



**MONTENEGRO
MINISTRY OF HUMAN
AND MINORITY RIGHTS**

**ANALYSIS OF THE MODEL OF LAW
ON REGISTERED PARTNERSHIP**

Podgorica, December 2015

I INTRODUCTION

Legal regulation of the same sex unions began in Scandinavian countries during the 80s of the last century. Since then, many countries have decided to as part of their internal legal systems adopt "specific" laws that will directly regulate unions of same sex partners. First country to give an opportunity to persons of the same sex to enter into a registered union was Denmark in 1989. In the years to follow also other Northern European countries, such as Norway (1993), Sweden (1994), Iceland (1996), Finland (2001), through the adoption of special laws, allowed same sex partners to register their relationships with the guarantee of achieving certain degree of rights. After Northern European countries, the practice of adopting special laws regulating unions of persons of the same sex was established also in the countries inside of the European continent - in: Germany (2001), the Netherlands (1998 and 2001), France (1999 and 2014), Belgium (2003), Luxembourg (2004), the United Kingdom (2004), Spain (2005), the Czech Republic (2006), Hungary (2009) Austria (2009), Ireland (2010), Portugal (2010). However, despite intensive activities to establish legal systems that guarantee the implementation and protection of the rights of persons in the same sex unions, in some European countries (e.g. Greece and Italy), there is still significant level of resistance when it comes to the possibilities for legal regulation and recognition of the same sex unions, so we cannot say that Europe is united on this issue.

There are three basic models of regulating the same sex unions. The most widely used is the model of regulating the same sex partnerships through the registered partnership - which is accepted in the most Western and Northern European countries and to which will be dedicated the largest space in the context of this analysis. In addition to registered partnership, in European countries is accepted the marriage of persons of the same sex, as model of regulating the same sex unions. After the Netherlands, which in 2001 recognized the same sex marriage and equal rights for same sex and heterosexual couples, the same sex marriages were recognized in Belgium, Spain, Norway, Sweden, Portugal, Iceland, Denmark, France, England and Wales, Slovenia, Luxembourg . Finally, the de facto civil partnership or partnership without marriage is the third form of the same sex unions that do not require any form in order to happen, but the rights and obligations of the partners are recognized by default - after a certain period of life in the union.

The content below was created with the intention to help the fulfilment of the obligations that we have as a society in the area of human rights. Human rights are universal and apply to all individuals, and their respect guarantees equality of dignity of all human beings and the enjoyment of the rights and freedoms of all individuals without discrimination on any grounds (sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status) in accordance with the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the Convention") and its Protocols

The affirmation of the values protected by international standards of human rights and freedoms and combating discrimination based on sexual orientation and gender identity as one of the priorities of the Government of Montenegro and the continuation of its existing activities in the field of promoting human rights. In accordance with what is been said and with the goal to realize measure number 3.6.3.3 foreseen by the Action Plan for negotiation Chapter 23 (Judiciary and Fundamental Rights), which is under the competency of the Ministry of Human and Minority Rights, it initiated preparing Analysis of the model of law on registered partnership. For the development of the Analysis was established a working

team consisting of: the coordinator of the working team and the Director General of the Directorate for the Promotion and Protection of Human Rights and Freedoms - Ms. Blanka Radosevic Marovic, the representative of the Ministry of Justice, Independent Adviser III - Ms. Milena Rajkovic, expert in civil law, MA in civil law – Ms. Ivana Jončić, the President of the board of NGO Queer Montenegro – Mr. Daniel Kalezić.¹

The aim of Analysis is to present the model of the Law on Registered Partnership, which best suit Montenegrin conditions, for the purpose of opening dialogue on future legal solutions in order to ensure full equality of the LGBT community when it comes to the rights and obligations related to marriage and family relations, and create opportunities to same sex partners to exercise property and other rights enjoyed by heterosexual partners in marriage and out of marriage union. It is very important to emphasize that the proposed solutions should be taken as an initial working material on the basis of which would be further opened the dialogue on the regulation of quality and adequate regulation of the rights of LGBT persons. In this sense, the intention of working team members is not to offer definitive solutions for future regulation, but only a basis for further public discussion.

¹ In preparation of the Analysis the working team used the draft analysis from the author Vlado Dedović, MA, *Registered partnership as a model for regulation of the same sex unions in EU countries*, 2015

II MODELS OF THE LEGAL RECOGNITION OF THE SAME SEX UNIONS

A) Denmark

Denmark is the state which was the first to legally recognize the same sex unions in Europe. It should not be surprising because the homosexuality in this state is legalized in 1933, and the state with its authority prohibits any form of discrimination based on sexual orientation.

Registered partnerships in Denmark were created by the Law which was adopted on 7 June 1989, which was the first law of its kind in the world. Three attempts to broaden this Law in the Parliament, in May 2003, June 2003 and June 2006, were unsuccessful. The Law has been successfully broadened in June 2009 and May 2010.

The institution of registered partnership was almost identical to marriage, in terms of financial and parental consequences, albeit with some important exceptions. Specifically, for the registration of the partnerships some conditions regarding the residence had to be met.

Same sex couples, which were previously allowed only to adopt children individually and to adopt children of their partners, were allowed to adopt children, in a way that in March 2009, the Folketing, the Danish Parliament, presented the law that gives to same sex couples in registered partnerships the right to jointly adopt children. The law was approved in May 2010, and started with application on 1 July 2010. The divorce for registered partnership was conducted under the same rules as divorce for hetero marriages. In 2006, to lesbians and lesbian couples, was approved the right on artificial insemination. The spouse is also necessary heir of the decedent.

In the report (2010) published by the commission formed in order to determine the position of the Church in relation to registered partnerships, the result was that 11 of the 12 members of the committee took the view that the traditional marriage and same sex partnership are two different things.² Despite this view, in November 2011, the Minister for Equality and Religious Affairs, has reached an agreement with the majority of the bishops of the church of Denmark, according to which the prohibition of registered partnerships, which was in force in the "religious institutions", will be removed and within each separate religion will be possible to reach the decision on whether to allow same sex couples to get married or not. In relation to this issue, the Government announced that it will submit a proposal to the Parliament in 2012. Most members of the Parliament agreed with this proposal.³

Same sex marriage was legalized in Denmark on 15 June 2012 with the new gender-neutral marriage law putting out of use the Law on registered. The law on legalization, presented by the government of Helle Thorning-Schmidt, was approved by the Folketing on 7 June 2012, and received the royal approval on 12 June 2012. The Law covers Denmark, but not Greenland and the Faroe Islands.

² Church of Denmark is the official state church with the largest number of believers in Denmark

³ S. Gajin, the Model Law on registered same-sex partnerships, Belgrade 2012, pag 15-16

France

Calls for the improvement of the rights of same sex couples started in France as early as 1989 after they made two important decisions of the Supreme Court of France. In the first case, *Secher against Air France*, flight attendant asked for the air ticket with a reduced price for a partner of the same sex, which would be available to him if his partner was of the different sex. Paris Court of Appeal concluded that the terms such as *conjoint en union libre*⁴, *agent et sa concubine*⁵ and *vie marital*⁶ can be interpreted only as to include exclusively the situation where a man and a woman are living together as if they were husband and wife. The intention was these terms to be based on the marriage and, as such, could not be extended to include same sex couples. In another case, *Ladijka against Caisse primaire d'assurance maladie de Nantes*, to a woman was denied the right to enjoy health insurance coverage for maternity of her same sex partner, and this is also something to what she would have had the right if her partner was of the different sex. The Appellate Court in Reno once again concluded that the concept of *vie maritale*, which is used in the applicable legislation on social security, can be applied only to different sex couples who are not married. The Supreme Court of France has confirmed both decisions.

At the same time when the decisions of the Supreme Court of France were delivered, in France was formed a very visible movement aimed at reformation of marital life and elimination of discrimination faced by couples who are not married. Despite the generality of this objective, the primary goal was legal recognition of the union of two persons of the same sex. Mostly the groups that defend the rights of homosexuals and those groups who are active in continuing and growing fight against AIDS were advocating for the reform of law and were gathering around the various parliamentary initiatives. Before the enactment of the infamous *pacte civil de solidarité*, at least five different versions were delivered to the French legislative body for discussion (each proposal was known by the acronym of the institute which sought to create, i.e. CPC (*contrat de partenariat civil*), CUC (*contrat d'union civile*), CUS (*contrat d'union sociale*), CUCS (*contrat d'union civile et sociale*) and PIC (*pacte d'intérêt commun*).

