Zdeňka Králíčková, Martin Kornel,
Jiří Valdhans
(eds.)

DNY PRÁVA 2018
DAYS OF LAW 2018

Část I.
Marriage for all?

Sborník z konference

MASARYKOVA
UNIVERZITA

ACTA UNIVERSITATIS BRUNENSIS IURIDICA
EDITIO SCIENTIA

MASARYK
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PRESS

MUNI
LAW

DNY PRÁVA 2018 – DAYS OF LAW 2018

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Masaryk University
Brno 2019

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ISBN 978-80-210-9304-1 (online : pdf)

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Selected Impacts of the Possibility to Enter into Marriage by Same-Sex Couples Manifesting in the Area of the Czech Social Security Law

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Abstract in original language

Předkládaný text je věnován v současné době hojně diskutované problematice manželství stejnopohlavních párů. Jeho hlavním záměrem je, na základě důkladně provedené analýzy vybraných státních dávek s akcentem na veškeré legální podmínky pro jejich poskytování, stanovit, zda tuzemské právo sociálního zabezpečení je, nebo není připraveno na ve svých důsledcích poměrně radikální změnu, spočívající právě v umožnění vstupu do manželství taktéž osobám stejného pohlaví. Jinými slovy tedy stanovit, zda je shledávána nutnost novelizace příslušných ustanovení, v důsledku případného přijetí možnosti uzavřít manželství homosexuálními páry.

Keywords in original language

Manželství stejnopohlavního páru; registrované partnerství; právo sociálního zabezpečení; peněžitá pomoc v mateřství; dávka otcovské poporodní péče (otcovská); rodičovský příspěvek; vdovský (vdovecký) důchod; sirotčí důchod.

Abstract

Presented text deals with recently quite an abundantly discussed topic focused on same-sex couple marriages. The major purpose is to state on the basis of the profound analysis of selected state benefits accenting various legal requirements for their providing, whether or not the Czech Social Security Law is prepared for such a radical change consisting in enabling marriage also for couples consisting of same-sex persons. In other words, to state, whether there is any amendment necessity as a consequence of prospective adoption of possibility to enter into marriage by homosexual couples.

Keywords

Same-Sex Couple Marriage; Registered Partnership; Social Security Law; Maternity Benefit; Fathers Post-Natal Care (Paternity Benefit); Parental Allowance; Widow's (Widower's) Pension; Orphan's Pension.

1 Brief Introductory Comments

From the global point of view, whether or not to enable a marriage for couples consisting of same-sex human beings has recently been vividly discussed in many jurisdictions. In November 2018, a referendum on this issue took place in Taiwan.[1] In countries whose legal regulation began to approve such marriages only a few years ago, it is meanwhile possible to get familiar with their increasing numbers through prepared statistics.[2] Within the European continental legal system, worth mentioning appear progressive evolution of legal basis for homosexual marriages in Germany applicable from October 2017[3] or latest reports referring on the very first same-sex marriage under the "marriage-for-all law" in Austria.[4]

In this contribution, its authors aim to focus on selected questions and practical consequences related to the branch of national social security law, provided the legislator decides, by amendments of respective currently effective legal provisions, to incorporate into the Czech legal order an explicit possibility to enter into marriage also for same-sex couples, and thus put

1 For further information on the referendum results, see e.g. HUMAYUN, Hira and CULLINANE Susannah. Taiwan voters reject same-sex marriage. *CNN.com* [online]. 25th November 2018 [cit. 7th January 2019]. Available at: https://edition.cnn.com/2018/11/25/asia/taiwan-same-sex-marriage-referendum/index.html

2 E.g. in Australia, the respective amendments came into effect on 9th December 2017; for further information concerning the exact numbers of homosexual marriages there see HENRIQUES-GOMES, Luke. More than 3,000 same-sex couples wed in Australia in first half of year. *TheGuardian.com* [online]. 27th November 2018 [cit. 7th January 2019]. Available at: https://www.theguardian.com/australia-news/2018/nov/27/more-than-3000-same-sex-couples-wed-in-australia-in-first-half-of-year

3 See e.g. Ehe für alle: Homosexuelle dürfen ab 1. Oktober heiraten. *SpiegelOnline.de* [online]. 1st October 2017 [cit. 7th January 2019]. Available in German language at: http://www.spiegel.de/panorama/gesellschaft/ehe-fuer-alle-homosexuelle-duerfen-ab-1-oktober-heiraten-a-1170535.html

4 See e.g. Erste "Ehe für alle" 2019 kurz nach Mitternacht geschlossen. *DerStandard.at* [online]. 1st January 2019 [cit. 7th January 2019]. Available in German language at: https://derstandard.at/2000095154953/Erste-gleichgeschlechtliche-Eheschliessung-in-Silvesternacht-in-Kaernten

the stated relationship on the very same level as the marriage of a man and a woman (i.e. conjugal relationship).

For the purposes of this text, selected state benefits have been analysed in order to state whether the biological divergence of a same-sex couple compared to the couple consisting of a man and a woman does have, or could possibly have, respectively, such a reasonable and justifiable influence on eventual various legal effects of those benefits. In other words, in order to answer the question, whether the legal nature of respective benefits shall stay exactly the same as in the case of a heterosexual couple.

Therefore, benefits related to the social event of childbirth and further coherent social events have been taken into consideration, i.e. benefits provided under sickness insurance (therefrom in particular, maternity benefit as well as fathers post-natal care – paternity leave), under state social support (therefrom in particular, parental allowance) and under pension insurance (therefrom in particular, survivors' benefits).

The authors have decided to start with a general introduction about the legal background of same-sex couples and their juristic position in the Czech Republic within the first part of the article. Thereafter, they continue with the topic of related state benefits.

2 General Legal Framework Concerning Same-Sex Couples

2.1 Marriage

The Charter of Fundamental Rights and Freedoms[5] provides the basic regulation on certain aspects concerning family law in its Art. 32. It states that: *"Parenthood and the family are under the protection of the law"*[6]. Constitutional law, however, regulates neither the issue of a registered partnership nor the relationships between same sex people. Moreover, unlike other Visegrad

5 RESOLUTION of the Presidium of the Czech National Council of 16th December 1992 on the declaration of the CHARTER OF FUNDAMENTAL RIGHTS AND FREEDOMS as a part of the constitutional order of the Czech Republic. Re-published as No. 2/1993 Coll., as amended by Constitutional Act No. 162/1998 Coll. (hereinafter referred to as *"The Charter of Fundamental Rights and Freedoms"*).

6 Art. 32, The Charter of Fundamental Rights and Freedoms.

countries, Czech constitutional law does not even provide an explicit protection of the marriage as a relationship between a man and a woman.

The current legal regulation *de lege lata* enables to solemnize a marriage only to a man and a woman. In the words of the Act No. 89/2012 Coll., Civil Code, as amended (hereinafter referred to as *"Civil Code"* or *"CC"*), the marriage is a permanent union of a man and a woman. Furthermore, it states that the primary purpose of the marriage is the foundation of the family, proper upbringing of the children and mutual support and assistance.

Pursuant to the Section 660, fiancés before solemnizing the marriage must declare whether they retain their surnames or which of the fiancés' surname will become a mutual surname.[7] Pursuant to the Section 672, only a person with full legal capacity may enter into marriage and even minor who has reached sixteen years of age if the court awarded him with the full legal capacity. Furthermore, even a minor without full legal capacity who has reached sixteen years of age may enter into marriage if it is permitted by court in case of important grounds.[8]

2.2 Registered Partnership

The currently effective Civil Code was formed as a basic act providing regulation for the whole area of private law. However, the regulation of registered partnership did not get it into the Civil Code because of prevailing a disapproving attitude of legislators. The regulation of the registered partnership is therefore regulated in a separate act, specifically Act No. 115/2006 Coll., on Registered Partnership and Amendments to Some Related Acts, as amended (hereinafter referred to as *"Registered Partnership Act"*). It is notable that the Czech legislator has been rather restrained and cautious to the registered partnership regulation so far and has been acting more like eastern legislators than the western ones.

Section 1 of the Registered Partnership Act defines the registered partnership as a permanent union of two same sex people.[9] Pursuant to the Section 3020 of the Civil Code, the rules relating to marriage and the rights and

7 Section 660, Civil Code.
8 Section 672, Paragraph 1 and Paragraph 2, Civil Code.
9 Section 1, Paragraph 1, Registered Partnership Act.

obligations of the spouses shall apply *mutatis mutandis* to registered partners and rights and obligations of the registered partners. This rule is particularly relevant for the application of the inheritance law. When the spouse shall inherit, so shall the registered partner.[10] Unfortunately, the registered partners are considerably restricted in their rights in other areas of law. It is not just symbolic, but it is also a matter of a purely practical nature. In our opinion, these differences cannot be rationally justified. We consider these differences as the most serious ones:

1. The very name *"registered partnership"* suggests this legal construction as something undignified for two people who love each other. The people in love want to marry, not to *"register"* themselves. In our point of view, it is not necessary for a union between two same sex people to be called marriage. We take into account a long-lasting tradition of the notion *"marriage"*. The legislator, however, might try to look for a more dignified notion instead of the term *"registered partnership"*. The Czech language offers many other options, which are not perceived so *"technical"* as the term registration. We suggest for example concept: *"a union"*.[11]
2. The Registered Partnership Act provides only the possibility to enter into a registered partnership in front of the registry office. Of course, we do not plead for the obligation of the Church to allow the same sex people to enter into the registered partnership in the church in front of the priest. However, the impossibility to become registered partners in front of the mayor is not justifiable.[12]
3. The absence of community property. Under the current legislation, registered partners become co-owners of the shares of the property as if a legal relationship did not exist between them.
4. The absence of the possibility to apply for a widow's (widower's) pension. Social security law regulation so far seems to be not entirely fair to the same sex couples. The second part of this article is mainly focused on this issue.[13]

10 Section 3020, Civil Code.
11 In the Czech language as: *"sezdání"*.
12 Section 3, Paragraph 1, Registered Partnership Act.
13 See Section 49ff. of Act No. 155/1995 Coll., on Pension Insurance, as amended (hereinafter referred to as *"Act on Pension Insurance"* or *"API"*).

5. The impossibility to jointly adopt a child who is one's of the registered partners.[14]
6. The impossibility to enter into the registered partnership before reaching eighteen years of age.[15]

2.3 Current Legislative Proposals

In these days, two proposals on amending the effective regulation on registered partnership are laid in the Chamber of Deputies. The first one might be, with a little exaggeration, labeled as a *"marriage for everyone"*. Under the aforementioned draft law proposed by several members of the Chamber of Deputies, it would not be possible to enter into the registered partnership in the future anymore. *"The existing registered partnerships would remain in force, although even the registered partners would be eligible to solemnize a marriage."*[16] The draft was submitted to the Chamber of Deputies on June 12, 2018. Since then, it has still been pending in the first reading of the draft. The discussion of this draft was interrupted. The essence of the proposed amendment to the Civil Code is that the current wording of Section 655 *"Marriage is a permanent union of a man and a woman formed in a manner provided by this Act. The primary purpose of marriage is the foundation of a family, proper upbringing of children and mutual support and assistance"* would change to *"Marriage is a permanent union of two people, formed in a manner provided by this Act. The primary purpose of marriage is the foundation of a family, proper upbringing of children and mutual support and assistance"*[17]. This parliamentary proposal has the support of the government. The government expressed its support after the discussion on 22th June 2018.[18]

The second submitted proposal is a draft of an amendment of the Art. 32 of the Charter of Fundamental Rights and Freedoms, which should modify the current wording on: *"Parenthood, family and marriage as a union between a man*

14 See Section 800, Paragraph 1 and Paragraph 2, Civil Code.
15 Section 4, Paragraph 4, Registered Partnership Act.
16 You can find all related documents at website of the Chamber of Deputies, Parliament of the Czech Republic. Agenda and Documents. *Public.psp.cz*. [cit. 8th January 2019]. Available in Czech language at: http://www.psp.cz/sqw/historie.sqw?T=201 & O=8
17 See Ibid.
18 See Parliamentary press No. 201/1, part 1/2. Government's opinion on Parliamentary press No. 201/0. Available in Czech language at: http://www.psp.cz/sqw/text/tiskt.sqw?o=8 & ct=201 & ct1=1

and a woman is under the protection of the law." If this proposal were passed and enacted as a law, it would serve as a protection of the term *"marriage"* not to be concurrently used as a term for the union between two same sex people. Submitting these two proposals is clearly not coincidental. The first proposal represents a weapon in the hands of the members of the Chamber of Deputies who act in the interests of the homosexuals while the second one should prevent the widening of rights of the sexual minority.[19]

2.4 Main Arguments of Both Sides and Our Statement

Supporters of *"marriage for everyone"* in numerous ongoing debates argue in particular with the right to dignity, the only one form of love, an undignified term of the current union as a *"registered partnership"*, the desire for a truly joyful life, the desire for the greater respect in the population, legal regulation abroad (e.g. the Dutch legislation allowed to solemnize a marriage to same sex people as early as in 2001) and with the current unjustifiable difference in the rights between spouses and registered partners (see above). They do not want to be second category citizens.

On the other hand, the opposition argues that the LGBT community has promised in the past that, after legalizing a registered partnership, they would not push forward thus would not demand widening the rights for the same sex couples. They further argue with the increased rate of bulling the children raised by homosexual parents and the thesis that two men or two women cannot serve as a sufficient example for their children as a family model. They also claim that one of the major aims of the marriage is to create a new life and with values such as *"traditional family as the cornerstone of the society, loss of traditional values, marriage as an ancient symbol of stability in the society"*. In their words, they *"fight for normality"*.

We consider such arguments as unpersuasive. Women were formerly also considered as the second-class citizens compared to men, and since women have been granted the right to vote, their position in the society has strengthened. To claim that women should have stuck with the voting right and

[19] You can find all related information at website of the Chamber of Deputies, Parliament of the Czech Republic. Agenda and Documents. *Public.psp.cz* [online]. [cit. 8th January 2019]. Available in Czech language at: http://www.psp.cz/eknih/2017ps/stenprot/020schuz/s020385.htm

should not have endeavour to enhance their position is entirely irrational, unjust and discriminatory. Other arguments might be summed up as one – lasting tradition. We understand the distress and fear felt by rather conservative people. However, homosexuality is neither a disease, nor a choice. We should not punish people for their orientation or treat them differently. Loving same-sex parents may be better ones than many heterosexual parents. Sexual orientation has nothing to say about parental qualities. These are two unrelated phenomena.

As far as the term *"marriage"* is concerned, we do not see a reason to insist on the requirement of the first group that the same sex couples union has to be called marriage. The etymology of the word marriage derives from the cohabitation of a man and a woman, therefore we do not insist on usage of the term marriage for the union of the same sex couples. As we have previously mentioned, we would recommend using the term *"union"*. What really matters is, whether the married couples and the same-sex couples in their *"marriage"*, regardless how we name it, are equal in their rights and duties.

2.5 Partial Conclusion

Out of curiosity, let us mention the referendum, which took place on February 7, 2015 in Slovakia when the Slovakian citizens refused to use the term marriage for the union of same sex people. The possibility for same sex couples to adopt a child was also denied. However, the referendum was not valid, as the required minimal threshold was not met.[20]

If we do not follow the Slovakian example and current widespread discussions are not silenced, we may expect that registered partners will sooner or later acquire equal rights and duties as spouses. It would distinguish us from other Visegrad countries.[21] As long as this happens, it will be late to connect and

20 Slovakia referendum to strengthen same-sex marriage ban fails. *BBC.com* [online]. 8th February 2015 [cit. 8th January 2019]. Available at: https://www.bbc.com/news/world-europe-31170464

21 For more detailed information about the current legal regulation and its possible further evolution in these countries see e.g. JAGIELSKA, Monika. Eastern European Countries: From Penalisation to Cohabitation or Further? In: BOELE-WOELKI, Katharina and Angelika FUCHS (eds.). *Legal Recognition of Same-Sex Relationships in Europe. National, Cross-Border and European Perspectives*. Fully revised 2nd edition. Cambridge: Intersentia Publishing Ltd., 2012, pp. 55–69.

project those changes into other areas of law. Therefore, in the latter part of this paper we would highlight and address some of the issues connected to the area of the social security law that have not been solved or even discussed yet. We will focus on the selected state benefits and we will discuss whether these benefits should be applied equally to the spouses as well as to the same sex couples or whether there are rational and justifiable reasons for a different treatment.

3 Selected State Benefits and Their Analysis

For the purposes of this text, the respective state benefits as follows have been selected in order to be analysed herein. Systematically, these benefits could be divided into two major groups, depending on whether or not they can be directly related to the social event of childbirth. The first group thus constitute benefits provided under sickness insurance (therefrom in particular, maternity benefit and fathers post-natal care, or else paternity leave). Secondly, the text has been focused on parental allowance arising from the group of state social support benefits. Whereas the scope of the third group has been dedicated to benefits provided under pension insurance (therefrom in particular, survivors' pensions), which shall be related (unlike those two afore-mentioned) to the social event of retirement.

3.1 Benefits Provided Under Sickness Insurance

As already mentioned above, for the purposes of this paper two relevant benefits have been chosen, i.e. firstly maternity benefit, and secondly fathers post-natal care (paternity leave). The latter shall be understood, in case the particular conditions for their providing have been met, as an equivalent benefit preferably for insured fathers taking care of their child, in comparison with the former one, primarily provided solely for insured mothers of the child (with further possible entitlements also for insured fathers though), as will be further analysed below.

Both benefits are currently regulated in respective provisions of the Act No. 187/2006 Coll., on Sickness Insurance, as amended (hereinafter referred to as *"Act on Sickness Insurance"* or *"ASI"*). The sickness insurance system in general is intended for people in remunerative work, who are provided

with security through financial sickness insurance benefits in cases of short-term social events. Besides maternity care, or paternity care respectively, which have been both taken into consideration, such events are mainly represented e.g. by temporary incapacity to work, ordered quarantine or taking care of a household member.[22] Except from maternity benefit and fathers post-natal care – paternity leave, to an exhaustive enumeration of provided benefits further belong in particular, sickness benefit, attendance allowance, long-term attendance allowance and contemporary benefit in pregnancy and maternity.[23]

3.1.1 Maternity Benefit

a) Legal Requirements for Maternity Benefit

Act on Sickness Insurance (Part Three, Title IV) prescribes obligatory requirements to be fulfilled for a legitimate entitlement to the financial assistance in the form of maternity benefit. Such conditions can be for the purposes of this analysis systematically divided into following groups (depending on their generality, or specialty, respectively):

- General conditions, in particular:
  - Essential temporal conditions[24], and
  - Negative conditions, i.e. obstacles to providing and receiving the benefit[25];
- Special conditions, in particular:
  - Personal conditions[26], and
  - Factual temporal conditions[27].

Generally speaking, for the entitlement to benefit in question, all the respective legal requirements for the creation of such entitlement shall be met during the insurance period, i.e. participation in insurance, or during the protection period, respectively. The stated means, that under certain conditions[28], the entitlement shall be legitimate even after termination of participation

22 Section 1, Paragraph 1 ASI.
23 Section 4, Paragraph a–f ASI.
24 In accordance with Section 14, Paragraph 1, as well as with Section 15, Paragraph 2 ASI.
25 In accordance with Section 16 ASI.
26 In accordance with Section 32, Paragraph 1 ASI.
27 In accordance with Section 32, Paragraph 2 ASI.
28 In accordance with Section 15, Paragraph 2 ASI.

in insurance.[29] Furthermore, the insured person shall not be provided with one of expressly stated benefits (in particular, sickness benefit, maternity benefit, paternity leave, attendance allowance) for the period of time during which the insured person e.g. performs work within the insured activity, to which these benefits belong, or personally performs a self-employed activity[30], or is in custody, as far as such benefits are concerned, whose entitlement thereto was created prior to taking into custody[31].

In the sense of Section 32, Paragraph 1 ASI, to maternity benefit shall be entitled:

- Firstly, an insured woman who gave birth to a child (or a pregnant insured woman, who shall be entitled prior to such childbirth, only in the time period starting from the beginning of 8th week before anticipated date of childbirth);
- Secondly, an insured man, provided the child was taken into care substituting parental care by such person on the basis of the decision of a competent authority (e.g. court decision on adoption or foster care of the respective child[32]);
- Thirdly, an insured man who takes care of the child in the case of death of its mother;
- Fourthly, an insured man who cares for the child and is simultaneously its father or husband of the woman who gave birth to such child, provided the child's mother shall not be able or shall not be allowed to care for her child due to a serious long-term disease, for which she has been recognised as temporarily unable to work, and shall thus not be entitled to payment of maternity benefit,
- Fifthly, an insured man who takes care of the child and is simultaneously its father or husband of the woman who gave birth to such child, provided he concluded a written agreement with the child's mother that he is going to care for the child[33].

29 E.g. for women whose insurance terminated while being pregnant, the protection period counts 180 calendar days from the day of termination of the sickness insurance.
30 Section 16, Paragraph a ASI.
31 Section 16, Paragraph c ASI.
32 See Section 38, Paragraph b and f ASI.
33 Under further legal requirements in accordance with Section 32, Paragraph 8 ASI. Such agreement is allowed to be agreed with effectiveness from the beginning of 7th week after childbirth and for the stated period of at least 7 following calendar days.

Nevertheless, the most fundamental requirement, as already indicated above, represents participation of the insured person in insurance, in particular for the required period of time, which is in accordance with Section 32, Paragraph 2 ASI at least 270 calendar days during last two years prior to the commencement of maternity benefit/leave.[34]

Participation of all employees (in employment relationship) under prescribed conditions in Act on Sickness Insurance shall be mandatory[35], whereas the self-employed persons (as well as foreign employees) can take part in the sickness insurance voluntarily, depending on their own free will[36].

b) Support Period for Maternity Benefit

If all the legal requirements (as analysed above) have been met, the entitlement to maternity benefit shall be seen as legitimate. Support period is legally defined for the purposes of the Act on Sickness Insurance as the period of time for which the respective benefit in accordance with this Act shall be paid.[37] Length of such period is further specified in Section 33 ASI as follows:

- 28 weeks, for an insured woman who gave birth to a child, or respectively,
- 37 weeks, in case of a simultaneous childbirth of two or more children (such insured woman stays entitled to this benefit after expiration of 28 weeks if she still keeps on taking care of at least two of these children);

As far as the insured men are concerned, the support period lasts 22 weeks in all afore-mentioned cases, or respectively 31 weeks provided an insured man cares for two or more children at the same time (such insured man stays entitled to this benefit after expiration of 22 weeks if he still keeps on taking care of at least two of these children).

Support period for maternity benefit starts on commencement of maternity benefit (or more precisely, maternity leave), which means in particular[38]:

- On the day determined by an insured woman (expectant mother) herself during the time period from the beginning of 8th week

34 Special regulation contained in Section 32, Paragraph 3 shall be applied to self-employed persons.
35 Section 2, Paragraph a in connection with Section 5, Paragraph a ASI.
36 Section 2, Paragraph b in connection with Section 5, Paragraph b ASI.
37 Section 3, Paragraph k ASI.
38 Section 34, Paragraph 1 ASI.

to the beginning of 6th week prior to the anticipated date of childbirth; in case of failure to do so, her maternity benefit shall start with the beginning of 6th week prior to the anticipated date of childbirth, or

- On the day of childbirth respectively, provided it occurred before the beginning of the support period as just has been stated.

For the cases concerning the insured men (under conditions described above), such support period starts on the day when a child was taken into care by the insured man.

Support period for maternity benefit terminates with its expiration (i.e. after whether 28, 37, 22 or 31 weeks, depending upon particular situation as already mentioned). However, it shall at the latest end on the day when the child reaches the age of one year and in cases of taking the child into substitute parental care or taking care of the child whose mother died by the insured man on the day when the child reaches the age of 7 years, at the latest up to the age of 7 years and 31 weeks though.[39]

c) Legal Consequences Related to Same-Sex Couple Marriages

After necessary dealing with legal characteristics of maternity benefit, in the following part of the contribution the possible legal consequences have been analysed in order to state whether or not the currently effective Czech legal regulation is prepared (in the sense of being effective and justifiable) for such a radical change consisting in the possibility to enter into marriage by same-sex couples.

Firstly, it is necessary to realise that also within current legislation it is possible to claim a legitimate entitlement to maternity benefit for father of a child, provided certain requirements (as described in detail above) have been met. Therefore, from this point of view, no legal change occurs and the respective regulation can be applied if the allowance for same-sex marriages is adopted, even though, when it comes to couples consisting of two males, just in case one of the husbands has been registered as a father of the child in the registry of birth, administered by the registry office[40]. Similarly, as far as marriage

39 Section 34, Paragraph 2 in connection with Section 32, Paragraph 7 ASI.
40 Section 3, Paragraph u ASI.

of two females is concerned, the only possibility for a legitimate entitlement to maternity benefit in such case seem to be that one of the wives gave birth to the child and is thus its mother[41]. Moreover, further possibility for one of the husbands (and thus extending the opportunities for same-sex couples consisting of men) is that he would care for a child whose mother died.

On the other hand, cases concerning taking a child into care substituting parental care, on the basis of the decision of a competent authority (which are various court decisions in family matters related to the child, as mentioned in the text above), differs in such sense, that the only possibility for a common taking into such care for homosexual couples is *de lege lata* the way of a joint tutorship according to the Civil Code.[42] Other options (within the scope of Section 38 ASI, i.e. establishing possible entitlement to maternity benefit according to Section 32, Paragraph 1 b ASI) are allowed solely whether for individuals or for spouses (nowadays nobody else than a married couple consisting of a woman and a man). These are in particular:

- Court decision on entrusting a child to the care of another person[43],
- Court decision on adoption[44] of a child[45],
- Court decision on the handover of a child into care of future adopter before adoption[46],
- Court decision on the handover of a child into care of adopter before adoption[47],
- Court decision on foster care and on foster care for a temporary time period[48],

41 In the sense of *"Mater semper certa est."* This postulate is also expressly stated in Section 775 of the Civil Code: *"A mother is a woman who has given birth to a child."*

42 See Section 932, Paragraph 2 CC: *"A court may also appoint two persons to act as tutors; this typically applies to spouses."*

43 In accordance with Section 953, Paragraph 1 CC.

44 See Section 794 CC: *"Adoption is to be understood as taking a person of another to be one's own."*

45 In accordance with Section 796, Paragraph 1 CC. Within this context see also Section 800, Paragraph 1 CC: *"Both or one of the spouses may become adoptive parents."*

46 In accordance with Section 824, Paragraph 1 CC.

47 In accordance with Section 826 CC.

48 In accordance with Section 958, Paragraph 1 CC. Within this context see also Section 964, Paragraph 1 CC: *"A child may be entrusted to joint foster care of joint foster parents if they are married."*

- Court decision on entrusting a child to pre-foster care of the persons interested in foster care[49].

Having taken all the afore-mentioned into consideration, the following partial conclusion can be made. Provided the legislator decides, by amendments of respective legal provisions, to incorporate into the Czech legal order an explicit possibility to enter into marriage also for same-sex couples, and thus put the stated relationship on the very same level as a current marriage as a conjugal relationship (i.e. consisting of a man and a woman), the subsequent amendments of respective provisions of the Act on Sickness Insurance concerning maternity benefit seem to be unnecessary.

Nevertheless, it is desirable to add within the overall context of what has been written, that the arisen question regarding the obvious discriminatory effect affecting same-sex couples (*de lege ferenda* would-be spouses as currently understood) manifesting in their impossibility to jointly adopt a child or in disallowance to entrust the child to a joint foster care (which goes beyond the scope of this text though) would still remain unanswered.

3.1.2 Fathers Post-Natal Care (Paternity Leave)

a) Legal Requirements for Paternity Leave

As of 1st February 2018, the Act on Sickness Insurance (Part Three, Title V) regulates a new benefit provided under sickness insurance. This benefit was added into the Czech legal order through its amendment[50] as a fathers post-natal care, or else paternity leave as the preferred version of its designation in the form of a legislative abbreviation (thus, hereinafter referred to as *"paternity leave"*).

As far as the obligatory requirements to be fulfilled for a legitimate entitlement to the financial assistance in the form of paternity leave are concerned, general conditions for entitlement to maternity benefit (as differenced above) shall be applied *mutatis mutandis*. Therefore, all the respective legal requirements for creation of such entitlement shall be met during

49 In accordance with Section 963 CC.

50 Act No. 148/2017 Coll., on Amendments to Act No. 187/2006 Coll., on Sickness Insurance, as amended, and to Further Related Acts (hereinafter referred to as *"Act No. 148/2017 Coll."*).

the insurance period (i.e. participation in sickness insurance). Nevertheless, there is no possibility to apply the protection period (unlike for maternity benefit). Similarly to maternity benefit (as well as to other benefits provided under sickness insurance, in particular sickness benefit and assistance allowance), the insured person shall not be entitled to the benefit in case one of the prescribed negative conditions (and thus obstacles to providing the respective benefit) in accordance with Section 16 ASI has been met.

Special conditions are to be found firstly in intertemporal provisions of the above-mentioned amendment to Act on Sickness Insurance.[51] As a consequence, the entitlement to paternity leave would arise from 1st February 2018 if the child were born (or similarly, if the child were taken into care substituting parental care) during the time period of 6 weeks prior to the effectiveness of the amending Act in question, i.e. on 21st December 2017 or later. Secondly, further special conditions covers Section 38a ASI, in particular:

- An insured man shall be entitled to paternity leave, provided he is a father of the child he cares for (i.e. he has been registered as the father of the child in the registry of birth, administered by the registry office[52]), or
- An insured person[53] shall be entitled to paternity leave, provided such person takes care of the child, that was taken into care substituting parental care on the basis of the decision of a competent authority in case the child has not reached the age of 7 years yet on the day of taking into such care.

Moreover, paternity leave shall be received when its commencement occurred in the time period of 6 weeks from the childbirth, or from taking the child into care (as just stated). In the very same case of care for respective child, the paternity leave shall be provided only once and solely

51 See Part One, Article II of Act No. 148/2017 Coll.

52 Section 3, Paragraph u ASI.

53 Nevertheless, it proves important to refer about a certain terminological inconsistency of the legislator. More precisely, it should have been expressly differed as follows, the *"insured man (insured father)"* for the purposes of Section 38a, Paragraph 1a, b ASI on one hand, and on the other the *"insured woman (insured mother)"* for the purposes of Section 38a, Paragraph 1 b ASI, similarly to the entitlement to maternity benefit in accordance with Section 32, Paragraph 1 ASI.

to one of the entitled insured persons. The situation does not differ in the case of care for more children simultaneously born, or taken into care, respectively.[54]

b) Support Period for Paternity Leave

If all the legal requirements (as analysed above) have been met, the entitlement to paternity leave shall be seen as legitimate. Support period is legally defined for the purposes of the Act on Sickness Insurance as the period of time for which the respective benefit in accordance with this Act shall be paid.[55] Length of such period is for the purposes of discussed benefit further specified in Section 38 b ASI and counts one week. Support period begins with the commencement of paternity leave, which shall be on the day determined by the insured person during the time period of 6 weeks from the childbirth or from taking the child into care.

Support period for paternity leave terminates whether with expiration of stated period of one week, even if the child dies earlier[56], or on the day of placing the child into care of facility providing continuous care for children, in case the child has been placed into such facility because of other than healthy reasons on the child's or its mother's side.[57] The same applies if the parents failed to continue in caring for their child and because of this reason, the child was entrusted to care substituting parental care.

c) Legal Consequences Related to Same-Sex Couple Marriages

After necessary dealing with legal characteristics of paternity leave, in the following part of the contribution the possible legal consequences have been analysed in order to state whether or not the currently effective Czech legal regulation is prepared (in the sense of being effective and justifiable) for such a radical change consisting in the possibility to enter into marriage by same-sex couples.

The consequences themselves are similar with those, which have been already stated as far as maternity benefit is concerned. Firstly, it is necessary

54 Section 38a, Paragraph 4 ASI.
55 Section 3, Paragraph k ASI.
56 Section 38 b, Paragraph 4 ASI.
57 Section 38 b, Paragraph 3 ASI.

to realise that also *de lege lata* it is possible to claim a legitimate entitlement to paternity leave for father of a child, provided certain requirements (as described in detail above) have been met. Therefore, from this point of view, no legal change occurs and the respective regulation would be able to be applied if the permission for same-sex marriages were adopted, even though, when it comes to couples consisting of two males, just in case one of the husbands is registered as father of the child in the registry of birth[58].

On the other hand, for the second type of entitlement to this benefit, consequences described as for the maternity benefit can be applied. Therefore, cases concerning taking the child into care substituting parental care, on the basis of the decision of a competent authority (various court decisions in family matters related to the child, as mentioned in the text above), which is simultaneously also the only way for receiving the paternity leave for couples consisting of two females, differs in such sense, that the sole possibility for a common taking into such care for homosexual couples is currently the way of a joint tutorship according to the Civil Code. Other options[59] are allowed solely whether for individuals or for a married couple (spouses), as was already analysed above. The only difference is represented by the express exclusion of the court decision on entrusting a child to foster care for a temporary time period from the exhaustive enumeration of possible decisions of a competent authority on handover of a child into care substituting parental care. Nevertheless, this difference is of no importance within the context of already stated.

Having taken all the afore-mentioned into consideration, the following partial conclusion can be made. Provided the legislator decides, by amendments of respective legal provisions, to incorporate into the Czech legal order an explicit possibility to enter into marriage also for same-sex couples, and thus put the stated relationship on the very same level as a current marriage as a conjugal relationship (i.e. consisting of a man and a woman), the subsequent amendments of respective provisions of the Act on Sickness Insurance regarding paternity leave seem to be unnecessary.

58 See Section 3, Paragraph u ASI.

59 Meaning within the scope of Section 38d ASI, and thus establishing possible entitlement to paternity leave according to Section 38a, Paragraph 1 b ASI.

Nevertheless, it is desirable to add within the overall context of what has been written, that the arisen question regarding the obvious discriminatory effect affecting same-sex couples (*de lege ferenda* would-be spouses as currently understood) manifesting in their impossibility to jointly adopt a child or in disallowance to entrust the child to a joint foster care (which goes beyond the scope of this text though) would still remain unanswered.

3.2 Benefits Provided under State Social Support – Parental Allowance

a) Legal Requirements for Parental Allowance

Parental allowance is one of the benefits provided by the state's social security law regulated specifically by its subsystem referred to as benefits under the state social support.[60] Parental allowance is therefore covered by the state. It is designed to support families with children, to assist them with covering part of the costs associated primarily with the personal needs of children. The parental allowance is granted to a parent who personally carries out a full day care for the youngest child in the family for a period of a full calendar month up to the maximum amount of 220.000 CZK, up to a maximum of four years of age.[61] If there are two or more youngest children born simultaneously, the maximum amount of money raises to 330.000 CZK. A parent may, while claiming a parental allowance, improve the social situation of the family and earn money on his or her own or as an employee, but at the same time he or she must ensure a personal care of the child by another adult.

If another child is born, the entitlement to the parental allowance for the older child shall be extinguished, even if the newly born child confers the entitlement to the parental allowance in an amount, which is equal to the amount of the parental allowance for the older child. It is necessary to report any change to the competent authority so that no overpayment on the benefit occurs. If the parental allowance has been paid while the conditions were not fulfilled, the parent is obliged to return the amount paid to the competent authority for

60 Section 2, Paragraph 2, Act No. 117/1995 Coll., on State Social Support, as amended (hereinafter referred to as *"Act No. 177/1995 Coll."*).

61 Section 30, Paragraph 1, Act No. 117/1995 Coll.

the period of time he or she was not entitled to claim the benefit. The entitlement to the parental allowance does not depend on the parent's income.[62]

b) Legal Consequences Related to Same-Sex Couple Marriages

Parental allowance is supposed to provide support for families consisting of an entitled person (the parent) and assessed person/s. The legislator should, in case of adopting the *"marriage for all"* amendments, certainly consider how to set up the conditions of this benefit for same sex couples who decide to *"acquire"* the child with the help of the so-called *"surrogate mother"*. We consider adopting the law enabling the legal construction of surrogate maternity to be the easiest and the most effective solution so that we are subsequently able to determine the *"real – legal"* parents of the child. Both fathers have to be allowed to have their names in the child's birth certificate. Thus we may assure that the biological parent as well as the non-biological one (the partner of the biological parent) is entitled to the parental allowance.

On the other hand, the surrogate mother would not have a claim for this benefit. However, other state benefits should be applied for her at least in the immediate post-birth period (such as maternity benefit). If two women, living in by the state recognized union, desire to have a baby, the solution should look similar. The father (sperm donor) should not be entitled to the parental allowance, whereas the mother and her legal partner should enjoy the state support.

3.3 Benefits Provided under Pension Insurance

For the purposes of a deeper analysis contained in this paper, two relevant benefits have been selected, namely widow's and widower's pension. Both these benefits are currently regulated in respective provisions of Act on Pension Insurance. Furthermore, an orphan's pension has been finally mentioned in order to have all the components belonging to the group of survivors' pensions covered.

The pension insurance system in general is intended for people participating in pension insurance (whether mandatorily[63], or voluntarily[64]), who are

62 See Parental allowance. *Portal.mpsv.cz* [online]. 1st January 2018 [cit. 7th January 2019]. Available at: https://portal.mpsv.cz/soc/ssp/obcane/rodicovsky_prisp

63 In accordance with Section 5 API.

64 In accordance with Section 6 API.

provided with security through financial pension insurance benefits in cases of long-term (or even terminal, irreversible) social events. These are legally enumerated as follows[65], besides death of one's breadwinners, which has been taken into consideration, such events further represent old age and invalidity. Except from widow's and widower's pension[66], to an exhaustive enumeration of provided benefits further belong in particular[67], old-age pension, invalidity benefit (disability) and orphan's pension (which is, as already indicated above, together with widow's and widower's pension assigned to so-called survivors' benefits).

3.3.1 Widow's and Widower's Pension

Despite a different designation, both benefits are in their quintessence identical. The only difference (and a consequence for divergent names) rests in the particular surviving spouse (whether a woman or a man) who is entitled to the respective benefit.[68] In other words, widow's pension shall be granted in the case of a husband's death, and *vice versa*, widower's pension shall be granted in the case of a wife's death. Their predominant functions are nowadays understood as maintaining and supporting as well as balancing, meaning compensating an apparent difference in the standard of living of respective family.[69]

a) Legal Requirements for Widow's and Widower's Pension

Act on Pension Insurance (Part Four, Title IV) prescribes obligatory requirements to be fulfilled for a legitimate entitlement to the financial assistance in the form of widow's or widower's pension. Such conditions can be systematically divided into two groups depending upon their generality, or speciality, respectively.

Generally speaking, the entitled person shall participate in pension insurance under conditions prescribed in the Act on Pension Insurance, whether

65 Section 1, Paragraph 1 API.
66 Section 4, Paragraph 1c API.
67 See Section 4, Paragraph 1a, b and d API.
68 See Section 49, Paragraph 2, as well as Section 50, Paragraph 7 API.
69 VOŘÍŠEK, Vladimír. In: TRÖSTER, Petr et al. *Právo sociálního zabezpečení [Social Security Law]*. 6th edition. Prague: C. H. Beck, 2013, pp. 172–173. Similarly, KOLDINSKÁ, Kristina. *Sociální právo [Social Law]*. 2nd edition. Prague: C. H. Beck, 2013, pp. 125–126.

mandatorily (meaning *ex lege*) in accordance with Section 5 API[70], or voluntarily (meaning on the basis of their possible application) in accordance with Section 6 API[71]. Furthermore, the condition of participation in pension insurance shall be met, which applies to employees and other groups of persons performing work or similar activity. That means in practice, e.g. for employees (of both types, as just divided), that they have participated in pension insurance according to the Act on Pension Insurance, provided they have taken part in sickness insurance in accordance with Act on Sickness Insurance.[72] As far as the self-employed are concerned, special legal regulation containing further requirements applies.[73]

The special essential conditions for entitlement to widow's and widower's pension are to be found in Section 49 API. The most essential requirement can be derived directly from its textual diction. On the day of one of the spouse's death, there shall be an existing marriage, notwithstanding the possibility that both spouses might have been living separately and even with their new partners in fact.

