Michal Janovec, Jan Malý, Josef Šíp,
Jakub Pohl, Marika Zahradníčková (eds.)

COFOLA 2021
part 2

Conference proceedings

MASARYK
UNIVERSITY
PRESS

ACTA UNIVERSITATIS BRUNENSIS IURIDICA
EDITIO SCIENTIA

MASARYK
UNIVERSITY
PRESS

MUNI
LAW

COFOLA 2021

Conference for Young Lawyers

Part 2

Michal Janovec, Jan Malý, Josef Šíp, Jakub Pohl,
Marika Zahradníčková (eds.)

Masaryk University
Brno 2021

This publication was written at Masaryk University as part of the project MUNI/B/1406/2020 “COFOLA 2021” with the support of the Specific University Research Grant, as provided by the Ministry of Education, Youth and Sports of the Czech Republic in the year 2021.

The conference was supported by the Central-European Professors´ Network coordinated by the Ferenc Mádl Institute of Comparative Law in Budapest, Hungary.

ISBN 978-80-210-9981-4 (online ; pdf)
DOI https://doi.org/10.5817/CZ.MUNI.P210-9981-2021

Section Guarantors and Reviewers

- Mgr. Martin Kornel, Ph.D.
- prof. JUDr. Zdeňka Králíčková, Ph.D.
- Mgr. Lucie Zatloukalová

Organization Committee

- JUDr. Michal Janovec, Ph.D.
- JUDr. Jan Malý
- Ing. Mgr. Josef Šíp
- Mgr. Jakub Pohl
- JUDr. Marika Zahradníčková

TABLE OF CONTENT

Cohabitation in European Context

COHABITATION IN EUROPEAN CONTEXT

DOI https://doi.org/10.5817/CZ.MUNI.P210-9981-2021-1

COHABITATION IN THE SLOVAK REPUBLIC: MYTH OR REALITY?[1]

Lilla Garayová
Faculty of Law, Pan-European University, Slovak Republic

Abstract

The following article deals with the issue of cohabitation in the Slovak Republic. An institute, that while does not formally exist in Slovak legal order, still has certain legal consequences. Slovak family law is facing a comprehensive transformation, so it is expected, that many of the issues outlined in the submitted article will be properly dealt with in the expected recodification of Slovak civil law, that will include family law as well. As far as the current legal framework however, it leaves much to be desired. There is no legal institute which would be an alternative to traditional marriage, nor an institute which would comprehensively cover the legal status, rights and duties of cohabitants. This is due to the traditional nature of Slovak family law, the way the institute of marriage and family are dealt with in our legal order. While a comprehensive legal framework of cohabitation is missing, it cannot be said that the Slovak legislation ignores cohabitation – there are many legal consequences in various fields of law that relate to the rights of cohabitants. The article highlights the gaps in these areas as well as potential opportunities for future legislation. The research was carried out within the framework of the Central European Professors' Network coordinated by the Ferenc Mádl Institute of Comparative Law.

Keywords

Protection of Families; Marriage; Matrimony; Family Law; Traditional Marriage; Cohabitation.

1 The research was carried out within the framework of the Central European Professors' Network coordinated by the Ferenc Mádl Institute of Comparative Law.

1 Introduction

This work seeks to define the basic concepts in connection with the issue of cohabitation as an institute, which, despite the changing social trends, is only addressed in Slovak legislation marginally. The 21st century is an era of change, where we can see the changing attitudes of young people towards marriage and traditional family values, so the question rightfully arises – what is the future of marriage? Slovak family law in its essence is very traditional – it does not recognize same-sex marriages or non-traditional forms of marriages; it does not define or protect cohabitation (regardless of the gender of the cohabitants). In spite of the rapid social changes, the legislation remains unchanging – we seek to explore the reasons behind this and the possible future evolution of Slovak legislation in this matter.

The union of a man and a woman, recognized by authority or rite, is as old as civilization itself, and marriage in some form is found in virtually every society. Throughout the centuries, marriage has taken many forms, and, in some ways, it barely resembles the meaning it once held. The primary purpose of marriage thousands of years ago was to bind women to men, thereby guaranteeing that their common children were indeed their biological heirs. Through marriage, women became property of men. Early marriage in ancient societies was accompanied by the need to ensure a safe environment for the preservation of the tribe. In these early times, marriage was often without love and desire, because the main motivation to enter into a marital bond was social and economic stability. Marriage remained unchanged in its foundations for thousands of years and the first major transformation of this institute started with universal suffrage in the 20th century. The idea that marriage is a private relationship for the fulfillment of two individuals is very new and due to the rapidly changing society in the 20th century the institute of marriage has changed more in the past 50 years than in the 5 000 years before. Cohabitation is very often viewed as an invention of these past few revolutionary decades, as an alternative to marriage, however a deeper dive into history actually shows, that cohabitation in some forms has existed in all eras of human history. The legal regulation of this institute and the legal interpretation of cohabitation is indeed a new development.

Cohabitation is an institute, that although exists in the reality of the Slovak Republic, the law however only touches on it marginally. It is a phenomenon that is not specifically defined or protected in Slovak law, however there are certain claims of the cohabitants, that are recognized by Slovak law. The primary reason for this discrepancy between the reality of everyday life and the legal theory is the rather conservative nature of Slovak family law, which stems from its historical evolution.

2 Cohabitation in the Slovak Family Act

In recent years, we have seen what many refer to as the crisis of the traditional family based on a marital union of a man and a woman in Slovakia. This crisis is clearly apparent in the growing rate of cohabitations[2] and a relatively high divorce rate. At the same time, we have seen several unsuccessful legislative attempts to grant legal recognition to an institute that would be an alternative to marriage (be it heterosexual or same sex). Family law in Slovakia has very traditional foundations, and as such, it protects the institute of a traditional marriage above all. It does not mean that other unions are not protected at all, on the contrary, it does guarantee the protection of all families, regardless of their form, if they provide a sense of safety to their members, this includes stable long-term cohabitations.[3]

Family law relations in the Slovak legal system are regulated in our Act on the Family 36/2005 Coll. that entered into force on 1 April 2005 (further referred to as the Family Act)[4]. Since 1950, family law relations have been set aside outside the scope of the Civil Code and are still regulated by a separate law. In the future, however, the regulation of family relations is to be returned to the Civil Code as a separate part of it in the framework of the forthcoming codification of general private law in Slovakia.

For the current relationship between family and civil law, the return to the dual structure of private and public law after 1989 means that the regulation

2 SPROCHA, B., B. VANO a B. BLEHA. *Prognóza vývoja rodín a domácností na Slovensku do roku 2030*. Vydavateľstvo EKONÓM, 2014, p. 52. ISBN 978-80-225-3961-6.

3 KRÁLÍČKOVÁ, Z. *Autonomie vůle v rodinném právu v česko-italském porovnání*. 1. vyd. Brno: Masarykova univerzita, 2003, 264 p., p. 81.ISBN 80-210-3093-3.

4 Act No. 36/2005 Coll. on Family and on amendment of some other acts.

of personal and property conditions in the family and marriage is closely linked to general civil law. The integration of both subsystems of private law is evident even now, especially in § 111 of the Family Act, which provides for the general subsidiarity of the Civil Code for legal relations regulated by the Family Act. Thus, unless the Family Act provides otherwise, the provisions of the Civil Code shall apply to family relationships. The currently applicable legal act to family law in Slovakia is the new Family Act No. 36/2005 Coll., that replaced the previous Family Act No. 94/1963 Coll. Originally the legislator only planned to amend the act from 1963 to reflect the fundamental changes that have taken place in society since 1963. While the Family Act was very modern for its time and was in force for over 40 years, it is undeniable, that it was not able to respond to the dynamic changes of family relationships in the 21st century, so the legislator in the end decided for the adoption of completely new legislation to account for the dynamic developments in family law.

The new legislation from 2005 already reacts to the Convention on the Rights of the Child as well as to the legislative intention to recodify the Civil Code, which will also include the integration of family law into the Civil Code.[5] In the preparation of the new Family Act a comparison with foreign legal systems (Hungary, Germany, the Czech Republic, etc.) was also partially used. According to the explanatory notes of the new Family Act from 2005, the changes introduced by the new legislation effective from 1 April 2005 concern in particular the grounds for invalidity and non-existence of marriage in circumstances excluding marriage, the possibility of regulating the child's contact with close persons, distinguishing between guardianship and wardship institutes. Compared to the previous regulation, the rules for monitoring the method of performance and evaluation of the effectiveness of institutional education, educational measures, evaluation of the performance of the function of guardian, guardian for the administration of the child's property are tightened. The issue of foster care regulation was also included in the new law. Although it has public law

5 DULAKOVA JAKUBEKOVA, D. Aktuálna stav práv na rekodifikácii súkromného práva v Slovenskej republike a jeho vízie. In: *Magister Officiorum*, 2020, Vol. 4, no. 2, p. 10. ISSN 1338-5569.

elements, by its nature it is mainly a private law institution of substitute family foster care.

Based on the provisions of § 1 of the Family Act, marriage is the oldest social institution and can be defined as the relationship of one man and one woman legally connected for life, with the aim of fulfilling obligations to each other as well as to society and as such, is founded on gender differences. Thus, in accordance with nature, tradition, morality and social consent, Slovak law regulates marriage so that it serves the individuals of society and fulfills its natural, biological, personal, moral, family and social tasks or missions. This provision of the Family Act is also strengthened and ensured by the Constitution of the Slovak Republic, namely Art. 41 (1), which states at the highest normative level that: *"Marriage is a unique union between a man and a woman. The Slovak Republic broadly protects and promotes its good. Marriage, parenthood and the family are protected by law."*[6] The special protection of children is guaranteed, which means that the marriage, as well as the family, is given the highest level of protection and the constitutional legal obligation of the state to assist this institution and to implement legislation that benefits marriage.

The previous version of the Constitution only stipulated, that *"matrimony, parenthood and the family shall be protected by law"*. In 2014 however describing marriage as the union of one man and one woman was elevated to the constitutional level by amending Article 41 of the Constitution of the Slovak Republic. Since the creation of the independent Slovak Republic, there have been two attempts at providing legal protection of same-sex registered partnerships. The general public has rejected these attempts, but the early 2010's meant the population started to warm up to the idea of registered partnerships. However, this public perception swiftly changed to a more conservative one after the ruling of the European Court of Human Rights in the case of *X and Others vs. Austria 53 ILM 64* in 2013. This ruling was the first recognition of the right of unmarried same-sex couples to second-parent adoption in European States that are a party to the European Convention on Human Rights. The ruling, while celebrated in many EU Member States, had an adverse effect in the more traditionally inclined Slovakia, where the

6 Constitution of the Slovak Republic of 1992 (460/1992 Coll.).

idea of same-sex couples being allowed to adopt children was not accepted well by the public. Upon societal pressure the Constitution was amended to state *"Marriage is a unique union between a man and a woman. The Slovak Republic broadly protects and promotes its good. Marriage, parenthood and the family are protected by law."* This principle had already existed in the aforementioned Family Act from 2005, however elevating it to the Constitution means a much stronger protection of this principle. While the principle had existed in our legal order before, it is granted constitutional protection only from 2014.

One of the criticisms addressing the Family Act from 2005 is that it does not address the issue of cohabitation at all. Neither the Civil Code, nor the Family Act define, regulate or protect cohabitation currently in Slovakia, however the institute does have certain legal consequences in our legal system.

3 Cohabitation Beyond the Slovak Family Act

The family can be characterized as a social group formed by individuals bound by marriage, blood relationships or adoption. Family members follow established patterns of behavior, each family member fulfilling a certain social role. According to the Slovak Family Act, the family is the basic cell of society and is established by marriage as a union of a man and a woman, which arises on the basis of their voluntary and free decision to enter into marriage after the fulfillment of the conditions laid down by law. The purpose of marriage is to create a harmonious and lasting community of life that will ensure the proper upbringing of children. At present, there is no precise universal legal definition of the term family. As far as the case law of the European Court of Human Rights is concerned, it is based on the broader concept of family, which is not only a community based on marriage.

During the societal evolution, the views on marriage and family continue to evolve and change. Lately, our society is witness to a declining motivation of young people to enter into marriage, but even today, marriage retains a high value. From the point of view of marriage, it is interesting that some heterosexual couples do not enter into marriage, which they present for several reasons, on the contrary, homosexual couples demand legalization

of their relationship. Lately we can see a trend of various alternative forms of marriage gaining popularity and while the Family Act might not reference these forms of relationship or provide them with legal protection, it is clear, that the law will have to catch up and provide a regulatory framework to these types of relationships as well. The fact is that in the Slovak Republic, in addition to the traditional marriage, the number of couples in cohabitation is rising. Given that unmarried relationships – such as a cohabitation - are not legally regulated as a marriage, it is important to recognize that these relationships require certain protection, especially if we look at the field of social security law or insurance law.

3.1 Legal Consequences of Cohabitation in Other Areas of Law

As mentioned above, while the Family Act does not recognize cohabitation, there are other areas of Slovak law, where we might find certain protection and even various legal consequences of a cohabitative relationship.

One of the areas worth mentioning is the field of social insurance, where a deeper dive into the legislation unveils certain gaps. An important component of social insurance is health insurance, through which persons are financially secured in the event of a social event such as illness, injury, the need to care for a person, pregnancy or maternity[7]. The benefits tied to the health insurance are dependent on the occurrence of the illness or injury regardless of if the persons involved are married, unmarried or single.

As an example, we could mention the need to treat a sick person, an event that conditions the entitlement to one of the health insurance benefits, namely nursing care. The provision of this allowance is regulated by Act no. 461/2003 Coll. on Social Insurance, as amended (hereinafter referred to as the "Social Insurance Act")[8]. Pursuant to this Act, an insured person is entitled to nursing allowance if they care for a sick child, sick husband,

7 DOBOS, I. Verejné zdravotné poistenie v podmienkach Slovenskej republiky. In: *Budúcnosť práva – právo budúcnosti*. 1. vyd. Bratislava (Slovensko): Paneurópska vysoká škola. Fakulta práva, 2021, p. 207. ISBN 978-80-89453-72-6.

8 Act No. 461/2003 Coll. on Social Insurance as amended by later regulations. Available at: http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/67708/70279/F-1973848846/SVK67708%20Svk.pdf [cit. 15.5.2021].

sick wife, sick parent or sick parent of a spouse whose health condition, according to the certificate of the relevant doctor, necessarily requires treatment by another person. It follows from the above that the provision of this benefit is conditioned by an indirect and adverse social event, which in most cases is the illness of a person defined by the Social Insurance Act.

Nursing benefit, as an obligatory cash benefit of health insurance from the point of view of married and unmarried couples, belong only to the insured person who treats a sick spouse. In case of unmarried persons, even if they have a common household, if one of them becomes ill, the other is not entitled to nursing allowance. The exclusion of these couples living in a cohabitation from the circle of eligible persons was caused by the new legislation, which, from 1 January 2004. The negative impact of this legislative change is very apparent in case of couples living in a cohabitation. If for example, an insured person lives in the same household as the mother of his children in an unmarried relationship. In this case, unlike married spouses, if the mother or father becomes ill, the other insured person is not entitled to nursing allowance. We believe that in the legislative amendments to the Social Insurance Act, there should certainly be an expansion of the range beneficiaries entitled to this benefit.

When we look at the nursing benefits with relation to a child, we can see the same gaps in legislation. For the purposes of the Social Insurance Act a child is the child of the insured person, or the adopted child of his or her spouse, or a child entrusted to the insured person in care replacing parental care by decision of the competent authority.[9] In the absence of adoption or entrustment to care replacing the care of the parents on the basis of a decision of the competent authority, the insured person is also not entitled to nursing care for the child of an unmarried partner, even if they live in the same household.

