LAW, IDENTITY AND VALUES

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MARRIAGE IN THE LIGHT OF SELECTED JUDGEMENTS OF THE CONSTITUTIONAL TRIBUNAL OF THE REPUBLIC OF POLAND

Marek ANDRZEJEWSKI[1]

ABSTRACT

This article attempts to show how marital issues are treated in the jurisprudence of the Constitutional Tribunal of the Republic of Poland. The issue of marriage accounts for only a small proportion of all family issues taken up by the Constitutional Tribunal for adjudication. The author points out the need for caution, reliability, and thorough analyses in the justifications, and also highlights the care the Tribunal shows for the stability of provisions regulating family life, which corresponds to the delicacy and stability of relations in marriage and family.

KEYWORDS

marriage
entering into marriage
the Constitutional Tribunal
Constitution of the Republic of Poland
Family and Guardianship Code

1. Introduction

The scope of the analysis in this paper was limited to showing the institution of marriage only in the light of the jurisprudence of the Constitutional Tribunal of the Republic of Poland (hereinafter referred to as the Constitutional Tribunal or Tribunal). The role of the Tribunal in investigating the essence of legal institutions, consolidating binding regulations, and influencing their evolution cannot be underestimated. The framework of this paper does not allow us to present the comprehensive jurisprudence of the Constitutional Tribunal, the judgements and decisions of administrative courts that have been significant in recent years, or the judgments of the European Court of Human Rights—all of them would have provided a more complex, fuller picture of the institution of marriage.

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The Polish Constitutional Tribunal was established in 1982.[2] It began adjudicating in 1986.[3] Its genesis is associated with the image-building activities of the communist regime, which, after the introduction of martial law on 13 December 1981, used the apparatus of repression to pacify society (through mass arrests and internment of thousands of people, political trials, mass dismissals from work, censorship, etc.), while trying, especially in the context of its relations with foreign countries, to create the appearance that it cared about the law and the rule of law.

In the beginning, the Tribunal adjudicated on the basis of the Constitution of the People's Republic of Poland of 22 July 1952[4] (hereinafter referred to as the Constitution of the PRP). Based on this document, the communist system was introduced and established in Poland.

After the political breakthrough of 1989, the so-called Small Constitution[5] was adopted, regulating only the most important issues relating to the change of the social and economic system, and work began on the preparation of a new fundamental law that would meet democratic standards. The Constitution currently in force in Poland was passed by the National Assembly on 2 April 1997.[6]

The legal foundations for the functioning of the Constitutional Tribunal of the Republic of Poland are currently regulated by Articles 188 to 197 of the Constitution of the Republic of Poland (hereinafter referred to as the Constitution of the RP or the Constitution) and the Act of 25 June 2015 on the Constitutional Tribunal.[7]

The regulations on marriage and family that were included in the post-war Polish constitutions, to some extent, governed the same issues, and even used similar wordings in some measure. However, their interpretation required reading individual provisions in the context of the political system of the state, which led to significantly divergent results. For example, Article 18 of the Constitution of the RP of 1997 states that '[m]arriage, 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', and Article 71 reads as follows:

> The State, in its social and economic policy, shall take into account the good of the family. Families, finding themselves in difficult material and social circumstances – particularly those with many children or a single parent – shall have the right to special assistance from public authorities.

Semantically, both refer to the language contained in Article 79, sec.1 of the Constitution of the PRP, which states that '[m]arriage, maternity and the family are under the *care*

2 | Act of 26 March 1982 on changing the Constitution of the People's Republic of Poland, Journal of Laws of 1982, No. 11, item 83.
3 | Act of 29 April 1985 on The Constitutional Tribunal, Journal of Laws of 1985, No. 22, item 98 as amended.
4 | Journal of Laws of 1952, No. 33, item 232 as amended.
5 | Constitutional Act of 17 October 1992 on mutual relations between the legislative and executive branch of the Republic of Poland and on territorial self-government; Journal of Laws of 1992, No. 84, item 428.
6 | The Constitution of the Republic of Poland, adopted by the National Assembly on 2 April 1997, was accepted by the nation through a constitutional referendum on 25 May 1997, and signed by the President of Poland on 16 June 1997; Journal of Laws of 1997, No. 78, item 483 as amended.
7 | Journal of Laws of 2015, item 1064 as amended.

and protection of the People's Republic of Poland. Families with numerous children shall be given special care by the state'.

However, if we were to read these sentences in the context of the political systems under which they were written, then *care and protection* in Article 79 of the Constitution of the PRP meant a declaration of a caring attitude towards the socialist state, while *care and protection* in the present Constitution should be perceived in the context of the constitutional principle of subsidiarity, which imposes some responsibilities on the state, although the primary accountability lies with those who are trying to overcome the crisis in which they have found themselves.[8]

Section 2 of Article 79 of the Constitution of the PRP states that '[i]t is the duty of parents to bring up children as righteous citizens of the People's Republic of Poland, conscious of their duties', which refers to children's upbringing. The same aspect can be found in Article 48, sec.1 of the Constitution of the RP, which states that '[p]arents shall have the right to rear their children in accordance with their own convictions. Such upbringing shall respect the degree of maturity of a child as well as his freedom of conscience and belief, as well as his convictions…'.

In this case, however, both the semantics and meaning of the passage are radically different. The provision of the 1952 Constitution established the primacy of the Communist Party in the upbringing of children and obliged parents to endeavour to implement this line of upbringing in everyday life. In contrast, Article 48, sec.1 and Article 53, sec. 3 of the Constitution of the RP unambiguously expressed the primacy of parents in the upbringing of children, which is consistent with the standards of protection of human rights set out in Articles 5 and 18 of the Convention on the Rights of the Child.[9]

On the other hand, Article 79, sec. 3 of the Constitution of the PRP states that '[t] he Polish People's Republic ensures the fulfilment of alimony rights and obligations', meaning the state took it upon itself to force debtors to pay their maintenance debts. To this end, an alimony fund was created in order to pay benefits to alimony creditors and collect the equivalent of the paid benefits from their debtors. This line of thinking, albeit without explicitly mentioning alimony, is now confirmed by Articles 18 and 71 of the Constitution of the RP.

Only a few regulations in the Constitution refer directly to families. In addition to the ones quoted above, that is, Articles 18, 48, and 71, two more should be mentioned: Article 47, which states that '[e]veryone has the right to the legal protection of one's private life, family life, honour and good name as well as the right to decide about one's personal life', and Article 72, sec.1, which states that '[t]he Republic of Poland shall ensure the protection of the rights of the child'. In legal complaints, judgements, and justifications, frequent references were made to Articles 30, 31 acting as a standard for aspects such as dignity, equality, and prohibition of discrimination.

Throughout the history of the Constitutional Tribunal, the same Family and Guardianship Code (hereinafter referred to as the FGC[10]), which was passed in 1964, remained in force in Poland, that is, when an exceptionally strong ideological group of communists held power. Surprisingly, despite the efforts of some scholars with a dogmatic approach

8 | Andrzejewski, 2003, pp. 76–94; Nitecki, 2008, pp. 76–88; Szurgacz, 1993, pp.32–49.

9 | The Convention on the Rights of the Child was passed by the General Assembly of the United Nations on 20 November 1989. Journal of Laws of 1991, no. 120, item 526 as amended.

10 | Act of 25 February 1964: the Family and Guardianship Code, consolidated text, Journals of Laws of 2020, item 1359.

to Marxism, the codification commission prepared a draft of the FGC free of elements of communist ideology.[11] For this reason, even after the political breakthrough of 1989, there was no need to create a new codification. This was one of the main reasons why the representatives of legal scholars unanimously criticised a new draft of the Family Code prepared in 2018 by the Ombudsman for Children.[12] However, numerous amendments were made to upgrade the FGC and adjust it to the requirements of the present day, but these were not fundamental changes. The exceptions are the provisions on marital property regimes, which could not be reconciled with the rules of the free market economy; as a result, they have been thoroughly revised.[13]

Among the issues related to marriage, the following are regulated in the FGC: conclusion of marriage, basic rights, mutual obligations of spouses in their relationship, separation, divorce, and matrimonial property regimes. Regulations concerning filiation also refer to marriage (they differ depending on whether the woman is married or unmarried), adoption, foster care, and guardianship (only spouses may jointly adopt, create a foster family, take care of the child). However, there is no difference between married and unwedded persons in their exercise of parental responsibility.

Since the second half of the 20th century, significant changes in the functioning of marriages and families have been taking place worldwide, and the pace of such changes in Poland increased after the political breakthrough of 1989. The most radical changes took place in social awareness, customs, and lifestyles. They were often triggered by the opening of borders and technological revolution, including the electronic media revolution. Major changes have been reported in the number of births, divorces, remarriages, and the scale of cohabitation. Substantial transformations have also been observed in moral (including sexual) behaviour, the level of consumption, as well as the approach to religion and the Church.[14] Some of these changes inspired the formulation of legislative postulates in public spaces. Others have led to complaints with the Constitutional Tribunal regarding some newly interpreted provisions that have been found to be inconsistent with the Constitution.

2. Heterosexuality as a premise for marriage

In the last three decades, the most fundamental issue related to marriage, which has generated a lot of emotions, has been the question of its heterosexuality. The importance of this issue stems from the demand raised in Poland to recognise homosexual unions as marriages. This issue has not yet been investigated by the Constitutional Tribunal. However, in its justification of the judgement issued on 11 May 2005[15] on the compliance of the treaty on Poland's accession to the European Union with the Constitution, the

11 | Fiedorczyk, 2014; Holewińska-Łapińska, 2009, pp. 1023–1025; Nazar, 2005, pp. 81–110.
12 | Andrzejewski, 2019, pp. 7–42; Nazar, 2019, pp. 7–25; Sokołowski, 2020, pp. 228–233.
13 | Nazar, 2014, pp. 31–74; Smyczyński, 2014, pp. 13–30.
14 | Adamski, 2002; Kocik, 2006; Kwak, 2007.
15 | Judgement of the Constitutional Tribunal of 11 May 2005, Ref. No./-18/2004, Jurisprudence of the Constitutional Tribunal; collection of judicial decision 2005/5a item 45.

Constitutional Tribunal expressed the view that marriage is a union of a man and a woman and that any change in this respect would require an amendment to the Constitution.[16]

The conjugal character of marriage has been challenged under Polish law in complaints submitted to the Tribunal (as well as to the European Court of Human Rights) regarding the content of Article 1 of the FGC. It clearly says that a man and woman may submit marriage declarations before the head of the registry office. According to the applicants, this is contrary to Article 47 of the Constitution (right to privacy), because it prevents homosexual unions from making such declarations. They claim that it is also inconsistent with Article 31, sec. 3 of the Constitution, which states the following:

> Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

Neither does it comply with Article 32, sec.1 and 2 or Article 30 of the Constitution, which states that '[t]he inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities'. The applicants take the view that Article 18 of the Constitution, cited previously, does not define marriage as a heterosexual union, but only stipulates that only heterosexual marriages are under state protection and care. Therefore, it does not exclude homosexual marriages, but only indicates that they cannot expect protection and care from the state. In the appellants' view, the admissibility of marriages of homosexual couples on the grounds of Article 18 of the Constitution is blocked by the content of Article 1 of the FGC, which excludes such a possibility.

The applicants' argumentation is based on a scientific paper,[17] which expresses views that are rather isolated from the Polish family law doctrine. The prevailing view declares that Article 18 of the Constitution defines marriage as a heterosexual union,[18] *inter alia*, because in 1997, when the Constitution was adopted, homosexual unions in several countries already had the status of marriage, which is why the Constitutional Committee unequivocally stated that the intention of this provision was to adopt a position contrary to the trend noticed abroad. In order to strengthen the regulation adopted in Article 18 of the Constitution, it was placed in the chapter defining the state system.[19] Consequently, Article 1 of the FGC was not modified when the Constitution came into force, though it was stipulated that all regulations inconsistent with the provisions of the new Basic Law should be harmonised with the Constitution within three years of its entry into force. Indeed, Article 1 of the FGC was not changed because it was fully synchronised with Article 18 of the Constitution.

16 | Mostowik, 2017, p. 45–46.
17 | Hartwich, 2011; Jezusek, 2015, pp. 67–68; Łętowska and Woleński, 2013, pp. 15–40; Pawliczak, 2014.
18 | Andrzejewski (ed.), 2013; Banaszkiewicz, 2004; 2013; 2016; Borysiak, 2016; Łączkowska-Porawska, 2019; Mączyński, 2012; 2013; Mostowik, 2013; Nazar, 2015, pp. 277–278; Smyczyński, 2013.
19 | Mostowik, 2017, pp. 44–46.

Accepting the argument that homosexual marriages are permissible because they are not forbidden would open the way to the idea (absurd in common opinion) that polygamous marriages (being not forbidden) are also permissible (though they will not benefit from the care and protection of the state).

What is shared by most views that either declare the admissibility of homosexual unions under Article 18 of the Constitution or question the wording of Article 1 of the FGC, and by views that, despite acknowledging the inadmissibility of such marriages *de lege lata*, demand changes in the law to allow them, is their ideological anchoring in the civilisational dispute about family. All propositions to redefine the concepts of marriage and family draw inspiration from neo-Marxism and gender philosophy, which preach the destruction of the family.[20] This provokes restraint and sometimes the resentment of many members of the Polish society because such an attitude has led not only to philosophical, semantic, and pedagogical issues, but also legal disorders in many Western countries.

Although Article 18 of the Constitution does not prevent the passage of an act on civil partnerships (including homosexual ones), the prevailing view in Polish society is that it is neither necessary nor useful. Apart from questioning the formal admissibility of passing such a law, anthropological, cultural, moral, and other arguments are also raised against it.

It is expected that the Constitutional Tribunal will soon issue a judgement on the admissibility of homosexual unions, which has been requested by critics of Article 1 of the FGC for several years. If the ruling is passed by the full panel of judges of the Tribunal, then it will end the dispute over such an important issue and make the legal situation unambiguous and indisputable, thus bringing stability to the constitutional and social order of the state.

3. Mental health of nuptial couples

The legal status of people with intellectual disabilities is an issue that has been the subject of lively legal academic debate[21] in Poland since the beginning of the 21st century, which is reflected in the Resolution of the Full Panel of the Civil Chamber of the Supreme Court[22], in three judgements of the Constitutional Tribunal, as well as in changes in regulations, particularly in the area of the Civil Procedure Code (CPC). In both academic debate and jurisprudence, the greatest emphasis has been placed on the institution of incapacitation. In the context of marriage, what has been discussed mostly is the question of the admissibility of marriage for people with intellectual disabilities. The debate intensified after the Supreme Court ruled that a fully incapacitated person cannot (and has no formal authority to do so) independently request that plenary guardianship be lifted, as the incapacitated person has no legal standing. After the Supreme Court adopted the resolution, relevant provisions of the CPC were appealed to the Constitutional Tribunal

20 | Cuby, 2013; Roszkowski, 2019, pp. 485–526; Sosnowski, 2014; Sztychmiler, 2015, pp. 227–244.
21 | Domański, 2013; Kociucki 2011; Kosek, 2014, pp.573–584; Mróz, 2018, pp. 7–43; Pudzianowska 2014.
22 | Judgement of the Supreme Court of 14 October 2004, III CZP 37/04; Judgement of the Supreme Court of 2005, No. 3 item 42.

on the grounds that they discriminated against persons under plenary guardianship. The Constitutional Tribunal found that the existing situation contradicted the constitutionally protected dignity of the person (Article 30 of the Constitution).[23] The CPC was soon amended to give fully incapacitated persons the right to apply for the revocation of their plenary guardianship.[24]

While this debate was evolving and the revision of the CPC was progressing in Poland, the United Nations General Assembly adopted the Convention on the Rights of Persons with Disabilities on 13 December 2006.[25] Article 23 of this Convention, which is crucial for the present remarks, requires member states to recognise the right of all such persons, provided they are of marriageable age, 'to marry and to found a family, on the basis of the free and full consent of the future spouses…'. This right is correlated with an obligation imposed on a state to provide adequate support to persons with disabilities in carrying out their child-rearing tasks.[26] Poland has filed an objection to this provision, contending that the intention of this objection is not to discriminate against persons suffering from a profound mental disorder, but to protect and safeguard the interests of such persons.

The issue of marriage by persons with mental disabilities has been the subject of two decisions of the Constitutional Tribunal. First, on 28 April 2015, the Constitutional Tribunal discontinued[27]—for formal reasons—a case initiated by a question raised by one of the courts regarding whether Article 12§1 of the FGC is in compliance with Articles 18 and 47 of the Constitution. The provision in question stated the following:

> A person suffering from mental illness or mental retardation shall not conclude a marriage. However, if the state of health or mind of such a person does not endanger the marriage or the health of future offspring, and if the person is not completely incapacitated, the court may permit him or her to conclude marriage.

The dismissal occurred mainly because the question was not related to the subject matter of the case the court was considering.

A year and a half later, the Constitutional Tribunal issued a substantive judgement on the same issue after hearing a complaint filed by the Ombudsman. According to the Ombudsman, Article 12 of the FGC violates the right to privacy of persons with disabilities (Article 47 of the Constitution) and prevents such persons from marrying in contravention of Article 23 of the UN Convention. In the Ombudsman's view, under these circumstances, people with intellectual disabilities are discriminated against. The Constitutional Tribunal did not share the Ombudsman's view and decided that Article 12 of the FGC is consistent with the Constitution.

The Tribunal took the position that barring persons with a serious mental illness (at its advanced stage) or severe intellectual disability from marrying, as stipulated in Article 12 of the FGC, does not discriminate against such persons. From the point of view of the

23 | Judgement of the Constitutional Tribunal of 7 March, 2007, K 28/5; Jurisprudence of the Constitutional Tribunal, collection of the judicial decisions – 4A 2007, No. 3, item 24.
24 | Cf. Article 559 of the Civil Procedural Code.
25 | Journal of Laws of 2012, item 1169.
26 | Mikrut, 2015; available at http://www.bwmp.up.krakow.pl/wpcontent/uploads/2015/01/Adam-Mikrut.pdf (Accessed on 2.05.2021).
27 | Judgement of the Constitutional Tribunal of 28 April 2015, P 58/13, Jurisprudence of the Constitutional Tribunal, collection of the judicial decisions – 4A 2015, item 58.

principle of equality with regard to the right to conclude a marriage, these persons are not in the same situation as persons of good intellect, which is why the unequal treatment is defendable. In addition, people with profound intellectual disabilities cannot fulfil the duties of a spouse and possibly a parent. Therefore, the limitations of Article 12 of the FGC must be viewed from the perspective of the principle of permanence of marriage[28] and the principle of the best interests of children[29] (understood in both pedagogical and eugenic terms). The stability of a marriage should be seen not only from the point of view of the provisions of divorce, but also from the perspective of other regulations that sustain the proper functioning of the marriage.

Regarding the right to privacy (Article 47 of the Constitution), which, according to the complainant, was violated by Article 12 of the FGC, the Constitutional Tribunal stated that Polish family law does not guarantee the freedom to conclude a marriage.[30] As a rule, the provisions are mandatory and their modification, in most cases, is impossible either by the will of the parties or by virtue of decisions of state bodies (courts, administrative authorities); in some situations, however, the provisions can be altered, albeit to a limited extent.

The Constitutional Tribunal shared only the Ombudsman's view that Article 12§1 of the FGC does not meet the standard of due precision as it employs expressions already abandoned by modern science (psychiatry, psychology, pedagogy). It, however, concluded that the outdated terminology did not lead to different decisions from those that would have been reached if the article had been revised and more updated terminology in line with modern science had been used.

The ongoing debate about the legal status of persons with intellectual disabilities[31] is expected to continue to evolve in terms of the positions of the parties to the debate, jurisprudence, and probably also the law.

4. Maintenance obligations between former spouses

In divorce cases, the court may decide to award maintenance to the former spouse. The maintenance obligation between spouses after divorce (Article 60 of the FGC) is a continuation of their obligation to meet the needs of the family during the marriage, which they established through their relationship (Article 27 of the FGC). From the point of view of the premise and scope of both obligations, they are significantly different.[32]

If the divorce has been pronounced on the grounds that the spouses were mutually at fault for the breakdown of their marriage, or if the judgement has been delivered without making an adjudication on the fault, then either spouse may claim maintenance from their former spouse if they prove that they are in need. Such an obligation expires within five years from the date of the divorce pronouncement. The same regulation applies to separation. This solution does not raise any constitutional issues.

28 | Ignatowicz and Nazar, 2016, pp. 354–356.
29 | Radwański, 1981, pp. 3–28; Sokołowski, 2020, pp. 209–211.
30 | Mostowik, 2017, p. 46.
31 | Kmieciak 2018, pp. 93–111; Mróz, 2018, pp. 7–43; Pudzianowska, 2014; Smyczyński and Andrzejewski, 2020, pp. 61–63.
32 | Pawliczak, 2017, pp. 810–811.

On the other hand, if the divorce decree provides that one of the spouses is solely to blame for the breakdown of the marriage, then the other spouse may request alimony only if they can demonstrate that as a consequence of the divorce, their economic situation has deteriorated (which does not have to involve falling into a state of deprivation). In such a case, the maintenance may be sufficient to enable the entitled person to satisfy their needs on a similar economic level as that before the divorce. This alimony obligation is not limited in time and may therefore continue until the death of either party or until the *innocent spouse* remarries (Article 60§3 of the FGC). Its greater scope and indefiniteness are a kind of sanction for causing the breakdown of the marriage.

In a judgement returned on 11 April 2006,[33] the Constitutional Tribunal challenged the claim that the indefinite obligation of maintenance towards the former spouse imposed on the person solely responsible for the breakdown of marriage violates the property rights of the obliged person (Article 64 of the Constitution) and is contrary to Article 31, sec. 3 and Article 2 of the Constitution. In the key part of the justification for the judgement, it was found, *inter alia*, that the principal cause of dissolution of marriage is the death of one of the spouses and, therefore,

> ...it should be assumed that certain forms of protection of property claims against the spouse may not only continue despite the divorce, but may also be 'life-long' in nature. If the divorce had not taken place, the spouses would have had the right to expect from each other support as well as material assistance in satisfying their legitimate needs.
> A culpable contribution to the breakdown of one's marriage is undoubtedly an action that must be assessed negatively not only from the point of view of the other spouse, but also the social life of a community, of which marriage and the family it established are important elements. Accordingly, in the light of the substantive regulations of the Constitution, 'harsher' treatment of the spouse at fault cannot in principle be regarded as socially unjust, and the legal nature and social assessment of the institution of divorce itself is of secondary importance in this respect.

In its judgement of 25 October 2012,[34] the Constitutional Tribunal again rejected the argument that Article 60§3 of the FGC is inconsistent with Article 64 sec.1 and 2 of the Constitution in conjunction with Article 31, sec.3 of the Constitution. This means that The Constitution provides that with the lapse of time, the maintenance obligation is not terminated. It was emphasised in the justification that the challenged regulation is not accidental, as it refers to the principle of the permanence of marriage. Moreover, it was found that a man and woman entering into marriage

> ...voluntarily assume an obligation to provide for the needs of the family (cf. Article 27 of the FGC), which...is intended...to last for the rest of their lives... . ... [B]oth should, as a rule, live on an equal living standard, although it may be higher or lower than before the marriage. In the case regulated by Article 60§2 of the FGC, such an assumed relationship between spouses is broken down by a unilateral decision of the spouse who is solely to blame for the marriage breakdown. By refraining from sustaining the marriage, this spouse affects the financial situation of the

33 | Judgement of the Constitutional Tribunal of 11 April 2006, SK 57/04; Jurisprudence of the Constitutional Tribunal, collection of the judicial decisions – A 2006, No. 4, item 40.
34 | Judgement of the Constitutional Tribunal of 25 October 2012, SK 27/12; Jurisprudence of the Constitutional Tribunal, collection of the judicial decisions – A 2012, No. 9, item 109.

> innocent spouse, who had the right to expect that the marriage would last and that the financial situation created by it would be relatively stable. In this context, lifetime alimony is a substitute for the guilty spouse's broken promise to live together and help each other for life.[35]

Both decisions of the Constitutional Tribunal have met with complete approval in the doctrine. The two fragments of their justifications quoted above serve to illustrate the principled and axiological argumentation that deserves attention and recognition.

5. Status of marriage and cohabitation in social law

To highlight the constitutional rank of the institution of marriage, including the position of marriage in relation to the state, as well as determine the significance of the responsibilities of the state in relation to marriage, it is important to focus on the judgements of the Constitutional Tribunal on Article 18 of the Constitution. However, what is of interest in this provision is not the most spectacular issue, namely the definition of marriage as a union of a man and a woman, but its imposition on the state the obligation to help and care for marriage, family, maternity, and parenthood.

In this context, the judgement of the Constitutional Tribunal of 18 May 2005[36] is particularly noteworthy, as it declared the nature of regulations governing the single parent allowance to be unconstitutional. In light of the provisions of the Act of 28 November 2003 on Family Benefits,[37] this allowance was formally available to persons who had the status of a single parent, but, in reality, it was also collected by persons who cohabited with others, while married couples with children were not entitled to it. A complaint filed by the Ombudsman argued that such a regulation violated the principle of protection of marriage as expressed in Article 18 of the Constitution because it favoured informal unions. Attention was also drawn to the fact that the provision had the effect of favouring cohabitation over marriage in social law in contravention to Article 18 of the Constitution, resulting in a significant increase in the number of divorces and separation proceedings as well as postponements of the decision to get married. This increase was due to the wish to obtain (or maintain) a single status (formally), which ensured access to benefits. In light of the social benefits, which have proven to be destructive to the functioning of marriages, it was impossible to see marriages as unions particularly protected by the state, which contradicts Article 18 of the Constitution.

Moreover, the Constitutional Tribunal found the challenged provisions of the Family Benefits Act to be inconsistent with the constitutional principle of subsidiarity because the provisions led to an erosion of maintenance obligations imposed on family members.[38] By granting a single parent supplement, the parent obliged to provide child support automatically reduced the amount paid to the child by the equivalent of the benefit. It was not

35 | In Polish literature, the first mention of this kind of argumentation can be found in Sokołowski, 1996.
36 | Judgement of the Constitutional Tribunal of 18 May 2005, K 16/5; Jurisprudence of the Constitutional Tribunal, collection of the judicial decisions – A 2005, No. 25, item 51.
37 | Journal of Laws of 2003, No. 228, item 2255 as amended.
38 | Kosek, 2009, pp. 1073–1085.

until 2008 that the revised FGC adopted a rule wherein social benefits paid to an eligible person from public funds were not intended to exclude or limit alimony obligations.

Similar situations were treated in the same way in the Constitutional Tribunal judgements of 23 June 2008[39] and 18 November 2014.[40] As a side note, it is worth mentioning that the category of *single parents* was known much earlier to the tax law;[41] however, it did not cause such a significant destruction as after its application into social law.

6. Conclusions

The Constitutional Tribunal is dealing with family issues, including those concerning marriage, more often now than before. Apart from matrimonial issues, judgements concerning filiation, parental authority, and foster custody are also issued.

Many applicants view the Constitutional Tribunal as an institution that can bring about a change in the way regulations are interpreted or can lead to the amendment of regulations that are challenged as being inconsistent with the provisions of the Constitution.

The Constitutional Tribunal exercises caution when adjudicating on the most important issues, showing care towards the institution of family law. In its judgements concerning marriage and family, it grounds its decisions in the principles developed by the doctrine and jurisprudence of the Supreme Court. The principles include, for example, permanence of marriage and family, the interests of a child, the interests of a family, respect for the autonomy of individuals and families, and primacy of parents in raising children. Thanks to this attitude, which is restrained by principles, the laws regulating the functioning of marriage and family in Poland are relatively stable, which is a desirable situation.

Several doubts have been raised in doctrine regarding the constitutionality of certain legal solutions concerning marriage, which, however, have not been submitted for adjudication to the Constitutional Tribunal.

From the point of view of the principle of secularity of the state and the separation of the state and the Church, the possibility of concluding marriages in a denominational form with consequences for the secular law has been questioned.

From the point of view of the principle of equality between men and women under law, an objection has been raised, which is that, by way of exception and with the permission of the court, the law allows a woman who has attained the age of 16 to conclude a marriage, while a 16-year-old man does not have that option.

Apart from the issue of heterosexuality and alimony after divorce, neither the literature nor any complaints submitted to the Constitutional Tribunal have so far challenged the FGC's characterisation of marriage as a relationship of equal partners, obliged to cohabitation, fidelity, and mutual assistance (Article 23 of the FGC).

39 | Judgement of the Constitutional Tribunal of 23 June 2008, sig. P 18/06; Jurisprudence of the Constitutional Tribunal, collection of the judicial decisions – A 2008, No. 5, item 83.
40 | Judgement of the Constitutional Tribunal of 18 November 2014, sig. SK 7/11; Jurisprudence of the Constitutional Tribunal, collection of the judicial decisions – A 2014, No. 10, item 112.
41 | Ofiarski 2008, pp. 559–563.

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FROM MARITAL PROPERTY LAW TO FAMILY PROPERTY LAW – THEORETICAL AND PRACTICAL ASPECTS OF PROPERTY LAW REGULATIONS PROTECTING FAMILIES

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ABSTRACT

Although the legislator prefers the institution of marriage and accepts it as a form of family relationship, the system of family relationships has altered as a result of social changes, which can also be seen in the legal regulation. Therefore, the framework of previous thinking, which is almost exclusively based on matrimonial property rights, has been modified by the social and economic changes and the consequent constant change in regulation and attitudes. As a result, not only matrimonial property regimes but also the legal relationship between persons living in a registered partnership or de facto partnership, and their relationship with third parties are covered by matrimonial property law as well. Consequently, it is necessary to apply a new comprehensive terminology to these property relations, which is family property law.

However, it can also be stated that during the development of the family property regulation, the legislator sought to incorporate guarantees into the system during the analysis of the diversity of family relationships, which prevented the endangerment of family existence, the vulnerability of the weaker partner or the rights of minors belonging to the family. However, most of the protecting provisions in the family property law apply to persons living in a marriage (registered partnership), the property relations of de facto partners are less regulated, and they contain only partially, or under certain circumstances family protection standards, legal consequences, and safeguards. The reason of this is that the legislature protects and favours marriage in principle over the other two legally regulated forms of partnership, by which it encourages young people and couples to marriage which requires mutual responsibility, solidarity, and commitment.

KEYWORDS

marital property law
family property law
marital community of property
the legal property regime of de facto cohabitants
legally recognised partnership
contractual freedom

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1. From marital property law to family property law

In the traditional Hungarian legal literature on civil law, we cannot find any writings on marital property law since the viewpoints of contemporary legal scholars were determined by the Tripartitum for a long time. Consequently, the term 'marital property law' was not used at all, and property law issues relating to the wife were classified into the frame of women's special rights. In addition, there was a significant overlap in the content of the law of succession and the rules on widows regarding women's special rights.[2] Among the special rights for women, they discussed the rights that protected the property and livelihood of women who remain unmarried or single after their marriage has ended, such as the girl's quarter (*de quartalitio seu quarta puellari*), the rights of unmarried women (*de Jure capillari*),[3] the rights of widows (*de Jure viduali*), the *dos scripta vel contractualis,*[4] the *de contradote*, the conjugal life of women and noble women (*de coaquitione conjugali*), and dowry and bride-price (*de allatura et parapherno*).

Nevertheless, in the works of Hungarian private law scholars published in the 1880s and 90s, the legal aspects of women's special rights and property benefits for widows were included in the family law section of personal law; these scholars did not distinguish between the law of matrimonial obligations and the law of matrimonial property.[5] These property provisions typically affected women's unequal property rights and aimed to compensate for it; therefore, they had a family protection objective only in an indirect way.

According to Károly Szladits, the main subjects of private law—even in 1941—were family law and property law.[6] The reason for this viewpoint is that family law was divided into three parts at that time: matrimonial law, kinship law, and guardianship law.[7] In 1940, Antal Almási wrote in Volume II of Hungarian Private Law, edited by Szladits, that the conclusion of marriage did not significantly change the property status of the spouse. With certain exceptions, spouses remained independent property subjects, and the partial merger or subsequent joint acquisition of matrimonial property after marriage was not common.

The legal effects of marriage in terms of property law were mainly in the form of some lasting obligations based on law: a) the maintenance obligation of spouses, particularly of the husband towards his wife, their minor children, and a minor child brought into the marriage by the wife and adopted by the husband; b) the husband's obligation to cover all the costs and expenses of the family household; c) the obligation in certain social classes for spouses to give half of the property that was acquired during the marriage at the time of dissolution of the marriage; and d) the husband's obligation to pay his wife legal wages at the time of dissolution of the marriage for not having breached his marital obligations (typically loyalty) during the marriage.[8] At the turn of the 19th and 20th centuries, most Hungarian women did not have any qualifications, so they were not engaged in any

2 | Herger, 2017, p. 166.
3 | The rights of unmarried women (ius capillare) cover the rights of a daughter orphaned by the death of her father to receive the benefits due to her rank (i.e., housing and maintenance) and to be married off from her father's estate. In Katalin, no date.
4 | Szladits, 1940, pp. 269–270.
5 | Herger, 2017, pp. 166–167.
6 | Szladits, 1941, p. 21 and 23.
7 | Szladits, 1940, p. 5.
8 | Szladits, 1940, pp. 269–270.

gainful employment. Therefore, the wife was treated on a par with minor children, who had to be cared for by the husband. In this respect, maintenance was an important family protection measure at that time.[9]

In summary, it can be stated that property rules in family law were typically linked to marriage. However, these property law provisions were part of family law (matrimonial law), which belonged to the law of persons, so they were not separated as matrimonial property law provisions, despite the fact that the contemporary legal literature dealt with the property obligations arising from marriage, matrimonial property contracts, and dower under the heading 'the property effects of marriage'.

Act IV of 1952 on Marriage, Family, and Guardianship (hereinafter referred to as the Family Act) was a milestone in the history of family law, which typically focused on personal relationships (such as marriage and parent-child relationships) but also regulated property relations between family members, including spouses.[10] However, family law property relations have almost exclusively appeared in the areas of community property, division of community property, maintenance, settlement of dwelling, and contracts between spouses and third parties, and, from 1986, in the area of *matrimonial property law*.[11]

In contrast to the Family Act, *Act IV of 1959 on the Civil Code* (hereinafter referred to as the 1959 Civil Code) primarily regulated property relations between parties in economic life, while personal relations played only a secondary role. Nevertheless, over the past 50 years, family relationships and the property situation of family members have become much more vibrant and complex. However, Hungarian family law considers the institution of marriage as the basic unit of family, and societal changes have made it necessary to provide legal protection for other forms of social cohabitation as well. In 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 increasingly preferred. The growth of cohabitation is a social trend, and Hungarian legislation could not ignore it.

For the first time, a concrete legal regulation concerning cohabitants was set out in *Act IV of 1977,* which inserted the concept of a cohabitant into the Part of Companies (Section 578. §) of the 1959 Civil Code According to the definition set by the Act, cohabitants refer to *a woman and man living together without marriage, in a common household, in an emotional and economic community.* After a Constitutional Court Decision,[12] Act *XLII of 1996* set out a new definition of cohabitant, which was inserted in the 'Closing provisions' of the 1959 Civil Code:[13] 'unless the Act otherwise stipulates, cohabitants are two persons, regardless of their sex, living together without marriage, in a common household, in an emotional and economic community'.[14] The 1959 Civil Code also provided for de

9 | Herger, 2017, p. 175.
10 | Weiss, 2000, pp. 4–5.
11 | Matrimonial property law, in a narrow sense, means the set of laws governing the external legal relations between spouses and between spouses and third parties, both during the marriage and in the event of dissolution of the marriage. The broader interpretation includes claims relating to the community of property of the spouse, its division, the use of the dwelling, and the enforcement of spousal maintenance. See Csűri, 2002, p.158.
12 | Decision 14/1995. (III.13.) of the Constitutional Court
13 | The definition was changed by the 1996 and 2009 amendments to the Civil Code, and it was transferred to the 'Interpretation provisions' of the Civil Code. The first amendment recognised the cohabitation of same-sex partners, on the grounds of the decision of the Constitutional Court. See Kőrös, 2013, p. 6.
14 | Kuti, 2016, pp. 7–8.

facto property relations between partners, recognising *property acquired by cohabitants in proportion to their contribution* as joint property.[15] Judicial practice has been consistent in the matter, with the presumption of joint acquisition applied to the growth in assets during the life of the partnership.[16]However, equal acquisition by life partners was not a presumption, but only a supplementary rule, which could be applied if it was not possible to establish a realistic acquisition ratio, even after evidence.[17]

The proportion of out-of-wedlock births in Hungary increased in the decade after the turn of the millennium and reached a record high of 47.8% in 2015. This can be traced back to the strong growth of extramarital partnerships and the increase in the number of people who had children out of them. Between 2001 and 2016, the number of people who chose to live in cohabitation more than doubled.[18]This tendency led to an increase in the number of disputes in which the *traditional* rules on matrimonial property and other family protection could not be applied automatically. Consequently, mothers, and less often fathers, were left alone and *unprotected* with their children after the end of a de facto partnership. There was also an increasing need to settle any property liability arising from contracts and transactions concluded by partners with third parties.

In our country, the adoption of the still effective *Act XXIX of 2009* on registered partnerships (Bét.) led to an almost complete elimination of gender discrimination regarding the optional forms of partnership. A registered partnership can be concluded between *two persons of the same sex* who have reached the age of 18 years. Such individuals may enter a registered partnership before the registrar if they mutually state their intention to do so.[19] Registered partners are entitled to all the rights and obligations that the Civil Code of 2013 attributes to marriage in the area of personal and property rights and obligations (according to the Family Law Book, they are loyalty, mutual cooperation and support, maintenance, mutual property acquisition, and right to dwelling, and according to the Succession Law Book, the same status as the spouse in intestate succession).[20] Accordingly, the Civil Code is a background for the law of registered partnerships.[21]

The still effective *Act V of 2013 on the Civil Code* (hereinafter referred to as CC) regulates family members' relationships in a separate unit, in Book Four, whose editorial solution acknowledged family law as an integral part of civil law.[22] However, it is significant that in line with the provisions of the Fundamental Law,[23] the Family Law Book *recognises only*

15 | Szeibert, 2012, pp. 173–189.
16 | BH1996, p. 258; BH2007, p. 122. See in detail: Hegedűs, 2008, pp. 11–19.
17 | Nyírőné, 2016, p. 38.
18 | According to the legal literature, most cohabitants consider their relationship a 'probationary marriage'. See in detail: Spéder, 2004, pp.137–151; Bukodi, 2002, pp. 227–251.
19 | Bét. art. 1. (1)
20 | Bét. art. 3 (1)
21 | Kőrös, 2013, p. 7.
22 | Kriston, 2020, p. 77.
23 | The Fourth amendment of the Fundamental Law supplemented Article L, showing that *the basis of family relationship is marriage and parent-child relationship.* The aim of the Fourth amendment of the Fundamental Law was to strengthen the protection of the family as a fundamental institution of society at the level of the Constitution, in line with historical tradition. The Constitution committed itself to protecting the institution of marriage, which also closed the debate on the recognition of same-sex marriage at the constitutional level. Schanda, 2012, pp. 84–85. The Fourth Amendment of the Fundamental Law also raised to a constitutional level the rules in which the family relationship is based on marriage and the parent-child relationship. With this viewpoint, the Fundamental Law does not recognise *the so-called de facto partnership as a family, even if it results*

marriage as the basis of the family among the forms of couple relationships. The concept of *registered partnership* has been completely removed from the Civil Code, which is intended to regulate private law relationships in a uniform way, to the extent that the law does not mention the registered partner either in the definition of 'relative'[24] or among the obstacles for marriage. It can be found only among the circumstances that exclude the existence of a de facto partnership if one of the partners has a registered partnership with another person.[25] The Civil Code still defines a de facto civil partnership as a contractual relationship in the Obligation Law Book as follows:

> *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.[26]

It is not a requirement for partners to be of different sexes, so a *de facto partnership can be established between same-sex partners* as well.