If this condition has been met, both widow and widower are entitled to discussed state benefit under the equal requirements, providing the following:

- The deceased widow's husband, or widower's wife respectively, was a receiver of the old-age pension or invalidity benefit (disability), or
- Such deceased wife or husband fulfilled on the day of his or her death the condition of required insurance period[74] for a legitimate

70 E.g. according to Section 5, Paragraph 1a and f API, all employees in an employment relationship as well as employees being active based on a concluded agreement on work performed outside employment law relationship (i.e. agreement to complete a job, or agreement to perform work) under regulation of respective provisions of Act No. 262/2006 Coll., Labour Code, as amended; or according to Section 5, Paragraph 1e API, self-employed persons.

71 Containing an exhaustive enumeration of persons who have already reached the age of 18 years and are thus entitled to file their application depending on their free will.

72 Section 8, Paragraph 1 API.

73 See Section 9 as well as Section 10 API.

74 I.e. in the sense of explanatory provisions, in particular Section 11, Paragraph 1a API, for major cases (e.g. all employees) the stated period of time for which the insurance premium has been paid in the Czech Republic.

entitlement to disability, or fulfilled the conditions for entitlement to old-age pension[75] under the Act on Pension Insurance, or

- Such person's death was a consequence of accident at work or occupational disease[76].

b) Duration and Extinction of Entitlement to Widow's and Widower's Pension

In general, discussed state benefit shall be received within the time period of one year following the day of wife's or husband's death, depending on the particular situation. Nevertheless, the respective widow (widower) shall be entitled to widow's (widower's) pension even after the stated period expired providing one of the expressly mentioned situations[77] occurred. In particular, provided she or he:

- Cares for a dependent child[78],
- Cares for a child who is dependent on another person's care with grade II (medium dependency), grade III (heavy dependency) or grade IV (full dependency)[79]; here it is indispensable to add a further special requirement concerning the child itself (applicable to the previous point, too), who shall be whether entitled to orphan's pension after the deceased, or brought up in the family of the deceased, meaning provided the child was an own (adopted) descendant of a widow (widower), or the child was taken at least from one of them until the day of the spouse's death into the permanent care substituting parental care[80],
- Cares for the individual's own parent or the parent of the deceased spouse who lives in the same household and is dependent on another

75 Including the entitlement to precocious pension in accordance with Section 31, Paragraph 1 API.

76 See Section 49, Paragraph 1 b in connection with Section 25, Paragraph 2 API.

77 See Section 50, Paragraph 2 API.

78 As generally specified in Section 20, Paragraph 4 API, until completing the obligatory school attendance, or until reaching the age of 26 years at the latest, in case stated conditions are met (e.g. the respective child is continuously preparing itself for the future occupation, as further specified in Sections 21–23 API).

79 See Section 8 of Act No. 108/2006 Coll., on Social Services, as amended.

80 Section 50, Paragraph 3 API. This condition has not been met e.g. in case the marriage had been concluded only one day before the death of the husband and the widow had been living in another common household with another man together with her dependent children for a couple of years; for further details see the decision of the Supreme Administrative Court from 25th October 2006, file no. 3 Ads 76/2005-49.

person's care with grade II (medium dependency), grade III (heavy dependency) or grade IV (full dependency)[81],

- Is disabled in the third degree of disability[82],
- Has reached the age of at least 4 years below the retirement age for a man[83] of the same date of birth, determined in accordance with Section 32 API, or has reached the retirement age, if such age is lower.

The entitlement to widow's (widower's) pension terminates with entering into new marriage[84] as well as with legal force of the court decision that the widow (widower) intentionally caused death of her husband (his wife) as an offender, an accomplice or a participant of a criminal offence.[85] In the latter case, the entitlement shall be terminated with effects *ex tunc* (unlike in the former one), i.e. from the day of granting the entitlement.

On the other hand, the entitlement to widow's (widower's) pension arises again if the afore-mentioned conditions justifying its receiving even after one year from the deceased spouse's death (according to Section 50, Paragraph 2 API, as specified above), providing one thereof is met until two years counting from the termination of the previous entitlement to widow's (widower's) pension.[86]

c) Legal Consequences Related to Same-Sex Couple Marriages

After necessary dealing with legal characteristics of widow's and widower's pension, in the following part of the contribution the possible legal consequences have been analysed in order to state whether or not the currently effective Czech legal regulation is prepared (in the sense of being effective and justifiable) for such a radical change consisting in the possibility to enter into marriage by same-sex couples.

Unlike the two previously mentioned benefits from the group of benefits provided under sickness insurance, to both discussed survivors' pensions shall be entitled expressly just whether a widow as far as her deceased

81 See Section 8 of Act No. 108/2006 Coll., on Social Services, as amended.
82 See Section 39, Paragraph 2c API.
83 This rule shall be applied for entitlement to both widow's and widower's pension.
84 Section 50, Paragraph 5 API.
85 Section 50, Paragraph 6 API.
86 Section 50, Paragraph 4 API.

husband is concerned, or a widower as for his deceased wife, *tertium non datur*. Therefore, in the case of possible forthcoming incorporation of same-sex couple marriages into the Czech legal order, homosexual couples would be obviously discriminated, since neither a wife nor a husband would be then allowed to claim an entitlement to the respective survivors' pension concerning their spouse of the same sex (i.e. a wife after her deceased wife and a husband after his deceased husband).

Having taken all the afore-mentioned into consideration, the following partial conclusion can be made. Provided the legislator decides, by amendments of respective legal provisions, to incorporate into the Czech legal order an explicit possibility to enter into marriage also for same-sex couples, and thus put the stated relationship on the very same level as a current marriage as a conjugal relationship (i.e. consisting of a man and a woman), the subsequent amendments re-formulating respective provisions of the Act on Pension Insurance regarding selected survivors' benefits (namely widow's and widower's pension) seem to be inevitable, in order to eliminate the described discriminatory effect.

As the most elementary (and non-burdensome) solution, it seems to add a common provision containing a rule that the regulation as currently expressed shall be applied by analogy also for situations regarding same-sex spouses. An undoubted efficiency of such approach can be supported by the decision of the legislator on application of quite a similar technique within the scope of the Civil Code[87], in particular as far as registered partners and respective provisions on marriage and rights and duties of spouses are concerned.

3.3.2 Orphan's Pension

a) Legal Requirements for Orphan's Pension

Orphan's pension scheme is currently also regulated by the Act on Pension Insurance.[88] Simplified, the claim for this benefit has a baby if one of its parents dies.

87 See Section 3020 CC: *"The provisions of Book One, Book Three and Book Four on marriage and on the rights and duties of spouses apply by analogy to registered partnership and the rights and duties of partners."*

88 Section 4, Paragraph 1, in connection with Section 52 API.

b) Legal Consequences Related to Same-Sex Couple Marriages

If a non-biological parent (registered partner of a biological parent) deceases, the child shall not be entitled to receive orphan's pension after his or her death. In our point of view, current regulation is not entirely fair. In fact, both parents may take care of the child from a very early childhood. The child may consider both registered partners as his or her "real parents"; he or she might not even have another parent.

Therefore, the current legal solution, i.e. if a parent who provides the child with care and support, even if he or she is not a biological parent of the child, dies, the child is not entitled to the orphan's pension, which seems to be rather discriminatory. An effective regulation at the same time states that if a married parent, who adopted a child of his or her spouse, dies, the adopted child is entitled to the orphan's pension. Because of the prohibition of the joint adoption of the child by both registered partners, the same sex couples are not equal in their rights even in this particular area of law. We argue that in the future the orphan's pension should be constructed as follows – if the same sex couple jointly adopts a child (in case they are allowed to do so), the child will be entitled to the orphan's pension after the death of one of the gay parents, meaning the entitlement will arise towards both registered partners (or both same sex spouses). In other words, if the legislation is amended as we propose, the child will be entitled to orphan's pension neither after the death of the surrogate mother, nor after the death of the father, the sperm donor.

4 Final Conclusion

This contribution has been dedicated to quite an abundantly discussed topic of same-sex couple marriages. As its essential purpose, it aimed to state on the basis of the appropriate legal analysis of selected state benefits accenting various legal requirements for their providing, whether the branch of the Czech social security law is prepared (in the sense of being effective and justifiable) for such a radical change consisting in enabling marriage also for couples consisting of same-sex persons.

First of all, from the general point of view, the following conclusion has been reached, regarding the topic of current as well as prospective legal framework relating to registered partnership and (would-be) same-sex marriages. As far as the contemporary concept of marriage is concerned, no reason has been found to necessarily insist on the requirement thereof to be called by this very name. Consequently, having taken the afore-mentioned overall context (whether historical, etymological, political or other) into consideration, any other consensually accepted designation (as has been proposed, e.g. a union) could be incorporated instead. It is crucial to be aware that what really matters is, whether the married couples and the same-sex couples in their *"marriage"*, notwithstanding its legal title, are equal in all their rights and obligations.

Secondly, as has been indicated in each part focused on the respective state benefit within its partial conclusions at the very end thereof, the analysis has overall proven that there is no amendment necessity, as far as some of the discussed provisions of the national social security law regulating selected state benefits are concerned. In particular, provided the legislator decides, by amendments of respective legal provisions, to incorporate into the Czech legal order an explicit possibility to enter into marriage also for same-sex couples, and thus put the stated relationship on the very same level as a current marriage as a conjugal relationship (i.e. consisting of a man and a woman), the subsequent amendments of respective provisions of the Act on Sickness Insurance regulating benefits provided under sickness insurance (namely maternity benefit as well as paternity leave) seem to be unnecessary. However, it is desirable to emphasise, that the arisen question regarding the obvious discriminatory effect affecting same-sex couples (*de lege ferenda* would-be spouses as currently understood) manifesting in their impossibility to jointly adopt a child or in disallowance to entrust the child to a joint foster care (going beyond the scope of this text though) would still remain unanswered.

Nonetheless, the situation differs and thus an exception from the needlessness of amendments, as indicated in the previous paragraph, represents the currently effective legal regulation of Act on Pension Insurance on widow's (widower's) pension, whose corresponding, more precise re-formulation

would have to be incorporated as a consequence of adoption of permission to enter into marriage by homosexual couples. Having already proven such legislative technique as effective, amending a common provision containing a rule that the regulation as currently expressed shall be applied by analogy also for situations regarding same-sex spouses, would certainly in quite a simple manner eliminate the unfavourable legal state. Similarly, the next one from the survivors' pensions, in particular the orphan's pension, should subject to change in the way that provided the same-sex couple jointly adopts a child (in case they are allowed to do so), the child will be entitled to the this pension after the death of one of the homosexual parents.

As far as the area of one of the benefits provided under state social support is concerned, in particular the parental allowance, it should be assured that the biological parent as well as the non-biological one (the partner of the biological parent) is entitled to this allowance. Whilst, similarly to what has been already noted above concerning the orphan's pension, the surrogate mother's possible entitlement ought to be reprobated.

Nevertheless, in the very end of our text, we can quote nothing else that who knows what the future brings, meaning within the legal background the dependence on how more or less successfully the Czech legislator will be able to cope with such a complex inter-dimensional issue. This kind of its uniqueness is constituted by mutual connecting not only the sociological-philosophical point of view represented mainly by respected human-rights-related provisions, but also the undeniable (and for the purposes of this contribution even more significant) legal aspects with consequences manifesting in many branches of law, e.g. in the national social security law, as has been demonstrated within this paper.

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Position of Children in Homoparental Families[1]

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Abstract in original language

Úkolem příspěvku je přinést srovnání právní situace dětí žijících se stejnopohlavním párem se situací dětí, které žijí s manželi. Tato analýza přispívá probíhajícímu diskurzu umožnění uzavírání manželství párům stejného pohlaví, neboť zohledňuje reálnou situaci současné legislativy dopadající na děti.

Keywords in original language

Homoparentalita; stejnopohlavní pár; rodina; děti; nejlepší zájem dítěte; manželství; manželství pro všechny; registrované partnerství.

Abstract

The task of the paper is to compare the legal situation of children living with the same-sex couple with the situation of children living with spouses. This analysis contributes to the ongoing discourse of allowing marriages of same-sex couples as it takes into account the real situation of the current child-related legislation.

Keywords

Homoparentality; Same-sex Partners; Family; Children; the best Interest of the Child; Marriage; Marriage for All; Registred Partnership.

1 Introduction

The ongoing debate in the Czech Chamber of Deputies is at least misleading for an unbiased spectator. Although the draft amendment to the Civil Code, which would make possible to get married even for persons of the same sex, did not even reach the first reading, the politicians discussed it heavily.

1 This article was supported by the Garnt "Selected Institutes of New Legislation of Private Law and Criminal Law in the Application Practice – II", no. SGS-2016-025.

There was no speaker who would not mention children in a short speech. There have been pronounced many myths, half-truths and seemingly life experiences. The Chamber of Deputies' meeting thus became a great inspiration for this contribution.

Regardless of the fact that Deputies are able to do their jobs mostly in their debates, they do nothing to make children better off in their families. Mentioned in families where children really live. And that's just because it has become modern to protect the values we call "traditional". The fact is that what we call the "traditional family" is no longer a social concept that is evolving over time and changing over time. Nor does it matter that marriage is not the only institution in which children are raised. Even there should be mentioned the negative fact that almost half of the marriage breaks down for various reasons. But this plays no role in such debates.

It is wholly irrelevant whether we are discussing the right to marry if we do not consider the appropriateness of raising children with the same-sex couple. It is absolutely necessary to accept the fact that single-parent couples are bringing up children today, and the state's task is to protect children and provide them with the right conditions for life. So what are the status of children who are brought up by the same-sex couple where only one can be a parent according to the law? Is the status of children living with (parents) husbands more advantageous?

2 Homoparental Families

The numbers of children living with same-sex partners are unknown today. Therefore, their number is estimated from different sources. One of these is the census, houses and flats carried out by the Czech Statistical Office in 2011.[2] Respondents said that 879 children live in a household with the same-sex couple. However, this figure is problematic. On the one hand, it is now more than 8 years old. On the other hand, the resulting number has emerged as a by-product of the census. This was a voluntary indication that a person living with another person of the same sex could fill in.

2 See the page of the Czech Statistical Office and the results at: https://vdb.czso.cz/vdbvo2/faces/cs/index.jsf?page=statistiky & filtr=G~F_M~F_Z~F_R~F_P~_S~_null_null_#katalog=30261

Even older, but much less accurate, is an estimate made by experts on LGBT topics conducted in the framework of the Analysis of the Situation of Lesbian, Gay, Bisexual and Transgender Minorities in the Czech Republic in 2007. The authors of the analysis estimated the number of hundreds, rather thousands of children.

For the purposes of the contribution, the number of children raised by the same-sex couples is not relevant. However, it should be seen that children with same-sex partners live as an undisputable fact.

Homoparental family is a family where adults are same-sex partners. No matter what gender the children are or what their sexual orientation is. This form of family is derived only from the fact that the upbringing is carried out by the same-sex couple, two women or two men.

In the past, most of the children were brought by their parents to the homoparental family. Usually after the collapse of marriage or another form of heterosexual cohabitation. The child was brought up together with a new partner of the same sex. In the last decade, we have been talking about gay baby-boom, especially in lesbian couples. Lesbian couples today are quite common in bringing up children who are born into an already existing same-sex partnership. Some of these children do not have fathers, [3] others do. He may also stay for an important role in the child's life, but the basic education, raising of the child is primarily realized in a family of two women.

For male couples, the situation is more complicated, because their possibilities of bringing the child into a family are limited. In the Czech Republic, we record a few male couples who raise children conceived in the form of surrogate motherhood. With regard to the complex legal situation of surrogate motherhood in the Czech Republic, the whole process is most often carried out (for example) in the United States of America in the specific states of the federation where the surrogate maternity is legally anchored (for example, the State of California).

Some male couples also look for surrogate mothers in the Czech Republic. The amount of male homosexual couples who have undergone surrogate motherhood will be very small. Also, a small number will be formed

3 Father is unknown.

by men who raise a child in foster care. After the abolition of Section 13 (2) of the Act on Registered Partnership by the Constitutional Court (Pl. ÚS 7/2015), we now know of the first cases of man of registered partnerships who have been assessed as suitable candidates for the adoptive parent and have successfully passed the whole process of adopting the child.

It can be stated, therefore, that the ways in which a child gets into the family are very similar for heterosexual couples as well as for homosexual couples. Except for natural conception, which can only be considered in the case of a heterosexual couple, both the heterosexual and the homosexual couples can bring the child in the form of assisted reproduction, adoption, or become a foster parent.

However, parenting rules do not apply to same-sex couples. Thus, for example, in the case of surrogate mothers, there is usually a woman from the ordering couple who becomes the mother of the child by adoption, because her husband is declared the father of the child. This leads to the adoption of the child by the wife, which is one of the ways of parental forms as preferred marital parenthood.

However, the assumption is that the woman who gave birth to the child is also consenting, as she is the mother by law. Furthermore, the consent of the child care body must be pronounced, and the court, taking all aspects into account, must conclude that the adoption by the spouse is in the best interests of the child.

For adoption, spouses can apply for a child's adoption together and become both adoptive parents. For the same-sex couple this possibility is not allowed by law. The applicant, respectively a person eligible to become an adoptive parent can be essentially only one from the couple. A child can never become a child of both partners when one of the partners becomes an adoptive parent, but the other does not.

Emphasis on the fact that the protection of a child is provided in particular by a family consisting of spouses was also confirmed by the Constitutional Court in Pl. ÚS 10/2015. In this case, it was the adoption of the child by mother's partner. They were living together for several years in concubinate. But the fact that the mother and the man were not married stated

as a legal obstacle to adopting a child whose execution would destroy all his bonds to the original family, which is not in his best interest. The Constitutional Court therefore abided by the law and ignored the fact that both the biological father of the child and the child care institution agreed with the adoption. The child almost did not come in contact with his biological father and, on the contrary, he had lived with his mother's partner since his early childhood and considered him for his father. There also was a younger brother of his mother and the applicant in the family. The adoption would also set as a family union act. The reason for adopting was the correction of legal status and reality. There would certainly not be any change for the family nor the boy even if the applicant and the mother of the child were married. Although the Constitutional Court ruled to protect the child and left him living the same life as before the application only without any possibility to become also a legal child of the man who was de facto father to him.

3 Parental responsibility and family needs

Parental responsibility includes rights and duties of parents consisting for the child, including, without limitation, care for his health, his physical, emotional, intellectual and moral development, the protection of the child, ensuring his upbringing and education, determining the place of his residence, representing him and administering his assets and liabilities.

The parental responsibility enshrined in § 858 of the Civil Code to the parent of the child. However, only a parent designated by law is the holder of the parental responsibility, not a de facto parent, that is, who actually cares and educates the child. The duration and extent of parental responsibility can not be changed, so it can not be abolished, for example. The scope and duration may be changed by the court only by the relevant decision.

Parental responsibility is fundamentally lacking in social parenting. That is, partners of parents who are not biological parents of a child. These people often spend much more time with their children than their biological parents because they share a household with them, for example because of biological parents' breakup. However, their rights and obligations towards children

are extremely limited. This situation actually occurs in couples of the same sex. Always a non-biological parent is in this position of a social parent.

The parental responsibility is closely related to family needs. They are an integral part of the rights and obligations of spouses and do not apply, nor analogues, to registered partners, or persons living in a concubinate. The spouses are obliged to jointly take care of children (Section 687 of the Civil Code), to contribute to the needs of the family life (Section 690 of the Civil Code), to jointly deal with family matters (Section 693 of the Civil Code) etc.

The protection of a child living in a family of married couples is also ensured by provisions of § 691 of the Civil Code. It is irrelevant whether it is a child jointly or child of one of the spouses or a child entrusted with the care of spouses or only one of them. It stipulates that if, without reason, the husband leaves the household and refuses to return, he must also contribute to the cost of the household he left. This observes the maintenance of the economic status of the household, where the status of the child remains and its standard of living is fundamentally unchanged.

4 Death of the partner, husband

Death interferes with each family in a very serious way. For the purposes of this paper, we can only mention the emotional side of the loss of a family member. The Civil Code then solves for us a much more fundamental reality, namely the transfer of the estate of the testator.

Legal inheritance inequality was one of the strong arguments in approving the Registered Partnership Act (115/2006 Coll.). That is why the partner was included in the first inheritance class, as follows:

The decedent's children and spouse inherit in the first class of heirs, each of them equally.

If any of the children does not inherit, his share is acquired equally by his children; the same applies to more distant descendants of the same ancestor.

The second inheritance class applies also in cases no children does inherit in the first class:

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 decede.

Second class heirs inherit equally; however, the spouse shall always inherit at least half of the decedent's estate.

There are several facts following from the above citation. One is the absence of a share for children who are not the legal descendants of the testator. Those children cannot inherit in the first inheritance class. If the testator lived as a partner in a family where his biological child was raised as well as his partner's, then the inheritance will be seized in the first inheritance class and partner's child will receive no share.

If the testator did not have his own children, then the partner's child can inherit in the second inheritance class. However, his share is much smaller than the share he would be entitled to if he was included in the first inheritance class.

Although it can be argued that the heritage is the same if it is a child of only one of the spouses, it should be recalled that such a child may under certain circumstances be the child of both spouses. For a child raised by the same-sex partners, there is no such a theoretical possibility.

An orphan's pension is a benefit that balances the economic stability of the child in the event that his or her parent dies. The conditions for the entitlement to an orphan's pension are relatively modest, as the aim of providing the benefit to an orphaned child, which logically does not participate in the pension insurance scheme, is observed. At the same time, it should not have direct consequences for the person who did not participated in it, and after the death of his parent should be entitled to benefit from the system.

A child is entitled to an orphan's pension if his or her father or a person who has taken the child into care replacing parental care died. A child who is taken into care for the care of parents is considered to be a child who has been taken into custody by decision of the competent authority, a child of a spouse entrusted to him by a court decision or by a court agreement approved by the court, the spouse, and the husband's child if the other parent of the child has died or is not known. A child taken into care for

the care of parents is also considered to be a child who was taken into custody by decision of a competent body for the social and legal protection of children or a former competent authority to entrust the child to the care of a prospective adopter or to the care of a person interested in becoming a foster parent, and the child who was taken into custody on the basis of a preliminary measure issued under a child custody procedure.

It is clear from the above that children who are brought up in a family formed by spouses are legally provided with conditions to be able to obtain an orphan's pension even for those who are not their biological parents. The basic condition is set as the marriage to a biological parent. For children brought up by partners, there is no such option. This means that if a parent's partner dies, the child's entitlement to an orphan's pension cannot arise.

5 Marriage or partnership breaksdown

The child's life is affected by any change that affects adults who raise him. However, the disintegration of relationships is nowhere to be isolated and interferes with relationships that include a child. We also find a difference in the position of children in those cases where the parents were married and their relationship breakdown is directed to the divorce of the marriage and the children whose parents have entered into a registered partnership which is annulled by the court after the dissolution.

In case partnership breaksdown, the only provision shield the interests of the child is § 927 of the Civil Code, that says that even persons socially close to the child have the right to contact with the child if the child has an emotional relationship to them which is not temporary, if it is clear that the lack of contact with these persons would cause harm to the child. The child also has the right to contact with such persons if they consent to the contact. The legal order does not contain any other provisions that would ensure its position in the interests of the child in case of a breaksdown of the partnership.

Marriage is considered by law to be the preferred model of child upbringing. Therefore, in the event of its disintegration, special care is given to children. Their needs need to be taken into account. The child has the fundamental

right to continue to reside where the family has a household. The child also has the right to the same standard of living as his parents have. It is similar with intercourse. The child has the right to contact both parents, ideally to the same extent. Often it is not possible to secure it, however, the right to the widest possible contact with the parent who has not been entrusted to the child is also provided. One way to raise a child after divorce is to provide alternate care. These are values that are ensured in the child's best interest, which are not shared for a different form of cohabitation than marriage.

6 Other aspects

Other aspects illustrating the differences between the status of children whose parents are married and children whose parents are partners in a registered partnership are undoubtedly the symbol of the institute. In general, marriage is perceived as superior, as an institution exclusively suited to child upbringing (cf. US Pl. 10/2015). Today, we can hardly imagine that the children were exposed to unwanted behaviors among their peers for coming from a family that does not conform to a generally accepted standard. However, 40 years ago, it was not quite common for parents to divorce, and children of divorced parents could become the target of ridicule by such a label. Today, I dare say that there is no strife among the children because of the family in which they are raised. Nevertheless, symbolically, marriage is the culmination of the cohabitation of two people, especially when a child is raised together.

We often find that people raising children who are not their biological parents at the same time are completely equal parents, whose care does not differ from that of biological parents. Obstacles impose a legal order to exercise their care, as stated above. This is the difference between de facto parenthood and de lege parenthood, which can not be considered compatible with the best interest of the child.

Especially in those cases where the other parent of the child is not known or does not live or has parental responsibility, the child's situation is unduly limited because the law does not confer the right to a second parent who satisfies all the conditions of parenthood unless he becomes the husband

of the child's parent. Such a condition leads to the fact that marriage is still the preferred institution for the upbringing of the child, which can only be accepted in the case where same-sex persons can close the marriage and straighten the rights of the children they are upbringing together.

In addition, it is possible, from the point of view of the person upbringing the child as a social parent, to introduce a number of aspects that prevent or at least make it difficult for them to do so properly. This person is not entitled to act as a parent because he is not children's legal representative. He can not decide to provide health care even in cases where the child is acutely ill. In such cases, the child is provided with only basic care to avert persistent consequences. The social parent is not entitled to participate in the decision on the child's property, the treatment of his assets, the permanent residence of the child or the school to attend.

7 Conclusion

In conclusion, it can simply be summed up that it is beneficial for children and their best interest is if they live with their married parents. Children whose parents are registered partners do not benefit from such a relationship. It is even impossible to think of the possibility that a parent's partner might be sucked away without the child losing his or her bond to the original family.

If they were able to marry, the same-sex partners would be in the aspects described in this paper in the same position as heterosexual couples. This would bring many benefits for childcare. In particular, there is no possibility of adopting or adopting a child's partner according to the legal order. Enabling marriage would straighten these inconveniences.

Among other things, the best interest of the child would always be secured, even if one of the parents wanted to leave a common household. But, in particular, protection of the children would be felt if the parents' marriage had to fall apart. Because a divorce condition is that relations with children are first settled.

Last but not least, it is necessary to perceive a totally inadequate provision of the child in case of death of a social parent. The child does not inherit either property or orphan's pension.

A traditional family will not destroy the possibility of same-sex couples marrying. On the contrary, the traditional upbringing of children in the spouse's family will be strengthened. And that is the only argument that is in the best interest of the child.

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Öffnung der Ehe für gleichgeschlechtliche Paare in Österreich ab 1. 1. 2019

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Abstract in original language

Mit Ablauf des 31. 12. 2018 wurde nach dem jüngsten Erkenntnis des österreichischen Verfassungsgerichtshofs die geschlechtsspezifische Unterscheidung für die Ehe und die eingetragene Partnerschaft aufgehoben. Dieser Beitrag beschäftigt sich mit der Rechtsentwicklung der eingetragenen Partnerschaft und den Unterschieden zur Ehe, dem genannten Erkenntnis des VfGH sowie den rechtspolitischen Konsequenzen der Entscheidung. Die weitere Entwicklung bleibt, in Anbetracht der bewussten Untätigkeit des österreichischen Gesetzgebers, abzuwarten.

Keywords in original language

Familienrecht; Ehe; Ehe für alle; eingetragene Partnerschaft; eingetragene Partnerschaft für alle; homosexuelle Paare; Diskriminierung; Gleichstellung.

Abstract

According to the latest ruling of the Austrian Constitutional Court, at the end of December 31, 2018 the gender specific differentiation of marriage and registered partnership was abolished. This article deals with the legal development of the registered partnership and the differences to marriage, the ruling of the Constitutional Court as well as its legal consequences. Given the deliberate inaction of the Austrian legislator, further developments remain to be seen.

Keywords

Family Law; Marriage; Marriage for All; Registered Partnership; Registered Partnership for All; Homosexual Couples; Discrimination; Equality.

1 Einleitung

In seiner jüngsten Entscheidung vom 4. 12. 2017[1] hat der Verfassungsgerichtshof entschieden, dass mit Ablauf des 31. 12. 2018 die Wortfolge „verschiedenen Geschlechts" in § 44 ABGB und die Bezugnahmen auf die Personen gleichen Geschlechts im EPG als verfassungswidrig aufgehoben werden. Damit soll die **Zugangsbeschränkung zur Ehe für gleichgeschlechtliche Partnerschaften entfallen**, sodass auch zwei Personen gleichen Geschlechts in Zukunft die Ehe eingehen können. Damit hat der VfGH den vorläufig letzten Schritt in der Gleichstellung von homo- mit heterosexuellen Paaren gesetzt.

Der **EGMR** sieht nach wie vor **keine Diskriminierung** darin, dass gleichgeschlechtlichen Paaren nicht der Weg zu einer Eheschließung offen steht,[2] sondern überlässt es den Mitgliedstaaten, in diesem Punkt selbständig zu entscheiden. Auch nach der Rechtsansicht des VfGH in einem Erk aus 2010[3] sei es weder diskriminierend noch gleichheitswidrig, dass verschiedengeschlechtliche Lebensgefährten nicht die Möglichkeit hätten, eine eingetragene Partnerschaft einzugehen, weil ihnen auch die Ehe offensteht. Gleichgeschlechtliche Partnerschaften sind allerdings nach der Diktion des EGMR bereits seit längerem vom Schutzbereich der Art 8 und 14 EMRK umfasst, die sowohl ein Recht auf Achtung des Privat- und Familienlebens garantieren, als auch ein Diskriminierungsverbot festlegen.[4]

2 Gleichgeschlechtliche Paare in der österreichischen Rechtsentwicklung

Im letzten Jahrzehnt hat sich das traditionelle Familienbild – insb auch durch die auf europäischer Ebene geführten Diskussionen – erheblich verändert. Ein Überblick über die Rechtslage in Europa zeigt, dass – der Rsp

1 VfGH G 258–259/2017-9.
2 Vgl EGMR 30.141/04, *Schalk und Kopf/Österreich* Z 62; VfSlg 19.492/2011.
3 VfGH B 1405/10 = iFamZ 2012/4.
4 Vgl EGMR 30.141/04, *Schalk und Kopf/Österreich* = EUGRZ 2010, 445.

des EGMR[5] und EuGH[6] folgend – bereits die **meisten Staaten Rechte für gleichgeschlechtliche Paare** vorsehen, die sich mehr und mehr in Richtung einer vollständigen Gleichstellung zur Ehe entwickeln.[7] Zunächst hat Österreich die Anpassung im Hinblick auf homosexuelle Partnerschaften nur punktuell und zögerlich vorgenommen, wobei oftmals lediglich Gesetzesbestimmungen von der Rsp durch Analogie erweitert wurden. So wurde Österreich durch den EGMR[8] wegen des Ausschlusses gleichgeschlechtlicher Lebensgefährten vom Eintrittsrecht in das Mietrecht nach § 14 MRG verurteilt, ohne dass der Gesetzgeber aber bislang eine ausdrückliche Klarstellung im Gesetzestext vorgenommen hätte. **2010** wurde in Österreich aber als erster wesentliche Schritt das Gesetz zur eingetragenen Partnerschaft (**EPG)** verabschiedet, durch das eine formalisierte, gesetzlich geregelte Partnerschaft für gleichgeschlechtliche Paare geschaffen wurde.

Einen weiteren Schritt setzte dann der VfGH mit seinem Erk aus 2014[9], in dem auch gleichgeschlechtlichen Paaren die **Elternschaft durch Fremdkindadoption** oder durch **künstliche Fortpflanzung** eröffnet wurde. Nunmehr dürfen nach aktueller Rechtslage gleichgeschlechtliche Paare ebenfalls Kinder (gemeinsam) adoptieren (§ 191 und 197 ABGB) und alle Formen medizinisch unterstützter Fortpflanzung in Anspruch nehmen (§ 2 Abs 2 iVm Abs 2 Satz 3 FMedG[10]). Durch diese Änderungen im FMedG wurden die § 144 und 145 ABGB novelliert, wonach die Frau, die das Kind nicht geboren hat, Elternteil sein kann, wenn sie mit der Mutter in einer eingetragenen Partnerschaft lebt und diese die Elternschaft anerkannt hat oder deren Elternschaft gerichtlich festgestellt ist. Auch in den meisten Ländern Europas besteht inzwischen im Adoptionsrecht oder bei der Frage des gemeinsamen Sorgerechts für Kinder eines Partners eine

5 Etwa EGMR 30.141/04, *Schalk und Kopf/Österreich* = EUGRZ 2010, 445; 40.183/07, *Chapin und Charpentier/Frankreich*; 51.362/09, *Taddeucci und MacCall/Italien*; 68.453/13, *Pajić/Kroatien* = FABL 1/2016-II, 1 (*Czech*); EGMR 19.010/07, *X ua/Österreich* = Zak 2013/122; 43.546/02, *EB/France* = EF-Z 2008/30.

6 Vgl EuGH C-267/06; C-147/08, *Römer*; C-267/12, *Hay*.

7 In Europa sehen Belgien, Dänemark, Deutschland, Finnland, Frankreich, Irland, Island, Luxemburg, Malta, Niederlande, Norwegen, Portugal, Schweden und Spanien die gleichgeschlechtliche Ehe vor.

8 EGMR 40.016/98, *Karner/Österreich* = EvBl 2004/2 (MRK).

9 Vgl VfGH G 119/2014 = VfSlg 19.942/2014.

10 BGBl I 2015/35.

weitgehende Gleichbehandlung mit Ehepaaren.[11] Weitere Angleichungen der Rechtslage für gleichgeschlechtliche Paare wurden in Österreich durch das **2. Sozialversicherungs-Änderungsgesetz 2013**,[12] durch Änderungen im **Steuerrecht**[13] und zuletzt im **Erbrecht**[14] sowie durch das **Deregulierungs- und Anpassungsgesetz 2016 – Inneres**[15] vorgenommen.

3 Gesetz zur eingetragen Partnerschaft – Unterschiede zur Ehe

Die Ehe war für das Gesetz zur eingetragenen Partnerschaft Vorbild; dennoch enthält das EPG einige, aber eher **marginale Unterschiede:** Während § 90 ABGB von **Treuepflicht** spricht, ist in § 8 Abs 2 EPG von einer „**Vertrauensbeziehung**" die Rede.[16] Weiters wird in § 8 Abs 2 EPG die Haushaltsführung iSd § 95 ABGB nicht explizit erwähnt.[17] Es kann bloß eine Ehe – nicht aber eine EP – uU bereits ab Vollendung des 16. Lebensjahres eingegangen werden, wenn ein Ehegatte für ehemündig erklärt wird. Auch ein **Verlöbnis** ist für gleichgeschlechtliche Partner nicht vorgesehen. Die **Auflösung** der eingetragenen Partnerschaft kann jedenfalls bei seit **drei Jahren** aufgehobener häuslicher Gemeinschaft ausgesprochen werden, während bei Ehegatten hier bei einer „Zerrüttungsscheidung" noch ein Widerspruchsrecht bis zum Zeitpunkt einer sechsjährigen Haushaltstrennung möglich ist. Dieser Unterschied hat allerdings so gut wie keine praktische Bedeutung und erklärt sich nur aus historischen Gründen. Bei einer **Zerrüttungsscheidung** gem § 55 EheG und Ausspruch des Zerrüttungsverschuldens des klagenden Ehegatten (§ 61 Abs 3 EheG) entspricht der nacheheliche Unterhalt gem § 69 Abs 2 EheG dem Ehegattenunterhalt bei aufrechter Ehe. Ein solcher Ausspruch nach

11 Vgl *Benke/Klausberger/Nausner/Tritremmel*, Wie das Kindeswohl die Familie neu aufstellt, iFamZ 2015, 154.
12 BGBl I 2013/139.
13 Vgl auch *Hilber,* Die eingetragene Partnerschaft im Steuerrecht, ecolex 2010, 288 ff.
14 BGBl I 2015/87.
15 BGBl I 2016/120.
16 Vgl dazu *Beclin,* Das eingetragene Partnerschafts-Gesetz im Lichte des Eherechts, EF-Z 2010, 52 (53).
17 Vgl *Leb*, Ehe, Verlöbnis und eingetragene Partnerschaft, in *Deixler-Hübner* (Hrsg), Handbuch Familienrecht (2015) 39 (45).

§ 61 Abs 3 EheG löst darüber hinaus auch **günstigere Konsequenzen im Sozialversicherungsrecht** aus – insb einen Pensionsanspruch in gleicher Höhe wie bei einer/einem Witwe/Witwer, wenn die Ehe zumindest 15 Jahre gedauert und der überlebende Ehegatte das 40. Lebensjahr vollendet hat. Diese Norm wurde zu Recht nicht in das EPG aufgenommen, weil diese Sonderkonstellation nicht mehr zeitgemäß und mE auch verfassungswidrig ist.[18] Dadurch mutet das **EPG insgesamt zeitgemäßer und partnerschaftlicher** an und kann insofern für eine allfällige Reform des Eherechts – die dann allen Paaren offensteht –vorbildhaftwirken (s unten).

Einige Unterschiede zur Ehe sind in jüngster Zeit erst – nicht zuletzt aufgrund von **Interventionen des VfGH** – weggefallen: Zunächst erfolgte zB die Begründung der eingetragenen Partnerschaft nicht vor der Personenstandsbehörde, sondern vor der Bezirksverwaltungsbehörde, doch wurde infolge eines Erk des VfGH[19] gem § 25 Abs 3 iVm § 18 Abs 1–3 PStG ein Anspruch auf Abhaltung einer Zeremonie, wie sie auch bei Abschluss der Ehe vorgesehen ist, eingeführt. Seit 2017 haben nun auch gleichgeschlechtliche Paare die Möglichkeit, ihre **Partnerschaft bei den Standesämtern** eintragen zu lassen.

4 Argumentation des VfGH für eine völlige Gleichstellung aller Paare

Im vorliegenden Erk stellt der **VfGH** aber nunmehr unter dem Blickwinkel des Gleichheitsgrundsatzes fest, dass durch die Trennung der Rechtsinstitute „Ehe“ und „eingetragene Partnerschaft“ eine **Diskriminierung** erfolgt.

Er gibt dafür im Wesentlichen **zwei Gründe** an:

- Durch die jüngere Rechtsentwicklung sei es – trotz verbleibender geringfügiger Unterschiede – zu einer **weitgehenden Angleichung** der beiden Rechtinstitute gekommen. Insbesondere stehe gleichgeschlechtlichen Paaren jetzt auch die gemeinsame Elternschaft, namentlich durch Adoption oder durch medizinisch unterstützte Fortpflanzung, offen. Die Differenzierung in zwei Rechtsinstitute

18 Gegenteiliger Ansicht OGH 10 ObS 2/02w = DRdA 2002, 413, vgl dazu auch *Deixler-Hübner*, Scheidung, 160 mwN.

19 VfGH G 18/2013 = iFamZ 2013/122 (*Pesendorfer*).

ließe sich heute nicht mehr aufrechterhalten, ohne gleichgeschlechtliche Paare in Hinblick auf ihre sexuelle Orientierung zu diskriminieren. Denn durch die Separierung der Rechtsinstitute komme in vielfältigen Lebensbeziehungen sichtbar zum Ausdruck, dass Ehe und eingetragene Partnerschaft zwar in Hinblick auf **Rechtsbeziehung und Rechtsfolgen gleich** sind, aber **ungleiche Verbindungen** erfassen. Dies habe einen – auch in Hinblick auf eine bis in die jüngste Vergangenheit reichende rechtliche und gesellschaftliche Diskriminierung gleichgeschlechtlicher Beziehungen – „diskriminatorischen Effekt".

- Durch die unterschiedliche Bezeichnung des Familienstandes („verheiratet" versus „verpartnert") müssten Personen in gleichgeschlechtlicher Partnerschaft ihre **sexuelle Orientierung** in Zusammenhängen, in denen diese keine Rolle spielen darf, **offenlegen** und liefen angesichts der historischen Entwicklung Gefahr, diskriminiert zu werden.