When it comes to pension insurance, it can be stated that there are also some disparities between married and unmarried persons. The main role of pension insurance is to ensure sufficient income for individuals during adverse social situations, mostly of a long-term nature such as old age, disability and loss of the breadwinner of the family. While there are no differences in claiming

9 Ibid.

any of the basic pensions for married and unmarried persons, for survivors' pensions, for widows' and widowers' pensions, the existence of a marriage is required. This follows from the provision of the § 74 the Social Insurance Act, according to which a living spouse is entitled to a widow's pension (for a deceased husband) and a widower's pension (for a deceased wife). If the persons are not married and live in the same household for a long time and possibly also have children together, if one of these persons dies, the right to a survivor's pension does not arise, which in our opinion is debatable and we believe that even in this case, it would be desirable to extend the circle of beneficiaries of these persons. Such legislation would not be an exception, as in many jurisdictions the circle of persons entitled to a survivor's pension is wider, as it is based on a closer family involvement and a higher dependency on income in the wider family and therefore the entitlement arises e.g., also to the parent, grandson, sibling, companion or divorced wife of the deceased.[10] According to the Slovak Health Care Act when it comes to the medical file, only the spouse has the right to access the medical file after the death of their spouse.[11] The same goes for an adult living in the same household with the deceased at the time of their death, but only if there is no surviving spouse, child or parent of the deceased.[12]

If we look at tax law, we can see more areas of discrepancies between partners in a cohabitation and married spouses. According to the Income Tax Act, the tax base calculated from the income of a person shall be reduced by tax allowance per spouse.[13]

3.2 Cohabitation in the Social Reality of the Slovak Republic

An overview of the legal situation in Europe shows that the traditional image of the family has changed significantly in the last few decades. Traditional family structures are often no longer viable or compatible with the lifestyle of the younger generation. This can be explained by the delay

10 TRÖSTER, P. et al. *Právo sociálního zabezpečení*. 6. ed. Praha: C. H. Beck, 2013. p. 173.
11 KOVAC, P. and A. ERDOSOVA. Právo na informácie o zdravotnom stave vo vybraných otázkach aplikačnej praxe. In: *Bulletin slovenskej advokácie: Slovenská advokátska komora,* 2020, Vol. 26, no. 10, p. 13. ISSN 1335-1079. – TUTPR signatúra E003463.
12 Act No. 576/2004 Coll. on Health Care.
13 Act no. 595/2003 Coll. on Income Tax.

in the residential independence of the younger generations, especially their access to housing, with unemployment also having a significant impact. The younger generations have great difficulty in obtaining two main preconditions for adult life: an independent income and a place to live.

From a social point of view, the average age of marriage for both women and men has increased in Europe, as well as Slovakia.[14] While women have their first child at an older age, the fertility rate itself is declining. The economic autonomy of young people is increasingly lagging behind. Young people's dependence on their family of origin takes two different ways. On the one hand, there are those who are completely dependent on their family, on the other hand, there are those whose main source of income is their work, but who need additional economic help from their families. The lack of housing, at affordable prices for young people, is an important aspect that is often mentioned in explaining the delay in housing independence. Another significant contributing factor to this trend is the increased autonomy of women.[15] The ideas and values about family, and marriage that today's mothers pass on to their daughters are changing dramatically. All of these socioeconomic factors add to the incentive to settle down later in life or in a relationship with lesser formalization, thus making cohabitation an increasingly popular option among younger generations. Various studies of cohabitation tend to start with a reference to its historical origins. Over the last 100 years, Europe, as well as the rest of the world, has undergone great changes, whether economic or political, but also a society-wide transformation. While in the first half of the last century the population was greatly affected by the two world wars, in the second half the population of Europe was affected by the political order. This has also led to major changes in the behavior of the population, which has meant the emergence of new demographic trends.

Cohabitation is a form of sharing a household between two adult partners, who live together for a long period of time, and form a union without

14 BLEHA, B. and B. VANO. Pokračujúca demografická transformácia na Slovensku a jej spoločenské dopady. In: *17. Slovenská demografická konferencia. Zborník abstraktov*. 2019. ISBN 978-80-88946-85-4.

15 SOBOTKA, T. Overview Chapter 6: The diverse faces of the Second Demographic Transition in Europe 2008. *Special Collection 7: Childbearing Trends and Policies in Europe*. Available at: http://www.demographic-research.org/special/7/ [cit. 15.5.2021].

actually being married. Informal partnerships have spread massively in most postindustrial societies as a result of the transformation of social and moral norms and it is directly linked to the postponement of marriage to a later age. Cohabitation is a phenomenon that has been rising steadily in the Slovak Republic, this can be concluded from the continuously rising percentage for children born out of wedlock in the country. While at the time of the Velvet Revolution in 1989 the percentage of children born out of wedlock was under 10 %, today it is over 37 % and is gradually rising. Compared to Western European countries, this share is relatively low. The highest values of this indicator are reached by the countries of Northern Europe (Denmark 44.6 %, Norway 49.3 %, Sweden 55.3 %).[16]

Most EU countries have moved to making cohabitation part of their legal systems and recognize various forms of it, registered partnerships or civil unions. The differences between Member States are rather large, EU member states largely differ on their interpretation of cohabitation and the rights and responsibilities that come with it. Slovakia belongs to the handful of EU member states that do not provide for registered partnerships alongside Latvia, Lithuania, Poland and Romania.

From the number of classifications and types of cohabitations, most commonly two types emerge in Slovakia:

a) Premarital cohabitation as a form of partnership in which the partners have agreed to live together and with some probability their relationship will be formalized by marriage. According to the intensity and development of partnerships, the authors distinguish two subtypes: cohabitation as a test partnership ("trial marriage") and cohabitation as a precursor to marriage, where stronger ties and beliefs about a future marriage are characteristic.
b) Cohabitations - long-term purposeful cohabitations, in which the partners have a common household and do not intend to formalize

16 TYDLITÁTOVÁ, G. Pluralizácia rodinných foriem na Slovensku ako predmet demografickej analýzy v regionálnej optike. *Sociológia*, 2011, Vol. 43, no. 1, pp. 28–56. ISSN 1336-8613.

their relationship by entering into a marriage, have consciously renounced the formalization of their union.[17]

4 Conclusion

By comparing the legal status of partners in a cohabitation partners and the legal status of married spouses, we encounter theoretical as well as practical issues. Should a non-marital partnership, based on the current legislation, where family law forms a separate branch of law, governed by legal norms under civil law or under family law? And if this institute should be governed by family law, should it be understood according to the model of the institute of marriage, or should it be defined and characterized based on its differences from a marital relationship? Obviously, the discussion has many variables and is becoming more and more pressing to provide some kind of legal framework that would account for the social evolution. And while changes in society cannot be ignored, the importance of marriage should not be forgotten. Although the dominant relationship type remains a family based on the marriage of a woman and a man, in addition to the classic type of family behavior, there are other types of family households. Within the framework of legal protection, we can state that natural persons are secured in various social situations and at a relatively good level. However, there are certain benefits tied to a formalized marital relationship. We believe that in further legislative changes, it would be appropriate to reflect on this fact and consider the possible adoption of legislative measures to mitigate the negative effects of adverse social situations on people who are not formally married. Slovakia has long been facing challenges in connection with the growing trend of extramarital cohabitation, but also in connection with other forms of cohabitation, which completely deviate from the traditional understanding of the family model.

It is clear, that the institute of traditional family is undergoing a transformation world-wide. A country like Slovakia, with a very traditional stance on family values and family law, in general is understandably more cautious

17 MLÁDEK, J. and J. ŠIROČKOVÁ. Kohabitácie ako jedna z foriem partnerského spolužitia obyvateľstva Slovenska. *Sociológia*, 2004, Vol. 36, no. 5, pp. 423–454. ISSN 1336-8613.

in implementing major changes hastily – when it comes to such sensitive topics as registered partnership, same sex marriage or even cohabitation. The ongoing debate is already very heated and polarizing. We believe most of these questions will have to be tackled within the framework of the expected recodification of Slovak civil law, which will include family law.

Literature

Act No. 36/2005 Coll. on Family.

Act No. 461/2003 Coll. on Social Insurance.

Act No. 576/2004 Coll. on Health Care.

Act No. 595/2003 Coll. on Income Tax.

Constitution of the Slovak Republic of 1992 (460/1992 Coll.).

BLEHA, B. and B. VANO. Pokračujúca demografická transformácia na Slovensku a jej spoločenské dopady. In: *17. Slovenská demografická konferencia. Zborník abstraktov*. 2019. ISBN 978-80-88946-85-4.

DOBOS, I. Verejné zdravotné poistenie v podmienkach Slovenskej republiky. In: *Budúcnosť práva – právo budúcnosti.* 1. vyd. Bratislava (Slovensko): Paneurópska vysoká škola, Fakulta práva, 2021. ISBN 978-80-89453-72-6.

DULAKOVA JAKUBEKOVA, D. Aktuálna stav práv na rekodifikácii súkromného práva v Slovenskej republike a jeho vízie. In: *Magister Officiorum*, 2020, Vol. 4, no. 2. ISSN 1338-5569.

KOVAC, P. and A. ERDOSOVA. Právo na informácie o zdravotnom stave vo vybraných otázkach aplikačnej praxe. In: *Bulletin slovenskej advokácie: Slovenská advokátska komora*. 2020, Vol. 26, no. 10. ISSN 1335-1079. TUTPR signatúra E003463.

KRÁLÍČKOVÁ, Z. *Autonomie vůle v rodinném právu v česko-italském porovnání*. 1. vyd. Brno: Masarykova univerzita, 2003, 264 p. ISBN 80-210-3093-3.

MLÁDEK, J. and J. ŠIROČKOVÁ. Kohabitácie ako jedna z foriem partnerského spolužitia obyvateľstva Slovenska. *Sociológia*, 2004, Vol. 36, no. 5, pp. 423–454. ISSN 1336-8613

SOBOTKA, T. Overview Chapter 6: The diverse faces of the Second Demographic Transition in Europe 2008. *Special Collection 7: Childbearing Trends and Policies in Europe*. DOI https://doi.org/10.4054/DemRes.2008.19.8. Available at: http://www.demographic-research.org/special/7/ [cit. 15.5.2021].

SPROCHA, B., B. VANO and B. BLEHA. *Prognóza vývoja rodín a domácností na Slovensku do roku 2030*. Vydavateľstvo EKONÓM, 2014. ISBN 978-80-225-3961-6.

TRÖSTER, P. et al. *Právo sociálního zabezpečení*. 6. ed. Praha: C. H. Beck, 2013.

TYDLITÁTOVÁ, G. Pluralizácia rodinných foriem na Slovensku ako predmet demografickej analýzy v regionálnej optike. *Sociológia*, 2011, Vol. 43, no. 1, pp. 28–56. ISSN 1336-8613.

Contact – e-mail

lilla.garayova@paneurouni.com

DOI https://doi.org/10.5817/CZ.MUNI.P210-9981-2021-2

THE RIGHT TO FAMILY LIFE IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Petra Kotková, Milan Palásek
Faculty of Law, Masaryk University, Czech Republic

Abstract in original language

The paper deals with the case law of the European Court of Human Rights relating to cohabitation and other law aspects with this institute related. Attention will be focused particularly to clarification of cohabitation in relationship of marriage or relationship of same-sex couples, especially in connection with Art. 8 and 14 of the Convention.

Keywords in original language

Cohabitation; Marriage; Registered Partnership; the European Court of Human Rights; Right to Family Life; Family; Children.

1 Introduction

Cohabitation like an existence of two people forming a certain long-term life community is a phenomenon these days. The last census in 2011 demonstrated that share of unmarried families is 11 % in total number of complete families.[1] Cohabitation is de facto form of unions without the relevant legal regulation in contrast to the legal relations of marriage and registered partnership, that a wide range of issues arise against unmarried cohabitation.

The European Court of Human Rights („ECHR") responded to this issue in its subsequent decisions. Content of this paper is introduces several conclusions from the relevant case law of the ECHR under examination.

1 Analysis – 2011. Cohabitation. *Czech Statistical Office* [online]. 30. 6. 2014, p. 4 [cit. 5. 5. 2021]. Available at: https://www.czso.cz/csu/czso/nesezdana-souziti-2011-ti6wlv4y3r

2 Cohabitation as „Family Life“ under Article 8 of the Convention

The question asked by the court in connection with this topic is: *„Can the cohabitation between two people be considered as family life, and therefore a family within the meaning of Article 8 of the European Convention on Human Rights ('Convention')"?*

In earlier decision from 1979 the ECHR dealt with case *Marckx vs. Belgium*[2]. The case describes birth of Alexandra, the child from cohabitation. According to former Belgian legislation a single mother had to recognize or adopt her motherhood due to specific process or adopt it, unlike married mothers, which received motherhood status by giving birth to a child. Although, she underwent this procedure. Alexandra had no legal relations to other family members. The ECHR extensively interpreted concept of family life within the meaning of Article 8 of the Convention to include more distant relatives.

Keegan vs. Ireland from 1994, was case about an unmarried cohabitation, which a daughter was born in. However, partners were not living together before the birth. Nevertheless, the ECHR stated that family life under Article 8 of the Convention includes de facto unions of persons living together with children born, regardless whether the partnership lasts even after birth of the child. The characteristics of the family under Article 8 of the Convention were also addressed by the ECHR in the case *X, Y and Z vs. United Kingdom*. ECHR deduced here wide range of facts, e.g. duration of the relationship or life of the partners in the common household. In this case, the Court declared the Article 8 applicability of the Convention to a union in which one of the partners underwent a gender reassignment.

The ECHR also favored an extensive interpretation of family life under Article 8 of the Convention in case *Schalk and Kopf vs. Austria*[3] from 2010. Although, the ECHR dealt mainly with the issue of the rights of homosexual couples. The Court dealt with the applicability of Article 8 of the Convention to homosexual couples – number of states in Europe whose legal systems recognize registered partnership or take them into account increase, thus

2 Decision of ECHR from 13. 6. 1979, *Marcx vs. Belgium*, application no. 6833/74.

3 Decision of ECHR from 22. 11. 2010, *Schalk and Kopf vs. Austria*, application no. 30141/04.

a common core is created. It reflected this development in its decision and concluded that the concept of family life under Article 8 of the Convention includes cohabitation.

3 The Position of Cohabitation in Relation to Marriage

Despite the ECHR statement about classification unmarried couples, like spouses, as family life within the meaning of Article 8 of the Convention, a question mark popped up whether these two forms of community have the same status in specific situations.

