Slovenia: Full Recognition as a Continuous Challenge

1 AUTHORSHIP AND TITLE

1.1 About the author(s)

Duplicate the table if more than one author

Surname	Kogovšek Šalamon
Name	Neža
Title(s)	Dr.
Affiliation	The Peace Institute, Director and Researcher
E-mail of the corresponding author to be included in the report (optional)	neza.kogovsek@mirovni-institut.si
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2 INTRODUCTORY REMARKS

In Slovenia, the legislation provides for legal recognition of same-sex relationship through registration only. Registration of Same-Sex Partnerships Act was passed by the National Assembly in 2005 and became applicable on 23 July 2006. Since the rights recognized to same-sex partners after the registration are narrower than those recognized to spouses this Act is considered as a "weak partnership law."

In the time of writing (November 2014), the Slovenian authorities prepared a proposal for a new Partnership Law Bill which is currently in public discussion. It still does not provide for same-sex marriage, but foresees equal rights for registered same-sex partners and spouses, as well as for equal rights of cohabiting same-sex partners as recognized to their opposite sex counterparts. An exception is joint adoption which is still reserved for opposite sex partners only. The Bill also explicitly states that the Act will be adopted without prejudice to legislation regulating assisted reproduction technologies.[1] If the bill is passed, Slovenia will obtain a "strong partnership law."

However, it needs to be stressed that this is not the first time such proposal recognizing equal rights to almost the full extent, is on the table. In fact, exactly the same proposal was put forth already by the centre-left government ten years ago. Early demands for equal rights of gays and lesbians, including the right to marriage, have been included into the political program of the Union of Socialist Youth of Slovenia

[1] Same-Sex Partnership Law Bill of 14 April 2014, available at http://e-uprava.gov.si/e-uprava/.

(*Zveza socialistične mladine Slovenije – ZSMS*) already in 1989.[2] Several unsuccessful initiatives followed and only in 1997 the Ministry of Family Affairs established an expert group mandated for the preparation of a bill on legal recognition of same-sex partnerships. A bill that was prepared by this group in 1998 never entered the parliamentary procedure.[3] In 2001 a new expert group was established (it comprised not only government officials but also gay and lesbian activists) and in 2003 the bill on same-sex partnership act, which provided for equal rights to same-sex couples except for the right to adoption and marriage, was submitted into the parliamentary procedure. Slovenian People's Party, at the time a member of the government coalition, refused to discuss the bill. Even though the remaining parties in the centre-left coalition reached an agreement on the law, the deliberation was overtaken by 2004 elections, won by conservative parties that consequently formed centre-right coalition. The latter prepared their own bill on registration of same-sex partnerships (providing for very limited rights) without consulting with the civil society working in the field of gay and lesbian rights.[4] Based on this bill, on 22 June 2005 the National Assembly passed the Registration of Same-Sex Civil Partnership Act[5], providing for legal recognition of registered same-sex couples for the first time. The Act became applicable a year later (on 23 July 2006) after the implementing acts were passed. With passing of this Act Slovenia became the 12th country of the European Economic Area which legally recognised same-sex partnerships. Since then the legislation concerning same-sex partnerships has not changed, some rights have been added in other thematic laws, such as Pension and Disability Insurance Act, Employment Relationship Act etc. There is no same-sex marriage in Slovenia, and unlike opposite sex cohabitation unregistered same-sex cohabitation is not yet legally recognized. This might change if the proposal that is currently on the table is passed.

The Constitution of the Republic of Slovenia[6] does not include any clause protecting marriage as a union between a man and a woman, but it also does not mention sexual orientation. The Constitution contains a general anti-discrimination provision in Article 14 §1, which states that everyone shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, gender, language, religion, political or other beliefs, financial status, birth, education, social status, disability or any other personal circumstance.[7] Although sexual orientation is not stated among various grounds on which discrimination is prohibited, this can be derived from the general clause. This means that formally the inclusion of these two grounds among the constitutionally protected grounds of discrimination is subject to the interpretation of the Constitutional Court. The fact that sexual orientation is nevertheless a protected ground in the meaning of Article 14 of the Constitution was confirmed by the unanimous decision of the Constitutional Court No. U-I-425/06 of 2 July 2009 which concerned statutory inheritance rights of same-sex partners. The exclusion of sexual orientation from the grounds explicitly listed in the Constitution was in 1991 a consequence of homophobic viewpoint of the political actors.[8] In spite of the fact that sexual orientation is missing from the Constitution, it is included in the specific anti-discrimination legislation (i.e. Act Implementing the Principle of Equal Treatment, passed as a result of transposition of EU Directive No. 2000/78/EC).

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[2] R. Kuhar, *Same-sex Partnership Policy Debates in Croatia and Slovenia*, in *Südosteuropa*, 2011, 32.
[3] Ibid., 33.
[4] Ibid., 34.
[5] The Registration of a Same-Sex Civil Partnership Act, Official Gazette of the Republic of Slovenia, No. 65/2005. Official translation is available at the website of the Ministry for Labour, Family and Social Affairs: http://www.mddsz.gov.si/fileadmin/mddsz.gov.si/pageuploads/dokumenti__pdf/z_registracija_ips_en.pdf.
[6] *Ustava Republike Slovenije* [The Constitution of the Republic of Slovenia], Official Journal of the Republic of Slovenia, No. 33/1991, 42/1997, 66/2000, 24/2003, 69/2004.
[7] This rule must be respected even in cases of the temporary suspension and limitation of human rights in case of war or emergency, Article 16 of the Constitution.
[8] See SiQRD – Slovenian Queer Resource Directory, Škuc Magnus, *at* http://www.ljudmila.org/siqrd/dosje.php.

Gender identity remains outside the scope of Slovenian law and is also not mentioned by the Constitution. Protection from discrimination on the grounds of gender identity can be derived from the already mentioned general clause 'any other personal circumstance'. The one law that briefly mentions gender identity is International Protection Act which regulates asylum procedures in Slovenia, however, only in relation to the definition of particular social group, and only as a result of a transposition of an EU directive that mentions this concept. Gender reassignment is not legally regulated nor is the position of intersex persons. Both issues are dealt with exclusively within the medical system and the protocols developed within this system.

Gays, lesbians, bisexual, transgendered and intersex persons are protected from hate speech both on Constitutional level as well as within the criminal law system. According to Article 63 of the Constitution any incitement to ethnic, racial, religious or other type of inequality, hatred or intolerance is unconstitutional. Incitement to hatred, violence on intolerance based on, inter alia, sex, sexual orientation or any other personal ground is prohibited and shall be punished with imprisonment of up to two years, upon the condition that the act threatened or could threaten public order or that it is committed by use of threat or insult.

3 TERMINOLOGY AND CONCEPTS IN THE *LEGAL* DISCOURSE

In Slovenian language there is one term (*spol*) for both "sex" and "gender". The term "gender" is marked with the term "sociological sex" (*sociološki spol*). However, legal sources only mention "sex" (*spol*), without indicating whether it is meant as "sex" or "gender". "Gender identity", for example, is marked with a term "*spolna identiteta*". In the legal language, "sex "(*spol*) therefore includes also "gender" as a socio-cultural category. An example of this is the main law that prohibits discrimination on a number of grounds (i.e. Act Implementing the Principle of Equal Treatment[9]). This law mentions "sex" as one of the protected grounds. "Gender identity" is not specifically listed as a protected ground, but can be included in "other" grounds as the list of grounds is open-ended. One example of an act that mentions "gender identity" is International Protection Act.[10] Article 27 (6) defines the notion of "membership of a particular social group" which is a protected ground under the Geneva Convention on the Status of Refugees. The law states that in defining membership of a particular social group the aspects related to sex, including gender identity, have to be taken into account.

The term "transsexual" or "transgender" are not used in the Slovenian legislation and other legal sources. There are no nouns in the legislation used to describe the person, meaning that the terms "transsexual" or "transgendered person" cannot be found in the official legal sources. In cases that concern change of sex the legislation refers to "gender reassignment" (*sprememba spola*). For example, Article 37 of the Rules on the implementation of the Births, Deaths and Marriages Registry Act state that change of sex is written into the register on the basis of a decision issued by a competent body. The decision is issued on the basis of the confirmation written by a competent doctor, on the basis of which it is evident that a person underwent gender reassignment.

Similarly, the terms "intersexuality" or "intersexual persons" are also not present in the official legal sources. In non-legal literature, mostly medical, various terms are used to describe intersexuality, such as

[9] Zakon o uresničevanju načela enakega obravnavanja (Uradni list RS, št. 93/07 - uradno prečiščeno besedilo).
[10] Zakon o mednarodni zaščiti (uradno prečiščeno besedilo) (Uradni list RS, št. 11/11).