Anzumerken ist freilich, dass der VfGH in den **Entscheidungsgründen zum Prüfungsbeschluss** zunächst als vorläufige Ansicht zum Ausdruck gebracht hat, dass die beiden Rechtsinstitute Ehe und eingetragene Partnerschaft durch die **bloße Aufhebung** der Zugangsbeschränkungen auf verschiedengeschlechtliche bzw gleichgeschlechtliche Personen einen **völlig veränderten Inhalt bekämen**, weshalb die vollständige Aufhebung des EPG den geringeren Eingriff in die bestehende Rechtslage zur Beseitigung einer allfälligen Verfassungswidrigkeit darstelle. In seinen **Erwägungen im Hauptverfahren** stellt sich freilich diese **Auffassung gegenteilig** dar, wonach es zur Herstellung der Verfassungsmäßigkeit genüge, die Wortfolge „verschiedenen Geschlechts" in § 44 ABGB einerseits und die Wortfolgen „gleichgeschlechtliche Paare" in § 1, „gleichen Geschlechts" in § 2, sowie die Z 1 des § 5 Abs 1 EPG (der als Begründungshindernis „Personen verschiedenen Geschlechts" vorsieht) aufzuheben. Hinsichtlich der darüber hinaus in Prüfung gezogenen Teile des EPG sei jedoch auszusprechen, dass diese nicht als verfassungswidrig aufzuheben seien. Erstaunlicherweise werden allerdings **keine Gründe** für die Änderung der Rechtsmeinung des VfGH hinsichtlich der Eingriffstiefe angegeben.

Die Aussagen des VfGH zum Diskriminierungsverbot sind überzeugend, doch darf nicht verschwiegen werden, dass **breitere Bevölkerungsschichten**

auf Grund eines traditionellen bzw religiösen Verständnisses eine **andere Auffassung** vertreten.[20]

5 Rechtspolitische Konsequenzen

Es war nun vor dem 1. 1. 2019 unklar, **welche rechtspolitischen Konsequenzen** aus dem Erkenntnis des VfGH zu ziehen sind; insbesondere ob ein **gesetzgeberischer Handlungsbedarf** besteht und in welcher Weise dieser am besten wahrgenommen werden könnte. Der Gesetzgeber hätte zB das EPG aufheben und bloß die Ehe als alleiniges Rechtsinstitut für alle Paare ermöglichen könnten.

Einige Stimmen in der Literatur haben auch aus dem Umstand, dass in § 44 ABGB weiterhin vom „Zeugen der Kinder" die Rede ist, den Schluss gezogen, dass die Eingehung der Ehe den gleichgeschlechtlichen Paaren weiterhin verwehrt bleibt, weil sie ja keine Kinder zeugen können.[21]

Vor allem *Merckens* hat in ihrem Beitrag als vorgeschlagen, der Gesetzgeber könne den bisher geltenden **§ 44 ABGB wiederherstellen** und lediglich die **eingetragene Partnerschaft** sowohl für verschiedengeschlechtliche als auch für gleichgeschlechtliche Paare öffnen: Den Vorgaben des VfGH werde hierdurch ausreichend Rechnung getragen, weil das „Zwangsouting" gleichgeschlechtlicher Paare durch die eingetragene Partnerschaft vermieden werde, wenn dieses Rechtsinstitut auch verschiedengeschlechtlichen Paaren offen stünde. Diese **Argumente überzeugen nicht**. *Merckens* verkennt, dass es dem VfGH ja nicht lediglich darum ging, gleichgeschlechtliche Paare vor einer zwangsweisen Offenlegung ihrer sexuellen Orientierung zu schützen, sondern dass er es überhaupt als diskriminierend erachtet, dass unterschiedliche Rechtsinstitute, verbunden mit unterschiedlichen Bezeichnungen, für in ihrem Wesen und ihrer Bedeutung für den individuellen Menschen grundsätzlich gleichen Beziehungen in erster Linie einen diskriminatorischen Effekt haben.

Zunächst wurde von der österreichischen Regierung auch noch versucht, die Ehe doch nur für verschiedengeschlechtliche Paare zugänglich zu machen

20 Vgl zB *Merckens*, Ehe für alle – oder: Ein Triumph der Verwirrung, Gastkommentar, Presse, 15. 12. 2017.

21 *Merckens*, Presse, 15. 12. 2017.

und diesen Schutz der Ehe auch auf Verfassungsebene zu verankern. Da dafür jedoch eine 2/3-Mehrheit erforderlich ist, war im Herbst sehr schnell klar, dass dieser Weg mangels Zustimmung der Oppositionsparteien nicht gangbar ist. Die Regierung hat daher verlauten lassen, dass sie das Erkenntnis des VfGH anerkennt und sowohl die **Ehe** als auch die **eingetragene Partnerschaft für alle Paare** unabhängig von ihrer geschlechtlichen Orientierung zulassen wird.

Eine Möglichkeit bestand auch darin, dass der **Gesetzgeber gar nichts in Richtung Umsetzung des VfGH-Erkenntnisses unternehmen wird.** Diesen Weg hat die Regierung letztendlich nun beschritten: Die im Erk des VfGH bezeichneten Wortfolgen, die in § 44 ABGB auf die Verschiedengeschlechtlichkeit und im EPG auf die Gleichgeschlechtlichkeit verweisen, sind nun **seit dem 1. 1. 2019 aufgehoben**, sodass sowohl die Ehe als auch die eingetragene Partnerschaft seit diesem Tag sowohl verschiedengeschlechtlichen als auch gleichgeschlechtlichen Paaren offensteht.

Der **Vorteil** dieser Lösung besteht darin, dass sie mit **verhältnismäßig geringem Aufwand realisierbar** war. Allerdings ist mE damit zu rechnen, dass sich kaum ein verschiedengeschlechtliches Paar für die eingetragene Partnerschaft entscheidet. Da mit dem EPG nämlich keine „Ehe light" installiert werden sollte und die eingetragene Partnerschaft keinesfalls mit dem französischen Rechtsinstitut des PACS[22] vergleichbar ist, ist es lebensfremd anzunehmen, dass verschiedengeschlechtliche Paare für ihre Partnerschaft das EPG anstreben würden. Umgekehrt werden die meisten gleichgeschlechtlichen Paare – schon um dem Stigma, nur verpartnert zu sein, zu entkommen – für die Ehe optieren. Die **Aufrechterhaltung der eingetragenen Partnerschaft als eigenständiges Rechtsinstitut** ist daher aus meiner Sicht **wenig sinnvoll**.

Leider hat der Gesetzgeber durch sein „Nichtstun" auch bisher die **wichtige Frage ungeklärt** gelassen, wie mit bereits **bestehenden eingetragenen Partnerschaften umzugehen** ist.

22 Vgl dazu *K. Neumayr/M. Neumayr*, PACS und "Ehe light" – Modelle für Österreich? iFamZ 2012, 198.

Bislang besteht nur eine **Leitlinie des Innenministeriums für die Standesämter**,[23] dass vor Eingehen der Ehe zwischen eingetragenen PartnerInnen die eP nicht aufgelöst werden muss.

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Judiciary of the ECtHR on Same-Sex Marriages/Relationships as a Challenge for Slovak Marital Law

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Abstract in original language

Slovenská republika je jedným z tých členských štátov Rady Európy, ktoré ústavnoprávne chránia tradičné manželstvo a zároveň legislatívne neupravujú partnerstvá osôb rovnakého pohlavia. Judikatúra ESĽP sa od rozhodnutia *Schalk & Kopf proti Rakúsku* (2010), v ktorom ESĽP uviedol, že stabilný *de facto* vzťah medzi pármi rovnakého pohlavia žijúcimi spolu spadá do aplikačného rámca čl. 8 Dohovoru ako právo na rodinný život, neustále vyvíja a prináša nové výzvy pre členské štáty. Cieľom príspevku je analýzou vybraných rozhodnutí ESĽP posúdiť, aké závery z týchto rozhodnutí vyplývajú pre slovenské rodinné právo v oblasti manželstiev/vzťahov osôb rovnakého pohlavia.

Keywords in original language

ESĽP; judikatúra; osoby rovnakého pohlavia; vzťahy; manželstvo.

Abstract

Slovak Republic is one of those Council of Europe member states that protect traditional marriage by the Constitution and do not have legal regulation of same-sex partnerships. The case-law of the ECtHR has, since *Schalk & Kopf v. Austria* (2010), in which the ECtHR stated that a stable de facto relationship between same-sex couples living together falls within the scope of Art. 8 as a right to family life, is constantly developing and bringing new challenges for member states. The aim of the contribution is to analyse selected decisions of the ECtHR to assess the conclusions of these decisions for Slovak family law in the field of same-sex marriages/relationships.

Keywords

ECHR; Judiciary; Same-sex Persons; Relationships; Marriage.

1 Introduction

Marital law (marriage law, matrimonial law) in Slovakia can be defined as set of rules and regulations regarding marriage as a legal union of a different-sex couple as spouses. In comparison to other Council of Europe members states, this definition is quite a narrow since it does not include any other relationships of different or same-sex couples. For the purposes of this paper, marital law shall be defined in broad sense – as set of rules and legislation regarding any legally recognized partnerships or any alternative unions to marriage.

At the beginning, it may be said that Slovak marital law has not changed much over the years – legislation is stable and unchanging. In Slovakia, marriage is defined as a union between a man and a woman, i.e. persons entering into marriage must be of different sex, not only under the provisions of the Act No. 36/2005 Coll. on Family, as amended, but since amendment of the Constitution[1] in 2014, is as such defined also by the Constitution, Article 41 para. 1: "*Marriage is a unique union between a man and a woman. The Slovak Republic protects marriage in all its aspects and supports its welfare.*" Same-sex couples have no legal option to enter into marriage or any form of legally recognized partnership. In the past, several drafts of the bills regarding recognition of some form of registered partnership have been made (4 drafts since 1997, last in 2018), but none of them succeeded in National Council of the Slovak Republic.

Decisions of the European Court of Human Rights (the ECtHR, the Court), in particular in cases of *Oliari*[2] and *Orlandi*[3], and the decision of the Court of Justice of the European Union (the CJEU) in *Coman*[4] for a moment, raised in the Slovak Republic a public discussion on the issue of legal status and legal recognition of same-sex relationships. The strongest was the reaction of the public defender of rights who in 2017 published her position

1 Act No. 460/1992 Coll. Constutition of the Slovak Republic, as amended.
2 Applications nos. 18766/11 and 36030/11, *Oliari and Others v. Italy*.
3 Applications nos. 26431/12; 26742/12; 44057/12 and 60088/12, *Orlandi and Others v. Italy*.
4 C-673/16, *Coman and Others. v. Inspectoratul General pentru Imigrări and Others*.

regarding the right of same-sex couples to have their relationship recognised in the legislation of the Slovak Republic based mostly of ECtHR judgement in *Oliari*. Public defender of rights has strongly stated that "*from the ECtHR case-law, from the development after an important ruling in the Oliary v Italy case and from the parameters important for establishing a positive obligation to recognize same-sex couples (e.g., an opinion poll affirmative of ensuring a certain level of recognition and protection), one can deduce that the actual absence of legal recognition of same-sex partnerships, so to say "legal ignorance" of such couples, contravenes the human rights commitments of the Slovak Republic. It is up to a national law-maker to pass a legislation answering to the requirements arising from the international conventions binding upon the Slovak Republic which will, at the same time, correspond to how the sensitive issues are perceived in Slovak society, the public defender of rights emphasised."*[5]

Surprisingly, this statement did not result in more substantial development in this issue at national level or in any form of public discussion on the marriage, on the needs of same-sex couples and public interests which those needs may conflict with or in passing on required legislation. Nowadays, there is almost no discussion in Slovakia regarding legal possition of same-sex couples living in stable committed relationship.

The purpose of this paper is not to analyse in detail decisions of the ECtHR on the legal status and recognition of same-sex relationships, but to present these decisions as a challenge to the Slovak family law jurisprudence and to suggest questions that could be derived from the ECtHR case law for the Slovak family law jurisprudence, and which should be dealt with in a scholastic discussion. Further aim is to analyse if judiciary of ECtHR really does not allow member states of the Council of Europe other option than legal recognition of same-sex marriages or other relationships.

2 Analysis of the situation de lege lata

Nowadays, there is no doubt that same-sex relationships fall within the scope of the Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR, the Convention) protecting rights to respect for private and family life, as well as under the Article 14

5 Available only in Slovak at: http://www.vop.gov.sk/stanovisko-k-problematike-pr-va-p-rov-rovnak-ho-pohlavia-na-uznanie-ich-vz-ahu-v-pr-vnom-poriadku-sr

prohibiting discrimination on multiple grounds, one of them being sexual orientation. In *Schalk & Kopf v. Austria* (2010) ECtHR ruled that relationship of a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would.[6] Previous to the *Schalk & Kopf* judgement, ECtHR considered same-sex relationships only as a part of private, but not family life, the latter having more public aspect. The Court also noted that since 2001, when the decision in *Mata Estevez* was given[7], a rapid evolution of social attitudes towards same-sex couples has taken place in many member States. The reason for including same-sex couples under the notion of family life was existence of an emerging European consensus towards legal recognition of same-sex couples, even though at the time majority of member states did not provide for legal recognition of same-sex couples. The ECtHR also ruled that "contracting states must enjoy a margin of appreciation in the timing of the introduction of legislative changes". From the wording used by the Court in the quotation we might conclude that States have freedom to decide when to adopt legislation allowing for the same-sex couples relationships recognition, but not anymore freedom to decide if to adopt such a legislation.[8] But is it really so?

In the Court's ruling we can recognise three of the leading principles of the Convention interpretation used by the Court when regarding same-sex couples issues. First being the principle of dynamic (evolutionary) interpretation, second the principle of European consensus and third the doctrine of margin of appreciation (margin of state discretion).

Principle of dynamic (evolutionary) interpretation was expressly applied by the Court for the first time in 1978 in case of *Tyrer v. the United Kingdom*[9]: "the Convention is a living instrument which, as the Commission rightly

6 Application no. 30141/04, *Schalk & Kopf v. Austria*, para 94.

7 Application no. 56501/00, *Mata Estevez v. Spain*. In its ruling, the ECtHR held: "*As regards establishing whether the decision in question concerns the sphere of 'family life' within the meaning of Article 8 ss 1 of the Convention, the Court reiterates that, according to the established case-law of the Convention institutions, long-term homosexual relationships between two men do not fall within the scope of the right to respect for family life protected by Article 8 of the Convention."*

8 GROCHOVÁ, M. Právní uznávaní homosexuálnich a heterosexuálnich vztahů: nikdy nekončící příběh před Evropským soudem pro lidská práva. In: *Právní rozhledy,* 2018, No. 7, No. 7, p. 249.

9 Application no. 5856/72, *Tyrer v. the United Kingdom*, para. 31.

stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field". This principle is of high importance, since changes to original text of the Convention are not possible, it can only be amended or altered by the means of protocols. The importance lies in the fact that: "acknowledging evolutionary development is the basis for using ECHR as a "living" instrument for the protection of human rights. This is the basic method of "revising" judicial precedents as the cornerstone of the European human rights system. The Strasbourg law enforcement authorities are trying to read the letters of the ECHR in the light of the current needs of life and society. Such an approach allows them to overcome their constant case law when changes occur in the development of society which, in particular regarding their approval in the individual member states of the Council of Europe, need to be implemented in order to create a modern system of European protection of human rights."[10] Denying the application of the principle would lead to the situation that text of the convention should be interpreted by the meaning at the time it was concluded, i.e. almost 70 years ago.

The second and the third principle are closely interrelated. Principle of the European consensus refers to the level of uniformity present in the legal frameworks of the member States of the Council of Europe on a particular topic.[11] This principle does strongly stand out in the area of our interest – legal status and recognition of same-sex couples relationships. When applying the principle, the Court usually makes a horizontal comparative research on the topic in question within the contracting states and makes a summary of prevailing legal regulation or practice. The outcome of the research makes an important part of the Courts reasoning, as we have seen in Schalk & Kopf. Results of the comparison also influence extent of margin of appreciation of the contracting state alleged to be violating the Convention. Relation between the European consensus and the doctrine of margin of appreciation may be explained as follows: The higher

10 SVÁK, J. *Ochrana ľudských práv v troch zväzkoch. 1. zväzok*. Žilina: EUROKÓDEX, 2011, p. 193.

11 See https://www.coe.int/en/web/help/article-echr-case-law

number of contracting states has the same or similar approach to the topic in question, the less margin of appreciation of the member state is granted by the Court. Doctrine of margin of appreciation refers to the space for manoeuvre that the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the European Convention on Human Rights.[12] It was developed in order to enable to take into account differences in national legislation of contracting states regarding protection of human rights based on different cultural and legal traditions, since the Convention intended to provide minimal standards of human rights protection.

For the purposes of legal recognition of same-sex couples, Slovak law did not create any specific legal framework either in the form of a registered partnership, a civil union or a life partnership, but from the point of view of Slovak law these relations are not "completely invisible". As the Constitutional Court of the Slovak Republic states in its decision on the referendum on the family, *"the Slovak legal order recognizes categories of coexistence of persons enjoying a certain degree of formal legal recognition, thus acquiring the form of a law institute with concretized content."*[13] By way of example, it states legal institution of a close person under Section 116 of the Act No. 40/1964 Coll. The Civil Code, as amended.[14]

When considering current Slovak national legislation of the matter in question in the light of the ECtHR decisions, especially in the cases of *Schalk & Kopf, Oliari* and *Orlandi*, it appears that it either does not at all conflict with the obligations which the Slovak Republic arising from the Convention or that potential conflict is questionable. Since the *Schalk & Kopf* judgment, the ECtHR, in its all following judgements, states it is clear from the provisions of Article 12 and Article 8 of the ECHR, either alone or in conjunction with Article 14, that the ECHR does not impose an obligation on contracting states to grant same-sex couples access to marriage. Violation of the positive obligation[15] to create

12 GREER, S. *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*. Council of Europe, 2000, p. 5.

13 Decision of the Constitutional Court of the Slovak Republic, no. PL. ÚS 24/2014 of 24th October 2014, para 79.

14 Decision of the Constitutional Court of the Slovak Republic, no. PL. ÚS 24/2014 of 24th October 2014, para 80.

15 As stated by Prof. Svák *"A positive obligation is typical method of interpretation of law that increases the state's responsibility for the protection of human rights… it defines human rights as legal claims of private individuals towards the state."* SVÁK, J. *Ochrana ľudských práv v troch zväzkoch. 1. zväzok.* Žilina: EUROKÓDEX, 2011, s. 193.

a specific legal form for the recognition and protection of same-sex couples under Article 8 at national level was founded by the ECtHR in relation to Italy in the *Oliari* case. Regarding the outcomes of the Oliari, many commentators present contradictory views on the question whether it is possible to extend this obligation also to the other ECHR Contracting States considering specific situation in Italy, by which the ECtHR has justified its decision.[16]

As pointed out by the judges in the concurring opinion, the specific situation in Italy can be described as follows: *"In its judgment no. 138 of 15 April 2010 in relation to the constitutional challenges of the applicants Mr Oliari and Mr A, the Italian Constitutional Court ruled that, by virtue of Article 2 of the Italian Constitution, two people of the same sex in stable cohabitation have a fundamental right to freely express their personality in a couple, obtaining – in time and by the means and the limits to be set by law – juridical recognition of the relevant rights and duties."*[17] At the time of ECtHR judgement in *Oliari "five years have elapsed since the judgment of the Constitutional Court, with no appropriate legislation having been enacted by the Italian Parliament. The applicants are thus in the unsatisfactory position of being recognised by the Constitutional Court as enjoying under Italian constitutional law an inchoate "fundamental right" affecting an important aspect of the legal status to be accorded to their private and family life, but this inchoate "fundamental right" has not received adequate concrete implementation from the competent arm of government, namely the legislature"*.[18] In such a situation, same-sex couples had no other option than *"to refer repeatedly to the domestic courts to call for equal treatment in respect of each one of the plurality of aspects which concern the rights and duties between a couple"*.[19] ECtHR also took into account the social reality in Italy when stated that *"the Court observes that such an expression reflects the sentiments of a majority of the Italian population, as shown through official surveys. The statistics*

16 GROCHOVÁ, M. Právní uznávaní homosexuálnich a heterosexuálnich vztahů: nikdy nekončící příběh před Evropským soudem pro lidská práva. In: *Právní rozhledy,* 2018, No. 7, pp. 249–252; KOZUBÍK, J. and J. WINTR. Ústavní soudy a práva gayu a leseb – veřejné mínení jako determinant rozhodnutí soudu. In: *Jurisprudence,* 2016, No. 5, p. 34–47; Concurring opinion of Judge Mahoney joined by Judges Tsotsoria and Vehabović, Applications nos. 18766/11 and 36030/11, *Oliari and Others v. Italy*, para 10.

17 Concurring opinion of Judge Mahoney joined by Judges Tsotsoria and Vehabović, Applications nos. 18766/11 and 36030/11, *Oliari and Others v. Italy*, para 2.

18 Concurring opinion of Judge Mahoney joined by Judges Tsotsoria and Vehabović, Applications nos. 18766/11 and 36030/11, *Oliari and Others v. Italy*, para 4.

19 Concurring opinion of Judge Mahoney joined by Judges Tsotsoria and Vehabović, Applications nos. 18766/11 and 36030/11, *Oliari and Others v. Italy*, para 4.

submitted indicate that there is amongst the Italian population a popular acceptance of homosexual couples, as well as popular support for their recognition and protection."[20]

With respect to the ambiguity of the *Oliari* conclusions, it is now questionable whether the ECtHR respects the broad margin of appreciation of the Council of Europe's member states' in legal regulation of social relations falling under Article 8 para. 1 of the ECHR, and whether the generally binding regulation of social relations constitutes a starting point for the ECtHR, based on which it assesses possible discrimination of applicants in the application of the relevant legislation[21] also in situation different to Italy's.

It should be noted, that in addition to Articles 8 and 14, also Article 12 of the Convention is closely connected to the same-sex couples and their relationships. Article 12 of the Convention guarantees that *"men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right"*. Again, application of *Schalk & Kopf* comes to be of high importance since it was the first case the Court decided on the issue of same-sex marriage under the Article 12. Unlike the Court's approach using principle of dynamic interpretation when delivering its reasoning for the violation of Articles 8 and 14, the Court in the matter of question whether the Convention guarantees right to marry under Article 12 also for the same-sex couples, held that articles 8 and 14 did not equate to the right to marry for same-sex couples. This means that the Convention does not oblige contracting states to ensure the right to marry to same-sex couples. Reason for such a decision did not lay it the Convention usage of words men and women implying that married couples must be of opposite sex: *"However, as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State. In that connection, the Court observes that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society."*[22]

20 Applications nos. 18766/11 and 36030/11, *Oliari and Others v. Italy,* para 171.
21 Decision of the Constitutional Court of the Slovak Republic, no. PL. ÚS 24/2014 of 24th October 2014, para 108.
22 Application no. 30141/04, *Schalk & Kopf v. Austria*, para 61, 62.

3 Challenges for Slovak Jurisprudence emerging from ECtHR case-law

Disputable question whether the conclusion of the ECtHR on violation of Article 8 of the ECHR by not creating a specific legal form of recognition and protection of same-sex couples can be extended beyond the Italian context proves the necessity of a consistent theoretical justification of the attitude of the Slovak Republic on this issue and the timeliness and the relevance of this topic. This conclusion is strengthened by the fact that gradually expanding number of ECHR contracting states which introduced a registered partnership or a civil union in their national legal system could be used by the ECtHR as a basis for the dynamic (evolutionary) interpretation of the ECHR.

Even if an evolutionary interpretation of Article 8 of the ECHR by the ECtHR would imply that the positive obligation to create a specific form of recognition and protection of same-sex couples applies generally, not only with regard to the specific Italian context, it does not mean that the Slovak legislation in which there is no specific legal framework allowing the legal recognition of same-sex relationships (e.g. a registered partnership) automatically violates the ECHR.

As the ECtHR held in the case of *F. v. Switzerland:* "*The fact that, at the end of a gradual evolution, a country finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that that aspect conflicts with the Convention.*" [23] That decision is also referred to by the ECtHR in paragraph 92 of the Decision in case of *Vallianatos and Others v. Greece*, when the ECtHR added: "*in view of the foregoing, the Court considers that the Government have not offered* **convincing and weighty reasons** *capable of justifying the exclusion of same-sex couples from the scope of Law no. 3719/2008. Accordingly, it finds that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8 in the present case.*"[24]

It has been suggested by some commentators that the ECtHR case-law cited above *"imposes on the State "in an isolated position" the obligation to justify,*

23 Application no. 11329/85, *F. v. Switzerland*, para 33.
24 Applications nos. 29381/09 *and* 32684/09, *Vallianatos and Others v. Greece*, para 92.

in a more stringent manner, the choice to not recognize same-sex couples. This means that the ECtHR has to use strict scrutiny on the arguments of the State; therefore, in the absence of "convincing and weighty" arguments, the Court can declare the infringement of the Convention." [25]

This is what we consider to be a crucial moment in terms of Slovak family law jurisprudence. We believe that in Slovak scholastic literature there is currently no deeper scholastic discussion about the reasons for the current legal regulation on same-sex couple relationship. Developing the doctrine on this issue at national level we consider of high importance, since it would undoubtedly be a source of *"convincing and weight arguments"* in possible proceedings before the ECtHR. Or, on the contrary, the source of arguments for changes in relevant legislation, especially in situations where political recultance are not sufficiently relevant from the point of view of the ECtHR, as seen in the *Oliari* case.

In discussions on the status of same-sex couples in Slovakia, the argument of the need to protect the traditional family comes first, but again without its deeper theoretical grasp. It must be pointed out that, in the light of the case-law of the ECtHR, that argument is relevant as is clear from the judgment in *Kozak*[26]: "*protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment".*

However, according to the ECtHR: "*The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. In cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary to exclude certain categories of people – in this instance persons living in a homosexual relationship – in order to achieve that aim.*"[27]

From the aforementioned, it is clear the general statement of the need for protection of a traditional family, without theoretical elaboration and

25 PINESCHI, L.(ed.). *General principles of law – the role of the judiciary*. Heidelberg: Springer, 2015, p. 224.
26 Application no. 13102/02, *Kozak v. Poland*, para 98.
27 Application no. 40016/98, *Karner v. Austria*, para 41.

justification, is not considered sufficient by the ECtHR, which again opens up space for Slovak family law jurisprudence. Last but not least, it is necessary to deal with the relevance of arguments based on hypothetical future rights and obligations awarded to same-sex couples in the context of the argument of the protection of the traditional family in the context of the possible future evolutionary interpretation of Article 8 of the ECHR, although, of course, at national level, it is not possible to separate the question of the legal recognition of such relationships from the rights and obligations that would arise from the legal recognition of such relationships.

From the foregoing, it follows that the current ECtHR case-law raises following questions:

- is the Slovak Republic obliged to provide legal recognition and protection of same-sex relationships in the form of the creation special legal institute other than that of a close person?
- what doctrinal approaches and arguments justify the current position of the Slovak Republic in the light of developments in the other Contracting States of the Council of Europe?
- if the purpose of the current legislation is to protect traditional family, what arguments can be used to specify this objective and to what extent it is possible within this objective to take into account the level of the hypothetical rights and obligations that would be potentially awarded to same-sex couples if special legal regulations to ensure legal recognition and protection for these rights was adopted.

4 Conclusion

The ECtHR is gradually evolving protection of the same-sex couples rights under Article 8 in conjunction with Article 14 of the ECHR. Arguments for such a protection lies among other things the existing European consensus on the status of same-sex couples which comes from the changes in social perception of such couples within in individual contracting states. Regarding the Article 12 and the right of same-sex couples to marry current situation differs, since such a European consensus is missing.

Situation in the Slovak Republic in legal status and legal recognition of same-sex partnerships is, on the contrary, static. As in the case of Italy in the past

also in the conditions of the Slovak Republic, it can be assumed this question will sooner or later be examined by the Constitutional Court of the Slovak Republic and eventually by the European Court of Human Rights, which some commentators consider proper and reasonable, on the grounds that "*minority protection and the effective defence of constitutional principles and values sometimes require to rule against the majority opinion, by the legislature*."[28] In our view, however, it would be unfortunate if the academic community did not join the discussion and did not contribute to this sensitive debate.

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28 GUERRERO, M. *Activating the Courtroom for Same-Sex Family Rights: „Windows for Opportunity" for Strategic Litigation before the European Court of Human Rights (ECtHR).* Available at: http://www.academia.edu/36259203/Activating_the_Courtroomfor_Same-Sex_Family_Rights_Windows_of_Opportunity_for_Strategic_Litigation_before_the_European_Court_of_Human_Rights

Quo Vadis Marriage?

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Abstract in original language

Manželství je právní konstrukce, která umožňuje dvěma fyzickým osobám učinit svůj zejména citový vztah právem uznaný, a současně zakládá jejich vzájemná práva a povinnosti. Obsah práv a povinností manželů se v různých státech může podstatně lišit, a to i v rámci států evropských. Odlišné přístupy panují i k požadavkům na osoby způsobilé uzavřít manželství. Tento příspěvek je zaměřen na podmínky týkající se pohlaví těchto osob, tedy, zda je vstup do manželství umožněn pouze osobám odlišného pohlaví, nebo je toto otevřeno i pro osoby pohlaví stejného. Regulace této otázky může být dána zákonem nebo, jak tomu v některých zemích je, ústavním zákonem. Od úrovně zakotvení se odvíjí možná forma změny podoby manželství, tedy, zda je možná rozhodnutím ústavního soudu, či pouze z vůle zákonodárného orgánů, příp. referendem. V některých evropských státech pozorujeme tendenci k otevírání manželství párům stejného pohlaví, v jiných naopak tendenci k ochraně manželství jako svazku osob odlišného pohlaví na ústavní úrovni. Je otázkou, kam bude vývoj směřovat v budoucnu.

Keywords in original language

Manželství; právo uzavřít manželství; stejnopohlavní páry; registrované partnerství; práva a povinnosti manželů.

Abstract

Marriage is a legal framework, which allows partners to make their relationship legally recognised and at the same time establishes mutual rights and obligations. The content of such rights and obligations may vary from state to state, and European states are no exception. Different approaches also exist to personal requirements for being able to marry. The contribution focuses on the conditions for partners' gender i.e. whether entering

into marriage is allowed only to different sex couples or whether marriage is opened also for same sex couples. Marriage can be enshrined by basic law or, as in some countries, by constitutional law. The level of legal enshrinement affects the possibility of change of marriage, specifically whether it is possible to change the nature of marriage by a Constitutional Court decision, or just by legislative procedure or by referendum. In some European countries, it is possible to see a trend of opening marriage for the same sex couples; in other countries, we can see a trend of protection of marriage as a bond of different sex partners on constitutional level.

Keywords

Marriage; Right to Marry; Same Sex Couples; Registered Partnership; Rights and Obligations of Spouses.

1 Introduction

Contemporary family law stands on an intersection in relation to the recognition of legal relationships between adults, specifically the marriage. We may observe different approaches of legislators around the world. The gender of persons that may enter into legally recognized unions or a variety of the rights and duties related to those involved are probably the most pressing issues that are currently under a scrutiny.

To give an example, if we focus just on the European trends, we may identify a vast diversity of approaches to the question of the same-sex couples on national levels.[1] Abstracting from peculiarities in different states, there are three main models. Firstly, marriage may be open to different-sex and same-sex couples equally. Secondly, the marriage is reserved just for opposite sex couples but same sex couples have a different option how to get their relationship legally recognized (civil unions, registered partnerships etc.). The last approach reserves the marriage just for different-sex couples (often by specific constitutional provision) and does not provide any option for same sex couples for legal recognition of theirs relationship.

1 CURRY-SUMNER, I. Same-sex relationship in European perspective. In: SCHERPE, J. M. *European Family Law volume III*. UK: Edward Elgar Publishing, 2016, pp. 128–137. ISBN 9781785363047.

Recent legal developments in some jurisdictions (e.g. Germany, India and Australia) shows that even marriage opened for the same-sex couples may not encompass situation of persons who are not legally classified on traditional binary scale of gender – male/female.[2].Future development may thus lead to reviewing of gendered legal provisions and in the long run to fully gender neutral laws on adult relationships.[3]

The aim of our paper is to provide a general overview of current developments in European jurisdictions in relation to marriage. Specifically, we will examine what European marriages have in common and how the lawmakers, constitutional courts and public react to changes in society by creating a pressure for the recognition of the same-sex marriage.

2 Rights and Duties of Married Couples

Marriage is a product of historical, cultural and religion functions in society and therefore it may differ from one society to another. Despite those differences, opposite-sex people marry, as Eekelaar proved, to comply with convention, to manifest externally their internal state, to confirm symbolically the completion of some internal process (marriage is sort of the "final point" of their relationship), to provide a framework within which an internal process is intended to develop (e.g. a stage before having children) or to achieve some pragmatic objectives (residence, tax etc.).[4] LGBTQ people share those reasons and moreover *stress out importance of the marriage right as a marker of equality and full citizenship for them*.[5]

In Europe, contemporarily the marriage may be defined by three basic themes. Those are the equality of the married couple (traditionally men and women),[6]

2 SCHERPE, J. M. The present and future of European family law. *Volume IV of European Family Law.* UK: Edward Elgar Publishing, 2016, pp. 79–81.

3 Ibid.

4 EEKELAAR, John. Why People Marry: The Many Faces of an Institution. *Family Law Quarterly,* Fall, 2007, Vol. 41, no. 3, pp. 413–431.

5 HULL, K. E. Same-sex Marriage: Principle Versus Practice. *International Journal of Law, Policy and the Family* [cit. 13. 1. 2018]. 2019, April, Vol. 33, no. 1, pp. 51–74. Available at: https://doi.org/10.1093/lawfam/eby018

6 GAULTIER, Arlette. Legal Regulation of Marital Relations: An Historical and Comparative Approach. *International Journal of Law, Policy and the Family*, 2005, April, Vol. 19, no. 1, pp. 47–72.

the enhancement of private features of marriage and by the recognition of new cohabitation models.[7] Equality encompasses the fact that both husband and wife have at least nominally the same rights toward each other (maintenance, marital property rights, protection of family housing etc.) or to their common children (parental responsibility, maintenance obligation etc.). The liberalization of marriage conclusion or divorce and wide possibility to modify matrimonial property regimes are only some of the examples manifesting private nature of the marriage.

Despite the differences that may be identified on national level in individual European countries, following similarities are widely shared by national laws:

- only two persons of maritable age (with some exemptions based on kin) may enter marriage;
- legal marital property regime, spouses are allowed to some extent to modify such regime by a contract;[8]
- spouses are obliged to provide maintenance to each other;
- spouses are allowed to adopt a child;
- spouses are provided with some social and tax benefits;
- marriage may be divorced;[9]
- divorced spouses have some mutual obligations (maintenance).[10]

3 Marriage for all

The opinion in the society on marriage for all within the meaning of allowing same-sex couples enter marriage may vary a lot. The approach depends on many factors like historical background, religion, society habits or attitude to morals etc. The opening of marriage to same-sex couples means providing them the same mutual rights and obligations as different sex couples already have. Besides the fact that it would be the expression of equality

7 SÖRGJERD, Caroline. Marriage in a European perspective. In: SCHERPE, J. M. *European Family Law volume III*. UK: Edward Elgar Publishing, 2016, pp. 5–27. ISBN 9781785363047.

8 BOELE-WOELKI, K. *Principles of European family law regarding property relations between spouses*. Cambridge: Intersentia, 2013, European family law series. ISBN 978-1-78068-152-8.

9 BOELE-WOELKI, K. *Principles of European family law regarding divorce and maintenance between former spouses*. Antwerp: Intersentia, 2004, European family law series. ISBN 90-5095-426-X.

10 Ibid.

it could also bring more practical benefits in the field of childcare, mutual property, housing, social benefits and many others which we describe below.

Nowadays 16 states in Europe recognises same-sex couples as eligible partners to enter into marriage. The first country to open marriages to the same-sex couples was Netherlands in 2001. The states which have introduced open marriage to all are (up to 1. 1. 2019) Austria, further Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom.[11] We can see these trend also in other states, for example in the Czech Republic the group of representatives submitted a bill[12] which would open marriage for same-sex couples, but the House of Representatives have not decided yet.

As Ian Curry-Sumner stated,[13] in 1990 nobody would ever have thought that there would come a time when a generation of new law students would not even question the eligibility of same-sex couples to marry. And yet, we have 16 states in Europe which open marriage for all and many others around the world, for e.g. Argentina, Brazil, Canada, Mexico, New Zealand, South Africa, the USA etc. At the same time some other states to same-sex couples option of registered partnership mostly in Eastern Europe including Czech Republic. Such approach is not common on other continents, with notable exceptions beeing Australia, Ecuador, French Guiana, Chile, Taiwan and Uruguay.

If we look at European interstate law surveys and academic projects, it is possible to see a reflection of the above described trend. Marriage is characterized as a union between "two persons of the same or of the different sex" in the Model Family Code.[14] Also, European Family Law vol. III distinguish

11 ILGA. Sexual orientation in the world – overview. © 2017 The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA). Available at: https://ilga.org/maps-sexual-orientation-laws

12 Sněmovní tisk 201, Novela z. – občanský zákoník. Available at: http://www.psp.cz/sqw/historie.sqw?t=201 & o=8

13 CURRY-SUMNER, I. Same-sex relationship in European perspective. In: SCHERPE, J. M. *European Family Law volume III*. UK: Edward Elgar Publishing, 2016, p. 116. ISBN 9781785363047.

14 SCHWENZER, I. H. *Model family code: from a global perspective*. Antwerpen: Intersentia, c2006, p. 12. ISBN 9050955908.

three approaches which are recognizable in Europe.[15] These are firstly marriage for all, marriage for different-sex couples and registered partnership for same sex couples or the previous both for all.

The ways which lead to open marriage for all are firstly by legislative procedure, secondly by ruling of supreme or constitutional court or by referendum.

Legislative procedure is the most common and regular way to enact this kind of law. We will mention just some examples like Sweden where change of Marriage Code, which took place in May 2015, consisted of replacing the term "man and woman" with term "two persons"[16] or South Africa, where the Civil Union Act (in force since November 2006) allowed same-sex couples to marry.[17]

Ireland provides an example of the referendum way to enact law that allowed same-sex couples enter into marriage. On 22 May 2015 a constitutional referendum was held in Ireland on the proposal for adding a sentence "Marriage may be contracted in accordance with law by two persons without distinction as to their sex" to the constitution.[18] The outcome of the referendum was in favour of opening marriage for same-sex couples.

It is also possible to mention some supreme/constitutional court decisions that have led to marriage for all. The ruling of the Constitutional Court of Austria delivered on 4 December 2017 declared the provision of Austria Civil Code the ban on same-sex marriage discriminatory and unconstitutional.[19]

Also The Supreme Court of the United States decided on 26 June 2015 in the case of *Obergefell v Hodges, Director, Ohio Department of Health* about petitions of same-sex couples and two men whose partners had died who claimed that their right to marry or right to have their marriage recognised

15 CURRY-SUMNER, I. Same-sex relationship in European perspective. In: SCHERPE, J. M. *European Family Law volume III*. UK: Edward Elgar Publishing, 2016, p. 128. ISBN 9781785363047.

16 SINGER, A. In: The International Survey of Family Law 2010. *Sweden, Equal Treatment of Same-sex Couples in Sweden*. 2010, p. 393.

17 SINCLAIR, J. The International Survey of Family Law 2008. *South Africa, A New Definition of Marriage: Gay and Lesbian Couples May Marry*. 2008, p. 395.

18 HARDING, M. In: The International Survey of Family Law 2015. *Ireland, Teetering on the Brink of Meaningful Change?* 2015, p. 176.

