Family Protection From a Legal Perspective

Analysis on Certain Central European Countries

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Family Protection From a Legal Perspective

Analysis on Certain Central European Countries

Edited by
Tímea Barzó and **Barnabás Lenkovics**

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Contents

Notes on the Contributors

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Chapter I

The Protection of the Family

Barnabás Lenkovics

1. Extent and delimitation of the topic

One of the joint research topics of the Eastern European Professors' Network is the "Protection of the Family in Law." The designation of this research topic can already be regarded as a delimitation in itself, since it refers only to the grounds and optimal means of legal protection. However, if we omit this restriction on the law (when discussing "Protection of the Family"), it immediately becomes apparent how much broader the research topic is. The protection of the family dates back to the beginning of human evolution (to prehistoric times), and its toolbox originates in the natural laws that long preceded the establishment of the state and the law. In addition to law, this broad field of research can also be explored via many other disciplines (biology and ethology, generally speaking, but especially human ethology, psychology, sociology, anthropology, and cultural anthropology). Among them, we can find not only social sciences but also natural sciences. All of these are sub-fields of "science," and their common denominator is that their subject is mankind, i.e., they are the *human sciences*. In its ultimate essence, "the goal of the acquisition of all human knowledge is the better self-knowledge of the man."[1] It is, therefore, expedient and useful if these research results are utilized by jurisprudence. In this sense, I try to broaden the thinking base of jurisprudence in this complex topic and to "social-scientificize," or more generally to "scientificize" the jurisprudence, in order to avoid

1 Lorenz, 1988, p. 93.

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the accusation of "one-track thinking."[2] This is a difficult field and an unusual methodological experiment, owing to its diversified complexity. For example, "ethology analyzes human behavior as a subject of the functioning of a particular system. … The analysis of the organic system that is the basis of human social behavior is the most difficult and at the same time the boldest task, because this system is far the most complex on Earth'.[3] However, the leading examples of *bio-economics* (in the harmonization of natural laws and economic principles) and *behavioral economics* (in the harmonization of the material and intangible, spiritual needs of man) prove that it is not impossible to accomplish the task. Man is a *natural and social creature*, living in these two systems, in their subsystems, and in their reciprocal interactions. As such, people marry and start a family, causing natural and social crises, including physical and mental crises that are both internal (self-conflicts) and external (one's marriage partner and family), for the purpose of creating future generations.

After these introductory remarks, it can be stated that the *protection of the family* is one of the oldest natural and moral laws, the extension of *legitimate self-defense* of descendants to the co-genitor, to the wider family and relatives, and even to the entire human community formed by families (regardless of the size of these communities and what we name them: genus, tribe, tribal alliance, people, nation, etc.). Self-defense, offspring protection, family protection, and community protection are all manifestations of the survival instinct in the biological sense. Based on this, humans—like all other living organisms in general—must survive and, being mortal, reproduce the inherited genes so that their parent's essence can continue in the lives of their descendants and their offspring's descendants (and so on). That is the reason a person establishes a heterosexual relationship, starts a family, tries to create security for it, and protects one's family even at the cost of the life of the attacker, and, in extreme cases, at the cost of his/her own life. In comparison, it is a bagatelle sacrifice if a person has to limit his/her own hedonism for self-defense. If family protection as self-defense is successful and families survive, then not only are parents' genes reproduced but also wider communities and society are preserved. "While it may seem foolish to emphasize something that is so obvious, social capital cannot exist without people, and Western societies simply do not create enough people to sustain themselves."[4] Therefore, if necessary, the whole community must protect every single member and every family, since these are the constituent parts and the basic and natural units of the community. All of this is really quite natural (in the language of the law: evident) to the extent that we should not even have to question it. This would be true if marriage and family worked hand-in-hand with this natural law. However, it appears that modern marriage and the family are no longer working as they once did; indeed, such institutions are in crisis in Europe and wider Western civilization. Europe, as a continent and a civilization, is the only one in which the

2 Pokol, 2015, pp. 126–127.
3 Lorenz, 1988, p. 11–12.
4 Fukuyama, 2000, p. 62.

overall population is declining and aging.[5] For more than half a century, willingness to marry has been on the decline, a large proportion of marriages have fallen apart, couples have not had children, have been unable to have children, or have had fewer children than planned. Generally speaking, selfishness and violence have been ruining families. As a result of the population decline, white people (belonging to Western or European Christian culture) are in danger of extinction in the foreseeable future. (Meanwhile, man puts plant and animal species at the same risk under increased protection!) The self-defense reflexes of marriage and family do not work or are insufficient. The collapse of marriage and the family—in addition to crime and loss of trust—is one of the main causes of the "Great Disintegration."[6] Conscious and voluntary intervention is therefore needed to protect social reproduction, marriage, and the family as a dual effort of both the law and society. However, since law is—in its ultimate essence—a human rule of conduct that is accompanied by the *external* coercive public power of the state, this intervention also raises a number of difficult questions. When, for which reasons, for which purposes, and by which means must there be interventions? This study attempts to contribute to solving the crisis of marriage and the family via methodical approach. For the correct answers, we need to identify the root causes of the crisis with scientific rigor, elucidate the goals to be accomplished by tackling the crisis, and select the most appropriate and sufficient legal instruments to achieve them. In addition, we must not forget that we have internal controlling norms (natural and moral laws), and it is good that they pull in the direction of resolving the crisis.

2. Human and legal starting point

The starting point of legal research cannot be other than man, since we research the crisis of the two natural and indispensable institutions of human existence, marriage and the family, which we wish to protect by means of law, for the sake of man. It is true here as well—which I have claimed for a long time—that the law is for humans, and not the humans for law. Therefore, we must talk about the first part of the highest legal definitions—"rights of humans," "human rights," "human dignity," i.e., about humans themselves. Philosophers generally agree that humans have emerged from the animal kingdom as the "crown of creation," either as a creature of God or as a result of evolutionary development. The views of other living creatures are not yet known on this issue, although the views of native species already extinct by humans as invasive species in particular could be very remarkable. That said, while it seems likely that humanity as whole will survive for the foreseeable future,

5 Gallai, 2019, p. 16.
6 Fukuyama, 2000, pp. 59–72.

there are some groups of people at risk of extinction. From the point of view of the destruction of the *natural foundations of life* on Earth by humans, the danger of a climate catastrophe resulting in our eventual extinction has reached the overpopulated human species nowadays. Overpopulation is discussed by Konrad Lorenz as the first of the eight deadly sins of civilized humanity because it is also the cause of several other catastrophic dangers (destruction of living space, frostbite of emotions, and genetic decline).[7] The population explosion, therefore, has also diverted attention for some time from the other extremity, depopulation. I mention this mainly to show that it is not enough to deal with the crisis of marriage and family of certain groups of people and to protect and support these institutions legally; it also needs to be known that human life is threatened by other, even more serious dangers that need to be urgently and effectively addressed. Second, I mention it because I think that the institutions of marriage and family are also part of the *natural foundations of human life*. Although they became a part of the system of legal regulation (the legal system) and therefore became *legal institutions and social institutions*, they did not cease to be a natural phenomenon, a natural principle, and they could not be intentionally torn from their natural foundations without their destruction. As humans are primarily natural (biological, biophysical, biochemical, psychosomatic, etc.) beings, they are subject to the laws of nature as such. The majority of our most serious *human problems* (such as the danger of a climate catastrophe) stem precisely from the fact that man has been too far removed from nature, torn from it, and even confronted with it, to the point that he now imagines himself not as part of nature but as its master. "The general and rapid alienation from living nature is largely responsible for the aesthetic and moral roughness of civilized man."[8] Man is already playing "god" ("*Homo Deus*," as YN Harari calls him in one of his books), wanting to force his own human laws on nature instead of adapting (as other living beings) to the laws of nature (see: evolution). As one of the contemporary *human aspirations*, this distorted phenomenon also affects the institutions of marriage and the family and some people want to "re-create" these as well. This is not surprising because "man" is an extremely complex, intricate creature. According to the evolutionary biologist and historian couple, Kai Michel and Carel van Schaik, man has *three natures*. The first is our "*natural nature*."

> The first nature embraces our innate feelings, reactions, and preferences. These have evolved over hundreds of thousands of years and have proven their effectiveness in the daily lives of small numbers of hunter-gatherer groups. (…) Inclinations such as love between parents and their children, a sense of justice, outrage over injustice and inequality, and a sense of duty to others after accepting a gift or help belong to this first nature. [9]

7 Lorenz, 1988, pp. 18–20.
8 Lorenz, 1988, p. 25.
9 Michel and van Schaik, 2019, p. 28.

The second nature is our "*cultural nature,*" which includes the components of propriety, politeness and good manners, morals and customs, the arts and religions, and "civilization" in the broadest sense. The *third nature* centers on our "*rational nature*." It includes the basic rules, practices, and institutions to which we conform consciously, relying on our intellect.[10] The three natures of man act simultaneously, partially overlapping with each other; their effect is optimal and positive when combined, but they can sometimes be confused with each other. An example of the interaction and overlap between these natures is the rule of family law (third nature), according to which providing support for minor children takes precedence over the parent's own needs. Aside from legal implications, certain actions related to the family are also required by morality (second nature), and are the command of nature (first nature). Due to such overlap, conflict may arise if, in the same way as marriage between a man and a woman (first nature), people of the same sex can marry (third nature) with the permission of the law. In the latter case, the second nature (morality and culture) can shift toward the first or third nature. Our premise regarding the legal regulation and protection of marriage and family is that none of the parts of human nature can be ignored or overemphasized. Therefore, neither the legal regulation (third nature), which is closed to itself, nor the first nature is free from internal contradictions and seems very rational.

A similar explanation expressing the complex and intricate nature of man can be found in the bioethical-psychologist József Kovács. According to him, man is a *"bio-psychosocial"* being as a result of his combined *physical* (somatic, genetic), *spiritual* (mental), and *communal* (social, social) talents. "Evolutionary psychology and psychopathology assume that human beings are not only a somatic but also a mental product of Darwinian natural selection: our mental characteristics essentially served for the adaptation in the ancient environment in which 99% of human evolution took place." Regarding modern life, Kovács stated that we live in

> a completely different environment than the one to which we have adapted, which means that we are not mentally ill, but our modern environment is not created in accordance with the psychological needs of man. (…) Man (…) is maladapted to his current environment. We could also say that man has domesticated himself and lives in a kind of self-created zoo, which is comfortable and safe compared to the ancient environment, but it does not enable the complete behavioural repertoire of the species under its natural conditions, and therefore neither psychic satisfaction nor happiness under natural conditions.[11]

Maybe that is the reason why more and more people desire to return to nature. Could it be that as this is their native environment they feel truly happy there? Perhaps this is the reason why the so-called "happiness index," which valorizes

10 Michel and van Schaik, 2019, p. 29.
11 Kovács, 2007, pp. 121–122.

natural values (e.g., clean air and drinking water, healthy soil and food, peace and quiet, marriage and family, kinship, and friendships) has recently been calculated in addition to/instead of GDP indicators. "Scientists have only just begun to research the history of happiness in the past few years, and we are still developing the initial hypotheses and looking for the right research methods. (…) I think this is the biggest white spot in the assessment of our history. We should start to fill it out".[12] Thus, there is some evidence that a harmonious marriage, a peaceful and safe family environment, provides the greatest happiness for both parents and children.[13] However, both institutions are in crisis, and their protection and support are needed. Even though people now have many rights ("human rights"), they do not seem to be happier as a result. On the contrary, they tend to lose confidence in the law. Although it is not certain whether the fault is in the law the decline in public confidence in legal institutions should be stopped and general faith it their efficacy restored. Let us begin by taking a closer look at the universal human rights standards that serve as the starting point for our research, i.e., the legal protection of the family. These are set out in the United Nations 1948 "Universal Declaration of Human Rights" (hereinafter, UDHR). It should be noted that while the 1789 French "Declaration of the Rights of Man and of the Citizen," which served as the model for the UDHR, declared that "men are born and remain free and equal in rights" (Article I), "the law must be the same for all," and "all citizens are equal in its eyes" (Article VI), it did not specifically mention the equality of men and women, including the equality of spouses, nor did it comment on marriage or the family. However, these general declarations were suitable for the organization of the women's emancipation movements to liberate women from male domination and to achieve equal rights for women (e.g., equal access to universities, entry into professions, state-public participation, voting rights, etc.). The struggle of the labor movements against the rule of capital for higher wages, social security, and social (material) equality also expanded protections of workers' families, especially children of employees and the emancipation of working women. The results of these struggles—more than two centuries later—are already reflected in the text of the UDHR (in which the former bipolar world system also played a role).

According to point 5 of the Preamble of the UDHR, "the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom." This is also mentioned in Article 22 of the UDHR, although in a general way:

> Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance

12 Harari, 2020, p. 352.
13 Kopp and Skrabski, 2020, pp. 145–165.

> with the organization and resources of each State, of the economic, social, and cultural rights indispensable for his dignity and the free development of his personality.

Such rights will be further enumerated by the United Nations International Covenant on Economic, Social, and Cultural Rights of 1966. The text speaks of individuals as members of society, but the fact is that the vast majority of people live in a family (especially children), and the right to social security is typically related to the family. In this sense, we have to mention Article 23(3): "Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection." Here I also would like to mention that this idea has already appeared in Rerum Novarum, the encyclic of Pope Leo XIII of 1891:

> A worker, if he lives reasonably, and if his salary is sufficient to support himself, his wife, and his children decently, will spare money and attain what nature itself urges him to keep, in addition to the necessary expenditures, something from which he can make a modest fortune over time.[14]

However, it is well known that wages have always been adapted to the principles of the labor market rather than to the circumstances of the worker's family (number of children, housing conditions, degree of poverty). That is the reason it has become necessary to link employment with the ever-expanding toolbox of "social legislation," social protection (health and pension insurance, family allowances, free public education, maternity and childcare allowances, social benefits, etc.). These are regulated in Article 25(1)–(2):

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

With this background regulation, especially if these rules prevail in practical life, it is already possible and worthwhile to get married, start a family, and have a child (children). This makes the *three paragraphs of Article 16 of the UDHR*, which is most closely related to our subject, more comprehensible and interpretable:

14 Rerum Novarum, point 35.

(1) Men and women of full age, without any limitation due to race, nationality, or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
(2) Marriage shall be entered into only with the free and full consent of the intending spouses.
(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

It is obvious from these norms that marriage and the family are global (universal) fundamental human rights values; marriage, the choice of partner and the foundation of family (having children) have risen to the rank of fundamental freedoms. In addition, in accordance with the first nature of man, self-evident basic truths and natural laws can be read from them: marriage and, in the same way, the foundation of family requires a man and a woman; the spouses are equal parties; the family as a "small" community is a "natural" and "essential" component—or "cell," according to the well-known synonym—of society as a "large" community. If this cell becomes ill or dies, so does the society. Therefore, if necessary, we must protect health and integrity; to cure and rehabilitate if it has symptoms of illness (crisis). Protection is primarily a social matter, but should it prove insufficient the state is also obliged to protect the family, by using public means, rewards, subsidies, or prohibitions.

Many people regard the Universal Declaration of Human Rights and the whole expanded system of fundamental freedoms and human rights as the Magna Carta of mankind; the peak of the development of human civilization. Others consider this system of fundamental rights and legal values as a universal (universal, global) constitution of . It is important—as the 3rd declaration states—that "human rights should be protected by the rule of law." Therefore, "Member States have pledged themselves to achieve (…) the promotion of universal respect for and observance of human rights and fundamental freedoms" (6th declaration) and "strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction" (8th declaration). Considering this, the sole question is why such an almost perfect system does not work as intended—why do struggles such as marriages and families with symptoms of crisis persist? This is neither the first nor the only case in which there is a large discrepancy between the solution considered legally ideal and the social reality. Thus, the goal is precisely to bring the reality—in which there is always room for improvement—and the ideal. The real problem is when reality moves in a direction different from the objective or when it moves away from it instead of approaching it. This is a problem with marriage and the family as well: they seem to develop in other directions (alternative forms of relationships, same-sex marriage), but their stability and reproductive function deteriorate. The causes can be found in the law itself (in its unrealistic or irrational expectations), in the natural and socio-economic-cultural

environment that determines the law (which is constantly changing while the law is often static and rigid), and of course in the person him or herself, who is both a natural and a social being. Man is not yet perfect in his humanity; therefore, his constructed rules and expectations are likewise imperfect. However, a ray of hope in a crucial world is to see the fundamental human rights values of the universal constitution of humanity as milestones, compasses, and right alignment points that show the proper direction and bring us closer to ideal solutions. Compared to these, we can measure crises, look for their causes, and find the means of solving them.

3. The historical roots of the crisis of marriage and the family

I intentionally do not talk about the *"beginning"* of the crisis of marriage and family, since it cannot be determined by scientific precision, partly because we do not even know from what point in history we can talk about *marriage* between a man and a woman. "Man has been living for 2.5 million years from collecting plants and hunting animals that lived and reproduced without his intervention."[15] We do not have any factual information about this prehistoric time. However, scientific assumptions are permissible. "For hunter-gatherers, the relationship between men and women was pretty much still balanced. Although the man dominated to some degree, if the woman was dissatisfied with her husband's abuse of power she could return to her family at any time or change husbands. The bondage to the partner was not necessarily exclusive. Although there were monogamous relationships, it was not a common practice for a woman to be bound to a man for her entire life. A woman could have different partners; one after the other or even at the same time. Such promiscuity did not meet obstacles because paternity could not be established. Contact with more men served the interests of the woman since a network of potential fathers could be built in this way, all of whom felt responsible for their partner.[16] Of course, it has to be added that they felt responsible for all children in the community. "All of this changed about 10,000 years ago, when homo sapiens began to devote almost all of his time and energy to manipulating the lives of some animal and plant species. (…) It was a revolution in the human way of life—the agricultural revolution."[17]

> The Neolithic revolution broke with one of the fundamental laws of human coexistence that has prevailed in the everyday life for many thousands of years—with the rule that food must be shared. The new idea of property undermined the solidarity of

15 Harari, 2020, p. 81.
16 Michel and van Schaik, 2019, p. 64.
17 Harari, 2020, p. 81.

> prehistoric man. Everything which had been a common good until then—food provided by nature—had become monopolized at one blow. That was the real scandal! It is not enough that a daily, vital activity—the collection of fruit—will be banned; it will even be treated as a crime. We still feel the aftermath of this scandal.[18]

This, perhaps the greatest *paradigm shift* in the history of mankind, has also transformed man himself, his family, and society as a whole. The selection, domestication, and production of animal and plant species made man greatly independent from the whims of nature; it enabled him to stand on his own two feet through his own work. Until then, nature had dominated man and we had had to invest in social relationships—mutual help, cooperation, and solidarity had worked as a kind of life insurance. Nowadays, "people are no longer so interdependent; they can better neglect their social relationships. The path they stated to move on was a one-way street, which led to a world that was getting richer financially but becoming increasingly poorer socially and emotionally." As community relationships faded, family relationships became more valuable and tighter. In addition to passing on life, men also had to inherit private property. The boys stayed to work the farms with their fathers within the family unit. They had to find and bring a woman to the house from the outside, and these girls were endowed. "In the forming of the patriarchate, women become commercial goods and property. (…) The first victims of the shift were women."[19] At the same time, "where reserve management is successful, the population jumps. Competition is becoming dominant and social disparities are growing. Hierarchies and forms of dominance evolve."[20] This is also true for marriage and family relationships. The wife comes under the power of her husband, the children come under paternal power, and their liberation—if at all—will be the result of struggles of many centuries and even millennia. I will mention just one example of this:

> The patriarchal world is raising female fidelity to the rank of a norm. (…) When women become male property, their power must be regained. However, this power is mainly based on sexual attraction. (…) After being expelled from Paradise, Eve must get dressed to hide her charms under a dress. … In farming societies, it is mainly women who have to dress morally.[21]

Nowadays, its "aftermath" is the debate over the dress of immigrant Muslim women in many Western European countries. According to this (according to the evolutionary reading of the Bible), original sin was nothing more than the agricultural revolution, the consumption of the forbidden fruit of the tree of knowledge, the

18 Michel and van Schaik, 2019, p. 62.
19 Michel and van Schaik, 2019, p. 63.
20 Michel and van Schaik, 2019, p. 63.
21 Michel and van Schaik, 2019, p. 65.

punishment of which is the expulsion from the Garden of Eden, the natural form of life. The three main consequences are

> the issue of torturous labour, the difficulty of accepting property, and finally the embarrassing fact of the subordination of women—three burning problems which humans have struggled with since we transitioned to a settled lifestyle. In this respect, the situation has not changed much in the last ten thousand years.[22]

Another important circumstance—from the point of view of its current, daily relevance, and of our topic—has to be mentioned.

> The measure of the evolutionary success of a species is also the number of copies of its DNA. If no more copies of DNA remain, the species will become extinct. (…) If a species makes a lot of copies of DNA, it is a success and the species thrives. This is the essence of the agricultural revolution: the ability to survive even in worse conditions. At the same time, it is a trap because the growth of the population has burned the bridges behind humanity. (…) There is no return. The trap is closed.[23]

Clearly, there is no return to the Garden of Eden. However, the mitigation and remedy of the negative effects of property are not hopeless. One of these negatives is the extension of one's "ownership spirit" to

> friends, to the love partner, to health, travel, artefacts, God, and to one's own self. (…) The greatest pleasure lies perhaps not in the control of material things, but in the control of living entities. In a patriarchal society, even the poorest man himself owned his wife, children, and possessions, and he could imagine himself to be their absolute master. It is definitely true of this type of society that a great number of offspring is the only way to own people without being forced to work or invest capital to do so. Considering that the burden of this must be borne by the woman, it can hardly be denied that raising offspring is a process of gross exploitation of women. However, the mother has also a kind of property: her child when he/she is still small. It is a vicious circle: men exploit their wives, women exploit their children, growing men join their fathers and exploit women. The male rule in the patriarchal system lasted for about six to seven millennia, and even if it began to disintegrate, it did not disappear, especially in poor countries and the lower classes of society.[24]

In conclusion, we wanted to illustrate that the origins of the crisis of marriage essentially coincide with the emergence of monogamous marriage in today's sense, which was a consequence of the development of private property, agriculture,

22 Michel and van Schaik, 2019, p. 71.
23 Harari, 2020, p. 89.
24 Fromm, 1994, pp. 74–75.

settlement, and patriarchal society. However, the fault did not and does not lie in monogamy. It is quite the contrary! "Societies that are based on stable families, monogamy, loyalty, and responsibility can mostly expand and prosper. Societies that are sexually more permissive, that accept short relationships, easy divorce and family relationships are more unstable and doomed to decline."[25] Man, his mode of existence based on possession and his desire for domination over other people is the real problem, which is still the ruin of countless marriages. Therefore, we briefly review the changes in the ownership-economic order and the related characteristics of marriage and family related to historical ages. After that, we will turn to the crisis symptoms of the 20th century, their causes and tendencies, and crisis management by the state.

4. Schematic images of marriage and family

"*Bella gerant alii, tu felix Austria nube!"* Let others go to war, you get married, and happy Austria! This motto of Habsburg House, aimed at the construction and survival of the empire, is part of history education in Hungary and in the successor states of the Habsburg Empire. Its principals have also been practiced in other European royal houses as the Hungarian kings married their daughters to the royal families of other countries while their sons married the daughters of foreign sovereigns. We can say that the royal houses of Europe formed a large, common family. "Blood kinship"—as in prehistoric times—meant a strong bond and, although it did not completely rule out it reduced the chances of war. However, the main function of royal marriages was the acquisition and/or maintenance of the status of the monarch, including the inherent power and the dominion over territories and people. This attitude pervaded the entire vertical feudal hierarchy. It was forbidden to marry "below one's rank" or it was allowed only with the prior permission of the overlord. This guaranteed the preservation of the given status and the associated birth privileges at all stages of the hierarchy, and therefore the maintenance of the feudal social order as a whole. This also resulted in it being almost impossible for the serfs to change of their status, at least through marriage. The system also involved the church since the institution of "holy marriage" was governed by ecclesiastical law. What God bound together man could not dissolve (it could only be invalidated by the church with a very complicated and cumbersome procedure). The practice of marriages of the appropriate order and rank, aligned with the hierarchy of power and wealth, was deeply ingrained in European culture, although there was no *caste system* there. Although feudal birthrights were replaced by the inherited privileges of great wealth ("lords of fortresses" are "lords of factories"), it was not suitable to marry "below

25 Gallai, 2019, p. 16.

one's rank" in capitalism either. "Capital married with capital" and "factory married with factory," and even "land married with land" in connection with peasants, which aimed at preserving and strengthening the property status occupied in the order of ownership and economy.[26] The late embourgeoisement was the specialty of the Hungarian "feudal capitalism"—the impoverished nobleman (gentry) married the daughter of the rich manufacturer, or the rich manufacturer (in a less hazardous way) first bought a "baronial rank" and then married according to his rank. It was exceptional—as in the tale of the prince with the snow white horse—that the bank manager came with a "fairy tale car' to ask for the hand of the poor typewriter. The mutually reinforcing institutions of civil society, civil property, and civil marriage had already been harshly criticized and considered to be liquidated by Marx and Engels in the Communist Manifesto:

> What is the basis of the current, civil family? Capital, private acquisition. In its fully developed form, this family exists only for the bourgeoisie, but its supplements are the forced familylessness of the proletariat and public prostitution. The bourgeois family naturally ceases with the cessation of this supplement, and both disappear with the disappearance of capital.[27]

However, what replaces the family with a change in the means of production into social property?

> Wage labour and the proletariat is also disappearing. Prostitution is disappearing and monogamy, instead of disappearing, will finally become a reality – for men too. In any case, the situation of men is changing a lot. But the situation of women, the situation of every woman is also going through a significant change. With the public ownership of the means of production, the monogamous family is no longer an economic unit of society. Private households are transforming into social activities. The care and education of children are becoming a public affair.[28]

Since the means of production did not become the property of the society but of the state, the workers became "wage slaves of the state" instead of the wage slaves of capital. Neither wage labor nor the proletariat has disappeared. Moreover, a mass of women became wage workers in order to ensure a "two wage earners" family model for a mere subsistence. On the other hand, the monogamous family was no longer an economic unit of society. However, if it could have remained, it would have been able to perform miracles, just as in Western European countries. The incessant pursuit of people to create a greater degree of livelihood security and well-being for themselves, their families, their children, and their grandchildren is an incredibly

26 Kopp and Skrabski, 2020, p. 12.
27 Marx and Engels, 1965, p. 63.
28 Engels, 1977, p. 497.

powerful impetus that results in rapid and wide socio-economic development. Socialism turned off this driving force, as it limited the material scope and extent of personal (consumer) property. While it hypocritically proclaimed that "the greatest value in socialism is man," in Hungary, "unusual" socialism was built. In 1968, it introduced a "new economic mechanism" (regulated market economy) and allowed the "backyard" family farms in agriculture, which was extended to industry and services in 1982. This system was nicknamed "Fridge Socialism" and "Goulash Communism" by the Orthodox Communists. This was the last impulse of the right to private autonomy, of private law, whose—according to Károly Szladits—"main subjects are *private economy* and *family life*; private law is essentially *property law* and *family law.*"[29] The family and the family economy (today micro, small, and medium-sized enterprises) are the main arenas for the socialization of future generations: they educate the populace in the matters of work, cooperation, mutual support, solidarity, and even selfless love. All of these are socially useful fundamental values beyond the law. This was destroyed by the totalitarian state of the proletarian dictatorship with tectonic destruction. The conscious transformation of social-economic-property relations resulted in (to put it mildly) large-scale "social mobility," which tore apart the ties of marriage, family, relatives, village community, civil society, and the "social safety net" that are so highly valued today. In lieu of self-care, *state paternalism* was introduced, whereby whoever is cared for by the state does not require family care. This kind of great collectivism, however, has strengthened egocentric selfishness, which loosens the bond of marriage and disintegrates the family. It is a historical rarity that marriage and the family have been equally affected in parallel to the development of industrial society coupled with the growth of capitalism from free-competitive wild capitalism to the more structured social market economy and welfare state. In the economic struggle of the bipolar world system, the socialist states, as "communal" (ideological) capital owners,[30] fought with capitalist big capital and its liberal states, but their common essence was that both needed a mass of "free" (i.e., freely exploitable) wage workers—proletarians. Therefore, both expelled peasants from their lands; assaulted large numbers of weaker citizens, family farmers, and small entrepreneurs; moved to industrial cities; and crowded the masses of wage workers into rental housing. It is not a coincidence that these were referred to as "wage barracks," while their inhabitants were called "industrial armies" and "wage slaves" because of their low wages. Konrad Lorenz wrote about "farms of human livestock" saying:

> The caged chicken factory can rightly be regarded as animal torture and a cultural scandal. However, it is considered perfectly acceptable to do similar things with humans, even though these are the humans who cannot tolerate such inhumane treatment in the truest sense of the word. As a result of the human evolution, man

29 Szladits, 1941, p. 21.
30 Bibó, 1986, p. 67.

> could not bear to be one of millions of individuals who are completely similar, anonymous, and interchangeable. Only one way remains to maintain the self-respect of the inhabitant of the farms of human livestock, namely, to banish the similar companions of his suffering from his consciousness, and to rigidly distance himself from them.[31]

As a consolation—and to cover up material poverty—the equality of all people, the freedom of individual self-determination, the dignity of the individual, and the abundance of human rights were increasingly stressed on both poles of the world system. However ,the shift of emphasis was "too good": although it may be an unintended outcome, it has also assaulted the relationship, the small communities, and marriage and the family that functioned as a major source of happiness for the individual.[32]"

> It is clearly seen that the fragmentation of families leads to a serious demographic and health situation, to the disappearance of the social safety net and to the threat of the very existence of the society. Nowadays, those who work to protect the institution of the family do the greatest service to humanity and protect the truth.[33]

5. Individual selfishness and the world of selfishness

The essence of scientific thinking is to try to condense reality into concepts. This is especially true in the social sciences (philosophy, ethics, sociology, economics, and law). If the concept and the reality are the same, the concept is true; if they are different, the concept is false. Moreover, the ever-changing reality may later deviate from the originally true concept, which could, therefore, become false. In this case, the (legal) concept must be adapted to the changed reality to ensure that the concept remains true. However, law has a very important feature: nowadays, the only source of law is the State as a public power. Therefore, the law itself is a power: a set of coercive rules prevailing in the State. It is suitable to align reality with its own concepts, thereby preserving its "truth." This shaping of reality can take two forms: it prevents reality from changing in the wrong direction or it hinders the change in the right direction. Later, we will apply these ideas to the concepts of marriage and family, but first we will analyze the key concept that mostly covers the reality of our modern world, which is *individual freedom*. If we use synonyms instead of the indicated concept (i.e., the noun "freedom" the difference between the concept and

31 Lorenz, 1988, pp. 26–27.
32 Kopp and Skrabski, 2020, pp. 145–165.
33 Kopp and Skrabski, 2020, p. 165.

the reality immediately emerges: *individual selfishness*. Here, the root of the tension between the two also lies in the concept of private property, which decisively determines the entire economic and social order. Private property is a self-contradictory, Janus-faced concept (a legal institution and a socio-economic institution): on the one hand, it has the effect of increasing wealth, developing personality, and increasing individual freedom, while on the other hand, it provides a sole and exclusive legal power over the subjects of property and—through them—over other people, thereby reducing and/or violating the individual freedom of others. This duality began with farming and early human settlements, which exploded after, the "agricultural revolution." It continued and was strengthened by the Industrial Revolution, and has become extreme in our contemporary world of global capital and a global market. It is not a wonder, since all people long for freedom, that we see a desire for *wealth*, and then *power*, neither of which have an upper limit. The *ethnicization and socialization* of law, i.e., the education of capital for social responsibility, tries to limit the pursuit of domination, but has had only moderate success thus far. In particular, there are the so-called "first-generation human rights"—the fundamental freedoms belonging mostly to individuals, both as human beings and as citizens. The preamble to the Charter of Fundamental Rights of the European Union also states that the Union "places the individual at the heart of its activities." However, the value of each individual can vary dramatically and it can deviate significantly among cultures and civilizations.

> The concept of personal me used in India and Japan is *sociocentric*. It is less individualized, much more family oriented … than protestant personal me in Northern Europe, which is much more *egocentric* (emphasis added by me: B.L.). From the point of view of the Eastern sociocentric concept of personal me, the Western, egocentric concept of personal me is alienated, antisocial, and naive. However, from the point of view of the Western, egocentric concept of personal me, the Eastern, sociocentric concept of personal me is not individualized, undeveloped, too dependent on others and immature[34]

It is obvious which concept is more useful for the family as a community, but it can be questionable as to which is more economically efficient. Ernst Schumacher, an eco-economist, quotes the opinion of Keynes (from 1930):

> For at least another hundred years, we have to convince ourselves and everyone that the good is evil and the evil is good because evil is useful while good is not. Let greed, usury, and suspicion be our gods for some time, because only they can lead us out of the tunnel of economic need into the light.[35]

34 Kovács, 2007, p. 80.
35 Schumacher, 1991, p. 22.

Envy, greed, unscrupulous selfishness, and dishonesty can undoubtedly bring great financial advantage and economic development in the short term. However, if—in the longer term and in other contexts—egocentric, individual selfishness disrupts marriage and family, tears apart the network of social trust, and—as we see nowadays—pushes the entire "Western" civilization to the brink of demographic collapse, then the balance tilts towards harm.

> However, people soon realized that there were serious problems with a culture of unbridled individualism in which, in some sense, breaking the rules remained the only rule. (…) A society that resolutely and consistently destroys norms and rules in the name of enhancing individual freedom will become increasingly disorganized, atomized, and isolated, and will be unable to achieve common goals, perform common tasks.[36]

According to the brain researcher Tamás Freund, it is a biological truth that trust, reciprocity, and cooperation remain the basis of social existence. Selfishness, on the other hand, is an evolutionary impasse, and selfish individuals and species are doomed to extinction. Therefore, it is essential that selfishness should remain hidden, and therefore be disguised. This is not too difficult because individual selfishness has three spectacular elements: a) I am for myself; b) the world is for me; and c) You are for me too! Marriages, families, and societies in which individual selfishness rules are unsustainable. Perhaps the most important way out is to rebuild societies/cultures from small communities characterized by trust and cooperation. "Reciprocity can be constantly monitored; the members of the community thus ennoble each other in spirit." Therefore, "*not only families* but also the workplace, church, professional communities, and other civil organizations need to be further developed."[37] It must be added that

> selfishness is not only manifested in the exploitation of our fellow human beings but also leads to the ecological destruction of our Earth. (…) Small communities, exemplary families, and historic churches still play a key role in actively shaping our spiritual environment and bringing more love and the power of a cooperative spirit into our smaller and larger social communities instead of selfishness.[38]

36 Fukuyama, 2000, pp. 30–31.
37 Freund, 2004.
38 Freund, 2004.

6. Protection of families – protection of society

From following this train of thought we can conclude that the basis of social existence cannot be individual selfishness but rather social and community solidarity. Here in Europe in the Judeo-Christian cultural circle, this is rooted in one of the greatest biblical commandments, that of neighborly love. However, forced industrialization and urbanization resulting in the huddling of crowds in big cities, also contradicts this. "Our neighbour love has been diluted so much by the mass of our neighbours that are too close that it can no longer be detected at all."[39] However, the European Union still shares the fundamental principles of "freedom, justice, and solidarity." János Zlinszky wrote about this: "Christianity calls solidarity neighbour love."[40] The primary field for learning (socializing) love and solidarity is the natural and fundamental component of society and the family. It is therefore in the fundamental interest of the society to protect the family. At the same time, it is at least to the same extent in the interest of the family to protect the solidarity-based (and not selfish) society. If one of them becomes sick, the other too becomes ill. The illness of the family—as we have tried to demonstrate so far—is mostly a kind of "addiction": the integrity and health of the family depends on the nature, integrity, health, and vitality of the social environment around it. Socio-economic dysfunctions are earthquake-like paradigm shifts that induce large-scale changes in the lives and internal relations of couples and families. Stable, harmonious marriages and stable, peaceful families require or would require harmonious, stable, and peaceful social conditions. This has never occurred in the history of mankind, but we must continue to pursue such conditions.

The novelty in the crisis of marriage and the family is its extent and the foreseeable danger of the demographic collapse of society. We also need to measure and develop its defense toolbox, for which we need to know the causes of the major crises. According to my point of view, the main reason for this is the *general crisis of values* that pervade society. This is ingrained in the internal relations of marriage and the family, which seriously affects the two fundamental (even universal) values: marriage and the family. However, the demographic collapse primarily threatens Europe, which would be the destruction of a large civilization, the "strange death of Europe,', according to the title of Douglas Murray's book. One of the main reasons for this is a kind of *"historical fatigue' (Geschichtmüde)* that characterizes Europe. Psychologists are diagnosing such a disorder (called "burn out") with increased frequency. Since the Enlightenment, Europe has "produced" a series of ideas that redeem man and society, leading to revolutions and wars. Specifically, the two world wars in the 20th century resulted in enormous devastation and suffering and caused severe disappointment, disillusion, and fatigue. "The more popular the philosophical and political ideas are, the more devastation they leave. (…) The fascist dream,

39 Lorenz, 1988, p. 19.
40 Zlinszky, 2007, p. 20.

like his cousin, communism, wanted to respond to the serious problems of the age, (…) but the devastation left behind them was horrible."[41] Both political ideas also destroyed the remaining faith of Europeans, culminating in the launch of secularization. However, "the religion of the continent has provided one of the major—if not most—energies for centuries."[42] With the loss of faith, confidence in fixed values also vanished.

> The point is to question everything and never get anywhere; the destruction of ideas is perhaps precisely because we are afraid of where they may lead. (…) If there are any ideas left at all, it is precisely that the ideas represent the problem. (…) If there is still certainty left, it is the doubt about the certainties.[43]

Contemporary psychologists also often face this problem. This is the phenomenon and mental illness of *anomie*: the hopelessness felt due to the loosening and disintegration of social norms and the lack of new norms, which is no longer a rare state of total *hopelessness*.[44] We should not be surprised if this has overtaken the *idea of human rights*.

> The post-war culture of human rights pretends (or their fans pretend) to be a religion itself and, as such, introduces a secularized version of the Christian consciousness. (…) But it is a religion that is never certain of itself, since it does not have safe points. The language is tell-tale. As the language of human rights became more grandiose and more self-deceptive, it became increasingly clear that this system was unable to fulfil its original function. The feeling of such a visible fall and the loss of the safe points is not only disquieting for both the individual and society, but also emotionally exhausting.[45]

Emotional exhaustion, fatigue, anxiety, hopelessness, fear, depression, and panic disorders are all symptoms of *anomie and burnout*. This is a depressing snapshot of our present and a dark vision for the future. However, even Murray says that there is a ray of hope. "Still, many people are looking for something certain in their lives. Religions, politics, and personal relationships are among the few things that constitute something solid in chaos."[46] This thought is similar to the hope of a "great reconstruction": "the return to religiosity takes a milder, more decentralized form in which religious faith is not so much an expression of a dogma as a reflection of the community's existing norms and desire for order".[47] Together with many others,

41 Murray, 2018, pp. 214–216.
42 Murray, 2018, p. 207.
43 Murray, 2018, pp. 221–222.
44 Kopp and Skrabsky, 2020, p. 125.
45 Murray, 2018, p. 211.
46 Murray, 2018, p. 222.
47 Fukuyama, 2000, p. 371.

I also consider marriage and family to be recurring fixed values and certainty in the lives of pathfinders. In European religions, and even in the values of most of the world religions, marriage and family are sacred things and fixed points. Most of the very close and important personal relationships are related to marriage, family, and kinship, which are part of the capital of trust, a source of happiness. They are worthy of rescue and protection, as well as the soul of Europe since marriage and the family are common treasures of the European community of values. As Robert Schuman wrote, the European Community

> cannot remain just a common economic and technical community; it must be given a soul, it must be stimulated by the context of its history, its responsibility for the present and the future, a policy for the human idea. (…) Every European state has been shaped by Christian civilization into what it is. It is precisely this European soul that must be resurrected".[48] Is this still possible? Yes, if – in agreement with ecophilophist László Ervin—we realize that "our future was there in our past, we just didn't notice it and went past it."

It is true that our daily reality is not the same as our tomorrow imagined today. Many of our values have been lost and many of our ideals have not become a reality. However, we still have values that can be salvaged from our rich heritage, such as those related to marriage and the family. We can change the world and we can save our values if we change ourselves.

> If we want to be part of the huge flood that is lifting humanity out of crisis and is driving it towards a positive future, we need to change ourselves. Everything else follows from this. There will be no need to tell us how to think and what to do: we will realize this ourselves. We become more mature and better individuals.[49]

7. Crises of values and definitions

If we transcribe core values into law, our aim is to become permanent and follow the norms. As a result of this, values become legal concepts. Legal concepts must be defined and their exact and correct content and meaning determined. For this, the concepts need to be analyzed and interpreted. This is performed by complementing and helping each other and by jurisprudence and law enforcement. There are well-known types of legal interpretation: grammatical, logical, historical, taxonomic, and *correctness*. The latter is aimed at exploring the correct content, i.e., the

48 Lejeune, 2015, pp. 245 and 249.
49 László, 2002, p. 91.

value content of law, and at comparing the legislation with the basic principles of law (most recently with human rights and constitutional fundamental rights) and reconciling them with their value content. The more general or abstract the law is, the more correct or deemed to be correct interpretation can be read from a given legal concept. The situation is aggravated by selfish individualism, which favors individual value priorities (there are as many types of interpretation as there are people) and, in conjunction with it, general value relativism, which overexpands and disperses the original content of legal concepts as core values with reference to the freedom of more and more interpretations. I would like to briefly illustrate this with the concepts of marriage, maternity, and family.

The origin of *marriage* goes back to the obscure prehistoric times, and it can be assumed that there had already been a shift from promiscuity to monogamous relationships in primitive societies (small communities) for the sake of genetic integrity and health of offspring. This was reinforced by the agricultural revolution and the development of private property, as we have already seen. The role of husband and father, the inheritance of genes, and personal ownership of property have been overestimated, and, at the same time, the roles of wife, mother, and woman have been re-evaluated to the detriment of the female sex. However, feminist movements for the *liberation of women* were organized only after the Industrial Revolution, which was completed in the second half of the 20th century. Whether women have achieved their most important goals and the justification for their militancy nowadays has already been highly debated. However, women and men are now partners and not opponents or enemies. Due to the concentration, centralization, subsequent socialization and nationalization, and finally multinational and transnational privatization and globalization of capital, the family economy as the basis of the private economy almost disappeared, its importance and proportion decreased significantly, the basis of the existence of patriarchate ceased, and the family became a group of wage workers and a consumer community. In the "two wage earners" family model, it is an obsolescent question to ask, "Who is the master at the house?" However, this does not mean that the rivalry ends, but rather the match is "doubtful." In the case of large masses, the weight of inheritance has also decreased and the genetic identity of the descendants is not as important as it once was (e.g., in "mosaic families"). In proportion to this, the strength of the monogamous *marriage bond* also decreased. This can be illustrated by the well-known public opinion that marriage is "just a paper"; it is not needed, the essence is the emotional community and *de facto coexistence*. At the same time, paradoxically, the looser, non-committed, *alternative forms of relationship* that rival marriage almost invariably claim the status and legal effects of marriage, especially its benefits (rights). Is it a crisis, or is it the developmental phase of the evolutionary process of marriage as a legal institution that was reached in the 21st century? We will return to this question. The situation is similar to the legal concept and the legal institution of *maternity*. Pregnancy and maternity are a long-recognized and valued status and legal state with associated benefits. At the same time, the principle of "there is only one mother whose identity is certain' is

no longer the same: we can speak about even five or six mothers, partly due to frequent (multiple) divorces and remarriages, and partly due to the increasing number of human reproductive procedures. At the same time, paradoxically, an increasing proportion of women (wives, unmarried partners) are unable (for biological reasons) or consciously do not want (for mental or rational reasons) to have children. The social and legal value of maternity has declined. One of the most important reasons for this are the slogans of feminist movements interpreting maternity as an extension of women's inequality, such as "a woman is not a domestic worker," "a woman is not a slave to her own child," "a woman is not a breeding animal," "a woman is not a parent machine," etc.

> The very commendable effort to create equality for a woman subject to man has led European civilization to an evolutionary impasse, and its biological foundations are destroyed at an accelerating pace. (…) The main reason for the demographic collapse is the change in the role of women and the relegation of the role of maternity to the background, which has been moving towards total rejection for an increasing number of women in the recent decades".[50] According to the professor, it was a mistake to interpret *emancipation* as *equality* in all areas of life, and to raise the biologically established role of women and the consequent natural difference from men as a social problem.[51]

This suicidal strategy, which seems to win here, loses in the long run.[52] The described impairment (devaluation) of marriage and maternity naturally have a serious influence on the concept and institution of the *family* as well. As we have seen, industrialization—either capitalist or socialist—destroyed the multi-generational large family while social mobility loosened marriage and reduced the willingness to have children. We have shifted from the nuclear family model (a married couple with one child) to the single-parent family model and even to personal career-building singleness, which is again only a manifestation of selfish individualism. A sign of the devaluation of marriage and family is the *incongruence*, i.e. the divergence of marital status and actual life situation (e.g., despite being married on paper, the parties actually live separately and even have a new partner and a child originating from him/her), which has become increasingly common in the last half century. Successive "polygamy' is also a kind of promiscuity, almost as if we had returned to prehistoric communities. What the future holds remains unclear. Will there be an "evolutionary regression" or will we reach a kind of dead end from which we recognize the need to retreat? How this will be experienced by future generations, children whose utmost interest would be a harmonious and stable marriage of their parents and a family community that provides security.

50 Pokol, 2010, pp. 172–174 and 185.
51 Pokol, 2010, p. 188.
52 Pokol, 2010, p. 189.

8. The toolkit of the protection of marriage and the family

If the causes of the crisis of marriage and family are extremely diverse and different, it is clear that the tools for their protection can only be the same. It is the primary task and duty of the current policy to select the most appropriate instruments for each crisis symptom. A comprehensive social policy program, in particular the population policy program and family and child protection, should be prioritized as key issues in the election programs of all political parties. Economic policy, social policy, taxation, and budget policy, and even individual policies (education and health policies) must be adjusted to support these goals. Quality programming requires a scientific basis. To achieve this end, research in individual disciplines, including disciplines more closely related to marriage and the family (e.g., statistics and demography, family sociology, relationship psychology, household economics, pediatrics, pedagogy, etc.) must be coordinated and its research results integrated and embedded in social programs. The implementation of the programs requires specific objectives that must be ranked, financed, managed, and monitored. It is good if this is done within the administrative sphere by a strongly professional and versatile educated apparatus with complex experiential knowledge. This should also serve as a political decision-making tool and guidance for future legislation. Family protection objectives and specific programs need to be translated into law, more specifically into the relevant branches of law within the legal system, in order to create a coordinated, uncontroversial subsystem of family protection law. This also requires a high degree of complexity and the ability to think in a broad context from the "family protection lawyers," which induces (continuous) training in this direction. However, the effectiveness of the best professional bureaucracy is also undermined by tracking patterns of behavior in the opposite direction, especially in relationships between parents and children, friends, and co-workers. For example, children of divorced parents are more likely to get divorced themselves than those whose parents have lived their lives together in honesty and fidelity, simply because such children "get used" to divorce, and "regard the divorce of their parent as natural."[53] People have to be raised to recognize and understand the benefits of marriage, starting a family (having children), maternity and paternity, and family life. The best terrain for this "socialization" process is the family with mother, father, and grandparents as role models illustrating positive patterns of behavior that can be followed. The principles of education and core values (patience, peace, forgiveness, fidelity, mutual support, and selfless love) preserve the lives of families as well as the personality and humanity of the family members and society as a whole in an orderly channel, provided that modern information and communication tools do not exert a destructive effect in the opposite direction (which has unfortunately numerous examples, especially in the programs of commercial television and in the virtual world of the Internet). We are still searching for or trying to develop the civil and state means to

53 Cseh-Szombathy, 2000, p. 590.

protect marriage, family, and children against such negative influences. It will not be easy; there is a high prevalence of destroyers nowadays in many forms , including those who are fighting with the weapon of human rights, insidiously reversing their meaning and purpose.

9. The legal dilemmas of the protection of marriage and the family

My dear professor, Imre Sárándi, always began his family law lectures with the pessimistic sentence: "Where family law begins, family ends!' This sentence has double meaning. On the one hand, he pointed out that court statistics show that nearly half of civil lawsuits are family lawsuits, divorce proceedings, and their ancillary lawsuits, i.e., proceedings in connection with spousal maintenance, child support, right of tenancy of the common house, distribution of community property, placement of the child, visitation rights, etc. These signify the end of marriage and family and settle and close conflicts around divorce. On the other hand, the sentence also suggests that we do not need law in the pre-divorce phases, i.e., in betrothal, in contracting marriage, in matters of internal content of marriage, and in the intimate sphere of the family. (Humorously, in marriage and the family, the law is like an elephant in a China shop; it's better not to let it in!) The relations between spouses and family members belong to a kind of "private sphere without law," an area of private autonomy where there is only a little room for general social norms, where almost exclusively the will or agreement of the parties is the governing norm. This means that the parties, spouses, and family members can shape their relationships independently of each other. Therefore, many representatives of the legal literature and the legislation considered that the law of marriage should contain only the formal, procedural, registrational rules, validity conditions, and grounds for invalidity, which are the most important for society, while only the dissolution of marriage and its related issues require more detailed regulation due to the further fate of the common children and the common property. There are at least two important reasons for this. First, marital and family relationships have been freed from the "bondage of private property"; from the male and father (ownership) power of the *bonus et diligens pater familias* inherited from Roman law" Second, compared to strictly moral ecclesiastical law, state regulation regarded marriage as a contract in which the parties are equal and subordinate, free to shape the content of their personal and property relations on the basis of *dispositive* regulation. However, traditions have a very strong power; male and paternal power is deeply ingrained in European and individual national cultures; e.g., in Hungary, many wives still call their husbands "my lord.". The law did not have a sufficient response to the case where the *pater familias* was neither a bonus (benevolent) nor

diligent (careful). Domestic violence, violence against children, or the squandering of family property are not new phenomena. The emancipation movements and later the defenders of children's rights justly and rightly demanded more detailed legal regulations and later law enforcement. Women's rights, especially maternal rights and children's rights, have been occupied prominent place in international human rights instruments, national constitutions, and at the level of national legislation. With regard to the nature of the norms, there are *imperative* orders, in particular prohibitive norms (criminal offenses and misdemeanors); *mandatory* norms, from which the parties cannot deviate even with equal will (only for the benefit of the woman or children, e.g., in labor law or in child support and placement questions); and *dispositive* rules that can be set aside by the parties and replaced by a consensus between them (e.g., matrimonial property matters). Among rules relating to family support, recommendatory and indirect incentive norms as the legal conditions for benefits are common. The application of norms imposing obligations and their enforcement by public authorities is a particularly sensitive issue nowadays. According to the common saying, one cannot love someone or demand loyalty by order, but their absence can be imputable to the breaker of the norm and can be sanctioned. The same is true of the obligation of mutual support between spouses: it cannot be enforced, but its failure can be sanctioned. The situation is different with regard to the responsibilities of the parents and the rights of the children, where the regulation is much more detailed and the sanctions more differentiated. A separate area of legal dilemmas is the tolerance, recognition, and support, or, conversely, the prohibition or sanctioning of atypical marriages, alternative forms of cohabitation, and family compared to good (according to the legal terminology: typical, ideal) marriages. How long should the state and law in this area be *value-neutral* or indifferent, and where is the limit of *deviance*? Where is there a possibility of positive discrimination and, on the other hand, where does state intervention and legal regulation contravene the prohibition of discrimination? The first and most difficult issue is the legal definition of marriage and family and the narrowing or extension of these notions. A separate dilemma is to whether to connect the two concepts or to interpret and treat them separately. When is the too narrow definition discriminatory against people living in excluded life relations, and when does the too broad definition itself means an impetus towards alternative and atypical life relationships, and when does it further destroy typical and traditional relationships and family life? Do changes in social customs or the will and values of the legislature (majority, politics) shape (and create) law and, which is motivated by which? These are difficult legal dilemmas and questions that must be answered.

10. The perspective of marriage and the family

According to the most pessimistic predictions, marriage and the family – at least in Western civilization – have no future. This is clearly an unacceptable perspective. If the family is invariably the natural and fundamental constituent (unity, cell) of society and it has no future, then the whole of society does not have a future either, since if the constituent elements of something disintegrate, the whole system collapses. This is true even if we call the disintegrating society an "open society." Similarly, an "open marriage" is not in fact a marriage, it is a specific contract, a consensus of at most two (or more involved) persons relating to their personal relations and the settlement of their cohabitation. According to the other overly optimistic prediction, we can expect the renewal, renaissance, and prosperity of marriage and family because people will only now be freed from the previous oppressive religious moral and civic property interest pressures and burdens. The truth on this question falls somewhere between the two extreme positions, and the question of which pole the balance tongue tilts toward depends on what and how successful the solutions we find are in dealing with the crisis. Legal instruments alone are insufficient tools for success. It is also necessary to rehabilitate and respect natural laws, as well as to renew and protect moral values. Significant material coverage is required to expand and apply the family protection toolkit. If it is successful, we also need social recognition and unanimous support. This is also the case in Hungary; Hungarian people are the most family oriented in Europe.[54] Children already need to be socialized for marriage and starting a family, for maternity and paternity, and its most effective means are good examples of a harmonious marriage. i.e., a family that creates peace and security in which children can thrive. As man is not only a rational but also a moral and even spiritual creature. Marriage is more than just an agreement based on a reasonable balance of interests: it is a moral and spiritual *alliance*. That is the new worldwide attempt of *covenant marriage* (or "marriage alliance"), which is about the lifelong *commitment* of the parties. It is nothing more than a moral and spiritual reinforcement, an appreciation of the legal concept of marriage and family. This is reflected in the solemn framework of marriage, which emphasizes not only the public law and social significance but also the transition from individual to federal (cohabitation) status, which brings about the *unity* of a "couple of people." Just as each person is sole, single, and unrepeatable, so too the commitment between two people creates an alliance that is also singular and unique. Spouses are complementary to each other; this community cannot be owned and people can only become a part of it.[55] Such marriage and family have a physical and mental "health-protecting" function and impact for both children and their parents.

54 Gergely-Baka, 2021, pp. 44–45.
55 Kopp and Skrabski, 2020, pp. 18–19.

> In the relationship between two people and then between parents and children, the essence of marriage and family is life commitment, unconditional trust, and devotion. Whoever is able to have such a relationship has at least embarked on the path that leads to self-fulfilment, self-realization, and a positive quality of life. (…) The role of family and marriage has never been as important as in modern society from the point of view of the quality of life, balance, and tolerable social atmosphere of the individual and of the next generation.[56]

Law—family law and constitutional law—cannot be without an image of humans and society as a goal and value. Within the law, special emphasis is placed on the image of the marriage and family model and the need for institutional protection. The original meaning and content of concepts and institutions must be restored and preserved. Only treatment and protection as a priority, in accordance with social perception, will give the institution of marriage and family a new rank and perspective. There is room for "competition" between legal systems only in terms of a sustainable image of human and society and a sustainable and maintainable model of marriage and family, and not in connection with their destruction. The same applies to the oversupply of extramarital partnerships (also called alternatives to marriage), and their competition with each other and with marriage. We cannot, for example, demand the same or even more rights for both heterosexual and same-sex partners than spouses with less commitment and responsibility and with a looser and more disruptive set of values.

Marriage and family are natural and universal institutions that already existed before the law and would probably exist without it. However, it is no coincidence that both have become part of the law and a fundamental legal value. Law, as a powerful normative tool, is capable of protecting and supporting the institutions of marriage and family, which, like law itself, is for man. Therefore, we have to watch out for marriage and family as much as possible, and, if needed, even beyond our strength. After all, if we manage to save marriage and the family, we will save man, humanity, and "human" society. In order to achieve this, we have natural and moral laws coupled with human rights and constitutional foundations. The rest depends on us.

56 Kopp and Skrabski, 2020, pp. 120–122.

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Chapter II

Family Protection in Croatia

Aleksandra Korać Graovac

1. Introduction

A family as a basic group unit of society surely represents an undisputed value *per se* for its members as well as for society. On the occasion of *The International Year of Family*, marked by the UN, a concept of the need for family building has been adopted in 1994: "*Building the Smallest Democracy at the Heart of Society*," which may be understood as not only building the family from the inside (via its members) but also as an impetus for building it from the outside (via the state). In the principles concerning the marking of the Year of Family, it has been pointed out that "these express the diversity of individual preferences and societal conditions."[1]

The family happens to be not only a social but also a legal phenomenon. The rights to form a family and to enter into a marriage are contained in many international documents and treaties whose purpose is to protect human rights. While the right to respect for family life, as a human right, has been addressed by international courts, such as the European Court of Human Rights (ECHR) in Strasbourg, the importance of family protection has been highlighted in many national

1 Proclamation of the International Year of the Family. See: https://bit.ly/3acAFgT (Accessed: 18 February 2021). The General Assembly of the United Nations adopted a number of resolutions relating to the proclamation, preparation, marking, and commemoration of the International Year of the Family and its 10th and 20th anniversaries.

Aleksandra Korać Graovac (2021) Family Protection in Croatia. In: Tímea Barzó, Barnabás Lenkovics (eds.) *Family Protection From a Legal Perspective,* pp. 37–76. Budapest–Miskolc, Ferenc Mádl Institute of Comparative Law–Central European Academic Publishing.

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constitutions.[2] The family does not have a legal personality, but its members do and enjoy certain rights (and have obligations), which are derived from the status of a family member.

Due to tumultuous social changes, the notion of the family has been altered spontaneously or in a targeted manner by interpreting existing regulations or adopting new ones. Whereas recognizing the status of a family member has primarily led to the modification of the rights and duties of those persons, it has also affected the rights and obligations of other persons, most of all those of children.

This study provides a general overview of possibilities, primarily with respect to the family law protection of the family and the protection of human rights for certain persons in view of their family status, furnished with examples stemming from the international level, political and legal tendencies at the European level, and their influence at the national level. The Croatian legal regime is in many aspects specific because new legal views are imposed on a relatively traditional society.

2. Family and Marriage in the International System of Human Rights

2.1. UN Treaties and Documents

The Universal Declaration of Human Rights[3] highlights the truth known from primordial times: "*The family is the natural and fundamental group unit of society*" and is entitled to "*protection by society and the State*" (Art. 16, para. 3). Paragraph

2 The first question faced by any constitution drafter is which values are to be protected. The second question is concerns how the chosen constitutional values are to be protected and formulated, i.e., what form the constitutional protection should take.
Drafters of constitutions attempt to a catalogue the fundamental rights and freedoms of different content. These may or may not encompass marriage and family protection.
Examples are the Constitution of the Republic of Croatia, Official Gazette 56/90, 135/97, 08/98, 1 13/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14 , Art. 61, par. 1:: "The family shall enjoy special protection of the state"; the Constitution of the Republic of Slovenia, Official Gazette of the Republic of Slovenia Nos. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13, Art. 53, para. 3: "The state shall protect the family, motherhood, fatherhood, children, and young people and shall create the necessary conditions for such protection"; According to Art. 6, para 1. of the Basic Law for the Federal Republic of Germany: "Marriage and the family shall enjoy the special protection of the State.", Constitution of the Italian Republic, Art. 31: "The Republic assists the formation of the family and the fulfilment of its duties, with particular consideration for large families, through economic measures and other benefits.", Art. 18: "Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland." For example, there is no mention of the family in the constitutions of France and Belgium.

3 *The Universal Declaration of Human Rights, General Assembly,* 10 December 1948., United Nations.

1 of the same article points out that "men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family." The Universal Declaration protects everyone's private life and family, home, correspondence, honor, and reputation from arbitrary interference and prescribes everyone's right to the protection of the law against such interference or attacks.

Among global treaties relevant to family law are the International Covenant on Civil and Political Rights[4] and the International Covenant on Economic, Social, and Cultural rights[5] (1966).The International Covenant on Civil and Political Rights contains a norm on privacy, i.e. family protection (Art. 17), proclaiming that the family is the natural and fundamental group unit of society and is accorded protection by society and the State (Art. 23, para. 1). Protection may differ from one state to another and depend on social, economic, political, and cultural conditions, as well as on tradition.[6] The right of men and women of marriageable age to marry and to found a family is recognized, while the State must take appropriate steps to ensure equality of rights and responsibilities of spouses during marriage and at its dissolution, the novelty being that in the case of dissolution, they must ensure the necessary protection of any children (Art. 23, para. 4).

There is a special provision governing certain issues relating to children — the right of a child, without discrimination as to race, color, sex, language, religion, national or social origin, property or birth, to the protection appropriate to his/her age on the part of his/her family, society, and the State (Art. 24, para. 1); the duty of the State to register the birth and name of a child (Art. 24, para. 2); and the right of a child to acquire a nationality (Art. 24, para. 3). The rights of parents and legal guardians of a child to ensure the religious and moral education of their children in conformity with their own convictions is stated earlier (i.e., in Art. 18, para. 4) within the provision granting the right (and freedom) of thought, conscience, and religion.

The International Covenant on Economic, Social and Cultural Rights imposes on States the obligation to accord protection and assistance to the family "as the natural and fundamental group unit of society," particularly for its establishment and while it is responsible for the care and education of dependent children (Art. 10, para. 1). The same paragraph provides for the duty of the State to ensure the free consent of the intending spouses when entering into marriage. Special social protection is envisaged with respect to mothers (Art. 10, para. 2) as well as special protection of children and young persons without any discrimination for reasons of parentage or

4 *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, Vol. 999.

5 *International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993.

6 Aumeeruddy-Cziffra v. Mauritius (9/35), *Human Rights Committee*, 36, 134; according to Sieghart, 1990, p. 204.

other conditions and protection from economic and social exploitation in regard to child labour (Art. 10, para. 3).

Parents, i.e., legal guardians, have the right to choose for their children schools other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State. Recognition has been given to the right of parents to ensure the religious and moral education of their children in conformity with their own convictions, and parents have the right to choose a private school for their children (Art. 13, paras. 3 and 4).

Treaties of indirect or direct relevance for the purposes of this research are the Convention on the Nationality of Married Women (1958),[7] the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962),[8] the International Convention on the Elimination of All Forms of Racial Discrimination (1965),[9] the Convention on the Elimination of All Forms of Discrimination against Women (1979),[10] the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990),[11] and the Convention on the Rights of Persons with Disabilities (2006). [12]

The Convention on the Rights of the Child (1989)[13] in the preamble points out that "the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding" and that

> the States Parties to the present Convention, … convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community…

The principle that strongly impacts all decisions and procedures pertaining to children is the protection of the best interests of the child, which is elaborated in

7 *Convention on the Nationality of Married Women*, 20 February 1958, *United Nations, Treaty Series, Vol. 309*.

8 *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages,* 10 December 1962 *United Nations, Treaty Series, Vol. 521*.

9 *International Convention on the elimination of all forms of racial discrimination*, 21 December 1965, *United Nations, Treaty Series*, Vol. 660.

10 *Convention on the Elimination of all Forms of Discrimination against Women,* 18 December 1979, United Nations, G.A. Res. 34/180, Doc. A/34/46.

11 *Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, adopted by General Assembly resolution 45/158 of 18 December 1990.

12 *Convention on the Rights of Persons with Disabilities*, adopted by General Assembly resolution 61/106.

13 *Convention on the Rights of the Child*, 20 November 1989, *United Nations, G.A. Res. 44*.

the General Comment by the Committee on the Rights of the Child.[14] In Art. 2, para. 2, the Convention requires States take all measures to ensure that "the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members." States are also required to recognize the responsibilities, rights, and duties of parents and other persons in directing and guiding the child while exercising his or her rights (Art. 5 of the Convention). The child is accorded the right to maintain family relations (Art. 7). Also of relevance is the right of the child not to be separated from his or her parents against their will, except when it is established in a corresponding judicial proceeding that this is in the best interests of the child, and that in the case of separation from the family, the child has certain rights, such as the right to have personal relations with separated parent(s) (Art. 9) and to family reunification (Art. 10). Art. 16 guarantees to the child protection from unlawful interference with his or her privacy and family, while Art. 18. recognizes the principle that both parents have common responsibilities for the upbringing and development of the child Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. In case of the adoption, States are to ensure that "the best interests of the child shall be the paramount consideration" (Art. 21). As there is no hierarchy of child's rights (except for four principles in the context of which all rights are to be considered)[15], we also single out a State's duty that child's education be directed to "the development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own."[16]

The Republic of Croatia is a signatory to the Universal Declaration of Human Rights and a party to all of the aforementioned treaties.

2.2. Conventions of the Council of Europe

2.2.1. Convention for the Protection of Human Rights and Fundamental Freedoms

The Convention for the Protection of Human Rights and Fundamental Freedoms (1950) is a "*living instrument*" since it is subject to the interpretation of the ECHR acting on the complaint of an individual considering that a Member State of the

14 General comment no. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1).

15 The four fundamental principles are the principle of the child's best interest, the right to development, the right to expression of opinions, and prohibition of discrimination.

16 Art. 19 para. 1 line c of the Convention on the Rights of the Child.

Council of Europe has violated his or her right or freedom guaranteed by the Convention.[17]

In addition to the legal limitations inherent to certain provisions relating to protected interests, the case law of the ECHR is subject to findings made while examining a complaint as to the legal regime in force in the major part of the Member States of the Council of Europe and what appears to be the public opinion in a particular State and is modified accordingly. Interpretation of certain provisions is certainly subject to the rules of the Vienna Convention on the Law on Treaties (1969), particularly those from provisions of Arts. 31 and 32. of the Vienna Convention[18]. Nevertheless, the ECHR also applies the evolutive interpretation:

> This evolutive interpretation finds its basis in the effectiveness principle …. If the Court did not take account of recent developments in society and technology in explaining the meaning of the Convention, it would be difficult for it to provide an effective protection of the Convention rights.[19]

Such an interpretation is often met by misunderstanding in some Member States of the Council of Europe, namely in some parts of the academic community. In addition to these principles, the ECHR also applies in its construction the metateleological interpretation, as referred to by Lasser[20] and according to which "in many cases, the Court does not specifically refer to the purposes of a particular Convention provision, but it refers to the general principles and values underlying the Convention as a whole."[21] The principles of interpretation must be supplemented by the principle "of autonomous interpretation," in accordance with which one must always take into account the national level of protection or a definition of a notion in national

17 In that sense, it is interesting how the Guide of the European Court pertaining to discrimination clarifies (a lack of) justification for a difference in treatment.
67. A special situation arises with the aim of supporting and encouraging traditional family; indeed, if the Court in its earlier case law considered this aim in itself legitimate or even praiseworthy (Marckx v. Belgium, 1979, § 40) and, in principle, a weighty and legitimate reason which might justify a difference in treatment (Karner v. Austria, 2003, § 40). This approach changed somewhat in more recent cases interpreting the Convention in present-day conditions. As a result, the Court considered the aim of protecting the family in the traditional sense as "rather abstract" (X and Others v. Austria [GC], 2013, § 139) and legitimate only in some circumstances (Taddeucci and McCall v. Italy, 2016, § 93). In Bayev and Others v. Russia, 2017, for example, the Court considered that there was no reason to consider the maintenance of family values as the foundation of society to be incompatible with the acknowledgement of the social acceptance of homosexuality, especially in view of the growing general tendency to include relationships between same-sex couples within the concept of "family life" (§ 67)."
Guide on Article 14 and on Article 1 of Protocol No. 12 – Prohibition of discrimination, updated on 31 December 2020.

18 Cf. Gerards, 2019, pp. 50–51.
Amplius.: Jacobs, Ovey, White, 2014, pp. 66–67.

19 Gerards, 2019, p. 52.

20 Cf. Lasser, 2004, p. 206 et seq., cited in Gerards, 2019, p. 60.

21 Ibid., p. 59.

legislation as a point of departure for a State's own case law. In order to illustrate an example thereof, Lasser explicitly refers to the definition of marriage.[22]

Understanding and protection of family are indirectly or directly affected by the provision of Art. 3 of the European Convention (protection from torture and inhuman treatment), Art. 8 (right to respect for private and family life), Art. 12 (right to marry and to found a family), Art. 2 of Protocol no. 1 (right of parents to freely decide on children's education), Art. 2 (right to life), prohibition of discrimination (Art. 14 and Art. 1 of Protocol no. 12 to the Convention), and indirectly by Art. 6 (right to a fair trial).

The European Court of Human Rights had a substantial impact on European family law legislation. Some of its judgments in the field of family law matters today represent the attained standards that cannot be called into question as to their value (prohibition of discrimination of children born in and out of wedlock,[23] right to know one's parentage,[24] guarantees in case of separation of children from their parents,[25] and positive obligations of the State to ensure exercise of personal relations between parents and children.[26].

The biggest debate among family law theoreticians was certainly triggered by judgments that affected the restructuring of the understanding of family at the national level, such as *Schalk and Kopf v. Austria*, according to which relations of same-sex couples have been subsumed under the notion of family life, not only under that of private life.[27] In that judgment, the Court also pointed out that there existed no obligation on the part of the State to grant same-sex couples access to marriage.[28]

22 Ibid., p. 67.

23 For example, Marcx v. Belgium, Appl. 6833/74, Judgement 13. June 1979.

24 For example, Mikulic v. Croatia, Appl. 53176/99, Judgment 7. February 2002.

25 Many different situations including divorce, measures for the protection of the welfare of the child.

26 For example, Gluhakovic v. Croatia, Appl. no. 21188/09, Judgment 12. April 2011.

27 Same-sex couples have also been recognized as enjoying a family life under Article 8. In *Schalk and Kopf v. Austria,* the Court explicitly recognized that 'a rapid evolution of social attitudes towards same-sex couples has taken place in many member States' (§93 *Schalk and Kopf v. Austria*) and because of this it considered that it would be "artificial" to maintain the view from previous cases that a same-sex couple can enjoy only a "private life and not a 'family life" under Article 8. It concluded that "the relationship of the applicants, 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."(§ 94.) See also X *and others v Austria.*
Cf. Guide on Article 8, 2020.

28 This position is confirmed in the case of Orlandi and others v. Italy, Appl. 26431/12; 26742/12; 44057/12 and 60088/12, Judgment of 14 December 2017, stating that under case law, States were still free to restrict marriage to different-sex couples (however, same-sex couples needed legal recognition and protection of their relationship). The Court accepted Italy's choice not to allow same-sex marriages could not be condemned under the Convention (but the crux of the case was that the couples had not been able to obtain any kind of legal recognition for their unions).
A complementary position is taken by the Court of Justice of the EU in the case Coman and Others in which it concludes that "*Member States are thus free to decide whether or not to allow marriage for persons of the same sex*" on the grounds that the rules relating to marriage fall within the exclusive competence of the Member States and that Union law does not affect competence (Case C-673/16, Coman and others, ECLI:EU:C:2018:385,par. 37 i 45. and the opinion of advocate general Wathelett, par. 38, 41 i 67.).

The findings of the ECHR relating to surrogate motherhood with an international element have also been moot as the Court assessed the justification for a limitation of travel with a child born to a surrogate mother,[29] (lack of) justification for non-recognition of child's parentage by the parents,[30] as well as separation of a child from the family of a couple that had abroad recourse to obtain surrogate motherhood services.[31] The *advisory opinion* adopted by the Grand Chamber in 2019 opened up the gates to recognize the effects of surrogate motherhood with foreign elements.[32]

The structure of the family may be indirectly affected by the entry of sex change of a transsexual person since it opens up the possibility that a person whose marriage had been heterosexual until then becomes homosexual (and thereby possibly contrary to the legal order) or that a person entered as a man gives birth to a child after a sex change, i.e., that a person entered as a woman becomes a parent to a child conceived by (her) sperm.

The ECHR took the view that a State not recognizing same-sex marriage is entitled to require that "married applicants convert their relationship to a registered

29 Case of D and others v. Belgium, Appl. no. 29176/13, Judgment 11 September 2014., para 59.

30 Mennesson v. France, Appl. no. 65192/11, Judgement 26. June 2011 and Labassee v. France, Appl. No. 65941/11, Judgement 26 June 2014.

31 Paradiso and Campanelli v. Italy, Appl. no. 25358/12, Judgement 247 January 2017.

32 "Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, requested by the French Court of Cassation (Request No. P16-2018-001) on 10 April 2019 (Grand Chamber). This case concerned the possibility of recognition in domestic law of a legal parent-child relationship between a child born abroad through a gestational surrogacy arrangement and the intended mother, designated in the birth certificate legally established abroad as the "legal mother," in a situation where the child was conceived using the eggs of a third-party donor and where the legal parent-child relationship with the intended father has been recognised in domestic law. The Court found that States were not required to register the details of the birth certificate of a child born through gestational surrogacy abroad in order to establish the Factsheet – Gestational surrogacy 5 legal parent-child relationship with the intended mother, as adoption may also serve as a means of recognising that relationship. It held in particular that, in a situation where a child was born abroad through a gestational surrogacy arrangement and was conceived using the gametes of the intended father and a third-party donor, and where the legal parent-child relationship with the intended father has been recognised in domestic law, 1. the child's right to respect for private life within the meaning of Article 8 of the Convention requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the "legal mother"; 2. the child's right to respect for private life does not require such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad; another means, such as adoption of the child by the intended mother, may be used."
On the other hand, the European Parliament has, in its Resolution of 5 April 2011 on priorities and outlines of a new EU policy framework to fight violence against women (2010/2209(INI)) and in the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter (2015/2229(INI)), stressed that surrogacy commodifies children and violates the legal norm of the Convention on the Rights of the Child, which protects a child's "right to know and be cared for by his or her parents." The European Parliament pointed out also that surrogate motherhood contravenes the European Convention on Human Rights and Medicine, in particular Art. 21, which provides that "the human body and its parts shall not, as such, give rise to financial gain."

partnership prior to obtaining recognition" (Hämäläinen v. Finland (2015]) given the fact that Finland provided the possibility of forming a registered partnership producing the same effects as marriage.

Additionally, the ECHR held that mandatory infertility, to obtain gender recognition, violates the right to physical and moral integrity under Article 8. Sterilization requirements place trans individuals in an "impossible dilemma (A.P, Garçon and Nicot v. France (2017)). In judgment X and Y v. Romania, "the Court observed that the national courts had presented the applicants, who did not wish to undergo gender reassignment surgery, with an impossible dilemma: either they had to undergo the surgery against their better judgment — and forego full exercise of their right to respect for their physical integrity — or they had to forego recognition of their gender identity, which also came within the scope of respect for private life. The Court held that the domestic authorities' refusal to legally recognize the applicants' gender reassignment in the absence of surgery amounted to unjustified interference with their right to respect for their private life".[33]

2.2.1. European Convention on the Exercise of Children's Rights

The European Convention on the Exercise of Children's Rights (1996) aims to enable children to exercise their rights in judicial proceedings in family law matters to express their opinions. While the Convention on the Rights of the Child deals primarily with children and parents, i.e., child's guardians, this Convention introduces a notion of a "holder of parental responsibilities" and a possibility that, in addition to parents, other persons may also exercise parental care. Article 2(b) of this Convention contains the definition according to which "the term holders of parental responsibilities' means parents and other persons or bodies entitled to exercise some or all parental responsibilities."

According to the Explanatory Report of the Convention, para. 24, the term "holders of parental responsibilities" refers to not only parents who are entitled to exercise some or all parental responsibilities but also to other persons or bodies, including certain local authorities. Foster parents or establishments in which children are placed can therefore be included in this definition, where appropriate. It should be noted that Committee of Ministers' Recommendation no. R (84) 4 on parental responsibilities defines such responsibilities as

> a collection of duties and powers which aim at ensuring the moral and material welfare of the child, in particular by taking care of the person of the child, by maintaining personal relationships with him and by providing for his education, his maintenance, his legal representation and the administration of his property.

33 Press Release X and Y v. Romania, Appl. nos. 2145/16 and 20607/16, Judgment X and Y v. Romania, 19.01.2021.

The Explanatory Memorandum (para. 6) to this Recommendation provides that the term "parental responsibilities" described:

> a modern concept according to which parents are, on a basis of equality between the parents and in consultation with their children, given the task to educate, legally represent, maintain, etc. their children. In order to do so they exercise powers to carry out duties in the interests of the child and not because of an authority which is conferred on them in their own interests.

This concept has also been adopted by the Directive Brussel II bis and the European Commission for Family Law in Principles regarding parental responsibility.[34]

It is interesting to note that the further step in the definition of parents after lobbying the Member States of the Council of Europe, whose policies protect traditional family values, was the reason why the Council of Europe failed to adopt the Draft recommendation on the rights and legal status of children and parental responsibilities (2011).[35] According to Principle 2, the notion of parents was defined as follows: "For the purposes of this recommendation, parents' mean the persons who are considered to be the parents of the child according to national law." Moreover, Principle 22 states: "For the purposes of this recommendation, holders of parental responsibilities are: a) the child's parents and b) other persons, or bodies having parental responsibilities in addition to or instead of the parents." Such views are remote in the sense that only parents may hold a *titulus* for parental responsibility, while certain elements of childcare may be exercised by some other third person.

2.2.3. European Convention on the Adoption of Children (Revised)

The Convention on the Adoption of Children (Revised), 2006, [36] in Art. 7, para. 1(a) provides that the law must permit a child to be adopted by two persons of different sex who are married to each other, or where such an institution exists, have entered into a registered partnership together, or by one person.

It is obvious that this convention differentiates between an informal and a formal (registered) heterosexual, non-marital union and mentions only the registered union,

34 Principle 3:2 Holder of parental responsibilities (1) A holder of parental responsibilities is any person having the rights and duties listed in Principle 3:1 either in whole or in part. (2) Subject to the following Principles, holders of parental responsibilities are:
(a) the child's parents, as well as
(b) persons other than the child's parents having parental responsibilities in addition to or instead of the parents. (underlined by the author)
Pursuant to Principle 3:9, third-person parental responsibilities may in whole or in part also be attributed to a person other than a parent.
https://ceflonline.net/wp-content/uploads/Principles-PR-English.pdf.

