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

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## Abstract in original language

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

## Keywords in original language

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

## 1 Introduction

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

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

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

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

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

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

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

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

<sup>2</sup> Decision of ECHR from 13. 6. 1979, *Marckx vs. Belgium*, application no. 6833/74.

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

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

### **3 The Position of Cohabitation in Relation to Marriage**

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

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

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<sup>4</sup> Decision from 18. 12. 1986, *Johnston and others vs. Ireland*, application no. 9697/82.

<sup>5</sup> Decision of ECHR from 2. 10. 2010, *Şerife Yigit vs. Turkey*, application no. 3976/05.

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

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

In comparison I would like to mention, for example, *Petrov vs. Bulgaria*<sup>7</sup> case. The applicant, Mr. Petrov, was sentenced to three and a half years<sup>6</sup> in prison. The complainant wanted to use a phone to contact his long-term partner and his daughter. However, he was not allowed to do that. According to Bulgarian law, prisoners have the right to make phone calls twice a month with relatives including spouses, children, parents and siblings. In this case

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

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

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

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

## **4 Cohabitation of Homosexual Couples**

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

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

## 5 Relationship of Parents and Children in Cohabitation

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

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

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

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

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

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

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

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



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

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

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

## 6 Conclusion

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

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

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

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

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

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