
DOI <https://doi.org/10.5817/CZ.MUNI.P210-9981-2021-4>

THE MISSING CONCEPT OF COHABITATION OF THE COUPLES OF THE OPPOSITE-SEX IN *DE FACTO* UNIONS IN THE CZECH CIVIL CODE¹

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Abstract in original language

The paper deals with couples in *de facto* unions, especially the ones formed by a man and a woman. It seeks to define cohabitation and differentiate the rights and duties of cohabitantes from the ones connected with the status relations between both the opposite-sex couples (marriage) and the same-sex couples (registered partnership). As there are seldom any kinds of agreements between cohabitantes, special attention is devoted to the relevant legal rules in all the Books of the Czech Civil Code and their applicability to cohabitantes during their relationship and after the break-up or upon the death of one of them. It is stressed that there is no difference between children born out of wedlock and within marriage. Once parenthood is legally established, there is no discrimination of non-married mothers and non-married fathers towards the children. And besides, there are special provisions that protect the weaker party: property claims of the non-married mother from the child's father for a reasonable time and within adequate limits.

Keywords in original language

Couples; Man and Woman; *de facto* Unions; Rights and Duties; Differences; Marriage; Registered Partnership; Agreement; Weaker Party; a Child Born out of Wedlock; Parenthood; Protection.

¹ The research was carried out within the framework of the Central European Professors' Network coordinated by the Ferenc Mádl Institute of Comparative Law.

1 Introduction

Due to the considerable changes in Europe over the several few decades, the portrait of the family has been changing, which is, of course, reflected in the legal orders of different countries,² as well as, in the case-law of the European Court of Human Rights. Besides, the Constitutional courts of many countries play a very important and irreplaceable role. That’s why they may be described “as drivers of reforms”.³

This sphere does not stay away from the activities of the Commission on Family Law (further “the CEFL”).⁴ Quite recently, the Principles of European Family Law regarding the Property, Maintenance, and Succession Rights and Duties of Couples in *de facto* Unions were published (hereinafter “the Principles”).⁵ Let’s add, that the Principles are the fourth deed by the CEFL following the Principles of European Family Law Regarding Divorce and Maintenance duty between the ex-spouses, the Principles regarding Parental Responsibilities, and finally the Principles regarding Property relations between the Spouses.⁶

² For details see ANTOKOLSKAIA, M. (ed.). *Convergence and Divergence of Family Law in Europe*. Antwerpen – Oxford: Intersentia, 2007; DOUGLAS, G. and N. LOWE. *The Continuing Evolution of Family Law*. Bristol: Jordan Publishing Limited, 2009; MCGLYNN, C. *Families and European Union. Law, Politics and Pluralism*. Cambridge: Cambridge University Press, 2006; SCHERPE, J. M. (ed.) *European Family Law*. Volumes I–IV. Cheltenham – Northampton: Edward Elgar Publishing, 2016.

³ See DETHLOFF, N. and K. KROLL. The Constitutional Court as Driver of Reforms in German Family Law. In BAINHAM, A. (ed.). *The International Survey of Family Law*. 2006 Edition, Jordan Publishing Limited, 2006, p. 217 ff.

⁴ For more information visit <http://ceflonline.net/> [cit. 12. 5. 2021].

⁵ BOELE-WOELKI, K., F. FERRAND, C. GONZÁLEZ-BEILFUSS, M. JÄNTERÄ-JAREBORG, N. LOWE, D. MARTINY and V. TODOROVA. *Principles of European Family Law regarding the Property, Maintenance and Succession Rights and Duties of Couples in de facto Unions*. Cambridge: Intersentia, 2019.