"hermaphroditism", "dual sexuality" (*dvospolnost*), "both-sexuality" (*obojespolnost*), "intersex" (medspol), "third sex" (*tretji spol*), "sexual inconsistency" (*spolna nedorečenost*), "disorder in sexual differentiation" (*motnje v spolni diferenciaciji*) and "disorder in development of sex" (*motnje v razvoju spola*).[11]

The main term used to describe LGB people is "sexual orientation" (*spolna usmerjenost*). This term is used in the main non-discrimination act, i.e. Act Implementing the Principle of Equal Treatment, and also in other relevant acts such as Employment Relationship Act,[12] Penal Code,[13] and Protection of Public Order Act.[14] Gays, lesbian, and bisexual persons are not mentioned in the legislation. The terms are not used even in the legislation which officially recognizes same-sex relationships (i.e. Registration of Same-sex Partnership Act[15]), in spite of the fact that this law address specific situation of gays and lesbians. The act rather refers to "persons of the same sex". The legislation also does not specifically mentions transsexual or intersex persons.

4 GENDER IDENTITY

Gender identity is not explicitly listed as a protected ground in the Constitution or in the Act Implementing the Principle of Equal Treatment[16], the main non-discrimination act. Both legal sources include an open-ended list of grounds that cover gender identity as well. Both sources mention "sex" as one of the protected grounds, and as already mentioned the Act Implementing the Principle of Equal Treatment also includes the notion of "sexual orientation". However, since both sources contain an open-ended list of grounds it is more likely that gender identity would be considered as a specific ground falling rather under "any other personal ground" than under "sex" or "sexual orientation".

There is no regulation of gender reassignment procedure. Namely, there are no legally binding rules on how, when, under what conditions and consequences gender reassignment is carried out. The whole procedure is completely individualized, carried out within the medical system and depends on the particular specialized doctor. In practice, the first step in the procedure comprises of a visit to a psychiatrist who makes an assessment and designs treatment that is most appropriate for the person concerned. This means that other possible "diagnoses" (transsexualism, homosexuality etc.) have to be excluded at this point. When the diagnosis of transgenderism is confirmed (generally after two years of seeing a psychiatrist) a five-member multidisciplinary medical commission comprised of psychiatrist, plastic surgeon, urologist, endocrinologist and gynaecologist meets and discusses further treatment. Then usually a hormonal therapy starts, lasting for at least one year. During this time the person has to regularly see his or her psychiatrist.[17] Since the procedure is not regulated there are no legal conditions that have to be met to undergo legal gender reassignment. There is no condition of sterility, gender reassignment surgery or age requirement.

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[11] Tonja Zadnik, "Interseksualnost kot izziv spolni dihotomiji: primer indijskih hidžer" (Intersexuality as a Challenge for Sexual Dichotomy: The Case of Indian Hijras", diploma Thesis, mentor dr. Zdenka Šadl, co-mentor: dr. Lucija Mulej, faculty of Social Sciences of the University of Ljubljana, 2006.

[12] Zakon o delovnih razmerjih (Uradni list RS, št. 21/13 in 78/13 - popr.).

[13] Kazenski zakonik (uradno prečiščeno besedilo) (Uradni list RS, št. 50/12).

[14] Zakon o varstvu javnega reda in miru (Uradni list RS, št. 70/06).

[15] Zakon o registraciji istospolne partnerske skupnosti (Uradni list RS, št. 65/05 in 55/09 - odl. US).

[16] Zakon o uresničevanju načela enakega obravnavanja (Uradni list RS, št. 93/07 - uradno prečiščeno besedilo).

[17] Lothar Orel: "Trans: Operacija spola v Sloveniji: operacija (skoraj) nemogoče" ("Trans: Gender Reassignment in Slovenia – Mission (almost) Impossible"), *Narobe*, 19 October 2012, available at: http://www.narobe.si/stevilka22-23/stevila-22-23/tema/operacija-spola-v-sloveniji (August 2014).

There is also no legal condition requiring a transgender person to be single, to get a divorce or end registered partnership. Namely, neither Marriage and Family Relations Act nor Registration of Same-Sex Partnership Act imposes such requirement for transsexual persons. Legally, there is also no requirement of diagnosis before gender reassignment takes place. However, as mentioned, in practice other possible psychiatric diagnoses have to be excluded in order for the doctor to issue a confirmation on gender reassignment.

The legal basis for changing the person's legal gender is Central Population Register Act. The provision of Article 8 (3) of this Act states that if the personal identification number is defined for the wrong sex, the Population Register manager annuls it and appoints a new identification number. This rule is used also in cases of transsexual persons as it covers cases when an individual has a "wrong" identification number due to gender reassignment.[18] Entering the new gender into the civil registry is defined with a by-law titled *Rules on the implementation of the Births, Deaths and Marriages Registry Act*[19]. Article 37 of the by-law states that change of gender is entered into the register based on a decision by a competent public authority. The basis for issuing such a decision is a certified statement issued by a competent health care provider or medical doctor, which clearly states that a person has changed his/her sex. Before a change of gender is entered into the registry the civil registry officer has to request a new personal identification number. The law also states that any extract from the civil register containing information about the new gender is issued without any reference to the previous gender.

According to an NGO report, anecdotal evidence provided by persons who underwent gender reassignment procedures in Slovenia show that practices differ. In some cases the civil registry requires a certified statement from psychiatrist while in other cases a statement from the surgeon who has performed gender reassignment is required. They report that in practice in some cases seriously invasive medical treatment, possibly including sterilization, is imposed.

There are no provisions that would explicitly define whether medically assisted procreation is available to trans persons in Slovenia. Donor insemination is generally regulated by the Infertility Treatment and Procedures of Biomedically-Assisted Procreation Act.[20] The beneficiaries of infertility treatment procedures are defined in Article 5 (section 2) which states that eligible persons are "a man and a woman who live in marriage or in extramarital partnership, who, in the light of medical science, cannot expect to achieve conception by means of sexual intercourse and cannot be assisted with other types of infertility treatment". This definition does not provide any details on whether the terms "man" and "woman" apply also to transgendered persons, and if they do apply in what way. It is possible to expect that these terms would be interpreted conservatively and that a woman would be entitled to treatment usually available to women and a man a treatment that is usually available to men, and not vice versa. A consequence, such interpretation could lead to denial of treatment for woman to man and man to woman transpersons. They would not meet the requirement of "in light of the medical science not being able to expect to achieve conception by means of sexual intercourse and cannot be assisted with other types of infertility treatment". Namely, the inability to conceive a child would not be a consequence of infertility but in the sense of not having appropriate physiognomy needed for conception. However, this is speculative as there is no relevant case law or practice in this field.

[18] Staša Grom: "Pravni in etični vidiki transseksualnosti in spremembe spola" ("Legal and Ethical Aspects of Transsexuality and Gender Reassignment"), Diploma Thesis, Mentor: dr. Suzana Kraljić, University of Maribor, Faculty of Law, p. 15.
[19] Pravilnik o izvrševanju zakona o matičnem registru (Uradni list RS, št. 40/05 in 69/09).
[20] Zakon o zdravljenju neplodnosti in postopkih oploditve z biomedicinsko pomočjo (Uradni list RS, št. 70/00).

If gender reassignment procedure takes place in another jurisdiction its recognition depends on whether reassignment was completed with a judicial or administrative decision. In Slovenia, recognition of foreign judicial decisions is regulated with the Private International Law and Procedure Act.[21] According to Article 94, section 1 of this Act, a foreign judicial decision is treated equally with a decision issued by a court of the Republic of Slovenia, and has the same legal effect as a domestic decision, only if it is recognized by a court of the Republic of Slovenia. One of the more important elements which must be considered in such procedures is that a foreign judicial decision is not recognized if the effect of its recognition would be "contrary to the public order of the Republic of Slovenia", as stipulated in Article 100 of the law. In this aspect, "public order" should not be understood as all the norms and provisions of the currently valid legislation in Slovenia, but only as a basic principle of law. In other words, in such cases the courts in Slovenia are not allowed to examine whether or not the same type of decision would be possible under Slovenian law, but can only evaluate the effects of the recognized decision and their relation to public order.

For recognition of administrative decisions judicial procedure is not required. However it is questionable whether there would be a need of recognition of such decision. Usually when a person underwent gender reassignment and this was recognized with a judicial decision, the change of sex would probably result in marking of this change on the birth certificate. In this aspect the birth certificate of a trans person would not differ from any other birth certificate. This means that the conditions for recognition of this birth certificate would be the same as conditions for recognition of any birth certificate. No additional conditions for recognition of birth certificate are stipulated in the law.

Due to the lack of legal regulation no specific rights are legally recognized only to transgendered persons. Consequently, lack of recognition of gender reassignment performed abroad would at least in the law not lead to any disadvantaged position compared to persons who have undergone gender reassignment in Slovenia. Lack of recognition could, however, have negative practical implications deriving from the fact that legal gender would not match the general appearance of the person.

5 INTERSEXUALITY

In Slovenia, there are no legal provisions or administrative guidelines related to intersexuality or governing situations of intersexuality. These situations remain entirely in the competence of medical professionals. Sex of the person is determined already in maternity hospitals.[22] If medical professionals identify disorders in relation to sexual organs they decide on the manner in which these disorders will be remedied. Based on the anatomical characteristics of the person and development of the person's brain the doctors advise the parents on which sex to select and perform an operation on the child.[23] Treatment of intersexual persons is similar to treatment of transsexuals and can include operation of genitalia, hormonal therapy and

[21] Zakon o mednarodnem zasebnem pravu in postopku (Uradni list RS, št. 56/99 in 45/08 - ZArbit).

