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## The Family in the Czech Legal Order

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## The Family in the Czech Legal Order

**Abstract:** This article on the status of the family in the Czech legal order is based on legal norms, but it cannot be limited to them because they have not defined the legal concept of the family for decades and they refer rather to the concept of marriage. Specification of the understanding of the family thus has become left more to sociology. Therefore, it has been necessary to extract this definition also from other official documents, such as the documents of the Ministry of Labour and Social Affairs of the Czech Republic, which is responsible for the development of state strategic documents in the area of family and marriage. From these documents, there follows a clearer understanding of the family, which, until 2015, was characterised by the support of marital families. This resulted in preferences of marriage in determining parenthood, in adoption and in the use of economic instruments, especially tax reductions.

The proposed new concept of family support from the end of 2016 retreated from a clear value distinction, and thus leads to such a wide definition of the family that this has become a subject of contention between ministries of the Czech government, those in the professional sphere, and those in the area of non-governmental organizations. At the same time, this concept surrenders its attempt to actively influence social reality through measures in favor of marriage, all of which are still the most effective economic benefits for spouses, with reference to the principle of non-discrimination.

The area of family and marriage is the subject of deep dispute and it is good that these questions have clearly entered the public social debate, even though it is not clear what results this will bring. In this situation, a clear statement has been issued by the Czech Bishops' Conference in favor of the marital family as the only standard model of the family.

**Keywords:** law, family law, civil law, the Catholic Church, catechism, family, marriage, registered partnerships, financial relief

## Introduction

In trying to describe the status of the family in the Czech legal order we will need to realize three successive steps.

First, it is necessary to analyze official documents. Therefore, in the first section we will analyze the most important provisions of the relevant laws since the establishment of Czechoslovakia in 1918 up to the present. In the second chapter, we will focus on strategic official documents relating to support of the family.

The third section will be devoted to different aspects which show a preferential approach towards marriage and family with regard to other forms of cohabitation.

In the conclusion, we will evaluate the findings reached and the whole situation regarding the rank of the family in the Czech Republic, whilst looking towards the future.

## Marriage and the Family in the Development of Czech law

### Austrian Act no. 946/1811 Coll., the General Civil Code

After the establishment of the Czechoslovak Republic in the year 1918, the existing legal situation of Austria was retained in the Czech lands, namely in the area of marriage and family by the General Austrian Civil Code (*Allgemeines bürgerliches Gesetzbuch*) no. 946/1811 Coll. (hereinafter ABGB).<sup>1</sup> Despite minor amendment in the following years, its fundamental provisions regarding marriage and the family remained basically unchanged.

ABGB in §§ 40 and 44 provides the basic definition of family as a marriage-based family:

§ 40 The family means parents with all their descendants. [...]

§ 44 Family relationships are based on matrimonial contract. Two persons of different sexes manifest in the matrimonial contract their will under which to live in indissoluble communion, to engender children, to bring them up and to provide mutual aid.

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<sup>1</sup> In Slovakia, the Slovak part of Czechoslovakia, Hungarian customary law was used.

The other provisions of the ABGB are considerably based on Canon Law, but this is not the subject of our investigation.

## Czechoslovak Act no. 265/1949 Coll., on Family Law

The Communist Party of Czechoslovakia embraced practically unlimited power in February 1948 and it began to prepare and implement the redevelopment of the Czechoslovak legal order almost immediately. This period is called “the period of socialist legality” or even “legal two-year plan.”<sup>2</sup>

Besides the new Civil Code, an important part of the new socialist legislation was also the first separate Czechoslovak Act no. 265/1949 Coll., on family law. The matter of family law was extracted from the Civil Code and composed as a separate legal act. In this act, the family is far less spoken about, but the act is meritoriously a text of considerable importance. The most fundamental texts can be found in the preamble of the act:

In order to lay the foundation for the creation of marriage as the voluntary and permanent life's community of a man and a woman, lawfully founded, which will serve as the base of the family to the interests of all its members and to the benefit of society in accordance with its up-to-date development, [...] and in order to ensure the protection of marriage and of the family, so that the family becomes a healthy base of the development of the nation [...].

Further, there is a subtle yet significant mention of the family in § 16 section 1:

The couple decides the essential matters of the family based on their marriage by mutual agreement. If they do not agree, it should be decided by the court.

Further mentions of the family in this act do not deal with major conceptual issues, but they concern the area of material provision of persons living in a marriage and especially of children.

Otherwise, it would be more adequate to call this law a ‘law of marriage’ because the vast majority of the text deals with marriage, and not with the family. Yet it can be said that the family is clearly presented as a marital family there.

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<sup>2</sup> Under this so-called legal two-year plan, the existing legal dualism, inherited from the Austro-Hungarian Empire, was overcome.

## Czechoslovakian Act no. 94/1963 Coll., on the Family

The recodification of the Czechoslovak legal order began by the issuing of the Constitution of the Czechoslovak Socialist Republic no. 100/1960 Coll., which notes in its flowery preamble, among others, that socialism has won in Czechoslovakia.

In this atmosphere, the recodification of a large number of important acts was introduced, among others, family law, namely by promulgation of Act no. 94/1963 Coll., on family. Before the articulated text, there are located some very basic principles. Two of them are very important for us:

Art. I. In our society, marriage consists in solid emotional relationships between a man and a woman. Both of them are equal in it. The main social purpose of marriage is the foundation of the family and the proper upbringing of children.