⁶ For more see BOELE-WOELKI, K., F. FERRAND, C. GONZÁLEZ-BEILFUSS, M. JÄNTERÄ-JAREBORG, N. LOWE, D. MARTINY and W. PINTENS. *Principles of European Family Law regarding Divorce and Maintenance Between Former Spouses*. Antwerpen – Oxford: Intersentia, 2004; BOELE-WOELKI, K., F. FERRAND, C. GONZÁLEZ-BEILFUSS, M. JÄNTERÄ-JAREBORG, N. LOWE, D. MARTINY and W. PINTENS. *Principles of European Family Law regarding Parental Responsibilities*. Antwerpen – Oxford: Intersentia, 2007; BOELE-WOELKI, K., F. FERRAND, C. GONZÁLEZ-BEILFUSS, M. JÄNTERÄ-JAREBORG, N. LOWE, D. MARTINY and W. PINTENS. *Principles of European Family Law regarding Property Relations between Spouses*. Cambridge – Antwerp – Portland: Intersentia, 2013.

The question I pose to myself in this article is whether the Czech Republic reflects the changes in family adequately and whether there should be more legal innovations in the future in the light of the case-law of the European Court of Human Rights and the Principles. As there is quite new regulation anchored into Civil Code, the relevant provisions will be critically discussed as well.

2 On the Protection of Family and Family Life in General

First of all, let's stress that the Charter of Fundamental Rights and Freedoms and the New Civil Code.

The Charter of Fundamental Rights and Freedoms from 1991 as a part of the Constitutional order of the Czech Republic protects the family as such without specifying it.⁷

The new Civil Code, which was passed in the year 2012 and has been effected since the year 2014, similarly to previous acts, regulates marriage only for people of the opposite sex.⁸

There is the Act on registered Partnership from 2006 as well, which regulates the status relationship between same-sex partners.⁹ For political reasons, the registered partnership was not included in the new Civil Code although it was planned and drawn by the main creators of the Civil Code. There is a pending draft on "Marriage for all" at present.¹⁰ The question is whether there will be political will for passing it.

However, regarding *de facto* unions, there is no special regulation in the Czech legal order and are not relevant statistical data.

⁷ See Act No. 2/1993 Coll., Article 32, Section 2: "*Parenthood and the family are under the protection of the law*".

⁸ Act No. 89/2012 Coll., Section 655: "*Marriage is a permanent union of a man and a woman formed in a manner provided by this Act*".

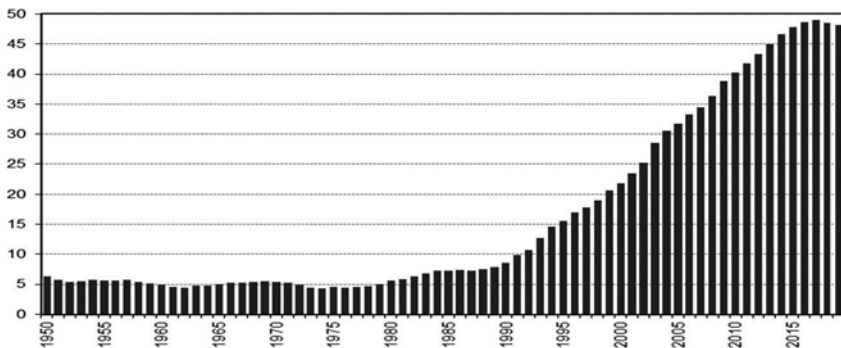
⁹ Act No. 115/2006 Coll.

¹⁰ Parliament of the Czech Republic, Chamber of Deputies, Parliamentary term No. VIII., Draft No. 201/0. According to the Draft, there should be changes to the Civil Code as follows. Next text of the § 655 would be "*Marriage is a permanent union of two people formed in a manner provided by this Act*."