19 Verfassungsgerichtshof, G 258-259/2017-9, 4. Dezember 2017. Available at: https://www.vfgh.gv.at/downloads/VfGH_Entscheidung_G_258-2017_ua_Ehe_gleichgeschlechtl_Paare.pdf

was denied because some states define marriage as a union between man and woman and refused to consider married same-sex partners as spouses. This approach had certainly several consequences to their rights and obligations deriving from marriage. The Court ruled by 5 to 4 vote in favour of the petitioners that couples of the same-sex shall not be deprived of that right and liberty and therefore same-sex couples may exercise the fundamental right to marry.

The ECHR does not share the same opinion as the Supreme Court of the United States although even ECHR made a few significant steps in its case law. In case of *Schalk and Kopf v Austria* the Court stated that same-sex couples enjoy protection of their family life under A 8 (not just a private life). Despite this fact the Court ruled that there is no positive obligation for states to have a special legal institution like marriage, but the states are bound to treat unmarried same-sex couples just like unmarried different-sex couples. In 2012 in case of *Gas and Dubois v France* the Court found no violation of A 14 in conjunction with A 8 by excluding same-sex couples from access to marriage. The case of *Oliari and Others v Italy* brought a certain progress in the Court's case law. Applicants tried to get married in Italy, but the Italian official denied their request. The Court ruled that A 8 was violated because Italy did not provide any appropriate legal protection to same-sex couples living in a stable relationship. The Court also decided that A 12 was not violated because this article does not contain the positive obligation for states to permit same-sex couples enter marriage.

Even the European Union reflects the tendencies described above. It is possible to demonstrate the progress within the EU by looking at the in Advocate General's Opinion in case Mr. Coman (Romanian national) and Mr. Hamilton (US national).[20] The couple married in Belgium in 2010 and in 2012 asked Romanian officials for documents necessary to Mr. Hamilton could work and permanently reside in Romania with his spouse Mr. Coman based on their marital status. The case ended in the Romanian Constitutional court, which asked the Court of Justice of EU whether Romania is obliged (based

20 Advocate General's Opinion in Case C-673/16. Court Justice of the European Union. Available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-01/cp180002en.pdf

on the right to freedom of movement) to grand Mr. Hamilton permanent residence due to the fact that he is spouse of EU citizen. The Advocate General stated that even though states are free to provide for marriage of same-sex couples or not, the states are bound to fulfil their obligations under the free movement of EU citizens. The EU directive in the term "spouse" includes also the spouses of the same-sex.

4 Marriage for men and women

The opposite trend to the one described above is the trend of protecting marriage as a union of men and woman on constitutional level. The reason why states generally choose such a protection is simple. It is significantly more complicated to change constitutional law rules. If the representatives decide to change constitutional law, usually a qualified majority of votes is required, or if the Supreme or Constitutional court decides about constitutionality of some act or interference by a public authority than the court is bound by such constitutional rule.

In 2016 at least 25 states worldwide had a Constitution which limited marriage to a union between man and a woman.[21]

From European countries, Slovakia provides an example of the protection of marriage as a union of man and woman on constitutional level. Since September 2014 amendment of art. 41 of Slovak constitution became effective, reserving marriage only to the man and woman. In the Czech Republic, as we have mentioned above, it is currently being decided whether the definition of marriage will be changed in the Civil Code to a neutral term a "union of two persons". At the same time, there is a proposal to amend the Constitution that would define marriage as a union of man and woman on the constitutional level.[22] The explanatory report to the amendment declares that the proposal's aim is to protect marriage itself and the term marriage from injudicious changes by legislative or interpretative experiments.

21 CURRY-SUMNER, I. Same-sex Marriage in European Perspective. In: SCHERPE, J. M. *European Family Law volume III*. UK: Edward Elgar Publishing, 2016, p. 120. ISBN 9781785363047.

22 Sněmovní tisk 211/0, část č. 1/4, Novela ústavního zákona – Listina základních práv a svobod. Available at: http://www.psp.cz/sqw/text/tiskt.sqw?O=8 & CT=211 & CT1=0

5 Conclusion

There is a clear tendency to open marriage to all in Western Europe. This trend of last two decades has encountered iron curtain of opposition to such trend. Former communist countries like Slovakia or Hungary answered such tendency by their own approach – constitutional protection of the marriage as union of the man and women. The main argument used by the proponents of such approach is the protection of so-called "traditional family". If we look at the legal rules governing marriage before one hundred year, we might see that a traditional family meant inequality of women or possibility of harsh corporal punishment of the children. One might therefore ask, what remained of such traditional family in the time of equality, human rights, falling marriage rates and raising divorce rates, and whether it is necessary to protect opposite-sex marriage so ferociously. We doubt that.

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Marriage for Transpeople

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Abstract

Trans-people is a term for people who have conflict between their psychic and physical sex. The reassignment is linked to a several consequences. One of them is termination of marriage. This paper is dedicated to the case law and it is development of the European Court of Human Rights in relation to this issue. The attention will also be focused on the debate on the amendment to the Character of Fundamental Rights and Freedoms as well as the provisions of The New Civil Code in relation to the introduction of the marriage institute for same-sex couples. This amendment should bring the same catalogue of rights for homosexual as for heterosexual couples.

Keywords

Transgender; Reassignment; Transpeople; Marriage; Case Law; Czech New Civil Code; Convention.

1 Introduction

The approach to the concept of marriage, as a permanent union between a man and a woman, can be said to be partially overcome. The conservative society will, however, only benefit from its positive attitude towards this social shift. However, today we can say that same-sex marriage exists. In Czech society, extensive discussions are currently taking place over this idea. The draft amendment to the law, which would allow marriage for all, is being prepared in the Chamber of Deputies. People of the same sex are allowed to enter into registered partnership regulated by the Act on Registered Partnership.[1] Registered partnership is in some aspects similar

1 Act No. 115/2006 Coll., as amended.

to marriage (maintenance duty between the partners and expartners) and in others to cohabitation without marriage (no duty to live together, no duty to be faithful to each other). Regarding the parental role of the partners, they have no right to adopt a child together (or become step – adopters) or to become commonfoster parents.[2] Especially with regard to the fact that the Czech legal order does not grant all rights and constitutionally guaranteed protection to registered partners, as are in the marriage. The aforementioned amendment should extend to the same-sex spouses the catalogue of rights. Part of the societal debates includes other sub-related questions. *Patrik Nacher*, the deputy, came up with a proposal to distinguish heterosexual and homosexual marriages by introducing two institutes with the same content but different names.[3] Could we extend the concept of marriage even to same-sex couples, thereby interfering with the traditional concept of this institute as a permanent union between a men and a women, or indeed to give these couples a symbolic level of celebrating marriage and enjoying a wedding, not registration with entitling to two days off? What is the aim of trying to establish a marriage institution for all? Create this opportunity for same-sex couples or, more broadly, lead society to the fact that homosexuals have equal rights in relation to family life, that today is a certain western European standard? What, however, will de lage lata become a marriage in which one of the partners undergoes a change of gender?

2 Legal regulation in the Czech Republic

The Civil Code ("CC"),[4] the primary source of status rights, uses in relation to the sex change term "individual" or "human being" and provides as follows (Section 29, CC):

1. Sex change of an individual takes place by surgery while simultaneously disabling the reproductive function and transforming the genitalia (sexual organs). The date of the sex change is presumed to be the date indicated in the certificate issued by the health care provider.

2 KRÁLÍČKOVÁ, Zdeňka. The Civil status of transsexual and transgender in Czech Republic. In: *The Lawyer Quarterly* [online]. 2018, Vol. 8, no. 4, p. 503 [cit. 10. 1. 2019].

3 NACHER, Patrik. Práva gayům ano, manželství ne. In: *Novinky.cz* [online]. 4. 12. 2018. [cit. 13. 1. 2019].

4 Act No. 89/2012 Coll.

2. Sex change does not affect the personal status of an individual or his or her personal and property situation; however, marriage or registered partnership are terminated. The rights and duties of the man and the woman whose marriage terminated towards their common child, their property rights and duties at the period following the termination of marriage are governed, analogically, by the provisions concerning the rights and duties of divorced spouses towards their common child and concerning their property rights and duties at the period following the divorce; a court shall decide, even at its own motion, on the care each of the parents will take of their common child thereafter.

As mentioned above, CC as lex generalis allows sex change to a person. CC does not define such a person in connection with his or her state of health, or does not stipulate expressis verbis the condition of a permanent disparity between psychological and physical gender unlike the Act on Specific Health Services ("ASHS")[5]. Amended The Act on Specific Health Services[6] provided for the first time the possibility of "transgender surgery" (Section27a). The Act on Specific Health Services uses the term "transsexual patient." This is main difference between this Act and CC. ASHS regulates reassignment for transsexual patient and CC regulates sex change for person generally.[7]

CC addresses this situation clearly but is it consistent with the Constitution and international conventions? Reassignment is a very controversial topic of contemporary society. According to the world health organization classification, transsexuality is not a mental disorder, especially with regard to reducing stigmatization in society, it is included in the chapter "Conditions related to sexual health" and it is assigned as a diagnosis of so-called "gender disagreement." The issue of transsexuality involves a number of legal issues. Czech law has already been able to find its identity in Article 29 of CC, where the conditions for legal recognition of reassignment have been established. However, it is important for the subject of this article, Section 29/2 CC, which stipulates that marriage is terminated by the gender

5 The former Act No. 20/1966 Coll.
6 Act No. 548/1991 Coll.
7 KRÁLÍČKOVÁ, Zdeňka. The Civil status of transsexual and transgender in Czech Republic. In: *The Lawyer Quarterly* [online]. 2018, Vol. 8, no. 4, p. 504 [cit. 10. 1. 2019].

conversion. The expiration of marriage has the effect of divorce, according to an explanatory report to this Act.[8] The Czech legal order, in order for spouses to be divorced by Czech courts, must demonstrate that their relationship has irretrievably broken down. What if, with the gender conversion, both spouses agree and want to continue in marriage?

3 Legal regulation in Germany and Austria

Neighbouring countries have already responded to this problematic situation. Transsexuellengesetz is an Act which regulates transsexual issues from 1981 in Germany.[9]

In 2008, the Constitutional Court in Karlsruhe, Germany, already stated that conditioning the recognition of sex change by non-marriage is incompatible with the right to free personality development and the constitutionally guaranteed protection of marriage and the family.[10] It was a transsexual man who lived 56 years in marriage from which three children came. The applicant and her wife did not want to divorce on the grounds that their relationship was not disturbed despite the fact that the applicant changed the name and consequently the gender. The court ruled its decision to justify the illegitimacy of the recognition of gender reassignment by divorce marriage. With the traditional concept of marriage, as a permanent union between a man and a woman, it has dealt with the inappropriateness of interfering with the fundamental rights of transsexuals in the form of divorce of marriage, as this denies its protection. The provision laying down the condition of marriage divorce has been declared inapplicable by the court until the legislator adopts new legislation that will respect fundamental human rights.

At the same time, the legislator suggested a suitable way out of this situation in the form of a marriage transformation in a registered partnership, but only on the assumption that he would be afforded the same protection as marriage.

8 Section 29 CC.

9 DOLEŽAL, Tomáš. Judikatura Evropského soudu pro lidská práva v oblasti problematiky "translidí." *Časopis zdravotnického práva a bioetiky* [online]. 2013, vol. 3, no. 1, pp. 39–47. Available at: http://medlawjournal.ilaw.cas.cz

10 BARŠOVÁ, Andrea. Skalpel a duše. Ke změně pohlaví podle nového občanského zákoníku. *Časopis zdravotnického práva a bioetiky* [online]. 2013, vol. 3, no. 1, s. 7 [cit. 10. 1. 2019]. Available at: http://medlawjournal.ilaw.cas.cz

Austrian law does not have any special regulation of reassignment. Only the Personal Status Act allows you to change the gender record. By 1996, however, reassignment means the annulment of the marriage entered by the relevant authorities in the marriage book. Consequently, based on the developmental viewpoint in this area, reassignments were only recorded for unmarried persons. In 2006, the Constitutional Court cancelled most of these legal provisions. In addition to requiring marriage, the court also dealt with the condition of reassignment by surgical intervention. According to the Constitutional Court, marriage cannot prevent the recording of reassingment.[11]

4 Case law and approach of the European Court of Human Rights

Similarly, the European Court of Human Rights ("ECHR") has generally adopted an innovative or evolutionary approach to transgender. This shift from a restrictive conception can be seen in particular in the interpretation of Articles 8 and 12 of the European Convention of Human Rights ("Convention"). Originally, the ECHR left national legislation in the country's dictates despite a relatively neutral approach that interpreted the negative protection of private life, despite an extensive approach that opens up an approach to active understanding of private life as an expression of autonomy and enabling the self-realization of each person. The interpretation of Article 8 has shifted from simple protection to the intervention of state power to a positive guarantee of the right of the individual to decide on his own life. Human space for self-realization is just private life, which means the positive duty of the state to provide protection for the rights of individuals. Addressing the basic question of whether transpeople who have been sexually modified within the meaning of Article 12 of the Convention have the right to marry a person of the opposite sex at the outset corresponded to the conclusions of the ECHR in relation to the rights of transpeople to recognize their new sexual identity

11 BARŠOVÁ, Andrea. Skalpel a duše. Ke změně pohlaví podle nového občanského zákoníku. *Časopis zdravotnického práva a bioetiky* [online]. 2013, vol. 3, no. 1, p. 9 [cit. 10. 1. 2019]. Available at: http://medlawjournal.ilaw.cas.cz

in the legal word meaning. In the cases of *Rees vs. The United Kingdom*[12] and *Cossey vs. The United Kingdom*[13], the ECHR interpreted that marriage within the meaning of Article 12 of the Convention must be interpreted in its traditional concept, that is, as a legal union of two persons of different sex. The interpretation of gender-specific issues has put the ECHR on the biological factor, taking into account the main purpose of marriage consisting in creating a family base. With this approach, the ECHR only took into account the reproductive function of marriage. In this context, it also stated that the persons who have undergone a surgical change of gender do not change all biological aspects that belong to their new sexual identity and therefore do not have the right to marry. In the case *Cossey vs. The United Kingdom*, the complainant of the MtF filed a complaint with the state following an operative reassignment, since he refused to make a change in the birth record and in the certificate of attestation. He claimed violations of Articles 8 and 12 of the Convention because the state did not recognize his marriage with a male. The Court noted, that in keeping with the balance between the interests of society and the interest of the individual, the positive duty of the state guarantee the legal recognition of a new status of post-operative transsexuals can not be based on the interpretation of Article 8. At the same time, he did not find a violation of Article 12, as there was no change in the concept of marriage as a permanent union of persons of the opposite sex. What is interesting, however, is the dissent of Judge Martens, whose premise is based on the following two principles:

If a transsexual is to achieve any degree of well-being, two conditions must be fulfilled:

- by means of hormone treatment and gender reassignment surgery his (outward) physical sex must be brought into harmony with his psychological sex;
- the new sexual identity which he has acquired must be recognised not only socially but also legally.

12 The Judgement of the European Court of Human Rights of 17 October 1986, *Rees vs. The United Kingdom*, Application no. 9532/81.

13 The Judgement of the European Court of Human Rights of 27 August 1990, *Cossey vs. The United Kingdom*, Application no. 10843/84.

Judge Martens allegedly interfered with the complainant's privacy. He reminded that the court as the last protector of the oppressed individuality should in such a case have a positive impact on its decision and determine the obligation of the state to change the system of records in the register. He also disagreed with the view of the court that it is necessary for the concept of marriage to be based on a biological sex determined at birth, which is unchangeable.

In the case *B. v. France*[14], the ECHR found an interference with the privacy right of the protected Article 8 of the Convention. In this case, the complainant MtF wanted to marry her parner, claiming in the civil proceedings that the court should declare that although she was registered as a male member in a civil registry, she is actually a woman. She also asked the court to declare herself a woman, to order the change of her birth certificate and to allow her to use her feminine names. Since she was not granted, she filed a complaint with the ECHR. According to the ECHR, at a time when the state refuses to accept a change of identity, although in France birth certificates are designed to be updated throughout the life of the person concerned (Article 52 of the judgment). It is therefore possible for a new citizen identity to be respected by the state even in official documents. Given the failure to achieve a fair balance to be struck between the general interest and the interests of the individual, there has been a violation of Article 8 of the Convention.

Decision *X, Y, and Z vs. The United Kingdom* there was a partial departure from the concept of sexual identity from an exclusively biological point of view. In this case, the applicant was born as a woman and subsequently underwent a surgical change of sex. The petitioner lived in a relationship with his partner for several years, that of the artificial insemination of the child they were caring for. The ECHR addressed here the question of whether such a community can be considered a family in the light of the Convention. The ECHR admitted that the applicant had always been a man, or a father, as a child. That is why it is also necessary to apply Article 8 of the Convention within the limits of family life to these specific groups of persons where one of the partners has undergone gender reassignment. The ECHR deviated from a strict gender

14 The Judgement of the European Court of Human Rights of 25. March 1993, *B. vs. France*, Application no. 13343/87.

perspective based on a purely biological factor, although in the case of *Sheffield and Horsham vs. The United Kingdom*[15] it did not accept that change.

A definitive change in the link to access to the transgenderto the marriage institute was brought by the *Goodwin vs. United Kingdom* decision. The ECHR highlighted the fact that marriage is not dependent on the ability of a couple to have a child. Although the Convention refers to marriage as an union of two persons of the opposite sex, gender can not be based on the current social and medical viewpoint based only on biological criteria. The response to this decision of the ECHR was the adoption of the Gender Recognition Act (2004), which allowed transgender people to legally change their sex and marry. Stimulating this shift has been scientific advances in exploring sexual identity disorders and the possibilities of transgender to achieve the greatest possible degree of identification with the new sex. However, the ECHR continued to allow contracting states to make special arrangements for marriage between transpeople. The ECHR found in this case a violation of Article 12 of the Convention and allowed it to transpeople enter to the marriage.[16]

The issue of marriage for transpeople also covered the ECHR in the *Wena and Anita Parry vs. United Kingdom*[17]. The United Kingdom's legislation allows marriage to be transformed into a registered partnership after a surgical change of gender. In this case ECHR has not found violations of Article 8 and Article 12 of the Convention, which the petitioners sought. This was due to the fact that the legislation in question allows partners to live in a civil partnership that includes almost the same rights as the rights of married couples. The petitioners have been married since 1960, after one of them underwent a reassignment with the consent of the other spouse, only obtained a temporary certificate confirming the reassignment but not full recognition, which would require the annulment of the marriage.

15 The Judgement of the European Court of Human Rights of 30. July 1998, *Sheffield and Horsham vs. The United Kingdom*, Application no. 31–32/1997/815–816/1018–1019.

16 The Judgement of the European Court of Human Rights of 11. July 2002, *Christine Goodwin vs. The United Kingdom*, Appliction no. 28957/95.

17 The Judgement of the European Court of Human Rights of 28. November 2007, *Wena and Anita Parry vs. The United Kingdom*, Application no. 42971/05.

The transformation of marriage in a registered partnership was also dealt with by the court in the case *H. vs. Finland.*[18] Finnish law, as well as English, provides a registered partnership with similar protection as marriage. At the heart of the case was the finnish legislation which made the legal recognition of reassignment conditional upon the disappearance of a marriage that is still ongoing. The exception was when the second spouse agreed with the continuation of the legal union, this legal fact had the effect of ex-law conversion of the marriage into the registered partnership. In the specific case, the petitioner refused to undergo the conversion of her marriage into a registered partnership for religious reasons. Therefore, the Finnish authorities refused to change the birth number. The ECHR has not found a violation of Article 8 of the Convention in this matter. He stated that it is on the state's own vision ofhow marriage should have a role in society and whether it will extend the concept of marriage to same-sex persons, but does not stem from the fundamental right enshrined in the Convention. The court also noted that the complainant was not forced to terminate marriage because she was offered an alternative to converting a marriage into a registered partnership as a legal union with the same catalog of rights as in the marriage. At the same time, this conversion did not affect legal links to her descendants. So she could freely carry her birth certificate, providing the state with sufficient protection for her family life so far. In conclusion, the more open approach of the ECHR in this issue will deepen the protection of rights of transpeople, but will ultimately affect the development of a democratic society for all individuals.

5 The approach of the Court of Justice of the European Union to marriage for transpeople

In June of this year, the Court of Justice of the European Union also dealt with the issue of the need to abolish marriage for recognition of pensions in case *MB vs. United Kingdom.* She was a UK national, Mrs. MB, who was born in 1948 as a man. Two children came from his marriage. As a female person, she has been living since 1991, when she has undergone a reassignment several years later. However, she did not obtain proof of recognition

18 The Judgement of the European Court of Human Rights of 16 April 2014, *Hämäläinen vs. Finland*, Application no. 37359/09.

of gender reassignment. The reason was the matrimonial condition for legal recognition of gender reassignment.In 2008, Mrs MB asked for a retirement pension as she reached the age of 60, which is age for women's pension entitlements. However, the authorities refused her request on the grounds that she needed to comply with a 65 – year period, as is the case with retirement. The reason was not to resign Mrs MB's final mention of the final gender certificate. This decision is considered by Mrs MB to be discriminatory, a provision under which she can not be married in breach of European law. This case is currently being handled by the United Kingdom Supreme Court, which has referred the case to the Court of Justice for a case. The European Court of Justice consults the national courts of the EU Member States with an interpretation of Union law. The Supreme Court of the United Kingdom has asked the Court of Justice whether the British legislation is in accordance with the European directive prohibiting any discrimination on grounds of sex in the field of social security and old age pensions. The ECHR found that legal recognition of gender reassignment and the marriage institute are within the competence of the member states, but in exercising that power, states must respect Union law, in particular the principle of non-discrimination. The Court of Justice has stated that the condition for the abolition of marriage to qualify for a retirement pension applies only to persons of changed gender.[19] According to the Court, British legislation against such persons is discriminatory, since it treats them less favorably than those with the same sex as when they were born. The condition for the abolition of the marriage to qualify for a retirement pension, therefore, according to the Court of Justice, constitutes direct discrimination on grounds of sex and is therefore contrary to the aforementioned European Directive. The Supreme Court of the United Kingdom will further decide on this case. However, the aforementioned Court of Justice decision is binding on the courts of all European Members states that must be. The situation in the UK has changed since then. Since 2004, the final gender recognition certificate has been issued on the basis of the consent of the spouse to each applicant or applicant. Same-sex marriages are also permitted from 2014 onwards.

19 BARŠOVÁ, Andrea. Skalpel a duše. Ke změně pohlaví podle nového občanského zákoníku. *Časopis zdravotnického práva a bioetiky* [online]. 2013, Vol. 3, no. 1, p. 22–38. Available at: http://medlawjournal.ilaw.cas.cz

6 Conclusion

Although it seems that Czech law contains a sufficient legislative framework in the field of transgender, compared to the legal orders of selected countries and the jurisprudence of the ECHR, this is not the case. In particular, the current state of legal regulation does not sufficiently respect the fundamental rights of transgender persons, in particular the right to respect for family and private life, in accordance with Article 8 of the Convention. Based on this comparison, it would be advisable for the legislator to respond appropriately to the evolutionary approach of the ECHR. Legal recognition of gender reassignment would be possible without surgical intervention. To satisfy the desire of the transsexual, its inner stability is important, not the change in the external sex traits. At the same time, it would be appropriate to modify the legal provisions regarding the termination of marriage. If, despite the change in sex, people wish to remain in marriage, it is not possible to force them to quit the marriage. One option could be to change a marriage in a registered partnership if the law would grant the registered partnership the same level of rights and protection as marriage.

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The Concept of Marriage in the Czech Republic: Traditional and Conservative?

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Abstract

In recent decades, there have been significant changes in Europe. As a result, the portrait of family has been changing which is reflected in legal orders of different countries as well as in the case law of the European Court of Human Rights. The Czech Republic does not stay completely out of this European development. Does the Czech Republic reflect the changes in family adequately? Should there be more legal innovations in the future? Is the Czech Republic conservative in this respect as it is traditionally seen or more progressive? The article is focused on legal development in marriage law and on the two contradictory pending drafts which could tip the scales in the near future.

Keywords

Family; Family Law; Marriage; Europe; Czech Republic; Development; Traditions; Innovations; Pending Drafts; Case Law; Constitutional Courts; European Court of Human Rights.

1 Introduction

As mentioned above, Europe is undergoing significant changes in the area of family life. The portrait of family has been changing which is reflected in legal orders of different countries as well as in the case law of the European

Court of Human Rights.[1] Both traditional models of marriage and the new ones are regulated in European civil or family codes and that is why it is difficult to speak about common European standards. However, the plurality of concepts of marriage seems to suggest that the law makers in different states respect more and more the freedom of choice of private and family life.

From the legal development described below one can see that the Czech Republic does not stay completely out of these recent important changes in Europe.[2] The question I pose to myself is whether the Czech Republic reflects the changes in family, family life and family law abroad adequately and whether there should be more legal innovations in the future.

The question is, is the Czech Republic conservative in this respect as it is traditionally seen or more progressive? It is important to see these changes in the light of recent legal history. Therefore, the main turning points will be listed here.

2 Legal Development

First of all, I would like to concentrate on the Charter of Fundamental Rights and Freedoms and the New Civil Code as there are two pending drafts in the Parliament of the Czech Republic dealing with the degree of freedom in the concept of marriage.

1 For details see 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; ANTOKOLSKAIA, M. *Harmonisation of Family Law in Europe: A Historical Perspective. A Tale of two millennia*. Antwerpen-Oxford: Intersentia, 2006; ANTOKOLSKAIA, M. (ed.). *Convergence and Divergence of Family Law in Europe*. Antwerpen-Oxford: Intersentia 2007; COESTER-WALTJEN, D. Human Rights and the Harmonization of Family Law in Europe. In: BOELE-WOELKI, K. and T. SVEDRUP (eds.). *European Challenges in Contemporary Family Law*. Antwerpen-Oxford-Portland: Intersentia, 2008, p. 5; LETSAS, G. *A Theory of Interpretation of the European Convention on Human Rights*. Oxford: Oxford University Press, 2007.

2 See SÖRGJERD, C. *Reconstructing Marrriage. The Legal Status of Relationships in Changing Society*. Cambridge–Antwerpen–Portland: Intersentia, 2012, p. 167 ff., Toward Gender-Neutral Marriage – Preceding Developments; SCHERPE, J. M. *The Present and Future of European Family Law*. Cheltenham (UK) – Northampton (MA, USA): Edward Elgar, 2016, p. 40 ff., Organic European Family Law – Horizontal European Family Law – The Legal Relationships between Adults.

The Charter of Fundamental Rights and Freedoms[3] as a part of the constitutional order provides protection to the family as such without specifying it. As far as the draft amendment to the Charter of Fundamental Rights and Freedoms is concerned, I will describe the details below.

The New Civil Code,[4] similarly to the previous Family Acts,[5] regulates marriage only for people of the opposite sex. However, there is another pending draft in the Parliament of the Czech Republic which should bring significant changes to the legal order.

It needs to be stressed that the Act on Registered Partnership[6] regulates status relationships between the same sex partners. It is not a marriage, but a kind of civil union. Registered partnership is sometimes similar to marriage and sometimes it is more like cohabitation without marriage. It means that in registered partnership there is no statutory duty to live together, no duty to be faithful to each other, no duty to help each other, no community of property, no common tenancy of a flat by operation of law, no protection of family dwelling and no institution of the things forming a common household.[7]

Registered partners have no right to adopt a child together (or to become step-adopters, step-parents) or to become common foster parents. The New Civil Code states that only spouses, i.e. a husband and a wife, are allowed to become common adopters or common foster pa-rents. The same was provided by the previous Family Acts.[8] It is a traditional approach.[9]

In addition, let's mention that within the process of recodification of the Czech Civil and Family Law, the Act on Registered Partnership was

3 Act No. 2/1993 Coll.
4 Act No. 89/2012 Coll.
5 Act 97/1963 Coll., Act No. 265/1949 Coll.
6 Act No. 115/2016 Coll.
7 And finally, there are seldom contracts between the partners which would solve a lot of problems in practice regarding separation, dissolution of partnership and the settlement of the common assets.
8 See note No. 5 above.
9 However, the New Civil Code recognises more rights for the registered partners regarding guardianship. It provides that spouses, which is a husband and a wife, can become common guardians of a minor child "as a rule". It means, that common guardianship is not reserved only for spouses, but it is available for other *de facto* couples or registered partners as well in relevant cases.

to be included into the New Civil Code – Book Two – *Family Law*. However, due to the very conservative approach of some political parties the main authors of the New Civil Code had to resign to the idea of the inclusion of registered partnership in the Civil Code draft that should have originally contain all the civil law status law. That is why the Act on Registered Partnership is still a part of the legal order of the Czech Republic.

Thanks to the case law of the Constitutional Court of the Czech Republic, very important changes to family law have been already made. The Constitutional Court followed the recent case law of the European Court of Human Rights and applied its so-called negative law making on one hand and sent relevant signals to Czech law makers on the other hand.

3 The Role of the Constitutional Court: Two Important Cases Following the Same Directions

As mentioned above, the Constitutional Court of the Czech Republic played a significant role in the field of family law, especially regarding registered partnership and children. With a bit of exaggeration the Constitutional Court can be called the driver of legal changes.[10]

3.1

By the decision the Constitutional Court issued in 2016,[11] Section 13, Subsection 2 of the Act on Registered Partnership was cancelled. This article provided that

> *Continued partnership impedes one of the partners from becoming the adopter of a child.*

Four key aspects of the decision should be mentioned.

First of all, the Constitutional Court stated that the construction of all the subsections of the Section 13 of the Act of Registered Partnership was absurd and illogical.

10 See DETHLOFF, N. and K. KROLL. The Constitutional Court as Driver of Reforms in German Family Law. Part IV, Premarital and Marital Settlement Agreements. A Constitutional requirement of judicial control. In: BAINHAM, A. (ed.). *The International Survey of Family Law*. Jordan Publishing Limited, 2006, p. 229 ff.

11 The case No. Pl. ÚS 7/15.

A single person was allowed to adopt a minor child irrespective of his or her sexual orientation.

However, if such a person entered into registered partnership, the registration of itself would be an obstacle according to the second subsection of Section 13 of the Act on Registered Partnership.

In addition, the Constitutional Court found an internal contradiction between the second Subsection of Section 13 and its other two Subsections.

The first Subsection of Section 13 Act on Registered Partnership provides that

> *The existence of a partnership is not an obstacle to an exercise of parental responsibility of a partner towards his or her child or an obstacle to his or her child's upbringing or custody. A partner who is a parent is obliged to ensure the development of the child and to consistently protect his or her interests etc.*

The third Subsection of Section 13 Act on registered partnership provides that

> *If one of the partners takes care of the child (has a child in physical custody) and both partners live in a joint household, the other partner is involved in raising the child. The obligations relating to the protection of the development and upbringing of a child also apply to that partner.)*

Second, the Constitutional Court took into consideration the political situation in the Czech Republic when the Act on registered partnership was passed. The Act on Registered Partnership was the result of a political compromise. Without the prohibition of adoption it would not be probably passed.[12]

The Constitutional Court considered and evaluated the situation in all the member states of the European Union, both its legislation and the practice, and the case law of the European Court of Human Rights, especially the well-known cases *Fretté v. France, EB v. France, X and others v. Austria, Schalk and Kopf v Austria, Olliari and other v. Italy* etc.[13]

Third, the Constitutional Court came to the conclusion that the Convention for the Protection of Human Rights and Fundamental Freedoms does not enshrine the right to a child, or to adopt a child.

12 The President of the Czech Republic applied his power of veto but it was overridden in the second proceeding and the Act on Registered Partnership was passed. The main point of the President's objections was that the draft did not regulate partnership – rights and duties of the partners, but just registration itself. In addition, the Act on Registered Partnership was said to be without any conception as it was passed only due to deputies' activities.

13 For details see https://www.echr.coe.int

It means that there is no fundamental right to a child which would arise from international obligations of the Czech Republic or national legislation.

As mentioned above, the Charter of Fundamental Rights and Freedoms protects the family without defining it. The issue is a matter of the national law maker and for its political decision.

However, the case law of the Constitutional Court shows a relatively restrictive definition of family. The Constitutional Court considers family primarily to be a biological unit based on blood ties, then the social institution.[14]

That is why the Constitutional Court came, in this particular case, to the findings that the provision of Section 13 Subsection 2 of the Act on Registered Partnership *did not violate the right to respect for family life.*

Finally, the Constitutional Court came to the conclusion that the Act on Registered Partnership had promoted the formal status above de facto relationships. This was not logical and, as a result, it was discriminatory.

The Constitutional Court stated that the Act on Registered Partnership put the registered partner who wanted to adopt a child into the position of *a person of a second order*. The Act on Registered Partnership was based on the prejudice that a registered partner was unable to raise a child. That is why the Constitutional Court concluded that the Section 13 subsection 2 of the Act on Registered Partnership *did violate the right to respect for private life*.

The Constitutional Court added that registered partnership is a status approved by law. If someone enters into a registered partnership, he or she behaves according to law, transparently. The right to respect for private life guarantees space for personality realization in the sense of self-determination, including decision-making about the organization of one's own life.

The decision of the Constitutional Court concluded that there was a conflict with the right to human dignity, the right to privacy and the prohibition of discrimination. There were dissenting opinions, too.[15]

14 The the case No. ÚS 568/06.

15 For instance, some justices argued that absurd or illogical law doesn't mean unconstitutionality. One should respect that some couples can't have a child naturally or that there are differences among people. Finally, a decision-making about adoption is a matter of the Parliament.

3.2

As mentioned above, in Czech legal order both a common adoption and a step adoption are allowed only to spouses, a husband and a wife.

However, the Czech Republic, as many other countries, faces new phenomena. There have been cases when Czech same sex citizens married abroad, used the *service* of a surrogate mother and then tried to register the child born abroad at the Birth Register Office in the Czech Republic.

Only recently the Constitutional Court of the Czech Republic said *yes* to recognition of two men as parents of a child, but only in this specific case.[16]

Three most important arguments of the Constitutional Court should be mentioned.

First of all, the Constitutional Court stated that there should be harmony between biological, social and legal parentage. Once a child has two legal fathers according to foreign law (it means the child's status was legally established) and there are genetic and social ties, common dwelling etc., it is not allowed for vital registers or courts to build barriers and refuse to register the child in the Czech Republic.

Secondly, the Constitutional Court found out that the case under consideration meets the criteria for defining family life in the light of the case law of the European Court of Human Rights, namely for instance the case *X and others v. Austria*.[17]

Finally, the Constitutional Court stressed that the best interest of the child must prevail over the abstract principles, namely public order etc.

According to the United Nations Convention on the Rights of the Child, its article 3,

> *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

There for, in the situation that there is family life between the child and his or her parents, that was established on legal basis abroad, the state must protect such a family life and give the child all the necessary guarantees for his or her development and happy life.

16 The case No. ÚS 3226/16.
17 See the note No. 13 above.

4 On the Pending Drafts: Two Opposite Groups of Deputies – Two Different Views on Family

4.1

In my opinion, the first pending draft lodged by the group of deputies is very conservative. It suggests an amendment to the Charter of Fundamental Rights and Freedoms.[18]

The Article 32 Section 1 provides that

> *Parenthood and the family are under the protection of the law.*

According to the draft amendment, the new version should state *expressis verbis* that

> *Parenthood, the family and* ***marriage as a union of a man and a woman*** *are under the protection of the law.*

If this amendment were passed, it would probably ban any future changes to the Civil Code according to the second pending draft. In other words, the marriage would remain as the traditional concept.

4.2

The second pending draft can be seen by some as progressive and modern, others will view it as a step undermining the traditional family values. A more correct expression could be *alternative*. According to the second pending draft lodged by another group of deputies, the concept of marriage regulated by the Civil Code should be changed radically.[19]

The Section 655 provides that

> *Marriage is a permanent* ***union of a man and a woman*** *formed in a manner provided by this Act.*

Should the pending draft be passed, the relevant Section would provide

> *Marriage is a permanent* ***union of two people*** *formed in a manner provided by this Act.*

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18 Parliament of the Czech Republic, Chamber of Deputies, Parliamentary term No. VIII., Draft No. 211/0.

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

In addition, the pending draft would not change the current regulation that rules that affiliation will not be used for establishing parentage of the same sex couples. There should be no gender neutral parentage in gender neutral marriage.

And finally, the Act on Registered Partnership should be cancelled.

5 Conclusion

The issue of the so-called gender neutral marriage has never been seriously discussed in the Czech Republic. It remains to be seen how the Parliament of the Czech Republic will deal with the contradictory pending drafts mentioned above.

In my opinion, marriage will remain available only for a man and a woman in the near future in the Czech Republic. The concept of marriage will stay traditional and conservative, although the number of marriages between people of the opposite sex is quite low and there is still quite a high divorce rate. The question is if the ban for the same sex partners to conclude a marriage will help to *protect* the traditional model of family based on marriage between a man and a woman. Should this be the case, will more marriages between a man and a woman be concluded, will fewer children be born out of wedlock and will there be fewer divorces of parents with minor children?

The two charts by the Czech Statistical Office below show the continuous decrease of the number of marriages, quite a high divorce rate and especially proportions of child births given by single mothers (within the years 1950 to 2017.)

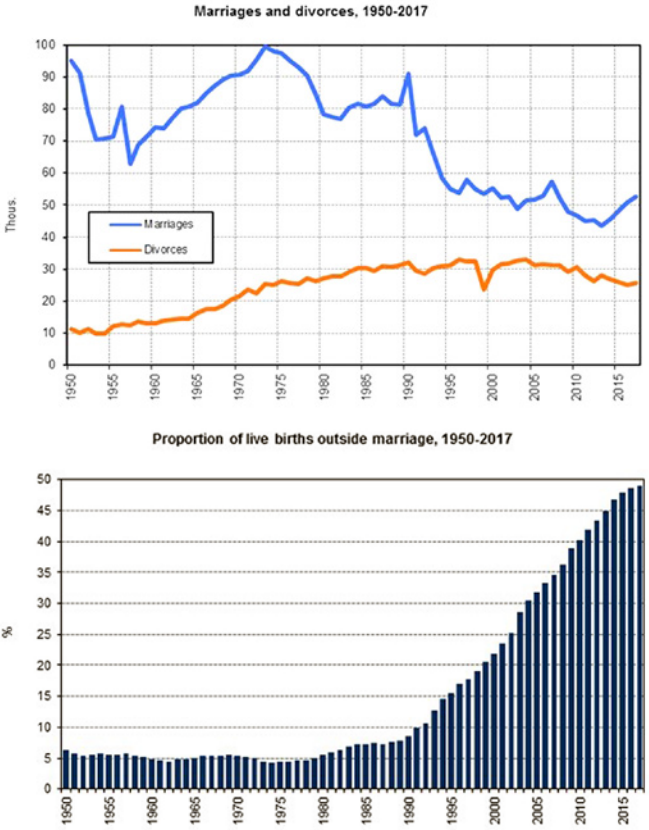
Despite the fact that in last years there has been a slight increase in the number of concluded marriages, the general trend is rather alarming, with steady drop since the 1970s.

Similarly, the Czech Statistical Office states that the number of the same sex couples living in lasting registered partnerships is fairly small. Regarding children, there were very few under age children living in the same-sex families according to findings.[20]

20 For more see https://www.czso.cz/csu/czso/0800492b9c?p_p_id=LanguageSelectPortlet_WAR_rsprezentace_INSTANCE_ABCD & p_p_lifecycle=0 & p_p_state=normal & p_p_mode=view [cit. 10. 12. 2018].

It is clear that the issue of same-sex families, especially in relation to minors, is highly sensitive in the Czech Republic. Although step-parent adoption was discussed many times, only a husband or a wife are allowed to adopt a child of his or her spouse. A common adoption is allowed only to spouses, a husband and a wife. In addition, some questions are still taboo, e.g. assisted reproduction for the same sex couples, registered or not.

However, thanks to the case law of the Constitutional Court of the Czech Republic we can see a slight improvement: a single adoption is not prohibited for registered partners and the continuity of the civil status of a child born abroad to the same sex couple was, in the particu-lar case mentioned above, guaranteed.