35 Draft recommendation on the rights and legal status of children and parental responsibilities (2011).

36 *Convention on the Adoption of Children* (Revised) Strasbourg, 27 November 2008, Council of Europe Treaty Series – no. 202.

while there is no mention of the informal union. With regard to same-sex unions (Art. 7, para. 2) states that states are free to extend the scope of this Convention to same-sex couples who are married to each other or who have entered into a registered partnership together. They are also free to extend the scope of this Convention to different sex couples and same sex couples who are living together in a stable relationship," but there exists no obligation on the part of the State to grant same sex couples the same possibility to adopt.

2.2.4. Istanbul Convention

The Council of Europe Convention on preventing and combating violence against women and domestic violence[37] (Istanbul, 2011) contains commendable purposes referred to in Art. 1 in view of protection from violence against women and protection from violence in the family.

After strong opposition voiced by the public due to the understanding that it introduced the gender ideology into the Croatian legal system,[38], the government of the Republic of Croatia provided a specific interpretative declaration on the occasion of the ratification:

> The Republic of Croatia considers that the aim of the Convention is the protection of women against all forms of violence, as well as the prevention, prosecution, and elimination of violence against women and domestic violence. The Republic of Croatia considers that the provisions of the Convention do not include an obligation to introduce gender ideology into the Croatian legal and educational system, nor the obligation to modify the constitutional definition of marriage. The Republic of Croatia considers that the Convention is in accordance with the provisions of the Constitution of the Republic of Croatia, in particular with the provisions on the protection of human rights and fundamental freedoms, and shall apply the Convention taking into account the aforementioned provisions, principles, and values of the constitutional order of the Republic of Croatia.

2.3. European Union

At the outset, the European Union showed no interest in family law. Although there existed ideas on harmonization and even on the unification of European family law,[39] the approach highlighting the pointlessness of creating a unique European codex pertaining to family law prevailed.[40] It was maintained that the family law of a particular

37 Council of Europe Convention on preventing and combating violence against women and domestic violence *Council of Europe Treaty Series - no. 210* , Istanbul, 2011.
38 Cfr. Hrabar, 2018.
39 Cf. Pintens, 2004, p. 548.
40 Cf. Martiny, 2011, pp. 429–457.

state was closely related to national tradition and that family relations in many states were regulated in an entirely specific manner.[41] After the Treaty of Amsterdam entered into force, the field of family law was partially subsumed under EU law, which began to be regulated by European secondary law. Judicial cooperation in certain family matters (as part of civil matters) facilitated a transition from the so-called "third pillar", i.e., intergovernmental cooperation, into the "first pillar" consisting of the common policies.

2.3.1. Charter of Fundamental Rights of the EU

By adopting the Charter of Fundamental Rights of the EU, the EU opened up the possibility of indirect effects through protection of human rights, as well as certain legal fields, such as family law, whose substantive provisions of law lie within the competence of the Member States.[42]

Many rights from the Charter overlap with those from the European Convention, so that the right to respect for private and family life (Art. 7) is, content-wise, almost identical. The right to marry and to found a family (Art. 9) omitted any reference to the heterosexual characteristic of marriage: "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." Still, it does not impose on member states the obligation to introduce same-sex marriage; conditions for entering into marriage are enumerate via national regulations (as long as they do not call into question that very right).

The literature indicates that the drafting of this article was being fiercely debated and that the last sentence was a concession to accent the sovereignty of a particular state. This is the reason why this provision is one of the rare ones, containing an additional limitation of a right explicitly referring to national legislation.[43]

The Charter recognizes everyone's (and thereby a child's — author's remark) right to education, which includes the possibility to receive free compulsory education. In doing so, it contains a requirement that, in case the State provides compulsory

41 Cf. Büchler, A., Keller, and H., Sythesis, 2016, p. 514, Tomljenović and Kunda, 2014, pp. 209–220; Šimović and Ćurić, 2015, pp. 175–176 and 184; Micković and Ristov, 2013, pp. 186–188.
In a still pending Case V.M.A. v. Stolichna obshtina, rayon 'Pancharevo' (Sofia municipality, Pancharevo district, Bulgaria), C-490/20, ECLI:EU:C:2021:296, par. 77, Advocate General Kokott concluded in her Opinion: "*This is because family law is a particularly sensitive legal area which is characterised by a plurality of concepts and values at the level of the Member States and the societies within them. Family law – whether based on traditional or more 'modern' values – is the expression of a State's self-image on both the political and social levels. It may be based on religious ideas or mark the renunciation of those ideas by the State concerned. To that end, however, it is in any event an expression of the national identity inherent in fundamental political and constitutional structures.*"

42 Poland gave Declaration No. 61 relating to Protocol 30, on the Application of the Charter of fundamental Rights of the European Union to Poland and the United Kingdom: "The Charter does not affect in any way the right of the Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity."

43 Cf. Wölfl, 2005, p. 779.

education, it has to be free. Parents are accorded the right "to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right" (Art. 14, para. 3). In the unofficial commentary, Wagner[44] points out that the rights of parents have to be compatible with children's rights, particularly with the best interest of the child, from Art. 24, para. 2 of the Charter.

A special provision of the Charter entitled "The Rights of the Child" (Art. 24) indicates, in principle, in para. 1. that "[c]hildren shall have the right to such protection and care as is necessary for their well-being." This further indicates the children's right to participate at a general level. The third paragraph of Art. 24 protects a child's [...] right to maintain on a regular basis a personal relationship and direct contact with both his or her parents unless that is contrary to his or her interests."

The significance of social law in the Charter is reflected in the provision of legal, economic, and social protections of the family (Art. 33, para. 1). The Charter does not venture into the determination of the notion of the family. Thus, no problem arises when the recognition of rights is claimed by members of traditional families, while problems may be expected when family members enjoying rights in one state claim the same rights in another state that does not recognize such unions as family.

2.3.2. EU Regulations on Family Law and Notion of Family

In the field of international private law governing family relations, regulations primarily regulate issues of jurisdiction as well as the recognition and enforcement of foreign judicial decisions:

- Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions, and cooperation in matters relating to maintenance obligations and
- 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 (Regulation Brussels II bis).[45]

Conflict-of-laws rules in certain family law matters include:

44 Cf. Wagner, 2006, p. 148.

45 All Member States are parties to the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorizing certain Member States to make a declaration on the application of the relevant internal rules of community law, which is why its conflict-of-laws rules apply to matters of parental responsibility throughout the EU.

- 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;
- 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; and
- Council Regulation (EU) No 1259/2010 of 20 December 2010, implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III).

Of relevance for the purpose of this paper is the *Directive on the Right to Family Reunification*[46] since it regulates matters involving right to family reunification of a sponsor who holds a valid residence permit in the EU for at least one year and has reasonable prospects of obtaining the right to permanent residence.

The key issue is certainly who is to be regarded as a family member with respect to which Art. 4, para. 1 of the Directive is relevant:

> sponsor's spouse[47], the minor children of the sponsor and of his/her spouse, including adopted children … ; the minor children including adopted children of the sponsor where the sponsor has custody and the children are dependent on him or her; … children of whom custody is shared, provided the other party sharing custody has given his or her agreement; the minor children including adopted children of the spouse where the spouse has custody and the children are dependent on him or her…

Article 4 paras 2 and 3 contain *optional* provisions indicating first-degree relatives in the direct ascending line of the sponsor or his/her spouse may be allowed as family members, where they are dependent on them and do not enjoy proper family support in the country of origin. Also mentioned are the adult unmarried children of the sponsor or his or her spouse in the case that they are objectively unable to provide for their own needs on account of their state of health.

Under the notion of family, the member state may also consider:

> the unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who

46 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

47 Considering the definition of "spouse", attention should be paid to paragraphs 32, 51-53, 66, 68, 71-72, 76-77 and 100 of the Case Relu Adrian Coman and others v. Inspectoratul General pentru Imigrări i Ministerul Afacerilor Interne, C-673/16, ECLI:EU:C:2018:385.
According to the Court, the spouse of a European Union citizen is a member of his family and given that "the term spouse within the meaning of Directive 2004/38 is gender neutral" may include a same-sex spouse of a European Union citizen."

> is bound to the sponsor by a registered partnership in accordance with Article 5(2), and of the unmarried minor children, including adopted children, as well as the adult unmarried children who are objectively unable to provide for their own needs on account of their state of health, of such persons. Member States may decide that registered partners are to be treated equally as spouses with respect to family reunification (Art. 5, para. 3).

It is clear that the Directives differentiate between various family members — with respect to the most inner circle from Art. 4, para. 1, which requires the Member State to enable family reunification, and for the others entitles the Member to do so, thereby indirectly establishing a hierarchy among individual family members. In the field of law applicable to family relations, one has to refer to the Hague Convention of November 23, 2007, on the International Recovery of Child Support and Other Forms of Family Maintenance[48] and the Hague Protocol of November 23, 2007, on the Law Applicable to Maintenance Obligation.[49]

3. Family in Crisis?

It is often submitted in the literature that the family goes through a crisis. In support of that thesis, some point out, for example, the increasing number of single-person households, postponed marriage, postponed birth of the first child, climbing divorce rates, and an increase in the number of single parent families either at the child's birth or after dissolution of family union.

The changes that came about in Croatia in families, household structure as a result of fewer contracted marriages, and increased nuptiality (marriage conclusion) and divortiality (divorce) rate are related to natural tendencies. These include changes in population age structure, rapid urbanization, rural exodus, transition from an agrarian to a tertiary society, and other pertinent processes.[50] Marriage and family disintegration has been facilitated by socio-cultural and psychological changes after the sudden industrialization and urbanization that ensued in the 1960s of the 20th century.[51] At the beginning of the 1990s, the Republic of Croatia fell into the Homeland War, which caused destruction and economic stagnation, and thereafter substantial emigration to the EU states. The COVID-19 pandemic reversed

48 Council decision of 9 April 2014 amending Annexes I, II and III to Decision 2011/432/EU on the approval, on behalf of the European Union, of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (2014/218/EU).

49 Council Decision of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (2009/941/EC).

50 Cf. Nejašmić, 2005, p. 27.

51 Cf. Aračić, 1995; Živić, 2002, cited in Majstorić, 2019, p. 20 .

economic growth, which continues to contribute to the drop in the birth rate. The already poor demographic picture of Croatia is aggravated not only by the low fertility rate (1.47[52]), which falls below the EU average but also by increased emigration caused by the economic crisis.

In addition to these events, the social perception of family is affected by the understanding of the post-modern society: relativism, scepticism, liberalism, and individualism, which seriously impacts marriage and the family.

The State protects individuals, as members of the family, through social contributions, but a long-term, real, and continuous family policy does not exist. The only national family policy[53] was adopted back in 2003 under the auspices of the State Institute for Protection of Motherhood, Family and Youth, which existed for only a short time and was dissolved thereafter. The National Population Policy was adopted in 2006,[54] while in subsequent activities, family policy is not supported in an integral and consistent manner and is often confused with demographic policy.

If we observe changes in the Croatian family law, then we can perceive, at the national level, a continuous development of the legal system that was advanced, from today's perspective, due to the socialist legacy. Since 1978, the system has been based on the (at least declaratory) principle of equality between women and men and equality of children born in and out of wedlock since 1978 in both family and inheritance law, as well as on the equality of their parents in view of the possibility of exercising parental responsibility. Under the influence of the Convention on the Rights of the Child, the principle of protection of the child's rights and the principle of shared parental responsibility were introduced in 1998.[55] Marriage was a privileged institution with regard to the legal effects of marriage,[56] whereas until 2014, non-marital unions and same-sex unions had limited effects, primarily at a private level between non-marital spouses and same-sex partners.

52 Eurostat, Available at: https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20210323-2 (Accessed: 18 April 2021).

53 Nacionalna obiteljska politika, ed. Puljiz, Bouillet, 2003.
"Family policy is an integral and systematic set of measures whose effects favour family, in particular families with children. Those measures aid them in problematic situations of economic, social, health, housing or similar nature, alleviate financial burden that children represent for a family, enable coordination of family and labour-based obligations, protect pregnant women and children…" Stropnik, 1996, p. 105.

54 National Population Policy, Official Gazette No. 132/2006.

55 Cf. Hrabar, 2004.

56 In that vein the Act on Discrimination Prevention from 2012 provides in Art. 9:
(2) By way of derogation from paragraph 1 of this Article, disadvantage shall not be regarded as discrimination in the following cases:
10. disadvantage in regulating rights and obligations prescribed by the Family Act, in particular for the purposes of legitimate protection of rights and well-being of children, protection of public morale and favouring marriage, whereby used means have to be appropriate and necessary.
…".

The development of family law that occurred until then has deviated from the original path after the adoption of the Family Act in 2014,[57] which was suspended in 2015 by the Constitutional Court of the Republic of Croatia on the account of many ambiguities and omissions and was subsequently replaced by the Family Act in 2015,[58]which managed to remedy only major omissions that had initially led to its suspension. The 2014 Family Act modified the fundamental principles set forth in family law legislation in force until then and abandoned the principle of marriage protection, thereby abandoning reconciliation attempts between spouses before divorce, forgoing the rules on shared parental responsibilities for the child after termination of family union, and equalizing the legal effects of marriage and cohabitation.

As the "Olah paper" (a report prepared for the United Nations Expert Group Meeting in 2015) correctly observes in assessing the phenomenon of new forms of unions in Europe, "The new partnership patterns have also had implications for family stability. Couple relationships have become less stable over time as consensual unions, which are more fragile than marriages, have spread and divorce rates increased."[59] In this report is further stated that declining partnership stability may reduce fertility given the shorter time spent in couple relationships and/or people choosing to have fewer offspring due to the prospect of having to raise their children alone or not being able to be involved with the children because of divorce or separation.[60]

The Croatian state also finances civil society; for this reason we live in a pluralistic society: non-governmental organizations have different programmes, some of which favour family and preservation of awareness of the importance and values of family.[61] By invoking human rights and non-discrimination, some of them introduce new social views that redefine traditional forms of unions and their relationships (e.g., the so-called Rainbow families).

It is interesting to note that one of the associations protecting traditional family values organized the first national referendum by virtue of which a provision defining marriage as a heterosexual union was introduced into the Constitution of the Republic of Croatia in 2013.[62]

57 Family Act, Official Gazette nos. 75/2014, 83/2014 and 5/2015.

58 Family Act, Official Gazette nos. 2013/2015 and 98/2019.

59 Oláh, 2015, p. 5.

60 Cf. ibid.

61 These are organizations which deal with projects such as providing information on family subsidies, psychological counselling for family members, organizing family mediation, assisting parents with impaired children, providing accommodation to single mothers, providing support to adopting families, helping parents to exercise shared parenting after termination of the family union, providing support in cases of family violence, etc.

62 This referendum divided the society, but 65.87% of the citizens who voted did so in favor of the amendment to the Constitution. The left-wing government of the Republic of Croatia, e.g., EU parliamentarians Ulrike Lunacek i Michael Cahman had voiced their opposition to the referendum. Available at: https://vimeo.com/79656001 (Accessed: 20 April 2021).

Regardless of the insufficient systematic family protection at the level of social policy and family law, individuals (citizens) hold family in high regard in terms of social values (similar to the majority of the other European states). According to the *European Study Values* in 2017, a total of 98.47% of surveyed persons in the Republic of Croatia (with similar outcomes to other states)[63] found the family to be important or very important in personal life. In that respect, it is interesting to observe that 75.5% of the surveyed persons in Croatia in the same study considered that a happy childhood required that the child have mother and father.[64] Furthermore, the study showed that "in the last 20 years, Croatian citizens have become increasingly aware of the legitimacy of divorce (separation)." Hence, in 2017. every fourth surveyed person justified separation or divorce. Comparison of data with the number of *de facto* separated persons in 2017 leads to the conclusion that the life theory on possible separation and life practice of realized separation or divorce gradually come closer."[65] Despite liberalization of the views on divorce, marriage ranks high on the value ladder: although the number of children born out of wedlock continues to rise, which allows for the conclusion that the number of non-marital unions rises, only 21% of children were born out of wedlock in the Republic of Croatia in 2020. These data do not indicate whether those children were born in a family union or outside of it.

4. Definition of Family

During the socialist period (1945–1990) family law legislation was separated into a specific legal field outside of civil law, and remained as such in the transitional and post-transitional periods. In its norms, the Croatian family law legislation does not contain a definition of family. The reason for that lies in the theoretical understanding "that is difficult to identify a phenomenon which is not static and is affected by socio-economic and other factors in the social environment. In addition, family relations among members also change during life."[66]

Despite this challenge, theorists have attempted to provide a very broad definition: "From a legal point of view, family is constituted by a group of people who are

63 Surveyed persons in the Netherlands scored the lowest percentage of positive answers — 94.03%, which is still an exceptionally high percentage.

64 Aračić, Baloban, Nikodem, 2019, pp. 336 and 337.
Original study: https://europeanvaluesstudy.eu/, study carried out in four waves in a certain number of the European States.

65 Ibid. p. 343. In 2017 there were 6,265 divorces out of 20,310 marriages entered into that year. Natural Change in Population, 2017, Statistical Reports. Available at: https://www.dzs.hr/Hrv_Eng/publication/2018/SI-1618.pdf (Accessed: 3 April 2021).

66 *Cf.* Alinčić et al., 2007, p. 7.

related among themselves based on kinship, marriage, or any other legally relevant point of reference and among whom there exist, therefore, legally defined rights and duties."[67]

It is interesting that after the attempt to define the family in Art. 1, para. 2 of the Draft Family Act in 2017: "For the purposes of this Act, the family is constituted by the mother, the father, their children, mother with the child or the father with the child although not living together, and other relatives living with them," that the draft has never been released by the government into the legislative procedure due to the strong opposition of the public, which designated it as conservative. This provision in itself would not have had any practical effects since it is limited by the scope of the Family Act, particularly due to the parallel existence of the Same-Sex Life Partnership Act (2014), which recognizes the existence of family life to same-sex partnerships (in line with the case law of the European Court for Human Rights). Furthermore, extra-marital unions were regulated by the same draft and recognized as the basis for the formation of family.

Similar dilemmas appear to exist in the international community since the Human Rights Council defined the family in 2014 as "the natural and fundamental group unit of society and is entitled to protection by society and the State." An amendment that aimed to introduce the concept of "different family forms" was rejected.[68]

Certain legislation provides particular effects derived from the family law relationship, but the circle of persons who belong to family is determined only for the purposes of regulating legal relations within the scope of that particular law. We cite only a few of them.

Among the members of the nuclear family entitled to a just pecuniary compensation in case of death or particularly severe disability, Art. 1,101 of the Law on Obligations (2005)[69] includes the spouse, children, and parents, and thereafter enumerates brothers and sisters, grandparents, grandchildren, and non-marital spouse, if between them and the deceased i.e. the injured person, there existed a more durable union, as well as a parent with respect to a conceived, but unborn child.

The Same-Sex Partnership Act[70] (2014) defines life partnership as the family union between two persons of the same sex entered into before a competent body. Pursuant to this Act, the legal positions of the (registered) life partners and those of informal partners are equalized.

According to the most recent amendment from 2019, the Act on Protection against Violence in Family[71] encompasses a large number of persons, determining it as being applicable to:

67 Ibid.
68 Resolution adopted by the Human Rights Council 26/11 Protection of the family, 16 July 2014.
69 Law on Obligations, Official Gazette nos. 35/05, 41/08, 125/11, 78/15 and 29/18.
70 The Same-Sex Partnership Act, Official Gazette nos. 92/2014 and 126/2019.
71 The Act on Protection against Violence in Family, Official Gazette Nos. 70/2017 and 126/2019.

> A spouse, non-marital spouse, life (same sex) partner, informal life partner, their common children and children of each of them, blood relatives of lineal kin relationship, relatives in collateral kin relationship up to the third degree, relatives by marriage up to the second degree, adoptive parent and adoptee … a former spouse, former non-marital spouse, former life partner,[72] former informal life partner, persons having a common child and persons living in the same household (Art. 8, paras. 1 and 2).

Pursuant to Art. 4, para. 1 (3) of the Social Welfare Act[73]:

> The *family* is the union consisting of spouses or non-marital spouses, children, and other relatives living together, earning, making income in some other way, and consuming it together. The child not living with the family shall also be regarded as its member, provided he or she undergoes education, until he or she completes his or her education, yet not beyond the age of 29.

Since 2014, family law has equated the effects of the non-marital union with those of the marital union, not only in family relationships but also principally in provisions of other acts (Art. 11, para. 2 of the Family Act), *see infra*.

Article 4, para. 3 of the Foster Care Act[74] defines the foster family as:

> a union consisting of spouses or non-marital spouses, children, and other relatives living together, earning, making income in some other way, and consuming it together. The child not living with the family shall also be regarded as its member, provided he or she undergoes education, until he or she completes his or her education, yet not beyond the age of 29.

After a family center (division of a center for social welfare) had allowed them to undergo the required preparation procedures for foster parents, a same-sex couple tried to foster a child but were denied during the administrative proceedings conducted by the social welfare center, because the life partnership (of same-sex persons) was not included in the law relating to foster families.

In the parliamentary debate for the adoption of the Act it was pointed out that "the goal of the Act is to reinforce foster care capacities, quality and scale of foster care, protecting thereby exclusively the best interest of children" (adult beneficiaries were mentioned sporadically). Opponents of allowing same-sex couples to be foster parents put forward the view that socio-cultural reasons, i.e., "the fact that in Croatian society the phenomenon of same-sex foster parents would still not be

72 Life partner is considered as homosexual partner.

73 Social Welfare Act, Official Gazette nos. 157/2013, 152/2014, 99/2015, 52/2016, 16/2017, 130/2017, 98/2019, 64/2020 and 138/2020.

74 Foster Care Act, Official Gazette No. 115/2018.

accepted, cause indignation and rejection, and further stigmatise foster children who are already traumatised by their experience and stigmatised by social conditions in which they live." The Constitutional Court also concluded: "In addition, the fact that by already mentioned other acts the members of that same social group have already been accorded the legal status of the family union in the legal order of the Republic of Croatia, together with corresponding legal effects in all walks of life, is undeniable."[75]

In addition, Art. 11, para. 3 of the Foster Care Act did not provide that persons living in a same-sex partnership, as beneficiaries of traditional foster care, can be accommodated together (as opposed to marital or non-marital spouses), from which the Constitutional Court inferred that based on the Life Partnership Act, providing that life partnership produces in the field of social welfare system the same effects as non-marital union, life partners "have a legitimate right to expect that in a traditional type of foster care they be accommodated together, already due to the fact the Life Partnership Act protects family unity of same-sex partners in the same way as it protects the marital union" (para. 27 of the decision of the Constitutional Court).

Finally, the Constitutional Court held that the exclusion of life partners from being able to become a foster family, i.e., be accommodated together as beneficiaries of foster care, was discriminatory and concluded that

> competent authorities conducting administrative and judicial proceedings and directly deciding on the rights and obligations of citizens in particular cases have a duty to interpret and apply every law, including the Foster Care Act, pursuant to its legitimate purpose and adopt decisions in accordance with the Constitution, treaties and other legal sources in force, inter alia according to legal views of the Constitutional Courts expressed in this decision and order (para. 29(3) of its decision).

4.1. Croatian Family Law Legislation and Family Protection

4.1.1. Definition and Significance of Marriage

In Art. 62, para. 2 the Croatian Constitution provides: "The marriage is a union of a woman and man," and in Art. 62, para. 3: "The marriage and legal relationships in the marriage, non-marital union and family shall be regulated by law."

As a condition for the existence of the marriage, the Family Act provides that the bride and the groom shall be persons of different sex (Art. 23, para. 1). If this condition is not met, the marriage has never been entered into and does not produce legal effects, while a determination from the court to that effect may be sought by a declaratory action.

There is a possibility in the Republic of Croatia to have a sex change entered as a modification of data in the base entry of the birth registry, which is to be decided by

75 Paragraph 24 of Decision of the Constitutional Court no. U-I-144-2019 of 7 February 2020.

an order (decision) adopted by a competent administrative authority. An order on the entry of a sex change into the birth registry is to be adopted based on the opinion of a competent authority relating to sex change or to life under another gender identity pursuant to medical documentation of the competent medical doctor or a health institution (Art. 9a of the Act on Civil Status Registries).

Relevant regulation (the By-Law on Collection of Medical Documentation and the Determination of Conditions for Sex Change or Life under Another Gender Identity)[76] prescribes conditions for the implementation of a sex change entry into the birth registry and provides that "nobody shall be forced to undergo a medical procedure, including surgical sex adaptation, sterilization, or hormonal therapy as a condition for recognition of sex change or life under another gender identity." This implies that if the National Health Council finds that the required conditions have been met, it should issue a positive opinion.

After a three-year procedure initiated by a request of a then 14 year-old child, represented by the mother as the legal guardian, to have a sex change for the purposes of life under another gender identity, in 2017, the Constitutional Court decided (U-III/361/2014) that the competent administrative authority violated the applicant's right to a trial within a reasonable time (Art. 29, para. 1 of the Constitution of the Republic of Croatia) and the right to respect for and legal protection of personal life (Art. 35 of the Constitution of the Republic) in relation to which there is also a positive obligation on the part of the State. This change in the base entry of the birth registry of the applicant leads to the possibility that, although entered as a man, he may get pregnant and give birth to a child, creating confusion in civil status registries of new-born children concerning the "mother" and "father" fields. Such a case in the Republic of Croatia was still unbeknown to a professional or broader public.

No regulation requires a person wishing to change his/her sex to not be married, which makes it possible for an uneducated civil registrar to modify the entry on sex in the birth registry of a married person. In that case, it would be possible that two persons of the same sex enter into marriage, which would contravene the public order in view of the constitutional and statutory determination of marriage as a heterosexual union. There is no way to subsequently terminate such a marriage due to the fact that the conditions for the existence of the marriage have to be met only when entering into the marriage.

Generally speaking, marriage is held in high regard in Croatia, which is why the 2008 Discrimination Prevention Act,[77] Art. 9, para. 2(10), accorded a higher level of protection to the institution of marriage by setting forth that

> disadvantage in regulating rights and obligations in family relations when provided for by the law, in particular for the purposes of protection of rights and interests of

76 By-Law on Collection of Medical Documentation and Determination of Conditions for Sex Change or Life under Another Gender Identity, Official Gazette, no. 132/2014.

77 Discrimination Prevention Act, Official Gazette, nos. 85/2008 and 112/2012.

children, to be justified by a legitimate purpose, protection of public morale and favouring marriage, as well favouring of marriage pursuant to the provision of the Family act will not be regarded as discrimination.

The 2012 amendment to this act added that "used means have to be appropriate and necessary."

4.2. Other Forms of Unions

4.2.1. Non-Marital unions

From a historical point of view, recognition of property effects of the non-marital union (initially through the institution of *condictio sine causa*) was based on the idea of protecting women abandoned after the termination of a non-marital union without remuneration for the property acquired during the non-marital union.

The informal non-marital union was introduced for the first time into the family law system in 1978[78] in such a way that non-marital spouses had the right to mutual maintenance and to acquire and separate property acquired by labor during the non-marital union, whereas in other legal fields, no effects of the non-marital union were envisaged.

In 1990, the non-marital union became a constitutional category: "The marriage and legal relationships in marriage, non-marital union and family shall be provided for by law" (Art. 62, para. 3 of the Constitution of the Republic of Croatia).

Over time, the effects of recognizing non-marital unions started to extend spontaneously and in a chaotic manner to other legal fields, partially due to the action on the part of the Constitutional Court, which had been extending the *effects* of the non-marital union to other legal fields.[79] The lack of a clear family policy as to what tatus should the non-marital union enjoy in other legal fields has led to a difference in requirements for the purposes of demonstrating different effects of the non-marital union, different manners of demonstrating its existence, and incompatible relations among certain regulations, which is why today the answer to the question of who are non-marital spouses under Croatian law and how they can prove their non-marital status is not quite clear. The unclear (family) law status of persons exercising

78 The Act on Marriage and Family Relations, Official Gazette, nos. 11/1978, 45/89. and 59/1990.

79 For example, the Constitutional Court (U-III-1233/2017, judgment of 10 July 2019, para. 13, 16, 17, and 19) held that there is no objective and reasonable justification for the difference in tax treatment of non-marital spouses in relation to marital spouses.
In the field of pension law, the Constitutional Court (U-X-1457/2007, judgment of 18 April 2007) held that the State should use the Family Act and the Inheritance Act as a framework for the regulation of the right to a pension for non-marital widows and widowers because the Pension Insurance Act, at that time, did not recognize them as beneficiaries of the aforementioned right to a pension.

non-marital cohabitation who do not meet the conditions to validly enter in marriage, primarily those lacking legal capacity, is highlighted as a specific problem.[80]

In the positive family law legislation, a non-marital union is defined as a "union of an unmarried woman and an unmarried man lasting for at least three years or shorter if the common child had been born therein or has been continued by entering into the marriage" (Art. 11, para. 1 of the Family Act). This article further indicates in para. 2 that a non-marital union "produces personal and property effects like a marital union and provisions of this Act governing personal and property relations of the marital spouses as well as provisions of other acts governing tax matters, personal, property and other relations of marital spouses apply *mutatis mutandis* thereto."

According to the family law regulation, a non-marital union is exclusively a factual union, which is why there is no prescribed way to determine its formal termination, which is entirely the case law. In some other legal fields, a declaratory judicial decision on the existence of the non-marital union (e.g., for the purposes of exercising the right to a family pension) is required, while others require a declaration of non-marital spouses certified by a notary public that they live in the non-marital union (in order to be able to benefit from medically assisted procreation).

In the context of equalizing marital and non-marital unions, non-marital spouses have been allowed to adopt (*see infra "Adoption"*), whereas non-marital spouses may be beneficiaries under the Act on Medically Assisted Procreation[81] pursuant to the conditions set forth by the law (*see infra*).

Acting entirely outside of the usual norm setting standards, the legislature decisively ventured into the field of discrimination prohibition, declaring that "disadvantageous treatment of non-marital spouses in respect to not only access to benefits, privileges but also to obligations guaranteed to marital spouses which cannot be justified by objective reasons and which is not necessary to exercise them, represents discrimination on the grounds of the family status" (Art. 11, para. 3). This applies not only in the field of family law but also in the legal field as a whole.

The Explanatory Memorandum of the Final Draft of the Family Act indicates that it is necessary to

> guarantee the recognition and protection of personal and family life and to show respect for their human dignity expressing the legal recognition for the equivalence of their autonomous choice, i.e. personal decision to jointly build personal and family life with a particular person in the same qualitative manner and with the same far-reaching effects as the marital spouses. The difference in the administrative form as to founding of marital and non-marital unions cannot justify disadvantageous treatment of either of those two unions.

80 Cf. Lucić, 2015, pp. 101–132; Hrabar, 2010, pp. 41–48, more on non-marital union: Lucić, 2020.
81 The Act on Medically Assisted Procreation, Official Gazette No. 96/2012.

According to the most recent population census conducted in 2011,[82] there were 959,487 couples living in marital unions and 48,886 couples in non-marital unions (out of the total number of heterosexual family unions, 95% were married, whereas 5% were in non-marital unions).

In the same year, 14% of children were born out of wedlock (20.7% in 2020),[83] but there are no data on how many children have been recognized, which might point to a higher possibility that they were born in a non-marital union. On the other hand, according to one of the rare studies conducted among youth in 2017, slightly over half of surveyed people agree that it is easier for non-marital partners to terminate their relationship than for marital partners, and that this is precisely the reason why the marital union is more appropriate to raise children than the non-marital union (62.2%).[84] In addition, it is significant that "men are more prone to the view that non-marital union is not a stable one and that they harbour a stronger conviction that non-marital union is more liberal than the marriage."[85]

In conclusion, the last four decades witnessed the development of the non-marital union from its institutional recognition in family law legislation to it being equated as a *de facto* institution with the legal effects of marriage throughout the entire legal system in a chaotic manner, which has brought about the overall legal uncertainty. Legal uncertainty is reflected in prescribing different conditions for the recognition of the status of non-marital spouses, different ways to determine the existence of the non-marital union, as well as in all problems that the aforementioned issues cause to the non-marital spouses and third persons.

4.2.2. Formal Same-sex Partnership and Informal Same-Sex Partnership

In 1998, the Republic of Croatia regulated for the first time certain family law effects of *de facto* same-sex union by the Same-Sex Union Act.[86] By modelling it after a heterosexual non-marital union, homosexual partners' mutual right to maintenance and property effects of their union has been recognized.

As opposed to the primordial development in some other systems, care has been taken that the name of the institution remains different for non-marital (heterosexual) couples and same-sex partners, and the legal provisions governing same-sex unions have been separated from the Family Act.

In 2014, the Same-Sex Partnership Act defined the same-sex partnership as the union of family life and named it a "life partnership." This act was also supported by the Communication of the Constitutional Court on the occasion of the referendum on marriage, which pointed out that:

82 Population and housing census. Available at: https://bit.ly/301uv1k (Accessed: 17 April 2021).
83 Statistical Information, Zagreb, 2020, p. 20. Available at: https://bit.ly/3Bd5A8C.
84 Bandalović, 2017, p. 52.
85 Ibid., p. 55.
86 The Same-Sex Union Act, Official Gazette no. 116/2003.

> a possible amendment to the Constitution based on a provision that the marriage is the union between a woman and a man must not affect by any means further development of the legal framework of the institution of the same-sex union in accordance with the constitutional requirement that anyone in the Republic of Croatia has the right to respect for, and legal protection of, his or her private and family life, and his or her human dignity (Art. 11).[87]

After the referendum, a professor of constitutional law, Ms. Sanja Barić, rightly concluded in the media that the introduction of the constitutional definition of the marriage protected only the notion of "marriage" in the sense of the institution designed for heterosexual persons, whereas all the effects of the life partnership were virtually equated with the marriage. A review of the constitutionality of the Same-sex Partnership Act is still pending before the Constitutional Court of the Republic of Croatia, having been initiated in 2015.

The legislature envisaged two types of life partnerships: life partnership, which can be entered into the registry of partnerships (similar to the marriage being able to be entered into the registry of marriages) and the informal life partnership, which was constructed via an analogy to the legal regime of the non-marital union. "The life partnership is the union of the family life of two persons of the same sex entered into before a competent authority pursuant to the provisions of this Act" (Art. 2). "The informal life partnership is the union of family life of two persons of the same sex who haven't entered into the life partnership before a competent authority, if the union lasts for at least three years and has from the outset met the conditions provided for in respect of the validity of the life partnership" (Art. 3, para. 1). Its existence is to be demonstrated in the same way as the non-marital union (in case of a dispute between the partners before a competent court in relation to the effects in other legal fields, the same as the non-marital union) according to Art. 3, paras. 2 and 3 of the Act on Same-Sex Life Partnership.

The conditions for entering into a life partnership and the conditions for its validity have been *mutatis mutandis* from nuptial law. The difference lies in the fact that minors cannot enter into a life partnership and that the competent authority for forming the life partnership is only the civil registrar (there is no possibility of a religious ceremony).

The Act envisages the following effects of the life partnership: personal rights and obligations; maintenance; relations regarding children in view of the exercise of care and property relations (which are dealt with by family law); inheritance; fiscal status of life partners; effects of the life partnership within the context of retirement insurance; status of life partners within the social welfare system; rights and obligations in the system of compulsory health insurance and health care; rights and

87 Communication of the Constitutional Court of the Republic of Croatia regarding the people's constitutional referendum on the definition of the marriage No.: SuS-1/2013 of 14 November 2013, Official Gazette no. 138/2013.

obligations regarding access to employment and labor relations; access to public and commercial services, as well as public law status of the life partnership (temporary residence permit for the purposes of family reunification; freedom of movement within the European Economic Area; status of the unions of same-sex persons entered into outside of the European Economic Area; international protection; acquisition of Croatian nationality; and rights and obligations of life partners during execution of a custodial sentence and the guarantee to prohibit less favorable treatment).

If one of the partners in the life partnership has his or her own child, it is possible for the life partner to be entitled to exercise parental responsibility so as to be entrusted by parent(s) exercising parental responsibility to exercise it in part or entirely (Art. 40, para. 3). The other possibility is that a court decides that the life partner together with the parents or instead of one of them is entitled to exercise parental responsibility or some of its elements pursuant to the provisions of a family law regulation (Art. 40, para. 1).Such a solution contradicts the Family Act from 2015 pursuant to which only parents exercise parental responsibility and opens up the possibility that three persons exercise it for the child (his or her parents and the parent's life partner).

The Same-Sex Partnership Act also introduced an institution that is content-wise similar to *adoptio minus plena*: terminable adoption with limited effects regarding adopting parents' relatives, according to which a life partner may in judicial proceedings claim partnership-based care and become partner-guardians. In principle, partnership-based care may be provided by a life partner as a form of care for the minor child after the death of the life partner of the child's parent and, exceptionally, during the life of the child's parent, if the other parent is unknown or he or she has been stripped of parental care due to child molestation (Art. 44). Partnership-based care has the effects that "permanent rights and duties existing under law between parents and children and their descendants are constituted between partner guardian of the child, on one side, and his or her descendants on the other" (Art. 48 of the Act). While the partner-guardian cannot be entered as the parent in the child's birth registry he or she has all rights as the parent of the child.

Life partners are not entitled to jointly adopt a child pursuant to the Family Act (although nothing prevents the life partner from adopting the child of his or her partner after the latter's death as any other person). Moreover, life partners cannot be joint or individual beneficiaries of the Act on Medically Assisted Procreation. As they have not been envisaged as foster family pursuant to the Foster Care Act while this was assessed by the Constitutional Court as meaning that courts had the duty to interpret the law *in favorem* of life partners, one may expect further proceedings before the Constitutional Court. Some of the applications have already been filed, although they are still pending. The latest decision from May 5, 2021 of the Administrative Court enabled homosexual couples to go through the procedure to approve that they might be capable adoptive parents. This decision has not yet been finalized.

In the 2016 case Paić v. Croatia, the ECHR found that the Republic of Croatia had violated the prohibition of discrimination because it failed to accord to the applicant, a national of Bosnia and Herzegovina, temporary residence for the purposes of family reunification, although she had maintained a stable relationship with the same-sex partner from the Republic of Croatia, because same-sex partners did not enjoy the legal status of a family member for the purposes of the Foreigners Act.

To assess the state of the society, one should observe data from the Ministry of Justice and Administration, according to which, in 2020, there were 66 life partnerships in total, 28 of which were between men and 38 of which (20 more than in 2019) were between female persons. These data show that 32 life partnerships were entered into between nationals of the Republic of Croatia as well as 30 life partnerships between a Croatian national and a foreign national. In four cases, foreign nationals entered into life partnerships.

Life partnerships with international elements are governed by the Act on International Private Law.[88] Pursuant to Art. 32, para. 2 "[t]he marriage entered into abroad by persons of the same sex shall be recognized as the life partnership, provided it has been entered into pursuant to the law of the State in which it has been entered into."

Since the effects of the registered life partnership have been rendered equivalent to the effects of the marriage of persons having entered into a same-sex marriage abroad, it is "translated" into a life partnership without affecting their rights and duties arising from marriage. Same-sex registered partnership is recognized in the Republic of Croatia as a life partnership if it has been entered into pursuant to the law of that State (Art. 39, para. 2 of the Act on International Private Law, whereas pursuant to Art. 40, para. 3)

> the law applicable to property relations in life partnership is to be determined according to 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 (OJ 2016, L 183, 8. 7 2016).

4.3. Determining the Child's Origin

4.3.1. Mother's Status

Motherhood may be determined by virtue of a presumption or a judicial decision. Since 2014, the presumption has been defined as the *praesumptio iuris:* "The woman having given birth to the child shall be regarded as the mother of the child" (Art. 58 of the Family Act).

Since most children are born in a healthcare institution, the fact that the child has been born is, in principle, reported to the civil registrar by the health institution

88 The Act on International Private Law, Official Gazette No. 101/2017.

that the child has been born by a particular woman who is to be entered as his or her mother in the birth registry. Childbirth outside a healthcare institution is to be reported by the child's father, i.e., the person in whose household the child has been born, the mother as soon as she becomes capable of doing so, or a midwife or a medical doctor who participated in the birth, i.e., the person who became aware of the child's birth (Art. 11, para. 2 of the Act on Civil Status Registries). To prevent possible manipulation of the child's parentage, the person reporting a child's birth outside a health institution has a duty to provide the civil registrar with medical documentation on the birth or the proof of motherhood (Art. 11, para. 3 of the Act on Civil Status Registries).

Motherhood may also be established in judicial proceedings. An action may be filed by the child (until he/she reaches 25 years of age — Art. 383, para. 1 of the Family Act) or the woman considering herself to be the child's mother and a social welfare center (until the child's 18 years of age – Art. 59 in connection with Art. 384, para. 1 and Art. 387 of the Family Act), if the box containing data on the child's mother has been left empty. The woman considering herself as the child's mother may contest motherhood of the woman entered into the birth registry but has to seek simultaneously that her own motherhood be established. If it appears from a medical expert report that the applicant is not the mother of the child with respect to whom she contests motherhood, the court will discontinue the proceedings for contesting motherhood, resulting in preservation of the child's parental responsibility.

In court proceedings, one is always required to submit, in practice, DNA evidence that indicates with exceptionally high precision who is the biological mother of the child, although formally the court is not bound by this evidence.

4.3.2. Father's Status

Fatherhood may be established by virtue of presumption, recognition, or judicial decision. Not all particulars of fatherhood determination will be elaborated, save for those considered essential for the purposes of this study.

The general rule reads *pater est quem nuptiae demonstrant* meaning that "the mother's husband shall be regarded as the child's father, if the child has been born in wedlock or within the period of 300 days after marriage termination" (Art. 61, para. 1 of the Family Act).

In case of *perturbatio sanguinis*, i.e., "if within the period of 300 days after the termination of marriage by death the child's mother entered into a subsequent marriage," the mother's husband from the marriage last entered into will be regarded as the child's father (Art. 61, para. 2 of the Family Act). If the child was born in wedlock or within the period of 300 days after marriage termination by virtue of divorce or annulment, the man considering himself as the child's father may recognize the child with the consent of the mother and mother's husband (Art. 61, para. 3). The man considering himself as the child's father is not permitted to contest marital fatherhood.

Criticisms may be submitted with respect to the provisions that recognition of fatherhood of the child who had a marital status has been allowed without the fatherhood of the child having been contested in court beforehand.[89]

If the child was born out of wedlock, fatherhood may be determined by recognition or a judicial decision. The civil registrar in charge of birth registry is competent to enter recognized fatherhood, whereas, among other conditions for entering of fatherhood recognition Art. 64, requires, depending on a particular case, consent of the adult mother independent of her legal capacity, consent of the minor mother younger than 16 years of age (together with her legal guardian's consent), consent of the child of 14 years of age with respect to whom fatherhood is being recognized, or consent of the mother and her husband if fatherhood of the marital child is being recognized by the man considering himself as the child's father. If the mother is not alive or her residence is unknown, consent of the child's guardian is required, together with the prior approval of the social welfare center.

By obtaining appropriate consent, one strives to ensure there are no abuses of fatherhood recognition since consent confirms the veracity of recognition. In addition, if the civil registrar official harbors doubts as to the veracity of the application or it proves to be necessary, he or she is entitled to suspend execution of the entry to verify the veracity of the data contained in the application.[90]

Neither the professional nor the broader public is aware of cases of false fatherhood recognition. In addition, changes in the child's family status by planting, replacing, giving false information, or in some other way, represents a criminal offense with a custodial sentence of up to three years (Art. 175, para. 1 of the Penal Code)[91].

4.3.3. Medically Assisted Procreation

Medically-assisted procreation is regulated by a special regulation[92] in which a married woman and a man, a woman and a man in a non-marital union, or a woman not living in a marriage, non-marital union or same-sex union whose treatment of infertility failed or has no prospect of succeeding are indicated as the beneficiaries (social infertility is not relevant). Each beneficiary has to be an adult with legal capacity, i.e., not being limited to making declarations concerning their civil status (Art. 10, para. 1–3. of the Act on Medically Assisted Procreation).

The guarantee that the child will enjoy parental responsibilities of both parents is provided in such a way that marital or non-marital unions must exist when implanting sex cells or embryos into women's bodies (Art. 11, para. 1). The existence of the non-marital union is to be demonstrated by non-marital spouses by means of

89 Cf Hrabar, 2019, p. 135.

90 Para. 5.6 of the Order on Implementation of the Act on Civil Status Registries and Entry of Adoption into Birth Registry, Official Gazette, no. 26/2008.

91 Penal Code, Official Gazette, nos. 125/2011, 144/2012, 56/2015, 61/2015, 10120/17, 118/2018 and 126/2019.

92 The Act on Medically Assisted Procreation, Official Gazette, no. 86/2012.

a declaration certified by a notary public (Art. 11, para. 3); the man has to give a declaration on fatherhood recognition, while the woman has to give a certified declaration on consent for the recognition of that child's fatherhood (Art. 16, para. 2).

Parentage of the child conceived by medically assisted procreation is regulated by the Family Act in the sense that "the mother of the child conceived by donated ovum or donated embryo within a procedure of medically assisted procreation is the woman having given birth to him or her" (Art. 82, para. 1), as the *praesumptio iuris et de iure*, which is nonetheless theoretically inconsistent because already at the next point, contestation of motherhood is permitted.

If the child conceived by donated semen has been born in wedlock or up to 300 days after marriage termination, the mother's husband is to be regarded as the child's father, while in the case of a child born out of wedlock, the mother's non-marital spouse has given written consent for the appropriate procedure and the declaration on the recognition of the child in accordance with medical procedure shall be regarded as the child's father (Art. 83, para. 1 and 2).

The mother's husband is to be regarded as the father of the child conceived by donated semen or embryo if the child has been born in wedlock or within 300 days after termination of the marriage, provided he has given appropriate consent.

After the required consent has been obtained, it is no longer possible to contest either motherhood or fatherhood (Art. 82, para. 2 and Art. 83, para. 3), and had the required consent not been obtained, motherhood of the child may be contested by the woman entered as the child's mother, the woman considering herself as the child's mother (Art. 82, para. 3), the man entered as the child's father, and the man considering himself as the child's father (Art. 83, para. 4), under the conditions provided for by the law.

Surrogate motherhood is not permitted, and contracts, agreements, and other forms of written and oral arrangements on donation of sex cells or embryos between donors of the sex cells or embryos are forbidden, while any contract or agreement to cede sex cells or embryos is null and void (Art. 21.).[93]

It is important that the child has the right to know his/her origin, so he/she has the right to inspect medical documentation, including the information of the donor's identity (Art. 15, para. 1 of the Act).

It is a reality that primarily due to the revealed anonymity of a donor (but also to some other medical reasons) heterologous methods are not applied and that many beneficiaries seek to transfer their genetic material to other countries (the most common being the Czech Republic, Macedonia, and the Ukraine) in which they have recourse to those medical services not available to them in Croatia.

The professional public is now aware of the case of a woman who sought maternity leave after her return from the Ukraine with a child in whose civil status registries she was entered as the mother but did not have the required medical

93 Regarding the view that surrogate motherhood is the new form of exploiting women and child trafficking cf. Hrabar (2020).

documentation on her pregnancy and the birth (everything was leading to the use of surrogate motherhood abroad). Upon the intervention of the ombudswoman for children, the woman was allowed to use maternity leave. The authorities did not intervene in the family life of that family, questioning the biological origin of the child.[94]

5. Adoption

Adoption is a "specific form of family law care and protection of the child without appropriate parental care with whom a permanent parent-child relationship is formed," based on which adopting parents become entitled to parental responsibility (Art. 180, para. 1 and 2 of the Family Act).

Eligible to adopt are marital spouses jointly, non-marital spouses jointly, persons who are married or have entered into a non-marital union, upon consent of the marital or non-marital spouse, as well as persons who are not married or have not entered into a non-marital union (Art. 185 of the Family Act). Family law experts have voiced substantial opposition as a precaution to a proposed solution that non-marital couples may adopt a child. Due to the case law of the ECHR, which is constantly extending the rights of non-marital spouses to same-sex couples (*see supra*), such a solution might lead the Constitutional Court to decide that same-sex couples have to be included as prospective adopting parents, such as the Constitutional Court in Germany. As mentioned above, the new approach led to the request of the Administrative Court toward centers for social welfare that homosexual couples should be allowed to go through the process of approval and that they have the capacity to adopt a child (although that is *contra legem*).

There is no obstacle for a single homosexual person to adopt a child. There is no obstacle for a person who is the life partner of the child's parent to adopt the child after the termination of the life partnership, after which he/she thus can acquire parental responsibility. Adoption is not rescindable, and the adopting parents may be entered as parents, while the legal effects also arise between the relatives of the adopting parents and the child. Regarding the *adoptio minus plena* under the new name partnership-based care, it is available only to partners of the child's biological parents or child's adopting parents (see *supra*).

94 More on international aspects of surrogacy: Šimović, Čulo, and Preložnjak, 2019.

5.1. Legal Framework of Parent-children Relationship

5.1.1. Content of Parental Responsibility

Parental responsibility is acquired as soon as the child's origin from the parents is determined and consists of responsibilities, duties, and rights of the parents for the purposes of promoting the child's personal and property rights and welfare. The fundamental elements of parental responsibility comprise the right and duty to protect the child's personal rights to health, development, care, and protection; upbringing and education; contacts; determination of the place of residence; asset management; and the right and duty to represent children's personal and property interests (Arts. 91 and 92 of the Family Act). Although maintenance is not mentioned in the Act as an element of parental responsibility, in theory, it is considered as one of its elements.

Since 1978, Croatian family law legislation has provided equality for children regardless of whether they have been born in the wedlock, as well as the equality of their parents regarding parental responsibility. The only difference lies in the way in which fatherhood is to be determined.

Exercising parental responsibility should not be confused with parental responsibility (*nudum ius*). Parents exercise parental responsibility jointly and by agreement until a contrary agreement is reached by parents or a judicial decision is adopted thereon, regardless of whether the child has been born in or out of the wedlock. By virtue of its most recent amendments, the Family Act derogated from the principle of joint parental responsibility in the sense that, after the termination of the family union, the parent living with the child exercises parental responsibility autonomously whenever no agreement on joint parental care has been reached during court proceedings.

Such a legislative solution was modified by the case law pursuant to which a court is empowered to award "exercise of joint parental responsibility in case of parents not living together and in case the matter has not been regulated by an agreement based on joint parental care plan under Art. 106 of the Family Act or by parents' agreement reached during the judicial proceedings, if it appears to be in the best interest of the child," as cited in the Legal Opinion of June 4, 2019 of the Zagreb County Court. Although such competence is not derived from Art. 104, para. 3 of the Family Act, it is entirely compatible with the Convention on the Rights of the Child.

The parent not living with the child and in the case of parents having failed to reach an agreement is substantially deprived in terms of exercising parental responsibility and has significantly limited rights even if he or she shares parental responsibility,[95] which is undoubtedly detrimental to his or her legal situation as compared to the earlier legislative solution.

95 Cf. Korać Graovac, 2017.

The stepfather and the stepmother are expressly referred to in the Family Act only as the persons who mutually enjoy with child the right to maintenance under the conditions provided for by the law (Arts. 281, 283, 293 *et al.*). In addition, just like the other family members living with the child, they may, upon parents' consent, make day-to-day decisions concerning the child (Art. 110, para. 4). What is to be subsumed under the notion of "day-to-day decisions" has to be determined according to the circumstances of a particular case, but that should certainly cover taking decisions on a day-to-day regime in the family and the like.

With regard to the rights to contact after the termination of the family union, stepfather and stepmother are entitled to personal relations provided they can be subsumed under "other persons if they have lived for a longer period in the family with the child, taken care of the child during that period and have an emotionally developed relation with the child" (Art. 120, para. 2).

The non-marital spouse and children of the non-marital spouse are not referred to at all as pertaining to the circle of persons enjoying mutual rights to maintenance, which may be interpreted only teleologically from the provisions on the effects of the non-marital union (Art. 11), whereas the non-marital spouse of the parent may in the same manner as the stepfather or the stepmother be included in the circle of persons entitled to make day-to-day decisions concerning the child as well as into the circle of persons entitled to contact with the child.

Although the Same-Sex Partnership Act has regulated these matters separately as well, life partners have life partnership effects regulated in more detail and to a greater extent in relation to the children of his or her life partner (see *supra*), including the possibility of exercising parental responsibility, whereby they are privileged in relation to marital and non-marital spouses in their relationship with the child.

In the context of the targeted interest of this study, one has to single out the case of parents' influence on the so-called health (sexual) education of children in schools, where, on the occasion of the attempt to introduce a curriculum containing sexual education, a part of the public voiced its opposition, considering that sexual education was conceived contrary to their freedom to freely decide on the upbringing and education of their children. Critics referred to it as "homosexual education" and "sexual re-education."[96] The justification for introducing of sexual education was based on the prevention of infectious diseases and pregnancy among minors as well the promotion of understanding of homosexuality, transgenderism, and other similar issues.[97] In an attempt to reconcile the opposing parties, the Ministry of Education proposed a model according to which parents would have the right to be informed on individual lessons and thereafter withdraw their children from them should they so choose. The debate on this issue was resolved in 2013 by the Constitutional Court decision that "until the adoption of the health education curriculum

96 Mrnjaus, 2014, p. 317.
97 Štulhofer, 2012.

in a procedure compatible with the constitutional requirements, content of health education shall be taught in primary and high schools in the Republic of Croatia pursuant to the programme" which had existed until then, due to the inability to engage in a public debate and include parents in the decision-making process involved with adoption of the curriculum (which has not yet been adopted).

5.1.2. Child's Right to Freedom of Conscience and Religion and Own National Identity (religion, language, culture, homeland)

Owing to the Constitution (Art., para. 40), the child has the right to freedom of conscience and religion, just like any other person. Notably, "all religious communities are equal before the law and separated from the State," whereby they are free to perform religious services, and "in their activity they enjoy protection and support of the State" (Art. 41. of the Constitution of the Republic of Croatia).

If parents wish to choose or change the religious affiliation of the child, they must do so together when they share parental responsibility in so far as it relates to representation concerning the child's essential personal rights. Moreover, the written consent of the other parent is always required (Art. 100, para. 1(3) and para. 2 of the Family Act). Family law experts are unaware of court disputes between parents on these issues, nor does there exist a case law thereon, although the norm has been applied since 2014.

In several recent annual reports, the ombudswoman for children warned of the opposition voiced by some parents not allowing their children to attend school simultaneously with a priest present therein[98]:

> We have been apprising the individual institutions for upbringing and education as well as the Ministry of Science and Education of our view that inclusion of religious content into the programmes and content designed for all the pupils to be contrary to the interest of children of other worldviews. Such an inclusion contravenes also one of the more important dimensions of the right to education which, pursuant to the Convention and the National Strategy for Rights of Children in the Republic of Croatia for the period 2014–2020, should be discrimination-free…[99]

In a situation where, according to the most recent population census, 86% of the surveyed citizens declared themselves to be Catholics[100] and bearing in mind the fact that society is marked by Christianity in cultural terms, the conclusion that

98 In that vein she alleges that those reports pertained to inclusion of children into programs of religious content (in kindergartens and schools, for example when marking the Bread Day accompanied by prayer and blessings) outside the approved religious education programme, i.e., religious education in the school. Cf: Report of the Ombudswoman for Children, 2019.

99 Ibid.

100 Population census, 2011.

exposure of children to religious activities constituting a part of a pluralistic society is discriminatory is somewhat surprising.

From a general point of view, the rights of children belonging to national minorities are protected by the Constitutional Act on Rights of National Minorities, which guarantees the use of language, preservation of cultural identity, the right to education and upbringing in the mother tongue, and the right to express their own faith and to found religious communities, etc. (Art. 7). Multiple educational models are available to members of national minorities. In each report, the ombudswoman for children indicates particular cases of discrimination toward children belonging to national minorities (mainly Roma), whereas in the field of school, Croatia was unsuccessful in cases brought before the European Court for Human Rights.[101]

6. Concluding remarks

Croatian society is still a relatively traditional one in relation to European developments, whereby marriage and family rank high in terms of values. Legal protection of family values may be reflected in many legal fields, out of which only the selected ones have been presented in this study, mainly those pertaining to family law.

With the most recent family law reforms, Croatia has abandoned the development of traditional marriage thus far, and in terms of legal effects equated the marriage and informal non-marital union (in all the legislative fields), which further contributed to legal uncertainty. Proceedings to establish fatherhood have been brought into a disarray because it enabled the fatherhood presumption to be modified by means of recognition, abolished the principle of shared parental responsibility, and conferred on to the parent not living with the child substantially limited rights — to mention but a few contentious solutions relating to the subject matter of the research.

Partners in same-sex unions, both formal and informal, are included in the notion of family, which produces legal effects equated to marriage, while partners have even more rights toward the children of their homosexual partners compared to heterosexual marital and non-marital spouses. The *adoptio minus plena* of the partner's child has been enabled (under a different name) and the Constitutional Court has provided same-sex couples the possibility to foster children, contrary to the fact that such individuals have been knowingly omitted from legislation. The doors toward the possibility to adopt are wide open, as the Administrative Court in May 2021 allowed same-sex couples to approach the proceedings if they were eligible to adopt a child.

101 Oršuš and others v. Croatia, Appl. no. 15766/03 Judgment 16 March 2010.

The parents are the first to be called upon in providing care for their children and deciding on their upbringing and education, while children's rights to faith, national identity, religion, language, and culture in the educational system and beyond are protected by the constitutional act; however, in practice, there are still cases of discrimination at the individual or institutional level.

The last few years have witnessed an obvious tendency to broaden the notion of family, family members' freedom of choice favoring individual interests over the interests of the family union (principle of the autonomy of will), as well as family law liberalization.

In order to gain a better insight into the legal protection of the family, it would be advisable to broaden the scope of the research and to focus on measures promoting marriage perpetuity, parents' cooperation after the termination of the family union, protections against family violence, ensuring effective maintenance, protection of the elderly within the family, promoting legal certainty, and determining effective social incentives that the State is capable of providing, and finding examples of good practices.

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Chapter III

On the Family and Family Law in the Czech Republic

Zdeňka Králíčková

1. Introduction

This chapter focuses on family, family life, and family law in the Czech Republic. Special attention is paid to *various forms of family and family life* and their legal backgrounds, as everybody has the right to choose their ways of life according to their wishes, needs, preferences, and options. That is why the concepts of marriage, registered partnership, and *de facto* cohabitation are discussed. This analysis is followed by a comparison of the rights and duties among family members within different models of family life. As there are often minor children in families, the subsequent lines of argument are devoted to establishing *parenthood,* the concept of *parental responsibility* in light of the best interests of the child, the participation rights of the child, and *family solidarity* and support. Finally, civil law provisions *against domestic violence* were introduced because of pathological phenomena in many families. Such behavior is far more visible these days and the lawmaker's eyes are not closed anymore.

Zdeňka Králíčková (2021) On the Family and Family Law in the Czech Republic. In: Tímea Barzó, Barnabás Lenkovics (eds.) *Family Protection From a Legal Perspective,* pp. 77–110. Budapest–Miskolc, Ferenc Mádl Institute of Comparative Law–Central European Academic Publishing.

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2. The family and forms of family life

Following the political, social, and economic changes in the Czech Republic after 1989, the structure of the family has undergone a complete change. Understanding Czech history can help clarify the demographic developments concerning society and family law in the Czech Republic.[1] One does not need to have a degree in sociology to notice that fewer children are being born and that fewer marriages are being concluded in recent years. However, this trend seems to be changing. The divorce rates are still very high. Consequently, there are many *non-complete* and *patchwork families*. The number of children born out of wedlock is still very high. All of this has brought about a lot of difficulties for both children and single mothers. Some sociologists speak about individual problems like the feminization of property, among others. Unfortunately, there are no general reports, studies, or books describing the evolution of family and family life in the Czech Republic.[2] However, the evolving nature of the family may become clear from the statistical data provided by *the Czech Statistical Office*,[3] especially those collected for *the Eurostat*.[4] It might be interesting to note that:

- a quarter of the population aged 20 years and over are single,
- first marriages are concluded 4 years later than at the turn of the century,
- there is an increase in the divorce rates among those in long-lasting marriages,
- cohabitation has become more popular than marriage among the youngest couples.[5]

Proportions of marriage and divorce can be seen in the following chart of the next page.[6]

1 For a general historical point of view see Bělovský, 2009, p. 463 ff. For a more detailed overview, see Králíčková, 2008, p. 173 ff.

2 There are some exceptions. For instance, see: Možný, 2011.

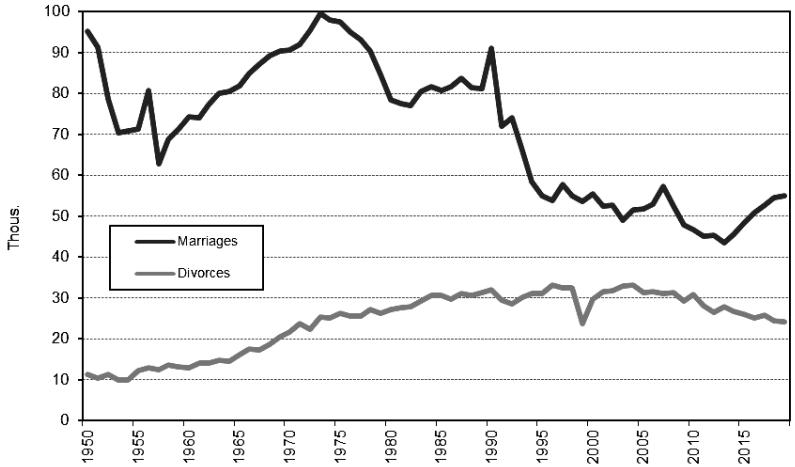
3 Czech Statistical Office, no date a.

4 For more statistical data, and details on the historical development, family law, succession law, and international private law, see Králíčková, Kornel, Zavadilová, 2019, pp. 122-159; Ministry of Labour and Social Affairs of the Czech Republic, 2021.

5 Němečková, Kurkin, Štyglerová, 2015.

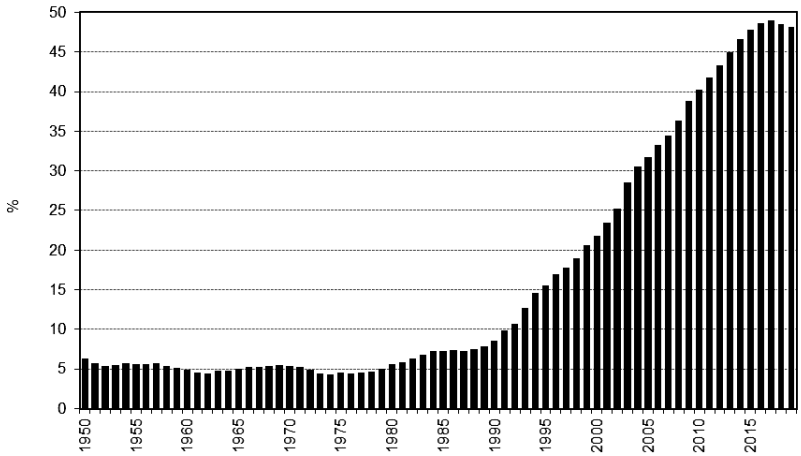
6 Czech Statistical Office, no date b.

Marriages and divorces, 1950-2019



The following chart shows the number of children born out of wedlock.[7]

Proportion of live births outside marriage, 1950-2019



The single lifestyle was not accepted much in the past. It was not convenient to live without marriage. Nowadays, the polls show that there are a lot of *one-person households* in addition to *one parent-families* comprising a mother and child. The Czech Statistical Office does not provide official data on *registered partnerships among same-sex couples* in comparison with marriage. However, non-official sources indicate that

7 Czech Statistical Office, no date c.

the interest levels in registered partnerships occurred right after new Act was enacted in the Czech Republic in 2006 (for more on the legal developments, see below). Then the figures slumped, but after a few years, a gradual increase in the number followed. According to non-official sources, registered partnerships were concluded by 2,174 couples by the end of 2015. Gays were more interested in the vital step than were lesbians. Registered partnerships had been concluded by 1,439 male and 735 female couples. The interest has been rising over the past few years. On the other hand, some 300 couples ended their registered partnerships.[8] Finally, there was *the Populations and Housing Census* in Spring 2021 which may show different figures and can help draw topical portraits of the family and family life in the Czech Republic.[9] The COVID-19 crisis has significantly influenced families in the Czech Republic and beyond, but it is still far too early to see the changes clearly, let alone to comment on them.

3. On the human rights dimensions of family, family life, and family law

The Convention for the Protection of Human Rights and Freedoms protects *the right to respect for private and family life of everyone* (see art. 8). The case law of *the European Court of Human Rights* describes the Convention as "*a living*" instrument that provides protection to all forms of families and all models of family life. The *Charter of Fundamental Rights and Freedoms*[10] is fully in harmony with the abovementioned concept of family life as guaranteed by international instruments. It contains general rules as well, indicating that *"Parenthood and family are under the protection of the law"* (art. 32, Section 2). The law does not limit families to those based on marriage alone. However, there is a pending draft lodged by a group of deputies that aims to create a constitutional ban for anchoring *"marriage for all"* according to another pending draft (see below, 5.1.). According to the first draft amendment, the new version of the *Charter of Fundamental Rights and Freedoms* 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."*[11] Especially because of many *human rights covenants* and the case law of both *the Constitutional Court of the Czech Republic* and *the European Court of Human Rights*, family law began to be amended, interpreted, and applied in harmony with its human rights dimension. A lot of changes to the previous legal regulation, especially the old law from the 1960s, occurred after 1989.[12]

8 Prague Monitor, 2016.
9 Scitani, 2021.
10 Act No. 2/1993 Coll.
11 Parliament of the Czech Republic, Chamber of Deputies, Parliamentary term No. VIII., Draft No. 211/0.
12 Haderka, 1996, pp. 181–197; Haderka, 2000, pp. 119–130.

4. Family law according to the Civil Code: A return to tradition?

In 2012, after a long "transitory" period,[13] the new *Civil Code* was adopted in the Czech Republic (CC).[14] It came into effect on January 1, 2014.[15,16] The main authors of the Civil Code[17,18] did not intend to include *Family Law* alone under *the Civil Code – Book Two*, but rather sought to return Family Law to the basics of *the General Civil Code*[19] and eliminate the ideology and influence of Soviet Family Law.[20] The return to the tested *European tradition* cannot be linked with the systematic nature of the Civil Code alone, but with its content as well. Individual provisions have incorporated important *innovations* that have been present in other *European Civil Codes* for a long time and *results* of various academic activities that originated especially in *the Commission on European Family Law (CEFL)*.[21] This is why the Civil Code may be considered *a reasonable compromise* that addresses both *traditions* and *new phenomena, models and tendencies*. The basic principles, values, starting points, and rules of interpretation and application can be found in *Book One – General Part*. The Civil Code emphasizes on the application of *autonomy of the will* in contrast to the legal regulation from the 1960s. It provides that unless expressly prohibited by the law, people may agree upon rights and duties differently from the law; only agreements contravening *"good manners, public order or rights relating to the status of persons including right to protection of personality are prohibited"* (Section 1, Sub-Section 2, CC). Autonomy of will is fully manifested in Family Law especially in *marital property law* (Section 708, CC). There are *reasonable limits,* such as concept of the special regime of *things forming the usual equipment of the family household* (Section 698, CC). Besides the Civil Code, *the Act on Registered Partnership*[22] is a separate source of family law. The rules regulating the rights and duties of same-sex partners were not incorporated into the Civil Code in 2012 although it was planned.

13 Králíčková, 2009, pp. 157–173.
14 Act No. 89/2012 Coll., Civil Code.
15 Králíčková, 2014, pp. 71–95.
16 Changes in Family Law introduced by the Civil Code were accompanied by the new civil law procedural legislation. See mainly Act No. 292/2013 Coll., on Special Civil Proceedings, and Act No. 202/2012 Coll., on Mediation.
17 Eliáš, Zuklínová, 2001.
18 Eliáš, Zuklínová, 2005.
19 Viz Allgemeines bürgerliches Gesetzbuch from the June 1, 1811 No. 946 Coll., that was taken by the Act from October 28, 1918 No. 11 Coll. to the legal order of the newly established Czechoslovakia.
20 Hrušáková, 2002; Hrušáková, Westphalová, 2011.
21 CEFL Online, no date.
22 Act No. 115/2006 Coll.

5. Marriage: A privilege and beneficial legal model for men and women

5.1. General

Book One of the Civil Code, the General Part, expressly protects the family established by marriage (Section 3, Sub-Section 2, Para b), CC). However, there is no definition of family and family members in both Books One (General Part) and Two (Family Law). The Civil Code allows marriage to be solemnized *only between a man and a woman* (see Section 655 CC).[23,24] *Gender-neutral marriages* were not discussed during the preparation of the Civil Code at all despite recent development in several European countries.[25] There was a pending draft lodged by a group of deputies in the Parliament of the Czech Republic at the time of this study, which was in favor of *gender-neutral marriages*.[26] Some consider the draft progressive and modern, whereas others have considered it a step undermining traditional family values. A more correct expression could be *alternative*.[27] The draft calls for a radical change in the concept of marriage regulated by the Civil Code. Section 655 CC 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 mentioned above be passed, the relevant Section would provide thus: *"Marriage is a permanent union of two people formed in a manner provided by this Act."* The pending draft will not change the current regulation of affiliation. There will be *no gender-neutral parentage* in *gender-neutral marriages*. Finally, the Act on Registered Partnerships will be cancelled.

On the other hand, the second pending draft lodged by another group of deputies is *very conservative*. It seeks to protect the traditional model of families and suggests an amendment to *the Charter of Fundamental Rights and Freedoms* as mentioned above. If this amendment is passed, it would ban potential changes to the Civil Code toward establishing *"marriage for all."* Marriage would remain a traditional concept. No matter how the Civil Code expressly protects the family established by marriage (Section 3, Sub-Section 2, Para b), CC), it is necessary to mention that *informal unions* of a man and woman, or anyone, also enjoy *protection* in connection with *the Convention for the Protection of Human Rights and Freedoms* as they are guaranteed by the

23 As for transsexuals, the new law regulates change of sex (Section 29, CC), establishing that the change of sex of a person occurs on the surgical operation disabling the reproduction functions and changing the sex organs. The day of the change of sex is the day recorded in the certificate issued by the provider of health services. The change of sex does not affect the personal state of a man/woman or their personal and property situation. Marriage or registered partnerships cease to exist. Details are included in Act No. 373/2011 Coll., on Specific Health Services.

24 Králíčková, Hrušáková, Westphalová al., 2020, p. 1 ff.

25 Sörgjerd, 2012, p. 167 ff.; Scherpe, 2016, p. 40 ff.

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

27 Masaryk University, 2018.

right to respect for private and family life (art. 8, the Convention, in connection with Section 2, Sub-Section 2, CC, referring to the constitutional order).

5.2. The nature and purpose of marriage

The Civil Code states that marriage is *a permanent union* of *a man* and *a woman* originating in a manner prescribed by law. The main purpose of marriage is to *establish a family and facilitate the proper upbringing of children* (even if marriage may be entered into by people who are not in the "fertile" age) and *mutual support and help* (Section 655, CC), which fully reflects the principle of solidarity. Despite the fact that marriage is characterized by the word "permanency," divorce is a legitimate manner of terminating marriage.

5.3. Solemnization of marriage

Civil marriages used to be obligatory forms of marriage according to Communist Family Law. Although religious marriages were reintroduced into the Czech legal order shortly after 1989, in 1992, many drafts of the new Civil Code recognized only civil marriage under *European standards*. Nevertheless, in the course of the legislative process, religious marriage was included in the Civil Code.[28] Thus, an engaged couple may be married in *either in civil or religious ways* (Section 657, CC). The marriage ceremony must be preceded in both forms by *pre-marriage proceedings before a state authority* where the following issues are examined (Section 673 and the following ones, CC):

a) the sex of the potential spouses,[29]
b) the age of the potential spouses (18 years or over),[30]
c) legal obstacles to marriage such as the existence of another marriage or registered partnership, family relationship in a direct line and between siblings, the existence of guardianship or any other form of custody, and mental disorder and lack of legal capacity.

A marriage comes into existence when the potential spouses publicly and solemnly declare in the presence of two witnesses that they enter together into marriage. The record in the register of marriages is made only for registration purposes. The law makes it possible for the spouses to declare at the wedding ceremony that

a) one of their surnames will be their common surname, or

28 Religious marriage may only be solemnized before registered churches and religious societies with special authorization under Act No. 3/2002 Coll., on Churches and Religious Societies. There were 21 authorized churches and religious societies at the time of writing.

29 As for transsexuals, see note No. 23.

30 There are exceptions: the court may allow a minor who is not fully legally competent and is over 16 years to enter into marriage if there are serious reasons for it (Section 672, CC).

b) both of them will keep their own surnames,[31] or
c) one of their surnames will be their common surname, and the other, whose surname is not the common one will add his or her surname to their common surname in the second place (Section 660, CC).

If the requirements stipulated by the law for the solemnization of marriage are breached, the sanctions are as follows:

a) the regime of apparent marriage *(matrimonium putativum)*, which originates *ex lege*, for example, when the registered church did not have special authorization under law etc. (see above), or
b) the regime of invalid marriage *(non-matrimonium)*, which must be pronounced *by the court*, for example, in the case of bigamy or kinship etc.

5.4. Rights and duties of spouses

Rights and duties of spouses are *traditional,* especially the personal ones. The law is based on the *equality of a man and woman* in marriage, family, and society, and draws on previous legal regulations. Spouses are obliged *to respect each other, live together, be faithful, mutually respect each other's dignity, support each other, maintain the family union, create a healthy family environment, jointly take care of their children* (Section 687, CC), *represent each other* (Section 696, CC), and *jointly manage the issues of the family* (Section 693, CC, and Section 694, CC). The law indicates that each spouse has the right to be told by the other about his or her income and the state of his or her property and about the existing and planned work, studies, and similar activities. Each spouse is obliged, while choosing work, studies, and similar activities, to take into consideration the interests of the family, the other spouse, and the minors who have not attained full legal capacity yet, and who live with the spouses in the family household, and potentially, the interests of other members of the family (Sections 688 and 689, CC).

The Civil Code paraphrases previous regulations establishing that each spouse *contributes toward the needs of the family and the family household* according to their personal and property conditions and abilities and possibilities so that the standard of living of all members of the family can be the same. Providing property has the same importance as *personal care* for the family and its members (Section 680, CC). Besides the duty to contribute to the needs of the family, the law also imposes *mutual maintenance duty* on the spouses, to the extent of fulfilling the right to the *same living standard* (Section 697, CC). There is an innovative component, wherein the law regulates the concept of *things forming the usual equipment of the family household* (Section 698, CC). Regardless of ownership, one spouse needs the consent of the other while

31 If the spouses keep their existing surnames, they will also declare, at the wedding ceremony, the surname that will be used for their common children (Section 661, CC). Therefore, children cannot have double surnames.

dealing with things that fulfil the life needs of the family. This does not apply if the thing is of a negligible value. A spouse may *claim the invalidity* of a legal act by which the other spouse dealt, without his or her consent, with a thing belonging to the usual equipment of the family household. Another innovative component is the regulation of *a family enterprise* (Section 700, CC), which is defined as an enterprise in which the spouses work together, or at least with one of the spouses working with their relatives to the third degree, or persons related to the spouses by marriage up to the second degree, and the enterprise is owned by one of them. Those who permanently work for the family or the family enterprise are considered members of the family and are deemed to participate in the operation of the family enterprise. Members of the family who participate in the operation of the family enterprise also participate in its profits and in things that are earned or gained out of those profits as well as in the growth of the enterprise to the extent corresponding to the amount and kind of their work. A person with full legal capacity may waive this right by making a personal declaration to such effect (Section 701, CC). If the family enterprise is to be divided, a member participating in its operation has a pre-emptive right to it (Section 704, Sub-Section 1, CC).

Community property is the key concept of marital property law, which was reintroduced into the Czech legal order in 1998 by the amendment of the *Act on the Family.*[32] The *legal regime of community property* is regulated. It includes *what* one or both of the spouses have *gained in the course of their marriage except for* (Section 709, CC):

a) what serves the personal needs of one of the spouses,[33]
b) what only one of the spouses has gained by gift, succession, or bequest unless the donor or testator in the will expressed a different intention,
c) what one of the spouses has gained as compensation for a non-proprietary infringement of his or her natural rights,
d) what one of the spouses has gained by legal dealings relating to his or her separate property, and
e) what one of the spouses has gained as compensation for damage to or loss of separate property.

Community property includes *profit* from the separate property of one of the spouses. It does not include an interest of a spouse in a company or cooperative if that spouse has become a member of such company or cooperative in the course of the marriage, with the exception of a housing cooperative (Section 709, CC). It also includes *debts* assumed in the course of the marriage unless:

a) the debts concern the separate property of one of the spouses—to the extent of the profit from that property, or

32 Psutka, 2015.

33 Since 1998, the things one uses for the performance of one's job have not been excluded from the scope of the legal regime of community property. For a different opinion, see Boele-Woelki et al., 2013.

b) only one of the spouses has assumed them without the other spouse's consent and it was not within the fulfillment of everyday or common needs of the family (Section 710, CC).

The new law enables not only *modifications of* the statutory regime of community property but the creation of *the agreed regime* as well (Section 716, CC) and the establishment of *the regime of separated property* (Section 729, CC). It is possible to conclude *arrangements for the case of the termination of marriage by divorce or death* by making a *contract of succession* (Section 718, Sub-Section 2, CC). Both potential and actual spouses may do so at any time: before entering into and during the marriage. By this, lawmakers fully respect the principle of *autonomy of will* to create *a wedding contract*. This was not permitted by the law in the 1960s. The parties to the contract are only required to maintain the formality of a public deed. A record in the public list is optional (Section 721, CC).

The protection of *a weaker spouse* and *third persons* is expressly established in the Civil Code under a separate provision. A wedding contract for a marital property regime may not, because of its consequences, exclude the spouse's ability to maintain the family and affect, by its content or purpose, the rights of a third person unless such third person agrees to it; a contract made without the third party's consent has no legal effects for such a party (Section 719, CC). The law establishes that if, during the existence of community property, a debt has arisen only for one of the spouses, the creditor may achieve satisfaction in the execution of the judgment recovering the debt from the community property, too (Section 731, CC). If a debt has arisen only for one of the spouses against the will of the other, who communicated his or her disagreement to the creditor without unnecessary delay after coming to know about the debt, the community property may be affected only up to the amount that would be the share of the debtor if the community property were cancelled and divided (pursuant to Section 742, CC). This also applies in the case of a spouse's duty to pay maintenance, or if the debt comes from an illegal act of one of the spouses, or in the case of the debt of one of the spouses having arisen before entering into the marriage (Section 732, CC).