[22] Tonja Zadnik, "Interseksualnost kot izziv spolni dihotomiji: primer indijskih hidžer" (Intersexuality as a Challenge for Sexual Dichotomy: The Case of Indian Hijras", diploma Thesis, mentor dr. Zdenka Šadl, co-mentor: dr. Lucija Mulej, faculty of Social Sciences of the University of Ljubljana, 2006.

[23] Tea Hvala, "Interseksualnost in ideologija naravnega v slovenski medicini" ("Intersexuality and the ideology of natural in Slovenian medicine"), *Narobe*, 18 October 2009, available at: http://www.narobe.si/narobe-11/interseksualnost (September 2014).

socialisation appropriate for a certain sex.[24] Accordingly, intersexual persons officially do not exist since the doctors place them either in the male or in the female category.

Research shows that, in Slovenia up to two children per year are born with undetermined sex. Sex of the child is not written on the birth certificate until the doctors decide on the child's sex, which lasts for up to three days. Intersexuality is considered as unacceptable and the only goal of official medicine is fast normalization of the situation. Intersexuality is a situation which is regarded as urgent from the medical perspective and the child is treated in the same way as if he or she was seriously ill. The opinion on the child's sex is given by a medical commission that comprises of a gynaecologist, surgeon, endocrinologist, and also urologist and geneticist if necessary, while if a child is already bigger also a psychologist and a psychiatrist. The commission works in the capital, therefore each child born elsewhere in the country is first transferred to the maternity hospital in Ljubljana where the treatment takes place.[25] After the doctors and parents decide on the sex of the child, the sex is written on the birth certificate and the child is considered to be of that sex.

Since the procedure of gender assignment in case of intersexuality is not legally regulated, there is no special right of appeal the decision taken by the parents (as advised by the doctors) and no specific safeguards are in place. The child and the parents have general legal remedies at their disposal, such as compensation claim in case of damage caused by operation. No case law on the matter exists at the moment. If intersex persons later express a wish to have their sex reassigned, they have this possibility within the health insurance scheme. This however would mean that they have to again submit themselves to painful operations and long-lasting hormonal treatment. There are a number of ethical dilemmas concerning intersexuality and mandatory sex assignment which is taking place in Slovenia, however elaborating on them here would exceed the purpose of this contribution.

Intersex people enjoy legal protection from discrimination due to the open-ended list of grounds in non-discrimination provisions in the Constitution and the main non-discrimination act – Act Implementing the Principle of Equal Treatment. In the same way they are also protected by hate speech and hate crime legislation, concretely by the Penal Code. None of these legal sources explicitly mention intersexuality as a personal ground, but include a general clause prohibiting discrimination on "any other personal ground" that is not specifically listed in legal provisions.

Intersex persons can ask for reassignment of their legal gender in the same way as transsexual persons. As mentioned, none of these two situations is legally regulated. The only provision that is relevant is the provision in the already mentioned by-law. Namely, Article 37 of the Rules on the Implementation of the Births, Deaths and Marriages Registry Act states that change of gender is entered into the register based on a decision by a competent public authority. The basis for issuing such a decision should be a certified statement issued by a competent health care provider or medical doctor, in the same way as for transsexual persons. Since intersexuality situation is not explicitly mentioned by law so clear responses to the issue at stake are not available. Due to the lack of legal rules, but also due to the lack of actual cases it is not possible to state clearly whether gender reassignment of an intersex person would be treated as rectification or as reassignment.

[24] Ibid.
[25] Ibid, p. 42.

6 BECOMING PARENTS

6.1 Adoption

In relation to adoption, homosexuality is of relevance from two different aspects. The first aspect concerns homosexuality of a child put for adoption. Such option is by all means possible and the question arises whether such situation would invoke doubts about the child's suitability for adoption. However, at the moment there is no evidence that would confirm the existence of judicial or administrative prejudice against homosexuality that would result in blockage of such adoption or any other problems related to adoption procedures.

The second aspect concerns sexual orientation of adoptive parent or parents. According to Marriage and Family Relations Act[26] (Articles 134 and onwards) single persons in general may adopt children. Discrimination on the grounds of sexual orientation is prohibited in all fields of life (according to Act Implementing the Principle of Equal Treatment), including adoption procedures. Therefore, single gays and lesbians have equal rights in access to adoption procedures as heterosexual persons.

Civil or marital status of the single applicant for adoption plays a significant role in adoption procedures. Namely, as provided by Article 138 of the Marriage and Family Relations Act, if a person is married, he or she can only adopt a child jointly with his/her spouse, unless one of them adopts a child of his/her spouse (second-parent adoption). This means that a spouse cannot adopt a child if the other spouse does not adopt as well. This is not necessarily the case with registered partners. There is no provision in the law that would preclude one of the registered or cohabiting (same-sex or opposite-sex) partners from adopting on her/his own. Accordingly, a person who lives in registered or cohabiting partnership would be treated as a single person in adoption procedures.

While there are no residency requirements in the law for applicants for adoption, this is not the case with nationality which is relevant for adoption procedures. Namely, according to Article 140 of the Marriage and Family Relations Act, the adopter may be a foreign national exceptionally, if social services could not find a suitable adopter among nationals of the Republic of Slovenia. In case the adopter is a foreign national consent of the minister for family and the minister for public administration is required for such adoption. Such consent is not necessary when the adopter is a spouse of the child's parent and performs second-parent adoption.

In addition to nationality, there are some other conditions that have to be met by adoptive parents. A person cannot adopt if his/her parental rights were withdrawn, if there is a justified reason to believe that the adoption would be abused on account of the adopted child, if the adopter does not guarantee that parental rights will be exercised in the best interest of the child, if the adopter's legal capacity was withdrawn, or the adopter has such intellectual disability or illness that would be dangerous for the adopted child (Article 139, Marriage and Family Relations Act).

Slovenia has concluded only one bilateral agreement on inter-country adoptions, namely with Macedonia.[27] An agreement with the Russian Federation is being negotiated but is not concluded yet. In the agreement with Macedonia there are no provisions that would explicitly prohibit or allow adoption by a single gay, lesbian or trans person. According to Article 4 (2) of the agreement, the state where the national of the

[26] Zakon o zakonski zvezi in družinskih razmerjih (uradno prečiščeno besedilo) (Uradni list RS, št. 69/04).
[27] Act Ratifying the Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Macedonia on Interstate Adoptions, Uradni list RS – Mednarodne pogodbe, št. 15/07.

other state applied for adoption checks whether the candidates for adoption meet the conditions valid in the application-receiving state. The obstacles for adoption therefore exist already in the national legislation.

Second parent adoption is legally possible for both registered and unregistered same-sex partners. The 1976 Marriage and Family Relations Act clearly defines only single adoption and joint adoption, whereas second-parent adoption is defined indirectly and is being done using legal interpretation of the Act. Namely, Article 138 of the Act states that "married partners can only jointly adopt a child, except in the case when one of the spouses adopts a child of the other spouse". Article 135 further states that "no-one may be adopted by more than one person, except in the case of a joint adoption by spouses". However, the law does not explicitly regulate a situation in which one person who is not a spouse, but a registered or cohabiting partner of the parent, wishes to adopt the partner's child. Legal theorists took the position that the lack of clear rules does not prevent the parent's partner from adopting the partner's child (second-parent adoption) since this is still in accordance with the principle that no-one may be adopted by more than one person except in the case of joint adoption by spouses. This position was also supported by the Supreme Court.[28] In July 2011 the first such second-parent adoption was carried out in practice. One of the partners in a lesbian couple filed for adoption of her partner's biological child. Her application was first rejected by the centre for social work, but on appeal it was approved by the Ministry of Labour, Family and Social Affairs. The Ministry justified its decision, stating that the second-parent adoption is still in accordance with the principle that no-one may be adopted by more than one person, except if the adopting parents are two spouses. The Ministry also stated that the law does not contain any limitations with regard to the marital status, sex or sexual orientation of the adoptive parent. It concluded that limiting second-parent adoption to male-female couples only would violate the principle of non-discrimination.[29] The decision is considered to be a landmark case, showing that the existing legislation adopted 35 years ago already allows for second-parent adoption within same-sex couples. Several second-parent adoptions have been carried out since then. The law applies equally to registered and unregistered same-sex partners.

Since Slovenia does not provide for same-sex marriage second-parent adoption carried out by a same-sex spouse is not explicitly foreseen. In cases of couples who concluded same-sex marriage in another country that allows such marriage, it is safe to conclude that such couples would also have the right to second-parent adoption. Such conclusion is based on *a fortiori* argument: if second parent adoption is possible for registered same-sex couples it should be even more so possible for same-sex spouses, since marriage is a stronger institution than registered partnership.

There are no residency requirements to carry out second parent adoption. There is however a requirement on citizenship which is the same as in the case of adoption by a single person: according to Article 140 of the Marriage and Family Relations Act, the adopter may be a foreign national exceptionally, if the social services could not find a suitable adopter among nationals of the Republic of Slovenia. In case the adopter is a foreign national consent of the minister for family and the minister for public administration is required for such adoption. Such consent is not necessary when the adopter is a spouse of the child's parent.