Art. II. The family based on marriage is the basic unit of our society, which broadly protects family relationships.

The articulated text of the act, however, speaks about the family very sporadically, namely on the mutual representation of the husband and wife in matters of the family and in property matters. Again, this act becomes more an act on marriage rather than one on the family, but even there the family is clearly presented as a marital family, whose main characteristic is to be stability, as it is determined by the opening paragraph of Title V on divorce:

### § 23

(1) State authorities, in collaboration with social organizations and with all citizens are obliged to assist the strengthening of marriages and families, particularly by preventing the causes which could lead to a disruption of the strength and of permanence of relationships in marriage and in the family.

(2) A frivolous attitude towards marriage is contrary to the interest of the society. Therefore, the abolition of marriage by divorce would proceed only in socially justified cases.

The focus of family law was progressively weakened by amendments, especially by Act no. 91/1998 Coll., by which were derogated the abovementioned basic principles. A large part of the provisions of the act was individualized by an elision of references to the social signification of marriage and substantially changed by provisions introducing so-called non-contradictory divorce. This significant amendment coincided with significant social changes, consisting in a preference for free cohabitation before marriage, in the steep increase of marriage age, and in the growth of the divorce rate. It can be stated that this

amendment follows social changes without attempting to distinguish values and to prefer worthwhile positive solutions.

## Czech Act no. 89/2012 Coll., the Civil Code

In 2012, the process of the recodification of Czech private law was completed after a twelve-year effort by issuing the new Czech Civil Code no. 89/2012 Coll.,<sup>3</sup> effective from January 1, 2014 (hereinafter referred to as CC). This Code is a monumental work, even in its size: 3,081 paragraphs. The second part of CC is applied to family law, involving §§ 655–975.

The provisions of this part of CC especially do not give any definition of the family, speaking almost exclusively about marriage, from which the family should arise:

§ 655 Marriage is a permanent union of a man and a woman formed in a manner stipulated by this law. The main purpose of marriage is the foundation of the family, the proper upbringing of children, and mutual support and assistance.

Thus, the family, family community and family households will then be spoken of mainly in the context of defining the rights and obligations of spouses, particularly in the issues of property.

## Summary

An analysis of the legal provisions in the area of family law leads unambiguously to the following conclusions:

- there is a tendency to specify closely legal matters of marriage, which has the important social role of creating the family;
- yet a gradual resignation in the definition of family is visible since the first communist legislation of 1950, and therefore the term family becomes a non-juridical or super-juridical concept with a definition that is left primarily to sociology.

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<sup>3</sup> Důvodová zpráva k návrhu nového občanského zákoníku. [Explanatory report to the proposal of the new Civil Code.] See Poslanecká sněmovna Parlamentu České republiky, “Sněmovní tisk 362/0, Občanský zákoník” [Chamber of Deputies of the Parliament of the Czech Republic. “Parliamentary Document 360/2, Civil Code”], accessed March 15, 2017, <http://www.psp.cz/sqw/text/tiskt.sqw?O=6&CT=362&CT1=0>.

## Definitions of the Family in Official Documents of the Czech Republic

Although the family is often mentioned in the legal norms, not one of them offers a definition of the family, even descriptively. Because the law is closely linked with politics, it is appropriate to rely on official government documents relating to the family, because the legal regulations are then shaped by them.

### State Anchoring of Care for the Family

At the level of the government, family issues are within the competence of the Ministry of Labor and Social Affairs of the Czech Republic. The Family Policy and Social Work Section were created there, which includes the Family and Aging Policy Department, Social Services Social Work, and Social Housing Department, Protection of the Rights of Children Department and the Department of Inspection of Social Services. Within the Family and Aging Policy Department, there has been created the Ward of Family Policy,<sup>4</sup> within which there operates an Expert Committee for Family Policy.<sup>5</sup>

The family policy of the state, according to data of the ministry itself, on the one hand, concerns various public areas of society, for example, housing, education, health, the labor market, and infrastructure, and on the other hand, it handles highly private areas, including human intimacy, which creates the home. It therefore seeks to respect the autonomy and the ability of families and to support them in exercising their natural functions, and not to assume these roles and not to interfere in the internal life of families, the distribution of social roles in the family, etc., while it should remember all of the developmental phases of families as well as their needs in specific situations too.<sup>6</sup>

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<sup>4</sup> Ministerstvo práce a sociálních věcí, “Organizační struktura Ministerstva práce a sociálních věcí.” [Ministry of Labour and Social Affairs. “The Organisational Structure of the Ministry of Labour and Social Affairs”], last modified March 7, 2017, accessed March 13, 2017, <http://www.mpsv.cz/cs/1856>.

<sup>5</sup> Ministerstvo práce a sociálních věcí, “Odborná komise pro rodinnou politiku.” [Ministry of Labour and Social Affairs. “National Concept of Support of Families with Children”], last modified May 4, 2015, accessed March 3, 2017, <http://www.mpsv.cz/cs/21022>.

<sup>6</sup> Ministerstvo práce a sociálních věcí, “Rodina a ochrana práv dětí, Podpora rodiny – rodinná politika.” [Ministry of Labour and Social Affairs, “Family and Protection of Children’s Rights, Family Support – Family Policy”], last modified January 30, 2013, accessed March 3, 2017, <http://www.mpsv.cz/cs/4>.