The last census from 2011 showed quite a small number of people living in *de facto* cohabitation. However, there is another census being conducted at this very moment which might bring to light some new highly relevant data.¹¹

In general, it is difficult to rely on statistical data showing the proportions of children born out of marriage. There are a lot of them in the Czech Republic these days. The following chart shows the increasing proportion of children born out of wedlock.¹²

Graph no. 1: Proportion of live births outside marriage, 1950–2019



¹¹ The Census began at midnight on 26–27 March 2021. According to the webpage of the Czech Statistical Office “the Census is a traditional component of the statistics in each country. It has been held in our territory since 1869 and takes place every 10 years, as in most other countries. Thanks to this, the results make it possible to compare the current state of our country with the past as well as the rest of the world. The importance of Census is absolutely crucial for our future. The results influence the activities of public administration, business plans and the direction of activities of research and scientific workplaces. Ultimately, they affect the lives of everyone of us and provide a picture of the economic activity of the population. In combination with data on education, housing or household composition, the results make it possible to analyse, the situation of recent graduates, single people, people who lost their jobs before retirement, working seniors or people without income for example. The data is the basis for analysis of the labour market or transport in specific locations. They help create new jobs, develop services or design support programs for the socially disadvantaged [...] the results are widely used, for example, in the preparation of housing programs, infrastructure development or for planning of better service availability. They also help secure the correct capacities in medical facilities or kindergartens, help create flood protection measures or help prepare intervention-readiness plans for firefighters”. For more see <https://www.scitani.cz/csu/scitani2021/recent-news> [cit. 28. 3. 2021].

¹² See <https://www.czso.cz/csu/czso/proportion-of-live-births-outside-marriage-1950-2019> [cit. 28. 3. 2021].

But the data and the chart by the Czech statistical office do not say anything about the parents of these children. Some of them have both legal parents, but some of them do not and live just with one of them, typically their mothers.

It is interesting that during the “communist times”, former Czechoslovakia used to have quite a low rate of children born out of wedlock (only 5–8 percent) and there were a lot of marriages. Cohabitation without marriage as a family model was used mainly by divorced or widowed people.

However, living in cohabitation has become more popular than marriage among the youngest couples nowadays.

As it was mentioned above, the portrait of the family has been changing everywhere. The Czech Republic does not stay out of European development. But there are a lot of questions which should be answered by demographers, sociologists, and other professionals, including lawyers. Let’s mention the most urgent ones:

- Is the Czech legal order regarding couples in *de facto* unions in harmony with the European standards?
- What are the European standards regarding *de facto* unions? Is it a case law of the International Court of Human Rights on the Article 8 Convention for the Protection of Human Rights and Freedoms? Are they the Principles of European Family Law by the CEFL? Is it the Model Family Code by the academics?
- Does the Czech Civil Code meet the needs of the current society? And what does Czech family life look like?
- Finally, do we need an amendment to the Civil Code?

3 About “The Principles and Sources of Inspiration for the New Civil Code”

As it was said above, the New Czech Civil Code was passed only recently after quite a long preparation period. It is generally known that regulations

of family law were excluded from civil law codes after the year 1949 and codified in independent codes in 1949 and 1963 in former Czechoslovakia.¹³

It must be stressed that thanks to “*The Principles and Sources of Inspiration for the New Civil Code*” which were created by the main authors of the Civil Code, professor Karel Eliáš and professor Michaela Zuklínová, the New Civil Code means “*a come-back*” to the traditions.¹⁴ The main creators of the New Czech Civil Code aimed the Czech Republic to become more traditional again in this respect. That is why family law rules were enacted into the Book Two of the new Civil Code and the concept of new family law is rather conservative.¹⁵ There are not many innovations. On the other hand, as a side-effect, couples living in *de facto* unions enjoy less standard of protection than in previous regulations.

The following lines are devoted to all the books of the Civil Code, especially to the provisions which can be used by the people living in *de facto* unions during their relationship and after the break-down.

4 The Book One of the Civil Code – General Part

How it was stressed in the introduction, the Civil Code expressly protects the family established by marriage. But there are two important sections in respect to cohabitantes they should be mentioned.