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.[27] However, the recent precedent-setting decision of the Curia recognised that even a de facto cohabitation relationship where only long-term cohabitation takes place, but no common minor child is born, is still a family relationship.[28] This decision is a good illustration of the fact that despite the separation of rules, case law seeks to address this partnership form in a uniform way in the future and clearly recognises its family law nature.

Decision No. 43/2012 (XII. 20.) of the Constitutional Court stated that if the legislature intended to highlight and set one form of cohabitation as a model, it is obliged to guarantee the same level of protection for other forms as recognised by law, because of its obligation to protect the institution.[29] So, family in the *sociological sense* shall also be protected, not just family based on marriage. This is also linked to a cornerstone principle of family law, which focuses on the protection of families alongside the protection of marriage. This

in the birth of a child. In such cases, the parents are considered the family of the common child, but the family relationship is not established between the parties. This approach is also reflected in the regulation of the de facto partnership in the Obligation Law Book of the Civil Code. Unfortunately, this 'marriage-centred' approach discriminates indirectly against children depending on whether they are born out of marriage, an occasional relationship, or a de facto partnership.

24 | CC. art. 8:1. point 1.2.

25 | CC. art. 6:514. (1)

26 | CC. art. 6:514.

27 | In the legal literature, family law issues of de facto cohabitation seem divisive. Kriston, 2016, pp.226–239; Kriston, 2018, 401–406; Kriston, 2019, pp.101–109.

28 | BH2021, p. 11.

29 | It did not follow from Article L of the Fundamental Law that 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, grandparents raising their grandchildren, and other relations 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. Decision 43/2012. (XII. 20.) of the Constitutional Court. The changing concept of the family and the related case law of the European Court of Human Rights are discussed in detail in the following paper: Bánki, 2015, pp. 367–372.

may also be the reason why the Family Law Book protects family law relationships in a broader sense and does not limit them to the legal relationships of married couples.

The regulation on the protection of the family, in principle, indicates that family law rules primarily *protect the family as a community* (the relationships between individual family members). This applies both to *family relationships established by law* (e.g., marriage, adoption, filiation, adoption, guardianship) and to *other forms of coexistence* regulated by law, in accordance with the case law of the European Court of Human Rights. So, for example:

- In the case of a step-parent, a step-child, a foster parent, and a foster child, the Family Law Book regulates mutual maintenance rights and obligations.[30]
- The law also grants the right to contact for the former step-parent, foster parent, guardian, or person whose paternity presumption was challenged by a court, provided that the child had been brought up in the household of the given person for a longer period of time.[31]
- A person who has a real family relationship with the child (e.g., a step-parent) may participate in the care and upbringing of the child with the consent of the parent who has parental responsibility.[32]

The hierarchy in the legal recognition and protection of partnerships—marriage, registered partnership, and de facto partnership in that order—is also reflected in the *family protection rules governing the property relations* of the persons in these partnerships.

2. Family protection provisions in property relations of persons in different relationships

2.1. Family protection rules of the statutory property regimes

2.1.1. Marital community of property as the legal property law regime

The *marital community of property* is the legal regime governing matrimonial property in Hungary, but the law differentiates between property used in the daily life of 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 spouses. The Civil Code stipulates special rules for entrepreneurial assets. There are special provisions that govern a *spouse's common house as the family's home*.

Spouses are entitled to settle their property relations primarily by way of a matrimonial property contract with content in line with their own intentions.[33] If the spouses do not conclude a matrimonial property contract, the *matrimonial community of property is the legal property system*. The rules of the matrimonial property regime cover property that is not governed by the spouses' matrimonial property contract. The family property

30 | CC. art. 4:198. – 4:200.
31 | CC. art. 4:179 (3)
32 | CC. art. 4:154. Hegedűs, 2014, p. 28.
33 | CC. art. 4:63.

function of the marital community of property can be found in the fact that all of the property, property values, rights, claims, and debts that the spouses acquire together or separately during the existence of marital cohabitation and which are not the personal property of either of them[34] shall be encumbered indivisibly from the date of acquisition or claim; they have an undivided and equal right and interest from the date of the acquisition or the creation of the claim, unless a contract stipulates otherwise.[35] This provision goes a long way to protect a wife who, for example, may be out of work for a long period and unable to take up gainful employment because of childbirths. Similarly, it protects the property interests of the spouse who takes on a greater burden in raising children, running the household, and carrying out family tasks since the other spouse is more of a property earner in terms of income and acquisitions from their work or business. Unfortunately, there is a darker side of this rule: the spouse shall be regarded as a joint owner not only of the assets but its passive elements as well. As a general rule, it means that the spouse who was not a party to the transaction must also be liable for the obligations assumed by the other spouse. This may lead to a situation in which one spouse, through risky transactions, or because of an addiction (e.g., gambling addiction, excessive alcohol consumption), may exhaust the community property and often the potential inheritance of the children during the existence of the community of property. However, the Family Law Book allows courts to terminate the community of property between spouses at the request of either spouse, in such a way that the existence of a life partnership between the spouses subsists. This shall, in particular, include whether the *spouse accumulated debts* that jeopardise their share of the community property and if an enforcement procedure is opened against the other spouse engaged in private entrepreneurial activities, or an *enforcement procedure or liquidation proceeding* is opened against the sole proprietorship, cooperative society, or business association, which jeopardises the other spouse's share.[36] These exceptional rules provide an escape way for spouses who do not want to divorce from their spouse for personal reasons, but, at the same time, do not also want to use their share of assets or income to cover the debts of the other spouse.

Thus, the property of the spouses can be divided into three separate sets of assets (sub-properties) from the moment of acquisition: the sub-properties of either of the spouses and the community of property. Thus, in addition to the community of property, the property of the spouses existing at the beginning of cohabitation and acquired during the period of cohabitation from specific legal grounds (e.g., gifts, inheritance) or from specific sources retains separate status. For example, property inherited by a spouse, typically from his or her ancestors, or received as a gift from close relatives, retains its separate property status for family protection reasons.[37]

The aim of the unification of family property can be ascertained in the property law rule, which states that assets that are a part of separate property of either spouse, which replace any furnishing and household item normally used in everyday life during matrimonial relationship, shall become community property after five years of marriage.[38]

34 | CC. art. 4:37. (4)
35 | However, in contrast to the presumption of equal acquisition, it is of course possible to prove that a separate investment or expenditure results in a different proportion of acquisition.
36 | CC. art. 4:54. (1) points a)-b)
37 | CC. art. 4:38. (1) point b)
38 | CC. art. 4:38. (3)

The priority of marital life community as a value that should be protected is ensured by judicial practice as well. According to courts, if one of the spouses living in marital life with community property establishes cohabitation with another person in another city at the same time, the proof of the marital life and community property excludes the *establishment of the existence of cohabitation from the viewpoint of law.*[39] However, the Curia also stated that the mere existence of a marriage of one of the parties will not exclude the existence of a cohabitation relationship. Therefore, it should be emphasised that it is not the mere existence of a marriage or registered partnership, but the existence of *marital life community or registered partnership* that precludes the establishment and maintenance of a de facto partnership .[40]

The spouses are entitled to jointly manage the assets of community property. *Common burden sharing* is emphasised by the rule, which stipulates that either of the spouses may request the other spouse's consent to take measures deemed necessary for the protection and maintenance of assets that are a part of community property.[41]

The costs of maintenance and administration of the assets of community property, *the costs of maintaining the common household,* and *the expenses of supporting and raising the common child* of the spouses shall primarily be covered from the community property. If the community property is insufficient to cover these costs, they shall be covered from the spouses' separate property as appropriate. If only one of the spouses has any separate property, the funds required to cover such outstanding expenses shall be made available by that spouse.[42]

The rule which stipulates that any contract for pecuniary interest concluded by a spouse during the community of property shall be presumed, with some exceptions, to have been concluded with the other spouse's consent if the contracting third party was aware or should have been aware that the other spouse had not given his/her prior consent for the contract shall be applied only between spouses. The exceptions include a transaction involving a jointly-owned dwelling, or the marital home, and the contribution of joint property to a business. In these cases, the consent of the other spouse cannot be presumed. This restriction was justified on the one hand for *the protection of the family home* and, on the other hand, for the prevention of the concealment of matrimonial property by making it available to a business entity, particularly a company. If the community property becomes part of the assets of a company or an enterprise as a result of a unilateral decision of one of the spouses, it can be managed or removed from the company or enterprise only in accordance with the basis of the law applicable to the given company or enterprise within the framework of the exercise of membership rights in which the non-member spouse has no say. In judicial practice, we can find cases where one spouse has deprived the other spouse of their claim to community property by making a major asset that is part of community property (for example, the common dwelling itself) available to a business as a non-monetary contribution. These rules have been established to prevent such cases.[43]

Regarding property relations of registered partners, Section 3(1) of Bét. II states as a *general rule* that *the rules on marriage shall be applied mutatis mutandis to the registered*

39 | BH2004, p. 504.
40 | EBH2018. M.8. and Csűri, 2016, p. 29.
41 | CC. art. 4:42. (2)
42 | CC. art. 4:44. (1)-(2)
43 | Kőrös, 2005, p. 9.

partnership, with the exceptions governed by law. These exceptions do not affect the property relations of registered partners, only the rules on binding and personal rights: for example, they cannot jointly adopt a child, and the notary can terminate the relationship in certain cases. Consequently, the registered partnership property regime, which is identical to the spousal property regime described in the previous point, and the connected family protection rules shall be applied to registered partners as well.[44] So, from the viewpoint of property law, there is no difference between the two relationship forms.

2.1.2. The legal property regime of de facto cohabitants

As mentioned above, the property law regulations of de facto partners, similar to the concept of cohabitation, are defined in the Obligation Law Book of the Civil Code. Cohabitants are allowed to settle property issues primarily within the framework of a *cohabitation property contract*. Otherwise, *they are subject to the statutory property law provisions*. The Civil Code of 2013 placed the legal property system of cohabitants on new grounds. Accordingly, cohabitants are *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 the separate property of a given partner shall not be considered a part of the growth in assets. In the course of the division of the growth in assets, the governing principle is the parties' *assistance in the acquisition of property*, so partners are entitled to a share in the jointly-acquired property primarily *in nature and in proportion to their contribution*.[45] Determining the proportion of participation is left to the courts to handle, which can create serious difficulties around proof in practice. According to equity and the need to protect the weaker party, the extent of their involvement in the *household and child-rearing tasks and in the other partner's enterprise* shall be construed as their contribution towards acquisition. If the ratio of contribution cannot be determined, *it shall be considered equal*, unless this would constitute an inequitable financial loss for 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.[46] According to an important rule, in the case of complete separation of property during cohabitation, cohabitants use and manage their property independently, so they have full autonomy over it and therefore are also independently liable for the obligations they have assumed. However, a situation may arise where the irresponsible, debt-generating transactions of one of the parties will result in no growth in the assets (jointly-acquired property), i.e., at the termination of the partnership, nothing can be claimed by the other party.

This could lead to an unfair situation where the prudent and careful party would be obliged to give a certain proportion of the growth in assets to the less prudent partner. Therefore, the CC makes it possible, in exceptional cases, to claim the determination of a given party's share of the jointly-acquired property during the existence of the life community, if one party concluded such a contract without the knowledge of the other party, which accumulated a debt that exceeded the claimant's share of the assets.[47] If the other party refuses to cooperate in establishing the value of jointly-acquired property

44 | Kőrös, 2013, p. 7.
45 | CC. art. 6:516. (1)-(4).
46 | CC. art. 6:516. (4); CC. art. 4:71. (1).
47 | Bata, 2017, p. 24.

and providing adequate safeguards despite having been asked to do so, or prevents such efforts, the party may bring action in court.[48]

It seems clear that in the marital community of property, the proportion of the community property acquired by each spouse, or the contribution to running the household and raising the children, is completely irrelevant; the result is undivided community property. On the contrary, in the case of de facto partners, although the *involvement in household and child-rearing tasks and in the other partner's business* is considered to be a contribution to the acquisition of property, the proportion of this contribution is determined by the court on the basis of the evidence, which will certainly fall short of the value calculated under the rules of community of property. There have been several studies on the difficulties in establishing the contribution to the acquisition rate.[49]

2.2. Family protection rules in contractual relationships of persons in a legally recognised partnership

Based on the principle of voluntary and free choice of a couple, the Family Law Book emphasises that spouses, registered partners, and de facto partners (hereinafter referred to as parties) shall settle their property relations by way of a *matrimonial, registered partnership, or de facto partnership property contract* with content in line with their own intentions.[50] In these contracts, parties can identify the *property law regime* that would govern their property relations instead of the statutory property system, from the date stipulated in the contract, during their life community.

The CC regulates *optional property systems* in addition to the legal property regime, and the rules of optional systems can be found within the framework of the rules regarding property law contracts. As an optional property regime, the law contains provisions on *the acquisition of community property based on the principle of added value* (called the property acquisition regime) and on the *separation of property*. The regulations, which aim to protect one spouse or partner from the indebtedness or abusive exercise of rights by the other spouse or partner, are incorporated into the statutory and optional property regime as well. Regarding the content, amendment, and termination of the contract, the rules of the matrimonial property contract can be applied mutatis mutandis to the property contract of de facto partners.[51] However, agreements are also often *concluded to divide the common property of spouses or registered partners or to liquidate the property of de facto partners*.[52]

2.2.1. Family protection limits of contractual freedom

The parties *are free to decide* whether they should settle their property relations for the duration of their cohabitation by a property contract, rather than through the provisions of the Family Code. They are also free to decide whether they should settle the division of the community property or growth in assets by contract after the end of their cohabitation or start a dispute before the court.

The *freedom to choose a partner* can only be applied to the free choice of the partner, since the subjective limit is strict in the contractual settlement of the parties' property

48 | CC. art. 4:70. (1)-(3).
49 | Nyírőné, 2016, pp. 38–43; Nyírőné, 2017, pp. 44–49.
50 | CC. art. 4:63; 6:515.
51 | Kriston, 2014, pp. 35–40.
52 | CC. art. 4:57. (1)-(2).

relations: property law contracts can only be concluded by the parties intending to form a partnership or by persons who are already in the given partnership (spouses, registered partners, de facto partners).The partners can also be the persons who dissolve the relationship in the division of community property or growth in assets. The parties are also free to determine the *content of their contracts*.

The freedom of the parties to determine the content of the contract is primarily guaranteed by the law, since most of the contract law rules are dispositive. The contracting parties can derogate from contractual rules by common consent, unless the law stipulates otherwise. Cogent rules are the limits of contractual freedom; therefore, they are exceptional in contract law. Cogent rules are required if the *interests of third parties or the protection of the moral values of society*, other than the contracting parties, require intervention in the autonomy of the contracting parties by means of a binding rule.[53] Accordingly, with regard to the contractual relations of spouses, the following interests are protected by provisions restricting the parties' freedom to formulate the content of the contract:

- protection of the fundamental interest of the family
- prohibition of property deprivation of the other spouse
- protection of one of the spouses' creditor, and
- exclusion of the limited responsibility of the spouse on the grounds of Art. 4:49 (2) of the CC[54]

We will only deal with those restrictions from the abovementioned list that are designed to protect the fundamental interests of the family, including the rules on the prohibition of spousal abuse.

As mentioned previously, the parties are free to decide in the contract whether to deviate from the rules of the statutory property regime for the duration of their cohabitation and live under full separation of property in the future. Family protection interests can be found in the cogent provision of the law, which stipulates that the *costs of maintaining the common household and the expenses of supporting and raising the common child* should primarily be covered from the community property, even if the spouses live in full separation. *Any contractual clause is null and void* if it exempts either spouse from all or most of these costs and expenses.[55] Work done in the household and efforts to raise a child shall be construed as a contribution to costs.[56] Since de facto partners are entitled to conclude a contract that contains any provision relating to property rights, which could apply to married couples under contract, or in accordance with the CC, the abovementioned restrictions shall be applied in contractual relationship of de facto partners as well.[57]

With regard to the contractual relations of the parties, it is very difficult to determine the extent of the contractual freedom and private autonomy of the spouses, and, thereby,

53 | Vékás, 2016, pp. 44–45.
54 | So, the spouses cannot exclude the liability of a spouse who is not a party to a community of property transaction.
55 | This provision is fully in line with the Principles of the European Committee on Family Law, in particular the principle on property relations between spouses, which requires each spouse to contribute to the family household needs according to his/her ability. This contribution includes running the household, meeting the personal needs of the other spouse, and raising, educating, and caring for children. See Boele-Woelki, 2014, p. 7; Kopasz, 2018, pp. 26–27; Szeibert, 2016, p.8.
56 | CC. art. 4:73. (2).
57 | CC. art. 6:515. (2).

the socially reprehensible threshold that negates the property interests of one (former) spouse and almost exclusively prioritises the property rights of the other spouse without any reasonable justification.

For such contracts, the legal provisions in the Civil Code on the invalidity of contracts can help in assessing the issue.[58] The property matters not covered by the Family Law Book, which include, for example, the invalidity of a contract, shall be governed by the obligation law rules of the Civil Code, but the court is entitled to derogate from those provisions on the basis of equity with regard to the specific and particular circumstances of family law relationships.

a) Gross disparity in value: The adjudication of this issue is very difficult because consideration or proportionality is not a requirement either in the contract between the parties relating to property law or in the contract for the division of community property or the division of the growth in assets.[59] Therefore, a claim based on gross disparity in value is not meaningful in these contracts.[60] The court shall examine the circumstances of the conclusion of the contract, the whole content of the contract, and the background of the case. Spouses may be guided not only by property considerations, but also by other *personal considerations*, which may influence their contractual intention to a greater extent than strict proportionality.[61]

b) Immoral contracts:[62] *Good morals* are a legal category and concern the general moral judgement of society. Thus, the question of whether a contract is contrary to *good morals* depends not on the harm to the contracting party's interests, but on *whether the transaction itself is socially reprehensible*. Therefore, a property law contract will not be considered unfair by public opinion at the time of its conclusion. A contract can be regarded as null and void if it is manifestly in contradiction to *good morals*. It also follows that both parties must be aware with due diligence that the content of the *contract serves a prohibited purpose* and its unethicality is obvious to them, but the good or bad faith of the parties is irrelevant. It should also be emphasised that the immorality of a contract can only be determined in the light of the *situation at the time of the conclusion of the contract;* subsequent changes may result in a situation that is unfair or even inconsistent with society's value judgements, but the assessment is not relevant from the viewpoint of whether the contract is immoral.[63]Judicial practice is unanimous on this issue:

> *[I]t is not contrary to the general moral perception of the society* if one party gives the other party a free pecuniary advantage at the expense of its own property, and nor is it if one of the spouses transfers his/her separate property or a part of it to the community property or to the spouse's separate property.[64]

58 | Barzó, 2010, pp. 24–26.
59 | The contractual relations between spouses *are not subject to the presumption of the retroactivity of contracts*, and the burden of proof on retroactivity is on the spouse who invokes it. BDT 2012. 2633.
60 | CC. art. 6:98.
61 | The fact that the plaintiff knew the value of the property and did not ask for any compensation and even initiated the contract showed the intention to give it for free. The intention to give the property free of charge excludes the application of a gross disparity in value. BH 2000. 539.
62 | CC. art. 6:96.
63 | BDT 2010. 2269. I.
64 | BH 1999. 409., BH 2000. 539.

Thus, if one party gives a free benefit, i.e., a gift, to the other party, or transfers his/her joint property to the spouse's separate property, it is not contrary to the general social view.[65] Consequently, a matrimonial property contract is not contrary to morality if it defines joint and separate property differently from the law. It follows from the nature of the marital property contract that the determination of the scope of community or separate property in a different way from the provisions of the law does not provide a basis for nullity on the grounds of an infringement of morality.[66]

A matrimonial property contract that *gives almost all of the separate property of one spouse and all of the community property to the other spouse without any real compensation* is contrary to morality and therefore null and void.[67] In another case, the Supreme Court also considered the clauses of a contract as contrary to morality, as the parties had transferred the assets, which were acquired until the conclusion of the contract, *exclusively to the husband's separate property*. The purpose of these provisions was to deprive the wife of her share of community property.[68]

The Curia ruled as *contrary to morality and therefore null and void* (partial invalidity) a clause in a matrimonial property contract, which excluded the community of property between the spouses retroactively to the establishment of the community of life 17 years earlier, and not just for the future; in this context, all the joint-owned real estate assets and business shares were stipulated as the separate property of one of the parties only. This provision *seriously infringed the interests of family protection* in that until the contract was concluded the spouses managed the property jointly and, according to their agreement, the children were being raised by the disadvantaged party.[69]

Thus, it can be stated that in contractual relationships, courts confirm that neither party is led by the intention to completely disregard the other party, especially if the implementation of the agreement negatively affects the future of joint minor children.

3. Summary

In summary, it can be said that even though marriage is the preferred form of family relationship, the legislature clearly and in detail regulates the property relations of both registered partners and de facto partners over time. As a result of social changes, the system of family relationships has also changed, which is evident in the legal framework as well. Consequently, previous viewpoints, which were almost exclusively centred on matrimonial property law, have been disrupted by social and economic changes and the constant changes in regulation and attitudes that have accompanied them.

65 | BH 2000. 539.
66 | BH 2011. 337. I.
67 | BH 1999. 409.
68 | The Supreme Court stressed that in 'the examination of certain points of a contract from the point of view of its immorality, it is not possible to disregard the parties' personal circumstances and their intention to conclude the contract, even if the legal assessment of the contract is governed by the provisions of Hungarian law. In this context, in a specific case, it was significant that the parties were citizens of Sweden-Iran and Iran, both from a state whose tradition and legal system was fundamentally different from the Hungarian, and which did not even recognise the presumption of the community of property regime'. Pfv.II.21.240/2007/4.
69 | BH 2015. 254.

This tendency led to a state of affairs where not only matrimonial property issues belong to the area of property law, but also the legal relationships between people and their children in a de facto partnership or a registered partnership, that is, the family in the sociological sense, as well as their property relationships with third parties. This makes it necessary to apply a new summary terminology to these property relationships, namely the family property law.

Edit Kriston deals with this issue in detail in her works. According to her viewpoint, family property law is the totality of laws that regulate the property relations between persons living in a legally regulated relationship and who are classified as relatives under the Civil Code, as well as between them and third parties, for the period determined by the provisions of the specific legislation, unless otherwise provided by the parties. It also includes property law relationships between persons in a family relationship who are not classified as relatives (e.g., guardian-ward). The definition is based on the legal literature-based definitions of matrimonial property law, but it is suitable for all property relationships between family members governed by the Civil Code. However, according to Kriston, the concept of family property law can be narrowed and divided into entities. As is clear from the abovementioned definition, there is a separate section for property relations between persons living in a relationship and other legal entities classified as relatives under the Civil Code (e.g., parents, grandparents).

Accordingly, family property law, in a narrow sense, is the totality of laws that regulate property relations between persons living in a legally regulated relationship as well as those between them and third parties for the period of life community and after the termination of marriage, registered partnership, or de facto partnership, unless otherwise provided by the parties.[70] However, the broader interpretation includes claims relating to the community of property of a spouse or registered partner, the property of de facto partners, the division of property, the use of a common dwelling by a spouse, registered partner or de facto partner, and the enforcement of maintenance by a spouse, registered partner, or de facto partner.[71] It also covers agreements between parents concerning the maintenance of a common minor child, its replacement by more valuable property, and property law provisions as well. An analysis and detailed presentation of these legal instruments from the perspective of family protection have not been included in this study due to scope limitations.

It can also be stated that during the establishment of family property law regulation, the legislature sought to incorporate guarantee rules into the system in order to prevent the endangerment of the family's existence, the vulnerable situation of the weaker party in a relationship, or the infringement of the rights of minors.

However, most of the provisions on family protection in the family property law shall be applied to married couples or registered partners, while regulation of property relations of de facto partners are less stringent and contain only partial rules, consequences, and safeguards for family protection, or can be applied only if certain conditions are met. The reason for this is that the legislature protects and prefers marriage over the other two legally regulated relationship forms, thus encouraging young people and couples to marry in the spirit of mutual responsibility, solidarity, and commitment.

70 | Kriston, 2020, pp. 138–139.
71 | Csűri, 2002, p. 158.

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FREEDOM OF CONSCIENCE AND COVID-19 VACCINATION: RECONCILING CONTRADICTORY FORCES

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ABSTRACT

Compulsory COVID vaccination is a timely question to ask as more and more countries introduce it. There is a growing body of case law and literature on child vaccination against a number of well-known diseases,[2] *yet the current issue involving the compulsory vaccination of adults against COVID-19 presents a new case. I hypothesise as follows: (a) compulsory vaccination is constitutional, under certain conditions; (b) alternative behaviour must be tolerated if it produces the same end. I verify these hypotheses by analysing the role of conscience in vaccinations in general and in COVID-19 vaccination in particular. I consider the Hungarian context, but the conclusions might apply to other countries as well. The key issue is the extent to which the government should respect individual conscience during a pandemic. I first discuss what conscience is in legal terms. Second, I discuss the legal nature and background of COVID-19 vaccination. Third, I describe the decision of the Hungarian Constitutional Court on mandatory vaccination and compare the current situation with the previous one. Fourth, I analyse the outcome of the 'comparative test of burdens'. Finally, I summarise my conclusions.*

KEYWORDS

freedom of conscience
COVID-19
vaccination
compulsory vaccination
contradictory forces

To begin with

If you travel through port towns of the North Sea, the first thing that may surprise you is the large number of churches, irrespective of the town's population. The reason why there are so many churches might be even more surprising: People say that sailors who lived through dangerous events at sea promised that they would give donations and

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2 | The constitutional perspective on child vaccination is summarised by Szendrői, 2020, pp. 186–199.

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build statues or even churches if they survived. Many of them were honest enough to keep their promises when they returned, resulting in many churches, although the number of churchgoers remained the same. Centuries later, one may conclude that there is no use for so many churches, or at least that it is irrational to build them.

Rationality does not always support conscience. It often does: Being true to one's conscience is rational. However, conscience sometimes overrules rationality and leads to behaviour that does not make logical sense, at least to others.

How can we evaluate conscience in legal terms? Freedom of conscience is accepted if it is rational and when it remains the generally accepted framework for rules. However, what if freedom of conscience were illogical and illegal?

1. On conscience

Freedom of conscience is clearly protected in constitutional terms. It is closely connected to human dignity: only human beings have a conscience. In other words, only human beings can act according to or against their conscience. Machines have no dignity and do not have a conscience. If they function well, they always do what they are programmed to do. They have no conscience that could overrule their 'rationality'.

Consequently, human beings have the fundamental right to *not be rational*, to obey their conscience even if it does not make logical sense. On the other hand, science is personal. In many cases, it cannot be explained in logical terms, as it is beyond rationality.

Freedom of conscience is often considered part of freedom of religion. Torfs differentiates between three layers of freedom of religion. The first layer is that of individual religious freedom: Everybody has the right to adhere to any religious conviction or belief, including the right to change one's religion or to not be religious at all. The second layer is collective religious freedom, which implies freedom of community building and the freedom to organise public manifestations of faith. The third layer is institutional religious freedom, implying people's right to organise themselves structurally into religious groups and associations, or into communities and churches with internal norms that create a subculture.[3]

In Hungary's Fundamental Law, the situation is slightly different: Freedom of conscience is a separate right; it is not part of freedom of religion, but is closely connected to it. Article VII of the Fundamental Law stipulates the following:

> Everyone shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to choose or change one's religion or other beliefs, and the freedom of everyone to manifest, abstain from manifesting, practice or teach his or her religion or other belief through religious acts, rites, or otherwise, either individually or jointly with others, either in public or in private life.

Conscience is not necessarily religious; it covers all views, ideologies, and convictions. The content of conviction is irrelevant to the law. Accepting the view of a historical

3 | Torfs, 2016, p. 3.

church is part of freedom of conscience, as is the acceptance of any other belief or the lack thereof.

Many argue that freedom of conscience exists only within the framework of law – thus, that conscience cannot be grounds for exemptions under the law.[4] In general, I find such statements dangerous. Freedom of conscience is a constitutional right. If laws are automatic restrictions of constitutional rights, it means that the content of a constitutional right is what the law allows it to be. There is therefore no need for a constitution because it is the *law* that determines what our rights are, not the constitution. My understanding is the exact opposite: Laws should adhere to the content of the constitution.

Why respect other people's consciousness? On the one hand, laws serve the common good – at least, that is what we choose to believe. Political entities make laws to achieve objectives that are socially beneficial. On the other hand, constitutional rights also serve the common good. In our culture, constitutional rights have been essential for preserving the state and society. Furthermore, conscience is not an entirely private matter; it also manifests in social life: 'Historically, religion and morality have been closely related. However, they are different ideas, different realities, and different meta-legal concepts. So they affect secular legal systems in different ways'.[5] Acting according to one's conscience is a virtue, even if individual conscience differs from person to person.[6]

When laws and constitutional rights conflict, there must be a test for the 'greater good'. There is no general answer. One cannot say either that laws are always more important than conscience or that matters of conscience should always create exceptions to the general rule. Courts can make decisions only on a case-by-case basis.

Lastly, it is worth mentioning that conscience is always personal. I strongly disagree with the idea that conscience is no more than a product of organised religion. Simply because traditional religions do not oppose vaccination, this does not mean that concerns regarding COVID-19 vaccination cannot be matters of conscience.[7]

2. Background on vaccination

The COVID-19 pandemic has left hardly any aspect of day-to-day life unchanged. The pandemic has posed an enormous challenge to healthcare, left ruined economies, and hindered social relations. In these circumstances, there are huge hopes that medical scientists can come up with a solution that will allow us to return to normalcy. This is why optimism began to grow when the arrival of vaccines was announced.

As Harrison and Wu point out, 'vaccine optimism has also been prominent in the public imagination during the early weeks of the COVID-19 epidemic, amidst a mixture

4 | According to a court ruling, public health and the prevention of plagues overrule personal integrity (BH2020.147.). I find that such a general statement oversimplifies the issue.
5 | Domingo, 2015, p. 180.
6 | Kuminetz, 2009, p. 20.
7 | In their study, Pelčić and colleagues analyse the views of several religions on vaccination (Pelčić et al., 2016, pp. 516-521). Not to argue with their conclusions, but it is entirely possible for someone (either religious or not) to have a view different from that of religions. Freedom of conscience must be protected even if not supported by religions.

of bravado, uncertainty and fear.'[8] However, vaccine hesitancy is also unsurprising: Some are cautious and prefer to wait until there is more information on the virus and the vaccine. Some objections to vaccinations are based on freedom of conscience, whereby people refuse them on religious grounds or see the pandemic and vaccines as part of a conspiracy.

Unsurprisingly, the question of vaccination soon became a political issue. Governments are rushing to obtain as many vaccines as possible and to vaccinate as many people as possible, while some question whether all vaccines are effective and whether governments' vaccination policies are satisfactory.

Most countries are seeing debates about whether COVID-19 vaccination should be mandatory and, if it remains voluntary, what benefits should be granted to those who are vaccinated. For our purposes, a crucial question is whether conscience can be grounds for an exemption from vaccination.

At first glance, mandatory vaccination is generally accepted. In constitutional terms, the aim of avoiding diseases and reducing their impact seems to provide constitutional grounds for restricting privacy and medical self-determination. When considering previous mandatory vaccinations, one may find that vaccination policies have been heterogeneous across countries: they 'vary not only in the presence or absence of a mandate but also in the implementation and enforcement of the mandates as well as in the consequences faced by individuals who fail to comply with their country's policy.'[9] Hungary has the world's greatest number of mandatory vaccines and the highest fines for failure to comply with mandatory vaccination.[10]

Mandatory vaccination mainly concerns children, who receive various vaccines. Most legal issues pertain to the question of whether parents have the right to object to their children being vaccinated or to substitute these vaccines with different ones. Hungarian jurisprudence includes cases that hinge on whether a parent's failure to comply with vaccination can be considered as an 'abuse of a minor' (i.e. a criminal offence). Several court decisions express scepticism, stating that a lack of vaccination in itself does not endanger the child's physical and mental health and integrity and therefore cannot be grounds for criminal punishment.[11] However, this judgment is criticised for ignoring the possibility of infection, which means that the child is endangered.[12]

In the United States, mandatory vaccination is generally accepted. The recent COVID-19 situation has shed new light on the century-old *Jacobson v. Massachusetts* case [197 U.S. 11 (1905)], which concerned the question of whether a state may prescribe mandatory vaccination during a pandemic. The court held that the statute was not invalid for an adult residing in the community and fit to receive the vaccination, as it was not in derogation of any of the rights of such a person under the Fourteenth Amendment. Interestingly, interpretations of the case vary: Certain courts view Jacobson as virtually a blank cheque for government action; others apply standard constitutional doctrines with little consideration given to the emergency issue.[13] It is worth

8 | Harrison and Wu, 2020, p. 325.
9 | Vaz et al., 2020.
10 | Vaz et al., 2020.
11 | Supreme Court of Hungary, Bfv.II.25/2009/5.
12 | Dávid, 2011, p. 38.
13 | Farber, 2020, p. 834.

mentioning that all US states grant medical exemptions; 45 states and Washington DC grant religious exemptions, and 15 states also allow philosophical exemptions from vaccination.[14] Seemingly, courts have long recognised that states are not required to provide religious exemptions to vaccination mandates, although most of them do.[15]

3. COVID-19 vaccination in Hungary

As in other European countries, COVID-19 vaccination is not mandatory in Hungary. At first glance, COVID-19 vaccines are similar to seasonal influenza vaccines, which are not obligatory. However, there are two major differences. First, the influenza vaccine is not a social issue, neither on a political level nor in everyday conversation. Politicians do not campaign on influenza vaccines, and people do not argue over being vaccinated against the flu. By contrast, politicians run massive pro-COVID-19 vaccine campaigns, leading to crucial disagreements between vaccine optimists and vaccine hesitants. Unlike with influenza vaccination, questions about COVID-19 vaccination have the potential to break up social groups, communities, and friendships.

Second, vaccination for influenza has no impact on social life. People can go to restaurants and movies and can travel irrespective of whether they are vaccinated. COVID-19 vaccination is very different. The government has issued vaccination cards for those who received the first dose of any among the nationally recognised vaccines (Pfizer-BioNtech, Moderna, Astra Zeneca, Janssen, Sputnik, and Sinopharm) or if they have been infected with COVID-19. In the latter case, the vaccination card expires in six months; otherwise, the card has no expiry date.[16]

For a long time, having a social life was impossible without a vaccination card. Entry to sports facilities, indoor restaurants, hotels, and social events were subject to vaccination status. These have led to semi-mandatory COVID-19 vaccination: The vaccine is officially voluntary but is practically required for social life. The situation changed in June 2021. After the number of vaccinated individuals in Hungary increased to 5.5 million, the government reduced the number of events for which vaccination is required. Many say that this is a turning point; life is getting easier and the vaccination ID has less relevance. However, I am not optimistic. If another COVID-19 wave hits, vaccination ID may become important again. On the other hand, the mere fact that there are fewer places where a vaccination ID is necessary does not mean that there is no need for constitutional evaluation.

In the following, I examine whether legislation can mandate COVID-19 vaccines and whether there are constitutional criteria for vaccination cards.

14 | Gostin, Salmon, and Larson, 2021, p. 532.
15 | Killmond, 2017, p. 913.
16 | This paper does not address the problem that national and EU approvals of vaccines vary; the EU does not acknowledge all vaccines that have national approval (e.g. Sputnik). Therefore, it is entirely possible that someone is vaccinated in Hungary but is not the beneficiary of the full range of vaccines granted approval in other countries. It further complicates the matter that, especially in the early phase of vaccination, people could not decide which vaccine to take.

4. Constitutional issues regarding mandatory vaccination

As mentioned, numerous vaccines are mandatory for children of certain ages. A small number of parents occasionally object to their children being vaccinated, mostly on religious or philosophical grounds.

The most well-known Hungarian case dates back to 1995. The parents in question failed to comply with the vaccination protocol, which led administrative agencies to impose a fine and order the parents to have the child vaccinated. The parents challenged the administrative decision in court, but the court rejected the petition. As pointed out by the court, under the Constitution, everyone has the right to freedom of thought, freedom of conscience, and freedom of religion; however, unless it is otherwise ordered by law, exercising these rights does not create grounds for exemption from the duties of citizens.

The parents challenged the court decision in the Constitutional Court. The court decided on the case in 2007, almost 10 years after the constitutional complaint was filed (when child vaccination was practically out of the question). The decision (39/2007 [VI. 20]) proved to be a landmark decision. The Constitutional Court examined whether people can refuse obligatory vaccination by referring to their freedom of conscience. The Court argued as follows:

> In constitutional democracies it is a frequently debated issue whether citizens may be exempt from statutes that prescribe general obligations based on their conscience and their religious beliefs. (...) When considering the proportionality of the restriction of a fundamental right in this type of regulation, the Constitutional Court applies a different, so-called 'comparative test of burdens' for those whose conscience and religious freedoms are also violated by the regulations. On the one hand, one should take into consideration the basic principle of a state under the rule of law which says that everybody has rights and obligations in the same legal system, and therefore the statutes apply to all in such a way that the law treats everybody as equals (as individuals with equal dignity). On the other hand, it should not be ignored that the fundamental values of a constitutional democracy include a diversity of political opinion and also the freedom and autonomy of individuals and their communities. Therefore, it may not be established as a general rule that the freedom of conscience and religion should always be an exception from the laws that apply to all, and likewise, the rule of laws may not be declared fully applicable to the internal life of a religious community.

The Court also considered

> the circumstance that some of those who refuse compulsory vaccination for religious reasons or because of their conscience do not disapprove of vaccinations as a whole; they usually only object to vaccines of a certain composition (quite similarly to condemning blood transfusion). If there are several types of vaccines available, there is an opportunity to provide 'alternative rules of conduct within reasonable limits' by applying vaccines of different compositions.

As a consequence, the law should combine legislative purpose and freedom of conscience, and it should support alternative behaviour that results in the same outcome and is also in accordance with conscience.

In constitutional terms, the key element is a comparative test of burdens. The first step is examining the connection between conscience and the activity in question: The closer the connection, the more reasonable it is to make an exception to the general rule. Second, it is also necessary to examine the extent to which the activity influences others: The greater the influence, the less reasonable it is to make exceptions. In terms of freedom of religion, the comparative burden test is as follows: The law may legitimately aim to restrict certain religious activities; on the other hand, religion may provide exemptions from general rules under certain conditions. There are two key issues: the extent to which the behaviour is linked to conscience (the more strongly they are linked, the more likely it will result in an exemption) and how it pertains to third parties (the more it influences others, the lower the likelihood that it will result in an exemption).[17]

5. Comparative test of burdens and COVID-19 vaccination

It seems to be important to examine how COVID-19 vaccination relates, in a constitutional sense, to child vaccinations – in other words, whether the 39/2007 (VI. 20) decision helps in evaluating the current situation.

