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SURVIVOR'S PENSION TO UNMARRIED PARTNERS

- Croatia, France, Italy, Germany and Slovenia -

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FOREWORD

„Domestic partnership (cohabitation) represents community of life between two unmarried persons of different gender (male and female) established with the intention of lasting indefinitely. It is established on the basis of free will between a man and woman, and terminated in the same manner, consensually or unilaterally. As a rule, marriage involves stability and endurance which cohabitation lacks. Immediately after the liberation, specifically until the adoption of the Constitution of the Federal Socialist Republic of Yugoslavia on 31 January 1946 and Basic Law on marriage, cohabitation produced certain legal effects, due to the assumption that marriage could not be realised given the various circumstances related to the previous social system and war circumstances. Female partner, i.e. a cohabiting partner, was granted the right to state aid provided that her cohabiting partner, as a breadwinner, was held in custody, or served in the military or died, and she lived with him in a joint household at least six months prior to him joining the army or he was her main breadwinner (Decision of the National Committee for the Liberation of Yugoslavia- NKOJ as of 19 December 1944). Following the adoption of the Constitution and Basic Law on marriage in 1946, a different point of view was established with regard to cohabitation. The legal provisions concerning marriage did not apply for cohabitation, due to the fact that it was deemed that the law provided many opportunities for joining in marriage, as a community of living of a man and a woman recognised and regulated by the law. However, there are various reasons which have led to the actual existence of domestic partnership. Given that these are unstable communities in which there are frequent conflicts, eventually leading to separation, frequent intervention by state authorities is needed, especially courts. This was immediately followed by the Instruction on the manner of solving disputes originating from domestic partnerships (SU 42/54), issued by the Supreme Court of Yugoslavia. Originally, the jurisprudence deemed that domestic partnership does not provide any rights arising from employment, and that it doesn't represent the basis for acquiring property rights. In addition, it is neither a basis for establishing the right to financial maintenance, nor the division of joint property. A common-law partner was granted the right to a share in the assets acquired on the basis of enrichment without any legal basis. However, later in the practice of the highest courts of law, Domestic partnership of lasting nature has the same legal effect as marriage.”¹

Convention for the Protection of Human Rights and Fundamental Freedoms and International Covenant on Civil and Political Rights provide for the right to marriage. According to Article 12 of the Convention, men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right², whereas Article 23 of the Covenant provides that the right of men and women of marriageable age to marry and to found a family shall be recognised³. The concept of domestic partnership and the right to domestic partnership are neither determined, nor guaranteed by the aforementioned international documents.

Unmarried couples within the European Union involve partners living in a stable relationship, who are neither married nor registered with an authority. Unmarried

¹ Pravna enciklopedija, Savremena administracija, Beograd, 1979. godina, str. 562

² European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, Rome, 4.XI.1950, Article 12 (Right to marry) <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm> (pristupljeno 1.7.2015)

³ International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, Article 23 <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (pristupljeno 1.7.2015)

couples living within the European Union have certain rights provided that they live together in a stable and continuous way, even if they have not registered their partnership with any authority. EU countries which recognise de facto unions provide for the rights and obligations concerning property, inheritance and maintenance payments following a separation. The aforementioned rights are also relevant to same-sex couples given that not all EU countries allow them to get married or register their partnership in any way. However, most countries have not defined exactly how one can prove a long-term relationship or cohabitation. In some countries there is the possibility of signing a cohabitation contract, in order to settle certain aspects of cohabitation. If conflicts about property arise, the law of the country where the conflict occurred will generally apply.⁴

Domestic partnership in the United Kingdom of Great Britain and Northern Ireland with focus on the right to pension

The United Kingdom provides for legal protection of Domestic partnership in certain areas, denying them the general legal status which offers rights and obligations, which is provided to married couples and registered partners.

According to the charity One Plus One, myth of Domestic partnership, respectively couples who live together with the same rights as married couples originates from a time when there was uncertainty about what constitutes marriage. The Ministry of Justice engaged One Plus One and Advice Services Alliance to carry out the campaign LivingTogether, aimed at raising awareness of unmarried couples concerning their legal status through provision of practical advice on manners in which they may protect themselves and their family. The campaign was initiated on 15 July 2004. *

The data from the Office for National Statistics show that in 2014 there were 18.6 million families in the UK out of which 12.5 million were married couples. Between 2004 and 2014, the number of married couples grew by 29.7%. In 2014, there were approximately 3.0 million opposite sex cohabiting couple families and 84,000 families consisting of a same sex cohabiting couple. The percentage of opposite sex cohabiting couple families has increased from 13 % in 2004 to 16 % in 2014. In addition, there was an increase in the number of families consisting of a same sex cohabiting couple, however, it was not statistically significant (ranging from 0.4 % to 0.5 %). **

Unmarried couples may conclude an agreement on a voluntary basis which grants them equal financial rights. In order to determine who's the owner of a property and who's entitled to a property, unmarried couples may conclude a cohabitation agreement or declaration of trust, as legally binding contracts. Declaration of trust defines the property owned by each partner when establishing a relationship, and determines the person who will receive the property in case the relationship ends. The contract determines the individual who would pay specific bills and each additional value provided by a partner, such as meeting the costs of maintaining the house. Cohabitation agreement mostly covers day-to-day issues, such as running the household and similarly.

Unmarried couples are not given the automatic right to use financial resources in case their partner dies before or after retirement. Most pension schemes deal with married couples and not cohabitators. In case the person dies prior to pension, a spouse or civil partner shall be entitled to a death-in-service benefits from the pension pot, and if the spouse has already retired then a "widow's pension" will be paid to the survivor. An employee has to nominate who they want to benefit from their pension should they die, however, it would depend on the scheme as to whether it would allow non-married couples to nominate a partner. ***

* *"Common law marriage" and cohabitation*, House of Commons Library
<http://researchbriefings.files.parliament.uk/documents/SN03372/SN03372.pdf> (accessed on 1 July 2015)

** *Families and Households, 2014* http://www.ons.gov.uk/ons/dcp171778_393133.pdf (accessed on 1 July 2015)

*** *How couples can protect their financial interests when cohabiting*
<http://www.independent.co.uk/money/spend-save/how-couples-can-protect-their-financial-interests-when-cohabiting-9672921.html> (accessed on 1 July 2015)

⁴ Official website of the European Union, Family, Unmarried couples
http://europa.eu/youreurope/citizens/family/couple/de-facto-unions/index_en.htm (accessed on 25 June 2015)

In Montenegro, in accordance with the Family Law, a community for living of a man and a woman lasting longer (domestic partnership), is equaled with marital community with regard to the right to mutual support and other property-legal relationships. On the other hand, Pension and Disability Insurance Law of Montenegro, which regulates the right to accrual of survivor's pension in the event of death of participant, as well as conditions a widower, i.e. a widow must meet in order for him/her to accrue the right to this type of pension, envisages that the following shall be entitled to survivor's pension: spouse, children (born in wedlock or out of wedlock or adopted; stepchildren who were the Participant's or Beneficiary's dependents), spouse from a divorced marriage provided that his/her right to financial maintenance was established by an effective court verdict.

The purpose of this research paper is to provide comparative overview concerning of legal solutions on the right to domestic partnership, and domestic partners entitlement to and exercise of the right to survivor's pension in **France, Croatia, Italy, Germany and Slovenia**.

The complete document in Montenegrin language can be found at:

<http://www.skupstina.me/images/dokumenti/biblioteka-i-istrazivanje/2015/15.pdf>