First of all, there is the “*concept of close persons*”. There are 3 definitions of them. According to § 22 CC, a close person is

- a) a relative in the direct line, sibling and spouse or a partner under the act of registered partnership,

¹³ For a general point of view see BĚLOVSKÝ, P. Rodinné právo (Family Law). In: BOBEK, M., P. MOLEK and V. ŠIMÍČEK (eds.). *Komunistické právo v Československu. Kapitoly z dějin bezpráví (Communist Law in Czechoslovakia. Chapters in History of Injustice)*. Brno: Masarykova univerzita, 2009, p. 463 ff.

For previous family law see HRUŠÁKOVÁ, M. Czech Republic. In: *The International Encyclopaedia of Laws*. The Hague/London/New York: Kluwer Law International, 2002; and HRUŠÁKOVÁ, M. and L. WESTPHALOVÁ. Czech Republic. In: *The International Encyclopaedia of Laws*. 2. ed. The Hague/London/New York: Kluwer Law International, 2011.

¹⁴ See ELIÁŠ, K. and M. ZUKLÍNOVÁ. *Principy a východiska nového kodexu soukromého práva (Principles and Starting Points of the New Code of Private Law)*. Praha: Linde, 2001.

¹⁵ For more see ELIÁŠ, K. and M. ZUKLÍNOVÁ. *Návrh občanského zákoníku (Draft for the Civil Code)*. Praha: Ministry of Justice, Spring 2005.

- b) other persons in a familial or similar relationship shall, concerning each other, be considered to be close persons if the harm suffered by one of them is perceived as his harm by the other,
- c) persons related by affinity and persons permanently living together are also presumed to be close persons.

The concept of close persons is quite traditional. There were similar definitions in previous legal regulations, the Civil Codes from 1950 and 1964. This concept should be distinguished from “*the concept of persons sharing the same household*” which is relevant for instance in housing law and succession law. However, there are many points of contact, which means that a close person is very often a person living in one household. In the other words, a cohabitee in a *de facto* union can enjoy rights from both concepts.

Secondly, let’s mention the provisions regulating “*Running of a limitation period*”. § 646 CC provides that between spouses a limitation period neither commences nor runs while the marriage lasts. It is traditional wording. New Civil Code provides as a novelty and that this applies, by analogy, to mutual rights of “persons sharing the same household”¹⁶ which is rather revolutionary, but still unknown in general and especially by cohabitees.

Let’s add that the above-mentioned concept is relevant for the whole legal order.

5 The Book Two of the Civil Code – Family Law

Due to quite limited concept of family regulated in the Civil Code, there are *no articles* there those would establish *mutual right and duties* between the cohabitees, e. g. there is no duty to help each other, no community of property, no protection of family dwelling and common household goods, and no mutual maintenance duty by operation of law. The situation of *de facto* couples is *similar* to the position of *registered partners*, except for mutual maintenance duty.

¹⁶ Beside that, this provision extends the rules on a person represented and his or her legal representative, on a ward and his or her guardian and on a person under tutorship and his or her tutor.

Unfortunately, there are not often property contracts between the cohabitants which causes a lot of problems for the so-called weaker party upon dissolution of the relationship *de facto*.

However, as there is no discrimination against children born out of wedlock and 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 both are principally *holders of parental responsibility* by operation of law without being discriminated against in comparison with married parents of a minor child. However, parenthood must be legally established. There are *no differences between the children at all* neither in person nor property spheres in the Czech legal order.

The Czech family law traditionally protects property claims of unmarried mother of the child towards the child’s father, or deemed father. There were always relevant provisions in previous codes from 1949 and 1963, and even in one from 1811.¹⁷ The New Civil Code regulates “*Maintenance and support, and provision for the payment of certain costs for an unmarried mother*” as follows in § 920 CC. It is provided that if the child’s mother is not married to the child’s father, the child’s father shall provide her with maintenance for two years from the birth of the child and provide her with a reasonable contribution to cover the costs associated with pregnancy and childbirth.¹⁸

Besides that, a court may, on the application of a pregnant woman order the man whose paternity is probable to provide an amount needed for maintenance and a contribution to cover the costs associated with pregnancy and childbirth in advance. And in addition, a court may, on the application of a pregnant woman, also order the man whose paternity is probable to provide in advance an amount needed to provide for the maintenance of the child for a period for which the woman would be entitled to maternity leave as an employee under another legal regulation.²¹⁹

¹⁷ For more information on history see the note 12 above.