One important distinction is that vaccine hesitancy is much less prevalent in cases of child vaccination. No social issue is triggered if only approximately five or six parents annually seek to avoid vaccines. A few exemptions do not risk herd immunity; an epidemic does not result if a few children are not vaccinated. However, if one-third of the population is vaccine-hesitant and is not willing to get vaccinated, herd immunity may be at risk.[18]

Moreover, COVID-19 vaccination is a significant social topic: Most people have a strong (either positive or negative) opinion on vaccination and on those who are not vaccinated. This impact is not only emotional but is also practical. For instance, if vaccination status is a condition of entry to a restaurant and someone in a company of friends does not have a vaccination ID, either the whole company will be excluded from the restaurant or the group will leave the non-vaccinated members behind.

The social relevance of COVID-19 vaccination brings us close to it being mandatory. Many vaccines for children are mandatory, while there are also voluntary vaccinations

17 | The Constitutional Court used the comparative test of burdens twice (the second one was in 2009), and neither occurred under the current constitution (Fundamental Law). Still, I presume the test is still applicable. Decision 3049/2020 (III. 2.) CC had a very similar outcome, without mentioning the test. That decision examined the connection between loud religious activity and the private lives of others. The neighbours of a Muslim individual referred to their privacy when speaking against his loud prayers. In that case, the court of first instance concluded that, although freedom of religion covers prayers and singing, such activities must be balanced with the privacy of others. This latter covers a decent private life and the sanctity of the home. The Constitutional Court accepted the position and stated that the court decision was in accordance with the constitutional provision on freedom of religion. The Court added that it is necessary to balance the competing interests case by case.

18 | I do not have reliable data on the rate of vaccine hesitancy in Hungary. Surveys estimate between 16 and 30% of the population, which is a big difference. By now, anyone who wants a vaccine receives one, and the vaccinated population has increased to 5.5 million. Considering that 8.35 million people in Hungary are above 15 (the age group for whom vaccine availability is highest), 35% of all people in Hungary above 15 have not received the vaccine. In any case, the COVID-19 vaccination rate is far from providing herd immunity.

(e.g. varicella, croup). At first glance, one may say that mandatory vaccination does have constitutional criteria, but voluntary vaccination is a mere medical issue, and has nothing to do with fundamental rights. I acknowledge that, in most cases, voluntary vaccination is out of the scope of the constitution. However, if vaccination is a condition for participation in social life, it becomes a legal issue. Therefore, I conclude that COVID-19 vaccination is semi-mandatory in Hungary, as described above. In particular, the sanctions (the consequences of not being vaccinated) are almost as grave as they are in the case of mandatory vaccination. The most basic consequence of not complying with mandatory vaccination is that it may, in special cases, lead to a criminal issue. By contrast, the lack of a COVID-19 vaccine has non-legal but very significant consequences.

One of the most significant differences is that COVID-19 vaccination is based on self-determination, while child vaccination is not. Children cannot decide on their own vaccinations; it is all up to the parents. It is not to underestimate parental rights to say that vaccination concerns the individual more. Therefore, when legislation declares a vaccination to be mandatory, stronger arguments are needed to restrict self-determination. In other words, there are stronger reasons to be exempt if I am deciding on my own body than there are when the decision concerns someone else.

A crucial question might be whether COVID-19 vaccination has an impact on others. In this context, constitutional law must rely on medical science, and medical doctors are obviously very cautious when making statements on the coronavirus and COVID-19 vaccines. The question is whether vaccination reduces only symptoms or reduces the possibility of transmitting the disease.

Finally, it is also important to consider if the regulation allows for alternative behaviour. Child vaccines are generally substitutable. Parents may, at their own expense, replace a vaccine with another that they believe is more suitable. By contrast, a vaccination ID is granted for COVID-19 vaccination or for a documented infection with the virus. However, alternative behaviour is not possible in this case: Negative PCR or antigen tests do not grant a vaccination ID. The main differences are summarised in the chart below.

	Child vaccination (as decided by 39/2007 CC)	COVID-19 vaccination
Social relevance	Little	Great
Mandatory nature	Mandatory	Voluntary
Consequence	Mostly administrative sanctions (fines)	Exclusion from social life
Self-determination	No	Yes
Freedom of conscience	Yes	Yes
Effect on others	???	???
Alternative behaviour	Yes	No

6. Testing COVID-19 vaccination on comparative test of burdens

The comparative test of burdens has two components: First, it tests the extent to which the behaviour required by law is linked to conscience; second, it tests how the behaviour affects others.

As regards the first element, the law faces difficulties. One cannot determine others' conscience; therefore, it is difficult to evaluate the link between behaviour and conscience.[19] The law can only make educated guesses.

Here, the link with conscience seems strong, as vaccination constitutes a physical intervention in a person's body. It is also important to determine the rationale of the debate over vaccination. People are likely to decide rationally if there is an honest debate based on the medical background, the effects and possible side effects, and the advantages and disadvantages of vaccines. However, if there is a massive campaign that targets emotions and criticises everyone who has a different opinion, then people are more likely to be irrational and emotional, or even turn to conspiracy theories.

The second element of the test is how it relates to others. The key question here is whether vaccination reduces transmission of the virus. If it does, then the impact on third parties is significant: Vaccinated people cannot transmit the virus, which means that the spread of the disease is slower. Contrariwise, if vaccines only diminish the symptoms but do not prevent transmission, vaccination does not affect third parties. Indeed, vaccination seems to have an effect on the individual, as non-vaccinated people are more likely to require medical help, which increases the workload on doctors and the healthcare system. However, many other behaviours that pose a health risk (e.g. smoking, heavy drinking, extreme sports) are legal. Consequently, if vaccination does not prevent transmission, then the personal decision does not affect others. Therefore, there is a good reason to allow exemptions from the general rule.

Promoting public health and protecting against diseases are legitimate and constitutionally acknowledged purposes. Vaccination might be a tool for achieving these, but it must not become the purpose itself. If other tools are available, then the regulation should accept them in cases where they fit the individual's conscience better. Goldner Lang arrived at a similar conclusion from an EU law perspective. She argued that

> EU vaccination certificates, where only the proof of vaccination would enable individuals to travel across the EU, are non-compliant with EU law, both at the time when there are insufficient vaccines and later on, when they become widely available. This is due to their discriminatory effect on certain categories of Union citizens and, possibly, even on certain EU nationalities during the time when they are scarce. By contrast, digital green passes have a wider scope and could avoid the shortcomings of vaccination certificates, but only once vaccines become widely available and only provided vaccination actually prevents or minimises the chances of transmission of the coronavirus.[20]

19 | According to the Bible, at the end of human history, no one will be able to buy or sell unless they have the mark of the Beast (Rev 13:17.). Christians may find it suspicious when economic activity is linked to a certain mark.
20 | Goldner Lang, 2021.

How can this be converted into constitutional law? To maintain public health, there is a rationale for knowing who is and who is not infected with the virus. Put simply, one may categorise the population into 'sick' and 'healthy' groups. Let us accept the medical standpoint that those who are vaccinated or have previously been infected with the virus have immunity (i.e. they are 'healthy'). However, negative PCR tests or antigen tests show that the bearer does not belong to the 'sick' group, which logically means that they are 'healthy'. Still, the regulation requires the verification of 'healthy' status; being 'not sick' is not enough. I find it a constitutional deficit that vaccination IDs cannot be replaced by other tools with the same purpose.

7. Can COVID-19 vaccination be mandatory?

Mandatory vaccinations always restrict fundamental rights: They limit privacy rights and medical self-determination. Therefore, mandatory vaccinations can be constitutional only if they meet the criteria required for such restriction: The restriction must serve a legitimate purpose, and it must be necessary and proportionate to the aim. Promoting public health and reducing the effects of COVID-19 have been constitutionally acknowledged. The question of whether vaccination is necessary is an entirely medical issue. Constitutional law must rely on medical views and should accept that vaccination is necessary for immunity. Mandatory vaccination is proportionate if the regulation grants exemptions. The extent to which the law should consider medical, religious, or philosophical reasons as exemptions is a further matter of debate. Consequently, I find that there is no constitutional obstacle to mandating COVID-19 vaccination.

What the social effects of compulsory vaccination might be is a different issue. In Israel, which considered mandatory vaccination, the mere suggestion of a law banning unvaccinated health care and education sector employers from entering the workplace resulted in increased distrust among individuals who were already concerned about infringements on citizens' rights.[21]

Opel et al. examined whether COVID-19 vaccination should be mandatory for children and established the following criteria:

- Vaccine-related: The vaccine is safe and has an acceptable level of adverse effects; the vaccine is effective and increases safety in the school environment.
- Disease-related: The vaccine prevents diseases with significant morbidity and/or mortality and reduces the risk of transmission;
- Implementation-related: The vaccine is acceptable to the medical community, the administrative burdens are reasonable, and the burden of adherence is reasonable for the parent/caregiver.[22]

However, COVID-19 vaccination is currently *not* mandatory. This fact does not imply that there are no constitutional frameworks for vaccination. Under the current regulation, the question is not whether the law can mandate COVID-19 vaccination (such a question was not put officially) but, rather, whether the law can require vaccination as a condition

21 | Wilf-Miron, Myers, and Saban, 2021, pp. 1503–1504.
22 | Opel, Diekema, and Friedman Ross, 2021, pp. 125–126.

of entry to particular events. For example, just because vaccination might be required for concerts and cinemas, it does not mean that it can also be required for fishing and playing tennis. Constitutional evaluations must be implemented individually in each case.

8. Conclusion

During a pandemic, it is incredibly difficult to estimate danger and evaluate our options correctly. The experience of the past 18 months shows that countries are prone to over- or underestimating the danger, which is perfectly understandable, as a pandemic had not occurred for generations. Defeating the coronavirus and reducing its impact are important objectives for states.

In the second half of 2020, the possibility of having access to vaccination gave new hope to societies; however, the general optimism was tempered by some scepticism and hesitancy. The reason for hesitancy was often freedom of conscience; either the vaccination itself or the manner of its promotion conflicted with psychological or religious considerations. This study examined how law and society should reflect on conscience-based vaccine hesitancy.

I conclude that COVID-19 vaccination can be made compulsory constitutionally under certain conditions. The regulations should meet a comparative test of burdens. The vaccine should be medically satisfactory and efficient in reducing the effects of the virus *and* minimising person-to-person transmission. This latter criterion is crucial: If vaccination does not reduce transmission, COVID-19 is a merely individual risk and not a social issue. The law should also grant possibilities for alternative behaviour that results in the same outcome, which is the verification of infection-free status. Finally, the regulation must provide an opportunity for exemptions in cases where the obligation to vaccinate would be disproportionate.

Vaccination is semi-mandatory in Hungary; there is no formal obligation to get vaccinated, but several areas of social life are linked to a vaccination ID. The list is changing. It was an extremely long list in early 2021; it was shortened in the summer, but it is uncertain how it will change in the autumn. Nevertheless, vaccine equity is much more important than vaccine passports.[23] As Harrison and Wu point out

> once this epidemic has fallen into historical memory, the development of the vaccine for COVID-19 should not be the indicator of a successful response, nor should it indicate the achievement of an improved health system. Vaccine confidence may be a better indicator.[24]

Vaccine confidence plays a significant role in convincing people to receive the vaccination. Political marketing and vaccination mandates do not convince people; they may even induce scepticism. Honest debates and social discussion are required. Society would be better served if people had honest discussions on the advantages and disadvantages of vaccination, accepting each other's standpoints, respecting different views, and the individual conscience.

23 | Tanner and Flood, 2021.
24 | Harrison and Wu, 2021, p. 328.

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LEGAL DEVELOPMENT OF NON-MARITAL UNION IN CROATIA

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ABSTRACT

Legal development of non-marital union in Croatia went through different phases – from modest family law effects (property rights and the right to maintenance) in late seventies of the twentieth century to equating non-marital union with marriage nowadays, except the establishment of fatherhood and gaining common family name.

In the Family Act (2015) non-marital union refers to a life union between an unmarried woman and an unmarried man that has lasted for at least three years or for a shorter duration if a common child has been born therein or has been continued by entering a marriage.

The author underlines the problem of legal uncertainty that arises from the fact that non-marital union is informal and that preconditions for non-marital union effects are different in different legal branches. Overall, legal regulation of non-marital union in Croatia is inconsistent due to particular legal solutions.

KEYWORDS

Croatian family law
non-marital union
non-marital spouses
cohabitation
children born out of wedlock

1. Introduction

All historical periods have been witness to informal life unions, which continue to take place today. Sometimes, they resulted from the inability to enter into marriage; at other times, they reflected women's weaker position when a man did not want to marry for various reasons. In modern times, they have tended to become a sort of lifestyle in many states.

Historical and social approaches differ depending on the legal effects of such unions. In modern times, fewer and fewer marriages are being concluded in the European states, while an increasing number of couples are deciding to live in a non-marital union

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(cohabitation). This trend is also seen in the Republic of Croatia, although marriage is still the main form of life union in which a vast number of children are born. However, the number of marriages entered into is declining, with the marriage rate in 2020 at 3.8 per 1,000 residents.[2] As opposed to the number of marriages entered into, which is easy to track, the number of established non-marital unions can be obtained only by means of a population census, which is implemented every ten years.

According to the most recent population census conducted in 2011,[3] there were 959.487 couples living in marriage and 48.886 couples in non-marital union (out of the total number of heterosexual family unions, 95% of them constituted marital unions, whereas 5% were non-marital unions).

Based on the number of children born out of wedlock, one may draw an indirect conclusion about the larger representation of non-marital unions as a family form. In 2011, 14% of children were born out of wedlock (rose to 20.7% in 2020),[4] but there is no data on how many of those parents live together in family unions.

Developments in the legal approach towards non-marital unions in the Republic of Croatia ranged from denying any effects and recognising limited effects only between non-marital spouses to completely equating non-marital union to marriage. The developments were specific since non-marital union has always been an informal relationship- , and the recognition of the effects has been dependent on the fact which legal effects of non-marital union need to be recognised.

Since the introduction of the institution of non-marital union into the Croatian family law in 1978, the effects of non-marital unions have been almost entirely equated to those of marriage, not only in family law, but also in other legal fields.

2. Historical overview of legal regulation of non-marital union

2.1. Period before legal regulation

During the socialist Yugoslavia after the Second World War (Federative People's Republic of Yugoslavia and Socialist Federative Republic of Yugoslavia), courts did not recognise the effects of non-marital unions, which were deemed immoral by society.[5] The legal approach also changed gradually to prevent exploitation of the weaker side, which regularly happened to be women, after the termination of a non-marital union.

In 1954, the Federal Supreme Court issued an instruction according to which non-marital spouses were not eligible for rights such as mutual maintenance and inheritance. On the other hand, for non-marital spouses who had lived in a more durable union similar

2 | *Natural Change In Population In The Republic Of Croatia, 2020, First release.* Available at: https://www.dzs.hr/Hrv_Eng/publication/2021/07-01-01_01_2021.htm (Accessed: 25 August 2021).

3 | Population and Housing Census. Available at: https://www.dzs.hr/hrv/censuses/census2011/censuslogo.htm
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4 | Statistical Information, Zagreb, 2020, p. 20. Available at: https://www.dzs.hr/Hrv_Eng/StatInfo/pdf/StatInfo2020.pdf (Accessed: 1 September 2021).

5 | Non-marital union is nevertheless not unknown to some Croatian regions, e.g., Slavonia, in the form of a 'probationary marriage'. Since it was of essence to make sure there is an heir to the estate, marriage was entered into only after it was certain that the woman would give birth and thereby guarantee an heir to family property.

to marriage, the effects of such a union were to be recognised if it had given rise to parties' considerable property interests. The instruction ordained that property disputes were to be resolved by applying general rules of property law: on acquisition of ownership and other rights in rem, such as *condictio sine causa* and *societas*.[6]

> Not only did the instruction deal with a problem for which there was absolutely no solution in positive law then in force, but it also served as a basis for a further evolution of the case-law and subsequent legislative intervention.[7]

The application of general civil law (*societas* and *condictio sine causa*) to property relations of non-marital spouses remains important even today in cases pertaining to property relationships between a woman and a man, where their life union does not meet the conditions for non-marital union required by the law. This paper will deal only with heterosexual non-marital unions since a different legal term is used in Croatian law for same-sex life unions, namely the one of life partnerships.

2.2. Development of legal regulation

It was the Act on Marriage and Family Relations of the Republic of Croatia[8] of 1978 that first introduced in family law the institution of *non-marital union*, which it defined as a life union between a woman and man lasting for a prolonged period and producing maintenance effects and effects of acquiring joint property, just like marital union (Art. 7, 254 and 293).[9]

Thus, the law considered non-marital union to be a form of inter-personal status[10] for which an informal life union was sufficient, while the essential features thereof were heterosexuality, monogamy, and durability. The last category was determined as a legal standard, and it was up to courts to ascertain, based on the circumstances of a particular case, whether a relationship displayed the elements of durability. Although it enabled individualisation, such an approach led to similar cases being treated differently, which was considered a downside.

In the same year, the Civil Obligations Act[11] provided that the statute of limitations shall not run between two persons as long as they live in a non-marital union (Art. 381, para. 4), and that a non-marital spouse was entitled to compensation in case of death of their spouse, provided that there was a more permanent non-marital cohabitation between them and the deceased or injured person (Art. 201, para. 4).

6 | *Cf.* Draškić, 1988, pp. 140–163.
7 | Draškić, 2015, p. 136.
8 | The Act on Marriage and Family Relations, Official Gazette Nos. 11/78, 27/78, 45/89, 51/89 – official consolidated version, 59/90, 25/94, 162/98.
9 | Yet, non-marital union as a legal term has been introduced into the legal system a little earlier, namely by virtue of the Housing Relations Act. The provision of Art. 9, para. 4 covered persons permanently living in a non-marital union, if such a union may be equated to marriage. Housing Relations Act of SR Croatia, Official Gazette No. 52/74.
10 | For more see: Bradley, 2001, p. 33, footnote 38, *cited by* Kovaček-Stanić, 2014, p. 185.
11 | Zakon o obveznim odnosima (The Civil Obligations Act), SFRY Official Gazette, No. 29/78.

In 1990, the Constitution of the Republic of Croatia[12] elevated the institution of non-marital union to the level of 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).

The first family law regulation of independent and post-transitional Croatia,[13] which was enacted in 1998, introduced only minor amendments to the definition of non-marital union to highlight the principle of monogamy: in order for non-marital union to produce legal effects, neither the woman nor the man in such a relationship were permitted to be simultaneously in a wedlock (Art. 3). Legal effects remained the same: property relations and maintenance.

Five years later, prompted by calls to harmonise the case law, the new Family Act introduced the duration of non-marital union as three years or less if a common child had been born therein (Art. 3 of the Family Act 2003). Family law effects remained limited to mutual maintenance and property relations and did not entail the possibility of adopting children. Marriage was still the preferred form of union in this regulation as well as in the new legislative period.[14]

The Family Act retained limited family law effects, but non-marital unions became an institution and started producing legal effects not only between non-marital spouses, but also in other legal fields. Thus, the Inheritance Act,[15] adopted the same year, included non-marital spouses in the circle of statutory heirs who were first-degree relatives, but set forth the conditions for non-marital union differently, that is, the life union should have lasted for a prolonged period and the preconditions for marriage validity should have been met. Newly enacted regulations caused a disagreement as to what conditions non-marital unions had to meet in order for a non-marital spouse to have the status of a statutory heir. *Lex posterior* and *lex specialis* arguments were drawn upon in the discussion in favour of applying the definition in the Family Act to other legal fields as well,[16]but the case law is still not uniform even at the level of the Supreme Court[17] given the element of duration of non-marital union present in these two regulations, which may find expression in cases where preconditions for marriage validity would not be met.

12 | Ustav Republike Hrvatske (Constitution of the Republic of Croatia), Official Gazette Nos. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10 and 05/14.

13 | Obiteljski zakon (The Family Act), Official Gazette, Nos. 162/98 and 116/03.

14 | A traditional approach to family, which favoured marriage as a form of living together, appears also in the Discrimination Prevention Act (2008) according to which '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 children, to be justified by a legitimate purpose, protection of public morale, as well favouring of marriage pursuant to the provision of the Family act' shall not be regarded as discrimination (Art. 9, para. 2[10]). Already in 2012 that protection was weakened due to a requirement made to the effect that the applied means had to be appropriate and necessary. Zakon o suzbijanju diskriminacije (The Anti-discrimination Act, Official Gazette) Nos. 85/08 and 112/12.

15 | Zakon o nasljeđivanju (The Inheritance Act), Official Gazette Nos. 48/03, 163/03, 35/05, 127/13, 33/15 and 14/19.

16 | See to that effect, Hrabar, 2003, p. 77. For a contrary view, see Crnić, 2003, p. 249.

17 | Decision of the Supreme Court of the Republic of Croatia No. Rev 783/2010-2 of 25 July 2012 referred to the three-year period provided by the Family Act as a criterion for the legal standard for 'prolonged period'. On the other hand, in an earlier decision (No. Rev 796/2008-2 of 27 January 2010), the Supreme Court of the Republic of Croatia indicated that the notion of non-marital union from the Family Act was not to be applied in other relations not regulated by the Family Act.

The necessity to protect families of persons disabled in war or peacetime led in 1992 to the inclusion of non-marital spouses in the circle of family members of veterans disabled in war or peacetime or civil persons disabled in wartime, giving them certain rights if they had lived for at least one year in a common household prior to the death of the non-marital spouse or if they had a common child.[18]

In 2004, the legal system went on to protect non-marital spouses of Croatian veterans of the Homeland War in the matter of veterans' family pensions. The condition was that prior to death, detention, or disappearance of a veteran, they had lived with their partner in a common household for at least three years. To prevent abuse, the Act provided that the existence of non-marital unions is to be established in a non-contentious procedure (Art. 6, paras. 2 and 3 of the Act on Rights of Croatian Veterans from the Homeland War and their Families).[19]

After recognising the right of a non-marital spouse to veterans' family pension, the Constitutional Court emphasised the unconstitutionality of the pension insurance scheme and stated the following:

> Family in the Republic of Croatia is under a special protection of the State and thus represents a protected constitutional domain. On the other hand, marriage and non-marital union are unions recognized by the Constitution. As regards family, the Constitution does not differentiate between marital and non-marital union. Both types of unions are recognized by the Constitution and both are regulated by the law. Building on Article 61 of the Constitution which recognizes two types of family union (marital and non-marital one) and taking into account legal nature and purpose of family pension in the pension insurance scheme (see point 1 of this Report), the Constitutional Court finds that ZOMO [the act governing pension insurance] should also regulate the conditions for entitling not only marital widow(er)s, but also non-marital widow(er)s to family pension.[20]

The ruling was followed by a period marked by recognition of the effects of non-marital unions in other legal fields (non-marital spouses have become beneficiaries of medically assisted procreation, they have entered the circle of persons covered by the law dealing with family violence, etc.). Finally, by virtue of an amendment added and accepted on the very day of voting that happened without a public debate, the Family Act 2014, in principle, equated informal non-marital union to marriage with regard to all the effects. The right of non-marital spouses to jointly adopt a child was explicitly introduced.

The only legal branch that differed in the treatment of non-marital spouses was tax legislation, which did not grant tax exemptions for property contracts or inheritance. After the decision of the Constitutional Court, tax legislation was changed in favour of

18 | Zakon o zaštiti vojnih i civilnih invalida rada (The Act on Protection of Disabled Veterans and Civil Persons Disabled in Wartime) Official Gazette Nos. 33/92, 57/92, 77/92, 86/92 – official consolidated version, 27/93, 58/93, 2/94, 76/94, 108/95, 108/96, 82/01, 94/01, 103/03, 148/13 and 98/19.

19 | Zakon o pravima hrvatskih branitelja iz Domovinskog rata i njihovih obitelji (The Act on Rights of Croatian Veterans from Homeland War and of Their Families) Official Gazette Nos. 174/04, 92/05, 2/07, 107/07, 65/09, 137/09, 146/10, 55/11, 140/12, 19/13 – official consolidated version, 33/13, 148/13, 92/14 and 121/17.

20 | Report on Detected Unconstitutionality within Pension Insurance Scheme No.: U-X-1457/2007; Zagreb, 18 April 2007. Available at: https://zakon.poslovna.hr/public/izvjesce-o-uocenoj-pojavi-neustavnosti-u-sustavu-mirovinskog-osiguranja/417094/zakoni.aspx. (Accessed 19 August 2021)

non-marital spouses. The Constitutional Court highlighted the fact that non-marital and marital spouses were not treated in the same way by the tax law:

> It is impossible for the Constitutional Court to continue accepting the administrative practice and the case-law consisting of a restrictive and mechanical interpretation of the notion "marital spouse" when applying the Act on Real Estate Transfer Tax. The Constitutional Court finds no objective and reasonable justification for the difference in treatment towards the applicant as a non-marital spouse when applying the provisions on tax exemption from payment of real estate transfer tax.[21]

3. Non-marital union in modern-day Croatian legislation

3.1. Family law effects

According to the Family Act of 2015, which was in force at the time of the writing of this paper,[22] non-marital union refers to a life union between an unmarried woman and an unmarried man (principle of monogamy and heterosexuality) that has lasted for at least three years or for a shorter duration if a common child has been born therein or has been continued by entering into a marriage (Art. 11, para. 1).

The novelty lies in the determination that a non-marital union may last for less than the specified duration if it was continued by entering into a marriage, which implies adhering to the case-law wherein it was construed that even in a short-term non-marital union, there is property continuity if the relationship was consolidated through marriage, which is a 'stronger' institution in terms of status.[23] Non-marital union is equated to marital union so as to

21 | Decision of the Constitutional Court of the Republic of Croatia, No. U-III/3034/2012 of 21 February 2017. *Cited by* Lucić, 2020, p. 194.

22 | Obiteljski zakon (The Family Act), Official Gazette, Nos. 103/15, 98/19 and 47/20. This regulation replaced the Family Act, Official Gazette Nos 75/14, 05/15, 103/15, which was suspended by the Constitutional Court of the Republic of Croatia, but which contained identical provisions pertaining to non-marital union.

23 | When applying the Family Act from 2003 in its decision in 2012, the Supreme Court took the position that the property of a non-marital spouse that existed before the formation of a non-marital union represents a unique continuity of property after entering into marriage, even if the non-marital union has not lasted for at least three years or a common child has not been born therein. At issue was the case of a famous athlete who first lived in a non-marital union, which was continued after less than three years by a marriage in which a child was born shortly after it had been entered into. During the non-marital union, the man concluded an exceptionally valuable sports contract. Interestingly enough, the Supreme Court pointed out in the statement of grounds that the quality of parties' union was improved. 'In the case at hand at issue is the non-marital union of the parties which changed its form after less than three years by entering into a marriage of the parties in which their common child was born. In light of the continuity of the parties' union, and in particular of the improvement of its quality (in relation to the legal status), this court concludes that it must be held that the continuity of (non-)matrimonial property belonging first to non-marital and thereafter to marital spouses is present here'.
Rev 1364/10-2, Supreme Court of the Republic of Croatia.
For an anticipated possibility of such an approach see Korać u Alinčić et al., 2007, p. 523, and for an anticipated criticism invoking protection of the principle of legality see Hrabar, 2010, pp. 43–46.

> produce personal and property effects like a marital union and provisions of this Act governing personal and property relations of marital spouses, i.e. provisions of other acts governing relations in tax matters as well as personal, property and other relations of marital spouses apply *mutatis mutandis* thereto (Art. 11, para. 2).

Moreover, family regulation repealed the Anti-discrimination Act in light of its disadvantageous treatment of non-marital spouses in terms of access to benefits, privileges, and other assistances guaranteed to marital spouses, which cannot be justified by objective reasons and represents discrimination on the grounds of family status (Art. 11, para. 3.). Nevertheless, the inability of non-marital spouses to change the family name does not represent disadvantageous treatment (Art. 11, para. 4).

This provision represented a firm expression of the political will to have the effects of non-marital union equated to those of marriage, which is why a provision to that effect was introduced into family law regulation. Admittedly, it should be pointed out that at that moment, it had already produced legal effects in the majority of legal fields, save for real estate transfer taxation (see *infra*). In line with these trends, non-marital spouses have also been enabled to jointly adopt a child (Art. 185).[24]

In summary, the non-marital union of a man and a woman produces similar family law effects as those pertaining to the personal rights and duties of marital spouses, including the possibility of adoption, maintenance during and after the termination of a non-marital union, and property effects.

It does not produce legal effects at the time of its formation, but rather with the passage of time or by virtue of materialised facts that are legally relevant (birth of a child or entry into a marriage). 'Therefore, non-marital union is characterised by its suspensive character'.[25]

Thus, in property relations, for example, there will be retroactive effects for the period prior to the lapse of the three-year period, birth of a child, or entry into marriage, which means that non-marital spouses who want to avoid such consequences should conclude a prenuptial agreement, i.e., an agreement on property relations.

As for parental care, there has been no change to the rights and duties of parents of a child born out of wedlock, because since 1978, parents have had the same rights and duties with respect to their child, regardless of whether the child had been born in or out of wedlock. The father of the child born out of wedlock may be determined by recognition or a judicial decision (Art. 60 and further). When parents live in a non-marital union, the involved male may recognize the child when the birth of the child is reported, and he is going to be determined as a father upon the mother's consent.

According to the law, parents are obliged to exercise parental care jointly, on an equal footing, and by agreement (Art. 103, para 1). In case of termination of a non-marital union, parents may continue to exercise parental care, but it is up to the good will of parents to

24 | From a historical point of view, there has existed an unabated resistance to enabling a non-marital spouse to adopt a child. Arguments that there was no procedure similar to divorce procedure within which children's rights could be protected in case of termination of non-marital union have been brought forward in support of the limitation. More recently, an objection was raised to the effect that opening the floodgates to adoption by non-marital spouses may also give rise to successful claims of the same rights by same-sex couples, which appears dubious in light of the best interests of the child.

25 | Hrabar, 2010, p. 46.

freely agree on the manner and frequency of maintaining contact with the child and on the maintenance amount. Such a state of affairs may be a reflection of either particularly good relations between parents (which is a rare occurrence) or ignorance, i.e., the inability of one of the parents to institute proceedings leading to a clear legal situation as regards the exercise of parental care.

The child as well the parents will be better protected if the parents adopt a plan on joint parental care,[26] which has to be approved by a court in a non-contentious court proceeding to be enforceable (Art. 107). Should they fail to reach an agreement, it is possible to initiate proceedings regarding parental care, personal relations of the child with the parents, and maintenance of the child (Art. 408–422 of the Family Act 2015). A former non-marital spouse has the right to contact a child and *vice versa* just like any other person who has lived in a family with the child for a long time, when they have taken care of and developed an emotional relationship with the child (Art. 120, para. 2).

The same rules on the maintenance of marital spouses are applicable to the maintenance of non-marital spouses, including a mutual maintenance obligation during the period when they live in a non-marital union.[27] Non-marital spouses may regulate maintenance by agreement (Art. 302) or court proceedings. Should they fail to conclude an agreement and the non-marital union is terminated, application for maintenance is to be filed by a non-marital spouse within a period of six months after its termination (Art. 303 of the Family Act 2015). The issue of establishing the day on which a non-marital union was terminated remains open, considering its factual nature.

Maintenance is determined according to the needs of the maintenance beneficiary and the capabilities of the provider, while the maintenance obligation may last up to one year depending on the duration of the non-marital union and the possibility of the applicant providing other means of subsistence in the foreseeable time. In justified cases, courts may prolong the maintenance obligation, an application for which may be filed only until the expiry of the period for which the maintenance has been imposed (Art. 298 in connection with Art. 304 of the Family Act 2015). The legislature has not set a period by which the maintenance obligation may be prolonged, which is why this issue has been left to the discretion of case law. Like marital spouses, non-marital spouses are first called upon to maintain their partners (Art. 283, para. 2), but one must wait for the non-marital union to begin producing legal effects.

The property relations of non-marital spouses are regulated in the same way as those of marital spouses. By operation of law, non-marital spouses may have non-matrimonial property in which they co-own equal parts or they may regulate their relations through

26 | Pursuant to Art. 106. of the Family Act 2015, 'the plan on joint parental care is a written agreement of the parents on the manner in which joint parental care is to be exercised in the circumstances in which parents of the child do not live permanently in a family union', whereby they are to regulate in detail the place and address where the child is to live, time the child is to spend with each of the parents, mode of information exchange in relation to giving consent when making decisions essential for the child, exchange of important information in connection with the child, the maintenance amount as the obligation of the parent with whom the child does not live, as well as the manner in which future contentious issues are to be resolved. By virtue of the plan on joint parental care, parents may also regulate other issues pertaining to exercise of parental care they deem essential for the child.

27 | It is difficult to conceive a life situation in which one non-marital spouse sues the other for maintenance, while the non-marital union continues to exist despite disturbed relations between the spouses that led to the litigation.

a contract. It is not logical to expect persons who are not inclined to formalise their union by means of a marriage to conclude a contract governing property relations, but they are nevertheless left with that option as well. The freedom to dispose of and manage property in legal transactions is altered for a person in a non-marital union, which, due to its informal nature, still exhibits legal uncertainty in relation to the protection of third persons.

The speed at which the amendment equated the effects of non-marital union to those of marital union also brought about certain deficiencies. Thus, the legislature omitted to provide that non-marital spouses may not be in a registered life partnership as registered partnerships preclude entering into marriage.

There is no answer if somebody lives in multiple, parallel, and non-marital unions. Analogy in interpretation can hardly be derived from the principle of monogamy in marriage, as non-marital unions are not formalised.

The deficiency also consists of the fact that some provisions contain while others do not contain the syntagms *marital or non-marital spouse* in their wording. The consequence is that an employee of a social welfare centre and their marital or non-marital spouse may not conclude with a person placed under guardianship a contract to dispose of or encumber that person's property (Art. 261, para. 5), while only a marital spouse has been referred to in the same chapter on guardianship as the one having the obligation to inform the social welfare centre of the need to place a person under guardianship (Art. 273, para. 2/2).

Relations towards third persons, above all children, constitute a far greater problem. The legislature has clearly provided that stepfathers and stepmothers have rights as well as a maintenance responsibility towards stepchildren under certain conditions, but there is no such stipulation for non-marital spouses. It seems unfair that non-marital spouses are exempted from the obligation to maintain the child of their non-marital spouse, especially since the obligation of relatives by marriage has been introduced precisely in order to prevent evasion of payment for child maintenance by biological relatives. It is expected that case law will close these loopholes in favour of children.

3.2. The effects of non-marital union in the legal system

Based on their status, non-marital spouses have rights and obligations in the legal system just like marital spouses, although some differences exist in the determination of the notion of non-marital union and/or means of proof. Among the regulations recognising the effects of non-marital unions, some of them only mention the rights of non-marital spouses without defining non-marital unions, and others define non-marital unions, but give it a different connotation than the one in family regulation while only rarely referring to a family regulation; in addition to defining a non-marital union, some regulations provide the means to prove its existence.

According to the *Act on Protection Against Domestic Violence,*[28] family is within the meaning of that act constituted by a man and a woman in a non-marital union and encompasses either of their children and their common children (Art. 3[1]). There is no mention of any conditions other than a factual union, independent of the duration, which

28 | Zakon o zaštiti od nasilja u obitelji (Act on the Protection against Domestic Violence), Official Gazette, No. 137/09, 14/10, 60/10 and 70/17.

is clear in light of the act's purpose of protecting as many persons suffering from domestic violence as possible.

As mentioned above, the *Civil Obligations Act*[29] states that the statute of limitations shall not run between two persons as long as they live in a non-marital union (Art. 235) and entitles non-marital spouses to pecuniary compensation for non-material damage in case of death or severe disability of a close person. In order for non-marital spouses to acquire that right, it is necessary that a more lasting life union exists between them and the deceased non-marital spouse (Art. 1101, para. [2]). For the purpose of applying the Civil Obligations Act, the Supreme Court did not apply the definition of non-marital union under the Family Act.[30]

Pursuant to the *Penal Code*,[31] a non-marital spouse is deemed to be a family member, while within the meaning of the Penal Code, a non-marital spouse is a person living in a non-marital union that is of a durable character or one that lasts for a shorter period of time but a common child has been born therein (Art. 87 para. [10] of the Penal code). Certain offences become aggravated if they are committed in relation to non-marital spouses, who are under no obligation to report the planning or commission of a criminal offence. According to a penal law provision, which is perhaps the most important for non-marital union, an extramarital relationship between an adult and a child younger than 16 years constitutes a criminal offence, as is the enabling or inducement of children younger than 16 years to live in an extramarital relationship (Art. 170). This provision could and should impact the recognition of the effects of non-marital unions, as living in such non-marital unions is a criminal offence, and as such, contrary to *the* public order. The judge should consider the circumstances of a particular case and always bear in mind the best interests of the child, including the fact that child has lived or is living in a non-marital union.

Under the *Foreigners Act*,[32] a non-marital spouse is a family member entitled to seek temporary residence for the purpose of family reunification. This regulation refers to the definition of non-marital union in family regulation, while temporary residence for the purpose of family reunification is not permitted if a non-marital spouse has already entered into a marital union,[33] is in a long-lasting relationship with another person, or does not live in an actual marital or extramarital relationship (Art. 64 para. [1] and Art. 64 paras. [5] and [6]). Non-marital spouses are entitled to autonomous residences, but in any case, it has to be established whether non-marital spouses actually live in a non-marital relationship. In the case of non-marital unions based on self-interest (if it was entered into to circumvent conditions necessary for entry and residence of third-country

29 | Zakon o obveznim odnosima (The Civil Obligations Act, Official Gazette), Nos. 35/05, 41/08, 125/11, 78/15 and 29/18.

30 | Decision of the Supreme Court of the Republic of Croatia, Rev. No. 796/2008-2 of 2 January 2010. Available: https://www.iusinfo.hr/document?sopi=VSRH2008RevB796A2 (Accessed: 9 September 2021).

31 | Kazneni zakon (The Penal Code), Official Gazette, No. 125/11, 144/12, 56/15, 61/15 , 101/17, 118/18, 126/19 and 84/21.

32 | Zakon o strancima,(The Foreigners Act), Official Gazette No. 133/20.

33 | The notion of marital union designates factual substance of marriage and does not have to overlap *ratione temporis* with the marriage itself. It is therefore obvious that terminology was put to wrong use. The legislature should have respected the terminology and used the term marriage.

nationals), temporary or permanent residence shall not be granted for the purpose of family reunification (Art. 57, para. [2]).

According to the *Social Welfare Act,*[34] in the social welfare system, non-marital unions have the same effects as marriage and are determined as the life union of unmarried women and unmarried men who meet the conditions provided for by family regulation (Art. 4).

The *Inheritance Act*[35] contains in Art. 8, para. (2) a definition of non-marital union that differs from the one in the family regulation:

> By operation of law, a deceased person's property is to be inherited by his or her non-marital spouse, who is equated to a marital spouse in inheritance law. Within the meaning of this Act, non-marital union is deemed to be a life union of an unmarried woman and unmarried man, which has endured for a long period and was terminated by the deceased person's death, provided that preconditions required for the validity of marriage had been met.