The new provision protecting *family dwelling* is important because the previous legal regulations belittled this issue. If the family house or flat is in the community property of the spouses, their position is equal and protection is provided by the regulation analyzed above. If not, the situation of the economically weaker spouse is dealt with under the Civil Code by defining the *derived legal reason for housing (family dwelling).* The law establishes that if the spouses' dwelling is a house or a flat in which one of the spouses has an exclusive right to live, and if it is a different right from the contractual one, by entering into marriage, the other spouse obtains the *right to housing* (Section 744, CC). If one of the spouses has an exclusive contractual right to the house or flat, especially a lease right, by entering into marriage, both spouses *jointly obtain the lease right,* thus ensuring the equality of rights and duties (Section 745, CC). It may be contractually agreed in a different way (Section 745,

Sub-Section 2, CC), which is fully in harmony with the principle of *autonomy of will*. This can be done within the scope of a wedding contract.

The law regulates *the prohibition of the disposal of the family dwelling* in a manner similar to the regulation to *the things forming the usual equipment of the family household* (Section 698, CC; for details see above). If at least one of the spouses has the right to dispose of the house or the flat in which the family household is situated and the house or the flat is necessary for the dwelling of the spouses and the family, that *spouse must refrain from and prevent anything that may endanger the dwelling or make it impossible*. A spouse cannot, without the consent of the other spouse, misappropriate such a house or flat, or create a right to the house, to part or whole of the flat, the exercise of which is incompatible with the dwelling of the spouses or the family, unless he or she arranges a similar dwelling of the same standard for the other spouse or family. If a spouse acts without the consent of the other spouse contrary to this rule, the other spouse may *claim the invalidity* of such legal conduct (Section 747, CC). If the spouses have a joint right to a house or flat in which the family household of the spouses or of the family is situated, the abovementioned prohibition applies (Section 748, CC).

5.5. Dissolution of marriage

The Civil Code sets forth that marriage can be terminated only for the reasons established by law (Section 754, CC). Drawing on previous legal regulations, these reasons are: *death* and *declaration of someone as dead* (Section 26, CC), *divorce* (Sections 755 ff, CC), and *a surgical change of sex* wherein the marriage is deemed terminated on the day recorded in the certificate of sex change issued by the provider of health services (Section 29, CC).[34]

The legal regulation of *divorce* is based on the *irretrievable breakdown* of marriage, which was the only reason for divorce introduced in *the Act on the Family* as early as in 1963. The new Civil Code sets forth the idea that marriage may be dissolved if the joint life of the spouses is deeply, permanently, and irretrievably broken down and its recovery cannot be expected (Section 755, Sub-Section 1, CC). The court deciding on the termination of a marriage shall *examine the fact of the breakdown* of the marriage and *reasons* leading to it (Section 756, CC). This variant is called *contested divorce*. However, if the spouses have agreed to the divorce, or the other spouse has joined the petition for divorce, the court *does not examine reasons* for the breakdown if the statements of the spouses on the breakdown of their marriage are identical and their intention to attain a divorce is true (Section 757, CC). This is called *uncontested divorce*.[35] The following requirements must be met:

34 See note No. 23.

35 The new legal regulation does not acknowledge consensual divorce. For more, see Boele-Woelki, Ferrand, González-Beilfuss, Jänterä-Jareborg, Lowe, Martiny, Pintens, 2004.

a) on the day of the commencement of the divorce proceedings, the marriage should have lasted for one year at least and the spouses should not have lived together for more than six months,
b) the spouses, who are parents of a minor child without full legal capacity, should agree on the arrangements for the child for the period after the divorce and the court should approve their agreement,[36]
c) the spouses should have *agreed on the arrangement of their property, their housing and, as the case may be, the maintenance for the period after the divorce;* the property contract must be in writing with officially authenticated signatures.

Like the previous law, which was amended in 1998, the new law establishes a *clause against harshness*. It indicates that despite the breakdown of their marriage, it cannot be dissolved if doing so goes against:

a) the interests of a minor child of the spouses because of special reasons; the court examines the child's interest in the marriage by interrogating a custodian appointed by it for proceedings concerning the child's custody following the divorce,
b) the interests of the spouse who was not predominantly involved in the breach of marital duties and who would suffer especially serious harm by the divorce, when there are extraordinary circumstances supporting the subsistence of the marriage, unless the spouses have not lived together for at least three years (Section 755, Sub-Section 2, CC).

If the spouses have *a minor child*, the court will not grant a divorce until *the special court dealing with the agenda on minors* decides on the custody of the child for the period after the divorce (Section 755, Sub-Section 3, CC). The court dealing with the custody of the minor child may decide on or approve the agreement between the spouses on entrusting the minor child into *individual (sole) custody* of one parent, or *alternating (serial)* or *joint custody* of both parents (Section 907, CC). *Both parents* of the child are principal *holders of the rights and duties resulting from parental responsibility* (cf. Section 865 and further, CC) and the decision on custody after divorce determines *who the minor child will live with, in the common household* (besides the maintenance duty toward the child and visiting rights).

There is another pending draft[37] in the Parliament of the Czech Republic that aims to make the position of divorcing parents of the minor child equal or at least similar to the position of non-married parents of a minor child who separate without any interventions by the state through their own informal mutual agreements. The pending draft is based on the idea that the parents of a minor child know their child

36 There should be changes. For more, see note No. 37.
37 Parliament of the Czech Republic, Chamber of Deputies, Parliamentary term No. VIII., Draft No. 899/0.

well and seek to safeguard the best interests of the child even when they decide to separate. Should the draft be passed, the divorce of a husband and a wife—who *can agree on divorce* and on property and dwelling consequences of the divorce and on a post-divorce arrangement regarding their minor children—would be *amicable, smooth,* and *quick*. The divorcing couple will have to submit only *the common motion* for a divorce, *the property and dwelling contract*, and *the agreement on the custody, maintenance, and if the case may be, the visiting rights of the minor child,* to the judge. The judge dealing with the divorce will not have to approve the property contract and the agreement on custody and maintenance of minor children.

5.6. Legal consequences of the dissolution of marriage

Dissolution of marriage affects the status and property of the ex-spouses. If a marriage is terminated by *death, or by the declaration of one of the spouses dead,* the deceased's property passes to the spouse according to *the first inheritance class of heirs* together with the decedent's children (Section 1635, CC). The new Civil Code gives the surviving spouse a *privileged position.* If there are no children, the property passes to the spouse in *the second class of heirs* together with the decedent's parents and cohabiting persons or those who share the same household (Section 1636, CC). However, in keeping with the previous law, the surviving spouse *is not a forced heir* who is entitled to an obligatory share (cf. Section 1642 and further, CC) as the regulation provides that *"Forced heirs include the decedent's children and, if they do not inherit, their descendants"* (Section 1643, Sub-Section 1, CC).

Nevertheless, if there is a will, for example, in favor of third persons, the Civil Code establishes that the surviving spouse gains possessory title to *things forming the basic equipment of the family household* (Section 1667, CC) and the *right to maintenance* from the inheritance arises for him or her (Section 1666, CC). Special protection is ensured for the surviving spouse in relation to *dwelling.* The law regulates the transition of a joint lease of a flat *ex lege* (Section 766, CC) and the discretion of the court to create an easement of dwelling for the surviving spouse if he or she has custody of a minor child—the easement being for a definite term and for payment corresponding to the usual rent (Section 767, Sub-Section 2, CC).

If the marriage was terminated by *divorce*, it is necessary, to first settle and adjust the community property of the spouses. As a rule, the law requires *an agreement* between the divorced spouses. If the agreement is not secured, *the court* will decide based on both quantitative and qualitative criteria like the interests of the unsupported children or the extent to which a spouse was involved in achieving and maintaining the property value falling within the community property of the spouses (Section 742, CC). If, within three years from the divorce, no agreement is made or petition filed, a *legal presumption* will be applied (Section 741, CC). The law states that *"If, within three years from reduction, cancellation or extinction of community property, no settlement of what was formerly part of the community property takes place,*

even by agreement, and no application for settlement by a court decision is filed, the spouses or former spouses are conclusively presumed to have settled as follows:

a) corporeal movable things are owned by the spouse who uses them exclusively as an owner for his own needs or the needs of his family or family household,

b) other corporeal movable things and immovable things are under undivided co-ownership of both spouses; their shares are equal,

c) other property rights, claims and debts belong to both spouses jointly; their shares are equal."

The spouses' *dwelling* after the divorce depends on the legal basis of their marital housing arrangement. If the house used for family dwelling was in the community property of the spouses, all that has been said above in connection with its settlement and adjustment will apply. If it was a joint lease of a flat by the spouses, they may cancel it by rescinding the contract or seeking recourse to the court that will determine, while deciding on cancelling the joint lease, the manner of compensation for the loss of the right considering the situation of unsupported children, and the opinion of the lessor among others (Section 768, Sub-Section 1, CC). If one of the spouses was an exclusive owner of the house or flat used for family dwelling, the other spouse loses by divorce legal reason for housing and the court may decide about his or her moving out (Section 769, CC).

The *maintenance duty between divorced spouses* is regulated in the Civil Code in a manner different from that under the previous law.[38] The basic presumption is *dependence on maintenance, or incapacity to maintain oneself independently.* The law has established that such an incapacity to maintain oneself independently has to have its origins in or connections to the marriage (Section 760, Sub-Section 1, CC). Another innovation is the *list of factors* that should be taken into consideration while deciding on maintenance. The court will consider the duration of the marriage, the date of dissolution, and whether (Section 760, Sub-Section 2, CC):

a) the divorced spouse has remained without a job despite not being prevented from finding a job because of serious reasons,

b) the divorced spouse could have ensured maintenance by properly managing his or her property,

c) the divorced spouse participated during the marriage in care for the family household,

d) the divorced spouse has not committed a criminal act toward the ex-spouse or his or her close person, or

e) whether there is another, similarly serious reason.

The scope of maintenance is established by the threshold of *adequacy.* The right to maintenance for a period after the divorce terminates only when the beneficiary enters into marriage, or by death of the obligor or the beneficiary. If a substantial

38 Králíčková, 2009, pp. 281–291.

change in the situation occurs, the court may decide on decreasing, increasing, or abolishing the mutual duty of maintenance between the divorced spouses.

The new Civil Code also establishes an *exceptional* right to *sanctioning maintenance* to the extent of ensuring *the same living standard*. The spouse that did not cause or agree with the divorce and who suffered serious harm because of the divorce may file a motion before the court to impose a maintenance duty on the former spouse to such an extent that ex-spouses can have *the same living standard.* The divorced spouse's right to maintenance may be considered justified only for a period adequate to the situation but for no longer than *three years* after the divorce (Section 762, CC).

6. Registered partnership between same-sex partners according to a separate act

A registered partnership between persons of the same sex should have been regulated by the Civil Code. However, as conservatism prevailed in the course of legislative work, the rules regulating the status of the union between persons of the same sex were taken out of the draft. Thus, *the Act on the Registered Partnership* continues to operate.[39] According to the Act on Registered Partnership, *some rights and duties* of registered partners are *similar to those of spouses,* for example, *mutual maintenance duty* based on *the same living standard* (Section 10, ARP), or former spouses, for example, mutual maintenance duty of an *adequate standard* or to match *the same living standard* in the case of sanctioning maintenance (Section 11, ARP). In many ways, *the rights and duties* of registered partners are *identical* to the position of those in *informal unions* and *de facto cohabitation*.

There is a special rule in the Civil Code, which stipulates that *"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"* (see Section 3020, CC). In the case of *death*, the surviving partner has the *same succession rights as the surviving spouse*, in keeping with the relevant provisions under Book Three—Absolute Property Rights, Title III Law of Succession.

In harmony with the abovementioned special rule, the Civil Code provides that the provisions regulating Family Law included in Book Two do not apply to registered partners (Section 3020, CC). It means that, for instance, there is *no community property and no common lease of flats* by operation of law, *no protection of family dwelling* and *no protection by* the provisions regulating *things forming the usual equipment of the family household* between registered partners.

39 Act No. 115/2006 Coll. (further mainly ARP). For details and critical comments, see Holub, 2006, pp. 313–317.

Registered partners are not allowed to jointly adopt a minor child (see Section 800, CC) or become foster parents of minors as only married couples can do it (Section 964, CC). However, in 2016, thanks to *a case law* before *the Constitutional Court of the Czech Republic*, there were some changes. The discriminatory provision that prohibited a single (unilateral) adoption by one of the partners during the subsistence of a registered partnership (Section 13, Sub-Section 2, ARP), was cancelled by the decision of the Constitutional Court of the Czech Republic.[40]

The Czech Republic has received several applications from men in relationships as legal parents of a minor child born abroad, out of surrogacy, for registration as parents in the Register of Births. There have also been various complaints and applications to the courts, such as the Supreme Administrative Court, the Supreme Court, and the Constitutional Court of the Czech Republic. The results vary as the same-sex partners may recognized as legal parents in foreign legal jurisdictions because of many legal instruments, such as presumptions by the operation of law, parental orders, adoption orders, and declarations of parentage (acknowledgments of parenthood). In contrast, provisions against *domestic violence* fully apply for registered partners as there are special assignations (Section 3021, CC). Of the two pending drafts—one supports *gender-neutral marriage*, and the other strengthens the position of the family based on marriage. *Gender-neutral parentage* does not have much support in Czech society.

7. *De facto* unions: Popular in society, neglected by law

While the Civil Code expressly protects families established by marriage (Section 3, Sub-Section 2, Para b), CC), *informal relationships* also *enjoy protection* in connection with *the Convention for the Protection of Human Rights and Freedoms* as they are guaranteed by the right to respect for private and family life (art. 8, Convention, in connection with Section 2, Sub-Section 2, CC, referring to the constitutional order). Owing to limited scope of the term "family" as regulated in the Civil Code, there are *no articles* that establish *mutual rights and duties* between the cohabitees, that is, there is no duty to help each other, no community property, no protection of family dwelling, and no concept of a common household and mutual maintenance by operation of law. Oftentimes, as there are no property contracts in place between

40 See the Ruling of the Constitutional Court of the Czech Republic No. Pl. ÚS 7/15, dated June 14, 2016. The Constitutional Court found the provision discriminatory as it indicated that registration is in itself an obstacle in the course of adopting a minor child by one of the registered partners. Available at: http://nalus.usoud.cz/Search/Search.aspx (only in Czech). There were dissenting opinions.

the cohabitees, weaker parties face a lot of problems upon the dissolution of *de facto* relationships.

However, as there is no discrimination among children born out of wedlock, the rights and duties of the parents toward their children remain equal. If an unmarried man and an unmarried woman "have a child together," they are principally the *holders of parental responsibility* by operation of law. They are not treated differently when compared with the married parents of a minor child. However, parenthood must be legally established. There are *no differences between the children*, both in the personal and property spheres under Czech law.

The law traditionally protects property claims of the unmarried mother of a child. The Civil Code provides for *"Maintenance and support, and provision for the payment of certain costs for an unmarried mother"* as follows (Section 920, Sub-Section 1 CC): *"If the child's mother is not married to the child's father, the child's father shall provide her with maintenance for two years from the birth of the child and provide her with a reasonable contribution to cover the costs associated with pregnancy and childbirth."*

Section 920, Sub-Section 2 and 3 CC describe the property rights of a pregnant woman thus: *"A court may, on the application of a pregnant woman, order the man whose paternity is probable to provide an amount needed for maintenance and a contribution to cover the costs associated with pregnancy and childbirth in advance. A court may, on the application of a pregnant woman, also order the man whose paternity is probable to provide in advance an amount needed to provide for the maintenance of the child for a period for which the woman would be entitled to maternity leave as an employee under another legal regulation."*[41]

These provisions are often used in practice as statistics show that almost 50% of children are born out of wedlock in these days. For details the chart "Proportion of live births outside marriage, 1950–2019" above.

A *surviving cohabitee* is in a *very weak* position in practice as there is seldom a will addressing their interests. The law regulates *the third inheritance class of heirs* as follows: *"If neither the spouse nor any of the parents inherit, decedent's siblings and those who lived with the decedent in the common household for at least one year before his death and, as a result, cared for the common household or were dependent in maintenance on the decedent, inherit in the third class of heirs equally"* (Section 1637, Sub-Section 1, CC).[42] The surviving cohabitee must prove many facts from their common life during the proceedings.[43]

41 It would be 28 weeks, in case of siblings or more children 37 weeks. For details see the Act No. 262/2006 Coll., The Labour Code (Section 195, Sub-Section 1).

42 The property situation of a surviving cohabitee is far more difficult if there is a child as he or she is considered a forced heir. If a deceased cohabitee is "formally" married of registered and his or her parents are still alive, the situation will be very different and complicated (Section 1636, CC).

43 Boele-Woelki, Ferrand, González-Beilfuss, Jänterä-Jareborg, Lowe, Martiny, Todorova, 2019.

8. Parents and children

8.1. General

The Civil Code establishes that *kinship is based on a blood tie or originates from adoption* (Section 771, CC) which is constructed as *a status change* (cf. Section 794 ff, CC). The legal regulation of *blood parenthood* is *traditional*. The Civil Code regulates the establishment of a parent and identifies the child's parent through the application of mandatory rules. The child's mother is the one who gives birth to the child (see Section 775, CC) and the child's father is the one whose fatherhood is based on one of the three legal presumptions of paternity (Section 776 et seq., CC). In addition to legal parenthood (*de jure)*, biological, genetic, and social parenthood (*de facto*) enjoy importance. It is necessary to respect the balance among legal, biological, and social parenthood. Therefore, the law also protects putative parents (e.g. Section 783, CC).[44]

The legal regulations governing the *adoption of a minor* are in harmony with the international standards established mainly by international covenants and case laws from *the European Court of Human Rights*. The *adoption of a major* was abandoned for political reasons as a *"bourgeois anachronism"* after the communist takeover in 1948. Thus, the Civil Code reintroduced an adoption of a major. A child is the descendant in the direct line of the first stage (see Section 772 and Section 773, CC). A minor child is understood as a child who has not reached the age of majority, that is, the age of 18 years (Section 30, Sub-Section 1, CC). A minor fully non-capable child is aged under 18 years and has not reached full legal capacity by a decision of a court (see Section 37, CC) or by concluding a marriage (Section 30, Sub-Section 2, CC). Law provides special protection to minor fully non-capable children especially within the private law concept of parental responsibility and through public law.

8.2. On motherhood: Mater semper certa est

The old Roman law principle respecting the fact of birth has *traditionally* been considered the basis for creating the *relationship between the mother and child,* even if *expressis verbis* it was not introduced in the Czech legal order until 1998. The lawmakers respected the natural law idea of one mother and one father for each child while adopting the Civil Code. That is why the Civil Code provides thus: *"The child's mother is the woman who has given birth to the child"* (Section 775, CC). Despite being a relatively simple one, the new legal regulation of motherhood is formulated as *a mandatory rule* from which *it is not possible to deviate unilaterally* (e.g. by giving up or abandoning a child, not expressing interest, etc.) or *contractually* (with or without payment).

44 Králíčková, 2008, pp. 275–282.

The basis of motherhood is *the fact of birth, which includes assisted reproduction, too*. The legal mother of a child is the woman who has gave birth to the child, regardless of who the donor of the egg was. Legal motherhood is identical to biological motherhood and in case of egg donation, genetic motherhood is irrelevant.[45] *Surrogate motherhood* is not regulated in Czech law except for "one note" in connection with adoption among close relatives (see Section 804, CC).

Motherhood is *a basic status* that is important for *the entire legal order*. Maternal status is crucial for everybody. Therefore, it is necessary—in compliance with international obligations, especially art. 7 of *the Convention on the Rights of the Child*, to register a child soon after birth in connection with his or her mother, thus making his or her status in connection with the parents certain. Public law regulations establish this duty as a rule especially for the medical staff assisting with birth. Thus, anonymous child delivery is not in harmony with Czech law.

Despite these rules, there is a legal possibility for *hidden childbirth* according to a special legislation that was passed in 2004[46] following some MPs' initiatives. This was followed by a new regulation recently.[47] According to this law, a woman with permanent residency in the Czech Republic, if it is not a woman for whose husband there is a presumption of fatherhood, has a *right to have her identity hidden in connection with birth*. If such a woman who wants to hide her identity in connection with birth, submits to the health service provider of *a written application* asking for her identity in birth to be hidden, also indicating that she does not intend to take care of the child, the child has a mother but will not know her identity because it will be hidden from them in the register of births. The rights of biological fathers are more or less omitted in such cases. There has been another new social phenomenon in the Czech Republic since 2005. Owing to private funds,[48] we face the reality of *baby-boxes for unregistered and unwanted children* in the country. This enables mothers to leave their new-born babies there. If the identity of a mother who placed her child in the baby-box is not discovered, the child obtains the status of *a foundling*.

8.3. On fatherhood: Pater vero is est quem nuptiae demonstrant

The new legal regulation determining fatherhood (Sections 776-793, CC) is based on *three traditional legal presumptions* drawing on *probability*. There are not many innovations in the Civil Code in this regard. Establishing legal parenthood is

45 The regulation of artificial insemination or assisted reproduction can be found in Act No. 373/2011 Coll., Act on Specific Health Services. This Act defines *basic concepts such as assisted reproduction, infertile couple, anonymous donor, mutual anonymity of the donor, the infertile couple and their child, etc.*, and the conditions for realization, that is, *informed consent,* and *various restrictions*, as far as the age or kinship are concerned.

46 See Act No. 422/2004 Coll., so-called *Act on hidden child birth.* For critical comments, see Hrušáková, Králíčková, 2005, p. 53 ff.

47 See the Act No. 372/2011 Coll., on Health Services, Section 37.

48 Statim, 2021.

traditional, despite the fact that legal presumptions of fatherhood were created when the legitimacy of a child was highly valued and when methods of assisted reproduction and paternity tests were in their infancy.

Thus, *the first presumption* is in favor of the mother's husband, if the child is born in wedlock or within 300 days since its termination (Section 776, CC). The *second presumption* respects the *autonomy or will of the child's parents* and is in favor of the man who has stated, together with the child's mother, that he is the father of her child (Section 779, CC). The *third presumption* is based on *sexual intercourse in the critical period*: the father of an unmarried woman's child is considered the man who had sex with her within the period of 160 days till birth and within the period not exceeding 300 days before birth unless his fatherhood is excluded by serious reasons (Section 783, CC).

However, there are some *novelties*[49] as well:

a) Considering the fact that the Civil Code *returns to the concept of declaring someone missing* (cf. Section 776, Sub-Section 1, CC), which, within the context of the first presumption, has the same importance as the death of the mother's husband;
b) *enabling the so-called conversion of the first presumption into the second one* (cf. Section 777, Sub-Section 1, CC), that is, if a child is born in the interim period lasting from the filing of the petition for divorce till the 300th day after the divorce, it is possible to consider the man the child's father if he declares thus and his statement is in conformity with the statement of the mother's husband, or the ex-husband, and with the statement of the child's mother;
c) *Including the presumption of an unmarried mother's partner* if he consented to *artificial insemination* (Section 778, CC);
d) *Introducing new rules for making a consenting declaration on the second presumption;*
e) *Extending the denial period for the mother's husband* if it is a denial of the first presumption from 6 months to 6 years since the birth of the child (see Section 785, CC);
f) *Extending the denial period* from 180–300 days to 160–300 days owing to *artificial insemination* for both the husband and the partner of the mother (Section 787, CC);
g) *Introducing the option of judicially pardoning one for missing the denial preclusive period* if it is required in the child's interest and by public order requirements (Section 792, CC);
h) *Introducing the option for the court to start ex officio proceedings on denying fatherhood* but only in the case of the second presumption in a situation where such a father cannot be the real father of the child and it is clearly required by the child's interest, and if the provisions guaranteeing the fundamental human rights are to be fulfilled (Section 793, CC).

49 The *rights of the putative father to establish legal fatherhood* even against the will of the child´s mother were introduced into the previous act in 1998.

Despite being planned, the *child's denial right is not expressly regulated* in the Civil Code even if it has never been put into question by expert committees. *Denial rights of putative fathers were completely omitted by the lawmakers*. The number of people who are actively legitimated for denying fatherhood is *a traditional* one—only the child's parents recorded in the Register of Births are allowed to challenge the child´s status. As for the third presumption, conservatism prevailed even though the Constitutional Court and several family law experts concluded that its traditional basis, namely sexual intercourse within the so-called critical period, was antiquated by the revolutionary development of genetics.[50]

The newest development was inspired by the case law before *the European Court of Human Rights*: the cases of *Paulík v. Slovakia*[51] and *Novotný v. the Czech Republic*.[52] The Czech legislature allowed men designated by the court to be legal fathers under the third presumption of paternity when DNA tests did not exist, in order to reopen proceedings and reverse the effects of *res judicata.*[53]

8.4. On the adoption of minors: adoption natura imitatur

Since 1949, the adoption of minors has been understood *as a benefit for real and social orphans, as well as for unwanted and abandoned minor children.* Adoptive parents consider adoption the *acceptance of a stranger's minor child as their own*. Since 1963, the law regulated *only the full adoption of minor children.* The adoption of minors has been created as a status change and as a fiction of biological family ties. As a result of a number of international human rights laws, the Czech legal order has broadened the protection of a child's natural family, the minor parents of the child, and his or her putative parents or parents without full legal capacity.[54]

The new conception of adoption of minor children anchored into the Civil Code (Section 794 et seq., CC) primarily modifies the *requirements of parental consent* (Section 809 et seq., CC) and the option of *consent withdrawal* (Section 817, CC) or *its expiry* (Section 816, CC). The child's *mother* may give consent to adoption after the expiry of *six weeks* from the delivery, that is, after *puerperium* (Section 813, CC). The child's *father* can give consent at *any time* after the child's birth. If the child's *parents are aged under 16 years, they are not allowed to consent to adoption* at all (Section 811, Sub-Section 1, CC). Any consent so given would be irrelevant. The law has introduced a rule wherein a court may, while depriving the parents of their parental responsibility, also decide *on the deprivation of the parental right to give consent to adoption* (Section 873, CC).

50 Cf. the Judgement of the Constitutional Court of the Czech Republic from February 28, 2008, I. ÚS 978/07.

51 Application No. 10699/05.

52 Application No. 16314/13.

53 Act No. 296/2017 Coll., an amendment to the Act No. 292/2013 Coll., Act on Specific Civil Law Proceedings, that introduced the new Section 425a.

54 Králíčková, 2003, pp. 125–142.

The law also addresses *parental disinterest*, by providing for a variety of situations, such as where a parent stays in an undisclosed location (Section 818, Sub-Section 1c, CC) or shows no interest in the child, thus permanently culpably breaching his or her parental duties (Section 819, CC). The law establishes *a presumption of apparent non-interest*, when non-interest *lasts at least three months since any instruction, advice, and assistance from the state authority* (Section 820, CC). If there are close relatives of the child who are willing and able to care for the child personally, *preserving family ties will always take precedence over adoption by a non-relative* (Section 822, CC).

The child's participation rights guaranteed by international conventions *have been strengthened.* The law explicitly states that *a child aged over 12 years should give consent to his or her adoption* (cf. Section 806, CC) and that he or she *may revoke his or her consent to adoption* (Section 808, CC). If, at the time of adoption, the child was of a tender age, the adoptive parents have *a duty to inform the adoptee about their adoption* as soon as it is appropriate and no later than when the adoptee starts *compulsory school attendance* (Section 836, CC).

The total ban on adoption among close relatives has been lifted. Close family ties used to be a traditional disincentive for adoption. However, the legislature came under strong pressure and revoked this natural, social, and legal ban. Adoption is excluded among those who are relatives in the direct line and siblings *except for kinship based on surrogate motherhood* (Section 804, CC). *Medical law has never regulated surrogate motherhood.*[55,56] However, *surrogacy is a reality today.* Private clinics provide surrogacy services without any legal regulation. As mentioned above, the child's mother is the one who delivered the child (Section 775, CC).

Discussions on *same-sex adoption* and *adoption by de facto couples,* have not led to any changes in the law around *joint adoption.* Only *married couples can adopt a child jointly,* although the Czech legal order regulates registered partnerships between persons of the same sex (see above). The law allows adoption by one of the spouses and exceptionally adoption by *a single person* (Section 800, CC).

The obligatory pre-adoption care was extended from three months to *no less than six months* (Section 829, CC). The new legal rule says that after the parents' consent to adoption and placing a child in the pre-adoption care of prospective adopters, the *exercise of parental responsibility of the child's parents is suspended* by operation of law (Section 825, CC) and the court must appoint *a guardian* for the adoptee. *The maintenance obligation* of a child's parents or other persons *is also suspended* as *prospective adoptive parents* are required to *have the child with them at their own expense* (Section 829, CC).

The Civil Code also establishes the option of *adoption* and its circumstances to be *kept a secret from the child's original family.* The option of secrecy applies for the child's parents and their consent to adoption, too (Section 837, CC). However, once *the child reaches the age of majority and legal capacity,* he or she *is entitled to know the details* of the adoption (Section 838, CC). Regardless of this new rule, the traditional

55 Haderka, 1986.
56 Act No. 373/2011 Coll., on Specific Health Services.

regulation on vital registers has allowed adoptees aged over 18 years to inspect the registry and related documents.[57] This proves that adoption has never been based on the principle of anonymity.

Another new feature of the new regulation is the possibility of *the court to order surveillance to determine the success of the adoption* for a particular period, usually through the Child Protection Office (Section 839, CC).

There has also been a *key change* in the consequences of adoption: a *revocable adoption is converted into an irrevocable one* by the operation of law *within 3 years* after the adoption order becomes effective. No petition for the revocation of adoption is possible (Section 840 paragraph 2, CC). An exception applies to situations when the adoption was in conflict with law. However, the court may decide upon the irrevocability of an adoption even before the expiry of the three-year period from the date of the adoption order.

The previous rule on *the surname of the adopted child* was strict in that it mandated a change in the child's original surname to that of the adopters. This was altered, and the court may allow *the adoptee to use both surnames together:* the old and adopters' surnames (Section 835, Paragraph 2, CC). The new regulation, following tradition, also allows *re-adoption,* which refers to the adoption of an already adopted child (Section 843, CC).

8.5. Adoption of an adult: A return to tradition

The Civil Code restored the regulation of adopting an adult that prevailed before the communist takeover in 1948 and radical changes to family law were imposed in line with the Soviet pattern. The adoption of an adult is always *a status change*. However, unlike the adoption of a minor, it does *not entail a full status change*. The law distinguishes between *two types* of adoption of an adult:

a) one that *is analogical* to the full adoption of minors (Section 847, CC), and
b) one that *is not analogical* to the full adoption of minors (Section 848, CC), that is, not full adoption when the adoptee remains—especially with regard to property—connected with his or her family of origin (cf. Section 849, CC).

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9. On mutual duties and rights of parents and children: An overview

The Civil Code pays significant attention to the mutual obligations and rights of parents and children (Section 855 ff., CC). The rules are built on *equality* and *reciprocity* of duties and rights of parents and children, regardless of their ages and levels

57 Act No. 301/2000 Coll., on Registers, Name and Surname.

of legal capacity. Many obligations and rights form an integral part of the lifetime of parents and children. A number of obligations and rights of parents in relation to their children concern only new-born children, such as the duty and right to name their child (Section 862, CC). Some obligations and rights arise from *parental responsibility* and form the substance of the legal relationship between the parents and minor children who are not fully capable (Section 865 et seq., CC). Similarly, some obligations and rights of children in relation to their parents concern only minor children. Others are established regardless of age, for example, maintenance. The legal regulation of parental responsibility is *traditional* in many ways, cf. the provisions governing the obligation of the child to heed his or her parents (Section 857, CC). A number of provisions are entirely new because it was necessary to meet the international obligations that bind the Czech Republic during recodification, such as reinforcing the parents and children's right to mutual personal contact in the case of separation or divorce between the child's parents, etc. (cf. Section 888, CC).[58]

Some mutual obligations and rights are *permanent*, although with the passage of time, the details may vary, such as the amount of reciprocal maintenance between parents and children (Section 910 et seq., CC), or the obligation to respect each other's dignity (cf. also Section 883, CC), or mutual assistance. Others, such as those belonging to parental responsibility (Section 865, CC) vary in relation to the gradual maturation of the child and *disappear* by the time the child becomes an adult or acquires full legal capacity. The equality and reciprocity between parents and children vis-à-vis obligations and rights are affirmed by the following statement: *"the parents and the child have obligations and rights in relation to each other"* (Section 855, CC). The rights of one always correspond to the obligations of the other and *vice versa*. The same provision says that *"these mutual obligations and rights cannot be waived; if they do so, it is disregarded."* Neither the parents nor the children can "get rid of" any of their obligations or rights regardless of whether they are personal or proprietary, as they are established by law. The relationship between the parents and the child cannot be cancelled both unilaterally and by agreement. There is only one legal exception: the parents have a right to give their consent to the adoption of their child (see Section 809 et seq., CC). A lot of *family agreements* and contracts regarding the child can be concluded between the parents, between the parents and third persons, and between the parents and the child. However, the parents must always bear in mind the main purpose of their obligations and rights in relation to their child, which is to ensure *the moral and material welfare of the child*. The content of any agreement concerning non-routine matters in respect of a child's assets and liabilities must be *assessed by courts*. Private law provisions under the Civil Code are supplemented by public law regulations because it is necessary to protect children, as there is a public interest to protect them.[59]

58 See Kornel, 2008.

59 Act No. 359/1999 Coll., on Socio-Legal Protection of Children.

10. Parental responsibility

10.1. General

Parental responsibility is *a key concept* in Czech Family Law.[60] While codifying rules pertaining to parental responsibility, the authors of the Civil Code took into consideration a major part of *the Principles of European Family Law regarding Parental Responsibilities* created by *the CEFL*.[61] This is why parental responsibility is based on the following categories of *duties and rights of parents*: (a) care, protection, and education of the child; (b) maintenance of personal relationships; (c) determination of residence; (d) administration of property, and (e) legal representation. The Civil Code governs the *establishment, holding, and administration of* parental responsibility in keeping with *the best interests and welfare of the child*. There are special provisions concerning decision-making on daily matters and important issues vis-à-vis the child. The *agreement and cooperation* of both parents are key factors under the Civil Code, and apply irrespective of whether they live together or are separated or divorced. However, if the parents cannot agree on important matters concerning the child, regarding the personal care (custody) of the child in particular, the court will decide on (a) individual (sole) custody by one parent, or (b) alternating (serial) custody, or (c) joint custody by both parents. The responsibility of one parent does not end with the placement of the child in the individual (sole) custody of the other after the dissolution or annulment of the marriage. It does not end with the factual separation of the parents, or with the placement of the child into some form of substitute care, such as foster or institutional care, etc. This issue must be considered in light of its human rights dimension.[62] A child is an integral part of his or her family of origin. Both parents have a right to exercise parentage and associated rights and duties. The duties and rights belong to parental responsibility, both in theory and in practice. Following *the Convention on the Rights of the Child*, a child is not treated as an object of decision-making, but as an active person. The child's participation rights and the right to self-representation in legal proceedings are taken seriously.[63]

10.2. The origin and duration of parental responsibility

Parental responsibility arises *ex lege* for each parent *at the birth of the child* and ceases as soon as the child acquires full legal capacity (Section 30, CC). It is irrelevant whether the child's parents are married or not, or live together or not, although these factors can play a significant role, especially in the exercise of individual obligations

60 Králíčková, 2011, pp. 829–840.
61 Boele-Woelki, Ferrand, González-Beilfuss, Jänterä-Jareborg, Lowe, Martiny, Pintens, 2007.
62 Králíčková, 2010.
63 Schön, 2015, pp. 36–45.

and rights arising out of parental responsibility. The duration and extent of parental responsibility may be changed by the court alone (Section 856 *in fine,* CC).

10.3. The holders of parental responsibility

Under the new law, *every legal parent* has parental responsibility and the obligations and rights arising from it, unless he or she was deprived of them by a court (Section 865, CC). *Minor parents* of children and *parents limited* in terms of *legal capacity* as declared by court because of a mental disease also have obligations and rights arising out of parental responsibility. However, not every parent has a right or duty to exercise parental responsibility. Bearing in mind the best interests and welfare of the child, the law provides for the *suspension of the exercise* of parental responsibility *ex lege* owing to the immaturity or mental disorder of the parent in question (Section 868, CC). Parental responsibility *cannot be transferred to another person*, as the law indicates that parents and children cannot waive their mutual obligations and rights (Section 855, Sub-Section 1, CC). The law does not give the court such an option, either. A spouse (step-parent) or partner of the child's parent is not the holder of obligations and rights arising out of parental responsibility, although the law may allow him or her to participate in the upbringing of the child (Section 885, CC). A guardian is not the holder of parental responsibility, either (Section 928, CC).

10.4. Scope of parental responsibility

The Civil Code in relation to *the Principles of European Family Law regarding Parental Responsibilities* sets out the scope of obligations and rights of parents. It is currently wider than it was under previous legal regimes. Parental responsibility covers *the duties and rights* of parents and includes: (a) caring for the child, including, without limitation, care for his or her health, and physical, emotional, intellectual, and moral development, (b) the protection of the child, (c) maintaining personal contact with the child, (d) ensuring his or her upbringing and education, (e) determining the place of his or her residence, (f) representing him or her, and (g) administering his or her assets and liabilities (see Section 858, CC). The exercise of all these obligations and rights must be understood as *the exercise of important duties and rights* on which the parents must *agree* (with the exception perhaps of trivial, daily matters with respect to the child's property, see Sections 897 and 898, CC). The non-exhaustive list of important issues explicitly includes unusual medical and similar treatments, determining the place of residence, and choice of education or employment of the child (see Section 877, CC). Parental responsibility *does not include:*

a) maintenance obligation and right to maintenance, because its duration is not dependent on reaching maturity or full legal capacity by the child (Section 859, CC), and
b) the right to consent to the adoption of the child (Section 809, CC).

10.5. Obligations of parents to provide their child with care and to protect and raise the child

Care for the child in the broadest sense of the term is a key part of parental responsibilities. It includes care of his or her health, and physical, emotional, intellectual, and moral development. It is different from *personal care* within *individual (sole) custody, and alternating (serial)* or *joint custody* after divorce or separation of the child's parents. Even a parent who is not the primary caregiver has the obligation and right to care for the child's health.[64] Parents have the duty and right to protect their child from the outside world, depending on his or her level of development, maturity, age, temperament, etc. It is a traditional component of parenting and parental responsibility. Protection may be understood as anything that is done in the best interests of the child. This could be, for instance, protection against negative effects of the Internet, pedophiles, violent criminals, and persons who do not fulfil their contractual obligations properly. The law stipulates that parents play a crucial role in a child's care and upbringing and that they are supposed to be all-round role models for their children, especially for their way of life and behavior in the family (see Section 884, CC). A child must heed his/her parents (see Section 857, Sub-Section 1, CC). Until the child acquires full legal capacity, the parents have a duty and right to guide their child's behavior using methods of education as appropriate to their developing abilities, including restrictions in order to protect their morals, health, and rights, as well as the rights of others and public order. The child is obliged to conform to such methods (Section 857, Sub-Section 2, CC). The parents also decide on the child's education and his/her career paths within the scope of parental responsibility. They always consider the child's opinion in relation to his/her participatory rights, skills, and talents (see Section 880, Sub-Section 2, CC).

10.6. The best interests and participation rights of the child

Parents must exercise the obligations and rights arising out of parental responsibility in keeping with the best interests and well-being of the child, and with respect to his/her participatory rights.[65] A child is neither the "property" of his/her parents, nor the passive object of parental responsibility. Children have participatory rights that are guaranteed by *the Convention on the Rights of the Child* (art. 12), which include the rights to:

a) be informed;
b) express their views and wishes;
c) influence, by his or her opinion, decisions; and
d) completely determine, by his or her opinion, decisions.

To realize these participatory rights, a child must have relevant information. The Civil Code also provides that before making a decision that affects the interests of the

64 Králíčková, 2016.
65 Van Bueren, 2007.

child, the parents shall inform the child of everything that is necessary for the child to know in order to form his/her own opinion on a given matter and communicate it to the parents; this does not apply if the child is unable to properly receive the message, or form his/her own opinion, or communicate it to his/her parents; the parents shall pay due attention to the child's opinion and take the child's opinion into account while making a decision (Section 875, Sub-Section 2, CC). The court has a similar information obligation toward the child, if it decides on a child's case (see Section 867, CC). The child must receive information on all the possible consequences of compliance with his/her view, or of any decision in a case or matter that concerns him/her.

To strengthen the participatory rights of the child, the Civil Code establishes a *rebuttable presumption* of the law, according to which *a child aged over 12 years* is presumed to be able to receive information and form and communicate his/her own opinion (Section 867, Sub-Section 2, the second sentence, CC). The court pays due attention to the opinion of the child. However, it must always pursue the best interests and welfare of the child.

11. Family solidarity and maintenance

11.1. General

The Civil Code respects the general principle of family solidarity. Several provisions in *Book Two—Family Law* protect weaker parties, for instance within the concept of *community property* of spouses (Section 708 ff, CC), *common lease of a flat* (Section 745, CC), and *things forming the usual equipment of family household* (Section 698, CC), among others. Special attention is paid to *maintenance duty* between family members. The Civil Code regulates maintenance duty between spouses (Section 697 ff, CC) and ex-spouses (Section 760 ff, CC; for details see above)[66] and toward the unmarried mother of the child (Section 920, see above), and especially between relatives in the direct line. The most detailed regulation is devoted to the maintenance duty of parents and grandparents toward children (Section 910 ff, CC).

11.2. Maintenance duty toward children

The maintenance duty of parents toward children *has not* traditionally *been a part of parental responsibility* as *both parents have a duty to maintain and support their child until he/she can make a living* (Section 911, CC). The scope of maintenance is supposed

66 The Act on Registered Partnership provides rules for maintenance between current and former registered partners of the same sex, like the Civil Code does for spouses and ex-spouses (Sections 10, 11, 12 ARP).

to fall *within the extent of the same standard of living* (Section 915, CC) including the option of making *savings out of maintenance* (Section 917, CC). Thus, the Civil Code fully respects the principle of solidarity and the non-consumption aspect of maintenance.

To avoid a situation where this remains a mere *"law in the books,"* the legislature complemented the new legal regulation with other effective elements by responding to two key problems confronted in practice:

a) detection of the income and property of the parents, especially when they get cash-in-hand, pay for unreported work, when they are self-employed, etc.;
b) the enforcement of judgments ordering maintenance duty.

First, in order to detect income, the lawmakers introduced *the legal presumption of the income of the liable parent* (or grandparent) in order to *improve* the child's position. The law states that *a parent must prove his/her income in court* by submitting documents necessary for the evaluation of his/her property and *must enable the court to find out other facts* that are necessary for decision-making, by making the data protected by special acts accessible. If a parent fails to fulfill this duty, *his/her average monthly earning shall be presumed to amount to the 25-multiple of the life minimum* required to ensure maintenance and other fundamental personal needs of such a parent pursuant to a special act[67] (Section 916, CC).

If a debtor fails to maintain and support a child, an executor shall *issue a writ of execution to suspend his/her driving license.* The executor will serve the writ on the driver and deliver it to the registry of drivers. The debtor, that is the driver, is not allowed to drive until he/she pays the overdue maintenance.[68] Criminal law traditionally considers failure to pay mandatory maintenance *a criminal offense* that can be punished in various ways *including imprisonment* (Section 196, Criminal Code); recently, a new remedy was introduced, namely *preventing a person from driving for a certain period* (Section 196a, Criminal Code).[69] There is a new regulation on *substitute maintenance*, which was passed only recently.[70]

12. On protection against domestic violence

It is necessary to mention civil law *provisions against domestic violence.*[71] The law sets forth that if a house or flat where the family household of the spouses is situated becomes intolerable for them to dwell jointly because of *physical or mental violence against the*

67 Act No. 110/2006 Coll., on Living and Subsistence Level.
68 Act No. 120/2001 Coll., on Enforcement Officials and their Activities, Section 71a.
69 Act No. 40/2009 Coll., Criminal Code.
70 Act No. 588/2020 Coll., effective on July 1, 2021.
71 The Civil Code complements the previous regulation established by a special law against domestic violence in 2006. Králíčková, Žatecká, Dávid, Kornel, 2011.

spouse or anyone else living in the family household of the spouses, the court may, at the motion of the affected spouse, *restrict or exclude the right* of the other spouse for a specified period to *dwell* in the house or the flat (Section 751, Sub-Section 1, CC). It is possible to proceed in the same manner in the case of divorced spouses as well as in the case when the spouses or ex-spouses live jointly elsewhere than in their family household (Section 751, Sub-Section 2, CC), and in the case of *other persons* than spouses, especially *registered partners or cohabitees* (Section 3021, CC). The restriction or exclusion of a spouse's right to live in the house or flat may last for a period of *1 month*. This period may be extended for up to *6 months* at the most, by the court. The court will, on a motion, decide again if there are serious reasons to do so (Section 752, CC).[72]

13. Conclusion

As discussed in this article, the Civil Code was adopted after a long period of legislative work and protracted behind-the-scenes negotiations as Family Law was considered a relatively conservative area that is closely linked to many aspects of culture, religion, and tradition. Thus, both professionals and the public believed that *the Civil Code would remain without significant changes* for a reasonable period of time. Nevertheless, *amendments have been made* and *many drafts are pending* before the Parliament of the Czech Republic. Some of them are rather problematic and controversial, especially the ones proposed by the members of parliament.

No matter what speeches politicians may make in the Parliament, we trust that family law should *protect all forms of families* as there are *no strict patterns for family life*. While drafting amendments to the Civil Code in the future, more attention should be paid to the rights and duties of *same-sex partners*. It is a question of whether the concept of *"marriage for all"* discussed above would be good solution for them. As far as *cohabitees* are concerned, *the Principles of European Family Law* laid down by academics may be a good framework to follow. As regard *divorce with minor children*, the pending draft underlining more autonomy of the will of the child's parents, concerning the divorce of marriage, should be supported. The situation of divorcing parents will be similar to the position of non-married child's parents who can communicate and agreed on arrangements regarding the minor in harmony with *the best interest of that child* and *without any interventions by the court*. The paternalistic role of the state will no longer be as strong. Finally, there is no doubt that the general public would, with great anticipation, welcome the passage of a long-awaited bill on *the Public Defender of Children's Rights* (*"ombudsman for children")*.[73]

72 For more information on procedure, see Act No. 292/2013 Coll., on Special Civil Proceedings, Section 400 ff., An interim proceeding on protection against domestic violence.

73 Parliament of the Czech Republic, Chamber of Deputies, Parliamentary term No. VIII., Draft No. 894/0.

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Chapter IV

Family Protection Under Public and Private Law in Hungary

Edit Sápi

This book chapter presents constitutional and private law (civil law) approaches to family protection and relations. The former serves as a basic introduction and covers the most relevant legal sources on the topic and offers a constitutional interpretation as provided by the Constitutional Court. The latter examines the private law approach to family protection, with a special emphasis on family law norms. The article deals with legally recognized relationships and rules governing parent-child relationships. Family protection is analyzed from the perspective of family law and related legal institutions.

1. The constitutional approach to family protection

The first and original version of art. L) of the Fundamental Law of Hungary described the protection of marriage and family as follows: "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." Besides the Fundamental Law, the *Act on the Protection of Family* (Act CCXI of 2011) (Csvt.), which entered into force on January 1, 2012, also stipulated that *raising children in a family* is safer than any other option. A family can fulfill its role if the strong relationship between the parents expands to include their responsibility toward their child. There is no

Edit Sápi (2021) Family Protection Under Public and Private Law in Hungary. In: Tímea Barzó, Barnabás Lenkovics (eds.) *Family Protection From a Legal Perspective,* pp. 111–150. Budapest–Miskolc, Ferenc Mádl Institute of Comparative Law–Central European Academic Publishing.

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sustainable development and economic growth without the birth of children. *The Declaration of the rights and duties of parents and children* is an integral part of the Act and will be described later. Section (1) of Paragraph 7 of the Csvt. originally stated that the *basis of a family* is marriage between a man and a woman or the direct line of kinship or family placement guardianship. Decision No. 43/2012. (XII. 20.) of the Constitutional Court stated that this segment under the Act violates the Fundamental Law. According to the Constitutional Court, the legislature took the opportunity in the Family Protection Act to redefine an institution governed by Fundamental Law, which occupies a lower position among the legal sources, without listing, separately or possibly under other names, other forms of social coexistence recognized by law owing to which families are entitled.

If the legislature intended to highlight and set one form of cohabitation as a model, he is still *obliged to guarantee the same level of protection for other forms as recognized by law,* because of his obligation to protect the institution.[1] According to the decision of the Constitutional Court, if the legislature wishes to establish rights and obligations for families, then those who wish to establish a family in another permanent emotional and economic community before or without marriage cannot *withdraw rights that have been already granted, must not reduce the existing level of protection of the form of partnership, and* must protect the institution in the same way, especially in connection with the best interests of the child. It is a requirement of the Fundamental Law that the *obligation of institutional protection affecting marriage and family may not result in any direct or indirect discrimination against children* on the ground that their parents are brought up in a marriage or other type of cohabitation.[2]

Consequently, before the Fourth Amendment of the Basic Law, the concept of the family covered, not just a family based on marriage, but that *in the sociological sense* as well. The body established the unconstitutionality of the sections of the Family Protection Act defining the family, while taking into account the level of legal sources at the end of 2012. Since then, the definition of the family relationship based on marriage was included only in the Family Protection Act. The contradiction was resolved by the Fourth Amendment of the Basic Law, in which the following is mentioned: *"the basis of the family relationship is marriage or the parent-child relationship."* However, this definition excludes de facto partnerships and children born from them, from the concept of family and, indirectly, from family protection. In such cases, the parents are considered the family of the common child, but the family relationship is not established between the parties.[3] The question then arises: Should our perception

1 It did not follow from art. L) of the Fundamental Law that, for example, those cohabitants who take care of and raise each other's children, but do not or cannot have a common child because of other circumstances (being elderly or infertile), persons caring for their siblings, possibly grandchildren, grandparents raising their grandchildren, and many based on lasting emotional and economic communities would not be subject to the same objective obligation of the state to protect the institution, no matter what the legislature may call them.

2 Barzó, 2017b, pp. 4–7.

3 Barzó, 2017a, pp. 41–44.

and the legal concept of family change as social and human relations change? Is the concept of family eternal? According to the text of the Fundamental Law, the answer is obvious.[4]

2. Legally recognized relationship forms

For a long time, Hungarian family law considered the institution of marriage the basic unit of family. However, changes in society have made it necessary to provide legal protections for other forms of social cohabitation as well. In the recent decades, we have been faced with the social fact that the marriage-based family model on which the family law system is built is being preferred less and less. The growth of cohabitation is a social trend and Hungarian legislation could not ignore it, either.

2.1. Legal history of the regulation of de facto cohabitation

The socialist approach considered cohabitation without marriage a phenomenon that is incompatible with its morals; thus, only the basic unit of society, the family, can be established by marriage.[5] Views that promoted the equal protection of marriage and extramarital affairs were not accepted at the time because it was feared that it would render the institution of marriage empty, which was contrary to the Constitution at the time.[6] However, in 1951, the first uniform social security legislation *granted a widow's pension on equal terms to the wife* to a partner who had lived with the deceased for at least a year before his death and had at least one child in the course of such cohabitation. [7] However, the definition of the legal concept and conceptual elements of cohabitation and the development of normative material for the legal institution were absent.[8]

Act IV of 1952 on Marriage, Family, and Guardianship (Csjt.) did not provide for any form of personal or property relations among cohabitants and denied the place and significance of the legal institution in family law. However, Hungarian society and law had to face the fact that marriage was increasingly being pushed into the background with a growing number of couples opting for cohabitation.[9] For the first time, a concrete legal regulation concerning cohabitants was set out in Act

4 Rácz, 2019, p. 35.
5 Nizsalovszky, 1963, p. 67.
6 Bajory, 1959, p. 208.
7 Section 15(2) of the Act 30 of 1951 on the uniform social security pension for employees.
8 Hegedűs, 2010, p. 22.
9 Kőrös, 2005, p. 1.

IV of 1977, which was based on PK 94.[10] This amendment inserted the concept of a cohabitant into the Part of Companies (Section 578.§) of Act IV of 1959 on the Civil Code. This part was effective from which took effect from March 1, 1978 as follows: "the spouses—woman and man living together without marriage, in a common household, in an emotional and economic community—acquire joint ownership during their cohabitation in proportion to their contribution to the acquisition. If the contribution rate cannot be determined, it shall be deemed to be equal. Working in the household counts as a contribution to the acquisition." These rules should be applied to the property relations of other relatives living in the same household, apart from spouses. With this, cohabitants were included within the law on obligations under the Civil Code and cohabitation was considered similar to an atypical civil law company.[11] However, the legislature has been dealing with the issue consistently. Regulations under the Civil Code of 1959 were amended through Act XXV of 1988, which incorporated Paragraph 578/G. However, this modification did not result in any substantive change, but only reorganized the rules on cohabitation.

The *Constitutional Court* in No. 14/1995. (III.13.) stated that the institution of marriage is traditionally a cohabitation between men and women in both culture and law. This partnership aims at childbirth and child-rearing and serves as a framework for spouses to live in mutual care and support. The ability to bear and give birth to children is not a conceptual element or condition for marriage, but it can be regarded as an original and typical purpose of marriage. *However, the Constitutional Court emphasized in the decision that the long-term cohabitation of two persons can achieve such values that they can claim legal recognition for, regardless of their gender, based on equal consideration of the personal dignity of the individuals involved.*

After the Constitutional Court's decision, Act XLII. of 1996 amended the Civil Code of 1959, following which the first sentence of Section 578/G(1) stated thus: "During their cohabitation, the spouses acquire joint ownership in proportion to their contribution to the acquisition." The amendment also introduced a new definition for cohabitation, which was placed under the "Closing Provisions" of the Civil Code of 1959:[12] "Unless otherwise provided by law cohabitants are, two persons living together in a common household, emotional and economic community without marriage," regardless of their gender.[13] The proportion of out-of-wedlock births in Hungary increased in the decade after the turn of the millennium, and reached the highest value ever measured, namely 47.8% in 2015.

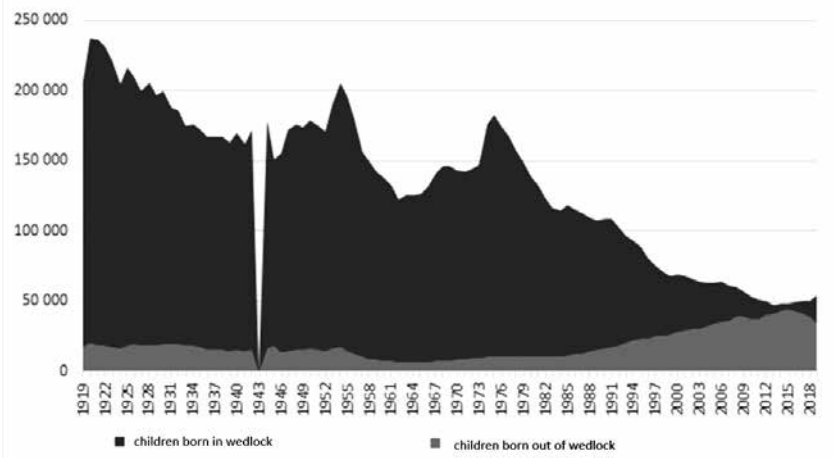
10 According to PK Resolution No. 94, "family relations may exist not only between spouses and blood relatives, but also between persons of the opposite sex who live together in the manner of spouses and without marriage". Repealed by the Resolution PK No. 272.

11 Hegedűs, 2006, pp. 10–11.

12 The definition was changed by the 1996 and 2009 amendments of the Civil Code. It was transferred to the "Closing Provisions" of the Civil Code. The first amendment recognized the cohabitation of same-sex couples following the decision of the Constitutional Court. Kőrös, 2013a, pp. 6.

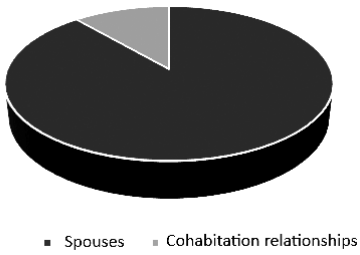
13 Kuti, 2016, pp. 7–8.

Number of births between 1919 and 2019

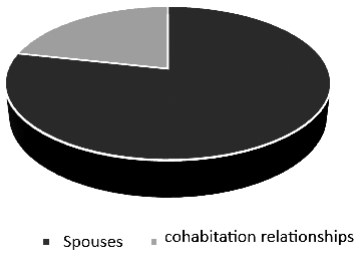


This can be traced back to the strong growth of extramarital partnerships and increasing courage among people who lived in such partnerships and had children out of them. Between 2001 and 2016, the number of people who chose to live in cohabitation more than doubled.[14]

Ratio between marriage and cohabitation in 2001



Ratio between marriage and cohabitation in 2016

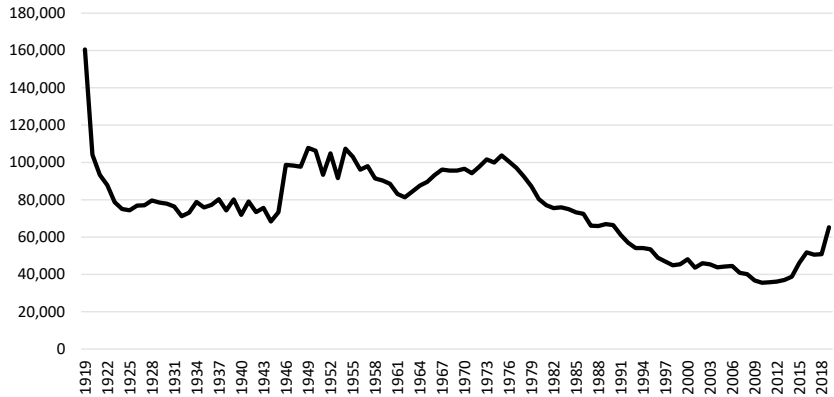


At the same time, a sharp decline in the number of marriages was seen. In the 1970s, the number of marriages were between 90,000 and 100,000, whereas in 2010, 355,000 marriages, were bounded. The latter data meant a local minimum, so it was one of the lowest number in the history of volt population statistics.[15]

14 According to the legal literature, most cohabitants consider their relationship a "probationary marriage." See e.g., Spéder, 2004, pp. 137–151. Bukodi, 2002, pp. 227–251.

15 There has been an increase over the last six years. In 2015, there were 459,000 marriages. Népmozgalom, 2015, pp. 3–4.

Number of marriages concluded between 1919 and 2019



The number of disputes to which "traditional" matrimonial property and other family protection rules were no longer automatically applied increased with the expansion of the family to include cohabiting couples and their children. Consequently, mothers and, less often, fathers, who were left alone with their children after the cessation of cohabitation became more vulnerable.

Accordingly, the regulation of cohabitation was heavily debated when the Civil Code was codified. An increasing number of cohabitants who lived like spouses, usually with their children (or one of their children), formed a family. They chose this instead of marriage in order to incur lower costs. Accordingly, the Concept of the Civil Code, which was published in 2003, clearly emphasized on the *inclusion of cohabitation in the Family Law Book*. It sought to grant the other cohabitant a *right of maintenance* in the case of certain conditions and a *right to use the common apartment as legal inheritance*.[16] The proposed legislation would not have raised the protection of cohabitation to the level of marriage, but would have provided additional rights compared to the law in force at the time. Within the property relations of the spouses, it proposed a more flexible public acquisition regime than joint ownership as a legal property system. In comparison, the amended *Civil Code* in force at present has completely changed the rules governing de facto partnerships. The legislature split the rules that were coherent in the Expert Draft in such a way that the *definition of cohabitants and property law consequences of cohabitation were incorporated into the Book of the Law of Obligation* (6th Book of the Civil Code), but *the rules on maintenance and the right to dwelling can be found in the Family Law Book* (4th Book of the Civil Code) under the title "Family law effects of de facto partnership".

Cohabitation will result in family law effects—maintenance and the right to dwelling—only if the partners *live together for at least for one year and have a "common child."* If the spouses do not have a common child, despite living together for long,

16 Tóth, 2003, pp. 16–17.

having their own individual children and running a household together, and contributing to each other's business, the family law effects do not exist.[17] Cohabitation in a common household within an emotional and economic community creates a family relationship without marriage which is not connected to the characteristics of a contract.[18] Contrary to the Expert Draft, the new Civil Code abandoned the *obligation of supporting and working together in order to achieve a common goal*. Nevertheless, it is obvious that the law shall require mutual solidarity between the parties in a de facto partnership as well, just as in all relationships, which was fully recognized over several decades of judicial practice.[19]

2.2. History of the introduction of registered partnerships

Same-sex relationships, homosexuality, and sexual orientation are significant characteristics of the human identity. They have been addressed over the last 30 years through both legal interpretation and the exercise of rights. The process led to the decriminalization and open acceptance of homosexuality, and the prohibition of discrimination on the ground of sexual orientation, to the point that public recognition of same-sex relationships emerged.

In 1989, Denmark became the first country to allow same-sex couples to have their relationships recognized by the state.[20] In Hungary, the near-complete elimination of gender discrimination in relation to optional forms of partnership resulted from the enactment of the Act CLXXXIV of 2007 on registered partnerships (Bét. I.). Bét. I. would have come into effect on January 1, 2009. It recognized registered partnerships as family law institutions and listed out rules that differed from those that applied to marriage. On the lines of French and Dutch legislation, the Bét. I. allowed all adults to have a registered partnership regardless of their sex and sexual orientation.[21] Decision No. 154/2008 (XII.17.) of the Constitutional Court emerged in response to the Act and declared that the "establishment of a registered partnership for same-sex persons is not unconstitutional." However, the concrete legislative solution was not in line with the Constitution. Thus, the Act was annulled. The problem was that the legislature did not find any difference between the registered partnership between same-sex and heterosexual persons and applied only a general reference rule to marriage. With this, the legal institutions of marriage and registered partnerships, and registered partnerships between same-sex and heterosexual persons were made uniform. For heterosexual people, the application of registered partnership would have meant the doubling of marriage and the "devaluation" of marriage. Therefore, the Constitutional Court instructed the legislature to "maintain a distance" between

17 Kriston, 2014, p. 36.
18 Kriston, 2016, pp. 235–236.
19 BH 2005.141.; BH 2013.217.
20 Novák, 2016, pp. 29–30.
21 Kriston, 2019, pp. 91.

marriage and cohabitation among men and women, and to distinguish between marriage and registered same-sex cohabitation. Thus, the Constitutional Court ruled that the Bét. I. was unconstitutional and annulled it. Consequently, the Bét. I. did not enter into force on January 1, 2009.

Act XXIX of 2009 on registered partnership and the amendment of the proof of cohabitation relationship (Bét. II.) was enacted based on the abovementioned Constitutional Court Decision and remains in force. Without prejudice to the separate law, the Committee's proposal for a new Civil Code sought to lay down the most important rules for the establishment, termination, and family law consequences of a registered partnership in the Family Law Book. The Government submitted the bill to the Parliament in accordance with the Commission Proposal.[22] The text of the Civil Code, which was adopted following the amendments, and that remains in force, is surprising and did not provide well designed changes.[23] *Registered partnerships* have been completely removed from the Civil Code such that the Act does not mention it in the definition of "relative"[24] and in the impediments to marriage, either. It can be only found in the circumstances that preclude the existence of effective cohabitation.[25] However, this does not mean that registered partners have fallen out of the scope of protection under the Civil Code. Section (1) of Paragraph 3 of the Bét. II. is still in force, because it *comprises a general reference that the rules on marriage shall be applied to registered partnerships* with exceptions regulated by law. Registered partners have all the rights and obligations that are attached to marriage in relation to personal and property rights and obligations fixed in the Civil Code and with this solution, the rules of marriage form the background for registered partnerships.[26]

3. The current regulation of legally protected relationships in Hungary

According to the law in force, it is possible to live in a relationship as a legal institution, in the form of a *marriage* or *registered partnership* in Hungary. However, we have to mention that *de facto cohabitation*[27] is regulated as a contractual relationship in the Book of Obligations of the Civil Code does not require a formal procedure, like in the case of marriage, because starting a life community is sufficient for the existence of a cohabitation relationship. Proving the existence of cohabitation

22 T/7971. Bill
23 See the critical analysis by Vékás, 2013, pp. 1–7.
24 CC. 8:1.§ 1.2. point
25 CC. 6:514.§ (1).
26 Kőrös, 2013a, p. 7.
27 In the legal literature, family law issues of de facto cohabitation seem divisive. See: Kriston, 2016, pp. 226–239.; Kriston, 2018a, pp. 401–406.; Kriston, 2019a, pp. 101–109.

is extremely complex, and the legislature sought to ease this by establishing the *Register of Cohabitation Declarations* (cohabitation register) from January 1, 2010 onwards. The Hungarian Chamber of Notaries maintains the Register. The cohabitation register contains declarations that serve as a proof of existence of a cohabitation relationship. These declarations include:

a) a statement that was made jointly by two non-incapacitated adults before a public notary to the effect that they are in a cohabitation relationship with each other under the Civil Code, and
b) a statement by at least one of the applicants before a notary that (s)he no longer has a partnership with the person previously registered with him or her.

The cohabitation register certifies the existence of a cohabitation relationship between those who make such joint declarations. However, the cohabitation register does not prove the existence of a partnership if a partner has subsequently made a declaration of non-existence in the partnership register, or if one of the partners has died, or if either partner has subsequently married or entered into a registered partnership.[28] However, the recognition of the statutory scope does not preclude the fact that the authority examines the substance of the partnership.[29]

3.1. Establishment and definition of certain relationship forms

3.1.1. Marriage

The Family Law Book of the Hungarian Civil Code declares that marriage shall be considered contracted if a man and woman appear together before the registrar in person and declare their intention to marry. This results personal and property legal effects. Such a declaration cannot be subject to a condition or time limit. After the exchange of wedding vows, the registrar shall declare the parties united in marriage and record the fact of marriage in the marriage registry (declarative effect).[30] The Family Law Book also regulates the *formalities of marriage*, which do not affect the existence (validity) of a marriage. These are the following: two witnesses, office of the local authority and publicly.

According to the Family Law Book, *proceedings for the conclusion of marriage can be divided into two parts*: actions before marriage and the conclusion of the marriage itself. Actions before marriage are regulated by laws on the procedure involved in maintaining a civil register.[31] Marriage begins with the announcement of the intention to marry. The spouses are obliged to declare their intention to marry jointly and in person, and the registrar draws up a *protocol* on it with the

28 Section 36/E. § (1)-(3) of the Act XLV of 2008, on the non-litigation procedures of public notaries
29 EBH2015. K.27. II.
30 CC. 4:5.§ (1)-(2).
31 Act I. of 2010. on civil register (At.).

data content specified by law. If the spouses prove that the legal conditions for their marriage are met and state that, according to their knowledge, *there is no obstacle to the marriage* [32] the parties shall wait for the mandatory waiting period of 30 days, according to the law. In justified cases, the notary is entitled to grant an exception from the 30-day waiting period. According to Section (3) of Paragraph 4:7 of the CC where either of the parties to the marriage suffers a terminal illness, the statement of the parties shall suffice in place of verifying all legal requirements of marriage. Marriage may be contracted immediately upon notification. The Family Law Book does not expressly regulate the age limit for marriage, but only states that marriage concluded by a minor is invalid; consequently marriage can be established between people aged 18 years and above. However, a guardian may authorize the marriage of a minor with limited legal capacity, that is, aged above 16 years.[33]

3.1.2. Registered partnership

Registered partnership is a family relationship between persons of the same sex that establishes personal status and has the same characteristics as marriage between persons of different sexes.[34] *A registered partnership can be* concluded between *two persons of the same sex who have reached the age of 18 years together. Such individuals may enter a registered partnership before the registrar if* they mutually state their intention to do so with each other. Other formal requirements include *publicity* (which means a public place in general) and *presence of two witnesses*.[35] The elements of the definition are almost identical to the formal requirements of marriage. However, a registered partnership can only be concluded by persons aged above 18 years. In the case of people aged over 16 years but under 18 years, the guardian cannot grant permission to establish such a relationship. After the registered partners' statement, the registrar incorporates the fact of establishing the relationship in the register. The registration, just as in the case of a marriage, has a *declaratory effect.* Similar to the actions prior to marriage, according to the *actions prior to the establishment of a registered partnership,* prospective registered partners *shall declare* before the registrar that, to their best knowledge, there is no legal impediment to their registered partnership and that they *shall justify* that the legal conditions for their registered partnership exist.[36]

32 Art. 17. § (1)-(5).
33 CC. 4:9. § (1)-(2).
34 Csűri, 2010, p. 13.
35 Bét. II. 1. § (1)-(4).
36 A total of 67 and 80 partnerships were concluded in the second half of 2009 and 2010, respectively. Until 2013, when 30 registered partnerships were concluded, the number of partnerships decreased each year. In 2014 there were 42, and in 2015 there were 65 partnerships (36 between men and 29 between women). Népmozgalom, 2015, p. 5.

3.1.3. De facto partnership

De facto partnership refers to a partnership where two people live together outside of wedlock in an emotional and financial community in the same household ("cohabitation"), provided that neither of them is engaged in wedlock or partnership with another person, registered or otherwise, that they are not related in direct line, and that they are not siblings.[37] Different sex of the partners is not a requirement, so a de facto partnership can be established between same-sex partners, as well. The definition enumerates positive requirements and exclusionary conditions in order to establish such a relationship.[38] Although the legislature aimed to provide a precise definition of cohabitation, the interpretation of individual conceptual elements remains unclear. These areas have been addressed by judicial practice.[39]

a) The existence of emotional community between the parties. The *emotional side* covers the partners' emotions toward each other and the resulting obligation to support and cooperate with each other. The Curia (Supreme Court of Hungary) also drew attention to the importance of solidarity and the obligation to support.[40]

b) Economic community between the parties. Economic community can be founded if the parties manage their everyday economic goals together in order to achieve their future economic goals.[41] It also means cooperation in major property-related activities and the use of income for common purposes. The parties should cooperate not only in the acquisition of assets, but also in their economic objectives, which must be shared *throughout the life of the community and their income should be used together for these purposes.*[42] Before the CC came into effect, case law focused on the concentration of property in some form, because legal property relations between de facto partners were based on a system of joint property, similar to that between spouses. However, the CC brought about a significant change, since it introduced a special system of property acquisition based on the segregation of property as a legal right of de facto partners, which also forced the judiciary to review its previous decisions. Therefore, it can be ascertained nowadays that parties can achieve a common economic goal without actually merging their assets.[43] This is supported by the Curia,[44] which, in a recent decision, indicated that during cohabitation for 28 years, the parties had separated their property, but made a number of long-term economic decisions that justified the establishment of economic community between them. However, starting a family and having children cannot be considered a common economic goal.[45]

37 CC. 6:514. §.
38 Kriston, 2018, p. 5.
39 Hegedűs, 2004, pp. 17–20.
40 Pfv. II. 21.089/2011/8. És Pf.17.21.403/2016/3.
41 BDT 2009. 1952.; BDT2007. 1628.; BH 2014.111., BDT2008. 1805. I.
42 BDT 2011. 2601.
43 Kriston, 2018, p. 6.
44 BH 2021.1.11
45 BH2017. 338.

c) Long-term cohabitation between spouses in a common household. In judicial practice, there was a consensus that parties should live together in a common house in order for a cohabitation relationship to be established between them.[46] However, lasting coexistence does not necessarily mean continuous and uninterrupted coexistence.[47] Cohabitation in the same real property is not an essential condition for establishing a joint household. Rather, the components of a joint household are cooperation in the choice of a jointly developed way of life, as well as the place and method of cohabitation.[48] Cohabitation in a joint household, especially between older partners, can take place by the parties retaining their property while sharing it, which means that they can be linked to their way of life as a joint household.[49]

d) Exclusion of the existence of parallel life communities and kinship. The law limits the determinability of cohabitation from a negative angle, as well. The establishment of a partnership is not precluded by the existence of a marriage or registered partnership, but by the fact that the party also maintains the *community of life* of such marriage or registered partnership. If one party lives in a marital *property and life community*, it precludes the existence of a cohabitation partnership.[50] However, the fact that one of the parties maintained a close relationship with another person during the period of partnership does not preclude the establishment of a cohabitation relationship.[51] *Kinship between the parties is an exclusionary factor*, just as in the case of spouses, because, as a result of healthy procreation, parties cannot be direct descendants or siblings of each other.

3.2. Termination of relationships

3.2.1. Termination of marriage

The Family Law Book establishes that a marriage can be terminated by the *death* of one of the spouses or the *dissolution* of the marriage by court order. Annulment differs from termination by divorce in that an annulment always has an "ex tunc," effect which is retroactive to the origin. The termination due to death or divorce is valid only from the date of the termination, so it has an "ex nunc" effect. Only *the court shall dissolve marriage* at the request of either spouse, in the event of the *breakdown of a marriage because of irreconcilable differences.* Hungarian law does not list the reasons for dissolution, but leaves it to the court to adjudicate circumstances leading to the final estrangement of the spouses. Detailed rules governing dissolution are listed in the Civil Procedure Code.[52] The Act identifies two forms of dissolution:

46 BDT2016. 3582.
47 BH 2001. 596. 4
48 Hegedűs, 2006, p. 13; Kriston, 2018, p. 5.
49 BH 2017.369.
50 BH 2004.504., EBH 2018.M.8.
51 EBH 1782.2008.
52 Chapter XXXI of the Act CXXX of 2016 on Civil Procedure.

mutual agreement, where the final, mutual, and independent intent of the spouses terminates the marriage and *factual dissolution,* where detailed evidence is relied on by the court to terminate the marriage. The court examines the evidence and investigates whether the marriage has been completely and irreparably damaged in the case of a *factual dissolution*. The proceedings may commence in two ways. It may be initiated at the *unilateral request of one of the spouses* against the other. Alternatively, if both spouses agree to the dissolution, but their conditions for their mutual agreement have not been met, and it is not possible for them to agree on these conditions, they may initiate proceedings.[53]

If the *mutual intention of the spouses* is based on a final and independent determination, it will be unnecessary to investigate the deterioration of the marriage in detail. In such cases, the court *must examine the parties' declarations*. Thus, *the personal hearing of the parties* is important and mandatory during the trial, with exceptions provided by law. In the case of a *mutually agreed dissolution*, the spouses shall agree on the contributory issues prescribed by law. *In the case of a joint minor child*, if the spouses agree on joint parental supervision, specifically details regarding the place of residence and maintenance of the child, the maintenance of the spouse on request, and the use of the common house, the marriage can be terminated. If the spouses do not agree on joint parental responsibility, the agreement must identify the scope of exercise of parental responsibility.[54] If the spouses do not have a joint minor child, they shall only agree on the maintenance of the spouses and the use of a joint apartment, if applicable. The Family Law Book no longer has the previous regulation that called for an agreement on *the division of common property* as a pre-condition for mutually agreed dissolution.[55] A decision on the dissolution of a marriage can only be made if the agreement of the spouses has been *approved by a court order.* However, a court will only approve a clear, specific, and enforceable settlement that sets a deadline for the performance of the obligations and that does not contain uncertain and unenforceable conditions.[56] It is only in the best interests of the joint child to change the provisions of the agreement on the exercise of parental supervision, maintenance of the child or contact, which was approved by a court. [57]

3.2.2. Termination of registered partnership

A registered partnership is terminated by the death of one of the registered partners, or by judicial dissolution or termination by a public notary.[58] According to the Bét. II., the rules on the termination of marriage shall be applied for the

53 Pál, 2016, pp. 22–23.
54 Visontai-Szabó, 2021, p. 8.
55 The reason for this is probably that property relations have become far more complex in recent times.
56 Kőrös 2013, p. 70.
57 CC. 4:170. §; 4:181. §; 4:210. §
58 Bét. II. 4. §.

termination of a registered partnership. In line with this, the Bét. II. identifies two forms of dissolution: *factual dissolution*, where the parties shall outline the reasons for the termination of the relationship and the *mutually agreed dissolution*. Instead of the latter, which involves litigation, the parties can choose to terminate their relationship in *a non-litigation procedure*.

Registered partnerships can be terminated by a public notary if a joint request is made by the registered partners. It is important that the request shall be made without any influence. The public notary who terminates the registered partnership in non-litigious proceedings is entitled to draw up a notarial document. *There is no possibility* for the termination of a registered partnership by a public notary if any of the partners is legally incapacitated or has limited legal capacity, or the registered partnership can be declared invalid or non-existent. In non-litigious proceedings for the termination of a registered partnership before a public notary, *there is no place for proof and certification.* An order approving the agreement of the parties has the same effect as an agreement approved by court, and an *order terminating a registered partnership has the same effect as a court judgment*.[59]

3.2.3. Termination of de facto cohabitation

De facto cohabitation ends with the permanent and irreversible termination of life community, which cannot be linked to court or notarial proceedings. Deleting the existence of cohabitation from the *Register of Cohabitation Declarations* has no constitutive effect, much like registration. Thus, a de facto cohabitation can be found in the register, even if the relationship itself ceases to exist. In such cases, the burden of proof is on the person who claims that the partnership no longer exists, despite registration. The opposite can also happen: that is, a de facto cohabitation relationship may not be found on the cohabitation register, but can still exist.

4. Personal law relations in the different forms of relationships

Loyalty is a fundamental component of all three relationships, and is based morality and social customs rather than legal requirements. It is an unenforceable requirement, and covers both sexual relations and all conduct that can harm the interests of the other party.[60] Accordingly, the requirement of *loyalty* goes beyond addressing sexual disloyalty alone: it implies a *responsible endurance of the relationship*

59 See Sections 36/A. § – 36/D. § in the Act XLV of 2008.

60 In the case of marriage, the law states that loyalty is an obligation on part of both spouses. CC 4:24. § (1)

even in difficult times.[61] *Although only spouses are required to cooperate and support each other according to law,* [62] *this requirement must be an essential feature of all relationships.*[63] Equality between those living in a partnership extends to all the *property and non-property rights* of the partners.