## The Framework of the State Concept of Family Support

### Reasons for the Elaboration of the National Conception of Family Support

The impetus for the processing of the first comprehensive family policy has become the harmonization of legal and other official documents during the accession negotiations to join the European Union, held in the years 1998–2002, which culminated in the signing of the Treaty of Accession of April 16, 2003. The accession of the Czech Republic to the European Union came into force on May 1, 2004.<sup>7</sup>

In preparation for the Czech Republic's accession to the European Union the characteristics of social life were also analyzed in comparison with actual EU member states.

### National Family Report from 2004

Following the example of other European Union countries, the Government of the Czech Republic entrusted the Ministry of Labor and Social Affairs with the preparation of a concept of family policy on April 7, 2003. As a starting document, first the National Family Report was issued in spring 2004, in collaboration with a number of experts from academic and various government institutions, and from several NGOs. For this, there were utilized foundational materials of the Ministry itself, working papers of various central government bodies, professional studies, and research reports from many disciplines related to the topic.

This document is very extensive, having 226 pages,<sup>8</sup> and it consists of three parts: I. The social function of the family and family policy in the Czech Republic, II. Socio-demographic synthesis of family life conditions in the Czech Republic, and III. Legislative and institutional provision of family support in the Czech Republic.<sup>9</sup> This document gives a solid basis for further work.

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<sup>7</sup> Detailed information is available at the official common web-site of the European Union and the Office of the Government of the Czech Republic [www.euroskop.cz](http://www.euroskop.cz): Petr Zenkner (Euroskop), "Vstup ČR do EU", accessed March 7, 2017, <https://www.euroskop.cz/803/sekce/vstup-cr-do-eu/>.

<sup>8</sup> Ministry of Labour and Social Affairs, *National Family Report (2004)*, accessed March 7, 2017, <http://www.mpsv.cz/en/1607>. (Only this document is available on the website of the Ministry in the English version.)

<sup>9</sup> Ministry of Labour and Social Affairs. *National Family Report (2004)*, 2–3.



## National Family Policy Concept from 2005

Based on the National Family Report, the National Family Policy Concept was prepared in 2005 and approved by the Czech government in October 2005.<sup>10</sup> This document is significantly shorter than the National Report on the Family, having 59 pages, and is divided into two parts: a general section and a special section.

The general part consists of four chapters: 1. Preamble, 2. Current Situation of Czech Families, 3. Goals of Family Policy, 4. Principles of the Implementation of Family Policy. It provides substantial empirical and ideological basis for specifying concrete measures in the special part. This part is relatively brief, comprising merely eight pages.

The special part consists of nine chapters: 5. Supporting Parenthood and Family Cohesion, 6. Financial Support of Family and Housing, 7. Services for Families, 8. Reconciliation of Professional and Family Roles, 9. Family and the Education System, 10. Family and Health Care Systems, 11. Families with Specific Needs, 12. Support of Families at Regional and Municipal Level, and 13. General Measures to Implement Family Policy. This part is much more detailed. Each chapter is divided into sections, with conclusions containing specified concrete measures identifying the responsible authority and the completion date as well. Not surprisingly, it is also substantially larger, occupying 48 pages.

It was expected that the National Family Policy Concept would be annually updated, but this was not fully realized. In 2008, two strategic documents were published nationwide: National Concept of Family Support with 36 pages and A Set of Pro-Family Measures—A Pro-Family Package in a much larger scale with 114 pages.<sup>11</sup>

## Family Policy at Regional and Municipal Level in 2008

Yet the National Concept of Family Policy of 2005 made provisions for a stronger involvement of regions and municipalities in the support of family, noting

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<sup>10</sup> Ministerstvo práce a sociálních věcí, *Národní koncepce rodinné politiky* [Ministry of Labour and Social Affairs, *National Concept of Family Policy*] (Praha: Ministerstvo práce a sociálních věcí, 2005), 6.

<sup>11</sup> Ministerstvo práce a sociálních věcí, *Národní koncepce podpory rodin s dětmi* [Ministry of Labour and Social Affairs, *National Concept of Support of Families with Children*] (Praha: Ministerstvo práce a sociálních věcí, 2008) and Ministerstvo práce a sociálních věcí, *Soubor prorodinných opatření – Prorodinný balíček* [Ministry of Labour and Social Affairs, *A Set of Pro-Family Measures – a Pro-Family Package*] (Praha: Ministerstvo práce a sociálních věcí, 2008). Both documents are available online at Ministerstvo práce a sociálních věcí, “Strategické dokumenty v oblasti podpory rodiny.” [Ministry of Labour and Social Affairs, “Strategic Documents in the Field of Family Support”], last modified January 30, 2013, accessed March 7, 2017, <http://www.mpsv.cz/cs/14474>.

that their importance in this regard was not being appreciated. It thus appears necessary to coordinate the activities of these units nationwide.<sup>12</sup>

Therefore, in 2008, the detailed methodical recommendations document *Family Policy at Regional and Municipal Level* was created, having a length of 32 pages, and was applicable nationwide.<sup>13</sup> This recommendation summarizes in the first part the objectives and means of the national family policy and, in the second part, which is devoted to regional policy, it then gives singular specific recommendations, including recommendations for the institutional provision of family policies in individual entities.

Currently it is normal that different regions have their own medium-term strategy for family policy, which is updated annually. Similar documents are also produced by larger cities.