As in the case of adoption by a single person, second parent adoption may not be carried out if the person's parental rights were withdrawn, if there is a justified reason to believe that the adoption would be abused on account of the adopted child, if the adopter does not guarantee that parental rights will be exercised in

[28] Conclusion of the Supreme Court of the Republic of Slovenia no II Ips 462/2009–9 of 28 January 2010.
[29] Ministry of Labour, Family and Social Affairs, decision no 12030–7/2011/4 of 14 July 2011.

the best interest of the child, if the adopter's legal capacity was withdrawn, or the adopter has such intellectual disability or illness that would be dangerous for the adopted child (Article 139 of Marriage and Family Relations Act).

Adoption of the adoptive child of the partner (subsequent adoption) is not explicitly regulated in the Slovenian legislation. However, in accordance with Article 142 adopted children have the same legal position as biological children of the adopting parents. Accordingly, this means that adopted children of the partner should be treated equally in second-parent adoption procedures as biological children of the partner. The best interest of the child should be a primary consideration in all procedures concerning children and subsequent adoption is not an exception.

The same conclusion could be drawn in relation to same-sex spouses, taking into account the *a fortiori* argument, as already mentioned above in the section on second-parent adoption.

There are no residency requirements in the law for applicants for adoption. There is however a requirement on citizenship which is the same as in the case of adoption by a single person and second-parent adoption.

Other conditions are the same as in the case of single and second-parent adoption. A person cannot adopt if his parental rights were withdrawn, if there is a justified reason to believe that the adoption would be abused on account of the adopted child, if the adopter does not guarantee that parental rights will be exercised in the best interest of the child, if the adopter's legal capacity was withdrawn, or the adopter has such intellectual disability or illness that would be dangerous for the adopted child (Article 139, Marriage and Family Relations Act).

Access to joint adoption is reserved to opposite sex couples only. Same-sex partners do not have access to joint adoption in Slovenia, regardless if they are cohabiting or registered or if they got married abroad. According to Article 135 of Marriage and Family Relations Act, only opposite-sex spouses can jointly adopt a child. According to Article 3 of this Act, marriage is a legally regulated relationship of a man and a woman. This means that by law only opposite sex spouses can jointly adopt a child.

As already mentioned, Slovenia has concluded only one bilateral agreement on intercountry adoptions, namely with Macedonia. In the agreement with Macedonia there are no provisions that would explicitly prohibit or allow joint adoption by a gay, lesbian or trans couple. According to Article 4 (2) of the agreement, the state where the national of the other state applied for adoption shall check whether the candidates for adoption meet the conditions valid in the application-receiving state. The obstacles for adoption therefore exist already in the national legislation.

No practices of workarounds were identified to de facto reach the same results as joint adoption, such as first single and then subsequent second-parent adoption.

Legally gender identity has no impact in accessing adoption. Non-discrimination principles apply in such situations as well, as the non-discrimination law (i.e. the Constitution and Act Implementing the Principle of Equal Treatment) covering all personal grounds is applicable in all areas of life. No case law exists with regard to gender identity and adoption.

Statistics on adoptions carried out by single persons segregated by sexual orientation and gender identity do not exist. Personal grounds of sexual orientation and gender identity are considered to be sensitive data that may only be collected with the consent of the person concerned, as required by Personal Data

Protection Act. According to available information, there were at least five second parent adoptions carried out in Slovenia so far. In all cases the partners were registered, all couples were lesbian. All recorded cases concerned second-parent adoption of biological children by the parent's same-sex partner.

6.2 Medically assisted procreation (MAP)

Donor insemination is not available for single applicants. The applicant has to be married to a person of the opposite sex or has to be in cohabiting relationship with a person of the opposite sex. Donor insemination is regulated by the Infertility Treatment and Procedures of Biomedically-Assisted Procreation Act.[30] This Act takes the approach that donor insemination is one of the procedures for treatment of infertility, which means that establishment of infertility is one of the conditions of eligibility for these procedures which are paid for by the medical insurance scheme. The beneficiaries of infertility treatment procedures are defined in Article 5 (section 2) of this Act which states that eligible persons are a man and a woman who live in marriage or in extramarital partnership, who, in the light of medical science, cannot expect to achieve conception by means of sexual intercourse and cannot be assisted with other types of infertility treatment. Another exceptional option for using donor insemination is allowed in cases where this would prevent the transmission of a severe genetic disease to the child (Article 5, section 3). Accordingly, this means that donor insemination in Slovenia is not available for single women or women with female partners, regardless of their nationality.

In 2001, the government proposed that artificial insemination services also become available for single women. On 19 April 2001, amendments to the Act were adopted enabling access to assisted reproduction technologies to single women. Consequently 34 members of the parliament who disagreed with the amendments filed an initiative for a legislative referendum, which was a possibility provided for in the Constitution. The referendum results of 17 June 2001 prevented the amendments to the law from entering into force, with a vote of 72.36% against the amendments. Consequently, assisted reproduction technologies only remain available to married and unmarried male-female couples.

For artificial insemination, the cells which are used are generally those of a man and a woman who are married or who live in extramarital partnership (Article 8, section 1). Exceptionally, donor semen or donor ova may be used if, according to medical science, there is no possibility that insemination with cells from a man and woman who are married or who live in an extramarital partnership would be successful, or if other procedures have been unsuccessful (Article 8, section 2). In any case, artificial insemination with donor semen and donor ova used at the same time is not permitted.

Since artificial insemination is not available to same-sex couples parenthood of the intentional couple in these situations is not regulated. Only rules regarding parenthood of opposite-sex couples exist in the national legislation, regardless of the fact whether the child has been conceived naturally or by way of assisted insemination. The mother of the child is a woman who gave birth to the child. According to Article 86 of the Marriage and Family Relations Act, the mother's husband is considered to be the father of the child who is born in matrimony or in the period of 300 days after the termination of matrimony. If the child is born out of wedlock the man who recognises his fatherhood is considered to be a child or the man whose fatherhood has been determined with the judicial decision. There are no similar provisions for same-sex couples.

[30] Zakon o zdravljenju neplodnosti in postopkih oploditve z biomedicinsko pomočjo (Uradni list RS, št. 70/00).

There are also no provisions that extend the effects of the law extraterritorially. If MAP is carried out abroad, the woman who gives birth to a child is considered as a mother, while the mother's partner may carry out second-parent adoption.

Due to the lack of access to artificial insemination techniques for same-sex couples lesbian couples have often resorted to 'home' insemination techniques. When the child was born the father of the child has usually remained unknown, but the child was later adopted by the mother's partner through second-parent adoption. When the parents requested a birth certificate for the child, there were cases when the gestational mother was listed as a parent, while the adoptive mother was listed under 'comments' and not as a second parent. In these cases distinction between the two mothers was clearly evident already from the birth certificate. The authorities explained that this is due to the fact that the IT system does not accept the personal identification number of persons of the same sex as parents. However, this was not the case in all such situations. Some same-sex couples received 'normal' birth certificates with both mothers listed as parents on equal basis. The practice remains inconsistent.

In Slovenia, obtaining parental rights through surrogacy is not permitted by law. By definition, surrogacy implies the need for assisted reproduction services, such as artificial insemination of donor ova or the ova of the surrogate mother (in the latter case, the surrogate mother is also the genetic mother of the child).

For this reason, the provisions prohibiting surrogate motherhood are contained in the Infertility Treatment and Procedures of Biomedically-Assisted Procreation Act. Article 7 of this Act states that a woman who intends to give the baby to a third person after birth (with or without financial compensation) is not entitled to assisted reproduction services. If the prohibition of provision of donor insemination services for the purposes of surrogacy is not respected, the person who provides such services is punished for a misdemeanor in accordance with the Infertility Treatment and Procedures of Biomedically-Assisted Procreation Act. The punishment is from 209 EUR to 627 EUR for natural persons who provide donor insemination for the purposes of surrogacy, and for from 2090 EUR 20.920 EUR for legal persons. The natural person may also be found guilty of a crime specified in Article 121 of the 2008 Penal Code. The punishment for such a crime is imprisonment for between six months and five years. There are no rules in the law prohibiting giving advice on surrogacy or advertising of surrogacy services abroad.

In spite of the fact that surrogacy is not allowed the law does not contain any provisions with extraterritorial effect. On the opposite, if surrogacy is carried out in another country and parental rights are obtained by way of judicial decision, these – if recognised by Slovenian courts – have full legal effects in Slovenia. Once the judicial decision granting parental rights to a child who was born through surrogacy is recognised, parental rights of the child's parents are fully recognised in Slovenia and the child whose parents are Slovenian citizens may be registered in the civil registry of citizens and is granted Slovenian nationality. On this basis the passport is issued to a child.

At the time of writing there have been no cases in which a child was born through surrogacy in another EU Member State to a same-sex couple who are Slovenian nationals. However, there has been such a case in which the child was born in the USA. In this case, the parental rights of the same-sex (male-male) couple were recognised, through the procedure for recognition of foreign judicial decisions.[31]

[31] District Court of the Republic of Slovenia, Judgment No. I R 226/2010 of 26 April 2010.

6.3 Multiple parenthood

Slovenia does not provide for or envisage situations of multiple parenthood. Even second parent adoption is not possible if it could lead to a child having more than two legally recognized parents. Second parent adoption is possible only if one of the biological parents (usually the father) is not known, or if the biological parent agrees with second parent adoption and renounces his or her parental rights.