In 1986 the ECHR dealt with a situation where Irish law at the time did not allow termination of marriage by divorce.[4] Mr. Johnston, after adjusting his relationship with his wife by a separation agreement, fathered a daughter with his new girlfriend. Although, the ECHR primarily addressed the issue of the right to divorce, it also commented on Mr Johnston's objections to the violation of his right to respect for family life by being forced to remain with his longtime partner only in de facto union without any alternative legal regulation of such cohabitation. According to the ECHR, there has been no violation of the right to family life. Contracting states are not bound by any positive obligation to provide special regime for cohabitation. The ECHR then noted that Irish law allowed the applicant to live with his girlfriend and their relations can adjust differently and proceeded similarly in 2010. This was the case of the complainant *Şerife Yigit*[5], who entered into a traditional religious marriage with her partner. Turkish law recognize only a civil form of marriage. When Serife's husband passed away, she sought a change in registration in connection with religious marriage. At the same time she asked for pension and health insurance after deceased husband. However, her applications were rejected due to absence of a legal relationship between them. The Court addressed the question of discrimination between married persons and people concluding only religious marriages, who are in the position of unmarried couple under Turkish law in access to widows' pensions and social security benefits. The Court held that there was no discrimination, because unequal treatment pursued the legitimate aim

4 Decision from 18. 12. 1986, *Johnston and others vs. Ireland,* application no. 9697/82.
5 Decision of ECHR from 2. 10. 2010, *Şerife Yigit vs. Turkey,* application no. 3976/05.

of protecting public order, the rights and freedom of others. At the same time, the Court pointed out that the negative consequences of not entering into a civil marriage had been known to Mrs Şerife Yigit from the outset and she accepted it voluntarily and should not have been in a legitimate expectation of drawing widow‘s pension or health insurance.

Next case, what the Court had to dealt with, was reciprocal status of marriage and cohabitatin in the case from 2012 called *Van der Heijden vs. Netherlands*.[6] The complainant, Mrs Van der Heijden, claimed in criminal proceedings against her long-term partner, the right to refuse to testimony, even though Dutch law only granted this right to spouses or registered partners. The complainant in the proceedings argued that her partnership was, by its very nature, fully in line with the marital relationship. Dutch courts had rejected her claims. Although, Court of First Instance accepted comparability of consequences of marriage and cohabitation, it emphasized the formal nature of marriage as a public obligation which gives rise to rights and obligations of a contractual nature. The Court concluded that marriage has a certain privileged position over cohabitation and Contracting States to the Convention are entitled to determine whether certain rights belong only to spouses and people from unmarried couples. At the same time, as in the *Şerife Yigit* case, the Court emphasized that the complainant had remained in an informal relationship with her partner on a completely voluntary basis and should therefore have been aware of certain negative effects of such decision. In the Court‘s view, the imposition of a link to the applicant cannot be regarded as a disproportionate negative consequence, having regard to the sufficient procedural guarantees of Dutch legislation.

In comparison I would like to mention, for example, *Petrov vs. Bulgaria*[7] case. The applicant, Mr. Petrov, was sentenced to three and a half years‘ in prison. The complainant wanted to use a phone to contact his long-term partner and his daughter. However, he was not allowed to do that. According to Bulgarian law, prisoners have the right to make phone calls twice a month with relatives including spouses, children, parents and siblings. In this case

6 Decision of ECHR from 3. 4. 2012, *Van der Heijden vs. Netherlands,* application no. 42857/05.

7 Decision of ECHR from, *Petrov vs. Bulgaria,* application no. 15197/02.

the Court concluded that there was discrimination within the meaning of Article 14 in conjunction with Article 8 of the Convention.

It means that the Court granted marriage, as a legal relationship between two people with special status in comparison with the de facto relationship of unmarried people, who Contracting States are not required to regulate a special legal regime for (for example in inheritance law, social security law and so on).

4 Cohabitation of Homosexual Couples

The ECHR addressed the issue of unequal treatment between heterosexual and homosexual couples in case of *X and Others vs. Austria.* The complainants were two unmarried partners who were raising an illegitimate son of one of them together. They have decided to form legal relations with the other partner to the child later. Austrian courts have rejected the adoption. Austrian law allowed only two people, man and woman, to have parenthood. The adoption lost the parental rights of a biological parent of the same sex as the adopter. The Court emphasized that the protection of a 'traditional family', that is to say, a family of father, mother and children, is in itself a sufficient legitimate reason for unequal treatment between those types of unmarried unions. On the other hand, the Court noted that the Austrian legislation did not preclude the existence of de facto partnership between two people of same sex caring for a minor child, but on the contrary expressly permitted the adoption of a child by homosexuality. As a result, the Court declared that in this particular case there was discrimination against same-sex couples against heterosexuals in the approach of one partner to the adoption of the other partner's child, but pointed out the lack of European consensus on the issue, and the very specific nature of the conflict of families of sexual minorities. The European Court of Human Rights has found discrimination between same-sex couples and gay couples minorities. For comparison, it is also appropriate to mention the judgment in *Gas and Dubois vs. France*. The complainants lived together in a cohabitation. Mrs. Dubois underwent artificial insemination from an anonymous donor. Mrs. Gas subsequently submitted a proposal for the so-called simple adoption of a minor daughter with the consent of a biological mother. The court

rejected the motion. Under French law, the simple attachment of a minor child to a biological parent did not cease on simple adoption, but he lost his parental responsibility to the child. The only exception was when the child was adopted by the husband of biological parent. The ECHR found that the complainants were in the same situation as unmarried heterosexual couples, given the approach of both types of union to a civil partnership and the same related negative consequences. He added that the Contracting States to the Convention are not obliged to permit marriage to people of same sex. *Vallianatos and Others vs. Greece* was a case of the ECHR, which it was reiterated that there was a lack of consensus among Contracting States on the legal recognition of same-sex unions in. The case involved homosexuals who wanted to formalize their union. However, at that time, Greece regulated an alternative form of cohabitation other than marriage only for heterosexuals. The ECHR also pointed out the practice of European legislation that makes registered partnerships available as an alternative to a marriage of homosexual couples.

5 Relationship of Parents and Children in Cohabitation

Following chapter brings us back to case of *Marckx vs. Belgium*. In relation to the question of the applicability of Article 8 of the Convention to cohabitation, the Court also touched the parenthood issue of people in cohabitation and the position of illegitimate children. As already stated, under the former Belgian legislation, in order to establish a legal relationship with a child, an unmarried mother first had to recognize her motherhood in a special procedure or adopt her child, as Miss Marckx did. However, the creation of legal connection with the child had *ex lege* certain negative consequences in the area of the mother‘s property rights, consisting in the restriction of the free transfer of property to her daughter. The court concluded that such legislation puts an unmarried mother in a disproportionate situation where she must choose whether to establish a status relationship with her child or to undergo a legal restriction on her property, which the Court found interference with family life and violation of Article 8 of the Convention in.

Meanwhile, the Court dealt with the issue of discrimination against unmarried mothers in connection with the obligation to undergo special proceedings

in order to declare their motherhood, or adoption of a minor child, in contrast to mothers in marriage, whom the legal relationship of motherhood arose by birth itself in. In its judgment, the Court pointed out, as in the case of *X and others vs. Austria*, that the fundamental importance of protecting the traditional family as a legitimate aim of such unequal treatment. In other hand, it did not accept the Belgian Government's objection that some unmarried mothers were not interested in caring about their minor child. Another example of violation of Article 14 in conjunction with 8 of the Convention is related to Paula Marckx and her daughter. The Court also addressed the position of the illegitimate child in the issue of the profession of inheritance proceedings due to the limited dispositions of unmarried mother. Although, the Court found that Article 8 of the Convention did not guarantee the child's access to the parents' estate in any way, it did not find any relevant grounds for differential treatment between married and unmarried children in the present case *Fabris vs. France*[8] from 2013. This was the case of applicant, Mr. Fabris, who was born as an illegitimate child in 1943. The applicant's mother was married to Mr. M. and they had together two legitimate children. In 1970, the applicant's mother entered into an *inter vivos* agreement with Mr. M., on the basis of which they transferred all their property to their two legitimate children, and contract to grant an easement of enjoyment on property. Following his mother's death, the applicant claimed in his proceedings against his two siblings a share in the mother's inheritance and under former French law he, as an illegitimate child, was entitled only to half of legitimate child's inheritance. The unequal position of illegitimate children was subsequently addressed by the Court in case of *Mazurek vs. France*. Here was found a violation of Article 1 of Protocol No. 1 in conjunction with Article 14 of the Convention. Following this decision several legislative changes have taken place in France, leading to equal rights for married and unmarried children. However, Mr. Fabris failed in his claim and the courts rejected his application on the grounds that the division of the applicant's mother's inheritance had already taken place before the 2001. Finally, the case was brought in front of Grand Chamber of the European Court of Human Rights, which did not find the French

8 Decision of ECHR from 7. 2. 2013, *Fabris vs. France,* application no. 16574/08.

Government's justification for the difference in treatment between married and unmarried children to be sufficient and found a violation of Article 14 in conjunction with Article 8 of the Convention. In case *Marcxk vs. Belgium*, stated above, the Court addressed the issue of maternity in connection with cohabitation.

The ECHR addressed the issue of the unequal position of illegitimate children in field of inheritance rights under French law in the case of *Mazurek vs. France*. Following the ECtHS's decision, there have been legislative changes in France in the field of inheritance rights leading to equal rights for married and unmarried children. However, Mr. Fabris failed in his claim and courts rejected his application about division of applicant's mother's inheritance, as it already took place before 2001 legislative changes came into force and so previous legislation precluded challenging *inter vivos* agreements. In the proceedings before the Fifth Chamber of the ECHR French Government argued, that the legislation not to challenge *inter vivos* agreements pursued the legitimate aim of protecting the legal certainty of the entities concerned. She also pointed to the potential disproportionate interference with family life, if the retroactive legislative changes in 2001 would be allowed. Finally, the Grand Chamber of ECHR dealt with the case, which, on the other hand, did not find the French Government's justification for difference in treatment between married and unmarried children sufficient and found a violation of Article 14 in conjunction with Article 8 of the Convention.

Next case, *Kroon and others vs. Netherlands*[9] from 1994, dealt with the issue of determining of paternity. The complainant, Mrs. Kroon, married Mr. M'Hall-Drisse in 1979. Next year, the couple and the complainant moved out within same household. Mrs. Kroon later began to maintain an intimate relationship with the second applicant, Mr. Zerrouk who fathered with Mrs. Kroon son Samir. On the basis of a legal presumption, Mr. M'Hallem-Drisse was registered as a father. Despite applicant's marriage to Mr. M'Hall-Driss was divorced after birth of her son, Mr. Zerrouk, as the biological father of the minor Samir, was not allowed to be entered in the register. In deciding the case, the Court had to deal primarily with

9 Decision of ECHR from 27. 10. 1994, *Kroon and others vs. Netherlands*, application no. 18535/91.

the Belgian Government's objection. The Court disregarded the objection and concluded that the biological and social reality must prevail over a legal presumption. It therefore found that Belgium's disproportionate interference with the applicants' family life had been infringed and that Article 8 of the Convention had been violated.

Other result, coming from ECHR's decision in the 2010 was *Chavdarov vs. Bulgaria*[10] case. Mr. Chavdarov decided to deny the paternity of a registered man in order to establish legal ties with his minor children. The Court proceeded much stricter than in the previous case.

Brief summarisation the existing case law of the ECHR in relation to the legal status of illegitimate children, it is necessary to point out that clear tendency of the Court is to eliminate various forms of discrimination between married and unmarried children. The case law shows the Court's considerable emphasis on creating sufficient procedural conditions for the establishment of status relations between parents in unmarried cohabitation and minors, taking into account the priority position of biological and social reality in family relationship.

6 Conclusion

Today gradual approximation of family law regulations in European legal systems leads to spontaneous creation of the basic principles of European family law cannot be overlooked. The case law of the European Court of Human Rights clearly contributes to this convergence and in connection with the issue of unmarried cohabitation, it often encounters a lack of consensus between the Contracting States to the Convention on various legal issues.

Newer approaches appears in this direction, for example in Model Family Code – authors Ingeborg Schwenzer and Mariel Dimsey created a „model family code" in 2006 based on knowledge from European and non-European family law regulations.[11] They didn't only reflected common aspects of legislation of the given states, but also took into account some modern

10 Decision ECHR from 21. 12. 2010, *Chavdarov vs. Bulgaria*, application no. 3465/03.

11 SCHWENZER, I. H. and M. DIMSEY. *Model family code: from a global perspective*. Antwerpen: Intersentia, 2006, s. VI.

elements. One of these very bold innovations was the creation of an unified concept of partnership that includes marriage, unmarried cohabitation and same-sex couples in equal status. European Court of Human Rights does described the Convention as a „living instrument". There is a significant shift in opinion reflecting legislative changes in European countries in connection with this issue, and therefore it is necessary to point out the considerable importance of the case law of the European Court of Human Rights for the European legal environment, including the Czech Republic.

Literature

GREGOROVÁ, Z. and Z. KRÁLÍČKOVÁ. Nesezdané soužití v právním řádu České republiky. *Právní rozhledy*, 1998, Vol. 6, no. 5. ISSN 1210-6410.

PALÁSEK, M. Nesezdané soužití v judikatuře Evropského soudu pro lidská práva. *Dny práva* 1. ed. 2016. ISBN 978-80-210-8202-1.

SCHWENZER, I. H. and M. DIMSEY. *Model family code: from a global perspective*. Antwerpen: Intersentia, 2006, 257 p. ISBN 9050955908.

Contact – e-mail

kotpet178@gmail.com

DOI https://doi.org/10.5817/CZ.MUNI.P210-9981-2021-3

COHABITATION AND ASSISTED REPRODUCTION IN THE CZECH REPUBLIC AND IN THE EUROPEAN CONTEXT

Denisa Kotroušová
Faculty of Law, University of West Bohemia in Pilsen, Czech Republic

Abstract

The contribution deals with a rather narrow topic related to cohabitation – namely with the access of cohabitants to assisted reproduction (ART). The focus is being put primarily on the Czech legal regulation of this issue. Then there is a broader European context added in the contribution. Some European countries are analysed in greater detail, especially if their approach to ART is specific or interesting. In the end, there is reflection of the Czech approach, taking into consideration the differences between the Czech Republic and other European countries.

Keywords

Cohabitation; Assisted Reproduction; Artificial Insemination; Same-sex Couples; Infertile Couple; Infertility Treatment; Parenthood; Children; Paternity.

1 Introduction

The society has changed a lot over the course of its existence in many different ways, one being the forms of relationships people tend to live in. While about a hundred or a hundred and fifty years ago, marriage was the most common type of relationship and living outside of wedlock was despised, today's situation is much different. Cohabitation nowadays is usually deemed to be quite normal – at least amongst European countries. A similar opinion is held in the judicial practice of the European Court of Human Rights, according to which there without a doubt may exist a family life between two persons living in a stable relationship outside of marriage or any other

formalised union.[1] An inherent part of the family life of any couple, regardless of their marital status, is the question of children. Unfortunately, not every couple can procreate naturally, due to various reasons. Medically assisted reproduction or assisted reproductive technology (hereinafter 'ART') may be one of the ways to help. As easy as it may seem in the first place, access to ART cannot be taken for granted when it comes to cohabitation - at least not for all cohabitants and not in every European country.

The following contribution describes the current legal position of cohabitants in terms of access to ART and the rights and duties arising from ART for them (particularly to the child conceived via ART), especially according to Czech law. The first part is introductory and briefly characterizes the key term 'cohabitation' both from the perspective of the Czech legal order and from the perspective of the Commission of European Family Law. The second part focuses solely on the legal position of cohabitants concerning the Czech regulation of ART. Assisted reproduction is therefore described closer, as well as the term 'infertile couple'. This part also analyses the issue from two closely connected points of view – the first one being whether or not both cohabitants formed the infertile couple, and the second one being if the cohabitants were of the same or of the opposite sex. The third part adds a broader international context while bringing a brief overview of approaches to this issue in Europe. Some European countries are examined in greater detail, in particular, if their approach is specific or interesting. The conclusion summarizes the contribution and sets down few questions arising from the confrontation of the Czech and the other European approaches.