### The Current Draft of the Family Policy Concept at the End of 2016

The Ministry of Labor and Social Affairs drew up a new draft of the Family Policy Concept in 2016, which targets its focus on the so-called functional families with children or other dependents, whereas the question of support for vulnerable families with children is addressed in other documents of the same ministry: *National Strategy for the Protection of Children's Rights*, and *National Strategy for the Development of Social Services*.<sup>14</sup> This draft, 54 pages long, has a very different structure in comparison to the existing concept from 2005. It is divided into four parts, being Part A: Socio-Economic and Demographic Trends, Part B: What Do Families Want, Part C: Well-Tested Experience from Abroad, and Part D: Proposed Measures.

Here, the elaboration of the concept was not preceded by an extensive analytical document, on which experts and special interest organizations working in this area would greatly participate—such a document has yet to be prepared by the Research Institute for Labour and Social Affairs.<sup>15</sup>

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<sup>12</sup> Ministerstvo práce a sociálních věcí, *Národní koncepce rodinné politiky* [Ministry of Labour and Social Affairs, *National Concept of Family Policy*], 56.

<sup>13</sup> Ministerstvo práce a sociálních věcí, *Rodinná politika na úrovni krajů a obcí* [Ministry of Labour and Social Affairs, *Family Policy at Regional and Municipal Level*] (Praha: Ministerstvo práce a sociálních věcí, 2008). This document is likewise available online at Ministerstvo práce a sociálních věcí, “Strategické dokumenty v oblasti podpory rodiny.” [Ministry of Labour and Social Affairs, “Strategic Documents in the Field of Family Support”], last modified January 30, 2013, accessed March 7, 2017, <http://www.mpsv.cz/cs/14474>.

<sup>14</sup> Ministerstvo práce a sociálních věcí, *Národní koncepce rodinné politiky, verze 22. prosince 2016* [Ministry of Labour and Social Affairs, *National Concept of Family Policy, version of 22nd December 2016*] (Praha: Ministerstvo práce a sociálních věcí, 2016), 2.

<sup>15</sup> “Zápis z 10. jednání Odborné komise pro rodinnou politiku konaného dne 19. dubna 2016” [“Minutes of the 10th meeting of the Expert Commission for Family Policy, held on April 19, 2016”], available online, accessed March 7, 2017, <http://docplayer.cz/33173777-Zapis-z-10-jedna-ni-odborne-komise-pro-rodinnou-politiku-konaneho-dne-19-dubna-2016.html>.

Publication of the concept provoked contradictory and mostly negative feedback. The actual interdepartmental comment procedure led to some very critical remarks from a significant number of ministries (led by ministers from various political parties) as well as by the Deputy Prime Minister Pavel Bělobrádek, chairman of the Christian Democratic Party—Czechoslovak People’s Party. Some ministries expressed that the concept cannot be repaired in parts, and that it therefore should be rejected as a whole. Currently (March 2017), the settlement of the comments from the Ministry of Labour and Social Affairs is in progress, and then the material should be handed over for discussion by the Government of the Czech Republic.

From the publicly available responses, very critical views on the draft concept were expressed by the Confederation of Employers’ and Entrepreneurs’ Associations of the Czech Republic<sup>16</sup> and by the Pro-life Movement of the Czech Republic,<sup>17</sup> which speaks about its attempted social engineering. Clear critical opinion was taken officially by the Czech Bishops’ Conference this time in its plenary session on January 25, 2017, whereupon—and indeed for the first time—the Conference has officially endorsed the National March for Life and Family, scheduled for April 22, 2017.<sup>18</sup>

## The Description of Family in the Czech Official Strategy Documents

### The Concept of the Family in the National Family Report of 2004

The National Family Report of 2004 contains a very long and in-depth exposition of the family.<sup>19</sup> With regard to the factual situation of human coexistence

<sup>16</sup> Konfederace zaměstnavatelských a podnikatelských svazů ČR, *Stanovisko Konfederace zaměstnavatelských a podnikatelských svazů ČR k návrhu Koncepce rodinné politiky* ze dne 6.1.2017 [Confederation of Employers’ and Entrepreneurs’ Associations of the Czech Republic, *Statement of the Confederation of Employers’ and Entrepreneurs’ Associations of the Czech Republic to the Draft of the to the Family Policy Concept* of 6th January 2017], accessed March 7, 2017, <http://kzps.cz/legislativni-navrhy/page/2/>.

<sup>17</sup> Hnutí pro život ČR. *Stanovisko Hnutí Pro život ČR ke „Koncepci rodinné politiky“* ze dne 13.1.2017 [Pro-life Movement of the Czech Republic, *Statement of the Pro-life Movement of the Czech Republic to the “Family Policy Concept”* of 13th January 2017], accessed March 7, 2017, [http://hnutiprozivot.cz/download/zpravy/2634-koncepce\\_rodinne\\_politiky.pdf](http://hnutiprozivot.cz/download/zpravy/2634-koncepce_rodinne_politiky.pdf).

<sup>18</sup> Katolická církev v České republice, “Biskupové a zástupci řeholí: Rodina je základní buňkou společnosti i církve” [Catholic Church in the Czech Republic, “Bishops and Representatives of Religious Orders: The Family in the Basic Cellule of the Society and of the Church”], accessed March 7, 2017, <https://www.cirkev.cz/cs/aktuality/170125biskupove-a-zastupci-reholi-rodina-je-zakladni-bunkou-spolecnosti-i-cirkev>.