Multiple parenthood is also not an issue with regard to non-full adoptions as the law provides only for full adoptions.

6.4 Recognition of foreign judgments/certificates or civil status documents

Recognition of foreign acts depends on the type of the act at stake, i.e. whether the act is of administrative or judicial nature. The recognition of a birth certificate would usually come at stake when Slovenian parents would wish to transfer their nationality to their child born abroad. The issue of recognition of birth certificates issued by hospitals is not explicitly regulated by law but would be dealt with in accordance of the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents. For automatic recognition the documents have to meet the requirements from the convention. Therefore, the response would depend on the type of document and might be subject to judicial review. The same procedure would be used for birth certificates issued by the civil status authority (other than hospital) of another country.

The procedure for recognition of foreign judicial decisions must be carried out in accordance with the Private International Law and Procedure Act.[32] According to Article 94, section 1 of this Act, a foreign judicial decision is treated equally with a decision issued by a court of the Republic of Slovenia, and has the same legal effect as a domestic decision, only if it is recognised by a court of the Republic of Slovenia.

Recognition of foreign judicial decisions is particularly relevant in cases of surrogacy performed abroad where parental rights have been granted parental rights by a court decision. In these cases this means that the court would have to take into account, for example, the rights of the child and evaluate whether it is in the best interests of the child to have its parents recognised in the country of its birth but not in Slovenia. So far there have been no cases in which a child was born through surrogacy in another EU Member State to a same-sex couple who are Slovenian nationals. However, there has been such a case in which the child was born in the USA. In this case, the parental rights of the same-sex (male-male) couple were recognised, through the procedure for recognition of foreign judicial decisions.[33] Recognition of foreign judicial decisions is also relevant for cases of (single, second-parent and joint) adoption where parental rights have been granted to parents by a court decision. In Slovenia one such adoption decision issued by a US court has already been recognised, on the grounds of the best interest of the child. Due to appeal of the State Prosecutor's office the case was also dealt with by the Supreme Court, which upheld the lower courts recognition decision.[34] In this case the Prosecutor's Office used the option provided to it by law to intervene by filing a claim for protection of legality (a legal remedy provided by the law) in the procedure initiated by private citizens in court, in order to challenge the decision of the first instance court. The Prosecutor's Office claimed that joint adoption by same-sex couples is not allowed in Slovenia, and that consequently, recognition of judicial decision granting parental rights to same-sex parents who jointly adopted a child is therefore also not allowed. Even though the claim lodged by the Prosecutor's Office

[32] Zakon o mednarodnem zasebnem pravu in postopku (Uradni list RS, št. 56/99 in 45/08 - ZArbit).
[33] District Court of the Republic of Slovenia, Judgment No. I R 226/2010 of 26 April 2010.
[34] Conclusion of the Supreme Court of the Republic of Slovenia no II Ips 462/2009–9 of 28 January 2010.

contained only legal arguments, the sole fact that it was lodged indicated a differential treatment based on sexual orientation. Namely, such claim was never lodged in cases of recognition of adoption carried out abroad by heterosexual couples or singles.

One of the more important elements which must be considered in such procedures is that a foreign judicial decision is not recognized if the effect of its recognition would be contrary to the public order of the Republic of Slovenia. In this aspect, public order should not be understood as all the norms and provisions of the currently valid legislation in Slovenia, but only as a basic principle of law. In other words, in such cases the courts in Slovenia are not allowed to examine whether or not the same type of decision would be possible under Slovenian law, but can only evaluate the effects of the recognised decision and their relation to public order.

A couple that has given joint consensus to MAP is not obliged to give any declarations at birth based on the fact that a child has been conceived through MAP. At birth there are no differences in treatment of children conceived through MAP or those conceived naturally. Differences in treatment in relation to declarations that have to be given in order for parental rights to be recognized are related to civil status of the parents. If the parents are married gestational mother is considered to be the child's legal mother, while the mother's husband is considered to be the child's father, if the child is born in wedlock or within the period of 300 days after the termination of matrimony. If the child's parents are not married but cohabiting, the man who recognizes the child after both or whose fatherhood is determined by way of judicial decision is considered to be the child's legal father. A same-sex partner of gestational mother can only become a legal parent through second-parent adoption. Any kind of declaration given at birth has no legal value and is not foreseen by law.

In case of surrogacy performed abroad parental rights are usually granted to intended parents by way of judicial decision, which might or might not mention the name of gestational mother, depending on the jurisdiction within which the judicial decision was issued. There is no requirement that such decision should contain the name of gestational mother, in order to be recognized in Slovenia in accordance with the International Private Law and Procedure Act. Not mentioning the name of the gestational mother would generally not violate the Slovenia law.

In principle, entry of the civil status as a parent into Slovenian public registries is not a necessary condition to exercise parental rights in everyday life. Proof of recognition as a parent (e.g. birth certificate) from abroad suffices. For example, if the parents are foreign nationals residing in Slovenia on the basis of residence permit, and their child is residing in Slovenia on the basis of family reunification, their civil status as children-parents is no per se inscribed in the civil registry. The child receives the residence permit on the grounds of family reunification provisions of the Aliens Act. Family ties are proven by a birth certificate, but parental ties deriving from the birth certificate do not need to be entered into the civil registry for the residence permit to be issued. Therefore, the proof of recognition as a parent under foreign law suffices. The fact that a child is a citizen of a country that recognizes both parents does not play a difference. Usually through recognition of parental rights the child would obtain citizenship of the parents based on the principle of *ius sanguinis* anyway.

7 LIVING AS PARENTS

7.1 Parental agreements

By law parents are obliged to carry out their parental responsibilities towards children, which includes up-bringing of children, maintenance, education and care, which all have to be in line with the best interest of the child. Parental duties are part of public law, therefore private agreements in relation to maintenance, delegation of parental responsibility are not possible. Separation, maintenance of children and custody issues have to be decided by courts, in accordance with the Civil Procedure Act.[35] If there is no separation and the couple continues to live together, without one parent being legally recognized, he or she has no maintenance obligations and has no parental rights to the child. Private agreements on this are not foreseen in the law.

7.2 Equality among children

In Slovenia, all children are in the same legal position, regardless of the fact whether they are adopted or not or conceived naturally or by way of MAP. MAP is not a relevant issue after the child's birth, and adoption can only be carried out as a full adoption, meaning that with the adoption (regardless of it is a single, joint or second-parent adoption) the child is in the same position as biological children of the parent(s).

7.3 Employment and social benefits

Employment benefits (parental leave, leave to care for a sick baby etc.) tied to parental role are recognized only when parental rights are officially recognized. Therefore, the failure to recognize parental rights usually results also in denial of employment and social benefits tied to parental role. Only in exceptional cases the member of a common household is considered regardless if he or she is officially recognized as a parent.

7.4 Organizations with ethos and exemptions

As for the organisations with ethos Slovenian law contains an almost identical provision to the provision of Directive 2000/78/EC. Namely, Article 2.a., §2, indent 2, of the Act Implementing the Principle of Equal Treatment states that difference in treatment in the area of employment on the grounds of religion or belief of the individual, in the case of occupational activities within churches and other public or private organizations the ethos of which is based on religion or belief, shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organization's ethos. The same provision is included in Article 3, §3 of the Religious Freedom Act. No relevant case-law exists at the moment.

7.5 Mobility of rainbow families and immigration

For immigration purposes the national legislation in Slovenia provides for definitions of "family members" for whom a Slovenian national, and EU national or a third country national legally residing in Slovenia can invoke family reunification rights. The definitions in the law differ with regard to Slovenian and EU nationals on one hand and third country national on the other hand. Family members of third country nationals, as defined in Article 47 (3) of the Aliens Act, and family members of Slovenian and EU nationals residing in Slovenia, as defined in Article 127 (1) of the Aliens Act include spouse, registered partner or a partner with whom a foreigner lives in a long-lasting life union (who are in fact cohabiting partners although this term is

[35] Zakon o pravdnem postopku (uradno prečiščeno besedilo) (Uradni list RS, št. 73/07).

not specifically used in the law). The law does not provide any specific definitions of the terms 'spouse', registered partner or cohabiting partner, and consequently, the definitions of these terms remain open for administrative and finally judicial interpretation. It remains to be seen whether the term spouse refers to both opposite and same-sex spouses, and whether cohabiting partners include both types of partnerships. It is safe to say that registered partners cover the meaning of same-sex registered partners as it is likely that the fact that many states do not allow for same-sex marriage but provide for registered partnership of same-sex partners was one of the main reasons why registered partners were included in the definition of the family members in the first place. Also, with regard to the definition of co-habiting partners it is interesting to observe that an older version of the Aliens Act contained a more strict definition. Namely, only those cohabiting partners had the right to family reunification for immigration purposes who were legally recognised by Marriage and Family Relations Act. And this act legally recognised only cohabiting partners of the opposite sex. Since this definition is not in the law anymore, it could be concluded that this condition is no longer relevant.

