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PRINCIPLES OF EUROPEAN FAMILY LAW AS AN INSPIRATION FOR LAW MAKERS IN EUROPE

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Abstract in original language

The Commission on European Family Law is an international group of academic experts on family law. The principles aim is to help harmonize European law and to inspire national legislators to modernize their legislation. The principles try to capture the common core of individual national legislations. If some substantial question has no common core, the Commission creates a new rule, so-called “better law”. The Principles relating to couples in de facto unions deals mainly with the definition and application framework, general rights and obligations, agreements, property and debts, termination of cohabitation, death and mutual disputes. The Principles are of a recommendatory nature only. In Czech Republic the conservative approach prevailed, and de facto unions have no specific legal regulation. In the future, there can be some interesting legal constructions of rights and duties of couple in de facto union that could be an inspiration for Czech legislator. In this contribution I will choose such rights and duties according to the Principles.

Keywords in original language

De Facto Couples; Unmarried Cohabitation; Legislation; Harmonization; Family Law; European Law; Principles.

1 Harmonization of Family Law in Europe

In the past decades there is significant tendency to harmonize the law in Europe. Since the Treaty on European Union and Treaty on functioning of European Union brought the free movement and right to reside

in member states, the harmonization of family law became more important and necessary. Nevertheless, there is no international binding legal instrument dealing with the regulation of rights and obligations of couples in de facto unions.

The EU has already harmonized jurisdiction, applicable law, divorces or maintenance.¹ There is no comprehensive harmonization of the legal regulation of cohabitation in EU or Europe as such.

The approach of European states to legal regulation of cohabitation still varies between states. Cohabitation is not comprehensively “legally grasped” in many countries. The legal relations arising between the partners are often affected by the general rules of private law. The Czech Republic is one of such states. On the contrary, the countries in which the cohabitation has special and complex legal regulations are states of the former Yugoslavia and the Nordic states. Although in some jurisdictions we do not find the legal regulation of cohabitation as an institute, a certain legal framework has gradually been created by case law and practice.

There are two possible sources of inspiration I will name in this contribution. The Principles of European Family Law Regarding Property, Maintenance and Succession Rights of Couples in de facto Unions which are product of work Commission on European Family Law. And the Model Family Code.

There are several areas of law or legal institutes where we can think about accepting legal rules regulating cohabitation.

2 Possible sources of inspiration and law institutes

2.1 Definition of Cohabitation

It is important to sufficiently define de facto unions to determine the beginning and the end, because these moments are associated with the creation or extinction of certain rights and obligations.

¹ Council Regulation (EC) No 2201/2003 of 27 November 2003; Council Regulation (EC) No 4/2009 of 18 December 2008; Council Regulation (EU) No 1259/2010 of 20 December 2010.

The Principles in the first chapter define de facto unions as two persons who live in a lasting relationship as a couple. In addition, the Principles define so-called qualified de facto unions, such as unions lasting at least five years or unions with common minor children of partners, to which certain rights and obligations apply. There is no condition about age of partners in the Principles. The question is also whether the persons of same sex can be cohabitants by legal rules, according to principles can – because the definition is “two persons”.²

The Model Family Code does not provide any definition of de facto unions. In the Czech Republic there are just two types of unions defined by law, marriage and partnership between same sex partners. Czech legislation does not define de facto unions and Czech private law does not deal namely with de facto unions.³ Some specific rights of partners in de facto unions are regulated in Czech public law.⁴

2.2 Maintenance

It is common in most national legislations that there is a maintenance duty between spouses. The de facto union is a similar union of two persons with much the same needs, so naturally, legislatures should consider the suitability and necessity of the maintenance obligation between unmarried partners.

The Principles does not settle maintenance for the duration of de facto union. The principles just settle a duty to contribute to household costs for both partners according to their ability.⁵

In the case of a qualified cohabitation principles regulate the possibility to claim maintenance for a limited period of time in case of dissolution of de facto union. There are some factors that should be taken into account like childcare, division of responsibilities over the duration

² BOELE-WOELKI, K., F. FERRAND, C. GONZÁLEZ-BEILFUSS, M. JÄNTERÄ-JAREBORG, N. LOWE, D. MARTINY and V. TODOROVA. *Principles of European Family Law Regarding Property, Maintenance and Succession Rights of Couples in de facto Unions*. Cambridge: Intersentia. 2019, p. 55.

³ The Czech Civil Code defines just “close persons” and confers on them certain specific rights and obligations.

⁴ E.g. right to refuse to testify, p. 100 of Act No. 141/1961 Coll., Czech Code of Criminal Procedure.

⁵ BOELE-WOELKI et al., op. cit., p. 73.

of the partnership, age, health and employment opportunities of the partners, duration of cohabitation, marriage, registered partnership or other unmarried cohabitation.⁶

The Model Family Code recommends that unmarried partners should mutually contribute to each other maintenance, if one partner does not, then the court can order him to pay a certain regular amount, especially in cases where one partner cares for household, common children etc.⁷

In the Czech civil law, there is a maintenance duty between spouses but no maintenance duty between unmarried partners. It is possible to name one specific maintenance obligation for unmarried couple in the Czech Civil Code which regulates an obligation for man to pay certain amount as a maintenance to support unmarried mother of their common child.⁸

2.3 Rights to household

Due to its importance for people, housing is one of the most legally protected value. Other important values such as privacy, home, material and social background, etc. are closely connected with housing and the right to it. It can be concluded that the right to housing has a reasonably increased legal protection.