2 Czech Legal Framework of Cohabitation

2.1 Cohabitation in the Czech Republic

Cohabitation in its broadest meaning presents a type of relationship between two people regardless of their sex. The other types are marriage and registered partnership (sometimes also called civil union, civil partnership,

1 Decision of the of the European Court of Human Rights from 24 June 2010, *Schalk and Kopf vs. Austria*, application no. 30141/04.

or life partnership). The biggest difference between them is that both marriage and registered partnership are formal (meaning regulated by law, which sets down rights and obligations for spouses/partners arising from such type of relationship), whereas cohabitation is usually informal. Similar to other European countries, cohabitation exists in the Czech Republic as well – according to the Population census from 2011, there were 234 346 "*de facto* marriages" and 4056 "*de facto* partnerships" in the Czech Republic in 2011.[2] Given the growing popularity of cohabitation in general, it is very likely these numbers have increased over the past 10 years.[3] Although cohabitation is clearly popular amongst Czech inhabitants, its legal definition, or at least clear legal regulation, is absent. The Czech Civil Code[4] does not define it – when referring to individuals living together outside of wedlock, the term 'close person' is often used. 'Close person' is defined in § 22(1) CC as *"a relative in the direct line, sibling and spouse or a partner under another statute governing registered partnership (hereinafter a 'partner'); other persons in a familiar or similar relationship shall, with regard to each other, be considered to be close persons if the harm suffered by one of them is perceived as his own harm by the other."* Cohabitants fall into the scope of the second part of the quoted sentence.

However, it is important to point out that defining cohabitants using the abovementioned provision leads to a much different concept of cohabitation than in other European countries or in the principles of Commission of European Family Law (see subchapter 2.2). According to Czech law, cohabitants can be opposite-sex or same-sex life partners. If we follow the definition of 'close person' strictly though, cohabitants actually do not have to be in any kind of intimate relationship at all (e.g. distant relatives, friends). This conclusion was confirmed by the Czech Constitutional Court as well.[5]

2 Tab. 550 Hospodařící domácnosti podle počtu členů a podle typu hospodařící domácnosti a způsobu bydlení. In: *ČESKÝ STATISTICKÝ ÚŘAD: Veřejná databáze* [online]. 26. 3. 2011 [cit. 22. 5. 2021]. Available at: https://vdb.czso.cz/vdbvo2/faces/cs/index.jsf?page=vystup-objekt-vyhledavani&vyhltext=tab.+550&bkvt=dGFiLiA1NTA.&katalog=all&pvo=SPCR550

3 This question will be answered for sure after this year's People's Census is processed.

4 Act no. 89/2012 Coll., Civil Code, as last amended (hereinafter ‚Civil Code' or ‚CC').

5 Judgment of the Constitutional Court of the Czech Republic from 9 July 2018, no. II. ÚS 955/18.

In terms of rights and duties, the status 'close person' grants cohabitants with partial rights and duties, such as tenancy rights, deciding (under certain circumstances) on the form of the funeral of the deceased cohabitant [§ 114(1) CC], the duty to take care of the other cohabitant's child if it lives in the household with the cohabitants (§ 885 CC), or a right to succession after the deceased cohabitant in the second class of heirs alongside the decedent's parents and/or spouse in case the cohabitant has lived in the household with the decedent for at least 2 years before his death and cared for the household [§ 1636(1) CC]. Other rights and duties may arise for cohabitants from other acts (e.g. access to ART – for further details see chapter 3).

2.2 Concept of Cohabitation in the Principles created by the CEFL[6]

The previous subchapter shows that Czech legal regulation and definition of cohabitation has many loopholes and is rather scrappy. In order to be able to subsequently compare rights and duties of cohabitants concerning ART amongst European countries, it is necessary to choose an unified definition which can be used throughout the whole contribution and for all countries. For such purpose, the definition set down by the CEFL in its '*Principles of European Family Law Regarding the Property, Maintenance and Succession Rights of Couples in de facto Unions*' (hereinafter 'Principles') will be used. The Principles were prepared to set basic common guidelines for *de facto* unions (cohabitations), which were becoming more and more popular amongst European countries. The Principles were created based on the existing legislation and approach to cohabitation in all of these countries. Principle 5:1 gives two definitions of 'cohabitation' or '*de facto* union' – a "standard" *de facto* union is a union where two persons live together as a couple in an enduring relationship, whereas a qualified *de facto* union is a union in which partners are in an enduring relationship for at least five years

6 The abbreviation 'CEFL' stands for the Commission on European Family Law, which is an international, European body consisting of Family Law experts from European Union member states. The main objective of the CEFL was to *"launch a pioneering theoretical and practical exercise in relation to the harmonization of family law in Europe."* For further details see History. In: *CEFL. Commission on European Family Law* [online]. [cit. 22. 5. 2021]. Available at: http://ceflonline.net/history/

or have a common child. The rest of these Principles deals with general rules regarding rights and duties of partners, property relationships as well as debts between partners or mutual right and obligations after separation of partners or death of one of them.[7] Out of these two definitions, only the first one will be used, for that one is more or less in compliance with the Czech concept of cohabitation.[8]

3 Legal Position of Cohabitants Concerning ART in the Czech Republic

3.1 Legal Framework of ART and the Importance of 'Infertile Couple'

Before heading into the main issue discussed in this contribution, a few other terms need to be addressed. All of them are connected with assisted reproduction. ART in the Czech Republic is regulated by § 3–11 of the Act on Specific Health Services.[9] Assisted reproduction is defined here as a set of methods defined in this act and conducted in order to perform artificial insemination on woman in two enumerative situations: a) as an infertility treatment of woman or man from the infertile couple when there is little or no chance of natural conception and concurrently other means of treatment haven't been successful of are not likely to be successful; b) as a way of early screening of the future child when there is a risk of genetically conditioned diseases that might have been passed on to the future child by woman or man from the infertile couple.

When trying to describe the legal position of cohabitants concerning access to ART, it is crucial to mention the term 'infertile couple' The infertile couple is the only subject that is allowed to access ART in the Czech Republic.

7 Comission on European Family Law. THE PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING THE PROPERTY, MAINTENANCE AND SUCCESSION RIGHTS OF COUPLES IN DE FACTO UNIONS. In: *CEFL. Commission on European Family Law* [online]. Pp. 1–6 [cit. 22. 5. 2021]. Available at: http://ceflonline.net/wp-content/uploads/English-De-Facto.pdf

8 There are no special rights for 'long-term' cohabitants nor for cohabitants with a common child (apart from rights arising from the parent-child relationship).

9 Act no. 373/2011 Coll., on Specific Health Services, as last amended (hereinafter 'ASHS').

It is defined in § (6)1 ASHS as *"a man and a woman who intend to undergo this health service (ART) together"*. Since this definition is very wide, cohabitating couples definitely fall into its scope (at least on the first sight – see subchapter 3.3 below). It hasn't always been so wide, though. This concept of 'infertile couple' was introduced to the Czech legal order in 2006 when Act no. 20/1966 Coll., on Care of People's Health was amended and a new § 27d was added. Before the 1 June 2006, only married couples could access ART. However, there exists a different opinion of the Supreme Court of the Czech Republic on the accessibility of ART for unmarried couples before that date. In its judgment from the 19 July 2012, no. 25 Cdo 754/2010, the Supreme Court stated that *"unmarried couples in the Czech Republic could access ART even before 1 June 2006"*. The court explained that the ordinance which regulated ART at that time and which indirectly limited access to ART only to spouses should be interpreted in the way that it actually explicitly regulated only rules applying on ART in the case of spouses, whereas in the case of unmarried couples there was no explicit regulation. The court also pointed out that cohabitation was a prevalent type of relationship at that time and that it was possible to limit one's rights only on legal basis, thus not on the basis of sub-legal ordinance.[10]

Even though nowadays there is – thanks to the wide definition of the infertile couple - no space for academic discussions on whether or not unmarried couples can access ART, the rights and duties of cohabitants arising from ART depends on further inconspicuous, yet important details. This issue may be analysed in two closely connected dimensions which are discussed separately in the following subchapters.

3.2 Did Both Cohabitants Form the Infertile Couple?

The first dimension brings a question of whether or not both cohabitants formed the infertile couple and underwent ART together. The answer entails substantial consequences and differences in rights and duties for cohabitants in both situations. If both cohabitants formed the infertile couple, both would become legal parents of the child born out of artificial insemination.

10 Judgement of the Supreme Court of the Czech Republic from the 19 July 2012, no. 25 Cdo 754/2010.

The woman becomes the mother of the child based on the fact of delivery (§ 775 CC). The man becomes the father of the child based on one of the presumptions of paternity which is bound to giving consent to artificial insemination [§ 778 CC and § 8(2) ASHS]. In this case, both cohabitants have parental responsibility towards the child (e.g. have the right and the duty to look after the child, to bring it up, to maintain it, to protect it etc.), as well as mutual inheritance rights to the child.

On the other hand, if only one of the cohabitants was part of the infertile couple, the legal position of both cohabitants would differ. This situation may occur, for example, if the cohabitation formed after ART methods were conducted but before the child was born. In this case, only the cohabitant who underwent ART would be the legal parent of the child. The other one would be in no legal relationship to the child and thus have no rights nor duties to it. He/she could only become a social parent of the child and its close person. In case the child lives with both cohabitants in the household, the other cohabitant also has the duty to take care of it (§ 885 CC). However, it is important to mention this situation can be changed and the other cohabitant can become the child's other legal parent. The only condition is he/she adopts the child. Although to be able to do so, cohabitants must conclude marriage, which means the cohabitation itself would have to terminate (or better said to transfer itself into another form of relationship).

3.3 Are Cohabitants of the Opposite-Sex or of the Same-sex?

The second dimension of the abovementioned issue is very closely connected to the first one and has to be addressed in concord with it. It lies in the question of whether the cohabitants are of the same sex or of the opposite sex. Again, similar to the first dimension, the answer strongly (even more than in the first case) determines their legal position concerning ART. The situation of opposite-sex cohabitants is clear and was covered essentially in the previous subchapter. Opposite-sex cohabitants can access ART without any significant problems. Same-sex cohabitants, on the other hand, have a much more difficult position. Even though the definition of an infertile couple is relatively wide, it is clear and uncompromising when it comes to same-sex couples. Same-sex cohabitants cannot access ART

as a couple in the Czech Republic. However, they are not *excluded as individuals* – provided they form an infertile couple with someone else of the opposite sex. The definition of an infertile couple is vague enough, so it sets down no requirements in terms of quality nor duration of the relationship between the persons in it. They can therefore be not only spouses or cohabitants but friends or even complete strangers to each other, as well.[11]

Even though this 'shortcut' is possible and probably often used, one has to ask if such course of action is following the law, namely § 3(1) ASHS. This provision allows undergoing ART (or better said performing artificial insemination on woman) *exclusively* as a treatment for infertility of one or both persons in the infertile couple, or as a way of early screening for hereditary diseases that may be passed on the future child. Does there actually exist infertility (or subfertility) as a medical diagnosis in an infertile couple consisting of one of the same-sex cohabitants and someone else of the opposite sex? As much as an affirmative answer cannot be fully excluded, it is not very likely. The situation in which this so-called 'infertile' couple is situated can be called an *incompatibility*, not infertility.[12] And according to ASHS and to the Czech view of ART in general, ART should not serve as a tool to remove incompatibility; it should be exclusively an infertility treatment. In such cases, where there actually exists no infertility, the sham infertile couple should not be allowed to undergo ART at all. However, we can't deny even these sham infertile couples get access to it and therefore circumvent the law.

Apart from the abovementioned circumvention of the law, there is another downside when it comes to same-sex cohabitants and ART. It is similar to the one present in case only one of the opposite-sex cohabitants formed the infertile couple. Again, only the cohabitant who formed the infertile couple would become a legal parent of the child conceived through ART.

11 FRINTA, O. Asistovaná reprodukce – nová právní úprava. *Právní fórum* [online]. 2007, no. 4, pp. 123–130 [cit. 24. 5. 2021]. Available at: https://www.noveaspi.cz/products/lawText/7/35406/1/2?vtextu=asistovan%C3%A1%20reprodukce%20-%20metoda%20pr%C3%A1vn%C3%AD%20%C3%BApravy#lema0

12 'Infertility' is defined by the WHO as "*a disease of the male or female reproductive system defined by the failure to achieve a pregnancy after 12 months or more of regular unprotected sexual intercourse.*" Infertility. In: *World Health Organization* [online]. 14. 9. 20204 [cit. 24. 5. 2021]. Available at: https://www.who.int/news-room/fact-sheets/detail/infertility

The other one would remain only a social parent and a close person to the child. The main difference between the situation of same-sex and opposite-sex cohabitants, however, is that the other same-sex cohabitant can never get himself/herself into the position of the second legal parent. That can be done solely through step-parent adoption which is reserved only for married couples. Same-sex couples in the Czech Republic cannot conclude marriage (§ 655 CC), only registered partnership that has slightly different legal consequences.

4 European Context of Access to ART for Cohabitants

4.1 General Overview of European Approaches

The following chapter tries to describe the European trends and concepts of access to ART using various analyses, statistics, and researches dealing with data on legislation and access to ART amongst European countries in recent years; and also using particular legal regulations of some of them.

When trying to compare the Czech legal regulation of access to ART with the rest of Europe, the first noticeable thing is that ART is very popular amongst European countries. On the other hand, there is no unified approach. Every country maintains slightly different approach to granting access to ART to different types of subjects.[13] Countries differ not only in the way to whom they grant access to ART, but also in the way what ART methods are legal in that particular country; and sometimes even in the way what methods are accessible for whom. The huge variety in access to different methods of ART for different types of applicants in different European countries is nicely and clearly shown in the table I of ESHRE's and EIM's Survey on ART and IUI from 2020.[14]

13 PRÄG, Patrick, MILLS, Melinda C. Assisted Reproductive Technology in Europe: Usage and Regulation in the Context of Cross-Border Reproductive Care. In: Kreyenfeld M., Konietzka D. (eds). *Childlessness in Europe: Contexts, Causes, and Consequences* [online]. Cham: Springer, 2017, pp. 290–291 [cit. 25. 5. 2021]. Available at: https://doi.org/10.1007/978-3-319-44667-7_14

14 CALHAZ-JORGE, Carlos., et al. Survey on ART and IUI: legislation, regulation, funding and registries in European countries. *Human Reproduction Open* [online]. Vol 2020, Issue 1, 2020, pp. 4–5 [cit. 24. 5. 2021]. Available at: https://doi.org/10.1093/hropen/hoz044

Generally speaking, it is much easier to differentiate countries based on the second dimension (based on the accessibility of ART for same-sex couples), than on the first one because it is the second one that usually attracts attention of both researchers and public. Even though marriage is quite a common prerequisite for access to ART, it is almost every time accompanied with an alternation of living in a 'stable couple'. This term is often used, yet not very well described nor defined, so it can definitely cover persons living in cohabitation as it is perceived by the CEFL. Strict marriage requirement exists mainly in Islamic countries, meaning in terms of extended concept of Europe only Turkey.[15] However, based on the second dimension of the analysed issue, European countries can be classified into four more or less homogenous groups which adhere to similar approach in terms of access to ART (not the same though, because they may differ in details). Amongst these groups, we can find clear trends of either growing or becoming smaller, which are visible especially if data from different years are compared.