The *equality* of those who living in a partnership covers all the *property and non-property rights of them.* The obligation of *mutual support and solidarity* between partners is a multi-layered requirement that calls for the cooperation of the partners. Joint decisions are important for spouses, and registered and de facto partners, and for the settlement of ancillary issues that arise not only during cohabitation, but also during the dissolution of the partnership. The choice of residence is a legal obligation for spouses.[64] However, partners have to choose their place of residence by mutual consent in a registered partnership and in de facto cohabitation as well.[65]

According to the general rule, the regulations of marriage apply to *registered partnerships as well.*[66] Consequently, personal and property relations of registered partners are mostly the same as those of spouses. There are some *exceptions* and *prohibitions* that are regulated by the Bét. II.

Among the personal relationships of marriage, registered partnership, and de facto partnership, we can find completely different rules about the persons' name after the establishment of a given partnership.

According to the choice of the parties, wearing a "spouse name" after marriage is not only a right, but also a duty.

While *declaring the intention to marry*, the spouses may declare the marital name they wish to bear after marriage. Until the marriage is concluded, the declaration can be changed.[67] According to law, any change of name must be registered in the *marriage register* and in relevant *identity cards and documents.* The wife's name choices can be varied for the period after marriage, and both the wife and husband can keep their own names or add the spouse's family name. In the latter case, the spouses have a *common marital name*.[68] The declaration of the names of spouses may *affect the name of the common child.*

61 Behavior that violates marital loyalty is governed by a special rule under family law. BDT2011. 2554.I.

62 CC 4:24. § (1)-(2)

63 BH 2013.217.

64 CC. 4:26. §

65 All European family laws contain a rule on the common choice of home. Resolution No. R(78) 37 of the Committee of the European Ministers addresses this as well. According to this rule, both spouses have an equal right to choose the common home or place of residence for the family that is separate from that of the other spouse. Kőrös, 2013, pp. 78-79.

66 Bét. II. 3. § (1)

67 At. 20. §

68 CC decision No. 58/2001. (XII. 7.) stipulates that men should also be given the opportunity to express their affiliation with their wives through a name change; At. 47. § (3) This rule was incorporated in the CC as well. CC. 4:27. § (2)

Registered partners are not subject to the naming rules that apply to spouses. Accordingly, they do not make statements around naming before registration.[69] There are no rules around naming in the case of de facto partners, either. Consequently, the relationship has no legal effect in this context. However, this does not mean that registered or de facto partners cannot use each other's names in some form. According to Paragraph 49 of the Act on Register Procedure, Hungarian citizens can seek to modify or change their birth or given names, and the office in question can authorize this request. This authorization process is a traditional administrative procedure, in which the parties can ask to bear each other's names.

5. Property relations in different partnership forms

5.1. Property relations in marriage

5.1.1. Marital community of property as a legal property regime

The Family Law Book of the Civil Code *regulates matrimonial property in a more detailed and nuanced manner* than did the former legislation. The *marital community of property* is the legal regime governing matrimonial property in Hungary. The law differentiates between property used in the daily life of the spouses and the entrepreneurial assets used by them for their occupation and participation in business. It lays down rules concerning their use, management, and right of disposal, as well as the division of the joint property of the spouses. The Act stipulates special rules on these entrepreneurial assets. There are special provisions that govern a *spouse's common house as the family's home*.

Based on the principle of voluntary and free choice of the couple, the Family Law Book emphasizes that the spouses shall settle their property relations by way of a *matrimonial property contract* with content in line with their own intention.[70]

In a matrimonial property contract, current and future spouses can identify the *mechanism* that would govern their property instead of the statutory property system. This would apply from the date specified in the contract and subsist for the duration of their life community. The Civil Code regulates *optional property systems* in addition to the legal matrimonial property regime. The legislature did not consider it necessary to provide detailed regulations for a certain property law system in addition to the characteristic provisions of the given system. Those spouses who wish to conclude a matrimonial property contracts will stipulate the content of such contracts in line with their life situations. The law contains provisions for the community

69 Bét. II. 3. § (3)
70 CC. 4:63. §

of acquisition based on the added value principle (the so-called acquisition property) as well as for the property segregation as an alternative systems of property regimes. These provisions protect a spouse from indebtedness and the abuse of rights by the other spouse. A matrimonial property contract can only settle the property relations of the spouses for the duration of their marriage as the term of the contract ceases with the termination of their marriage. However, this does not mean that the parties cannot address the ownership of the assets acquired before cohabitation or the potential division of property.

If the spouses do not conclude a matrimonial property contract, the *matrimonial property community* is the *legal property system*. The rules of the matrimonial property regime cover property that are not governed by the spouses' matrimonial property contract. Marital community is a special form of *joint ownership*. All property, property values, rights, claims, and debts that the spouses acquire together or separately during the existence of marital cohabitation and that are not the separate property of either of them,[71] and shall be encumbered indivisibly from the date of acquisition or claim. Recent judicial practice has also clearly emphasized that the property within the scope of matrimonial property law is broader than property in the general sense.

The spouses' property can be divided into legally separable sub-properties from the date of acquisition: for the separate property of the spouses and for the joint property. This system does not mean the total aggregation of assets, as the spouses' assets at the beginning of and during the marriage (e.g., gift, inheritance) or from the source remain separate. The following "assets" constitute the *active side of common property*:[72] *things*, money and securities, and *property rights*,[73] such as a usufruct, utilization, rental right, praxis right, etc., and *claims*.[74] Common property also has a *passive side*: burdens of assets of common property, common debts, or interests of common debts. Common property covers debts arising from a contract concluded toward meeting expenses pertaining to such common property. A loan taken out by one of the spouses is joint debt even if it has been used to purchase property belonging to the community property or to promote joint economic activity. Tax, health insurance, pension, and employee contribution tax on the income from the earning activity of the spouses constitute *common debt,* because the income from the earning activity during cohabitation is also common.[75] The joint acquisition of the spouses *refers to an equal acquisition*, so it is presumed that the acquired property falls within the joint ownership of the spouses. However, contrary to the presumption of an equal acquisition, it can be proved that the acquisition ratio differs as a result of a separate investment or expense. According to this rule, the spouse *has a claim in rem* on half

71 CC. 4:37. § (4)
72 CC. 8:1. § (1) 5.
73 BDT2016. 3472. I., BDT2012. 2754., BDT2001. 542., EBH1999.23., BH2000. 395., EBH 2002. 658., BDT2005. 1124. I.
74 CC. 5:14. § (1)-(2).
75 BDT2012. 2754. II., BH1998. 233., BH2013. 154.

the property acquired by either of the spouses and has a *contractual settlement claim* on half the value of the property rights or claims belonging to the joint property. However, (s)he is also obliged to bear the share of joint obligations. The "*indivisibility*" of property emerges from the fact that during the existence of the community of property, the *spouses cannot dispose with their shares independently.* From this point of view, the marital community is a closer link than the general civil law common property, where the owners have the right to dispose of their own shares, within the framework of certain restrictions.[76] The two most important elements of the entry into force of a matrimonial property partnership are the establishment and existence of a *marital bond* and *marital life community.* The statutory property regime applies from the beginning of the cohabitation if the spouses lived together as cohabitants before marriage. The formation of a life community shall be presumed by the conclusion of the marriage.[77] If the parties merely concluded a marriage but did not enter marital life community with each other, matrimonial property will not be established. If the parties enter into marriage without the intention of cohabitation and life community, it becomes a *fictional marriage* that does not create a property community between the parties.

The conceptual elements of life community cannot be found in law because it has been developed by judicial practice. The characteristics of the marital life community include economic, family, and personal aspects. *Economic characteristics* involve running a common household, joint farming, and cooperation to achieve different economic goals. *Family facts include characteristics of belonging together*, such as cohabitation in a shared dwelling, continuation of a regular sex life, joint care and upbringing of the child(ren), other relatives, and themselves, either within the framework of a common household or in any other way, or the existence of an internal, personal, and responsible perseverance (solidarity). If one of the parties lives in a marital life and property community, this precludes the existence of a partnership of cohabitation.[78] However, the Supreme Court has emphasized that the existence of cohabitation is not precluded if one of the parties have a marital bond with another party. The establishment and existence of a de facto cohabitation is not precluded by the fact of a marital or registered partnership, but by the *existence of a connecting life community.*[79]

5.1.2. The right to use the dwelling and spousal maintenance

The property relations of spouses also incorporate the provisions for the settlement of the *right to use the dwelling of former spouses.* The development of special rules for the use, availability, and settlement of spousal housing was necessitated by

76 Kőrös, 2007, pp. 139–145.
77 CC. 4:35. § (1)
78 BH2004. 504.
79 Csűri, 2016, p. 29.

the fact that *in most cases, the spouses' joint residence is the home of the family*, which is also the scene of family life and raising children. Therefore in line with foreign examples, the law protects the right of spouses and their children to use the dwelling, regardless of which of them owns or rents the dwelling as an "asset".

The Civil Code provides for several types of settlement so that divorced spouses are not forced to live together, and seeks to encourage spouses to settle their dwelling use by sharing the joint property, if possible.[80] However, in the case of settlements, it is always a fundamental aspect to investigate which spouse will exercise parental custody over the joint minor children in the future, and about that it is exclusive or joint custody.[81]

Spousal maintenance is a family law institution that characterizes both the personal and property relations between spouses. It arises from the basic institutional nature of marriage that the spouses' liability toward each other does not cease completely after divorce. Therefore, one is obliged to provide financial care for the former spouse if (s)he needs maintenance. The maintenance claim and obligation of the spouses are *mutual*: both the (ex) husband and the (ex) wife are entitled to and liable for it. The *basis* of maintenance is a valid marriage.

According to the Hungarian legal literature, spousal maintenance obligation has three stages.[82]

The first stage involves providing support in the course of marital life, where the spouses shall not only help each other in spiritual and sensual ways,[83] but also in economic ways. The second stage starts with the termination of life community and ends with the dissolution of marriage. The third stage comprises providing maintenance for the ex-spouse after such dissolution. The Civil Code links the second and third stages by granting the same subjective right of maintenance for both the separated spouse in need and the former spouse. *The duration of the marriage is irrelevant* for maintenance claims. However, if the life community—and not the marriage community—lasted for less than a year, and no child was born out of the marriage, the former spouse is entitled to maintenance for the duration of the life community. In special cases, the court may order the provision of maintenance for a longer period.[84] The ideological basis is that marriage is considered a long-lasting life community by the legislature and society. Thus, short cohabitation cannot result in all legal effects that a long-lasting marriage can produce.

The conditions for spousal maintenance are as follows: if the spouse is unable to support himself/herself for reasons beyond his/her control and the lack of undeserving the maintenance on the side of the entitled party and the ability to provide maintenance on the side of the obliged party. The Civil Code has limited

80 Justification under the Civil Code.
81 See in detail: CC 4:76. §-4:85. §.
82 Lábady, 2014, pp. 30.
83 CC. 4:24. §.
84 CC. 4:29. § (3).

the enforcement of a maintenance claim to five years from the date of termination of life community, indicating that if the need arises five years after the dissolution of cohabitation, maintenance may be provided only in exceptional circumstances. Therefore, the *date on which the former spouse's need arises is important*: if the need occurred within five years of the termination of life community, and not after the dissolution of marriage, the maintenance can be claimed later, *even after five years from separation*. For example, the long-time re-establishment of life community after the dissolution of marriage can be an exceptional circumstance.

5.1.3. The spouses' right to intestate succession

The condition for the intestate inheritance of a surviving spouse is a *valid marriage* and the *existence of life community* with the successor and his/her spouse at the time of succession.[85] In the absence of a spouse, his/her descendants do not have a right of inheritance. A widow is entitled to *half the matrimonial property* in line with the rules provided by the matrimonial property regime, and not as an inheritance. Therefore, only the other half of the spouses' common or separate property belongs to the testator's estate, which does not qualify as lineal property.[86] The CC. divides the property into two parts: the family dwelling, which is used together with the testator, including furnishings and appliances, and the rest of the property. The widow *inherits life-long usufruct* on the dwelling and inherits *one share property which is equivalent with the share of a child* from the property under the second category. With this, the surviving spouse can use the family dwelling. The law does not provide a subjective right to the descendants to restrict the usufruct right of the widow. In the rest of the estate, such as cash, shares, bank deposits, stocks, cars, and other real estate, the law creates a joint property between the surviving spouse and the children of the successor in such a way that the widow owns one share which is equivalent with the share of a child from the property with the children. This situation can create serious conflicts when the successor's widow and her children, and children from a previous marriage (relationship), are forced to resolve disputes over joint ownership or to terminate the joint ownership entirely. If there is no descendant, the successor's spouse inherits the property together with the parents of the successor. The CC. divides the estate into two, namely the family dwelling that is used together with the successor—if it is not the subject of lineal succession—including furnishings and appliances, and other property. The property named in the first category is succeeded by the *spouse of the* successor, as the law intends to protect the former life circumstances of the widow even if there are no children. In the second category,

85 CC. 7:62. §.

86 The purpose of lineal succession is to ensure that property in the estate of the successor who has died without a will and without children and acquired that property from their ascending relatives free of charge should flow back to the branch from which it originated and not to the spouse that did nothing toward acquiring it. CC. 7:67. §-7:71. §.

half the estate is inherited by the successor's spouse, and the other half by the testator's parents in equal shares, so that the parents inherit in ¼ – ¼ proportion.[87] If a parent is debarred from succession, *the other parent and the successor's spouse shall succeed in equal measure.* If there is no descendant or parent, or if they are excluded from succession, *the surviving spouse shall receive the entire estate*. In this case, only the rules on lineal succession can restrict the sole succession of the spouse.

5.2. Property relations of registered partners

According to Section 3. (1) of the Bét. II., *the rules on marriage shall apply to registered partners as* well, with the exceptions laid down in the Act. Therefore, registered partners are entitled to the same rights and obligations in personal and property relations as are spouses. Consequently, all the above mentioned rules concerning the matrimonial property regime, the right to dwelling, and intestate succession shall apply to registered partners as well.[88]

5.3. Property relations of de facto partners

5.3.1. The legal property regime of de facto cohabitants

The property law regulations of de facto partners—similar to the concept of cohabitation—are defined under the Obligation Law Book of the Civil Code. The CC. aims to guarantee the private autonomy of the parties and consequently strives to settle property issues primarily within the framework of a *cohabitation property contract,* which can be concluded both before and during the establishment of the cohabitation relationship and lasts until the end of such cohabitation. The rules concerning matrimonial property contracts apply to the content, amendment, and termination of cohabitation property contracts.[89]

If the parties do not wish to enter into a property contract with each other, they are subject to the *provisions of the legal property regime*. The Civil Code of 1959 indicated that the spouses would *acquire joint ownership in proportion to their involvement during their cohabitation*.[90] There was also a uniform judicial practice in that the presumption of joint *acquisition prevailed in respect of an increase in wealth that occurred during the tenure of the cohabitation*.[91] However, the equal acquisition of cohabitants was not a presumption, but only a supplementary rule that could apply if the real cost of acquisition could not be established after an evidence procedure. The Civil Code of 2013 placed the legal property system of cohabitants on new ground,

87 CC. 7:60. §.
88 Kőrös, Kőrös 2013a, p. 7.
89 Kriston, 2014, pp. 35–40.
90 Szeibert, 2012, pp. 173–189.
91 BH1996. 258., BH2007. 122. Hegedűs, 2008, pp. 11–19.

wherein cohabitants began to be *considered independent in their property acquisitions* during their relationship, but after the termination of the relationship, either party can demand a *share in the growth in assets*. Assets constituting separate property of a given partner shall not be considered a part of the *growth in assets* (e.g., property existing at the time of the establishment of the partnership; property inherited or gifted by the spouse during the life of the cohabitation, and/or free benefit). While dividing the growth in assets, the governing principle is the acquisition of property. Thus, partners are entitled to a share in the jointly acquired property primarily in kind, in *proportion to their contribution*. Determining the proportion of participation is left to the courts to handle. This creates serious difficulties around proof in practice. According to equity and the need to protect the weaker party, *the work done in the household and child-rearing, and in the other partner's enterprise shall be construed as a contribution toward acquisition*. If the ratio of contribution cannot be determined, it shall be considered equal, unless this would constitute an inequitable financial loss in respect of either partner. The legal property system between cohabitants can be considered specific, however, it *bears many similarities* with the *property acquisition regime* that can be concluded between spouses by contract.[92]

5.3.2. The right to use the dwelling and maintenance

The property relations cover the provision of *the right to use the dwelling*, which is called the legal effect of the de facto cohabitation relationship.[93] The development of special rules in this area was necessary because *in most cases the joint house of the cohabitants also refers to the home of the family,* which is an important component of family life and the upbringing of children. Therefore, in the event of the termination of a de facto cohabitation, the legal provisions on the use of a dwelling can only be applied if such a cohabitation has lasted for at least one year and at least one child has been born from this relationship. Otherwise, the rules of the law governing the use of a dwelling shall not apply to separate cohabitants.

The principle of the best interests of the child also has paramount importance in resolving issues concerning the dwelling, because *the joint minor child's right to use the house* should be taken into account.[94] The Supreme Court stated that dwelling issues of cohabitants are covered by independent principles of family law, namely the principles of equity and the protection of the weaker party.[95] Another key impact of a cohabitation relationship is that either partner is entitled to demand *maintenance* from the other if they are unable to support themselves for reasons beyond their control *if their civil partnership existed for at least one year and a child was born from it.* The conditions for the maintenance of a cohabitant are the same as those for

92 CC. 4:71. § (1).
93 CC. 4:92. §-4:95. §.
94 Szeibert, 2013, pp. 147–158.
95 BH2021. 11.

the maintenance of a former spouse, namely the needs of the party, the absence of fault, the lack of unworthiness, and the capacity on the obligatory side. The former partner can claim maintenance for *one year* from the end of cohabitation. If the former partner is in need of support after one year following the termination of the civil partnership, maintenance may be provided in exceptional cases. The ex-cohabitant is entitled to maintenance just as a separated spouse and ex-spouse are. However, the cohabitant is not obliged to support his or her former partner if doing so would jeopardize the maintenance of their children or themselves. The common rules of maintenance (for example, the amount, its performance, etc.) will apply. However, the right to maintenance ceases if the entitled partner establishes a new de facto cohabitation or registered partnership or marriage. *De facto partners do not have an intestate right to inherit.* They can only inherit after each other if they make a will to such effect.

6. Legally recognized forms of the establishment of descendant family relationships

Part Four of the Family Law Book of the Civil Code addresses the establishment and termination of *kinship* and its legal consequences, such as parental responsibility, custody, and child support. It includes family relationships established by adoption, as adoption provides the adopted child with full family status in the family of the adopter. In addition to the biological fact of descent and the adoption based on an act of public authority, there are also the so-called *actual family relationships*, such as the family relationship between the stepparent and the stepchild, foster parent and foster child, or the child's placement with a family. These relationships are closely aligned with the law governing kinship. Although the Civil Code does not define the concept of "kinship," it mentions two equivalent institutions of kinship, namely *blood descent* and *adoption* in connection with the kinship relationship in a direct line. The Civil Code states that an *adoptee receives legal status as the adoptive parent's child*.[96] From the perspective of the child, therefore, no distinction can be made on the mode of descent—that is, by blood or adoption. *A child cannot be discriminated* against based on how the parental status was established, that is, whether he/she was born out of marriage, cohabitation, or occasional sexual intercourse, or whether he/she was raised and cared for by blood or adoptive parents. This applies to the family law consequences of the parent-child relationship, and to all other legal effects (for example, the child is the legal heir not only of the man declared to be his father, but also of the relatives of his father). However, we should be aware that the Basic Law of Hungary does not recognize de facto cohabitation relationships as

96 CC 4:119. § (1) and CC. 4:132. § (1).

families deserving of constitutional protection. As a result of the dual regulation of the Civil Code, persons in de facto cohabitation relationships have far fewer rights both during and after the cohabitation relationship as spouses. This fact—not directly but indirectly—affects children born out of a de facto cohabitation.

Kinship based on descent is established by legal facts specified by law, such as marriage, a reproduction procedure, and an acknowledgment of paternity, which do not necessarily coincide with the biological fact of descent. Kinship based on descent as "legal parentage" is primarily based on presumptions. However, the law must seek to bring legal facts and circumstances underlying a relationship in direct line—that is, maternity or paternity—"as closely as possible to the real biological descent." However, the *legal relationship between the parent and child* can be established not by biological origin but by a form recognized by law. Therefore, for example, the presumption of paternity based on marriage may be established between a father and child who are otherwise not in a blood relationship.

6.1. Paternal presumptions

The importance of the family status of a child can be expressed in the *interest of a normal family life*. The orderliness of the family status of a child provides a basis for the child to live in a legally recognized family relationship, which can be regarded as *legally complete* if both paternal and maternal status are occupied in the child-parent relationship. From a social standpoint, however, it is only considered complete if the people who gave birth to the child are established as the father and mother of the child and are registered in the birth register.[97] The CC. lists the legal facts generating paternity in the order in which they are applied:

- the marriage bond of the mother,
- special procedures for the purpose of human reproduction in the case of de facto partners,
- the acknowledgment of paternity,
- the determination of paternity by court decision.

If paternity is established by a presumption that is higher up in the order presented above, subsequent presumptions cannot be applied.[98] It is an exception under the general rule, so if the presumed time of conception—i.e. 300 days—did not lapse between the time when the mother's previous marriage was terminated and the date when the child was born from a human reproduction procedure. In this case, it is not the spouse in the first place, but the de facto partner of the mother who is considered the child's father. The same situation arises if after successful reproduction between de facto cohabitants, the mother enters into marriage with another man before the birth of the child. This marriage also does not invoke the presumption of paternity in

97 Csiky, 1973, p. 13.
98 Szeibert, 2013, p. 30.

respect of her husband.[99] The system of presumptions of paternity remains *uniform*, that is, they have the *same legal consequences* regardless of whether the child was born in or out of wedlock.

a) Presumption of paternity based on marriage. The presumption of paternity based on marriage is established *automatically.* The man with whom the mother lived in wedlock from the alleged time of conception of the child until the birth of the child—that is, 300 days before the birth of the child—or at least during a part of this period, shall be considered the father of the child.[100] For the presumption of paternity based on marriage, the conclusion of the marriage has legal effect. It does not matter whether the spouses actually lived together or whether the mother had sexual contact with her husband alone. Therefore, the husband of the mother is the father of the child even if the mother is already living with another man—without terminating her previous marriage—and the child did in fact originate from the mother's sexual contact with such other man. The ipso jure establishment of the paternity of the already "abandoned" husband puts the biological father in a difficult position, as the paternal status is occupied. This forms a legal obstacle to the acknowledgment of his paternity. However, the CC allows a joint request to be made by the presumed father, the mother, and the man who wishes to make a fully enforceable acknowledgment of paternity to declare that he is the father of the child; upon receiving this, the court shall establish, in non-contentious proceedings, that the father of the child is not the mother's husband or former husband.[101] The CC. allows a court, in a non-litigious proceeding, to declare, at the joint request of a presumed father, a mother, and a man seeking full recognition of a child through paternal acknowledgment, that the child was not born from the mother's husband or ex-husband's father. However, the issue of paternity must be settled in the same procedure by a full-fledged paternity declaration. In the same action, paternity shall be established by means of a fully enforceable acknowledgment.[102] The law solves the problem of *conflicting presumptions of paternity based on two marriages* between the presumed conception date and birth of the child. The presumption of paternity is linked only to the newer marriage. Based on a previous valid or invalid marriage, only an *underlying presumption of paternity* can be established. If the presumption of paternity against the new husband is rebutted, the presumption of paternity of the former husband will be resurrected.

b) Presumption of paternity based on a special procedure for the sake of reproduction. A special procedure for reproduction ("reproduction procedure") can be carried out by *persons living in marriage* or by a *heterosexual couple living in a de facto cohabitation*, if it is unlikely for a child to be conceived in a natural way from the relationship because of the infertility of either party. According to the law, the

99 CC. 4:100. § (2)–(3).
100 CC. 4:99. §.
101 Kun, 2018, pp. 38–40.
102 CC. 4:114. §.

reproduction procedure can only be carried out at the joint request of the de facto partner in a private document containing conclusive evidence, based on which the applicants accept that the family status of their child born this way is exactly the same as that of a biological child.[103] However, in the case of de facto cohabitation, a reproduction procedure may be carried out only if *none of the de facto cohabitants has a marital relationship*. The reason for this is that the paternal status in case of a child born from a reproduction procedure between spouses is based on the marriage of the mother; therefore, such a procedure creates paternal status only in case of de facto partners. Thus, *Act CLIV of 1997 on Healthcare (Healthcare Act)* emphasizes that neither de facto partner can have a marital relationship during the reproduction procedure.[104] However, the *marriage of the parties may be terminated after the fertilization of the female gamete during the reproductive process*, for example, with the death of the husband. An embryo that came into existence outside the body is entitled to the status of a fetus from the date of implantation.[105] The determination of paternal status in such cases is not always clear.

In sum, the reproductive process *gives rise to a presumption of paternity only* if the applicants are unmarried partners of different sex, none of the applicants are married, the male member between the partners is involved in the reproductive process, and the child's origin is a consequence of the reproductive process.[106] A *single woman* can undergo a reproductive process if, because of her age or health (infertility), it is unlikely for her to have a child naturally.[107]

c) Presumption of paternity based on the acknowledgment of paternity. If the mother was not married between the point of conception and the date of birth of the child and did not participate in a reproduction procedure invoking the presumption of paternity, or if the presumption of paternity was invoked and rebutted, the man who admitted in a fully enforceable acknowledgment of paternity that he is the father of the child shall be considered the father. An acknowledgment of paternity can be made from the point of conception by a man who is at least 16 years older than the child. An acknowledgment of paternity shall be construed fully enforceable with the consent of the mother, the child's legal representative, and the child, if he/she is over the age of 14 years. The acknowledgment and consent shall be executed in a statement made before the registrar, court, guardian authority or shall be executed in a notarial document.[108] Once the statement is signed, the acknowledgment of paternity cannot be withdrawn.[109]

103 Somfai, 2006, p. 11.
104 Healthcare Act. 167. § (1).
105 Healthcare Act. 179. § (3).
106 CC. 4:100. §.
107 Healthcare Act. 167. § (4).
108 Varga, 2020, p. 29.
109 CC 4:101–102. §.

d) Presumption of paternity based on a court decision. The law considers the judicial determination of paternity an irrebuttable presumption. It rejects the *possibility* that, after the court has "thoroughly considered all the circumstances" to infer paternity, another lawsuit could be filed to prove that it is "impossible" for the child to originate from the presumed father. Paternity may be established through a judicial process, if a child's father cannot be identified based on the mother's marriage, reproduction procedure, or fully enforceable acknowledgment of paternity. The judicial determination of paternity is not possible in the case of a *donor* providing a gamete or embryo if the mother became pregnant through a reproductive procedure.

In practice, the presumption of paternity is established by a court decision when it is necessary to determine the paternity of a man who has conceived the child but he does not wish to undertake paternity, or when the mother opposes the settlement of paternal status for some reason and does not consent to the fully enforceable acknowledgment of the paternity of the father. The establishment of the presumption of paternity by a court can also occur where the age difference is less than 16 years between the child and the man asserting paternity, which is a condition for the acknowledgment of paternity. In the event of the legal incapacity of the father, there is no possibility of acknowledging or establishing paternity in any other way. The establishment of the presumption of paternity by a court requires *double proof*: it must be proven that the man had engaged in sexual intercourse with the mother at the time of conception and, upon careful consideration of all circumstances (based on physiological tests), there are reasonable grounds to consider that the child was conceived as a result of such sexual contact.[110]

The law continues to provide the opportunity for a man interested in a lawsuit to *recognize the child with* a *fully enforceable acknowledgment of paternity during the paternity suit*.[111] He must be warned of this in the first hearing and after the evidentiary procedure has taken place. In paternity and other lawsuits that aim to determine the origins of a child, there is a significant individual and social interest that the child can obtain from a legal parent-child relationship with the biological father. Judicial practice places great emphasis on the fact that the establishment of origin (paternity) is based on duly substantiated facts and the results of *scientific studies*.[112]

6.2. The fact of maternity

For a long time, maternal status was not the subject of debate: the law treated motherhood—going back to Roman law (*"mater semper certa est"*)—as a fact and not as a presumption. However, the parental status and biological origin of the child has been revalued since genetic and foster motherhood (parenthood) have been

110 CC. 4:103. §.
111 Civil Procedure Act 468. §.
112 Mécsné, 2000, pp. 425–429.

separated in several cases during reproductive procedures, such as where donor gametes or donated embryos are used.[113] The Civil Code chooses between the biological and genetic mothers in accordance with international practice and considers *the woman who gave birth the mother.* This new rule is important not only from the standpoint of reproductive procedures that are permitted under current law, but also crucial from the standpoint of *surrogacy (nursing pregnancy)*, because, as a result of that provision, a woman who has asked another woman to carry an embryo derived from her ovum cannot be considered the mother.[114] In Hungary, neither surrogacy nor nurse pregnancy is allowed.

Although the Civil Code does not regulate the *recognition of maternity*, it may be appropriate in case of the "emptiness" of maternal status (for example, if the mother of an exposed or found child demands the child) if the mother demands the child within six weeks and can prove beyond doubt that she is the real, biological mother of the child. If the identity of the mother of the child is in dispute or cannot be established, this question can only be clarified in a *maternity lawsuit* in keeping with the Civil Code. The claim seeks to award maternity status to the person so designated. This request can be issued on two grounds: one, if the *maternity position is vacant* (for example, the mother demands that a child be placed in an incubator or be found) and, the other, where the plaintiff seeks to establish that a person shown in the registry of births as the mother is not the one who gave birth to the child (*action for a negative declaration*) and that the mother is the person he/she designates (*action for a positive declaration*) thus. In the event of erroneous registration (for example, the mother was registered based on a stolen identity card or the children were exchanged at the hospital), the Civil Code considers maternity lawsuits *secondary means,* because the parties should first try to remedy the wrong entry through an administrative procedure. A lawsuit can be initiated only if this fails.[115]

6.3. Descendant relationship through adoption

The legal sources on adoption are very diverse.[116] Under the Civil Code, the main purpose of adoption is to ensure that *minors grow up in a family* when their biological parents are unable to help them do so. Adoption refers to the admission of a person outside the family as a full member of the family. The purpose of adoption differs in spousal and kinship contexts, and in other contexts, where a child is adopted by a person outside the family.[117] The Civil Code states that "family relationship in direct

113 Herczog, 2020, p. 46.
114 Navratyil, 2012. pp. 142–145; Szabó-Tasi, 2012, p. 14.
115 Barzó, 2017, pp. 318–321.
116 In addition to the Family Law Book of the Civil Code, the Succession Law Book also contains the inheritance effects of adoption. The Act on the Protection of Children (Act XXXI of 1997. Gyvt.), and partly the Guardianship Order (149/1997. (IX. 10.) Order) also contains regulations.
117 Katonáné Pehr, 2007, pp. 447–450.

line between parent and child is established by *descent* or by *way of adoption*. A child shall be related to all his/her parent's relatives upon descent or adoption."[118]

Adoption has two main objectives: to establish a *family and kinship relationships* between the adopter(s) and their relatives, and between the adoptee and their descendants; and to ensure that a *minor is raised in a family* where the proper development of his/her physical, moral and intellect is ensured.[119] For adoption, identical petitions should be submitted by both a person who wishes to assume the parenting responsibility of a child and that child's legal representative, together with the consent of the child's parents and the spouse of the adoptive parent. A minor of limited legal capacity over the age of 14 years may be adopted only with his/her consent. A minor of sound mind under the age of 14 years shall be heard and his/her opinion shall be taken into consideration wherever appropriate. In the adoption process, efforts should be made to ensure a degree of continuity in the child's upbringing, with particular regard for his/her *family ties, nationality, religion, mother tongue, and cultural background*. In Hungary, adoption shall be authorized by the guardian if the legal requirements are met and if it is deemed to be in the child's best interests.[120] As a general rule a *child may only be adopted by a married couple*, except where the child is adopted by a relative or the parent's spouse.[121] Registered partners and de facto cohabitants cannot adopt children. Consequently, the joint adoption of a child by same-sex partners is not allowed. This change entered into force March 1, 2021 onward. Based on the previous regulation, joint adoption was possible only for spouses, but the mode of adoption was essentially the same for spouses and single adopters. Single adoption resulted in the same legal consequence as when only one parent of a child was related by descent. The Civil Code previously established the priority of adoption by spouses. However, this clause was overwritten by an amendment with the legislative justification that a child should only be adopted by married couples so that the child could be raised in a family. An adoptive parent must be at least 25 years of age with legal capacity at the time of adoption, and must be the child's senior by *at least 16 to 45 years*; further, a person is *considered suitable* to adopt a child based on his/her personality and other circumstances.[122] Where an application for the adoption of a child over three years of age is submitted, in the best interests of the child, adoption may be authorized even if the age difference between the adoptive parent and the child is no more than 50 years. In the case of adoption by a relative or spouse, the age difference requirement does not apply. In the case of adoption as a common child, the age and age difference requirement set out in the law shall be satisfied by either of the adoptive parents. If the adoptees are siblings, the age of the older child shall be taken into consideration. Any person

118 CC 4:97. § (1)-(2).
119 Kőrös, 2008, pp. 2–3.
120 CC 4:120. § (1)-(5).
121 Incorporated to the CC by the Act CLXV of 2020.
122 Katonáné Pehr, 2020, pp. 1–8.

whose parental supervision has been terminated by court order, or who has been excluded from public affairs, and whose child is under foster care may not adopt a child. In cases of exceptional circumstances specified by law, *suitability for adoption of a person wishing to assume the parenting of a child alone* may be established in accordance with a relevant government decree, by completing the procedure defined therein.[123] At present, however, it is not possible to know how the exception will work in practice.

7. Legal framework of the parent-child relationship

Minor children are under parental custody or guardianship.[124] It clearly follows from this fact that it is legally impossible for a child not to have a parent with parental custody or a guardian. In the case of a child born within a marriage, parental custody is established in both the paternal and maternal positions by birth, that is, "ipso jure" by virtue of law. Apart from the exceptional rules on adoption, parental custody cannot be waived or resigned, and parental custody of a minor child can only be terminated in cases specified by law and by court. The *rights and obligations arising out of parental custody* under the law are as follows: naming the child, care, training and instruction of the child, selecting the home and residence of the child, management of the assets of the child, legal representation of the child, right to nominate a guardian, and the right to be excluded from guardianship. In addition to parental custody, the Family Protection Act[125] defines the rights and obligations of the parent as follows. The *mother* and *father* have the *same obligations and rights* based on parental custody. A parent is obliged and entitled to take care of his or her minor child in the family, in order to bring him/her up responsibly, and to ensure the conditions necessary for his/her physical, mental, spiritual, and moral development and access to education and healthcare. *It is the duty of the parent of a minor child in particular*

- to respect the human dignity of the child,
- to cooperate with the child,
- to inform the child of issues concerning him/her—according to his/her age and development and to take his/her opinion into account,
- to provide guidance, advice, and assistance for the exercise of the child's rights,
- to take necessary measures to enforce the rights of the child,

123 CC 4:121. § (1)-(4).
124 CC 4:146. § (1).
125 Act CCXI of 2011 on the Protection of Families (Csvt.).

- to cooperate with persons and bodies involved in the care of the child and with the authorities,
- to take care of the child in accordance with the provisions of a separate law when the child is in a public place or club at night.

Act LXXIX of 2021, which was enacted in June 2021, contains several child protection rules in addition to stricter action against pedophile offenders. According to the Act, pornography and content that depicts sexuality self-centered, or promotes deviation from birth gender identity, gender reassignment, and homosexuality is prohibited to be available to anyone under the age of eighteen.[126] Anyone under the age of 18 years cannot be made available for any advertisement that depicts sexuality self-centered, or that promotes deviation from the gender identity assigned at birth gender identity, gender reassignment, and homosexuality.[127] With the amendment of the National Public Education Act, school sessions on sexual culture, life, sexual orientation and sexual development for students should not aim at the deviation from birth gender identity, gender reassignment, and homosexuality.[128] A person or organization other than the employee of the educational institution, in a teaching position, and the school health service specialist in the institution, and state body with a cooperation agreement concluded with the institution, can conduct a school session on sexual development, the harmful effects of drug use, the dangers of the Internet, and other physical and mental health improvements only within the limits set by law.[129]

A parent is obliged to use the *support received for the child, toward caring for and raising the child*. They are obliged to maintain the child in a manner specified by law, with the exceptions specified by law applicable; and they are obliged to maintain a minor child even by limiting their own maintenance.[130] The Civil Code determines the principles governing the exercise of custody rights by parents, which is decisive for the parent-child relationship, with due respect for the priority of the best interests of the minor.

In the context of parental custody, *cooperation between parents* is essential to promote the proper physical, mental, and moral development of the child, regardless of whether the parents live together or separately. However, the obligation to cooperate does not always and in all respects constitute a right of consent or joint decision if *only one parent exercises parental custody* of the joint minor child(ren) after the separation of the parents. In such cases, the parent living separate and apart shall exercise the joint right of decision only in respect of the major issues

126 Section 3/A.§ and 6/A.§ of the Act XXXI of 1997 on the protection of children and the guardianship administration.

127 Section 8 (1a) of the Act XLVII of 2008 on the basic requirements and limits of economic advertisement; Section 5/A.§ of the Act CCXI of 2011 on the protection of families.

128 Section 9 (12) of the Act CXC of 2011 on the National Public Education Act.

129 Section 9/A of the Act CXC of 2011 on the National Public Education Act.

130 Csvt. 9-10. §.

pertaining to the child's well-being.[131] In other contexts, the parent raising the child is only obliged to inform the separated parent of the child's development, state of health, and education.[132] The Civil Code also enables the court to delegate certain rights to the parent living separately and apart from the child in connection with caring for and raising the child. In such cases, the parent authorized by the court exercises exclusive parental custody; however, the parent living separately and apart shall inform the parent having the right of custody of such activities.[133] The Civil Code emphasizes the *cooperation obligation* of the *parent having the right of custody and the parent living separately and apart from the child* in the interest of the child's balanced development, with due respect for and without any disturbance to the family life of each other.[134]

As part of parenting responsibilities, the parent must educate the minor child with general moral norms and shape the minor's character, values, and habits in accordance with the moral requirements accepted by society. Respect for life and human dignity is the central element of moral education and the core of socialization and emotional intelligence of a minor child. These aspects are violated if the caretaker of the minor does not do his or her best to teach the minor these values, and thus fails to shape the child's emotional stability, and mental balance and health. The caretaker is responsible for the imputable failure to comply with these obligations.[135]

One of the most important principles in family law is the equality of spouses.[136] However, the legislature also considered it important to place special emphasis on the *requirement of equality* with respect to the parents. Another important principle in the exercise of parental custody is the *involvement of a child in matters affecting him or her.* The parents shall inform their child concerning all decisions that pertain to the child, and shall permit the child of sound mind to express his/her views before a decision is made, and to partake in making the decision together with his/her parents in cases defined by law. The parents shall take the child's opinion into account, giving due weight, consistent with the child's age and degree of maturity.[137] The Civil Code also obliges the court to hear both parents during the proceedings—except where unavoidable impediments exist—and to *inform the child of sound mind of the possibility of making a statement*. If the child requests to be heard or if the court considers it justified in the absence of an explicit request from the child, the court

131 Major issues pertaining to the child's well-being can include naming a minor child and changing the child's name, relocation of the child's residence to a place other than one where his/her parents live or abroad for long-term residence or for the purpose of settlement, changing the child's citizenship, and decisions relating to the schooling or career path of the child. CC 4:175. §.

132 CC 4:174. §.

133 CC 4:176. §.

134 CC 4:173. §.

135 BDT2010. 2364.

136 CC 4:3. §.

137 CC 4:148. §. See also: Darnót, 2017, p. 24; Gyengéné, 2018, pp. 2–9.

shall hear the child directly or through an expert. If the child is aged over 14 years, the decision relating to custody and his/her placement can be made upon the child's agreement, except[138] when the child's choice is considered to jeopardize his/her development.[139] In addition to the principles for the exercise of parental custody, the Civil Code regulates, in several places, respect for the views of the minor of sound mind.[140]

However, the assessment of whether a *child has sound mind* is extremely complex. Can it be linked to a specific age, and if not, is there, for example, a psychological method by which the presence or absence of sound mind can be determined? According to the legal source (Gyer.)[141], a child of sound mind is a minor who, in accordance with his or her age, intellectual and emotional development, can *understand the essential content* and *see the expected consequences* of the facts and decisions concerning him or her.[142] Despite this definition, it is a serious problem in practice to assess the sound mind of a child involved in the proceedings, which is often not available to the court or guardian authority. Based on the analysis of specific court and guardian authority cases, it can be seen that in almost all cases, the court hears a child over the age of 14 years with binding force, and in all other cases, it entrusts this task to a specialist, that is, a forensic psychologist.[143] Even without psychological knowledge, it is obvious that there are issues on which a minor before the age of 14 years—even at the age of 6 or 7 years—can give a meaningful opinion, and there are also issues on which even an elder minor cannot be considered competent.[144] Children can usually be heard in court proceedings with respect to parental custody from the age of 3 years onward, or sometimes even before that, depending on their intellectual development. According to established judicial practice, they are optimally heard with the involvement of a psychologist until the age of about 10 years.[145]

The exercise of parental custody may be restricted or revoked by a court or other authority only in exceptional cases specified by law, and only to the extent strictly necessary to safeguard the best interests of the child(ren). However, the *restriction on parental custody used for the protection of child(ren)* must always be proportionate to the seriousness of the emergency or the harm proven. However, in practice, the assessment of the degree of vulnerability poses a serious dilemma in all cases.[146]

138 The text of the Act LXII. of 2021 with effect from 1 August 2021.
139 CC 4:171. § (4).
140 BH2019. 298., CC 2:14. § (3); CC 4:120. § (2); CC 4:181. § (1)-(2); CC 4:228. §
141 Government Decree 149/1997. (IX. 10.) on the guardianship authorities, child protection and guardianship procedure.
142 Gyer. 2. § a); Ádámkó, 2015, pp. 10–11.
143 Bucsi, 2011, p. 20.
144 Szeibert, 2019, p. 3.
145 Fehérné, 2016, p. 9.
146 Mentuszné, 2019, p. 22.

8. Legal protection and strengthening of a child's family relationships

The Civil Code attaches great importance to the child's *"direct family relationships"*, that is, it seeks to ensure the rights of those who are de facto involved in the child's care and upbringing and those who provide or have been provided with personal and environmental stability for a long time, even in the absence of blood ties. This is reflected in the rule that entitles a child's *stepparent or foster parent*—with the consent of the parent exercising parental custody—to exercise certain parental custody rights in the context of care and upbringing of the child.[147] They can, for example, take part in meetings held at the child's school, go to kindergarten or school for the child, take them to various school events, special classes etc. A person with an actual family relationship with the child is usually the new *spouse (stepparent)* or *de facto partner (foster parent)* of the parent exercising parental custody, who is often an active participant in the child's upbringing and care. A *foster parent* is one who permanently and for a long period of time takes care of a minor child in his or her own household, and he or she is not the biological, adoptive, or stepparent of the child. A foster parent can be the *cohabitant* of the biological parent who takes care of the child in their own household, but also the *third person with whom*—if he or she requested—*the court has placed the child*. This is not altered by the fact that this person must be appointed as the guardian of the child. However, the person who has actual contact with the child may be the new spouse or de facto cohabitant, or *the grandparent, aunt, sibling of the parent, or godparent*. The importance of the actual family relationship is strengthened by the provision in the Civil Code, which expands the scope of the right to maintain contact with the child to the *stepparent, foster parent*, former guardian, and the parent whose presumption of paternity for the child has been overturned by a court, provided that the child concerned was raised in their household for a long period of time. The sudden interruption of the intimate relationship between the child and the man he loves as a father can seriously damage the spiritual development and emotional security of the child. This may be particularly important in cases where no one takes the place of the father in the life of the child after the presumption of paternity has been rebutted.[148]

The Civil Code regulates the right and duty of maintenance of non-biological family members. Although the person entitled to maintenance may claim it primarily from his or her immediate relatives, the maintenance of stepchildren, stepparents, and foster parents is an exception to this provision.[149] The *spouse* shall provide maintenance in his/her home to his/her spouse's dependent minor child *(stepchild)* who was *brought by his/her spouse to their common home with his/her consent.* If the

147 CC. 4:154. §.
148 CC. 4:113. § (1) b).
149 CC. 4:198. § and CC 4:199. §.

stepparent has their own children, the entitlement for maintenance shall accrue to the biological children and stepchildren in the same line. However, if the stepparent has objected to the child being brought into the common household, he or she is not obliged to provide maintenance, which means that the child must be maintained exclusively by his or her biological parents. In such cases, the child is usually taken care of by his or her other biological parent.[150] The entitlement of the stepparent to maintenance is *conditional* as it depends on whether the stepparent has previously taken care of the maintenance of the stepchild. As reciprocity is the basis for the maintenance of the stepparent, he or she *cannot become unworthy of maintenance later*. His or her behavior toward the child can only be examined during the infancy of the child and the time spent in the common household, from the perspective of care for the child. The *duration and extent of maintenance* for a stepparent *does not depend* on the duration and extent of maintenance for the stepchild.

Maintenance of stepchildren is limited to maintenance in kind and only lasts until the *termination of the cohabitation (marriage)* of the stepparent and biological parent. A stepparent who lives separately from the child is no longer liable for maintenance in any form. However, the maintenance obligation of the stepparent does not affect the obligation of the biological parent to pay maintenance, that is, the stepparent's maintenance obligation is *ancillary* to that of the biological parent. In a *de facto cohabitation*, the consensual upbringing of a child in a common household does not give rise to a maintenance obligation of the cohabitant of the biological parent as a foster parent. In case of voluntary performance, if the spouse of the biological parent continues to take care of the child of his or her partner *(foster child)* in his or her own household for a long period of time, this behavior—as a foster parent—can give rise to a maintenance claim against the foster child, based on the principle of reciprocity.[151] Therefore, it must always be examined whether the activities of the foster parent were limited only to the care of the child or if he or she also contributed to the maintenance of the child. If, for example the guardian, as a foster parent, has provided maintenance for a longer period of time at his own expense, he may claim parental maintenance from his foster child. As reciprocity is also the basis of the right of the foster parent to maintenance, this also precludes the possibility of unworthiness in the case of a foster parent.[152] In light of the foregoing, a foster parent who has cared for a child in the context of child protection care for remuneration cannot claim maintenance. However, the situation is different for a *registered partner*, as Points a) and b) of Section 3(1) of the Bét. II. state that the rules on marriage shall apply *mutatis mutandis* to the registered partnership and the rules on the spouse or spouses shall apply *mutatis mutandis* to the registered partner or partners. Therefore, a child brought into the common household by one of the registered partners with the consent of the other is required to be maintained in kind by the registered partner who is not the non-biological parent.

150 CC. 4:198. §.
151 CC. 4:199. § (2).
152 Bencze, 2007, pp. 569–570.

9. Policy for the protection of the family

The population of Hungary was the largest in 1980 with almost 11 million inhabitants. However, it has been steadily declining since then. Since 2011, the population of Hungary has fallen below 10 million. To stop the decline of the population, the government initiated a *"Family Protection Action Plan"* within the framework of which, in addition to classic legal instruments, it introduced a unique family policy that was aimed at increasing the number of marriages and strengthening the desire to have children. The Action Plan includes the development of nurseries, the baby-bond program, serious tax and contribution reduction for children, and the baby waiting support. Within the framework of the baby waiting support, every first-married woman under the age of 40 years can take out a discount loan of 10 million forints for the start of life, which becomes interest-free in case of the birth of one child. In case of two children, 30% of the debt and in case of three children 100% of the debt are taken over by the state. The family home foundation allowance is also worth highlighting. It involves state support of up to 10 million forints and a discounted home loan of up to 15 million forints for the creation of a new home in case of three or more children. An important form of support is the baby-care and childcare fee, the latter of which can be used by parents pursuing higher education and by grandparents. The measures initiated for the protection of the family and growth of the population should hopefully achieve the desired result, the appreciation of the work for the family, family formation, and the growing desire to have children.

10. Summary

The term "family" is defined in the highest legal source in the Hungarian legal system, namely the Fundamental Law. Marriage enjoys primacy in the Hungarian legal system. However, this does not mean that a same-sex relationship is not recognized or protected, because registered partnerships have similar legal effects. There are some differences in the legal effects of marriage and registered partnerships, such as that registered partners cannot adopt a child jointly and cannot participate in an assisted reproduction procedure. De facto cohabitation is regulated by the Civil Code, but the regulation is dual, because the legislature treats this as a contractual relationship. De facto partnerships will result in family law effects only if the partnership has existed for at least one year and the partners have a common child from their relationship. Kinship connection is based on descent and the father's status can arise in four ways, among which two are not rebuttable: the judicial decision and human reproduction procedures, but the latter can be rebutted only in special cases within the frameworks of strict rules. In Hungary, as there are different ways to

conceive a child under the eyes of law, a mother's status may be doubtful, especially in the case of surrogacy or nurse pregnancy. But Hungarian law definitely stipulates that a woman giving birth to the child shall be considered the mother of that child. Neither surrogacy nor nurse pregnancy is allowed.

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Chapter V

Legal Protection of the Family: Essential Polish Provisions Regarding International Legal Standards and Social Change

Marek Andrzejewski

1. Introduction

This article represents an overview of the most significant problems associated with legal protection of the family in Poland while taking into account the influence of various new social, political, and legal phenomena taking place in the Euro-American cultural sphere, which includes Central Europe, and thus Poland. The main subject of the overview is the Polish law in force, which is described and discussed against universal and European legal standards that were cataloged half a century ago. What now is more or less openly questioned is the interpretation of the Polish law that is rooted in values hitherto commonly shared in the western culture.

Developments of legal institutions dealing with legal protection of the family have caused fierce controversies, primarily as the result of changes taking place in the Family and Guardianship Code (hereafter referred to as FGC), diverse acts in the constitutional, administrative, and procedural law, and many international documents ratified by Poland (in doctrine all the documents are referred to as law referring to the family).[1]

1 Ziembiński, 1982, p. 126; Andrzejewski, 2003, pp. 51–61; Telusiewicz, 2013.

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These controversial issues are often the axes of scientific disputes (philosophical, psychological, and legal) and subsequent political divisions, thus becoming a distinguishing factor in classifying a politician as liberal, socialist, conservative, a supporter or an opponent, or of other political leanings. Indeed, these issues feature prominently in presidential, parliamentary, or local elections. Among them we often find such disputes as the (in)admissibility of abortion and euthanasia, the nature of regulations on the institution of marriage and other forms of permanent relationships, the availability of divorce, the nature of adoption, the legal position of parents regarding children, and the legal position of the state regarding the family. These controversial topics generate intense philosophical, political, and legal disagreement that gives rise to conflict among the general public.

The gravity of the issues touched upon in the overview is connected with the fact that in Western and Central Europe, and to a certain extent in Eastern Europe, the right to freedom of travel, and thus the freedom to choose which country one works and lives in, is generally respected. Under the conditions of a free flow of people, it is not uncommon that people establish personal relationships with citizens of different countries. Such contacts are also fostered by the existence of and cooperation between international social, economic, and political institutions. In this way, a special context that is conducive to establishing family relationships between people from different parts of the European continent has been created. However, in addition to the many advantages arising from this state of affairs, such relationships also generate legal disputes on an unprecedented scale. Naturally, the involvement of foreign elements in solving family legal problems tends to make them more difficult to resolve.

Family-related issues also entail a political aspect, manifested in the fact that some European states and member state organizations create pressure to impose certain regulations on family law in other states, regardless of their obligation/or commitment, politically declared and formulated in international documents, to respect different regulations adopted in individual states regarding family protections. This creates tensions between Western Europe, where so-called "progressive" views on the family and *quasi*-family issues dominate, and some Central European countries, in which the so-called "conservative" perception of family prevails.

The perception of marriage and family and of their role in society has recently become the axis of civilizational dispute.[2] The so-called "conservatives" consider marriage a union of a man and a woman, abortion an evil only exceptionally permissible, euthanasia a disgrace, divorce a dissolution of marriage to be granted only once certain conditions have been met, raising children the domain of their parents, and adoption an imitation of natural relationships. The so-called "progressive" leftists and those in the liberal camp, whose understanding of the family is anchored primarily in the ideology of gender, may claim that those seeking to marry should be entirely unrestricted with regard to gender or the state of consciousness of the

2 Roszkowski, 2019, pp. 485–526; Wildstein, 2020.

future spouses; that divorce should be dependent on the will of the spouses and thus be unrestricted; that a mother should have unrestricted access to abortion; and that the liberal state may undermine the primary role of parents in raising children. In this dispute, Poland has its own unique experience that is reflected in debate and legislation, and all legal regulations are a function of long-term scientific reflection and political dispute. Hence, it is difficult to predict what the future effects of the discussions and changes will be.

2. Marriage and the family: Symptoms of evolution or a crisis?

2.1. Introductory remarks

Countries belonging to the western European cultural circle continue to witness several similar social processes that have a destabilizing effect on the functioning of families. These processes vary in intensity from country to country due, *inter alia,* to each country's unique societal traits', its political history, the level of its economic development, and the role of religious, social, and moral norms. These processes, which began in Western European countries, have spread over time to Central European societies. There, the effect of the processes has, thus far, been less forceful because the so-called "threats" were diagnosed in time and some counter-measures were taken. However, because the societies of Central European countries are greatly or slightly different, they have different outlooks: some are less susceptible to the currents of thought anchored in the philosophy of the Enlightenment. Moreover, they are less susceptible to neo-Marxist influences (e.g., new definitions and policies on gender).

A crisis of the family has been widely discussed in world literature, especially in the field of sociology.[3] One must agree that this crisis truly exists. Its symptoms should be monitored and remedial measures sought, and, most importantly, its scale should not be overestimated. The family undergoes changes, but endures. Its weaknesses and its perception of the threats it faces are integral to the nature of its existence. Thus, the symptoms of the family crisis, especially pronounced in Western Europe, are not, and need not be, equally destructive in the countries of Central Europe, including Poland.[4]

In what follows the most significant symptoms of the crisis in family life and marriage in Europe today will be presented. Other issues such as abortion, the trivialization of marriage, and domestic violence will be discussed in later sections.

3 Szlendak, 2010, pp. 363–391; Adamski, 2002, pp. 175–193; Kocik, 2006, pp. 353–384.
4 Przybył, 2012, p. 31.

2.2. Demographic changes

Europe continues to face enormous and mostly unfavorable demographic changes[5] that began in the 19th century with the evolution of the way the family and societies functioned. The key factors in this process have been a high standard of living for European societies and their focus on the so-called "quality of life," which is presumably easier to achieve with fewer children. Other factors at play include, among others, secularization and the increasing professional advancement of women.[6] The aforementioned increased economic wealth contributes to a longer lifespan for both women and men, which, together with a lower reproductive rate, leads to a greater proportion of elderly people in the population. This, in turn, necessitates the development of geriatric medicine, the development of social care services, and a reform of pension systems.

The birth rate in Poland has remained extremely low since the mid-1990s. The reproductive rate required to achieve a simple replacement of the generations, i.e., the average number of children born to a woman during her reproductive period, between 15 to 49 years of age, is 2.1, while over the last two decades this rate has been approximately 1.36–1.40 in Poland (ranking 212th of 224 countries[7]).[8] This generates many problems, not only for the stability of the labor market (almost a million foreigners work legally in Poland, mainly citizens of the Ukraine) but also for the Polish pension system.[9]

2.3. Marriage and divorce

In Europe, marriage tends to be less common while the opposite is true of divorce.[10] In the context of the sociology of the family, the term "de-institutionalization of marriage" has been coined to describe the conduct of partners who—motivated by such values as individualism, the right to privacy, and an aversion to the customs and obligations traditionally associated with family life—choose to co-habit in relationships alternative to marriage such as cohabitation, civil partnerships, and same-sex relationships. The assumption in these relationships is that they last as long as the relationship brings satisfaction to both parties and provides a sense of fulfillment and self-realization. In this context, marriage, as a permanent relationship with its attendant obligations independent of the emotional state of the participants, appears restrictive. A relationship based solely on an emotional bond is, however, by definition less stable and less permanent.[11] Despite the decline in the status and

5 Strzelecki, 2015, pp. 42–66.
6 Golinowska, 1994, pp. 116–147.
7 The World Factbook, 2012, Available at: https://bit.ly/3mnhlmA (Accessed: 25 April 2021).
8 Szukalski, 2009, pp. 59–75.
9 Golinowska, 1994, pp. 70–77.
10 Cierniak-Piotrowska et al., 2019, pp. 151–157.
11 Kwak, 2007, p. 37.

importance of marriage, its symbolic significance remains clear: it is still seen as an indicator of prestige and personal achievement.[12]

It has been observed that the above processes that weaken marital ties and which are widely observed in Western Europe have a lesser impact on more conservative societies, an example of which is Poland.[13] However, due to wider access to higher education and a sense of instability (caused by factors such as a lack of housing and a high unemployment rate until 2015) the age at which people tend to marry in Poland has also increased over the last three decades: from around 20 for women and 22 for men to around 28 and 30, respectively.

Another characteristic feature of family life in Europe is the increase in the divorce rate over the last five decades. In Poland, the number of divorces remained unchanged at around 40,000 annually between the 1960s and the 1990s, but increased dramatically in the middle of the first decade of the 21st century to the current level of approximately 65,000 divorces annually.[14] All told, about 2.5 million people in Poland have divorced in the 21st century (7% of the adult population).

2.4. Migrations

Migration patterns, both past and present, have often led to disruption in the newcomers' family life and sometimes to a breakdown of family ties.[15] Immigration also affects the family life in those societies that host immigrants. Economic migration is a fact of life for between 2 and 3 million Poles who live and work in Great Britain, Ireland, and other European Union nations. Although it is not as intense as in other European countries, economic migration in Poland has destabilized family life. Immigration is often a necessity, whether economic or political, rather than an individual's free choice. This factor notwithstanding, the non-economic effects of immigration on the stability of the family must be considered.

Migration also generates cross-border issues that affect family life. Among these issues we find the breakdown of marriage and the decisions of different family members to settle in different countries.

2.5. Women's emancipation and empowerment

One factor that significantly affects the structure and well-being of the family is women's emancipation, which implies that on average women's current levels of education are higher than those of men, and women are more present in the labor market than before.[16] The root cause of this emancipation process is the idea of

12 Cherin, 2004; Glynn, 2013.
13 Ostaszewska-Nagórka, 2012, pp. 35–58; Przybył, 2012, pp. 13 ff.
14 Report of Centre for Public Opinion Research, 2019. Available at: https://bit.ly/3iCfoBS.
15 Danilewicz, 2010; Becker-Pestka, 2012, pp. 9–26.
16 Dyczewski, 1994, pp. 67–89; Kawula, 2005, pp. 97–111.

equality between women and men, which is the current standard adopted in the constitutions of European countries (Art. 30 of The Constitution of the Republic Poland; hereafter referred as The Constitution). In addition to the changes in constitutional law, emancipation and equality have given rise to a number of implications for other areas of law, especially family law (particularly Art. 23 FGC, but also provisions on property and matrimonial regimes and equal status of both parents regarding their children) and labor law (Art. 183a Labor Code).[17]

As a result of emancipation, women choose different pathways for personal fulfillment. This has had a decisive impact on the way family members fulfill their roles in the modern family in such areas as family finances and the provision of care and child-rearing (more institutional support is provided for parents in the form of nurseries, kindergartens, community clubs, and school clubs, for instance).[18] Emancipation and subsequent professional participation of women in the labor market is also one reason for the decline in the family fertility rate.

Women's emancipation and empowerment—obvious, inevitable, and favorable for civilization—must have led to a marriage crisis, especially in unions where men still function according to rules that govern families with a so-called "traditional" division of roles.

2.6. Secularization

Secularization is an important trigger for social change, including those changes affecting the form and well-being of the family. Initiated by the Reformation, secularization went on to expand and was strengthened by the ideas of the Enlightenment, whose influence endures.[19]

The struggle against the Catholic Church and religion in general, waged by communists in Central Europe[20] after World War II, led to the secularization of those directly and indirectly involved in the communist system, both politically and economically. However, unlike in other East European countries where large parts of society were secularized, in Poland resistance to communism actually resulted in strengthening religiosity and adherence to Catholic Church in a large section of society. It must be added the role of church in Polish society had been particularly strong after Poland regained independence in 1918 because during partitions (1795–1918) the Catholic Church had often been the pillar of Polishness.

Secularization did not gain force in Poland until 1989. However, in recent years, the influence of religious institutions on Polish society has been weakening, religious participation has declined, and behavior that defies the moral and social teachings of

17 Labor Code of 26 June 1974, consolidated text (hereinafter ct.): Journal of Laws of 2020, Item 1320.
18 Szlendak, 2010, p. 117; Kwak, 2007, p. 37.
19 Adamski, 1987, pp. 63–94.
20 Cywiński, 1990.

the Catholic Church and other Christian churches on such issues as divorce, alcohol abuse, abortion, and domestic violence has increased in frequency and visibility.[21]

On the other hand, the formation of communities and groups of conscious faith followers, such as the neo-catechumenate, Opus Dei, and the Light-Life Movement, whose every aspect of life is guided by religious principles, is worth noting. This is mostly manifested in the approach of these groups to family, i.e., in terms of fertility, the roles of the spouses in marriage, the way parental rights are exercised, and in the establishment of kindergartens and schools that guarantee an education in accordance with the parents' beliefs, etc.

"Relations between the state and the Church and other religious institutions are based on respect for their autonomy and independence each in their own domain, as well as on co-operation for the good of man and the common good" (Art. 25 (3) of The Constitution). The foundation for the co-operation between the Catholic Church and Polish state authorities is the Concordat, i.e., the international agreement ratified between Poland and the Holy See on July 28, 1993.[22] Some of its regulations concern family issues, for example, the solemnization of marriage in civil registers, the organization of burials, the religious education of children, and church organizations, many of which deal with many problems concerning the family. According to the constitutional principle of autonomy, declaring a religious marriage null and void falls within the ambit of Church authorities, and granting divorce to those couples whose weddings were performed in a denominational form that has consequences for secular law is the prerogative of the common courts (Art. 10 of the Concordat).[23] The state ensures that religion be taught in kindergartens and state schools in accordance with the will of the parents (Art. 12 of the Concordat), and the Church has the right to establish its own educational institutions in accordance with the applicable law.

Numerous church institutions are involved in charity (e.g., Caritas Polska), education (kindergartens, schools, and colleges), and child-rearing and adult care (child care facilities, nursing homes). Family counseling centers are organized in parishes and provide help regarding psychology, pedagogy, law, and pastoral care with a special focus on families. Pre-marriage courses for prospective spouses are an example of other educational activities.

2.7. Sexualization

Sexualization is defined as "bestowing sexual meaning (which is seen as socially and culturally inadequate), to stimuli, people, or situations that have no such inherent meaning in a culture, or whose meaning is more complex; thus, sexualization

21 Potocki, 2017, pp. 99–167.
22 Journal of Laws of 1998, Item 318.
23 Smyczyński, 1997a; Ignatowicz, Nazar, 2016, pp. 197–203; Gajda, 2009, pp. 112–137.

involves assigning excessive attention to sexuality."[24] This phenomenon may be traced back to the sexual revolution of the 1960s.

The destructive influence of sexualization on the development of irresponsible attitudes in sexual behavior cannot be questioned. This is further influenced by the pornography industry, whose products are now readily accessible, even to children. Another factor that has contributed to the development of sexualization is the focus in sex education on the physical and technical aspects of sex, with disregard for its ethical dimension.[25] Such an approach to sex leads to a reduction of the age of consent and to adolescent motherhood.[26] Moreover, any discussion on sexualization should not fail to mention the wide scale of pedophilia and other cases of sexual abuse and crimes.

3. Protection of marriage and the family: International standards

3.1. Universal standards

Documents detailing the standards for the protection of human rights emphasize the significance of the family and marriage, and, by extension, such issues as the primacy of parents in raising their children, the right to privacy, and the responsibility of the state towards the family. Such documents clearly buttress the so-called "conservative" attitude towards the family.[27]

Among the universal standards for the protection of marriage and the family, the most important argument for the need to protect this institution can be found in Article 16, Sec. 1 of the United Nations Universal Declaration of Human Rights of December 10, 1948, specifically the statement that marriage and the establishment of a family are the rights of men and women. The authors certainly did not anticipate that this statement, derived from the inherent dignity of a person, would, half a century later, become an argument used to protect the identity of marriage as a heterosexual union. It should be emphasized here that the concept of marriage as the union of a man and a woman has never been and is not an expression of discrimination against homosexuals but rather results from the nature of the marriage, described from the point of view of biology, anthropology, and sociology of the family as a fertile union whose social function is procreation.[28]

24 Zielona-Jenek, 2017, p. 23; Waszyńska, Zielona-Jenek, 2016, pp. 351–376.
25 Cube, 2013.
26 Maciarz, 2004, Izdebski, Niemiec, Wąż, 2011.
27 Smyczyński, 1999, pp. 149–166.
28 Wiśniewski, 2009, pp. 157–162; Tyszka, 1997, pp. 59–60; Kocik, 2006, pp. 241–276.

Article 23, Sec. 1 of the United Nations International Covenant on Civil and Political Rights of December 16, 1966 defines the family as the natural and basic social unit that should be protected by the general public and the state. Such an understanding is rooted in the philosophy of Aristotle and Auguste Comte, who perceived society as an organism consisting of different cells, the most basic of which is the family unit. Such an approach imposes on a state an obligation to conduct a social policy that benefits families and society as a whole by designing various support programs targeted at families.[29]

The UN Convention of November 20, 1989 is one of the most important universal documents that addresses family issues and the rights of the child.[30] In this landmark document, children are perceived as having rights conferred upon them by virtue of the inherent dignity of a person, the source of these rights being dignity rather than the state.[31] The adoption of the Convention represented a turning point in the discussion on children; specifically concerning their legal status. The breakthrough was evident in the fact that the Convention treats children as family members and parents as responsible for children's development, having primacy in their upbringing and entitled to support from public institutions. This document was rooted in a philosophy that emphasizes the community (social group) dimension of humanity, specifically the family. Nearly all the provisions of the Convention (especially the preamble and Articles 5, 7, and 18) suggest this community aspect of the family; the conclusion may thus be drawn that children have the right to live in a family. The Convention therefore sends a message addressed to the signatory states that in order to ensure proper protection of children's rights, families must be supported. Hence, the Convention may be seen as a family-friendly document.[32]

The December 13, 2006 UN Convention on the Rights of Persons with Disabilities[33] also contains provisions for family situations for such persons. Article 23 obliges states to eliminate discrimination against people with disabilities in all matters relating to marriage, family, parenthood, and relationships, ensuring "recognition of the right of all persons with disabilities who are of marriageable age to marry and to found a family, on the basis of free and full consent of the intending spouses; […] to decide freely and responsibly on the number and spacing of their children,"[…] and to "maintain their fertility on an equal basis with others." This law delineates the obligation of the state to provide persons with disabilities appropriate support to enable them to raise children.[34]

An inherent obligation in the provisions of the Convention to treat persons with severe mental disorders on an equal basis with healthy persons results from the conviction of their subjectivity. Such treatment, a civil obligation of people and

29 Tyszka, 1973, pp. 233–248.
30 Ct. Journal of Laws of 1991, Item 526.
31 Smyczyński, 1999b, pp. 39–48; Jaros, 2015, pp. 21–34.
32 Andrzejewski, 2012, pp. 41–46.
33 Journal of Laws of 2012, Item 1169.
34 Mikrut, 2015, Available at: https://bit.ly/3FmQlwp (Accessed: 20 April 2021).

institutions towards more vulnerable members of society, need not lead to bestowing identical family rights and family-related legal obligations on them. Hence, the reservation entered by Poland to the above-mentioned provisions of the Convention constitutes no discrimination against those suffering from a severe mental disorder; on the contrary, it reflects their state of health and is intended to protect them and safeguard their interests. It should also be emphasized that the approach adopted by Poland towards marriage with regard to persons suffering from serious mental disorders is the embodiment of an international standard that requires the state to ensure that the consent to marriage is expressed consciously and voluntarily.[35]

Even in this brief review of universal legislation regarding the family, the conventions adopted by the Hague Conference, and in particular the Convention on the Civil Aspects of International Child Abduction (the Hague, October 25, 1980),[36] warrant mentioning. Every year the number of cases relying on this act is increasing. It was drawn up during times characterized by free movement of people. Among these migrants, some would have established close relationships with citizens of different countries, had children with them, and separated in an atmosphere of dispute over who should have custody of the children, and hence, in which country those children should live. Disputes of this kind are already notoriously difficult to resolve when the spouses are citizens of the same country, so the foreign element only exacerbates the difficulty. Attempts to improve the method of resolving cases under this Convention to date have so far failed to produce results.

The Convention for the Protection of Children and Co-operation in the Field of International Adoption (the Hague, May 29, 1993),[37] created a measure to protect children whose adoption involves moving to the country of their adoptive parents. This form of adoption is permissible in Poland if it has proved impossible to secure a foster family or an adoptive family in Poland.

3.2. European Standards: Sources

Since many Polish measures are functions of standards developed in a number of European documents, their content will not be discussed here, and only the content of some of them will be recounted. These documents are referenced below.

The European standard for the protection of marriage and the family arises from a number of documents (conventions, resolutions, and recommendations) of the Council of Europe, European Community regulations, and the jurisprudence of the European Court of Human Rights in Strasbourg.

35 Article 16(2) of the UN Universal Declaration of Human Rights, Article 23(3) of the United Nations International Covenant on Civil and Political Rights, Article 10(1) of the UN, International Covenant on Economic, Social and Cultural Rights, and Art. 1 of the Convention on Consent to Marriage, Minimum Marriageable Age and Marriage Registration). Journal of Laws of 1965, Item 53.

36 Journal of Laws of 1995, Item. 28.

37 Journal of Laws of 2000, Item 448.

Of the documents prepared by the Council of Europe, the most important are the following: the European Convention for the Protection of Human Rights and Fundamental Freedoms,[38] especially Articles 8 and 12; the judgments of the European Court of Human Rights in Strasbourg;[39] the Adoption Convention;[40] the Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention);[41] and the Convention on the Exercise of the Rights of the Child.[42]

The evolution of Polish family law after the 1989 political breakthrough was much impacted by the resolutions and recommendations of the Council of Europe on such issues as marital property regimes, parental authority (defined in the documents as parental responsibility), foster care, and social benefits for maintenance obligations. Although these documents are not formally binding for member states of the Council of Europe, they have become an important point of reference in the preparation of important amendments to the Family and Guardianship Code, especially those introduced in 2004, 2008, and 2011.

In the past two decades, several regulations of the European Union concerning formal law have been adopted; in particular Council Regulation (European Community; hereafter EC) No 2201/2003 of November 27, 2003 on the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility,[43] repealing Regulation (EC) No. 1347/2000 (referred to as the new Brussels II); and Council Regulation (EC) No. 4/2009 of December 18, 2008, on jurisdiction, governing law, recognition and enforcement of decisions, and cooperation in matters relating to the maintenance obligations.

3.3. International standards of protection of marriage and the family: Selected controversial issues

3.3.1. Ideological and semantic aspects of the disputes

Modern popular philosophical and political concepts, such as post-modernism and gender ideology, tend to downplay the special role of the family in people's development as individuals and in the way societies function. In particular, the structure of the family as a group originating from marriage or an informal permanent relationship between a man and a woman is questioned while same-sex unions are treated as equally important, or sometimes more important. The positive treatment of and a positive attitude towards the latter become even more spectacular when they are displayed by people in prominent social and political positions such

38 Journal of Laws of 1993, Item 284.
39 Nowicki, 2010, pp. 508–556, 662–663.
40 Journal of Laws of 1999, Item 1,157.
41 Journal of Laws of 2015, Item 961.
42 Journal of Laws of 2000, Item 1,128.
43 OJ L 338, 23 December 2003.

as heads of state, government ministers, and leaders of various national and international organizations. Such persons oftentimes seem to question even the semantic field used to describe the family; furthermore, concepts related to human sex such as man, woman, father, mother, boy and girl, are relativized.[44]

In modern literature, marriage and the family are described as being on a par with other alternative forms of unions, and the individual is emphasized over the community. More emphasis is also placed on the importance of the emotional ties one has with one's current significant other than on the permanent relationships governed by nature and law, the latter even at times depicted as oppressive. Society is therefore extremely confused about what constitutes the family, which in practice contributes to the weakening of family ties.

Noticing severe symptoms of semantic inroads in language and the way of life, as well as intellectual abuse in debates about the family, it should be emphasized that Poland remains a country where

1. the law regulates the marriage contract as being between a woman and a man (Art. 18 of The Constitution, Art. 1§1 FGC), i.e., persons of different sexes, and not, for example, by "two persons";
2. a mother, i.e., a woman, gives birth to a child (Art. 61^9 FGC), i.e., a person of a specified sex; and
3. the presumption that the husband of the woman who gives birth to a child is the "father" of the child, and therefore is a man (Art. 62 FGC), just as a "father", i.e., is a man who acknowledges his paternity (Art. 72§1 and 73§1 FGC) in relation to a child born to an unmarried woman or whose paternity will be determined by the court (Art. 84 FGC).

A similar consistency may be observed in the use of terminology by Polish law in regulations concerning the legal situation of a child conceived but yet unborn. A child in the womb is defined as a "child" (Art. 927 of the Civil Code and Art. 2 of the Act of the Ombudsman for Children[45]). Moreover, if the word "fetus" appears, it is usually qualified by the adjective "human" (as defined by the January 7, 1993 Act on Family Planning, Human Embryo Protection, and Circumstances for Performing Abortion). The provisions on abortion use the term "pregnancy," most likely to mitigate the description of the act of killing a person (Art. 152 and 153 of Criminal Code, hereinafter CrC).

3.3.2 Domestic violence: Controversy over the Istanbul Convention

The issue of domestic violence as defined in the Istanbul Convention is one example of a heated debate that has philosophical, ideological, and legal implications. Notwithstanding these disagreements, there is a common agreement that violence

44 Wildstein, 2020, pp. 48-106; Keyes, 2018.
45 Ct. Journal of Laws of 2020, Item 141.

should be combatted. In Poland, however, opinions can be heard that the Istanbul Convention should be denounced on the grounds of its ideological profile, which presages a redefinition of concepts of the family in the spirit of gender ideology and ascribes generation and perpetuation of violence to traditional family. It should, therefore, be stressed that criticism of the Istanbul Convention from conservative circles is not dictated by their reluctance to combat the social ill that is domestic violence. In fact, Polish victims of domestic violence are protected to a much greater extent by the national law on domestic violence than by the Istanbul Convention.

3.3.3. Erosion of the notion of human rights

It has also become difficult to protect the family within the discourse on human rights as the significance of those rights has been relentlessly eroded. Over the last three decades the idea of human rights has been consistently undermined, among others by representatives of the academia. This is especially detrimental when an influential social group decides to refer to something as a human right and then demands that this alleged human right be respected by others.[46] The doctrine of human rights "disseminated […] throughout our civilization an atmosphere of infinite claims couched in the language of these rights. […] All claims, whether justified or unjustified, rational or absurd, arising out of a real and painful scarcity or arising out of mindless envy, may be presented in our culture in terms of human rights and their violations."[47] On a global scale, the profound thought of the Polish philosopher Leszek Kołakowski is well illustrated by acts undertaken in defense of human reproductive rights. On the one hand, reproductive rights refer to the right to adoption, including adoption by homosexual couples, and to artificial procreation, as a right to be provided and financed by the state, and on the other, to the right to have an abortion without requiring reasons or specifying time restrictions on when it can be performed (see 6.1.3).[48]

3.3.4. State intervention into the parent-child relationship

Disturbing changes may be observed in the relationship between the state and parents, in particular in some legal measures that undermine the primacy of parents in raising children as clearly spelled out in the Convention on the Rights of the Child. This is clear from a historical perspective, when both the constitution and ordinary laws of communist states, including those of Central Europe, contained regulations regarding both the primacy of the communist party in child-rearing and the subsequent obligation

46 Kołakowski, 2003; Bobko, 2021; Borkowicz, 2021; Freeman, 2002, pp. 11–12; Cornides, 2010, pp. 5–45.

47 Kołakowski, 2003.

48 Post-natal abortion (which is considered murder in Polish law) is the subject of serious debate (Art. 148 CrC). See: Giubilini, 2013, pp. 261–263.

of parents to respect the child-rearing guidance issued by state authorities. Courts and administrative bodies complied with this direction, and as a result, interfered in the sphere of parental authority of parents who failed to respect this directive.

In contradiction to the standards that uphold the protection of human rights, many European countries today once more are passing regulations that undermine the importance of parents. This does not happen, however, in post-communist countries, but in the so-called "liberal" democracies of Western Europe. The legislative changes introduced may be seen in semantic shifts seen in modification of terminology, especially in the provisions on marital status or replacement of words such as father and mother by parent 1 and parent 2, terms stripped of their relation to sex Another example of such interference is regulations (or postulates for their introduction) that ignore parents' opinions on such issues as access to contraception, abortion for minors, and more recently, gender reassignment.

4. Family and marriage in the light of the articles of The Constitution and the judgements of the Constitutional Tribunal of the Republic of Poland

Many European countries' fundamental laws contain regulations on marriage and the family that refer to documents setting standards for the protection of marriage and family. The Constitution of April 2, 1997, which contains only a few provisions on this subject, is a good case in point.

4.1. Protection of the family

The article most frequently quoted in debates on family protection is Article 18 of the Constitution. The debates tend, however, to refer mainly to the one statement contained therein that marriage is a relationship between a man and a woman (see point 6.1.4). Of much less interest is the obligation this provision imposes on the state to provide protection and care for the family, motherhood, parenthood, and marriage. Article 71 of The Constitution, which obliges the state to enact a social and economic policy that takes into account the good of the family, especially those families in a difficult financial or social situation, is a constitutional specification of this obligation (for more on this subject, see point 4.1). It also spells out the state's duty to offer special assistance to families with many children and single-parent families, as well as providing support to mothers before and after giving birth.