This intense debate eventually led to the introduction of a controversial form of recognition of partnership in France. The final compromises on all sides led to the creation of the institute, which is located somewhere in the no man's land, between status and contract.

Agreement on solidarity and concubinage (PACS) regulates the legal effects of factual life union of two persons of the same or different sex - who live in "the concubinage as in the life union characterized by stability and durability". Thus, the French legislator decided to regulate with the same act the rights and obligations of the partners living in the non-marital heterosexual union and in the life union of persons of the same sex. The intention of such solution, i.e. the unification of both groups of couples in a single legal text was aimed to facilitate the adoption of PACS in the Parliament. The authors point out that it was assumed that this approach and the integration of both groups of pairs in one piece of legislation will contribute to reaching consensus among the political groups on its adoption much easier. However, even with that the road to the adoption of the law did not go smoothly, and there were even open demonstrations against its adoption.

⁴ Out of marriage spouse (author's note)

⁵ Employee and his female partner (author's note)

⁶ Marital life (author's note)

Conclusion of the agreement on solidarity for partners means the entry into the rights and duties which also belong to spouses (rights from the domain of property, housing, tax and other rights). The agreement is concluded between two adult individuals, of different or the same sex, with which they want to regulate the most important issues and organize their life together. Concluded agreement has the legal effects similar to marriage in the sense of mutual obligation for provision of financial and other assistance, with joint responsibility for obligations to third parties, which one of the partners took in relation to third parties to meet the needs of joint living (e.g. the cost of apartment). PACS does not contain any provision concerning the adoption of children, therefore on this institute are applying general rules on adoption in France pursuant to which only spouses, but also single persons can adopt children. Homosexual and heterosexual couples in PACS are not eligible for joint adoption, but one partner may become "*single-parent*".⁷

Property effects of conclusion of the agreement are manifested in relation to the jointly acquired property and separate property of partners. In the agreement, the partners should agree on the acceptance of the regime on undecided shares on movables obtained after the conclusion of the agreement (joint owners of movable property). If they do not specify that with the agreement, it shall be considered that they have a co-ownership with equal shares on all (movable and immovable) things that they obtained after the conclusion of the agreement. Unmarried partners do not have the right of mutual inheritance on the basis of the PACS, except when talking about the lease. The property of the deceased partner is inherited by his ancestors, descendants or collateral relatives.

Partners who live in the union for more than two years from the conclusion of the solidarity agreement have certain types of tax relief when it comes to the gift in case of death, and after three years, the incomes of partners are taxed as if they were married.

Persons who have entered into a PACS were not allowed to enter into another PACS with someone else, and if they get married later (with each other, or with a third party), then the PACS terminates automatically. As a result, many claimed that PACS ultimately should be considered as an institution that affects the civil status, regardless of whether that was initial intention of the legislative body.⁸

The law called "The Law on Marriage for All" was adopted by the National Assembly of France in 2013, after more than a year since it was sent by the French government into the procedure and after almost 500 amendments.

This law allows gay couples to marry and adopt children. Adopting this Law, France has become the 14th country in the world to legalize same sex marriages.

The law was adopted after the Constitutional Council assessed that gay marriage does not constitute a violation of the Constitution and that is "in the domain of legislators". It was explained that the right to adopt a child is not "exclusive right to a child" - but in such cases are considered the best interests of the child, as well as in heterosexual couples.

⁷ See more: Dijana Jakovac-Lozić, Ines Vetma: „Sexual orientation of adoptive parents and the best interests of the child ", Collection of Papers of the Law Faculty in Zagreb 56 (5) 1405-1442 (2006)

⁸ Ian Curry Suumner, Overwiev of European developments, pag.5-7

The Netherlands

In the Netherlands in 1997, was adopted a Proposal law on registered partnership and already in 1998 was submitted a draft law to allow marriage to same sex couples, while in 2001 the Netherlands passed the Law on Same Sex Marriages.

Before the adoption of the Law on Registered Partnership, the Netherlands has passed anti-discrimination law that included sexual discrimination. The wave of the sexual revolution, a change of official attitude of Dutch psychiatric institutions that homosexuality is not a disorder led to the visible development of tolerance in society towards LGBT persons and provided the atmosphere for the smooth passing of the first law on registered partnership, and then the of the law on same sex marriages.

In the Netherlands, there is a parallel application of the concept of the same sex marriage and same sex partnership. Registered partnership in the Netherlands can be concluded by two persons of the same or different sex. In accordance with the provisions of the Civil Code of the Netherlands, and part of the provisions governing registered partnership, the registered partnership is based on a formal act of issuing a certificate by the registrar. As Civil Code contains detailed provisions on marriage, many of them *mutatis mutandis* apply to the provisions of the Registered Partnership.

The conclusion of registered partnership, in principle does not bring changes in the family name of partners. As well as spouses, partners in registered partnership have the right to take the family name of the partner, to keep each own family name or to add the family name of the partner to each own family name, adding the surname of partners, if they wish so. Registered partnership produces certain effects on personal rights reflected in the obligation to have the union of life, and to help each other and be faithful to each other until a registered partnership lasts. Partners are required to live together, except in the case of reasonable and serious reasons for separated life. In addition, the partners have to contribute to covering the costs of the household - including the care and responsibility for raising children.

Same sex couples can adopt a child, and also they are allowed to adopt a child separately. Adoption is based on the decision of the regional court and must be "in the interests of the child". In case of a joint application of partners to adopt a child, then are required the following conditions: union of life partners for at least 3 years in continuity up to the date of application and that partners took care of the child for at least one year prior to the adoption. If a child is adopted by one partner - a single adoptive parent, in this case the requirement is that the person took care of the child for a continuous period of at least three years.

Property relations in the registered partnership are regulated among partners through the application of the principle of common property for all assets that partners have in the moment of conclusion and gain during the registered partnership. However, if they want to arrange their property relations in a different way, the partners may conclude an agreement on the property of registered partnership before the notary. This option is available to them before the conclusion or during the registered partnership.

Partners have the same legal position as well as spouses in a marriage. The surviving partner in registered partnership, in accordance with the provisions of the Civil Code of the

Netherlands, is treated in the same way as the surviving spouse. If there is no testament, the members of the first line of inheritance, the surviving partner and children of decedent, inherit him. In terms of implementation of public rights - tax, social and pension rights, the partners in registered partnership have the same status as spouses in marriage.

Only in certain cases, after the death of a partner, the amount of inherited pension to which the surviving partner acquires the right, may be less than the amount to which would have the right the surviving spouse.

Marriage or registered partnership may, beside by the death of the one of spouses or partners, be stopped by a divorce or termination. Divorce is possible for both marriage and registered partnership. About a divorce is always decided in proceeding before a judicial authority.

Termination is one of the ways to stop a registered partnership. When partners have kids the proceeding is performed before a judicial authority. If it is about a registered partnership in which there are no children and it is not a consensual termination, a decision on termination is issued by a judge. If there is an agreement i.e. consensual termination of the partnership, the competent authority is the registrar.

One of the characteristics of the legal system of the Netherlands is that it allows the conversion of registered partnership into a marriage and vice versa - a marriage into registered partnership. Both legal transformations are implemented in a very simple procedure. The interest for this type of legal transformation from one institute to another is explained by the desire of spouses to avoid the strict regime and the divorce procedure compared to simpler procedure for termination of the partnership.

B) Germany

The Law on Registered Life Partnership in Germany entered into force in 2001.

This is one of the countries whose path to the adoption of the law was very bumpy, and implied solving many legislative issues so to be even possible to think about the law governing the rights and responsibilities of same sex partners. Namely, since 1872 in Germany was in force a Penal Code whose Article 175 pronounced homosexual acts as criminal offense. Until the cancellation of this Article in 1994, 140,000 men were convicted based on it.