Such preconditions may lead to a situation in which someone has the status of a non-marital spouse regarding property effects of non-marital union, while the right to inheritance has been denied due to the existence of a marriage impediment (for example, the fact that a person has been deprived of legal capacity without it being established whether the guardian has given consent to form a non-marital union[36]).

Furthermore, the *Inheritance Act* does not contain provisions on the means to prove the existence of non-marital unions. Since the inheritance procedure is first conducted before a notary public, it is easy for a person to represent herself or himself as a non-marital spouse and claim inheritance, while the notary public has no power of inquiry and can refer parties to judicial litigation only in case of opposition by an heir. In relation to this issue, different solutions have appeared in legal doctrines. First, in case a person in the inheritance procedure bases their right to inheritance on an extramarital relationship with the deceased person, they may demonstrate their capacity as a non-marital spouse in the proceedings before a notary public only by means of a final judgment adopted in a civil procedure, by virtue of which a court finds that the non-marital union had existed at the time of death of the deceased person.[37] According to a contrary view, the notary public should resort to litigation only in case of opposition by one of the heirs, i.e., when a dispute on the existence of a non-marital spouse arises.[38]

Although the provision on non-marital spouses being statutory heirs seems like a good solution for the protection of non-marital spouses, it has the potential of having the non-marital spouse imposed as the heir despite the will of the deceased person, since

34 | Zakon o socijalnoj skrbi (The Social Welfare Act), Official Gazette Nos. 157/13, 152/14, 99/15, 52/16, 16/17, 130/17, 98/19, 64/20 and 138/20.

35 | Zakon o nasljeđivanju (The Inheritance Act), Official Gazette Nos. 48/03, 163/03, 35/05, 127/13, 33/15 and 14/19.

36 | The situation is further complicated by the vague provision of Art. 258, Par. 5 of the Family Act according to which only a person placed under guardianship may give consent to enter into life union with persons of different sex. On the other hand, insofar as it concerns personal declaration of will, the consent of a guardian is required for a person deprived of legal capacity to enter into marriage, failing which a court may grant permission (Art. 26 para [2] and Art. 26 para [3] of the Family Act).

37 | *Cf v.* Josipović, 2003, p. 46.

38 | *Cf v.* Korać, 2003, p. 130 and Crnić, 2003, p. 249.

he or she was ranked a first-degree heir and accorded the status of a forced heir by the legislature (Art. 69, para. [1] in connection with Art. 8, para [2] of the Inheritance Act). This may particularly be an impediment for elderly persons who are against the new marital or non-marital spouse competing with children from the previous marriage.

The *Act on Medically Assisted Procreation*[39] provides that non-marital union refers to the union between a woman and man who do not live in a marriage or same-sex union and meet the conditions to enter into a valid marriage (Art. 11, para. [5]). It is not necessary to ascertain whether non-marital spouses are aware of the conditions for marriage validity under family regulation, which is why general rules dealing with false declarations remain applicable.

Non-marital spouses declare the existence of a non-marital union before the notary public, whose duty is only to certify their signature (Art. 11, para. [3]); prior to any procedure for medically assisted procreation, each beneficiary, even a non-marital spouse, is obliged to give written consent (Art. 14). In a non-marital union, prior to a procedure for medically assisted procreation, the man is obliged to give a certified declaration on being recognised as the father of the child that will be conceived in the procedure, whereas the woman is obliged to give a certified declaration of consent for the recognition of fatherhood of that child (Art. 16, para. [2]).

The *Act on Rights of Croatian Veterans from the Homeland War and of Members of Their Families*[40] provides that if non-marital spouses had lived with a Croatian veteran from the Homeland War in a common household until his or her death, detention, or disappearance, or had a child out of the non-marital union even if the cohabitation was for a short duration (members of the nuclear family), they can be regarded as a family member. The existence of non-marital unions is to be established in non-contentious court proceedings (Art. 17, para. [1], and Art. 17, para. [2]). By virtue of this regulation, non-marital spouses exercise a series of rights, such as health protection, housing, and rights from pension insurance (Art. 18).

The *Pension Insurance Act*[41] entitles non-marital spouses to family pensions if they had lived for at least three years in the same household prior to the death of the insured person or pension beneficiary; this regulation also requires that the status of non-marital unions be established in non-contentious court proceedings. It may be noted that this regulation does not encompass a person who has not lived with the insured for three years, even if they have a common child.[42] When applying this regulation, the case law extended the status of non-marital spouses to persons who had lived less than three years in a non-marital union prior to their partner's death, but there was continuity in the non-marital union in relation to divorced marriage due to debt evasion.[43]

39 | Zakon o medicinski pomognutoj oplodnji (The Act on Medically Assisted Procreation), Official Gazette No. 86/12.

40 | Zakon o pravima branitelja Domovinskog rata i njihovih članova obitelji (The Act on Rights of Croatian Veterans from Homeland War and of Members of Their Families), Official Gazette Nos. 121/17, 98/19 and 84/21.

41 | Zakon o mirovinskom osiguranju (The Pension Insurance Act), Official Gazette Nos. 157/13, 151/14, 33/15, 93/15, 120/16, 18/18, 62/18, 115/18, 102/19 and 84/21.

42 | *Cfv.* Lucić, 2020, p. 198.

43 | Decision of Zagreb District Court, No. Gž Ob1323/2019-1 of 17 December 2019, according to Lučić, ibid., p. 199.

The tax regulation[44] had long opposed the exemption of non-marital spouses from real estate transfer tax, and there is no mention of it in the wording of the act. In that field, the state had been persistently vigilant over its financial interests, and administrative courts had refused to exempt non-marital spouses from real estate taxes, since they relied on the argumentation that tax regulations that represent *ius cogens* are applicable to rights to exemption from taxation.[45] Only the Constitutional Court, in 2017, equated the effects of non-marital unions in tax regulations as well. The argumentation it relied on read as follows:

> 18. Within that framework, the Constitutional Court observes that in the case at hand there was not a semblance of attempt on the part of either the competent administrative authorities or the High Administrative Court to consider the effects of their interpretation, that is, application of law to the applicant's case, in light of the constitutional and conventional prohibition of discrimination, that is, in light of the then development of legislative order in the Republic of Croatia aimed at eliminating the differences between marital and non-marital spouses in case of property relations and inheritance.

During the proceedings before the Constitutional Court, the General Tax Code[46] provided in 2016 that provisions of tax regulations applicable to marital spouses also apply to non-marital spouses (Art. 15, para. 1). This change marked the end of the developments concerning the congruity of effects of marital and non-marital union.

4. Concluding remarks

Non-marital union is a sociological phenomenon that is growing in popularity as a lifestyle. Some non-marital unions serve as *probationary marriage,* and if they witness temporary success, they usually lead up to marriage, especially when the woman becomes pregnant. Recent research shows that young people principally support non-marital union, which, in their opinion, is desirable for the purpose of testing the compatibility of partners and improving the prospect of a happier marriage in the future.[47] The other type of non-marital union is one that reflects a more liberal approach towards living together (especially by making it economically more viable), but it is not inclusive of plans for marriage and is often chosen as an easier way out of life union.[48]

Even the Family Act, which should be *sedes materiae* for the legal regime of non-marital union, is burdened by deficiencies. The foundation underlying non-marital union is *animus* and *corpus*. For *animus,* a person needs legal capacity or the possibility of making decisions on their personal status. There is no answer in family legislation regarding whether a person lacks the legal capacity to express their will; it is unclear as to how a person deprived of legal capacity insofar as it concerns the status may form a non-marital

44 | Zakon o porezu na promet nekretnina (Act on Real Estate Transfer Tax), Official Gazette, Nos. 115/16 and 106/18.
45 | *Amplius* Lucić, 2020, pp. 191–193.
46 | Opći porezni zakon (General Tax Code), Official Gazette Nos. 115/16, 106/18, 121/19, 32/20 and 42/20.
47 | Research has been conducted among young people in Rijeka. Bandalović, 2017, p. 67.
48 | Ibid., p. 47.

union and what happens in case they have started to live in a non-marital union that is detrimental to them.

Corpus exists when a woman and man live as co-tenants in some kind of emotional relationship, but if there are no other characteristics of marriage (for example, economic ones), their union does not have to be classified as a non-marital union.[49] In practice, a problem arose for persons placed in homes for the elderly, who did not want marital effects, but could not be excluded from the purview of non-marital union.

All these complex issues could be subject to subsequent judgements in court proceedings, as the ease of spontaneity coupled with the informal nature of non-marital unions may backfire in the form of long-lasting and complex court proceedings affecting the party wishing to exercise certain rights.

In addition, the family-law solution should have explicitly provided solutions in cases where the formation of a non-marital union has led to the criminal offence of living with a minor or the criminal offence of incest. In the latter case, non-marital union should not produce legal effects, but in the former, the legal order may be opposed by the principle of the best interests of the child (should the child benefit from a non-marital union that constitutes a criminal offence).

The necessity of establishing the existence of non-marital unions is particularly complex because different legal fields envisage different grounds of its existence, with the means of proof ranging from certified declaration before a notary public to non-contentious or contentious court proceedings.[50] In practice happened that a person who had presented himself as a non-marital spouse of deceived one, had gained family pension after the death of a non-marital spouse and the other person, who represented himself as non-marital spouse of same deceived person, gained the property rights.. Different case law concerning the interpretation of non-marital union increases legal insecurity.

The *bona fide* path paved by the Croatian legal system on the back of the idea of protecting women as the weaker party in a family union[51] has led to legal regulation that does not correspond to the fact that there are many similar, yet different non-marital unions based on the wishes and expectations of different individuals. The legislature has misled non-marital spouses based on the idea of protection of women in case of termination of a non-marital union given its informal nature and protection of the principle of autonomy in the free choice of lifestyle, which has been a key argument in the defence of non-marital unions. Many are aware of their rights, but those rights depend heavily on various conditions, so they cannot be aware of all legal obstacles. On the other hand, disarray has been brought about in the legal system, which requires prudent reform capable of improving legal certainty so as to encompass all legal fields regulating the effects of non-marital union.

De lege ferenda, it would be more convenient if non-marital spouses were allowed to make a certified declaration in front of a notary public, with adequate registry of non-marital declarations capable of being withdrawn by a simple act. This declaration might

49 | Lucić, 2020, p. 136 and Hrabar, 2010, p. 42: 'neither living at the same address nor even sharing of the same bed as a necessity doesn't have to imply ... that they do live in a non-marital union'.

50 | *Cfv.* Lucić, 2015, pp. 101–131.

51 | The principal advocates of equating marriage and non-marital union are so called women NGOs, motivated by the noble idea of protecting the weaker side, i.e., women.
Available: https://dnevnik.hr/vijesti/hrvatska/udruge-obiteljski-zakon-treba-potpuno-izjednaciti-bracnu-i-izvanbracnu-zajednicu---321972.html. (Accessed on 7 September 2021)

be the proof that a non-marital union exists and has legal effects, provided that *onus probandi* in on the one claiming to the contrary. 'It is advisable [*for non-marital spouses*] to…establish their status by a declaration certified before a notary public'.[52] Furthermore, it is possible that such a declaration of non-marital spouses has to be a requirement for gaining rights towards others. For rights and duties between non-marital spouses, such a declaration might not be necessary.

Yet, attention should be paid to avoid the risk of creating a so-called *small marriage*, which would have the effects identical to marriage; there exist concerns that parallelism of institutions would undermine the institution of marriage as such.

In the last two decades, we have witnessed a sudden change in the legal approach to non-marital unions and traditional marriages. Non-marital unions have become completely informal marriages. Legal regulations anticipated prevailing social needs. How social changes follow the footsteps of legal changes is to be seen in the population census of this year. It will be interesting to find out what will prevail: tradition and legal certainty or the need not to be bound by matrimonial chains. The good aspect is that the quality of the relationship between spouses in family matters is more important than the form.

52 | Lucić, 2020, p. 180.

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MARRIAGE AND PARTNERSHIP IN SERBIAN FAMILY LAW: LEGAL CONSEQUENCES

Gordana KOVAČEK STANIĆ[1]

ABSTRACT

In this paper the author analyses the family law consequences of family law unions in Serbia. Two types of family law unions are regulated: marriage and heterosexual non-marital cohabitation. Same-sex union is not regulated at present, but the draft law is under preparation. The author analyses consequences of: personal relations, property relations, nuptial contract, family home, maintenance and exercise of parental rights.

KEYWORDS

marriage
non-marital cohabitation
same-sex union
consequences
family law

1. Introduction

In Serbia two types of family law unions are regulated: marriage and heterosexual non-marital cohabitation. Same-sex union is still not regulated, but currently the draft law on same-sex union is under preparation.

The Constitution of the Republic of Serbia[2] in section two on human and minorities rights stipulates 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` (Art. 62/1,2). Furthermore, `non-marital cohabitation shall be equal with marriage, in accordance with the law` (Art. 62/5).

The Family Act is the main act that regulates family law relationships. This Act makes provisions with respect to: marriage and marriage relations, relations in non-marital cohabitation, parent-child relations, adoption, foster care, guardianship, maintenance, property relations in the family, protection from domestic violence, proceedings regarding family relations and personal name. (Art. 1).[3]

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2 | Constitution of the Republic of Serbia, *Official Gazette of Serbia* no. 98/06.

3 | Family Act, *Official Gazette of Serbia* No. 18/05 with amendments, hereinafter FA.

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2. Marriage/non-marital cohabitation: family law consequences

The Serbian Family Act (FA) defines marriage as cohabitation between a man and a woman governed by the law under Article 3/1. According to this definition, the basic element of marriage is: monogamous cohabitation between two persons of the opposite sex which is governed by the law. Cohabitation is a complex relationship that involves different connections between spouses based on love, including intimate relationships, respect, maintenance and economic relationships.

The substantial requirements for a valid marriage are the following: opposite sex, expression of will to get married and lack of marriage impediments. The impediments to a marriage are: an already existing marriage, incapability of reasoning, minority, non-existence of free will, kinship by blood or adoption, affinity and guardianship (Art. 15-24).

Non-marital cohabitation is a *de facto* relationship, which means there is no obligation, or possibility to register it. However, heterosexual non-marital cohabitation only has consequences if the legal requirements for the establishment of non-marital cohabitation are met. These requirements include the non-existence of marriage impediments and continuance on-marital cohabitation.

The main difference in legal consequences between marriage and non-marital cohabitation is in the inheritance law. According to Law on Inheritance 1995 there are no inheritance rights between partners directly from law.[4] However, it is possible to make a testament and nominate a partner as a heir. Legal nature of family law consequences for spouses/partners is different. Some effects are personal, while others consider property relations or the exercise parental rights.[5]

2.1. Personal consequences

Spouses are under the obligation to cohabitate, mutually respect and help each other, and determine the place of their residence and manage the joint household consensually, but they are free to make independent decisions on their profession and work (Art. 25-27 FA). In addition Art. 348 FA governs surname options following a marriage, wherein spouses may agree to retain their surname, take their spouse's surname or add their spouse's surname or vice versa.

The Family Act does not explicitly stipulate personal relations between partners in non-marital cohabitation. Thus, the possibility of changing surnames does not exist as a consequence of non-marital cohabitation. In addition, there is a difference in affinity relations. Affinity relations are a consequence of marriage and refer to the bonds between one spouse and relatives of the other, but affinity relations do not exist in non-marital cohabitation.

4 | Law on Inheritance, *Official Gazette of Serbia* No. 46/95.

5 | It is also worth mentioning that the new amendment to the Law on Pension and Disability Insurance *(Official Gazette of the Republic of Serbia*, No. 34/03 .... 86/19) recognises the right of the non-marital partner of the deceased person, to survivor`s pension, if the cohabitation with the deceased partner lasted at least three years or the partners have a child together (Art. 28).

2.2. Property relations

In Serbian law, the statutory property regime in marriage/non-marital cohabitation is the community property regime. Community property is the property that spouses/partners acquire through work when live together (Art. 171). The property that a spouse/partner acquires before marriage remains separate property. 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 becomes their separate property (Art. 168).

The Serbian Family Act has introduced the main criterion for the equal division of community property. The investigation of court practice on the division of the community property after the divorce reveals that one of the courts, namely the Court of Novi Sad, divided community property into equal parts in 75% of the cases.[6]

Retirement payment (severance pay) is considered to be community property. This is explicitly stated in the jurisprudence.[7] This is because retirement payment is the payment derived from the work of one of the spouses during their marriage.

The stance of jurisprudence has evolved with respect to the question of disposing of immovable property in community ownership by spouses. The matter concerns cases in which one spouse disposes of such property without the consent of the other spouse. To dispose of immovable property that spouses own in community ownership, Art. 174 FA is relevant:

(1) Spouses manage and dispose of their community property jointly and consensually.

(2) It is to be considered that one spouse always undertakes operations of regular management with the consent of the other spouse.

(3) A spouse may not dispose of his/her share in community property nor may he/she burden it with legal operations *inter vivos*.

This means that the community property regime prevents a community property owner from disposing of their share (be it by transfer or encumbrance), taking into account that shares, although specifiable, are not specified. The community property regime comes to an end the moment they are specified in any way (ideally or physically). Given the unspecified nature of shares, the administration and disposal of things that are in the community ownership of spouses, should be exercised jointly and agreeably.[8]

What will happen when disposal is done in contrvention of the aforementioned rule? The answer should be simple: such disposial would be null as it runs contrary to the imperative provision. A third person cannot acquire ownership rights or any limited property right over any assets in community ownership that have been disposed of one spouse without the authorisation of other, on the basis of a legal transaction, although they can do so in accordance with general rules on good faith acquisition, or by way of adverse possession.[9]

6 | The investigation was rather small, from 43 cases in 32 the division of the community property was in equal parts. Thus, it is just an illustrated fact.

7 | The decision of the District Court in Valjevo, Court of Appeal, Gž 179/2007 from 5 Oct 2007.

8 | More in Cvetić 2016, 2019.

9 | See: Draškić, 2020, pp. 387–388. Rules on good faith acquisition and adverse possession are devised as to protect good faith participants of legal transactions. They present secondary or alternative ways to acquire ownership, which the legislature exceptionally allows when conditions for regular acquisition are not met, so as to protect, as a rule, a good faith acquirer.

Given that rules on good faith acquisition apply only to movable things,[10] when it comes to immovable things, good faith acquirers could rely only on adverse possession provided that conditions prescribed by law are met.[11] A rule that protects a spouse who is not inscribed in a public registry as a holder of community ownership, can be found in Art. 176, para. 2 of FA:

It is to be considered that the entry has been made for both spouses even when only one spouse is entered, unless a written agreement on division of community property or a nuptial contract was concluded after the entry, or a court decided on the rights of the spouses regarding immovable property.[12]

Acording to this rule, the law introduces an irrefutable legal presumption that immovable property, although inscribed on behalf of one spouse, belongs to both spouses as community property holders, by way of which, when it comes to proving their status, the position of a spouse who is not inscribed in the public registry has been drastically changed (rather than requring the spouse who is not inscribed to prove their status as a community property holder, athe law requires the spouse in whose name the immovable property has been inscribed needs to prove that he/she is the exclusive owner).Thus, if an immovable property was inscribed on behalf of one spouse, the other spouse could prove that the immovable property was acquired through work during marriage, and, as such, belongs to both of them in the form of community ownership of unspecifiable shares.[13] To determine whether the case concerns community ownership what matters is whether the asset in qestion was acquired through work during cohabitation in marriage,[14] and not whether such property has been inscribed as community ownership in the public registry.

If ownership has not been inscribed not as community ownership but as exclusive ownership by one spouse (as per rule, the husband), the aforementioned rule enables the protection of the other spouse who contributed to the acquisition of such immovable property, and who, in most cases for traditional reasons, has not been inscribed as a holder of community ownership. Indeed, the rule attempts to protect women who traditionally hold a subordinated positions in a marriage. It is a fact that women are rarely inscribed as owners of family property. The severity of the problem has been detected and, with the help of the World Bank, preparation works have been undertaken to change the regulations so as to facilitate and make it considerably affordable to inscribe both spouses as community ownership holders or co-owners. At the same time this should contribute to gender equality and an increase in the numberof women who are inscribed in the real estate cadastre, which in turn will lead to the empowerment of women and reinforce the marriage.[15] The mere fact that only one spouse is inscribed as an owner, does not affect the application of the community ownership regime, if the immovable property was acquired through work during cohabitation in marriage.[16]

10 | Article 31 of the Law on Foundations of Property Law Relations, *Official Journal of Yugoslavia,* No. 6/1980, 36/1990, 29/1996.

11 | Law on Foundations of Property Law Relations, Art. 28, 30.

12 | The rule was introduced by way of the previous Law on Marriage and Family Relations, *Official Gazette of Serbia* No. 22/80, 11/88.

13 | Obren Stanković in Obren Stankovic, Miodrag Orlic, Stvarno pravo, Beograd, 1996, 164, fn. 483.

14 | Family Act, Art. 171, para. 1; Draškić, 2020, pp. 397–400; Kovaček Stanić, 2007, pp. 114–115.

15 | Source of information http://www.rgz.gov.rs/default.asp, 4th January 2017.

16 | More in: Cvetić, 2016 and 2019.

Nevertheless, in the absence of an explicit rule for a situation where an inscribed owner disposes of such property without the authorisation of their partner, the basis of protection of the good faith of the third person, generally lies in the principle of reliance on the public registry of the rights over immovable property.[17] Two decisions of the Supreme Court of Cassation,[18] concerning on the motions for review, which the court exceptionally allowed in order to achieve uniformity of jurisprudence,[19] presents a turning point from the long-enduring adverse stance of jurisprudence towards good faith acquisition through reliance on the public registry. From the facts it can be seen that the cases concerned immovable property that had been acquired through work during cohabitation in marriage, whereas only one spouse had been inscribed as the exclusive owner. The inscribed owner encumbered immovable property in community ownership regime by way of an enforceable extra-judicial hypothec based on a pledge statement (unilateral hypothec). Viewed from the relevant provisions of the Law on Hypothec,[20] the hypothec was duly established.

Taking into account the already examined rules contained in Art. 176 of Family Act, if one questions of the validity of such a disposal, the answer would be that this disposal is void, because it had been done without the consent of the other community property holder, i.e. the unregistered spouse. The fact that the community property is not registered does not prevent the unregistered spouse from filing an action seeking the nullification of a legal transaction in which the registered spouse disposed of the immovable property in community ownership without former`s consent. This would enable the entry of an annotation of a dispute prior to hypothec registration, thereby preventing the possibility of acquisition by a third party in good faith. In one case decided by the Supreme Court of Cassation, a pledge statement was given by an inscribed owner of immovable property in 2008, and an action seeking nullification in 2013. Regardless of the fact that claiming nullification of a legal transaction is not limited in terms of time,[21] the good faith of an unregistered spouse is seriously disputable. The initial dishonest intention or subsequently disturbed marital relations should not affect the legal status of *bona fide* acquirers. If this aspect is ignored, the doors would be widely open for the deception of a hypothec creditor and good faith acquirers in general. We share the court's view that the question of an acquirer's good faith is crucial in disputes arising out of an unauthorised disposition by a community ownership holder who is inscribed as the exclusive owner. At the same time, for a fair solution, it seems essential to examine the legal position, intentions and good faith of all participants in case, so as to rule out even the least possibility circumvention of the law. Although, the aforementioned discussion shows that it is possible to protect a good faith acquirer by referring to the principle of reliance on the real estate cadastre, we deem that it would be extremely useful for the law to explicitly provide

17 | Art. 63 of the Law on State Surveying and Cadastre, *Official Gazette of Serbia,* No. 72/2009, 18/2010, 65/2013, 15/2015 – decision of the Constitutional Court, 96/2015.

18 | Rev. 321/2014 of 5th June 2014, available in the database *Paragraf* and Rev. 1981/2015 from 14th April 2016, available at the web page of the Supreme Court of Cassastion.

19 | Art. 404 para. 1 of the Civil Procedure Law, *Official Gazette of Serbia* No. 72/2011, 49/2013 – decision of Constitutional Court 55/2014.

20 | Law on Hypothec, *Official Gazette of Serbia* No. 115/2005, 60/2015, 63/2015 – decision of Constitutional Court, 83/2015, Art. 2, Art. 8, para. 1, point 2, Art. 10, Art 15.

21 | Art. 110 of the Law on Contract and Torts, *Official Journal of Yugoslavia,* No. 29/1978, 39/1985, 45/1989 – decision of Constitutional Court of Yugoslavia, 57/1989, *Official Journal of Yugoslavia,* No. 31/1993, *Official Journal of Serbia and Montenegro* No. 1/2003 – Constitutional Charter.

such a protection in cases where the right to community ownership is not inscribed in the public registry. This view is taken especially bearing in mind that in the court's reliance on the Serbia registry of rights over immovable property in acquisition related cases is outdated. The fact that women are rarely inscribed as owners and that in most cases they appear to be losers in property disposal by the husband who is inscribed as the exclusive owner, creates the impression that court' ruling that rely on the registry are unjust. Hence, a great responsibility rests on the courts when establishing facts of each concrete case. It seems that en explicit rule of the protection of a good faith acquirer would enhance legal discipline, i.e., it would force property rights' holders to consider if they intend to merit the protection provided by legal order. Ultimately, for someone who aspire to be viewed as a good faith acquirer, establishing the fact that an inscribed owner is married and if an immovable property is under exclusive or community ownership could be accepted as a surmountable obstacle in legal transactions. Nevertheless, a considerable limitation of legal transactions could be expected with regard to the corresponding application of provisions on property relations of spouses to the property relations of partners in non-marital cohabitation. The Supreme Court of Cassation is of the view that under rules contained in Art. 176, para. 2 of the Family Act, it is necessary to enter into a real estate cadastre annotation of community ownership with respect to the inscribed immovable property, so as to make it clear to the interested parties that the concerned property is under a community ownership regime. The entry of such annotations has, so far, not been envisaged by law, so we deem that an annotation would be possible only if a spouse who is not inscribed in the real estate cadastre files an action in order to establish that an immovable property is under the community ownership regime, or in order to establish nullity or voidability of a legal transaction which is used as a legal basis for unauthorised disposal of an immovable property in a community ownership regime. Inadequate regulation of examined relations and their inconsistent treatment by the courts, as an imminent consequence, could impair legal certainty in legal transactions. The rights of good faith participants in legal transactions could be brought into question by various types of spousal abuses. The practice testifies cases of law circumvention, in which spouses often resort to the fictitious divorces. However, it should be highlighted that the position of a good faith owner who is not inscribed in the real estate cadastre as a rights holder, which results from the applicable regulation on property relations of spouses, could be impaired by a sudden shift of jurisprudence with the tendency to provide protection to each person who relied on the real estate cadastre, regardless of their good or bad faith. Only a good faith acquirer can and shall deserve protection that applies also to the right holder who exercises his/her right in accordance with the principle of good faith and fair dealing, i.e., the exercise of the right could not be qualified as an abuse of law. Refusal by public notaries to authenticate a contract which envisages disposing of ownership rights over immovable property, entirely or in part, without the authorisation of the other spouse, presents a significant step forward in preventing the emergence of a document that could become susceptible for entry into the public registry, although it was made contrary to the imperative provisions. Nevertheless, where non-marital partners are concerned, it is disputable if that is an adequate way for their protection, bearing in mind that non-marital cohabitation is factual relationship in Serbian law, so a notary public cannot formally acquire knowledge of its existence (except from the partners' statements), in contrast to

marriage whose existence can easily be established based on the excerpt from the marriage register.[22]

The Law on Registration Procedure with the Cadastre of Real Estate and Line Cadastre from 2018 improved this situation by introducing the obligation of the notary public and cadastre authorities to check if the buyer is married at the time of purchase of the immovable property. If they are married, they obliged to register the property as a community property in the cadastre. The property would not be registered as community property in these following situations: if both spouses make a statement that the property is separate property owned by one of them, or if they have agreed to register property as property with two owners with specific shares.[23]

In jurisprudence, the issue of acquiring community property during non-marital cohabitation arises. The Supreme Court of Serbia expressly stated that the property of one partner acquired during non-marital cohabitation does not become community property, if at the time of acquision, both partners were married to other persons.[24] An existing marriage is an impediment to non-marital cohabitation, which has a legal effect, and prevents the creation of community property in this way. Consequently, the property becomes the separate property of the partner who purchased it. This property cannot become the community property of the spouses in an existing marriage. In order for purchased property to become community property, some legal requirements must be met. One requirement is for the spouses or partners to have been living together at the time of purchase of the property. In this case this requirement did not exist, as the partners lived in non-marital cohabitation and not with spouses. Thus, the property cannot become community property, between partners in a non-marital cohabitation, or between spouses.

2.3. Nuptial contract and family home

The concept of (pre) nuptial contract was introduced in Serbian law by the Family Act 2005. The authority for issuing the (pre) nuptial contract now belongs to the notary public (the authority was initially the court, according to Family Act 2005).[25] The form of (pre) nuptial contract is notarial solemnisation of the legal document (Art. 188) (amendments to the Family Act 2015).

Marital contractual property regimes are specific because personal relationships exists between contracting parties. They are bound through marriage or non-marital cohabitation. This is important for the content and form of the contract. In addition, a marital contract is specific considering the fact that it is concluded with the idea of its longevity. These are the reasons why family law should provide special protection for weaker partners in relation to protection under general rules of contract law. The mechanisms for the protection of weaker partners can be either direct or indirect. Direct mechanisms takes into account the property position of the spouse/partner, and indirect mechanisms imply imperative norms about the content of the (pre) nuptial agreement and strict form of agreement. The law may prohibit contracting or exclusion of certain rules, and the possibility of contracting only regimes that are provided by the law.

22 | See more: Cvetić, 2016 and 2019.
23 | Law on Registration Procedure with the Cadastre of Real Estate and Line Cadastre *Official Gazette of Serbia,* No. 95/2018, Art. 7/5.
24 | Rev. 2265/2005 from 28 92006, *Court practice bulletin of the Supreme Court of Serbia* 1/2009.
25 | Law on Notary Public Art 82/1/10, 11, *Official Gazette of Serbia* No. 31/2011.

According to Serbian law, waiving the right to maintenance has no legal bearing (Art. 8 FA). The aim of this provision is to protect the weaker spouse, as the right/obligation of maintenance exists regardless of the contract. In addition, strict form of (pre) nuptial agreement is mandatory. During the act of solemnization, the notary public is obliged to warn the parties about the fact that by the nuptial agreement the legal (statutory) regime of common property would be excluded. A notary public has to include a note about doing so into the clause of solemnisation. Once issued, there is no explicit authority under the Family Act for a judge, or any other authority, to evaluate the suitability of the agreement. However, it is possible to contest the agreement in court, as any other contract.

A (pre) nuptial agreement relating to immovable property shall be registered in the public register of real estate rights, so that third parties will be in a position to become familiar with the agreement.[26]

Another family law consequence of marriage/non-marital cohabitation concerns the family home. The parent exercising parental rights and the minor child have the right to reside in the apartment (house) owned by the child's other parent (*habitatio*), (Art. 194 FA). The prerequisite is that the child and the parent exercising parental rights do not have property rights over an unoccupied apartment (house). The right to live in the apartment (house) lasts until the child acquires maturity. The child and the parent would not acquire this right if the acceptance of their request would present manifest injustice to the other parent.

In jurisprudence, the issue if whether *manifest injustice* existed or not arose in particular cases. The Supreme Court of Serbia reviewed a lower court decision which found that it would be unjust to the defendant if the right to reside was established *in favour* of his minor child, and reversed the decision as wrongful. The fact that the apartment was a gift to the defendant from his mother did not constitute grounds for the implementation of the legal standard of *manifest injustice*. The legal standard of *manifest injustice* does not concern how the ownership right is constituted, but rather about the entire situation of the defendant. This would concern his health, social status, or other circumstances that he could not improve by his actions. The fact that the defendant was a psychologist with a full-time job, and the other circumstances in this case did not indicate the existence of *manifest injustice* to the defendant.[27]

In other decision concerning the right to reside, the Supreme Court of Cassation of Serbia reviewed a lower court decision, which found that it would not be unjust to the defendant if the right to reside in the apartment that he owned was established *in favour* of his minor children and ex-wife and upheld the lower court's decision as correct. In the appeal of the lower court's decision, the plaintiff (ex-husband and father of the minor children) claimed that it would be *manifest injustice* to him to constitute *habitatio* on his apartment, because he rents this apartment out and, lives in his family house.[28]

2.4. Maintenance

The right and obligation of maintenance is one of the effects of marriage/non-marital cohabitation, and of the termination of marriage/non-marital cohabitation, as well (Art.

26 | See more: Kovaček Stanić, 2012, pp. 87–100.

27 | Decision of the Supreme Court of Serbia Rev. 1594/06 from November 29, 2006, *Bulletin of Court Practice of Supreme Court of Serbia* 06/4.

28 | Decision of the Supreme Court of Cassation of Serbia Rev. 3036/2010 of 14 July 2010, (http://www.vk.sud.rs/sr-lat/rev-303610-pravo-stanovanja-habitatio-mal-dece).

151,152 FA). A spouse/partner who lacks sufficient means of support, and is unable to work, or is unemployed (without his/her fault), has the right to maintenance from their spouse/partner in proportion to the latter's capacities. These conditions are objective in nature. Although *fault* as a category is abandoned in family law, the right to maintenance is not quite objective. The spouse/partner can lose the right to maintenance if the acceptance of their request for maintenance would represent *manifest injustice* to the other spouse/partner (Art. 151/3 FA).

Thus, subjective elements is still relevant in maintenance relations. The legal standard of *manifest injustice* encompasses a variety of specific situations and circumstances, and the courts should concretise this legal standard in their decisions. Case law can consider the reasons for the existence of *manifest injustice*, which may include violent behaviour, short-lived marriage, long-lasting autonomy of the spouse/partner who seeks the maintenance, or abandoning the spouse/partner without reason.

In its 2017 decision on maintenance proceeding, the Court of Appeal in Belgrade has emphasised the importance of finding the reason why spouse abondoned his sick spouse.[29] In its decision, the court stressed that for the proper evaluation of whether the petition for maintenance is manifestly unjust or not, it is important to find out if justified reasons for abandoning sick spouse existed.

2.5. Exercise of parental rights

In Serbian law, paternity in marriage is established upon the presumption that the husband of a child's mother is to be considered the father of the child. If a child was born out of wedlock, paternity has to be established by acknowledgment or court judgment (Art. 45 FA).

Exercising parental rights can take two forms. On the one hand, parents with parental responsibilities can exercise them jointly. Another possibility is the sole exercise of parental rights by only one parent. Joint exercise of parental rights in cases when parents live separately was first introduced into the Serbian legal system by the Family Act 2005. One of the conditions for joint exercise of parental rights in these situations is written agreement between parents.

Case law concerning parental rights after divorce for different periods of time was the topic of an investigation at the Faculty of Law in Novi Sad. The investigation concerned case law in 1969 and 1979, followed by decisions from 1987, 1988, and 1989 issued by two courts of first instance: the High Court in Novi Sad and the High Court in Subotica. In addition, research on the exercise of parental responsibilities after divorce in 2007 and 2016, was conducted at the Basic Court in Novi Sad, which served as a court of first instance in this period.[30]

Over fifty years ago (precisely in 1969) in Serbia mothers exercised parental rights after divorce in 65% of the cases and fathers in 28%. Over thirty years ago (precisely in 1987 and 1988), children were entrusted to their mothers in about 81% of the cases and to fathers in 15%. Fifteen years ago (2007), sole exercise of parental rights was ordered in approximately 87% and joint exercise of parental rights in about 12%. In 2016 sole exercise of parental rights was given to mothers and fathers in 74% and 9% of cases, respectively, and joint exercise of parental rights was ordered in 11% of cases.

29 | Decision of the Court of Appeal in Belgrade, Gž 988/2016 from 13 January 2017.
30 | Kovaček Stanić et al., 2017.

If we bear in mind the fact that even in the cases of joint exercise of parental rights, children mostly live with their mothers, then the percentage of children who live with their mothers increases to 82%. There are significant similarities in the situations 30 years ago, 10 years ago and 5 years ago. However, the situation was different over 50 years ago when fathers exercised parental rights more often than recently (28% in 1969, vs. 9% in 2016). This might be explained by the considerable influence of the patriarchal model of parenting 50 years ago in rural settlements, awhile there has been more equal division of roles between parents in the time of socialism in urban settlements.

3. Draft law on same-sex unions: family law consequences

The draft law on same-sex unions is under the preparation in Serbia. Draft law 2021 regulates two types of same-sex unions: registered same-sex unions and *de facto* same-sex unions, so a parallelism of the concepts exists.

Registered same-sex union is defined as the union in family life of two same-sex persons, that is concluded by a competent organ. Unregistered (*de facto*) same-sex union is defined as union of family life of two same-sex persons, which 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 at least three years (Art. 2 and Art. 66).

The legal effects of same-sex unions are similar to those of marriage. Personal effects are as follows: same-sex partners consensually and jointly decide on all important matters of 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 care of their partner in times of illness (Art. 30).

Upon conclusion a same-sex union, partners may agree on their surnames. They might decide to retain their separate surnames, adopt either of their surnames, take both surnames, or add their partner's surname to theirs (Art 34). Compared to the surname options available to married couples it can be seen that same-sex partners do not have the option where one of them adopts the surname of the other partner. This is understandable, because in marriage, women usually choose this option; on the contrary, in same-sex union, there is no gender difference.

Some personal legal effects stipulated for spouses are not stipulated for same-sex partners. For instance, spouses are free to make independent decisions on their profession and work. Spouses determine the place of their residence and decide on managing the joint household consensually. In addition, affinity relations are not established in same-sex unions.

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). Contracts on property are available to same-sex partners, during or before conclusion of a same-sex union (Art. 46). Maintenance is the right and duty of partners in same-sex unions, similar to maintenance in marriage (Art. 35).

De facto same-sex union has the same effects on personal relations, the property rights are the same as in registered same-sex union (Art. 67). However, what is noteworthy is that maintenance is not stipulated. It is difficult to understand why maintenance is omitted, considering that the right to maintenance after the termination of a

legal relationship should be available to spouses, partners in non-marital cohabitation, partners in registered same-sex union, but also partners in *de facto* same-sex union, as maintenance is one of the effects that is very important to protect the weaker partner.

Same-sex partners in registered unions have inheritance rights in the same way as spouse (Art. 47). On the contrary, same-sex partners in *de facto* unions do not have inheritance rights, having a similar position to a heterosexual partner in non-marital cohabitation.

The draft law stipulates rights and duties between same-sex partners and a child of either partner. A partner in a same-sex union has the duty to maintain a child of the other partner, if the child does not have relatives who have a duty of maintenance or if they lack sufficient means for maintenance. The duty to maintain a child of the other partner exists even after the death of the child's parent, if cohabitation existed until death. If a same-sex union ceases by annulment or cancellation, a partner's duty to maintain the child of the other partner comes to the end (Art. 36).

A partner in a same-sex union who is not a child's parent has the right to make necessary and urgent decisions in the interest of the child, when there is a danger to the health and life of the child. The partner who makes such a decision has an obligation to immediately inform the child's parent. It seems that during the writing of the draft, fact that the child could have another legal parent, whit parental rights has been overlooked. The legal parent's rights in urgent situations precede those of the same-sex partner.

A partner who is not a child's parent might make day-to-day decisions about the child in agreement with the child's parent in the best interests of the child. If a same-sex union ceases, the child has the right to maintain personal relations with the ex-partner of his/her parent, but this right may be limited by a court decision, when it is in the best interest of the child (Art. 37).