<sup>19</sup> Ministry of Labour and Social Affairs, *National Family Report (2004)*, 9–11.

connected with parenthood, it avoids a clear definition of the family, even initially presenting several possible concepts of the family. It does not hide that not all of these forms of coexistence are (equally) desirable for the society. As a starting point, then, it provides a definition of various socially relevant functions of the family.

The first, primary and irreplaceable role is still cited as the biological-reproductive or generative one.

The second, equally important role is a socialization function, which was suppressed and replaced by a state system of organized education in the period of totalitarian regimes. Within its framework, the educational function of the family is essentially important for the preparation of a child for living in a society where its full replacement by another institutional form always causes a risk to healthy child development.

The third is appointed as the socio-economic function, which is not unlike the first two family functions, being directly dependent on the presence of children.

Regenerating function and support, which includes all of the mutual emotional support of singular family members, but also any financial or material assistance, is listed last as the socially relevant functions of the family.

Based on this description, the relatively long summarizing text is thus given:

Given its basic biological and functional characteristics, the family in the European and Czech environment can, in its broadest sense, be seen as a social unit whose constituent feature is the cohabitation of at least two directly related generations (parent-child) and whose secondary features are the performance of basic family functions, with a desirable but not essential, legislative-institutional basis in society. In exceptional cases, family relations can be based on legal institutions not based on biological parentage (e.g., adoption). It must be emphasized that this form of family is not restricted to two-generation cohabitation, but also includes multiple generation forms of family cohabitation. Attention must also be devoted to this issue in relation to current demographic changes and discussion of forms of intergenerational solidarity.

In the narrower sense, the natural nuclear family, which is the predominant form of cohabitation in the Czech Republic, can be seen as an institutionally structured community founded on parental and marital relationships as its two basic relationship lines, which is based on family law, besides which, marital cohabitation, whose main role is to create a family and raise children under Czech law, envisages this basic type of family.

The broader, biological function related definition of the term family can be used when demographically describing heterogeneous forms of family life based on any form of cohabitation between two people of opposite sexes with children. However, in formulating its family policy concept, the state has to choose which forms of partner relationships it considers most appropriate. In

this context, it must be realized that a family based on marriage meets all of the family's socializing, economic and regeneration functions in relation to the stability of its partnership union. However, the state must naturally also respect other forms of cohabitation between partners with children (to whom state assistance must also be directed in relation to children raised). However, it has to be realized that these informal types of cohabitation create much more pressure on state budget resources and are supported from these resources to a much greater degree in comparison to marital families. According to the principle of responsibility, the state should give people the freedom to decide the form of cohabitation they wish to live in, but at the same time for them to bear responsibility for their decision. Equally, in making its decision on preferences in family policy, the state should not overlook the major role played by the development of alternative forms of cohabitation as an important component of population regression. In view of these facts, the narrower legislative-institutional definition of the family, based on marital and parental relationships, should be determinative for state family policy.

Via this rather long detour, the government document arrives at the notion of the marital family and notes that this form of family deserves the greatest state aid.

### The Concept of the Family in the National Family Policy Concept of 2005

The National Family Policy Concept of 2005 explicitly concurs with the National Report on the Family from 2004, and it does not define the family. It uses the terms defined in the document of 2004 as the "nuclear family" and the "incomplete family" without using the expression "marital family."

Marriage is explicitly mentioned in the description of the second general objective of the family policy:

To increase awareness of family values and of personal responsibility for its functionality and stability, especially in today's young generation and in subsequent generations, among others by promoting education for partnership, marriage and parenthood.<sup>20</sup>

However, the importance of marriage is emphasized there by means of two economic elements, namely: a tax deduction for the husband/wife and the joint taxation of spouses.<sup>21</sup>

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<sup>20</sup> Ministerstvo práce a sociálních věcí, *Národní koncepce rodinné politiky* [Ministry of Labour and Social Affairs, *National Concept of Family Policy*], 9.

<sup>21</sup> Ministerstvo práce a sociálních věcí, *Národní koncepce rodinné politiky* [Ministry of Labour and Social Affairs, *National Concept of Family Policy*], 20.

## The Concept of the Family in Family Policy at the Regional and Municipal Level of 2008

The strategic document *Family Policy at Regional and Municipal Level* of 2008 continues the line of the previous two above-mentioned documents. It avoids defining the concept of family, but it states at the same time:

Influences of contemporary changes in the sphere of culture and values are problematic, too. The marital family as a traditional form of life stands in contrast to many of the newly created alternatives based on a much looser, childless relationship.<sup>22</sup>

Among the key areas of family policy, it includes support for the institution of marriage and for its social prestige,<sup>23</sup> and also economic resources related to tax benefits legally set at national level.<sup>24</sup>

## The Concept of the Family in the Current Draft of Family Policy at the End of 2016

While it can be stated that the documents issued up until 2008 prefer the marital family, it is no more the case with the current draft Family Policy of 2016, which is deliberately and explicitly based on a “reflection of social development” including the legalization of registered partnerships in 2006,<sup>25</sup> clearly surrendering value preferences. Those result in a significantly different definition of family<sup>26</sup>:

The decisive criterion for the family is an ongoing relationship and values of love, respect and mutual care. Today’s family is in fact a very diverse category and it is still changing. This diversity is the result of complex and often new situations in which families are facing. The family in today’s world consists of individuals and couples with children (biological and the adoptive) or without them (even deliberately childless), marital, registered, unmarried, foster and so called composite, often multigenerational, namely always regardless of their gender.