Zdroj: autorka

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Relationship Forms in the Contemporary Hungary – in the Light of the European Trends[1]

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Abstract

Family relationships have more and more significance in the 21th century. The regulations of family relations (especially the relationship forms) try to adjust itself to the social expectation, and to discharge it, that is a really big challenge for the national legislator and for the European Union as well. In my presentation, I would like to introduce the Hungarian solutions of this question, because the Hungarian Civil Code came into force in 15th March 2014, and the family law became the part of it. The incorporation was a big step and the experts waited it with bated breath, but the final version of the Civil Code become a big surprise for them. In Hungary there are three legal forms of relationships: marriage, registered partnerships and de facto partnership. The definitions and legal consequences of these three forms are different, and they cause problems in legal practice sometimes.

Keywords

Family; Marriage; Registered Partnership; de facto Partnership; Hungary.

1 Introduction – Family in Europe

Family, marriage, partnership – if we are reading these words, we can associate different things. Marriage and the traditions have less and less popularity. Young people do not need the traditional alternatives for establishing their emotional-financial community anymore, they try to find other solutions. But these relationships have not been protected enough in the past, the concerning regulations were quite minimal. The law-makers have not arranged these

1 Supported BY the ÚNKP-2018-3 New National Excellence Program of the Ministry of Human Capacities.

questions for long time, but nowadays it became indispensable to handle these problems. Across Europe there are differences between the nations' viewpoint, lots of nations can accept the modern form of family relations (for example same-sex marriages, de facto civil partnerships etc.) but some others stick to the traditional forms.

To be a member of a family, it is one of the basic rights, and this right appeared early in the European history.[2] The first and most important legal document was the Universal Declaration of Human Rights (UDHR) in 1948. According to the Article 16 of the UDHR "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State."[3] The International Covenant on Civil and Political Rights (ICCPR), which was adopted on 16 December 1966 and came into force 23 March 1976, composed the relevant regulations similarly in the Article 23. Both consider the family as a defended value, but any of them do not explain, what is the meaning of family, or what is the legal content of this legal institution. In 1950 the European Convention of Human Rights (EUCHR was adopted. According to Article 8 "*Everyone has the right to respect for his private and family life, his home and his correspondence*"[4] and the Article10112 complements it with the right to marry.[5] The same problem of these Articles can be considered like in the UDHR and in the ICCPR: the correct legal content is missing.

The European Court of Human Rights (ECHR) tries to interpret the content of these Articles. Nowadays it is a hard challenge also and of course the Court shall estimate the unique circumstances in every case, but the practice of ECHR reflects a unified standpoint. In the case of F v. Switzerland, the applicant, who was born in Switzerland in 1943, has married four times since 1963. The first three marriages were dissolved by divorce; the sole issue in the instant case was the temporary prohibition on remarriage imposed on him following the third divorce. F married Miss G in 1963 and divorced

2 BARZÓ, Tímea. *A magyar család jogi rendje (The legal orders of the Hungarian Family).* Budapest: Patrocínium Publisher, 2017, p. 36.

3 UDHR Article 16.3.

4 EUCHR Article 8 1.

5 "*Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.*" – EUCHR Article 12.

from her on 8 May 1964. On 12 August 1966, he remarried to Mrs. B, a divorcee, who bore him a son on 26 November of the same year. The couple separated in December 1978, and F cohabited with another woman. Mrs. B obtained a divorce on 27 October 1981. The court prohibited the applicant the remarrying within a year, under Article 150 of the Swiss Civil Code.[6] It was the first case, where the Court stand by the traditional explanation/interpretation of marriage, but it admits the freedom of matrimony. It was the same viewpoint in the *Rees v. United Kingdom* case.[7] The Court loosen this rigid interpretation later because it came to front the marriage of same-sex people. The applicants of case of *Schalk and Kopf v. Austria* in 2002 were born in Austria and they are living in Vienna as a same-sex couple. On 10 September 2002 the applicants requested the Office for Matters of Personal Status to proceed with the formalities to enable them to contract marriage. By a decision of 20 December 2002, the Vienna Municipal Office refused the applicants' request. Referring to Article 44 of the Civil Code (Allgemeines Bürgerliches Gesetzbuch), it held that marriage could only be contracted between two persons of opposite sex. According to constant case-law, a marriage, which is concluded by two persons of the same sex was null and void. The Court decision was that here has been a violation of Article 14 of the Convention taken in conjunction with Article 8. The explanation of the court stated, that nowadays the society can accept, that same-sex couples enter into a stable relationship like different-sex couples "The Court has established in its case-law that in order to an issue to arise under Article 14 there must be a difference in treatment of persons in relevantly similar situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment. The Court started from the premise that same-sex

6 *F v. Switzerland,* no. 11329/85 (1987).

7 *Rees v. the United Kingdom,* no. 9532/81 (1986) – In this case the applicant was born as female, but later came to receive treatment and live as a male. The proceed authority denied his request, to amend his birth certificate.

couples are capable to entering into a stable, committed relationships such as different-sex couples. Consequently, they are in a relevantly similar situation as different-sex couples as regards their need for legal recognition and protection of their relationship."[8]

The unification effort of the European Union ignored a long time the area of the family law, but the number of cross-border family relations was growing day by day. After the Amsterdam Treaty the judicial cooperation in civil matters were transferred to the competence of the European Union's bodies and the legislation has been started.[9] The Charter of Fundamental Rights of the European Union contains similar rights – as the other international document – and the protection of family life as well. It says, that "*Everyone has the right to respect for his or her private and family life, home and communications*."[10] In another section declare, that "*The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights*."[11] These sections guarantee a general protection of family life, but there are a lots of secondary legislation.[12] The problem of these legislations, that they cannot give a unified interpretation of marriage and of other relationship forms. The Court of Justice of the European Union (CJEU) created a very openly approach in many cases, it is sensitive, and it reflects to the modern expectation of society, but the interpretation of the definitions keeps up the member states. In Case of Maruko the CJEU declared, that "*civil status and the benefits flowing therefrom are matters which fall within the competence of the Member States and Community law does not detract from that competence. However, it must be recalled that in the exercise of that competence the Member States must comply with Community law and, in particular, with the provisions relating*

8 *Schalk and Kopf v. Austria,* no.30141/04 (2010).

9 SZEIBERT, Orsolya. *A családjogi harmonizáció kérdései és lehetőségei Európában. (The questions and possibilities of family law's harmonization in Europe).* Budapest: HVG-ORAC Publisher, 2014, pp. 22–24.

10 Charter of Fundamental Rights of the European Union (CFREU) 2012/C 326/02 section 7.

11 CFREU section 9.

12 For example the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, the Council Reguéation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation etc.

to the principle of non-discrimination"[13] In another case says, that "*The Member States are thus free to provide or not provide for marriage for persons of the same sex, or an alternative form of legal recognition of their relationship, and, if they do so provide, to lay down the date from which such a marriage or alternative form is to have effect.*"[14]

2 Marriage or not marriage? – the Hungarian answer

The Hungarian Civil Code[15] came into force at 15 March 2014., which was almost five years ago. It was a huge result, that the disposition of family law came into Civil Code, because earlier it was separated, and it was incomplete.[16] It was not necessary to creating orders, because private autonomy of the members is a huge part of family relations[17], and earlier the traditional approach and traditional practice was enough to deal whit legal problems. But today in a modern society there are some modern form of family relations. The Hungarian law-makers take the modern relations into consideration during planning the Civil Code and they wanted to widen the regulation.

Before I will analyse the system of CC, I shall write about the higher regulations of this theme. When the Fundamental Law of Hungary[18] came into force, it declared, that "*Hungary shall protect the institution of marriage, the conjugal union of a man and a woman based on voluntary and mutual consent; Hungary shall also protect the institution of the family, which it recognizes as the basis for survival of the nation.*"[19] These orders create some differences between marriage and other relationships form, but it doesn't mean, that marriage can be the only one protected form of the family relation by the law.[20] At the same time the Constitutional

13 Case C267/06 59.
14 Case C443/15 59.
15 Act V of 2013 about the Hungarian Civil Code (CC).
16 KŐRÖS, András. A házastársak közös rendelkezési joga és e jog megsértésének jogkövetkezményei (Disposition over common property and the consequences of this right's violation). *Családjog,* Vol. 2011/2. 1.-6.o.
17 KŐRÖS, András. A családjog jövője: Az új Ptk. Családjogi könyve – a 2013. évi V. törvény és a Szakértői Javaslat összevetése; Első rész: Alapelvek, Házasság, Élettársi kapcsolat (Future of family law: The Book 4 of the new Civil Code – Comparison of the Act V of 2013 and the Concept; Part 1. Principles, Marriage, De Facto Partnership. *Családijog*, 2013, no. 3, p. 81.
18 The Fundamental Law of Hungary came into force in 2012.
19 The Fundamental Law of Hungary article L time status: 1.I.2012.
20 SCHANDA, Balázs. A jog lehetőségei a család védelmére (The possibilities of law for the protection of families). *Iustum Aequum Salutare,* 2012, no. 2, p 77.

Court destroyed an old regulation of an Act, which contained the definition of family.[21] The explanation was, that the Fundamental Law considers family and marriage as the basic part of the nation, so it is necessary to protect them on the highest legal level. However, it does not mean, that other relationship forms (for example registered partnership for same-sex couples) cannot be protected by the State. The meaning of family cannot be acceptable in traditional sense, but the starting-point of legal practice must be the sociological interpretation of the notion of family.[22] This decision would be the basis of the legislation, and the Hungarian legislator takes the modern relations into consideration during the planning of CC. The plan of the legislator was, that they create an obvious and clear system with same personal, financial and inheritance consequences for every form of relationships.[23] They wanted to make the systems of marriage, the registered partners and de facto civil partners equal. However, in 25 March, 2003, the Hungarian legislator modified the Article L in the Fundamental Law, and the new sentence says, that "*the basis for family relationship is marriage, as well as the relationship between parent and child*".[24] It means that, if just the Article L could be the definition of family, the couples who not married, the only family relationship would be within their children. So, there would be a family relationship between mother and the children, or the father and the children, but there would be not family connection between the parents, unless if they are not married.

After this modification the legislator modified the plan of CC in the last moment before it would come into force.[25] Now the CC contains the regulation of Family law in Book 4, include the regulation of marriage. "*Marriage shall be considered contracted if a man and a woman together appears before the registrar in person and declare their intention to marry. Such declaration cannot be made*

21 This act was the Act CCXI of 2011 about the protection of families. The definition of family was in article 7: "*Family is a relationship between a man and a woman, who lived in an emotional and financial community together, and they are married, relative in direct line, or they live in guardianship.*"

22 Decision of Constitutional Court of Hungary no. 43/2012. (XII. 20.).

23 HEGEDŰS, Andrea. Az élettársi kapcsolat a polgári jogi kodifikáció tükrében (The de facto partnership in the light of the codification of Civil Law). *Pólay Elemér Alapítvány*, 2010, pp. 101–128.

24 The Fundamental Law of Hungary article L time status: after 2013 and nowadays.

25 KRISTON, Edit. Az élettársi kapcsolatok szabályozása az új Ptk. tükrében (The regulation of de facto partnerships in the light of the new Civil Code). *Advocat,* Miskolc, 2014, Vol. XVII, no. 1–2, pp. 35–36.

subject to a condition or time limit"[26] It is obvious, that the Hungarian legislator is loyal to the traditional approach. The age limit of marriage is 18 years, but in cases provided by law, the guardian authority may authorize the marriage of a minor of limited legal capacity over the age of sixteen years. The basic consequence of marriage is that it creates a status and it comes with other consequences for example property or succession questions.

The same-sex marriage is not legally accepted in Hungary, but there is the possibility of registered partnership for the same sex couples. The Constitutional Court declared in many cases, that the same-sex couples have the right that they have legal protection despite that they cannot marrying.[27] In 2007, the legislator created an independent act for the registered partners, which was not enough good, so the Constitutional Court destroyed before it would come into force. However, in 2009 the legislator reconsidered this independent act and established new rules of registered partnership. This is the Act XXIX. of 2009 on the registered partnership (RP Act), which is valid now. As you can see, the registered partnership is not part of the CC, because the regulation can be found in this independent act, but we can find an interesting solution of the legislator in the Article 3. This says, that "*If the CC or another Act is not ordering differently, the regulation of marriage shall apply mutatis mutandis to the registered partners*."[28] In consequence, if the CC declares a right for spouses, it shall be used for the registered partners also. For example, the Section 4:34 of CC declares the financial consequences of marriage: "*(1) Parties to the marriage and spouses may arrange their relationship in terms of property by means of a marital agreement for the duration of their matrimonial relationship. (2) Unless otherwise provided by the marital agreement, marital community of property (matrimonial property regime) shall exist between the spouses for the duration of the matrimonial relationship*."[29] We cannot find in this section any rule about the registered partners, but because of the indicating rule of the RP Act,

26 Act V of 2013 on the Civil Code, article 4:5.

27 See more SCHANDA, Balázs. A házasság intézményének védelme a magyar alkotmányjogban (The protection of marriage in the hungarian fundamental law). *Iustum Aequum Salutare,* 2008, no. 3, p. 71; and DRINÓCZI, Tímea and Judit ZELLER. A házasság és a család – alkotmányjogi értelemben (The marriage and the family – in the sense of fundamental law). *Acta Humana,* 2005, no. 4, p. 77–78.

28 RP Act. 3.§ (1).

29 CC 4:34. § (1)–(2).

it is use for them. However, there are some differences between spouses and registered partners. The RP Act declares in Article 3, that registered partners

- cannot adopt a child as the spouses,
- cannot use each other names,
- cannot participate/ involved in a reproduction procedure,
- the presumption based on wedlock cannot use for the establishment of paternity.[30]

There is a last one legal type of relationship forms in Hungary, and this is the de facto partnership. This form can be found in CC, but not in the Book 4. (or rather partly can be found in Book 4). In this case the legislator implemented an individual solution, because the main regulation[31] can be found in Book 6 (in Law of Obligation) and the regulation which affect not only to the de facto partners but their childrens also[32], can be found in Book 4. The definition – what the legislator gives – is this: "*De facto partnership means when two persons are living together outside of wedlock in an emotional and financial community in the same household provided that neither of them is engaged in wedlock or partnership with another person, registered or otherwise, and that they are not related in direct line, and they are not siblings.*"[33] As you can see, the de facto partnership is applicable for different-sex or same-sex couples, but the most problematic point is, that the legislator treats de facto partnership as a special contract and there are less consequences as spouses or registered partners, and only the de facto partners, who have own child, can be family.

3 Conclusion

As a summary, it can be stated, that, in Europe the modern approach of family starts to dominate in society and in the legal system also. Lots of European country accepted the modern form of family relations[34], but also there are some State, which are still attaching to the traditional solutions.

30 RP ACT 3. § (2)–(4).
31 As the definition, the financial consequences and the regulation of agreements between de facto civil partners – CC 6:514-6:517.
32 As the maintance obligation and the right of tenancy – CC 4:86-4:95.
33 CC 5:514. § (1).
34 For example, 15 European Nation accept the marriage of the same-sex couples, and after 1. January 2019. Austria will join this States.

The Hungarian legislator tries to follow the expects of the modern society, and established the base of modern legal protection, but it is also insisting on traditional solutions. This duality causes conflict and contradiction of the regulations. I think, the regulation is not finished yet, the practice is going to discover its faults and the elimination of the occurred problems will be the task of the generation of the future.

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Same-Sex Couples on the Move: Family Life Guaranties & Challenges[1]

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Abstract in original language

Ochrana základých práv LGBTI osôb je pretrvávajúcou citlivou právnou otázkou. Pri uvážení širokých rozdielov vo vnútroštátnych úpravách manželstva sa páry rovnakého pohlavia neraz stretávajú s prekážkami pri pohybe medzi členskými štátmi. Analýzou rozsudku Súdneho dvora vo veci C-673/16 *Coman*, rozhodnutia ESĽP v prípade *Taddeucci* and súvisiacich ustanovení práva EÚ popisujeme základné záruky pre migrujúce páry. Napriek ostatnému vývoju sa domnievame, že absencia pravidiel uznania neoprávnene obmedzuje voľný pohyb párov rovnakého pohlavia. Článok vyzvdihuje prínos vývoja rozhodovacej činnosti pre "dúhové rodiny" a poskytuje základný náčrt otázok spojených so slobodou pohybu, ktoré môžu byť v blízkej budúcnosti kľúčové v skúmanej problematike.

Keywords in original language

LGBTI; manželstvo osôb rovnakého pohlavia; sloboda pohybu; Súdny dvo Európskej Únie; Európsky súd pre ľudské práva; Coman; Taddeucci.

Abstract

Fundamental rights protection of LGBTI persons remains a highly sensitive legal issue. Considering vast differences in national spousal legislations, same-sex couples encounter obstacles when they move from one Member State to another. Through analysis of the CJEU Judgment C-673/16 *Coman*, decision of the ECtHR in *Taddeucci* case and relevant EU provisions

[1] The article was supported from the research project VEGA n. 1/0386/19 – Nové dimenzie metodológie právnej argumentácie – Úloha právnych princípov vo viacúrovňovom právnom systéme (New dimensions of legal argumentation methodology – Role of legal principles in multilevel legal system).

we describe fundamental guaranties of family life for migrating couples. Despite recent advancement we contend that the absence of recognition rules hinders free movement of same-sex couples unjustifiably. The article highlights the importance of jurisprudential progress in protection of 'rainbow families' and provides an indication of movement-connected issues, which may shape subsequent development of this topic.

Keywords

LGBTI; Same-Sex Marriage; Free Movement; Court of Justice of the European Union; European Court of Human Rights; Coman; Taddeucci.

1 Introduction

Since the foundation of the European Communities the movement of persons has been promoting progressively with intention of economic growth. In the beginning with creation of *marché commun* and later internal market the freedom of movement as one of the four fundamental freedoms played crucial role in economic integration. In 1993 the EU citizenship was established as a fundamental status, bringing the right to move and reside freely within the Member States for all EU citizens. Nowadays it is estimated that approximately 4 per cents of the EU population of working age consist of EU nationals living in another EU country; also, we cannot leave unmentioned the 5 per cent of population who are third country nationals living in the EU.[2]

Although achievements and development not only in areas purely economic and political but also in area of human rights are undeniable, still some groups of EU citizens encounter obstacles in relation with movement among Member States due to a civil status or way of family life. The article focuses on same-sex couples and their legal recognition in Member State in a light of recent judgment of the EU Court of Justice (hereinafter ECJ).

The effects of same-sex marriage concluded abroad may be treated as marginal political issue, mainly in the east of EU, however they pose complex

2 EUROSTAT, [migr_pop1ctz]; age group 15-64y, 2017.

legal problem affecting everyday lives of individuals. The freedom of movement brings brand new legal puzzles rich in foreign or EU elements; thus, the development abroad towards marriage equality must be taken seriously. Even Slovakia discovered the significance of legal discourse on same-sex unions in a recent run for a seat of European Medicines Agency (EMA). Although, the Slovak Minister of Health and embassy in Brussels were trying to hush up uncertainty of the EMA's staff over their family status there,[3] Slovakia lost the vote. Additionally, the previous bold statements, made by the embassy and Minister of Health, that Slovakia would recognize foreign same-sex unions were denied by Slovak Ministry of Justice, Ministry of Interior and Ministry of Labour.[4]

According to survey conducted by the EU Agency for Fundamental Rights (hereinafter FRA) approximately 7 per cent of the EU citizens who identify as LGBT are living in another Member State.[5] This article aims to pinpoint issues in free movement of lesbian and gay couples and highlights the importance of jurisprudential progress.

2 Family Life of Same-Sex Couples

Normative systems praise family as the fundamental and natural unit of society and such proclamation are found in various international legal instruments.[6] It is recognized that the special social bonds among people who are deemed as family deserve respect and protection from any unjust interference; therefore, leading a normal family life and enjoyment of family members' company must be allowed.[7]

3 POLITICO. Bidders for Brexit-exiled EU agency split along social fault lines; EUobserver. Fears for LGBTI staff at Brexit relocation agencies.

4 SME. *Gay páry pre slovenské úrady neexistujú, tie vidia len jednotlivcov.*

5 EU AGENCY FOR FUNDAMENTAL RIGHTS. *EU LGBT survey European Union lesbian, gay, bisexual and transgender survey: Main results*, pp. 94–95.

6 E.g. Art. 16 Universal Declaration of Human Rights; Art. 17 and 23 International Covenant on Civil and Political Rights; Art. 10 International Covenant on Economic, Social and Cultural Rights; Art. 16 European Social Charter and revised European Social Charter; Art. 8 European Convention on Human Rights; Art. 7 EU Charter of Fundamental Rights.

7 *Olsson v. Sweden,* (no. 1) § 59; *Marckx v. Belgium,* § 31.

Speaking of families consisting of same-gender partners, there are conceptual differences in family life possibilities acknowledged by the States to such partners, despite there are still ongoing oppression in some countries[?]. In greater or lesser extend the national legislation acknowledges existence of relationships and may grant some right for cohabitees. Some countries have established civil unions specifically for lesbian and gay couples, the others gone further to fully acknowledge marital equality.

The purpose of the following sub-sections is twofold. First, they summarize national legislation on same-sex unions in EU Member States with few notices on variability in regulations and complexity of research issue. Second, they assembe the ECHR and the EU provisions with relevant jurisprudence related to migration and family life of same-sex couples.

2.1 Same-Sex Unions in EU Member States

Since 2001, when the Netherlands historically opened marriage for everyone, overall 14 of EU Member States have decided for marriage equality. Nowadays seven EU Member States allow the partners of same sex to choose whether they wish to conclude marriage or civil partnership and additionally another seven Member States celebrate solely marriages.

In 1998, Belgium enacted law on *cohabitation légale* that can be entered by same-sex and mixed couples and until the change of legislation in 2003, the marriage was reserved only for heterosexual couples. [8] French legal system introduced gender neutral PACS – *pacte civil de solidarité* [civil union of solidarity] in 1999, same-sex couples concluded *mariage* for the first time in 2013.[9] According to Luxembourgish law of 2014 two people irrespective of their sex might conclude *partenariat*, and additionally same-sex couples

8 Loi du 23 novembre 1998 instaurant la cohabitation légale; Loi du 13 février 2003 ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil.

9 Loi n° 99-944 du 15 novembre 1999 relative au pacte civil de solidarité; Loi n° 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe.

got opportunity to marry in 2015.[10] Malta introduced *unjoni ċivili* for two persons of the same or different sex in 2014 and started celebrating marriages – *żwieġ* of same-sex couples in 2017.[11] Historic Dutch law of 2001 allowed two persons of the same sex to celebrate *huwelijk* through *geregistreerd partnerschap? has been also possible for every couple since 1998*.[12] In the meantime it was possible to enter civil partnership in the whole United Kingdom only for same-sex couples, even though equality marriage has been granted since 2014 in Wales, England and Scotland, excluding Northern Ireland.[13] And finally, Austria recognizes *eingetragene Partnerschaft* and by the decision of *Verfassungsgerichtshof* [Austrian Constitutional Court] the marriage became possible also for two men or two women starting from January 2019.[14]

Denmark introduced *registreret partnerskab* solely for same-sex couples in 1989, which was replaced by marriage – *ægteskab* after the change of marital

10 Loi du 9 juillet 2004 relative aux effets légaux de certains partenariats (Mémorial A No. 143 de 2004); Loi du 4 juillet 2014 portant a) réforme du Titre II.- du Livre Ier du Code civil «Des actes de l'état civil» et modifiant les articles 34, 47, 57, 63, 70, 71, 73, 75, 76, 79, 79-1 et 95; b) réforme du Titre V.- du Livre Ier du Code civil «Du mariage», rétablissant l'article 143, modifiant les articles 144, 145, 147, 148, 161 à 164, 165 à 171, 173 à 175, 176, 177, 179, 180 à 192, 194 à 199, 201, 202, 203 à 206, 212 à 224, 226, 227, introduisant les articles 146-1, 146-2, 175-1, 175-2 nouveaux et abrogeant les articles 149 à 154, 158 à 160bis, 178, le Chapitre VIII et l'article 228; c) modification des articles 295, 351, 379, 380, 383, 390, 412, 496, alinéa 1, 509-1, alinéa 2, 730, 791, 847 à 849, 852, alinéa 3, 980, alinéa 2, 1405, 1409 et 1676, alinéa 2, et abrogation des articles 296 et 297 et 1595 du Code civil; d) modification de l'article 66 du Code de commerce; e) modification des articles 265, alinéa 1er, 278 et 521 du Nouveau Code de procédure civile; f) introduction d'un Titre VI.bis nouveau dans la Deuxième Partie du Nouveau Code de procédure civile; g) introduction d'un Chapitre VII.-I nouveau au Titre VII du Livre Ier du Code pénal; h) abrogation de la loi du 23 avril 1827 concernant la dispense des prohibitions du mariage prévues par les articles 162 à 164 du Code civil; et i) abrogation de la loi du 19 décembre 1972 portant introduction d'un examen médical avant mariage. (Mémorial A No. 125 de 2014).

11 No. IX of 2014 Civil Unions Act, 2014, Government Gazette of Malta No. 19,239 – 17. 04. 2014; No. XXIII of 2017 Marriage Act and other Laws (Amendment) Act, 2017, Government Gazette of Malta No. 19,840 – 01. 08. 2017.

12 Wet van 5 juli 1997 tot wijziging van Boek 1 van het Burgerlijk Wetboek en van het Wetboek van Burgerlijke Rechtsvordering in verband met opneming daarin van bepalingen voor het geregistreerdVolgende zoekterm markering partnerschap (Staatsblad 1997, nr. 324); Wet van 21 december 2000 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht (Wet openstelling huwelijk (Staatsblad 2001, nr. 9).

13 Marriage (Same Sex Couples) Act 2013; Marriage and Civil Partnership (Scotland) Act 2014; Civil Partnership Act 2004.

14 Bundesgesetz über die eingetragene Partnerschaft, BGBl. I Nr. 135/2009; Erkenntnis vom 4. Dezember 2017 VfGH G 258-259/2017-9.

legislation in 2012.[15] Ireland enabled marriages after a national referendum in 2015, following that date conclusion of civil partnerships was not possible anymore.[16] *Rekisteröity parisuhde* [registered partnership] was allowed in Finland in 2002 that could be contracted until the equalization *of marriage – avioliitto in 2017*.[17] Germany introduced *Lebenspartnerschaft* for same-sex couples in 2001. This legislation was replaced in 2017 after opening access for gays and lesbians to marriage; however, previous law remains applicable on partnerships concluded before October 2017 or abroad.[18] Portugal legalized marriage – *casamento* for same-sex couples in 2010, besides cohabiting couples in informal *união de facto* have been enjoying legal protection since 2001.[19] The autonomous communities and cities in Spain are affording some forms of recognition; moreover, already in 2005 after a legislation change the equal access to *matrimonio* were granted.[20] Under Swedish law same-sex couples have been enjoying *registrerat partnerskap* since 1995 up until 2009, when gender neutral marriage – *äktenskap* was enabled by law. [21]

Additionally, eight other Member States allow civil unions only for couples of two persons of the same sex. In Cyprus there were established *πολιτική συμβίωση* for couples irrespective of gender in 2015.[22] Czech *registrované partnerství* has been reserved only for same-sex couples since its enactment in 2006.[23] Greece has designed *σύμφωνο συμβίωσης* for heterosexual couples, but after the legislative changes in 2015 following ECHR Valianatos

15 Lov nr 372 af 07/06/1989 om registreret partnerskab; Lov nr 532 af 12/06/2012 om ændring af lov om ægteskabs indgåelse og opløsning, lov om ægteskabets retsvirkninger og retsplejeloven og om ophævelse af lov om registreret partnerskab.

16 Marriage Act 2015 (No. 35 of 2015); Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (No. 24 of 2010).

17 Laki avioliittolain muuttamisesta (156/2015).

18 Lebenspartnerschaftsgesetz vom 16. Februar 2001 (BGBl. I S. 266); Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts vom 28. 07. 2017, (BGBl, I S. 2787).

19 Lei n.° 9/2010 de 31 de Maio Permite o casamento civil entre pessoas do mesmo sexo; Lei n.° 7/2001 de 11 de Maio Adopta medidas de protecção das uniões de facto.

20 Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio.

21 Lag (1994:1117) om registrerat partnerskap Lag (2009:253) om ändring i äktenskapsbalken.

22 ΝΟΜΟΣ Που Προνοει Για Τη Συναψη Πολιτικησ Συμβιωσησ Ν. 184(Ι)/2015 Ε.Ε. Παρ. Ι(Ι) Αρ. 4543, 9. 12. 2015.

23 Zákon č. 115/2006 Sb. o registrovaném partnerství a o změně některých souvisejících zákonů.

judgment, gay and lesbian couples were allowed.[24] After ECHR judgment Oliari, Italy passed legislation on *unione civile*.[25] Same-sex unions have been made possible in Slovenia since 2006, however the law of 2017 strengthens significantly rights of partners in *partnerska zveza*.[26] Although Estonia has been celebrating civil unions – *koselulepingu* since 2016, the legislators still fail to enact implementing legislation.[27] Moreover, marriages of foreign couples concluded abroad are recognized as marriages in Estonia.[28] Gay couples are able to enter *bejegyzett élettársi kapcsolat (registered partnership)* in Hungary, however a new constitution from 2011 defines marriage as a union of opposite-sex partners.[29] Similarly in Croatia, national referendum in 2013 limited marriage to heterosexual couples in constitution, though a year later the Croatian parliament approved životno partnerstvo *(civil union)*.[30]

Despite the tendencies towards equality, the attitudes in Member States from the eastern part of the EU suggest otherwise. It was after the failed referendum about…, when the Slovak parliament adopted constitutional definition of marriage as a union of a man and a woman in 20XX.[31] The Bulgarian post-socialist constitution of 1991 secures marriage for couples consisting of a man and a woman, [32] the very same states Art. 18 of the Polish constitution. Marital definition as union based on free consent of a man and a woman is encompassed in the Lithuanian constitution of 1992 and Lithuanian Civil code specifically prohibits same-sex marriages; moreover, same-sex partners would be excluded from entering civil union either.[33] For

24 ΝΟΜΟΣ ΥΠ' ΑΡΙΘ. 4356 ΦΕΚ Α'181/24. 12. 2015.

25 Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze». (GU Serie Generale n.118 del 21 maggio 2016).

26 Zakon o partnerski zvezi (Uradni list RS, št. 33/16).

27 Kooselusaedus, RT I, 16. 10. 2014, 1.

28 Tallinna Ringkonnakohus, 24. 11. 2016 a otsus asjas nr 3-15-2355.

29 2009. évi XXIX. törvény a bejegyzett élettársi kapcsolatról, az ezzel összefüggő, valamint az élettársi viszony igazolásának megkönnyítéséhez szükséges egyes törvények módosításáról.

30 Zakon o životnom partnerstvu osoba istog spola (Narodne Novine 92-1836/2014, 28. 7. 2014).

31 Ústavný zákon č. 161/2014 Z. z. ktorým sa mení a dopĺňa Ústava Slovenskej republiky č. 460/1992 Zb. v znení neskorších predpisov.

32 Конституция На Република България (Обн., ДВ, бр. 56 от 13. 07. 1991 г.).

33 Art. 48 Lietuvos Respublikos Konstitucija įsigaliojo 1992 m. lapkričio 2 d, (Žin., 1992, Nr. 33-1014); Art. 3. 12. ; Art. 3.229 Lietuvos Respublikos civilinis kodeksas. Trečioji knyga. Šeimos teisė (Žin., 2000, Nr. 74-2262).

the definition of marriage Latvia changed its constitution in 2006 and Civil Code forbids gay marriages.[34] There is no constitutional limitation of marriage in Romania; however provisions of *Codul Civil* outlaw same-sex marriages. Furthermore, it stipulates that same-sex marriage and any civil union contracted abroad should not be recognized in Romania.[35]

2.2 Family Life under the ECHR

Earlier ECtHR was reluctant to afford protection for same-sex couples under notion of family life enshrined in Art. 8 ECHR; however, in its view these couples could enjoy right to respect their private life.[36] It was not until 2010 that the court has found out there was no reason to differentiate heterosexual and homosexual couples in relation to family life.[37] Although, same-sex couples may not rely on right to marry yet,[38] they should not be treated different without reasonable justification in national legislation on family matters.[39] Finally, the undeniable development in national legislations consequently led the ECtHR to recognize positive obligations of the States to provide legal framework for recognition and protection of the same-sex partner;[40] however, scope of such legislation and timing of adoption falls under states' margin of appreciation.[41]

In relation to migration, the Court reiterates that the State has sovereign right to control entry of foreign nationals on its territory. The right to respect family life in Article 8 ECHR does not extend to a state's obligation to accept the choice of married couple to live in specific country.[42] Therefore the extent of respect of family life in legislation on family reunification vary depending of circumstances of the involved persons and even economic general interest.[43] Nevertheless, if the State provides rights of family reunification, that legislation must be applied in non-discriminatory manner.[44]

34 Art. 110 Grozījums Latvijas Republikas Satversmē, Latvijas Vēstnesis, 1 (3369), 03. 01. 2006.; Art. 35 Civilikums, Valdības Vēstnesis, 41, 20. 02. 1937.
35 *Codul Civil.*
36 *Mata Estevez v. Espagne.*
37 *Schalk and Kopf v. Austria*, paras 92 – 94.
38 *Schalk and Kopf v. Austria*, paras 63 and 101; *Hämäläinen v. Finland*, para 71.
39 *Vallianatos and Others v. Greece.*
40 *Oliari and Others v. Italy*, paras. 178, 180 – 185; *Orlandi and Others v. Italy*, para. 201.
41 *Oliari and Others v. Italy*, para. 163.
42 *Abdulazis, Cabales and Balkandali v. UK*, para. 67; *Boujlifa v. France*, para 42.
43 *Jeunesse v. Netherlands,* paras. 103 and 107; *Biao v. Denmark,* para. 117.
44 *Hode and Abdi v. UK,* § 43.

Concerning the recognition of foreign marriages of same-sex couples in countries which do not regulate such unions, it should be noted that generally it is up to the State to enact legislation on validity and legal consequences of marriage; however, any limitations must meet criteria under Art. 8 (2) ECHR.[45]

2.3 The EU Law

Although the European Union thirsts primarily for economic integration, it has adopted its own Although the European Union thirsts primarily for economic integration, it adopted own human rights bill which is relevant in application of the EU law and in that case binding even for Member States.[46] Family life protected under EU Charter of Fundamental Rights should have similar scope as the right to family life under the ECHR. Explanation on EU Charter's right to marry and right to found a family states that "*This Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. This right is thus similar to that afforded by the ECHR, but its scope may be wider when national legislation so provides.*"[47]

The EU primary law guarantees to every EU citizen a right to move and reside freely in another Member State,[48] however secondary legislation contains more detailed regulation of this right. The Directive 2004/38/EC, hereinafter Citizen Rights' Directive, extends a right of residence to a family member accompanying or joining the Union citizen. In the Directive as a family member is qualified primarily a spouse and register partner, however, the partnership is subjected to restrictions – it must be concluded in a EU Member State and the legislation of host country should recognize partnerships as equivalent to marriage.[49] Also others family members – i. e., members of household, dependants and the partner with whom the Union citizen has a durable relationship, duly attested enjoy only limited scope of rights under the Directive.[50]

45 *Benes v. Austria.*
46 Art. 51, Charter of Fundamental Rights of the European Union.
47 Explanation on art. 9, Explanations relating to the Charter of Fundamental Rights.
48 Art. 21, art. 45 TFEU.
49 Art. 2 (2) Directive 2004/38/EC.
50 Art. 3 (2) Directive 2004/38/EC.

Even the definition of spouse was problematic,[51] since previous jurisprudence of ECJ were not welcoming to same-sex partnerships.[52] In case of third country nationals, there is no right for family reunification a partner under Directive 2003/86/EC.[53]

In relation to rights of LGBT, the Commission and the FRA noticed the deficiencies of Member States in application of the Citizens' Rights Directive.[54] Consequently, the European Parliament adopted resolution that called on Member States to fully implement Directive, since "*Directive imposes an obligation to recognize freedom of movement to all Union citizens (including same-sex partners) without imposing the recognition of same-sex marriages"*[55] Afterwards the Commission published guide to the Directive and reminded that *"[m]arriages validly contracted anywhere in the world must be in principle recognized for the purpose of the application of the Directive."*[56]

3 *Taddeucci and McCall v Italy*

On 15th September 2009, Italian citizen Roberto Taddeucci and his husband Douglas McCall from New Zealand lodged application with ECHR against Italy because of refusal to grant residency by Italian authorities. Mr. Taddeucci and Mr. Douglas have been together since 1999, when

51 GUILD, E., S. PEERS and J. TOMKIN. *The EU Citizenship Directive: A Commentary,* p. 33; TITSHAW, S. *Same-Sex Spouses Lost in Translation? How to Interpret "Spouse" in The E.U. Family Migration Directives.*

52 RIJPMA, J. and N. KOFFEMAN. *Free Movement Rights for Same-Sex Couples un-der EU Law: What Role to Play for the CJEU?* p. 469; TONER, H. *Migration Rights and Same-Sex Couples in EU law: Case Study.*

53 Art. 4 Directive 2003/86/EC.

54 Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States COM(2008) 840 final.
Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I – Legal Analysis. European Union Agency for Fundamental Rights. Wien, 2009. ISBN-13 978-92-9192-291-8.

55 Sec. 2, European Parliament resolution of 2 April 2009 on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (2008/2184(INI)).

56 Art. 2. 1. 1., Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM(2009) 313 final).

they met on holiday in Spain. After living in New Zealand, they decided to move to Italy in 2003. It was after Mr. McCall's student visa expired, when he applied for residency as a family member of Italian citizen, however the application was rejected by authorities. The court of first instance *Tribunale di Firenze* held that partners in de facto unions should be included in the notion "family member", since the couple lived together, and they were recognized as non-married partners in New Zealand, the court revoked the rejection and granted residency.[57]

Subsequently, the judgment was contested before *Corte d'appello di Firenze* by the authorities. Appellate court disagreed with *Tribunale di Firenze* on scope of family members, the court emphasised that protection of family cannot be extended to cohabiting partners. In the decision it was concluded that the status that same-sex couple had gained in New Zealand was contrary to Italian public order.[58] The couple filed appeal to *Corte di Cassazione* which ruled that under the law only spouse and strictly defined family members are entitled to residency and neither the EU Citizenship Directive were applicable, therefore the appeal was dismissed. Consequently Mr. Taddeucci and Mr. McCall moved to the Netherlands, initiated proceeding in ECHR and in a meantime got married.[59]

A breach of the Art. 14 ECHR in conjunction with Art. 8 was complained in the application, it was suggested that the rejection of residency by the Italian authorities constitues discrimination based on sexual orientation. Generally, the Government of Italy relied on margin of appreciation in relation to regulation of same-sex unions and considered the protection of traditional family to be legitimate aim.[60] TheArt. 14 ECHR prohibits any discrimination in relation to other rights protected in the ECHR, due to its complementary character it was necessary to establish, if the case falls under the scope of rights protected by ECHR. In that relation the Court reiterated that Art. 8 did not impose obligation to meet a wish of a family to settle

57 *Taddeucci and McCall v. Italy*, paras. 7–14; *Taddeucci et McCall c. Italie*, Affaire communiquée.
58 *Taddeucci and McCall v. Italy*, paras. 15–18; *Taddeucci et McCall c. Italie*, Affaire communiquée, Corte di Cassazione, prima sezione civile, sentenza del 17 marzo 2009, n. 6441.
59 *Taddeucci and McCall v. Italy*, paras. 19–25; Taddeucci et McCall c. Italie, Affaire communiquée, Corte di Cassazione, prima sezione civile, sentenza del 17 marzo 2009, n. 6441.
60 T*addeucci and McCall v. Italy*, para. 35, 42–43.

in a specific country. However, in some cases family life may be affected, especially when a person keeps personal connection or family ties in a given country. Following in that time emerging jurisprudence the Court established that the relationship of a same-sex couple fell under notion of family life. Therefore, considering facts of the case, the Art. 8 ECHR in conjunction with Art. 14 was applicable.[61]

To assess that nature of a State's action is discriminatory, there needs to be a difference in treatment between persons in similar situation or, contrarywise, the lack of differentiation in significantly different situation. The Court stated that without reasonable justification, even general measure or policy that has disproportional effect on the specific group is discriminatory. In this case it was clear that unmarried same-sex couples were treated in same manner as unmarried couples of opposite sexes, since the law granted residency only to spouses. However, the heterosexual couples were able to marry, on contrary, two men or two women had no possibility to tie a knot and subsequently enjoy residency permit. Therefore, these couples cannot be regarded to be in similar position. The Court noticed that "*it is precisely the lack of any possibility for homosexual couples to enter into a form of legal recognition of their relationship which placed the applicants in a different situation from that of unmarried heterosexual couples.*"[62]

The discriminatory nature of the comparable treatment in a significantly different situation dwells in absence of objective and reasonable justification. Therefore, two criteria must be met – first, lack of legitimate aim and second, disproportionality in relation to the means that were used aimed. In its position Italy recalled to margin of appreciation and the aim to protect traditional family. Although, the Court found that protection of family may present legitimate aim, in relation to residency permit it did not constitute convincing reason to justify discrimination based on sexual orientation.[63] On these grounds the Court in its judgment of June 2016 found violation of Mr. Taddeucci and Mr. McCall's right to not be discriminated in relation to right to respect family life.