One of the key points that allowed reaching the adoption of the Law on registered life partnership was the decision of the Constitutional Court from 1993, with which the court refused the request of 250 gay couples to get a marriage permit but also declares that the situation of gay couples should be clarified.⁹

The Law on registered life partnership entitles the life partners to enter into a registered partnership before the registrar. They were also given the option to choose a common last name. The Law regulated the obligation of sustenance between the partners, the

⁹ Klaus Meyer- Cabri, *Registered life partnerships in Germany*, Taiex workshop on laws and practices in relation to the registered partnership, Montenegro, 2014.

right to inheritance, the ability to regulate property relations. Law does not allow adoption and the does not regulate the issue of facilitations for taxation.

After the adoption of the Law, the acceptance of gay couples by the general public was gradually growing. Even 73,000 gay couples in 2012 used the registered partnership. The Constitutional Court through several decisions strengthened the position of registered partners and forced the legislator to a new action.

By the amendments of the Law, the unequal treatment of the spouses and same sex partners has been removed and the right to adopt was given to the partners through the following forms:

- Adoption of stepchildren
- Adoption by one partner
- Successive adoption

Registered partners still do not have the right to adopt children by themselves.

England and Wales

The Law on Civil Partnership of 2004 allows only to persons of the same sex to register the relationship, i.e. to conclude civil partnership. On the other hand, for couples of different sex there is no form of registered partnership, but only the civil marriage. The Law stipulates that civil partnership can be concluded between persons older than 16, therewith for a person who intends to conclude partnership and who is under the age of 16 is required a written consent of the persons having parental responsibility over him/her. Until recently, there was a ban on reading religious texts, or inclusion of religious symbols or music in the ceremonies of conclusion of civil partnerships, but since 2011, the new rules allow same sex couples to register their civil partnerships in religious premises provided that there is no obligation of religious groups to participate in the ceremony.¹⁰

The requirement for partners from civil partnerships to enjoy the same rights and obligations as spouses is only formal, and it concerns the conclusion of the partnership before the competent authorities. The procedure is similar to the procedure of marriage, and the termination of the partnership takes place before the court, by a similar procedure by which the divorce takes place. Civil partnerships enjoy the same property rights, the same exemption from taxes on inheritance, social and pension benefits as married couples. Also, same sex couples have the right to sustenance (financial support), tenancy rights and can in the same extent exercise parental rights over the child of his partner.¹¹ Same sex partners in a civil partnership are entitled to mutual legal inheritance and are inheriting by identical rules prescribed for the inheritance of a spouse, in accordance with the provisions of the Law on Administration of Estates from 1925 - regulating inheritance rights of surviving spouse.¹²

Adoption of children is recognized to partners in civil partnership after the amendments to the Law on the Adoption and Children, which contained a provision which provided that if

¹⁰ See Doc. Dr. Sasa Gajin "Same sex unions in comparative international law", the Center for the advancement of legal studies, Belgrade, 2012..

¹¹ *Ibid.*

¹² See more: Novak Krstic: "Inheritance of partners of same sex partner community "thematic compilation of works. " Access to justice - the instruments for the implementation of European standards in the legal system of the Republic of Serbia": Book 4: Publications Center of the Faculty of Law, 2008 - P. 265-279.

a couple wants to jointly adopt a child they have to be married or living as partners in family relationship what includes the same sex relationship. If, however, a couple does not have continuity - such couple cannot jointly adopt a child, but one of them can.¹³

C) Croatia

Croatian Parliament adopted the Law on Civil Partnership of the Same Sex Persons in 15 July 2014. After the adoption of the Law, the Minister of Administration reiterated that the Law is the product of a democratic compromise of fierce opponents and supporters of this Law. This Law regulates the life partnership of persons of the same sex, the principles, the conclusion and the termination of the life partnership, the procedures of the competent authorities in connection with the conclusion and termination of life partnership, keeping a register on the civil partnership and the legal consequences of living partnerships.

With the Law from 2014, Croatia has provided for same sex couples all the rights enjoyed by married couples, except the right to adopt children.

In fact, most of the rights and obligations regulated by the Law on Civil Partnership concern the social rights: the right to a survivor's pension, health insurance through the life partner, rights and obligations concerning sustaining the partner, it guarantees freedom of movement and related rights in the entire territory of the European Union, non-discrimination and equality in the field of the market of public and private services, ensures equality in the field of housing and tax exemption, gives to employed life partners the right to paid leave and care for the other partner, regulates inheritance and the area of family life of same sex couples with children.

For the conclusion of the life partnership is needed: the persons who intend to enter into a life partnership to be of the same sex, that persons declare their consent to enter into the life partnership, that life partnership is concluded before the registrar.

In addition to the concept of life partnership which is defined as "a community of family life of two persons of the same sex concluded before the competent authority" the law recognizes the concept of **non-formal life partnership** and defines it as "a community of family life of two persons of the same sex, which had not concluded a life partnership before the competent authority if the community lasts at least three years and from the start complies with the requirements for the validity of the life partnership".

In life partnership cannot enter a person who has not reached eighteen years of age and a person who is already in a civil partnership or marriage. Life partnership is concluded before a registrar after it is determined that the all legal requirements are met. Life partnership ceases by the death of a life partner, declaration of dead of missing life partner, annulment and termination. Termination of a life partnership can be requested to the court by one life partner, and both life partners can request it by consensual proposal. Exceptionally, life partnership can be terminated by giving consensual statements with the registrar, provided that in the life community is not living a minor child. Life partners have equal rights and status in any judicial and administrative proceedings to spouses.

¹³ Op. cit: Dijana Jakovac-Lozić, Ines Vetma: „Sexual orientation of adoptive parents and the best interests of the child ", Collection of the Faculty of Law in Zagreb 56(5) 1405-1442 (2006)

Life partner of a parent of a child has the right to exercise parental care for the child together with the parents or instead of a parent based on a court decision, in accordance with the provisions of a special law regulating family relations. Both parents jointly or a parent who individually realizes fully parental rights over a child, can temporarily entrust the exercise of parental care for the child partially or fully to the life partner if he/she meets the conditions for guardians prescribed by a separate law regulating family relations.

When it comes to property regime of the partners, the Law recognizes partner's acquis (assets acquired in the course of the partnership, which is a common property) and their own (separate) property. Also, the Law is regulating the contract on the property, with which the partners can regulate property relations as they see it in their best interest.

On inheriting a life partner respectively applies provisions of the law governing the right to inheritance, where the life partner in the law of inheritance is equal to the spouse, and the children of whom he has partner custody are equal with his own children.

In case of death of an insured person or a pension beneficiary, as his family members, except for persons established by regulations governing the pension insurance are considered as well:

- Life partner;
- A child over whom he/she realizes partnership care;
- A child of the deceased life partner who was sustained by the insured person;
- Life partner of a parent of the insured person who was sustained by the insured person.

Life partners, their children and children who are in their parents' or partners' care are considered to be insured persons to whom are ensured the rights and obligations from the compulsory health insurance in terms of a special law on mandatory health insurance.

The Law prohibits discrimination, i.e. unfavourable treatment of any kind in respect of employment, working conditions and participation in the labour market and which is dependent on the status of life partnership.

Life partners who have concluded and registered a life partnership or marriage in accordance with the regulations of the country where the partnership or marriage took place, or the partners of the same sex who live in informal community life that lasts at least three years, have the right to apply for a temporary residence permit in Croatia, all in accordance with the law.

Finally, the Law clearly stipulates that the life partners are family members and that they are in the same position with the spouses for the purpose of exercising the rights and obligations stipulated by a special law regulating the status of persons in the execution of imprisonment.

This Law was preceded by the **Law on the Same Sex Unions from 2003**, with which was regulated the non-registered cohabitation between persons of the same sex. In order the partners to acquire the rights regulated by this Law, the community had to last at

least three years, and the Law was not regulating sustenance and property relations. The Law of 2003 was also prohibiting discrimination of persons who lived in the same sex union.

Slovenia

On 3 March 2015 Slovenian Parliament adopted the Law on Marriage and Family Relations fully equating the same sex couples in their rights with heterosexuals, and most importantly allowing same sex couples to adopt children.

But, immediately after the adoption of the Law, on the initiative of two members of the civil group "For children GRE", it was appealed before the Constitutional Court of Slovenia, where they sought to hold a referendum on the question of "whether this law should be passed at all".