With reference to the above-mentioned regulations, the Constitutional Tribunal of the Republic of Poland (hereinafter CT)[49] ruled that provisions of the Act of No-

49 Judgement of the CT of 18 May 2005, K 16/04; Judgement of the CT of 23 June 2008, P 18/6.

vember 28, 2002 on family benefits[50] concerning an allowance paid to single parents were inconsistent with Art. 18 and Art. 71, Sec. 1 of The Constitution. This social benefit was paid to unmarried, single, widowed, divorced, or separated persons who raised a child with the child's father or mother. At the same time, no provision was introduced to exclude cohabitating couples with children from being eligible. As a result, those cohabiting had an advantage in terms of access to benefits over married spouses raising children together. Thus, the regulation evaluated by the CT serves as an example of an unwise social law that weakened family ties.[51]

4.2. Protection of human life

The provision that has stirred up a tumult of emotions in Poland, creating social tensions and political dispute over the conditions for the admissibility of abortion, is Article 38 of The Constitution. This article ensures the legal protection of life for every human being. The reason abortion is discussed in the context of family life is that it concerns a child living in its mother's body, and this, indirectly, also applies to the child's relationship with the man who is the father.[52]

In its 1997 judgment, the CT took the stand that The Constitution should protect human life from conception.[53] It enumerates, however, three exceptional circumstances that allow for the termination of a pregnancy. Under the Polish law, abortion was permissible if the conception of a child was a consequence of a punishable act, when the pregnancy endangered the mother's health and life, and if the child was permanently damaged.[54]

In its 22 October 2020 judgement, the CT ruled[55] that the admissibility of performing abortion on the basis of the last premise is inconsistent with Arts. 38, 30, and 31, Sec. 3 of The Constitution, as it discriminates against persons with disabilities (see point 6.1.3).[56]

4.3. Right to privacy and the parental authority in child rearing

The privacy of family life and the right to make decisions about one's personal life are subject to constitutional protection (Art. 47 of The Constitution). In reality, however, the right to privacy is often forfeited. The clearest case in point is social networking sites, overflowing as they are with content related to family life, which

50 Ct. Journal of Laws of 2020, Item 111.

51 The effects are known from the experience of Scandinavian countries and policies implemented by the American Government in the 1970s towards the African Americans, in: Murray, 2001.

52 Haberko, 2010, pp. 111–182.

53 Judgement of the CT of 28 May 1987, K 26/96

54 Act of 7 January 1993 on family planning, the protection of the human fetus, and the admissibility of abortion. Journal of Laws of 1993, Item 78 with changes; Mazurkiewicz and Mysiak (eds.), 2017.

55 Judgement of the CT of 22 October 2020, sig. K 1/20.

56 Justification of the judgement in: Monitor Polski, 2021, Item 114.

almost borders on exhibitionism. Of special concern can be a trend observed among parents, foster families, and even care and educational institutions of posting images of children on websites and social networks.

Article 48, Sec. 1 of The Constitution also grants parents primacy in the rearing of their children, which "should take into account the child's level of maturity, as well as the freedom of its conscience and religion and its beliefs." An element of this primacy is parents' freedom to choose schools other than state schools for their children (Art. 70, Sec. 3) (More about this in Sec. 2.3.4).

4.4. Protection of children's rights[57]

In Poland, children's rights are protected by The Constitution (Art. 72, Sec. 1). This acknowledges their importance, emphasized in the directive that "[e]veryone shall have the right to demand of the organs of public authority that they defend children against violence, cruelty, exploitation, and actions which undermine their moral sense." The Constitution also highlights two issues: first, the need to provide a child deprived of parental care with the assistance of public authorities (for foster care and adoption, see 8.3) and second, the obligation of public authorities and those responsible for the child to hear and, if possible, take into account the views of the child when considering matters directly or indirectly concerning the child (see 8.1).

4.5. Provisions of the Family and Guardianship Code in the light of the jurisprudence of the Constitutional Tribunal of the Republic of Poland

Many of the Constitutional Tribunal's important judgements have concerned family issues in the context of equality based on sex, of non-discrimination based on disability, and of the provision's inconsistency regarding subsidiarity. Relevant examples follow.

4.5.1. Mental disability and marriage

In its decision on the motion of the Ombudsman for a declaration of non-compliance of Art. 12 FGC with Art. 47 of The Constitution and Art. 23 of the United Nations Convention on the Rights of Persons with Disabilities (see 2.1), the CT disagreed with the applicant.[58] It took the position that prohibiting a person suffering from significant mental disability resulting from a serious mental illness (at an advanced stage) or from a profound intellectual disability to get married, to which the aforementioned provision refers, does not discriminate against people with mental illnesses and/or disabilities. From the point of view of equality with regard to the

57 Smyczyński (ed.), 1999a; Stadniczeńko (ed.), 2015.

58 Judgement of the CT of 22 November 2016, K 13/15; Kmieciak, 2018, pp. 93–111.

right to marry, persons with mental disabilities are considered to be in a different position from those who are intellectually sound.

4.5.2 Filiation

In 2003 the CT questioned the lack of a procedural path in FGC for a man who considers himself to be the father of a child in cases for judicial establishment of paternity.[59] The judgement was issued in a case initiated by the allegation that a man cannot recognize a child as his own unless the child's mother gives her consent (Art. 73 FGC). This allegation was considered ineffective, since permission for such recognition on the basis of the man's statement alone would violate the child's mother's right to privacy (Art. 47 of The Constitution). The principle of equality before the law stipulates that a man (the alleged father) be allowed to bring a claim to the court to establish his own paternity (Art. 84 § 1 FGC). In another case, however, the Tribunal refused a man who considered himself to be a child's father the opportunity to seek the annulment of another man's recognition.[60]

In another judgement[61], the CT found Art. 71 FGC unconstitutional, stating that denial of paternity after the death of a child is unacceptable. The verdict, which was questioned[62] in the Polish legal doctrine, was issued in the context of an exceptional situation of pending paternity proceedings for twins, one of whom died during the trial. The CT took the position that the deceased child would be affected by the verdict that would be given for its sibling.

Article 70 § 1 FGC was likewise found not to be in compliance with The Constitution "to the extent that it specifies the time limit for bringing an action for denial of the paternity of the mother's husband, regardless of the date when an adult child became aware that he or she was not fathered by his or her mother's husband."[63]

4.5.3 Foster children benefits

In its judgement of February 26, 2003[64] the CT questioned the practice that children in a foster family established by persons unrelated to the child received greater benefits than children in a foster family established by people related to them (in practice by grandparents or adult siblings). The argument supporting the practice was that the relatives belonged to a group obliged to provide support to the charge and thus should contribute to the costs of their maintenance.

59 Judgement of the CT of 28 April 2003, K 18/02.
60 Judgement of the CT of 17 April 2007, SK 20/05.
61 Judgement of the CT of 28 November 2013, P/33/12.
62 Smyczyński, 2018, pp. 205, 221–222.
63 Judgement of the CT of 16 May 2018, sig. SK 18/17
64 Judgement of the CT of 26 February 2003, sig. K/01; Judgement of the CT of 1 July 1996. sig. U. 3/95.

It was only in the judgement of 2012 issued on the grounds of a new regulation (Art. 80 of the Act on Supporting the Family and the System of Foster Care)[65] that the CT interpreted the provisions of administrative law on the benefits for foster families together with the provisions FGC, and it found the difference in the amount of benefits allocated in maintenance for the two types of foster families mentioned above consistent with the constitutional principle of equality before the law.[66] Apart from the key issue of proportionality, one of the arguments in support for the view is that social benefits for a child cannot exempt family members from maintenance obligations.[67]

4.5.4. Disciplining child maintenance defaulters

In two judgements, the CT ruled that those defaulting on maintenance payments should have their driver's licenses confiscated. This sanction is currently provided for in the Act of September 7, 2007 on assistance to persons entitled to alimony.[68] In 2009, on the basis of a previously passed law, the CT decided that this sanction violated the principle of proportionality and defended the maintenance defaulters.[69] In 2013, the case was heard again, as the above-mentioned sanction was reintroduced to the aforementioned Act. A slightly changed regulation served as a pretext to proceed with this case again, this time leading to the conclusion that confiscating a driver's license from a notorious maintenance defaulter is in accordance with Art. 2 of The Constitution (the principle of proportionality).[70] This sanction was found to correspond to the degree of misconduct, in this case a persistent evasion of the axiologically strongly justified maintenance obligation.[71]

5. Protection of marriage and family as a task of state social policy

5.1. Social and family policy

In accordance with the provisions of The Constitution, a family is a relationship built on the foundation of marriage (i.e., a formally contracted marriage consisting of spouses with a child or children), which includes an incomplete family (as implied

65 Ct. Journal of Laws of 2020, Item 821.
66 Judgement of the CT of 23 April 2013, K 12/12.
67 Pietrzykowski, 2020, pp. 1037–1038.
68 Ct. Journal of Laws of 2020, Item 608.
69 Judgement of the CT of 22 September 2009, P 46/07.
70 CT Ruling 2 February 2014. Sign. K 23/10; Andrzejewski, 2015, pp. 168–198.
71 Boczek, 2017, pp. 115–128.

directly by Art. 71 of The Constitution), irrespective of whether single parenthood is the result of the death of a spouse, divorce, abandonment, or a woman's conscious decision. In this sense, cohabiting couples with children also constitute a family, as described in Art. 18 of the Constitution.[72]

The relationship between the Polish state and families that may be inferred from the regulations adopted in The Constitution corresponds to a model that lies somewhere between the model suggested by libertarian and the communitarian views,[73] i.e., a subsidiary state.[74]

The aforementioned Articles 18 and 71 of The Constitution oblige the state to promote an active social policy in favor of the family. In the context of family policy, i.e., social policy in relation to the family, Article 71 of The Constitution elucidates this general idea by imposing on the state an obligation to implement a social and economic policy that considers the good of the family, with a particular emphasis on supporting families in difficult material and social circumstances, especially single-parent and large families. The state's family policy is therefore specified in a number of legal regulations, acts, and measures, the aim of which is to create optimal conditions for families to thrive.[75]

5.2 Issues with the constitutional principle of state subsidiarity

From the beginning of the political transformation, attempts were made to create a Polish state that would support social groups in need, but in a way that would neither relieve them of their duties nor leave them to their own devices.[76] Unfortunately, the model of the state outlined above aiming to ensure that welfare recipients eventually become independent was not consistently implemented. Social programs were not introduced in areas with structural unemployment, and low benefits rendered recipients dependent on them, creating the so-called "learned helplessness syndrome." In some areas, up to 30% of households fell victim to this syndrome.[77] Due to the lack of a consistent policy of family social support, in the economic discourse of the 21st century, a symbol of the Polish political transformation was a face of a poor child, an offspring of unemployed parents dependent on social benefits unable to provide good educational prospects for their child.[78]

Since 2015 there has been a visible departure of the state from a liberal social policy. Instead, the state has adopted a more active model towards social problems, in particular supporting the family through centralized social programs. The model currently implemented assumes, at least in the short term, no independence of those

72 Smyczyński, 1997a.
73 Morawski, 1998, pp. 26–42.
74 Andrzejewski, 2003, pp. 76–94.
75 Szudlińska-Kanoś, 2019, pp. 9–10.
76 Dylus, 1995; Millon-Delsol, 1995; Rymsza, 2003, pp. 19–32; Nitecki, 2008, pp. 95–102.
77 Czubkowska, Klinger, 2010, p. A8.
78 Domański, 2002, pp.73–79; Balcerzak-Paradowska, 1999; Balcerzak-Paradowska, 2009, pp. 39–45.

families receiving a variety of benefits. The goal of the most spectacular social program, commonly known as 500+,[79] is not to make the beneficiaries independent, which is the most important aspect of the principle of subsidiarity, but to reduce significant areas of poverty. Analysis of the subsidiarity principle in the context of the legal protection of family, including intra-family relations, reveals that thanks to the comprehensive social support systems, especially in Western Europe and Scandinavia, the state, on the one hand, protects families against poverty, and on the other, takes on a familial role, providing the poor with the means to survive by redistributing funds raised from taxes. However, while it ensures that people living below the poverty line fulfill their economic duties, it simultaneously weakens family ties and even demobilizes and demoralizes family members, especially parents. The latter are in fact relieved of their economic duties towards their children, which runs contrary to the principle of subsidiarity.

6. Institutional forms of protection of marriage and family

6.1. State and local government administration

The Ministry of Family and Social Policy is an integral part of the government. Its nomenclature suggests that the ministry implements social policy in the context of the family. With the family in mind, various social programs are coordinated at the ministerial level. Some family-focused programs are also enacted by other ministries, such as the Ministries of Education, Culture, Justice, or Construction.

Local governments (on each level: communal, district, and voivodship) pay special attention to family issues. At the communal level, social assistance centers are set up that provide means-tested benefits for families and organize social work to assist them in overcoming emergency situations.[80] The centers provide help following a thorough analysis of the economic and social circumstances of the family with the aim of making beneficiaries independent.

At the district level, family support centers are created. Their task is, *inter alia,* to organize and support foster families and set up and operate care and educational centers.[81] The district government is also responsible for founding committees whose task is to address the specific needs of families with children with disabilities.[82]

79 Act of 11 February 2016, on State Assistance in Child Rearing, ct. Journal of Laws of 2019, Item 2,407.

80 Act of 24 March 2004 on Welfare, ct. Journal of Laws of 2020, Item 1,876.

81 Act of 9 June 2011 on Supporting Family and Foster Care, ct. Journal of Laws of 2020, Item 821 as amended.

82 Act of 27 August 1997, on Social and Vocational Rehabilitation and Employment of the Disabled, ct. Journal of Laws of 2021, Item 573.

The voivodship (province) government is charged with the task of organizing regional welfare centers.

6.2. Family courts

The primary institution tasked with resolving family legal problems is the family court, established in Poland at the end of the 1970s.[83] Family courts are the family and juvenile divisions of regional courts and some district courts. It is no longer obligatory for district courts to have a family division, but those existing have rightly not been shut down.

Regional family courts handle cases in matters related to the FGC, with the exception of the most complex and difficult cases, such as cases of divorce and separation. These regional courts are the courts of first instance. Family courts also adjudicate when claims are made under the acts on juvenile justice,[84] on rearing in sobriety and combatting alcoholism,[85] on the protection of mental health,[86] and on supporting the family and the foster care system,[87] and others.

The creation of the family courts was promoted by the following ideas:

1. to concentrate under one judge all family cases that go to court from one particular region (city, borough, or municipality);[88]
2. accord cases be heard by judges who possess both a high level of legal competence and a thorough understanding of psychological, pedagogical, or social issues indispensable for a firm grasp of the specific nature of the cases under consideration. These judges should be able to cooperate with people and institutions that deal with family issues, including agencies of the social welfare system, non-governmental organizations, and the prosecutor's office;[89] and
3. to provide judges with support from a network of expert institutions.

The designed model of the family court system has, however, never been implemented, leaving scholars and specialists to debate ways to improve its current performance.

Probation offices are an auxiliary agency to family courts. These offices are divided into adult probation officers—who deal with people released from prison and demoralized minors[90]—and family probation officers. All operate outside court, performing educational, rehabilitation, diagnostic, preventive, and control tasks; in all their actions they execute court decisions.

83 Zedler, 1984, pp. 7–46.
84 Act of 26 October 1982, ct. Journal of Laws of 2018, Item 969
85 Act of 26 October 1982, ct. Journal of Laws of 2012, Item 1,356 as amended.
86 Act of 19 August 1994, ct. Journal of Laws of 2020, Item 685.
87 Act of 9 June 2011, ct. Journal of Laws of 2020, Item 821 as amended.
88 Arczewska, 2009, pp. 64–127; Słyk, 2019, pp. 54–65.
89 Czech, 2011, pp. 15–18.
90 Act of 27 July 2001 on Probation Officers; ct. Journal of Laws of 2020, Item 167.

6.3. Combatting domestic violence

In Poland the legal basis for combating domestic violence is laid out in the Act of July 29, 2005.[91] From the point of view of the legal protection of the family, what is of interest in here is the establishment of interdisciplinary teams at the communal level that are charged with performing comprehensive analyses of domestic violence and developing methods to combat it. The teams are composed of representatives of social welfare and communal commissions that work to solve alcohol-related problems, the police, educational institutions, healthcare organizations, non-governmental bodies, and probation officers. In addition to developing anti-violence programs geared toward supporting the victims of domestic violence, the teams implement agenda laid out in communal programs of prevention of domestic violence and protection of victims of such violence. The teams establish a special task force to resolve and combat problems of violence in individual cases. The task force assesses a particular situation, develops and implements an assistance plan tailored to suit the particular case, monitors the situation, and documents the taken actions.

6.4 Miscellaneous

Poland has many other institutions and institutional measures aimed at the legal protection of the family, but the scope of this study is limited to listing few of them, indicating key legal acts and highlighting some of the relevant literature.

The prevalence of alcoholism means that an important part of family policy is **resolving alcohol-related problems**, which entails both prevention and mitigation of the effects. To that end The State Agency for Resolving Alcohol Problems and communal committees were established.[92]

Another acute and widespread problem is parental ineptitude. In 2011, a new position to address this issue was created: **the family assistant**.[93] Family assistants operate at the level of local government. If a family refuses to accept the assistant, then he or she may be assigned to the family under a family court injunction limiting parental authority (Art. 109 § 2 (1) of FGC).

An important factor in family protection that requires a separate, extensive discussion is that of the various **social benefits** targeted at families. In recent years the catalog of such benefits has been expanded and their significance in household budgets has also increased. The most important of them is the so-called 500+ benefit paid to parents monthly for each child under the age of 18. Other means-tested benefits and entitlements include a family allowance; supplements to family allowance for, among other things, childbirth, single parents, childcare as part of maternity

91 Ct. Journal of Laws of 2020, Item 218.

92 Act of 26 November 1982, ct. Journal of Laws of 2016, Item 487 as amended, on Upbringing/Education in Sobriety and Counteracting Alcoholism.

93 Krasiejko, 2011.

leave, large families, education and rehabilitation of a child with disabilities;[94] cash from social insurance in the event of sickness and maternity, including maternity allowance and care allowance;[95] and benefits for people who cannot make ends meet due to the delinquency of their debtors in paying maintenance (see 3.5.5). [96]

It should be also mentioned that an important obstacle for women in their professional life is the shortage of available nurseries and kindergartens. Psychiatric care for children is likewise deficient due to lack of medical personnel and investment in infrastructure.

7. Current dilemmas over legal protection of marriage and the family

7.1. Dispute over the attitude of the state towards the family

There is a general debate in Poland as to whether and to what extent the state should intervene in the family in order to achieve an appropriate balance between the autonomy of the family in relation to the state and the admissibility of a state to interfere in the life of the family. This issue touches on the constitutional principles of family autonomy and the primacy of parents in child-rearing (Articles 47 and 48(1) of The Constitution), which are primarily understood as autonomy and primacy over state institutions that govern education, health care, social assistance, and the administration of justice, among others.[97]

The Constitution asserts that the state may not remain passive towards the family but should protect (Art. 18) and support it by implementing social policy in favor of the family or intervene, if necessary, especially for the protection of children (Articles 48 (2) and 72 (1).

7.1.1. State and divorce

In the debate regarding whether a divorce should be granted at the request of the spouses or whether it may be granted only after the conditions set out in law are met,[98] the position of the Polish legislation (Art. 56 FGC) differs from the measures adopted in most European countries, in which divorce by mutual consent dominates

94 Act of 28 November 2003 on Family Allowance, ct. Journal of Laws of 2020, Item 111.
95 Act of 25 June 1999 on the Money Benefits from Social Insurance in Case of Illness and Maternity, ct. Journal of Laws of 2020, Item 870.
96 Act of 7 September 2007 on Assistance to Persons Entitled to Alimony ct. Journal of Laws of 2020, Item 808.
97 Banaszak, 2009, pp. 244–253; Smyczyński, 2012, pp. 14–17.
98 Mazurkiewicz, 2012; Andrzejewski, 2016.

and no court proceedings are involved. Instead, an administrative authority or a notary may dissolve a marriage. These measures perceive marriage in individualistic terms, ignoring the communitarian[99] aspect of marriage, and thus do not treat the legal aspects of marriage (the contract, its function, the possible reasons for dissolution) seriously.

In Poland, a divorce may be granted only in court on the grounds of a complete and permanent breakdown of the marriage and as long as the divorce does not diverge from the principles of social coexistence, especially concerning the good of minor children (Art. 56 §1 and §2 FGC). Divorce is also inadmissible if the action is brought by the spouse who is solely guilty of the circumstances causing the breakdown of the marriage unless the other spouse agrees to the divorce, or the refusal to consent is considered contradictory to the principles of social coexistence (Art. 56 §3 FGC).[100] Evidence should therefore always be collected and presented before the court in order to verify the grounds for divorce.

On the other hand, at the unanimous request of both parties, the court may grant a no-fault divorce (Art. 57 FGC) and refrain from adjudicating on access to children (Art. 58 § 2 FGC). The divorcing spouses may also prepare a child custody proposal (Art. 58 § 2 FGC). The court will accept the agreement if its provisions do not contradict the best interests of the child.[101]

7.1.2. Pregnant women and alcohol consumption

In the public debate in Poland, it has been put forward that a pregnant woman who consumes alcohol should undergo treatment for drug addiction or at least detoxification in order to save her child from the onset of damage in the fetal phase of life referred to as FAS syndrome (fetal alcohol syndrome[102]).[103] Indeed, there is a clear cause-and-effect relationship between the development of FAS syndrome and the consumption of alcohol by a pregnant woman.

7.1.3. The state and so-called reproductive rights

In this debate the basic question raised is whether adults have the right to have children, which is correlated with the state's obligation to ensure a child to anyone who requests it, be it through adoption or artificial methods of procreation.[104] This triggers the consequent dilemma of whether the use of all technology in the field of artificial procreation is morally permissible.[105] At the other end of the spectrum,

99 Terlikowski, 2006, p. 11–22; Rymsza, 2009, pp. 57–69.
100 Stojanowska, 2009, pp. 562–666; Olejniczak, 1980; Gajda 2020, pp. 482–493.
101 Sokołowski, 1997, pp. 96-101; Gajda 2020, pp. 500–503.
102 Banach and Matejek, 2016.
103 Bernfeld et al., 2019.
104 Bagan-Kurluta, 2018; Śledzińska-Simon, 2009; Łączkowska, 2005.
105 Stelmach et al., 2010; Varaut, 1996;

it is more often claimed that adults have the right not to have children. The consequence of the latter is the state's obligation to guarantee abortion at the request of a pregnant woman, regardless of the circumstances. The polar opposite opinion to this statement posits that the fetus has the right to protection.[106]

In regard to so-called "reproductive rights," a heated dispute rages in Poland over the admissibility of abortion (see 3.5.3). Meanwhile, the use of technology supporting procreation is regulated by the Act of 2015 on the treatment of infertility,[107] which introduced the prospect of performing *in vitro* procedures that are reimbursed by some local governments. So-called "surrogate motherhood"[108] and ensuing contracts remain invalid (according to Art. 58 CC).

In the context of reproductive rights, there are no postulates for allowing homosexual couples to adopt children. The legal doctrine in Poland is dominated by a critical approach to this idea.[109]

In recent years the subjects of both the jurisprudence of administrative courts and disputes in the Polish doctrine have been issues centered on a demand to enter a child's filiation in the Polish register of marital status from same-sex parents. The Supreme Administrative Court in its resolution of 212.2019. II OPS 1/19 did not allow foreign birth certificates of children with same-sex parents to be acknowledged in Poland.[110]

7.1.4. Dispute over the concept of marriage

The focal point in this dispute is the admissibility of same-sex couples entering into marriage.[111] The same issue arises regarding mentally ill persons whose mental impairment renders it impossible for them to fulfill marital and family obligations.[112] In the case of mentally ill persons, the CT found Art. 12 FGC in compliance with the Constitution. This article banned marriage in the case of persons whose mental impairment would threaten the marriage and well-being of any offspring (see 3.5.1).

As already mentioned, under Polish law, marriage is a union of a man and a woman (Art. 18 of the Constitution) and it is performed on the basis of a consistent declaration made by them, either before the head of the Civil Registry Office or before a competent clergyman (a religious form with consequences for secular law; see Art. 1§2 FGC). Homosexual couples are allowed to neither marry nor register

106 Mazurkiewicz and Mysiak (eds.), 2017.
107 Journal of Laws of 2015, Item 1,087.
108 Haberko, 2016; Telusiewicz, 2019, pp. 497–508.
109 Sokołowski, 2013, pp.103–116; Gajda 2013, pp. 117–126.
110 Mostowik, 2019, pp. 3–29; Zachariasiewicz, 2019, pp. 143–170.
111 Łączkowska-Porawska, 2019; Łączkowska, 2013, pp. 171–208; Mączyński, 2013, pp. 83–102; Smyczyński 2013, pp. 71–82; Pawliczak, 2013; Łętowska and Woleński, 2013; Banaszkiewicz, 2004; Hartwich, 2011.
112 Judgement of the CT of 22 November 2015, sig. K13/15; Kmieciak, 2018.

their partnerships. Over the last two decades, several bills aimed at legitimizing such unions have been rejected in the Polish Parliament (see 6.5).

7.2 Concept of the family

In the above section, the family was discussed in the context of social policy (see 4.1) and in provisions of The Constitution (Arts. 18 and 71) (see 3.1). This section will discuss the concept of marriage on the basis of ordinary acts.

The Family and Guardianship Code regulates the functioning of the family, which is understood as a marriage and a two-generation family (in the language of sociology, a nuclear family).[113] Only the provisions on the maintenance obligation apply to all relatives in lineal descent, and kin in the stepfather/stepmother–stepchildren relations may be included as eligible (Art. 113^6, Art. 129, and Art. 144 FGC).

The provisions of inheritance law (Art. 931-941 CC) include the spouse, descendants, parents, siblings and their descendants, grandparents, and their descendants, and in exceptional circumstances, stepchildren as those legally eligible to inherit the property of the deceased.

The provisions of administration law likewise define the family by indicating specific ties between individual family members. In the Act on Social Assistance,[114] for instance, the ties are economic as the family is defined as persons forming a common household. The Act on Pensions and Old-Age Pensions from the Social Insurance Fund[115] indicates that the death pension given to the relatives of the insured deceased will be granted to, among others, the deceased's own children, his or her stepchildren, adopted children, other children raised and maintained in the household before they come of age, grandchildren, siblings, a spouse (widow or widower), as well as parents (including stepmother, stepfather or adopters) (Art. 67). The family circle exempt from tax under the Act on Inheritance and Donation Taxes[116] includes the husband, wife, descendants, ascendants, as well as stepchildren, siblings, stepfather, and stepmother (Sons-in-law, daughters-in-law and in-laws are excluded.).

Differences in the definition of the concept of family are justified by the purpose of different legal acts. The prevailing position in the Polish doctrine is that there is no need to create a legal definition of the family that would apply to all regulations regarding the functioning of this social group.

7.4. Cohabitation

In Polish legal language—that used in the Polish doctrine—the term "cohabitation" refers to a man and a woman living in a stable relationship. Similarly to

113 Smyczyński, 2009, pp. 2–12.
114 Ct. Journal of Laws of 2020, Item 1,876.
115 Ct. Journal of Laws of 2021, Item 291.
116 Ct. Journal of Laws of 2019, Item 1,813 as amended.

married life described in Art. 23 FGC, this relationship is realized in economic, spiritual, and sexual spheres. In more recent literature, cohabitation is sometimes referred to as a civil partnership, which may be confusing in the context of same-sex relationships.

Cohabitation (also referred as concubinage), provided that it produces children, is a family in the sociological sense and thus the recipient of social policy (Art. 18 of The Constitution). Cohabitants may receive social assistance benefits since in the doctrine a family consists of persons running a common household, but they acquire no right to a dependent's pension.

As an informal relationship, concubinage is subject to no registration. Cohabitation creates no formal grounds for using a partner's apartment. Likewise, provisions in the FGC on property and matrimonial regimes are inapplicable to cohabitants. Issues of settlements after the termination of concubinage are resolved on the basis of the CC provisions.[117]

The presumption that a child born to a cohabitant is the child of a cohabitant does not apply; filiation of a child is determined by recognition of paternity. For filiation to be recognized, a man must submit a declaration declaring that he is the child's father, which must then be confirmed by the child's mother (Art. 73 §1 FGC).

Cohabitants have joint custody over their child and their parental rights do not generally differ from those of married parents. Cohabitants may not adopt a child jointly as such adoption is permitted only to spouses (Art. 115 § 1 FGC). In practice, it is also impossible to adopt a partner's child as this would lead to the termination of the legal relationship between the child and his/her parent.

In the event of the death of a cohabitant who is the tenant of a flat, his or her partner may enter into a tenancy relationship as the living partner of the tenant (Art. 691 § 1 of CC).

Cohabitants do not inherit by law; nor are they entitled to a reserved share (Art. 931-941 of CC and Art. 991 of CC). They are also unrelated in the eyes of tax law. In criminal, civil, or administrative proceedings, cohabitants enjoy the status of next of kin, which affords them the right to refuse to testify, for instance, in a criminal trial against a partner. Unlike homosexuals, cohabitants have yet not formed non-governmental or political organizations and have submitted no legislative demands to give a legal framework for their way of life.

7.5. Protection of same-sex relationships

Homosexuals living in long-term relationships are referred to in the literature as partnerships like those cohabiting. In Poland, legislative action was taken to legitimize such relationships (note the emphasis on legitimize rather than legalize, since homosexuality has never been illegal in Poland (in fact in Poland homosexual acts have never been penalized). The attempts found no support, however, in the Polish

117 Nazar, 1993; Hartwich, 2011.

Parliament. As a consequence, the relationships between homosexuals in long-term relationships are not registered.

Until now, bills submitted to Parliament to regulate the functioning of homosexual couples have aimed at making changes to define the status of their relationships as marriage, i.e., to grant same-sex couples the status of married couples under Polish family law. In the literature, apart from an open criticism of the idea of institutionalizing same-sex relationships and their approval, we also find a compromise solution resembling the law on the social solidarity pact (PACS) in operation in France, which provides for the registration of a civil partnership and the regulation of economic issues such as taxation, loans, inheritance, and lease. Such a model would require no amendment to The Constitution, in which marriage was defined as a union between a man and a woman, as the registered same-sex relationship would not be a marriage.

On many points, the legal status of same-sex unions resembles that of cohabitants. Just like cohabitants, they may take advantage of social welfare benefits, assume the rights of a deceased partner who is a tenant of a flat,[118] and exercise the right to refuse to testify as a person close to the defendant in a court case. On the other hand, the partner, like a cohabitant, may not exercise the right to use accommodation owned by a partner (Art. 28^1 FGC); nor do the provisions on matrimonial property regimes (Art. 31–54 FGC) apply to them. The settlements between them may, however, be affected *inter alia* by provisions on unjust enrichment or on the fulfilment of a common economic goal in the form of a civil partnership.[119]

Partners do not inherit their deceased partner's property under the provisions of the law, but they may appoint any person in their will as the beneficiary. They are not entitled to a legitimate portion. In addition, partners may not adopt children together.

In relation to the partner's child, a person in a permanent same-sex relationship does not enjoy the status of guardian (as long as a child's parents exercise parental responsibility over him/her, it is formally unacceptable), nor any other formal authorization.

Under medical law, homosexuals have the same status as spouses, both in terms of the right to information regarding a partner's health and hospital visits. The rights can be exercised only by the persons indicated by the sick. Without the consent of the patient, the doctor may only provide information to the statutory representative, i.e., the parent or legal guardian.

The admissibility in Poland of homosexual marriage certificates obtained abroad is in dispute. On the one hand, the literature emphasizes that the legal status in Poland (Art. 18 of The Constitution) prevents transcription; on the other hand, the jurisprudence of the European Court of Human Rights and the standard of legal protection of such relationships designated therein are highlighted.[120]

118 Resolution of the Supreme Court of 28 November 2012, sig. III CZP 65/12.
119 Hartwich, 2011, pp. 87–110.
120 Grabarczyk, 2019.

Homosexuals may avail themselves of the right to create social organizations benefiting their community and to present their views in the media (they own magazines and websites) or via social activism in the form of public gatherings.

8. Marriage and family: Crisis prevention and management

Public opinion and The Constitution both place great value on marriage and the family. It is therefore necessary to indicate the ways in which they may be supported and helped in preventing projected crises.

The guardianship court and other public authorities are obliged to "provide assistance to parents if it is necessary for the proper exercise of parental responsibility" (Art. 100 § 1 FGC). Difficulties in this regard should not engender criticism but rather concerted efforts to support them.

One form of family support in crisis is therapy. Motivation to participate in psychological therapy should come from the affected person or family, but therapy may also be necessitated by an obligation imposed on a parent whose behavior constitutes a threat to the child's well-being. A parent whose behavior poses a threat to a child's good may be required to seek psychological therapy. Such behavior may be the basis for a decision issued by the family court to limit parental authority (Art. 109 §2 (1) FGC).

Two legal institutions may be used in divorce or legal separation proceedings to encourage the divorcing spouses to talk and reach a compromise. The first is mediation, a process regulated by Art. 183^1–186 of the Civil Procedure Code[121] that aims to help spouses reach an agreement in all matters to be resolved in the divorce decree. Mediation is voluntary, so if a spouse refuses to participate or displays disruptive behavior, this cannot be considered by the court when reaching a judgment. Mediation is also used in custody proceedings concerning parental responsibility. The second institution of divorce law is the "parental agreement, which lays out the manner of exercising parental authority and maintaining contact with the child after the divorce" (Art. 58 § FGC). The court takes these measures into account if it finds that it is in the best interests of the child. A lack of agreement means that the burden of decision falls on the court.

Separation is an institution that is conciliatory in character and intention. It arose as a response to the proposal to keep marriage permanent and is thus addressed to people who conscientiously take marriage, even in terms of secular law, to be an indissoluble union. Legal separation allows spouses to settle issues related to their failed marriage, which are typically settled in the divorce decree, but in this case without dissolving the marriage bond. In a separation, the legal status of

121 Białecki, 2012; Kalisz and Zienkiewicz, 2014.

a marriage continues in spite of a complete breakdown of the marriage in all its aspects (Art. 61[1] § 1 FGC).

9. Selected aspects of the legal status of child

This section will discuss only some of the issues regarding a child's legal status as several problems concerning children have already been discussed in 2.1, 2.3.4, and 3.5.3.

9.1. Subjectivity and identity of the child

The subjectivity and dignity of a child are guaranteed by a constitutional norm (Art. 72(1) of The Constitution), standards set out in the UNCRC, and a number of provisions of the FGC, particularly those regarding parental authority exercised over children (Art. 87 and Arts. 93–105). The same documents emphasize the specific character of the legal protection of a child, stemming from the fact that the child grows up in a family, and parents have primacy in his/her upbringing (Art. 48 of The Constitution, Arts. 5 and 18 of the UNCRC, and Arts. 87–112 of the FGC). In Poland, the child's legal situation is perceived through the prism of the parental authority exercised by his/her parents[122] and the implementation of the child's rights is mediated in the family in which he/she is raised. If what parents do is to be regarded as the exercise of parental responsibility, it must be done in the best interests of the child and with the child's well-being in mind. If the parents abuse their superior position in relation to a child, then what they do is not exercising parental authority and it may constitute grounds for depriving them of that right (Art. 111 § 1 FGC). Parents may not use corporal punishment on their child (Art. 96[1] FGC).

One of the most important issues related to the subjectivity of a child and his/her identity is shaping his/her worldview.[123] When bringing up a child within a given religion or in the spirit of agnosticism or atheism, parents should take into account the child's stage of development and his/her reasonable expectations (Arts. 48, 53(3), and 72(1) of The Constitution). In this case, as well as in other matters concerning the child that fall within the ambit of the parents as part of their parental authority, parents should know the child's opinions and, if possible, take them into account (Art. 95 § 4 FGC).[124] A case in point is the decision to opt out or enroll a child in religious classes, which lies in parents' competence.

122 Strzebińczyk, 2011.
123 Smyczyński (ed.), 1999a.
124 Słyk, 2017.

Polish law establishes several ages at which the scope of the child's rights increases, while simultaneously stricter sanctions are imposed. At the age of 13, for example, a child achieves limited legal capacity (Art. 15 CC). On the grounds of the Act on Juvenile Delinquency Proceedings, the child may then be liable not only for demoralization but also for a specific punishable act (Art. 1§1). When turning 15, a minor who commits a particularly serious crime may be held accountable by a criminal court as an adult (Art. 10 § 1 the CrC). The child may also sign an employment contract. At the age of 16, minors, irrespective of their parents or guardians, have the right to consent to hospitalization or medical treatment, and at the age of 17 the child is responsible under criminal law as an adult.

Further evidence that a child is treated as a legal subject is the fact that children have the right to participate in the legal procedures that concern them. Article 72(3) of The Constitution, in accordance with Art. 12 of the UNCRC, mentions the obligation of public authorities (including courts and administrative bodies) and those responsible for the child, e.g., parents or teachers, to "hear and, as far as possible, take into account the child's opinion."

In court proceedings, a child's opinion is expressed and formulated during psychological tests in the form of counselling that takes place outside courtroom (Art. 216^1 Civil Procedural Code). The Polish doctrine postulates that during this counselling a lawyer be assisted by a psychologist. Also, new regulations (Arts. 99^1–99^3 FGC) on providing tutelage of a child in family matters warrant positive opinion.

9.2. Forms of parental control

The state may question the autonomy of the family and the primacy of parents in bringing up a child: under the circumstances specified in Arts. 109, 110, and 111 in the FGC, it may intervene in parental authority.[125] The main aim of the constraint of parental authority would be to correct the situation in the family that threatens the good of the child; therefore, the constraint should be temporary. Depending on the scale of the problems, the court may apply different orders: cooperation with a family assistant, enrollment of the child in a day care facility, supervision by a probation officer, and even placing the child with a foster family or in an institution. The justification for such orders may entail diverse, sometimes drastic circumstances, but all these suggest that there are arguments to protect a family by affording it support.

If there is a short-term obstacle in the exercise of parental authority, the court may temporarily suspend it (Art. 110 FGC). However, the court is obliged to remove parental authority from those parents who grossly neglect their child, abuse their parental authority (in practice, if they commit a criminal offense against the child), or if there is a permanent obstacle to exercising the authority (Art. 111 § 1 FGC). Parents may also be deprived of their parental authority if they show no interest in the child once he/she is placed in foster care (Art. 111 § 1a FGC).

125 Długoszewska, 2012; Słyk, 2017, pp. 1287–1304; Strzebińczyk, 2011.

Parental authority also expires if a parent becomes incapacitated. When a child has been completely incapacitated, then the parents are subject to the same restrictions as the legal guardian (the court supervises their actions in relation to the child).

The exercise of parental responsibility entails a number of parental obligations specified in acts of administrative law. Parents are responsible, for instance, to ensure that their children study and attend all levels of compulsory education. They must also ensure a child receives all mandatory vaccinations or hospital treatment. If parents fail to fulfill these obligations, administrative bodies may compel them by means of a fine. The bodies may also inform the family court of the delinquency of the parents.

9.3. Adoption and foster care

Only minors may be adopted and for the sole purpose of his/her good. An adoptive parent needs to be suitably older than the adopted child and he or she must possess the personal attributes to cope with the obligations of child-rearing. Such suitability is ascertained by adoption centers that issue a certificate of the completion of relevant training and an opinion on whether the candidate is qualified to adopt a child (Art. 114^1 FGC). The rules governing the way adoption centers conduct the qualification procedure of persons intending to adopt a child and the manner in which a register of children prepared for adoption must be maintained, are laid out in the provisions of the Act of June 11, 2011 on Supporting the Family and the Foster Care System.

A child is qualified for adoption if his or her parents fail to exercise parental authority over him/her because they are dead, unknown, have been relieved of their parental authority or have consented to the adoption of their child. Upon consenting to relinquish their parental rights, parents may not indicate candidates for the adoptive parents other than close members of the child's parents' family (Art. 119^{1a} FGC).

Polish law permits adult adoptees to know their biological origins. The court may allow them access to their complete birth certificate, which would contain information about the adoption (the Act on Civil Status Records).[126] In legal transactions, only abbreviated copies of the original birth certificate are used and these list the adoptive parents as parents.

As a general rule, married couples are preferred as adoptive parents, but it is also possible for a single person to adopt. Joint adoption of a child by cohabitants is not permitted. A full adoption modifies the child's legal status, making the adoptive parents his/her parents, meaning that they exercise parental authority over the child, and enabling parties in the adoption relationship to inherit and provide maintenance. Under specific circumstances, this adoption can be dissolved (Art. 125

126 Ct. Journal of Laws of 2021, Item 709.

FGC). On the other hand, a "blanket" adoption, i.e., the one adjudicated in the event of the parents' death or their consent to adopt the child without an indication of the adopter (blanket authorization), is additionally unbreakable (Art. 125^1§ 1 FGC).

Adoption involving transfer of the child abroad (so-called foreign adoption)[127] is permitted only if it has proved impossible to find a substitute family for the child in Poland. (This applies not only to adoption, but also to placing a child in a foster home.)

In recent years adoption has become less popular due to the availability of artificial forms of procreation that allow almost all parents to experience parenthood from conception. Another important reason for this decline in popularity is the ease with which adoptees can learn about their own roots, which encourages them to build relationships with their biological family.

Foster care is regulated in Arts. 112^1–112^8 of the FGC and in the Act on Family Assistance and Foster Care and is provided in the form of a family (foster families) or institutional (child care homes) environment. It replaces the care provided by parents when they are unable to do so. The strategic goal of placing a child in foster care is to bring him or her back to the family after he or she has received support, and new conditions conducive for reintegration are created.[128] If this goal is not achieved, parental authority may be removed from the biological parents and the child may be transferred for adoption. In practice, many charges remain in foster care for long periods of time due to the inability to either return to their parents or be put up for adoption for formal reasons. Other reasons for an extensive stay in foster care are that a child does not consent to adoption or there are no suitable adopters available.

The formal basis for placing a child in foster care is a court order. As a rule, it may limit parental authority (Art.109 § 2(5) FGC), suspend it (Art. 110 §1 FGC), and, on rare occasions, remove it (Art. 111 § 1 FGC). During the child's time in foster care, remedial actions are taken towards the biological parents (Art. 109 § 4 FGC). If these actions prove ineffective, parents may eventually be stripped of their parental authority (Art. 111 § 1a FGC).

Foster families who are the child's relatives predominate. The rest comprise professional foster families (including emergency foster care), therapeutic foster care (for sick and disabled children), social rehabilitation foster care (for demoralized youth), and foster care for adolescent mothers.

Foster care to function properly requires cooperation between the family court, family foster care organizations, municipal and regional social welfare structures, probation officers, and many others. However, no appropriate forms of cooperation have thus far been developed, which means that the end result is unsatisfactory in terms of meeting children's needs.[129]

127 Bagan-Kurlata, 2009; Holewińska-Łapińska, 2011.
128 Nitecki, 2016.
129 Arczewska, 2009; Andrzejewski, 2003.

In foster families, foster parents are commonly observed to consider the foster child as their own child (quasi-adoptive motivation), not as a child who has a family to which he or she should return. This causes problems in contacts between parents and their children and hampers family integration.

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Chapter VI

Marriage and Family in Serbian Law: A Contemporary Perspective

Gordana Kovaček Stanić

1. Introduction

"The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." This definition was formulated more than 70 years ago in the Universal Declaration of Human Rights, but still applies today. Marriage and family are social and legal institutions that retain their importance in contemporary society while constantly changing in their appearance and content as they adapt to shifting norms. As a result, new family forms develop, including family in non-marital cohabitation, the binuclear family (as a consequence of joint exercise of parental rights after divorce or separation), and family formed as a consequence of using artificial reproduction technologies.[1]

2. Marriage and family as universal human rights

In Serbia, marriage and family are universal human rights and fundamental values. The Constitution of the Republic of Serbia[2] in Section 2 "Human and

1 Kovaček Stanić, Samardžić, 2020, pp. 557–558.
2 Constitution of the Republic of Serbia, *Official Gazette of Serbia* no. 98/06.

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minorities' rights" stipulates the following: "Everyone shall have the right to decide freely on entering or dissolving a marriage. Marriage shall be entered into based on the free consent of man and woman before the state body" (Art. 62/1, 2). "Families, mothers, single parents and any child in the Republic of Serbia shall enjoy special protection in the Republic of Serbia in accordance with the law" (Art. 66/1). "Everyone shall have the freedom to decide whether they shall procreate or not. The Republic of Serbia shall encourage the parents to decide to have children and assist them in this matter" (Art. 63).

These provisions are in accordance with 1948 UN Universal Declaration of Human Rights 1948 Article 16 (1): "Men and women … have the right to marry and to found a family" and with Article 16 (3): "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

2.1. Social characteristics of marriage and family

Statistical data show that marriage and family in contemporary societies become less stable. Today in Serbia marriage rate is about five in 1000 population. It decreased from 7, 5 thirty years ago. Approximately every fourth marriage ends in a divorce in 2011 and every third in 2018. However, there is a difference comparing divorce rate in the Republic of Serbia and the Province of Vojvodina thirty years ago. In Serbia app. every seventh marriage ended in a divorce at that time, thus in Vojvodina, every fifth marriage ended in a divorce. It could be noticed that the in Serbia during the period of thirty years divorce rate increased much faster than in Vojvodina.[3]

Table 1

	Marriage rate (1.000 population)									**Divorce rate (1.000 population)**								
Year	1981	1990	2000	2006	2011	2017	2018	2019	2020	1981	1990	2000	2006	2011	2017	2018	2019	2020
Serbia	7,5	6,2	5,5	5,4	5,0	5,1	5,2	5,1	3,4	1,0	1,1	0,8	1,2	1,3	1,3	1,4	1,7	1,2
Vojvodina	7,6	6,0	5,9	5,2	4,9	5,4	5,5			1,6	1,3	1,1	1,1	1,1	1,7	1,8		

Table 2

		Divorces (number on 1.000 marriages)						
1	Year	1981	1991	2002	2006	2011	2017	2018
2	Serbia	141	145	238	206	230	257	275
3	Vojvodina	213	223	227	232	252	320	319

3 Kovaček Stanić, Samardžić, 2019, pp. 235–244.

The marital structures of urban and other rural settlements differ. The biggest difference is the percentage of divorces, which is almost double that of urban settlements. The urban population is an approximately 6% of the population over 15 years of age is divorced, but in rural areas it is almost 4%. This might be associated with the fact that the rural population has maintained a more patriarchal model of family relations compared to the younger age structure and less traditional marital behavior seen in in urban areas. In urban areas, there is a higher percentage of unmarried and divorced persons and a smaller proportion of married persons and widowers.

Table 3

Marriage status of population*	Republic of Serbia		Province of Vojvodina	
	2002	2011	2002	2011
Urban settlements				
Single	26.7	29.6	28.6	31.8
Married	58.6	53.8	55.5	51.1
Widows/widowers	9.6	10.5	9.8	10.4
Divorced	5.1	6.0	6.1	6.6
Rural settlements				
Single	21.6	25.7	24.2	28.7
Married	63.3	57.5	60.2	54.2
Widows/widowers	12.5	13.4	12.4	13.0
Divorced	2.6	3.4	3.2	4.1

In Serbia it is common for women to be employed, but the employment rate is still higher for men. The employed population consists of 44% women and 54.3% men. However, there are differences in wages: men's wages are 16% higher than women's. The overall unemployment rate is 15.7% for the female population, and 11.1% for the male population.

Recently, there have been indications that more women than men lose their jobs. Women do a greater proportion of the housework than men, regardless of their employment status. There is a difference in the contribution of money/housework in urban vs. rural populations. Men in urban areas are more likely to engage in household work compared to men in rural areas. This is a consequence of the fact that a greater percentage of women are employed in urban areas as well as social differences, such as the patriarchal (traditional) family model, which regards men as the primary breadwinners. This model is accepted more in rural areas than in urban

areas. Notably, the proportion of women as owners of immovable property in the public record of rights on immovable property is 29.7%.

One of the causes of the crisis symptoms of marriage and family in Serbia is the negative population growth rate. According to vital statistics in 2011, the population growth rate was -5.2‰. The birth rate was 9.0‰, while mortality rate was 14.2‰. The population growth rate for 2019 was -5,5‰, and for 2020 -7,7‰. The birth rate was 9,2‰ in 2019, and 8,9‰ in 2020; and mortality rate was 14,6‰ in 2019, and 16,6‰ in 2020.[4]

In the period from 2002 to 2011, the population decreased by approximately 241,000, and the average annual growth rate was -3.3 per 1,000 inhabitants. In the same period, the share of the population younger than 15 years and older than 65 years in the total population changed: the percentage of young people (0–14) fell from 16.1% in 2002 to 15% in 2011, while the proportion of those aged 65 and older increased from 16.6% (2002) to 16.8% (2011).

The other cause of crisis symptoms of marriage and family in Serbia is the emigration of young people from Serbia. In 2018, according to Eurostat information, over 50,000 people left Serbia. According to data provided by the Organization for Cooperation and Economic Development (OECD) and the International Monetary Fund (IMF) information, more than 400,000 people emigrated from Serbia to OECD countries during the period 2008–2016. A survey conducted by the Fridrih Ebert organization on more than 1,100 young people aged 14 to 29 years shows that three quarters of young people wish to emigrate.[5]

2.2. Social and state protection of marriage and family

Different laws in Serbia stipulate measures to protect the family. The first of these is the Family Act, which regulates marriage law, child (parental) law, and guardianship law.[6]

The Family Act stipulates value priorities for upbringing children: ”Parents have the right and duty to develop a relation based on love, trust, and mutual respect with the child, and to direct the child towards adopting and respecting values of emotional, ethical, and national identity of his/her family and the society” (Art. 70).

The Serbian Constitution stipulates: “The Republic of Serbia shall promote understanding, recognition, and respect of diversity arising from specific ethnic, cultural, linguistic, or religious identity of its citizens through measures applied in education, culture, and public information” (Art. 48).

It could be said that this provision also prioritizes certain aspects that could (should) be applicable to children’s upbringing.

4 Statistical Office of the Republic of Serbia, Monthly Statistical Bulletin 12/2020. Available at: https://bit.ly/2XmCh4Q, p. 36. I-XII 2019 8511 Æ I-XII 2020 9580.

5 See: https://bit.ly/3AbfqaE.

6 Family Act, *Official Gazette of Serbia* 18/05 with amendments, hereafter FA.

The Constitution stipulates special protection of the family, mother, single parent, and child (Art. 66), while the Family Act regulates special protection of the family, mother, and child (Art. 2/1, Art. 5/2). The wording of the Constitution takes into consideration the situation of the single parent, regardless of whether it is the mother of the father, and seems to be more appropriate for the contemporary situation in practice. The Constitution provides special support and protection for the mother before and after childbirth. Special protection is provided for children without parental care and for children with impediments that affect their mental or physical development. The Serbian Constitution states everyone shall have the right to decide freely on entering or dissolving a marriage, i.e., marriage shall be entered into based on the free consent of men and women before the state body. Moreover, contracting, duration, or dissolution of marriage should be based on the equality of men and women.

The Serbian Constitution states that provisions on human rights shall be interpreted as the benefit of promoting values of a democratic society, pursuant to valid international standards in human rights, as well as the practice of international institutions that supervise their implementation. The Constitution shall guarantee, and as such, directly implement human rights guaranteed by the generally accepted rules of international law and ratified international treaties and other agreements. The law may prescribe a manner of exercising these rights only if explicitly stipulated in the Constitution or necessary to exercise a specific right owing to its nature, whereby the law may not under any circumstances influence the substance of the relevant guaranteed right (Art. 18). In addition, the Serbian Constitution states that all are equal before the Constitution and the law. Everyone shall have the right to equal legal protection, without discrimination. All direct or indirect discrimination based on any grounds, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability shall be prohibited.

Special measures (affirmative action – positive discrimination) that the Republic of Serbia may introduce to achieve full equality of individuals or groups of individuals in a substantially unequal position compared to other citizens shall not be deemed discrimination (Art. 21).

The principle of equality between mother and father as parents and the equality of male and female children represents a more concrete version of the gender equality principle, which is stipulated in the Serbian Constitution signed in 2006. This principle was introduced into the domestic legal system through the Constitution of the Federal People's Republic of Yugoslavia in 1946. As a consequence, the mother and father have the same rights and obligations with respect to their children. Male and female children have the same rights in family and all other relations. Historically, in domestic law prior to World War II, the mother had an inferior status with respect to the father (pursuant to the institute of paternal authority), while female children had a considerably narrower set of rights than male children (pursuant to the Civil Code of the Kingdom of Serbia, 1844 female children possessed no inheritance rights).

The Serbian Constitution states that non-marital cohabitation shall be equal to marriage, in accordance with the law (Art. 62/5). Non-marital cohabitation is

defined as the sustained cohabitation of a man and a woman between whom there are no marriage impediments (Art. 4 Family Act).

Regarding the legal nature of family norms, it could be stressed that some family law norms are imperative norms, thus parties are not able to change them by their will (e.g., norms on concluding marriage and divorce). Some family law norms are recommending and incentive norms (e.g., norms on the personal rights and duties of parents). Enforcement and imposition of sanctions in family law are specific, as in most cases, the sanction is quitting the existing relationship, while civil law sanctions are a coercive realization of obligations and damage compensation. In family law, there are methods to prevent and improve family relations; for example, the Center for Social Services (as a guardianship authority) can warn parents of deficiencies in the exercise of parental rights and refer parents for consultation with a family counseling service or an institution specialized in mediating family relations. Mediation, which has recently increased in importance, is a process that aims to help spouses and parents reach an agreement on important matters.

The self-determination principle is a tenet of contemporary family law. Self-determination gives spouses and parents several options for arranging their mutual relationships and relationships with minor children after divorce or separation. Divorce by mutual agreement is a form of divorce that is largely accepted in family law and family practice. The joint exercise of the parental right (joint custody) is possible even after divorce or separation of parents. Self-determination is possible in property relations in contemporary family law via the signing of a (pre)nuptial agreement between spouses. The other manifestation of the self-determination principle concerns the legal position of the child. In contemporary family law, the legal position of the child has been strengthened and children are acquiring rights earlier than before, along with the opportunity to exercise them independently.

As far as legislation is concerned, the Family Act contains most of the principles adopted in the UN Convention on the Rights of a Child 1989. Family law protection from domestic violence was introduced in Serbia in the Family Act, and the Law on Preventing Domestic Violence was enacted in 2016.[7]

Some acts that regulate other fields of law have provisions in order to protect the family. For example, the Law on Labor, enacted in 2005, stipulates the right to maternity leave and childcare leave. Maternity leave lasts for a period of three months after the child is born and childcare leave lasts for an additional nine months. Maternity leave is mostly provided for mothers; the father can only take it if the mother is unable to care for the child. On the contrary, leave for childcare is available for both mothers and fathers, depending on the parents' agreement. It is possible to share childcare leave between parents. The Law on Labor further encourages the birth of a third and fourth child as the maternity and childcare leave last for two years instead of the one year of leave provided for the first and second child. The Law on Biomedical-assisted Fertilization stipulates different procedures (technologies) available to men and women to

7 *Official Gazette of Serbia* no. 94/16.

help them become parents (not including surrogate motherhood). From 2020, procedures for the stimulating fertility are free of charge, limitless,[8] as well as three embryo transfers are also free of charge for women up to the age of 43. For the second child, two procedures for fertility stimulation are free of charge and one embryo transfer.

The Law on Financial Support for Families with Children[9] stipulates different allowances, such as the parental allowance and child allowance. The parental allowance is the sum that parents receive as financial assistance when the child is born. This allowance is progressive and depends on the number of children. Parents' social status is not a factor in the receipt of this allowance. For the first child, the parental allowance is a lump sum of 100,000 din; for the second child, 240,000 din is paid in 24 monthly installments; for the third child is 1,440,000 din paid in 120 monthly installments; and for the fourth child 2,160,000 din is paid in 120 monthly installments. Given the obvious increase in payments for subsequent children, this is a birth-rate stimulative measure. The child allowance is a payment for the parents of the low social status. This law stipulates payments for maternity and childcare leave and the leave for the child care in accordance with Law on Labor.

The Law on Retirement and Disability Insurance[10] favors the birth of a third child, stipulating that an insured's seniority — here, the seniority of a woman who gave birth to a third child — accrues during the two-year maternal leave as a special type of seniority (Art. 60). Changes and amendments to this Law in 2005 extended the rights of the children without both parents to receive not just one parent's pension but two separate family pensions (Art. 73/1). While this measure does not directly affect family planning, it is certainly significant as a measure that protects a child.

In Vojvodina, in 2004, the Assembly of the Autonomous Province of Vojvodina adopted "The Programme for Demographic Development of the AP Vojvodina with the Measures for its Implementation." One of the most important measures of this bill is the financial compensation offered for the third child, which would be paid to the mother in the amount of the average monthly wage in the province until the child has reached the age of 19, regardless of whether the mother received an income. Unfortunately, this measure has not been applied due to a lack of funds.[11]

8 State Instructions for conducting biomedical assisted fertilization no. 06/2020.

9 *Official Gazette of Serbia* no. 113/17 i 50/18.

10 *Official Gazette of of Serbia* no. 34/03, 84/04, 85/05.

11 The condition for granting this compensation is proof that in the year when a third child was born the family has obtained an income per family member higher than the average salary in Vojvodina. Therefore, this measure is not social in its nature (it is restricted to well-off families), but is solely demographic in its character and stimulates the procreation of a third child. The measure is considerably expensive; it is estimated that in 2005 it would be necessary to provide 369600,000,00 dinars for these purposes. Other measures include the following: for a third and a fourth child – financial help and provincial child benefit, full child's attendance at pre-school, maternity allowance, child benefit paid for the first child; two free procedures of artificial insemination, *The Program for Demographic Development of AP Vojvodina* with the Measures for its Implementation, The Assembly of the Autonomous Province of Vojvodina, Executive Council of AP Vojvodina, Provincial Secretariat for Demography, Family and Social Child Care, 2005.

2.3. International legal background and constitutional considerations

According to the Serbian Constitution, ratified international documents are a direct source of law in Serbia.

> "Generally accepted rules of international law and ratified international treaties shall be an integral part of the legal system in the Republic of Serbia and applied directly. Ratified international treaties must be in accordance with the Constitution" (Art. 16/2).

For family law, the most important conventions are as follows: the Convention on the Elimination of All Forms of Discrimination against Women[12]; the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages[13]; the Convention on the Rights of a Child[14]; the Convention on the Civil Aspects of International Child Abduction[15]; the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children[16]; the Convention for the Protection of Human Rights and Fundamental Freedoms[17]; the Council of Europe Convention on Preventing and Combatting Violence against Women and Domestic Violence[18]; the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse[19]; and the Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption[20]. In 2009, Serbia signed, but has not yet ratified, the European Convention on the Adoption of 1967, which was revised in 2008.

One of the most important principles of European family law is the principle of respecting family life. This is stated in the European Convention on Human Rights, Art. 8:

> "1. Everyone has the right to respect for his private and family life, his home, and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." [21]

12 Ratified: *Official Journal of Yugoslavia* no. 11/81.
13 Ratified: *Official Journal of Yugoslavia* no. 13/64.
14 Ratified: *Official Journal of Yugoslavia* no. 15/90.
15 Ratified: *Official Journal of Yugoslavia* no. 7/91.
16 Ratified: *Official Journal of Yugoslavia* no. 1/01.
17 Ratified: *Official Journal of Serbia and Montenegro* no. 9/03.
18 Ratified: *Official Gazette of Serbia* no. 12/13.
19 Ratified: *Official Gazette of Serbia* no. 1/10.
20 *Ratified: Official Gazette of Serbia* no. 12/13.
21 Kovaček Stanić, 2002, p. 1.

Authors *Janis, Kay, and Bradley* have commented on this provision:

> "The phrasing in which this protection was stated, however, is unique in the Convention…Rather it speaks of a right to `respect for… private and family life`. Respect, as J.E.S. Fawcett pungently observed, `belongs to the word of manners rather than the law."[22]

The Serbian Family Act has a provision on respect for one's family life:

> "Everyone has a right to have his/her family life respected" (Art. 2/2).

In contrast, the Serbian Constitution does not contain a similar provision. Historically, during the period where the state of Serbia and Montenegro existed, a constitutional document entitled "The Constitution Charter on State Union of Serbia and Montenegro" had a Charter on Human and Minority Rights and Civil Freedoms that contained a provision on respect for private and family life (Art. 24).[23] It is not clear why similar provision was not stipulated in the subsequent 2006 Constitution of Serbia.

The most important decisions of the European Court of Human Rights involving Serbia, in connection with the violation of Article 8 (violation of family life) include the following: V.A.M. v. Serbia no. 39177/05; 13.3.2007; Tomić v. Serbia no. 25959/06 26.6.2007; Jevremović v. Serbia no. 3150/05. 17.7.2007; Damnjanović v. Serbia no. 5222/07. 18.11.2008; Felbab v. Serbia no. 14011/07. 14.4. 2009; Krivošej v. Serbia no. 42559/08. 13.10. 2010; and Jovanović v. Serbia no. 21794/08 26.3.2013.

In most cases, the issue before the court is the parent-child relationship. In two cases it concerns right to visitation (V.A.M. v. Serbia, Felbab v. Serbia and Krivošej v. Serbia), two cases concern entrusting the child to parental care (Tomić v. Serbia and Damnjanović v. Serbia), one establishes paternity of the father of a child born out-of-wedlock, (Jevremović v. Serbia), and one case concerns "missing" babies (Jovanović v. Serbia).

In Serbia, the issue of "missing" babies is a present problem. The specific act on this issue was adopted in March 2020: the Law on Establishing Facts on the Status of Newborn Children Suspiciously Missing from Maternity Hospitals in the Republic of Serbia.[24] The aim of this Act is to establish facts for finding the truth on the status of newborn children suspiciously missing from maternity hospitals in the Republic of Serbia and to exercise the obligation of the Republic of Serbia arising from the judgment of the European Court for Human Rights in the case of Jovanović v. Serbia.

22 Janis, Kay, Bradley, 2000, p. 225; Fawcett, 1987.
23 *Official Journal of Serbia and Montenegro* no. 1/2003, 6/2003.
24 *Official Gazette of Serbia* no. 18/20

The Constitutional Court of Serbia was called to assess the constitutionality of the provisions of the Family Act in the 9-year period (2007–2016) and found that no case determined their unconstitutionality. First, the Constitutional Court rejected the proposal to establish the unconstitutionality of the Family Act provisions that defines non-marital cohabitation as a lasting community of life for both men and women. Bearing in mind that by the constitutional provision itself, non-marital cohabitation shall be equal to marriage — which the Constitution has just defined as a community of life of a man and a woman — the Constitutional Court assessed that the disputed provisions of the Family Act were in accord with the aforementioned provision of the Serbian Constitution.

Subsequently, the Constitutional Court confirmed the constitutionality of the provisions of the Family Act on the obligation of parents to maintain their adult children who are incapable of working and lack sufficient means of subsistence.

The next crucial decision made by the Constitutional Court related to the Family Act, seeking to determine if the measure for temporary eviction of the perpetrator from a family apartment should have been dismissed. The Constitutional Court confirmed that in this case, "it was not a restriction of property rights but a temporary restriction of the manner of using the property that is permitted by the Constitution in order to protect the psychological integrity of the victim of domestic violence, and thus also for the public interest protection…"[25]

Of great importance was the 2010 decision of the Constitutional Court of Serbia on a matter involving an individual's sex change. This decision ordered the municipal authorities to decide on the application for registering the individual's sex change. In this case, the applicant of the constitutional complaint was a person who had had sex reassignment surgery but was not able to change the sex recorded in the administrative register, as the municipal authority declared itself incompetent, citing the Serbian Law on Registration of Births, which does not provide such a possibility. In this case, the Constitutional Court assessed that the principles of protection of human dignity and free development of personality should prevail.

Therefore, the Court ordered the competent municipal authority to decide on this request for registration of the individual's sex change.[26]

The possibility of changing one's sex was introduced into the Law on Registrations of Births in 2018 when this Act was amended.[27] Specifically, Article 45b was added, which stated that sex is changed could be registered in the register of births on the basis of health institution certificate. This certificate might be issued on the ground of at least one year of hormone therapy for a person whose sex is in the process of transition or on the grounds of surgical intervention resulting in his/her sex change.

25 Draškić 2017, pp. 58–59.
26 UZ-3238/2011 of 8 March 2011.
27 *Official Gazette of Serbia* no. 47/18.

2.4. Separation and cooperation of church and state in marriage law

In Serbian Family law, civil marriage is obligatory; thus, marriage concluded in a religious form does not have any legal consequences. Solemnization of religious marriage before the civil marriage was considered a crime until 1994, when this criminal offense was eliminated from the Serbian Criminal Act. In Serbia, civil marriage has been obligatory since the adoption of new rules after the Second World War — the 1946 Yugoslav Principle Law on Marriage. In the province of Vojvodina, civil marriage was obligatory much earlier because Hungarian law was in force before the Second World War (Law on Marriage 1894, para. 29/1, which required civil marriage). Nowadays, there is a widely accepted custom in Serbia to conclude marriage in a religious form apart from the civil. There is no precise provision in the effective law in which religious forms of marriage may be solemnized. Taking into account constitutional provisions related to the prohibition of discrimination, which includes a ban of discrimination based on religion (Art. 21/3), one may conclude that marriage may be solemnized based on the rules of all the recognized religious groups to which the future spouses belong.

In the Serbian orthodoxy, religious marriage is regulated by the Marriage Rules of the Serbian Orthodox Church.[28] Specifically, marriage is defined as "a holy sacrament in which two persons of the opposite sex attach themselves to one another, in the way prescribed by the Church through a spiritual and physical relationship, for the purpose of complete cohabitation and upbringing of children." Some minorities in Vojvodina, (e.g., the Hungarian minority, which is the largest minority group) accept the Catholic religion. The Catholic Church regulates marriage according to the Code of the Canon Law, wherein marriage is defined as an "alliance (*matrimonial foedus*) in which the husband and wife are establishing cohabitation, which is in its nature aimed at spouses' welfare and birth and upbringing of children" (Canon 1055, para. 1). The Code also uses the term "marriage contract" (*matrimonialis contractus*), but it gives priority to the alliance rather than the contract.[29]

The principal distinction between the civil contemporary definition of marriage and definitions of marriage according to religious law is the permanence or impermanence of the marriage. The Family Act has excluded the element of duration of marriage, although this does not imply, neither from the theoretical nor from a practical point of view, its brevity. Spouses today still get married with the desire for a long and harmonious marriage, but if this cannot be achieved for some reason, they have an option to get a divorce. In contrast, religious law views marriage as a lifetime union dissolved only by the death of one spouse. The other significant difference is that religious definitions view marriage as a sacrament (holy mystery). The principle of monogamy as a basic rule in marriage relations is prescribed in

28 *Marriage Rules of the Serbian Orthodox Church*, 2nd supplemented and corrected issue of the Holy Bishops Synod, paragraph 1-2, Belgrade, 1994.

29 Nuić, 1985, p. 337.

both civil and religious law. The significant distinction between Christian Orthodox rules and Catholic rules concerns divorce. As opposed to the Catholic Church, the Orthodox Church allows divorce.[30]

3. Marriage and family in Serbian family law

The Serbian Family Act does not contain a definition of what constitutes a family. There are several reasons for this approach. One is that family law regulates family relations and relations among family members, so, while it enjoys civil and social protection under the Constitution the family itself is generally not the holder of the rights and duties. Another reason is that a precise definition of the family will lead to restrictions on the term "family." Family relations, however, tend to develop quickly — there are new forms of family unknown in earlier historical periods that would otherwise remain outside the concept of a family if the definition of family determined exactly who can be considered a family member.[31]

In modern times, the most common family type is the nuclear family, consisting of parents and their immediate children. Some authors take a narrower definition to include only parents and children residing together. In contrast to this modern form of family, in Serbia's past, the extended family, as a broader definition of family, was of great importance. The extended family consisted of all relatives who lived and worked together. The Serbian Civil Code (1844) regulated the legal status of the extended family, providing that the extended family is a legal entity (Para. 57). Today, Serbian family law attaches importance to extended families, regulating property relations among members of family who live and work together through a special form of property that results from this situation: community property (Art. 195 FA). However, in modern times, the extended family as a form of family in Serbian society is the exception, as nuclear families prevail.

Cohabiting couple families, family based on adoption, and family created through medically assisted reproduction have gained greater legal significance in modern times. Additionally, an entirely new form of family, the so-called *binuclear family*, has arisen as the result of joint parental custody in a situation where the parents do not live together.

Societies have an interest in protecting the family, primarily because of their reproductive function and the role in renewing the population. Upbringing, education, and psychological support for children are primarily achieved within the family

30 Kovaček Stanić, 2011, pp. 811–813.
31 Kovaček Stanić, Samardžić, 2019, pp. 235–244.

sphere. These functions of the family affect the development of a child's personality and his/her upbringing to be responsible members of society upon reaching adulthood. However, questions remain over whether the principle of special protection of the family is implemented sufficiently in practice or whether such protection is provided to families who are unable to perform their functions according to modern standards.

The Serbian Family Act defines marriage as cohabitation between a man and woman governed by the law (Art. 3/1). According to this definition, the basic elements of marriage are cohabitation between two persons of the opposite sex and monogamous cohabitation (cohabitation of one woman and one man), which is governed by the law. Cohabitation is a complex relationship, which implies different relationships between spouses, based on love, including intimate relationships, respect, support, and economic relationships. If marriage is entered into in order to achieve a goal other than the intent to cohabitate (e.g., acquisition of citizenship, work permit, domicile, habitual residence, inheritance, housing rights, or other property rights), it is considered fictitious and invalid (Art. 16).

There is a tendency in contemporary family law to reduce marriage impediments, which in turn leads to the liberalization and facilitation of marriage formation. According to the Serbian Family Act, the substantial requirements are the following: opposite sex, expression of will to marry, cohabitation, and lack of marriage impediments (existing marriage, mental incapacity, minority, lack of free will, kinship by blood or adoption, affinity, and guardianship) (Arts. 15–24).

Marriage may only be solemnized between two persons of the opposite sex, i.e., a woman and a man. In Serbia, there is no act that governs the same-sex union (registered partnership or marriage), nor does any statute govern the legal status of persons who changed their sex (transsexuals). At present, a law to govern same-sex unions is in the process of being drafted.

Non-marital cohabitation between men and women in Serbian law constitutes a *de facto* relationship, so it is not possible to register it. Consequently, there can be difficulties in proving the existence of non-marital cohabitation in legal proceedings. Under Serbian family law, heterosexual non-marital cohabitation is regulated by the Article 4 of the Family Act. At the outset, it is important to emphasize that heterosexual non-marital cohabitation only has legal consequences if the legal requirements for the establishment of non-marital cohabitation are first met. These requirements are as follows: absence of marriage impediments (existing marriage, underage, kinship relation, adoption relationship, affinity relationship, mental incapacity, lack of free will to consent to marriage and guardianship). In addition, the non-marital cohabitation must be a sustained relationship. If non-marital cohabitation does not meet these requirements at the moment of its establishment, the court should apply civil law norms to the acquisition of property. However, if impediments cease to exist, non-marital cohabitation becomes lawful.

In Serbia, the statutory property regime in marriage and non-marital cohabitation is the community property regime. Community property is the property that

spouses/partners acquire through work while living together (Art. 171). The property that a spouse/partner acquires before marriage remains separate property; thus, assets acquired pre-marriage will remain individual property. Likewise, property that a spouse/partner acquires during marriage by inheritance, gift, other legal acts whereby rights are acquired exclusively, or by the division of community property is treated as his/her separate and individual property (Art. 168).

The (pre)nuptial contract was introduced in Serbian law by the 2005 Family Act. The authority for issuing the (pre) nuptial contract now belongs to the notary public (Law on Notary Public 2011 Art. 82/1/10, 11).[32] According to the amendments to the 2015 Family Act, the form of (pre) nuptial contract is notarial solemnization of the legal document (Art. 188). According to Serbian law, waiving the right to maintenance has no legal bearing (Art. 8 of FA); consequently, this cannot be a content of a (pre)nuptial contract. The (pre)nuptial contract is also available to partners engaged in non-marital cohabitation.

The right of a child and a parent exercising parental rights to live in an apartment owned by the other parent *(habitatio*) represents existential protection, especially designed for children, but also for parents who exercise parental rights. *Habitatio* is also available to spouses and partners in the situation of non-marital cohabitation. The condition for acquiring *habitatio* is that the child and the parent exercising parental rights do not have property rights to an unoccupied apartment. The right to residence lasts until the child acquires maturity. However, the child and the parent do not have the right to residence if the acceptance of their request for the right to residence would present manifest injustice for the other parent (Art. 194 FA).

The right and obligation of maintenance is a dual consequence of the creation and termination marriage and non-marital cohabitation (Arts. 151, 152 FA). A spouse/partner who lacks sufficient means of support and is unable to work or is unemployed (due to no fault of his/her own), has the right to maintenance from his/her spouse/partner in proportion to the spouse/partner's capacity. Thus, in order for the spouse/partner to have the right to maintenance, certain conditions must first be fulfilled and evidence provided indicating that the spouse/partner was unable to independently provide for his/her existence. There are two cumulative conditions, taking into account that the second condition consists of two alternative components. The first condition, — insufficient means of support — is considered to be fulfilled in a situation where the spouse/partner lacks the means to support him or herself or is in a situation where such means are insufficient for the fulfillment of basic needs. For example, a spouse/partner has an apartment or house, which is a place to live, but has no regular income that would satisfy other needs such as the need to maintain monthly rent or mortgage payments.) The second condition — the inability to work — can be permanent or temporary, complete or partial; for example, as a result of illness or old age. Unemployment, as an alternative component, should come about due to no fault of the spouse/partner. The condition on the side of the debtor (capable

32 *Official Gazette of Serbia* no. 31/2011.

spouse) is his or her ability to provide maintenance. These conditions are objective in nature. Although the concept of fault as a category has been abandoned in family law, the right to maintenance is not quite objective. As aforementioned, the spouse/partner can lose the right to maintenance if the acceptance of his/her request for maintenance would represent manifest injustice for the other spouse/partner (Art. 151/3 FA).

The amount of maintenance must be determined in accordance with the requirements of the maintenance creditor and the capacities of the maintenance debtor. The needs of the maintenance creditor depend on his/her age, health, education, property, income, and other circumstances that significantly contribute to the determination of the amount owed as maintenance (Arts.160–167 FA). The capacity of the maintenance debtor depends on his/her income, possibility to find employment and earn wages, his/her property, his/her personal needs, any obligations to maintenance other persons, and other circumstances that significantly contribute to the determination of maintenance. The standard of living during a relationship is not one of the statutory criteria. However, the contribution in practice would indirectly depend on the standard of living during the relationship, as the needs of the maintenance creditor would be different depending on the standard of living. Generally, the contribution is determined in terms of monetary support. However, it may also be determined in other terms in the case that both the maintenance creditor and debtor agree. The maintenance creditor may, at his/her own choice, request that the amount of maintenance be determined as a fixed monthly amount or as a percentage of the regular monthly pecuniary income of the benefactor. If the amount of maintenance is determined as a percentage of the regular monthly pecuniary income of the benefactor (salary, pension, royalties, and other compensation), the amount of maintenance, generally speaking, must be between 15% and 50% of the regular monthly pecuniary income of the maintenance debtor, minus the amount of taxes and contributions to compulsory social insurance. The possibility of calculating the amount of maintenance in percentage terms was introduced into Serbian law in 1993, at a time of hyperinflation, as a fixed sum was losing its value on a daily basis.[33]

According to FA, maintenance may last for a definite or an indefinite period of time, but is typically limited to a specific period. The maintenance of a partner after the termination of a marriage or non-marital cohabitation may last no longer than five years. However, there is a safeguard clause that provides that in exceptional situations the maintenance may be prolonged longer than five years, particularly if justifiable reasons prevent the spouse maintenance creditor from working (e.g., old age).

The main legal difference between marriage and non-marital cohabitation is that there are no hereditary rights between partners explicitly stated in or supported by the law (Law on Inheritance 1995). However, it is possible to make a testament and nominate a partner as an heir.

33 Law on Marriage and Family Relationships 1980 – amendments in *Official Gazette of Serbia* no. 22/93, 25/93, and 35/94.

In social law, partners have equal rights as spouses (Law on Financial Support for Family with Children, Law on Retirement and Disability Insurance).

Other forms of unions, e.g., same-sex unions, are not regulated in Serbian law. However, a law concerning same-sex unions is in being drafted. The 2021 Draft Law on Same-Sex union regulates two types of same-sex unions: registered same-sex unions and *de facto* same-sex unions; thus, parallelism of concepts exists.

A registered same-sex union is defined as the union of the family life of two same-sex persons, which is concluded by a competent organ. An unregistered (*de facto*) same-sex union is defined as the union of family life of two same-sex persons that is not concluded by a competent organ. This union has legal effects only if there are no impediments for its conclusion and if it lasts for a period of three years (Art. 2, Art. 66).

A same-sex union is concluded by affirmative and uniform statements in order to realize the cohabitation given before the registrar (Art. 8). A same-sex union is to be concluded before the registrar in a solemn manner and in a room specially designated for this purpose. The registrar may, exceptionally, allow for a same-sex union to be concluded in another venue if there are justified reasons for doing so. The future partners, two witnesses, and the registrar are to be present at the conclusion of same-sex union. Any person having legal capacity may be a witness to the conclusion of the same sex union (Art. 14). A same-sex union is terminated by the death of a partner, proclaiming missing person is dead, by annulment, or by cancellation (break) (Art. 18). A same-sex union can be cancelled in court proceedings, or exceptionally by registrar (break by agreement) (Art. 26). Each partner has the right to a court cancellation (break) of a same-sex union by action or agreement. If the relations are seriously and permanently disturbed or if the same-sex union cannot be realized, the termination is by an action. If both parties are in agreement, the partners must include a written agreement on the division of community property (Art. 27). It is stipulated in the Draft that, exceptionally, a same-sex union can be cancelled by providing consensual statements of will to withdraw the union to the registrar.

The legal effects of same-sex unions are similar to the legal effects of marriage. Regarding personal effects, same-sex partners consensually and jointly decide on all important matters for their life together, have the right to protect the privacy of their family life and right to mutual cooperation, and have a duty to help each other and to care and provide assistance in the case of illness (Art. 30). Finally, same-sex union partners may agree on any changes to their surnames.