61 Ibid., paras. 53–60.
62 Ibid., paras.81, 83, 95..
63 Ibid., paras. 87, 93, 94.

4 C-673/16 *Coman and Others*

Romanian citizen Adrian R. Coman and American Robert C. Hamilton in their lawsuit of 2013 they asked the *Judecătoria Sectorului 5 Bucuresti* to rule that Romanian authorities discriminated against applicants. The two had met in the United States in 2002, where they were living until 2009. Afterwards Mr. Coman moved to Belgium, where he was employed at the European Parliament. Finally, the couple got married there in 2010. Following the termination of Mr. Coman's occupation in Brussels, they intended to move in Romania. Initially they sought inscription of marriage certificate to Romanian civil status register, however their demand was rejected. Subsequently they requested authorities to provide information on conditions for Mr. Hamilton's residency application. In a reply on the request, they were notified that there was no possibility to obtain residency for period longer than 3 months due to non-recognition of their marriage. On basis of that reply, Mr. Coman and Mr. Hamilton brought an action demanding a declaration of given practice as discriminatory together with a request for a compensation and a call on putting an end to the discrimination.

At first, the *Judecătoria Sectorului 5 Bucuresti* declined its jurisdiction. The case was transferred to the *Tribunalul Bucuresti*, however just to find no jurisdiction as well. The negative conflict of competence had to be resolved by the *Curtea de Apel Bucuresti* that ordered case back to the *Judecătoria Sectorului 5 Bucuresti.*[64] After hearing parties, the *first instance court* requested constitutionality review of the *Codul Civil* provisions that ban recognition of same-sex unions. Subsequently in 2016, the *Curtea Constituțională* referred questions to the Court of Justice for a preliminary ruling, because the interpretation of Citizens Rights' Directive seemed to be crucial point, since Romanian *Noul Codul Civil* prohibits recognition of same-sex marriage and any kind of civil partnership; however, it expressly states in art. 277 (4) that this does not affect the EU provisions on free movement of persons.[65]

First, ECJ recalled that although the *Curtea Constituțională* sought interpretation of the Directive, the rights in the Directive were limited to EU citizens

64 Tribunalul Bucuresti, Hotarare 286/2015 din 04. 03. 2015, dosar n. 31667/3/2014; Curtea de Apel Bucuresti, Hotarare 183/2015 din 14. 09. 2015 dosar n. 31667/3/2014.

65 Art. 277 Lege nr. 287 din 17 iulie 2009 privind Codul civil (republicare 2011).

moving to another EU country; therefore, it was not applicable to the position of Mr. Coman and Mr. Hamilton. However, the Court agreed with its previous jurisprudence and with opinion of the Advocate General Wathelet that the EU citizen could be discouraged from exercising free movement, if he would be precluded from continuing in his family life after returning to the country of origin.[66] Therefore, the fact that Mr. Coman had already enjoyed right of free movement when he was residing in Belgium, entitled him to the rights of a "returnee". The ECJ stressed that the EU citizen after exercising freedom of movement may rely directly on the rights contained in art. 21 (1) TFEU, and that even against the state of his origin. In that light the Directive should be applied by analogy when directly applying art. 21 (1) TFEU.[67]

On a question whether the term spouse used in the Directive includes person married to EU citizen of same sex, Wathelet suggests that for the sake of uniform application and principle of equality this term is autonomous and does not rely on national law,[68] and the Court emphasises accordingly that this term is gender neutral.[69] Even tough matters of civil status falls under retained powers, their exercise must be in compliance with EU law, especially with freedom of movement. The ECJ concludes that any derogation from the right of free movement must be interpreted strictly, such restriction need to be based on objective public interest and proportionate. [70] Although some Member States view protection of heteronormative marriage as matter of public interest, recognition of same-sex marriage for granting residency without obligation to legalise such unions cannot, according to the ECJ, undermine national concept of marriage. Moreover, it neither pose threat to fundamental interests of society; therefore, the objections of public policy and national identity are not legitimate.[71] Based on these thoughts, the ECJ decided that a Member State cannot refuse to grant residence permit to a same-sex spouse of its own national, if that national has

66 Opinion of Advocate General Wathelet, *Coman*, C-673/16, para. 25; *Coman,* C-673/16, para. 24.
67 *Coman*, C-673/16, paras. 23–26, 31.
68 Opinion of Advocate General Wathelet, *Coman*, C-673/16, para. 34.
69 *Coman,* C-673/16, paras. 35–36.
70 Ibid., paras. 41, 44.
71 Ibid., paras. 42, 44–46.

exercised freedom of movement and has created or strengthened family life in another Member State. Same-sex spouse from third-country has in such situation derived right of residence in that Member State for more than three months.[72]

After delivery of ECJ judgment, the *Curtea Constituțională* ruled that Art. 277 (2) and (4) of *Noul Codul Civil* conform with the Constitution insofar they allow right of residency according to EU law for the spouses in same-sex marriage concluded in another EU Member State. A relationship of same-sex couple falls under constitutional and fundamental right to family life. In the court's view, couples in stable relationship have a right to express their personality and are entitled, in time and by the means provided by law, to benefit from legal and judicial recognition of corresponding rights and duties. Therefore, the ban cannot constitute basis for refusal of residency permit for family reasons; therefore, in that case the prohibition of same-sex marriage would not apply according to Art. 277 (4).[73] In the main proceeding, the *Judecătoria Sectorului 5 București* have not issued a judgment yet.

5 Implications for Family Life of Same-Sex Couples

Based on the ECtHR and ECJ jurisprudence the same-sex couples should enjoy legal guaranties primarily in obtaining residence permit for the sake of their family life. The *Taddeucci* reasoning should provide guaranty for same-sex couples in committed relationship to enter and stay in the country which does not provide any mean of recognition for such a couple. On the other hand, the *Coman* judgment more narrowly protects married same-sex couples from deny of entry and stay in EU countries which do not recognize that kind of union. Although, the ECJ has stated that a marriage should be concluded in a Member State, considering other formulation that family life should be created or strengthened in a Member State, we contend that even same-sex marriage concluded outside the EU should be recognized.[74] However, for a returning national previous exercise of free movement is mandatory.

72 Ibid., paras. 51, 56.
73 Decizia nr. 534 din 18 iulie 2018, Dosar nr. 78D/2016, paras. 41–43.
74 *Coman*, C-673/16, para. 56 compared with para. 51.

The first national ruling following the ECJ decision was issued by the end of June 2018 by the *Административен съд София-град* [Administrative Court Sofia – City]. The instant adoption of ECJ jurisprudence is not surprising since judgments of ECJ are deemed to have "*res interpretata"* effect, thus the interpretation of EU law is binding for every national court. The Bulgarian case concerned residence permit for Cristina P., Australian wife of French national Mariama D. who have married in France. The court granted residence permit to Cristina based on the ECJ interpretation of term "spouse" in Citizens' Rights Directive.[75]

In contrast, the *Taddeucci* principle seems to cover wider range of situation than *Coman*, nevertheless ECtHR judgments lack clear *extra omnes* quality, therefore the reception of its arguments by national courts tends to be more gradual. Especially countries that do not recognize same-sex couples, deny residence permit of foreign partner and therefore halt enjoyment of normal family life. The interpretation of Articles 8 and 14 ECHR in *Taddeucci* should provide solution for many international couples living in Europe. The issue is not unfamiliar for Slovakia either.[76] Apart from family reunification of third country nationals and EU free movement provisions, the *Zákon o pobyte cudzincov* [Slovak Act on Residence of Aliens] provides permanent residency for 5 years to a spouse of Slovak national.[77] However the same-sex spouse of a Slovak national cannot benefit from this provision, since the marriage is constitutionally defined as union of opposite-sex partners and the law stipulates *lex patriae* rule for marriage of Slovak nationals.[78]

75 Административен съд София-град, Решение № 4337, от 29. 6. 2018, дело № 3500/2018; Административен съд София-град, Решение № 108, от 8. 1. 2018, дело № 7538/2017.

76 The story of Slovak national Gabriel W. and his husband Neil W. from New Zealand is publicly known. They met in New Zealand, where they got married in 2013. In 2015 they moved to Slovakia, since when they have been trying to get residence permit for Neil.

77 Art. 43 (1) c. *Zákon o pobyte cudzincov*. This provision poses an obstacle even for married same-sex Slovak – foreign couple, because under art. 46 (2) e. the fact that a marriage was not concluded in accordance with Slovak law constitutes a reason for refusal of residency permit.

78 According to Art. 19 of the *Zákon o medzinárodnom práve súkromnom a procesnom* [Slovak Act on International Private and Procedural Law] the matrimonial capacity and validity of marriage are governed by the applicable rules in a country of nationality of spouses; however, marriage of Slovak national validly concluded abroad is valid in Slovakia unless there is any *impedimentum matrimonii* under Slovak substantive law..

Moreover, civil unions have not been enacted despite few proposals. Under such circumstances same-sex partners of Slovak citizens could apply only for tolerated residence;[79] yet *Taddeucci* reasoning may uncover new possibilities for same-sex couples.

It is generally accepted that international obligations stemming not only from the ECHR, but also relevant ECtHR case-law, have primacy over Slovak national legislations.[80] The principle of material justice stands on a premise that fundamental rights permeate through the whole legal order, therefore court and public authority must apply the law in compliance with fundamental rights.[81] Subsequently, respecting ECtHR judgment and applying Slovak law accordingly would require either to enact new regulation or ignore marriage definition, or apply vague provision of the *Zákon o pobyte cudzincov* in compliance with fundamental rights. In the law there is a wide place for discretion, since the residence permit may be also granted if that is *"in interest of Slovak republic"* or if there are *"reasons worth special consideration*."[82] There are no precise conditions, therefore in our view the authorities should consider applying these provisions in the situation of same-sex couples who do not have other option to apply for permanent residency. After all, there is no doubt that respect for the fundamental rights and compliance with ECHR and ECtHR jurisprudence are indeed *"in the interest of Slovak republic."*

Nevertheless, same-sex couples may encounter obstacles in free movement even when moving to a country which recognizes civil unions. Estonia has passed legislation allowing same-sex couples to enter *kooselulepingu* [registered partnership], however due to issues in adopting implementing legislation, the *Välismaalaste seadus* [Estonian Aliens Act] does not provide explicitly right for permanent residency for a registered partner of Estonian citizen.[83] Furthermore, the Estonian courts do not recognize same-sex

79 Tolerated residence for family reasons under art. 58 (1) b *Zákon o pobyte cudzincov* lasts 180 days and can be repeatedly renewed; however it is more limiting than permanent residency for 5 years provided to spouse, e.g. the applicant cannot conduct business activities.

80 Ústavný súd SR, Nález sp. zn. I. ÚS 239/04 z 26. 10. 2005.

81 Ústavný súd SR, Nález sp. zn. I. ÚS 255/2010 z 30. 6. 2011, Nález sp. zn. III. ÚS 72/2010 z 4. 5. 2010, Nález, sp. zn. I. ÚS 106/2016 z 18. 5. 2016.

82 Art. 43 (1) e., Art. 45a (1) b. *Zákon o pobyte cudzincov.*

83 Under Sec. 137 *Välismaalaste seadus.*

marriages of Estonia nationals concluded abroad due to *lex patriae* rule.[84] Thus such couples have to enter *kooselulepingu* in order to ask for residency as it was in case of Estonian Kristiina R. and American Sarah R. who wedded in the US in 2015.[85] The application of *Taddeucci* principle could find its way in Estonia soon, since the *Riigikohus* [Estonian Supreme Court] is examining in constitutional review the lack of permanent residency provisions for registered partners.[86]

The most recent decision of the *Konstitucinis Teismas* [Lithuanian Constitutional Court] may serve as an example of *Coman* and *Taddeucci* implications. In review the court examined the constitutionality of Lithuanian Aliens Act on request of the *Lietuvos vyriausiasis administracinis teismas* [Supreme Administrative Court]. The case originated in September 2015, when Lithuanian authorities denied residency application of a Belarus man who has had married with a Lithuanian man in Denmark. Since Lithuania has adopted constitutional definition of heterosexual marriage, the authorities found that conditions prescribed for residency were not satisfied. Although, *Konstitucinis Teismas* did not consider law to be unconstitutional, it held that partners of a Lithuanian national or a foreigner residing in Lithuania who wedded or contracted partnership abroad should be able to apply for residency. [87] We suppose that this ruling, however progressive might be, does not satisfy fully the conclusions in *Taddeucci*. The reasoning of the *Konstitucinis Teismas suggests that same-sex couples qualifying for family reunification residency must at first conclude partnership or marriage in other country. This might pose an issue for couples who established their relationship in a country where no such kind of union is possible. Especially couples consisting of Lithuanian and foreign citizen residing temporarily in Lithuania would be affected.*

Moreover, married same-sex couples should benefit from the egalitarian interpretation of term "spouse" in judgment *Coman* when there is a room for application of the EU legislation concerning spousal rights. Such situation may arise under Family Reunification Directive which confer right to entry and residence of a spouse of third country national lawfully residing in a Member

84 Tallinna Ringkonnakohus, 23. 11. 2017 a otsus sasjas nr 3-16-2415.
85 Ibid.
86 Riigkohtu Põhiseaduslikkuse Järelevalve Kolleegium, asjades nr 5-18-5 ja nr 5-18-6.
87 Konstitucinis Teismas 2019-01-11 nutarimas Nr. KT3-N1/2019, bylos Nr. 16/2016.

State.[88] The spousal definition brings interesting implication for application of the Brussels II-bis Regulation, since the Regulation may confer jurisdiction for divorce of same-sex spouses to courts of a Member State which does not recognize such unions.[89] Similar consequences could arise under the Rome III Regulation and the Matrimonial Property Regimes Regulation.

6 Looking Fast-Forward

The marriage, whatever differences exist, is accepted as universal family law concept. Although, international law and neither EU law regulate validity and recognition of foreign marriages, [90] still foreign marriages are generally recognized based on national conflict-of-law rules. That is not the case mostly for marriages of same-sex couples, given that there is tendency to downgrade these marriages to civil partnerships or regard as non-existent on basis of public policy, therefore creating *matrimonium claudicans*.[91] These approaches might appear especially problematic after *Coman* judgement. We would like to focus on challenges the same-sex spouses may encounter, three provisions of EU law are discussed below that are connected to free movement, but they do not confer rights for spouses directly.

First selected issue concerns a worker moving with their spouse in a country which does not recognize same-sex marriage. Besides rights of EU citizenship, they enjoy benefits of free movement of workers. In given situation the Free Movement of Workers Regulation is applicable and under its Art. 7 (2) such worker *"[…] shall enjoy the same social and tax advantages as national workers."*[92] The situation may occur that their spouse might be unemployed

88 Directive 2010/19/EU.

89 *See* BOELE-WOELKI, K. *The Legal Recognition of Same-Sex Relationships Within the European Union*, p. 1971.

90 Nonetheless the international law tackles some of the most urgent issues of marital law – *i. e.*, marital consent, child, early and forced marriages. Although, there were even attempts to adopt conventions concerning marriages, numbers of participating states remain limited. *See* the UN General Assembly Resolution A/RES/73/153; Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages; Convention on celebration and recognition of the validity of marriages; Convention facilitating the celebration of marriages abroad.

91 Downgrading might appear in countries only allowing civil unions for same-sex couples, such in Hungary or Czech republic.

92 Art. 7 (2) Regulation 492/2011.

or earning low income therefore become dependent. Although the tax system offers usually for married couples in mentioned position tax rebates, spouse of same-sex could be ineligible.[93] Similarly the same-sex spouse would be ineligible for most of the social benefits in the host state.[94]

Secondly, working in another EU country and exercising one of the fundamental freedoms, the worker should enjoy also rights in EU area of social policy. The Framework Agreement on Parental Leave Directive established right to time off in case of force majeure for urgent family reasons,[95] additionally national legislation can grant wage compensation or paid leave for the specified circumstances.[96] Yet same-sex spouse could be left out of benefiting this leave.

As we have mentioned above, the Brussels II-bis Regulation should open access for same-sex spouses to divorce even in countries that do not allow same-sex marriages. Since a prerequisite for divorce is existence of valid marriage, we wonder what the outcome in the absence of EU marriage validity conflict-of-law rules would be. In countries with no recognition of any kind of same-sex unions with even constitutional marital definition like Poland, Slovakia, Latvia, Lithuania and Bulgaria it might happen that national judge would apply *ordre public* clause and refuse to perform divorce of same-sex couple.

Would be such practices conform with EU law after *Coman* judgment? Surely, the EU itself does not have competence over personal status issues, but it has shared competence in civil matters judicial cooperation.[97] The EU may adopt measures relating to conflict-of-laws, although family law connected issues are subjected to unanimous decision making.[98] Therefore solely national rules are applicable. However, even in situation concerning shared

93 Under Art. 11 (3) of the *Zákon o dani z príjmov* (Slovak Income Tax Act) only dependent spouse is eligible..

94 Those benefits are covered under Regulation No 883/2004 and Implementing Regulation No 987/2009.

95 Directive 2010/18/EU.

96 Nařízení vlády č. 590/2006 Sb. [Czech Government Regulation on Personal Obstacles to Work]; Art. 141 Zákonník práce č. 311/2001 Z. z. [Slovak Labour Code], Art. 152 Codul Muncii [Romanian Labour Code].

97 Art. 4 (2) j.; Art. 81 (2) c. TFEU.

98 Art. 81 (3) TFEU.

or purely retained competences the Member States must respect EU law, especially with right to free movement.[99] One may argue that that social and tax benefits reserved only for mixed-sex spouses are discouraging from moving to other EU country; or that the denial of divorce with subsequent need to leave country of residence for purpose of initiating proceeding hinders the right of EU citizen to move and reside freely. "*European Union law militates against any national measure which, even though applicable without discrimination on grounds of nationality, is capable of hindering or rendering less attractive the exercise by Member State nationals of the fundamental freedoms guaranteed by the Treaty",*[100] *and non-recognition of foreign same-sex marriage may be indeed a major drawback. This would be a disadvantage also for returning citizens.*[101] *A*bove-mentioned practices would also mean discrimination on the ground of sexual orientation,[102] additionally it would contravene one's family and private life when applying EU law.[103] We suppose that public policy exception would not be successful at ECJ proceeding in similar cases, simply because the argument of traditional marriage protection is too much disconnected from divorce of same-sex couple or abovementioned benefits, similarly like it was in *Coman* case.

With the half of the Member States legalizing same-sex marriage, the overlap of EU law in national legislation and increasing circulation of EU citizens, there are numerous possibilities to clash of national law with the freedom of movement.[104] We would like to note that heterosexual marriages are affected as well by lack of common conflict-of-law rules.[105] Based on an idea behind the *Coman* case, the ECJ would be ruling in such situations

99 *Coman*, paras. 37–37; *Dafeki,* C-336/94, para. 19; *Garcia Avello,* C-148/02, para. 25.

100 *Wencel*, c589/10, para. 69.

101 *"National legislation which places certain of the nationals of the Member State concerned at a disadvantage simply because they have exercised their freedom to move and to reside in another Member State is a restriction on the freedoms conferred by Article 21(1) TFEU on every citizen of the Union."* judgments of 14 October 2008, *Grunkin and Paul*, C353/06, EU:C:2008:559, paragraph 21; of 22 December 2010, *Sayn-Wittgenstein*, C208/09, EU:C:2010:806, paragraph 53; and of 12 May 2011, *Runevič-Vardyn and Wardyn*, C391/09, EU:C:2011:291, paragraph 68.

102 With regard to working conditions and special leave the Employment Equality Directive might be invoked as well.

103 Both rights beeing protected by EU Charter of Fundamental Rights, which is applicable in given cases.

104 An interesting case arise reportedly in France where two men, who under UK Marriage act transform their civil partnership to marriage. However, France rejected recognition since there were no witnesses in celebration. See EVENING STANDARD. *Same-sex couple's fury after being told to ‚divorce and remarry' to protect rights on move to France.*

105 See PFEIFF, S. *La portabilité du statut personnel dans l'espace européen*, p. 505.

case-by-case that in matter of application of EU law a valid marriage concluded in another Member State should be recognized. However, considering the position of marriage as general family law instrument in every Member State, there might be a room for jurisprudential establishing of the EU marital mutual recognition, which would be based on principle of mutual trust. We believe that this would truly protect family life of married couples when exercising freedom of movement.[106]

Conclusion The legal regulation on unions of same-sex partners varies in Member States, however it can be concluded that a certain trend is emerging. The development of ECtHR jurisprudence on family life, especially the imperative to eventually provide legal recognition brings a positive impact on legal and social position of lesbian and gay couples. However, due to these differences it is no surprise that protection of family life in exercising one of the most intrinsic EU rights meets with difficulties in Member States.

The ECtHR judgment *Taddeucci* and ECJ decision in Coman represent important milestone. *Taddeucci* case strengthen rights of same-sex couples in committed relationship who do not have possibility to access marriage or civil union. While judgment *Coman* ensured partial portability of civil status of couple who had already married. The complementarity of these two landmark rulings established guaranties for same-sex couples moving across Europe and will be reflected eventually in national case-law and legislation.

Despite significant progress, there still exist areas connected to free movement where enjoyment of family life is still challenging for same-sex couples. Ineligibility to social and tax benefits under national law and access to other rights is up to future development. In our view, eventually it would be necessary to rule on mutual recognition of civil status in the EU to prevent the negative effects which *matrimonium claudicans* has on freedom of movement and family life of same-sex couples.

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The Convention, Same-sex Marriage and Other Rights

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Abstract

The paper deals with the case-law of the European Court of Human Rights related to the topic of legal unions of same-sex couples. It is aimed at the current tendencies of ECHR in the legal concept of marriage under Art. 12 of the Convention and its position in relation to other legal forms of the cohabitations of homosexuals. The paper also discusses a question of several other rights of gay couples with regards to the judgements of ECHR, for example parental responsibility, parental leave or adoption.

Keywords

Same-Sex Unions; Registered Partnership; Marriage; Recognition and Protection; Parental Responsibility; Adoption; the Convention.

1 Introduction

The European Convention for the Protection of Human Rights and Fundamental Freedoms[1] is one of the most important legal instruments securing a protection of human rights for citizens of all contracting states all over Europe. Moreover, the interpretation of the Convention deducted by the European Court of Human Rights ("the ECHR") in Strasbourg supports the harmonization of legal systems of the European countries,[2] especially with regards to the controversial legal issues. Taking in account an increasing number of states which change a concept of the institute

1 The Convention of 4. 11. 1950 for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols nos. 11 and 14. In: European Court of Human Rights [cit. 1. 11. 2018] ("the Convention").

2 BOELE-WOELKI, K. *Common core and better law in European family law*. Antwerp: Intersentia, 2005, pp. 31–32.

of marriage and permit it also for same-sex couples, the ECHR has to reflect these trends within its case-la, because the Convention is so-called "living instrument" and has to be interpreted in lights of current situation and conditions in society regardless the previous legal opinions declared by the ECHR.

Therefore, the aim of this contribution is to present a development and current tendencies in the ECHR's case-law in connection with the topic of so called "gender-neutral marriage" or "marriage for all" and of other rights of same-sex unions.

2 The Concept of Marriage and Registered Partnership

With regards to the progress of the recognition of same-sex couples among the contracting states of the Convention, the ECHR had to react on the complaints connected with the question of rights homosexuals for the marriage within the scope of the Convention. The most current case, in which the ECHR decided in relation with the aforesaid, was the judgement **Chapin and Charpentier v. France**[3] of 9th June 2016. The case concerned a complaint of two homosexual men, living in a stable relationship for several years, who had applied for a marriage to the civil registry department despite the fact that the relevant French law at that time had not permitted same-sex marriages. Although the applicants had been given the wedding ceremony by the state authority and a change of their personal status had been noticed in the relevant register, later the public prosecutor had brought proceedings against them. Consequently, French courts had annulled marriage of the applicants and had ordered a change of the relevant records in the register. As the Court of cassation had dismissed an appeal of the applicants, their brought a complaint before the ECHR in which they claimed the breach of Article 8 together with Article 14 of the Convention.

First of all, it should be observed that it was not the first case based on right for same-sex marriage within the Convention decided by the ECHR. Therefore,

3 The Judgement of the European Court of Human Rights of 9. 6. 2016, *Chapin and Charpentier v. France,* application no. 40183/07.

the ECHR reiterated the legal opinions declared in the previous judgements, e.g. **Hämäläinen v. Finland**[4] of 16th July 2014. The ECHR concluded that stable same-sex couples had to be included in the scope of family life under Article 8 of the Convention. Nevertheless, this fact, as the ECHR had decided, did not allow to come automatically to the conclusion that people living in same-sex couples had right for a marriage or that contracting states of the Convention had a positive obligation to implement this legal institute. Subsequently, the ECHR pointed out the world-wide traditional meaning of a marriage as a legal bound between a man and a woman. Since the ECHR did not find a consensus on this question among the contracting states of the Convention, the court followed the aforesaid interpretation of marriage and did not deduct a right of same-sex couples for marriage under Article 12 of the Convention nor Article 8 together with Article 14.

Moreover, the ECHR emphasized the liberal trend of the French legal system which first provided *Le Pacte civil de solidarité (Le PACS)* as an alternative legal form of cohabitation between two homosexual persons and later even the institute of gender-neutral marriage as well. As a result, according to the ECHR there was no breach of any rights within the Convention made by the French Government.

As can be seen in this case, the ECHR stays stable in the question of the meaning of marriage and the court does not emerge any positive obligation of the contracting states to permit gender-neutral marriage from Article 12 of the Convention (from Article 8 of the Convention neither). Therefore, the concept of marriage under the Convention is still traditional and conservative and needs to be defined only as a legal bound between two people of different sex. The question is if this definition is final and unchangeable and if the ECHR omits a progress in forward to strengthen rights of homosexuals in Europe and other countries (e.g. there are 15 EU-member states permitting same-sex marriages).[5]

4 The Judgement of the European Court of Human Rights of 16. 7. 2014, *Hämäläinen v. Finland*, application no. 37359/09.

5 The last EU-member state which adopted the same-sex marraige legislation was Austria on 1. 1. 2008 becuase of the judgement of the Austrian Constitutional court. In: Austria: the judgement of Constitutional court of 4. 12. 2017, case no. G 258-259/2017-9 [cit. 11. 1. 2019]. Available at: https://www.vfgh.gv.at

As the ECHR declared so many times, the Convention is "a living instrument" and has to be interpreted with regards to the actual situation and conditions among the contracting states. Therefore, although the ECHR had been really conservative about the rights of homosexuals, later the court changed its previous legal opinions in some very important cases. First of all, there has to be mentioned a case of 24th June 2010, *Schalk and Kopf v. Austria*,[6] in which the ECHR declared for the first time that stable relationships between two persons of the same sex fell within a family life under Article 8 of the Convention. Hereby the ECHR overturned previous case-law defying this sort of unions as an emotional and sexual relationship falling within the scope of a private life,[7] and granted for them a specific level of protection provided for a family institution. This judgement was just a first step of the evolution of the ECHR's case-law on same-sex unions' rights because later another important case came up.

It was a case of 7th November 2013, *Vallianatos and Other v. Greece*,[8] concerned the topic of discrimination on the basis of sexual orientation related to a possibility to conclude a registered partnership. Because, Greece and Lithuania, these were the only two countries among the contracting states which legalized both, a marriage and a registered partnership, exclusively for different-sex couples. With regards to the aforesaid, the ECHR reiterated that no provisions of the Convention could be interpreted that a marriage was gender-neutral institute including same-sex unions. On the other hand, the ECHR decided, if there was a legislation establishing an institutionalized form of union between two persons as an alternative to a marriage, there was no relevant reason for determining it only for different-sex couples. Therefore, the ECHR declared a breach of Article 14 of the Convention taken in conjunction with Article 8.

Afterwards, there was a critical case of *Oliari and others v. Italy*[9] of 21st July 2015 concerned complaints of three Italian same-sex couples claiming

6 The Judgement of the European Court of Human Rights of 24. 6. 2010, *Schalk and Kopf v. Austria*, application no. 30141/04.

7 E.g. the decision of the European Court of Human Rights of 10. 5. 2001, *Mata Estevez v. Spain*, application no. 56501/00.

8 The Judgement of the European Court of Human Rights of 7. 11. 2013, *Vallianatos and Others v. Greece*, applications nos. 29381/09 and 32684/09.

9 The Judgement of the European Court of Human Rights of 21. 7. 2015, *Oliari and Others v. Italy*, applications nos. 18766/11 and 36030/11).

a breach of Article 8 of the Convention because of lack of legislation on registered partnership in Italy. The ECHR reiterated that homosexual couples had same needs to get a legal protection and recognition of their relationship guaranteed by a state as different-sex couples. Thus, the ECHR analyzed a level of protection and recognition of same-sex unions within the Italian legal system. Firstly, the ECHR concluded that there was no relevant law providing a special legal status including specific rights for same-sex unions and therefore these were legally accepted only on the basis *de facto* relationships. Secondly, although *de facto* relationships could have enjoyed a limited scope of rights set up by a private agreement, these rights did not cover basic life needs of same-sex couples. Moreover, the contractual rights were conditional upon to common cohabitation of the persons, although, as the ECHR had decided in previous cases,[10] a family life existed even if the persons did not cohabitate at a common household (e.g. because of the work or other personal issues). Last but not least, these contractual rights were provided for all persons in common cohabitation (e.g. including students' apartments) regardless of whether they lived in a stable relationship or not, thus this law did not recognize same-sex unions as a special status.

Furthermore, the ECHR found that the Italian local courts' case-law had deducted several rights for stable homosexual couples. Nevertheless, these rights had been interpreted from very individual cases. This fact in connection with an overburdence of the Italian judicial system had been in breach of the legitimate expectations of same-sex couples and had made these rights almost unenforceable. What is more, the Italian Constitutional Court had pointed out repeatedly there was a relevant need to secure a higher level of protection of rights of homosexuals in Italy but these were not reflected by the Italian legislator.

With regards to the aforesaid, the ECHR declared that there was a positive obligation of the Italian Government to secure a certain legal framework providing a recognition and a protection for stable same-sex unions in Italy under Article 8 of the Convention, and the court pointed out a registered

10 E.g. the judgement of the European Court of Human Rights of 24. 6. 2010, *Schalk and Kopf v. Austria*, application no. 30141/04.

partnership or civil union as the most appropriate form of this framework. Since the Italian legislator did not provide any form of recognition, the ECHR declared there was a breach of Article 8 of the Convention. In addition, the ECHR decided that any legal changes in this way would have not caused an unbreakable burden for the Italian legislator. On the other hand, it would have satisfied rights belonging to a significant number of homosexual couples in Italy. Moreover, it would have not overweighed private interests of the same-sex unions in comparison with the public interests, because the public opinion verifiably supported the implementation of law on the registered partnership within the Italian legal system.

In connection with the previous case, two questions arise. Firstly, if the "legal framework providing a recognition and a protection for stable same-sex unions" means necessarily an institute of the registered partnership or the civil union (an institutionalized form of legal bound conducted between two people of the same sex before the state authority). Since the ECHR expressly stated that the registered partnership or the civil union are "the most appropriate" forms of legal framework providing a recognition and a protection for stable same-sex couples, these cannot be meant as the only option. Therefore, the abovementioned positive obligation of the contracting states under Article 8 of the Convention could be probably satisfied by implementation of unregistered partnership[11] as well. However, this informal sort of partnership would have to comply with the condition of "recognition". Thus, the relevant law would have to be applied expressively to all stable same-sex unions regardless of their common cohabitation.

The second question is if the presented legal opinions are supposed to be applicable to all contracting states of the Convention in general. On the one hand, the ECHR reflected several aspects connected especially with Italy and Italian legal system, such as the national courts' caselaw, an Italian public opinion etc. On the other hand, the ECHR reiterated the abovesaid legal opinion in the following decisions, for example

11 E.g. Croatia recognises informal partnership without a formal registration. In: KOVAČEK STANIĆ, G. In: WARDLE, Lynn D. and Scott A. LOVELESS. *Marriage and quasi-marital relationships in Central and Eastern Europe: from the 2006 Vienna colloquium on marriage*. Provo: Byu Academic Publishing, 2008, pp. 61–62.

in the case *Ratzenböck and Seydl v. Austria*[12] of 26th October 2017. This judgement concerned a complaint of a heterosexual couple which claimed a breach of Article 14 of the Convention in the conjunction with Article 8 because of the lack of legislation on registered partnership provided for different-sex couples. At that time, there was an Austrian law on the registered partnership, nevertheless this was legally defined as a legal bound between two people of the same sex. Thus, the applicants found themselves discriminated on the basis of their sexual orientation because there was a marriage as the only option for them how to legally formalize their stable relationship.

In connection with the previous case, the ECHR concluded that the absence of a different-sex registered partnership had to be analyzed with regards to an overall legal framework governing the legal recognition of relationships. Since homosexuals were excluded from marriage under the Austrian law, the institute of registered partnership was the only form of legal recognition and protection for same-sex couples. On the other hand, different-sex couples could enjoy a right to get married therefore their needs for legal recognition were fully satisfied by the institute of marriage. The ECHR summed up that there was no discrimination in the case.

Although the ECHR reiterated the legal statements on the positive obligation of the contracting states, these were applied from very different perspective and the court did not specify if they were supposed to be applicable to all contracting states of the Convention in general. Nevertheless, the ECHR used these legal opinions later in the case *Orlandi and Others v. Italy*[13] of the 14th December 2017 as well. The judgement concerned complaints of six same-sex couples which claimed a breach of Article 8 of the Convention because Italian state authorities had denied to recognize their same-sex marriages conducted abroad under foreign laws. Firstly, the ECHR declared that there was an evident evolution among the contracting states and other countries all around the world in forward to strengthen rights of homosexuals, especially their rights for a recognition of their relationships. On the other hand, the ECHR pointed out there was a serious lack of consensus among

12 The Judgement of the European Court of Human Rights of 26. 10. 2017, *Ratzenböck and Seydl v. Austria*, application no. 28475/12.

13 The Judgement of the European Court of Human Rights of 14. 12. 2017, *Orlandi and Others v. Italy*, applications nos. 26431/12, 26742/12, 44057/12 and 60088/12.

the contracting states on the issue of the recognition of same-sex marriages conducted by citizens under foreign laws by domestic state authorities. Therefore, according to the ECHR there was still a wide margin of appreciation for the contracting states related to this subject. However, the relationships of the applicants were not recognized in any form, thus the applicants were left in a legal vacuum causing daily legal obstacles.

With regards to the aforesaid, the ECHR summed up that the Italian Government did not put any relevant public reasons justifying the decisions of Italian state authorities. The ECHR found there was no fair balance between private interests of the applicants and public interests which caused a breach of Article 8 of the Convention. Finally, it has to be mentioned, the ECHR reiterated that the contracting states had a positive obligation to ensure a legal framework recognizing and protecting same-sex unions similarly as the court had done in the case *Ratzenböck and Seydl v. Austria*.[14] Nevertheless, in this case the ECHR pointed out expressively, that specific community's public interests in the contracting states could overweigh the private interests of homosexual coiuples. In the light of these aspects, it can be concluded that legal opinions of the ECHR, presented in the case *Oliari and Others v. Italy*,[15] have to be interpreted as general statements applicable to all contracting states of the Convention with a limitation represented by serious public interests.

To sum up, as it was presented in the ECHR's case-law, the concept of marriage within Articles 8 and 12 of the Convention stays traditional and conservative and it has to be interpreted only as a legal bound between a man and a woman. However, the question of the marriage definition falls within the wide margin of appreciation of the contracting states of the Convention, therefore permitting a gender-neutral marriage has to be meant as an exclusive competence of the national legislators. On the other hand, the contracting states have a positive obligation under Article 8 of the Convention to secure a legal framework providing a recognition and a protection for stable same-sex unions. And the registered partnership or civil unions have

14 The Judgement of the European Court of Human Rights of 26. 10. 2017, *Ratzenböck and Seydl v. Austria*, application no. 28475/12.

15 The Judgement of the European Court of Human Rights of 21. 7. 2015, *Oliari and Others v. Italy*, applications nos. 18766/11 and 36030/11).

to be meant as the most appropriate institutes securing this obligation. Therefore, with regards to the Convention the registered partnership and other similar legal institutes need to be defined as a legal bound between two people of the same sex. Nevertheless, the concept of the registered partnership falls within the margin of appreciation of the contracting states as well, thus this institute also can be defined gender-neutrally by national legislators.

Last but not least, the ECHR always points out the evolution in the question of recognition of same-sex unions all around the world and reflects this fact in the case-law related to rights of homosexuals. Although the ECHR stays conservative in connection with the issue of same-sex marriages, the progress of the case-law is obviously very fast, since the ECHR declared that same-sex couples fell within the scope of family life under Article 8 of the Convention in 2010 and only five years later the court decided that there was a positive obligation of contracting states to recognize same-sex unions. As the number of the European countries, which accept the institute of gender-neutral marriage, still increases, it can be expected that the dynamic evolution of the case-law on rights of homosexuals will continue and the abovementioned conservative concepts of marriage and registered partner within the Convention, interpreted by the ECHR, could be changed.

3 Other Rights of Homosexuals

As it was presented in the previous part of this contribution, the ECHR still defends the traditional concept of marriage consisted of legal bound between two people of different sex. Although the ECHR has interpreted the term of family life under Article 8 of the Convention in various models, not even as a traditional meaning represented by two spouses and their children, the court does not omit the aim of traditional "nuclear" family, such as social or reproductive functions. Since there is a fast evolution of the recognition of same-sex unions in the ECHR's case-law and stable homosexual relationships are supposed to fall within the scope of family life under Article 8 of the Convention, the following chapter of this contribution is focused on decisions of the ECHR connected with a child-care

topic which is closely related to the institutes of marriage and registered partnership.

First of all, there should be mentioned the general legal statements of the ECHR, regarding the issue of parenthood and homosexuality, which were presented in the case *Salgueiro da Silva Mouta v. Portugal*[16] of the 21st December 1999. The judgement concerned a complaint of a homosexual man claiming a breach of Article 8 of the Convention taken together with Article 14. The applicant found decisions of the Portuguese courts discriminatory on the basis of sexual orientation because the courts had granted a parental responsibility for his former wife with regards to his homosexuality and his same-sex partnership. Even though the Portuguese Government denied, that the national courts had reflected the applicant's homosexuality against him, and claimed, that any courts' statements related to sexual orientation of the applicant had supposed to be mere *orbiter dicta* without any effect on their decisions, the ECHR found these statements as a factor which had been decisive in the final decisions.