After assessing the claims in the appeal, on 23 October 2015 the Constitutional Court ruled that at the end of the year the citizens of Slovenia shall decide at the referendum on the right of the same sex couples to marriage before the registrar and to adopt children. However, to this day, the referendum was not called.

This Law was preceded by the Law on Registered Partnership which was adopted in 2005 and entered into force on 23 July 2006. This Law was regulating property relations, inheritance, sustenance payments (during partnership and after its cancellation), and partially the right to immobile property and the right to visit in the hospital.

The Law was not regulating the rights in the field of social security (social and health insurance, pension rights, tax exemptions), and the partners did not have the status of members of the closest circle of relatives. By Law is prescribed the obligation of partners to care for each other in case of illness, but they are not given the right to sick leave due to partner or partner's child illness. The foreign partner who is registered with the Slovenian partner was not entitled to a residence permit.

The Draft Law was drafted without consultation with NGOs, and after a year of its application there were only 12 cases of registration under that Law.

With still relevant Law on Registered Partnership, in 2007 Slovenia gave some more rights to the same sex partners, but not the right to marriage and adoption of children. The Law on Equating the Rights of Same Sex and Heterosexual Couples which in 2010 was accepted by at that time Social Democratic government, was overthrown at referendum which was organized at that time.

III POSITIVE LEGAL FRAMEWORK

In order to form a model or models laws on registered partnership is necessary to examine the current legal framework regulating those areas that are important for the adoption of the new law and to evaluate to what extent it can be matched with existing legal norms. It is also necessary to assess whether it is necessary to work on amending the relevant norms.

In the following part of the analysis are going to be presented those norms of the Constitution and the laws governing the matter, i.e. those categories that will be regulated by the future law on registered partnership.

1. The Constitution of Montenegro

Human rights and freedoms

Article 6

Montenegro shall guarantee and protect rights and freedoms.
The rights and freedoms shall be inviolable.
Everyone shall be obliged to respect and protect the rights and freedoms of others.

Prohibition of discrimination

Article 8

Any direct or indirect discrimination on any ground shall be prohibited.
Regulations and introduction of special measures aimed at creating the conditions for the exercise of national, gender and overall equality and protection of persons who are in an unequal position on any ground shall not be considered to be discrimination.
Special measures may only be applied until the achievement of the aims for which they were introduced.

Marriage

Article 71

Marriage may be concluded only with a free consent of a woman and
a man.
Marriage shall be based on equality of spouses.

Family

Article 72

Family shall enjoy special protection.

Parents shall be obliged to take care of their children, to bring them up and educate them.

Children shall take care of their own parents in need of assistance.

Children born out of marriage shall have the same rights and responsibilities as children born in marriage.

2. **Family Law** (Official Gazette of the Republic of Montenegro, No.01/07 of 9 January 2007)

Article 2

The family is a life union of parents, children and other relatives who in the sense of this law have mutual rights and obligations, as well as the other basic life unions in which children are raised and cared for.

Article 3

Marriage is based on a free decision of a man and a woman to enter into marriage, on their equality, mutual respect and mutual assistance.

Article 6

The rights and duties of parents and other relatives towards children, as well as the rights and duties of children towards their parents shall be equal, regardless of whether the children were born in marriage or out of marriage.

Article 8

By adoption, between the adopter and the adoptee shall be established such relations as those existing between parents and children, with the aim of providing to the child being adopted the living conditions enjoyed by the children living in family.

Article 12

A long lasting life community of a man and a woman (union out of marriage), is equalled with marriage union with regard to the right on mutual sustenance and other property-legal relationships.

The union out of marriage does not produce effect referred to in paragraph 1 of this Article, if at the time when it was established, existed the obstacles for concluding a valid marriage.

Article 15

Marriage is a legally regulated life union of a man and a woman.

Concept of Adoption

Article 121

Adoption is a special form of family-legal protection of children without parents or without adequate parental care, by which parental or the relationship of kinship is created. Adoption may be established as incomplete and complete

Article 132

A child can be completely adopted by spouses jointly, as well as by a step-mother and a step-father of a child who is being adopted.

A child can be completely adopted by out of marriage partners who have been living in a long lasting out of marriage union.

Article 253

Mutual sustenance of family members and other relatives shall be their obligation and right.

In cases in which mutual sustenance of family members or other relatives cannot be exercised fully or partly, the state shall provide, under the conditions determined by the law, the means necessary for the sustenance of family members who don't have the sustenance secured.

Waiving the right to sustenance shall not have the legal effect.

II. SUSTENANCE OF A SPOUSE

Article 262

A spouse who does not have sufficient means for living, who does not have the capacity to work or who cannot get employment is entitled to sustenance provided by his/her spouse, in proportion to his/her financial circumstances.

Taking into consideration all the circumstances of the case, the court may reject a request for sustenance, if the sustenance is requested by a spouse who, without a serious cause given by the other spouse, behaved rudely or disorderly in the marital union or if he/she deserted his/her spouse without a justified cause, or if his/her request would be an obvious injustice towards the other spouse.

Article 263

Under the conditions from the Article 262 of this Law, the financially unsecured spouse is entitled to request that in the judgment by which the marriage is divorced he/she is awarded sustenance on the burden of the other spouse, in proportion to his/her financial circumstances.

Exceptionally, the spouse who in the divorce proceedings did not request to be awarded sustenance on the burden of the other spouse, may, due to justified reasons, submit such a request in a separate litigation, within a year after the marriage is divorced, but only if the prerequisites for sustenance have occurred before the divorce of the marriage and lasted continuously until the closure of the main hearing in the proceedings for sustenance, or if in this period occurred an incapacity for work as a consequence of a bodily injury or damaged health from the time before the divorce of the marriage.

If in the case of divorce of the marriage spouses agreed about the sustenance, or if one spouse without an explicit agreement participated in the sustenance of the other spouse by

paying certain amounts of money, by giving his/her property to be used by the other spouse or in some other manner, the deadline from the paragraph 2 of this Article for submitting the request for sustenance shall start from the day on which the last contribution for the purposes of the sustenance was given, i.e. from the day on which the spouse was given his/her property back.

Article 264

If the life union of spouses ceased to exist permanently and if the spouses were committed to completely independently provide means for sustenance for many years, and if such circumstances existed until the divorce of the marriage, the court may, considering all the circumstances of the case, reject the request to award sustenance to the benefit of such a spouse.

Article 265

Court may decide the obligation to provide sustenance to last for a limited period of time if for the person requesting sustenance is possible to other ways provides means for sustenance in the foreseeable future.

In case when the marriage lasted for a short time, the court may, considering all the circumstances, decide the obligation of sustenance to last for a limited period of time, or reject the request for sustenance as a whole, regardless of the possibilities of the requestor to other ways provide means for sustenance in the foreseeable future, if the person requesting sustenance is not bringing up joint minor child. Wherein, the court shall particularly take into consideration whether the financial circumstances of the spouse changed with entering into the marriage.

In justified cases, the court may extend the obligation of providing sustenance.

The claim for extension of the obligation to provide sustenance may be submitted only before the expiry of the period for which the sustenance was adjudicated.

Article 266

The right of a divorced spouse to sustenance shall cease when the conditions referred to in Article 262 paragraph 1 of this Law cease to exist, when the period for which the sustenance was adjudicated expires, when a divorced spouse exercising the right to sustenance enters into a new marriage, establishes union out of marriage, or if the court, analysing all the circumstances, finds that a divorced spouse has become unworthy of exercising the right.

The spouse whose right to sustenance ceased once may not exercise the right to sustenance from the same spouse again.

Article 267

In case of annulment of a marriage, the spouse, who at the time of entering into marriage did not know of the cause of the nullity of the marriage, may request that he/she to be adjudicated sustenance on the burden of the other spouse, under the conditions under which a divorced spouse may exercise the right to sustenance.

III. SUSTENANCE OF OUT OF MARRIAGE PARTNER

Article 268

If union out of marriage of a woman and a man ceases to exist, each of them, under the conditions referred to in the Article 262, paragraph 1 of this Law, is entitled to be provided with sustenance from the other partner if the union out of marriage lasted for a longer period of time.