Another family law effect concerns property rights. Partners might have separate and community properties, similar to spouses and heterosexual partners in non-marital cohabitation (Art. 38). The contract on property is available to same-sex partners, during or before conclusion of a same-sex union (Art. 46). Another family law effect is maintenance; partners in same-sex unions have both the right and duty of maintenance (Art. 35).

The Draft Law stipulates rights and duties between same-sex partners and the child of the other partner. A partner in a same-sex union has a duty to maintain a

child of the other parent if a child does not have relatives who have a duty of maintenance or if they lack sufficient means to do so. The duty to maintain a child of the other partner exists even if the union ceases to exist due to death of one partner if cohabitation continued until death. If a same-sex union ends by annulment or by cancellation, a partner's duty to maintain the child of the other partner also ends (Art. 36).

A partner in a same-sex union who is not a child's parent has the right to make decisions on necessary and urgent acts in the interest of the child when there is a danger to the health and/or life of a child. Another legal effect of same-sex unions is domestic violence.

Same-sex partners in registered unions have the inheritance rights as spouses (Art. 47). However, same-sex partners in *de facto* unions do not have inheritance rights that are similar to the position of heterosexual partners in non-marital cohabitation.

According to health law, a same-sex partner has the right to information about the illness and its treatment and to participate in decision-making on the medical treatment of the partner who is ill. If the partner is incapable of giving consent to medical treatment, the other partner has equal rights and duties as a spouse (Art. 32). If one of the partners is in the hospital, the other partner has the same visitation rights as spouses (Art. 33).

Partners in same-sex unions have the same rights as spouses in criminal proceedings. The partner who is in jail has the right to receive parcels from his/her partner and to visitation rights as a spouse (Art. 31).

Partners in same-sex unions have equal status as spouses under tax law, pension law, labor law, laws governing the acquisition of nationality, health insurance law, social protection law (including child protection law), tort law, etc. (Arts. 48–55).

A *de facto* same-sex union has the same effects on personal relations, children, property rights as registered same-sex unions (Art. 67). The effects on pension rights, social security, health insurance, and labor law are the same as the effects of non-marital cohabitation of two persons of the opposite sex (Art. 68).

The 2017 Law on Biomedical Assisted Fertilization stipulates different procedures available to men and women to help them become parents. These procedures are available to heterosexual couples, spouses, and partners engaged in non-marital cohabitation. Exceptionally, woman living alone are entitled to the right to infertility treatment by biomedical-assisted fertilization (adult, legally capable woman) (Art. 25). In practice, it would also be possible for the woman in the same-sex union to use biomedical procedures if they claim that they live alone. This would be easy, especially if the union is a *de facto* one, as there is no registration thus and no evidence of existing union. Therefore, although the Draft Law on same-sex union does not include reproductive rights and the availability of biomedical technologies to same-sex partners, in practice this could happen.

Serbian Draft Law could be classified as a group of laws that regulate registered same-sex unions with legal effects that are similar to the legal effects of marriage.

The process for creating and dissolving same-sex unions is similar to that of marriage and divorce. That is, comparable conditions and procedures exist for the conclusion of a same-sex union and marriage and for establishing the grounds for divorce and dissolution of a same-sex union. It might be a better solution for the contemporary Serbian situation, keeping in mind social circumstances and the general views of the population, to start by regulating the same-sex union as a registered partnership, an institution that differs from marriage. For example, in some countries, jurisdiction for the registration of registered partnerships has a court (France: *Du pacte civil de solidarité et du concubinage* – PACS). On the contrary jurisdiction for concluding the marriage has administrative organ.[34]

3.1. Legally recognized forms of family relationships

According to the Constitution and Family Act, a child born out of wedlock has the same rights as a child born in wedlock (Art. 64 Constitution and Art. 6/4 FA). The status of a child born out of wedlock does not depend on whether the child is born in a situation of non-marital cohabitation or non-marital cohabitation never existed. This principle was introduced into the domestic legal system with the 1946 Yugoslav Constitution. However, the equal status of children born in and out of wedlock was incomplete at first. The illegitimate child had legal relations with his mother and her relatives, but the father had to acknowledge the child in order for him/her to obtain all the rights and obligations in relation to the father and the father's relatives. However, if paternity was established through court proceedings, the child entered into legal relations with his/her father only and not with his relatives. In the jurisprudence, there was a view that a child acquires the rights and obligations in relation to paternal relatives if the father accepts the child after the court's decision. The complete equalization of the status of the children born in and out of wedlock came into effect via the 1974 Constitution. Today, children have the same rights and obligations in respect to both parents and their relatives, regardless of the existence or non-existence of marriage at the time of their birth. In modern times, the number of children born out of wedlock has increased. In Serbia, 24% of all children are born to unmarried parents, which is the reason for the change in the social attitude towards them. Children born out of wedlock should no longer be stigmatized. The only difference in the legal status of children born in and out of wedlock exists in the method of determining paternity.

The principle from ancient Roman law *pater vero is est, quem nuptiae demonstrant* accepted until now. Under Serbian law, the husband of the child's mother is to be considered the father if a child was born within 300 days after the termination of the marriage, but only if the marriage was terminated owing to the death of the

34 Rubellin-Devichi, 2000, pp. 158–164; Martin, Théry, 2001, p. 152.

husband and if the mother does not enter into another marriage during this period. The husband from the new marriage of the child's mother is to be considered the father of a child born during that marriage, regardless of how short a time may have elapsed between the termination of one marriage and the commencement of the other (Art 45/1-3 FA).

If a child born out of wedlock, paternity has to be established by the father acknowledging the child as his own or by a court judgment (Art. 45/4 FA). A person who has reached 16 years of age may acknowledge paternity (Art. 46 FA). Paternity may be acknowledged only if the child is alive at the moment of acknowledgment. Acknowledgment of paternity before childbirth is accepted, but only if the child is born alive (Art. 47 FA). The acknowledgement takes effect only if the mother and, under certain circumstances, the child consent to the father's acknowledgment. The mother and child can consent if they are at least 16 years of age (Art. 48/1 and Art. 49/1 FA). If either the mother or the child cannot consent, the consent of one of them is sufficient (Art. 48/2 and Art. 49/2 FA). If neither the mother nor the child can consent, the ability to consent to the acknowledgment of paternity is conferred to the child's guardian with prior establishment of his/her guardianship authority (Art. 50 FA).

Thus, the acknowledgement is not a unilateral act. These provisions vividly illustrate the principles of family autonomy. The acknowledgment depends almost entirely on the will of the parties concerned. If the man acknowledges his paternity and the mother (or a child older than 16) consents to it, this man is considered the father. The biological truth is not examined.

In Serbian law, paternity can be contested. In the case of a child born in wedlock, the mother, the child, the husband, and another man (who claims to be the father) could initiate proceedings to contest paternity and rebut the presumption of the husband's paternity (Art. 56). When adopting the Family Act, the legislature decided to synchronize the deadlines in all the maternity and paternity disputes by providing all parties, except the child, with a subjective deadline of one year from learning the relevant facts and an objective deadline of ten years from the child's birth. The deadline for the child is unlimited, so if it is in the interest of the child to initiate the procedure before he or she reaches legal age, the procedure will be initiated by his or her legal representative and, after reaching the legal age, by the child him or herself. If the child's interests collide with the interests of his legal representative, the guardianship authority will appoint a so-called "collision guardian to the child" (Art. 132/2 item 3 and Art. 265 FA).

Challenges to paternity can also be brought regarding children born out of wedlock. However, only the man claiming to be a child's father may initiate an action to contest the paternity of the man considered to be the child's father on the grounds of the acknowledgment. The mother, the father, and the child cannot contest paternity based on acknowledgment, as they consented to acknowledgment. If the paternity of the child born out of wedlock is established by a court decision, it cannot be contested at all (Art. 56 FA). In the proceedings for contesting paternity, the court

is obliged to determine the biological truth, which may be based on DNA and other biomedical evidence.

The mother's husband or partner is to be considered the father of a child conceived through biomedical assistance, provided he has granted written consent to the procedure of biomedical-assisted fertilization (Art. 58 FA).

The paternity of the man considered to be the child's father may not be self-contested, but an exception is made if he suspects that the child was not conceived through the procedure of biomedical-assisted fertilization. In this situation, he can contest paternity within one year from the day of learning that the child was not conceived through a procedure of biomedical-assisted fertilization, but no later than ten years from the birth of the child. If a child is conceived through biomedical assistance by donated semen cells, the paternity of the man who donated the semen cells may not be established (Art. 58/5 FA).

For a long time in legal history the matter of child maternity was rarely an issue. The principle of ancient Roman law, *mater semper certa est etiam si vulgo conceperit,* was broadly accepted, i.e., mother was the woman who gave birth to the child. In contemporary family law, statutory provisions often establish or define motherhood. The same is true in Serbian family law. The Family Act contains a provision explicitly stating that a woman who gave birth to a child is to be considered the child's mother (Art. 42). In addition, maternity can be established by a court decision in the exceptional instance of a woman who gave birth to a child who was not entered into the register of births indicating the identity of the mother. The child and the woman claiming to be the child's mother both have the right to establish maternity. A child may initiate an action to establish maternity at any time, and a woman claiming to be a child's mother may initiate an action to establish her maternity within a year of learning that she gave birth to that child (but no later than ten years from the birth) (Art. 249). Maternity can also be contested. This procedure is necessary in cases where the wrong data of a child's mother have been entered into the register, in the case of default or substitution of children, or the use of someone else's health identification card in a delivery hospital. In a number of cases, false documents are used in the hospital because the mother does not have medical insurance and is unaware that medical services to assist in giving birth is free, regardless of insurance. Although in such cases there is no dispute as to maternity, court proceedings must be initiated so that maternity can be properly established.

A child may initiate an action to contest maternity, regardless of the time limit. A woman entered in the register of births as a child's mother may initiate an action to contest her maternity within one year from the day of learning that she did not give birth to that child, but no later than ten years from the birth of the child. A woman who claims to be a child's mother may initiate an action to contest the maternity of the woman entered in the register of births as the child's mother within one year from the day of learning that she gave birth to that child, and no later than ten years from the birth of the child. A man considered to be the child's father under this Act may initiate an action to contest maternity within one year from the day of

learning that the women entered in the register of births as the child's mother did not give birth to the child, and no later than ten years from the birth of the child (Art. 250 FA). There are some restrictions to contesting maternity. Maternity may not be contested if established by a final court judgment, after the adoption of the child, and after the death of the child (Art. 44 FA).

If the child is conceived via biomedical assistance, the mother of the child is the woman who gave birth to the child. If a child is conceived through biomedical assistance by a donated ovum, the maternity of the woman who donated the ovum may not be established (Art. 58 FA). The Law on Biomedical Assisted Fertilization forbids surrogacy in such a way that it specifically prohibits the inclusion of a woman who intends to give the child to a third party with or without paying a fee or achieving any tangible or intangible benefits, as well as offering surrogate mother services by women or other individuals with or without charges or other tangible or intangible benefits (Art. 49/18).

According to the Law on biomedical assisted fertilization**,** the right to infertility treatment by biomedical-assisted fertilization procedures has adult and legally capable men and women, who are in need of help for biomedical assisted fertilization, who live together in accordance with the law governing family relationships – spouses or partners in non-marital cohabitation. They should be able to perform parental duties in the best interest of the child, considering their psychosocial conditions. Exceptionally, the right to infertility treatment by a biomedical-assisted fertilization procedure is entitled to an adult and legally capable woman living alone who is able to perform parental duties in the best interest of the child, Art 25. Thus, in the majority of cases, families formed with biomedical assistance will consist of both parents and a child, and only exceptionally will consist of the mother and child.

The Constitution of Serbia and the Family Act includes the principle of equalization of adoption with parenting, the Art. 6/5 Constitution, and Art. 7/4 FA. According to the Family Act, a child can be adopted if it is in their best interests, (Art. 89). Only a minor may be adopted, but not before reaching the third month of life (Art. 90). The family status of the adoptee has to be as follows: a child who has no living parents, a child whose parents are unknown, or their dwelling place is unknown; a child whose parents are fully deprived of parental rights; a child whose parents are fully deprived of legal capacity; a child whose parents gave their consent to adoption (Art. 91). A parent gives his/her consent to adoption with or without designating the adopters (Art. 95/1). A child who has reached ten years of age and who is capable of reasoning gives his/her consent to adoption, as well (Art. 98/1). The Family Act stipulates that spouses or cohabitees may adopt together. This ensures that the child grows up in complete families that have two parents, both mother and father. It is permitted for the person who is a spouse or a non-marital partner of the child's natural parent to adopt a child, in which case the child will have two parents, one natural and the other by adoption. Exceptionally, the minister responsible for family protection may grant adoption to a person who lives alone if there are justified reasons for doing so. The difference in age between the adopter

and the adoptee must not be less than 18 years or more than forty-five years (Art. 99/1). Only a person for whom it has been established that he/she possesses personal characteristics upon which it may be concluded that he/she will exercise his/her parental rights in the best interest of the child may adopt. The following persons may not adopt: a person fully or partially deprived of parental rights or of legal capacity, a person suffering from an illness that may have detrimental effects on the adoptee, a person convicted for a crime belonging to the group of crimes against marriage and family, against sexual freedom and against life and body (Art. 100). Adoption results in the establishment of the same rights and duties between the adoptee and his/her offspring and the adopters and their relatives, as between a child and his/her parents and other relatives (Art. 104). Adoption terminates the parental rights of parents and the rights and duties of the child toward his/her relatives and the rights and duties of the child's relatives (Art. 105). Adoption may not be rescinded, but may terminate by annulment, if it is null and void or voidable (Art. 106).

3.2. Legal framework of parent-child relationship

Parental rights are derived from the duties of the parents and exist only to the extent necessary for the protection of the personality, rights, and interests of the child (Art. 67). Parents have the right and duty to care for their children. Taking care of the child includes protection, raising, upbringing, education, representation, and maintenance[35] of the child and management and disposal of the child's property (Art. 68). Parents have the right and duty to protect and raise the child by personally taking care of their lives and health. Parents may not subject the child to humiliating actions and punishments that insult the child's human dignity and have the duty to protect the child from such actions by other persons. Parents may not leave the child of pre-school age, unsupervised. Parents may temporarily entrust the child to another person only if that person meets the requirements for being a guardian (Art. 69). Parents have the right and duty to develop a relationship based on love, trust, and mutual respect with the child, and to direct the child towards adopting and respecting values of emotional ethical and national identity of his/her family and society (Art. 70). Parents are under the obligation to provide elementary education to children and have the duty to take care of the child's further education according to their possibilities. Parents have the right to provide the child with education that is in accordance with their religious and ethical beliefs (Art. 71). Parents have the right and duty to represent the child in all legal operations and in all proceedings exceeding the limits of the child's legal capacity and capacity to be a party in the proceedings (legal representation) (Art. 72).

In Serbian law, the stepparent (the blood parent's new spouse) has the obligation to maintain a minor stepchild, during the marriage and after termination of marriage by death of the biological parent (not if the marriage between his/her parent

35 Kovaček Stanić, 2009, pp. 638–642.

and stepmother or stepfather has ceased by annulment or divorce). A stepparent has the right to get maintenance from his/her mature stepchild if the stepparent is unable to work and lacks sufficient means of maintenance in proportion to stepchild capacities. A stepparent does not have the right to maintenance if the acceptance of his/her request for maintenance would present manifest injustice for the stepchild (Art. 159).

A child has the right to maintain personal relations with relatives and other persons he/she is particularly close to, if that right has not been limited by a court decision (Art. 61/5). The stepparent is included as an in-law relative (affinity).

In Serbian family law, parents exercise parental rights jointly and consensually when they cohabitate. Married parents automatically acquire parental rights at the moment of childbirth. If parents are not married, the mother automatically acquires parental rights at the moment of the birth of the child and father when paternity is established (by father`s acknowledgment or by court judgment). Thus, if parents cohabitate and if paternity is established when parents are not married, parents exercise parental rights jointly and consensually.[36]

When parents do not live together, there are two forms of exercise of parental rights: joint and independent. In the Serbian legal system, joint exercise of parental rights in situations where parents do not cohabitate has been introduced in Serbian family law by the Family Act 2005. The parents might not cohabitate as a consequence of parental divorce, annulling their marriage, separation, terminating heterosexual non-marital cohabitation, or if parents never lived together.

A provision states that parents may continue to exercise parental rights jointly even after they do not lead a common life, provided that they make an agreement on joint exercise of the parental rights and provided that the court is satisfied that this agreement is in the best interests of the child (Arts. 75-76 FA). This kind of parental agreement enables parents to exercise all the rights and duties comprised within parental rights if they do not lead a common life. It is intended to avoid the hostility and antagonism caused by court decision granting the exercise of the parental rights to one of them. The wording of the provision on joint exercise of the parental rights confers great freedom upon the parents because it enables them to agree on matters related to their child in a manner that is most appropriate for their own particular situation. The only limitation is the parents` duty to reach an agreement on the issue of the child's domicile (Art. 75/2 FA). The domicile, followed by the child's address, must be established for the sake of legal certainty, and especially for the sake of facilitating legal acts (communication of legal documents, notification, etc.). In the opinion of the Commission that produced the Draft, this limitation does not necessarily mean that the parents cannot agree on the alternating residence of the child (factual joint custody).

36 Kovaček Stanić et al., 2017, p. 1290.

The other form of exercise for parental rights is sole (independent) exercise. In Serbian family law, one parent exercises parental rights independently when the other parent is unknown, has died, or is fully deprived of parental rights or legal capacity, when the child lives with this parent only, and the court has not yet made a decision on the exercise of parental rights. One parent exercises parental rights alone on the basis of a court decision when the parents do not cohabitate: if they do not conclude an agreement on the exercise of parental rights; if they have concluded an agreement on joint or independent exercise of parental rights, but the court finds that this agreement is not in the best interest of the child; if they conclude an agreement on independent exercise of parental rights, and the court finds that this agreement is in the best interest of the child (Art.77 FA).

The other parent who does not exercise parental rights has the right and duty to maintain the child, to maintain personal relations with the child, and above all, she/he has the right to decide, jointly and consensually with the parent exercising the parental rights, on issues that significantly influence the child's life (Art. 78/3 FA). The issues considered to have a significant influence on the child's life, in terms of the Serbian Family Act 2005, are specifically: the education of the child, significant medical interventions on the child, the change of the child's residence, and the disposal of the child's property of great value (Art. 78/4).

The right of the other parent to decide on issues that significantly influence the child's life, jointly and consensually with the parent exercising the parental rights, is a solution that existed in Serbian law before joint exercise as a form of exercise of the parental rights of parents who do not live together was formally introduced (Law on Marriage and Parental Relations 1980). In the process of enacting the Family Act 2005, the solution of joint exercise of parental rights was proposed to be enacted. Joint exercise of parental rights is possible only if the parents agree with this form. The solution that stipulates that the other parent has the right to decision making is not abandoned if the other parent exercises parental rights independently, particularly because of the fear that the rights of the other parent would actually be decreased in practice, if she/he lost the right to decision-making. This is due to the assumption that independent exercise of parental rights would be predominant in practice, as joint exercise requires agreement between parents, which is not easy to reach. It could be said that Serbian Family law is theoretically inconsistent, as the rights of parents are similar in both situations, the situation of joint and independent exercise of parental rights. However, parent who exercises parental rights independently is legal representative of the child and "the other parent" is not, while if they exercise parental rights jointly, both parents are legal representatives of the child.

The Serbian Family Act does not have an explicit provision for resolving the parental conflict.[37] Having in mind the specific concept of decision-making on issues that significantly influence the child's life, which might result in a great number

37 Kovaček Stanić, 2014, pp. 165–169.

of parental conflicts in practice, the need for explicit regulation of possible ways to resolve the conflict is evident. The solution to deprive parents of parental rights is rather drastic and suitable only if the parent acts negligently. The solutions that would be suggested for resolving parental conflict are as follows. The competent authority should be the court, as the decision in question is the most important issue concerning the child. The court has the competence to make such decisions, as judges who act in family law have to be particularly specialized in this field of family law and children's rights. The courts should have different options to resolve the conflict. First, to try to conciliate the parents through family mediation conducted by competent authorities (guardianship authority, marriage or family counseling services, or another institution specialized in mediating family relations). In addition, the court should have an option to authorize one of the parents to act alone with regard to one or more specific decisions. Finally, the court should be authorized to make a decision by itself on the particular issue. The court should have discretion to choose the option(s) that are most appropriate for the current situation. This will depend on different circumstances, for instance, is the matter urgent, is the parental conflict exception or frequent, etc.

Influenced by the UN Convention on the Rights of the Child 1989 and other relevant international documents, the Serbian Family Act 2005 introduced a new concept to the rights of the child, which are regulated in a separate chapter and have been broadened compared to previous acts. In family law, the rights of the child can be divided into rights regarding status, rights derived from parent-child relations, legal competence and the right to express an opinion, the right to maintenance, and property rights. The Family Act of 2005 introduced a special procedure for the protection of the child's rights.

The Constitution also regulated the rights of the child. According to the Constitution, a child shall enjoy human rights suitable for their age and mental maturity. Every child shall have the right to personal name, entry in the registry of births, the right to learn about its ancestry, and the right to preserve his own identity (Art. 64).

Rights regarding child's status are: right to a personal name, right to a domicile, right to a citizenship and right to know who his/her parents are.[38] The Family Act 2005 states that the right to a personal name is acquired at birth (Art. 13/2). The personal name consists of the name and surname (Art. 342/2). The parents determined the personal name of the child. Parents have the right to freely determine a child's name. They cannot, however, give the child a defamatory name, a name that insults the morality or a name that is contrary to the customs and opinions of the community. Except in the official language, parents also have the right to have the child's name entered into the Birth Register in the mother tongue and in the alphabet of one or both parents. If the parents are not living, unknown, if they did not determine the name in the time limit established by law, they could not agree on the child's name or gave a defamatory name, a name that insults the morality or a

38 Kovaček Stanić, 1997.

name that is contrary to the customs and views of the community, the child's name is chosen by the guardianship authority (Art. 344). The child's surname is chosen according to the surname of either one or both parents. Parents cannot give their common children different surnames. If the parents are not living, are unknown, or could not agree on the surname of the child, the child's surname is to be chosen by the guardianship authority (Art. 345).

Rights derived from parent-child relations are as follows: the right of a child to live with his/her parents, the right to be taken care of by his/her parents, in preference to all others, the right to maintain personal relationships with the parent with whom the child does not live, the right to development, upbringing, and education (Art. 60-63 FA).

A child has the right to be provided with the best living and health conditions for his/her proper and full development (Art. 62 FA). The protection of life and health of the child in contemporary conditions has, to a great extent, become a function of healthcare institutions. However, the role of parents is no less important. In addition to direct care about the life and health of the child, it also covers the provision of consent to any medical procedures being carried out on the child.

The Serbian Family Act 2005 provides that parents must not subject the child to degrading acts and punishments that insult the human dignity of the child, as well as being obliged to protect the child from similar actions by other persons (Art. 69/2). Historically, parents were empowered by law to punish their children.[39]

The Family Act 2005 introduced the obligation of parents not to leave a child of preschool age without supervision and thereby strengthen the obligation of parental care for the child (Art. 69/3).

A child has the right to education in accordance with his/her abilities, wishes, and inclinations (Art 63). The child's education, in contrast to its upbringing, which is many respects falls within the scope of the family, is carried out in schools as institutions. The Serbian Constitution provides an obligation to elementary schooling (Art. 71).

The majority was obtained by reaching 18 years of age. Full legal capacity is obtained by reaching the age of the majority or by concluding a marriage with court permission before reaching the age of the majority. The court may also permit a minor to obtain full legal capacity if he/she has reached sixteen years of age, has become a parent, and has reached the physical and mental maturity to provide independently for his/her own personality, rights, and interests (Art. 11 FA).

39 Pursuant to the Serbian Civil Code 1844, the parents had the right to return run-away of lost children and to "…what more, punish corrupted and insubordinate children with a moderate domestic punishment of castigating power ". Besides the application of 'domestic punishment', Serbian law also provided for the possibility of imprisoning children for up to ten days, pursuant to criminal law legislation, Para. 120 Serbian Civil Code, for a prison sentence – Para. 350 Penal Code, in Marković, 1920, p. 192. The child's obligation to obedience towards the parent and tutor was provided for in Hungarian law which was applied in Vojvodina, while minors could be forced to be obedient with 'domestic discipline'. "Domestic discipline was to be carried out so as not to affect the child's health" Para. 10 Law on Tutelage and Guardianship. See: Bogdanfi, Nikolić, 1925, pp. 130–165.

In spite of the fact that full legal capacity is obtained by reaching the age of majority, the child acquires some rights before reaching the majority. For instance, according to the Family Act, at the age of fifteen (but only if he or she is able to reason), a child has the right to change a personal name (Art. 346/1 FA), the right to inspect the Birth Register and other documentation related to his or her origin (Art. 59/3 FA), to decide which parent he or she wants to live (Art. 60/4 FA), to give consent to medical intervention (Art. 62/2 FA), to decide about maintaining personal relations with the parent he or she does not live with (Art. 61/4 FA), and to decide which secondary school he or she will attend (Art. 63/2 FA). A child who has not yet reached the age of fourteen (younger minor) can undertake legal affairs through which it exclusively obtains rights (e.g., gift contract), legal affairs by which he/she does not attain rights, obligations, or legal affairs of minor importance (e.g., purchasing of daily necessities). A child over the age of 14 (older minor) can undertake all other legal affairs with the prior or later consent of the parents. For some affairs, it is necessary to have the consent of the guardianship authority (disposal of immovable or movable property of great value). A child of the age of fifteen can undertake legal affairs through which he/she manages and disposes of income or property that he/she has earned through employment (Art. 64/3 FA). Furthermore, at the age of ten, the child who is able to reason gives consent to adoption (Art. 98 FA), to fostering (Art. 116 FA) and has the right to propose the person who shall be appointed his/her guardian (Art. 27 FA).

In court practice, though, it might be difficult to judge if the child is "able of reason," or if the child is "capable of forming his/her own opinion," which are prerequisites for taking the child's opinion into account. There is potential risk connected with court discretion in judging a child's capabilities and the risk of continuation in a paternalistic approach that might be hidden in court assessment of such capabilities.

For the first time, the Family Act 2005 explicitly governs the child's right to express an opinion (Art. 65). The child has the right to freely express his or her opinion if the child is capable of forming an opinion. A prerequisite for the formation of an opinion is being informed, whereby the Family Act provides that the child has the right to be duly informed. The child's opinion must be given due consideration in all matters and procedures regarding his or her rights, in accordance with the age and maturity of the child. At the age of ten, the child can freely and directly express his or her opinion in any judicial or administrative proceedings in which his or her rights are being upon. In addition, the child can independently or through other persons or institutions to address the court or administrative organ and request assistance in the exercise of his or her right to freely express an opinion. The Family Act obligates state organs, administrative organs, and courts to establish the child's opinion. A child's opinion is established under a special procedure deemed suitable for the child and with the assistance of a school psychologist, guardianship authority, family counseling center, or some other institution specialized in mediating family relations, and in the presence of persons the child chooses him or herself.

4. Concluding remarks

The law in some way affects the family from the very beginning by determining who is considered a family member, what are their mutual rights and obligations, how certain relationships are formed, and how they end. However, the modern understanding of the family necessarily implies respect for the self-determination principle (autonomy). The self-determination principle has consequences in the spouse/partner relationship (e.g., marriage contract) and in the parent-child relationship (e.g., joint exercise of parental rights after divorce/separation, rights of a child).

On the other hand, there are very weak formal legal obligations of the state in taking an active role in strengthening the family, and in practice, there is virtually no involvement of the state in strengthening ties within the family before certain problems arise. The protection of the family must not be reduced only to the question of how to do it, but also to the moment or whether the protection and development of healthy family relationships must be addressed much earlier, even before the family is formed. In that sense, counseling or conversations with competent persons can be of special importance. In addition, although they are relatively foreign to Serbian culture, the popularization of prenuptial agreements and presenting future spouses/partners with the possibilities of this agreement can contribute to the avoidance of later property disputes. Although some proposals have already found their place in the positive legislation of Serbia, the extent to which these provisions have been applied and whether they really contribute to maintaining stable family relations in situations where relations are seriously disturbed.

Statistical data on marriage and divorce in Serbia show that the marriage rate has decreased from 7,5 30 years ago to about 5 today. The divorce rate has increased, as approximately every third marriage ended in a divorce in 2018 compared to every fourth in 2011. The population growth rate decreased from -5.2 ‰. in 2011 to –7,7‰ in 2020. Comparing mortality rate in 2019 and in 2020 it has to be noticed the mortality rate has increased in 2020 from 14,6‰ in 2019 to16,6‰ in 2020. This considerable increase is probably due to the coronavirus pandemic and illness of Covid 19.

In Serbia, the current issue is the regulation of same-sex unions. The prepared Draft Law might be classified in the group of laws that regulate registered same-sex unions similar to marriage. Considering the different concepts of the same-sex union in comparative law, we would suggest that Serbia starts with some differences in the procedure for concluding and dissolution of same-sex union and marriage. For instance, to abandon the condition for witnesses to be present, abandon solemn form, and the possibility of registering a partnership outside the registrar office. For the dissolution of the same-sex union, the proposal would be to stipulate registrar as an organ with jurisdiction, instead of the court, to regulate two ways of dissolution, by mutual agreement and by unilateral demand, but without stipulation of the grounds as for the divorce.

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Chapter VII

The Protection of Families in the Slovak Legal System

Lilla Garayová

1. Introduction

The union of a man and a woman, recognized by authority or rite, is as old as civilization itself, and marriage in some form is found in virtually every society. Throughout the centuries, marriage has taken many forms, and, in some ways, it barely resembles the meaning it once held. The primary purpose of marriage thousands of years ago was to bind a woman to a man, thereby guaranteeing that their common children were indeed their biological heirs. Through marriage, a woman became the man's property. Early marriage in ancient societies was accompanied by the need to ensure a safe environment for the preservation of the tribe. In these early times, marriage was often without love and desire, because the main motivation to enter into a marital bond was social and economic stability. The foundations of marriage remained unchanged for thousands of years, and the first major transformation of this institute started with universal suffrage in the twentieth century. The idea that marriage is a private relationship for the fulfillment of two individuals is very new, and due to the rapidly changing society in the twentieth century, the institute of marriage has changed more in the past 50 years than in the 5000 years before. If the evolution of marriage and family is virtually the same across the globe, why are the guiding principles of family law so different, even for countries within the same region? Should family law reflect the values of each country? Is there a way to

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create a unified family law that is palatable to all European (EU) countries? Will the Visegrád Four (V4) countries, with a more traditional interpretation of family law, keep their values, or will they step onto the path of Europeanization?

Family law is a set of legal norms governing personal relationships and related property relationships between spouses and between parents and children, as well as relationships imitating or replacing them. The subject of Slovak family law consists of three basic types of family law relationships:

- relationships between spouses – these arise from the free and voluntary declaration of a man and a woman that they are getting married,
- relationships between parents and children (and through them, also among other relatives),
- relationships of surrogate family care – these are relationships that replace the relationship between parents and children (foster care, guardianship) and relationships that mimic the relationship between parents and children (adoption).

The primary source of our national family law is the Constitution of the Slovak Republic[1] as the basic law of the state, which, in Art. 41, enshrines the principles of family law, from which the legal provisions contained in the Family Act are derived. Since January 19, 2005, the legal norms governing family law relations are contained in Act No. 36/2005 Coll. on the family (hereinafter referred to as the Family Act)[2]. The Family Act is a separate act, which is the primary source of family law, among many others. It can be said that the Family Act has become well established in society and has been generally accepted relatively quickly. It was not significantly amended until 2015; prior changes were minor and only affected the institute of pre-adoption care, the institute of substitute alimony, and the institute of alternating care. The biggest change came in 2015, whereby the principles contained in the Family Act were amended, placing a greater emphasis on the best interests of the child, with the intention of creating a modern family law more in line with European standards. As a result, the basic principles concerning the criteria of the best interests of the child were expanded, the conditions for placing a child in institutional care were tightened, and the priority position of substitute personal care was emphasized. These changes occurred with the adoption of Act No. 175/2015 Coll.[3] In response to current societal trends, namely the decline of the traditional family where the child's mother and father live in marriage, higher divorce rates, the growing number of children born out of wedlock, international child abductions and the related improvements in child protection, and, last, the importance of a stable family environment that includes the father and the mother.

The Ministry of Justice of the Slovak Republic and the Ministry of Labor, Social Affairs and Family of the Slovak Republic cooperated in the preparation of the bill,

1 Constitution of the Slovak Republic of 1992 (460/1992 Coll.).
2 Act No. 36/2005 on Family and on Amendment of Other Acts.
3 Act No. 175/2015 Coll.

with the aim of strengthening the protection of children's interests. The joint proposal of the two ministries received great support in the legislature, with 98 members of parliament (larger than the constitutional majority) voting for it.

Most importantly, the amendment to the Family Act established the environment of the family formed by the father and the mother of the child as the most suitable environment for the all-round and harmonic development of children. Another change was on the issue of the best interests of the child. We consider this step by the legislator to be positive and desirable, as before the adoption of Act No. 175/2015 Coll. This term was not defined, although the Family Act refers to it in many places (but it is a term used and referenced in many other laws that had not been defined previously) and highlights it as a basic criterion, for example, in the decision-making activity of the courts and of all the authorities in general, in the absence of its definition, its determining criteria were left to the discretion of the courts.

The current family law in Slovakia is at a crossroads. The basic principles of family law enshrined in the Constitution and the Family Act are based on inherently traditional values, whose aim is to protect the traditional family. In recent years, however, there has been increasing pressure from the EU to reform Slovak family law, move towards Europeanization, and adopt modern trends in family law. While society is undeniably changing, and the current legal framework does not fully reflect that (there are no provisions on cohabitation or civil partnership; there are no alternatives to traditional marriage). Slovak society at its core remains mostly conservative; therefore, the values that provide the foundation of family law principles reflect this disposition. The following chapter looks at the evolution of family law, the core principles of family law, and the protection of matrimony and families in family law in an attempt to identify the reason behind the conservative nature of Slovak family law, its future, and the resilience of its traditional values against modern trends.

2. The evolution of family law and the creation of its basic principles in the Slovak Republic

Family law is one of the oldest legal disciplines in private law. This is because, since time immemorial, it has applied to the interests of the most private nature of an individual –spouses, parents, children, or other persons holding family rights and responsibilities.

Family law relations in the Slovak legal system are regulated by the Family Act. Since 1950, family law relations have been set outside the scope of the Civil Code and are still regulated by a separate law. In the future, however, the regulation of family relations will be returned to the Civil Code as a separate part of it in the framework of the forthcoming codification of general private law in Slovakia.

In terms of the current relationship between family and civil law, the return to the dual structure of private and public law after 1989 means that the regulation of personal and property conditions in the family and marriage is closely linked to general civil law. The integration of both subsystems of private law is evident even now, especially in §111 of the Family Act, which provides for the general subsidiarity of the Civil Code for legal relations regulated by the Family Act. Thus, unless the Family Act provides otherwise, the provisions of the Civil Code shall apply to family relationships.

Until 1949, family law was not uniformly regulated and codified in the territory of the Slovak Republic. Legal relations in the family were regulated by their nature through several civil law regulations. After the First World War, after the Czechoslovak Republic was established, Act No. 11/1918[4] reciprocated the then Austro-Hungarian law, with some exceptions. In Slovakia, the reception standard took over Hungarian civil law, which was mostly an unwritten customary law. Of the written regulations concerning family law relations, the most important was the Marriage Act (Act No. XXXI/1894)[5], which regulated in detail the conditions for the formation and dissolution of marriage. The law was based on the contractual nature of marriage, introduced obligatory civil marriage, and allowed separation, regardless of the confessional affiliation of the spouses. The content of the marital relationship and the rights and obligations of the spouses were, however, not regulated by the Marriage Act and were therefore governed by customary law. Another important legal act that was reciprocated was Act No. XX/1877 on guardianship and custody. Many questions on family law, however, remained a murky gray area; because of this legal dualism (sometimes even trialism of Austrian, Hungarian, and customary law, with further differences between customary laws of different regions of the newly formed state), the newly established state prioritized the unification of laws.

Shortly after the reception of the Austro-Hungarian regulations, some questions on matrimonial law were unified in 1919. The Amending Act on Marriage (Act No. 320/1919 Coll.)[6] was undoubtedly the most important step in the path of an independent Czechoslovak legislation during the first republic. The Act uniformly regulated the formation of marriage, marital obstacles, and the dissolution of marriage. The Amending Act on Marriage introduced an optional civil marriage in addition to a valid church marriage. It exhaustively adjusted the reasons for separation after marriage. This Act was revolutionary in a sense, since it unified matrimonial law in that it applied to all citizens of the Republic, regardless of religion. The Act broke the principle of the inseparability of Catholic marriage during the lifetime of the spouses. The previous Austro-Hungarian marriage law granted the possibility of separation

4 Act No. 11/1918 Reception Act, Section 2 stipulated that '*all existing regional and imperial laws and regulations shall continue to be in force temporarily*' in order '*to avoid any confusion and to regulate an unobstructed transition to a new life of the State*'.

5 Marriage Act (Act XXXI/1894).

6 Act No. 320/1919 Coll.

only to non-Catholics, and Catholic marriage was separable only by death. For the Czechoslovak population, the marital amendment represented a transition from the irrevocability of marriage to the possibility of its annulment by separation in a new, yet desirable, way and corresponding to the needs of the people. It exhaustively regulated the methods of marriage separation and kept in force the institute of separation 'from bed and board', which, although it did not mean the dissolution of the marriage, relieved the spouses of the obligation to live together.

Regarding the analysis of Act No. 320/1919 Coll., it is also necessary to consider that the territory of the then Czechoslovak Republic was newly created. In addition to the so-called historical countries, it also includes Slovakia and Subcarpathian Ruthenia. These huge territorial changes after the World War were much more than merely new borders; they also meant legal transformation and connection of the various territorial units of the newly formed country via law. The social, religious, and other differences affecting family life were also palpable between these territorial units; therefore, these differences had to be considered in the new legislation as well. While the act tried to incorporate all these challenging areas and brought a new perspective on family law, much less affected by religious affiliation than ever before, it also involved a range of future problems that legislators never managed to overcome during the first Czechoslovak Republic.

Despite the unification tendencies discussed above, several issues remained fractured in the new legislation. For example, the issue of adjusting the joint property of spouses remained different in Slovakia from that of the other territories of the country. In Czechia, Moravia, and Silesia, the system of separate property of spouses was applied with a wide range of contractual modifications through so-called marriage contracts. In Slovakia, the institute of co-acquisition was applied, which represented a system of property community in case of marriage dissolution.

The fundamental political changes in Czechoslovakia after February 1948 were reflected in the entire legal order. The new communist government within the so-called biennial of legal proceedings launched a revision of legal regulations, which also affected the area of family law. The first Act on Family Law No. 265/1949 Sb.[7], which entered into force on January 1, 1950, became, among other things, a legislative expression of the ideological principles of the new socialist law, which abandoned the classification of public and private law. The Act on Family Law brought many important changes to legal provisions on family relationships. It elaborated on the family law regarding the basic principles expressed in the May 1948 Constitution. Legal provisions on family were separated from general civil law, and family law provisions were unified for the entire territory of the country. This Act featured an obligatory civil wedding, full equality of the husband and the wife in their rights and obligations, the removal of discrimination of children whose parents did not enter marriage, and the reduction of impediments of marriage. The Act on Family Law undoubtedly represented the legislator's undertaking to get marriage and family

7 Act on Family Law No. 265/1949 Sb.

life under the control of the state. The Act itself had the status of a separate legal regulation; therefore, it did not contain any provision that would create its specialty in relation to the Civil Code as a general, applicable regulation; therefore, the act meant the complete separation of family law and civil law.

The 1949 Act was based on the principle of equal status for men and women and the equal legal status of children born in and out of wedlock. A complete secularization of the marriage was carried out, and the formation of the marriage was obligatorily linked to civil marriage. The law abandoned the concept of marriage as a contractual relationship and replaced it with the consent of the spouses to voluntarily enter marriage before the relevant national committee in the presence of two witnesses. When it comes to the dissolution of a marriage, the distinction between divorce and separation 'from bed and board' was removed. The only way to dissolve a marriage became a decision of the court.

The Act on Family Law from 1949 was amended twice during its short period of validity. The first amendment was made by Act 61/1955 Coll. on the amendment to divorce regulations. This amendment alleviated the impossibility of dissolving a marriage without the consent of the spouse, by a court decision, which, in exceptional cases, allowed the court to declare a divorce in its decision if the marriage had been permanently and deeply dysfunctional for a long time. The second amendment was made by Act No. 15/1958 on the amendment of the regulations on adoption, in which the adoptive parents were entered in the register, instead of the biological parents.

The Act on Family Law did not survive for a long time. In 1960, Czechoslovakia adopted a new socialist constitution. Under ideological influence, they mistakenly anticipated the victory of socialism and subsequent social development. These misconceptions were legally expressed in the new constitution, and shortly thereafter, the basic branches of law were recodified. Important changes in the legal order ensued, affecting all areas of law, including family law and matrimonial law. The result of the second wave of socialist codification of law was the new Family Act No. 94/1963 Coll.[8] The new law entered into force on April 1, 1964, and was in force until April 1, 2005. The new Family Act followed the main principles of the regulation of individual institutes in the Family Law Act of 1949, with much greater emphasis on the paternalistic understanding of the relationship between the state and the family. The biggest changes affected the regulation of divorce and some basic principles of marriage. The opening provision of the Act stated that *'the morality of socialist society should become the basis for all relationships in family, for the marriage itself, and for raising children'*.[9] Therefore, the previously separate provisions on the legal protection of children and youth were incorporated into this Act, and the powers of National Committees in terms of social control of raising children were substantially enlarged. Based on the Family Act, the family became the basic building block of society, where parents were responsible for the mental and physical development of

8 Family Act No. 94/1963 Coll.
9 Family Act No. 94/1963 Coll.

their children, with the state and other social organizations being also ascribed some responsibilities in terms of raising children and fulfilling their material needs.

The Act maintained the obligatory civil wedding: the wedding had to be performed in front of a state authority, with limited exceptions from this provision. The dissolution of the marriage was largely impacted by this act as well, and the courts were supposed to investigate the causes of the breakdown of the marriage, but they were to abstain from providing a formal verdict on the guilt in divorce proceedings. The courts were also supposed to include a decision concerning the parents' rights and duties after the divorce with respect to their minor children. The concepts of wardship and guardianship were replaced by a single concept of guardianship, and wardship was assigned to state authorities, further emphasizing the growing state control.

The dissolution of the Czechoslovak federation simultaneously meant the birth of new successor states – Slovakia and the Czech Republic – on January 1, 1993. After the establishment of the Slovak Republic, the Family Act of 1963, as amended, became the basis for the regulation of family law in Slovakia as stated in the reception norm contained in Art. 152 of the Constitution of the Slovak Republic. In the mid-1990s, in discussions on the new concept of legal regulation of relations under private law, expert opinions prevailed that understood the normative regulation of family law as an integral and natural part of the forthcoming recodification of the Civil Code. In other words, family law, together with other branches of private law, should be concentrated in the new Civil Code. Currently, this is still in the realm of the future evolution of family law.

The new Family Act No. 36/2005 Coll. was not originally included in the Plan of Legislative Tasks of the Slovak Republic. The plan required the Ministry of Justice of the Slovak Republic to prepare only an amendment to the Family Act No. 94/1963 Coll. as amended. However, the scope of the proposed changes exceeded the possibilities of direct amendment of the law and required not only a change in the system of the law but also the adoption of a completely new legislation. The previous legislation was modern at the time and was in force for over 40 years. In the twenty-first century, however, it has not been able to respond sufficiently to the dynamic development and fundamental changes that have taken place in society.

The new legislation from 2005 already reacts to the Convention on the Rights of the Child as well as to the legislative intention to recodify the Civil Code, which will also include the integration of family law into the Civil Code. In the preparation of the new Family Act, a comparison with foreign legal systems (Hungary, Germany, the Czech Republic, etc.) was also partially used.

According to the explanatory report of the new Family Act in 2005, the changes introduced by the new legislation effective from April 1, 2005 concern the grounds for invalidity and non-existence of marriage in circumstances excluding marriage, the possibility of regulating the child's contact with close persons, distinguishing between guardianship and wardship institutes. Compared to the previous regulation, the rules for monitoring and evaluating the performance and effectiveness of

institutional education, educational measures, the performance of the guardian, and the guardian's administration of the child's property have been tightened. The issue of foster care regulation was also included in the new law. Although it has public law elements, by its nature, it is mainly a private law institution of substitute family foster care.

In view of the current developments in medical science, as well as in foreign practice, the increasingly frequent disputes over the determination of maternity law express the principle that the mother of a child is the woman who gave birth to the child. In this context, it was necessary to clearly enshrine the invalidity of any contracts and agreements that run counter to the irrebuttable presumption of maternity.

3. The basic principles of Slovak family law

The core sources of Slovak family law are the Constitution of the Slovak Republic and the Family Act of 2005. While a closer look at all the provisions of these Acts would be impossible due to the limitations of this publication, I believe a look at the basic principles of Slovak family law is essential in understanding the state of family law in Slovakia in comparison with other EU countries. The Family Act of 2005 contains a list of basic principles in its first provision. In essence, these basic principles represent the pillars on which the Slovak family law was built. These are the most important provisions of national family law, with the possible exception of Art. 41 of the Constitution of the Slovak Republic, which represents the framework of the entire family law regulation. The purpose of the basic principles lies mainly in that they serve as common rules for the interpretation of family law. It is necessary to look at every family law relationship through the lens of these principles, and the rights and responsibilities of each subject involved must be assessed based on these principles. An interesting common feature of these principles is that while family law is inherently private, unlike most private law principles, these principles are not only aimed at determining the relationship between two private entities, but also outline the responsibilities of the state and society in relation to the family and its protection. They provide answers to questions about which types of family relationships are preferred or prioritized by the state and what they should entail. For this reason, no public authority may use discretion in interpreting family law relationships that would run contrary to the pillars of family law. These basic principles are enshrined in Arts. 1–5 and represent the values and principles of family law in Slovakia.

Art. 1: *Marriage is a union of a man and a woman. The society comprehensively protects this unique union and helps its welfare. Husband and wife are equal in their rights and*

responsibilities. The main purpose of marriage is the establishment of a family and the proper upbringing of children.

Marriage, understood as a union of two people who are close and irreplaceable to each other, is still the most desirable form of human coexistence. According to research by psychologists, marriage is extremely important for a person's physical and mental health.[10] These studies have shown that married people live longer and have happier lives.[11] There is less violence in it than in unmarried cohabitation or between singles.[12] Marriage requires a person to emotionally invest in a relationship, which has a positive effect on his or her personal well-being. It creates new social ties, integrates a person into social groups, and strengthens their position in society. It not only plays a key role in one's family life but also directly affects society. Naturally, all these positive tasks are only performed in a marriage that is functional and working. The Family Act interprets its function through the principle of equality of spouses. This equality must be understood not only as equality in rights between spouses but also as equality in responsibilities. Each spouse contributes to the well-being of the family according to their possibilities, abilities, and material conditions. The equality of spouses is reflected in the position of each of them as a partner and as a parent. Neither sex should be discriminated against when assessing the legal status of a marriage. When evaluating a dispute, in each individual case, it is necessary to assess separately how the spouses enjoy the rights derived from their marriage and how they fulfill their obligations.

Marriage under Slovak law is still a union between a man and woman. This provision has even been incorporated into Art. 41 of the Constitution of the Slovak Republic, being the only legislative change that this article has gone through since the Constitution came into effect. To date, no legal alternative to marriage exists in the Slovak legal order (more details on this are given in the following chapters). This is rooted in the traditional view of family law in the Slovak legal order and emphasizes the biological-reproductive function of the family.

Art. 2: *'Family founded by marriage is the basic cell of society. Society comprehensively protects all forms of the family.'*

The term 'family' is understood more broadly than just a 'family established by marriage.' Every form of family is protected and supported by the state, regardless of how it was formed, if it gives its members a sense of security and solidarity. Even under the International Covenant on Civil and Political Rights,[13] the *'family is the*

10 Uecker, 2012, pp. 67–83.
11 Stavrova, 2019.
12 Kenney and McLanahan, 2006.
13 Art. 23 of the International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification, and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with art. 49.

natural and fundamental group unit of society and is entitled to protection by society and the State.' The Covenant further declares the right of every man and woman of marriageable age to marry and to found a family. This right is closely linked to the right to respect for private and family life as outlined in the European Convention on Human Rights.[14] The Family Act highlights marriages that have fulfilled their main purpose within the meaning of Art. 1 of the Basic Principles and have created a family, which forms the basis of society and which society is committed to protecting comprehensively. Based on this principle, a family is a group of at least one parent and at least one child. In principle, it is not possible to participate in any discrimination of other marriages (i.e. marriages that have remained childless) because these unions are also protected by Art. 1, Basic principles. It can therefore be assumed that the protection provided in this article is a special type of protection that goes beyond the general principle of Art. 1.

> Art. 3: *Parenting is a mission of men and women recognized by society. The society recognizes that a stable family environment formed by the child's father and mother is the most suitable for the all-round and harmonious development of the child. Therefore, the society provides parents not only with its protection, but also with necessary care, especially with material support for parents and assistance in the exercise of parental rights and responsibilities.*

One of the most important functions of a family is its educational function. Being a parent means taking responsibility for the proper upbringing of a child. When analyzing Art. 3 of the Family Act, a comparison with its predecessor from 1963 shows significant differences. The 1963 Family Act stated that 'Motherhood is a woman's honest mission. Society provides motherhood not only with its own protection, but also with all its care, especially with material support for mothers and children and assistance in their upbringing'.[15] As opposed to the 1963 wording, the 2005 legislation no longer refers to motherhood as the woman's mission; it clearly reflects a shift in societal values by using terms such as 'parenthood' and 'parenting'. This further supports the principle of equality of spouses in marriage, both in their rights and their responsibilities. Trends regulating the boundaries between family privacy and state interest are currently leaning toward the theory of responsibility for the exercise of parental rights and obligations. As stated by the Constitutional Court of the Czech Republic, conceiving a child is not a sport or a pastime, although it may seem that way to some individuals at the beginning. In reality, however, future parents assume duties and responsibilities that accompany them throughout their lives, often until their own death. Therefore, it is essential that they behave in such a way that they can always and in all circumstances meet their obligations and

14 Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, art. 8.
15 Family Act No. 94/1963 Coll.

responsibilities.[16] If the parent naturally performs this function properly, the state provides help and support with respect to both privacy and social care. However, if the proper upbringing of a child is endangered or disrupted, the Family Act gives the court the right to take measures to remedy this situation without a proposal. For this reason, Art. 3 of the Basic Principles was supplemented in 2016 by a second sentence stating that society recognizes that a stable family environment formed by the child's father and mother is the most suitable for the all-round and harmonious development of the child. This formulation clearly favors the traditional family union of a man and a woman and their children over other forms of cohabitation. This amendment established the family environment formed by the child's father and mother as the most suitable environment for the all-round and harmonious development of the child. This is primarily to express society's belief that the competent authorities and institutions, which may affect the child and their rights, are obliged to respect the fundamental rights of the child (while considering the circumstances), growing up from birth in a natural family environment. This emphasizes the importance of parents for the child's healthy, versatile, and harmonious development. On the other hand, the definition in question resulted in many debates before the amendment, because according to some experts, the wording of this sentence in its current form may be discriminatory. It could, in a sense, indicate that a family in which one of the parents is absent is incomplete and unable to fulfill its potential completely, not considering the multitude of reasons such an absence may occur, such as the death of one of the parents. There were concerns that while the intention behind this principle is clearly a positive one (to protect the rights of the child), when it comes to the application, this provision might result in discrimination or, in certain divorce cases, the judge's efforts to preserve a broken marriage for the sake of the minor.

The change in the wording of this principle is a very positive one, declaring that parental rights and responsibilities belong to both parents and that both holders of parental rights and responsibilities, namely mother and father, are equal in their parental rights and responsibilities; therefore, no discrimination is acceptable in this area.

> Art. 4: *All family members have a duty to help each other and, according to their abilities and possibilities, to ensure the increase of the material and cultural level of the family. Parents have the right to raise their children in accordance with their own religious and philosophical beliefs and the obligation to provide the family with a peaceful and safe environment. Parental rights and responsibilities belong to both parents.*

16 From the ruling of the Supreme Court of the Czech Republic 4 Tdo 250/2012-24. The Supreme Court of the Czech Republic ruled in a closed session held on April 18, 2012 on an appeal filed by the accused V. J. Against the resolution of the Regional Court in Hradec Králové of November 24, 2011, file no. 10 To 368/2011, in a criminal case conducted at the District Court in Jičín under file no. 8 T 57/2011.

Family solidarity is the basis for fulfilling the family's socio-economic functions. It concerns all members of the family without distinction, and its understanding reflects the morals of society. Contributing to the prosperity of the group should naturally be inherent in everyone, more so in the case of a family, since it is the primary social unit to which an individual belongs.

This solidarity means more than just finances. The law also understands it as the basis of mutual assistance and support. The obligation to participate in meeting the needs of the household is expressly imposed by law. All rights and obligations of family members must be comprehensively understood and assessed comprehensively. None of its members can only have obligations or only enjoy rights.

The moral and ethical principles of this provision are further detailed in the provisions of §18 and §19 of the Family Act, according to which all family members (children included) are obliged to help each other and according to their abilities and possibilities. Parents are further granted the right to raise their children according to their own religious, philosophical, or ideological beliefs, but this right of parents should directly respect the rights of the child guaranteed by Art. 14 of the Convention on the Rights of the Child – the right to freedom of thought, conscience, and religion. It is the duty of parents to ensure a harmonious environment in which all family members feel safe. This principle is further extended by the amendment expressed in several provisions of the normative part of the Family Act (§28, §35, etc.), namely that both holders of parental rights and obligations – that is, mother and father – are equal in their parental rights and obligations; therefore, no form of discrimination in this area is acceptable.

The institute of good morals plays an important role in Slovak family law, although it is only explicitly mentioned once in the Family Act. It balances the mutual position of participants in family law relationships to contribute to a harmonious family life.

It has been observed many times throughout human history that the traditional family is second to none. Therefore, the traditional approach to Slovak family law is understandable. Moreover, it is essential to insist on traditional values and their observance not only in the family but in society as a whole. Divergent behavior contrary to these values could lead to various undesirable societal factors, such as crime, poverty, and divorce. It is much easier to prevent them by forming public opinion, and quality and consistent legislation play a significant role in this.

Art. 5: *The best interest of the minor shall be the primary consideration in all matters affecting him or her. In determining and assessing the best interests of the minor, particular account shall be taken of:*

a) level of childcare,

b) the safety of the child, as well as the safety and stability of the environment in which the child resides,

c) protection of the dignity as well as of the child's mental, physical and emotional development,

d) circumstances related to the child's state of health or disability,
e) endangering the child's development by interfering with his or her dignity and endangering the child's development by interfering with the mental, physical and emotional integrity of a person who is close to the child,
f) conditions for the preservation of the child's identity and for the development of the child's abilities and characteristics,
g) the child's opinion and his possible exposure to a conflict of loyalty and subsequent guilt,
h) conditions for the establishment and development of relationships with both parents, siblings and other close persons,
i) the use of possible means to preserve the child's family environment if interference with parental rights and responsibilities is considered.

The principle of the best interest of the child is the guiding principle of all family laws. Some authors even consider it the basis of family law.[17] This is not only based on domestic law, but also follows international law, particularly the Convention on the Rights of the Child[18], in which it is mentioned repeatedly. This principle is most often identified with the general clause contained in the Convention on the Rights of the Child, specifically in Art. 3, which imposes an obligation to take into account 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.

Despite the fact that several provisions of the normative part of the Family Act referred to the best interests of the child (e.g., §23, §24, §54, §59), as well as the provisions of special regulations (e.g., Act No. 305/2005 Coll. on the social legal protection of children and on guardianship, Act No. 176/2015 Coll., on the Commissioner for Children and the Commissioner for Persons with Disabilities, etc.), this term was not defined for a long time and its determining criteria were never established. By supplementing Art. 5 of the Family Act through an amendment to Act No. 175/2015 Coll., this important principle of the Convention on the Rights of the Child has gained its appropriate place in Slovak family law, namely by establishing it as a basic principle of the Family Act. The reason for this regulation was to emphasize the obligation of courts, as well as other bodies, which significantly interfere with the rights and obligations of children in their decisions, to proceed carefully and responsibly in their assessment of the circumstances of a particular case and to take into account the best interests of the child in all circumstances. It was not the intention to prescribe what is best for the child in each time and situation; therefore, the Family Act does not directly define the concept of the child's interest as such, and it should be determined according to the circumstances of the case and the needs of the child concerned. Each child is unique and, therefore, has specific needs.

17 Králíčková, 2015.
18 UN General Assembly, 1989, p. 3.

The state is obliged to take all the necessary measures to take into account the best interests of the child and to ensure that the best interests of children are taken into account in all actions of the competent authorities and public institutions whose decisions affect the rights of the child.

The best interest of the child is a complex, albeit flexible and adaptable, concept, the content of which must be determined based on specific cases. It needs to be adapted and defined based on the specific situation of the child concerned, taking into account the personal context, situation, and needs of the child. The concept of the best interests of the child, characterized by flexibility, makes it possible to respond to the situation in an individual manner. However, it also leaves room for manipulation. In assessing and determining the best interests of the child, it is necessary to consider the individual elements according to their relevance to the situation, while these are specific rights and not only elements of its determination.

General Comment No. 14 (2013)[19] on the right of the child to have his or her best interests taken as a primary consideration contains a list of elements to be taken into account when assessing the child's best interests. It provides the following elements: the child's views; the child's identity; the preservation of the family environment and maintaining relations; care, protection, and safety of the child; the situation of vulnerability; the child's right to health; and the child's right to education. The assessment of the best interests of the child considers all these elements, the weight of which is interdependent. It is obvious that not all elements will be suitable for each case, and the way in which the individual elements are used in different cases will be case-specific as well. Thus, the content of each element will vary for each child, depending on the specific circumstances. The importance of each element in the overall assessment of the case also varies. In specific cases, these elements of assessment and determination of the best interests of the child may even contradict each other. In such situations, the age and maturity of the child should be decisive for their balance, taking into account the child's level of physical, emotional, cognitive, and social development when assessing the child's maturity.

It is also necessary in this context to consider that the child's abilities evolve over time; therefore, decision-makers should impose measures that can be revised or adapted to the child's development and not make final and irreversible decisions. With this in mind, it is important to assess not only the child's physical, emotional, educational, and other needs at a particular moment, but also the child's possible development scenarios, and to analyze them in the short and long term.[20]

As seen from the above, the best interest of the child is not a new concept; however, its adoption into Slovak family law only happened in 2016 based on Act No. 175/2015 Coll., Amending and supplementing Act No. 36/2005 Coll. on the Family and Amendment of Certain Acts With this amendment, we see this principle reflected in the Family Act for the first time, specifically in the newly added Art.

19 UN CRC, 2013, art. 3, para. 1.
20 ibid.

5. The principle was added as a non-hierarchical enumeration of the criteria. According to Art. 5, the best interest of the minor shall be the primary consideration in all matters affecting him or her. This provision in itself is rather vague; however, given the uniqueness of each child, a clear definition of the best interests of the child would not be appropriate.[21] A uniform definition would make adaptability and flexibility impossible in the application practice, which are prerequisites for an individual approach to assessing a given child's situation. The various elements that need to be considered include, among others, the safety of the child, as well as the safety and stability of the environment in which the child resides; the protection of the dignity as well as of the child's mental, physical, and emotional development; the circumstances related to the child's health status or disability; the child's opinion and his possible exposure to a conflict of loyalty and subsequent guilt; conditions for the establishment and development of relationships with both parents, siblings, and other close persons, etc. The Family Act does not prioritize any of these criteria. It is up to the responsible authority to assess which element prevails as a starting point, taking into account the circumstances of the individual case. The flexibility and adaptability of the concept are also based on the possibility of relying on facts other than those mentioned in Art. 5 of the Family Act, as the enumeration of the criteria mentioned therein is not final or fixed. The implementation of this principle in the Family Act is necessary. Before 2016, public authorities involved in decision-making on children had a tendency to generalize, regardless of the specific circumstances of the case. Such an approach was in serious conflict with the obligations that obliged the Slovak Republic to respect the uniqueness of each child and its peculiarities. Slovakia generally has a major problem with the predictability of judicial decisions. To counteract this tendency to generalize, the best interest of the child was incorporated into the Family Act, enumerating the most important attributes of deciding on the best interests of the child in a demonstrative, non-hierarchical way. According to the legislator, the inspiration for formulating a legal definition in this manner was primarily General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration. It was necessary to create a non-exhaustive and non-hierarchical list of elements that are crucial criteria and should be included in the assessment of the best interests of the child. The alphabetical order does not mean that one criterion takes precedence over others. In any case, it is important to consider the specific circumstances of the case.

Since the child has the status of a special subject and a weaker party, he or she requires increased protection to ensure the fulfillment of his or her rights. This is also the starting point of the Convention on the Rights of the Child itself, which introduced the notion of the best interests of the child, highlighting that it should be given priority in any action concerning children by public authorities, courts, and public or private welfare institutions. To defend the best interests of the child, it is essential to pay attention to the establishment of mechanisms at the national, regional,

21 Bános and Košútová, 2020, pp. 4–5.

and local levels, as well as mechanisms and procedures for lodging complaints and appeals to fully realize the child's right to properly integrate their best interests by implementing measures and judicial and administrative proceedings relevant to or affecting the child. Parents have a primary duty to ensure the child's standard of living. It is the duty of the state to ensure that this obligation is and can be fulfilled.

The implementation of this principle in the Family Act is necessary. Before 2016, public authorities involved in decision-making on children had a tendency to generalize, regardless of the specific circumstances of the case. Such an approach was in serious conflict with the obligations that required the Slovak Republic to respect the uniqueness of each child and their peculiarities. Slovakia generally has a major problem with the predictability of judicial decisions. To counteract this tendency to generalize, the best interest of the child was incorporated into the Family Act, enumerating the most important attributes of deciding on the best interests of the child in a demonstrative, non-hierarchical way. According to the legislator, the inspiration for formulating a legal definition in this manner was primarily General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration. It was necessary to create a non-exhaustive and non-hierarchical list of elements that are crucial criteria and should be included in the assessment of the best interests of the child. The alphabetical order does not mean that one criterion takes precedence over others. In any case, it is always important to consider the specific circumstances of the case. In conclusion, given the uniqueness of each child and their needs, a single definition of the concept of the best interests of the child would not be appropriate; on the contrary, it is necessary to maintain the flexibility and adaptability of this concept. In assessing the best interests, particular attention should be given to the circumstances relating to the individual characteristics of the child concerned, such as his or her age, sex, degree of maturity, experience, ethnicity, physical, sensory, or intellectual disability, and the social environment in which the assessed child lives, further circumstances such as the presence or absence of the child's parents and the quality of the child's relationship with the biological or surrogate family. The family is the basic unit of society and the natural environment for the growth and prosperity of its members, especially children. The Convention on the Rights of the Child (Art. 16) protects the child's right to family life. An important element of the system of this protection is the prevention of the separation of the child from the family environment and the preservation of the family as a unified community. Nevertheless, if the child is separated from one or both parents, he or she has the right: '… to maintain regular personal relations and direct contact with both his or her parents, provided that this is not contrary to his or her best interests.' Given the seriousness of the influence of the separation of the child from the parents, such a separation should occur only in the ultima ratio, that is, exclusively as the last solution to the situation, for example, if the child is at imminent danger of injury or in other necessary cases. Separation should not take place without first applying all the available measures to protect the child. Likewise, the child must not be separated from his or her parents because of a disability. If separation becomes

necessary, decision-makers must ensure that the child maintains connections and relationships with his or her parents and family (siblings, relatives, and persons with whom he or she has a strong personal relationship), unless this is contrary to his or her best interests. If the child's relationship with the parents is interrupted, for example, migration (parents without a child or a child without parents), the obligation to maintain the family community must also be taken into account when assessing the best interests of the child in the context of decisions on family reunification.

4. The protection of matrimony in current Slovak legislation—the union of a man and a woman

Marriage is a unique bond between a man and a woman. The Slovak Republic broadly protects and promotes its good. Marriage, parenthood and the family are under the protection of the law[22] (Art. 41(1), Constitution of the Slovak Republic).
Marriage is a union of a man and a woman. The society comprehensively protects this unique union and helps its welfare. Husband and wife are equal in their rights and responsibilities. The main purpose of marriage is the establishment of a family and the proper upbringing of children[23] (Art. 1 (Basic principles) Family Act No. 36/2005 Coll.).

The protection of marriage and families is explicitly laid down in two key legal acts in the Slovak Republic; one being the Family Act[24] and the other the Constitution of the Slovak Republic itself.[25] As discussed above, an adventurous road affected by historical changes impacted the current Slovak legislation. Slovak family law is very traditional – it does not recognize same-sex marriages or non-traditional forms of marriage; it does not define or protect cohabitation (regardless of the gender of the cohabitants). Besides these traditional principles being the basis of the Family Act, the most important ones have been elevated to a constitutional level.

4.1. The protection of matrimony in the Family Act

The legal regulation of marriage and its legal consequences form the basic predicament of Slovak family law and its legal regulation – Family Act No. 36/2005. Marriage is not of a contractual nature, but a union of a man and a woman, which is preferred by society in terms of starting a family and the proper upbringing of

22 Art. 41(1) Constitution of the Slovak Republic (460/1992 Coll.).
23 Art. 1, Family Act No. 36/2005 Coll.
24 Act No. 36/2005 on Family and on amendment of some other acts.
25 Constitution of the Slovak Republic (460/1992 Coll.).

children. The legal regulation of marriage enables, among other things, the socially desirable stability of family relationships and the precise definition of rights and obligations arising from family functions, including the social records of marital relations. According to Art. 1 (Basic principles) of the Family Act of 2005, 'marriage is a union of a man and a woman. The society comprehensively protects this unique union and helps its welfare'. As evident from the wording, the basic approach of the legislator to the principle of marriage protection as a legally presumed relationship between a man and a woman, in contrast to the previous legislation, is also reflected in the fact that the new family law explicitly refers to the union of a man and a woman when defining marriage. We also distinguish between the unmarried cohabitation of a man and a woman from the marriage (the only legally protected union of a man and a woman), but the legal regulation of this institute is absent in our legal system. However, despite the fact that the given institute does not explicitly define the Slovak legal order, there are examples in Slovak legislation that address the specific legal claims of a partner in the cohabitation of a man and a woman – although the relationship itself is neither defined nor protected in Slovak law, apart from certain claims. The basic principles of the protection of marriage are laid down in Art. 1 of the Family Act, where the legislator emphasizes the core principle of marital bonds in the Slovak Republic. It characterizes marriage as a unique union of a man and a woman, which completely excludes from the institute in question possible unions of persons of the same sex and other types of relationships, such as registered partnerships, which the Family Act does not mention in its terminology at all. The comprehensive protection of marriage and the need to help it prosper are also emphasized. Although the law identifies as the purpose of marriage the primary creation of a harmonious and lasting community of life, such as the family and, in connection with the family's reproductive function, the proper upbringing of children, we do not believe that childless couples should not be protected or that such marriages would not fulfill their mission. The purpose of marriage as set out in Slovak law is considered obsolete by many experts, who highlight that there are more and more childless couples due to medical reasons; however, the 2005 legislation considered the main purpose of a marriage to be the reproductive function and ultimately the proper upbringing of children.

According to the article in question, the husband and wife are equal in their rights and obligations both to each other and to others in society. They have a duty to live together, to be faithful, respect each other's dignity, help each other, take care of their children together, create a healthy family environment, and decide on family matters together. No discrimination is allowed in this relationship when it comes to rights and obligations.

When it comes to the legislation explicitly referring to marriage as a union of a man and a woman, this provision has been contested several times on the grounds of discrimination and human rights; however, both the Constitutional Court of the Slovak Republic and the Supreme Court of the Slovak Republic have upheld this

principle as the core principle of family law and have not found Art. 1 discriminatory or in violation of human rights.

In 2012, the Supreme Court of the Slovak Republic held, in decision 5/2012, that *'the intention of the legislator was to allow the establishment of marriage exclusively to persons of different sex, and not of the same sex."*[26] In this case, two men turned to the Supreme Court because they were not able to enter into marriage and claimed that their fundamental constitutional rights were violated. The Supreme Court of the Slovak Republic, however, ruled that their rights were not violated; in fact, they were allowed to marry in accordance with the Constitution of the Slovak Republic and the Family Act. However, neither of these legal documents established a legal claim to the right of persons of the same sex to marry. As a result, even in this case, the fundamental right is granted to the plaintiffs as a constitutional right (subject to marriage to a woman). However, since the Family Act does not allow same-sex persons to enter into marriage, neither public administration bodies nor the court can act beyond their competence and the Family Act and allow them to enter into marriage, as they would violate Art. 2 par. 2 of the Constitution of the Slovak Republic and Art. 1 of the Family Act. Both the Constitutional Court and the Supreme Court have confirmed the basic principles of family law in Slovakia, and on this basis, marriage or registered partnership between persons of the same sex is prohibited in the Slovak Republic. The legislator clearly states that marriage can only take place between a man and a woman, that is, people of different sexes. The legislator considered the basic principles to be the legal expression of moral postulates. During the historical development of family law, moral norms already played an important role in the implementation of family law relations. It is specific to family law to adopt moral rules and give them a normative character. It clearly follows that the intention of the legislature was to allow marriages to be entered into exclusively by persons of the opposite sex. The Supreme Court also held that the Anti-discrimination Act could not be applied to the area of family law. This law regulates the application of the principle of equal treatment and provides for the means of legal protection in the event of a breach of this principle in the enshrined areas. The EU Charter of Fundamental Rights binding on EU Member States, in Art. 9, regulates the right to marry and the right to start a family, directly by reference to the national laws governing the exercise of these rights. It is clear from the Commentary to the Charter that the scope of the article in question is wider and includes other than traditional forms of marriage, provided that these are governed by the national law of each member state. Therefore, national legislation plays a key role. Art. 9 does not contain prohibitive restrictions on the right to marry. However, this does not imply that this is an absolute right. It is not possible for any couple, if they wish, to exercise their right to marry before a competent authority without fulfilling the legal conditions. The national legislation of most EU member states is based on the assumption that marriages are only allowed for couples of different sexes. Given the considerable

26 2Sžo / 5/2012 (NS SR). – Decision of the Supreme Court 5/2012.

diversity of national rules on marriage, it can be argued that Art. 9 is drafted neutrally and *expressis verbis* does not determine the sex of persons who may enter into marriage. At the same time, there is a direct reference to national legislation, which in the case of the Slovak Republic very clearly states in the Constitution and in the Family Act that marriage is a union between a man and a woman.

Besides Art. 1 (Basic principles), the Family Act also defines the conditions of entering into marriage and the purpose of marriage further in §1, according to which *'marriage is a union of a man and a woman, which arises on the basis of their voluntary and free decision to enter into marriage after the fulfillment of the conditions stipulated by this Act.'*

Based on the provisions of §1 of the Family Act, marriage is the oldest social institution and can be defined as the relationship between one man and one woman legally connected for life, to fulfill obligations to each other as well as to society and, as such, is founded on gender differences. Thus, in accordance with nature, tradition, morality, and social consent, Slovak law regulates marriage so that it serves the individuals of society and fulfills its natural, biological, personal, moral, family, and social tasks or mission. This provision of the Family Act is also strengthened and ensured by the Constitution of the Slovak Republic, Art. 41(1), which states at the highest normative level that: *'Marriage is a unique union between a man and a woman. The Slovak Republic broadly protects and promotes its good. Marriage, parenthood and the family are protected by law.'*

The special protection of children is guaranteed, which means that marriage, as well as the family, is given the highest level of protection and the constitutional legal obligation of the state to assist this institution and to implement legislation that benefits marriage.

The definition of marriage implies monogamy; therefore, it is clear that it can only occur between one man and one woman. In direct connection with the provision of §9 of the Family Act, any bigamy (polygamy) is sanctioned by the invalidity of a later marriage. Sanctions at the criminal law level for the criminal offense of polygamy in the sense of §204 of the Criminal Code might also apply.

Despite the legislation of some EU member states (such as France, Spain, Belgium, Denmark, the Netherlands, Portugal, Sweden, etc.) recognizing the so-called registered partnerships or de facto ties between persons of the same sex as legal institutes of marriage, Slovakia does not have legislation related to registered partnerships or similar legal institutions that would legalize same-sex unions, provide these with legal protection, or put these on an equal footing with an institute such as marriage. So far, there has been no binding legislation at the EU level that would require Member States to adopt a law on same-sex unions (marriages, registered partnerships). As mentioned above, there is no legislation in Slovakia; however, some claims could be formulated based on the provisions of private law. For example, inheritance law stipulates that inheritance claims are admissible in the case of those who lived with the deceased for at least one year before his death in the same household and who, for this reason, cared for the common household or were dependent on the

guarantor. There is no stipulation of gender in this case, and this is not a type of marriage, or even registered partnership, but merely a claim recognized by the Slovak law based on private law. However, the position of the spouse is always protected as a matter of priority. Slovak legislation definitely favors marriage to other forms of cohabitation, for example, community property only exists between spouses; only spouses can adopt a child together; and they are also favored in the area of inheritance.

The basic condition for entering into a marriage is the voluntary decision of the woman and the man to enter into marriage. Thus, the wording of the law implies freedom in choosing a life partner. However, only persons with the capacity to marry may be the subject of a legal relationship such as marriage. This competence is not explicitly regulated by the Family Act, but it can be derived from the regulation of the so-called circumstances precluding marriage, also known as marital obstacles (see the provision of §9 Family Act). The purpose of this obligation is to prevent persons without the personal preconditions necessary for marriage (e.g., under-age or lack of mental maturity) from entering into marriage, contrary to the principle of monogamy, or where marriage is unsuitable due to biological and moral reasons (e.g., marriage between relatives). The lack of capacity to marry results in the invalidity of such marriages. Depending on the seriousness of the marital obstacle, it is declared either at the proposal of one of the spouses or ex officio. Incapacity to enter into marriage can be absolute (if the personal conditions for marriage to any person are not met) or relative (when the person is not qualified to marry only a particular person). An exception stipulated by the Family Act is the possibility of marrying a minor over the age of 16. The marriage of such a person must be authorized by the court. The petitioner in question is a person who wants to enter into a marriage, and the participants are their legal guardians, most often their parents.

There is no legal right to issue a marriage permit; therefore, the court may decide not to allow a marriage. In doing so, the court examines various circumstances related to the couple – property, economic relations, maturity, relationship with the family, employment, whether one of the fiancés has been convicted for a crime, whether one is divorced, the perspective of the relationship, how long the relationship lasts, and so on. The court may also allow a person suffering from a mental illness to enter into marriage. The court proceedings in question are not subject to a court fee.

The Family Act, §1(2), states, 'the purpose of marriage is to create a harmonious and lasting community of life that will ensure the proper upbringing of children.' This sentiment is also highlighted in Art. 1 (Basic Principles) as well as in the Constitution. Marriage has its purpose and goal, which is primarily the creation of a harmonious and lasting community of life and ensuring the proper upbringing of children. The addition of 'the proper upbringing of children is mainly' related to the reproductive function of the family in the marriage concerned. The proper upbringing of minor children, as one of the main purposes of marriage, does not merely consist of the superficial provision of their basic living needs or the material and better spatial equipment of the household but, especially, involves meeting the deeper emotional

needs of minor children, creating opportunities for quality contact with children, preparing for future careers, etc. Based on the provisions of the Family Act, this upbringing should primarily be provided by the child's parents, ideally the spouses.

However, it is not possible to conclude from the diction of the law in question whether a marriage formed for a different purpose should be regarded as invalid. The Family Act does not examine the purpose for which the spouses enter into marriage but the seriousness of the spouses' will to enter into marriage, that is, they want to marry the other partner. However, a problem may occur if it is proven to be the so-called purposeful or sham marriage. Indeed, there is a growing concern in several EU member states that the institute of 'family reunification' is increasingly being abused as a means of obtaining residence in EU countries, combined with the many benefits of this institute. Abuse of the right to family reunification, in the form of a marriage of convenience, can be considered a form of illegal migration or an illegal way of obtaining residence in the country. Therefore, a marriage of convenience may be grounds for refusing an application for temporary residence. The police department may also administratively expel a national of a third country and ban him or her from entering the country for three to five years. He or she may also be fined up to €1,600 if he or she does not comply with the order to leave the country. Although the Slovak Republic does not currently have any bilateral or multilateral agreements with the EU or third countries aimed solely at combating the abuse of the right to family reunification and the prevention of marriages of convenience, it has concluded several police cooperation agreements in the fight against organized crime, which do not explicitly mention marriages of convenience or false declarations of parental responsibility, but aim, inter alia, to strengthen cooperation in the fight against illegal migration in general and in the area of illegal residence of persons.

While the Family Act clearly declares the upbringing of children as the main purpose of a marital union, marriage and having children in real life are not always interdependent. While the Family Act stipulates that the family environment formed by the child's father and mother is the most suitable environment for the all-round and harmonious development of the child, it also recognizes that not all children are born to married couples and also protects children born outside of a marital relationship without any discrimination. The purpose of the marriage is not conditional to the existence of a marriage; therefore, the inability to conceive and subsequently raise a child may not be grounds for marriage annulment or loss of capacity to marry. The connection between the purposes for which the spouses enter into marriage is therefore not absolute. It is important to note, however, that despite this, the legislator still found it necessary to include the purpose of marriage in the Family Act – highlighting the legal evolution and the current leading legal, cultural, and moral principles. While they might be considered conservative or even obsolete by some EU member states, these conservative principles are the very core of the legislation of the V4 countries – Slovakia included.