Thus, the ECHR decided that if a state authority limited a parental responsibility of a person by reason of his or her homosexuality such a procedure had to be found incompatible with the aim of the Convention. For comparison, the ECHR was analyzing the issue of parental responsibility in connection with a homosexuality in a later case *Bonnaud and Lecoq v. France*[17] of the 1st March 2018 as well. The decision concerned two homosexual women living in *Le PACS* claiming a breach of Article 14 of the Convention in conjunction with Article 8 because the French courts had not granted them a mutual delegation of parental responsibility for their two children given birth by each of the applicants by using a medically-assisted procreation. Although the applicants argued, that the French courts had reflected their sexual orientation against them, the ECHR stated, that the relevant French law did not make any difference between heterosexual parents and homosexual parents and provided an equal criterion, consisted of a specific factual circumstance justifying a delegation of parental responsibility,

16 The Judgement of the European Court of Human Rights of 21. 12. 1999, *Salgueiro da Silva Mouta v. Portugal*, Application no. 33290/96.

17 The Decision of the European Court of Human Rights of 1. 3. 2018, *Bonnaud and Lecoq v. France*, application no. 6190/11.

for both. Since the previous national courts' case-law had specified this factual circumstance mainly as the state of health of the mother or the child, time spent away from home and work-related constraints, the ECHR found that there was no discrimination caused by French state authorities, because the reason of rejection of the applicants' proposal was based on a lack of factual circumstances justifying a delegation of parental responsibility, not in their sexual orientation.

To sum up, in the light of the Convention, any discrimination on a basis of sexual orientation related to a parental responsibility is unacceptable. Nevertheless, if the state authority does not grant an exercise of parental responsibility for a homosexual person, this procedure can be found a discrimination only if the relevant decision is based on the reason consisted of this person's sexual orientation.

Following the abovesaid, another important issue related to a discrimination, which should be presented in this chapter of the contribution, is a comparison of the adoption made by same-sex couples and by spouses. Firstly, there was a case *Gas and Dubois v. France*[18] of 15th March 2012 concerned two homosexual women living in *Le PACS* claiming a breach of Article 14 of the Convention taken in conjunction with Article 8, because the French courts had rejected their proposal for an adoption of Ms. Dubois's child by Ms. Gas. The applicants argued that they were discriminated on a basis of their sexual orientation. Because on the one hand, the French law permitted a simple adoption of the first partner's child by the second partner on the condition that the first partner lost a parental responsibility to the child, and on the other hand, this condition was not applied, if the adoptive parent was a husband or a wife of the child's parent.

The ECHR declared, since the contracting states of the Convention had no positive obligation to secure a gender-neutral marriage, the applicants could not be found at a comparable situation to the spouses' one because at that time France did not permit an institute of marriage for same-sex couples. Furthermore, the ECHR pointed out, if the contracting state decided to implement another legal institute as an alternative to marriage, such as *Le PACS*,

18 The Judgement of the European Court of Human Rights of 15. 3. 2012, *Gas and Dubois v. France*, application no. 25951/07.

the concept of this institute, including the scope of special rights (e.g. right to adopt the partner's child), fell within the margin of appreciation of the state.

On the other hand, the ECHR stated that the applicants as an unmarried homosexual couple are at a comparable situation as unmarried heterosexual couples. However, since the French legislator limited the unmarried partners' right to adopt a child regardless of their sexual orientation, there were same negative consequences for both, for different-sex partners and same-sex partners. With regards to the aforesaid, the ECHR decided that there was no discrimination of the applicants on the basis of their sexual orientation. For comparison, there was a very similar case *X and Others v. Austria*[19] of 9th February 2013, in which the ECHR declared, if the state allowed second-parent adoption only for unmarried different-sex couples, not for unmarried same-sex unions without any serious public interests overweighing private interests of homosexual couples, there had to be found a beach of the Article 14 of the Convention taken in conjunction with Article 8.

To sum up, the ECHR has not found a consensus among the contracting states of the Convention related to a second-parent adoption made by persons living in same-sex union, thus the court leaves this topic within the margin of the appreciation of the contracting states, as well as the question of medically-assisted procreation[20] or of parental leave.[21]

4 Conclusion

Although the number of states, which permit the institute of gender-neutral marriage, still increases, the issue of same-sex marriage is still very controversial and discussed in various scientific disciplines such as law, ethics, medicine, psychology etc. This fact causes that there are different opinions and various legal trends in connection with the level of recognition of same-sex union all around Europe. Therefore, there is still a lack of consensus among

19 The Judgement of the European Court of Human Rights of 19. 2. 2013, *X and Others v. Austria*, application no. 19010/07.

20 The Decision of the European Court of Human Rights of 8. 2. 2018, *Charron and Merle-Montet v. France*, application no. 22612/15.

21 The Decision of the European Court of Human Rights of 18. 1. 2018, *Hallier and Others v. France*, application no. 46386/10.

the contracting states of the Convention related to rights of homosexual, especially a right for marriage or a right to adopt a child.

It is precisely for this reason why the ECHR has an essential and irreplaceable role to play in harmonizing legal system of the states within the European law area and in unifying interpretations of controversial issues.[22] In the lights of the presented judgements, there is an obvious fast and dynamic progress in the ECHR's case-law in forward to strengthen rights of homosexual couples. However, as it was mentioned above, the ECHR has to reflect various legal opinions all around Europe and to find a consensus among 47 contracting states of the Convention. For this reason, the ECHR still leaves so many issues in the margin of appreciation of the contracting states. That is why we have to wait for the new ECHR's legal opinion related to same-sex unions presented in the upcoming judgements.

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Marriage (not for all) in Slovak Republic

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Abstract

Marriage in Slovakia is a legal relationship between one man and one woman. This is the very first premise of our family law. Since September 1st 2014 this is a part of the Constitution in Art. 41, Sec. 1. There is more about the reasons of this constitutional change in this article. Slovak family law is very traditional. It does not know yet a similar legal institute, which would in some way legalize legal relationship like marriage for two people of the same gender. Similarly, it does not specifically protect cohabitation (regardless of gender of the cohabitants). Certain partial rights can be found in the legislation of some private law relations. These rights are the content of following contribution.

Keywords

Marriage; Registered Partnership; Cohabitation; Relationship; Gender of Partners; Protection of Partnership; Adoption.

As stated in my annotation, marriage in Slovakia is, explicitly understood in the Constitution, as a legal relationship between one man and one woman. Interesting is the history of this establishment. Former form of Constitution in its Art. 41 Sec.1 only described, that *matrimony, parenthood and family shall be protected by the law. Special protection of children and minors shall be guaranteed.* Like this, our supreme law, has existed since its establishment (1. 9. 1992) until 1st September 2014[1], when already mentioned definition of marriage, as a legal unique relationship between one man and one woman, was amended to Art. 41. It was a reaction on evolvement in European Union, mostly within the context of decision of the European Court of Human Rights, known as X and Others v. Austria.[2]

1 Act. No. 161/2014 Coll.

2 Judgement ECHR from 19. February 2013, appeal Nr. 19010/07.

If I have to, at first sight this incomprehensible coherence explain, I need to go deeper in the history. Since the establishment of sovereign Slovak Republic in 1993, there have been two attempts to legalize, or at least to establish in certain form institute "registered partnership" for the same-sex couples in our legal order. Both of these attempts ended in development phase of law without being presented in legislative proceeding. In 2000, Slovak public opinion was literally indignant with the proposal of this institute and its arrangement in preparing Civil Code (that still is not enacted). To be specific registered partnership had to be amended in its second part, titled Family Law as section V. Registered partnership should have been made by contract between two natural persons of the same gender, older than 18 years of age. The aim of this contract should have been to create the life and property union. The contract had to be made in a form of notarial record registered in special register. This register still has not been established. Registered partners, had to form, according to law, common household, if they lived together and paid costs for their needs. A common household protection was supposed to be referred to them, even when renting a flat. They could proxy for each other, alimony and succession were equal to legally married couples. Registered partnership dissolution was, in comparison to marriage, far less formal. One of the partner's petition was enough to be published in bulletin board, and on the fifteenth day since its declassification, registered partnership was dissolved. This proposal caused a very indignant and negative reaction. Finally the work on Civil Code was stopped and registered partnership was "forgotten".

In the second case, the atmosphere in society, was rather positive about establishing "registered partnership" in our Legal Order. It was in 2012–2013, when the work on the new Civil Code was renewed. Amending registered partnership in a part of family law did not cause any protests. Relatively conservative Slovak society within more than 10 years, has managed to process this novelty and accept, that two persons of the same gender, will have partnership institute similar to a marriage. However, during legislation work the European Court of Human Rights decreed in case *X and Others v. Austria*. This judgement influenced further law evolvement of the same gender partners in Slovak Republic. The idea, of state allowing persons

of the same gender adopting minors, Slovak society declined. Government coalition rarely (and very fast) agreed on changes in Constitution by amending sentences: *Marriage is a legal relationship between one man and one woman. Slovak Republic broadly protects marriage and helps its well-being,* in article 41.

Until that time, on the one hand this definition of marriage was known in our Legal Order, but only *in Article 1 of the fundamental principles of the Family Act as a union of a man a woman.*[3] To change (an ordinary) law is much more easy than to change the Constitution. To change law are needed 39–76 votes from MPs of the National Council of the Slovak Republic, according to the number of present in person. The National Council of the Slovak Republic has a quorum, if more than half

of all Members of Parliament are present.[4] To change the Constitution of the Slovak Republic, the consent of a three-fifths majority of all Members of Parliament shall be required, which is at least 91 votes[5]. It could be alleged, that definition of marriage as a unique relationship between one man and one woman has been approved in Slovak Legal Order for a long time.

I feel the need to mention one more interesting act, and that is the referendum "On the protection of family", held in Slovakia, also like a reaction on evolvement in European Union in February 2015. The organization "The Alliance for the Family", gained 390.000 signatures and asked president of the Slovak Republic to declare referendum upon article 95 par. 1 of the Constitution. Primarily, it was supposed to have four questions, however the president used his constitutional right[6] and before declaring a referendum, submitted to the Constitutional Court of the Slovak Republic

3 JANČO, Milan et al. *Introduction to Slovak Civil Law*. Plzeň: Aleš Čeněk, 2010, p. 51.

4 Art. 84 Line 1, 2 of the Constitution.

5 Art. 84 Line 4 of the Constitution.

6 Art. 95 Line 2 of the Constitution: "*The President of the Slovak Republic may, before declaring a referendum, submit to the Constitutional Court of the Slovak Republic a proposal for a decision on whether the subject of a referendum which shall be declared upon a petition of citizens or a resolution of the National Council of the Slovak Republic according to paragraph 1 is in conformity with the Constitution or a constitutional law. If the President of the Slovak Republic submits to the Constitutional Court of the Slovak Republic a proposal for a decision on whether a subject of referendum which shall be declared upon a petition of citizens or a resolution of the National Council of the Slovak Republic is in conformity with the Constitution or a constitutional law, from the submission date of the proposal of the President of the Slovak Republic to the date of effectuality of the decision by the Constitutional Court of the Slovak Republic, the term according to paragraph 1 shall not lapse".*

a proposal for a decision on whether the subject of a referendum is in conformity with the Constitution. The Constitutional Court was inquired to decree,

1. whether the four referendum questions do or do not involve fundamental rights and freedoms upon Art. 93 Sec. 3 of the Constitution of the Slovak Republic and therefore;
2. whether these questions are or are not upon the Constitution of the Slovak Republics and so whether;
3. the referendum with such questions could or could not be declared.

The plenum of the Constitutional Court, in executive session decided that one of the proposed questions is not in conformity with the Constitution[7]. The question in full was:

"Do you agree that, no other co-habitation of persons except marriage was regulated by personal protection, rights and duties, that are rules to 1. 3. 2014 that are only adopted in marriage and a married couple (mostly status, registration or recording as co-habitation by legal authority, possibility of adopting a child by the second partner of parent?"

According to the adjudication, this question is not in conformity upon Art. 93 Sec. 3 of the Constitution in conjunction with Art. 19 Sec. 2 of the Constitution. The problem, that the Constitutional Court resoluted, was not discrimination of any group of citizens, but ambiguity of the form, the referendum question was formulated. This was considered as crucial, because according to the Constitution Court the third question could be interpreted in two different ways. *On the one hand, rights and duties referred to a husband and wife and no other cohabitation currently guaranteed by Slovak legal order and on the other, that rights and duties do not only characterize matrimony, but they are also typical of other forms of cohabitation currently legally regulated (e.g. relatives according to § 116 Civil Code or cohabitating persons according to § 115 Civil Code).*

After the resolution of the Constitution Court, the president had to decide, whether the referendum with three remaining questions should or because of rejected question should not have been declared. Finally, the referendum on "the Protection of Family" was held on 7 February 2015 with the following three questions:

- *"Do you agree that no other cohabitation of persons other than a bond between one man and one woman can be called marriage?"*

7 PL. ÚS 24/2014 z 28. 10. 2014.

- *" Do you agree that same-sex couples or groups should not be allowed to adopt and raise children?"*
- *" Do you agree that schools cannot require children to participate in education pertaining to sexual behaviour or euthanasia if their parents or the children themselves do not agree with the content of the education?"*

The results were repugnant. De jure, it was not valid because only 21.41% of registered voters turned out, when 50% were required for the results to count. LGBT community considered the results as a success because almost 80 % of Slovaks declined such "traditionalistic" ideology. Protectors of the traditional family also considered results as a success because more than *900.000 Slovaks* voted "yes". Meanwhile it did not matter, because traditional understanding of the traditional family had already been a part of article 41 of the Constitution of the Slovak Republic for five months. The greatest truth is, that referendums in Slovakia are not successful. Up to this day there have been 8 referendums declared whereas only one in 2003 (on question of the Slovak Republic joining EU) reached more than 50 % votes (52 %). In the others, on the average, 25 % voters turned out and were invalid. The completely worst referendum was held in 1997 on the question whether Slovakia should join NATO, that voters literally ignored. Only 9,53 % voters turned out[8]. With the logic of the traditional family opponents, Slovaks declared disagreement with NATO membership. We became members of this organization on 29 March in 2004.

Unambiguously, we could point out that the pressure from European Union on the equalization of both "traditional and non-traditional" family in EU members, became, because of the idea success, literally counterproductive in Slovakia. The resolution of ECHR, known as case X and Others v. Austria, laid down the premises " if the state allows the right to adopt a child by unmarried heterosexual couples (that still has not been regulated in Slovakia, only husband and wife could adopt a child in common), so the same sex couples must be allowed as well, otherwise we could

8 Https://sk.wikipedia.org/wiki/Zoznam_referend_na_Slovensku

speak about sexual orientation discrimination[9]. According to the resolution, it would be just a small step, if the state amended the same sex bonds a status similar to matrimony. Their right to adopt a child should not be denied, as it is still accessible only in matrimony.

Despite this vast ideological defence of non-traditional family community, there have not been any serious discussions on the question of amending their bonds in the Civil Code of the Slovak Republic.

So what are the rights of persons cohabitating regardless their gender? They have some rights (succession, transition of the tenancy of the flat), but when comparison with their position spouses, then are cohabitants always less protected. Adjustment of their relations law leaves to the will of the parties (e.g., adjustment of the Civil Code about innominate contracts or the will by succession). Content of rights and duties of the spouses, however, is clearly given by law mainly in terms of their personal, property-personal and not property relations. Cohabitation of persons is always less protected than a spouse or children. Their condition (e.g. in succession) is only supportive. According to the law there is possibility of succession only if a legator did not have any children. When proxy for each other, no legal proxy is possible, they need delegation of powers. They are not automatically informed about health condition of their partner (e.g. hospitalization) and also have no access to state benefits and allowances.

So, it is probably clear now, that marriage is in our country by the state preferred form of co-living of people, where the aim of marriage is making a family and proper uprising of children. And under my opinion, there is no real chance to change this in the next 10 years.

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9 In the same thing, however, ECHR alleged violation of art.14 in conjunction with art. 8 of the agreement, based on finding that according to the rules of Austrian Civil Law regulating adoption, nothing prevented one of the partners in unmarried heterosexual partnership from adopting a child from the second partner without violating legal bonding between this partner and a child. European Court of Human Rights, comes to a resolution, that it is up to the jurisdiction of each state to regulate, whether unmarried couples (heterosexual or homosexual), or registered partners have the right to adopt biological child of the second partner. If states allow such adoption to unmarried heterosexual couples then, excluding homosexual partners from such adoption, is sexual orientation discrimination and the agreement violation.

The Revision of Brussels IIa Regulation on Matrimonial Matters

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Abstract

Judicial cooperation between EU Member States must be gradually improved and must keep pace with the fact that there is an increasing number of mobile citizens in the EU, who are getting married and having children. Within the EU, every year around 10% of the total number of divorces relate to international couples. The Brussels IIa Regulation is the cornerstone of Union judicial cooperation in matrimonial matters and matters of parental responsibility. It applies since 1st March 2005 to all Member States except Denmark. It establishes uniform jurisdiction rules for divorce, separation and the annulment of marriage as well as for disputes about parental responsibility with an international element. It facilitates the free circulation of judgments, authentic instruments and agreements in the Union by laying down provisions on their recognition and enforcement in other Member States. Courts in all Member States have to apply it in all the above mentioned matters with a cross-border element.

The evaluation study of the Regulation considered a wide range of issues in both areas; matrimonial and parental responsibility matters. These were compared with the outcome of the public consultation, discussed with experts, Central Authorities and Member States. In addition, the available data was taken into account to draw the overall conclusion from the REFIT exercise. As a result, the range of issues was narrowed down so as to enable the Commission to propose changes which would enhance the operation of the Regulation.

Keywords

Marriage; Europe; Brussels IIbis Regulation; Jurisdiction.

1 Introduction and historical background

The objective of the recast of Brussels IIa Regulation is to further develop the European area of Justice and Fundamental Rights based on Mutual Trust by removing the remaining obstacles to the free movement of judicial decisions in line with the principle of mutual recognition, and to better protect the best interests of spouses and children by simplifying procedures and enhancing their efficiency. On the 30th June 2016, the European Commission put forward proposals to reform the Brussels IIa Regulation. It facilitates the free circulation of judgments, authentic instruments and agreements in the Union by laying down provisions on their recognition and enforcement in other Member States. To emphasize the importance of the current codification process let me briefly summarize the historical background of the Regulation.

In 1998, Member States signed the "Brussels II Convention" and the Protocol on its interpretation by the Court of Justice. This Convention extends the 1968 Brussels Convention to cover matrimonial matters, so far were excluded from the scope of cooperation between Member States. This has prompted a growing need to speed up matrimonial procedures and ensure legal certainty in matters of jurisdiction. The Convention has not been ratified by the Member States, because the Amsterdam Treaty changed the legal basis for judicial cooperation in civil matters, so the Convention has been converted into a Community instrument (regulation) to ensure that it is implemented quickly and to overcome the practical difficulties encountered by citizens in their daily lives. Regulation No 1347/2000 laying down rules on jurisdiction, recognition and enforcement of judgments on divorce, separation and marriage annulment as well as judgments on parental responsibility for the children of both spouses was the first Union instrument adopted in the area of judicial cooperation in family law matters. The content of that Regulation was substantially taken over from the Convention of 28 May 1998 on the same subject matter. On the 3rd of July 2000 France presented an initiative for Council Regulation in order to ensure equality for all children, so the Regulation should cover all decisions on parental responsibility, independent of any link with matrimonial proceedings to protect

the children's interests. It was replaced by Regulation No 2201/2003, known as the Brussels IIa Regulation.

In matrimonial matters, the Brussels IIa Regulation regulates the jurisdiction of the courts of the Member States for divorce, legal separation and the annulment of marriages, but it does not contain rules on applicable law. In 2006, the Commission proposed amendments to the Regulation introducing rules concerning applicable law in matrimonial matters as well as some modifications concerning jurisdiction. No unanimity could be reached within the Council[1] with regard to the rules on applicable law. As a result, based on the Commission's proposals, fourteen Member States initially established enhanced cooperation among themselves and adopted Regulation (EU) No 1259/2010 laying down rules determining the law applicable to divorce and legal separation (hereinafter "the Rome III Regulation"); they were later joined by two more States. This was the first enhanced cooperation in the history of the European Union. The Rome III Regulation therefore plays a role only as far as a possible "rush to court" is concerned. Another Regulation applied in family matters the Council Regulation No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. Finally, the Commission proposed in 2011 two Regulations concerning property rights for international couples (spouses and registered partners). The purpose of the proposals was to establish a clear legal framework for determining jurisdiction and the law applicable to matrimonial property regimes and property regimes of registered partnerships and to facilitate the movement of decisions among the Member States. After four years of negotiations, the JHA Council voted on the 3rd December 2015 on the package of the two proposals. Unanimity which is required by the Treaty for measures in the area of family law with cross-border implications could not be reached. Member States opposing the adoption of the Regulations explained that "any initiative of the Union in that area should not interfere, even indirectly, with the fundamental principles of the family laws of its Member States". But in 2016 these two proposals were adopted as enhanced cooperations.

1 According to the Article 81 paragraph 3 of Treaty on Functionin of the European Union.

2 Revision of the Regulation

After ten years beeing in force, according to the Brussels IIa Regulation, by 1st of January 2012, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application of the Regulation on the basis of information supplied by Member States. The report should be accompanied if need be by proposals for adaptations.

Like the Regulation itself, these adaptations are subject to the special legislative procedure defined in Article 81 para. 3 of TFEU: For measures concerning family law, unanimity in the Council is required, and the Parliament will be consulted.

The Juncker Commission's Political Guidelines indicate that judicial cooperation among EU Member States must be improved step by step keeping up with the reality of increasingly mobile citizens across the Union getting married and having children; by building bridges between the different justice systems and by mutual recognition of judgments, so that citizens can more easily exercise their rights across the Union.[2]

The Commission has assessed the operation of the regulation in practice and considered necessary amendments to the instrument in its application report[3] adopted in April 2014. This assessment took place as part of the Regulatory Fitness and Performance Programme (REFIT). This is the Commission's programme to ensure that EU legislation is fit for purpose and delivers the results intended by EU law makers, in other words: regulating better. This evaluation found that the Regulation is a positive asset which generally works well, but identified a number of shortcomings which would need to be tackled in order to ensure that the Regulation delivers even better the results intended for it. In large measure, the objectives set for the assessment below are therefore the same as those pursued by the Regulation in force. Given the concerns expressed by stakeholders about the number and complexity

2 JUNCKER, Jean-Claude. *A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change – Political Guidelines for the next European Commission*. Strasbourg, 15 July 2014. Available at: https://www.eesc.europa.eu/resources/docs/jean-claude-juncker-political-guidelines.pdf [cit. 2. 1. 2019]..

3 COM (2014) 255.

of EU family law instruments, it is suggested to propose a recast rather than an amendment in order to enhance transparency and legal certainty, readability by the subjects and hence applicability of the instrument. This will also make it easier to follow and to evaluate in the future as some more specific reporting obligations will be proposed, thus making simpler to provide more factual evidence about its application and whether it works instead of resorting to more abstract legal analysis.

At their Informal Council in July 2015, the Justice Ministers exchanged views on the part of the Brussels IIa Regulation concerning parental responsibility, on the basis of a description of some shortcomings identified by the Commission in the evaluation process. All speakers welcomed the review and agreed on the need to further improve the Regulation in matters of parental responsibility given the particular sensitivity of the subject matter.

On the other hand, the Proposal does not contain any changes with regard to its scope and the matrimonial matters for which the status quo is retained. This means that Chapter I and Chapter II Section 1 of the Regulation remain unchanged, except the following 3 articles:

The Proposal clarified the definitions applied in the Regulation, but in matrimonial matters changed the terminology of court and judgement to authority and decision. As we can see in the case of the European Court of Justice, proceeding C plaintiff, the term civil matters' within the meaning of that provision, must be interpreted autonomously. According to the fifth recital of Brussels IIbis Regulation, that objective can only be safeguarded if all decisions on parental responsibility fall within the scope of that regulation. So the term 'court' shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1. I think this change of terminology is unnecessary because upon the interpretation of the definition and case law, we can clearly seem that we shall use the term of court in a broad manner, which includes administrative authorities within the scope of Regulation. And vice versa, under authority we have to also mean judicial authority, i. e. court. And of course, if the Regulation will use the term authority, the judgement shall

be replaced by decision. Personally I understand the reasons for it, but I preferred the terminology in force.

Article 6 and 7 have been redacted into one article, but its content of residual jurisdiction was not changed. And it also contains that "*As against a respondent who is not habitually resident in a Member State* and is *not either a national of a Member State or, in the case of the United Kingdom and Ireland, does not have his 'domicile' within the territory of one of the latter Member States, any national of a Member State who is habitually resident within the territory of another Member State may, like the nationals of that Member State, avail himself of the rules of jurisdiction applicable in that Member State.*"

3 Regulation in the case law of CJEU

The European Court of Justice (CJEU) has so far rendered 24 judgments concerning the interpretation of the Regulation which were taken into account by making the Proposal, but only five cases were in connection with matrimonial matters (in accordance questions like scope of application, jurisdiction, dual nationality, residual jurisdiction and time of seizing of the court), so limited evidence of existing problems was available at this stage to allow for a precise indication of the need to intervene and the scale of the problems, and for a fully informed choice. Furthermore, since the adoption of the Brussels IIbis Regulation, four more EU instruments facilitating the handling of matrimonial matters in case of divorce of an international couple have been adopted. The Rome III Regulation contains rules on the law applicable to divorce, and the Maintenance Regulation addresses jurisdiction and applicable law concerning maintenance for spouses and children. Moreover, there two enhanced cooperation with respect to the property aspects of international couples, for spouses and registered partners also.

The availability and completeness of the statistics on the application of the Regulation is limited and differs widely across Member States. For instance, there is no reliable record of all cases heard or their outcome. A large share of the decisions relating to the application of the Regulation

are not published or not easily accessible. This is in particular true for matrimonial matters.

Several aspects of the Regulation – which has already been the subject of 24 judgments of the European Court of Justice – are now to be reformed. The Commission proposal intends to make the regulation even more effective: it focuses on the part of the regulation that deals with legal matters pertaining to parent-child relationships and does not go into the rules relating to divorce procedures.

As the Borrás explanatory report[4] has also declared the Convention excludes from its scope religious proceedings, which may become more frequent as a result of immigration (Muslim and Hindu marriages, for instance).[5] The CJEU in its 12th May 2016 decision[6] committed itself how to interpret an application for recognition of a decision made by a religious court in a third state, not for divorce. The parties referred to the Rome III Regulation, but it defines only rules on applicable law in cross border divorce and separation cases, not the recognition of a decision made in an other member state. The Brussels IIa Regulation however does, but it cannot be applied in case of decisions made in a third state.[7]

In the case of *Edyta Mikolajczyk vs. Marie Louise Czarnecka*, Stefan Czarneczki[8] the question was the personal scope and jurisdiction of the Regulation. The point of interest of this case was that the applicant was a person other than the spouses, in addition she submitted her claim after one of the spouses' death. On 20 November 2012, Edyta Mikołajczyk brought an action before the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland) seeking annulment of the marriage of Stefan Czarnecki to Marie Louise Czarnecka (née Cuenin), entered into on 4 July 1956 in Paris (France). The applicant stated that she was the heir to the estate of Zdzisława Czarnecka, Stefan

4 BORRÁS, Alegría. Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (approved by the Council on 28 May 1998). *Official Journal,* C 221, 16/07/1998, pp. 0027–0064.

5 Borrás Report 20 (B).

6 *Soha Sahyouni vs. Raja Mamisch* (C-281/15).

7 WOPERA, Zsuzsa. *Az európai családjog gyakorlata (European Family Law in Practice).* Budapest: Wolters Kluwer, 2017, p. 38.

8 C-294/15.

Czarnecki's first wife, who died on 15 June 1999. According to the applicant, the marriage of Stefan Czarnecki to Zdzisława Czarnecka, contracted on 13 July 1937 in Poznań (Poland), had not been dissolved at the time the marriage between Stefan Czarnecki and Marie Louise Czarnecka was contracted. Consequently, that second marriage was a bigamous union which should therefore be annulled. Marie Louise Czarnecka contended that the action for annulment was inadmissible because the Polish courts did not have jurisdiction. She submitted that, pursuant to the second and third indents of Article 3(1)(a) of Regulation No 2201/2003, that action should have been addressed to a court of the Member State in which the spouses were last habitually resident, in so far as one of them is still habitually resident in that State, or to a court of the State where the respondent is habitually resident, namely, in both cases, France. [9] By its first and second questions, which should be examined together, the referring court asks, in essence, whether an action for annulment of marriage brought by a third party following the death of one of the spouses falls within the scope of Regulation No 2201/2003. Under Article 1(1)(a) of Regulation No 2201/2003, the regulation is to apply, whatever the nature of the court or tribunal, in civil matters relating to divorce, legal separation or marriage annulment. To determine whether an application falls within the scope of that regulation, the focus must be on the object of the application In principle, the object of that action is therefore 'marriage annulment' within the meaning of Article 1(1)(a) of Regulation No 2201/2003. Nevertheless, the referring court is uncertain whether such an action falls within the scope of that regulation when brought by a third party following the death of one of the spouses. the terms of Article 1(1)(a) of Regulation No 2201/2003, it should be noted that that provision states, inter alia, that marriage annulment is one of the matters which fall within the scope of that regulation, without making any distinction on the basis of the date on which such an action is brought in relation to the death of one of the spouses or the identity of the person entitled to bring such an action. Consequently, if account is taken only of the wording of that provision, an action for annulment of marriage brought by a third party following the death

9 Judgement 11–13 points.

of one of the spouses would appear to fall within the scope of Regulation No 2201/2003.[10]

By its third question, the referring court asks, in essence, whether the fifth and sixth indents of Article 3(1)(a) of Regulation No 2201/2003 must be interpreted as meaning that a person other than one of the spouses who brings an action for annulment of marriage may rely on the grounds of jurisdiction provided for in those provisions. Since the fifth and sixth indents of Article 3(1)(a) of Regulation No 2201/2003 make no express reference to the law of the Member States for the purpose of determining the scope of the term 'applicant', that scope must be determined in the light of the context of those provisions and the purpose of the regulation. As regards the criteria listed in Article 3(1)(a) of that regulation, the Court has held that they are based in various respects on the habitual residence of the spouses (judgment of 16 July 2009, Hadadi, C168/08, EU:C:2009:474, paragraph 50). It follows from the foregoing that the jurisdiction rules laid down in Article 3 of Regulation No 2201/2003, including those referred to in the fifth and sixth indents of Article 3(1)(a), are designed to protect the interests of spouses. Accordingly, the term 'applicant' within the meaning of the fifth and sixth indents of Article 3(1)(a) of Regulation No 2201/2003 does not extend to persons other than spouses. In the light of the foregoing considerations, the answer to the third question is that the fifth and sixth indents of Article 3(1)(a) of Regulation No 2201/2003 must be interpreted as meaning that a person other than one of the spouses who brings an action for annulment of marriage may not rely on the grounds of jurisdiction set out in those provisions.[11]

Hadadi was the first, and so far the only case among cross-border family matters, which was interpreted by the ECJ from the view of jurisdiction based on the connecting factor of dual nationality.[12, 13] In this case Article 3(1)(b) of Brussels IIbis Regulation was in the middle of the question

10 Judgement 22–37.
11 Judgement 38–53.
12 Judgment of the Court (Third Chamber) of 16 July 2009**,** *Laszlo Hadadi (Hadady) v Csilla Marta Mesko, épouse Hadadi (Hadady)*, Case C-168/08, EBHT 2009 I-06871.
13 See details ZSUZSA, Wopera. A Hadadi ügy – A kettős állampolgárság megítélése a házassági perek joghatósági szabályaiban. *JeMa,* 2010, no. 1, pp. 66–76.

referred for preliminary ruling.[14] The Third Chamber of the ECJ on contrary to the French arguments stated Article 3(1) does not contain any specific provisions governing the case of dual nationality, with the result that each Member State applies its own nationality law in this type of situation. Accordingly, where the spouses have the same dual nationality, the court seized cannot overlook the fact that the individuals concerned hold the nationality of another Member State, with the result that persons with the same dual nationality are treated as if they had only the nationality of the Member State of the court seized. That court must, on the contrary, take into account the fact that the spouses also hold the nationality of the Member State of origin and that, therefore, the courts of the latter could have had jurisdiction to hear the case. So no basis can be found in the objectives of that provision or in the context of which it forms part for an interpretation according to which only an 'effective' nationality can be taken into consideration for the purposes of Article 3(1) of Regulation 2201/2003. Moreover, such an interpretation would restrict individuals' choice of the court having jurisdiction, particularly in cases where the right to freedom of movement for persons had been exercised. The burden of the judgement is that in the case of spouses with the same nationalities, the Regulation provides any spouse to dissolve marriage at both the courts, which jurisdiction based upon any of the common nationality of the spouses, so we cannot set up a rank between the nationalities.[15]

The next case before the CJEU dealt with the exclusive nature of jurisdiction and residual jurisdiction. Mrs Sundelind Lopez, a Swedish national, is married to Mr Lopez Lizazo, a Cuban national. When living together, they were resident in France. Currently, Mrs Sundelind Lopez is still resident in France but her husband is resident in Cuba.[16] Acting on the basis of the Swedish legislation, Mrs Sundelind Lopez petitioned the Stockholms tingsrätt (District Court, Stockholm) (Sweden) for divorce. Her petition was dismissed by decision of 2 December 2005 on the ground that, under Article 3 of Regulation

14 Art. 3. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State (b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the "domicile" of both spouses.

15 ZSUZSA, Wopera. A Hadadi ügy. A kettős állampolgárság megítélése a házassági perek joghatósági szabályaiban. In: *Jogesetek Magyarázata,* 2010, I. évfolyam, 1. szám, p. 74.

16 *Kerstin Sundelind Lopez vs. Miguel Enrique Lopez Lizazo* (C-68/07.).

No 2201/2003, only the French courts have jurisdiction and that, accordingly, Article 7 of that regulation precludes Swedish rules on jurisdiction from applying. By judgment of 7 March 2006, the Svea hovrätt (Court of Appeal, Svea) (Sweden) dismissed the appeal brought against that judgment. Mrs Sundelind Lopez appealed against that judgment to the Högsta domstolen (Supreme Court). The national court is essentially asking whether Articles 6 and 7 of Regulation No 2201/2003 are to be interpreted as meaning that where, in divorce proceedings, a respondent is not habitually resident in a Member State and is not a national of a Member State, the courts of a Member State can base their jurisdiction to hear the petition on their national law, even though the courts of another Member State have jurisdiction under Article 3 of that regulation. In the main proceedings, it is not disputed that, in accordance with Article 3(1)(a) of Regulation No 2201/2003, the French courts have jurisdiction under the regulation to hear Mrs Sundelind Lopez's petition under either the second indent of that provision, as the last place where the spouses were habitually resident, to the extent that she is still resident in France, or the fifth indent of that same provision, as the place where she is habitually resident, since she has resided in France for at least a year immediately before her divorce petition was introduced. According to the clear wording of Article 7(1) of Regulation No 2201/2003, it is only where no court of a Member State has jurisdiction pursuant to Articles 3 to 5 of the regulation that jurisdiction is to be governed, in each Member State, by the laws of that State. Consequently, since the French courts have jurisdiction to hear the petition in the main proceedings pursuant to the criteria laid down by Article 3(1)(a) of Regulation No 2201/2003, the Swedish courts cannot base their jurisdiction to hear that petition on rules of their national law, pursuant to Article 7(1) of the regulation, but must, in accordance with Article 17 thereof, declare of their own motion that they have no jurisdiction, in favour of the French courts.[17]

3.3.1 In the Last Case, *A vs. B* (C-489/14)

Ms A and Mr B, who are French nationals, were married in France on 27 February 1997, having entered into a marriage contract under French

17 Paragraph 20 of the judgement.

law under the regime of séparation des biens (principle of separate property during marriage). They moved to the United Kingdom in 2000. The couple had two children, twins, in 1999, and a third child in 2001. The family continued to reside in the United Kingdom until June 2010, when the couple separated after Mr B moved out of the former matrimonial home. On 30 March 2011, Mr B lodged a request for judicial separation with the family court of the tribunal de grande instance de Nanterre (Nanterre Regional Court) (France). On 19 May 2011, in response to the proceedings brought by her husband, Ms A applied to the Child Support Agency for child support for the children in her care, then filed a petition for divorce and a separate application for maintenance with the courts of the United Kingdom on 24 May 2011. The High Court of Justice of England & Wales, Family Division, nevertheless declined jurisdiction in respect of the divorce petition on 7 November 2012, on the basis of Article 19 of Regulation No 2201/2003, with Ms A's consent. By its questions, which must be considered together, the referring court asks, in essence, whether, in the case of judicial separation and divorce proceedings brought between the same parties before the courts of two Member States, Article 19(1) and (3) of Regulation No 2201/2003 must be interpreted as meaning that, in a situation such as that at issue in the main proceedings in which the proceedings before the court first seised in the first Member State expired after the second court in the second Member State was seised, the jurisdiction of the court first seised must be regarded as not being established. As regards the purpose of the rules of *lis pendens* in Article 19 of Regulation No 2201/2003, it must be noted that those rules are intended to prevent parallel proceedings before the courts of different Member States and to avoid conflicts between decisions which might result therefrom.[18] For that purpose, the EU legislature intended to put in place a mechanism which is clear and effective in order to resolve situations of *lis pendens*. Pursuant to the terms of Article 16, a court is to be deemed to be seised, depending on the option chosen in the national law applicable, either at the time when the document instituting the proceedings or an equivalent document is lodged with the court, or, if that document has to be served before being lodged with the court, at the time when

18 See judgment in *Purrucker*, C 296/10, EU:C:2010:665, paragraph 64.

it is received by the competent authority. The court will, however, be deemed to be seised only if the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent (under the first option), or to have the document lodged with the court (under the second option). However, in order for there to be a situation of *lis pendens*, it is important that the proceedings brought between the same parties and relating to petitions for divorce, judicial separation or marriage annulment be pending simultaneously before the courts of different Member States. Where two sets of proceedings have been brought before the courts of different Member States, and one set of proceedings expires, the risk of irreconcilable decisions, and thereby the situation of *lis pendens* within the meaning of Article 19 of Regulation No 2201/2003, disappears. It follows that, even if the jurisdiction of the court first seised was established during the first proceedings, the situation of *lis pendens* no longer exists and, therefore, that jurisdiction is not established. The answer to the questions referred is that, in the case of judicial separation and divorce proceedings brought between the same parties before the courts of two Member States, Article 19(1) and (3) of Regulation No 2201/2003 must be interpreted as meaning that, in a situation such as that at issue in the main proceedings in which the proceedings before the court first seised in the first Member State expired after the second court in the second Member State was seised, the criteria for *lis pendens* are no longer fulfilled and, therefore, the jurisdiction of the court first seised must be regarded as not being established.

4 Problematic points of the Proposal

4.1 Limited party autonomy and forum running

The term "international couple" is therefore used to refer to situations where spouses are habitually residing in different Member States, have different nationalities or have the common nationality of one Member State, but are habitually residing in another Member State. It is estimated that, on average, one in twelve couples in Europe is an "international couple".

I think it would decrease the forum running of the parties if they could conclude an agreement on jurisdiction, beside applicable law, especially in cases

of Member States not joined the enhanced cooperation of Rome III. Regulation and apply their own private international law rules to the case.

Spouses in an international marriage do not have a possibility to agree on the competent court which would settle their divorce or separation. This causes some drawbacks as it has been reported in the evaluation study. First of all, it may lead to a lack of predictability for the spouses in that they do not know in advance where potential litigation will take place in the event of a divorce. The current rules offer seven possible fora to bring the divorce case based on, for example, one or both spouses' habitual residence or nationality.

85% of the respondents to the public consultation identified that the Regulation does not sufficiently promote a common agreement between spouses. Furthermore, when a couple divorces or separates, they usually have several matters to settle at the same time. Besides the divorce, solutions must be found for the parental responsibility over the children, for the maintenance of the spouse and children, for the property consequences of the divorce. At present, it is not excluded that courts in different Member States have jurisdiction over these closely related matters.