The claim for sustenance may be submitted at latest within a year from the moment of cessation of the union out of marriage, but only under the conditions that the prerequisites for sustenance occurred before the cessation of the union out of marriage and lasted continuously up to the closure of the main hearing in the litigation proceedings related to the sustenance.

The court may reject the request for sustenance, if it is requested by the partner from the union out of marriage who, without a serious cause given by the other partner, behaved rudely or disorderly in the union out of marriage or if he/she deserted his/her partner without a justified cause, or if his/her request would be an obvious injustice towards the other out of marriage partner.

Article 269

Court may decide the obligation to provide sustenance to last for a limited period of time, particularly if the person requesting sustenance is in the possibility to provide other means for sustenance in the foreseeable future.

In justified cases the court may extend the obligation to provide sustenance.

The claim for extension of the obligation to provide sustenance may be submitted only before the expiry of the period for which the sustenance was adjudicated.

Article 270

The right of an out of marriage partner to sustenance shall cease when the conditions referred to in Article 262 paragraph 1 of this Law cease to exist, when the period for which the sustenance was adjudicated expires, when the partner exercising the right to sustenance enters into a marriage, establishes a new union out of marriage, or if the court, analysing all the circumstances, finds that the partner has become unworthy of exercising the.

3. The Law on Inheritance (Official Gazette of Montenegro, no. 74/08 05.12.2008)

Out of marriage and civil relatives

Article 4

Out of marriage relatives are equalled in terms of inheritance with marital ones and relatives from full adoption with relatives by blood.

In case of full adoption the mutual inheritance rights of the adoptee and his descendants to his relatives by blood cease to exist.

Grounds of calling for heritage

Article 6

Heritage can be based on the law (legal heirs) and based on the testament.

The circle of legal heirs

Article 9

According to the Law, the legacy of the decedent is to be inherited by: his descendants, adopted children and their descendants, his spouse, his parents, adoptive parents, his brothers and sisters and their descendants, his grandparents and their descendants, his great-grandfathers and great-grandmother.

According to the Law the decedent is to be inherited also by his out of marriage spouse who is equal in right of inheritance with the marital one.

By the out of marriage union, in the sense of this Law, is considered a union of woman and man, which lasted for a long time and in which there were no obstacles for entering into a valid marriage, and which ceased because of the death of the decedent.

Necessary heirs

Article 27

Necessary heirs are descendants of the decedent, his spouse, his adopted children and their descendants, his parents and their adoptive parents.

Grandparents and siblings of the adoptive parents of the decedent are necessary heirs only if they are permanently unable to work and if they do not have the necessary means for life.

Persons referred to in paragraphs 1 and 2 of this Article are necessary heirs when by the legal order of inheritance are called for heritage.

Determination of heirs

Article 93

The testator can designate one or more heirs with the testament.

The heir on the grounds of the testament is a person who was determined by the testator to inherit all or a part of the property, determined in proportion to entire property.

As a heir will be considered also a person to whom the testator has left one or several specific things or rights, if it is determined that the will of the testator was this person to be his heir.

4. **The Law on Property - Legal Relations** (Official Gazette of Montenegro, no.19/09 of 13.03.2009)

Acquisition of property

Article 28

The property right is acquired according to the law, on the basis of a legal transaction or.

The property right is acquired by the decision of a governmental organ, in a manner and under conditions prescribed by the law.

5. **The Law on Health Insurance** (Official Gazette of Montenegro, no. 14/10 of 17.03.2010, 40/11 of 08.08.2011, 47/15 of 18.08.2015)

Insured persons

Article 7

Insured persons who have rights and obligations deriving from compulsory health insurance are the insured, their family members and other persons in accordance with this Law.

Family Members of the Insured

Article 10

Compulsory health insurance rights shall be provided, under the conditions of this Law, to family members of the insured if they do not enjoy them under some of terms quoted in Article 8 of this Law.

In terms of this Law, family members are considered to be:

- members of immediate family: spouse and children from the marriage and out of marriage, adopted children, step-children, and foster
- members of extended family: parents (father, mother, stepparents, and adoptive parents), grandchildren, siblings if they are permanently and totally incapable for work in terms of specific regulations and if they are supported by the insured person.

6. **The Law on Pension and Disability Insurance** (Official Gazette of the Republic of Montenegro, no. 54/03, 39/04, 61/04, 79/04, 81/04, 14/07, 47/07, and Official Gazette of Montenegro, no. 79/08, 14/10, 78/10, 66/12 i 38/13 of 02.08.2013, 61/13 of 30.12.2013, 06/14 of 04.02.2014, 60/14 of 31.12.2014, 10/15 of 10.03.2015, 44/15 of 07.08.2015)

Article 16

Rights arising from pension and disability insurance shall be:

- 1) in the event of old age – right to an old-age pension
- 2) in the event of disability – right to a disability pension
- 3) in the event of death :

- right to a survivor's pension;
- right to funeral cost compensation;
- 4) in the event of bodily injury caused by injury at work or professional disease – right to subsidy for bodily injury.

Article 42

Right to a survivor's pension may be realized by family members of:

- 1) a deceased insured person who had at least five years of accrued insurance service or at least ten years of pension service, or who was eligible to old-age or disability pension, or
2. a deceased beneficiary of an old-age or disability pension.

Where the death of a insured person or person under Article 14 and 15 of this Law arose as a consequence of an injury at work or professional disease, members of his/her family shall become entitled to a survivor's pension regardless of the pension service length of the insured person or that person.

Article 43

Family members of the deceased insured person or beneficiary under Article 42 of this Law shall be deemed to be:

- 1) the spouse; and
- 2) the children (born in marriage or out of marriage or adopted; stepchildren who were the insured person's or beneficiary's dependents).

A spouse from a divorced marriage may also be entitled to a survivor's pension, under the conditions stipulated in Articles 44 and 45 of this Law, provided that his/her right to sustenance was established by an effective court verdict.

7. **Law on Social and Child Protection** (Official Gazette of Montenegro, no. 27/13 of 11.06.2013, 1/15 of 05.01.2015, 47/15 of 18.08.2015)

Activity

Article 2

Social and child protection is an activity that ensures and implements measures and programmes intended for an individual and a family in unfavourable personal or family circumstances, which shall include prevention, assistance for meeting the basic life needs and support.

Principles of social and child protection

Article 7

Social and child protection is based on the following principles:

- 1) **Respect for the integrity and dignity of beneficiaries of social and child protection** which is based on social justice, accountability and solidarity, and is provided with respect for physical and psychological integrity, safety, and with respect

for the moral, cultural and religious beliefs, in accordance with the guaranteed human rights and freedoms;

- 2) **Prohibition of discrimination** of beneficiaries on the basis of race, gender, age, national belonging, social origin, sexual orientation, religion, political, trade union or other belonging, property owned, culture, language, disability, nature of social exclusion, belonging to particular social group or other personal characteristics;
- 3) **Informing the beneficiary** on all the data important for determining his social needs and exercising rights, and on how that needs can be met;
- 4) **Individual approach** to the beneficiary in providing rights in the area of social and child protection;
- 5) **Active participation of beneficiaries in the creation, selection and use of the rights in the area of social and child protection**, which is based on participation in the situation and needs assessment and the decision making on the use of the needed services;
- 6) **Respect for the best interest of the beneficiaries** in exercising the rights in the area of social and child protection;
- 7) **Prevention of institutionalisation and availability of services in the least restrictive environment** whenever conditions for it arise in their home or the local community through extra-institutional forms of protection, provided by various service providers, with the aim of improving the quality of life of the beneficiaries and their social inclusion;
- 8) **Pluralism of services and providers** of social and child protection, which is performed also by civil society organisations and other legal and physical persons, under the conditions and in the manner prescribed by the law;
- 9) **Partnerships and joining of different entities responsible for activities and programmes, especially at the local level** with the objective of making services available in the least restrictive environment and preventing institutionalisation;
- 10) **Transparency** with regard to informing the public on social and child protection through the media, and in other manners, in accordance with the law.