4.2 Overview of Individual Groups with Examples

4.2.1 Groups of Countries Denying Access to Same-sex Cohabitants

The first group grants access to ART only to opposite-sex couples, regardless of their marital status. The Czech Republic belongs to this group alongside, for example, Slovakia, Poland, Switzerland, Turkey or Italy[16] (and until August 2021 France – for further details see subchapter 4.2.2).[17]

Even this group is not unanimous. Some countries clearly grant access to ART to cohabitants, whereas some others do not have such clear regulation. Slovakia is an example of a slightly blurred approach and

15 Chapter 4: Marital status. In: ORY, S. J. et al. *IFFS Surveillance 2013* [online]. October 2013, pp. 31–33 [cit. 24. 5. 2021]. Available at: https://cdn.ymaws.com/iffs.site-ym.com/resource/resmgr/iffs_surveillance_09-19-13.pdf

16 CALHAZ-JORGE, C. et al. Survey on ART and IUI: legislation, regulation, funding and registries in European countries. *Human Reproduction Open* [online]. Pp. 4–5 [cit. 24. 5. 2021].

17 This contribution was presented at a conference that was hosted in an online form in April 2021. While working on its written form, the legislation of France changed significantly. This text aims to incorporate the changes as they exist to the date the 10 August 2021.

incomplete legal regulation. Slovak explicit regulation of ART (or better said of artificial insemination) is contained in an obsolete Ordinance of Ministry of Health from the 10 October 1983, no. Z-8600/1983-D/2, on Conditions for Artificial Insemination. This ordinance, which is in fact similar to the one that was in force in the Czech Republic before the 1 June 2006, mentions performing artificial insemination only in case of spouses. It may therefore seem that Slovakia is very strict and excludes cohabitants from accessing ART. However, there is another sub-legal ordinance – in this case Ordinance of the Government of Slovakia no. 20/2007 Coll. (so-called "Ordinance on Donors"), which amongst other things defines 'partner donation' as a *"donation of gametes between a man and a woman, who declare to have an intimate relationship"* – which is in fact an allowance of performing ART (or better said artificial insemination) in unmarried couples.[18] Such scattered, partially obsolete and not even legal regulation of ART and access to it is definitely not ideal and may cause many problems for persons undergoing it. One of the problems may be the question of determination and denial of paternity in case of unmarried couples which is not explicitly regulated in the Slovak Act on Family. This issue recently represented a subject matter to decide on by the Regional Court in Prešov. The court said that when there is no specific legal regulation related to denial of paternity to a child conceived through artificial insemination performed in an unmarried couple, the closest possible regulation must be applied – in that particular case conditions for denial of paternity for spouses should be used because the cohabitants are in a similar legal position as spouses.[19]

Another difference between countries in this group relates to what methods are accessible for whom. A good example is Switzerland. Not only it is stricter then the Czech Republic in terms of ART methods that are legal in Switzerland, but it also distinguishes between different types of applicants. Under the Swiss law, both married and unmarried couples are allowed to access ART.

18 PETRENKO, M. and Z. ZOLÁKOVÁ. Reprodukčná medicína v slovenskom právnom prostredí. In: *inVitro* [online]. 2017, Vol. 5, no. 2, pp. 94–95 [cit. 26. 5. 2021]. Available at: https://issuu.com/alphamedicalinvitro/docs/__asopis_invitro_-_reproduk__n___me

19 Judgement of Regional Court in Prešov from the 30 March 2021, no. 24CoP/151/2020 [online]. In: *Slov-Lex. právny a informačný portál*, Úrad vlády Slovenskej Republiky. Available at: https://www.slov-lex.sk/sk/vseobecne-sudy-sr/-/ecli/ECLI-SK-KSPO-2021-8120201908_1

However, married Swiss couples have access to both ART using their own cells, as well as to ART using donor sperm. Swiss cohabitants, on the other hand, can access ART only using their own cells.[20] This approach is being criticized as discriminatory, not only towards opposite-sex cohabitants, but towards same-sex cohabitants, who are excluded completely, as well.[21]

The second group includes countries that allow opposite-sex couples and single women to access ART. This group is bigger than the previous one (14 countries) and includes countries such as Croatia, Hungary, Greece, Russia or Ukraine.[22]

4.2.2 Groups of Countries Allowing Access to ART to Same-sex Cohabitants

In opposition to groups number one and two, groups number three and four are much friendlier towards same-sex couples. Group number three is currently the biggest one (18 countries; 19 counting in France) and includes for example Finland, the United Kingdom, Belgium, Spain or the Netherlands. Countries from this group grant access to ART to opposite-sex couples, single women as well as same-sex female couples.[23]

With opening access to ART to female same-sex couples, the countries are sooner or later faced with a question that is closely connected to ART in general - the question of parenthood. These countries usually allow adoption for same-sex couples,[24] however at some point adoption ceases being sufficient. Determination of parenthood (not only) in cases where ART

20 § 3(3) and § 5 of the Federal Act no. 810.11 from the 18 December 1998 on Medically Assisted Reproduction [online]. In: *Fedlex. The publication platform for federal law*. Available at: https://www.fedlex.admin.ch/eli/cc/2000/554/en

21 HOCHL, K. Reproductive medicine in Switzerland – Factsheet. In: *SCHAUB HOCHL RECHTSANWÄLTE AG* [online]. September 2019, pp. 2–3 [cit. 26. 5. 2021]. Available at: https://schaubhochl.ch/wp-content/uploads/2019/09/FortpflanzungsmedizinFactsheetENDinah30.09.2019.pdf

22 CALHAZ-JORGE, C. et al. Survey on ART and IUI: legislation, regulation, funding and registries in European countries. *Human Reproduction Open* [online]. Pp. 4–5 [cit. 26. 5. 2021].

23 Ibid.

24 For overview of European countries regarding access of same-sex couples to joint adoption and step-parent adoption see e.g. KOTROUŠOVÁ, D. *Manželství osob stejného pohlaví z pohledu české právní úpravy a jejích navrhovaných změn*. Diploma thesis. Pilsen: University of West Bohemia, Faculty of Law, 2020, pp. 133–134.

was used only in favour of opposite-sex couples is deemed discriminatory towards same-sex couples,[25] and thus is opened to same-sex couples as well – usually the female ones, and usually only for those in a formal relationship. However, exceptions do exist – for example, Finland, which allows access to ART for same-sex female couples from 2007, introduced the so-called presumption of parenthood (presumption of maternity) in 2019. This presumption can apply to a woman who has consented to performing ART on her female partner regardless of their marital status.[26]

An example of a country that allows access to ART to same-sex female couples and regulates presumptions of maternity only for married couples is Spain. The co-maternity is in this case established through a declaration of the other woman under the provisions of the Civil Registry Law and her consent to filiation to the child born to her spouse.[27]

The last and smallest (5 countries) group overlaps a little bit with the third one. Countries that belong to this group (e.g. the United Kingdom, the Netherlands, or Belgium) allow access to ART also to same-sex male couples.[28] It is obvious that it is the friendliest one for same-sex couples, but on the other hand, it is the most controversial one. When thinking of access to ART for two men, there always has to be a woman involved in this process to carry the baby for them. Therefore, the question of surrogacy comes into place. Surrogacy itself is a very delicate and controversial topic that raises a lot of emotions and difficult legal and ethical questions. That may be the reason most of the European countries are nowadays more or less reluctant to granting access to ART to all same-sex couples.

25 The reasoning based on alleged discrimination was used e.g. in Belgium when its legislation on determination of parenthood was amended in 2014. See FIERS, D. Dra een oplossing voor lesbische meemoeders? In: *vrt NWS* [online]. 4. 1. 2014 [cit. 26. 5. 2021]. Available at: https://www.vrt.be/vrtnws/nl/2014/01/04/dra_een_oplossingvoorlesbischemeemoeders-1-1823193/

26 The 'co-maternity' established this way shall be confirmed by a decision of the Digital and Population Information Agency. See § 3 of the Maternity Act, no. 253/2018 [online]. In: *FINLEX*. Available at: https://www.finlex.fi/en/laki/kaannokset/2018/en20180253

27 S 6 and S 7(3) of the Act no. 14/2006 from the 26 May 2006 on Assisted Humar Reproduction Techniques [online]. In: *Agencia Estatal Boletín Oficial de Estado*. Available at: https://www.boe.es/buscar/act.php?id=BOE-A-2006-9292

28 CALHAZ-JORGE, C. et al. Survey on ART and IUI: legislation, regulation, funding and registries in European countries. *Human Reproduction Open* [online]. Pp. 4–5 [cit. 27. 5. 2021].

It also needs to be mentioned, that all four groups are changing over time. There is a clear trend which shows that groups two and three are slowly, but steadily getting bigger, as more and more countries are opening their ART legislation. Some countries are even in the process of change right now (or has just gone through it). Concerning that, the current situation of France must be mentioned. Just until recently, French legal regulation of ART has been very similar to the Czech one. Since 2019, there has been pending a draft, which has awakened lots of strong emotions.[29] This draft aimed to amend the French Bill on Bioethics in the way that (amongst other things) the access to ART would be opened to single women and same-sex female couples regardless of marital status and that there would be newly introduced into the French legal order the abovementioned presumption of maternity. There was a long time of debates and opposing opinions between the French Parliament and the French Senate. The Parliament kept on supporting the original version of the amendment, whereas the Senate kept on either approving it in a significantly modified version (during the second reading),[30] or refusing it completely (during the third reading, where the Senate expressed its final opinion).[31] However, it was the Parliament, which had the "last word" in this debate and on the 29 June 2021, during the final reading, overturned the Senate's refusal and adopted the amendment in its more or less original version.[32] The adopted amendment

29 LANGLOIS, G. La loi de bioéthique à l'heure de la révision. In: *ActuSoins* [online]. 11. 3. 2020 [cit. 27. 5. 2021]. Available at: https://www.actusoins.com/325648/la-loi-de-bioethique-a-lheure-de-la-revision.html

30 During the second reading, the French Senate voted in favour of the draft in a very modified version, that was deprived of the access to ART for single women and same-sex female couples as well as of the presumption of maternity. For further details see FITZPATRICK, M. French Senate approves controversial bioethics law, drops key elements. In: *rfi* [online]. 4. 2. 2021 [cit. 9. 8. 2021]. Available at: https://www.rfi.fr/en/france/20210204-french-senate-approves-controversial-bioethics-law-drops-key-elements-medically-assisted-procreation-pregnancy-women-s-rights

31 During the third reading, the French Senate turned down the original version of the amendment approved yet again in the Parliament. For further details see JOCHOVÁ, J. Bioetický zákon, který zbavuje děti otců, neprošel francouzským Senátem. In: *alipro.cz* [online]. 25. 6. 2021 [cit. 9. 8. 2021]. Available at: https://alipro.cz/2021/06/25/bioeticky-zakon-ktery-zbavuje-deti-otcu-neprosel-francouzskym-senatem/

32 Franceinfo avec AFP. Le projet de loi de bioéthique, dont la PMA pour toutes, sa mesure phare, est définitivement adopté. In: *franceinfo:* [online] 29. 6. 2021, last update 30. 6. 2021 [cit. 9. 8. 2021]. Available at: https://www.francetvinfo.fr/societe/pma/le-projet-de-loi-de-bioethique-dont-la-pma-pour-toutes-sa-mesure-phare-est-definitivement-adopte_4683331.html

("Law no. 2021-1017 of August 2, 2021") was published in the Official Journal on the 3 August, 2021.[33]

When speaking about ART legislation changing over time, a short mention should be dedicated to Switzerland once more. Its current legislation on ART has been discussed in the previous subchapter. However, similar to France, the Swiss legislation is currently undergoing a substantial change. In December 2020, the Swiss Federal Assembly approved a bill that opened marriage to same-sex couples, opened access to ART to married same-sex couples, and also introduced the so-called presumption of parenthood for same-sex female couples that would undergo ART. Nevertheless, this amendment is not in force yet, for there is a referendum to be held upon it in September 2021.[34] Although it is fair to mention that even if the new amendment is actually adopted, the main issue of Swiss ART legislation (meaning the differentiation between married and unmarried couples in terms of methods accessible) won't be removed.

5 Conclusion and Discussion

To conclude this contribution, the Czech regulation of access to ART for cohabitants may be judged both liberal and strict. It is liberal because of the wide definition of the infertile couple which allows cohabitants to access it. On the other hand, it is also quite strict, judging from the point of view of same-sex couples, who are currently excluded from accessing ART as a couple. However, it shall not be forgotten that same-sex cohabitants can access ART as individuals if they form the infertile couple with someone else of the opposite sex (although such course of action presents an obvious circumvention of law).

Looking at the overview of different approaches amongst European countries a clear and quite persistent (judging based on the example of France) trend of opening access to ART to same-sex female couples and/or to single women can be seen. Comparing the Czech regulation to the European ones, one can

33 Bioéthique. Loi relative à la bioéthique. In: *SÉNAT. UN SITE AU SERVICE DES CITOYENS* [online]. [cit. 9. 8. 2021]. Available at: https://www.senat.fr/dossier-legislatif/pjl19-063.html

34 Ehe für alle: Zieht die Schweiz nach? In: *humanrights.ch* [online]. 19. 5. 2021 [cit. 10. 8. 2021]. Available at: https://www.humanrights.ch/de/ipf/menschenrechte/lgbtiq/schweiz

ask a question of whether or not should the Czech Republic follow the trend as well. As much as this is mainly a question for the legislator to decide on, I dare to point out one thing that is important to keep in mind in my opinion. The Czech approach differs from some of the European ones mainly due to the way each of them perceives ART as a whole. Meanwhile the Czech one views ART *exclusively* as a *treatment* of infertility or subfertility (a medical treatment of a disease), the others hold the view it is also a *way of fulfilling one's reproductive rights* and a way to deal with involuntary childlessness[35] – or in other words, a commercial service opened to anyone who asks for it. Personally, I am an advocate for the more conservative Czech approach, for I believe ART is and should be a treatment in the medical meaning of that word, not an enhancement of human body above its natural abilities.[36]

It should be also kept in mind – concerning the complex and chronological changes in European countries from groups three and four - that with opening access to ART to other subjects, some fundamental legal institutes would have to be changed as well (especially determination of parenthood and adoption). However, that poses an important question to consider – do we want to change the very core of the Czech Family Law in such a radical way? Therefore, based on this question, as well as on the view of ART as a treatment, I do not see the need of changing Czech legislation regarding this issue, perhaps only in the way of a stricter punishment for circumvention of ASHS.

Literature

CALHAZ-JORGE, C. et al. Survey on ART and IUI: legislation, regulation, funding and registries in Europe-an countries. *Human Reproduction Open* [online]. 2020, no. 1, pp. 1–15 [cit. 24. 5. 2021]. ISSN 2399-3529. Available at: https://doi.org/10.1093/hropen/hoz044

35 FERTILITY EUROPE. Ethics Statements on Medically Assisted Reproduction (MAR): Policy statements on prevention and access to treatments. In: *fertility europe* [online]. 2019, p. 4 [cit. 28. 5. 2021]. Available at: http://www.fertilityeurope.eu/our-projects/ethics-policy-statement/

36 The same opinion is held by some of the Czech experts in the field of reproductive medicine, as well. See e.g.: KONEČNÁ, H. Asistovaná reprodukce jako výkladní skříň medicíny. In: KONEČNÁ, H. et. al. *Rodičem kdykoliv a jakkoliv?*. Praha: Mladá fronta, 2017, pp. 47–51.
Or see KONEČNÁ, H. Osamělé a hoomosexuální osoby a rodičovství. In: KONEČNÁ, H. et. al. *Rodičem kdykoliv a jakkoliv?*. Praha: Mladá fronta, 2017, pp. 161–179.