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<sup>22</sup> Ministerstvo práce a sociálních věcí. *Rodinná politika na úrovni krajů a obcí* [Ministry of Labour and Social Affairs, *Family Policy at Regional and Municipal Level*], 7.

<sup>23</sup> Ministerstvo práce a sociálních věcí. *Rodinná politika na úrovni krajů a obcí* [Ministry of Labour and Social Affairs, *Family Policy at Regional and Municipal Level*], 8.

<sup>24</sup> Ministerstvo práce a sociálních věcí. *Rodinná politika na úrovni krajů a obcí* [Ministry of Labour and Social Affairs, *Family Policy at Regional and Municipal Level*], 12.

<sup>25</sup> Act no. 115/2006 Coll., on the registered partnership and changes of connected acts.

<sup>26</sup> Ministerstvo práce a sociálních věcí, *Národní koncepce rodinné politiky, verze 22. prosince 2016* [Ministry of Labour and Social Affairs, *National Concept of Family Policy, version of 22nd December 2016*], 2.

This radically new definition of the family became the subject of sharp criticism both from some ministries, and from some non-governmental organizations in the comments to the draft concept.<sup>27</sup>

In response to demographic changes, especially to the decline in the marriage rate, the growth in the number of unmarried cohabitations and the significant increase in the number of children born out of wedlock, which has amounted to 48.6% in 2016,<sup>28</sup> and with an emphasis on the principle of non-discrimination, the draft of the concept brings the intention to move the financial benefits of marriage in the tax area to the direct support of parents with children, without distinction, whether they are married or not.<sup>29</sup>

## Legal Support of Marriage

### Starting Position

While Czech law avoids defining the family, the Catholic Church is clear on this topic. The definition of the family is given by the Catechism of the Catholic Church,<sup>30</sup> n. 2202:

A man and a woman united in marriage, together with their children, form a family. This institution is prior to any recognition by public authority, which has an obligation to recognize it. It should be considered the normal reference point by which the different forms of family relationship are to be evaluated.

It is clearly stated that the family in the Catholic understanding is the marital family. If we therefore deal with this from the perspective of the Catholic Church on the legal support of the family in the Czech law, we necessarily reach the topic of the legal support of marriage.

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<sup>27</sup> Cf. above 2.2.5 *The Current Draft of the Family Policy Concept at the End of 2016*.

<sup>28</sup> Český statistický úřad, “Pohyb obyvatelstva – 1. – 3. čtvrtletí 2016” [Czech Statistical Office, “Motion of Population – 1st to 3rd Quarter 2016”], accessed March 13, 2017, <https://www.czso.cz/csu/czso/cr/pohyb-obyvatelstva-1-3-ctvrtleti-2016>.

<sup>29</sup> Ministerstvo práce a sociálních věcí, *Národní koncepce rodinné politiky, verze 22. prosince 2016* [Ministry of Labour and Social Affairs, *National Concept of Family Policy, version of 22nd December 2016*], 36.

<sup>30</sup> *Catechism of the Catholic Church* (New York: Doubleday, 1994).

## The Institutionalization of Marital Status

Individual types of legally recognized marital status arise from the second part of Act no. 89/2012 Coll., the Civil Code, and from the state administrative practice. Thus, these conditions are referred to as a family: single, married, divorced, and widowed.

This concept has been somewhat undermined by the adoption of Act no. 115/2006 Coll., on registered partnership, and amendments to other acts. This act defines a registered partnership in § 1 section 1:

Registered partnership is a permanent association of two individuals of the same sex established in the way that prescribes this act (hereinafter the ‘partnership’).

In the explanatory report of the bill, the registered partnership has the status of a relationship, but it is not the marital status. Nevertheless, it is determined in § 39:

Partnership is registered in place of marital status in the identity card of a partner and in other public documents in which marital status is featured.

The Registered Partnership Act, however, is formulated as a shortened modification of the then Family Act no. 94/1963 Coll., and also in the CC, especially in its second part *Family Law*, effectively acting as marital status—for example, a registered partnership is an impediment for the solemnization of marriage, and vice versa. It is no wonder that ‘gay marriages’ are often talked about in popular and journalistic parlance. Although this is legally flawed, it corresponds to the state de facto established by the law.

## Parenthood

The question of motherhood is dealt with in § 775 of CC unambiguously in the traditional manner, according to the principle of Roman law *mater semper certa est*: the child’s mother is the woman who bore him/her. A factual discrepancy may occur in the event that it is an assisted reproduction with use of a donated egg—the donor must be anonymous and it can only be a woman who has completed 18 years of age and did not exceed the age of 35 years, as regulated by Act no. 373/2011 Coll., on specific health services in § 7. In contrast, the question of a surrogacy motherhood is not regulated in Czech law, for which CC does not provide for any contract—in this case, only the path of adoption remains for the client of surrogacy.<sup>31</sup>

<sup>31</sup> Milana Hrušáková et al., *Rodinné právo [Family Law]* (Praha: C.H.Beck, 2015), 130–31.