If the parent who is an EU national is a sponsor who is claiming family reunification rights with regard to his/her non-biological children, he or she will only be able to claim family reunification for the child if parental rights have been legally recognized (i.e. by way of judicial or administrative decision). However, if this concerns a child who is a biological or adopted child of the sponsor's spouse, registered partner or cohabiting partner he or she is also recognised as a family member of the sponsor. The partner would also qualify as a family member, provided that the authorities would understand the terms 'spouse, registered partners and cohabiting partners' broadly enough to include same-sex partners as well.

7.6 Trans parenthood

The law does not provide for a duty to amend the birth certificate of the child whose parent has undergone legal gender reassignment. However, since personal identification number is one of the key signs of legal gender and it is also written on the birth certificate of the child it is possible that the child's birth certificate would change automatically after legal gender reassignment of the parent.

8 PARENTHOOD IN DIFFICULT TIMES

8.1 Equality among parents

In case of separation of parents in LGBTI families issues of custody and maintenance arise. In relation to these issues sexual orientation or gender identity do not play any role. Based on the specific mention of sexual orientation and an open-ended list of grounds in the non-discrimination legislation which is relevant for all areas of life, differential treatment of parents based on their sexual orientation and gender identity is prohibited.

In all cases when parents are splitting up (i.e. when married opposite sex partners are getting a divorce or when registered partners terminate their registered partnership, or when cohabiting partners are splitting) custody and maintenance issues are dealt with by district courts. Discrimination on the grounds of sexual orientation and gender identity is prohibited.

8.2 Foreign decisions on parental responsibility

Recognition of foreign judicial decisions is regulated by Private International Law and Procedure Act. For recognition of a foreign decision a judicial procedure (described above) has to be carried out. In general such decisions are recognized.

8.3 Death

In case of death of the biological parent of the child the partner of the deceased maintains guardianship only if he or she has adopted the child by way of second-parent adoption, the same as in the case of heterosexual partners. There is no guarantee that after the biological parent's death guardianship will automatically be given to the surviving partner or that the surviving partner will automatically have a possibility to adopt this child. In such situations the best interest of the child would be a primary consideration.

9 BECOMING A COUPLE

Slovenia does not provide for same-gender marriage. The only possibility to obtain legal recognition of relationship is registration of same-sex partnership provided by Registration of Same-Sex Partnership Act,[36] adopted in 2005. In 2010 the Ministry of Labour, Family and Social Affairs started to prepare a new Family Code which would replace both the existing Marriage and family Relations Act as well as the Registration of Same-se Partnerships Act. The first version of the Family Code Bill provided for a full equality of same sex and opposite sex partners and granted gay and lesbian couples also two of the most disputed rights – the right to marry and the right to joint adoption. At the time the coalition parties were able to secure simple majority in the National Assembly (lower house of the parliament), which approved the bill in the first reading on 2 March 2010. However, since there was a possibility for the bill to be vetoed in the upper house (the State Council) it was also necessary to secure absolute majority needed for the bill to be passed again in the National Assembly. The issues that some coalition members of the parliament were not ready to accept and therefore represented a serious challenge for the Code were the right of same-sex couples to marry and access to the possibility of joint adoption. If the then coalition wished to bring the Family Code to light, it first had to convince their own parliamentarians and come up with a compromise that would be suitable for them.

Consequently, the Government prepared a new version of the bill, removing the right to joint adoption by same-sex couples and the right to marry. Instead of marriage, the Government introduced an already existing separate regime of civil partnerships for same-sex couples into the Family Code, recognizing them all other rights that are already recognized to married couples (which would correspond to the concept of strong-partnership act.[37] The bill was approved in the second reading on 7 April 2011 by the National Assembly Committee for Labour, Family, Social Affairs and People with Disabilities, and then also at the plenary session of the National Assembly on 16 June 2011. Even though the right to marry and the right to joint adoption were excluded from this compromise version of the bill, the conservative parties and the church-affiliated groups continued to oppose it. The sole fact that same-sex partnerships and families remained in the family legislation posed an insurmountable problem for the opponents. Conservative groups decided that a referendum had to be organized on this issue. The possibility of a legislative referendum demanded by the voters is regulated in Referendum and Popular Initiative Act[38]. The opponents of the Family Code, led by Civil Initiative for Family and the Rights of Children, met all the required conditions, and lodged a claim for referendum on 22 June 2011. They still needed to gather 40.000 signatures to ensure that the referendum be organised. Without waiting for the signatures to be collected,

[36] Zakon o registraciji istospolne partnerske skupnosti (Uradni list RS, št. 65/05 in 55/09 - odl. US).
[37] Draft Family Code of 16 June 2011.
[38] Referendum and Popular Initiative Act (official consolidated text), Official Gazette of the Republic of Slovenia, No. 26/2007.

the National Assembly used the only option at its disposal to prevent the referendum from taking place – a complaint to the Constitutional Court in which it claimed that the delay in entry into force of the Family Code or the rejection of the Family Code at the referendum would cause "unconstitutional consequences", which is an option provided for in Article 21 of the Referendum and Popular Initiative Act. In the complaint, lodged on 2 September 2011, the National Assembly claimed that unconstitutional consequences would be caused by the fact that the Family Code was addressing a situation where several rights recognized to opposite sex partners are not recognized to same-sex partners under equal conditions, thereby causing discriminatory treatment. The National Assembly underlined that by passing the Family Code two Constitutional Court decisions will be implemented – the one on inheritance regime for same sex partners (U-I-425/06) and another one on the issue of establishing fatherhood (U-I-328/05); if the Family Code was rejected, these decisions would remain unimplemented which would cause unconstitutional circumstances by itself. The National Assembly highlighted the advantages of regulating all similar issues in the Family Code, which enables for comprehensive and complete regulation of legal position of same-sex couples. It stressed that amendments of many separate laws would be more time-consuming and less comprehensive. Addressing all these issues and not only inheritance regime was, in the opinion of the National Assembly, crucial as the lack of recognition of equal rights violated Article 14 of the Constitution which guarantees equal treatment, as well as Article 2 of the Constitution which protects the principle of legal certainty.[39]

With its decision No U-II-3/11 of 8 December 2011 the Constitutional Court rejected the National Assembly's complaint, allowing the referendum to take place. The Court held that in the process of assessment of consequences of rejection of the Family Code it had to take into account the moment when the Code would enter into force. The Court noted that according to Article 309 of the Family Code this Code would enter into force fifteen days after its publication in the official gazette, but it would only start to be used in practice one year after entry into force. At the same time this means that the acts which the Family Code would replace (Marriage and Family Relations Act and Registration of Same-Sex Civil Partnerships Act) would cease to be valid in fifteen days, but they would continue to be used for another year. The Court therefore found that:

- In case of rejection of the Family Code at the referendum this Code would not enter into force and for at least one year Marriage and Family Relations Act and Registration of Same-Sex Civil Partnerships Act would continue to be used;

- In case of confirmation of the Family Code at the referendum this Code would enter into force, but in fact the two mentioned acts would still be used for another year.[40]

Based on this rather formal formula the Court concluded that regardless of the outcome of the referendum the legal regime governed by Marriage and Family Relations Act and Registration of Same-Sex Civil Partnerships Act would remain the same for at least one additional year, hence in this first year the referendum by itself could not cause unconstitutional consequences, regardless of its outcome. The Court also noted that apparently the National Assembly itself did not consider that these unconstitutional consequences should be immediately remedied if it decided that that law should only be used after one year since its entry into force. The Court finally concluded that since the referendum would not cause unconstitutional consequences, it does not need to look into the reasons which would justify such claims.

[39] Constitutional Court of the Republic of Slovenia, Ruling No. U-II-3/11 of 8 December 2011.
[40] Ibid., par. 20-21.

Based on this reasoning the Court rejected the complaint of the National Assembly.[41] Only one of the judges in her dissenting opinion regretted that the Constitutional Court did not look into the content of the Family Code. She was convinced that by entry into force this Code would imminently become part of national legal order and would have effects on it, even though it would not be used yet. She provided several examples where this would be particularly visible, e.g. in cases when existing implementing acts could only be used in this first year as long as they would not counter the newly adopted legislation. She recognized the attempt of the National Assembly to implement the Constitutional Court decisions in a more comprehensive way, amend legal order where there was a need for it and remedy the *lacoona* in the law which affect the lives of same-sex couples.[42] With such decision the Constitutional Court gave leave for the referendum to take place. The referendum took place on 25 March 2012, with a result of 54.55 % of voters opposing the Family Code and 45.45 % of voters supporting it, the voter turnout being 30.31 %.[43]

Two years after the referendum the centre-left coalition decided to prepare a new Same-Sex Partnership Law Bill that maintains a separate institution of civil partnership reserved for same-sex couples only awhile marriage remains reserved for a man and a woman. Apart for the right to marriage and the right to access joint adoption, the bill provides for equal rights in all other relevant areas. Another exception is access to MAP: if the bill is passed it will have no effect on the legislation governing access to donor insemination and surrogacy.

De facto cohabiting partners are not legally recognized. There are no legal consequences of the existence of such partnerships except in cases of inheritance. Namely, according to a Constitutional Court decision of 2013, co-habiting same-sex partners have the same rights in the field of statutory inheritance as opposite sex cohabiting partners.[44] The proposal for a new Same-Sex Partnership Law that is currently in public discussion foresees that de facto same-sex partners would also receive the rights that are already recognized to de facto opposite sex partners, with the exceptions already mentioned above.