It could be noticed that same-sex partners have a wider scope of rights than step-parents. A step-parent does not have any parental rights, but is subject to the duty of maintenance, according to the Family Act. The child has the right to have personal relationship with the step-parent, but only if he/she is particularly close to him/her (Art. 61/5 FA).

4. Concluding remarks

Family law consequences of marriage and non-marital cohabitation are almost similar (property relations, family home, nuptial contract, maintenance, and exercise of the parental rights), but there are difference with respect to surname changes and affinity relations, as these effects do not exist in non-marital cohabitation. In addition, there is also a difference how the paternity is to be established.

The main legal difference between marriage and non-marital cohabitation in other fields of law is that partners do not directly derive inheritance rights from law. In practice, this legal solution causes many problems, as partners are not aware of the provisions of the Law on Inheritance. This is so especially because according to the Family Act, which is the basic act for the regulation of non-marital cohabitation, the consequences of marriage and non-marital cohabitation are almost equal. Bearing in mind the constitutional provision that `non-marital cohabitation shall be equal with marriage, in accordance with

the law` the confusion in practice is not difficult to explain. It might be said that this legal situation creates not only confusion but also some kind of delusion for partners.

Joint exercise of parental rights after divorce or separation was first introduced into the Serbian legal system by the Family Act of 2005. After two years (2007), joint exercise of parental rights was ordered by courts in 12% of cases; in 2016, it was ordered in 11% cases. Thus, this form of exercise of parental rights after divorce was not widely accepted in court practice even more than ten years after its implementation in the legal system. As the condition for joint exercise of parental rights is a written agreement between parents, it might be concluded that the situation in court practise is actually due to lack of acceptance among parents of this form of exercise of parental rights after divorce.

Family law consequences of same-sex union are almost identical to the as consequences of marriage according to the Serbian draft law on same-sex unions. Regarding the exercise of parental rights, same-sex partners have a wider scope of rights than a step-parent: the right to make necessary and urgent decisions as well, day-to-day decisions about the child in agreement with the child's parent in the best interests of the child; even if a same-sex union has ceased, the child still has the right to maintain personal relations with the ex-partner of his/her parent. On the contrary, the step-parent does not have the option of exercising parental rights. The step-parent has only the right and duty to maintain. The child has the right to maintain personal relations with the step-parent, but only if the child is particularly close with step-parent and not unconditionally, as in the case with a same-sex partner. In order to harmonise the legal system, it is of great importance to stipulate the rights of same-sex partners, similar to the rights of a step-parent, or to change rules on the rights and duties of step-parents, before giving these rights to same-sex partners.

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CHANGES IN CZECH FAMILY LAW IN LIGHT OF THE PRINCIPLES OF EUROPEAN FAMILY LAW

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ABSTRACT

Czech family law has recently been re-codified as part of the new Civil Code. The intention of its main drafters was to build on the values and traditions of Christian-Jewish culture in the Czech Republic and to enrich Czech family law with a new dimension, especially in relation to international human rights conventions and developments in the field of human rights in general. Some sections have also been significantly influenced by the Principles of European Family Law (PEFL) developed by the Commission on European Family Law (CEFL) aiming at 'better law' and the harmonization of family law systems in Europe. It was stressed that the Principles of European Family Law regarding Divorce and Maintenance Between Former Spouses, the Principles of European Family Law regarding Parental Responsibilities and the Principles of European Family Law regarding Property Relations Between Spouses were published during the time of recodification of the new Civil Code and took into consideration. However, the Principles of European Family Law regarding the Property, Maintenance and Succession Rights and Duties of Couples in de facto Unions were published later. It is unclear whether the concept of unmarried cohabitation will be a challenge for Czech legislators. One can agree with the view that the new private law code should, in principle, cover all private law matters, including family law, as is customary in countries with comparable legal environments. And finally, the article was focused on the pending drafts, as developments in this area are not over, as further changes are on the way.

KEYWORDS

family law
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1. Introduction

The twentieth century is often referred to as the *century of human rights conventions, constitutions or charters of fundamental rights, and freedoms*. There is no doubt that family law has gradually been influenced by international conventions, the case law of the *European Court of Human Rights,* and new approaches to family law by constitutional courts, not only in the Czech Republic, but also in Europe and the world in general.[2] One can also say that it has been given a new dimension by the *Principles of European Family Law* (hereinafter *PEFL* or *Principles I, II, III, IV*) drawn up by the *Commission on European Family Law* (*CEFL*),[3] even though they are not binding. Many changes are taking place despite the fact that family law is said to be the least suited to harmonization or unification. The reasons given include tradition, culture, religion, political climate, ideology, and conservatism[4]—terms that reflect a certain kind of inertia. Several other questions are raised here,[5] particularly regarding whether further harmonization or unification of family law in Europe is merely utopic thinking or a realistic goal.[6] It is generally acknowledged that family law in Europe is diverse, having been influenced by the legal arrangements enshrined in the great civil codes such as those of France, Germany, or Austria, as well as former Soviet law.[7]

An extensive range of opinions[8] have been published regarding the harmonization or unification of family law in Europe, representing a certain degree of *dynamism*[9] in addition to the above-mentioned *inertia*, *stagnation*, or *rigidity.* These are not primarily political issues.[10] Following the establishment of the *European Union* and the gradual formation of *European private law*, many new approaches have been required, particularly in relation to the free movement of persons who marry, enter into partnerships, or live together informally, and have children together, whether naturally or through assisted reproduction or adoption, foster care, or other forms of substitute family care of minor children.[11]

Although Czech family law has been significantly changed recently as part of the recodification of the basic source of private law—the *Civil Code*,[12] into the core of which it has been reintegrated[13]—its form is not final and new questions are being asked. Many amendments are being debated in the Parliament of the Czech Republic. Some of the proposed changes are conceptual, such as the proposal to enshrine 'marriage for everyone',[14] while others proposals are partial but not insignificant.[15]

2 | See Králíčková, 2010.
3 | For details see http://ceflonline.net/.
4 | Towards development of family law in Europe see Douglas, Lowe, 2009.
5 | For more see Meulders-Klein, 2003, p. 111 – 112.
6 | See Martiny, 1995, p. 419 ff.; Martiny, 1998, p. 151 ff.
7 | For details see Mladenović, Janjić-Komar, Jessel-Holst, 1998.
8 | Towards different views see Antokolskaia, 2003, pp. 28–49.
9 | See Pintens, 2003, p. 20 ff.
10 | See Brüggemeier, Colombi Ciacchi, Comandé, 2010, and Brems, 2008.
11 | See Králíčková, 2012.
12 | See Act No 89/2012 Sb., Civil Code, as amended. It came into effect on the 1st January 2014.
13 | For details see Králíčková, 2013, p. 801 ff.
14 | Parliament of the Czech Republic, Chamber of Deputies, Parliamentary term No. VIII., Draft No. 211/0.
15 | For details see Králíčková, 2021.

2. On the Principles of European Family Law

If we admit that there has been a certain convergence of family law in Europe, or Europeanization, we can further ask whether this is a *controlled process* or a *spontaneous convergence* due to respect for the universally recognized and shared *values* on which the Christian-Jewish culture in Europe is based. These include *respect for human beings, their private and family life, or life in general, human dignity, freedom, honor, equality, autonomy of the will, solidarity, and the protection of the weaker party, whoever it may be.* Traditionally, the minor child has been considered the weaker party due to age. However, the weaker party can be anyone, which is especially relevant in legislation on matrimonial property law and family home.

Many experts on family law share an optimistic vision of a *gradual value enrichment of systems of family law*[16] and their positive evolutionary development.[17] Even some prominent experts on civil law emphasize *harmony in the transformation of private law*, which is more likely to be brought about by the long-term competition of ideals and concepts, and decades of evolving internal social conviction than by direct action. Much has already been written on this subject.

As far as the *European Court of Human Rights* is concerned, there is no doubt that the *generally shared values* are the central theme in its case law and positively influence the development of family law, its interpretation, and application. It is not without interest that in foreign literature, national constitutional courts are often referred to as the *driving force of family law.*[18] The influence of the case law of the *European Court of Human Rights* on family law, as reflected by national constitutional courts, is thus gradual but unquestionable. Much is changing, rather spontaneously, which supports the phenomenon known as the *de facto convergence* of systems of family law in Europe, or their Europeanization.[19] This is especially due to Article 8 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, guaranteeing everyone the right to respect for *private and family life*, but also to Article 14, enshrining the requirement of *non-discrimination*, and, last but not least, to Article 6, providing for the *right to a fair trial.* The case-law of the *European Court of Human Rights* thus forms, in essence, a *universal basis*, or *at least a general values guideline.*

It should be pointed out that the *Principles of European Family Law* developed by the *European Commission on European Family Law* are also based on a '*common core*'. They may therefore appear to be a compromise. However, in the light of developments, some of them call for '*better law*'.[20] In general, they can be characterized by generality, simplicity, and timelessness.

The question is whether actions of the *European Commission on Family Law* should be seen as an *overly ambitious project or as a rational inspiration* for national legislators. There is no doubt that they are gradually gaining complexity and have already been considered to a greater or lesser extent in the legislative process in several European countries, even

16 | For more details see Stalford, 2002, p. 410; Caracciolo Di Torella, Masselot, 2004, p. 32; Antokolskaia, 2007.
17 | See Douglas, Lowe, 2009.
18 | For instance, see Dethloff, Kroll, 2006, p. 229 ff.
19 | In details see Müller-Freienfels, 1968 – 1969, pp. 175–218.
20 | Regarding the working methods, see Boele-Woelki, 2005, p. 15 ff.

if they are by no means binding. This has brought the results of academic work closer to practice and has helped to bring about a *de facto convergence* of systems of family law in Europe. The *Commission's* objectives of achieving a genuine European identity and *modernization* of the legal systems are thus gradually being achieved.

3. Toward the recodification of Czech family law and its sources of inspiration

The new Czech family law is the result of long-term legislative work,[21] in which completely contradictory opinions, from quite liberal to very conservative ones,[22],[23] often met. In addition, tradition versus innovation were in a relevant tension.[24] In the following section, however, particular reference will be made to the extent to which the *Principles of European Family Law* produced by the *European Commission on European Family Law* were taken into account at the time of its adoption.

It should be added that family law was incorporated into 'Book Two' of the Civil Code[25] within the recodification of the basic source of Czech private law. The legal regulation of registered partnerships remained established in a separate act.[26] Like any great work, the new Civil Code was supplemented by extensive accompanying legislation. As far as family law is concerned, most family law cases are now judged in court proceedings not according to the general procedural norm, the Code of Civil Procedure, but according to the new Act on Special Civil Proceedings.[27]

However, the development of family law legislation in the Czech Republic is not complete, especially with regard to the position of same-sex couples, which is developing under the influence of case law in the *European Court of Human Rights*. Many foreign legal systems have approached the issue in a gender-neutral manner.[28] However, the *Commission on European Family Law* has not given attention to this matter thus far. As already mentioned in the introduction, in the Czech Republic, this issue is now very topical, as the Parliament of the Czech Republic is currently debating, among other things, a proposal to establish 'marriage for everyone'.

As it is generally accepted that family life can take many forms, many codes in Europe provide protection for non-marital family life. This is to be welcomed, as we cannot turn a blind eye to the fact that almost half of children in the Czech Republic are born out of wedlock.[29] However, this issue is not pressing for Czech society and the Civil Code does not associate excessive consequences with unmarried cohabitation. The relative novelty

21 | Regarding many such attempts, see Haderka, 1996, Haderka, 2000.
22 | See Eliáš, Zuklínová, 2001.
23 | For more see Eliáš, Zuklínová, 2005.
24 | In details Králíčková, 2014.
25 | Act No 89/2012 Sb., Civil Code, as amended.
26 | Act No 115/2006 Sb., on Registered Partnership, as amended.
27 | Act No 292/2013 Sb., on Specific Civil Law Proceedings, as amended.
28 | See Sörgjerd, 2012.
29 | For more see https://www.czso.cz/ (retrieved on 21 June 2021).

of the *Commission on European Family Law*, which is discussed below, may be all the more inspiring for Czech legislators.

4. The Principles of European Family Law regarding Divorce and Maintenance between Former Spouses (*Principles I*)[30]

During the second half of the twentieth century, a new view on the (in)dissolution of marriage emerged in several European countries.[31] The development in many places went from the principle of fault, through so-called divorce based on irretrievable breakdown, to consensual divorce, or the administrative dissolution of marriage. Divorce is thus nowadays generally seen as a *legitimate solution* to the crisis of marital cohabitation.

The contribution of *Principles I* can be seen especially in the fact that they *fully respect the autonomy of the human will*, do not obscure the essence of the matter, and do not create complex or incomprehensible concepts that do not benefit anyone.

Principles I distinguish *two types of divorce*. The key factor is whether or not the spouses are able to agree on the dissolution of their marriage by divorce, whether they are also parents of a minor child, and whether they have concluded an agreement on the division of their property.

In the first place, *divorce by mutual consent* is mentioned (Principles 1:4 et seq.), the prerequisites of which do not include the need to observe any minimum duration of marriage or *de facto* separation, nor the need to conclude a property agreement on the post-divorce settlement. However, this option reasonably provides for a *period of reflection* in cases in which the spouses are also parents of a minor child under 16 or have failed to conclude a property settlement agreement, in part or in full.

In the second place, *divorce without the consent of one of the spouses* is provided for (Principles 1:8 et seq.), being based—in Czech terminology—on the so-called *irretrievable breakdown* of marriage, but the court is not obliged to examine it or its causes, *as it is inferred from the de facto separation of the spouses for a period of one year.* This approach of the drafters of *Principles I* fully reflects the development of European society.

Principles I also provide for the so-called *hardness clause* in favor of the spouse seeking the divorce. In some cases, there is no need for *de facto* separation of the spouses for one year (Principle 1:9). This may be used if the marital cohabitation is disturbed by domestic violence or mental disorder, for example.

Regarding the *maintenance duty of the divorced spouses*, this is established as an *extraordinary measure*, the prerequisite of which is *dependence on maintenance* or the inability to meet one's own needs. *Principles I* do not include the so-called sanction maintenance, a relative innovation of the Czech legal system established in 1998,[32] the essence of which is the right to the same standard of living for a maximum of three years under relatively strict conditions.

Unfortunately, within the recodification of the Czech Civil Code, *Principles I* were not adopted or even taken into account and the Czech legal regulation of divorce is currently

30 | Boele-Woelki, Ferrand, González-Beilfuss, Jänterä-Jareborg, Lowe, Martiny, Pintens, 2004.
31 | For more details see Verschraegen, 2004.
32 | See Králíčková, 2008.

the subject of much discussion. The legal regulation of divorce has been based on the *irretrievable breakdown* of marriage since 1963.[33] The new Civil Code sets forth 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. The court deciding the divorce shall *examine the fact of breakdown* of the marriage and the *reasons* leading to it. This variant of divorce is called *contested divorce*. However, if the spouses have agreed about the divorce, the court *does not examine reasons* for the breakdown if it comes to the conclusion that the identical statements of the spouses about the breakdown of their marriage and about their intent to achieve divorce are true. This is called *uncontested divorce*.[34] The following requirements must be met:

a) on the day of the commencement of the divorce proceedings, the *marriage has lasted for one year* at least and the *spouses have not lived together for more than six months*,
b) the spouses, who are parents of a *minor child* without full legal capacity, have agreed on arrangements for the child for the period after the divorce and the *court has approved their agreement*,
c) the spouses have *agreed on the arrangement of their property, their housing and, if 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 the so-called *clause against harshness*.

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. The court dealing with the custody of the minor child may decide on or approve the agreement of the spouses in the matter of entrusting the minor child into the *individual (sole) custody* of one parent, *alternating (serial) custody,* or *joint custody* of the parents. It is necessary to emphasize that *both parents* of the child are principally *holders of rights and duties resulting from parental responsibility* (see below) and the decision on after-divorce custody only determines *who the minor child will live in the common household with* (besides the maintenance duty toward the child and visitation rights).

It is necessary to mention that a *pending draft*[35] in the Parliament of the Czech Republic aims to make the situation of divorcing parents of a minor child equal or at least similar to that of non-married parents of a minor child who separated without any interventions by the state, thanks to the mutual non-formal agreement. The pending draft is based on the opinion that the parents of a minor child know their child very well and seek to follow the best interest of the child even when separating. 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 divorce and on post-divorce arrangement regarding their minor children—would be *amicable, smooth, and quick*. The divorcing couple will have to submit to the judge only *the common motion* for granting the divorce, *the property and dwelling contract,* and *the agreement on minor child regarding custody, maintenance* and, if the case may be, *visitation rights*. The judge dealing with the divorce will not have to

33 | Op. cit.
34 | The new legal regulation does not know the so-called divorce on the basis of agreement, i.e. consensual divorce or divorce by mutual consent.
35 | Parliament of the Czech Republic, Chamber of Deputies, Parliamentary term No. VIII., Draft No. 899.

approve the property contract or the agreement on custody and maintenance toward the minor children. However, without fulfilling all the legal conditions, the marriage cannot be terminated.

5. The Principles of European Family Law on Parental Responsibilities (*Principles II*)[36]

After the Second World War, national legislation in many European countries sought to redefine the rights of children and to eliminate discrimination against children born out of wedlock. The adoption of a number of declarations and, later, human rights conventions, in particular the universal *Convention on the Rights of the Child, the European Convention on the Exercise of the Rights of the Child and the European Convention on Contact with Children,*[37] undoubtedly contributed to this approach. The Czech Republic, and the former Czechoslovakia, initiated reforms that resulted in children being regarded not as passive objects of the will of their parents or a paternalistic or totalitarian State, but as *fully-fledged and active entities.*[38] This entailed many things, including a change in terminology or the abandonment of some obsolete terms such as 'illegitimate child', and a move away from the institution of 'paternal power' or 'parental rights and obligations', to the concept of 'parental responsibility', which had already been established in the 1990s in connection with international conventions and essentially adopted by the new Civil Code, but was adopted as a new concept in connection with *Principles II*.

From this perspective, the Civil Code appears fundamentally in line with European family law standards, although the substantive intention and many working versions of the draft of the new Civil Code were based on a different concept.

First, it should be stated that *Principles II* are *not based on a mere trichotomy* like the earlier Czech concept of parental responsibility, but they divide the rights and obligations arising from parental responsibility into *five partial rights and obligations*. These include, in addition to the traditional ones, (a) care and upbringing of the child, (b) management of the child's property and (c) legal representation of the child, (d) the right to maintain personal relationships and, in particular, and (e) the right to determination of residence of the child (Principle 3:1). This approach seems to be more appropriate, as it considers humanitarian issues, the reality of free borders and migration, and thus the negative consequences, or the illegal relocation of children, or their international abduction.

As a contribution of *Principles II* to the discussion of the draft, the new Civil Code should be considered primarily a *broader conception* of the content of parental responsibility, and the distinction between the 'holding' of parental responsibility and the 'exercising' of the individual rights and obligations as belonging to this conception. It is also worth highlighting that the position of parents of minor children is being strengthened in favor of parents who are incapacitated, or minors, particularly in relation to personal care or contact with the child. It should also be stressed that the exercise of rights and obligations

36 | For more see Boele-Woelki, Ferrand, González-Beilfuss, Jänterä-Jareborg, Lowe, Martiny, Pintens, 2007.
37 | See Van Bueren, 2007.
38 | For details see Hrušáková, 2002, and Hrušáková, Westphalová, 2011.

arising from parental responsibility after divorce or in the event of separation of parents have been thoroughly regulated and that explicit rules have been established for parents and prospective adoptive parents that will undoubtedly prevent conflicts. With regard to the limitation and removal of parental responsibility as a 'sanction' for parents who abuse their rights and obligations, it is worth mentioning in particular the provisions according to which the court must deal with the parent's contact with the child or deprive the parents of the right to consent to the adoption.[39]

6. The Principles of European Family Law regarding Property Relations between Spouses (*Principles III*)[40]

It is generally acknowledged that the subject matter of matrimonial property law *varies* across European national systems. It particularly differs between countries that use continental law and those that use Anglo-Saxon law. There are thus many property systems. Individual civil codes, which have historical roots, have systems ranging from 'separate property' to 'community property', from 'property acquired only through marriage', with numerous statutory exceptions, to 'property of the whole community'. However, after the Second World War, a common trend among many legislators can be traced, regarding the desire to *protect the weaker party and to strengthen family solidarity* in the framework of amendments. This not only concerns property systems as such, but in particular the establishment of a special arrangement for the goods forming the usual equipment of the family household and the so-called non-disposability of the family home. The *Commission on European Family Law* therefore respects the *value basis* of matrimonial law, or matrimonial property law, which is common to family law systems in Europe.

It can be said that although *Principles III* were published after the adoption of the new Czech Civil Code, the legal regulation of matrimonial property law and housing included in its 'Book Two' is consistent in value with both the concept and the individual rules.

The *Commission on European Family Law* was primarily concerned with the question of whether *tradition* should be respected, or whether the *statutory property system* should be regulated first and only then the *contractual system*, or vice versa.[41] We believe that the latter approach gives the spouses a greater degree of autonomy. In the new Civil Code, the matter is dealt with *in a traditional way*, or in favor of the statutory matrimonial property system regulated in the first place, even though the historical arrangements here were based on the marriage contract (see the ABGB in particular).[42]

As far as the particulars of *Principles III* are concerned, the general rights and obligations of spouses are specified (Principles 4:1 to 4:9). They protect the equality of spouses and the autonomy of the will to contract both before marriage and at any time during marriage. They also regulate the obligation to contribute to the needs of the family, the need for the consent of both spouses when disposing of their own or rented dwelling and

39 | For more see Králíčková, Hrušáková, Westphalová, 2020.
40 | Boele-Woelki, Ferrand, González-Beilfuss, Jänterä-Jareborg, Lowe, Martiny, Pintens, 2013.
41 | For more details see Boele-Woelki, Jänterä-Jareborg, 2011, p. 47 ff., mainly pp. 57–58.
42 | See Psutka, 2015.

the usual equipment of the family household. They also lay down rules on mutual representation in legal matters concerning the spouses, the obligation to inform the spouse of exclusive assets and liabilities, and of important administrative actions when they could endanger the other spouse.

It should be stressed that the protection of the family home and its usual or basic equipment (household goods) (Principle 4:5, 4:6) has long been a feature of many European private law codes. The new Civil Code also takes these values into account, and can be considered a breakthrough in this area. A related issue is the possibility for the weaker party to claim the invalidity of both unfavorable terms of disposal of movable property serving the needs of the family and the hindrance or impossibility of living in the family home.

Principles III allow for both a *community property* and a *separate property* system. These systems are equivalent, while fully reflecting the autonomy of the will of the spouses or future spouses. The marital property arrangement can be modified or changed during the marriage. The agreement may cover all or only certain assets, for example movable or immovable property. It may also exclude certain types of property from the matrimonial property arrangement. In terms of form, the contract must be drawn up by a notary (or other legal professional with a comparable function, e.g. in the Nordic countries, see Principle 4:13).

Principles III emphasize the need for *publicity*. A matrimonial property contract is effective against a third party if an entry is made in a public register or if the substance of the contract is otherwise known to the third party (Principle 4:14). The new Czech legislation is fully in line with *Principles III* in this respect, which puts it among the countries where the publicity of matrimonial property contracts has been established for years and constitutes a traditional pillar of third-party rights protection. It is thus undoubtedly the *'common core'* of European matrimonial property law.[43]

As an element of the *'better law', Principles III* establish the so-called hardness clause, exceptional hardship (Principle 4:15). It provides that in the event of a change in the terms and conditions from those under which the contract was made, the competent authority may exclude the effectiveness of the contract or modify the contract. The Czech Civil Code does not regulate this matter.

7. The Principles of European Family Law regarding Property, Maintenance, and Succession Rights of Couples in *de facto* Unions (*Principles IV*)[44]

As mentioned above, *Principles IV* concerning unmarried cohabitation were only developed after the adoption of the new Czech Civil Code. They provide considerable protection for *de facto* unions, given that even the Preamble points out that the number of informal unions is increasing in society. The aim of *Principles IV* is to balance, on the one hand, the autonomy of will and freedom of contract of the contracting parties and, on the other hand, the need to protect the weaker party, but also to ensure the welfare of the

43 | For details see Králíčková, Kornel, Zavadilová, 2019.

44 | See Boele-Woelki, Ferrand, González-Beilfuss, Jänterä-Jareborg, Lowe, Martiny, Todorova, 2019.

family of couples in *de facto* unions. It should be added that *Principles IV* do not distinguish between same-sex and different-sex unions. The introductory lines suggest that *de facto* unions consist of two persons living together and forming a permanent relationship of at least five years or having a child in common (Principle 5:1). Furthermore, the equality of rights and obligations (Principle 5:4) and the possibility of concluding agreements and their scrutiny by the competent authority are emphasized (Principles 5:8 and 5:9). Particular attention is paid to the contribution to the joint costs of the household and the protection of the family home and household goods (Principle 5:6). *Principles IV* provide for a presumption of joint ownership (Principle 5.12) and special rules for separation (Principles 5:15 et seq.) and death (Principles 5:22). This not only applies to property as such and maintenance, but also to the family home and household goods.

Regarding Czech Family Law, due to the limited concept of family as regulated in the Civil Code, there are *no articles* that would establish *mutual right and duties* between cohabitees. Unfortunately, property contracts between the cohabitees are rare, which can cause problems for the so-called weaker party upon the dissolution of the *de facto* relationship. However, as there is no discrimination of parental rights regarding children born out of wedlock, the rights and duties of the parents of any child are equal. It should be mentioned that if an unmarried man and an unmarried woman 'have a child together', they are both principally *holders of parental responsibility* by operation of law (for details, see above) without being discriminated against in comparison with married parents of a minor child. The law traditionally protects the property claims of the unmarried mother of the child. The Civil Code regulates the *'maintenance and support, and provision for the payment of certain costs for an unmarried mother'*.[45] Regarding rights of a *surviving cohabitee,* his or her situation is in practice *very weak* as there is seldom a will. The surviving cohabitee must prove many details from common life during the proceedings, unlike the rules set out in *Principles IV*.

Regarding the designed law, it is worth considering whether and how the Civil Code should be amended in this area. Persons of different sexes can marry and enjoy the legal protection afforded to spouses by the Civil Code, both in the personal and property matters, even in the event of the dissolution or annulment of the marriage by divorce. Same-sex couples can benefit from registered partnership, which, although it does not come with a very wide set of rights and obligations, is a status relationship that is relevant to the entire legal order. Should the legislator respect the autonomy of the will of persons who 'refuse' the marital or 'official' partnership status, or should the law maker associate substantial legal consequences with the *de facto* unmarried cohabitation? There are rarely property contracts, inheritance contracts, or wills between unmarried persons, which is to the detriment of the weaker parties, in particular those who, following the *de facto* separation or death of the 'main breadwinner', care for minor children together and therefore do not have sufficient independent sources of livelihood and the possibility of living on their own legal basis.

45 | For details see Králíčková, 2009, pp. 286 ff.

8. Conclusion

In conclusion, we can say that family law has its limits and cannot be changed on a daily basis. Not only in the Czech Republic, but in many European countries, family law has been undergoing gradual changes in response to the convergence of lifestyles and changes in the family and society in general. For legislators in many European countries, the need to find common methods is coming to the fore due to globalization.[46] People exercise their right to family life according to their wishes, ideas, and opportunities. Many get married or enter into registered partnerships with foreigners and in foreign countries, move, have children, get divorced, and die. Although there has been a spontaneous convergence of systems of family law in Europe, especially due to the values set out long ago by international conventions, the influence of the *Council of Europe* and the case-law of the *European Court of Human Rights*, it is still quite difficult to describe the *European standard* in all its detail. However, the unquestionable value is and must be *respect for the human being, including the minor child, for their human rights and freedoms, autonomy of will, and protection of the weaker party.*

In principle, the Czech Republic does not fall outside of European trends.[47] In general, the harmonization and unification tendencies in family law are already slowly influencing the development of family law in the Czech Republic. A certain reticence, even indifference, can be seen with regard to the *Principles of European Family Law* drawn up by the *Commission on European Family Law*, especially with regard to the dissolution of marriage (*Principles I*). However, these are not binding. Nevertheless, as mentioned above, this area is currently undergoing substantial changes. Regarding parental responsibility, or its conception and value, it can be noted that the most important aspects have been considered in the recodification process (*Principles II*). A similar conclusion can be drawn about the values, especially the protection of the weaker party and family solidarity, in relation to the new Czech matrimonial property law (*Principles III*). It is unclear whether the relatively recently adopted concept of unmarried cohabitation will be a challenge for Czech legislators (*Principles IV*). One can agree with the view that the new private law code should, in principle, cover all private law matters, including family law, as is customary in countries with comparable legal environments.[48] However, the autonomy of will of the free person must be respected. In private law, the balance of values, harmony, the protection of the weaker party and the interests of the family as a whole, whatever form it may take, must always be sought.

46 | For more details see Scherpe, 2016.
47 | See Králíčková, 2009, and Králíčková, 2014.
48 | Towards theoretical issues see Zuklínová, 2003, pp. 141 ff.

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THE RIGHT TO KNOW ONE'S ORIGINS IN LIGHT OF THE LEGAL REGULATIONS OF ADOPTION IN SLOVENIA

Suzana KRALJIĆ[1]

ABSTRACT

The relationship between parents and children forms a central part of family law. As a rule, the legal relationship between children and parents also has a coherent biological starting point. However, a legal relationship between parents can also arise through adoption, where legal and biological relationships diverge. Children who have been adopted often want to know the identity of their biological parents. In the past, priority was given to the biological parents' anonymity, but the child's right to know their origin is now at the forefront. Slovenia has implemented new family law legislation; however, it does not specifically address this subject. Adoption court proceedings are not uniform because of this inconsistency. Comparative law, however, provides varied approaches to exercising a child's right to know their origins or biological parents, which is now widely regarded as a critical part of one's identity. The author of the paper analyzes Slovenia's current legal regulations and compares it to contemporary ECtHR case law that has provided the groundwork for modern approaches to the legal regulation of a child's right to know their origin. In this article, the author also attempts to formulate proposals for changes to Slovenia's existing legislation, as well as proposals for de lege ferenda improvements, which, on the one hand, would bring Slovenia closer to realizing children's rights, and, on the other hand, could lead to a unification of Slovenian court case law, ensuring greater legal certainty and predictability.

KEYWORDS

adoption
biological parents
right to identity
anonymity
constitutional rights

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1. Introduction

Knowing one's origin is a given for most people who know their biological parents.[2] However, some children and adults do not know their biological parents. Putting aside the sociological aspects of children's desire and need to know their biological parents and focusing on the legal background, we can accept that the rapid development of biotechnology has opened up many legally sensitive family law issues.[3] For a variety of reasons, children search for their biological parents. Not knowing their biological parents is often the missing part in their lives. Knowing own biological parents has also an important role in defining one's identity. Today, we can no longer merely speak of a child's right to know their origin, but of everyone's rights to know their origins. The right to know one's origins has already been enshrined in the constitutions of some countries.

There may be conflicts between the right of the child to know their origins and the parent's right to remain anonymous. Parents who have given up a child for adoption may not want the child to know their identity. The right of children to know their origins has gained importance in recent years, both abroad and in the Republic of Slovenia, which, after more than forty years, has recently adopted a new Family Code (FC).[4] This article presents the differing approaches to this issue between Slovenia and other countries. The European Court of Human Rights (ECtHR) case law has also set important milestones in this area of children's rights. The right of the child to know their origins will only be analyzed in the context of adoption; it will not be applied to other relationships that are also linked to this right (e.g., in the case of children conceived through artificial insemination, anonymous births, or surrogacy).

2. Children's rights to know their origins

The Convention on the Rights of the Child (CRC)[5] was adopted in 1989. Children's rights have taken on new dimensions and have become an indispensable basis for decision-making in all matters concerning children. The CRC is an international human rights treaty that defines children's civil, political, economic, social, health, and cultural rights. The principle of the child's best interests, which is now a fundamental principle of children's law, must be applied to all articles of the CRC.[6] Children's rights are an area in which the law and the children's daily lives are intertwined.

According to Article 7 of the CRC, children have the right to know and be cared for by their parents. States parties shall ensure the implementation of this right in accordance with their national law and their obligations under the relevant international instruments in this field. However, according to Article 7(1) of the CRC, the child has this right only in so far as it is possible. The provision of Article 7 of the CRC does not therefore impose an obligation on states to guarantee the child the absolute right to know the identity of their

2 | Besson, 2007, p. 138.
3 | Lamçe and Çuni, 2013, p. 605.
4 | Uradni list RS, št. 15/17, 21/18 – ZNOrg, 22/19, 67/19 – ZMatR-C, 200/20 – ZOOMTVI.
5 | Uradni list SFRJ, št. 15/90; Uradni list RS, št. 35/92.
6 | Čujovič IN: Novak, 2019, p. 59.

parents. The CRC leaves it to the States Parties to decide how the state will regulate the rights of the child.[7] At the same time, it should be stressed that an absolute prohibition of the right to know one's biological parents is contrary to that of the CRC.[8]

Article 8 of the CRC complements Article 7. It sets the right of the child to preserve their own identity, which the CRC does not clearly define. However, the CRC gives three examples of what 'own identity' includes, namely nationality, name, and family relationships (Article 8(1) of the CRC). It follows that nationality, name, and family relationships are crucial in defining a child's identity, but are not the only significant information. Article 8(2) of the CRC imposes an obligation on states parties to ensure that, where a child has been illegally deprived of some or all of the elements of their identity, they shall be provided with appropriate assistance and protection in order to re-establish their identity as soon as possible.[9]

The family relationships referred to in Article 8 of the CRC, as an elementary part of the child's right to know their identity, also form the basis for knowledge of parents, both legal/social parents, and biological or gestational ones. The latter has become particularly important in recent years, as many children who have been adopted, born through artificial insemination, or an anonymous birth tend to search for their biological parents. While such a search has been based mainly on paper documents and personal testimonies, the rapid development of modern technologies has further contributed to, and indeed made it possible for children who are now adults to find their biological parents.

Article 1 of the CRC states that for the purposes of the CRC, 'child' refers to every human being below the age of eighteen years unless the law applicable to the child provides that the age of majority is attained earlier. However, a person's search for their own origin and identity usually does not begin until after attaining the age of the majority. This was confirmed by the ECtHR in the case of *Jäggi v. Switzerland*, in which the ECtHR explicitly pointed out that a person's interest in knowing the identity of their parents does not disappear with age.[10] A child informed during their childhood that they are adopted often does not set out to find their biological parents until they reach the age of majority.

In 2002, the UN Committee on the Rights of the Child explicitly appealed to States Parties to ensure that all States Parties shall take the necessary measures to enable all children, regardless of the circumstances of birth, and adopted children, to obtain information about their parents' identity to the extent possible.[11] However, the CRC itself does not provide any guidance or conditions for providing this right to children.

3. Legal regulations of adoption in Slovenia and the right to know one's origins

3.1. General

Although the right to know one's origins is enshrined in the CRC and is thus a fundamental right of a child, it is not enshrined in the Constitution of the Republic of Slovenia

7 | Novak IN: Novak, 2019, p. 742.
8 | Ziemele, 2007, p. 27.
9 | See also Clark, 2012, p. 627.
10 | *Jäggi v. Switzerland*, app. no. 58757/00, 13 February 2006.
11 | Concluding Observations, recommendations 31 and 32, CRC/C/15/Add.188, 8.

(CRS).[12] However, the right of a child to know their origins is explicitly provided for in, for example, the constitutions of Serbia[13] (see Article 64(2)), Uganda[14] (see Article 34(1)), Namibia[15] (see Article 15(1)), Malawi[16] (see Article 23(2)), Costa Rica[17] (see Article 53[18]), and the Congo[19] (see Article 41).

The new FC, adopted in 2017 and entered into force in April 2019, does not include any provision explicitly referring to the right of the child to know their origins. Neither the CRS nor the FC mentions this right. However, this right cannot be denied, given that its legal basis is derived from the CRC. Article 8 of the CRS states that ratified and published international treaties (including CRC) are directly applicable. In 2007, the Constitutional Court of the Republic of Slovenia (CCRS) took a clear position that the right of an individual to know their origin belongs to the set of personality rights. Articles 34 and 35 of the CRS laid down the basis and limits of the constitutional protection of personality rights. Human personality is a combination of several personal goods that are protected by individual personality rights that belong to the human person. The guarantee of personality rights guarantees that the component of an individual's personality that are not protected by other provisions of the CRS, but only together with them, is given the ability to develop freely and shape their life in accordance with their own choices. Among the component that are decisive for the development of an individual's personality is the knowledge of one's origins, that is, the knowledge of one's biological parents. This is one of the components that is crucial to a person's self-conception and the conception of their place in society. Knowing one's origins also has an important impact on family and kinship ties. Not being able to establish one's origins can be a burden and a source of uncertainty for an individual. Therefore, the right to know one's origin is also a part of personality rights. In a broader sense, this is the right to personal identity, which includes the right to a personal name and the right to nationality, and the right to know the identity of one's parents.[20]

The reasons an individual may have for wanting to discover their origins are manifold. They may be rooted in an individual's psychological need for identity. They may also have a medical basis (e.g., knowledge of hereditary diseases) or even reflect the individual's material interests (e.g., inheritance, alimony). A child's research into their origins as an adult may lead to unpleasant consequences for the personal and family lives of all persons involved. However, a child's interest in knowing their origins should outweigh the interests of legal certainty and the need to safeguard the permanence of existing family law relationships.[21]

12 | 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, 92/21 – UZ62a.
13 | Službeni glasnik RS, br. 98/06.
14 | See Parliament of the Republic of Uganda, 2021.
15 | Constitute, 2021d.
16 | Constitute, 2021c.
17 | Constitute, 2021b.
18 | Unlike other constitutions, Costa Rica's Constitution does not focus only on children, but recognises this right for all.
19 | Constitute, 2021a.
20 | Decision of the Constitutional Court of the Republic of Slovenia U-I-328/05-12, 18 October 2007, par. 8.
21 | Decision of the Constitutional Court of the Republic of Slovenia št. U-I-328/05-12, 18 October 2007.

3.2. Adoption

Following Besson, the right to know one's origins amounts to the right to know one's parentage, that is, one's biological family and ascendance, and one's conditions of birth. It protects each individual's interest in identifying where they come from.[22] It was in the case of adoption, which is an old legal institution that has evolved throughout history and has been adapted to the needs of a particular period, that the question of the right to know one's origins first arose. Today, adoption is the best-known form of social parenthood[23], where a child is left without parents or cannot be cared for by them. Social parenting is used because both parents, or at least one of them, are not genetically related to the child in adoption.[24] A legal bond between the adoptive parent and the adopted child is established to imitate the natural parent–child relationship. The adoptive parent acquires parental care and the rights and obligations arising therefrom.[25]

For children or people who have been adopted, the knowledge that they have been adopted raises many questions (e.g., who are my biological parents?; why I was given up for adoption?; do I have other relatives?) and a desire to meet their biological parents. This is especially the case in international adoptions, as these children often differ physically from their adoptive parents and thus question their origins. They often not only seek information about their biological parents, but also information regarding their cultural heritage.[26] Knowing one's biological parents is also important from a medical perspective (e.g., prevention, detection, and treatment of hereditary diseases). This could also be achieved simply by providing data in an anonymized manner.[27]

The right to know one's origin is a fundamental right of the child, but not the adoptive parent. It must be assumed that a woman who has chosen to give her child up for adoption at birth may not want her identity to be known. Similarly, prospective adoptive parents usually do not want biological parents to know who has adopted their child. They may fear that the biological parents can cause problems by tracing their child. This is especially the case if the adoption has resulted from the deprivation of parental care by the biological parents. It follows from the fact that adoption, as an institution of family law, is often intertwined with strong emotions.