The legislator decided not to establish a single forum but to provide a list with a variety of connecting factors to make sure spouses can find a forum to obtain their divorce and ensure flexibility which is often needed in a cross-border marriage breakdown as the situation constantly changes at short notice. However, the result, namely seven alternative (as opposed to hierarchical) grounds of jurisdiction set out in the Regulation in conjunction with the absence of uniform conflict-of-laws rules in the entire Union may in some instances induce a spouse to "rush to court", that is, to apply for divorce before the other spouse does to ensure that the law applied in the divorce proceedings will safeguard his or her own interests. A Member State might then consider that its courts are receiving too many cases which are not connected closely enough to the forum, and where it might also be inappropriate to apply that forum's substantive law as foreseen by that State's conflict-of-laws rules.

"Rush to court" was already addressed by the harmonisation of the rules on the law applicable to divorce (Rome III Regulation). As a result of such

harmonisation, any court seised within the EU would have to apply the same substantive law as determined by the common rules. Therefore, it would not matter anymore which court in the EU is seised of the matter. However, as the Regulation does not yet apply in all Member States (today it applies in 16 Member States while one more – Estonia – has announced to join soon), there may still be an incentive for spouses to act first by choosing a convenient court from the list of available jurisdictions.

Specialised legal advice may be required to take full advantage of the alternative grounds of jurisdiction in matrimonial matters. The risk that the other spouse will rush to court may encourage a spouse to rush to court herself/himself as quickly as possible or at least to consult a specialised lawyer in this regard – leading to additional costs. Several experts in the evaluation study noted that citizens may require several lawyers from different legal systems for cases where a possibility for rush to court / forum shopping exists. Therefore, legal advice and representation in two Member States could be necessary. As presented in the study, in a typical case concerning rush to court, the costs doubled, both of the lawyer and court's fees, reaching almost € 15,000.

The "rush to court" problem cannot be dealt with by individual Member States under their own national law because the underlying reason for the rush to court lies in the fact that the substantive divorce laws in Member States are different, and depending on where divorce is pronounced, the consequences for each spouse may be different. The Rome III Regulation, by creating uniform rules on applicable law, solves this problem to a large extent for those 16 Member States in which this Regulation adopted under enhanced cooperation applies and could be sufficient to solve the "rush to court" problem in all Member States if the remaining 9 would decide to join the Rome III Regulation. However, only Estonia has announced to do so while the other Member States remained silent or explicitly declared that they did not intend to join Rome III.

Therefore, a hierarchy of jurisdiction grounds or the possibility for a court to transfer jurisdiction to another Member State would be the only solutions available at this stage. As the Court of Justice has ruled that Member States are not allowed to use any discretion which may exist under their

national law to transfer jurisdiction established by EU Regulations, the transfer mechanism could only be created by including it into the Regulation. The same would be true for a hierarchy of the jurisdiction grounds already offered by the Regulation.

4.1.1 Lack of exact definitions

The proposal does not give a definition of habitual residence, like the Regulation. It is interesting the CJEU never interpreted the content of habitual of the spouses, only the habitual residence of the child. But the Borrás Explanatory Report defines habitual residence as 'the place where the person had established, on a fixed basis, his permanent or habitual centre of interests, with all the relevant facts being taken into account for the purpose of determining such residence'.

It also does not dispose the question of dual nationality. In the Hadady case the Court stated in its judgement "*Where spouses each hold the nationality of the same two Member States, the Regulation precludes the jurisdiction of the courts of one of those Member States from being rejected on the ground that the applicant does not put forward other links with that State. On the contrary, the courts of those Member States of which the spouses hold the nationality have jurisdiction under that provision and the spouses may seise the court of the Member State of their choice.*" Personally I prefer this point of view, but it is out of key with the rules of Rome III. Regulation, which states where the Regulation refers to nationality as a connecting factor for the application of the law of a State, the question of how to deal with cases of multiple nationality should be left to national law, in full observance of the general principles of the European Union.

The next Problem is that the Brussels IIbis Regulation does not define who could be applicant in matrimonial cases. Edyta Mikolajczyk brought an action for annulment of marriage as a third party after the death of one of the spouses. In this case the CJEU stated in its judgement that the scope of Regulation must be interpreted as meaning that an action for annulment of marriage brought by a third party following the death of one of the spouses falls within the scope of Regulation. The applicant in the fifth and sixth indents must be interpreted as meaning that a person other than one of the spouses who brings an action for annulment

of marriage may not rely on the grounds of jurisdiction set out in those provisions, i.e. his/her own habitual residence, because it does not serve the interest of the spouses.

In situations where the spouses are not habitually resident in the territory of a Member State and do not have a common EU nationality, the Regulation does not provide any basis of jurisdiction. International jurisdiction is established on the basis of the national rules of the Member States (so-called "residual jurisdiction"). In practical terms this means that in about half of the Member States the EU nationality of a plaintiff spouse alone is sufficient to bring proceedings in his/her Member State of nationality. In the other half, it is not possible for residents of third countries to bring proceedings in their Member State of nationality alone, but only in conjunction with other connecting factors. In the end, 24 Member States do provide residual jurisdiction for the case described above. In the remaining 4 Member States, this may lead to situations where no court at all in the EU has jurisdiction to deal with an application for divorce because of the different criteria being used to establish it; this forces spouses to file their divorce proceedings in a third State if that State has jurisdiction under its own law.

Since a decision issued in a third State cannot be recognised in a Member State pursuant to the Brussels IIa Regulation, but only pursuant to national rules or applicable international treaties, divorcing, spouses could face problems to have their divorce recognised in their respective countries, and it can even happen that their divorce will be recognised in the home Member State of one of the spouses but not in the home Member State of the other. This difference in civil status has a negative impact on the freedom of movement and the right to respect for a person's private and family life. A person wishing to remarry in a Member State cannot do so if the divorce pronounced in a third State is not recognised under that Member State's national law while at the same time that Member State did not provide a forum for the divorce to be pronounced there. In other words, Union law regulates only the larger part of the international jurisdiction of the Member States' courts, leaving a remaining small part to national law.

4.1.2 Legislation process

And last we have to mention that in the field of cross-border family law, unanimity is further expected, which does not facilitate the adoption of the proposed regulation, so we cannot be sure whether it could be received or not.

The evaluation study highlighted the useful role played by the Regulation with respect to cross-border litigation in matrimonial and parental responsibility matters. According to the statistics, each year in the EU there are about 100.000 international divorces, and the Regulation applies to all of them. It has also helped in settling cross-border cases relating to the attribution, exercise, restriction or termination of parental responsibility which arise independently of a marital link between the parents. An estimated 150.000 to 245.000 individuals were annually involved in such proceedings.

The EESC considers that the scope of application of the Brussels IIa Regulation needs to be clarified. Even if marriage is defined according to "national" criteria, Member States are required to comply with Article 21 of the EU Charter of Fundamental Rights. The EESC proposes that compliance with Article 21 be mentioned in one of the recitals of the Regulation.[19]

While the Regulation is considered to be functioning well overall and to be delivering value to EU citizens, the operational functioning of the instrument is at times hampered by a series of legal issues; the current legal text is insufficiently clear or there are omissions. This is considered in particular the case for the child return procedure and for the cooperation between the Central Authorities on parental responsibility matters.

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19 Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) [COM(2016) 411 final – 2016/0190 (CNS)].

The Concept of Marriage in European Private International Law

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Abstract

The concept of marriage as a legal institution differs considerably in particular legal systems. Although marital status is a legal ground for enjoying a number of rights stemming from the European Union law, a common definition of "marriage" does not exist. The aim of this contribution is to consider the difficulties, which may arise with regard to characterisation of the notion of marriage in the context of the European private international law instruments, especially the newly adopted EU regulations concerning property regimes of international couples.

Keywords

Concept of marriage; cross-border property regimes; characterisation; European private international law; family law; same-sex marriage

1 Introduction

With the freedom of movement within the European Union ("EU"), the EU citizens move increasingly across national borders. The rise in mobility of persons inevitably results in an increase in the cross-border legal relationships. A number of international[1] marriages and registered partnerships is growing as well.[2] Nevertheless, substantive family law is not uni-

1 The notion "international" refers not only to mixed or migrant marriages and registered partnerships, but also to situations, in which a couple acquires property abroad. Similarly DIAGO DIAGO, Maria del Pilar. The Matrimonial Property Regime in Private International Law. In: ŠARČEVIĆ, Petar and Paul VOLKEN (eds.). *Yearbook of Private International Law. Volume II – 2000*. The Hague: Kluwer Law International, 2000, p. 180.

2 Similarly VAN ERP, Sjef. Matrimonial property regimes and patrimonial aspects of other forms of union: what problems and proposed solutions? (Proposal for Rome IV Regulation). *Directorate General for Internal Policies* [online]. European Parliament, © 2010 [cit. 27. 12. 2018], pp. 6–7.

fied within the European Union. Rather, the substantive rules governing family law matters vary significantly in particular Member States.[3] The same is true for the concept of marriage. Even though marital status is a legal ground for enjoying numerous rights stemming from the European Union law, no EU act provides a definition of "marriage".[4]

The aim of this paper is to consider the difficulties, which may arise with regard to the characterisation of the notion of marriage in the context of the European private international law instruments.

The concept of marriage is relevant in (European) private international law from three points of view. Firstly, the question of which is the law applicable to the formation of a marriage has to be answered. Secondly, the private international law rules have to be considered if the validity of a marriage concluded abroad is at stake. Finally, the law applicable to the consequences of marriage (especially personal and proprietary relations between spouses, and between them and third parties) have to be determined.[5]

Although all these questions are interconnected, the author of this contribution would only like to focus on the notion of marriage with regard to the property effects of marriage having cross-border implications. Therefore, the emphasis will be put on the definition of marriage for the purpose of the newly adopted EU regulations concerning matters of matrimonial property regimes and the property consequences of registered partnerships. The author will analyse this topic from the perspective of the Czech courts.

2 Legislative background

Even though the family rights protection did not belong to the objectives of the European Union (or more precisely the European Community)

3 MARTINY, Dieter. European Family Law (PIL). In: BASEDOW, Jürgen, Klaus J. HOPT, Reinhard ZIMMERMANN and Andreas STIER (eds.). *The Max Planck Encyclopedia of European Private Law: Volume I*. Oxford: Oxford University Press, 2012, p. 595.

4 For further details, see TOMASI, Laura, Carola RICCI and Stefania BARIATTI. Characterisation in Family Matters for Purposes of European Private International Law. In: MEEUSEN, Johan, Gert STRAETMANS, Marta PERTEGÁS and Frederik SWENNEN (eds.). *International Family Law for the European Union*. Antwerp–Oxford: Intersentia, 2007, p. 342.

5 COESTER-WALTJEN, Dagmar. Marriage. In: BASEDOW, Jürgen, Giesela RÜHL, Franco FERRARI and Pedro DE MIGUEL ASENSIO (eds.). *Encyclopedia of Private International Law: Volume 2*. Cheltenham: Edward Elgar Publishing, 2017, pp. 1226–1227, 1233.

as a regional economic integration organisation, the protection of family life has become more important under the free movement rights.[6] In order to demonstrate to what extent and according to what legal framework the EU legislator can and should act in the field of (international) family law, the author would like to summarize the legislative development within the EU and highlight the crucial milestones.[7]

The competence of the European Union to legislate in the field of judicial cooperation in civil (including family) matters having cross-border implications was introduced with the Treaty of Amsterdam[8], which entered into force in 1999[9]. It is however important to emphasize that the EU did not acquire the competence to unify the rules of substantive law[10]; the substantive family law remains a matter of exclusive competence of the particular EU Member States[11]. The legislative competence of the European Union is only limited to private international law.

In the 1998 Vienna Action Plan, the adoption of the measures in matters of international family law (namely instruments concerning matrimonial property regimes, succession, and divorce) was identified as a priority.[12] The Hague

6 Similarly MEEUSEN, Johan, Marta PERTEGÁS, Gert STRAETMANS and Frederik SWENNEN. General Report. In: MEEUSEN, Johan, Gert STRAETMANS, Marta PERTEGÁS and Frederik SWENNEN (eds.). *International Family Law for the European Union*. Antwerp–Oxford: Intersentia, 2007, p. 5.

7 More to the legislative development see ZUPAN, Mirela nad Vjekoslav PUJLKO. Shaping European Private International Family Law. *Slovenian Law Review* [online]. 2010, vol. 47, iss. 1–2, pp. 30–50 [cit 20. 10. 2018]; VALENTOVÁ, Lucia. Property Regimes of Spouses and Partners in New EU Regulations – Jurisdiction, Prorogation and Choice of Law. *International and Comparative Law Review* [online]. 2016, vol. 16, no. 2, pp. 224–227 [cit. 26. 12. 2018]; ROZEHNALOVÁ, Naděžda. Evropský justiční prostor ve věcech civilních. In: ROZEHNALOVÁ, Naděžda, Klára DRLIČKOVÁ, Tereza KYSELOVSKÁ and Jiří VALDHANS. *Mezinárodní právo soukromé Evropské unie*. 2. ed. Praha: Wolters Kluwer ČR, 2018, pp. 17–31.

8 Article 65 of the Treaty establishing the European Community, consolidated version [online]. In: *EUR-Lex* [cit. 22. 11. 2018].

9 ROZEHNALOVÁ, Naděžda. Evropský justiční prostor ve věcech civilních. In: ROZEHNALOVÁ, Naděžda, Klára DRLIČKOVÁ, Tereza KYSELOVSKÁ and Jiří VALDHANS. *Mezinárodní právo soukromé Evropské unie*. 2. ed. Praha: Wolters Kluwer ČR, 2018, p. 26.

10 MARTINY, Dieter. European Family Law (PIL). In: BASEDOW, Jürgen, Klaus J. HOPT, Reinhard ZIMMERMANN and Andreas STIER (eds.). *The Max Planck Encyclopedia of European Private Law: Volume I*. Oxford: Oxford University Press, 2012, p. 596.

11 FIORINI, Aude: *Which Legal Basis for Family Law? The Way Forward* [online]. European Parliament, © 2012, p. 5 [cit. 22. 11. 2018].

12 JUSTICE AND HOME AFFAIRS COUNCIL. *Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice* [online]. 3. 12. 1998 [cit. 21. 11. 2018]. C 19/10.

Programme adopted in 2004 invited the Commission to submit proposals regarding these family and succession law matters. Nevertheless, it explicitly stated that the EU instruments *"should cover matters of private international law and should not be based on harmonised concepts of 'family', 'marriage' or other"*.[13]

With the entry into force of the Treaty of Lisbon in 2009, judicial cooperation in civil matters is regulated under Article 81 of the Treaty on the Functioning of the European Union[14] ("TFEU"). Measures concerning family law with cross-border implications can only be adopted by means of special legislative procedure. This implies that unanimity by the Council after consulting the European Parliament is required to take any decision in family-law related matters, unless the ordinary legislative procedure under the *passerelle* clause is utilized[15]. As a rule, however, consensus of all EU Member States is necessary. Process of adoption of measures in the field of family law matters is therefore slower than in other civil and commercial matters, which is caused by the sensitive nature of these questions that derives from the national traditions and culture in particular states.[16]

In March 2011, the European Commission presented two proposals on cross-border property regimes, one dealing with married couples[17], the other concerning registered partnerships[18]. These instruments were supposed to be adopted by the EU Member States together as a package. This approach should contribute to fighting discrimination based on the ground of sexual orientation, which is a fundamental principle recognised in Article 21 of the Charter of Fundamental Rights of the European Union.[19]

13 COUNCIL. *The Hague Programme: strengthening freedom, security and justice in the European Union* [online]. 4.–5. 11. 2004 [cit. 21. 11. 2018]. C 53/13.

14 Article 81 of the Treaty on the Functioning of the European Union, consolidated version [online]. In: *EUR-Lex* [cit. 22. 11. 2018].

15 Article 81(3) of the TFEU.

16 Similarly FIORINI, Aude. *Which Legal Basis for Family Law? The Way Forward* [online]. European Parliament, © 2012, pp. 6–7 [cit. 22. 11. 2018].

17 *Proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes* [online]. Brussels: European Commission, 16. 3. 2011, COM(2011) 126 final.

18 Proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships [online]. Brussels: European Commission, 16. 3. 2011, COM(2011) 127 final.

19 Similarly EUROPEAN COMMISSION. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Bringing legal certainty to property rights for international couples* [online]. Brussels, 16. 3. 2011, COM(2011) 125 final. p. 6.

In 2015, the Council concluded that unanimity could not be reached within a reasonable period by the European Union as a whole. The reason was that the institutions of same-sex marriage and registered partnership were not known in several EU Member States. Some Member States found that the proposed regulations provided for sufficient safeguards, which ensure that these Member States would not have to deal with foreign institutions unknown in their national legal system. Other Member States expressed their concern that *"even if the future instruments would not require them to introduce unknown institutions in their national law, the recognition in their country of the property consequences of such foreign institutions would have an indirect effect on their national family law and policy"*.[20] Despite the compromise texts[21] of the proposals were drafted, absence of the common understanding of notions of marriage and registered partnership proved to be an obstacle to the process of unification within the EU.

However, 18 EU Member States notified their intention to establish enhanced cooperation between themselves in the area of property consequences of international couples. Enhanced cooperation (or flexibility) is a procedure, which allows establishing advanced integration or cooperation of a group of Member States. These states are authorized to move at different speeds and towards diverse goals than those EU Member States, which decide to stay outside enhanced cooperation.[22] A special regime of enhanced cooperation may only be utilized *"as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole"*.[23]

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20 Proposal for a Council decision authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships [online]. Brussels: European Commission, 2. 3. 2016, COM(2016) 108 final. pp. 2–3.

21 Proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes – Political agreement [online]. Brussels: Council of the European Union, 26. 10. 2015, 14651/15; proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships – Political agreement [online]. Brussels: Council of the European Union, 26. 10. 2015, 14652/15.

22 More to the legal basis for enhanced cooperation see Article 20 of the Treaty on European Union, consolidated version [online], ("TEU"); Articles 326–334 of the TFEU. See TÝČ, Vladimír. *Základy práva Evropské unie pro ekonomy*. 7. ed. Praha: Leges, 2017, p. 58.

23 Article 20(2) of the TEU.

After many years of preparations, negotiations and searching for political consensus, Council regulation (EU) 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes[24] ("Matrimonial Property Regulation") and Council regulation (EU) 2016/1104 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships[25] ("Registered Partnership Regulation") were adopted in June 2016. As of 29 January 2019, both regulations will be directly applicable in so-called "participating Member States".[26] It should however be noted that upon the fulfilment of the prescribed conditions of participation, enhanced cooperation is at any time open to all EU Member States.[27]

3 Cross-border property regimes

3.1 Concept of marriage and registered partnership

Marriage is usually described as *"a lifelong personal union between two individuals based on mutual consent given in a formalized way"*.[28] Even if there is a common approach to the notion of marriage in European legal systems, there are still considerable differences in the general understanding of this institution

24 Council regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [online].

25 Council regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships [online].

26 More to the temporal and territorial scope of application of the regulations see Articles 69, 70 of the Matrimonial Property Regulation; Articles 69, 70 of the Registered Partnership Regulation. Participating Member States are Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, France, Germany, Greece, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain, and Sweden. See recital 11 of the Preamble to the Matrimonial Property Regulation; recital 11 of the Preamble to the Registered Partnership Regulation.

27 Recital 13 of the Preamble to the Matrimonial Property Regulation; recital 13 of the Preamble to the Registered Partnership Regulation.

28 COESTER-WALTJEN, Dagmar. Marriage. In: BASEDOW, Jürgen, Klaus J. HOPT, Reinhard ZIMMERMANN and Andreas STIER (eds.). *The Max Planck Encyclopedia of European Private Law: Volume II*. Oxford: Oxford University Press, 2012, p. 1154.

as well as in more detailed rules.[29] While some EU Member States opened up marriage to the same-sex couples[30], other legal systems are still based on the traditional, heterosexual concept of marriage.[31]

In general, there are two principal approaches to the characterisation[32] of the family-law notions in the European private international law instruments. Either these notions may be given an autonomous meaning, or reference to the national law of the EU Member State can be made. Autonomous characterisation and interpretation contributes to the uniform application of the EU law. However, too broad (and all-embracing) autonomous definition may be considered by some Member States as an attempt to indirectly legislate over substantive family law.[33] Reference to the national law is usually given preference with regard to more controversial family-law notions, where a considerable divergence between the Member States exists.[34]

In order to apply European private international law instruments, which concern the institution of marriage, a court of an EU Member State has to decide whether it recognises the relationship in question as marriage.[35]

29 COESTER-WALTJEN, Dagmar. Marriage. In: BASEDOW, Jürgen, Klaus J. HOPT, Reinhard ZIMMERMANN and Andreas STIER (eds.). *The Max Planck Encyclopedia of European Private Law: Volume II*. Oxford: Oxford University Press, 2012, p. 1154.

30 Marriage is open for both opposite-sex and same-sex couples in fourteen EU Member States, namely Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, Malta, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom (England and Wales).

31 GONZÁLES BEILFUSS, Cristina. The Proposal for a Council Regulation on the Property Consequences of Registered Partnerships. In: ŠARČEVIĆ, Petar, Paul VOLKEN, Andrea BONOMI and Gian P. ROMANO (eds.). *Yearbook of Private International Law. Volume XIII – 2011*. Munich: Sellier. European Law Publishers, 2011, p. 185.

32 More to the characterisation see ROZEHNALOVÁ, Naděžda. *Instituty českého mezinárodního práva soukromého*. Praha: Wolters Kluwer ČR, 2016, pp. 52–92.

33 TOMASI, Laura, Carola RICCI and Stefania BARIATTI. Characterisation in Family Matters for Purposes of European Private International Law. In: MEEUSEN, Johan, Gert STRAETMANS, Marta PERTEGÁS and Frederik SWENNEN (eds.). *International Family Law for the European Union*. Antwerp–Oxford: Intersentia, 2007, pp. 354–356.

34 MEEUSEN, Johan, Marta PERTEGÁS, Gert STRAETMANS and Frederik SWENNEN. General Report. In: MEEUSEN, Johan, Gert STRAETMANS, Marta PERTEGÁS and Frederik SWENNEN (eds.). *International Family Law for the European Union*. Antwerp–Oxford: Intersentia, 2007, p. 21.

35 GRAY, Jacqueline; QUINZÁ REDONDO, Pablo. Stress-Testing the EU Proposal on Matrimonial Property Regimes: Co-operation between EU Private International Law Instruments on Family Matters and Succession. *Family & Recht* [online]. November 2013 [cit. 13. 12. 2018].

The notion of marriage is used in the Brussels IIbis Regulation[36], the Rome III Regulation[37], and the Maintenance Regulation[38]. Nevertheless, none of these EU instruments provides a definition of marriage for the purpose of its application. The same is true for the regulations concerning property regimes of international couples – the Matrimonial Property Regulation and the Registered Partnership Regulation. While the notion of registered partnership has an autonomous meaning under the Registered Partnership Regulation, situation is different as regards the concept of marriage.[39]

Registered partnership is defined autonomously as *"the regime governing the shared life of two people which is provided for in law, the registration of which is mandatory under that law and which fulfils the legal formalities required by that law for its creation"*.[40] This definition is only applicable for the purpose of the Registered Partnership Regulation. It should however be emphasised that the actual substance of the notion of registered partnership will still be characterised in accordance with the national laws of the EU Member States. Moreover, it is explicitly stated that those Member States, legal system of which does not know the registered partnership, are not required under the Registered Partnership Regulation to introduce this institution in their national substantive law.[41]

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36 Council regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [online].

37 Recital 26 to the Preamble; Article 13 of the Council regulation (EU) 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [online]. It should however be stated that this EU instrument is not applicable in the Czech Republic.

38 Recital 25 to the Preamble, Article 22 of the Council regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [online].

39 DUTTA, Anatol. Beyond Husband and Wife – New Couple Regimes and the European Property Regulations. In: ŠARČEVIĆ, Petar, Paul VOLKEN, Andrea BONOMI and Gian P. ROMANO (eds.). *Yearbook of Private International Law. Volume XIX – 2017/2018*. Köln: Otto Schmidt, 2018, pp. 146–148.

40 Article 3(1)(a) of the Registered Partnership Regulation. It should be noted that this EU regulation does not deal with *de facto* unions. Similarly KYSELOVSKÁ, Tereza. Příslušnost, rozhodné právo a uznání a výkon rozhodnutí v oblasti rodinného práva. In: ROZEHNALOVÁ, Naděžda, Klára DRLIČKOVÁ, Tereza KYSELOVSKÁ and Jiří VALDHANS. *Mezinárodní právo soukromé Evropské unie*. 2. ed. Praha: Wolters Kluwer ČR, 2018, p. 338.

41 Recital 17 of the Preamble to the Registered Partnership Regulation.

The Matrimonial Property Regulation applies to "matrimonial property regimes".[42] Even though this EU instrument contains a definition of "property regime"[43], there is no autonomous definition of the notion of "marriage" or "matrimonial". Instead, the national laws of each EU Member State should govern this concept.[44] Therefore, *lex fori*[45] characterisation is required.

3.2 Problem of characterisation

Although the Matrimonial Property Regulation and the Registered Partnership Regulation are to great extent parallel, the dividing line between the institutions of marriage and registered partnership is less obvious than it seems.[46] Because both marriage and registered partnership may or may not be open to opposite-sex couples or to same-sex couples, depending on the national law of the EU Member State, the EU regulations are gender neutral, i. e. these instruments do not differentiate on the basis of sexual orientation.[47]

It is indisputable that the Matrimonial Property Regulations applies to monogamous opposite-sex marriages, which constitute the common core of the notion of marriage in all legal systems.[48] Nevertheless, the fundamen-

42 Article 1(1) of the Matrimonial Property Regulation.

43 Recital 18 of the Preamble, Articles 3(1)(a), 27 of the Matrimonial Property Regulation

44 Recital 17 of the Preamble to the Matrimonial Property Regulation. For further details, see DUTTA, Anatol: Beyond Husband and Wife – New Couple Regimes and the European Property Regulations. In: ŠARČEVIĆ, Petar, Paul VOLKEN, Andrea BONOMI and Gian P. ROMANO (eds.). *Yearbook of Private International Law. Volume XIX – 2017/2018*. Köln: Otto Schmidt, 2018, p. 148.

45 Similarly COESTER-WALTJEN, Dagmar. Connecting Factors to Determine the Law Applicable to Matrimonial Property Regimes. In: ŠARČEVIĆ, Petar, Paul VOLKEN, Andrea BONOMI and Gian P. ROMANO (eds.). *Yearbook of Private International Law. Volume XIX – 2017/2018*. Köln: Otto Schmidt, 2018, p. 198.

46 GONZÁLES BEILFUSS, Cristina. The Proposal for a Council Regulation on the Property Consequences of Registered Partnerships. In: ŠARČEVIĆ, Petar, Paul VOLKEN, Andrea BONOMI and Gian P. ROMANO (eds.). *Yearbook of Private International Law. Volume XIII – 2011*. Munich: Sellier. European Law Publishers, 2011, p. 184.

47 Similarly EUROPEAN COMMISSION. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Bringing legal certainty to property rights for international couples [online]. Brussels, 16. 3. 2011, COM(2011) 125 final. p. 38.

48 DUTTA, Anatol. Beyond Husband and Wife – New Couple Regimes and the European Property Regulations. In: ŠARČEVIĆ, Petar, Paul VOLKEN, Andrea BONOMI and Gian P. ROMANO (eds.). *Yearbook of Private International Law. Volume XIX – 2017/2018*. Köln: Otto Schmidt, 2018, p. 148.

tal question the author would like to address in this contribution is which EU regulation shall apply to the property consequences of same-sex marriage that is only known in some EU Member States. Characterisation of this institution is of crucial importance for the determination of the material scope of application of both instruments on cross-border property regimes.

For example, the Netherlands opened up the institution of marriage to both heterosexual and homosexual couples. Therefore, a Dutch court will probably apply the Matrimonial Property Regulation in case of the property consequences of same-sex marriage. On the contrary, the Czech substantive law only provides marriage for opposite-sex couples.[49] Those EU Member States, which do not recognise the institution of same-sex marriage, are not obliged to apply European private international law instruments concerning the marital relationship to such situations.[50]

In literature, three possible solutions are discussed. Firstly, a Member State whose substantive law does not recognise same-sex marriage could deny all effects of such marriage, including the property consequences relating to this same-sex relationship.[51] Therefore, such couple will be treated as persons that have joint ownership of the property.[52] Secondly, a court of the Member State, which does recognise same-sex marriage in its national law, might give partial or complete recognition to the property effects of same-sex marriage concluded abroad. According to third approach, a court of the Member State, which does not regulate same-sex marriage in its substantive law, but whose law provides for same-sex registered partnership, could downgrade

49 Section 655 of the Act No. 89/2012 Coll., the Civil Code, as amended [online].

50 GRAY, Jacqueline and Pablo QUINZÁ REDONDO. Stress-Testing the EU Proposal on Matrimonial Property Regimes: Co-operation between EU Private International Law Instruments on Family Matters and Succession. *Family & Recht* [online]. November 2013 [cit. 13. 12. 2018].

51 GRAY, Jacqueline and Pablo QUINZÁ REDONDO. Stress-Testing the EU Proposal on Matrimonial Property Regimes: Co-operation between EU Private International Law Instruments on Family Matters and Succession. *Family & Recht* [online]. November 2013 [cit. 13. 12. 2018].

52 Similarly HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW. Key features of Council regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships [online]. p. 3. [cit. 13. 12. 2018].

this relationship to same-sex registered partnership, provided for by the *lex fori*.[53]

In the Czech courts, the property consequences of same-sex marriage concluded abroad will, presumably, be dealt with according to the Registered Partnership Regulation. It means that same-sex marriage concluded abroad will be downgraded to registered partnership under the Czech law.[54] It should however be mentioned that the solution is not even clear under the Czech Private International Law Act[55] ("PILA"), as the commentaries are not unanimous on this matter. While some authors consider that the property effects of same-sex marriage should be dealt with under Section 67 of the PILA (registered partnership and similar regimes)[56], others subject this matter within the scope of Section 49 of the PILA (marital regimes)[57].

To sum up, some EU Member States will not recognise same-sex marriages celebrated abroad as marriages that fall within the scope of application of the Matrimonial Property Regulation. Solution in particular case will depend on the characterisation of the notion of marriage in a Member State which court has jurisdiction. Nevertheless, the rather wide definition of registered partnership under the Registered Partnership Regulation will cover

53 GRAY, Jacqueline and Pablo QUINZÁ REDONDO. Stress-Testing the EU Proposal on Matrimonial Property Regimes: Co-operation between EU Private International Law Instruments on Family Matters and Succession. *Family & Recht* [online]. November 2013 [cit. 13. 12. 2018]. See also MARINO, Silvia: Strengthening the European Civil Judicial Cooperation: The Patrimonial Effects of Family Relationships. *Cuadernos de Derecho Transnacional* [online]. 2017, vol. 9, no. 1, pp. 267–268 [cit. 18. 10. 2018].

54 Recently, the Supreme Administrative Court of the Czech Republic was dealing with a case concerning same-sex marriage in the context of the application for registration of same-sex marriage concluded in the Netherlands as marriage in the special register. The court confirmed that the register is only allowed to consider same-sex marriage concluded abroad as registered partnership for the purpose of the registration in the Czech register. See decision of the Supreme Administrative Court, Czech Republic of 30 May 2018, No. 8 As 230/2017 [online]. *The Supreme Administrative Court of the Czech Republic* [cit. 22. 11. 2018].

55 Act No. 91/2012 Coll., the Private International Law, as amended [online].

56 BŘICHÁČEK, Tomáš and Zuzana FIŠEROVÁ. § 67 [Pravomoc, rozhodné právo a uznávání a výkon rozhodnutí ve věcech registrovaného partnerství]. In: BŘÍZA, Petr, Tomáš BŘICHÁČEK, Zuzana FIŠEROVÁ a kol. *Zákon o mezinárodním právu soukromém: komentář.* Plzeň: C. H. Beck, 2014, p. 342.

57 ZAVADILOVÁ, Marta and Jiří GRYGAR. § 67 (Pravomoc, rozhodné právo a uznávání a výkon rozhodnutí ve věcech registrovaného partnerství). In: PAUKNEROVÁ, Monika, Naděžda ROZEHNALOVÁ, Marta ZAVADILOVÁ a kol. *Zákon o mezinárodním právu soukromém: komentář.* Praha: Wolters Kluwer ČR, 2013, p. 438.

relationships that have been contracted in one EU Member State as marriages, but which are not recognised as marriages in another Member State.[58] The property consequences of same-sex marriages will therefore receive at least some recognition.

3.3 Adopted safeguards

Both the Matrimonial Property Regulation and the Registered Partnership Regulation provide for a series of safeguards in order to respect national legal systems and legal traditions of particular EU Member States.

Firstly, it should be noted that issues of "the existence, validity or recognition of a marriage" (or registered partnership) are excluded from the material scope of the EU regulations. These questions continue to be governed by the national law of particular Member States.[59]

Secondly, both EU instruments introduce a judicial margin of appreciation in the acceptance of the jurisdiction.[60] A court of the Member State, which does not recognise the marriage (or does not provide for the institution of registered partnership) at stake, is exceptionally allowed to decline jurisdiction under the Matrimonial Property Regulation (or the Registered Partnership Regulation) to hear cases about the property consequences of such relationships. Subsequently, a couple has possibility to submit their dispute to a court in any other Member State, which would have jurisdiction in accordance with the regulation (i. e. this court will have an "alternative jurisdiction"). It is however not possible to decline jurisdiction if the spouses have obtained a divorce, legal separation or marriage annulment (or the partners have obtained dissolution or annulment of a registered partnership), which is capable of being recognised in the Member State of the forum. The aim of this safeguard

58 GONZÁLES BEILFUSS, Cristina. The Proposal for a Council Regulation on the Property Consequences of Registered Partnerships. In: ŠARČEVIĆ, Petar, Paul VOLKEN, Andrea BONOMI and Gian P. ROMANO (eds.). *Yearbook of Private International Law. Volume XIII – 2011*. Munich: Sellier. European Law Publishers, 2011, p. 187.

59 Recital 21 of the Preamble, Article 1(2)(b) of the Matrimonial Property Regulation; recital 21 of the Preamble, Article 1(2)(b) of the Registered Partnership Regulation.

60 MARINO, Silvia. Strengthening the European Civil Judicial Cooperation: The Patrimonial Effects of Family Relationships. *Cuadernos de Derecho Transnacional* [online]. 2017, vol. 9, no. 1, p. 276 [cit. 18. 10. 2018].

clause is to ensure that the couple will benefit from a foreseeable forum, which will give effect to the property consequences of their marriage (or registered partnership).[61] Nevertheless, the margin of appreciation left to the Member States poses a question whether the unification of private international law in matters of cross-border property regimes in fact leads to an approximation of laws, which is the main purpose of these EU regulations.

Last but not least, the Matrimonial Property Regulation and the Registered Partnership Regulation contain the public policy exception, which allows a court to refuse the application of a provision of the law determined by the regulation, if, in a given case, such application is manifestly incompatible with the public policy (*ordre public*) of the forum. Application of the public policy clause is limited by the principle of non-discrimination, i. e. it is not possible to set aside the foreign law, when doing so would be contrary to the Article 21 of the Charter of Fundamental Rights of the European Union. Therefore, a court of the EU Member State may be prevented from using the public policy clause to disregard a law, which allows same-sex marriages, if it would amount to a violation of the principle of non-discrimination.[62]

4 Conclusion

Newly adopted EU regulations on property regimes of international couples may be seen as a step forward that will bring considerable benefits to the EU citizens, who are dealing with the property relations disputes. Nevertheless, some questions, including the characterisation of the notion of marriage remain open. As the European Union did not acquire legislative competence to unify the substantive family law, it cannot define notion of marriage. This matter

61 Recital 38 of the Preamble, Article 9 of the Matrimonial Property Regulation; recital 36 of the Preamble, Article 9 of the Registered Partnership Regulation. For further details, see FRANZINA, Pietro: Jurisdiction in Matters Relating to Property Regimes under the EU Private International Law. In: ŠARČEVIĆ, Petar, Paul VOLKEN, Andrea BONOMI and Gian P. ROMANO (eds.). *Yearbook of Private International Law. Volume XIX – 2017/2018*. Köln: Otto Schmidt, 2018, pp. 184–189.

62 Recital 54 of the Preamble, Article 31 of the Matrimonial Property Regulation; recital 53 of the Preamble, Article 31 of the Registered Partnership Regulation. For further details, see CLAVEL, Sandrine and Fabienne JAULT-SESEKE. Public Interest Considerations – Changes in Continuity. In: ŠARČEVIĆ, Petar, Paul VOLKEN, Andrea BONOMI and Gian P. ROMANO (eds.). *Yearbook of Private International Law. Volume XIX – 2017/2018*. Köln: Otto Schmidt, 2018, pp. 233–240.

should still be governed by the national law of the EU Member States. The aim of this contribution was to consider the difficulties, which may arise in connection with the characterisation of the notion of marriage in the context of the European private international law instruments. The author focused on the delimitation of the scope of application of the Matrimonial Property Regulation and the Registered Partnership Regulation.

In the course of the legislative process, the concepts of marriage and registered partnership proved to be crucial for the adoption of both EU regulations as a package. Sensitivity of this matter and the absence of the uniform understanding of these notions within the European Union were the reasons, why only enhanced cooperation as an *ultima ratio* was established.

Because both EU regulations are gender neutral in application, it is left to particular Member States to decide whether the Matrimonial Property Regulation applies to the property consequences of same-sex marriage. Those Member States, which do not recognise the institution of same-sex marriage, are not obliged to apply this EU instrument concerning marriage to such situations. In the Czech Republic, same-sex marriage will probably be downgraded to registered partnership, which is provided for by the *lex fori*. Consequently, the property consequences of same-sex marriage concluded abroad will be dealt with the Registered Partnership Regulation.

It is obvious that the scope of application of the Matrimonial Property Regulation will vary, depending on the national law and its approach to unknown foreign institutions. This means that the EU regulations on the cross-border property regimes will not be applied uniformly in all participating Member States. It contradicts the general purpose of these instruments, which is to eliminate the obstacles to the free movement of persons within the European Union, in particular the difficulties experienced by the couples in managing or dividing their property.[63]

Nevertheless, the Matrimonial Property Regulation provides sufficient safeguard mechanisms (namely option to decline jurisdiction and the public policy exception) for the courts of the EU Member States, which do not know the institution of same-sex marriage in their national legal systems.

63 Similarly recital 8 of the Preamble to the Matrimonial Property Regulation.

To conclude, the question on how to treat same-sex marriages for the purpose of the EU regulations on the property regimes of international couples may still be seen as problematic. It should however not be overestimated, as institution of same-sex marriage is already known in most participating Member States[64]. Nevertheless, the Czech courts may still encounter this problem of characterisation.

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64 Same-sex marriage is not legally recognised in seven Member States participating in enhanced cooperation. Those are Bulgaria, Croatia, Cyprus, the Czech Republic, Greece, Italy, and Slovenia. See COESTER-WALTJEN, Dagmar. Connecting Factors to Determine the Law Applicable to Matrimonial Property Regimes. In: ŠARČEVIĆ, Petar, Paul VOLKEN, Andrea BONOMI and Gian P. ROMANO (eds.). *Yearbook of Private International Law. Volume XIX – 2017/2018*. Köln: Otto Schmidt, 2018, p. 198.

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DNY PRÁVA 2018 – DAYS OF LAW 2018
PART I. – MARRIAGE FOR ALL?

Eds.: prof. JUDr. Zdeňka Králíčková, Ph.D., Mgr. Martin Kornel, Ph.D., JUDr. Jiří Valdhans, Ph.D.

Published by Masaryk University
Žerotínovo nám. 617/9, 601 77 Brno
in 2019

Publications of the Masaryk University
Edice Scientia, No. 648

1st edition, 2019

ISBN 978-80-210-9304-1 (online : pdf)
www.law.muni.cz

ISBN 978-80-210-9304-1

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