Concerning household rights, the Principles state that in qualified partnerships one partner cannot dispose with family home without the consent of the other partner. Such disposition without consent can be annulled by a court. Court may also replace consent of one partner with the disposition with the household if the competent authority finds the disposal in the interest of the family. Court may grant to one of the partners right to use family home in qualified cohabitation in some specific situations.⁹

The Model Family Code settles that partner cannot dispose with the house/flat where the family home is. The needs to have consent of other partner or court. The court would analyse if the refusal has legitimate

⁶ BOELE-WOELKI et al., op. cit., p. 175.

⁷ SCHWENZER, I. H. *Model family code: from a global perspective*. Antwerpen: Intersentia, c2006, p. 33.

⁸ Czech Civil Code, § 920.

⁹ BOELE-WOELKI et al., op. cit., p. 82.

basis or not.¹⁰ The Model Family Code also states that one partner cannot be excluded from using a family home (by the other partner, unless the court orders so (third parties are not bound)).¹¹

In the Czech law the spouse (in case of marriage) has the right to live in the house or flat derived from the right of the other spouse who has his own right. The right to household in de facto unions is protected only by the general provisions of the law, i.e. the protection of possession of the right of use, or criminal protection against interference with the right to an apartment or house. The Czech Civil Code regulates specific right in case of the death of one partner who was the lessee, that the other has a right to stay in the apartment without the consent of the lessor for maximum period of two years.¹²

2.4 Property regime

During the duration of the partnership, the partners acquire property and have variously divided roles (e.g. caring for a household, caring for the financial security of the family or caring for a family business). The marriage compensate for differences arising from the fulfilment of these roles.

The Principles settle that the assets acquired during the duration of the partnership for joint use by the partners are considered to belong to co-ownership, unless proven otherwise. That means that the Principles provide for the presumption of co-ownership when the thing is acquired for the purposes of joint use, but the presumption then does not apply in the case of donation or inheritance.¹³

According to the Principles, each partner remains the owner of its exclusive property, while the partners can continue to acquire property and commit to debts individually or jointly, resp. jointly and severally.¹⁴

The Principles also regulate the issue of property execution. According to the Principles, in addition to his exclusive assets, joint property may

¹⁰ SCHWENZER, *op. cit.*, p. 37.

¹¹ SCHWENZER, *op. cit.*, p. 39.

¹² Czech Civil Code, § 2279(2).

¹³ BOELE-WOELKI et al., *op. cit.*, p. 128.

¹⁴ BOELE-WOELKI et al., *op. cit.*, p. 121.

be affected for the exclusive debt of one partner, but only up to the amount of the debtor's share in it.¹⁵

The Model Family Code just defines, what the separate property includes, e.g. property owned before partnership, inheritance or gifts.¹⁶ Than the benefits and detriments acquired during the partnership should be settled after the dissolution (see article 2.5).¹⁷

In the Czech Republic the partners acquire the property in principle, each to their exclusive ownership; the provisions on the joint property of the spouses do not apply by analogy. In some cases, unmarried partners may acquire property as part of co-ownership, provided that the conditions for the application of the general provisions on co-ownership are met (there are no special rules for an unmarried couple).

2.5 Dissolution

The Principles declare that partners should take care of themselves after dissolution of partnership. In the end of cohabitation, each of the partners will keep his property, the jointly owned property will be distributed, unless the partners agree otherwise. According to principles, the partners have the right to compensation for contribution to partnership (care for household, for common children, for contribution to the other partner profession).¹⁸

The Model Family Code, as well as the Principles, settles that the partners should be self-sufficient as soon as possible. In case of dissolution of a partnership, the partnership-related benefits and detriments should be adjusted by financial relief. The benefits are property or pension acquired by each partner during partnership. The detriments are care for child, household, the other partner, contribute to the other partner profession etc. Partnership-related benefits should be equally divided, but the court may modify this principle.¹⁹ Financial relief should be limited so it covers just necessary time for the other partner to care for himself.

¹⁵ BOELE-WOELKI et al., op. cit., p. 142.

¹⁶ SCHWENZER, op. cit., p. 24.

¹⁷ SCHWENZER, op. cit., p. 22.

¹⁸ BOELE-WOELKI et al., op. cit., p. 147.

¹⁹ SCHWENZER, op. cit., p. 57.

The Czech law does not have specific provisions regulating relationships between partners after dissolution. The rights and obligations are governed by the general rules of Czech private law.

2.6 Inheritance

The question of who will inherit the testator's estate is substantial for surviving partner, because the partner often participates in building the assets of the other partner, can be dependent on the other, shares the assets with the other partner etc.

The Principles regulates for the qualified cohabitation that in the case of inheritance by law, the surviving partner has the same right as the spouse in inheritance of the estate of the deceased partner. After the death of one of the partners, the other has the right to use the apartment owned by the deceased partner six months after the death of the partner.²⁰

According to Czech Civil Code the surviving partner is not in any grade of heirs (the Czech law has six grades). However, if the partner (or any other person) lived with the deceased person in the common household for at least one year before the death and shared care for the common household or were dependent for maintenance on the deceased, than can be heir in the second or third grade.²¹

3 Conclusion

When considering the legal regulation of rights and obligations between unmarried partners, it is necessary to respect the choice of partners not to enter into marriage as a legally regulated union. On the other hand, it is necessary to respond to the social reality in society and the growing number of couples living together unmarried, and thus to provide these relationships with basic legal protection (especially protection of the weaker party). Legislators should seek a fair balance between the free choice of partners and sufficient legal protection, legislator's reasoning can be inspired by the above-mentioned international academic documents.

²⁰ BOELE-WOELKI et al., *op. cit.*, p. 195.

²¹ Czech Civil Code, § 1635.

In the Czech Republic as part of the recodification of private law into the Civil Code, the Czech legislator had at his disposal the Principles of European Family Law and, according to the explanatory memorandum, they were taken into account.²²

Literature

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