In order to register their same-sex partnership under the currently valid law, one of the partners has to be a national of the Republic of Slovenia, as required by Article 3(2) of The Registration of a Same-Sex Civil Partnership Act. The procedure for registration of same-sex partnership is limited to expression of the will to become partners, after being informed by the administrative official about the consequences of partnership registration, as provided for in Article 6 of the Registration of Same-sex Partnerships Act. The procedure does not entail any obligation to express any other commitments.

The registration of registered partnerships is carried out by an administrative official employed by the Administrative Office (administrative offices are administrative expositions of the central government on the local level where residents handle their state administrative affairs). The procedure is similar to marriage, however it is much less solemn, simpler as it does not require the same amount of formalities, faster and cannot be conducted outside the premises of the Administrative Office. If the proposed new Same-Sex Partnership Law is adopted, the procedure of entering into a partnership will be the same as concluding marriage.

[41] Ibid., par. 22-25.
[42] Dissenting opinion of judge Jasna Pogačar to the Constitutional Court of the Republic of Slovenia, Ruling No. U-II-3/11 of 8 December 2011.
[43] State Election Commission, Official report on the outcome of the vote and on the outcome of the legislative referendum on the Family Code held on 25 March 2012, No. 042-1/2012-312 of 12 April 2012.
[44] Constitutional Court of the Republic of Slovenia, Ruling No U-I-212/10 of 14 March 2013.

In the currently valid law there are no provisions that would limit access to partnership registration to persons who are nationals of state that do not allow for same-sex marriage or partnership registration. For the foreigner who wishes to register his or her partnership with a Slovenian national the Slovenian authorities require a proof that he or she is not married or in registered partnership (this is a so-called 'no hindrance certificate'). If a certificate on not-being registered cannot be provided because the country of origin of the foreigner does not allow for registration or civil partnership, the letter of the competent body (e.g. a consulate) stating that there is no possibility to register same-sex partnership in the country of origin is sufficient in Slovenia.

The approach is the same in case of multiple nationalities of the Slovenian national's partner. In such case no-hindrance certificates would be required from each country of each nationality. The law does not require the partners who wish to register their partnership to have a common residence/domicile.

There are also no explicit requirements in the law that the partners would have to live in the same country after the registration. It is therefore possible for one partner to live in one Member State and the other one in another.

Private agreements between the partners are specifically allowed in the law. Article 18 of the currently valid Registration of Same-Sex partnership Act states that the partners may conclude agreements with each other that they could conclude with any third person, in order to establish any rights or duties. The agreements that the partners conclude while they are in registered partnership have to be concluded in a form of notary act. The law therefore dos not limit the conclusion of private agreements to certain matters. However, there are certain provisions in the law that should be considered as *ius cogens* since there is no disclaimer that they are valid only if the partners do not agree otherwise. Such provisions are for example those related to common property. According to the law, all property acquired by the partners with their work while they are in registered partnership is considered to be common property. They can always agree (by way of concluding a notary act) to divide their common property *ex post facto*, as provided in Article 16 of the Act, the same way a married couples. Private agreements between the partners have no third-party effects.

The registration of same-sex partnership affects the civil status of a person: a person who is in registered partnership may not conclude another partnership and may not get married to an opposite sex person unless the registered partnership is terminated. After the registration is performed a certificate on registration is issued and it is entered into the public registry of registered partnerships.

The consequences of registration of same-sex partnership are defined with the 2005 Registration of Same-Sex Partnership Act. They are very limited and do not correspond to legal consequences of marriage. According to Article 9 of Registration of Same-sex Partnership Act property already owned by a partner remains his or hers, while the property obtained by work while the partners are in registered partnership is their common property. They can only manage this property together, unless they agree that one of them is fully authorized to manage it, as provide by Article 10 of this Act. The partner who does not have sufficient means of subsistence and is not able to work or cannot get a job may claim from the other partner to sustain him or her, as guaranteed by Article 19 of the Act. The law also contains guarantees for housing protection for the partners, rights in case of illness of one of the partners, inheritance rights and rights to mutual assistance that the partners may claim from each other. After the termination of same-sex partnership there are also consequences provided for by law. The partner who has no means of subsistence, cannot work or cannot get a job has the right to alimony provided by the other partner (Article

26 of the Act). The law also contains guarantees for partners who have rented the apartment together. If they cannot agree on who is going to stay in the apartment they can ask the court to decide, taking into account housing needs of each partner and other relevant circumstances, as provided by Article 37 of the Act.

The formal union establishes affinity between the partners. Namely, in a number of other acts (but not in all of them) partnership registration is treated equally as marriage when it comes to conflict of interest, determining family members and in similar cases.

Registration of same-sex partnership does not have an automatic effect on family names of the partners. E.g. in case of marriage the partners are automatically asked to specify what will their family names be like after marriage. In case of registered partnership this is not provided for. If the partners wish to overtake the family name of the partner, they have to do it through a regular procedure of name change, and have to pay a tax for this (while this is not required in case of name change at marriage). The proposed new same-Sex partnership Law foresees changes in this respect: if passed, changing the name at conclusion of partnership for free will be possible under the same conditions as in the case of concluding marriage.

Religious ceremonies are not possible for partnership registration.

10 LIVING AS A COUPLE

Marital and family statuses are not explicitly included as protected grounds in the non-discrimination discrimination provisions in the Constitution or the main non-discrimination act. However, they both contain an open-ended list of grounds and a general clause “any other personal ground/circumstance” which includes marital or family status.

The Constitution does not contain any provision on equality of rights and duties between cohabiting, registered and married couples. It states only that marriage as well as legal relations within marriage, family and cohabitation are regulated by law (Article 52/2 of the Constitution). It also states that children born in or out of wedlock have equal rights (Article 54/2). It does not contain any other relevant provisions. In the law there are significant difference between rights and duties of partners who are married, in registered partnership or cohabitation. In terms of cohabitation, only opposite sex cohabitation is legally recognized (the exception is inheritance when same-sex cohabitation is also recognized), however only in those areas where this is explicitly regulated by law. This means that there is no blank equality between marriage and cohabitation, but there has to be an explicit legal basis provided in order for the cohabiting partner to claim a certain right.

Registered partners have significantly less rights deriving from their legally recognized relationship than married partners. Registration of Same-sex partnership Act contains only a handful of rights that are explicitly awarded to registered partners (e.g. alimony, rights in case of an ill partners, housing rights, right to mutual assistance etc.). A common denominator of the rights recognized by this act is that they have no effect on third parties or on the state. In other words, the rights that the partners could claim from the state based on their legally recognized relationship are not recognized by this act. However, some of the rights are determined also in other laws where spouses are mentioned as rights beneficiaries. Such laws are for example Employment Relationship Act or Exercise of Rights to Public Funds Act (regulating social welfare) where equal rights are awarded to registered and married partners. However some of the acts that have not yet been amended in the recent years exclude registered partners from accessing certain

rights. Examples of the rights which are still excluded but are very important are the right to health insurance for an unemployed partner after the employed partner, paid sick leave to care for sick same-sex partner, and housing protection for surviving partner in case the deceased partner had a lease agreement for a non-profit housing. A detailed analysis of which rights are excluded from protection in the entire legal system in Slovenia is in progress (as part of the project funded by Norwegian Funds) at the moment of writing.

Unregistered same-sex partners are not (yet) legally recognized, meaning that de facto cohabitation of same-sex partners produces no legal effects. The only exception is statutory inheritance. The reason for this is a Constitutional Court decision in which it was established that de facto cohabitation of same-sex partners in content does not differ from de facto cohabitation of opposite sex partners, and if the latter have the right to statutory inheritance this right should also be recognized by the former. The case is a result of a death of one of the cohabiting same sex partners. Since the deceased did not leave any will the surviving partner would by law remain without any right to claim inheritance after the deceased. The County Court that handled the matter took a position that the Act that does not provide for this option is unconstitutional and asked the Constitutional Court for constitutional review. The Constitutional Court agreed with that, declared the inheritance act unconstitutional as it does not provide for inheritance rights of cohabiting same-sex partners and ordered that the latter should be treated equally as cohabiting opposite sex partners in all inheritance procedures.[45] As already mentioned, the newly proposed Same-Sex Partnership Law Bill, if passed, will grant the same rights to cohabiting same-sex partners as granted to de-facto opposite sex partners.

Measures in cases of domestic violence are regulated in the Prevention of Family Violence Act.[46] The provision of Article 2 of this act which provides for definitions of family members to be covered by this act include registered same-sex partners, but does not mention cohabiting same-sex partners. It does apply to cohabiting partners more generally, however at the moment according to the relevant legislation this term is reserved only for opposite sex cohabiting partners. This means that cohabiting same-sex partners do not enjoy the protection of this act.

The Penal Code which also includes the prohibition of family violence (Article 191) is more general and does not contain definitions of which family members are protected by the law. Further, it does not prohibit violence only within family communities but also in 'other long-lasting life communities'. Therefore, if the prosecutor or the court were not convinced that family community includes co-habiting same-sex partner, the other provision referring to 'other long-lasting life community' could be used.