Financial support Article 21

An individual or a family can obtain the right to financial support, if an individual or a family member:

- 1) Is incapable to work;
- 2) Is capable to work, under the condition:
 - she is expecting a child;
 - he/she is a single parent;
 - A parent sustaining a child, or a parent exercising prolonged parental right, in accordance with the law regulating family relations;
 - A person who has completed education according to the educational programme with adapted delivery and additional expert assistance or special educational programme;
 - A person who has turned 18, if he/she is attending regular secondary school education, until the end of the time limit prescribed for that education;
 - A child without parental care or a person who was a child without parental care, until he/she finds employment for a time period longer than six months.

The adoptive parent, guardian, foster parent or a person to whom care, education and upbringing of the child has been entrusted shall be entitled to right referred to in paragraph 1 item 2 indents 2 and 3 of this Article.

The longest period during which the person referred to in paragraph 1 item 2 indent 4 of this Article can exercise the right to financial support is five years from the day of completion of education.

The person referred to in paragraph 1 item 2 indent 6 of this Article can exercise the right to financial support for a maximum period of five years from the day of termination of placement into an institution, family placement - fostering, or from termination of guardianship.

The base for exercising financial support

Article 22

The right to financial support can be exercised by an individual, or a family referred to in Article 21 of this Law, on the condition that:

1) The amount of average monthly revenues from the previous three months does not exceed the base for exercising the right by:

- 63.50 euro for an individual;
- 76.20 euro for a family with two members;
- 91.50 euro for a family with three members;
- 108.00 euro for a family with four members;
- 120.70 euro for a family with five and more members;

2) He or it does not possess or does not use business premises;

3) He or it does not possess or does not use a flat or a residential building bigger than:

- one bedroom flat for an individual;
- two bedroom flat for a family with two or three members;
- three bedroom flat for a family with four or more members.

4) He or it does not possess land in town or suburban region;

5) He or it does not possess, or does not use agricultural land, or commercial forests of surface larger than:

- 20 ares for an individual;
- 30 ares for a family of two members;
- 40 ares for a family of three members;
- 50 ares for a family of four members;
- 60 ares for a family of five and more members;
- or does not possess, or does not use other land of surface larger than 2 ha;

6) An individual or a member of the family is capable of work, and is included in the records of the Employment Agency, in accordance with a special law;

7) The Social Welfare Centre determines that the person obliged to provide maintenance is not capable of maintaining the person that is incapable of work, in accordance with this Law;

8) An individual or a family member did not refuse employment offered to him or vocational training, re-training or additional training, in accordance with a special law, unless a minimum of one year has elapsed since the refusal;

9) The employment relationship of an individual or a family member was not terminated by the statement of his will, his consent or his guilt, due to disciplinary or criminal liability, unless as a minimum one year has elapsed since termination of

employment relationship or if incapacity for work arose after termination of employment relationship;

10) An individual or a family member did not terminate his employment relationship by mutual agreement with payment of severance pay in the amount exceeding ten average monthly wages including taxes and contributions in the state, in accordance with a special law, unless a minimum of three years have elapsed since the mutual agreement on termination of employment relationship and payment of the severance pay;

11) An individual or a family member did not exercise the right to severance pay based on termination of employment relationship, in accordance with a special law, unless a minimum of six months have elapsed since the exercising of the right;

12) An individual or a family member did not alienate immovable property or renounce the right to inherit property referred to in items 2, 3, 4 and 5 of this Article, unless a minimum of three years have elapsed since alienation or renouncing;

13) An individual or a family member does not own cattle stock, agricultural and construction mechanisation and other means for work and doing business;

14) An individual or a family member does not own a motor vehicle, except the motor vehicle which serves for transport of an individual or a family member, beneficiary of allowance for care and support of other person;

15) An individual or a family member did not conclude a contract on life-long maintenance, except with the Social Welfare Centre.

For families which have a member who is beneficiary of the care and support allowance, the scope of residential space referred to in paragraph 1 item 3 indent 1 and 2 of this Article shall be increased by one room.

Amount of financial support

Article 31

The monthly amount of financial support for an individual or a family with no revenue shall amount to:

- 1) 63.50 euro for an individual;
- 2) 76.20 euro for a family with two members;
- 3) 91.50 euro for a family with three members;
- 4) 108.00 euro for a family with four members;
- 5) 120.70 euro for a family with five and more members..

The amount of financial support for a person who was a child without parental care shall amount to 120.70 euro per month.

The amount of financial support for a family that earned revenue shall be established in the amount of difference between the amount established by paragraph 1 of this Article and the average monthly revenue of the family from the previous three months.

The number of family members referred to in Article 21 of this Law shall be taken into account in determining the amount of financial support.

The monthly amount of financial support for a family referred to in Article 25 of this Law shall be established in the amount of 50% of the amount established in paragraph 1 of this Article.

One-time financial support

Article 37

An individual or a family who, due to special circumstances that affect their residential, material and health condition, find themselves in the state of social need can exercise the right to one-time financial support.

The person referred to in paragraph 1 of this Article shall exercise this right in accordance with the criteria and according to the procedure prescribed by the competent state administration body.

The amount of support referred to in paragraph 1 of this Article shall be established by the Social Welfare Centre, depending on the need of an individual or a family and the financial capacity of the state.

8. **Law on Protection from Domestic Violence** (no.46/10 of 06.08.2010, 40/11 of 08.08.2011)

Domestic violence

Article 2

Domestic violence ('violence'), within the meaning of this Law, shall be acting or omission by a family member that endangers physical, psychological, sexual or economic integrity, mental health and peace of other family member, irrespective of where it has occurred.

Family members

Article 3

Family members, within the meaning of this Law, shall be the following:

- 1) spouses or former spouses, children they have in common, and children of each of them separately;
- 2) out of marriage partners or former out of marriage partners irrespective of the duration of out of marriage union, children they have in common, and children of each of them separately;
- 3) blood relatives and relatives from full adoption, in the direct line with no limitation and in collateral line up to the fourth degree;
- 4) relatives from incomplete adoption;
- 5) in-laws to the second degree in marriage and out of marriage union;
- 6) persons sharing the same household irrespective of the nature of their relationship;
- 7) persons who have a child in common or a child is conceived.

9. The Law on Obligations (Official Gazette of Montenegro, no.47/08 of 07.08.2009, 04/11 of 18.01.2011)

Lifelong Support

Concept

Article 1075

- 1) By a contract on lifelong support one party (provider of support) shall assume an obligation to provide support for other party or for third person (recipient of support) until his death, while the other party shall assume the obligation to transfer to former party entire or portion of latter party's property, under condition that acquiring of objects and rights shall be postponed until the moment of death of the recipient of support.
- 2) Recipient of support may cover by the contract only things or rights which exist at the moment of concluding of the contract.
- 3) Obligation of providing support, unless otherwise stipulated, shall especially include providing of housing, food, clothes and footwear, adequate care in case of illness and old age, expenses for medical treatment and dues for ordinary everyday needs.

IV POSSIBILITIES, DIFFICULTIES, RECOMMENDATIONS

As already mentioned in the introduction and the presentation of the models analysed in Chapter II, three models through which it is possible to legally regulate same-sex unions are observed:

1. The first model allows marriage between same-sex couples. According to this model, same-sex couples acquire the same rights and obligations as spouses. In fact their marriage is legally recognized as a marriage of spouses of different sexes (Denmark, France, Netherlands, Slovenia).¹⁴
2. The second model is a registered partnership or cohabitation. This model allows for same-sex couples to register with the competent authorities and thus obtain a certain extent of the rights, obligations and legal recognition as married or out of marriage couples (The Netherlands, Germany, England and Wales, Croatia).

This model can be organized in such a way so to apply its provisions exclusively on the same-sex.

On the other hand, it is possible to in the same way regulate with this law the rights and obligations for different-sex couples.

3. The third model is unregistered cohabitation. Unregistered cohabitation exists when to same-sex couples automatically are recognized certain rights and obligations after the passage of a certain period of out of marriage partnership (Croatia).¹⁵

¹⁴ The Netherlands allows same-sex couples to choose one or another model, i.e. the marriage or registered partnership

¹⁵ **In addition to the concept of life partnership** which is defined as "a community of family life of two persons of the same sex concluded before the competent authority" the law recognizes the concept of **non-formal life partnership** and defines it as "a community of family life of two persons of the same sex, which

Also this model can be organized in such a way so to apply its provisions exclusively to same-sex couples, or to apply it also to different-sex couples.