The Family Act, §1(3), states that a man and a woman who intend to enter into marriage (hereinafter referred to as 'fiancés') should know each other's character traits and health status in advance. Disagreements between the spouses' character and personality traits and different views on life, household functions, the upbringing of children, and finances are some of the most common causes of marital breakdown and subsequent divorce. For this reason, the Family Act introduced the obligation for spouses entering into marriage to know each other's characteristics and health status to prevent the negative consequences of reckless and superficial marriages. In addition to fulfilling this obligation to know each other's character, priorities, goals, personal structure, or values, the couple should, at least to some extent, identify with these. At the same time, they need to know each other's characteristics, priorities, and expectations from marriage and combine them to avoid later disappointment, frustration, and, ultimately, divorce. However, as this is an imperfect norm, failure to comply with this legal requirement does not affect the validity of the marriage, even if such concealment was intentional. In addition to their character traits, both fiancés should be aware of their mutual health status. The importance of this fact is also presented in the statement itself, which the couple makes before the marriage (see §6 of the Family Act). The term 'health status' should be understood not only as physical but also as mental health. Of course, the law does not require mandatory preventive medical examinations before entering into marriage. However, it is the moral duty of each fiancé to find out his or her health status and, in the case of genetic disorders, degenerative diseases, untreatable diseases, fertility disorders, or sexually transmitted diseases, to inform their partner so that he or she can freely and seriously make an informed decision about getting married.

The current legislation distinguishes between two forms of marriage depending on the authority before which the spouses make a declaration of consent. Both the civil form (at the registry office – the municipality or city district competent to keep the registry) and the ecclesiastical form (before the church – the registered church or registered religious society) have an equal status in relation to legal effects related to marriage. The right to choose the form of marriage is the exclusive right of the partners. Therefore, if they are unable to agree on a choice, neither the court nor any other competent authority can make this decision for them (this is based on the premise that the state may intervene in family relationships only if the relationship enjoys protection under the law). Both civil and ecclesiastical marriages have constitutive effects. It is also possible to choose both forms of marriage, but only if the couple has made its initial declaration before the registry office, that is, in the civil form. The subsequent ecclesiastical form represents only a spiritual rite in the sense of the internal regulations of the given church and has no other legal effects. The first statement of consent before a competent authority has constitutive effects, that is, at the very moment the marriage is founded. If the couple decides to marry before a church body, the subsequent civil form is no longer possible.

In addition to the clash between civil and ecclesiastical marriage, the couple may, depending on their faith, be faced with the choice of church and religious

society. In this case, the legal order attributes the constitutive effects to the first ceremony; the other ceremony does not affect the personal status of the spouses. An exception is a situation in which one church is not registered by the Ministry of Culture of the Slovak Republic. In such a case, the constitutive effects of the spouses' declaration of marriage are associated with a marriage held before a body of the registered church. Church leaders hold different perspectives on this matter. The so-called mixed marriage, for example, marriage between a Catholic person and a person baptized in another church, can be conducted only with the prior permission of the ecclesiastical authority.

For the spouses' declaration of marriage to have constitutive effects, they must meet the conditions clearly listed in the Family Act, namely:

- Public ceremony,
- Solemnity of expression,
- The presence of two witnesses,
- Orality,
- Addressability.

In the absence of any of the above requirements, the marriage in question would be non-matrimonium, that is, it would not occur.

The condition of the public ceremony of the marriage is maintained unless access to the ceremony is prevented. However, an extensive interpretation of this requirement is out of the question; therefore, no explicit notification of the planned ceremony can be required. The participation of two witnesses in the solemn declaration of the spouses is needed because of the possibility of additional validation of the certificate of marriage later on. Therefore, personal participation and full legal capacity are essential. Their ability to understand the language in which the marriage ceremony is conducted, the ability to reproduce its course, and the ability to sign the marriage certificate are required. Witness status is voluntary and cannot be enforced. The solemnity of expression is determined by several aspects. The first aspect is the venue for the ceremony. To preserve the ceremonial form of civil marriage, there are criteria for the visual design of the ceremony room (decoration, placement of the coat of arms, etc.) as a special room adapted for wedding ceremonies, or other suitable place determined by special regulations of the municipality and city. Solemnity is also given in the ecclesiastical form of marriage, where the law explicitly establishes a church or other suitable place determined by the internal regulations of the church and religious society as the place for the ceremony. Solemnity is also ensured by the person performing the ceremony, who can only be the mayor, or another authorized member of the local (city) council. In the case of a church ceremony, it is a person performing the activity of a spiritual registered church or religious society. However, dignity and solemn expression are also given through other circumstances, such as the intercession, traditions, and dressing of those present. Despite these apparently essential elements of the prenuptial act, failure to observe the condition of solemnity, as in the case of the publicity of the ceremony, has no legal consequences for the

conclusion and validity of the marriage. The oral form of the ceremony is ensured by clear and comprehensible speech in the form of an answer to a question aimed at ascertaining the seriousness of the spouses' will to enter into marriage with each other. The oral form presupposes that both fiancés (as well as their witnesses) understand the language in which the ceremony takes place; otherwise, an interpreter should be asked to interpret the given act. In principle, however, the legal system does not clearly preclude making an act of declaration in another way, one that does not cast doubt on what the party intends to express (e.g., by a clear nod of the head).

4.2. The protection of matrimony in the constitution

Slovak family law is very traditional; it does not recognize same-sex marriages or non-traditional forms of marriage, and it does not define or protect cohabitation (regardless of the gender of the cohabitants). Besides these traditional principles being the basis of the Family Act, the most important ones have been elevated to the constitutional level. Marriage is a legal relationship between one man and one woman. This is the first premise of family law. It has also been part of the Constitution of the Slovak Republic since 2014.

The previous version of the Constitution only stipulated *that 'matrimony, parenthood and the family shall be protected by law.'* In 2014, however, the description of marriage as the union of one man and one woman was elevated to the constitutional level by amending Art. 41 of the Constitution of the Slovak Republic. Since the creation of the independent Slovak Republic, two attempts have been made to provide legal protection to same-sex registered partnerships. The public rejected these attempts, but in the early 2010s, the population started to warm up to the idea of registered partnerships. However, this public perception swiftly changed to a more conservative one after the ruling of the European Court of Human Rights in the case of X and Others v. Austria 53 ILM 64 in 2013. This ruling was the first recognition of the right of unmarried same-sex couples to second-parent adoption in European states that are a party to the European Convention on Human Rights. The ruling, while celebrated in many EU member states, had an adverse effect on the more traditionally inclined Slovakia, where the idea of same-sex couples being allowed to adopt children was not accepted well by the public. Following societal pressure, the Constitution was amended to state, *'Marriage is a unique union between a man and a woman. The Slovak Republic broadly protects and promotes its good. Marriage, parenthood and the family are protected by law.'* This principle had already existed in the aforementioned Family Act from 2005; however, elevating it to the constitutional level implies much stronger protection of this principle. While the principle had existed in our legal order before, it was only granted constitutional protection in 2014. The explanatory report of the constitutional amendment stated that based on this definition, 'marriage therefore cannot arise between persons of the same sex'. The explanatory report was not expertly written. It did reference international law (in particular, Art. 12 of the Convention for the Protection of Human Rights and

Fundamental Freedoms and Art. 16 of the Universal Declaration of Human Rights); however, the explanatory notes failed to correctly interpret the relevant provisions of international law.

It is important to emphasize that this is not a new principle, contrary to what the media coverage of the amendment sometimes suggested, but an already existing principle of family law in Slovakia, which was newly introduced to the Constitution as well. As marriage is the basic institution of family law relations, its protection in the Constitution is self-explanatory and is a matter of public interest. Despite the extensive media coverage brought about by this adopted amendment to the Constitution of the Slovak Republic, the amendment did not affect people's lives since it was something that had already existed in the Slovak legal order.

This public perception was further used to fuel a referendum in 2015, titled 'On the Protection of Family.' The referendum, organized by the Alliance for Family, was held on February 7, 2015, with the following three questions:

1. Do you agree that no cohabitation of persons other than a union between one man and one woman can be called marriage?
2. Do you agree that same-sex couples or groups should not be allowed to adopt and raise children?
3. Do you agree that schools should not require children to participate in education pertaining to sexual behavior or euthanasia if the parents or the children themselves do not agree with the content of such education?

A fourth question aimed at banning registered partnerships was invalidated by the Constitutional Court of the Slovak Republic. Voter participation barely exceeded 21 percent, rendering the referendum invalid.

The evolution of family law in the past decade in Slovakia is a clear example of how ideological pressure can have counterproductive effects. The EU has exercised some pressure on its member states to equalize and protect both the traditional and the non-traditional family. This pressure and the ruling of the European Court of Human Rights led Slovak legislators to feel the need to give a higher level of protection to traditional, conservative family law principles.

5. Protection of families in current Slovak legislation

The previous chapter of this report dealt with the protection of matrimony and the definition of a marital relationship under Slovak law. There are, however, some very interesting principles not only guiding the protection of marriages but specific to the protection of families present in Slovak legislation.

The importance of the family as part of the life and destiny of the vast majority of humanity and its immense importance for society itself has led and constantly

leads to the interest of many scientific and non-scientific disciplines in this concept, its essence, content, and its changes in the 21st century. This law is no exception. However, each field of study devotes a different space to the family and provides a different view. Most dictionaries provide several general definitions of a family, for example, 'a group consisting of two parents and their children living together as a whole,' 'a group of persons connected by blood or marriage,' 'all descendants of the same ancestor.' From a sociological perspective, a family is a group of persons connected by marriage, blood, or adoption, who form one household and interact with each other; they are usually spouses, parents, children, and siblings. The family is not a foreign concept even in psychology, where it is perceived as a social group connected by marriage or blood, responsibility, and mutual assistance. Finally, a family is subject to regulation, legal order, and the interest of legal science. Legal theory often does not define a family but only describes it through rights and responsibilities. When it comes to the Slovak Republic, it is necessary to point out the absence of a legal definition of a family, despite the fact that this term is used in several legal regulations in both private and public law, and, of course, in the Family Act itself. The closest to a definition is the formulation in the Family Act, which states 'family founded by marriage is the basic cell of society. Society comprehensively protects all forms of the family.' This cannot, of course, be considered a definition of the family, as it cannot be stated from the first sentence in the context of the second sentence that the family arises only by marriage. There is no legal definition of a family, or even a similar definition anywhere in the Slovak legal order. The interpretation of the concept of a family is equally relevant from the point of view of case law, particularly the case law of the European Court of Human Rights. The European Convention for the Protection of Human Rights and Fundamental Freedoms enshrines the protection of private and family life in its Art. 8, but it does not provide a definition of a family and leaves it to the judiciary. In this context, it should be noted that the absence of any legal definition of a family can be considered advantageous, as it leaves room not only for the existence of atypical forms of families but also in no way restricts existing ones and, at the same time, allows itself to interpret this concept as needed in order to align social reality with legal theory.

Many of the principles of family law were enshrined in the Slovak legal system from a more conservative approach to families than in most EU member states; therefore, these principles unique to Slovak family law are worth exploring.

Art. 2 (Basic principles) of the Family Act discusses the protection of families. Based on Art. 2 a *'family founded by marriage is the basic cell of society. Society comprehensively protects all forms of the family.'* The Family Act highlights marriages that have fulfilled their main purpose and have created a family, which forms the basis of society and which society is committed to protecting comprehensively. A family is a bond between at least one parent and at least one child. In principle, it is not possible to discriminate marriages that have remained childless, as marriages are also provided with protection in Art. 1 of the Family Act. It can therefore be assumed that the protection provided under Art. 2 is a special type of protection, as it provides

protection for families with children – either established by marriage and ensuing reproduction or formed on the basis of blood relationships or adoption.

The Act (Art. 3) further highlights the main purpose of marriage as that of upbringing children.

> *Parenting is an extremely important mission of women and men recognized by society. Society recognizes that a stable family environment formed by the child's father and mother is the most suitable for the all-round and harmonious development of the child. The society provides parenthood not only with its protection, but also with the necessary care, especially with material support for parents and assistance in the exercise of parental rights and obligations.*

One of the basic functions of a family is reproduction, which is highlighted several times throughout the text of the Family Act of 2005. The parental role is an important part of an adult's identity, which is socially valued and recognized, as reflected both in the provision of parental protection and in the material support of the family by the state (parental allowance, child allowance, childbirth allowance, maternity allowance, childcare allowance, etc.).

With an amendment to the Family Act in 2015,[27] this principle was further strengthened by explicitly identifying the ***'family environment formed by the child's father and mother'*** as the most suitable environment for the all-round and harmonious development of the child. According to the explanatory report, this is primarily to express the belief that the competent authorities and institutions, whose decisions may affect the child and their rights, are obliged to respect the fundamental rights of the child, depending on the circumstances, of course. This emphasizes the importance of the child's parents for the versatile and harmonious development of the child. The legislator refers to Art. 7 of the Convention on the Rights of the Child, according to which every child has the right to know his or her parents and be cared for by these parents.[28] In addition, as mentioned in Pt. II of Point 3 of the United Nations (UN) Guidelines on Substitute Care for Children, given that the family is a fundamental cell of society and a natural environment for the growth, well-being, and protection of children, efforts should be made to keep children with their parents, return them to the care of their parents, or, if that is not possible, to the child's close relatives. The statement supplemented by the amendment on the most suitable environment, together with the addition of the principle of the child's interest (Art. 5 of the Basic Principles of the Child Protection Act), should highlight the child and his or her rights as an equivalent element of family law relations. This addition is followed by the regulation of the conditions of institutional care and provisions on the sequence of forms of alternative care, where priority is given to care

27 Act No. 175/2015 Coll.

28 Art. 7. Convention on the Rights of the Child Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989.

provided by parents, relatives, and persons close to the child; if such persons are not available, foster care comes into play and, as the ultima ratio solution, institutional care comes into play.[29]

6. Alternatives to traditional matrimony and family in Slovak legislation

As discussed in the previous chapters of this report, the Slovak family law is conservative in nature. This is explicitly reflected in the Constitution and Family Act. If we look at the legal framework of the country, we quickly discover that there is no alternative to traditional marriage in the Slovak legal system. Slovakia does not recognize same-sex marriage, registered partnerships, or civil unions. Cohabitation is not recognized either; however, certain rights and responsibilities can be derived from a cohabiting relationship according to civil and penal law, which does not mean that cohabitation is in any way regulated by the Family Act or that partners in such a relationship would have rights equal to those in a marital relationship. It is merely a 'close person' living in the same household.

Cohabitation is often viewed as an invention of these past few revolutionary decades as an alternative to marriage; however, a closer look into history actually shows that cohabitation has existed in some forms in all eras of human history. The legal regulation of this institute and the legal interpretation of cohabitation are, indeed, a new development. Cohabitation is an institute that exists in the reality of the Slovak Republic, and the law only touches on it marginally. It is a phenomenon that is not specifically defined or protected in Slovak law; however, there are certain claims of the cohabitants that are recognized by Slovak law. The primary reason for this discrepancy between the reality of everyday life and legal theory is the rather conservative nature of Slovak family law, which stems from its historical evolution.

In recent years, we have seen what many refer to as the crisis of the traditional family based on the marital union of a man and a woman in Slovakia. This crisis is clearly apparent in the growing rate of cohabiting relationships[30] and a relatively high divorce rate. At the same time, we have seen several unsuccessful legislative attempts to grant legal recognition to an institute that would be an alternative to marriage (be it heterosexual or same-sex). Family law in Slovakia has very traditional foundations, and, as such, it protects the institute of a traditional marriage above all. This does not mean that other unions are not protected at all; on the contrary, it guarantees the protection of all families, regardless of their form, if they provide a sense of safety to their members, which includes stable long-term

29 §§ 44–55 supplementing Act No. 36/2005 Coll. on the Family.
30 Sprocha, 2014, p. 52.

cohabiting relationships.[31] One of the criticisms of the Family Act from 2005 is that it does not address the issue of cohabitation. Neither the Civil Code nor the Family Act defines, regulates, or protects cohabitation in Slovakia; however, the institute does have certain legal consequences.

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

Views on marriage and family continue to evolve and change as society evolves. Lately, our society is witnessing a declining motivation for young people to enter into marriage, but even today, marriage remains highly valued. From the point of view of marriage, it is interesting that some unmarried heterosexual couples are not eager to enter into marriage for several reasons, while homosexual couples demand the legalization of their relationships. Lately, we can see a trend of various alternative forms of marriage gaining popularity. While the Family Act might not reference these forms of relationship or provide them with legal protection, it is clear that the law will have to catch up and provide a regulatory framework for these types of relationships as well. Bills to recognize registered partnerships were introduced four times in Slovakia, in 1997, in 2000, in 2012, and in 2018, but they were all rejected. Slovak society does not seem to be ready for that; however, it should be noted that in addition to the traditional marriage, the number of couples in cohabitation is rising, and this is not just true for same-sex relationships. Given that unmarried relationships, such as cohabitation, are not legally regulated as marriage, it is important to recognize that these relationships require certain protection, especially considering social security law or insurance law. As mentioned above, while the Family Act does not recognize cohabitation, there are other areas of Slovak law where we might find certain protection and even various legal consequences of a cohabiting relationship.

One of the areas worth mentioning is the field of social insurance, where a closer look at the legislation unveils certain gaps. An important component of social insurance is health insurance, through which persons are financially secured in the event of a social event such as illness, injury, the need to care for a person, pregnancy, or maternity[32]. The benefits of health insurance are dependent on the occur-

31 Králíčková, 2003, p. 81.
32 Dobos, 2021, p. 207.

rence of the illness or injury, regardless of whether the persons involved are married, unmarried, or single.

An example is the need to treat a sick person, which implies the person's entitlement to one of the health insurance benefits, namely nursing care. The provision of this allowance is regulated by Act No. 461/2003 Coll. on Social Insurance, as amended (hereinafter referred to as the 'Social Insurance Act')[33]. Pursuant to this Act, an insured person is entitled to a nursing allowance if they care for a sick child, sick husband, sick wife, sick parent, or sick parent of a spouse whose health condition, according to the doctor's certificate, necessarily requires treatment by another person. It follows from the above that the provision of this benefit is conditioned by an indirect and adverse social event, which, in most cases, is the illness of a person defined by the Social Insurance Act.

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

The same gaps in legislation can be seen in the nursing benefits in relation to a child. For the purposes of the Social Insurance Act, a child refers to the child of the insured person, the adopted child of his or her spouse, or a child entrusted to the insured person in care replacing parental care at the decision of a competent authority.[34] In the absence of adoption or entrustment to care replacing the care of the parents on the basis of a decision of a competent authority, the insured person is also not entitled to a nursing care allowance for the child of an unmarried partner, even if they live in the same household.

There are also some disparities between married and unmarried persons in terms of pension insurance. The main role of pension insurance is to ensure sufficient income for individuals during adverse social situations, mostly of a long-term nature, such as old age, disability, and loss of the breadwinner of the family. While there are no differences in claiming any of the basic pensions for married and unmarried persons, the existence of a marriage is required for survivors' pensions (widows' and widowers' pensions). This follows from the provision of §74 the Social Insurance Act, according to which a living spouse is entitled to a widow's pension (for

33 Act No. 461/2003 Coll.
34 Ibid.

a deceased husband) and a widower's pension (for a deceased wife). If the persons are not married and live in the same household for a long time and possibly also have children together, if one of these persons dies, the right to a survivor's pension does not arise, which in our opinion is debatable. We believe that even in this case, it would be desirable to extend the circle of beneficiaries of these persons. Such legislation would not be an exception, as in many jurisdictions, the circle of persons entitled to a survivor's pension is wider, as it is based on closer family involvement and a higher dependency on income in the wider family; therefore, entitlement arises, for example, to the parent, grandson, sibling, companion, or divorced wife of the deceased.[35] According to the Slovak Health Care Act, only the spouse has the right to access the medical file after the death of their spouse.[36] The same applies to an adult living in the same household as the deceased at the time of their death, but only if there is no surviving spouse, child, or parent of the deceased.[37]

Tax law also shows discrepancies between partners in cohabitation and married spouses. According to the Income Tax Act, the tax base calculated from the income of a person is reduced by the tax allowance per spouse.[38]

As mentioned above, Slovak society does not seem to be ready to introduce same-sex partnerships into the legal framework. However, the question remains: should we provide heterosexual couples with an alternative to traditional marriage given that the number of cohabitations is rising each year, or is the current legislation sufficient? While we are standing at a crossroads of reforming Slovak family law and there will be an opportunity to rethink our interpretation of marriage and family, many scholars and legislators remain reluctant to introduce an alternative to traditional marriage.

7. Conclusion: The future of family law in Slovakia

In the area of private law, especially in the law of obligations, there has been an effort to comprehensively harmonize and unify the various legal systems, if not on a global scale, at least on a pan-European scale. These works began in the second half of the twentieth century. Family law has long been resistant to the challenges of internationalization, if not globalization. The possibility of harmonizing family law based on the area of social relations that it regulates was perceived very carefully until 1970, and family law itself was considered to be an area of law based on the unique historical, cultural, and social aspects of each country and are deeply rooted in the values of the people.

35 Tröster, 2013, p. 173.
36 Kovac and Erdősová, 2020, p. 13.
37 Act No. 576/2004 Coll. on Health Care.
38 Act No. 595/2003 Coll. on Income Tax.

Some authors[39] also take the view that family law is unsuitable for harmonization or Europeanization, in view of the various cultural, religious, moral differences, and traditions within Europe or the world in general. However, the family knows no boundaries. Current trends and harmonization efforts in the field of family law in the legal environment of Europe and the European Union consist of research, especially of a comparative nature.

Nevertheless, it can undoubtedly be stated that important reforms of family law are happening, not only at the academic level but also at the level of European Union legislation, and legislation on family law is being adopted, albeit predominantly of a procedural nature or extending into private international law. However, the work of the European Union Court of Justice, especially the work of the European Court of Human Rights, cannot be neglected. International legislation, case law, and international documents all have a significant impact on the evolution of family law, and their influence cannot be understated. In addition to harmonization through legislation, there is a significant convergence of individual legal systems thanks to academics and their influence. The Commission on European Family Law, established in 2001 and has, in addition to many publications or reports, also published the Principles of European Family Law (which focuses mainly on divorce and maintenance obligations between ex-spouses, parental responsibility, responsibilities, and property relations between spouses), is particularly important in this context. I would also mention the Central European Professors' Network. While there are many global, international, or EU-wide research projects, it is often forgotten that the V4 countries and the surrounding region share a piece of history that undoubtedly formed their values and views on legislation. It is therefore extremely important to collaborate with academics and legal practitioners across the countries in this region in the area of family law.

The Europeanization of family law, as well as current societal changes, seems to be an inexhaustible source of not only inspiration but also conflicting and controversial opinions in society, as family law is the area that affects the most intimate area of every person's life. The main objective of this country report was not only to provide answers to current problems but also to summarize these problems and ask questions to stimulate a broader discussion about these ongoing changes in our society. In terms of Slovakia, it should be noted that at present, with regard to the recodification of the Civil Code, there is a unique opportunity for change, which does not occur often. Family law cannot become a field for political war or propaganda; it must respect the unique historical and societal attributes and values of the country and serve, above all, to protect families and the best interests of the child. This study highlighted the need for discussion on controversial topics, thus enabling the creation of a code worthy of the 21st century, which would reflect the values of this region and could subsequently be an inspiration for many other codifications.

39 Blair et al., 2009, p. 14.

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Chapter VIII

Family Protection in Slovenia

Suzana Kraljić

1. Marriage and family are fundamental values of universal human rights

1.1. The right to marry in international law

The Republic of Slovenia is a party to many international and regional human rights instruments. Marriage and family are universal fundamental values and areas of human rights incorporated in many international treaties to which Slovenia is bound:

a) Article 16(1) of the Universal Declaration on Human Rights (1948)[1] (hereinafter, UDHR): *"1. Men and women of full age, without any limitation due to race, nationality, or religion, have the right to marry and to found a family…3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."*;

b) Article 23(1) of the International Covenant on Civil and Political Rights (1966)[2] (hereinafter, ICCPR): *"1. The family is the natural and fundamental group unit of*

1 Uradni list RS, št. 24/2018.
2 Uradni list RS, št. 35/1992 – MP, št. 9/1992.

Suzana Kraljić (2021) Family Protection in Slovenia. In: Tímea Barzó, Barnabás Lenkovics (eds.) *Family Protection From a Legal Perspective,* pp. 255–286. Budapest–Miskolc, Ferenc Mádl Institute of Comparative Law–Central European Academic Publishing.

https://doi.org/10.54237/profnet.2021.tbblfl_8

society and is entitled to protection by society and the state. 2. The right of men and women of marriageable age to marry and to find a family should be recognized.";

c) Article 10(1) of the International Covenant on Economic, Social and Cultural Rights (1966)[3] (hereinafter, ICESCR): *"The States Parties to the present Covenant recognize that: 1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society,…"*;

d) Article 12 of the European Convention on Human Rights (1950)[4] (hereinafter, ECHR): *"Men and women of marriageable age have the right to marry and to find a family, according to the national laws governing the exercise of this right.";*

e) Article 9 of the Charter of Fundamental Rights of the European Union (2012)[5] (hereinafter, CFREU): *"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."*[6] However, the CFREU has taken a step further than Article 12 of the ECHR. The right to marry and the right to start a family in CFREU no longer states "men and women," as this right may also apply to same-sex partners if the national law gives them this right.

1.2. Symptoms of the European and nation-state crisis and family tendencies

Since Slovenia became an independent state in 1991, its crude marriage rates (CMRs) have declined. According to the Statistical Office of the Republic of Slovenia,[7] in 1992, CMRs were 4.6 marriages per 1000 people, while in 2005 they reached their lowest level, at 2.9 marriages per 1000 people. According to the latest data, recorded in 2018, most marriages were recorded after that year,[8] with CMRs of 3.5 marriages per 1000 people (in 2019, the rate was 3.2). The OECD ranks Slovenia among the countries (Chile, Italy, Luxembourg, and Portugal) with very low CMRs. In contrast, in some other countries (e.g., Lithuania, Turkey), the CMRs per 1000 people are 7 or higher.[9]

On the other hand, the crude divorce rate (CDR) has been quite stable in the last 20 years in Slovenia. CDR in Slovenia was the lowest in 1995 when there were only

3 Uradni list RS, št. 35/1992 – MP, št. 9/1992.
4 Uradni list RS, št. 33/1994.
5 Official Journal C 326, 26.10.2012.
6 Additionally, all international treaties with provisions bearing on the right to marriage can also be found listed in Article 5(d)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination (Uradni list RS – MP, št. 9/1992 and Article 23(1)(a) of the Convention on the Rights of Persons with Disabilities (Uradni list RS, št. 37/2008).
7 SURS, n.d.
8 SURS, 2020.
9 OECD, 2019.

0.8 divorces per 1000 people. The divorce rate was the highest in 2005 and 2007 with 1.3 divorces per 1000 people.[10] Based solely on CDRs, Slovenia belongs among the OECD countries with the lowest CDR.[11]

However, it should be noted that Slovenia is one of the countries with a very high percentage of extra-marital unions. Although it is impossible to give an exact number of extramarital unions in Slovenia, no formalities are required for its formation (comp. Article 4(1) of the FC: "*Extra-marital union is a long–lived union of man and woman who have not been married, and there are no reasons that would result in a marriage being invalid. Such a union has the same legal consequences under this Code as if they were married …*"). However, extra-marital unions comprise the fastest-growing type of family in Slovenia. Their number has increased by 5,500 in the last three years.

One of the critical indicators that extra-marital unions are widespread in Slovenia is the relatively high birth rate of children born out of wedlock. Slovenia ranks in the top three among the EU countries in terms of children born out of wedlock. In 2019, France had the highest number of children born out of wedlock (61 percent), followed by Bulgaria (58.4 percent) and Slovenia (57.7 percent). The nations with the fewest children born out of wedlock were Greece (12.4 percent), Cyprus (20.3 percent in 2017), and Croatia (21.5 percent).[12]

However, the highest rates of children born out of wedlock are recorded in countries that are non-members of the EU: for example, Mexico (69 percent), Iceland (69.4 percent), and Chile (74 percent). In contrast, fewer children are born outside of wedlock in Japan, Korea, and Turkey; their rates are about 2–3 percent.[13] However, the rate of children born out of wedlock has decreased in recent years in some countries (e.g., in Georgia from 54.4 percent in 2006 to 34 percent in 2019 and in Belarus from 22.7 percent in 2006 to 13 percent in 2018).[14]

1.3. Causes of the crisis symptoms of marriage and family (possible Eastern European and nation-state special reasons; non-legal and legal reasons)

The family is still a fundamental social institution that is found in all societies. However, its forms may differ. The reasons for the differentiation of families could have their roots in various factors, such as the historical development of the country, the economic and political situation in the country, the role of men and women in society, and legal provisions concerning the family, as well as individual factors (e.g., employment, marriage, adoption, same-sex relations, property).

10 SURS, n.d.
11 OECD, 2019.
12 EUROSTAT, 2021.
13 OECD, 2020.
14 EUROSTAT, 2021.

In Slovenia, the family as a fundamental institution still represents one of the most cherished and desired values. The younger generations (< 35 years) still see and appreciate the family as a particular value, but not so much marriage. However, over the years, the forms of the family have changed. In the past, as already mentioned, marriage was the main form of family. However, in the last 30 years, families based on extra-marital unions have passed marriage as a traditional family form.

The roots of this change mainly lie in legal regulation, which provides, on the one hand, the equality of all children born in wedlock or outside the wedlock. On the other hand, cohabitants also enjoy the same rights as spouses, not just in family matters (e.g., maintenance, property relations, housing, children) and in all other fields of law (e.g., taxation, pension rights, social transfers, in vitro fertilization procedures).

The reasons for the crisis in marriage and family can be very different. Sometimes it may be a single reason; other times, it may be a given concatenation or conjunction of several reasons.

The reasons can be of a culpable (e.g., adultery, domestic violence) or non-culpable nature (e.g., physical or mental illness). Family and marital life could be influenced by relatives, friends, or even social media. Nevertheless, we should not forget that families and marriages break down because of addiction to work, sports, gambling, wastefulness, or simple non-compliance of the partners.

2. Non-legal and legal tools of social and state protection of marriage and family

The family is an important social institution and a natural and fundamental unit of society. Whatever its form (nuclear family, patch-work family, extended family, etc.), every family constitutes an individual different from others. Each family has its characteristics, which may be defined by the members of the family, religion, culture, geographical components, historical background, economic situation, social organization of society, social arrangements, etc.

The principle of institutionality defines marriage as a social and legal institution. The public-law element of a marriage is manifested through state-imposed formality, which is a condition for the validity of a marriage. The social aspect is reflected in the meaning of marriage as a community, which is the usual starting point for forming a family and the community in which the child's protection, education, and training for later independent life are provided. However, as a social institution, marriage also enables spouses to fulfill their needs (emotional and economic security, love, etc.).[15]

15 Kraljić, 2019, p. 104.

According to Article 53(2) of the CRS, legal relations within the family shall be regulated by law. The main legal act that regulates family relations is the Family Code. Family policy in Slovenia is based on an integral approach.[16] The FC provides a broader definition of the family as the living community of the child, regardless of the child's age, with both or one parent or with another adult, provided that the adult person cares for the child and has certain obligations and rights toward the child. Family is thus recognized in the FC as an important social institution that enjoys special protection. Article 2 of the FC is reinforced by Article 3(2) of the FC, which stresses the importance of marriage in conceiving a family.[17]

Although the child's best interest is at the forefront of what is to be secured for the child by the family and parents have autonomy, the state has an interest in controlling this social relationship. The state will intervene in the family as soon as the child's best interests are at stake. It is irrelevant whether this occurs due to the parents' fault or that of other persons who have family ties with the child (e.g., physical abuse, sexual abuse, neglect) or without fault (e.g., mental health problems, illness, death of a parent).

The state's role is more significant today than formerly, as the state is involved in both the formation and dissolution phases of the family. The state can even provide care and education for the child on a subsidiary basis (e.g., by placing the child in an institution) if the parents cannot provide this for the child appropriately. Through its system of differentiated protection (e.g., family, social, penal, health), the state seeks to ensure the best possible conditions for the upbringing and care of the child, primarily within the family.[18] Only if adequate child protection cannot be guaranteed will the state interfere in the parent-child relationship and in the family.

On February 20, 2018, based on Article 17(1) FC, the Government of the Republic of Slovenia adopted the Resolution on Family Policy 2018–2028, *A Family-Friendly Society for All (ReDP18-28)140* (hereinafter, "the Resolution on Family Policy"). The Resolution on Family Policy was prepared by the Ministry of Labour, Family, Social Affairs, and Equal Opportunities in cooperation with other ministries, NGOs, and experts in the field and includes, in particular,

a) Basic orientations and objectives in the field of family policy;
b) Assessment of the situation and identification of key concepts and problems in the field of family policy;
c) Key measures and tasks in the field of family policy, their implementers, and deadlines for their implementation;
d) The data to be collected, processed, integrated, stored, analyzed, and reported in the framework of national statistics, surveys, or opinion polls;
e) The children and family programs;

16 Resolution on Family Policy, p. 7.
17 Kraljić, 2019, p. 34.
18 Končina Peternel, 1998, p. 17.

f) The definition of monitoring and reporting on the implementation of the resolution;
g) The definition of the indicative level of resources for implementing the measures set out in the resolution and how they will be provided.

In its introduction, the Resolution on family policy emphasizes that, like other countries, Slovenia faces a pluralization of family forms and family lifestyles, changes in parent-child relationships, and changes in partnership relations and family roles. Nevertheless, the family remains a fundamental social institution so important to individuals that it ranks highest in the scale of values in their lives. In 2015, 98 percent of the respondents said that their families were significant to them. Family policy in the Republic of Slovenia is based on a holistic, integral, and inclusive approach. It includes all types of families, considers the plurality of family forms, and the different needs that arise from this, and respects the autonomy of the family and the individuality of its individual members. In particular, it protects the child's rights within the family and beyond, and places the protection and quality of life of families and children at its center. It pursues the best interests of children, who form a special social group entirely dependent on adults and excluded from decision-making because of their age. Children cannot influence their own situation and are highly vulnerable, and therefore need special protection and care. Their situation and circumstances are mainly linked to other persons' situations or living conditions, and above all, of course, their parents. Essential elements of the family policy are aimed at reconciling work and family life, ensuring equal opportunities for both sexes, establishing a wide range of programs and services for families, and contributing to the costs of facilitating the maintenance of children and the protection of families in special circumstances (Resolution on Family Policy, Introduction). Based on various international rankings, indicators, and measurements, Slovenia has achieved a fairly high level of quality of life for families and children.

a) The results of the 2017 survey on the quality of life of children, conducted by the international organization Save the Children, showed that children in Slovenia have the highest quality of life; Slovenia ranked first among 172 countries.
b) According to an indicator illustrating the situation of children, the level of children's risk of poverty and social exclusion, Slovenia was ranked as the country with the fourth-lowest level of risk in 2015.
c) In terms of access to justice for children, Slovenia ranked 20th out of 197 countries in 2016.
d) In terms of fairness for children, Slovenia ranked ninth out of 41 of the world's most developed countries (Resolution, Preface).

The purpose of the Resolution on Family Policy is to identify key objectives and measures for the next 10 years that will further increase the quality of family life, ensure the protection, security, and well-being of families, especially children, and improve the socioeconomic situation of families. The pursuit of the objectives and

the consistent implementation of the measures could thus create a social context and an enabling environment for decisions to have children. The resolution of family policy has nine equally important priority areas: family support programs, parental care and family benefits, alternative childcare, family welfare, reconciliation of work and family life, labor market and employment, health or health care, upbringing, care, education, and housing.

3. Dilemmas in the legal protection of marriage and the family

3.1. Normative issues

When the proposal of a new FC was adopted, sensitive issues immediately came to the fore, such as introducing new definitions of family and marriage and the full equality of same-sex partners with spouses. The conservative pole has dealt with the problems of modern families (e.g., the disintegration of the traditional family, the rise of single-parent families, and same-sex unions) by advocating the reassertion of the values of the traditional family. The liberal pole saw these problems as temporary or transitory. It did not believe that the old values were an adequate response to the new modern situation and tended to seek new solutions adapted to the contemporary situation.

A referendum in 2015 was held on the proposal of a new FC. The referendum results led to the retention of the previous definition of marriage and certain restrictions on the rights of same-sex partners. The Civil Unions Act was also adopted in 2016, which brought about the equalization of partners in a civil union with spouses. At the same time, CUA did not grant same-sex partners rights that are certainly among the most desirable, namely the right to marry and the right to joint adoption of a child in Slovenia, nor were they given the right to undergo IVF in Slovenia.

The FC has only been in force for two years. During these two years, there have been no particular trends in Slovenia toward changes in legislation related to marriage and the family.

3.2. The dilemma about the neutrality of the state and the law and/or legal value creation

As the referendum results in 2015 were in line with the conservative pole, they feel validated in their aims. The definition of marriage remains traditional ("*Marriage is a union of a man and a woman*") and same-sex partners cannot marry in Slovenia, though they can enter a civil union or live in a *de facto* union. Therefore, the Slovenian family law related to the definition of family and marriage still does not stipulate the complete equalization of hetero-and same-sex partners.

3.3. Legal recognition, rewarding, and encouragement or avoidance of alternative forms of relationships and family cohabitation

Despite the traditional definition of marriage in the new FC, Slovenia regulates and recognizes alternative relationships and family cohabitation. As mentioned *supra,* cohabitation as an alternative form of relationship (marriage) is widespread in Slovenia. Cohabitation is also mentioned in the Slovenian CRS. Article 53(2) of the CRS provides that the law regulates legal relations in an extramarital union (cohabitation). Following the CRS, the new FC defines cohabitation in its Article 4: "*An extramarital union is a long-term life community between a man and a woman who have not been married, and there are no reasons why the marriage between them could be invalid. Such a community has the same legal consequences under this Code as if they had been married; in other areas of law, however, such a community has legal consequences if the law so provides.*"

In 2005, Slovenia adopted its first legal act that regulated some rights and obligations of partners of same-sex registered partnerships. Only registered partnerships enjoyed legal protection. The intention to completely equalize same-sex partners with spouses was not possible; thus, as mentioned, in 2017, the new legal act was adopted. CUA widened the rights and obligations to same-sex partners living in *de facto* civil unions if they fulfilled the conditions prescribed for valid cohabitation in Article 4 of the FC.

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4. International legal background of the legal protection of marriage and family

The family as an important social institution and a natural and fundamental unit of society, as well as marriage, is also subject to various international documents, such as soft law and hard law. Slovenia is a contracting party to all important binding international documents (see also Chapter 1, Part 1).

4.1. Legal protection of marriage and family in Europe and in the law of the European Union

Several legal instruments have been adopted to unify the legal rules in the area of family law, covering substantive, procedural, and, in particular, conflict-of-law aspects of the legal regulation of this area of family law. This has led to the adoption of several regulations and other acts at the EU level, which, by their very nature, have an impact on the area of family law, for example:

- Council Resolution of December 4, 1997, on measures to be adopted on the combating of marriages of convenience;[19]
- Council Directive 2003/86/EC of September 22, 2003, on the right to family reunification;[20]
- Council Regulation (EC) No. 4/2009 of December 18, 2008, on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations;[21]
- Council Regulation (EU) No 1259/2010 of December 20, 2010, implementing enhanced cooperation in the area of the law applicable to divorce and legal separation;[22]
- Charter of Fundamental Rights of the European Union;[23]
- Council Regulation (EU) 2016/1103 of June 24, 2016, implementing enhanced cooperation in the area of jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of matrimonial property regimes;[24]
- Council Regulation (EU) 2016/1104 of June 24, 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;[25]
- Council Regulation (EU) 2019/1111 of June 25, 2019, on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility, and on international child abduction.[26]

The ECtHR has also emphasized the importance of the family in various respects. In *Marckx v. Belgium*,[27] the ECtHR stressed that the right to live together is an essential component of family life, as it allows family relationships to develop normally. In *Berrehab v. the Netherlands*,[28] the ECtHR stated that a child born in wedlock is an *ipso jure* part of that family unit, from the moment and by the very fact of the child's birth. Furthermore, the ECtHR has confirmed the existence of family ties or the right to family life for persons deprived of their liberty (*Kurkowski v. Poland*[29]) and for partners living in a *de facto* cohabitation (*Johnston et al., Ireland*[30]). The child's best interests dictate that family ties should be maintained, except when the family has proved to be highly unsuitable. Family ties can

19 Official Journal C 382, 16. 12. 1997, pp. 1–3.
20 Official Journal L 338, 23. 12. 2003, pp. 1–29.
21 Official Journal L 7, 10. 1. 2009, pp. 1–79.
22 Official Journal L 343, 29. 12. 2010, pp. 10–16.
23 Official Journal C 326, 26. 10. 2012, pp. 391–407.
24 Official Journal L 183, 8. 7. 2016, pp. 1–29.
25 Official Journal L 183, 8. 7. 2016, pp. 30–56.
26 Official Journal L 178, 2.7.2019, pp. 1–115.
27 *Marckx v. Belgium* (app. no. 6833/74), 13 June 1979.
28 *Berrehab v. the Netherlands* (app. no. 10730/84), 21 June 1988.
29 *Kurkowski v. Poland* (app. no. 36228/06), 9 July 2013.
30 *Johnston and others v. Ireland* (app. no. 9697/82), 18 December 1986.

be severed only in exceptional circumstances, and every effort must be made to preserve personal relationships and, if and when appropriate, to restore the family (*Gnahoré v. France*[31]).

The ECtHR has also considered that, in the absence of natural parents, family ties also exist between uncle/aunt and nephew/niece (*Butt v. Norway*[32]; *Jucius and Juciuvienė v. Lithuania*[33]). However, in normal circumstances, the relationship between grandparents and grandchildren is different. Legal protection is lower than that enjoyed by the parent-child relationship (*Kruškić v. Croatia*[34]; *Mitovi v. the former Yugoslav Republic of Macedonia*[35]). From the ECtHR cases cited above, we can conclude that the definition of family and family ties is broad. It is not limited to parents as holders of parental care, but extends in individual cases to other relatives or family members. However, Article 8 of the ECHR only guarantees the right to respect private and family life, but not the right to find a family or the right to adopt. The right to respect for family life does not protect the desire to find a family. Still, it presupposes the existence of a family, or at least the presence of a potential relationship between particular persons, such as between a child born out of wedlock and his father, or between a child and his father, even if it later turns out that there is no biological link between them (*Paradiso and Campanelli v. Italy*[36]). However, the ECtHR has also recognized the right to private and family life for same-sex couples (*Vallianatos et al. v. Greece*[37]; *Oliari et al. v. Italy*[38]; *Orlandi et al. v. Italy*[39]).

4.2. The appearance of international and European norms in the national constitutions and legal systems

The constitutional legal basis of marriage is Article 53(1) of the Constitution of the Republic of Slovenia[40] (CRS). Article 53(1) of the CRS states that marriage shall be based on the equality of the spouses and shall be solemnized before an empowered state authority. Unlike other constitutions (for example, Croatia [comp. Article 61(2) of the Croatian Constitution: "*Marriage is a living union between a woman and a man*"); Hungary (comp. Article L(1) of the Hungarian Constitution: "*Hungary shall protect the institution of marriage as the union of a man and a woman…*"); Serbia

31 *Gnahoré v. France* (app. no. 40031/98), 17 January 2001.
32 *Butt v. Norway* (app. no. 47017/09), 4 March 2013.
33 *Jucius and Juciuvienė v. Lithuania* (app. no. 14414/03), 25 February 2009.
34 *Kruškić v. Croatia* (app. no. 10140/13), 25 November 2014.
35 *Mitovi v. the former Yugoslav Republic of Macedonia* (app. no. 53565/13), 16 July 2015.
36 *Paradiso and Campanelli v. Italy* (app. no. 25358/12), 24 January 2017.
37 *Vallianatos and others v. Greece* (app. no 29381/09 in 32684/09), 7 November 2013.
38 *Oliari and others v. Italy* (app. no. 18766/11 in 36030/11), 21 July 2015.
39 *Orlandi and others v. Italy* (app. no. 26431/12), 14 December 2017.
40 Uradni list RS, št. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90,97,99, 75/16 – UZ70a.

(comp. Article 62(2) of the Serbian Constitution: "*Marriage shall be entered into based on the free consent of man and woman before the state body*"), the CRS emphasizes the equality of spouses but does not assume gender diversity of the spouses. Some other constitutions define marriage through equality of the spouses (e.g., see Article 31(1-2) of the Constitution of Kosovo: "*1. Based on free will, everyone enjoys the right to marry and the right to have a family, as provided by law. 2. Marriage and divorce are regulated by law and are based on the equality of spouses*"; Article 32(1) of the Constitution of Spain: "1. *Managers and women have the right to marry full legal equality*"; and Article 29(2) of the Italian Constitution: "*Marriage is based on the moral and legal equality of the spouses within the limits laid down by law to guarantee the unity of the family*").

4.3. Protection of marriage and family as fundamental rights and values in the practice of national constitutional courts

The constitutional legal basis of marriage is laid down in Article 53 of the CRS. Article 53(1) of the CRS states that marriage shall be based on the equality of the spouses and that it shall be solemnized before the competent state authority. The equality of the spouses is reflected in the relationship between the spouses themselves, as in the relationship of the spouses/parents to their common children.

The fact that the CRS already provides for marriage to be solemnized before a state authority demonstrates the state's interest in marriage. Two persons (man and woman) will only enjoy rights and obligations as spouses if the marriage is solemnized before a state authority consisting of:

a) a registrar and head of the administrative unit or a person authorized by the head (Article 33(1) of the FC);
b) a registrar and the mayor of the municipality in which the marriage should be solemnized (Article 33(2) of the FC);
c) or just a registrar (Article 38 of the FC).

All the named options are *a forma ad solemnitatem*, since a deviation from the prescribed formality means that such a marriage does not exist and has no legal consequences (Art. 42 of the FC). In such a situation, the public prosecutor can file a proposal for a declaration that marriage does not exist. This also shows that the state has an interest in marriage. The jurisdiction for matrimonial maters (e.g., dissolution of marriage) has occurred since 2019 in non-contentious courts.

Article 53(2) of the CRS provides that marriage and the legal relationships within it, the family, and the extramarital union shall be governed by law. The law governing marriage and the legal relationships within it, the family and cohabitation, is the FC. In addition, several other legal acts contain provisions that interfere with family law relations (e.g., Domestic Violence Act, the Criminal Code, the Provision of Foster Care Act, and the Non-Contentious Civil Procedure Act).

4.4. Separation and cooperation of the state and churches in the protection of marriage and the family

Article 7(1) of the CRS states that the state and religious communities are separated. On the other hand, Article 53 of the CRS provides that marriage shall be solemnized before a competent state authority (see *supra*). Following Article 7(1) and Article 53 of the CRS, only so-called civil marriage is recognized in Slovenia. In Croatia, however, it is left to the future spouses to choose between two alternatives: whether to marry before a state authority (civil marriage) or before a religious community (religious marriage) that has the competence to solemnize marriages following the Croatian Family Code. A marriage in the religious form, but with the effect of civil marriage (dualist system), may be contracted before the official of a religious community that has a legal relationship with the Republic of Croatia on the matter (Article 13(3) of the Croatian Family Code). When a marriage solemnized before a religious community produces civil effects, it is a so-called concordant marriage. However, since the separation of state and religious communities is consistently applied in Slovenia, only a marriage contracted before a state authority (a so-called civil marriage) produces civil effects under civil law. However, it is left to the spouses to confirm their marriage before an official religious community (so-called religious marriage).[41]

4.5. Civil society (non-governmental) bodies and institutions for the protection of marriage and the family

FC contains some general provisions that address the role of non-governmental organizations in the protection of marriage and family.

Article 5(5) of the CPR provides that the state shall ensure the conditions for the activities of non-governmental organizations and professional institutions for the development of positive parenting.

Social work centers and other public authorities, public service providers, state and judicial authorities, local authorities, humanitarian organizations, and other non-governmental organizations must cooperate in carrying out FC tasks (Article 16 of the FC).

State bodies, bodies of self-governing local communities, holders of public powers, providers of public services, and non-governmental organizations that, in the course of their work, become aware of circumstances from which it may be concluded that a child is at risk, shall immediately inform the competent social work center or court (Article 180(1) of the FC)).

A non-governmental organization working in the field of family policy may be granted the status of a non-governmental organization in the public interest following the law regulating the status of non-governmental organizations in the public

41 Kraljić, 2019, p. 106.

interest. The status of a non-governmental organization in the public interest shall be granted to a non-governmental organization if its activities contribute to the development of family policy and if it continuously carries out activities that positively affect the functioning and development of families (Article 281 of the FC).

4.6. State institutions for marriage and family protection

Family policy in the Republic of Slovenia is based on an integral and inclusive approach, promotes positive social values, and follows the general principles (inclusion, equality, protection, safeguarding, and respect) of:

a) inclusion of the whole population or orientation toward all families;
b) respect for the plurality of family forms and the different needs that arise therefrom;
c) respect for the autonomy of the family and the individuality of its members;
d) protection of children's rights in the family and society and concern for the quality of children's lives;
e) promotion of equal opportunities for both sexes;
f) contribution by the state to the cost of supporting children;
g) positive discrimination against the most vulnerable families;
h) consistency of measures with the perceived needs of the population;
i) generality of family policy measures (Resolution on Family Policy, 1.2. Fundamental Principles).

Monitoring the implementation and realization of the set objectives in light of the basic principles of the Resolution on Family Policy is the duty of all ministries, which are the promoters of individual measures. Once a year, all ministries submit a report on the realization of the objectives and the implementation of the measures to the Council of the Republic of Slovenia for Children and Family, and as part of the regular annual reporting to the Government of the Republic of Slovenia they also include a report on the realization of the Resolution on Family Policy in the report on the implementation of the resolution (Resolution on Family Policy, 1.4. Monitoring the Implementation of the Resolution and Reporting).

The state's role is more significant today than it used to be, as the state is involved in both the formation and dissolution phases of the family. The state can even provide care and education for the child on a subsidiary basis (e.g., by placing the child in an institution) if the parents cannot provide this for the child in an appropriate way. The state tries to ensure through a system of differentiated protection (e.g., family, social, penal, health) the best possible conditions for the upbringing and care of the child, primarily within the child's family. If after a gradual implementation of protective measures, starting with the least restrictive, adequate protection of the child's best interests still cannot be assured, the state will through its authorities (e.g., courts, social work center, police) interfere in the parent-child relationship.

Slovenian social work centers play a crucial role in protecting marriages and families. Their roles are essentially twofold. On the one hand, they have a supervisory role, and on the other an advisory role. In the first role, they supervise the performance of certain family matters (e.g., guardianship and foster care). In the second, they have the ability to assist the court by giving opinions to help the court in decision-making (e.g., on the allocation of the child, on the best interests of the child). In some matters, the social work center can appear as the initiator of the procedure (e.g., adoption, guardianship).[42]

The social work center also plays an important role in divorce. Before filing a proposal for a contested or uncontested divorce, the spouses will attend preliminary counseling with the social work center, unless:

a) they have no children in common over whom they have parental care;
b) one of the spouses is incapable of reasoning;
c) one of the spouses has an unknown place of residence or is missing;
d) one or both spouses live abroad.

The preliminary counseling aims to help the spouses determine whether their relationship has deteriorated or whether it is possible to preserve the marriage. The deterioration of marriage should be so extreme that marriage has become unbearable for at least one of them. The spouses shall attend preliminary counseling in person without a proxy (Article 200 of the FC).

The parents must also attend the preliminary counseling before they propose to the court to decide on the child's custody, maintenance, and contact with them or other persons or on issues relating to the exercise of parental care, which have a significant impact on the child's development. There will be no preliminary consultation if one of the parents is inconsistent or lives abroad, is missing, or has unknown residence (Article 203 of the FC).

The regulation of family mediation in FCs also represents innovation. Mediation was an alternative dispute resolution used in family matters before the FC, but was not regulated in the previous Marriage and Family Relations Act. Mediation can occur before, during, or after court proceedings. A mediator should help spouses or parents to regulate personal and property issues (Article 205(1) of the FC).

Article 153 of the FC gives general authorization to the court and the social work center to take all necessary actions and measures required for the upbringing and protection of the child or the protection of the child's property and other rights and interests.

Before the court decides on a measure of a more permanent nature, the social work center draws up a family and child assistance plan. The assistance plan shall contain a description of the situation, the needs of the children, the possibilities of the family, the method of monitoring, the forms of assistance, and a description of the implementation of the measure. The social work center may include in the

42 Kraljić and Križnik, 2021, p. 105.

family and child assistance plan a family therapy program, psychiatric treatment, treatment for alcohol or illicit drug dependence and other health, educational and psychosocial programs if it appears that the parents would be able to resume the child's upbringing and care after the therapy or treatment, or in other cases where it is in the best interests of the child (Article 170 of the FC).

5. Determination of the notion of "family"

The Slovenian FC adopts a broader definition of the family. Family is defined as the living community of a child without regard for the child's age, with both (e.g., a nuclear family) or one parent (e.g., a single-parent family) or with another adult (e.g., a foster family or a patch-work family), if this adult person cares for the child and has certain obligations and rights toward the child. The child is the central subject of the family. Therefore, the family enjoys special protection from the state. According to the priority principle, parents are responsible for protecting the child and the child's best interests. However, circumstances may arise that could entail the derogation from this principle (e.g., deprivation of parental care and removal of the child). The FC introduced important innovations. Following Article 231 of the FC, the court may grant parental care to a relative for a child without living parents if doing so is in the child's best interest. The relative must be willing to take responsibility for the granted parental care and fulfill the conditions prescribed for the child's adoption. The relative to whom the court will grant parental care is also responsible for the child's care and upbringing. Therefore, a family is formed between them.

A precise definition of the family is almost impossible, as family relationships are rapidly changing. New forms of family are emerging that were unknown or not legally regulated in the past or were not covered by the concept of family (e.g., a family based on parents living outside of marriage did not enjoy legal protection, nor did a same-sex family).[43] This makes it difficult for modern law to define the family, and as a result, modern family laws avoid specific definitions of the family for this reason. However, lawyers have mainly defined the family in two ways: *descriptively* (by listing the members of which the family is composed) and *operationally* (by listing the functions that the family performs).[44] From the above, it can be concluded that the FC has combined the two ways of describing the family by listing the persons (but not exhaustively) in the first part and the functions of the family in the second part.[45]

43 Kovaček Stanić, 2014, p. 30; Coester-Waltjen, p. 230.
44 Draškić, 2016, p. 35.
45 Kraljić, 2019, p. 39.

6. The definition of marriage

Article 3 of the FC defines marriage traditionally: "*(1) Marriage is the union of husband and wife,…*" Following the adoption of the new FC, marriage can only be between a man and a woman, but not by same-sex partners.

The Civil Unions Act, adopted in 2016, introduced a new term, namely civil union, replacing the term of registered same-sex civil partnership, which was regulated in the previous Act on Registered Same-Sex Partnerships. In Article 2(1), CUA defines a civil union as a living union between two women or two men. The CUA governs the entry, legal consequences, and dissolution of civil unions. Therefore, there is a clear distinction between marriage, which under the FC can be entered into by two persons of different sexes, and civil unions, which can be entered into by two persons of the same sex, that is, two women or two men. FC and CPA have in common that both legal acts are based on the principle of monogamy.

In addition to marriage and civil unions, Slovenia also regulates cohabitation and de facto civil unions.

7. Protection of marriage and family at the level of family law principles

For this purpose, different legal acts define a different range of family members. Article 2 of the Domestic Violence Act[46] (DVA) listed the following persons as relatives:

a) a spouse or extramarital partner;
b) a relative in the direct line (e.g., grandfather/grandmother, grandson/granddaughter, father/mother, son/daughter, etc.);
c) a relative in a collateral line up to the fourth grade (cousins, aunts/uncles, nephews/nieces, brothers/sisters—the same applies to half-siblings);
d) a person/relative by affinity in a direct line (father-in-law/mother-in-law, son-in-law/daughter-in-law);
e) a person/relative by affinity in a collateral line up to and including the second degree (brother-in-law/sister-in-law);
f) an adoptive parent and an adopted child;
g) a foster parent and a child placed in a foster family;
h) a guardian and a ward;
i) persons who have a child in common;
j) persons living in the same household;

46 Zakon o preprečevanju nasilja v družini (Domestic Violence Act (DVA): Uradni list RS, št. 16/08, 68/16, 54/17 – ZSV-H.

k) persons who are in a partnership relationship, whether living in the same household.

The persons listed above are considered family members under the DVA, even if the relationship or partnership has ended. A new spouse, extramarital partner, a partner in a civil union or partner in a *de facto* civil union, a family member (stepfather/stepmother), or a child of one of the listed family members (stepchild) is also considered a family member under the DVA.

The DVA is an essential legal act to protect the best interests of the child. DVA provides that the child enjoys special protection against violence. A child is also a victim of violence if the child is present when violence is perpetrated against another family member or lives in an environment where violence is perpetrated (Article 4(1-2) of the DVA). Article 6 of the DVA sets out a duty to report. Comparing Article 6 of the DVA (duty to report) and Article 180 of the FC (duty to inform), we can see that both legal acts address the same subjects. However, the difference is in the subject matter of information. The FC is broader in this respect, referring to "circumstances from which it may be inferred that a child is at risk." In contrast, the DVA is narrower, referring to "circumstances from which it may be inferred that violence is being committed."

8. Marriage as the smallest basic unit of the family

Under Article 3(1) of the FC, marriage is the union of the husband and wife. Article 3(2) of the FC states that the meaning of marriage is the conception of the family. However, the modern dynamics of everyday life (e.g., increasing life expectancy) and the interests of individuals who may not desire to procreate also dictate the possibility of a different meaning of marriage.

Older people who marry (usually) do not intend to produce offspring but want to ensure, through marriage, that they can grow old securely with a person for whom they have feelings of affection. Accordingly, the legislator has supplemented Article 20(2)(3) of the FC to extend the primary aim of marriage. Thus, marriage is based on the spouses' free choice to marry, mutual emotional attachment, mutual respect, understanding, trust, and mutual assistance. All of the above is the basis of the obligations between the spouses (Article 56 of the FC).

A living community between spouses can exist even if the spouses live apart for legitimate reasons (e.g., working or studying abroad). On the other hand, purely living together does not guarantee the fulfillment and satisfaction of the emotional, psychological, sexual, procreative, economic, cultural, and other needs of the spouses that otherwise form the core of the spouses' living community. Although the legislator has expressly provided that marriage should be based on mutual emotional attachment, mutual respect, understanding, trust, and mutual assistance (cf. Article 20

in conjunction with Article 56 of the FC), which constitutes the basis of the mutual relations between the spouses, in the event of a deviation, the other spouse cannot be forced to emotional attachment to his or her spouse, respect him or her, understand and trust each other, and assist each other.

The existence of marriage or an extramarital union is not excluded even in the case of domestic violence between spouses or cohabiting partners. Therefore, the presence of domestic violence may preclude mutual cohesion, emotional attachment, understanding and respect, and mutual assistance. However, following the principle of autonomy, the spouse or cohabiting partner has to decide whether he or she wishes to end or remain in such a partnership.

9. Other legally recognized forms of partnership

Marriage is a legal institution in all states, but there are differences in legal regulations. However, the situation concerning same-sex partnerships differs. There are various forms of legal recognition of same-sex partnerships throughout the world, including marriage, registered partnerships/civil unions, cohabitations/de facto civil union, or even no regulation. Slovenia, Croatia, Hungary, Czech Republic, Slovakia, Poland, Estonia, Latvia, Lithuania, Bulgaria, and Romania have a common history of socialist systems as part of the communist bloc. Therefore, in the last 30 years, all the forenamed countries have been faced with political changes, new legislation, and transitional problems. In many of them, religion still plays an essential role in everyday life and is related to legal questions or regulations of same-sex partnerships. Marriage as a "traditional value and partnership relation" is still very strongly represented in some countries.[47] Some EU countries regulate the legal registration and recognition of same-sex partnerships, but none of them enables the right to marry. Such regulation deliberately separates marriage from a registered same-sex partnership/civil union. On the other hand, in some countries, same-sex partners have almost the same rights and obligations as the spouse in the marriage (e.g., Slovenia).

Currently, partners from same-sex civil unions in Slovenia have all but three of the rights and obligations that come with marriage: They cannot enter into marriage, jointly adopt a child, or use the system of in vitro fertilization (Article 2(3) and 3(4) of the CPA). The right to marry is recognized for same-sex partners in 13 EU countries[48]: the Netherlands (since 2001), Belgium (2003), Spain (2005), Sweden (2009), Portugal (2010), Denmark (2012), France (2013), Luxembourg (2015), Ireland (2015), Finland (2017), Malta (2017), Germany (2017), and Austria (2018).[49]

47 Kraljić, 2017, p. 56.
48 Status as of April 2021.
49 European Union, 2020.

As mentioned above, the new Slovenian family code[50] was rejected by the referendum on March 25, 2012. Therefore, on March 3, 2015, the Slovenian Parliament amended the Slovenian Marriage and Family Relations Act with a new redefinition of marriage based on gender equality. The redefinition of marriage also made it possible for same-sex partners to conclude a marriage. The new definition of marriage (also cohabitation) affected adoption and afforded same-sex couples the right to contract a marriage. Therefore, discrimination based on sex orientation was eliminated. However, the bill was rejected on the referendum on December 20, 2015 (voters voted against, with 63.47 percent of a turnout of 36.38 percent). One day after the referendum on December 20, 2015, the CUA was passed to the National Assembly, which adopted CUA on April 21, 2016, with 54 votes in favor and 15 against. CUA does not regulate family relations or relations with third persons (also not regarding children).

10. The relation and connection of extramarital relationships to family and marriage

Slovenia is one of the countries with a liberal approach to the legal regulation of cohabitation. Cohabitation entails rights and obligations equal to those of marriage. The legal regulation of the consequences of cohabitation has a history of several decades in Slovenia. The earliest legal act recognizing the legal status of cohabitants is the Yugoslav Law on Workers' Insurance,[51] dating back to 1922. This act allowed the cohabiting partner of a deceased worker to obtain material support if she had lived with him for at least one year, and if a child had been born to them during the cohabitation. Both these conditions had to be cumulatively satisfied.

In 1976, the Marriage and Family Relations Act was adopted, explicitly including cohabitation among the legislative provisions. Thus, cohabitation was placed alongside marriage. The social meaning of marriage was the conception of the family (Article 3(2)(3) of the Marriage and Family Relations Act). However, a family can also be created in an extramarital union, as a relationship between parents and children.

In 1991, the extramarital union was also given a constitutional dimension. Article 53(2) of the CRS expressly stipulates that legal relations in an extramarital union shall be regulated by law.

According to Article 4(1) of the FC, an extramarital union or cohabitation is considered a long-term living union between a man and a woman who have not

50 The bill of Family Code defined marriage as a union between a man and a woman and stipulated that same-sex partners should have all rights of marriage except joint adoption.

51 Uradni list Kraljevine Jugoslavije, št. 117/1922.

entered into a marriage, where there are no grounds for a marriage between them to be invalid. Such a union shall have the same legal consequences for the relationship between them under the CUA as if they had entered a marriage. However, in other areas of law, such a union has legal consequences if the law so provides.

However, in 2016, the CUA introduced an additional innovation by granting legal validity to a same-sex *de facto* civil union in addition to a "registered" civil union. In its definition of a *de facto* civil union, the CUA is aligned with Article 3(1) of the FC. A *de facto* civil union is a long-term living union between two women or two men who have not entered into a civil union, and there are no grounds for a civil union between them to be invalid. A *de facto* civil union has the same legal consequences under the CUA in the relationship between partners as if they had entered into a civil union. A *de facto* civil union shall also have the same legal consequences as a civil union in those areas of law where a civil union has legal consequences, unless the CPA provides otherwise.

If a decision on a right or obligation depends on the existence of a cohabitation (either a de facto civil union or an extramarital union), the decision on that question has a legal effect only in the matter for which that question was decided (Article 4(2) of the of the FC and Article 3(3) of the CPA).

The essential difference between an extramarital union and a *de facto* civil union is given in the limitations of Article 3(4) of the CPA, which stipulates that the partners of a *de facto* civil union cannot adopt a child together and that they are not entitled to undergo assisted reproduction procedures by biomedical means.

The following is a description of the preconditions that must be fulfilled for the cohabitation to enjoy legal protection and for legal consequences, that is, rights and obligations, to arise between partners. All of the above also applies to a *de facto* civil union. These differences are highlighted.

Temporal condition: The FC stipulates that the extramarital union must last for a long time. The FC does not specify how long an extramarital union must exist to produce legal effects under the FC. Whether a particular situation gives rise to a long cohabitation will be determined by the court on a case-by-case basis, and thus the court will have to answer whether cohabitation has lasted for a long time, though it should be long enough to create a similarity between an extramarital union and the community of life present during marriage. In each case, the court will consider all the relevant circumstances (e.g., actual duration, duration, possible birth of a child).

Personal condition: Under the FC, only the living union between a man and a woman is legally recognized. Therefore, an extramarital union is based on the gender diversity of the partners. However, under the CPA, a *de facto* civil union can be contracted between two men or two women.

Substantive conditions: Both the FC and the CPA stipulate the existence of a living community as a fundamental prerequisite for the validity of an extramarital union and a *de facto* civil union (cf. Article 4(1) of the FC and Article 3(1) of the CPA). However, the legislator has not specified what constitutes a living community. The

living community is a legal standard to be filled in by the court on a case-by-case basis. The cohabitation of cohabiting partners or partners in a *de facto* civil union must constitute a living community in the physical-natural, moral-spiritual, sexual, and economic sense. The common household of cohabiting partners is the most visible sign to the surrounding community that a living community exists between a man and a woman. Living together or sharing a household is therefore an essential element of cohabitation. The obligation to live together is judged more strictly in cohabitation matters than in marriage, as it is the only outwardly visible sign that cohabitation exists. In certain cases, cohabitation is presumed to exist despite the separation. The reasons for living apart must be justified (e.g., if one of the cohabiting partners is working abroad, military service, school, etc.).[52]

Material condition: The fourth constitutive element of a legally recognized cohabitation/extramarital union (including a *de facto* civil union) is the absence of grounds that would render marriage between the partners invalid. Persons wishing to enter into a valid extramarital union (a man and a woman) or a *de facto* civil union (two men or two women) must fulfill the conditions for marriage (e.g., free consent, monogamy, kinship, marriageable age).

According to the FC, *the legal consequences* of cohabitation between partners (male and female) have the same legal consequences under the FC in the relationship between them as if they had entered into a marriage. In other areas of law, a sectoral law is provided. The introduction of extramarital union into the Slovenian CRS in 1991 led to a proliferation of laws placing extramarital partners on an equal stage with spouses regarding rights and obligations. There is a notable difference between older and newer laws. Older laws provide for the recognition of specific rights, while more contemporary laws start from the general premise of equality of rights and obligations of spouses and cohabitants.

Children born or conceived out of wedlock are not subject to a legal presumption of paternity, and therefore the institution of recognition or even judicial establishment of paternity is applicable. However, the FC is an exception to this general rule. In Article 133, the FC extends the legal presumption of paternity to the extramarital partner (not to the partner of a *de facto* civil union!). The father of a child conceived by biomedical assistance is deemed to be the mother's husband or her extramarital partner, provided that he has given his consent to the procedure following the Infertility Treatment and Procedures of Biomedically Assisted Procreation Act (hereinafter, "Infertility Act").[53] The exception is based on prior consent that the extramarital partner must provide assisted procreation or conception through biomedical assistance. The paternity of the person who is presumed to be the child's father may not be contested, except on the grounds that the child was not conceived by means of a procedure of assisted reproduction (Art. 133(1-2) of the FC). Since

52 Kraljić, 2019, p. 53.

53 Zakon o zdravljenju neplodnosti in postopkih oploditve z biomedicinsko pomočjo: Uradni list RS, št. 70/00, 15/17 – DZ.

the partners of a civil union, whether or not contracted, are not eligible for assisted reproduction procedures (cf. Article 2(3) and Article 3(4) of the CPA), the legal presumption in Article 133(1) of the FC does not extend or apply to them.

11. Legally recognized forms of kin family relationships

11.1. Presumptions for determining paternity status

The child's mother's husband is considered to be the father of the child born in wedlock (Article 113(1) of the FC). The legal presumption of paternity has roots in Roman law.[54] While maternity could be linked to childbirth, which someone usually witnessed, paternity was long considered to be impossible to establish with certainty. Therefore, to ensure financial security for the child, there was a presumption that the father of a child born in wedlock was to be considered the mother's husband.[55] Since marriage was already based on the principle of monogamy, it was assumed that the mother's husband was the only one, or presumably the one with whom the mother had most sexual relations. Therefore, the legal relationship between the child and father is based on a presumption and not on a factual establishment of genetic paternity. The legal presumption of paternity for a child born in wedlock is, therefore, based on two presumptions:

a) a *positive presumption* that the husband of the child's mother had sexual relations with his wife, the child's mother, at the critical time, that is, at the time when conception could have occurred.
b) a *negative presumption* that the wife, the child's mother, did not have sexual relations with another man, that is to say, a man who is not married to her, at the critical time.[56]

The second paragraph of Article 113 of the FC is novel. Under the Marriage and Family Relations Act of 1976, the legal presumption of paternity extended to 300 days after the dissolution of the marriage, irrespective of the manner of dissolution (cf. Article 86 of the MFRA—thus also in the event of divorce). However, the new FC extends the legal presumption of paternity to 300 days after the dissolution of the marriage only in the case of dissolution due to the mother's husband's death. Article 114(3) of the FC, which has a twofold purpose, is also new. On the one hand, it excludes applying the legal presumption of paternity to a child born 300 days after the divorce or annulment of the marriage. The legislator was guided by the premise that

54 Lat. *pater est quem nuptiae demonstrant*.
55 Cretney, 2000, p. 193.
56 Mladenović, 1981, p. 38.

spouses who divorce because of mutually aggravated (hostile) relations do not have sexual relations. On the other hand, it expressly stipulates that the father of a child born in a marriage entered by the child's mother within 300 days of the dissolution of the previous marriage is to be considered the mother's husband from the new marriage, irrespective of the reason for the dissolution of the previous marriage.

Article 14 of the CRS prohibits discrimination on the grounds of birth. This is further supported by Article 54(2) of the CRS, which states that children born out of wedlock shall have the same rights as children born in wedlock. However, there is a difference in creating a legal relationship between the child and father, that is, paternity. Children born out of wedlock or not born within 300 days of the dissolution of the marriage due to the father's death are not subject to the legal presumption of paternity. In such cases, paternity will have to be established, either by acknowledging paternity or by a court decision to establish paternity. In the first case, the man who gave the acknowledgement of paternity is considered as the father (subject to the conditions laid down in the FC). The consent of wills has to be given, as the child's mother must also agree to the father's acknowledgement. Whether the man who makes the acknowledgement is also the father of the child is not examined. The situation is different in the case of paternity by judicial decision, where, at the end of the court proceedings, the man whose paternity has been established in court proceedings will know that he is the father.

Acknowledging paternity is a strictly personal act. It is a unilateral declaration of will made in the prescribed form by a man who wishes to establish a family-law relationship (father-child relationship) through this declaration. It is a personal right since it is not transferable or inheritable, and it is absolute since it has an *erga omnes* effect. Paternity may be recognized only in the form prescribed by Article 115 of the FC. A man may acknowledge paternity at a social work center, before a registrar, in a public deed, or in a last will. Paternity may be acknowledged by a man who is capable of understanding the meaning and consequences of acknowledgement (Article. 116 of the FC).

The new Act also contains provisions on the maternity and paternity of children conceived with biomedical assistance. If the mother consented to the biomedical assistance procedure under the provisions of the Infertility Act, her maternity may not be contested (Article 133(1) of the FC). If the child was conceived with the help of a donor egg, her maternity may not be contested (Article 133(2) of the FC). The father of a child conceived with biomedical assistance is considered the mother's husband or her extramarital partner, provided that they have given their consent to the procedure according to the Infertility Act (Article 134(1) of the FC). In the case of a child conceived by biomedical assistance, the legal presumption of paternity extends to the extramarital partner (Article 134(1) of the FC). The legal presumption provided makes paternity conditional on consent to the artificial insemination procedure. If consent was not in accordance with the provisions of the Infertility Act, the legal presumption of paternity of a child born through biomedical assistance will not arise. The paternity of a child conceived by biomedical means may not be contested, except

if the child is not conceived by a procedure of assisted reproduction (Article 134(2) of the FC). If the child was conceived with the help of a donor's sperm cell, the child's paternity may not be established (Article 134(3) of the FC).

11.2. The mother's status

Motherhood is the legal bond between the mother and child, established when the child is born. Starting from Article 112 of the FC, the woman who gave birth to the child is considered the child's mother. This definition is the old Roman legal presumption "*mater semper certa est*," which has been preserved by the new FC, although its predecessor, the MFRA, did not expressly include it. However, the presumption of motherhood was considered irrelevant. In the past, the woman who gave birth, that is, the gestational mother, was also a genetic or biological mother. However, the biological mother did not necessarily have to be the social mother, as adoption was already known, for example, in ancient Rome. Although deviations from the legal presumption of maternity may have occurred in the past (e.g., switching of a child in the hospital, deliberate switching, or tampering), there has been significant deviation from this classical legal presumption.

As biomedicine has developed, various assisted reproductive techniques have been developed. Today, assisted reproductive technologies (ART) are part of everyday life. Every sixth couple in Slovenia facing infertility-related problems. The ART that leads to a deviation from the legal presumption of motherhood is egg donation (ovum), embryo donation (embryo), or cases of surrogacy (surrogate motherhood). The latter two techniques (donations) are not allowed in Slovenia (cf. Article 13(1) and Article 7 of the Infertility Act). If the mother consented to the ART procedure under the provisions of the Infertility Act, her maternity may not be challenged (Article 133(1) of the FC). If the child was conceived with the help of a donor egg, her maternity may not be contested (Article 133(2) of the FC).

On the one hand, the development of medicine, specifically that of assisted reproduction technologies, has enabled many couples to fulfill their desire to have a child, but it has also led to so-called "split motherhood."[57] Donation of female ovum and embryo donation makes it possible for a woman to give birth to a child who is not genetically related to her. As a result, a distinction is made between genetic maternity, which is linked to the origin of the ovum or embryo, and gestational (including medical) maternity, linked to pregnancy and thus to carrying the child to term. This is particularly applicable in the case of surrogacy or surrogate motherhood. Under Article 7 of the Infertility Act, a woman who intends to give her child to a third party for free or for payment after birth is not entitled to ART in Slovenia.

The importance of maternity is already enshrined in the Slovenian CRS, as Article 53(3) of the CRS provides that the state shall protect maternity and create the necessary conditions for it. This constitutional provision on motherhood is

57 In German: *gespaltene Mutterschaft.*

complemented by Article 55 of CPR, which provides that parents shall be free to decide on the birth of their children and that the state shall provide opportunities for the exercise of this freedom and create conditions that enable parents to decide on the birth of their children. The Infertility Act is relevant to this freedom. The mother of a child is considered to be a woman who gave birth to a child. It follows from the above that the child's birth is sufficient for this legal relationship to arise. Entry in the civil registry verifies this relationship.[58] The child must be entered into the civil register immediately after birth. This is also defined as a fundamental right of the child in the Convention on the Rights of the Child (cf. Article 7(1) of the Convention on the Rights of the Child). This is also confirmed by Articles 4(1) and (4) of the Slovenian Civil Register Act.[59]

11.3. Adoption—who can be an adoptive parent?

According to the primacy principle, parents are the primary persons who should take care of their children. However, since circumstances may arise that make it impossible for them to care for their children (death, illness, withdrawal of parental care), an alternative form of care must be found for such children. Adoption is the best option when there is a need for permanent replacement of absent parents or their care as part of parental care. Adoption has a subsidiary character in that it will only take place when parents are unable to care for their child. Parents are the primary caregivers and have the right and obligation to care for their children.

Although adoption is the best permanent alternative form of care for children who, for various reasons, cannot be cared for by their parents, adoption should be an *ultima ratio* measure. Adoption is the most intrusive way of affecting the relationship between biological parents and children. When the child is adopted, parental care is permanently terminated since the adoption terminates the rights and obligations of the child toward his or her parents and other relatives, and the rights and obligations of the parents and other relatives toward the child (Article 220(1) of the FC). An exception is made if the child is adopted by the spouse or extramarital partner of one of the child's parents. Such adoption does not terminate the rights and obligations of the child toward that parent and his/her relatives, nor the rights and obligations of that parent and his/her relatives toward the child (Art. 220(2) of the FC). The purpose of adoption is to provide the child with a stable, loving, secure, and caring environment in which he or she can grow and develop harmoniously.

Article 8 of the FC provides that children enjoy the special protection of the state whenever their healthy development is endangered and when the child's best interests are required. This is the legal implementation of the constitutional provision in Article 56(3) of the CRS, which guarantees care and special protection by the state

58 Hrabar, 2007, cited in Alinčić et al., p. 133.

59 Zakon o matičnem registru: Uradni list RS, št. – official consolidated version, 67/19. See: https://bit.ly/3iAGOYW.

for children and minors who are not cared for by their parents, who have no parents, or who are without adequate family. The situation of these children is regulated by law, specifically the FC. The state has a duty to ensure that, when such circumstances arise, the child who is a member of a vulnerable group is protected and that his or her rights and best interests are safeguarded. Adoption in this context is a measure that considers the child's ethnic, religious, cultural, and linguistic background and can ensure the continuity of the child's upbringing in a family environment (Article 20(3) of the Convention on the Rights of the Child).

In Slovenia, only a child may be adopted (Article 212 of the FC). Adoption creates the same relationship between the adoptive parents and the child as between the parents and their children. The FC, therefore, regulates only full adoption,[60] which means that in the case of adoption, adoptive parents take the place of the child's biological parents.

Following the wording of Article 212 in conjunction with Article 218 of the FC, it can be concluded that adoption before the birth of the child (*prenatal adoption*) is not possible, since Article 212 of the FC expressly provides that "only a child may be adopted." Article 218(1) of the FC provides that "…only a child may be placed for adoption if the parents have consented to the adoption after the child's birth…" Therefore, prenatal adoption and prenatal consent to adoption are not possible.

In addition to the safeguards mentioned above for biological parents, the legislator has added a further safeguard: Parents who have given their consent to the adoption of their child after birth but before the child is eight weeks old must confirm this again after eight weeks; otherwise, the consent has no legal effect (Article 218(1) of the FC). Adoption can only occur after six months have elapsed since the consent was given (or the consent was confirmed), which still gives parents the possibility to withdraw their consent. Exceptionally, adoption may also occur before the expiry of the six months from the giving of consent (or confirmation of consent), if the court finds that this would be in the child's best interests.