Under Slovenian law, the final adoption order also marks an important turning point with regard to the information relating to all three parties involved—the child being adopted, the child's biological parents, and the adoptive parents. Once the adoption order has become final, the adopted person has no right to obtain the personal data of their biological parents, which are kept in the civil registry and other personal data registers. The biological parents who have given the child up for adoption also do not have the right to access the personal data of the child (Article 222(2) FC).

The Slovenian civil register is a computerized database in which adoptions are registered (Article 2(1) of the Civil Register Act[28] (CRA)), that is, the adoptive parents are registered as the child's parents. When accessing or extracting data from civil registers,

22 | Besson, 2007, p. 140.
23 | In the case of an anonymous birth, a child conceived with donated gamets, or surrogacy, social parenting can also be considered.
24 | Zaviršek, 2012, p. 26.
25 | Kraljić, 2019, p. 788.
26 | Inštitut za socialno politiko RS, 2019.
27 | Fenton-Glynn, 2014, p. 191.
28 | Uradni list RS, št. 11/11 – UPB, 67/19.

only the names of the adoptive parents, and not the biological parents, are visible (comp. Article 222(1) FC and Article 29(2) of the Rules on the Implementation of the Civil Register Act[29] (Rules)). This is because in the case of adoption, the birth registration certificate is issued without endorsement of the adoption (Article 29(3) Rules). Information about the adoption from the civil register may be obtained only with the written consent of the person to whom it relates. A child who has attained the age of 15 may give consent if they are capable of understanding its meaning and consequences. Otherwise, the child's legal representative, that is, the adoptive parents or guardian, may give consent. Consent can be obtained by the social work center at the initiative of the adoptee or biological parents. This makes it clear that the task or power of obtaining consent is entrusted to Slovenian social work centers (Article 222(2) FC). Simultaneously, this ensures that the information or circumstances surrounding an adoption are protected from the general public, which cannot freely access the information in the civil registry.[30]

Information about an adopted person's biological parents may relate to:

a) Non-identifying information, including their general appearance, religion, ethnicity, race, education, occupation, etc. This includes the name of the agency (e.g., in the United States) that arranged the adoption, and the facts and circumstances relating to the nature and cause of the adoption.

b) Identifying information about the biological parents or other members of the biological family, consisting of their names and addresses;

c) The medical and psychological data of the biological parents, which may be provided to the registry at any time after adoption. This information is important for adoptive parents, as it can indicate whether a child is at an increased risk for certain diseases.[31] Ensuring access to health data is also crucial for the enjoyment of the child's right to the highest attainable standard of health under Article 24 of the CRC, as this inevitably also includes information on family history. Denying adequate medical information about children could be detrimental to their standard of care and unnecessarily jeopardize their health.[32]

The Slovenian FC has been very restrictive in terms of providing information that would enable a child to exercise their right to know their origin or knowledge regarding their biological parents. Slovenia is one of the most restrictive countries in this respect, as it makes this right conditional on the consent of the child's biological parents. Many European countries regulate children's right to know the identity of their biological parents. Differences exist as to the age at which the child acquires this right:

a) 12 years: Belgium, Finland, Czech Republic[33];

b) 14 years: Austria, Hungary, United Kingdom (the exception is Scotland for 14 years);

c) 16 years: Bulgaria, Germany, the Netherlands[34];

29 | Uradni list RS, št. 40/05, 69/09, 77/16, 102/20.

30 | Farnós Amorós, 2015: p. 7.

31 | Law Offices Stimmel, Stimmel & Roses, no date.

32 | Childs Rights International Network, 2018.

33 | Children in the Czech Republic have access to adoption information starting at the age of 12. If the original mother of the child requests secrecy of this information at the time of birth, an exception is made. In the case of a 'secret birth', 'anonymous birth', or 'confidential birth', the latter is given. The identity of the mother will only be revealed in these circumstances if a court order will be obtained.

34 | In the Netherlands, the age limit in the case of inter-country adoption is at 12 years.

d) 18 years: Cyprus, Croatia, Denmark, Estonia, Greece, Lithuania, Latvia, Malta, Poland, Portugal, Romania, Spain, and Sweden.

e) maturity of the child: France, Slovakia;

f) 25 years: Italy;

g) Ireland does not guarantee the right of a child to know their biological parents. Slovenia allows it, but makes it conditional on the consent of the biological parents.[35]

The review shows that most countries have a better approach to the issue than Slovenia. They prioritize the child and their right to know their origins. Although it is also possible under the Slovenian FC for a child to know who their parents are, this is conditional on the consent of the biological parents. If they refuse to give consent, the disclosure of information about the biological parents to the child will not take place. In particular, this will deny the child's psychological need to know their biological parents' identity. Apart from the psychological interest, the child may also have a medical interest, which is realized through Article 222(3) FC, or a material interest (e.g., inheritance), which should not play a primary role in establishing the identity of the biological parents.[36]

An exception to the regulation under Article 222(2) FC is the acquisition of health data. The adoptee or their legal representative may request information from the social work center about the health of the biological parents to the extent and under the conditions provided for by law.[37] In this case, the social work center will obtain information from health institutions (e.g., possible hereditary diseases) and send it in an anonymized form to the adopted person or their legal representative (Article 222(3) FC). The anonymization of data means that the form of personal data has been changed in such a way that it can no longer be linked to the individual or can be linked only with disproportionate effort, cost, or time. However, when the child has been adopted by the spouse or cohabitation partner of a parent[38], the provisions of Article 222(2-3) of the FC do not apply, as the child still has one parent.

Social work centers are also responsible for keeping records on children who have been adopted. The latter is not explicitly provided for, but is self-evident, given that the social work center is the body that verifies the suitability of a child for adoption. If the social work center establishes that the child meets the conditions for adoption, it registers the child in the central database of children in need of adoption (Article 218(5) FC). In order for the social work center to reach such a conclusion, it will need to have the relevant documents (e.g., on health and parental consent) at its disposal and to keep them.[39]

35 | FRA, no date.

36 | Povzeto po Končina Peternel, 1998, p. 65.

37 | In *In re Adoption of S.J.D.* (641 N.W.2d 794 (Iowa 2002)), the court refused to open adoption records for an adopted person even though she was manic depressive. The court held that there was no 'good reason' to justify opening the adoption file. It is clear from US case law that 'good reason' is the legal standard. The court must determine in each individual case whether there are good reasons justifying the opening of the adoption files. Medical reasons are certainly good reasons, but not all of them. Thus, the court did not define the mere existence of manic depression as a good reason, whereas the need for an organ transplant was considered as a good reason justifying the opening of adoption files. Through the practice of the American courts, the view has also emerged that adoption records should be opened if it is necessary to save life or prevent irreparable harm to physical or mental health – see Tilly, 2005; Oliphant & Ver Steegh, 2016, p. 492.

38 | It should be stressed that in Slovenia the same-sex partners living in registred or not registred civil union do not have the right to joint adoption.

39 | Kraljić, 2019, pp. 790–791.

The conflict of interests between the child and their right to know their origins as an adopted child, and the birth mother's right to remain anonymous was also addressed by the ECtHR in the case of *Godelli v Italy*.[40] The ECtHR upheld a violation of Article 8 of the ECHR as the Italian authorities failed to ensure a balance between the child's interest in knowing their origins and the birth mother's right to remain anonymous. In fact, priority was given to the mother, as Italian law allowed women to give birth anonymously in order to prevent unlawful terminations of pregnancy, discarding the child in unsafe circumstances, and ensuring adequate medical care during childbirth. However, the child was not allowed to request information about their ancestors or, with the consent of the biological mother, to reveal her identity. Nor did Italian law provide for a procedure whereby the mother could revoke her request for anonymity.[41]

However, the mere fulfilment of the objective presumption is not sufficient, because the child must also fulfil a subjective presumption, which is manifested in their capacity to understand the meaning and consequences of the given consent. If the objective condition is met, but not the subjective condition, the child's legal representative will be able to give consent. If the child's biological parents do not give consent, the child is prevented from obtaining their information. Biological parents are thus guaranteed anonymity if they do not want their information to be disclosed. Thus, if consent is refused, they will not be able to know the identity of their biological parents. For the child's right to information or knowledge of origin to be realized, three cumulative conditions must be met: i) the child must be at least fifteen years old (objective condition); ii) the child must be able to understand the meaning and consequences of the consent given; and iii) the biological parent must have given their consent. Indeed, a complete denial of the possibility of accessing information on biological parents would be contrary to Articles 7 and 8. However, the child's right to know who their biological parents are is still not sufficiently protected, as there is no legal obligation under the FC for the adoptive parent to inform the child of their parentage (e.g., in Croatia).[42] Following the example of other countries, it would also be advisable to shift the scales in this area to the side of the child, ensuring respect for their right to know their biological parents.

What about information revealed during the adoption process itself? Adoption proceedings can only be initiated on the proposal of a social work center (Article 121(1) of the Non-Contentious Civil Procedure Act[43] (NCCPA-1)). The jurisdiction for adoption is today given to the courts, which decide on them in a non-contentious civil procedure. There is no consensus among social work centers regarding how to proceed in this situation. The social work centers submit proposals in three different copies: i) one for the court, ii) one for the biological parents, and iii) one for the prospective adoptive parents. The court copy of the application contains all the information. The biological parents' copy conceals the information of the prospective adoptive parents, and the adoptive parents' copy conceals the information of the biological parents. The social work centers thus expect the court to conduct the adoption procedure anonymously, although the current arrangements do

40 | *Godelli v. Italy,* app. no. 33783/09, 25 September 2012.
41 | Velkavrh, 2012, p. 34.
42 | Vučković Šahović & Petrušić, 2016, p. 109.
43 | Uradni list RS, št. 16/19.

not support this.[44] This was also the practice of social work centers before the FC, under the Marriage and Family Relations Act of 1976.[45]

According to Article NCCPA-1, which refers to the right to be heard, the court must give the parties to the proceedings the opportunity to be heard on the allegations made by the other parties, to participate in the taking of evidence, and to discuss the outcome of the proceedings as a whole (Article 5(1) NCCPA-1). As the social work center is the initiator of the adoption procedure in the case of joint adoption, it is an open question as to who the participants are in the adoption procedure. According to Article 21 NCCPA-1, the participants to a non-contentious civil proceedings are: i) the initiator (applicant) of the proceedings; ii) the persons against whom the proposal is filed (the counterparty); iii) the person with respect to whom the proceedings are brought (the child to be adopted); iv) or the person who will be directly affected by the court's decision (the prospective adoptive parent and the biological parents); v) and the person whose legal interest may be affected by the court's decision. Participants may also be persons and authorities entitled by law to take part in the proceedings. It follows from the foregoing that the prospective adoptive parents, the biological parents, and the child also have the status of a participant in the adoption proceedings (with the exception of the social work center as the petitioner). In non-contentious procedures, including adoption proceedings, the court must respect the right to be heard by all participants.

The court may also make a decision without giving the participant an opportunity to be heard if the law so provides or if the court considers that this would jeopardize the other constitutional rights of a person whose rights and legal interests the court is obliged to protect *ex officio* (Article 5(2) of the NCCPA-1).[46] Given that adoption is a special form of child protection, the court must protect the rights and legal interests of the child. However, the constitutional rights of the child in adoption proceedings are in no way jeopardized in such a way as to justify depriving the other participants in the adoption proceedings of their right to be heard on the allegations made by the other participants, to participate in the taking of evidence, and to discuss the outcome of the proceedings as a whole.[47]

Since the new Slovenian FC came into force, diverse perspectives on the protection of data on children's biological parents and prospective adoptive parents have evolved. Before the social work center files a petition with the court, the biological parents are made aware of the information about the potential adoptive parents, as they must consent to the child's adoption. According to the legal act, consent to adoption cannot be given to a person whose complete name is not specified because the FC is unaware of the incognito or blanco adoption.[48] As a result, the concealing of the prospective adoptive parent's personal information in the adoption petition itself is useless or needless, because the biological parents are already aware of it.[49] The adopted parents' names and surnames are

44 | Horvat-Pogorelec, 2021, pp. 6–8.
45 | Uradni list RS, št. 69/04 – UPB, 101/07 – odl. US, 90/11 – odl. US, 84/12 – odl. US, 82/15 – odl. US, 15/17 – DZ, 30/18 – ZSVI.
46 | Rijavec IN: Rijavec & Galič, 2020: pp. 50–51.
47 | Horvat-Pogorelec, 2021, pp. 6–8.
48 | Biological parents consent to an adoption in a 'blanco adoption' without knowing who would adopt their child. The adoptive parents are already known in an 'incognito adoption', but only to the authority that will carry out the adoption, not to the biological parents who consent to have their kid adopted (Kraljić, 2019, p. 731; Novak, IN: Novak, 2019, p. 743).
49 | Horvat-Pogorelec, 2021, pp. 6–8.

listed in the adoption decision. As previously indicated, under the new Slovenian FC, until the adoption decision is final, the adoptee has no right to know their biological parents' personal data, which is registered in the civil registry and other personal data registries. The biological parents of a child who has been placed for adoption do not have the right to access the child's personal information (Article 222(3) FC).

Article 22 of the European Convention on the Adoption of Children (ECAC) also deals with access to and disclosure of information.[50] The ECAC prioritizes the disclosure of identity, that is, open adoption. However, it may be decided that adoption will take place without disclosing the identity of the adoptive parent to the child's biological family (Article 22(1) ECAC), that is, a closed adoption. The ECAC guarantees the adopted child access to information held by the competent authorities about their origin (Article 22(3) ECAC). If the biological parents of an adopted child have a legal right not to disclose their identity, the competent authority has the right to determine whether to overrule this right and disclose information about their identity, to the extent permitted by law. In doing so, the authority must consider the circumstances of the case and the rights of the child and their biological parents. The right of an adopted child to know their origin is not an absolute right under the ECAC. It is also impossible to prohibit this right completely. In all circumstances, a balance must be achieved between the child's right to know their origins and the biological parents' right to remain anonymous.[51]

An adopted child who has not yet reached the age of the majority may be given appropriate counselling (Article 22(3) ECAC). The adoptive parent and the adopted child must be able to obtain a document containing extracts from public records confirming the adopted child's date and place of birth. It is not necessary to reveal the fact of adoption or the identity of the biological parents (Article 22(4) ECAC). Taking into account the right of a person to know the identity and origin of an adopted child, under Article 22(5) ECAC, information on the adoption shall be collected and kept for at least fifty years after the finality of the adoption, as adoptees often wish to have access to that information in adulthood.[52] However, civil status registers should be maintained in such a way that only those persons who demonstrate a legitimate interest in the information recorded in them will be granted access. Persons who do not have such an interest should be denied or prevented from obtaining such information (Article 22(6) ECAC). The current Slovenian regulation on access to biological parents' information differs from ECAC's Article 22(3) (see above). However, this cannot be interpreted as a reason Slovenia should not ratify the ECAC. Upon accession to information, Slovenia could make reservations to Article 22(3) of the ECAC.

Sweden has also not acceded to the ECAC because, unlike the ECAC, under Swedish law, adult children who have been adopted have an absolute right to disclose the identity of their biological parents. This is because the child's right to know their origin always overrides the parents' right to anonymity.[53]

50 | The European Convention on the Adoption of Children (Revised) was opened for signature in Strasbourg on 27 November 2008 and became applicable on 1 September 2011. Only ten countries have ratified the ECAC (as of 10 September 2021), namely Belgium, Germany, Denmark, Malta, Finland, Norway, Ukraine, Romania, the Netherlands, Spain. Slovenia has not acceded to the ECAC.
51 | Council of Europe, 2008, p 11.
52 | Council of Europe, 2008, p. 11.
53 | Center for Adoption Policy, no date; see tudi Kovaček Stanić, 1997, p. 172.

In the case of *Odièvre v. France*[54], the ECtHR[55] considered an adopted child's right to know about their origins. The ECtHR acknowledged that people have a fundamental right to know their origins, but also found that the mother had a legitimate interest in remaining anonymous. At the same time, it emphasized that the right to information about one's origins and the identity of one's biological parents is an essential element of an individual's personality. The ECtHR found that France had not violated Article 8 of the European Convention on Human Rights (ECHR), as it had succeeded in ensuring a fair balance between the competing interests (the mother's right to remain anonymous and the child's right to know their origins).[56] The ECtHR case in question concerned an adult complainant who was adopted at the age of four. The complainant's mother requested anonymity at birth under the French system ('*accouchement sous X*'[57]). In this case, the ECtHR assessed the French anonymous birth regime. Although the mother has the right to remain anonymous, she can waive this right at a later time, so that the child can learn her identity and have access to non-identifiable information about her.[58] Even if the biological parent does not consent to the disclosure of their identity, the competent authority must be able to authorize disclosure in situations in which the circumstances are reasonable.[59]

4. Conclusion

The right of a child to know their origin is now recognized in a number of international documents (such as CRC and ECAC) as well as in numerous national laws. However, differences remain between national law and international documents. Some countries deny the child's right to know their origin (e.g., Ireland), and there are disparities regarding the age at which a child can exercise this right among those that explicitly recognize the child's rights (e.g., 14, 15, 16, 18 years).[60] A further distinction is made regarding whether countries recognize it as an absolute right of the child, that is, a right that always prevails over the biological parents' right to anonymity (e.g., Sweden), or as a non-absolute right, in which proportionality must be considered according to the circumstances of the case, as well as the right of the child to know their origins and the right of the biological mother to remain anonymous.

Another distinction is that certain countries require adoptive parents to inform the adopted child of their adoption. Article 92 of the Federation of Bosnia and Herzegovina's Family Act expressly stipulates that a child has the right to know the identity of their parents. Adoptive parents are even required by law to inform the adopted child about the adoption no later than the child's seventh birthday, or immediately after the adoption if

54 | *Odièvre v. Franciji,* app. no. 42326/98, 13 February 2003.
55 | Already in 2002, in case *Mikulić v. Croatia* (app. no. 53176/99, 7 February 2002), the ECtHR stressed that it is crucial for an individual to know their biological father, as knowledge of one's origins is an important element in the formation of an individual's personality.
56 | Council of Europe, 2019, p. 55.
57 | Več glej Besson, 207: p. 139; Clark, 2012, p. 634.
58 | *Odièvre proti Franciji*, app. no. 42326/98, 13. februar 2003.
59 | Velkavrh, 2012, p. 34.
60 | FRA, no date.

the adopted child is older.[61] Croatia has a similar law. Adoption is a highly compassionate relationship, and it would be ethically and morally unacceptable to construct this relationship based on a misunderstanding of one's origins.[62] However, it is also crucial to guarantee that adoptive parents are sufficiently supported in taking the best approach to transmit such important information to the child (e.g., in Slovenia, parents are aided by social work centers).

There is also a fairly consistent arrangement in place to secure the data protection or anonymity of the prospective adoptive parent in relation to the biological parents, and vice versa, during the adoption process. Of course, there are exemptions in the event of so-called open adoptions. However, the Slovenian legal regulations today depart from this. The current procedures show a lack of uniformity and uncertainty. As a result, despite the fact that both laws have only been in effect since April 2019, the Slovenian legal regime, both substantive under the FC and procedural under the NCPPA-1, would need to be revised or supplemented. This will assure compliance with the ECtHR case law and the CRC on the one hand, and more uniform adoption proceedings by Slovene courts, on the other. *De lege ferenda*, the necessary amendments should be made to allow children to exercise their rights to know their biological parents or origin. The latter is now restricted because of its reliance on biological parents' consent. De lege ferenda regulations should put the child at the forefront. It should also be clarified that the child has the right to know the identity of their biological parents. The adoptive parent should thus be obliged to inform the child of the adoption. This would ensure an improvement in the existing legal regulations and increase the protection of the child's best interests.

61 | Nekatere države ne vežejo to na starost otroka, temveč na otrokovo sposobnost razumeti posledice tovrstnega razkritja.
62 | Bubić & Traljić, 2007, p. 126.

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CRISIS OR EVOLUTION?

Barnabás LENKOVICS[1]

ABSTRACT

According to the author, the serious crisis of marriage and family in the European (Western) civilization shall be stopped with effective legal protection and government measures. Since the root causes are complex, the protection shall also be the same. The natural and social side of man shall also be taken into account. The phenomenon of domination shall also be eliminated both within marriage and family. The level of the current legal protection cannot be reduced, it can only be increased. The priority (constitutional) protection of traditional marriage and family as natural and fundamental values is not discriminatory.

KEYWORDS

marriage and family
crisis
evolution
protection and support
basic values
alternatives

1. Crisis of marriage and family

In his paper on the situation in Poland regarding the crisis of marriage and family, Professor Marek Andrzejewski mentioned the two concepts of *crisis* and *evolution*. The abovementioned paper was written within the framework of the 'Protection of family in the legal system' research project coordinated by the Ferenc Mádl Institute of Comparative Law. In addition to family law professors from Hungary and Poland, their peers from the Czech Republic, Slovakia, Serbia, Croatia, and Slovenia also took part in the research and prepared a so-called 'country report' for a comparative analysis. Are the symptoms and causes of the crisis the same, and how have the legal instruments for crisis management evolved from country to country? What common lessons can be drawn for the future? What are the most important similarities and possible differences between the crisis management practices of Western and Central European countries? Many other questions and answers can be explored from the country reports. I consider the most important, or fundamental, question to be the one posed in the title of this paper. This question is also

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important from the viewpoint that many other answers depend on it; therefore, I believe that this question is worthy of a study in itself. Although, according to the rule of formal logic, the answer can be either crisis or evolution, with a compromise solution of 'crisis in some ways, and evolution in others', I give my own answer in advance: crisis.

In the countries that belong to the European (Western, Jewish-Christian) cultural circle, the crisis of marriage and family, in essence *the lack of social reproduction*, has reached a point where a red line must be drawn and it must be said *so far and no further!* Otherwise, these people will become extinct, its civilisational achievements will be destroyed, and its culture (including the culture of human rights) will fade into the mists of history. Since Europe is building a civilisation of 'freedom, justice, solidarity', and, according to the Christians, it is a civilisation of 'love and peace', the consequences of this crisis would be disastrous, with the effects limited to not just Europe. The changes that have led to this situation cannot be called evolutionary development or any development at all. The essence of evolution is not just *change*, but the acquisition or preservation of the ability to *survive*, and consequently the qualitative improvement *to become a better human being*.[2] The process of becoming human may be complete in the biological sense, but the process of *becoming a good human being, a better human being, and a more humane human being* is not yet complete and can never be complete in the individual, national, civilisational, or global sense. The essential and primary condition for this evolution is the survival and reproduction of humans. However, the *crisis of man*, especially the crisis of the white human race, is at the root of the crisis of marriage and family, which in turn is at the root of *the reproduction crisis*. The *crisis of man* is in fact a *crisis of values*, or a crisis of the hierarchy of values. As an intended(?) or unintended(?) side effect, the 'value neutralisation' of society and the state has resulted in *people with no value* at the bottom of the value hierarchy, with their fundamental values questioned, destroyed, or existing only 'on paper'. This has become the fate of marriage and family,[3] and with them loyalty, selfless love, respect, mutual solidarity and support, trust and gratitude, commitment, having children, being there for others, sacrifice, and so on. The crisis of marriage and family cannot be managed with the current thinking and attitudes about these values. Crisis management requires the preservation, rescue, and rehabilitation of the fundamental values. This is not impossible because many people share these values and set goals (e.g., happy marriage, big family), but later they are diverted by other goals and act contrary to their original goals, moving further and further away from them. This is a well-known paradox that can be resolved, even though it is not an easy task as the resolution of paradoxes is usually very difficult.

2. A contradictory world

Nowadays, young people postpone marriage or avoid it altogether, and, in many cases, they prefer the looser partnership type, cohabitation, over marriage. They do not have children,or have only one child. Furthermore, married couples divorce too easily, and their child is usually brought up without a father, etc. This is the typical marriage and

2 | Bregman, 2020, pp. 319–334.
3 | Fukuyama, 2000, pp. 31, 47, 59–60.

family model. While this was not their original plan, the need to pursue their own careers and livelihoods, the need for freedom, travel, and pleasure, and so many other such values and goals push their marriage and family, and ultimately their lives, into the background and then into crisis. They look for happiness, but lose their way.[4] They are not alone, and this is not the only wrong turn in today's world, the *world of paradoxes*.

The whole world is facing a *population (human reproduction) problem*. In the smaller but rich parts of the world, *depopulation* is causing increasingly serious problems (economic, social, and environmental), while in the larger but poorer parts, *overpopulation* is causing these problems. The two problems should be solved simultaneously, but separately. Global population migration—as it would contribute to overpopulation of the earth, where there are no more freely occupied territories—is not a solution, and it would only make the problem more serious.

The *ecological footprint* of humanity is growing every year, and the present generation is rapidly consuming (wasting, even destroying) the natural foundations, resources, choices, and opportunities of the future generations. The solution to the problem is not intentional depopulation. The *World Inequality Report* issued annually by Oxfam International shows that the super-rich people are rapidly growing in number and increasing their wealth while exploiting billions of people and nature and driving more than half of the world's population into poverty. Our world is morally, socially, and environmentally unsustainable. Production and consumption (unnecessary, superfluous, useless, and harmful), driven by compulsive growth, overburden the natural environment, accelerate climate change, cause increasingly severe climate disasters, endanger human life and the whole living world, and make hundreds of millions of people homeless, which is clearly unacceptable and unsustainable. These serious, paradoxical problems caused by man are unworthy of man as a *rational and moral being*, and violate the requirement of *humanity* and the *right to human dignity*. These problems do not receive the attention they deserve in science, politics, and international public life, and, therefore, are not prioritised in the daily lives of individuals. In contrast, other issues, such as *sexual identity*, receive disproportionate attention. Violent minority movements and organisations attack and destroy the traditional and natural institution of marriage and family, a crisis that is at the root of the population problem and which, of course, has deeper historical causes. These problems can only be solved if we try to manage them in their proper place, in proportion to their weight and importance. This requires a new way of thinking, because the crisis of marriage and family cannot be solved by the same thinking that caused or contributed to the problem in the first place.

3. The complexity of the approach

If an effect (negative social symptom) has more than one cause, they must first be examined individually and then in their totality including their interactions (to make the correct *diagnosis*); subsequently, the correct *therapy* can be considered—in a consultative manner with the involvement of several specialists and co-disciplines and combination of knowledge.

4 | Kopp and Skrabski, 2020, pp. 145–165.

Therefore, legal science should be opened up and its thinking base must be broadened so that it gains a social scientific and even a general scientific nature.[5] It is true that we are talking about the need for an interdisciplinary approach to a complex, long-standing problem, but since jurisprudence is a closed system in itself, it tends to be constantly narrowing. It analyses its own concepts and examines them under a magnifying glass and then under a microscope until it becomes lost in its own problems. As an instrument of power, jurisprudence considers itself to be a big player in its own circle, but it is a pity that this circle is too small.

If, for example, marriage and family are in crisis, and we treat this only as a legal problem, although it is not primarily a legal problem, then solutions to this problem with any number of legal instruments will not be enough. All the essential causes of the problem should be identified and addressed appropriately. This must be managed in a holistic approach: if a person has multiple diseases and multiple causes, it is not enough to treat just one disease, cause, or symptom; the sickness must be treated as a whole (in its complexity).

If the crisis of marriage and family is understood as a symptom of disease of man and society, then the essential causes must be identified, investigated, and treated together. To heal the crisis of marriage and family, we can use the law as a *means* of regulating human behaviour. However, applying the human rights, family, or constitutional law research viewpoint and approaches alone is not enough; the 'consultation' and involvement of all 'human sciences' (natural and social sciences, including biology, human ethology, psychology, sociology, and economics) is needed.

4. The natural side of man

Man is a *biopsychosocial* being,[6] a unity of physical, mental, and spiritual capabilities, in this evolutionary order. None of these aspects can be ignored, considered alone, or over-dimensioned. Marriage and family have an *inborn* natural side (original, genetic, physical and spiritual, biological): the instinct and motivating force of subsistence *and* procreation. For these purposes, a *union of two people*, that is, a *monogamous relationship* between a man *and* a woman, had developed within the ancient herd community. Survival and transmission of life are possible only when the couple is together and united; it is easier and healthier when the couple also forms a physical and spiritual unity. The pair then becomes *parents* and forms a family with their offspring.

The *family* was originally a consumption-oriented community leading a hunter-gatherer lifestyle with their main natural and moral law being that 'food must be shared'.[7] Later, with the *Neolithic* revolution and *paradigm shift,* the family became the basic unit of *farming* with an emphasis on agriculture and settlement. Later, with the Neolithic revolution and paradigm shift, the family became the basic unit of farming with an emphasis on settlement and consequently marriage. Marriage and family, as living organisms, have their own natural evolutionary development, which is nothing but active adaptation to the changing natural and life-sustaining conditions. However, two closely related problems have arisen. One of the problems is that humans have *domesticated* not only plants

5 | Pokol, 2015, pp. 106–130.
6 | Kovács, 2007, p. 122.
7 | Michel and Schaik, 2019, p. 62.

and animals, but also themselves by not only experiencing, learning and mastering, and accumulating knowledge of the laws of nature, but also shaping and changing them to suit their own impulses. It is said that 'what a man thinks is mostly wrong, but what he knows is true'.[8] The experienced laws of nature are permanent, and the conceived laws of man are fleeting. Although man is originally a natural being, while following his self-conceived laws, he is constantly distanced from nature and, in no small measure, even turned against it. As if he could create his own world, he begins to see himself as a god (*homo deus?*).[9] Instead of protecting and caring for the nature that was entrusted to man by creation, mankind, which currently totals 7.5 billion, is not only using, but also destroying nature for the sake of its own world. His actions are unacceptable, unsustainable, and suicidal, both rationally and morally, according to common sense and moral (natural or divine) law as well. If a species, in this case man, exhausts its own resources, ruins its living conditions, and destroys whatever sustains its natural environment, it will also become extinct. Therefore, the natural side of man must also be carefully protected as part of nature conservation, and this is aided by the recently emerging evolutionary and complex scientific approach whose arrival is deliberate and not accidental.

5. The social side of man

The evolutionary development of marriage and family has a man-made social side in addition to the natural side; this side was *created* by man, adapting to changes in social circumstances (religions, ideologies, beliefs, political powers, farming methods, technologies, market laws, fashion, etc.). It can be said that they are purely human creations produced by humans according to their own interests, and always far fewer than those who are forced *to adapt* to them. If adaptation to social conditions is successful, regardless of whether it was voluntary, enthusiastic, or under pressure, these creations act as an unavoidable force (*vis-maior*) on the lives of individuals, just like the forces of nature. They can act as vitalising forces, as *ideals and beliefs*, objectives, and guides, or as experienced and proven *fundamental values*; on the other hand, they can also cause human and social disasters, as *dogmas of mass-destructive ideologies*. For example, the 20th century was a disastrous century in this respect, dominated by man-made dogmas (e.g., fascist and communist). 'The power of dogma can be truly satanic only if it unites very large masses, whole continents, or even the mankind in a single evil misconception'.[10] I think this kind of dogma is today's *open society*, which is nothing more than the created idea of a society falling apart, disintegrating into atoms due to total individual selfishness. Despite such rumours, man is a community being. Man is no longer a creation of an *indigenous community*, but still belongs to *the community*. He is a member of a family, a nation, a cultural community or civilisation (e.g., European), and the great family of humanity, or the *human civilisation*, and if he is sufficiently educated, he can strongly resist mass-destructive dogmas. As a valuable person who is rich in knowledge and in spirit, he is able to enrich his immediate and distant communities (e.g., his family, his nation, and humanity) and can resist the power of satanic dogma as well.

8 | Lorenz, 1988, p.75.
9 | Harari, 2020, p. 27.
10 | Lorenz, 1988, p. 81.

6. The phenomenon of dominance

Man has shifted from an existential mode of *being* to an existential mode of *possession* with the agricultural revolution, which is the greatest paradigm shift of humanity so far.[11] According to the law, the essence of possession is the *domination* of things (goods) that are possessed and owned. The possessed goods constitute *wealth*. The exclusionary rights holder of all wealth is the *owner*.

The law recognised and protected the institution of private property against all outsiders. The essence of ownership rights as property status rights is *full and exclusive legal power* over property. However, the *extent and value* of possession and ownership can vary from one individual to another; consequently, the degree of dominance and power of each person can vary as well. This inequality has differentiated and later hierarchised property and the economic and political organisation of society. People without property or without sufficient property were placed in a dependent and vulnerable position to owners. Old *win-win* social games began to be displaced by new *win-lose* games. Property and the economic and social order built on it, and the hierarchical order of domination have always penetrated people's life relations, including the internal (intimate) relations of marriage and family. The agricultural revolution and settlement led to family farming and the establishment of private property. Private property and inheritance led to paternal power, which took over matriarchy. The emerging *male domination*, supported by private property power, was different in character from the previous female domination. Marriage also *became* a *win-lose game*. The industrial revolution abolished small private property, and the communist revolution abolished large private property, but the 10,000-year-old flywheel of male domination within the family continued to turn for two or three centuries. Today, the family has ceased to be the basic unit of economic management, but family households as a consumer community remain important in the consumer society. However, in this situation, there is no need for paternal or maternal power or male or female domination. In fact, now is the time for real equality between men and women, for free marriage based on strong attraction, for mutual loyalty and support, for starting a family with joint offspring, and for a renewed winner-takes-all game.

7. The liberation of man

The intolerable legal and material (wealth) inequality has given rise to great ideas of equality throughout history (early Christianity, utopian socialism, scientific socialism, national socialism, communism). The mottos of civil enlightenment were 'liberty, equality, and fraternity'. The great codes of private law codified the emancipation of man (abolition of slavery, emancipation of serfs) and the social freedom of man (equality before the law, universal equality of rights, the principle of equality and co-ordination, horizontality), while transforming marriage and family relations as well. Movements and struggles were started for women's liberation, equality between

11 | Fromm, 1994a, p. 25.

women and men, and equality between spouses, in order to ensure freedom of marriage. Civil marriage became a contractual obligation between two parties, which can be freely contracted or dissolved. Legal relief had an incentive effect: the number of divorces began to rise, which had a negative effect on the number of marriages but encouraged the establishment of civil partnerships. Followers of a lasting and meaningful marriage, in the analogy of a 'sacramental' religious marriage, wanted more: a lifelong commitment, a *life union*, and a 'covenant marriage' with moral rights and obligations towards each other and the children. This excludes the ownership sense of the spouses, possession, or dominion over the other spouse, which is the most common cause of divorce. The equality experiment of socialism also failed because it practiced total domination based on state ownership when it should have eliminated the phenomenon of domination. The guarantee of real equality of rights of spouses in their relationship was characterised by the abolition of domination, effective equal sharing of the burden, and mutual support.

8. The liberation of children

The issue of liberation of children, which is also the liberation of the future generation, has shifted focus from paternal authority or parental domination to the protection of children's rights and unilateral parental obligations towards the child. The principle of the best interests of the child has been transformed from an international public law norm into a national principle of family law. However, a unilateral over-emphasis on children's rights, the severity of militant guardianship (e.g., against immigrant parents in some Scandinavian countries), or child tyranny are not in the interests of parents or the child. The 'single mother' model has become a social phenomenon and a legal concept. In many European countries and the USA, the majority of children are born out of wedlock or are placed with the mother in divorce and grow up without a father. The problem of the 'fatherless child' has emerged as a modern psychological syndrome, and, more generally, the problem of a 'fatherless society'[12] is developing in the absence of paternal love.

The conditional, task-giving, performance-monitoring, strict, and disciplining, but always fair fatherly love is lacking, even though it is needed to balance the unconditional, forgiving, accepting, reassuring, and consoling love of mothers. Both forms of love are necessary for the child to grow into a mature adult with a sound mind. In other words, it is necessary for the child to learn that they have not only rights but also duties and responsibilities. Family law and judicial practice have realised this, which is why they no longer banish the divorced fathers from the family, but this does very little to address the social and psychological gravity of the problem. The lack of earned paternal and maternal prestige leads to a lack of respect for parents, which in turn leads to a lack of respect for marriage and family as fundamental values, which again leads to a general lack of prestige and respect and, thus, to a lack of respect for fundamental values, resulting in a general crisis of values.

12 | Fromm, 1994b, pp. 57–60; Kopp and Skrabski, 2020, pp. 62–63; Ranschburg, 2011, p. 176.

9. The problem of legal reflection

The question of the relationship between the economic basis and the social structure was one of the greatest debates of Marxist jurisprudence: does the economy determine the law or does the law determine the economy, and what transitional solutions can be imagined between the two extremes in time and space? The legal theory aspect of the question is the problem of the *source of law:* is the law *built from below*, evolving from social relations, or does it guide society *from above as a state command*, an instrument of political power? Is the state ruled by society, by the *will of the people*, or does the *state rule society*? I do not intend to answer these evergreen questions here and now, but I have raised them against the backdrop of the crisis of marriage and family as a toolbox for legal protection. The legal debates here are very similar. If the changes in marriage and family relations were an evolutionary developmental symptom, then the law would have no other task than to follow and reflect these changes. However, if the changes are a symptom of a crisis, they must be stopped and reversed, and the two institutions should be consciously protected and supported. Since the time of civil marriage, the natural and social evolution of marriage and family has been followed, mapped, and reflected in law, which has evolved and changed and continues to change. However, for nearly two thousand years before that time, marriage was dominated by canon law, which considered marriage as a sacrament and an indissoluble institution. In effect, it 'sanctioned' the effects (including the negative effects) of the agricultural revolution. In this respect, as we have seen, the paradigm shift was established by civil enlightenment, which promoted the ideas of 'liberty, equality, fraternity', and the institutionalisation of *civil marriage*, which considered marriage as a *contract* between two free people, one man and one woman, with equal rights, which could be dissolved as well. Initially, the *principle of fault* dominated the dissolution process, which turned it into a war between the parties, with the result that all parties became losers. This was followed by the *principle of dissolution*, which is more peaceful than the former as long as one party does not object to the divorce. The easiest, quickest, and cheapest way of dissolution is by an *agreement of the parties*, with *two 'nos'* for the marriage instead of *two 'yeses'*. In such cases of dissolution, there is no need for a church or a court, with the registrar sufficient in many countries. However, if a marriage was at first sacred and indissoluble, and then became a civil contractual bond, why should it be concluded at all as it is just a piece of paper! Thus, the alternative forms of cohabitation and partnership without marriage have begun to grow in popularity. Strangely, people living in such relationships have begun to claim the rights of spouses, albeit without the spousal obligations.