FERTILITY EUROPE. Ethics Statements on Medically Assisted Reproduction (MAR): Policy statements on pre-vention and access to treatments. In: *fertility europe* [online]. 2019, 6 p. [cit. 28. 5. 2021]. Available at: http://www.fertilityeurope.eu/our-projects/ethics-policy-statement/

FIERS, D. Dra een oplossing voor lesbische meemoeders? In: *vrt NWS* [online]. 4. 1. 2014 [cit. 26. 5. 2021]. Available at: https://www.vrt.be/vrtnws/nl/2014/01/04/dra_een_oplossingvoorlesbischemeemoeders-1-1823193/

FITZPATRICK, M. French Senate approves controversial bioethics law, drops key elements. In: *rfi* [online]. 4. 2. 2021 [cit. 27. 5. 2021]. Available at: https://www.rfi.fr/en/france/20210204-french-senate-approves-controversial-bioethics-law-drops-key-elements-medically-assisted-procreation-pregnancy-women-s-rights

FRINTA, O. Asistovaná reprodukce – nová právní úprava. *Právní fórum* [online]. 2007, no. 4, pp. 123–130 [cit. 24. 5. 2021]. Available at: https://www.noveaspi.cz/products/lawText/7/35406/1/2?vtextu=asistovan%C3%A1%20reprodukce%20-%20metoda%20pr%C3%A1vn%C3%AD%20%C3%BApravy#lema0

HOCHL, K. Reproductive medicine in Switzerland – Factsheet. In: *SCHAUB HOCHL RECHTSANWÄLTE AG* [online]. September 2019, pp. 1–4 [cit. 26. 5. 2021]. Available at: https://schaubhochl.ch/wp-content/uploads/2019/09/FortpflanzungsmedizinFactsheetENDinah30.09.2019.pdf

JOCHOVÁ, J. Bioetický zákon, který zbavuje děti otců, neprošel francouzským Senátem. In: *alipro.cz* [online]. 25. 6. 2021 [cit. 9. 8. 2021]. Available at: https://alipro.cz/2021/06/25/bioeticky-zakon-ktery-zbavuje-deti-otcu-neprosel-francouzskym-senatem/

KOTROUŠOVÁ, D. *Manželství osob stejného pohlaví z pohledu české právní úpravy a jejích navrhovaných změn*. Diploma thesis. Pilsen: University of West Bohemia, Faculty of Law, 2020, 165 p.

KONEČNÁ, H. et. al. *Rodičem kdykoliv a jakkoliv?*. Praha: Mladá fronta, 2017, 256 p. ISBN 978-80-204-4652-7.

LANGLOIS, G. La loi de bioéthique à l'heure de la révision. In: *ActuSoins* [online]. 11. 3. 2020 [cit. 27. 5. 2020]. Available at: https://www.actusoins.com/325648/la-loi-de-bioethique-a-lheure-de-la-revision.html

PETRENKO, M. a Z. ZOLÁKOVÁ. Reprodukčná medicína v slovenskom právnom prostredí. In: *inVitro* [online]. 2017, Vol. 5, no. 2, pp. 93–99 [cit. 26. 5. 2021]. ISSN 1339-5912. Available at: https://issuu.com/alphamedicalinvitro/docs/__asopis_invitro_-_reproduk__n___me

PRÄG, P. and Melinda C. MILLS. Assisted Reproductive Technology in Europe: Usage and Regulation in the Context of Cross-Border Reproductive Care. In: KREYENFELD M. and D. KONIETZKA (eds.). *Childlessness in Europe: Contexts, Causes, and Consequences* [online]. Cham: Springer, 2017, pp. 289–309 [cit. 25. 5. 2021]. ISBN 978-3-319-44667-7. Available at: https://doi.org/10.1007/978-3-319-44667-7_14

Act no. 14/2006 from the 26 May 2006, on Assisted Humar Reproduction Techniques. In: *Agencia Estatal Boletín Oficial de Estado* [online]. Available at: https://www.boe.es/buscar/act.php?id=BOE-A-2006-9292

Act no. 373/2011 Coll., on Specific Health Services, as last amended.

Act no. 89/2012 Coll., Civil Code, as last amended.

Bioéthique. Loi relative à la bioéthique. In: *SÉNAT. UN SITE AU SERVICE DES CITOYENS* [online]. [cit. 9. 8. 2021]. Available at: https://www.senat.fr/dossier-legislatif/pjl19-063.html

Chapter 4: Marital status. In: ORY, Steven J. et al. *IFFS Surveillance 2013* [online]. October 2013, pp. 31–34 [cit. 24. 5. 2021]. Available at: https://cdn.ymaws.com/iffs.site-ym.com/resource/resmgr/iffs_surveillance_09-19-13.pdf

Comission on European Family Law. THE PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING THE PRO-PERTY, MAINTENANCE AND SUCCESSION RIGHTS OF COUPLES IN DE FACTO UNIONS. In: *CEFL. Commission on European Family Law* [online]. [cit. 22. 5. 2021]. Available at: http://ceflonline.net/wp-content/uploads/English-De-Facto.pdf

Ehe für alle: Zieht die Schweiz nach?. In: *humanrights.ch* [online]. 19. 5. 2021 [cit. 10. 8. 2021]. Available at: https://www.humanrights.ch/de/ipf/menschenrechte/lgbtiq/schweiz

Federal Act no. 810.11from the 18 December, 1998, on Medically Assisted Reproduction. In: *Fedlex. The publication platform for federal law* [online]. Available at: https://www.fedlex.admin.ch/eli/cc/2000/554/en

franceinfo avec AFP. Le projet de loi de bioéthique, dont la PMA pour toutes, sa mesure phare, est définitivement adopté. In: *franceinfo* [online]. 29. 6. 2021, last update 30. 6. 2021 [cit. 9. 8. 2021]. Available at: https://www.francetvinfo.fr/societe/pma/le-projet-de-loi-de-bioethique-dont-la-pma-pour-toutes-sa-mesure-phare-est-definitivement-adopte_4683331.html

History. In: *CEFL. Commission on European Family Law* [online]. [cit. 22. 5. 2021]. Available at: http://ceflonline.net/history/

Infertility. In: *World Health Organization* [online]. 14. 9. 2020 [cit. 24. 5. 2021]. Available at: https://www.who.int/news-room/fact-sheets/detail/infertility

Judgement of the European Court of Human Rights from 24 June 2010, *Schalk and Kopf vs. Austria*, no. 30141/04.

Judgement of the Supreme Court of the Czech Republic from the 19 July 2012, no. 25 Cdo 754/2010.

Judgment of the Constitutional Court of the Czech Republic from 9 July 2018, no. II. ÚS 955/18.

Judgement of Regional Court in Prešov from the 30 March 2021, no. 24CoP/151/2020. In: *Slov-Lex. právny a informačný portál* [online]. Úrad vlády Slovenskej Republiky. Available at: https://www.slov-lex.sk/sk/vseobecne-sudy-sr/-/ecli/ECLI-SK-KSPO-2021-8120201908_1

Maternity Act, no. 253/2018. In: *FINLEX* [online]. Available at: https://www.finlex.fi/en/laki/kaannokset/2018/en20180253

Tab. 550 Hospodařící domácnosti podle počtu členů a podle typu hospodařící domácnosti a způsobu bydlení. In: *ČESKÝ STATISTICKÝ ÚŘAD: Veřejná databáze* [online]. 26. 3. 2011 [cit. 22. 5. 2021]. Available at: https://vdb.czso.cz/vdbvo2/faces/cs/index.jsf?page=vystup-objekt-vyhledavani&vyhltext=tab.+550&bkvt=dGFiLiA1NTA.&katalog=all&pvo=SPCR550

Contact – e-mail

dkotrous@kpo.zcu.cz

DOI https://doi.org/10.5817/CZ.MUNI.P210-9981-2021-4

THE MISSING CONCEPT OF COHABITATION OF THE COUPLES OF THE OPPOSITE-SEX IN *DE FACTO* UNIONS IN THE CZECH CIVIL CODE[1]

Zdeňka Králíčková
Faculty of Law, Masaryk University, Czech Republic

Abstract in original language

The paper deals with couples in *de facto* unions, especially the ones formed by a man and a woman. It seeks to define cohabitation and differentiate the rights and duties of cohabitees from the ones connected with the status relations between both the opposite-sex couples (marriage) and the same-sex couples (registered partnership). As there are seldom any kinds of agreements between cohabitees, special attention is devoted to the relevant legal rules in all the Books of the Czech Civil Code and their applicability to cohabitees during their relationship and after the break-up or upon the death of one of them. It is stressed that there is no difference between children born out of wedlock and within marriage. Once parenthood is legally established, there is no discrimination of non-married mothers and non-married fathers towards the children. And besides, there are special provisions that protect the weaker party: property claims of the non-married mother from the child´s father for a reasonable time and within adequate limits.

Keywords in original language

Couples; Man and Woman; *de facto* Unions; Rights and Duties; Differences; Marriage; Registered Partnership; Agreement; Weaker Party; a Child Born out of Wedlock; Parenthood; Protection.

1 The research was carried out within the framework of the Central European Professors' Network coordinated by the Ferenc Mádl Institute of Comparative Law.

1 Introduction

Due to the considerable changes in Europe over the several few decades, the portrait of the family has been changing, which is, of course, reflected in the legal orders of different countries,[2] as well as, in the case-law of the European Court of Human Rights. Besides, the Constitutional courts of many countries play a very important and irreplaceable role. That´s why they may be described "as drivers of reforms".[3]

This sphere does not stay away from the activities of the Commission on Family Law (further "the CEFL").[4] Quite recently, the Principles of European Family Law regarding the Property, Maintenance, and Succession Rights and Duties of Couples in *de facto* Unions were published (hereinafter "the Principles").[5] Let´s add, that the Principles are the fourth deed by the CEFL following the Principles of European Family Law Regarding Divorce and Maintenance duty between the ex-spouses, the Principles regarding Parental Responsibilities, and finally the Principles regarding Property relations between the Spouses.[6]

---

2 For details see ANTOKOLSKAIA, M. (ed.). *Convergence and Divergence of Family Law in Europe*. Antwerpen – Oxford: Intersentia, 2007; DOUGLAS, G. and N. LOWE. *The Continuing Evolution of Family Law*. Bristol: Jordan Publishing Limited, 2009; McGLYNN, C. *Families and European Union. Law, Politics and Pluralism*. Cambridge: Cambridge University Press, 2006; SCHERPE, J. M. (ed.) European Family Law. Volumes I–IV. Cheltenham – Northampton: Edward Elgar Publishing, 2016.

3 See DETHLOFF, N. and K. KROLL. The Constituional Court as Driver of Reforms in German Family Law. In BAINHAM, A. (ed.). *The International Survey of Family Law*. 2006 Edition, Jordan Publishing Limited, 2006, p. 217 ff.

4 For more information visit http://ceflonline.net/ [cit. 12. 5. 2021].

5 BOELE-WOELKI, K., F. FERRAND, C. GONZÁLEZ-BEILFUSS, M. JÄNTERÄ-JAREBORG, N. LOWE, D. MARTINY and V. TODOROVA. *Principles of European Family Law regarding the Property, Maintenance and Succession Rights and Duties of Couples in de facto Unions*. Cambridge: Intersentia, 2019.

6 For more see BOELE-WOELKI, K., F. FERRAND, C. GONZÁLEZ-BEILFUSS, M. JÄNTERÄ-JAREBORG, N. LOWE, D. MARTINY and W. PINTENS. *Principles of European Family Law regarding Divorce and Maintenance Between Former Spouses*. Antwerpen – Oxford: Intersentia, 2004; BOELE-WOELKI, K., F. FERRAND, C. GONZÁLEZ-BEILFUSS, M. JÄNTERÄ-JAREBORG, N. LOWE, D. MARTINY and W. PINTENS. *Principles of European Family Law regarding Parental Responsibilities*. Antwerpen – Oxford: Intersentia, 2007; BOELE-WOELKI, K., F. FERRAND, C. GONZÁLEZ-BEILFUSS, M. JÄNTERÄ-JAREBORG, N. LOWE, D. MARTINY and W. PINTENS. *Principles of European Family Law regarding Property Relations between Spouses*. Cambridge – Antwerp – Portland: Intersentia, 2013.

The question I pose to myself in this article is whether the Czech Republic reflects the changes in family adequately and whether there should be more legal innovations in the future in the light of the case-law of the European Court of Human Rights and the Principles. As there is quite new regulation anchored into Civil Code, the relevant provisions will be critically discussed as well.

2 On the Protection of Family and Family Life in General

First of all, let´s stress that the Charter of Fundamental Rights and Freedoms and the New Civil Code.

The Charter of Fundamental Rights and Freedoms from 1991 as a part of the Constitutional order of the Czech Republic protects the family as such without specifying it.[7]

The new Civil Code, which was passed in the year 2012 and has been effected since the year 2014, similarly to previous acts, regulates marriage only for people of the opposite sex.[8]

There is the Act on registered Partnership from 2006 as well, which regulates the status relationship between same-sex partners.[9] For political reasons, the registered partnership was not included in the new Civil Code although it was planned and drawn by the main creators of the Civil Code. There is a pending draft on "Marriage for all" at present. [10] The question is whether there will be political will for passing it.

However, regarding *de facto* unions, there is no special regulation in the Czech legal order and are not relevant statistical data.

---

7 See Act No. 2/1993 Coll., Article 32, Section 2: *"Parenthood and the family are under the protection of the law"*.

8 Act No. 89/2012 Coll., Section 655: *"Marriage is a permanent union of a man and a woman formed in a manner provided by this Act"*.

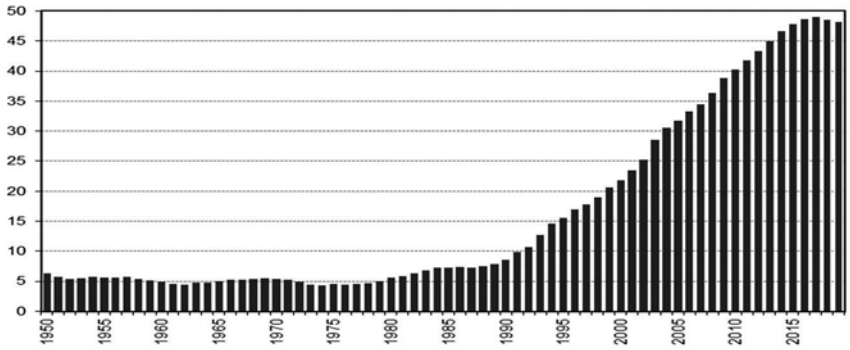
9 Act No. 115/2006 Coll.

10 Parliament of the Czech Republic, Chamber of Deputies, Parliamentary term No. VIII., Draft No. 201/0. According to the Draft, there should be changes to the Civil Code as follows. Next text of the § 655 would be *"Marriage is a permanent union of two people formed in a manner provided by this Act."*

The last census from 2011 showed quite a small number of people living in *de facto* cohabitation. However, there is another census being conducted at this very moment which might bring to light some new highly relevant data.[11]

In general, it is difficult to rely on statistical data showing the proportions of children born out of marriage. There are a lot of them in the Czech Republic these days. The following chart shows the increasing proportion of children born out of wedlock.[12]

Graph no. 1: Proportion of live births outside marriage, 1950–2019



11 The Census began at midnight on 26–27 March 2021. According to the webpage of the Czech Statistical Office *"the Census is a traditional component of the statistics in each country. It has been held in our territory since 1869 and takes place every 10 years, as in most other countries. Thanks to this, the results make it possible to compare the current state of our country with the past as well as the rest of the world. The importance of Census is absolutely crucial for our future. The results influence the activities of public administration, business plans and the direction of activities of research and scientific workplaces. Ultimately, they affect the lives of everyone of us and provide a picture of the economic activity of the population. In combination with data on education, housing or household composition, the results make it possible to analyse, the situation of recent graduates, single people, people who lost their jobs before retirement, working seniors or people without income for example. The data is the basis for analysis of the labour market or transport in specific locations. They help create new jobs, develop services or design support programs for the socially disadvantaged* […] *the results are widely used, for example, in the preparation of housing programs, infrastructure development or for planning of better service availability. They also help secure the correct capacities in medical facilities or kindergartens, help create flood protection measures or help prepare intervention-readiness plans for firefighters"*. For more see https://www.scitani.cz/csu/scitani2021/recent-news [cit. 28. 3. 2021].