Selection of the model is also a selection of the scope of rights and obligations which will be regulated by law, and refers to the three key sets of rights and obligations that should be regulated.

1. **The financial consequences** – the law should regulate how the registered partnership reflects the rights and duties of sustaining a registered partner, both in the course of the union and after its termination. Also it should precisely regulate property relations (property regime, regulation of the consequences upon a registered partnership in relation to joint property and joint debts of registered partners), as well as the right to health and pension insurance, rights relating to compensation and tax exemptions.
2. **Parental consequences** – refer to the possible right of registered partners to be adoptive parents (to adopt children together, adopted stepchildren, one of the partners individually to adopt a child or right to successive adoption).
3. **Other** - refer to the right of registered partners in the event of sickness, criminal procedure and possibly other procedures (obligations of registered partners to mutual sickness care, the right of one registered partner to sick leave due to sickness of the other, the right to visit a registered partner in a hospital and be informed about the health state of the sick partner, the rights pertaining to spouses under the criminal law).

Analysis of the legal system in which the new law should be incorporated in and the legal consequences that are expected after the adoption of the law, leads us to recognize the basic problems we encounter, namely, the difficulties arising from the constitutional and statutory definitions of the family. When we take another look at how the Montenegrin Constitution and laws treat the family we will notice which problems can be encountered today in making a decision on the selection of model for the Law, but we will also try to offer solutions to overcome the problems in order to provide conditions for the selection of the most acceptable model of the Law on registered partnership.

1. Constitution of Montenegro, Article 72

Family shall enjoy special protection.

Parents shall be obliged to take care of their children, to bring them up and educate them.

Children shall take care of their own parents in need of assistance.

Children born out of marriage shall have the same rights and responsibilities as children born in marriage.

Although it does not define the family, from the manner in which the Constitution of Montenegro treats and protects the family should be undoubtedly concluded that the family includes parents and children. So parents and children are obliged to undertake mutual concern under specific circumstances, are equated the children born in and outside of

had not concluded a life partnership before the competent authority if the community lasts at least three years and from the start complies with the requirements for the validity of the life partnership

marriage, and the institution in which are created all the rights and obligations of these entities (parents and children), is specially protected by the Constitution.

2. Family Law, Article 2

The family is a life union of parents, children and other relatives who in the sense of this law have mutual rights and obligations, as well as the other basic life unions in which children are raised and cared for.

From the current definition of the family is crucial to be cumulatively fulfilled two conditions so the members of a particular community get treated as a family. The first condition is the existence of children and the other is the life community among its members.

3. The Law on Pension and Disability Insurance, Article 43

Family members of the deceased insured person or beneficiary under Article 42 of this Law shall be deemed to be:

- 1) the spouse; and*
- 2) the children (born in marriage or out of marriage or adopted; stepchildren who were the insured person's or beneficiary's dependents).*

A spouse from a divorced marriage may also be entitled to a survivor's pension, under the conditions stipulated in Articles 44 and 45 of this Law, provided that his/her right to sustenance was established by an effective court verdict

From the above mentioned, it is clear that the legislator has limited the users of the deceased insured person, and as the only possible stated spouses and children.

4. The Law on Health Insurance, Article 10

Compulsory health insurance rights shall be provided, under the conditions of this Law, to family members of the insured if they do not enjoy them under some of terms quoted in Article 8 of this Law.

In terms of this Law, family members are considered to be:

- members of immediate family: spouse and children from the marriage and out of marriage, adopted children, step-children, and foster*
- members of extended family: parents (father, mother, stepparents, and adoptive parents), grandchildren, siblings if they are permanently and totally incapable for work in terms of specific regulations and if they are supported by the insured person.*

The Law very precisely regulates who is to be considered a member of the family, both close and extended. In case when as the beneficiaries of the rights from the compulsory health insurance arise extended family members is determined the cumulative existence of special conditions (that persons are incapable of independent life and work , that these persons supported by the insured person).

5. The exception is the Law on Protection from Domestic Violence where Article 3 prescribes that:

Family members, within the meaning of this Law, shall be the following:

- 1) spouses or former spouses, children they have in common, and children of each of them separately;
- 2) out of marriage partners or former out of marriage partners irrespective of the duration of out of marriage union, children they have in common, and children of each of them separately;
- 3) blood relatives and relatives from full adoption, in the direct line with no limitation and in collateral line up to the fourth degree;
- 4) relatives from incomplete adoption;
- 5) in-laws to the second degree in marriage and out of marriage union;
- 6) persons sharing the same household irrespective of the nature of their relationship;**
- 7) persons who have a child in common or a child is conceived

Such definition of the family enabled this Law to protect the rights of the members of same sex unions, thus, in relation to other laws, it determines in more flexible manner who are family members.

- 6. The Law on Inheritance** does not define the concept of the family, but in the Article 9 lists precisely who on legal grounds can be called for heritage:

According to the Law, the legacy of the decedent is to be inherited by: his descendants, adopted children and their descendants, his spouse, his parents, adoptive parents, his brothers and sisters and their descendants, his grandparents and their descendants, his great-grandfathers and great-grandmother.

According to the Law the decedent is to be inherited also by his out of marriage spouse who is equal in right of inheritance with the marital one.

By the out of marriage union, in the sense of this Law, is considered a union of woman and man, which lasted for a long time and in which there were no obstacles for entering into a valid marriage, and which ceased because of the death of the decedent.

Legal inheritance is acquiring subjective inheritance right because of and at the moment of the decedent's death, when regarding acquirer (legal heir) exist those legal facts which are defined by law as the legal basis of inheritance of the decedent at the time of opening of the heritage.¹⁶

To the legal inheritance always comes when the decedent did not leave the legacy (testament), i.e. the legacy is null and void or the decedent did not dispose of the whole legacy. In addition the legal inheritance will occur if the testamentary heir dies before the testator or has renounced the inheritance, or at the time of inheritance he was unworthy. If a person does not fall within the circle of potential legal heirs, he will be able to inherit a particular testator only if the late so determines in his legacy, therefore, only as a testamentary heir.

From the above we see that the constitution and mentioned laws have defined concepts of the family and that they do not know the family as a registered union of two persons of the same sex. This also means that at the current state of affairs the rights and obligations which same-sex couples in Montenegro would have are not just narrower than the

¹⁶ Gavella, N.Belaj, Law on Inheritance, Official Gazette, Zagreb, 2008, page189

rights and obligations of those enjoyed by spouses and out of marriage partners, but are in a significant way narrower than the rights under the laws of registered partnership in countries having the laws on registered partnership analysed in the previous section.

On one hand, the law would enable regulation of registration of same-sex partners, but also their mutual rights and obligations would be based on the rights **that stem from the obligace**, not from the rights arising from family relationships.

Based on the above it is clearly excluded the possibility that same-sex partners can conclude marriage, so as the possibility are remaining models under two or three (above 2, 3). It is worth mentioning that in the meantime the countries, on the basis of which model we are supposed to make a recommendation for a model law on registered partnership, passed laws allowing entering into marriage to the same sex partners, so in these countries (Denmark, France) the Law on Registered Partnership ceased to be valid.

On the other hand Netherlands is a country where parallel models survived - registered partnership and right to marry of same-sex couples.

On the other hand, regardless of choice of the model remains the essential question: what rights are eligible for registered partners after the formal recognition of the union or informal.

We believe that there is no impediment to with the law recognize and regulate the rights and duties of mutual sustaining of registered partners, both in the course of the union and after its termination. We also believe that is possible to in this normative framework precisely regulate property relations (property regime, regulation of the consequences that a registered partnership will have in relation to joint property and joint debts of registered partners).

The Law on Inheritance excludes the possibility for a registered partner to inherit the other on the legal grounds. Therefore, the testament remains as foundation for calling to heritage. Disposing with the testament is always falsifiable, since necessary heirs to which by the testament would be violated their right to necessary part have the right to challenge in court proceedings the disposing with the testament in a certain percentage.

Also registered same-sex couples should be able to conclude a contract of lifelong care, if there are circumstances provided by the law for its validity. In this way would be avoided any possibility of the necessary heirs to demand their share of the necessary heritage.