The FC provides that a child may be adopted jointly by spouses or extramarital partners, that is, by a man and a woman who have been living together for a long time but have not entered into a marriage and where there are no grounds that would invalidate any marriage between them (Article 4(1) of the FC). Such legal definition favors so-called joint adoption since both spouses or extramarital partners appear in the definition of adoptive parents. This arrangement aims to provide the child with a "father" and a "mother" and thus a new family environment, representing a new beginning. On the other hand, this legal definition makes joint adoption available only to spouses or extramarital partners. Under the FC, these two partnerships can only be entered into by partners of different sex.

Following the CPA, same-sex partners have the choice of either a civil union or a *de facto* civil union. According to Article 213(1) of the FC, partners living in a civil union or *de facto* civil union cannot adopt a child together in Slovenia. The possibility

60 Lat. *adoptio plena.*

of joint adoption is also expressly excluded under CPA (cf. Articles 2 and 3 of the CPA). In addition to joint adoption, Article 213 of the FC also allows for so-called single adoption, which can occur in two cases. The first case will be given when a spouse or extramarital partner adopts a child of his/her spouse or extramarital partner. In such cases, the child usually already lives with and knows the person who is the spouse or extramarital partner of his/her parent and who is already caring for him/her (step-parent adoption). However, unilateral adoption will also be carried out exceptionally for a child if it is impossible to obtain adoptive parents who are spouses or extramarital partners, and if this is in the child's best interests. In this case, such a child will also be adopted by one person. In the case of single adoption, a partner from a civil union or *de facto* civil union can adopt the partner's child.

In 2017, 593 applications for adoption were filed in Slovenia. In 2019 in Slovenia, there were 47 adoptions (17 from abroad). From the above, we can conclude that many couples in Slovenia wish to adopt a child, but there are essentially not enough children eligible for adoption. The married and cohabited couples included 21 children. However, the majority of children were adopted by the child's parent spouse or partner (24 children, step-parent adoption). There were four cases of adoption by single persons (single adoption).

As "demand exceeds supply," the waiting period of potential adopters may be greater than ten years. Therefore, some couples are ready to adopt a child from another state. Such a situation is not new since Slovenia faced a lack of "children at disposal" for adoption in former Yugoslavia. The status of that time was much more favorable, of course, as couples went for children to other federal republics and the autonomous regions, giving rise to so-called inter-federal adoptions. Today, Slovenian couples and individuals consider and undertake adoption from abroad, that is, intercountry adoption. In the past ten years, most of the children from intercountry adoption were adopted from the Russian Federation, Ukraine, and Ghana.

12. Legal framework of the parent-children relationship

12.1. The content of parental control

Parental care represents all the parents' obligations and rights to create. According to their abilities, parents should ensure that the child's full development will be possible. Parental care belongs to both parents (Article 6 of the FC). Parental care is an implementation of the constitutional provision of Article 54 of the CRS, which grants parents the right to maintain, educate, and bring up their children (Article 54(1)(1) of the CRS). Parents have the right to ensure their children's successful physical and mental development through direct care, work, and activity. Parents should take appropriate measures and actions to ensure that the child's well-being

will be realized. Parents shape what is best for their children according to their ideas, wishes, and expectations. "Parental care" is a new legal concept that has replaced the concept of "parental rights." Thus, the concept of parental care also reaffirms the child-centered approach that the entire FC pursues and builds on.

Following the principle of priority, parents have primary and equal responsibility for the child. Parental care belongs to both parents jointly and represents the whole of the parents' obligations and rights. According to their respective capacities, the parents shall ensure everything that the child needs for full development (Article 6 of the FC). This provision is supplemented by Article 136(1) of the FC, which states that parental care comprises the obligations and rights of the parents related to the care of the child's life and health, upbringing, protection and care, supervision of the child and care for his or her education, and the obligations and rights of the parents relating to the representation and maintenance of the child and the management of the child's property. Parental care may be limited or withdrawn from one or both parents only under the conditions laid down by the FC (Article 136(2) of the FC).

Parents' rights and obligations are set out not only in the FC, but also in other legal acts. One such legal act is the Personal Name Act[61] (PNA). The PNA stipulates that parents must determine a personal name for their child and register it with any administrative unit no later than 30 days after the child's birth (Article 6(1) of the PNA). The child's personal name shall be determined by the parents by mutual agreement, unless one of the parents is unknown, no longer alive, or unable to exercise parental care. In this case, the other parent determines the personal name of the child. The child may take the surname of one or both parents, or the parents may give the child a different surname. However, in the event that the child's parents are no longer alive or cannot exercise parental care, the child's personal name is determined by the person entrusted with the child's care, in agreement with the competent social work center (Article 7 of the PNA). Therefore, the child has the right to a personal name (Article 7(1) of the Convention on the Rights of the Child). The basic characteristics of a personal name are that it enables the individualization of a specific natural person. It has a non-property character and is (in principle) non-transferable. The right to a name is now included in the protection system for fundamental human rights.

Parents exercise parental care jointly and consensually. This fundamental principle applies both while they live together, and if they are no longer living together or will no longer be living together. Despite separation, parental care still belongs to both parents, unless it has been limited or withdrawn. Parents are (usually) the most important people in the child's life, influencing the child's present and future life through their direct or indirect actions, thoughts, lifestyles, etc. The patterns that parents have passed on to their children during their childhood are patterns that children themselves often follow when they grow up (e.g., child-rearing, world and religious views). Parents have obligations and rights as part of their parental

61 Zakon o osebnem imenu: Uradni list RS, št. 20/06; 43/19.

responsibility toward their children. These rights also place them in a privileged position vis-à-vis third parties. Parents have primary obligations and rights with respect to their children. Only if they fail to exercise parental care for the child's best interest may other persons take over certain rights of parental care (e.g., care and upbringing in the case of foster placement). Parental obligations correlate with children's rights.[62]

If the parents do not or will no longer live together, they must agree on the care and upbringing of their joint children following their child's best interests. Separation can be caused by divorce or annulment, the break-up of an extramarital union or civil union, or where the parents have never lived together but have a child in common. Following the principle of autonomy, parents should have the best knowledge of the circumstances, subjective and objective, relevant to regulating the relationship to the common child in the event of their separation. The parents can thus also settle by mutual agreement the question of the care and upbringing of the joint children over whom they have parental care.

If parents cannot reach an agreement on their own, they are assisted by the social work center or, if they wish, by mediators. When the court dissolves the marriage based on a divorce petition filed by one of the spouses, it also decides on the custody, upbringing, and maintenance of the children living together and on their contact with their parents (Article 98(2) of the FC). However, before deciding on the above, the court must determine how the child's best interests will be safeguarded (Article 98(3) of the FC). If parents agree on the custody of their children, they may propose a court settlement. The court will examine the content of the proposal for a court settlement *ex officio*. The interests of the children are at stake and require closer supervision of consensual agreement.

The court will follow the parents' agreement if it finds that it is in the child's best interests and that their rights are safeguarded. However, if the court finds that the agreement is not in the child's best interests, it will reject the agreement (Article 138(2) of the FC). Parents may amend or modify the agreement accordingly. If they do not do so or have not reached an agreement, the court will decide only on the custody of the joint children over whom the parents have parental care. In doing so, the court may also decide beyond the claims (*extra petitum*) or even without any claims being raised (*ultra petitum*).

Maintenance enables the child to meet his or her daily needs in terms of food, clothing, education, leisure time, etc. As long as the parents live together, both parents usually contribute to the child's maintenance within the framework of the existing community. However, where the parents do not or will not live together, the parent who does not live with the child must contribute to the child's maintenance. In this case, following the principle of autonomy, parents can make arrangements for maintenance. In particular, it is understood that they agree on the amount of maintenance and payment method. The parents know the child's needs and capacity

62 Kraljić, 2019, p. 439.

to determine the amount of maintenance. The parents are free to agree on how to share the maintenance burden between them. Despite the possibility of autonomous decision-making, parents must regard the child's best interests, which the court must verify of its own motion. If parents cannot reach an agreement themselves, they will be assisted by the social work center or, if they so wish, mediators. However, if the parents cannot reach an agreement on the maintenance of their joint children, the court will decide on maintenance.

The principle of family solidarity implies an obligation for the spouse or extramarital partner of the partner (step-parent) to support the child (stepchild) of his/her spouse or extramarital partner unless the child's parent is capable of supporting the child (Article 187(1) of the FC). This maintenance obligation is of a subsidiary nature, since it will only be imposed if the child cannot be maintained by the parents. The maintenance obligation of a spouse or extramarital partner of the child's parent will cease with the dissolution of the marriage or extramarital union with the child's parent unless the dissolution of marriage is a result of the death of the child's mother or father. In this case, the surviving spouse or extramarital partner (step-parent) must support the child if they were living together at the time of death (Article 187(2) of the FC).

12.2. The child's right to freedom of conscience and religion, the child's right to their own national identity (religion, language, culture, homeland, home)

Article 41(3) of the Slovenian CRS gives parents the right to provide their children with religious and moral upbringing following their beliefs. The religious and moral guidance given to children must be appropriate to their age and maturity and be consistent with their free conscience, religious beliefs, and other beliefs or convictions. Article 10 of the Freedom of Religion Act[63] complements the CRS by giving parents the right to educate their children following their religious beliefs. In doing so, they must respect the child's physical and mental integrity. However, a child who has reached the age of 15 has the right to make his or her own decisions relating to religious freedom.

The social work center must find an adoptive parent for the child who, in its opinion, can best care for the child. In doing so, it shall also take into account the child's previous upbringing, ethnic, religious, or cultural background, if any.

63 Zakon o verski svobodi: Uradni list RS, št. 14/07, 46/10 – odl. US, 40/12 – ZUJF, 100/13.

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Chapter IX

Family Protection in Central European Countries

Tímea Barzó

1. Introduction

This volume presents the family law and protection systems of seven Central European countries (Croatia, Czech Republic, Hungary, Poland, Serbia, Slovakia, and Slovenia). This article is a summary of the relevant legal regulations in force in the abovementioned countries. As this chapter is a synthesis, it was written based on the country reports that comprise this volume. Consequently, there are no scientific, literature-related references, or footnotes in this article. Only the Acts and other legal sources are indicated in the footnotes. A part of the article deals with the legal environment concerning this topic. If the reader is interested in the sources and a more detailed analysis of the legal institutions and solutions involved, they may read the relevant country reports. We did not aim to present the countries in alphabetic order, but rather prioritized a comprehensive approach. Therefore, we composed the article according to a logical line where similarities and differences dominate in relation to the given legal institutions. We present an overview of the topic in five parts from a comparative perspective. The legal basis, definition of family, relationship forms, descendant relationships, and the parent-child relationship are presented.

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2. The structure of the legal basis

2.1. Constitutional protection

The constitutional protection of a legal field has utmost importance because it constitutes the legal basis of the legal institutions governing the field in question. Many basic features can be ascertained in relation to a given legal area if we analyze the relevant regulations of the country's Constitution. The constitution forms the basic law of each Central European country. If we take a deep dive into the regulations under each country's constitution, we can see that all of them establish a constitutional framework that aims to protect the family.

In the Constitution of the Slovak Republic[1] there are no legal alternatives to marriage. This is rooted in the perspective governing Slovak family law, which emphasizes on the biological reproductive functions of the family. According to Article 41 of the Constitution, *"Marriage is a unique bond between a man and a woman. The Slovak Republic broadly protects and promotes its good. Marriage, parenthood and the family are under the protection of the law."* We will examine this in detail in this chapter. A deeper analysis is presented in the Slovak country report as well. The family law regime in Slovakia does not recognize same-sex or non-traditional forms of marriage. It does not define or protect cohabitation, either. A similar approach is seen in the Constitution of The Republic of Serbia,[2] as well. The Serbian Constitution emphasizes that marriage and family are universal human rights and fundamental values. It declares that, *"Everyone shall have the right to decide freely on entering or dissolving a marriage. Marriage shall be entered into based on the free consent of man and woman before the state body."* In the Serbian Constitution, the protection of family relations and parents are merged. It stipulates that families, mothers, single parents, and any children in the Republic of Serbia shall enjoy special protection in accordance with the law. This legal protection incorporates a special support and protection mechanism for mothers before and after childbirth and for children without parental care and/or with impediments to their mental and/or physical development. According to the Serbian Constitution, non-marital cohabitation shall be equal to marriage. The definition of non-marital cohabitation is found in the Family Law Act. The Constitution of the Republic of Poland[3] contains only a few provisions on family. However, it emphasizes that marriage is contracted between a woman and a man. The privacy of family life and the right to make decisions on personal life are subject to Polish constitutional protection. Besides the privacy of family life, the protection of children is also of great importance, specifically with respect to the children's right to a hearing in proceedings and for their views to be taken into account, and for children who are deprived of parental care.

1 Constitution of the Slovak Republic of 1992 (460/1992 Coll.)
2 Constitution of the Republic of Serbia, Official Gazette of Serbia no. 98/06.
3 The Constitution of Poland, April 2, 1997.

We can read about the concrete protection of family and parenthood in the Czech Charter of Fundamental Rights and Freedoms[4], because it declares thus: "Parenthood and the family are under the protection of the law" (Article 32, Section 2). A family based only on marriage is not mentioned there, but there is a draft amendment that intends to modify the text as follows: "Parenthood, the family and marriage as a union of a man and a woman are under the protection of the law".[5]

Most of these Constitutions consider marriage a basic unit of family. Article 62 of the Croatian Constitution[6] provides thus: *"The marriage is a union of a woman and a man"* and adds that *"The marriage and legal relationships in the marriage, non-marital union and family shall be regulated by law".* According to Article 53(2) of the Slovenian Constitution,[7] legal relations within the family must be regulated by law. However, there is a unique solution under Slovenian law. Cohabitation is also mentioned as follows: *"law shall regulate legal relations in an extramarital union (cohabitation)."* The Slovenian Constitution offers rather detailed regulations and principles regarding marriage, as it declares that marriage shall be based on the equality of the spouses and shall be solemnized before an empowered state authority (Article 53(1)). Unlike other constitutions, we can see a more open approach in that the Slovenian Constitution emphasizes on the equality of spouses, but does not assume their gender diversity. The Fundamental Law of Hungary[8] states that "the basis of the family relationship is marriage or the parent-child relationship".

The table below summarizes the constitutional protection mechanisms

Country	Constitutional protection
Slovakia	Constitution of the Slovak Republic of 1992 (460/1992 Coll.) There are no legal alternatives to marriage. Article 41 of the Constitution states that "Marriage is a unique bond between a man and a woman." Marriage, parenthood, and the family are protected by the law.
Serbia	Constitution of the Republic of Serbia, Official Gazette of Serbia No. 98/06 Marriage and family are universal human rights and fundamental values Families, mothers, single parents, and any child in the Republic of Serbia shall enjoy special protection Non-marital cohabitation shall be equal to marriage, but the definition of non-marital cohabitation can only be found in the Family Law Act

4 Act No. 2/1993 Coll.
5 Parliament of the Czech Republic, Chamber of Deputies, Parliamentary term No. VIII., Draft No. 211/0.
6 Consolidated text, Official Gazette Nos 56/90, 135/97, 113/00, 28/01, 76/10 and 5/14.
7 Constitution of the Republic of Slovenia. Official Gazette of the Republic of Slovenia Nos. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.
8 Fundamental Law of Hungary (25 April 2011).

Country	Constitutional protection
Poland	The Constitution of April 2, 1997 Contains only a few provisions on family Privacy of family life and the right to make decisions on personal life are subject to constitutional protection Protection of children Marriage is contracted between a woman and a man
Czech Republic	Charter of Fundamental Rights and Freedoms (Act No. 2/1993 Coll.) Parenthood and family are under the protection of the law.
Croatia	Consolidated text of the Constitution, Official Gazette Nos 56/90, 135/97, 113/00, 28/01, 76/10 and 5/14 Marriage is a union between a woman and a man Marriage and legal relationships arising out of marriage, non-marital unions, and families shall be regulated by law
Slovenia	Constitution of the Republic of Slovenia. Official Gazette of the Republic of Slovenia Nos. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13 Legal relations within the family shall be regulated by law Cohabitation is mentioned in the Constitution: "The law shall regulate legal relations in an extramarital union (cohabitation)." Open approach Principles regarding marriage
Hungary	Fundamental Law of Hungary (25 April 2011) Basis of the family relationship is marriage or the parent-child relationship

2.2. The relationship between Family and Civil Laws

One of the most important questions regarding the systematic approach to family law is whether it is an integral part of the domestic Civil Code or is regulated under a separate act. In the legal system of the aforementioned Central European countries, we can find samples for both situations. The systematic positioning of family law can change in the course of legal development. For example, in Hungary, Family Law was regulated by a separate act, namely the former Family Law Act[9] for a long time. However, when the current Civil Code[10] was adopted in 2013, the family law rules became an integral part of the "new" Civil Code, known as Book V. In contemporary Hungary, family law is a part of the Civil Code, but there are several Acts and legal sources that supplement the overall system. The Czech legal system is similar. The

9 Act IV of 1952 on Marriage, Family, and Custody.
10 Act V of 2013 on the Civil Code.

new *Civil Code* was adopted in 2012[11] and *Family Law* was integrated into *the Civil Code – Book Two*. The basic principles, values, starting points, interpretations, and rules can be found in *Book One – General Part*. As the Civil Code emphasizes, like the Hungarian one, the autonomy of the will is fully manifested in Family Law as well, especially in the context of *marital property law*. In other Central European countries, family law is regulated by a separate Act.

In the socialist era (1945–1990) in Croatia, family law was separated into a specific legal field distinct from civil law, and remained thus in the transitional and post-transitional periods. The currently effective primary legal source of family law is the Family Act of 2015[12]. Poland also has a separate act, namely the Family and Guardianship Code,[13] which governs family law affairs. Similarly, family relations in the Slovak legal system are regulated by the Family Act.[14] Since 1950, family relations have been set outside the scope of the Civil Code and are still regulated by a separate law. Unless the Family Act provides otherwise, the provisions of the Civil Code apply to family relationships. In the Slovak legal environment, the basic principles of family law are listed in the Constitution. In Serbia, the Family Act[15] regulates families. A fresh legal source operates in Slovenia, where the new Family Code entered into force in April 2019, which replaced the Marriage and Family Relations Act, which was over 40 years old at the time. Further, the Civil Unions Act and Non-Contentious Civil Procedure Act were adopted. All three laws represent the pillars of contemporary Slovenian family law. Family law is governed by separate legislation in most of Central European countries. However, it remains an integral part of the Civil Code in the Czech Republic and Hungary alone.

The table below outlines the relationship between family and civil laws

Country	Relationship between family and civil laws
Hungary	Family law rules became an integral part of the Civil Code in 2013
Czech Republic	Family Law was integrated into the Civil Code in 2012
Croatia	Separate Family Act from 2015, not an integral part of the Civil Code
Poland	Separate act, the Family and Guardianship Code, not an integral part of the Civil Code
Slovakia	Separate Family Act, not an integral part of the Civil Code

11 See the Act No. 89/2012 Coll., Civil Code.
12 Family Act, Official Gazette Nos. 2013/2015 and 98/2019.
13 Act of 25 February 1964 the Family and Guardianship Code, ct. Journal of Laws 2020, item 1359.
14 Act No. 36/2005 on Family and on amendment of some other acts.
15 Official Gazette of Serbia 18/05.

Country	Relationship between family and civil laws
Serbia	Separate Family Act, not an integral part of the Civil Code
Slovenia	Separate Family Act, not an integral part of the Civil Code

2.3. Other legal sources

In the legal systems of the countries analyzed, other legal documents were significant, too. We can find, for example, administrative laws and acts dealing with the protection of family relationships from the perspective of criminal law. In countries where same-sex relationships are regulated by law, separate laws govern the legal aspects of such relationships.

The proper legal terminology used to refer to same-sex partnerships varies by country. For example, in the Czech Republic and Hungary, the term used is "registered partnership." In Croatia, the term "same-sex life partnership" is used. In Slovenia, the term "civil union" is used (earlier, the term used was "registered same-sex civil partnership"). In the Croatian legal system, the Same-Sex Life Partnership Act (2014)[16] recognizes same-sex partnerships. Other laws also deal with different aspects of family protection, such as the Act on Protection against Violence in Family[17], Foster Care Act[18], and the Act on Medically Assisted Reproduction.

Besides the Civil Code, *the Act on Registered Partnership*[19] operates as a separate source of family law in the Czech legal system. It is quite similar to the Hungarian legal system, because family law is incorporated in the Civil Code and registered partnerships are governed by separate laws. Thus, the rules regulating the rights and duties of same-sex partners were not incorporated into the Civil Code. However, according to the country report, a pending draft submitted by a group of deputies before the Parliament of the Czech Republic is in favor of gender-neutral marriages.[20] In parallel, another pending draft was lodged by another group of deputies that aims to protect the traditional family model. In Slovenia, the Civil Unions Act was adopted in 2016. It introduced a new term, namely "civil union," and replaced the former term "same-sex civil partnerships," which was regulated by the previous Act on Registered Same-sex Partnerships. According to the Civil Union Act, civil unions can be entered into by two people of the same sex and this Act, like the Family Code, which governs marriage as a union of two persons of different sexes, is based on the principle of monogamy. In Slovenia, several other laws contain provisions interfering

16 The Same-Sex Partnership Act, Official Gazette Nos. 92/2014 and 126/2019.
17 The Act on Protection against Violence in Family, Official Gazette Nos. 70/2017, and 126/2019.
18 Official Gazette 115/2018.
19 See the Act No. 115/2006 Coll.
20 Parliament of the Czech Republic, Chamber of Deputies, Parliamentary term No. VIII., Draft No. 201/0.

with family law relations, such as the Domestic Violence Act, the Criminal Code, and the Foster Care Act.

In Hungary, Act XXIX of 2009 on registered partnerships and the amendment of the proof of cohabitation relationship was enacted in 2009. It continues to remain in force. Registered partnerships has been completely removed from the Civil Code. The Act does not mention the term in the definition of "relative" and in the list of impediments to marriage. It can only be found in circumstances that preclude the existence of effective cohabitation. However, this does not mean that registered partners have fallen out of the protection zone of the Civil Code, as the Act on Registered Partnerships says that the rules on marriage shall be applied to registered partnerships with exceptions regulated by law. Registered partners have all the rights and obligations that are attached to marriage in relation to personal and property rights and obligations under the Civil Code. The Acts on the Protection of Families (2011), the Register Procedure (2010), and the Civil Procedure (2016) also regulate families. In Serbia, there is no law governing same-sex partnerships. However, a Draft Law is under preparation. In Slovakia, the law does not recognize same-sex partnerships. Polish law is similar to Slovak law, as homosexual couples are not allowed to marry or conclude registered partnerships. In Poland, among many legal sources of family protection, the most important ones are: the Act on Supporting the Family and the System of Foster Care, the Alimony Support Act, the Act on Pensions and Old-Age Pensions from the Social Insurance Fund, as well as the Civil, Civil Procedure, and Criminal Codes.

The most significant legal sources are listed in the table below

Country	Law on same-sex partnership and other important legal sources
Croatia	Same-Sex Life Partnership Act Act on Protection against Violence in the Family Foster Care Act Act on Medically Assisted Reproduction
Czech Republic	Civil Code Act on Registered Partnership Two opposing drafts
Slovenia	Civil Unions Act Family Code Domestic Violence Act Criminal Code Foster Care Act

Country	Law on same-sex partnership and other important legal sources
Hungary	Act on Registered Partnership Civil Code (Family Law Book, Law of Obligation Book, Succession Law Book) Act on the Protection of Families Act on the Register Procedure Act on Civil Procedure
Serbia	Draft law on same-sex partnership Family code
Slovakia	No legal regulations govern same-sex partnerships Family Act
Poland	No legal regulation on same-sex partnerships Act on Supporting the Family and the System of Foster Care Alimony Support Act Act on Pensions and Old-Age Pensions from the Social Insurance Fund Civil Code Civil Procedure Code Criminal Code.

3. The conceptual approach to family

Conceptual approaches and legal definitions are important from the perspective of legal research. Thus, it is worth engaging in a conceptual analysis of the central element of a given topic. Accordingly, this section analyses the legal definition of family, which remains in transition between the perspectives of private and public law. Nor the international legal documents contain a proper legal definition of family. It is not common to articulate concrete legal definitions in the laws of Central European countries. Thus, it is not easy to provide a legal definition for the term "family", although the word seems easy to understand. However, we study two exceptions, as the Hungarian and Slovenian legal systems define the term.

Generally, "family" can be considered a natural and basic component of a society that represents unity. Croatian family law has become a separate legal discipline under civil law. Croatian law has not provided a legal definition for the term "family" yet. The Croatian legal literature acknowledges that there are many forms of families in a sociological sense and emphasizes that it is not possible to define the term clearly within the legal framework of family law. The same is true of the Czech legal system: there is no definition for the term family and family members in the Czech Civil Code, either. However, the First Book of the Czech Civil Code,

which is the General Part, expressly protects families established by marriage. Polish law does not define family in a legal sense, but the country report emphasizes that a conceptual approach to understanding the term shall be analyzed from different perspectives. The prevailing position in the Polish doctrine is that there is no need to create a legal definition that would apply to all regulations concerning the functioning of this social group.

None of the other countries' laws define the term "family," because family law regulates family relations and relations among family members. Thus, the family itself is generally not the holder of rights and duties, but enjoys civil and social protection under the Constitution. A precise definition of the term would result in restrictions. Family relations develop quickly. Consequently, new forms of family that were unknown in the past have now emerged. Thus, it would be impossible to formulate an appropriate definition for the term. Slovak family law was not uniformly regulated or codified until 1949, and it did not define the term either. Since 1950, family relations were not stipulated by the Civil Code but by a separate law.

The Slovenian and Hungarian family laws define the term "family." According to Slovenian law, marriage is the main form of family. However, over the last 30 years, the number of families based on extramarital unions has grown. The Slovenian Family Code defines the term "family" in broad terms, as an important social institution that enjoys special protection. It is a living community of a child, regardless of the child's age, with both or one parent or another adult, provided that the adult cares for the child and has certain obligations and rights toward the child. The child is central to the interpretation of the term "family" in Slovenian family law. It is based on an integral approach and is recognized in the Family Code as an important social institution that enjoys special protection. Article 2 of the Family Code is supported by Article 3(2) of the Family Code, which sees the importance of marriage in conceiving a family.

Hungarian law also defines the term "family." Besides the Fundamental Law, the Act on the Protection of Family stipulates that raising children in a family is safer than any other option. A family can fulfill its role if there is a strong relationship between the mother and father, which, in turn, completely expands to cover the responsibility owed to the child. Before the Fourth Amendment of the Basic Law, the term "family" covered both families based on marriage and those in a sociological sense. The body established the unconstitutionality of the sections of the Family Protection Act defining the term "family". Since 2012 the definition of the family relationship based on marriage was included only in the Family Protection Act, which is at a lower level of legal source. The contradiction was resolved by the Fourth Amendment of the Basic Law, which states thus: "the basis of the family relationship is marriage or the parent-child relationship". However, this definition de facto excludes partnerships and children born out of this relationship from the scope of family and, indirectly, family protection.

The table below summarizes the conceptual approach to the term "family"

Country	Conceptual approach
Croatia	No definition of family. In the legal literature, family "is constituted by a group of people who are related among themselves based on kinship marriage or any other legally relevant point of reference."
Czech Republic	No definition of family and family members. First Book of the Czech Civil Code expressly protects the family established by marriage.
Poland	No definition of family.
Serbia	The Serbian Family Act and other family laws do not contain a definition of family.
Slovakia	Slovak Family Law was not uniformly regulated until 1949. Since 1950, family relations were not stipulated by the Civil Code but by a separate law. No definition of family.
Slovenia	Marriage is the main form of family. The Slovenian Family Code provides a broad definition of family. Family is an important social institution that enjoys special protection. Family is a living community of the child, regardless of the child's age, with both or one parent or with another adult, provided that the adult cares for the child and has certain obligations and rights toward the child. The child is a central element of the interpretation of family.
Hungary	Act on Family Protection: Originally stated that the basis of the family is exclusively marriage between a man and a woman or a direct relationship, or guardianship. In 2012 – the Decision of the Constitutional Court: this clause of the Act contradicts the Basic Law → Before the Fourth Amendment of the Basic Law, the concept of family covered, families based on marriage and in a sociological sense. Fourth Amendment of the Basic Law: The basis of the family relationship is marriage or the parent-child relationship. De facto partnerships are excluded.

4. Legally acknowledged relationships

4.1. Legal protection and marriage

In all the countries mentioned above, marriage is regulated and recognized on the same grounds. The Croatian Constitution protects marriage and states that "marriage is a union of a woman and a man." It stipulates that "Marriage and legal relationships in marriage, non-marital union and family shall be regulated by law". The Croatian Family Act allows marriage only between people of different sexes. The Czech Civil Code also defines marriage as a union between a man and a woman. However, a pending draft of a new law favors gender-neutral marriages. A second pending draft protects the traditional family model. According to Czech law, the main purposes of marriage are establishing a family, enabling the proper upbringing of children, and providing mutual support and help. Preserving solidarity between a married couple is of utmost importance. The Polish Constitution states that marriage is a relationship between a man and a woman. Thus, it does not acknowledge same-sex marriages. Homosexual couples are not allowed to marry, and cannot enter into registered partnerships, either. According to Serbian law, a man and woman can enter into marriage before a state body. The Serbian Constitution states that everyone has the right to decide freely on entering into or dissolving a marriage. Serbian law emphasizes the equality of men and women in the establishment and dissolution of marriages. In Slovakia, the Family Act explicitly defines marriage as a union between a man and a woman. According to Slovak family law, marriage is of a non-contractual nature. It is a union between a man and woman and aims at starting a family and raising children. The Family Act and the Constitution of the Slovak Republic protect marriage and families. Slovak family law does not recognize same-sex marriages and non-traditional forms of marriage and does not define or protect cohabitation. Although Slovenian family law offers a broad interpretation of the term "family," it defines marriage as a union between a man and a woman. Thus same-sex partners cannot marry in Slovenia. The basis for marriage is laid down in the Constitution, which provides that marriage shall be based on the equality of the spouses and solemnized before a competent State authority. The equality of spouses is reflected in the relationship between the spouses and with their common children. Two persons (man and woman) will only enjoy rights and obligations as spouses if their marriage is solemnized before a State authority: that is, a registrar and head of the administrative unit or a person authorized by the head, or a registrar and the mayor of the municipality in whose territory the marriage should be conducted, or a registrar alone. The Family Law Book under the Hungarian Civil Code declares that marriage shall be considered contracted if a man and a woman appear together before the registrar in person and declare their intention to marry. In Hungary, marriage is a bond between a man and a woman that results in personal and legal

property effects. The Civil Code lays down the formalities for the conduct of marriage, and lists out the grounds for declaring a marriage invalid.

The table below summarizes the legal situation and protection of marriage

Country	Protection of marriage
Croatia	The Constitution protects marriage. "Marriage is a union of a woman and man." Marriage and legal relationships in marriage, non-marital unions, and family are regulated by law. The Croatian Family Act allows marriage between people of different sexes.
Czech Republic	The Civil Code allows only marriage between a man and a woman. A pending draft favors gender-neutral marriages. A second pending draft protects the traditional family model. The main purposes of marriage are establishing a family and maintaining solidarity between the spouses.
Poland	The Constitution states that marriage is a relationship between a man and a woman. It does not acknowledge same-sex marriages.
Serbia	A man and a woman can enter into marriage before a state body. Equality of man and woman during both the establishment and dissolution of civil marriage is essential.
Slovakia	The Family Act defines marriage as the union between a man and a woman. Marriage is of a non-contractual nature.
Slovenia	Defines marriage as a union between a man and a woman.
Hungary	According to the Family Law Book under the Civil Code, a man and woman can enter into marriage before the registrar. Marriage has personal and property-related legal effects. The Civil Code stipulates formalities and invalidity of marriage.

4.2. Legal solutions for and the protection of same-sex partnerships

The legal solutions for same-sex partnerships in Europe differ by country. In some countries, same-sex marriage is permitted. This is seen especially in Western European countries. Same-sex registered partnerships are also common, and are permitted, for example, in Hungary. Certain formalities and elements specific to registered partnerships are similar to those particular to marriage. However, there are some rights and possibilities that are not open to same-sex partners. The third form is a de facto civil partnership, or civil union that does not require adherence

to any formalities. In some countries, such as Hungary, same-sex couples may enter into registered or de facto partnerships. There is no single, unified legal mechanism governing the protection of same-sex partnerships.

In Serbia, a draft act on same-sex unions is currently under discussion. It will regulate both registered and de facto same-sex unions if adopted. Like the Hungarian context, in the draft, same-sex partners have the same inheritance rights as do spouses. In Slovakia, the Family Act prohibits same-sex marriages and the registration of same-sex relationships before public administration bodies. Slovakian judicial practice has confirmed the basic principles Slovakian family law which prohibits same-sex marriages and registered partnerships Homosexuality has always been legal in Poland. In the Polish legal literature, homosexual persons living in long-term relationships are considered to live in partnerships. The legal status of same-sex unions is similar to that of cohabitants, that is, they can take advantage of social welfare benefits, enter into the rights of a deceased partner who was a tenant of a flat, and exercise the right to refuse to testify in proceedings. Unlike in Hungary, people in same-sex relationships in Poland are not entitled to inherit under the provisions of intestate succession. In Czechia there is a separate Act on Registered Partnerships, which is similar to the Hungarian model and serves as the main source of Czech Family Law. Some rights and duties of registered partners are similar to those of spouses, such as mutual maintenance duty based on "the same living standard." In case of death, the surviving partner has the same hereditary right as that of the surviving husband or wife in a marriage – this can also be found in Hungarian law. In Croatia, the Same-Sex Partnership Act names the same-sex partnership as a "life partnership." In 1998 the Republic of Croatia amended its family law on de facto same-sex unions. In 2014, it named two types of life partnerships: formal ones that can be listed in the registry of partnerships, and informal life ones by analogy to the legal regime of non-marital unions. Registered and life partnerships in Hungary and Croatia have some similarities. In both countries, if one of the partners in a life partnership has a child, the life partner is entitled to exercise parental responsibility. Registered partnership is a recognized form of same-sex unions. In Hungary, the Registered Partnership Act was adopted in 2009. In a registered partnership, two people of the same sex, both having reached the age of 18 years, personally enter into a registered partnership before the registrar. There are many similarities between marriages and registered partnerships, for example partners in both cases can inherit under the provisions of intestate succession but cannot marry and adopt children jointly. In Slovenia, the Civil Unions Act was adopted in 2016, which granted almost the same rights to the same-sex partners in a civil union as those granted to spouses in a marriage. Slovenian law does not grant same-sex partners the right to marry and adopt children.

The table below presents details on the legal protection of same-sex partnerships

Country	Protection of same-sex partnerships
Serbia	The draft act on same-sex unions is currently under discussion. Registered same-sex unions and de facto same-sex unions are permitted. Same-sex partners have the same inheritance rights as do married spouses.
Slovakia	The Family Act does not allow same-sex marriages. It does not allow the registration of same-sex relationships.
Czech Republic	Interesting legal situation (two separate drafts). Separate Act governing Registered Partnerships. Some rights and duties of registered partners are similar to those of married spouses. Same-sex persons are not allowed to adopt minor children jointly or become joint foster parents of minors.
Poland	Homosexuality has always been legal. Homosexual persons living in long-term relationships are qualified. Legal status is similar to that of cohabitants. They are not entitled to inherit under the provisions of intestate succession. They cannot adopt children.
Croatia	The Same-Sex Partnership Act considers same-sex partnerships "life partnerships." In 1998, Croatia amended its family law to address de facto same-sex unions. It distinguished between two types of life partnerships: Life partnership (registry). Informal life partnership (similar to non-marital union).
Slovenia	The Civil Unions Act was adopted in 2016 → It granted almost the same rights to same-sex partners in a civil union as it does to married spouses. Same-sex partners cannot marry and jointly adopt children.
Hungary	Registered partnerships. The Registered Partnership Act was adopted in 2009. Two same sex persons who reached the age of 18 years. Similarities to marriage (e.g., inheritance rules). Differences: Same-sex partners cannot marry and jointly adopt children.

4.3. Legal issues and protection of de facto partners

According to Hungarian family law, de facto partners live together outside of wedlock or in a registered partnership in an emotional and financial community in the same household. A similar basis for de facto partnerships is found in other Central European countries. Slovakian family law does not recognize non-traditional

forms of marriage, and consequently, does not protect cohabitation. The Czech Civil Code protects families established by marriage. Thus, there are no rules in the Czech Civil Code that can establish the mutual rights and duties between cohabitees. The Czech country report emphasizes that property contracts between the cohabitees are not common in the practice. This causes some practical problems as there is a weaker party in such a relationship. On the lines of the Hungarian rules, there is no discrimination of children born out of wedlock, the rights and duties of the parents of any child are equal. In Croatia, informal non-marital unions were introduced for the first time within the scope of family law in 1978. In 1990, non-marital unions became a constitutional category in Croatia. The Croatian family law defines non-marital union as a "union of an unmarried woman and an unmarried man lasting for at least three years or shorter if the common child had been born therein or has been continued by entering into the marriage."

Serbian law considers non-marital cohabitation a de facto relationship. It is not possible to register non-marital cohabitation, which means that there may be difficulties in proving the existence of a non-marital cohabitation before a court of law. In Serbia the community property regime (as in marriage) is the statutory regime in a non-marital cohabitation. The community property is the property that spouses acquire through work if they live together. Non-marital cohabitation is defined as the sustained cohabitation of a man and woman between whom there are no marital impediments. In the Polish legal system, cohabitation refers to a man and a woman living together in a stable relationship. It is realized in economic, spiritual, and sexual spheres. As it is an informal relationship, it need not be registered. Cohabitation does not create a formal ground for the use of a partner's apartment and property. Matrimonial laws do not apply to cohabitants. According to Polish law, cohabitants have joint custody over their children, and their parental rights are mainly the same as those of married parents. However, cohabitants cannot adopt children jointly.

For a long time, Hungarian family law considered marriage the basis for the formation of a family. However, changes in society made it necessary to offer legal protection for other forms of social cohabitation as well. Cohabitation was a social trend that Hungarian legislation could no longer ignore. In Hungary, the legal regulation of de facto partnerships is really special. De facto partners can be same-sex or heterosexual persons. Hungarian law offers a dual regulation regime for de facto partnerships, because the relationship can have family law effects, and this relationship is contractual in nature. The definition of such relationship and their property related rules are incorporated in the Obligation Law Book of the Civil Code. De facto partnerships have family law effects only if the partnership has existed for at least one year, and the partners have a common child from their relationship. If same-sex partners live in a de facto cohabitation, then this relationship has no family law effect, because these partners cannot have a common child from this relationship. Cohabitants enjoy strong protection in Slovenia, where they enjoy the same rights as spouses in both family and legal matters. Following the Constitution, the new Family Code defines cohabitation as: "*An extramarital union is a long-term life community*

between a man and a woman who have not been married, and there are no reasons why the marriage between them could be invalid. Such a community has the same legal consequences under this Code as if they had been married; in other areas of law, however, such a community has legal consequences if the law so provides."

The table below summarizes the legal protection of de facto partnerships

Country	Protection of de facto partnerships
Croatia	Informal non-marital unions were introduced into the family law system in 1978. In 1990, non-marital unions became a constitutional category in Croatia. The union between an unmarried woman and unmarried man lasting for at least three years or below if the common child had been born therein or has been continued by entering into the marriage.
Serbia	De facto relationships. It is not possible to register non-marital cohabitation as doing so causes difficulties in court practice. The statutory regime is the community property regime.
Poland	A man and a woman living together in a stable relationship. The relationship is realized in economic, spiritual, and sexual spheres. Cohabitants have joint custody over their children and parental rights are the same as those of married parents. The couple cannot adopt children jointly.
Slovenia	Strong protection mechanism. They enjoy the same rights as those of married spouses.
Slovakia	The law does not recognize non-traditional forms of marriage. It does not protect cohabitation.
Czech Republic	The Civil Code expressly protects families established by marriage. Informal relationships enjoy protection. There are no rules under the Czech Civil Code that would establish mutual rights and duties. There are no property contracts between the cohabitees. There is no discrimination of children born out of wedlock.
Hungary	De facto partners can be same-sex and heterosexual persons as well. Dualistic approach: A relationship can have family law effects (at least one year and one child) A kind of contractual relationship (definition and property rules).

4.4. Legal status of children born in and out of wedlock

Children enjoy the same legal status regardless of whether they are born in or out of wedlock in all Central European countries. Some countries' domestic regulations expressly state this. The Slovenian Constitution prohibits discrimination on the grounds of birth and provides that children born out of wedlock shall have the same rights as those born in wedlock. According to the Constitution and Family Act of Serbia a child born out of wedlock has the same rights as a child born in marriage. The status of a child born out of wedlock does not depend on whether the child was born in a non-marital cohabitation or that the non-marital cohabitation never existed. The presumptions of paternity in the Hungarian legal system are uniform, which means that they have the same legal consequences regardless of whether the child was born in or out of wedlock. The Czech Civil Code establishes that kinship is based on blood ties or originates from adoption, which is constructed as a status change.

The table below summarizes the legal status of children born in and out of wedlock

Country	Legal status of children born in and out of wedlock
Slovenia	The Constitution prohibits discrimination on the grounds of birth.
Serbia	A child born in wedlock has the same rights as a child born out of wedlock, under the Constitution.
Hungary	No difference in the child's legal status (Civil Code).
Czech Republic	Kinship is based on blood ties and adoption (Civil Code).

4. Descendant family relationship

Descendant family relationship is one of the most important components of family law, as these rules on the one hand determine the origin of the child and on the other hand constitute the family relationship with the rights and obligations of the parties. In this part we will examine the issues of father status, mother status and adoption.

5.1. Issues concerning the father's status: Presumptions of paternity

The presumptions of paternity and judicial decisions serve as common grounds in Central European countries, with some domestic specialties. The importance of the family status of the child is lightning back in the interest of a normal family life. The orderliness of the family status of the child provides a basis for the child to live in a legally recognized family. This is legally complete if both parental statuses are occupied in the child-parent relationship. Regarding the topic there are some general features which are the same in the countries' legal systems. On the one hand it can be stated that fathers' status can mainly be based on four ways in the Central European countries, namely the marriage bond, recognition (acknowledgment) of the man, the judgment of the court and, in some countries, biomedical assistance procedure.

Consequently, we highlight only those specialties where we can find discrepancies. On the other hand, it also can be ascertained as a second general feature, that the first three varieties prevail in some legal form while the fourth, the biomedical assistance procedure or with other words human reproduction procedure is known and regulated only in some countries. Based on these, we will describe the similarities and differences below.

5.1.1. Marriage bond

The first of the paternity presumptions is the marriage bond, which was put in place in all the examined countries. The most important component of the marriage bond is strengthening the position of the mother's husband, because he is considered the father of the child(ren). Among the legal systems, we can find some samples for that the father's status is based on that whether the child born during the marriage or after the termination of marriage for a period of time. Here, there is a difference based on how the marriage was terminated – that is, by divorce (dissolution) or death. If the marriage was terminated by death or dissolution, but the child was born within 300 days after such termination, the mother's husband shall be considered the father. If marriage was terminated by dissolution and over 300 days have passed since such dissolution, the ex-husband will not be the father of the child, but the new husband, if any. This rule is in place in Croatia, Serbia, the Czech Republic, and Slovenia. In contrast, in Hungary and Slovakia the main point of contention is not the date of termination and birth. Rather, the calculation goes backward, wherein, if the mother lived in a marriage at the presumed date of conception – which is calculated backward from the date of birth – the husband at that time shall be considered the father.

Based on these differences, we list out the following observations. In Serbia the husband of the child's mother shall be considered the father if the child was born within 300 days after the termination of marriage. In the Serbian legal system, this rule can apply only if the marriage was terminated by the death of the husband and if the mother did not conclude another marriage in this period. Serbian law also adds

that the new husband of the child's mother shall be considered the father of a child born during that marriage, regardless of how short a time may have elapsed between the termination of the former marriage and the establishment of the new one. According to Slovenian family law, the legal presumption of paternity is extended to 300 days after the dissolution of the marriage only if the dissolution is because of the mother's husband's death, like in the Serbian model. Children born out of wedlock or after more than 300 days after the dissolution of the marriage are not covered by the legal presumption of paternity. In such cases, paternity will have to be established either by acknowledgment or a court decision. The abovementioned principle is also applicable in the Czech Republic. If a child is born in wedlock or within 300 days after the termination of the marriage, the mother's husband shall be the father. In the Polish system, it is presumed that the husband of the woman who gives birth to a child is the father of the child.

In Hungary, a man shall be considered the father of the child with whom the mother lived in marriage from the alleged time of conception until the birth of the child, or at least during a part of this period. The presumed time of conception refers to the period between the 182nd and 300th days since the date of the child's birth, including both dates. If the child is claimed to have been born before or after the presumed time of conception, it may be verified by evidence. For the presumption to apply, it does not matter whether the spouses actually lived together or whether the mother had sexual contact with her husband alone. Therefore, the husband of the mother must be considered the father of the child even if the mother is already living with another man – without the termination of her previous marriage – and the child was conceived through the mother's sexual contact with that other man. We can find a similar legal solution in Slovakia as well, where the expected conception date is the day between the 180th and 300th days before birth.

5.1.2. Recognition of the man

In most countries, the recognition (acknowledgment) of the man is considered the second presumption that can establish paternity. It is quite different in the Hungarian system, where recognition is the third in the list of paternity presumptions. In *all the analyzed countries, if the child was born out of wedlock, the father's status can be determined by recognition*. There are a few different rules concerning the need for the consent of the mother and/or child. The consent of a mother is vital in the countries examined because it confirms the veracity of the recognition. If a man acknowledges his paternity and the mother consents to it, the man shall be considered the father, regardless of biological fact. In some countries like Croatia, Serbia, and Hungary, there is a need for consent in special cases, as well. Some additional specialties are listed below.

In Croatia, if the mother is not alive or her residence is unknown, the consent of the child's guardian is necessary along with prior approval from the social welfare center. This is also the case in Serbia, where if neither the mother nor the child can

give consent, the child's guardian with prior consent of the guardianship authority can provide it. In Serbia, a man can recognize a child as his own until the child turns 16 years of age. In Slovakian law, recognition is provided by a joint statement by both parents, rather than a unilateral acknowledgment. Thus, it is known as a "joint statement of recognition by parents" and not a paternal statement of recognition. In Hungary, there is an additional rule that once a statement or document is signed, the recognition of paternity may not be withdrawn. The Slovenian regulation emphasizes that the recognition of paternity is a strictly personal unilateral declaration of will that is made in the prescribed form (i.e., at a social work center, before a registrar, in a public deed, or in a last will).

5.1.3. Judgment of the court

In the Polish, Serbian, Slovak, Czech, and Hungarian systems, courts can establish paternal status. This legal solution prevails when the marriage bond or recognition cannot apply. It effectively applies if the child was born out of wedlock. The court's decision is based on the occurrence of sexual intercourse in the critical period, which means that a man shall be considered the unmarried woman's child, if he had a sexual relationship with the woman within a given period of time. This period varies by country. For example, in the Czech Republic, it is 160 to 300 days before birth, in Hungary, it is the period between the 182nd and 300th days before the date of the child's birth, including both deadlines. In Slovakia, the period between 180 and 300 days is considered decisive. In connection with the paternal status based on judicial decisions, mostly the same features can be ascertained, but some specialties can be highlighted. Slovenian law emphasizes that children born out of wedlock or not born within 300 days of the dissolution of marriage owing to the father's death are not subject to the legal presumption of paternity based on marriage. In such cases, paternity shall be established by recognition or court decision.

In the Serbian and Hungarian systems, paternal status determined by court cannot be questioned. The Hungarian legal system indicates that the judicial determination of paternity is not possible in the case of a donor donating a gamete or embryo if the mother became pregnant through an assisted reproductive procedure. The presumption of paternity is established by a court when it is necessary to determine the paternity of a man who has procreated, but does not wish to exercise paternity. According to Hungarian law, two elements shall be proven during the judicial procedure: one, that the man has engaged in sexual intercourse with the mother at the time of conception and upon careful consideration of all circumstances (based on physiological tests), there are reasonable grounds to consider that the child was conceived as a result of such sexual contact. Slovakian law has similar features as the Family Act emphasizes that a man shall be considered the father if he has had sexual intercourse with the mother of the child at the time of conception, unless other circumstances preclude his paternity.

5.1.4. Biomedical assistance procedures

Biomedical assistance procedures can be considered to pave the way for a paternal presumption. However, it is not so in all the Central European countries analyzed. The Serbian, Slovenian, and Hungarian systems permit it. In Serbia and Hungary, the mother's husband shall be considered the father of the child if the child was conceived through biomedical assistance, provided that the man granted written consent to the procedure. Serbian law emphasizes that the paternity of a man considered to be the child's father because of biomedical assistance cannot be contested. However, the man himself has the right to contest paternity if the child was not conceived through a biomedical procedure. Under Slovenian law, biomedical procedures are governed by the Infertility Act. If a child is conceived by a biomedical procedure, the legal presumption of paternity extends to the extramarital partner and the mother's husband. The paternity of a child conceived by biomedical means may not be contested, except if the child was not conceived by an assisted reproduction procedure. In Hungary, paternity based on human reproduction procedure (assisted reproduction procedure) can be contested within strict regulations and conditions alone. It has to be mentioned also, that this special procedure is the second one in the line of paternity presumptions in the Hungarian family law and it is also really important that it can establish paternal status only in the case of de facto partners, because if a married couple takes part in biomedical assistance procedure, the paternal status is based on the marriage bond. In the Hungarian system, the special procedure can be carried out by people living in a marriage bond or by heterosexual couples living in a de facto cohabitation, if it is unlikely for a child to be conceived naturally because of the infertility of either party. However, in the case of a de facto cohabitation, reproduction procedures may be carried out only if none of the de facto cohabitants has a marital relationship.

The following table summarizes the paternity presumptions

Country	Paternity presumptions
Croatia	Fatherhood can be established by: marriage bond, or recognition (acknowledgment), or judgment of the court.
Serbia	Fatherhood can be established by: marriage bond, or recognition (acknowledgment), or judgment of the court, or biomedical assistance procedure – if the man has granted written consent to such a procedure.

Country	Paternity presumptions
Slovenia	Fatherhood can be established by: marriage bond, or recognition (acknowledgment), or judgment of the court, or biomedical assistance procedure – governed by a separate Act.
Czech Republic	Fatherhood can be established by: marriage bond, or recognition (acknowledgment), or judgment of the court (on the basis of the conduct of sexual intercourse within the critical period of time).
Hungary	Fatherhood can be established by: marriage bond, or biomedical procedure in the case of de facto partners, or recognition (acknowledgment if the parties are not married), or judgment of the court.
Poland	Fatherhood can be established by: marriage bond, or recognition (acknowledgment), or judgment of the court.
Slovakia	Fatherhood can be established by: marriage bond, or recognition (acknowledgment in the form of a joint statement), or judgment of the court.

5.2. The mother's status

For a long time, the mother status was the most obvious point under family law, because according to the old Roman law principle, the child's mother is the one who gave birth to the child. Nowadays, while it is easier to determine than the father's status, there are additional questions that must be examined in light of the mother's status, namely surrogacy and nursing pregnancy. Maternal status is important for every child. According to international obligations, it is necessary to register a child soon after birth and to acknowledge their mother in order to make the parental status clear.

5.2.1. The fact of childbirth

The Central European countries examined manage the mother's status based on the aforementioned old Roman law principle. This principle can apply in connection

with surrogate motherhood and nursing pregnancy as well. None of the Central European countries examined permit surrogate motherhood and nursing pregnancy. This is emphasized in Slovakian law as a non-rebuttable presumption of maternity. The Slovak Family Act stipulates the invalidity of any contracts and agreements that run counter to this principle.

Croatian law adds a few administrative rules that indicate that children born in a health institution are reported to the civil registrar by the health institution and the women who give birth to such children are registered as their mothers. If childbirth happens outside a health institution, it is reported by the child's father or the person in whose household the child was born. In such cases, the person reporting the child's birth is obliged to provide the civil registrar with medical documentation on the birth or the proof of motherhood. Under the Czech Civil Code, this is mandatory. The basis of the mother's status is the fact of birth in the Czech system as well, which includes assisted reproduction. The legal mother of a child is the one who gives birth to the child, irrespective of who the donor of the egg may be. Legal motherhood is identical to biological motherhood. In the case of egg donation, genetic motherhood becomes irrelevant. The Czech system permits hidden childbirth, where a woman with permanent residency in the territory of the Czech Republic has a right to have her identity hidden in connection with birth if she does not have a husband who has a presumption of fatherhood. There are also baby-boxes for unregistered unwanted children, where mothers can leave their new-born babies. Surrogate motherhood is not regulated under Czech law. Polish law also emphasizes the Roman law-based principle. Like the other Central European countries, surrogate motherhood and concluding such contracts have always been invalid in Poland. Under the Slovenian Family Act, a woman who gives birth to a child is considered the child's mother. This is considered irrebuttable. An average of six couples in Slovenia face infertility and related problems, which lead to legal novums as well, such as egg donation (ovum) which is allowed in Slovenia. If a mother has consented to an assisted reproduction procedure, her maternity cannot be challenged. If the child was conceived with the help of a donor egg, her maternity cannot be contested. However, embryo donation and surrogacy are not allowed in Slovenia. Serbian Law emphasizes this as well and stipulates that if a child is conceived through biomedical assistance with a donated ovum, the maternity of the woman who donated the ovum may not be established. Under Serbian law, the mother is the one who gives birth to the child and it also prohibits surrogacy.

A similar situation prevails in Hungary as well, where the law treats motherhood as a fact and not as a presumption. The Civil Code chooses between biological and genetic mothers in keeping with international practice and considers the woman who gives birth of a child as the mother. Although the Civil Code does not regulate the recognition of maternity, it may be appropriate in a case where there is a vacancy in the maternal status if the mother demands the child within six weeks and can prove beyond doubt that she is the real, biological mother of the child. A woman who has asked another woman to carry an embryo derived from her ovum cannot be considered a mother. In Hungary, surrogacy and nurse pregnancy are not allowed.

5.2.2. Judicial decisions

Courts can help address the mother's status, especially if there is a doubt about who the child's mother is. This is managed in a similar manner in the countries analyzed. The Slovakian Family Act states that if there is any doubt about a child's mother's identity, motherhood shall be determined by the court based on the facts ascertained around the birth of the child. In Croatia, motherhood can be determined by a judicial decision if the box containing data on the child's mother has been left empty. An action may be filed by the child until they turn 25 years of age, or the woman who claims to be the child's mother, or a social welfare center before the child turns 18. In court proceedings, evidence of the child's biological mother's identity should always be provided using DNA, although the court is not bound by such evidence.

According to Serbian law, maternity can be established by a court decision in an exceptional instance where a woman who gave birth to a child was not registered in the Birth Register as the child's mother. The child and the woman claiming to be the child's mother have the right to establish maternity. A child may initiate action to establish maternity at any time, and a woman claiming to be the child's mother may initiate an action to establish her maternity within a year of learning that she gave birth to that child (but no later than 10 years from such birth). Maternity can be contested, as well. This procedure is necessary in cases where wrong data regarding the child's mother have been entered into the register. A similar solution prevails in Hungary as well, wherein if the identity of the mother of a child is in dispute or cannot be established, this question can only be clarified in a maternity lawsuit in accordance with the Civil Code. The aim of the claim is to give the mother's status to the designated person. This request can be issued if the maternity status is empty and the plaintiff seeks to establish that the person shown in the registry of births as the mother is not the one who gave birth to the child and that the mother is the designated person.

The following table outlines the issues pertaining to the mother's status

Country	**Mother's status**
Slovakia	The mother of the child is the woman who gives birth to the child Court proceedings – if there is any doubt around the identity of the child's mother Surrogate motherhood and nursing pregnancy are not allowed
Croatia	The mother of the child is the one who gives birth to the child Court proceedings – if the box containing data on the child's mother has been left empty Surrogate motherhood and nursing pregnancy are not allowed

Country	Mother's status
Serbia	The mother of the child is the one who gives birth to the child Court decisions – if she was not registered in the Birth Register as the child's mother Surrogate motherhood and nursing pregnancy are not allowed
Czech Republic	The mother of the child is the one who gives birth to the child Surrogate motherhood and nursing pregnancy are neither allowed nor prohibited
Hungary	The mother of the child is the one who gives birth to the child Court proceedings – if there is any doubt about the child's mother's identity Surrogate motherhood and nursing pregnancy are not allowed
Slovenia	The mother of the child is the one who gives birth to the child Surrogate motherhood and nursing pregnancy are not allowed
Poland	The mother of the child is the one who gave birth to the child Surrogate motherhood and nursing pregnancy are not allowed

5.3. Regulations on adoption

5.3.1. General features of adoption

The main purpose of adoption is the same in all the Central European countries, namely to ensure that minors can grow up in families, if their biological parents are unable to raise them. All the examined countries regulate adoption in a similar manner. Most country reports have emphasized that adoption is the best option where a permanent replacement of the absent parents or their care as part of parental care is necessary. Adoption is the best alternative for children who cannot be cared for by their parents. It aims to provide a stable, secure, and caring environment for the child in which the child can grow up and develop harmoniously. The main consequence of adoption is similar in all the countries analyzed in that it will change the legal status of the child wherein the adoptive parents will be the child's parents and will exercise parental control over him/her. We present the requirements of adoption in the following section. This part covers the question of whether a single person, or de facto partners, or same-sex partners can adopt a child.

5.3.2. The requirements of adoption vis-à-vis the adoptive parent

Most countries have some general requirements and prescribe some age-related regulations as well for adoptive parents to follow. We highlight the issues and opportunities around adoption for single people, and de facto and same-sex partners.

First, the general requirements and age-related regulations are presented. The Croatian system emphasizes that adoption cannot be cancelled and that adoptive

parents can be admitted as parents, and that adoption creates legal consequences for the relatives of the adoptive parents with respect to the child. The Slovenian legal system emphasizes that during adoption, a child's ethnic, religious, cultural, and linguistic background shall be considered to ensure the continuity of the child's upbringing in a family environment. There are additional regulations for biological parents. Parents who have consented to the adoption of their child after birth but before the child is eight weeks old must reconfirm after eight weeks. Otherwise, the consent has no legal effect. Adoption can take place only after six months have lapsed since the consent was given, which still gives parents the chance to withdraw their consent. Polish law emphasizes that the adoptive parent shall be suitably older than the adopted child. This is ascertained at the adoption center, which issues a certificate of completion of relevant training and an opinion on whether the candidate is qualified to adopt a child. Czech law emphasizes obligatory pre-adoption care, which cannot be less than six months. The rule says that after receiving the parents' consent to adoption and placing the child in the pre-adoption care of the prospective adopters, the exercise of parental responsibility of the child's parents is suspended and the court must appoint a guardian for the adoptee. The Hungarian Civil Code stipulates that any person whose parental supervision has been terminated by a court order or who has been excluded from public affairs, and whose child is under foster care may not adopt a child. In Hungary, adoption is authorized by the guardian authority if the legal requirements are met and if it is deemed to be in the child's best interest. The Civil Code also lays down concrete regulations regarding the age of the adoptive parent, who must be at least 25 years of age with legal capacity, and older than the child by at least 16 to 45 years. It also indicates that one shall be considered suitable to adopt a child based on his/her personality and other circumstances. In the case of a child aged over three years, adoption may be authorized if the age difference between the adoptive parent and the child is not more than 50 years. In the case of adoption by a relative or spouse, the age difference requirement does not apply. In the case of adoption as a common child, these requirements shall be satisfied by either of the adoptive parents. If the adoptees are siblings, the age of the older child shall be taken into consideration. According to the Serbian legal system, the following people cannot adopt: a person who is fully or partially deprived of parental rights or legal capacity, a person suffering from an illness that may have detrimental effects on the adoptee, and a person convicted of a crime belonging to the group of crimes against marriage and family, sexual freedom, and life and body. In Serbia, too, there are concrete regulations on age differences, on the lines of the Hungarian model. The difference in age between the adopter and adoptee must be between 18 and 45 years.

Another interesting issue is whether or not a single person or person living in a de facto cohabitation or same-sex partnership can adopt, and if they can, under what conditions. In Croatia, a wide circle of individuals can adopt. According to the rules, married and non-married spouses may adopt jointly, a person who is married or has entered into a non-marital union may adopt with the consent of the married

or non-married spouse, and a person who is not married or has not entered into a non-marital union can adopt. Nothing prevents a person who is single and/or homosexual from adopting a child. Nothing prevents a person who was the life partner of a child's parent from adopting a child after the termination of such life partnership. Slovenian family law prescribes that a child may be adopted jointly by spouses or extramarital partners. Under the law, both partnerships can only be established by different-sex partners. In Slovenia, same-sex partners cannot adopt a child together. In addition to joint adoption, the law also allows single adoption. We can talk about the so-called stepparent adoption if a spouse or extramarital partner adopts a child of his/her spouse or extramarital partner. It is also be carried out exceptionally for a child if it is impossible to obtain adoptive parents who are spouses or extramarital partners and if this would meet the child's best interests. In such a case, a child can also be adopted by one person. In the case of single adoption, the partner from a civil union or de facto civil union can adopt the partner's child. Cohabitants and same-sex partners cannot adopt a child jointly in Poland, as joint adoption is open only for spouses. In Polish legal practice, it is impossible to adopt a partner's child, as this would lead to the termination of the legal relationship between the child and parent. A married couple may adopt a child. It is possible for a single person to adopt a child. In the Czech Republic, only married couples can adopt a child jointly. The law also allows adoption by one of the spouses and in exceptional circumstances, by another person. The Czech system allows re-adoption, or the adoption of an already adopted child. In Hungary, a child may only be adopted by married couples, except where the child is adopted by a relative or by the parent's spouse. Registered partners and de facto cohabitants cannot adopt. The joint adoption of a child by same-sex partners is not allowed. A single person can adopt a child only with a license from a minister in a justified case. In Serbia, spouses and cohabitees can adopt together. The minister responsible for family protection may grant permission to a person who lives alone to adopt, if it can be justified by special reasons. In Slovakia, only married spouses can adopt a child jointly.

5.3.3. Rules concerning the adopted child

In most countries, only minors can be adopted. This aligns with the purpose of adoption, that is, a child should grow up in a family. However, there is an exception to this. The Czech Republic permits the adoption of an adult. Adoption creates the same relationship between the adoptive parents and the child as that between natural parents and their children. Slovenian law prohibits prenatal adoption. In Poland, the general requirement on the side of the child is that (s)he can be adopted if the parents fail to exercise parental authority because they are dead, or unknown, or have consented to the adoption of their child, or, if the parents' custody rights have been removed altogether. Polish law allows adult adoptees to know their biological origins. The adoption of minor children requires parental consent in the Czech system. The child's mother can consent to the adoption after the expiry of

six weeks from the birth of child. The child's father can consent at any time after the child's birth. Parents aged under 16 years cannot consent to adoption. A child aged over 12 years must consent to his or her adoption and this consent can be revoked. Adoptive parents have a duty to inform the adoptee about adoption as soon as appropriate, but no later than when the adoptee starts compulsory schooling. In Hungary, it is an important requirement that a minor of limited legal capacity aged over 14 years may be adopted only with his/her consent. A minor under the age of 14 years shall be heard and their opinion shall be taken into consideration wherever appropriate. In Serbia, a minor can be adopted after (s)he aged the third month. In the case of a child who has reached 10 years of age and is capable of reasoning shall gives his/her consent to the adoption.

The table below shows the legal regulations concerning adoption

Country	**Adoption**
Croatia	Who can adopt: marital spouses jointly non-marital spouses jointly single adoption
Slovenia	Who can adopt: marital spouses jointly single adoption
Poland	Who can adopt: marital spouses jointly single adoption
Czech Republic	Who can adopt: marital spouses jointly single adoption
Hungary	Who can adopt: marital spouses jointly single adoption – with the license of the appropriate minister in a justified case.
Serbia	Who can adopt: marital spouses jointly single adoption – with the license of the appropriate minister in a justified case.
Slovakia	Who can adopt: marital spouses jointly

6. Parental responsibility

Minors are placed under parental responsibility or in parental custody. First, we outline the scope of parental responsibility and provide an overview of the rights of single parents and parents who live together.

6.1. The scope of parental responsibility

Parental responsibility is a significant component of the parent-child relationship as it determines the extent of the rights and duties that are vested and oblige the parents toward each other and their child(ren). The central components of parental responsibility are similar across all Central European countries. These components are:

- care and protection of the child,
- education of the child,
- legal representation of the child,
- management of the child's assets, and
- maintenance of the child.

Some countries include other components of parental custody. For example, the determination of the home and residence of a child can be found in Croatian, Czech, and Hungarian laws as well. In the Hungarian system, there are a few more elements, such as naming a child, the right to nominate a guardian, and the right to be excluded from guardianship. Act LXXIX of 2021, which was enacted in June 2021, also contains several child protection rules in addition to stricter action against pedophiles. By amending the Child Protection Act, it was declared that the state protects the right of children to their self-identity according to their birth gender in the child protection system. Pornography and content that depicts sexuality self-centered, or promotes deviation from the gender identity ascribed at birth, gender reassignment, and homosexuality is prohibited if it involves anyone aged under 18 years. It is also prohibited to make available to anyone aged under 18 years any advertisement that depicts sexuality self-centered, or that promotes deviation from the gender identity ascribed at birth, gender reassignment, and homosexuality. With the amendment of the National Public Education Act, school sessions on sexual culture, life, orientation, and development should not be aimed at promoting the deviation from one's gender identity assigned at birth, gender reassignment, and homosexuality. A person or organization other than the employee of an educational institution in a teaching position, a school health service specialist from an established institution, and a state body with a cooperation agreement concluded with the institution are entitled to conduct a school session on sexual development, the harmful effects of drug use, the dangers of the Internet, and other areas of improvement under the ambit of physical and mental health only within the limits set by law. Serbian family law emphasizes that parents have the right and duty to take care of their children personally, which

implies that they cannot carry out humiliating actions and punishments that insult their children's dignity. They also have the duty to protect their children from such actions by other people. Parents cannot leave a child of pre-school age unsupervised. Polish law contains a number of parental obligations regulated both on the grounds of family and administrative law. Such obligations are for example the fulfillment of their children's obligation to study or given all compulsory vaccinations or hospital treatment to the child.

6.2. Exercise of parental custody – Issues of parents living together or alone

We now outline the possibilities of parents living alone and together and its impact on parental custody. It is a general rule that parents living together exercise parental rights and obligations together. Parental rights and responsibilities can be exercised by both parents in Slovakia. Minor children are under parental custody or guardianship in Hungary. In the case of a child born in marriage, parental custody is established in both paternal and maternal positions by birth. Cooperation between parents is essential to promote the proper physical, mental, and moral development of the child, regardless of whether the parents live together or separately. However, joint decisions do not always manifest if only one parent exercises parental custody of the joint minor child(ren) after the separation of the parents. In such cases, the parent living separately and apart shall exercise the joint right of decision-making only in respect of the major issues relating to the child's well-being. In Croatia, parents exercise parental responsibility jointly and by agreement until a contrary agreement is arrived at by parents or a judicial decision is adopted on this issue. After the termination of the family union, the parent living with the child exercises parental responsibility autonomously when no agreement pertaining to joint parental care has been arrived at in the course of court proceedings. A parent who does not live with the child and has not been able to arrive at an agreement on the exercise of parental responsibility has significantly limited rights. The Czech Civil Code stipulates that it is not relevant whether the child's parents are married or not, or live together or not. If the parents are not able to arrive at an agreement on important matters concerning the child, especially regarding the personal care of the child, the court can decide among three types of custody: individual custody by one parent or alternating or joint custody by both. The law provides for the suspension of the exercise of parental responsibility on the ground of immaturity or mental disorder on part of such a parent. In Poland, complex rules govern state intervention in the context of parental custody, in the form of limitation, suspension, and removal. Parental custody is limited by the family court through different orders such as orders for cooperation with a family helper, admission of the child into a day-care institution, or placement of the child in a foster parent or institution's custody. If there is a short-term obstacle preventing the exercise of parental custody, the court may suspend it temporarily. The court is obliged to remove parental custody from those parents who grossly neglect their child or abuse their parental authority (by

using violence against the child), or if they pose a permanent obstacle to exercising such authority. Parents can be deprived of their parental authority if they show no interest in the child after (s)he has become a foster child. Parental custody expires if a parent becomes incapacitated. In Serbia, if the parents are not married, the mother automatically acquires parental rights from the moment of the birth of the child and the father acquires rights when paternity is established. The parent who does not exercise parental rights has the right and duty to contact and maintain a personal relationship with the child and have a say on the issues that significantly influence the child's life, such as significant medical interventions, a change in the child's residence, and disposal of the child's property. When parents do not live together, they may exercise their rights jointly or independently. One parent exercises the parental right alone based on a court decision when the parents do not live together. The parent who does not exercise parental rights has a right and duty to maintain the child. In Slovenia, parents exercise parental care jointly and consensually, and this rule applies to parents who live together and alone. Despite the separation, both parents exercise parental care unless it has been limited or withdrawn. If the parents no longer live together, they must agree on the care and upbringing of their joint children following their best interests. When the court dissolves a marriage based on a divorce petition filed by one of the spouses, it also decides on the custody, upbringing, and maintenance of the children living together and on their contact with their parents.

The table below presents a summary of the exercise of parental responsibility

Country	Summary of the exercise of parental responsibility
Slovakia	Rights and responsibilities belong to both parents. In case of a dispute, the court can decide on parental custody.
Hungary	Rights and responsibilities belong to both parents. If parents no longer live together, they must agree on the care and upbringing of their children with due regard for the child's best interests. In case of a dispute, the court can decide on parental custody.
Croatia	Rights and responsibilities belong to both parents. In case of a dispute, the court can decide on parental custody.
Czech Republic	Rights and responsibilities belong to both parents. In case of a dispute, the court can decide on parental custody.
Poland	Rights and responsibilities belong to both parents. Possible state intervention concerning parental custody.

Country	Summary of the exercise of parental responsibility
Serbia	Rights and responsibilities belong to both parents. If the parents are not married, the mother automatically acquires parental rights. If the parents do not live together, joint or independent parental custody applies.
Slovenia	Rights and responsibilities belong to both parents. If the parents no longer live together, they must agree on the care and upbringing of their children with due regard for the child's best interests.

6.3. The child's religion and issues concerning the national identity of the child

It is also an interesting question on the content of parental responsibility, whether the parents or the State are entitled to determine the child's religion and national identity. In Hungary, the State is not allowed to influence the religion of a child. Only the parents can handle this issue. We saw in the part on adoption, that in the Hungarian system, the parties participating in the adoption process shall take into account the child's family ties, nationality, religion, mother tongue and cultural background. In Slovakia, parents have a right to raise their children in accordance with their religious and philosophical beliefs and the obligation to provide the family with a peaceful and safe environment. The Polish Constitution grants parents primacy in raising their children in keeping with their conscience and convictions. This applies to religious and moral upbringing (art. 48(1) and art.53 (3) of the Polish Constitution). Parents are entitled to freely choose schools for their children. In Croatia, the child has the right to freedom of conscience and religion, just like any other person. If the parents wish to choose or change the religious affiliation of the child, they shall do that together when they share parental responsibility. In the Croatian legal system, the rights of children belonging to national minorities are protected by the Constitutional Act on Rights of National Minorities, which guarantees the right to use a language, the preservation of cultural identity, the right to education and upbringing in their mother tongue, and the rights to express their own faith and found religious communities. The Serbian Constitution stipulates thus: "The Republic of Serbia shall promote understanding, recognition and respect of diversity arising from specific ethnic, cultural, linguistic or religious identity of its citizens through measures applied in education, culture and public information." In line with this regulation, parents have the right to provide a child with education that is in accordance with their religious and ethical beliefs. The Slovenian Constitution also gives the parents the right to provide the children a religious and moral upbringing in line with their beliefs. The religious and moral guidance given to children must be appropriate to their age and maturity, and consistent with their free conscience and religious and other beliefs or convictions. The Freedom of Religion Act also gives

parents the right to educate their children in line with their religious beliefs. According to this law, a child who has reached the age of 15 years, has a right to make his or her own decisions relating to religious freedom.

The following table outlines the issues concerning a child's religion

Country	Issues concerning a child's religion
Hungary	The state cannot influence the religion of the child, only parents can.
Slovakia	Parents may raise their children in line with their religious and philosophical beliefs.
Poland	Parents have primacy in raising their children in accordance with their conscience and convictions. Parents are entitled to freely choose schools for their children.
Croatia	The child has the right to freedom of conscience and religion. If the parents wish to choose or change the religious affiliation of the child, they shall do so together when they share parental responsibility. The rights of children belonging to national minorities are protected by the Constitutional Act on the Rights of National Minorities.
Serbia	Parents have a right to provide their children with education that is in line with their religious and ethical beliefs.
Slovenia	Parents have the right to provide their children religious and moral upbringing in line with their beliefs. A child who has attained the age of 15 years, has the right to make his or her own decisions vis-à-vis religious freedom.

6.4. Direct family relations with special regard for maintenance

In this part, we examine direct family relationships or kinship connections among parents and their children and the situation of foster children. We present a comparison – whenever possible – of the definition of *stepparent* and *foster parent*. We can see the detailed regulations on the system of foster care in some countries. The stepfather and stepmother are expressly referred to in the Croatian Family Act only as people who mutually enjoy the right to maintenance with the child under the conditions provided for by the law. Like other family members who live with the child, they may, upon the parents' consent, take day-to-day decisions concerning the child. In Slovakia, foster care is addressed in the Family Act, but the regulation can be found on the boundaries of private and public law. Consequently, the legal institution has private and public law features. In Serbian law, the stepparent (the blood parent's new spouse – same definition as in Hungary) has the obligation to maintain

a minor stepchild during and after the termination of marriage by the death of the biological parent (not if the marriage between his/her parent and stepmother or stepfather has ceased by annulment or divorce). A stepparent has the right to maintenance from his/her mature stepchild if such a stepparent cannot work and lacks sufficient means of maintenance in proportion to their stepchild's capacities. A stepparent does not have a right to maintenance if it would amount to an injustice to the stepchild. The definitions in the Slovenian law align with the terminology in place in other countries: a new partner of a de facto partner is a *foster parent,* whereas the blood parent's new spouse is the *stepparent.* Family solidarity implies an obligation for the spouse or extramarital partner of the partner to support the child of his/her spouse or extramarital partner unless the child's parent is capable of supporting the child. This obligation has a subsidiary nature as it can be imposed only if the child cannot be maintained by their parents. The maintenance obligation of a spouse or extramarital partner of a child's parent will cease with the dissolution of marriage or extramarital union with the child's parent unless the dissolution is the result of the death of the child's mother or father. In such cases, the surviving spouse or extramarital partner (stepparent) must support the child, if they were living together at the time of death. In the Czech Republic, foster care is provided in foster families or through institutional childcare homes. It replaces the care exercised by parents when they are unable to exercise it. The strategic goal of placing a child in foster care is to bring him or her back to the family after he or she has received support, and new conditions conducive for reintegration are created. If this is not achieved, parental authority may be removed from the biological parents and the child may be transferred for adoption. The formal basis for placing a child in foster care is a court order. It limits and sometimes suspends parental authority, but seldom removes parental authority altogether. Foster parents are commonly observed to consider the foster child their own (quasi-adoptive motivation), and not a child who has a family to which he or she should return. This causes problems between parents and their children and hampers family integration. In Poland, foster care is regulated by the Family and Guardianship Code and the Act on Family Assistance and Foster Care. Foster care is provided through foster families and institutional childcare homes. It replaces the care exercised by parents when they are unable to offer it. The strategic goal of placing a child in foster care is to bring him/her back to the family after he or she has received support, and new conditions conducive for reintegration are created. If this is not achieved, parental authority may be removed from the biological parents and the child may be transferred for adoption. The formal basis for placing a child in foster care is a court order. In foster families, foster parents are commonly observed to consider the foster child as their own child and not as a child who has a family to which he or she should return, which can cause problems in practice. The Hungarian Civil Code attaches great importance to the child's *"direct family relationships."* This is reflected in the rule that entitles a child's *stepparent or foster parent* to exercise certain parental custody rights in the context of care and upbringing of the child. A person with an actual family relationship with the child is usually the new

spouse (stepparent) or *de facto partner (foster parent)* of the parent exercising parental custody, who is often an active participant in the child's upbringing and care. In the Hungarian context, a *foster parent* is a person who permanently and for a long period of time takes care for a minor child in his or her own household, and he or she is not a biological, adoptive, or stepparent of the child. The importance of the actual family relationship is strengthened by the provision in the Civil Code, which expands the scope of the right to maintain contact with the child to the *stepparent, foster parent*, former guardian, and the parent whose presumption of paternity for the child has been overturned by the court, provided that the child concerned was raised in their household for a longer period of time. The sudden interruption of the intimate relationship between the child and the man he loves as a father can seriously damage the spiritual development and emotional security of the child. This may be particularly important in cases where no one takes the place of the father in the life of the child after the presumption of paternity has been rebutted.

The table below presents issues pertaining maintenance and direct family relationships

Country	Maintenance and direct family relationships
Croatia	The stepfather and stepmother mutually enjoy the right to maintenance with the child. They take day-to-day decisions concerning the child.
Slovakia	The issue of foster care is addressed in the Family Act. The legal institution has private and public law features.
Serbia	Stepparent: The blood parent's new spouse. Obligation to maintenance a minor stepchild. A stepparent does not have the right to maintenance if it would amount to an injustice for the stepchild.
Slovenia	A new partner of the de facto partner is the foster parent, whereas the blood parent's new spouse is the stepparent. Principle of family solidarity. Maintenance obligation has a subsidiary nature.
Czech Republic	Foster care is provided in the family (foster families). Institutional form (childcare homes). In foster families, foster parents are commonly observed to consider the foster child their own child (quasi-adoptive motivation).
Poland	Foster families. Institutional form (childcare homes). Formal basis for placing a child in foster care takes place by a court order.

Country	Maintenance and direct family relationships
Hungary	Great importance to the child's "direct family relationships." A child's stepparent or foster parent can exercise certain parental custody rights in the context of care and upbringing of the child. Stepparent: New spouse. Foster parent: De facto partner.

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