¹⁸ Regarding the maintenance towards the child, both the child parents have maintenance duty and the child has the right to the same living standard as his or her parents till he or she reaches the capacity to provide maintenance for himself or herself (§ 910 ff. CC).

¹⁹ It would be 28 weeks, in case of siblings or more children 37 weeks. For details see § 195, Subsection 1 of the Act No 262/2006 Coll., the Labour Code.

Let's add that there is neither common adoption nor common foster care available for cohabittees. On the other hand, regarding the law against domestic violence (§ 751 ff. CC), “*anybody*” can seek protection. Cohabittees are not excluded (§ 3021 CC).

6 The Book Three of the Civil Code – Property Rights and Succession

As it was mentioned at the beginning, there is no community of property between people in *de facto* union and no protection of family dwelling and common household goods in comparison with the married couple.

If people in a *de facto* union acquire a property together, there can be only co-ownership with shares between other people. Provided there is not agreed otherwise, the Civil Code states that the shares are equal.

Regarding the rights of a *surviving cohabitee*, his or her situation is in practice *quite weak* as there is seldom a will or an inheritance contract.

The rights of the surviving person are protected by the concept of “*persons sharing the same household*”. It must be stressed that “*anybody*” can be such a person. The Civil Code mentions “persons sharing the same household” in two provisions regulating heirs of the second and the third class. Cohabitee can be never an heir in the 1st class where only a spouse and a child can inherit. If there is a child in cohabitation, he or she takes all.

Regarding the second class of heirs, the law stipulates in § 1636 CC that if the decedent's descendants do not inherit, the second-class heirs include the spouse, the decedent's parents, and „those who lived with the decedent in the common household” for at least *one year* before his death and, as a result, cared for the common household or were dependent in maintenance on the decedent. Second-class heirs inherit equally; however, the spouse shall always inherit at least half of the decedent's estate. The surviving spouse can never be the only heir in the second class of heirs. He or she falls to the third class.

The law regulating the third class of heirs provides in § 1637(1) CC, that if neither the spouse nor any of the parents inherit, decedent's siblings and “those who lived with the decedent in the common household” for at least *one year* before his death and, as a result, cared for the common household

or were dependent in maintenance on the decedent, inherit in the third class of heirs equally.

To summarise: the surviving cohabitee must prove many details from the common life during the succession proceedings, mainly duration of *de facto* union, etc.

Besides, there is the concept of “*a forced heir*”. According to § 1643 CC, the forced heirs include the decedent’s *children* and, if they do not inherit, their descendants. If a forced heir is a minor, he must inherit at least three-quarters of his statutory inheritance share. If a forced heir is an adult, he must inherit at least a quarter of his statutory inheritance share.

However, regarding couples living in *de facto* unions, another new provision might be useful. New Civil Code provides in § 1666(1) *in fine* CC that the surviving pregnant cohabitee has right to limited maintenance from inheritance; the mother of the decedent’s child in the postpartum period of six weeks has the same rights. The protection of cohabitee in this field is the same as the protection of a surviving spouse who has according to § 1666(1) CC the right to fair maintenance from the decedent’s estate for six weeks after the death of his spouse; if a widow is pregnant, she has the right to fair maintenance until the end of the sixth week after birth.²⁰

7 The Book Four of the Civil Code – Obligations

The new Civil Code recognizes private autonomy, in particular the freedom to make the contract. The partners in *de facto* unions may conclude in principle

²⁰ Besides, it is provided in the § 1666(2) CC, that if a surviving spouse has been denied statutory inheritance or his statutory inheritance has been reduced, the surviving spouse is entitled to the necessary provision for life until he remarries, provided that he otherwise lacks such a provision for life and he is unable to provide for himself; in this manner, however, he may not get more from the decedent’s estate than what half of his statutory inheritance share would have been. However, a spouse who, without serious reasons, did not share the family household with the decedent, a spouse lacking the capacity to be an heir or a spouse who renounced or refused inheritance is not entitled to the necessary provision for life.