The question of paternity is already much more complicated. It is mostly based on three legal rebuttable presumptions. CC in § 776 establishes a presumption for the couple: the father of the child is considered to be the mother's husband; further in § 779 a presumption of paternity is established in the case of the affirmative declaration of the man and the child's mother; the third presumption is laid down in § 783 and is based on the fact of intercourse at the decisive time—that presumption is implemented through court proceedings. All three presumptions can legally be denied. Currently, the basic proper evidence consists in the test of conformity of DNA.

In the case of assisted reproduction, it is assumed that the father of the child is the husband of the woman or the man who gave his consent to assisted reproduction (CC § 778), even in the case of sperm donation. This presumption can be disproved in court.

In the field of fatherhood, therefore, the easier solution is fatherhood (the first presumption) for married couples, even in the case of assisted reproduction.

## Adoption of a Child

In Czech law, adoption significantly is newly regulated by the CC in §§ 794–854. It is again understood as a private relationship and it includes the possibility of the adoption of an adult person.

The comparison of different forms of cohabitation with regards to adoption shows significant differences.

The first major difference concerns the possibility of joint adoption: it is possible only for a married couple according to § 800 of CC. It is possible to liken it to adoption by one spouse if the other spouse is the parent of the child. Such adoption is therefore not allowed to partners in a heterosexual non-married couple.

The question of the adoption of children by persons living in a registered homosexual partnership is regulated specifically in Act no. 115/2006 Coll., on registered partnership. The original wording of its § 15, sect. 2 was:

Persisting partnerships inhibit either partner becoming the adoptive father of a child.

This is clearly expressed in the explanatory report:

The partner will have in principle a step-parent relationship to a biological child of his partner, or to a child previously entrusted to the care and education of the partner, or to an adoptive child of the partner, with the corresponding rights and obligations. The adoption of a child by registered partners,

respectively by any of the partners at the time of persisting partnership will be banned. The reason is the preference of foster care of a child by a heterosexual couple.

Although representatives of LGBT organizations declared at the time of the legislative process of the Registered Partnership Act that they will not seek the adoption of children by registered partners, the opposite has proven to be true. Efforts for change proceed at the parliamentary and judicial level. At the parliamentary level, a parliamentary amendment bill was filed on registered partnerships allowing the registered partner of the child's parent to adopt the child in 2014—this proposal suffered from technical and legal flaws. Expanded and modified substantially, a similar proposal has been presented by the government in 2016. Discussion of the first proposal in the first reading started only on July 13, 2016, and was interrupted on the same day.<sup>32</sup> The second proposal is still pending (at the end of March 2017) in the Chamber of Deputies.<sup>33</sup> It is difficult to predict the fate of these legislative initiatives.

Judicial power has intervened in this matter. The Municipal Court in Prague proposed to the Constitutional Court the annulling of the above-cited § 15 sect. 2 of Act no. 115/2006 Coll., on registered partnership, in March 2015. The Plenum of the Constitutional Court granted the petition in June 2016,<sup>34</sup> leaving open the way for the adoption of a child by one of the registered partners—the legal impossibility of the joint adoption of a child by a registered couple persists.

## Economic Advantages for Spouses

Experience shows clearly that economic indicators are a considerable motive for the selection of specific solutions and behaviors of individuals and of society. From the history of Czechoslovakia, the phenomenon of population growth in the early 1970s is well known, having been fuelled by economic incentives for married couples with children (loans to young families, facilitating the issuance of decrees on flats, etc.). It caused a phenomenon called Husák's children, named

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<sup>32</sup> Poslanecká sněmovna Parlamentu České republiky, *Sněmovní tisk 320, Novela z. o registrovaném partnerství* [Chamber of Deputies of the Parliament of the Czech Republic, *Parliamentary Document 320, Amendment of the act on registered partnership*], accessed March 16, 2016, <http://www.psp.cz/sqw/historie.sqw?o=7&t=320>.

<sup>33</sup> Poslanecká sněmovna Parlamentu České republiky, *Sněmovní tisk 967, Novela z. o registrovaném partnerství* [Chamber of Deputies of the Parliament of the Czech Republic, *Parliamentary Document 957, Amendment of the act on registered partnership*], accessed March 16, 2016, <http://www.psp.cz/sqw/historie.sqw?o=7&T=957>.

<sup>34</sup> Decision of the Constitutional Court of the Czech Republic Pl. ÚS 7/15 from June 14, 2016, published in the Collection of Acts and Orders as no. 234/2016 Coll.

after the former first secretary of the Communist Party of Czechoslovakia Gustav Husák.

The situation of economic stimuli for marriages in the Czech Republic is contradictory. While single mothers reach easier and higher social benefits, especially in housing benefit and material need benefit, the state permits applying tax credit for a spouse with no income to the tax on personal income under § 35ba of Act no. 586/1992 Coll., on income tax; in this matter, registered partners are equated to a married couple according to § 21e of the act.

The joint taxation of spouses, introduced in the Czech tax system in the same act in 2005, was possible only for years 2005–2007, it was abolished in 2008.

It is considerable that the current draft Concept of Family Policy at the end of 2016 plans the abolition of tax credit for a spouse with no income and transfer it into direct support for families with children without discrimination regarding contracting or not contracting marriage.<sup>35</sup>

## Conclusions

The analysis of the Czech legal acts and official strategy documents showed two clear tendencies: first, the resignation of the legal definition of family, which is becoming the domain of sociology; and second, the growing trend of government policy merely to follow social changes.