Being that in the near future are not envisaged amendments to the Law on Inheritance, at present there is no framework in which registered partners would be enabled to inherit each other on legal grounds. However, because the provision of this right to registered partners is necessary, which as a practice is confirmed also by the examples of analysed model laws on registered partnership, it is necessary to consider the amendments to the Law on Inheritance.

When it comes to mutual sustainment, pension rights, health insurance, and even the rights classified as "other", they could not be recognized to same sex couples because by special laws they are prescribed for individuals and family members. Since same sex couples cannot enter into the category of the family, as it is now defined, the rights enjoyed by family members from the above-mentioned laws cannot by applied on them.

When it comes to same-sex couples' right to adopt children, today in Montenegro there is also no basis for the recognition of this right, because the law, without doubt, determine who can be adoptive parents as well as the goals of adoption. Thus, Article 8 of the Family Law stipulates: *Through adoption, are established such relationships between the adopter and the adoptee as those existing between parents and children, with the aim of providing to the child being adopted the living conditions enjoyed by the children living in a family.*

From the above, the need to overcome the problem created by the definition of family is clear, otherwise certain rights which based on analysed laws have spouses and out of marriage companions will not be fully applicable to same-sex couples.

Furthermore, should be considered the possibility to, without necessary change of the definition of family, change abovementioned laws through amendments by adding a paragraph stating that the same rights enjoyed by the family members shall apply to registered partners.

In this way there would be no amendments to the Constitution, or the definition of the family, and the same regime in respect of rights and obligations for spouses and out of marriage couples would be established for same-sex couples.

In addition to positive legislation, is not less important to assess the social and political circumstances that we have to bear in mind when deciding on the model to be selected among the possible models.

Looking at the comparative analysis of the regulations, we will see that in no country the first law governing the partnership between persons of the same sex was allowing nowhere near equal rights to those allowed to married or out of marriage partners. The way up to a maximum of rights was long and difficult everywhere. For example, Denmark in 1933 legalized homosexuality and prohibited any form of discrimination based on sexual orientation. Only in 1989, so half a century after that, it adopts the Law on Registered Partnership. Before the adoption of the registered-partnership in the Netherlands was passed anti-discrimination law that included sexual discrimination. Croatia in 2003 adopted a law on same-sex unions which regulated unregistered cohabitation between persons of the same sex. In order for partners to acquire the rights regulated by this law, the union had to last at least three years, and it was regulating sustenance and property relations. This law was also prohibiting discrimination of persons living in same-sex unions. Only after eleven years since its adoption, Croatia adopted a new law that allowed same sex couples all the rights enjoyed by married couples, except the right to adopt children.

Based on the above we can propose the following structure for the model law on registered same-sex unions:

Definition of registered same sex union

The registered same-sex union or registered partnership, is a life union of two adult persons of the same sex (two women or two men), who have registered their civil partnership before the competent public authority in accordance with the provisions of the law on registered same-sex unions.

General principles the registered partnership steams from

(principle of equality, respect, dignity, mutual assistance)

Protection against domestic violence

(full application of the Law on Domestic Violence)

The conditions for the registration of same-sex couples

(the authority responsible for the registration is the registrar: registration can be made by a declaration of wills of two adults of the same sex; the aim of the same-sex union is the community of life; obstacles for the conclusion of same-sex union are: lack of the will to conclude the same-sex union, mental incapacity, being currently married, under-age, consanguinity, adoptive relationship)

Registration procedure

Effects and the legal consequences of registered partnerships

(the obligation of sustenance (right and obligation of mutual sustenance, right and obligation to sustain a minor child of one registered partner by the other))

Property relations

(property of registered partners may be common and separate (apply the model from family law to both the property regime and the conclusion of contract at the notary, which would regulate the property regime in accordance with the will of registered partners))

Inheritance

(Registered partners can inherit on the basis of a testament)

The right to compensation of damages

(in the case of death or severe disability of one registered partner, the other is entitled to compensation for non-pecuniary)

The right to tax exemption

(in legal transactions between registered partners, accordingly are applied rules on the exemption from the obligation to pay transfer tax for the transition of absolute rights applicable on the relations between)

Right in the event of illness

(partners have the right to be informed about the health status of the partner that received medical care)

Rights from pension, disability and health insurance

(partners have the same rights as married couples, and they are regulated by special laws regulating this)

Rights in criminal proceedings

(partners have the same rights as spouses under the Law on Criminal Procedure and the Law on Execution of Criminal Sanctions)

Termination of a registered partnership

(death, cancellation, termination; nullity and voidance; from the reasons by which the conjugal or out of marriage union would be null or void)

Procedure of termination

(complaint, agreement on the termination of registered partnership)

CONCLUSION

After an analysis of comparative laws and solutions they contain in terms of the model law on registered partnership, as well as analysis of the Montenegrin legislation, following conclusions imposed:

- In different countries there are different models, i.e. the rights, obligations and privileges (and their scope too) that same-sex couples gain after registering;
- Montenegro belongs to the group of countries that did not regulate the status of same-sex unions
- There are three models through which it is possible to legally regulate same sex unions:
 1. Model allowing marriage between same-sex couples. According to this model, same-sex couples acquire the same rights and obligations as spouses. In fact their marriage is legally recognized as the marriage of spouses of different sexes (Denmark, France, Netherlands, Slovenia)
 2. Model allowing registered partnership or cohabitation. This model allows for same-sex couples to register with the competent authorities and thus obtain a certain extent of the rights, obligations and legal recognition as married or out of marriage couples (The Netherlands, Germany, England and Wales, Croatia).
This model can be organized in such a way so to apply its provisions exclusively on the same-sex. On the other hand, it is possible to in the same way regulate with this law the rights and obligations for different-sex couples).
Also this model can be organized in such a way so to apply its provisions exclusively to same-sex couples, or to apply it also to different-sex couples.
- In selecting the model we should have in mind that by selecting the model we are, in great deal, selecting a scope of rights and obligations which will be regulated by law, and refer to the three key sets of rights and obligations that should be regulated

(financial consequences, parental consequences, other (rights in the event of illness, criminal proceedings)).

The existing analysis of the legal framework leads us to the obvious conclusion that Montenegro cannot apply a model of same-sex marriage (model 1), and that the model of registered partnership (model 2) is the most acceptable and with the most possibilities to be incorporated into the current legal framework.

Through the presentation of the models we have shown the contents of the future law on registered partnership, going along with the possibilities left by the present legislative system, provided that the suggestion of the team on amending analysed laws get accepted so as to the rights (the rights analysed in the text) enjoyed by the family members get spread also to registered partners.

Registered partnership or cohabitation would allow same-sex couples to register with the competent authorities and thus obtain a certain extent of the rights, obligations and legal recognition which are enabled to spouses or out of marriage couples.

Model 2 which we believe is the most acceptable and which we presented in the previous section, can be organized in two ways (sub-models):

- A) So to apply provisions of the law exclusively to same-sex couples
- B) So that the law allows regulation of rights and obligations at the same way also for couples of different sexes

At this point it is difficult to give an excuse for sub-model B, since in Montenegro the out of marriage union is fully equal with marriage in terms of rights and obligations. In fact, out of marriage partners would move to the category that narrows the scope of rights, and despite the fact that in a registered partnership proving that a partnership exists is extremely simple (which is not the case with out of marriage union), different-sex couples would not have significant benefit.

Finally, model 3 - unregistered cohabitation, it seems, would lead to the same problems in practice that exists at out of marriage union. And that is the problem of proving the existence of such union.

On the other hand, unregistered cohabitation, i.e. the possibility to automatically recognize certain rights and obligations to same-sex couples after the expiry of a certain period of out of marriage partnerships, can be alternatively regulated with the model of registered partnership, as already adopted in some comparative systems (Croatia).

When choosing a model, the legislator should start from the goal of affirmation of the values protected by international standards in the area of human rights and freedoms and the task that Montenegrin society has, which is to combat discrimination based on sexual orientation and gender identity. To in accordance with so set goals find a solution that would overcome the existing problems and finally pass a law that provides most rights to same-sex couples.

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Law on Marriage France

Law on same-sex marriages Netherlands

Law on registered life partnership Germany

Law on Life Partnership of Persons of the Same-sex of Croatia

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