Because of political, sociological, and demographic facts and reasons, the law has constantly yielded to the growing social expectations, with the result that the man-woman partnership has been elevated to the status of marriage in terms of its essential elements. The concept of the so-called 'sociological family' has gained ground, with the prohibition of discrimination against children born out of wedlock playing a major role. The conscious and deliberate rejection of marriage and the resultant family and the choice of looser forms of partnership instead were not valued as legal facts. Cohabitation has been placed in a homogeneous group with marriage and family, whereas treating non-equals as equals can be discriminatory as well. On the other hand, it led to a further progressive erosion of traditional marriage and family as fundamental

social and legal values. Moreover, legal generosity has not solved the crisis of marriage and family or the lack of social reproduction, but, as an unintended side effect, it has exacerbated these problems. The problem has been compounded by the growing number of alternative forms of relationships and cohabitation that have been claiming marriage and family status, especially for same-sex couples. In recent times, the global population migration and the reception of illegal migrants are contributing to this problem: superficially, as a replacement for a declining labour force, a little more profoundly, as a replacement for a decreasing population, and more profoundly and in the longer term, as a problem of 'population exchange' and even 'civilisation exchange'. Here again, we come to our initial question: is this the latest stage in the evolutionary development of marriage and family, or is the crisis already so deep that a remedy cannot be postponed? My answer is the same: because of the crisis of marriage and family, we have reached the red line of 'so far and no further' in legal regulation as well, which shall not be crossed.

10. Social diversity

The evolutionary development in nature, in the world of creatures, means that a species in danger becomes capable of adapting to changing natural conditions in order to survive. Replacing the endangered species with an alien ű, especially an 'invasive' species, is not survival or evolutionary development, but rather an acceleration of the extinction of the threatened species. In the case of humans, the issue is much more complicated; since 'all humans are brothers and sisters' in a global sense, all humanity is one big family. From the point of view of the threat of the climate catastrophe, the survival of the whole humanity in the 'natural' sense is also questionable. Moreover, in addition to natural conditions, man-made social conditions (cultural, religious, political, economic, and social) have also been substantially transformed, and among these, there may be shocks, collapses, and disasters to adapt to, or escape from. In addition to *biodiversity*, humans as a species are also characterised by *social* (cultural, religious, political, economic, social) *diversity*. The most serious issue of the *global* versus *local* debate is the preservation or elimination of this diversity, in the latter case, the homogenisation of the diversity and variety of the human species for the sake of survival. I acknowledge the importance of the principle of preservation. The preservation and maintenance of biodiversity is important for the conservation and maintenance of the natural foundations of life. The diversity and variety of our world is a source of beauty and an element of genetic richness, but it is also key to evolutionary progress. It provides choices for survival. This is also true for social diversity, which can not only be preserved, but also expanded and enriched in order to increase the chances of survival and the range of choices. Only one thing is forbidden, the use of violent means or methods by whatever name they are called such as war, 'democracy export', 'spreading of true faith', 'gender ideology', or 'sexual identity revolution'. The principles of freedom *and* responsibility, thus combined and interlinked, must also be applied in the field of marriage and family protection.

11. Our basic social values

Marriage and family, freedom of marriage, equality between women and men, having children, and starting a family are no longer just natural, biological (genetic), and psychological values, but *fundamental social values* as well. They are universal human rights in the legal world and fundamental constitutional rights in national constitutions. They are valuable for human beings and therefore worthy of protection for the benefit of society and the state. The monogamous marriage of a woman and a man, based on mutual fidelity and support, and the family as a community built on love may be seen as fiction,[13] but they are in fact attractive, stimulating, and value-enhancing objectives and fundamental values that improve human beings. They should be defended and protected from all value-destroying, value-relativising ideas, movements, and activities. Marriage and family have a *protective function for the physical and mental health* of both women and men. This is particularly true for children whose best interest is to grow up in a harmonious family. Marriage and family, alongside faith, are the greatest sources of strength for surviving crises. They could also be resources for surviving the crisis of the two institutions. Family policy and legal protection, the family-friendly society, and the state should help in this endeavour.

12. The *non-derogation* principle

The principle of *non-derogation*[14] was elaborated as a principle of environmental protection, especially nature protection, just half a century ago. This means that the achieved level of legal protection of nature cannot be reduced, but can only be increased. The protection of the natural foundations of life *would protect the right to life of wildlife* if it were a legal entity, and it would have a subjective or fundamental right. Because of the absence of these rights, the legislature prohibits man from destructive activities that destroy and endanger protected species of plants and animals and those that are under threat of extinction. Economic (investment) and social (job creation) policy objectives do not enjoy benefits over nature conservation. Economic growth, which damages or endangers nature, is no longer considered a development. The direction, pace, and scale of such development are *unsustainable*. The *requirement of sustainability* protects the *right to life of wildlife*, including the protection of *human beings' right to life*, which should be interpreted in conjunction with their *right to dignity*. If the natural basis of life is destroyed, the *human being* will perish along with it, which is the greatest violation of dignity, whereas human dignity is an inviolable fundamental right and value. It cannot be said that the principle of non-derogation is already fully applied in environmental and nature conservation practices, but at least it exists as a guiding principle in that area. What is the situation if a race of people is endangered? If the European white race is threatened with extinction, it should be declared as a protected species. Since the natural basis and traditional social framework for having children is marriage and family, or the union of a woman

13 | Hankiss, 2014, pp. 405–412.
14 | 28/1994. ABh.

and a man (as a *human* and *parent couple*), this should be protected and encouraged by means of subsidies. The level of legal protection of marriage and family should achieve that level from where it cannot be reduced, but only increased. Any human behaviour, movement, or action that further destroys, violates, or endangers the natural and fundamental institution of marriage and family as a value that requires increased protection must be prohibited. Such ideologies, movements, and activities are unsustainable from the viewpoint of social reproduction. The ideas and actions of selfish *individualism*, which destroy society and family, are unacceptable. No human right can be interpreted in a way that would destroy, or even endanger, marriage and family.

13. Purpose of rights

The *abuse of rights* is a common problem of the too direct and concrete application of the general and too abstract norms of human rights. For example, emancipation of women should not go against the law of nature, that is, it should not be aimed at the total (biological) equalisation[15] of the two sexes and the elimination of gender. There is no need for a permanent revolution or war against men[16] in the women's movement, in which both parents and children and, indeed, the institution of marriage and family and social reproduction would be losers. The demand for the right of 'free' interoperability between the sexes, as well as its implicitly forced acceptance by the majority and its teaching to incapacitated children, is nothing other than a distorted interpretation of freedom of expression as *unrestrained individualism*.

This is similar to the idea of an open society, but this 'open to all – sexual – orientation' represents a disintegrating, mentally disturbed, drifting personality. It is an evolutionary deception, or as Pope Francis called it an 'anthropological impasse'. Freedom is not boundless and unlimited; it is forbidden to abuse it at the expense of others. The freedom of an individual is freedom within the *family* and *society*, and not freedom *from the family and society*. *Solidarity* (which also means marital, family, and social solidarity) is the *freedom for the family and society* from the viewpoint of Christian *benevolence*.[17] Man needs faith and experiential knowledge that keeps him and his personality on the right path.

Just as the basic freedom and human rights of adult men and women are not purposeless and unlimited, the rights of children are also not unlimited and unbound. Nor can a child treat the parent in an inhuman way and humiliate, torture, or enslave them. The table has turned and it is time to free parents from the 'child rule', otherwise no one will have children at all. Thus, there are no unlimited rights, just as there is no unlimited power. The source of rights is the fulfilment of obligations: the obligation of husband towards the wife and vice versa, parent to child, child to parent, etc. According to this view, the freedom of the individual and the personality of man, thereby humanity, which is usually represented as concentric circles, can only unfold and be fulfilled in the communities. As Article 29(1) of the UN's Universal Declaration of Human Rights (UDHR) stipulates, '[e]veryone has duties to the community in which alone the free and full development of his personality is possible'. Thus, it is not the *egocentric* vision of man

15 | Pokol, 2011, pp. 188–195.
16 | Murray, 2020, pp. 136–143.
17 | Zlinszky, 2007, p. 20.

and society that prevails, but the original, traditional, community, and *sociocentric* vision of man and society. According to this view, a person's worth is measured by what he is, and not what he has. We do not live *to have more*, but *to be more,*[18] and thereby to enrich others in terms of values, spirit, knowledge, and integrity.

14. The value of monogamy

Man was originally of polygamous inclination (traces of which are noticeable even today), but in the evolutionary process over hundreds of thousands of years, man has become monogamous, or at least adopted it by exercising the virtues of prudence and temperance. If we consider the question of polygamy or monogamy from an evolutionary perspective over a long period of time, it can be seen that it is not a recent one, with its roots going back to prehistoric times. We know little about these times, and a wide range of conclusions can be drawn from archaeological records, which can be neither proved nor disproved. Consequently, our thoughts and statements are *presumptions*, which are well known in law, i.e., probabilities, which we consider to be real. To confirm our presumptions, we usually reflect on the past based on empirical knowledge of later times, which may also carry doubts. Nevertheless, the gravity of the problem (the crisis of heterosexual, monogamous marriage and family that is built on it, plus its exposure to increasing attacks) and its continuing aggravation force us to reflect on the issue to see if any thought can bring us closer to the problem and help us find the right solution. In the sciences, the assumptions, intuitions, and imagination of scientists often play a major role. They see what everyone else can see, but at the same time think about such things in a way that others cannot. For more than two million years, prehistoric and Neanderthal men lived as *community creatures*: in a community of women and men, in a community of children and property, and in and as part of nature. *Mutual cooperation* ensured the vitality, survival, and evolutionary development of the community. This situation presumes *win-win games* in relations within the community. Man's original natural inclination was polygamy, and monogamy was considered a deviant behaviour. The sexual attraction (dominance) of women and the linking of children to their mothers resulted in a *matrilineal* society and, *female domination (matriarchy)* within it. This female domination did not threaten but rather strengthened community cooperation and resulted in *win-win games*. However, as a result of biological developments over a long period of time, the *monogamous male-female pair relations* developed and became the rule. There are many reasons for this, of which at least three can be highlighted as being highly probable. The first is that, in addition to, and sometimes instead of, the casual and instinctive sexual relationships, more enduring sympathetic relationships developed, driven by strong mutual attraction and permanent bonds (today we can say that the 'chemistry of love' developed and operated between some couples). Second, in such relationships, the presumption of paternity was narrowed to the permanent male partner, who became more devoted to the care of his own child and the mother, his wife (even at the expense of his own maintenance, as the family law–as a natural law–still requires both parents to do today). The third reason, as mentioned by Professor Nizsalovszky in his book from

18 | Vereb, 2010, pp. 38 and 365.

1963,[19]was that in the case of children born from a relationship with two identifiable parents, incest and the risk of giving birth to genetically defective offspring could be excluded. Other reasons and causes of monogamy may have included mutual sexual *loyalty*, increased *support* for each other, and mutual *trust*, which spilled over to other monogamous couples in the community and to the whole community. Consequently, it reinforced the sense of belonging, mutual cooperation, and community solidarity, eventually contributing to the win-win game.

It is interesting that Plato, in Book III of his work *State*, believed that 'the taking of wives, marriage and the procreation of children should be made public property', and in Book V, he proposed a so-called 'community of women and children' in the order of guards to 'prevent discord'. Arguing with his master, Aristotle wrote in *Politics* that

> they care at least for that which has the most masters: everyone cares most of his own, and less for the common, or only so far as he is concerned, and because they think that he is cared for by someone else, they prefer to forget him [...] For there are two essential conditions in men which testify to care and love: property and affection; only neither of these can be found in such citizens.[20]

This empirical knowledge was confirmed by the failure of the historical experiment of communism, or by the dissolution of the hippie communes in the second half of the 20th century. Therefore, monogamy originally emerged *as a win-win couple relationship*, the result of the *natural* evolutionary development of man, even before the advent of private property and the agricultural revolution. It was not only an institution and means for joint procreation by a man and woman, but also a tool for the survival of the social community. It was also a vehicle of values that served to improve man and community. Article 16(3) of the UN UDHR acknowledges that '[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State'. It is also clear when reading paragraphs (1) and (2) that we are talking essentially about a monogamous marriage between a man and a woman, and a family complete with children. The UN UDHR is a universal norm that encapsulates the fundamental values of mankind, which are protected by Articles 29 and 30 against any abuse.

15. Are there any alternatives?

According to my personal point of view, there is no equal alternative to monogamous marriage between a man and woman, and family with children. However, the facts that there are alternative forms of *partnership and cohabitation*, and that the concept of *having children* has also been broadened by the possibilities of adoption, fostering, and *human reproduction procedures* cannot be ignored. The spread of alternative forms of relationships is a way out of the crisis of marriage and family. However, since the fault lies not in marriage and family, but in the person who marries and has a family, alternative forms of relationships also exhibit the same symptoms of crisis as

19 | Nizsalovszky, 1963, pp. 25–26.
20 | Arisztotelész, 1984, pp. 38 and 40.

marriage and family. If a marriage breaks down, the parties behave like consumers in a consumerist society: they do not fix it but throw it away and buy another. This is an unacceptable waste.

A person, even a *bad* spouse, is more valuable than any thing. Even if they are incorrigible, they cannot be thrown away, especially if they have a child together. The situation is similar for alternative relationships like cohabitation; they can also carry important values from the viewpoint of society and can be legally protected and (despite the differences) supported. Encouraging and rewarding a more serious and responsible marriage will not result in discrimination and cannot be classified as homophobia. The essence is in the legal recognition of the differences in the chosen life situations, and in the *legal distancing* between the different forms of relationships. The legal representation of an original difference (otherness) is not discrimination; on the contrary, treating those who are different as identical can be considered discriminative.

16. Summary

Marriage and family are essential for social reproduction; they are traditional, well-established means of *population replacement* in ageing and declining societies, as well as overpopulated ones, and, therefore, need to be strengthened, rehabilitated, rebuilt, and better protected. The mass admission of illegal migrants from foreign civilisations will not result in population replacement, but in *population exchange*, and ultimately *civilisation exchange*. Unsurprisingly, that population would be the winner, which appreciates marriage, family, having children, fatherhood, and motherhood. This would lead to the decline and fall of a great European, Western, or Christian civilisation, leading to the 'strange death of Europe'.[21] Those who repair and save their marriage and family can repair and save their nation and Europe as well.

What needs saving is not only marriage and family, or the population and culture of Europe, but also the soul of Europe and European man. 'All European states have been shaped by Christian civilisation. It is precisely this European soul that shall be resurrected', according to Robert Schuman.[22] According to Popes Paul VI and John Paul II, Europe is building a civilisation of love.[23] The European Union acknowledges the principles of *freedom, justice, and solidarity*. Solidarity is called benevolence by Christians. Europe is a forerunner of universal (global) solidarity, which is a model and guide for humanity. Solidarity starts with win-win games in the family and radiates to national, European, and global levels. Global capital and the domination of the global financial market are not at the heart of globalisation, profit maximisation, and utilitarianism, which should not be the main guiding ideals. There is no need for a war of nations or a clash of civilisations. Instead of racism and chauvinism, we must talk about *culturalism*, as national cultures enrich the diversity of our world. We also need *familism* rather than militant feminism, genderism, sexual revolutionism, and the war of the sexes.[24] The common essence of

21 | Murray, 2018, pp. 5–11.
22 | Lejeune, 2015, p. 249.
23 | Vereb, 2010, pp. 174 and 194.
24 | Kopp and Skrabski, 2020, p. 66.

family is the *community of love,* i.e., a community that holds its members together and keeps them united. Becoming a human being begins at birth, but a person's humanity and personality are formed in the family, a community of love, and then continues in their marriage and family. This is an unbroken chain of generations, a circular development on an ever-higher level, which can never end and can never be completed. It is a miracle and a gift of life, participation in which can contribute personally to the preservation and development of marriage and family.

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‘OUR FATHER’ – IN OR OUT? RELIGIOUS EDUCATION AND SECULAR TENDENCIES IN CROATIAN PUBLIC SCHOOLS IN THE EUROPEAN CONTEXT

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ABSTRACT

This study discusses religious education in Croatian and European schools, within the overall context of religious symbols in public life. Europe is a vibrant and non-homogenous continent that comprises many cultures and traditions based mostly on Roman law. Various legal cultures and value systems have developed in Europe, which differ due to developmental variations within the European continental system. Religious education is offered in most European countries in various forms. Only three European countries, Albania, Slovenia, and (to some extent) France do not allow religious teaching in public schools. For instance, the crucifix is a part of faith and folklore in Italy, religious celebrations during Christmas, St. Nicholas Day, and Days of the Bread are part of the religious tradition in Croatia (forcibly) broken during the socialist Yugoslavia era, and crosses are present on the national flags of many nations, although their citizens might have forgotten why. Praying and mentioning God, and singing, do not harm anyone but, rather, can serve as a call for friendship, mutual understanding, and peace. It would be useful to create a legal document (e.g. a by-law) that established standards for such public behaviour in schools, which could be followed on a voluntary basis by students, including non-religious children. The Croatian State should organise alternative courses for children who do not follow religious education in order to diminish differences and prevent dissatisfaction and feelings of isolation. Also, education experts should consider the principles of Christian ethics, which secure respect for every citizen. Croatian history and legal traditions as well as International treaties between the Holy See and Croatia secure a place for ‘Our Father’ and other religious appearances in Croatian public schools. Prayer as well as religious folklore is an important part of religious education and thus an important part of regular curricula. It could be used to build respect for everyone within the Croatian community.

KEYWORDS

Our Father
religion
law
international treaties
religious education
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religious community

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1. Introduction – General Tendencies

In our heavily secularised world, there is no area where worldviews collide on a greater scale than in the education sector, especially in public schools. In the so-called 'developed world' (I will consider all of Europe as such for the purpose of this article), we live in a world of conformity and consumerism, and there is increasingly little space allowed for spiritual life, not just in terms of the time people dedicate to it but also in terms of attitudes towards religiosity itself. Believers are associated with old-fashioned way of living and are often ridiculed for their dedication and piety. At the same time, there are forces within society that do not accept the weakening of their spiritual lives and try to maintain their identity, which includes their religious lives and practices.

One of the most significant rights parents have is the right to educate their children according to their beliefs and worldviews.[2] The education of children is a critical issue. It is essential to understand that parents' freedom to educate their children as they wish comes from their right to believe and live according to specific values, which deserve to be treated with respect. Belief is an essential part of human existence and metaphysics and defines who you are. The dignity of belief is shared with children and transferred to them within the family as a core unit of society. Of course, there are those who would claim that being secular, agnostic, or atheistic is much more neutral and that religious practices should be reserved for the private sphere. However, being secular, agnostic, or atheist is not neutral at all. This is also a worldview, one that does not acknowledge the presence of the spiritual or divine. It seems erroneous to claim that being agnostic or atheistic allows more neutrality. It is also incorrect to claim that being secular means being neutral, for two reasons. The first reason is that 'secular' in the etymological sense denotes attitudes that have moral, ontological, and axiological value and that are not universal or widely accepted. Second, the claim is not true in the historical sense. Secularity, followed by secularism, appeared as a product of the legal thought of Pope Gregory VII,[3] who wanted to protect the Church from attacks by feudal lords. Secularism started with completely different intentions and prefixes in terms of source-direction phenomena. This could be called the 'secular moment',[4] the point at which modern church–state relations started to develop. The term 'neutrality' implies a secularised society of which secularity is its main

2 | Article 26 of the Universal Declaration of Human Rights explicitly says '3. Parents have a prior right to choose the kind of education that shall be given to their children' (available at: https://www.un.org/en/about-us/universal-declaration-of-human-rights; accessed 10 April 2021); Article 2 of the Second Protocol of the European Convention on Human Rights says 'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions' (available at: https://www.echr.coe.int/documents/convention_eng.pdf; accessed 10 April 2021; Article 14(3) of the Charter of the Fundamental Rights of the European Union says 'The freedom to found educational establishments with due respect for democratic principles and the right of parents 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' (available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012P/TXT&from=EN; accessed 10 April 2021); Hrabar, Dubravka, The Istanbul Convention and the pitfalls of gender perspective, Samizdat, Zagreb, 2018.

3 | See Savić, 2020.

4 | Ibid., p. 274 (Table).

characteristic: a fair and balanced cooperation but a dissociation of Church (religion) from State.

The modern world became a world of secularism with a secularised society as a characteristic, one that is negative toward church and religiosity. Religion tends to be treated unfairly or, at least, as an entirely private affair.[5] This leads us to the position that religion is the same as a sports club or friendship society, but it is not. Religion is very different from all other associations. From the psycho-anthropological perspective, religion lies at the core of the existence of humankind and its quest to seek answers to ultimate questions. The second difference is purely legal: Religion has been legally protected due to the historical pogroms that have occurred for religious reasons. Religion is protected widely around the world, from the Universal Declaration of Human Rights to the European Convention of Human Rights and the Declaration on Human Dignity for Everyone Everywhere.[6]

Aggressive secularism wants to erase religiosity from all aspects of public life, especially from schools and universities. The paradox is that those who claim to be most liberal and accept everyone accept only those who think like them. Who will tolerate the intolerant? Who are the intolerant ones in this contemporary world? Are we in an era where parents will have to clash with a system that does not understand the layers of secularity and the historical development of Church–state relations, which work best when conducted through cooperation, mutual understanding, and respect? Liberal states and neo-liberal groups have chosen a path of aggressive secularisation, which changed religion from an ally to a foe. This study discusses recent trends in Croatia. Croatia features higher church attendance and a firmer connection between religion and national identity than is seen in many other European countries, but, as is true everywhere in the West, Croatia is facing problems due to the global influences of conformity, materialism, and decadence. This study argues that, paradoxically, there are two Europes: In one, which has had freedom and where democracy has flourished, church life and religious observance have decreased, not only in the public sphere but also in private life; in the other, countries that suffered from communist repression have perceived religion as a gateway to freedom. As I often say, life in the catacombs made religion flourish in those nations much more strongly than in Western Europe. This provides insight into religious education in Croatia and, to some extent, in the rest of Europe.

2. Unusual political request in Croatia

Religion is often used for political purposes. Religions and religious organisations are often affected by situations caused by external, political factors. Religion is often praised or attacked in our deeply polarised world, not out of devotion or hatred, but in order to use it as a tool for political profit.

In early 2018, members of the Croatian Parliament on the political left as well as the Liberals and the Party of Retired People (*Građansko-liberalni savez i Hrvatska stranka*

5 | Ibid., p. 266 (Table).

6 | Punta del Este Declaration on Human Dignity for Everyone Everywhere written and signed in Punta Del Este, Uruguay in December 2018, on the occasion on the 70th Anniversary of the Universal Declaration on Human Rights; see https://www.dignityforeveryone.org/introduction/; accessed 10 April 2021.

umirovljenika) proposed that the Croatian government should begin negotiations with the Holy See to amend the so-called 'Vatican Treaties'.[7] During the Parliamentary debates, the treaty between the Republic of Croatia and the Holy See on education and culture was heavily criticised.[8] As Staničić pointed out, Liberal MPs proposed a) removing religious education from the public school system, which currently instructs according to the 'values of Christian ethics'. The MPs argued that this violated the principle that a pluralistic civil society cannot be connected and/or bound to any specific moral code, as well as Article 14 of the Constitution.[9] Also problematic for them was b) the employment of religious teachers and the funding for religious textbooks used in religious education, as well as c) the funding for textbooks used by the Faculty of Theology at the Universities of Zagreb, Đakovo, Makarska, Rijeka, and Split. They also argued that d) the Church could partner with other universities and institutes that are funded by the state but that have no contractual limitations or restrictions (i.e. treaties).[10]

Those claims all argue that confessional religious education conflicts with the provision that all are equal before the law as defined in Article 14 of the Constitution,[11] and that religious education in public schools discriminates against non-religious students because they do not belong to a specific religious group and are thus subordinated under the dominant Roman Catholic Church.[12] An additional critique is that teachers of Catholicism-related education are in a better position than are teachers working in the sphere of other religions and/or of other subjects, as the state does not influence the teaching methods they use. This is obviously an inaccurate claim, since all religious communities that operate under an agreement with the Republic of Croatia must offer programs that follow the methodology scientifically determined to be appropriate for the curricula, while respecting the nation's constitution and legal system. In that respect, there are no real differences between the various religious communities in the country.

Another argument is that the Catholic Church has easier access to funding, which is relevant to the publishing of the religious books used as official school textbooks.[13]This argument has to be examined by considering how religious communities are funded in Croatia. This funding is equitable since it is on a *per capita* basis. All religious communities (not just Catholic ones) are funded through institutional income, donations, and state budget funds, which are the most important part of their income.[14] In fact, religious

7 | Savić, 2019; Staničić, 2018.

8 | *Ugovor između Svete Stolice i Republike Hrvatske o suradnji na području odgoja i kulture od 18.12. 1996*. This Agreement was the basis for another agreement signed on January 29, 1999 between the Catholic Church and Croatia on religious education, available at: https://hbk.hr/ugovor-o-suradnji-na-podrucju-odgoja-i-kulture/, accessed 12 April 2021. To maintain our focus, three other treaties will not be elaborated upon in this paper.

9 | Ibid, Staničić, op .cit. supra footnote 8, p. 400.

10 | Ibid.

11 | Staničić, op. cit., supra footnote 8, p. 402.

12 | See, Ibid., pp. 404–405.

13 | Ibid., pp. 409–410.

14 | Savić, 2019, pp. 257–259. 'Transfers from the State budget may also be put into two categories: i) which are dependent on the characteristics of the particular community and its importance to Croatian society and ii) which will be awarded for specific purpose or need'; see Art. 17. of the Law on the Legal Status of religious communities. Zakon o pravnom položaju vjerskih zajednica [Law on Religious Communities], Narodne Novine (NN), National Gazette of the Republic of Croatia, No. 83/2002, 73/2013, available at: https://narodne –novine.nn.hr/clanci/sluzbeni/2002_07_83_1359.html, accessed on 17 April 2021

communities enjoy a special tax status.[15] Most countries, regardless of their model of state–church relations (e.g. state church, complete 'detachment', cooperation),[16] benefit from and rely heavily on religious institutions in many aspects of life. For example, many religious organisations and religious workers serve in hospitals, penitentiaries, schools, and social work facilities. Therefore, cooperation between church and state in the school system should be considered part of the multi-layered process of mutual collaboration and coexistence in society, which has its roots in Judeo-Christian culture. Until the imposition of communist rule, religion occupied an important place in Croatia's public life and created public morals, which are still present in the fibre of the law today.[17] Agreements with the Catholic Church formed the basis of all other contracts with the numerous religious communities in the country, and a large majority of those accept their value for all.[18]

It is important to stress that parents are given complete authority over the education of their children according to their moral and ethical values under not only international conventions but also the Croatian Constitution and Judicature of the Constitutional Court.[19] In that respect, religious education is optional and the decision lies solely with parents.

The Catholic Church used the opportunity provided by the Croatian government's response to the Initiative which was focused on changing the Treatise between Croatia and the Holy See, to implement a religious education program, and Orthodox, Islamic, Jewish, Adventist, evangelical, and Mormon religious organisations followed suit.[20]

15 | Ibid., p. 259.

16 | Those three models are: a) state church, b) separation and c) cooperation; Doe, 2011, pp. 30–39.

17 | For more, see Savić, supra footnote 16, at Chapter 'Historical Background', pp. 240–244; also see Lušić, Tajana, Ugovori između Svete Stolice i Republike Hrvatske, available at: http://www.mvep.hr/custompages/static/hrv/files/lusic_tajana.pdf, accessed 17April 2021; also see Bajs and Savić, 1998, p. 79-95 (a pioneering article on these issues).

18 | The Government of the Republic of Croatia answered this way to the initiative to change the so-called 'Vatican treaties': *'Sve navedeno je iskaz stava Republike Hrvatske koja sukladno Ustavu Republike Hrvatske i odgovarajućim zakonima priznaje opće društveno vrijedan rad Katoličke Crkve u službi građana na kulturnom, odgojnom, društvenom i etičkom polju, što je izrijekom i navedeno u članku 6. Zakona o potvrđivanju Ugovora između Svete Stolice i Republike Hrvatske o gospodarskim pitanjima (Narodne novine – Međunarodni ugovori, broj l8/98). Vlada Republike Hrvatske napominje kako se iz državnog proračuna, na temelju ugovora koje je Vlada Republike Hrvatske sklopila s vjerskim zajednicama, financiraju i ostale vjerske zajednice u Republici Hrvatskoj'*, available at: https://vlada.gov.hr/UserDocsImages//2016/Sjednice/2018/05%20svibnja/99%20sjednica%20VRH//99%20-%2021%20b.pdf, p. 6., accessed on 17April 2021; Summary translation: 'The Croatian Government pointed at the Treaties stipulated between the Republic of Croatia and the Holy See and explained that all religious communities receive funds form the Treasury'.

19 | See supra footnote 2; also *'U skladu s odredbom članka 64. stavka 1. Ustava Republike Hrvatske (Narodne novine br. 85/10 – pročišćeni tekst i 5/14 – Odluka Ustavnog suda Republike Hrvatske) roditelji su dužni odgajati, uzdržavati i školovati djecu te imaju pravo i slobodu samostalno odlučivati o odgoju djece. Slijedom navedene Ustavne odredbe, razvidno je da roditelji samostalno odlučuju u pogledu uključivanja svoga djeteta u izborni predmet pa tako i na vjeronauk bilo koje vjerske zajednice. Svrha organiziranja izborne nastave je omogućavanje slobode u kreiranju odgojno-obrazovnog procesa, proširivanje i produbljivanje znanja i sposobnosti u onom odgojno-obrazovnom području za koje učenik pokazuje posebne sklonosti i pojačan interes'*; summarized translation: 'Parents are responsible for raising and educating their children, which also includes decisions about their religious education'; this was published in the National Gazette of the Republic of Croatia No. 85/2010.

20 | Ibid., supra footnote 19, p. 4.

Although I agree with most of Staničić's statements, I would argue that he is wrong to claim that religious communities operating under agreements with the Croatian state are in a significantly better position than those who are not and that we cannot talk about the equal position of religious communities before the law, even technically,[21] for two reasons. The ultimate legal question is 'What does it mean for a specific person or group to be equal before the law?' This obviously does not mean expecting the same treatment under different circumstances. For example, a person who is 14 years old or visually impaired will not be allowed to drive a car. One might claim that such a person is not being treated equally before the law, but this is obviously false. In legal theory (jurisprudence), equality before the law means having the same rights under the same (sometimes very similar) circumstances. In our example, the 14-year-old will be able to drive when they are older, and the visually impaired person will be able to drive if they gain their sight. We have to use the same pattern here, especially after the decision of the European Court of Human Rights in *Savez Crkava Riječ Života and others v. Croatia*, in which the Court decided that Croatia had violated Articles 9 and 14 of the Convention by not granting 'religious community' status to a community that did not have at least 6,000 members or a traditional presence in the country. The decision was handed down because this status had been granted to, for instance, the Bulgarian Orthodox Church, which entered into an agreement with the state but was not native to Croatia and had not requested an agreement.[22] Because of that decision, all new religious communities can seek equal status when they reach the appropriate stage (e.g. to become 'religious communities', not just 'associations'). This was regulated by the Law on Religious Communities, which allowed the Government of Croatia to sign agreements with religious communities as set out in Article 9 of the law. This law, which had various restrictions, was declared unacceptable. This was the only regulation governing religious communities that mentioned the European Court of Human Rights (ECHR) case (No. 7798/08).

Religious education is often attacked from those on the political left, especially to gain political points and especially before elections. I call these attacks *autumn awakenings*; every year, another debate starts about religious education in public schools. However, they have gone too far, especially by targeting religious education in public schools, which

21 | See Staničić, op. cit. 8.

22 | European Court of Human Rights Appl. No. 7798/08; see http://www.refworld.org.cases;ECHR,4d5bd2973.html; accessed 18 April 2021: 'In relation to the merits of the claim of a violation of Article 14 in conjunction with Article 9, the Court noted that as the difference in treatment between the Applicants and the other religious communities was not in dispute, it was therefore necessary only for the Court to consider whether such difference in treatment had an objective and reasonable justification, whether it pursued a legitimate aim and whether it was proportionate to the aim pursued. Referring to the decision in Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria (no. 40825/98, 31 July 2008), the Court reiterated that the imposition of criteria which a religious community that already had legal personality had to satisfy in order to obtain special privileges raised delicate questions, "[a]s the State had a duty to remain neutral and impartial in exercising its regulatory power in the sphere of religious freedom and in its relations with different religions, denominations and beliefs". As the Government of Croatia had been unable to provide any meaningful explanation as to why some religious communities satisfied the criteria of belonging to "the European cultural circle" whereas others, including the Applicants, did not, the Court found that such distinction was without "objective and reasonable justification" and, as such, a violation of Article 14 taken in conjunction with Article 9 was found'; Equal Rights Trust, available at: https://www.equalrightstrust.org/sites/default/files/ertdocs//Savez%20Crkava_Case%20Report.pdf, accessed 6 April 2021.

is voluntary. Another request is to stop funding the Catholic Faculty of Theology and the Faculty of Philosophy and Religious Sciences (Jesuits), as well as the partial funding of Croatian Catholic University.[23,24] This is especially hostile, given that the Jesuits founded the University of Zagreb (in 1669) and that the Faculty of Theology was prevented from working within that university when the communists came to power after WWII.

3. 'Our Father' and the Days of Bread

Under pressure from political correctness and Western secularism, many teachers are using generic formulas, especially in matters of religion. For instance, 'Merry Christmas' is replaced with 'Happy Holidays', and 'Happy Easter' is replaced with 'All the best', even though Croatian law establishes official holidays in the country and identifies those that are unmistakably religious in their nature and origin. Christmas, commemorating the birth of Jesus Christ, is clearly a religious holiday; Easter Monday is a celebration of the Resurrection of the Saviour, Jesus Christ, and All Saints Day (November 1) is not the same as the Day of the Dead. Nevertheless, religious and non-religious people both enjoy their non-working days but 'forget', or are ashamed to acknowledge, their religious dimension.

The 'Our Father' is a principal prayer taught in school by religious educators. It is also recited at religious shows for children on St. Nickolas Day and the Days of Bread, when priests visit schools to bless children and bread, the most important symbol of human labour and a sign of prosperity and plenty. However, in recent years, an increasing number of complaints have been made regarding religious ceremonies in schools.

Croatia, like most countries in Europe (e.g. Poland, Italy), follows a cooperation model of church–state relations. Other countries have state churches (e.g. the United Kingdom, Denmark); still others do not recognise the presence of religion within the public sphere, like France.[25] However, the French Republic has different rules for the departments of Bas-Rhin, Haute-Rhin, and Moselle, as well as for its overseas territories. French secularism retains elements of the Judeo-Christian tradition and Christian (or at least culturally Christian) values, despite the historical hostility of the French Revolution to the Catholic Church.[26]

23 | Prijedlog zaključaka o pokretanju postupka pregovora o izmjenama Ugovora između Svete Stolice i Republike Hrvatske, Predlagatelj: Klub zastupnika GLAS-a i HSU-a, Fonogram rasprave, available at: https://edoc.sabor.hr, accessed on 18 April 2021.

24 | See more in Sokol and Frane, 2018, p. 54.

25 | See Bloss, 2003: 'The history of these nowadays French territories developed differently so that the current legal situation in this region differs significantly from the rest of France. The local law still in force dates back to the law Germinal year X (8 April 1802) that merged a Concordat signed on 15 July 1801 and organic articles of the Catholic and Protestant religion. The Israelite religion was established a couple of years later via a decree from 17 March 1808. Thus, four congregations are officially recognized by the state: the Catholic Church, the Lutheran Church (Confession d'Augsbourg, d'Alsace et de Lorraine), the Reformed Church Alsace-Lorraine and the Israelite religion. The law of the recognized denominations is historically characterized by the principle of non-separation which nowadays exists only in theory. In fact, the public authorities intervene inter alia in the fields of creation and modification of e.g. dioceses, parishes, consistories etc. as well as in the nomination procedures of most of the ministers whose salaries are being paid by the state.'

26 | See more in Savić, 2015, Available at: https://digitalcommons.law.byu.edu/lawreview/vol2015/iss3/5.

If we accept these kinds of secularist critiques, we face an absurd situation in which children undergoing religious education, who are the majority (in some cases, representing over 90% of the student body), cannot show religious feelings for fear of hurting the minority.[27] It is dangerous to democratic principles to insist that the values of the majority are wrong, false, and undesirable. The feelings of the minority are also very important and need to be protected, but not in a way that allows the minority to rule over the majority. It is a major mistake to consider secularism, atheism, agnosticism, or even religious neutrality as 'neutral' positions.[28] The problem is that non-religious people too often see indoctrination in religious ceremonies rather than the values of friendship, sacrifice for the greater good, joy in community, gratitude, and respect for others (while also feeling that buying presents and eating cake at Christmas are somehow not unacceptable).

Most pupils want to participate in religious ceremonies and truly enjoy them. Many non-believing parents and their children also take part in them, not for fear of being isolated, but because they are members of a community that requires mutual respect. Love and respect should go both ways, from majority to minority and *vice versa*. Only in such a society is it possible to build a healthy environment for all. As Professor Pardon has said, it is important that children develop a conscience and become aware of the path from the tiny seed to the bread on the table. The Days of Bread and public prayer offer children a chance to become aware of that reality, and of the fact that they are blessed to be well-fed and have everything they need.[29]

4. *Grzelak v. Poland* and Law as a Just and Fair Balance

A few words should be said about the Grzelak[30] case, which is often used as a key case involving the unequal position of children who do not attend religious education.[31] In that decision, the ECHR ruled that public documents such as school diplomas and transcripts should not contain any information from which religious affiliation could be determined,[32] as such information could be used prejudicially (e.g. in employment), which would be unacceptable. Religious affiliation should not be a prerequisite for holding public office in Europe.

As Staničić rightly said, the Grzelak case does not endanger the secular state. The ruling affirms that religious education in public schools falls within the scope of the state;

27 | Arg. Pažin, Zvonko in Glas Koncila, available at: https://www.glas-koncila.hr/je-li-problematicna-prisutnost-svecenika-na-danima-kruha-u-skoli-razvijanje-vrijednosti-zahvalnosti-a-ne-indoktrinacija/, accessed on 18 May 2021.

28 | See Weiler's argument in the oral presentation in *Lautsi v Italy* in front of the Grand Chamber of the ECHR; https://classic.iclrs.org/content/blurb/files/ARTICLE_LAUTSI_PUPPINCK_English_BYU_Law_Review.pdf; it is also advisable to watch his final argument, available at: https://www.youtube.com/watch?v=ioyIyxM-gnM, accessed 18 April 2021.

29 | Pardon, supra footnote 29.

30 | European Court of Human Rights; Guide on Article 9 of the European Convention on Human Rights, Freedom of thought, conscience and religion; updated on https://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001–99384%22]}, accessed 18 April 2021.

31 | See, Staničić, op. cit., supra footnote 8, p. 401.

32 | Ibid., supra footnote 28.

the state may decide whether religious education will be introduced and in which form; only indoctrination is impermissible.[33] It is obvious that the existence of religious education is not predicated on the shape or form of its public expression. Moreover, Croatia's treaties with the Holy See[34] require that its education system take Christian ethics into account, which clearly shows the connection between Croatian law and the values and tradition of Christian thought.[35] At the same time, Staničić argues, as do I, that children who do not attend religious education face discrimination. The only difference in our approach is that I consider Staničić's suggestion to omit mention of confessional education from diplomas and transcripts as a change that would discriminate against religious education, which should be treated like any other academic subject.[36] Those who participate in religious education on a voluntary basis are presumably not ashamed of it and do not mind having it mentioned on their diplomas (even if they are not religious). In addition, the Republic of Croatia is obliged to respect its international treaties, including those signed with the Holy See. The only solution would be to have an alternative course such as 'Ethics', 'Religions,' or 'Cultures of the World', which would be offered along with religious education. That would at least prevent students from sitting in the library or just walking around during religious education classes. A sensible and responsible state should seek a solution to this problem that does not harm religious education but that respects the rights of those who do not believe or who believe but do not wish to attend. The law should always be a good, fair, and just mechanism that seeks to balance the rights of the majority (democratic principle) with the rights of minorities (human rights principle). The human rights principle requires that the law respect both the minority and majority.