The definition of the family in official strategy documents is marked by support of marital families until 2015. The proposed new concept of family support at the end of 2016 retreated from its clear value distinction, and thus it leads to such a wide definition of the family, which has become a subject of contention between ministries of the Czech government, those in the professional sphere, and those in the area of non-governmental organizations. At the same time, this concept surrenders its attempt to actively influence social reality through measures in favor of marriage, all of which are still the most effective economic benefits for spouses, with reference to the principle of non-discrimination.

At the time of issuing the present article, that is, in March 2017, it was not clear whether and how the proposed new concept of family support would win recognition. However, it is evident that these concern the essential realities affecting the lives not only of the current generations of the inhabitants of the

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<sup>35</sup> Ministerstvo práce a sociálních věcí, *Národní koncepce rodinné politiky, verze 22. prosince 2016* [Ministry of Labour and Social Affairs, *National Concept of Family Policy, version of 22nd December 2016*] (Praha: Ministerstvo práce a sociálních věcí, 2016), 36–37.

Czech Republic, but also of future generations and the future direction of the Czech state.

It is therefore good that in this situation, which must be assessed as critical, the Catholic bishops publicly have taken an official position with a declaration of the Czech Bishops' Conference in accordance with the clear teaching of the Catholic Church. It is evident that the area of family and marriage is the subject of serious dispute and it is favorable that these questions have clearly entered into the public social debate.

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## La famille dans l’ordre juridique tchèque

### Résumé

L’article sur le statut de la famille dans le système juridique tchèque est basé sur les normes juridiques, mais il ne peut s’y limiter, car depuis des décennies ces normes ne définissent plus la notion de famille et se réfèrent plutôt à la notion de mariage. Ainsi, la spécification de la notion de famille est réservée à la sociologie. En l’occurrence, il s’est avéré nécessaire de consulter d’autres documents, tels que ceux du Ministère du Travail et des Affaires sociales de la République tchèque qui est responsable du développement des documents étatiques stratégiques dans le domaine de la famille et du mariage. De ces documents se dégage une compréhension plus nette de la famille qui, jusqu’à 2015, se caractérisait par le soutien aux familles maritales. Le mariage est devenu le point de repère préférable dans la définition de la parentalité, de l’adoption et dans l’usage des instruments économiques, surtout les allègements fiscaux.

La nouvelle conception du soutien à la famille de la fin de 2016 a renoncé à la distinction nette de valeurs, ce qui par là même conduit à la définition de la famille tellement vaste que cela est devenu l’objet de discordance entre les ministères tchèques, aussi bien dans la sphère professionnelle que dans celle des organisations non gouvernementales. En même temps, cette conception, par rapport au principe de la non-discrimination, renonce à ses tentatives d’influer activement sur les réalités sociales en faveur du mariage ; de toutes les actions, ce sont bel et bien les allègements fiscaux pour les époux qui s’avèrent les plus efficaces.

Le champ de la famille et du mariage est l’objet d’un litige très sérieux, et il est bon que ces questions se soient infiltrées dans le débat social public, bien qu’il ne soit pas clair quels résultats

il va apporter. Dans cette situation, la Conférence épiscopale tchèque a formulé une déclaration nette en faveur de la famille maritale en tant que seul modèle standard de la famille.

Mots clés: droit, droit familial, droit civil, Église catholique, catéchisme, famille, mariage, partenariats enregistrés, allégement fiscal

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## La famiglia nell'ordine giuridico ceco

### Sommario

L'articolo sullo stato della famiglia nel sistema giuridico ceco è basato sulle norme giuridiche ma non può essere limitato ad esse perché già da decenni esse non definiscono la nozione di famiglia e fanno piuttosto riferimento alla nozione di matrimonio. La specificazione della nozione di famiglia in questo modo è destinata alla sociologia. Per questo motivo è stato necessario estrapolare tale definizione anche da altri documenti ufficiali, ovvero dai documenti del Ministero per gli Affari del Lavoro e della Politica Sociale della Repubblica Ceca che è responsabile dello sviluppo dei documenti strategici statali nel campo della famiglia e del matrimonio. Da tali documenti risulta una comprensione più chiara della famiglia che, fino al 2015, era caratterizzata dal sostegno delle famiglie coniugali che ha determinato la preferenza del matrimonio nella definizione della genitorialità, nell'adozione e nell'uso degli strumenti economici, specialmente delle agevolazioni fiscali.

La nuova concezione di assistenza familiare proposta, risalente alla fine del 2016, ha rinunciato alla distinzione chiara dei valori, e quindi conduce ad una definizione così ampia della famiglia da divenire oggetto di disaccordo tra i ministeri cechi, nella sfera professionale e nel campo delle organizzazioni extra-governative. Nel contempo tale concezione rinuncia ai tentativi di influire attivamente sulle realtà sociali attraverso misure in favore del matrimonio, che continuino tutte ad essere le più redditizie agevolazioni economiche per i coniugi, in riferimento al principio di non discriminazione.

Il campo della famiglia e del matrimonio è l'oggetto di una seria controversia ed è un bene che tali domande siano entrate espressamente nel dibattito sociale pubblico anche se non è chiaro a quali risultati porterà. In tale situazione la Conferenza Episcopale Ceca ha rilasciato una dichiarazione chiara in favore della famiglia coniugale come unico modello standard di famiglia.

Parole chiave: diritto, diritto della famiglia, diritto civile, Chiesa Cattolica, catechismo, famiglia, matrimonio, unione civile registrata, agevolazione finanziaria