12 See https://www.czso.cz/csu/czso/proportion-of-live-births-outside-marriage-1950-2019 [cit. 28. 3. 2021].

But the data and the chart by the Czech statistical office do not say anything about the parents of these children. Some of them have both legal parents, but some of them do not and live just with one of them, typically their mothers.

It is interesting that during the "communist times", former Czechoslovakia used to have quite a low rate of children born out of wedlock (only 5–8 percent) and there were a lot of marriages. Cohabitation without marriage as a family model was used mainly by divorced or widowed people.

However, living in cohabitation has become more popular than marriage among the youngest couples nowadays.

As it was mentioned above, the portrait of the family has been changing everywhere. The Czech Republic does not stay out of European development. But there are a lot of questions which should be answered by demographers, sociologists, and other professionals, including lawyers. Let´s mention the most urgent ones:

- Is the Czech legal order regarding couples in *de facto* unions in harmony with the European standards?
- What are the European standards regarding *de facto* unions? Is it a case law of the International Court of Human Rights on the Article 8 Convention for the Protection of Human Rights and Freedoms? Are they the Principles of European Family Law by the CEFL? Is it the Model Family Code by the academics?
- Does the Czech Civil Code meet the needs of the current society? And what does Czech family life look like?
- Finally, do we need an amendment to the Civil Code?

3 About "The Principles and Sources of Inspiration for the New Civil Code"

As it was said above, the New Czech Civil Code was passed only recently after quite a long preparation period. It is generally known that regulations

of family law were excluded from civil law codes after the year 1949 and codified in independent codes in 1949 and 1963 in former Czechoslovakia.[13]

It must be stressed that thanks to *"The Principles and Sources of Inspiration for the New Civil Code"* which were created by the main authors of the Civil Code, professor *Karel Eliáš* and professor *Michaela Zuklínová*, the New Civil Code means *"a come-back"* to the traditions.[14] The main creators of the New Czech Civil Code aimed the Czech Republic to become more traditional again in this respect. That is why family law rules were enacted into the Book Two of the new Civil Code and the concept of new family law is rather conservative.[15] There are not many innovations. On the other hand, as a side-affect, couples living in *de facto* unions enjoy less standard of protection than in previous regulations.

The following lines are devoted to all the books of the Civil Code, especially to the provisions which can be used by the people living in *de facto* unions during their relationship and after the break-down.

4 The Book One of the Civil Code – General Part

How it was stressed in the introduction, the Civil Code expressly protects the family established by marriage. But there are two important sections in respect to cohabitees they should be mentioned.

First of all, there is the *"concept of close persons"*. There are 3 definitions of them. According to § 22 CC, a close person is

a) a relative in the direct line, sibling and spouse or a partner under the act of registered partnership,

13 For a general point of view see BĚLOVSKÝ, P. Rodinné právo (Family Law). In: BOBEK, M., P. MOLEK and V. ŠIMÍČEK (eds.). *Komunistické právo v Československu. Kapitoly z dějin bezpráví (Communist Law in Czechoslovakia. Chapters in History of Injustice).* Brno: Masarykova univerzita, 2009, p. 463 ff.
For previous family law see HRUŠÁKOVÁ, M. Czech Republic. In: *The International Encyclopaedia of Laws*. The Hague/London/New York: Kluwer Law International, 2002; and HRUŠÁKOVÁ, M. and L. WESTPHALOVÁ. Czech Republic. In: *The International Encyclopaedia of Laws*. 2. ed. The Hague/London/New York: Kluwer Law International, 2011.

14 See ELIÁŠ, K. and M. ZUKLÍNOVÁ. *Principy a východiska nového kodexu soukromého práva (Principles and Starting Points of the New Code of Private Law)*. Praha: Linde, 2001.

15 For more see ELIÁŠ, K. and M. ZUKLÍNOVÁ. *Návrh občanského zákoníku (Draft for the Civil Code)*. Praha: Ministry of Justice, Spring 2005.

b) other persons in a familial or similar relationship shall, concerning each other, be considered to be close persons if the harm suffered by one of them is perceived as his harm by the other,
c) persons related by affinity and persons permanently living together are also presumed to be close persons.

The concept of close persons is quite traditional. There were similar definitions in previous legal regulations, the Civil Codes from 1950 and 1964. This concept should be distinguished from *"the concept of persons sharing the same household"* which is relevant for instance in housing law and succession law. However, there are many points of contact, which means that a close person is very often a person living in one household. In the other words, a cohabitee in a *de facto* union can enjoy rights from both concepts.

Secondly, let´s mention the provisions regulating *"Running of a limitation period"*. § 646 CC provides that between spouses a limitation period neither commences nor runs while the marriage lasts. It is traditional wording. New Civil Code provides as a novelty and that this applies, by analogy, to mutual rights of "persons sharing the same household"[16] which is rather revolutionary, but still unknown in general and especially by cohabitees.

Let´s add that the above-mentioned concept is relevant for the whole legal order.

5 The Book Two of the Civil Code – Family Law

Due to quite limited concept of family regulated in the Civil Code, there are *no articles* there those would establish *mutual right and duties* between the cohabitees, e. g. there is no duty to help each other, no community of property, no protection of family dwelling and common household goods, and no mutual maintenance duty by operation of law. The situation of *de facto* couples is *similar* to the position *of registered partners,* except for mutual maintenance duty.

16 Beside that, this provision extents the rules on a person represented and his or her legal representative, on a ward and his or her guardian and on a person under tutorship and his or her tutor.

Unfortunately, there are not often property contracts between the cohabitees which causes a lot of problems for the so-called weaker party upon dissolution of the relationship *de facto.*

However, as there is no discrimination against children born out of wedlock and the rights and duties of the parents of any child are equal. It should be mentioned that if an unmarried man and an unmarried woman "have a child together", they both are principally *holders of parental responsibility* by operation of law without being discriminated against in comparison with married parents of a minor child. However, parenthood must be legally established. There are *no differences between the children at all* neither in person nor property spheres in the Czech legal order.

The Czech family law traditionally protects property claims of unmarried mother of the child towards the child´s father, or deemed father. There were always relevant provisions in previous codes from 1949 and 1963, and even in one from 1811.[17] The New Civil Code regulates *"Maintenance and support, and provision for the payment of certain costs for an unmarried mother"* as follows in § 920 CC. It is provided that if the child's mother is not married to the child's father, the child's father shall provide her with maintenance for two years from the birth of the child and provide her with a reasonable contribution to cover the costs associated with pregnancy and childbirth.[18]

Besides that, a court may, on the application of a pregnant woman order the man whose paternity is probable to provide an amount needed for maintenance and a contribution to cover the costs associated with pregnancy and childbirth in advance. And in addition, a court may, on the application of a pregnant woman, also order the man whose paternity is probable to provide in advance an amount needed to provide for the maintenance of the child for a period for which the woman would be entitled to maternity leave as an employee under another legal regulation."[19]

17 For more information on history see the note 12 above.

18 Regarding the maintenance towards the child, both the child parents have maintenance duty and the child has the right to the same living standard as his or her parents till he or she reaches the capacity to provide maintenance for himself or herself (§ 910 ff. CC).

19 It would be 28 weeks, in case of siblings or more children 37 weeks. For details see § 195, Subsection 1 of the Act No 262/2006 Coll., the Labour Code.

Let´s add that there is neither common adoption nor common foster care available for cohabitees. On the other hand, regarding the law against domestic violence (§ 751 ff. CC), *"anybody"* can seek protection. Cohabitees are not excluded (§ 3021 CC).

6 The Book Three of the Civil Code – Property Rights and Succession

As it was mentioned at the beginning, there is no community of property between people in *de facto* union and no protection of family dwelling and common household goods in comparison with the married couple.

If people in a *de facto* union acquire a property together, there can be only co-ownership with shares between other people. Provided there is not agreed otherwise, the Civil Code states that the shares are equal.

Regarding the rights of a *surviving cohabitee,* his or her situation is in practice *quite weak* as there is seldom a will or an inheritance contract.

The rights of the surviving person are protected by the concept of *"persons sharing the same household"*. It must be stressed that *"anybody"* can be such a person. The Civil Code mentions "persons sharing the same household" in two provisions regulating heirs of the second and the third class. Cohabitee can be never an heir in the 1st class where only a spouse and a child can inherit. If there is a child in cohabitation, he or she takes all.

Regarding the second class of heirs, the law stipulates in § 1636 CC that if the decedent's descendants do not inherit, the second-class heirs include the spouse, the decedent's parents, and „those who lived with the decedent in the common household" for at least *one year* before his death and, as a result, cared for the common household or were dependent in maintenance on the decedent. Second-class heirs inherit equally; however, the spouse shall always inherit at least half of the decedent's estate. The surviving spouse can never be the only heir in the second class of heirs. He or she falls to the third class.

The law regulating the third class of heirs provides in § 1637(1) CC, that if neither the spouse nor any of the parents inherit, decedent's siblings and "those who lived with the decedent in the common household" for at least *one year* before his death and, as a result, cared for the common household

or were dependent in maintenance on the decedent, inherit in the third class of heirs equally.

To summarise: the surviving cohabitee must prove many details from the common life during the succession proceedings, mainly duration of *de facto* union, etc.

Besides, there is the concept of *"a forced heir"*. According to § 1643 CC, the forced heirs include the decedent's *children* and, if they do not inherit, their descendants. If a forced heir is a minor, he must inherit at least three-quarters of his statutory inheritance share. If a forced heir is an adult, he must inherit at least a quarter of his statutory inheritance share.

However, regarding couples living in *de facto* unions, another new provision might be useful. New Civil Code provides in § 1666(1) *in fine* CC that the surviving pregnant cohabitee has right to limited maintenance from inheritance; the mother of the decedent´s child in the postpartum period of six weeks has the same rights. The protection of cohabitee in this field is the same as the protection of a surviving spouse who has according to § 1666(1) CC the right to fair maintenance from the decedent's estate for six weeks after the death of his spouse; if a widow is pregnant, she has the right to fair maintenance until the end of the sixth week after birth.[20]

7 The Book Four of the Civil Code – Obligations

The new Civil Code recognizes private autonomy, in particular the freedom to make the contract. The partners in *de facto* unions may conclude in principle

20 Besides, it is provided in the § 1666(2) CC, that if a surviving spouse has been denied statutory inheritance or his statutory inheritance has been reduced, the surviving spouse is entitled to the necessary provision for life until he remarries, provided that he otherwise lacks such a provision for life and he is unable to provide for himself; in this manner, however, he may not get more from the decedent's estate than what half of his statutory inheritance share would have been. However, a spouse who, without serious reasons, did not share the family household with the decedent, a spouse lacking the capacity to be an heir or a spouse who renounced or refused inheritance is not entitled to the necessary provision for life.
And finally, in the § 1666(3) CC, it is provided the right to fair maintenance under above mentioned Subsection (1) prejudices the right to essential maintenance under § 1665 CC, all these rights are prejudiced so that all obliges receive an equal share. Necessary provision for life under above mentioned Subsection (2) may not be provided if it prejudices the right to essential maintenance under § 1665 CC.

any agreements before and during their cohabitation and after the separation. There are almost no limits and no provision for any authority to scrutinize the agreement.

As mentioned before, unfortunately, there are seldom property contracts between the cohabitees which causes a lot of problems for the so-called weaker party upon dissolution of the relationship *de facto*.

Regarding family dwelling, there are no special provisions that would protect the situation of surviving partner living in a *de facto* union in a rented flat by a lessee. The Civil Code provides quite limited general rules in provisions titled *"Consequences of the death of a lessee"* in § 2279 CC. It is said that if a lessee dies and there is no joint lease of the apartment, the lease passes to *"a member of the lessee's household"* who lived in the apartment on the day of the lessee's death and has no apartment of his own. If such a person is a cohabitee, the lease passes to such a person only if the lessor *consents* to the passage of the lease to that person. Here we can see a big problem for cohabitees and less protection than in previous regulations. It must be mentioned that the law provides as well that a lease of an apartment after its passage shall end no later than two years from the date of the passage of the lease. This does not apply if the person to whom the lease passed reached *the age of seventy years* on the date of passage of the lease. Likewise, this does not apply if the person to whom the lease passed has not reached the age of eighteen years on the date of passage of the lease; in such a case, the lease shall end no later than on the date on which the person reaches the age of twenty years, unless the lessee and the lessor agree otherwise.

8 Conclusion

The people of the opposite sex can enter into marriage and enjoy the full catalog of the rights, married couples are entitled to. People of the same sex can get registered and have some protection by law, especially in case of the death of one of the spouses.

So, the questions we need to ask are:

- Is there a need for an amendment to the new Civil Code?

- Shall the lawmaker respect the private autonomy of the cohabitees willing not to have special rights and duties connected with marriage or registered partnership?
- Or should the lawmaker draw special rules for them according to the Model Family Code or the Principles of European family law by the CEFL?
- And finally, should the lawmaker create different provisions?

As there is almost no regulation of rights and duties of cohabitees and there are seldom contracts between them, the situation of the weaker one is quite difficult. There is a lack of legal certainty, especially in families with minor children, when the unit breaks down.

However, it is *difficult to strike a fair balance* between the *private autonomy* of those who form a *de facto* union and between the protection of the weaker party and the welfare of the family not based on marriage. It is generally known that the legal orders of European states are very different. Only optimists may speak about European standards in this field. However, we can see the first steps towards spontaneous harmonization of rules regulating the situation of couples living in *de facto* unions, done mainly thanks to the case-law of the European Court of Human Rights and the Principles of European Family Law by the academics concentrated within the project of the European Commission of Family Law.[21] The Czech lay maker should rethink the concept of protection of family not based on marriage and "improve" at least the provisions regarding family dwelling, especially strait the right of surviving cohabitee as *"a member of the lessee's household"* to passing a lease more favourable.

Literature

ANTOKOLSKAIA, M. (ed.). *Convergence and Divergence of Family Law in Europe.* Antwerpen - Oxford: Intersentia, 2007.

BAINHAM, A. (ed.). *The International Survey of Family Law.* Jordan Publishing Limited, 2006.

21 Regarding this inspiration sources, see contributions by Milan PALÁSEK, Petra KOTKOVÁ and Lucie ZATLOUKALOVÁ in the COFOLA 2021 Conference Proceedings.

BOBEK, M., P. MOLEK and V. ŠIMÍČEK (eds.). *Komunistické právo v Československu. Kapitoly z dějin bezpráví (Communist Law in Czechoslovakia. Chapters in History of Injustice)*. Brno: Masarykova univerzita, 2009.