Foreign registered partnerships are recognized and are listed in the registry of same-sex partnership on the basis of a public document confirming that such partnership was registered, as provided by the Rules on the registration of same-sex partnerships.[47] Foreign same-sex marriages are recognized in Slovenia only as registered partnerships which results in downgrading of civil status of an individual concerned. Unregistered cohabitations are not legally recognized.

[45] Constitutional Court of the Republic of Slovenia, Ruling No U-I-212/10 of 14 March 2013.
[46] Zakon o preprečevanju nasilja v družini (Uradni list RS, št. 16/08).
[47] Pravilnik o registraciji istospolnih partnerskih skupnosti (Uradni list RS, št. 55/06 in 91/11).

Recognition of registered partnerships is annotated by way of entry into the civil registry of registered partnerships, as provided for in Article 4 of the Register of Deaths, Births and Marriages Act.[48]

There are no explicit provisions in the law clarifying whether same-sex unions concluded abroad are recognized for the purposes of enforcement of inheritance or maintenance rights. There is no requirement in the law that same-sex unions should first be entered in the civil registry in order to be taken into account for such purposes. Taking into account the principle of non-discrimination on the grounds of sexual orientation and marital status enforcement of such rights should be ensured. For such purposes a proof of recognition as a spouse or registered partner issued in foreign jurisdiction should suffice, as the law does not state otherwise.

As already mentioned above, family members of third country nationals, as defined in Article 47 (3) of the Aliens Act, and family members of Slovenian and EU nationals residing in Slovenia, as defined in Article 127 (1) of the Aliens Act include spouse, registered partner or a partner with whom a foreigner lives in a long-lasting life union (who are in fact cohabiting partners although this term is not specifically used in the law). The law does not provide any specific definitions of the terms “spouse”, “registered partner” or “cohabiting partner”, and consequently the definitions of these terms remain open for administrative and finally judicial interpretation. It remains to be seen whether the term “spouse” refers to both opposite and same-sex spouses, and whether the term “cohabiting partners” includes both types of partnerships. It is safe to say that “registered partners” cover the meaning of same-sex registered partners as it is likely that the fact that many states do not allow for same-sex marriage but provide for registered partnership of same-sex partners was one of the main reasons why registered partners were included in the definition of the family members in the first place. Also, with regard to the definition of co-habiting partners it is interesting to observe that an older version of the Aliens Act contained a more strict definition. Namely, only those cohabiting partners had the right to family reunification for immigration purposes who were legally recognised by Marriage and family Relations Act. And this act legally recognised only cohabiting partners of the opposite sex. Since this definition is not in the law anymore, it could be concluded that this condition is no longer relevant.

11 COUPLES IN DIFFICULT TIMES

Slovenia does not provide for same gender marriage and there are of course no provisions on termination of same-gender marriage concluded in Slovenia. As for same-gender marriage concluded abroad, Slovenia is in some cases competent for divorce. According to International Private Law and Procedure Act, the court in Slovenia is generally competent if the defendant has permanent residence in Slovenia (Article 48 of the Act). In addition to this, in marital disputes the court in Slovenia is competent also if the defendant does not have permanent residence in Slovenia, if i) both spouses are Slovenian nationals regardless of where they have permanent residence, ii) the plaintiff is Slovenian national and has permanent residence in Slovenia, and iii) if the last common permanent residence of the spouses was in Slovenia and the plaintiff has temporary or permanent residence in Slovenia when the claim is lodged. If the sued spouse is a Slovenian national and has permanent residence in Slovenia, the court in Slovenia is exclusively competent (Article 68 of the Act). The Act does not distinguish between the type of marriage or the spouses based on their sex or sexual orientation. It is not clear whether the Slovenian courts would consider themselves competent using these provisions and applying them in light of non-discrimination principles, or would they

[48] Zakon o matičnem registru (Uradni list RS, št. 11/11 - uradno prečiščeno besedilo).

declare that the law was written for opposite sex spouses only and that in the absence of the possibility of same-sex marriage in Slovenia cannot be used for divorce of same-sex spouses who concluded their marriage in another EU member state.

The procedure for ending registered partnership is defined with Article 25 of the Registration of Same-sex Partnership Act. The application for termination of registered partnership may be lodged with the body where the partnership was registered, by one or both partners on the prescribed form. The administrative body decides on the application by issuing a decision stating that the registered partnership was terminated. In case of an appeal the competent body is the Ministry of Interior. The partnership is terminated on the day when the administrative decision becomes final. The fact that the registration was terminated has to be entered by the administrative official into the civil registry in seven days after the decision becomes final.

In the law there are no explicit provisions on termination of registered partnership that was concluded in another EU Member State. It is therefore not clear whether the competent body would rely on the international private law provisions (described above) and, if the conditions were met, use Slovenian law on termination o registered partnership, or would it consider that registered partnerships concluded abroad cannot be terminated by Slovenian bodies as this is not explicitly provided for by law. In this respect the legal void is even clearer than in the case of termination of same-sex marriage.

The law does not provide for any protection in case of separation of cohabiting same-gender partners.

In the law there are no indications that conversion from same-sex marriage to same-sex registered partnership (which is provided for by law) is used to avoid the possible waiting period in case of divorce, as there is no such waiting period prescribed for divorce in the Slovenian law.

In Slovenian law there is no requirement for termination of marriage or registered partnership in case of legal gender reassignment.

Slovenia has separate regimes for same-sex partners and for opposite sex partners. Conversion from one status to another is not possible.

Recognition of foreign divorce, dissolution or annulment of the union is carried out in line with the rules on recognition of administrative and judicial decisions, as already described. It first depends whether the decision is judicial or administrative in nature. For recognition of foreign judicial decisions the International Private Law and Procedure Act is used, while for recognition of foreign administrative decisions the legal basis used is the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents.

In case of death of a registered or cohabiting same-sex partner the surviving partner has the right to statutory inheritance if the deceased left no will, under the same conditions as married and cohabiting opposite sex partners. Inheritance has been an issue most discussed by the Constitutional Court of the Republic of Slovenia in the field of sexual orientation law. The reason for this is connected with the original inheritance provision in the Registration of Same-sex Partnerships Act. In this law the right to statutory inheritance was awarded to registered same-sex partners but the original inheritance conditions imposed by the law differed significantly from the conditions in place for opposite-sex spouses. In other words, it was a very attractive article to be attacked before the Constitutional Court since it was clearly discriminatory and no justification was provided by the legislator for such provisions. The first

Constitutional review completed in 2009 led to declaration of unconstitutionality of this provision as it did not provide for equal treatment of registered same-sex partners in inheritance procedures. The Constitutional Court ordered the legislator to amend the problem in six months, while in the meantime the Inheritance Act had to be used by granting to registered same-sex partners same inheritance rights as are granted to spouses. Later on the Constitutional Court also decided on inheritance rights of cohabiting same-sex partners. It stated that this right should be available to this group as well, as already described above.

Under the new Pension and Disability Insurance Act[49] registered same-sex partners also have the right to survivor's pension under the same condition as spouses. On the opposite, survivor's pension is not available for cohabiting same-sex partners, while it is available for cohabiting opposite sex partners.

12 CONCLUSIONS

Under the current legal system marked by a relatively weak partnership law there are a number of legal inconsistencies that require further legislative activity by the Slovenian authorities. The awareness of this fact is present and led to a proposal for a new same-sex partnership legislation that is currently being debated. The proposal is a step back in comparison with the initial 2011 proposal for a new Family Code which did not only grant equal rights to same sex couples but also covered rainbow families with a modern definition of a family, and consequently had a significant meaning for them on a symbolic level. A new proposal for partnership legislation seems to be a compromise, originating either in the fear from new referendums, the costs and the campaign connected to it, or perhaps in the latent reluctance of the authorities to comprehensively address this issue and stepping up against the strengthening of neoconservative movements that do not only oppose granting equal rights to gay and lesbian couples and rainbow families, but also to abortion, reproductive rights, legal recognition of cohabitation and the like.

There are significant loopholes in the legal system concerning transgendered persons. Only very limited provisions exist with regard to legal gender reassignment while the reassignment procedure as such is completely unregulated and left to the medical system. The same is the case with intersex issues.

The system provides for supporting mechanisms for mobile rainbow families who are moving from one EU Member State to another or families that were formed using MAP or surrogacy available in other states. Immigration provisions allow for family reunification, recognition of foreign unions is provided for even though in case of marriage there is a problem of downgrading of a relationship to a registered partnership. Recognition of foreign judicial and administrative decisions does not seem to have caused any significant problems so far. Furthermore, there are precedents showing the foreign judicial decisions concerning joint adoption and surrogacy are recognized. Also, although not explicitly provided for by law, second parent adoption is available based on the interpretation of the general legal provisions that exist in relation to adoption. Slovenia has also witnessed two Constitutional Court decisions that are relevant not only for inheritance (the issue the decisions relate to) but also for a number of other social and economic issues important for same-sex partners and their families. So in spite of a weak partnership law, a number of loopholes in some of the areas concerned with this paper there are certain positive developments that are of international interest.

[49] Zakon o pokojninskem in invalidskem zavarovanju (Uradni list RS, št. 96/12, 39/13, 99/13 - ZSVarPre-C, 101/13 - ZIPRS1415 in 44/14 - ORZPIZ206 - ORZPIZ206).