino ad ora in questi Paesi e come le argomentazioni economiche possano sostenere l'idea di creare società più inclusive ed eque per le coppie dello stesso sesso. La prima parte dello scritto si occuperà di fornire una rassegna sulla posizione delle persone LGBTI nei Balcani occidentali. La seconda

parte fornirà un'analisi giuridica comparata con una panoramica del divieto costituzionale e legislativo di discriminazione basata sull'orientamento sessuale nei rispettivi paesi, seguita da un resoconto delle definizioni di matrimonio nelle costituzioni e nel diritto di famiglia. La terza parte dell'articolo si concentra sull'aspetto economico del riconoscimento delle relazioni omosessuali. Come quadro metodologico, l'autore implementerà il positivismo giuridico, il metodo giuridico comparato e l'analisi economica delle istituzioni giuridiche (diritto e approccio economico).

KEYWORDS

Analisi Economica del Diritto/Diritto ed Economia, Balcani Occidentali, Orientamento Sessuale, Relazioni Omosessuali, Riconoscimento Legale.