BOELE-WOELKI, K., F. FERRAND, C. GONZÁLEZ-BEILFUSS, M. JÄNTERÄ-JAREBORG, N. LOWE, D. MARTINY and V. TODOROVA. *Principles of European Family Law regarding the Property, Maintenance and Succession Rights and Duties of Couples in de facto Unions*. Cambridge: Intersentia, 2019. DOI https://doi.org/10.1017/9781780689111.002

BOELE-WOELKI, K., F. FERRAND, C. GONZÁLEZ-BEILFUSS, M. JÄNTERÄ-JAREBORG, N. LOWE, D. MARTINY and W. PINTENS. *Principles of European Family Law regarding Property Relations between Spouses*. Cambridge – Antwerp – Portland: Intersentia, 2013.

BOELE-WOELKI, K., F. FERRAND, C. GONZÁLEZ-BEILFUSS, M. JÄNTERÄ-JAREBORG, N. LOWE, D. MARTINY and W. PINTENS. *Principles of European Family Law regarding Parental Responsibilities*. Antwerpen – Oxford: Intersentia, 2007. DOI https://doi.org/10.1007/s12027-007-0011-x

BOELE-WOELKI, K., F. FERRAND, C. GONZÁLEZ-BEILFUSS, M. JÄNTERÄ-JAREBORG, N. LOWE, D. MARTINY and W. PINTENS. *Principles of European Family Law regarding Divorce and Maintenance Between Former Spouses*. Antwerpen – Oxford: Intersentia, 2004.

DETHLOFF, N. and K. KROLL. *The Constituional Court as Driver of Reforms in German Family Law*.

DOUGLAS, G. and N. LOWE. *The Continuing Evolution of Family Law*. Bristol: Jordan Publishing Limited, 2009.

ELIÁŠ, K. and M. ZUKLÍNOVÁ. *Principy a východiska nového kodexu soukromého práva (Principles and Starting Points of the New Code of Private Law)*. Praha: Linde, 2001.

ELIÁŠ, K. and M. ZUKLÍNOVÁ. *Návrh občanského zákoníku (Draft for the Civil Code)*. Praha: Ministry of Justice, Spring 2005.

McGLYNN, C. *Families and European Union. Law, Politics and Pluralism*. Cambridge: Cambridge University Press, 2006. DOI https://doi.org/10.1017/CBO9780511495014

SCHERPE, J. M. (ed.). *European Family Law. Volumes I. - IV*. Cheltenham – Northampton: Edward Elgar Publishing, 2016.

The International Encyclopaedia of Laws. The Hague/London/New York: Kluwer Law International, 2002.

The International Encyclopaedia of Laws. The Hague/London/New York: Kluwer Law International, 2011.

Act No. 89/2012 Coll.

Act No. 115/2006 Coll.

Act No. 2/1993 Coll.

Parliament of the Czech Republic, Chamber of Deputies, Parliamentary term No. VIII., Draft No. 201/0.

Contact – e-mail

zdenka.kralickova@law.muni.cz

DOI https://doi.org/10.5817/CZ.MUNI.P210-9981-2021-5

PRINCIPLES OF EUROPEAN FAMILY LAW AS AN INSPIRATION FOR LAW MAKERS IN EUROPE

Lucie Zatloukalová
Faculty of Law, Masaryk University, Czech Republic

Abstract in original language

The Commission on European Family Law is an international group of academic experts on family law. The principles aim is to help harmonize European law and to inspire national legislators to modernize their legislation. The principles try to capture the common core of individual national legislations. If some substantial question has no common core, the Commission creates a new rule, so-called "better law". The Principles relating to couples in de facto unions deals mainly with the definition and application framework, general rights and obligations, agreements, property and debts, termination of cohabitation, death and mutual disputes. The Principles are of a recommendatory nature only. In Czech Republic the conservative approach prevailed, and de facto unions have no specific legal regulation. In the future, there can be some interesting legal constructions of rights and duties of couple in de facto union that could be an inspiration for Czech legislator. In this contribution I will choose such rights and duties according to the Principles.

Keywords in original language

De Facto Couples; Unmarried Cohabitation; Legislation; Harmonization; Family Law; European Law; Principles.

1 Harmonization of Family Law in Europe

In the past decades there is significant tendency to harmonize the law in Europe. Since the Treaty on European Union and Treaty on functioning of European Union brought the free movement and right to reside

in member states, the harmonization of family law became more important and necessary. Nevertheless, there is no international binding legal instrument dealing with the regulation of rights and obligations of couples in de facto unions.

The EU has already harmonized jurisdiction, applicable law, divorces or maintenance.[1] There is no comprehensive harmonization of the legal regulation of cohabitation in EU or Europe as such.

The approach of European states to legal regulation of cohabitation still varies between states. Cohabitation is not comprehensively "legally grasped" in many countries. The legal relations arising between the partners are often affected by the general rules of private law. The Czech Republic is one of such states. On the contrary, the countries in which the cohabitation has special and complex legal regulations are states of the former Yugoslavia and the Nordic states. Although in some jurisdictions we do not find the legal regulation of cohabitation as an institute, a certain legal framework has gradually been created by case law and practice.

There are two possible sources of inspiration I will name in this contribution. The Principles of European Family Law Regarding Property, Maintenance and Succession Rights of Couples in de facto Unions which are product of work Commission on European Family Law. And the Model Family Code.

There are several areas of law or legal institutes where we can think about accepting legal rules regulating cohabitation.

2 Possible sources of inspiration and law institutes

2.1 Definition of Cohabitation

It is important to sufficiently define de facto unions to determine the beginning and the end, because these moments are associated with the creation or extinction of certain rights and obligations.

1 Council Regulation (EC) No 2201/2003 of 27 November 2003; Council Regulation (EC) No 4/2009 of 18 December 2008; Council Regulation (EU) No 1259/2010 of 20 December 2010.

The Principles in the first chapter define de facto unions as two persons who live in a lasting relationship as a couple. In addition, the Principles define so-called qualified de facto unions, such as unions lasting at least five years or unions with common minor children of partners, to which can certain rights and obligations apply. There is no condition about age of partners in the Principles. The question is also whether the persons of same sex can be cohabitants by legal rules, according to principles can – because the definition is "two persons".[2]

The Model Family Code does not provide any definition of de facto unions.

In the Czech Republic there are just two types of unions defined by law, marriage and partnership between same sex partners. Czech legislation does not define de facto unions and Czech private law does not deal namely with de facto unions.[3] Some specific rights of partners in de facto unions are regulated in Czech public law.[4]

2.2 Maintenance

It is common in most national legislations that there is a maintenance duty between spouses. The de facto union is a similar union of two persons with much the same needs, so naturally, legislatives should consider the suitability and necessity of the maintenance obligation between unmarried partners.

The Principles does not settle maintenance for the duration of de facto union. The principles just settle a duty to contribute to household costs for both partners according to their ability.[5]

In the case of a qualified cohabitation principles regulate the possibility to claim maintenance for a limited period of time in case of dissolution of de facto union. There are some factors that should be taken into account like childcare, division of responsibilities over the duration

2 BOELE-WOELKI, K., F. FERRAND, C. GONZÁLEZ-BEILFUSS, M. JÄNTERÄ-JAREBORG, N. LOWE, D. MARTINY and V. TODOROVA. *Principles of European Family Law Regarding Property, Maintenance and Succession Rights of Couples in de facto Unions*. Cambridge: Intersentia. 2019, p. 55.

3 The Czech Civil Code defines just "close persons" and confers on them certain specific rights and obligations.

4 E.g. right to refuse to testify, p. 100 of Act No. 141/1961 Coll., Czech Code of Criminal Procedure.

5 BOELE-WOELKI et al., op. cit., p. 73.

of the partnership, age, health and employment opportunities of the partners, duration of cohabitation, marriage, registered partnership or other unmarried cohabitation.[6]

The Model Family Code recommends that unmarried partners should mutually contribute to each other maintenance, if one partner does not, then the court can order him to pay a certain regular amount, especially in cases where one partner cares for household, common children etc.[7]

In the Czech civil law, there is a maintenance duty between spouses but no maintenance duty between unmarried partners. It is possible to name one specific maintenance obligation for unmarried couple in the Czech Civil Code which regulates an obligation for man to pay certain amount as a maintenance to support unmarried mother of their common child.[8]

2.3 Rights to household

Due to its importance for people, housing is one of the most legally protected value. Other important values such as privacy, home, material and social background, etc. are closely connected with housing and the right to it. It can be concluded that the right to housing has a reasonably increased legal protection.

Concerning household rights, the Principles state that in qualified partnerships one partner cannot dispose with family home without the consent of the other partner. Such disposition without consent can be annulled by a court. Court may also replace consent of one partner with the disposition with the household if the competent authority finds the disposal in the interest of the family. Court may grand to one of the partners right to use family home in qualified cohabitation in some specific situations.[9]

The Model Family Code settles that partner cannot dispose with the house/flat where the family home is. The needs to have consent of other partner or court. The court would analyse if the refusal has legitimate

6 BOELE-WOELKI et al., op. cit., p. 175.
7 SCHWENZER, I. H. *Model family code: from a global perspective*. Antwerpen: Intersentia, c2006, p. 33.
8 Czech Civil Code, § 920.
9 BOELE-WOELKI et al., op. cit., p. 82.

basis or not.[10] The Model Family Code also states that one partner cannot be excluded from using a family home (by the other partner, unless the court orders so (third parties are not bound).[11]

In the Czech law the spouse (in case of marriage) has the right to live in the house or flat derived from the right of the other spouse who has his own right. The right to household in de facto unions is protected only by the general provisions of the law, i.e. the protection of possession of the right of use, or criminal protection against interference with the right to an apartment or house. The Czech Civil Code regulates specific right in case of the death of one partner who was the lessee, that the other has a right to stay in the apartment without the consent of the lessor for maximum period of two years.[12]

2.4 Property regime

During the duration of the partnership, the partners acquire property and have variously divided roles (e.g. caring for a household, caring for the financial security of the family or caring for a family business). The marriage compensate for differences arising from the fulfilment of these roles.

The Principles settle that the assets acquired during the duration of the partnership for joint use by the partners are considered to belong to co-ownership, unless proven otherwise. That means that the Principles provide for the presumption of co-ownership when the thing is acquired for the purposes of joint use, but the presumption then does not apply in the case of donation or inheritance.[13]

According to the Principles, each partner remains the owner of its exclusive property, while the partners can continue to acquire property and commit to debts individually or jointly, resp. jointly and severally.[14]

The Principles also regulate the issue of property execution. According to the Principles, in addition to his exclusive assets, joint property may

10 SCHWENZER, op. cit., p. 37.
11 SCHWENZER, op. cit., p. 39.
12 Czech Civil Code, § 2279(2).
13 BOELE-WOELKI et al., op. cit., p. 128.
14 BOELE-WOELKI et al., op. cit., p. 121.

be affected for the exclusive debt of one partner, but only up to the amount of the debtor's share in it.[15]

The Model Family Code just defines, what the separate property includes, e.g. property owned before partnership, inheritance or gifts.[16] Than the benefits and detriments acquired during the partnership should be settled after the dissolution (see article 2.5).[17]

In the Czech Republic the partners acquire the property in principle, each to their exclusive ownership; the provisions on the joint property of the spouses do not apply by analogy. In some cases, unmarried partners may acquire property as part of co-ownership, provided that the conditions for the application of the general provisions on co-ownership are met (there are no special rules for an unmarried couple).

2.5 Dissolution

The Principles declare that partners should take care of themselves after dissolution of partnership. In the end of cohabitation, each of the partners will keep his property, the jointly owned property will be distributed, unless the partners agree otherwise. According to principles, the partners have the right to compensation for contribution to partnership (care for household, for common children, for contribution to the other partner profession).[18]

The Model Family Code, as well as the Principles, settles that the partners should be self-sufficient as soon as possible. In case of dissolution of a partnership, the partnership-related benefits and detriments should be adjusted by financial relief. The benefits are property or pension acquired by each partner during partnership. The detriments are care for child, household, the other partner, contribute to the other partner profession etc. Partnership-related benefits should be equally divided, but the court may modify this principle.[19] Financial relief should be limited so it covers just necessary time for the other partner to care for himself.

15 BOELE-WOELKI et al., op. cit., p. 142.
16 SCHWENZER, op. cit., p. 24.
17 SCHWENZER, op. cit., p. 22.
18 BOELE-WOELKI et al., op. cit., p. 147.
19 SCHWENZER, op. cit., p. 57.

The Czech law does not have specific provisions regulating relationships between partners after dissolution. The rights and obligations are governed by the general rules of Czech private law.

2.6 Inheritance

The question of who will inherit the testator's estate is substantial for surviving partner, because the partner often participates in building the assets of the other partner, can be dependent on the other, shares the assets with the other partner etc.

The Principles regulates for the qualified cohabitation that in the case of inheritance by law, the surviving partner has the same right as the spouse in inheritance of the estate of the deceased partner. After the death of one of the partners, the other has the right to use the apartment owned by the deceased partner six months after the death of the partner.[20]

According to Czech Civil Code the surviving partner is not in any grade of heirs (the Czech law has six grades). However, if the partner (or any other person) lived with the deceased person in the common household for at least one year before the death and shared care for the common household or were dependent for maintenance on the deceased, than can be heir in the second or third grade.[21]

3 Conclusion

When considering the legal regulation of rights and obligations between unmarried partners, it is necessary to respect the choice of partners not to enter into marriage as a legally regulated union. On the other hand, it is necessary to respond to the social reality in society and the growing number of couples living together unmarried, and thus to provide these relationships with basic legal protection (especially protection of the weaker party). Legislators should seek a fair balance between the free choice of partners and sufficient legal protection, legislator's reasoning can be inspired by the above-mentioned international academic documents.

20 BOELE-WOELKI et al., op. cit., p. 195.
21 Czech Civil Code, § 1635.

In the Czech Republic as part of the recodification of private law into the Civil Code, the Czech legislator had at his disposal the Principles of European Family Law and, according to the explanatory memorandum, they were taken into account.[22]

Literature

BOELE-WOELKI, K., F. FERRAND, C. GONZÁLEZ-BEILFUSS, M. JÄNTERÄ-JAREBORG, N. LOWE, D. MARTINY and V. TODOROVA. *Principles of European Family Law Regarding Property, Maintenance and Succession Rights of Couples in de facto Unions*. Cambridge: Intersentia, 2019. DOI https://doi.org/10.1017/9781780689111.002

SCHWENZER, I. H. *Model family code: from a global perspective*. Antwerpen: Intersentia, 2006.

Act No. 89/2012 Coll., Czech Civil Code.

Act No. 141/1961 Coll., Czech Code of Criminal Procedure.

Council Regulation (EC) No 2201/2003 of 27 November 2003.

Council Regulation (EC) No 4/2009 of 18 December 2008.

Council Regulation (EU) No 1259/2010 of 20 December 2010.

Government: Explanatory Memorandum to Act No. 89/2012 Coll., Civil Code.

Contact – e-mail

Lu.zatloukalova@gmail.com

22 Government: Explanatory Memorandum to Act No. 89/2012 Coll., Civil Code.

COFOLA 2021 – part 2
Conference for Young Lawyers

**JUDr. Michal Janovec, Ph.D., JUDr. Jan Malý, Ing. Mgr. Josef Šíp,
Mgr. Jakub Pohl, JUDr. Marika Zahradníčková (eds.)**

Published by Masaryk University
Žerotínovo nám. 617/9, 601 77 Brno
in 2021

Publications of the Masaryk University
Edition Scientia, No. 718

1st electronic edition, 2021

ISBN 978-80-210-9981-4 (online ; pdf)
DOI https://doi.org/10.5817/CZ.MUNI.P210-9981-2021
www.law.muni.cz

ISBN 978-80-210-9981-4

MASARYK UNIVERSITY PRESS

MUNI LAW