5. Croatia and European Examples

As mentioned, Croatia conducts its relations with religious groups on the cooperation model. This involves cooperation not just with major religious groups like the Catholic Church but with all religions and religious organisations. Croatia values its religious groups and may serve as a leading example of a country where religious rights and freedoms flourish. The Catholic Church is for historical and cultural reasons the forerunner and leader of the network of agreements Croatia has made with religious organisations (and communities) operating within the Croatian legal system.[37] This has led to both verti-

33 | Ibid., 403.
34 | *Ugovor između Svete Stolice i Republike Hrvatske o suradnji na području odgoja i kulture od 18.12. 1996.* As noted, this Agreement was the basis for another agreement signed on January 29, 1999, between the Catholic Church and Croatia on religious education, available at: https://hbk.hr/ugovor-o-suradnji-na-podrucju-odgoja-i-kulture/, accessed 18 April 2021.
35 | Ibid., supra footnote 8, p. 401. As Staničić correctly points out by citing Archbishop Nikola Eterović, the term 'ethics' was used rather than 'morals' since morals will always be connected with Catholicism but 'ethics' is an expression of values built upon Christian values, which are more common and acceptable to all Christians, and in a greater sense to the members of other monotheistic religions as well as other citizens; a similar standpoint can be found in Croatian family law theory; Šimović, 2015, 1, str. 235., 256, 262.
36 | See supra footnote 33.
37 | Savić, op. cit., supra footnote 16, p. 250.

cal and horizontal cooperation, which involve the relation of each particular organisation to the state and ecumenical and interreligious relations, respectively.

Religious education is always a sensitive topic. It is about children, society's most vulnerable group. For that reason, we have to make a special effort to find the right balance for everyone. However, this does not mean that the modern tendency to over-secularize, which has become increasingly aggressive and lacks a proper understanding of the origins of secularity,[38] must be accepted automatically, without criticism. Everyone has to be aware that we all live in a heterogeneous world and must fine-tune our social relations. Very few European countries have legal systems that include no form of religious education. These few include Albania, Slovenia, and (to a limited extent) France.

France, presumed to be the most secular state, really is not. Religious education exists in various forms in most European countries. Sometimes it is offered as 'just' a course in ethics, connected to the teachings of religion generally or Christianity specifically. The French state funds Catholic education in the departments of Bas-Rhin, Haut-Rhin, and Moselle, and in France's overseas departments.[39] Many initiatives against religious education, like the one mentioned above,[40]seem like modern versions of the French Revolution, but now it is not only the Catholic Church that is criticised but all religious communities, and religiosity in general.[41] It seems that the world is polarised between religious and non-religious. The world is filled with antagonisms, and the quest to balance majority and minority rights may seem a utopian project. However, it may not be. In a study on secularism in Europe and the presence of God in public spaces conducted years ago, I argued that a balance between minority and majority groups could be found in five steps: by a) acknowledging that religion is an important part of cultural life (awareness), b) acknowledging that religion has shaped culture (foundations), c) establishing a minimum number among the majority's prevailing norms in law (democratic principle), d) establishing the maximum possible number of minority rights in law (human rights principle); and e) balancing between minority and majority rights (cohabitation).[42]

6. Conclusion

Europe is not homogeneous. Although Europeans share the same basic legal values, derived from our common civil law and Roman law heritage, we have developed in different directions and under various influences. We have to realise that there is nothing wrong with looking at things differently, as long as we respect each other's human dignity and values. Sometimes those values will clash, and we will have to find our way out of the problem in order to be able to live together. The solution is simple. It was described in J. J. H. Weiler's speech in front of the Grand Chamber during the *Lautsi v. Italy* case: The solution

38 | Savić, 2020; Casanova, 2009, available at: https://berkleycenter.georgetown.edu/publications/the-secular-and-secularisms. There see more about Pope Gregory VII and his effort to secure a religious life for the Church in the times of strong feudal lords.
39 | Savić, op. cit., supra footnote 8.
40 | See, infra 'Unusual political request in Croatia'.
41 | Savić, op.cit., supra footnote 8.
42 | Savić, op.cit., supra footnote 26, p. 726.

will be found through tolerance[43] and mutual respect for different worldviews. However, tolerance must go in both directions. This is a matter of discussion between the majority and minority about the prevailing legal culture of the country, which has to find a way to accommodate the rights of minorities. A minority in one country may be a majority in another just a couple of hundred miles away. Everybody is a minority. The issue of human rights is a two-way street: Democracy would lose its meaning if everything were decided by the minority, but democracy can easily degenerate into tyranny if the majority does not protect minorities. It is a two-way street and requires the ability to hear all arguments.

Religion and religious education do not belong in the Middle Ages, nor are they exclusively for primitive, uneducated people 'at a lower stage of development'. Europe is a mosaic of traditions and cultures, joys, and wounds. It is a continent where people believe in God and laws are derived from and for that belief, where people believe in God and the laws are silent on the matter, and where people do not believe in God but laws protect those who do. Britain has an official state church, the monarch is its head of state, and its national anthem mentions God. Greece's constitution starts by invoking the name of the Holy Trinity. In Denmark, all citizens help fund the Danish National Lutheran Church. In Croatia, most holidays are Catholic. The fact is that contemporary international treaties between the Holy See and the Republic of Croatia secure a place for religious education in Croatian public schools, while also allowing space for all religions.

This does not mean that our way is correct, but it is right for us. The key is to respect one's home and social environment. The key is to throw away bitterness and understand that the 'Our Father' does not harm anyone but merely expresses the values of one's society. Allowing religion in the public square is part of a noble tradition of belonging to a particular history and to a culture that allows space for minorities, including non-believers, and all those who share the same geography and call it 'home'. An understanding of Europe and of the Margin of Appreciation doctrine used by the European Court of Human Rights suggests that the Cross belongs in the classroom in Italy and that Croatian children should pray the 'Our Father' on St. Nicholas Day. No one has an obligation to unify Europe in a way that would erase its history, foundations, or religious identity.

Croatia has to find a way to shape a solution that will provide a complete framework regarding the use of religious symbols in public spaces, especially in schools. This could begin with public forums and conclude with by-laws and clear instructions for school principals and teachers. There is a way to keep tradition alive, while including all pupils.

43 | It is advisable to watch the final argument Weiler delivered in front of the European Court of Human Rights in the *Lautsi v. Italy* case; available at: https://www.youtube.com/watch?v=ioyIyxMgnM, accessed: 14 March 2021., see footnote 29.

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NECESSITY OF PROTECTING RELIGIOUS FEELINGS UNDER CRIMINAL LAW IN A DEMOCRATIC STATE

Paweł SOBCZYK[1]

ABSTRACT

Offending religious feelings, as referred to in Article 196 of the Polish Penal Code, was criminalized as follows: 'Any person who offends the religious feelings of others by publicly insulting an object of religious worship or a place dedicated to the public celebration of religious rites shall be liable to a fine, restriction of freedom or imprisonment for a term not exceeding 2 years.' This study highlights some doubts concerning the protection of freedom of conscience and religion using the example of the crime of offending religious feelings and attempts to prove the necessity of such protection in the Republic of Poland, a democratic state ruled by the law. The study first examines whether criminalising offences to religious feelings contravenes the constitutionally and internationally guaranteed freedom of speech (expression), freedom of conscience and religion, and broadly understood democratic standards. The study then examines whether criminal law is too strict an instrument to apply to alleged offences against religious feelings, and whether administrative or civil law (thought to be more lenient) is sufficient for ensuring the protection of individual freedoms and rights in this regard.

KEYWORDS

freedom of conscience and religion
offence to religious feelings
Constitution of Poland
Penal Code

1. Introductory remarks

Polish scholarly research on human rights points out that several basic stages can be identified in the development of human rights: idealisation, conceptualisation, positivisation, constitutionalisation, and internationalisation. Our thinking about human rights has reached the stage of practical implementation. Human rights are implemented (realised) by actually protecting individual freedoms and rights, and allowing people to

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learn about them and exercise them. The purpose of this realisation is to ensure their effectiveness and practical application, so that they are not only theoretical or illusory.[2]

The guarantees of freedom of thought, conscience, and religion enshrined in Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), drawn up in Rome on November 4, 1950[3] ('Everyone has the right to freedom of thought, conscience and religion') provided input for Article 53 of the Polish Constitution[4], which asserts that 'Freedom of conscience and religion shall be ensured to everyone.'[5] The authors of the Polish Basic Law made efforts to stay close to the wording of the Convention in framing the freedom and rights of individuals, as exemplified by the guarantees of freedom of conscience and religion.[6]

Despite the undeniable position of freedom of conscience and religion in the content and systematics of the chief acts of international and supranational law concerning human rights, as well as the constitutions of most European democratic states under rule of law, the interpretation of this freedom and the application of its guarantees (i.e. realisation) are still problematic.

One of the tasks of contemporary democratic states ruled by law is to establish guarantees and means of protecting individual fundamental freedoms and rights at various legislative levels. The constitution of a state (the basic law) is of key importance in most legal systems (though this does not diminish the role and significance of supranational and international guarantees). Similarly, the framers of the Polish Constitution (April 2, 1997) not only included freedom of conscience and religion (Article 53) among the fundamental freedoms and rights of individuals but also provided the grounds for a system for their protection, including the right to a fair trial and the institution of the Commissioner for Citizens' Rights, the individual constitutional complaint being the most prominent.

This study highlights doubts concerning the protection of freedom of conscience and religion by exploring the crime of giving offence to religious feelings under Article 196 of the Penal Code Act of June 6, 1997 ('Penal Code' or 'PC' hereafter).[7] It attempts to establish the necessity of such protection in the Republic of Poland, a democratic state ruled by law.[8] The study first examines whether the criminalisation of offending religious feelings violates constitutionally and internationally guaranteed freedom of speech (expression), freedom of conscience and religion, and broadly understood standards of a democratic state. Second, the study examines whether criminal law is not too 'strict' an instrument to use to assess acts alleged to have offended religious feelings, and whether administrative or civil law (considered 'more lenient') suffice to ensure the protection of individual freedoms and rights in this regard.

2 | See Jasudowicz, 2005, pp. 22–25.
3 | Journal of Laws of 1993, No. 61, item 284.
4 | Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997, No. 78, item 483 as amended.
5 | As noted by the Constitutional Court, 'Article 53 (1) of the Constitution is about (public authorities) ensuring everyone the freedom of religion (and freedom of conscience)'; Judgement of the Constitutional Court of 2 December 2009, case ref. U 10/07; Judgement of the Constitutional Court of 6 October 2015, case ref. SK 54/13.
6 | See Garlicki, 2001, p. 6.
7 | Act of 6 June 1997 – The Penal Code, Journal of Laws of 1997, No. 88 item 553, as amended (consolidated act: Journal of Laws of 2020, item 1444, as amended).
8 | Article 2 of the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78 item 483, as amended.

I am not an expert in criminal law; my research is conducted from the perspective of constitutional law (the status of an individual) and religious law, so I will not refer to academic discussions among criminal law specialists regarding this legal offence.[9]

2. The Doda case

To illustrate the legal issue at hand, let me present a case that has been widely discussed by lawyers and hotly debated in the media for some time – an offence to religious feelings committed by Polish singer Dorota Rabczewska, known as 'Doda'. In an interview she gave on July 24, 2009, and published online by *Dziennik.pl* on August 3, 2009, Doda said she was convinced by scientific discoveries, not by 'something written by someone drunk with wine and smoking some pot'. When asked by the journalist what she meant, she said, 'All those who wrote down all these incredible [biblical] stories.'[10]

Ryszard N. and Stanisław K. notified the prosecutor's office of a suspected legal offence committed under Article 196 of the Penal Code, pointing out that she offended their religious feelings by mocking biblical authors and the Bible itself, considered a holy book in both Christian religions and Judaism. The prosecutor of the District Prosecutor's Office in Warsaw brought an indictment against the complainant, accusing her of committing the offence under PC Article 196.

In its judgment of January 16, 2012, the court of first instance, in this case the District Court for Warszawa–Mokotów in Warsaw, 3rd Criminal Division,[11] found the complainant guilty of offending the religious feelings of R. N. and S. K. by publicly offending an object of religious worship (i.e. the authors of the Bible) under PC Article 196, and imposed a fine on her.

After examining the complainant's appeal (Doda was the 'complainant' in the appeal proceedings), the Regional Court in Warsaw, 10th Criminal Appeals Division, by a decision of June 18, 2012,[12] amended the challenged judgement, determining that the defendant had committed the alleged act, and imposed a fine on her of PLN 5,000.

The singer decided to use the individual constitutional complaint as provided in Article 79 of the Polish Constitution. Such a complaint may be brought before the Constitutional Court by anyone whose constitutional freedoms or rights have been violated. In essence, it appeals to the consistency with the Constitution of a statute or other legal act, on the basis of which a court or a public administration body has issued a final decision

9 | The contentious issues in interpreting this provision were most aptly pinpointed by Pohl:
[B]ased on both the review of the relevant literature on this provision and the observation of its application, it can be concluded that the construal of the provision in question is very often inconsistent. An analysis of these materials shows that the most serious differences of opinion emerge over two most fundamental matters. In the first of them, the dispute is whether an offence to religious feelings is a formal-only (non-consequential) offence or, contrariwise, a material (consequential) crime. As part of the latter, the discussion touches on the *mens rea* of the offence. Some support a position allowing only a direct intent, while others favour the view that a conditional intent may also come into play here. (Pohl, 2020, pp. 336–337).

10 | Dziennik.pl, 2010 [Online], http://wiadomosci.dziennik.pl/wydarzenia/artykuly/299624,sad-nie-odpuszcza-dodzie-bedzie-proces.html.

11 | Case ref. III K 416/10.

12 | Case ref. X Ka 496/12.

relating to constitutional freedoms or rights. This means that a precondition for a constitutional complaint to be reviewed substantively is that the complainant must indicate which constitutional freedoms or rights have been infringed on, and in what way, by the decision of a court or a public administration body when issued pursuant to the contested law or provisions of a normative act.

In the case at hand, the issue was the constitutionality of Article 196 of the Penal Code to the extent that it penalises offending the religious feelings of other people by publicly insulting an object of religious worship, punishable by a fine. The crucial point is related to the constitutional problem resulting from the fact that

> Article 196 of the Penal Code is an expression of a specific position taken by the legislator in the face of a conflict, which may occur between the freedom to express one's own views (Article 54 of the Constitution) and freedom of religion (Article 53 thereof). The legislator resolved this conflict in favour of freedom of religion, concluding that it is criminal to express views that insult an object of religious worship or a place intended for the public celebration of religious rites, which results in offending other people's religious feelings.[13]

The complainant pointed out that the protection of religious sentiments did not justify interference with freedom of expression so far as to criminalise conduct as a prohibited act subject to public prosecution under the penalty of two years' imprisonment. The complainant claimed that the protection of religious sentiments could be limited to cases in which the insult threatened public order or limited to penalising only a specific action. In her opinion, freedom of religion and conscience is provided a sufficient guarantee by Article 256 of the Penal Code, which penalises hate speech, including public incitement to religious hatred.[14]

Therefore, as argued by the complainant, PC Article 196 restricted freedom (affirmed by Article 54 (1) of the Constitution) to express views in a way that goes beyond the permissible limits specified in Article 31 (3) of the Constitution, particularly beyond what is necessary in a democratic state ruled by law, imposing restrictions in a manner disproportionate to the intended purpose.[15]

3. Protection of freedom of conscience and religion under the criminal law in Poland

It is commonly accepted, in both case law and jurisprudence, that freedom of conscience and religion is a fundamental freedom. The obligation to respect it follows chiefly from the principle of human dignity, from which spring the freedoms and rights of people at large and those of citizens in particular.[16]

13 | Judgement of the Constitutional Court of 6 October 2015, case ref. SK 54/13, OTK ZU 9A/2015, item 142.
14 | Judgement of the Constitutional Court of 6 October 2015.
15 | Ibid.
16 | Article 30 of the Constitution. This provision clearly stipulates that '[t]he inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens'.

Freedom of conscience and religion is included in the first category of freedoms and rights (i.e. personal freedom and rights) in universal and regional acts of international law and in the constitutions of many democratic states governed by law, including the Constitution of the Republic of Poland. This no doubt determines the rank of this freedom among political and civil freedoms and rights. Thus, a profound problem arises when a conflict occurs within the same category of human rights: freedom of speech (expression) is sometimes in conflict with the protection of freedom of conscience and religion but belongs to the same category of individual freedoms and rights (the Doda case), and this aspect is crucial.

Constitutional guarantees regarding conscience and religion are essentially freedoms,[17] which implies that the drafters of the Polish Constitution laid stress on preventing public authorities and third parties from interfering in the guaranteed sphere of individual behaviours.[18]

The constitutionally upheld legal protection of freedom ('Freedom of the person shall receive legal protection'[19]) and the right to a fair trial ('Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court'[20]) are realised vis-à-vis freedom of conscience and religion, primarily through the guarantees contained in the Civil Code[21] and the Penal Code. Further, one must not ignore the protection of freedom of conscience and religion under administrative law and through the jurisprudence of the Constitutional Court.

Chapter XXIV of the Penal Code describes offences against freedom of conscience and religion. Religious discrimination (Article 194), malicious interference with a religious act (Article 195 (1)), malicious interference with funerals, ceremonies, or rites (Article 195 (2)), and offending religious feelings (Article 196) have the nature of misdemeanours; therefore, the uniformly specified sanctions are lenient (cf. PC Article 7) and are liable to public prosecution. The offences under Chapter XXIV of the Penal Code are common in the sense that they can be committed by anyone; they can be committed only deliberately, and the offender must be demonstrated to have had a criminal intention (cf. PC Article 9).

Offending religious feelings (as referred to in PC Article 196) was criminalised thus:

> Any person who offends the religious feelings of others by publicly insulting an object of religious worship or a place dedicated to the public celebration of religious rites shall be liable to a fine, restriction of freedom or imprisonment for a term not exceeding 2 years.

It follows, then, that the individual protection under criminal law covers the religious feelings of members of a specific religious denomination,[22] who – wronged by an offender – suffer from at least psychological discomfort,[23] while type-related protection provided

17 | The wording of Article 53 (1) of the Constitution provides for the **freedom** of conscience and religion. Nevertheless, the freedom of religion comprises the **right** of persons to benefit from religious services, wherever they may be (Article 53 (2) *in fine*) and the **right** of parents to ensure their children a moral and religious upbringing and teaching in accordance with their convictions (Article 53 (3)).
18 | See Wojtyczek, 1999, pp. 24–28.
19 | Article 31 (1) of the Constitution.
20 | Article 45 (1) of the Constitution.
21 | Act of 23 April 1964 – The Civil Code, Journal of Laws, No. 16, item 93, as amended.
22 | Cf. Krukowski, 2008, p. 268.
23 | Cf. Stefański, 2009, p. 248.

under criminal law refers to freedom of religion.[24] An offender is liable for public prosecution.[25] In light of the criminal procedure, however, the proceedings can be initiated by non-public entities (e.g. a victim or third party) reporting a possible legal offence.[26] Further, the consent of the aggrieved party is not required to initiate and conduct the proceedings.[27]

As a side note, the system of the criminal law protection of freedom of conscience and religion is completed by the qualification of offences involving the use of violence or unlawful threats directed against a group of people or an individual on the grounds of, *inter alia*, their religious affiliation or religious neutrality, as well as public instigation to commit such an act (Article 119), the offence of insulting a foreign head of state (Article 136 (3)), publicly insulting a group of people or a particular person on the grounds of, *inter alia*, their religious affiliation or religious indifference (Article 257), and profaning human remains, ashes, or a burial site (Article 262).

4. Need for criminal law protection of religious feelings in the assessment of the Constitutional Court

4.1. Positions of parties to the proceedings

Before we present the position of the Constitutional Court, which is crucial for this argument, it will be instructive to briefly discuss the positions of the Sejm and the Public Prosecutor General.

The Marshal of the Sejm, in a letter dated June 18, 2014, on behalf of the Sejm, requested that a decision be issued that Article 196 of the Penal Code, to the extent that it penalises offending the religious feelings of other people by publicly insulting an object of religious worship, was consistent with Article 42 (1) in conjunction with Article 2 and Article 54 (1), in conjunction with Article 31 (3) of the Constitution, and that it was not inconsistent with Article 53 (1) in conjunction with Article 54 (1) of the Constitution. Moreover, he requested that the proceedings be discontinued, pursuant to Article 39 (1) of the Constitutional Court Act, due to the inadmissibility of a judgment.[28]

Highlighting the correlations between the specific freedoms and rights indicated in the request (freedom of conscience and religion, freedom of expression), the Sejm upheld the position that PC Article 196 was an instrument for the protection of the freedom expressed in Article 53 (1) of the Constitution and conveyed the legislator's desire to protect religious feelings. In Sejm's opinion, the use of criminal law instruments in Article 196 of the Penal Code, the application of which is limited to sanctioning behaviours that infringe on certain interests related to the religious feelings of an

24 | Cf. Kruczoń, 2011, p. 38.
25 | Cf. also Hypś, 2012, p. 340; Łukaszewicz, 2012, p. C3.
26 | Cf. Article 196 of the PC in conjunction with Article 9 § 1 of the Code of Criminal Procedure; cf. also Janyga, 2013, p. 290; Piórkowska-Flieger, 2009, p. 401; Stanisz, 2011, p. 113; Szymański and Jędrejek, 2002, p. 52; Wojciechowska, 2010, p. 901; Wróbel, 2008, p. 556.
27 | I quote the most straightforward description of this offence (contained in the paragraph above) after Poniatowski, 2013, pp. 23-24.
28 | See the Judgement of the Constitutional Court of 6 October 2015, Reasons, point I.2.

individual, does not constitute an excessive interference with other constitutional rights and freedoms.[29]

The Sejm noted that freedom of speech was not absolute and could be limited in consideration of other constitutional rights and freedoms, particularly the freedom of conscience and religion, which included the right to the protection of religious feelings. PC Article 196 constitutes a proportionate interference with freedom of expression. It applies only to statements that are offensive or contemptuous. Thus, the penalisation of conduct, whose sole purpose is to deride values essential from the point of view of the constitutional rights of individuals, is grounded in the protection of a value, that of freedom of religious belief.

The Public Prosecutor General took a similar position on March 27, 2014.[30] In his opinion, Article196 of the Penal Code – in its interference with the freedom of conscience of those who are religiously indifferent by preventing them from freely expressing their views about objects of religious worship – was not inconsistent with Article 53 (1) in conjunction with Article 54 (1) of the Constitution; Article 196 of the Penal Code, with regard to the qualities of 'the offence to religious feelings' and 'object of religious worship' as used therein, was consistent with Article 42 (1) in conjunction with Article 2 of the Constitution; and Article 196 of the Penal Code was consistent with Article 54 (1) in conjunction with Article 31 (3) of the Constitution. Moreover, pursuant to Article 39 (1) (1) of the Constitutional Court Act, the Public Prosecutor General concluded that the proceedings were subject to discontinuation due to the inadmissibility of a judgment. The Public Prosecutor General noted as follows:

> The challenged provision criminalises not all critical views expressed about objects of religious worship, but only those that harm other people's religious feelings and where the offence consists in publicly insulting an object of religious worship. So, it is about a deliberate conduct of an offender, by which they publicly demonstrate contempt for an object of worship and religious feelings.[31]

In reference to the question alluded to in the introduction (whether criminal law is too strict), we should recall the words of the Public Prosecutor General:

> The fact that this provision eliminates any grounds for claiming that the penalty specified in Article 196 of the Penal Code is out of proportion is borne out by its application. In the years 1999–2004, a misdemeanour under PC Article 196 was committed 380 times, with less than 14% of cases leading to convictions. Of the 50 judgments issued in that period, fines were imposed 13 times, restriction of liberty was used 14 times, and a sentence of conditionally suspended imprisonment was handed down 23 times. In the Prosecutor General's opinion, therefore, we cannot speak of a 'freezing effect' regarding the freedom of expression.[32]

Thus, the Public Prosecutor General concluded that Article 196 of the Penal Code was consistent with Article 54 (1) in conjunction with Article 31 (3) of the Constitution.

29 | Ibid., point I.2.
30 | Ibid., point I.3.
31 | Ibid, point I.3.6.
32 | Ibid., point I.3.6.

In the judgement of October 6, 2015, the Constitutional Court ruled that Article 196 of the Penal Code Act, to the extent that it penalises offending the religious feelings of other people by publicly insulting an object of religious worship, punishable by a fine, was consistent with Article 42 (1) in conjunction with Article 2 of the Constitution of the Republic of Poland, which is not inconsistent with Article 53 (1) in conjunction with Article 54 (1) of the Constitution, and consistent with Article 54 (1) in conjunction with Article 31 (3) of the Constitution:

> The Constitutional Court has found, too, that the object of constitutional review in the present case solely covers Article 196 of the Penal Code to the extent that it penalises offences to religious feelings of other people consisting in publicly insulting an object of religious worship, which are punishable by a fine. The above extent of challenge is relevant to the case in which a constitutional complaint has been lodged.[33]

In its statement of reasons, the Polish Constitutional Court broadly addressed the established views of doctrine as well as the case law regarding the offence referred to in Article 196 of the Penal Code[34].

4.1. The subject: the offender

It clearly follows from the Penal Code, as well as the positions of jurisprudence and doctrine, that the act described in Article 196 of the Penal Code is universal, which means that anyone with a criminal capacity can commit it. It is immaterial whether the offender is a follower of a specific religion or denomination or religiously indifferent.[35] At the same time, religious feelings can be insulted only through intentional conduct. On October 29, 2012, the Supreme Court concluded that '[t]he offence specified in Article 196 of the Penal Code is committed by someone who, with their direct or conditional intent, satisfies all the qualities of an offence.'[36] The intentionality of the offender's conduct is an expression of intentionality – that is, an intent which may take the form of 'willing' or 'consenting'.

Religious affiliation is important in relation to those whose feelings have been offended, as one cannot speak of the religious feelings of people who do not belong to any religious denomination.

4.2. The object: religious feelings

The Constitutional Court, by referring to its judgment of June 7, 1994,[37] recalled that the constitutional protection of freedom of conscience and religion is expressed, *inter alia*, in banning violations of religious feelings, which 'due to their nature, are subject to special protection by law. It is so because they are directly related to freedom of conscience and religion, which is a constitutional value'.

In Polish scholarly literature, the object protected under Article 196 of the Penal Code is defined as the freedom of beliefs (feelings) of citizens in matters of faith, resulting from the ideological and philosophical tolerance of a neutral state.[38] This means that

33 | Judgement of the Constitutional Court of 6 October 2015, Reasons, point III. 2.3.
34 | See e.g. Malec-Lewandowski, 2016, pp. 77-84.
35 | See Budyn-Kulik, 2014, p. 12.
36 | Case ref. I KZP 12/12.
37 | Case ref. K 17/93, OTK (1994), part 1, item 11.
38 | Wojciechowska, 2010, p. 899; Kozłowska-Kalisz, 2013, p. 453.

Article 196 of the Penal Code protects the religious feelings of believers, and therefore 'a certain attitude (mainly emotional) of a certain group to the faith they profess, also manifested in the right to protect the respect for their values and places and objects of worship.'[39] Religious feelings, as an object protected under PC Article 196, are interpreted as people's relationship with the *sacrum* on a number of levels, be it intentional, volitional, or emotional.[40]

It is also argued that 'The object of the protection under Article 196 of the Penal Code are religious feelings, not protection of a deity, i.e., God.'[41] Article 196 does not protect 'objects or places of worship themselves, but religious feelings of specific individuals, hurt by the offending conduct of a perpetrator'[42] and 'not that which is divine, but that which is human'.[43]

4.3. Offence (insult)

One should perhaps start discussing the offence against religious feelings by considering the dictionary meanings of the term. In Polish, 'offence' [*obraza*] is defined as follows:

> 1. violating by word or deed someone's self-esteem, dignity, honour, insulting, or demeaning someone 2. a person's feeling that their personal dignity has been violated 3. a violation or breaking of the law, of a social or moral rule, or ridicule, mockery of one's respected values.[44]

Synonyms of 'offence' include 'affront', 'dishonour', 'insolence', 'impertinence', 'displeasing', 'misdemeanour', and 'insult'.[45] To 'offend' means to blaspheme, humiliate, abuse, affront, hurt, slander, demean or denigrate someone.[46] In turn, 'feeling' stands for a sensation, emotion, sense, experience, [47]and the word 'religious' can mean spiritual, confessional, or denominational.[48]

The key opinion on the term 'offend' is that expressed by the Supreme Court in its judgement of February 17, 1993: 'the term 'offend' has the same meaning (and scope) in all provisions where it refers to a prohibited act.' [49] This means that the offensive conduct of the perpetrator should therefore be characterised by an expression of contempt, a desire to demean, or ridicule. Nevertheless, the assessment of whether the perpetrator has actually insulted something or someone must be based on cultural and moral rules commonly accepted in society, and therefore on objective criteria.[50] Hence, Natalia Kłęczyńska concluded that insulting consists of behaving in a way that manifests contempt in light of moral and cultural norms. An insult may take place in any form, either

39 | Hypś, 2015, p. 976.
40 | See Janyga, 2013, p. 592.
41 | Paprzycki, 2008, p. 87.
42 | Kłączyńska, 2014, p. 508.
43 | Warylewski, 2005, p. 370.
44 | My translation of *Wielki słownik języka polskiego* (Dunaj, 2009, p. 384); the richness of the verbs 'offend' and 'insult' has been pointed out by, among others, Łukasz Pohl.
45 | Cf. Cienkowski, 1990, p. 109; Bańko, 2007, p. 458.
46 | Cf. Cienkowski, 1990, p. 109; Bańko, 2007, p. 459.
47 | Cf. Cienkowski, 1990, p. 215; Bańko, 2007, p. 834.
48 | Bańko, 2007, p. 669.
49 | Case ref. III KRN 24/92, *Wokanda*, no. 10/1993, p. 8.
50 | See the Judgement of the Supreme Court of 17 February 1993, case ref. III KRN 24/92.

verbal or written, by gesture, picture, film, installations, or happenings.[51] The criterion of a prohibited act under PC Article 196 is the public character of the offender's conduct. An object of religious worship can therefore be insulted only in public, in such a way that the conduct in question may be noticed by any given number of persons. Thus, an insult may be disseminated through mass media such as television, the Internet, and the press.

Most of the representatives of the doctrine assume that the crime under Article 196 of the Penal Code has a material nature, and therefore that insulting an object of worship must entail an offence against the religious feelings of specific persons.[52] The occurrence of offending religious feelings is a necessary but insufficient condition; it needs to have been caused by an insult to an object of religious worship. Therefore, Włodzimierz Wróbel defines an offence to religious feelings as follows:

> [a]n emotional reaction of a person related to degrading conduct towards an object, sign, symbol..., which may be accompanied by a sense of violated dignity, a feeling of shame, embarrassment, sorrow. An offence to religious feelings will be a negative reaction going beyond a mere negative opinion on a view or a statement concerning an object of religious worship.[53]

In other words, only the conduct of an offender perceived by a specific person or members of a religious community as demeaning or contemptuous toward an object of religious worship may offend religious feelings.[54] Lech Paprzycki concludes as follows:

> There is no doubt that the offensiveness of a conduct should be assessed on the basis of objective premises. The assessment should refer to the beliefs prevailing in the cultural circle of the aggrieved party. The literature rightly proposes that the average level of sensitivity be taken as a reliable measure. While this is a fairly vague concept, adopting this kind of criterion is essential, as for a very religious person, even undermining the principles of their faith can be hurtful. This is of particular importance in a democratic state ruled by law that observes worldview pluralism, where even acrimonious religious disputes may arise. It is always necessary to distinguish between provocative action, which offends feelings, and the exercise of freedom of conscience involving publicly presentation of different views. We can therefore speak of an offence to feelings only when the offender's conduct oversteps the accepted boundaries of content-related analysis or criticism and becomes a tool for distressing others.[55]

We must now discuss the constitutional freedom of expression (Article 42 of the Constitution of the Constitution of the Republic of Poland) and its limits as set out in Article 31 (3) of the Constitution. In the opinion of the Constitutional Court, the restriction on the freedom to express abusive or offensive views as referred to in Article 196 of the Penal Code unequivocally meets the requirement of statutory regulation and is moreover necessary in a democratic state to ensure the protection of the rights and freedoms of others and also of public order (i.e. the values referred to in Article 31 (3) of the Constitution). As discussed above, the object protected under Article 196 of the Penal Code is the right to protect religious feelings resulting from the constitutional freedom of religion.

51 | See Kłączyńska, 2014, p. 510.
52 | See Budyn-Kulik, 2014, p. 4.
53 | Wróbel, 2013, p. 659.
54 | Ibid., p. 658
55 | Paprzycki, 2000, p. C3.

By referring to its previous jurisprudence, the Polish Constitutional Court emphasised that

> the penalization of offending religious feelings by publicly blaspheming an object of religious worship is therefore to counteract this kind of 'criticism', which consists in replacing, in declared reliance of the freedom of speech, substantive arguments with insults that cannot be an accepted standard in a democratic state.[56]

Blaspheming an object of religious worship aims to deliberately offend other people's religious feelings and harm their personal dignity. The Constitutional Court maintains the position that, in a democratic state, which is the common good of all citizens, a public debate in which everyone is guaranteed the freedom to express their views, including in the religious sphere, should take place in a civilised and cultured manner, without any harm to the rights and freedoms of individuals and citizens.[57]

4.4. Object of religious worship

It follows from Article 196 of the Penal Code that the object of an offender's action is an object of religious worship or a place intended for the celebration of religious rites (i.e. *prima facie* objects of a material nature). The term 'object of religious worship' should be 'understood as any object that is recognized by a religious community as an object of worship, worthy of the highest respect and adoration'[58] Therefore, an object of religious worship is 'what the worship of a religious nature refers to, whereby worship should be understood as deep respect, associated with a positive view, resulting from the transcendent character (elements) of the object of worship.'[59] In practice, this refers to objects that are actually worshipped and venerated by a religious community (i.e. religious symbols, such as the cross, Star of David, crescent), images and names of God, deities, saints, prophets, icons, relics, holy books, and objects expressing the presence of God.[60]

Most of the representatives of the doctrine, relying on a linguistic, functional, and logical interpretation, recognise that an 'object of religious worship' as defined under Article 196 of the Penal Code includes (in addition to material objects) God, a deity, or deities, understood personally or otherwise, a direct subject of worship, and the source of a denomination or religion.[61] On the other hand, a minority among the representatives of the doctrine, relying on a linguistic and historical interpretation, recognise that an 'object of religious worship' as described in Article 196 of the Penal Code is limited to material things only and does not include the subject or subjects of such worship.[62]

4.5. The penalty

An offence to religious feelings is punishable by an alternative sanction in the form of a fine, restriction of liberty, or imprisonment for up to two years. In view of the severity of

56 | Judgement of the Constitutional Court of 11 October 2006, case ref. P 3/06.
57 | Cf. Judgement of the Constitutional Court of 6 July 2011, case ref. P 12/09.
58 | Wojciechowska, 2010, p. 899.
59 | Wróbel, 2008, p. 659.
60 | Kłączyńska, 2014, p. 512.
61 | See Wróbel, 2008, pp. 659–660; Hypś, 2015, p. 977; Wojciechowska, 2010, p. 900; Kozłowska-Kalisz, 2013, p. 496; Budyn-Kulik, 2014, p. 8; Janyga, 2013, p. 592; Gardocki, 2007, p. 247.
62 | E.g. Wojciechowski, 1997, p. 340; Filar, 2014, p. 1132.

the impending penalty, a conditional discontinuation of criminal proceedings is admissible. The court may also refrain from imposing a penalty and limiting itself to imposing a penal measure, unless the offence to an object of religious worship was an act of vandalism.[63]

An offence to religious feelings under Article 196 of the Penal Code is a publicly prosecuted crime. However, the doctrine postulates that the procedure should be changed to prosecution on a complaint[64] because, whenever they suspect that an object of religious worship has been blasphemed, law enforcement agencies have no instrument under criminal procedure to reach out to specific persons whose religious feelings could be offended in this way.

5. Summary

The object protected under Article 196 of the Penal Code is the right to the protection of religious feelings resulting from the freedom of conscience and religion guaranteed in Article 53 (1) of the Constitution of the Republic of Poland. As the Constitutional Court concluded in its judgement on June 7, 1994, religious feelings 'due to their nature, are subject to special legal protection. It is so because they are directly related to the freedom of conscience and religion, which is a constitutional value'.'[65]

In turn, on October 6, 2015, as is cited several times in this paper, the Constitutional Court indirectly upheld the legitimacy and necessity of protecting freedom of conscience and religion by criminalising offences to religious feelings as in the Penal Code. The doubts raised by the complainant with regard to the specificity of this provision and its consistency with other constitutionally protected values, such as freedom of expression (speech) and of conscience and religion, were resolved by the court, which found that the criminal law protection of religious feelings is consistent with the provisions of the constitution raised in the complaint.

The basic argument supporting the necessity of the criminal law protection of religious feelings in a democratic state is the orientation of the crime towards the protection of the freedom of conscience and religion as an interest protected at the constitutional level. Moreover, freedom of religion occupies a special place in the hierarchy of constitutionally protected interests. This is due not only to the historical, cultural, and social significance of religion, but also to the position of this freedom in the systematics of the Basic Law (among the freedoms and rights of persons) and the means used to protect it, including extraordinary measures.[66]

63 | Cf. Article 59 of the Penal Code.
64 | See Budyn-Kulik, 2014, p. 19.
65 | Case ref. K 17/93.
66 | That is, the provisions concerning the exercise of constitutional freedoms and rights during martial law, a state of emergency, or a state of natural disaster. It follows from Article 233 (1) of the Constitution of the Republic of Poland that a statute specifying the scope of limitations to the freedoms and rights of persons and citizens in times of martial law and states of emergency may not limit freedom of conscience and religion. Paragraph 3 of that Article provides that the said freedom may not be limited during a state of natural disaster.

However, realising the guarantee of freedom of conscience and religion as defined under conventions and the constitution by protecting it under criminal law encounters a number of difficulties. Due to the wording of Article 196 of the Penal Code, the doctrine and judicature have interpretative problems related to, *inter alia*, the evaluative nature of the elements of the crime.

We agree with the reviewer, Pohl, who claims that the objective deficiency in the form of criminalisation of the protection of religious feelings should not lead to decriminalisation.[67] Hence, the statutory provision must be clarified as part of its amendment, not removed from the Penal Code.

The 'Doda case' confirms that the practical application of the guarantees of freedom of conscience and religion under conventions and the constitution depends on a range of public institutions, not only the judiciary, and on the development of Poland's legal culture.

The implementation and realisation stage of human rights as indicated by the Polish doctrine is not a manifestation of a purely academic concept or debate, but a real stage in the development of human rights.

67 | Cf. Pohl, 2020, pp. 335–336.

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