And finally, in the § 1666(3) CC, it is provided the right to fair maintenance under above mentioned Subsection (1) prejudices the right to essential maintenance under § 1665 CC, all these rights are prejudiced so that all obliges receive an equal share. Necessary provision for life under above mentioned Subsection (2) may not be provided if it prejudices the right to essential maintenance under § 1665 CC.

any agreements before and during their cohabitation and after the separation. There are almost no limits and no provision for any authority to scrutinize the agreement.

As mentioned before, unfortunately, there are seldom property contracts between the cohabitees which causes a lot of problems for the so-called weaker party upon dissolution of the relationship *de facto*.

Regarding family dwelling, there are no special provisions that would protect the situation of surviving partner living in a *de facto* union in a rented flat by a lessee. The Civil Code provides quite limited general rules in provisions titled “*Consequences of the death of a lessee*” in § 2279 CC. It is said that if a lessee dies and there is no joint lease of the apartment, the lease passes to “*a member of the lessee’s household*” who lived in the apartment on the day of the lessee’s death and has no apartment of his own. If such a person is a cohabitee, the lease passes to such a person only if the lessor *consents* to the passage of the lease to that person. Here we can see a big problem for cohabitees and less protection than in previous regulations. It must be mentioned that the law provides as well that a lease of an apartment after its passage shall end no later than two years from the date of the passage of the lease. This does not apply if the person to whom the lease passed reached *the age of seventy years* on the date of passage of the lease. Likewise, this does not apply if the person to whom the lease passed has not reached the age of eighteen years on the date of passage of the lease; in such a case, the lease shall end no later than on the date on which the person reaches the age of twenty years, unless the lessee and the lessor agree otherwise.

8 Conclusion

The people of the opposite sex can enter into marriage and enjoy the full catalog of the rights, married couples are entitled to. People of the same sex can get registered and have some protection by law, especially in case of the death of one of the spouses.

So, the questions we need to ask are:

- Is there a need for an amendment to the new Civil Code?

- Shall the lawmaker respect the private autonomy of the cohabitantes willing not to have special rights and duties connected with marriage or registered partnership?
- Or should the lawmaker draw special rules for them according to the Model Family Code or the Principles of European family law by the CEFL?
- And finally, should the lawmaker create different provisions?

As there is almost no regulation of rights and duties of cohabitantes and there are seldom contracts between them, the situation of the weaker one is quite difficult. There is a lack of legal certainty, especially in families with minor children, when the unit breaks down.

However, it is *difficult to strike a fair balance* between the *private autonomy* of those who form a *de facto* union and between the protection of the weaker party and the welfare of the family not based on marriage. It is generally known that the legal orders of European states are very different. Only optimists may speak about European standards in this field. However, we can see the first steps towards spontaneous harmonization of rules regulating the situation of couples living in *de facto* unions, done mainly thanks to the case-law of the European Court of Human Rights and the Principles of European Family Law by the academics concentrated within the project of the European Commission of Family Law.²¹ The Czech lay maker should rethink the concept of protection of family not based on marriage and “improve” at least the provisions regarding family dwelling, especially strait the right of surviving cohabitee as “*a member of the lessee’s household*” to passing a lease more favourable.

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²¹ Regarding this inspiration sources, see contributions by Milan PALÁSEK, Petra KOTKOVÁ and Lucie ZATLOUKALOVÁ in the COFOLA 2021 Conference Proceedings.

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