

Ondřej Frinta

Development of Family Law in European Context. Fundamental Principles of Family Law.



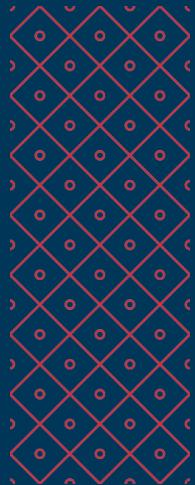
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Chapter 1

Definition of Family Law, Family and Child



Emil Svoboda:

“The law is not omnipotent. It has final limits beyond which it cannot proceed with its means. The subject of legal provisions, which have been included in the concept of "family law" since time immemorial, are personal life circumstances that, at first glance, are least susceptible to interference by external powers. [...]. If there are limits elsewhere to how far the law can intervene, they are much more fateful in this field. [...]. If it is necessary for the law to decide a dispute between a man and a woman, between parents and children, it is already a misfortune, if not a complete failure. If anything can prove how far we are from moral perfection, it is certainly the fact that the law has to deal with issues of family life.”

Svoboda, Emil. Rodinné právo československé. Praha: Vesmír, 1935, pp. 6-7.



Definition of Family Law and Family

Q: What is Family Law? What is it about?



Definition of Family Law and Family

A set of legal norms regulating

rights and duties of persons appearing in various roles in **family**

and

in **family-like communities**



Definition of Family Law and Family

A set of legal norms regulating in particular:

the **legal status** of:

relatives

spouses

in-laws

(registered) partners

mutual rights and obligations of these persons

mutual rights and obligations of persons substituting parental care for children



Definition of Family Law and Family

Q: What is family?



Definition of Family Law and Family

Q: What is family?

- a) A family **is a group** (i.e., it has members – there are ties between them, number of members – broader or narrower understanding)
- b) It provides its members with unconditional **acceptance of their human existence** in general.
- c) It provides its members with **protection – material and social**, i.e., in particular, it ensures their basic needs are met and provides mutual interpersonal support.
- d) It is the starting point and intermediary link in the penetration of the individual – the member – into the macrosocial environment, i.e., into the surrounding society.



Definition of Family Law and Family

Q: What functions does the family perform?



Definition of Family Law and Family

Q: What functions does the family perform?

- 1) reproductive, generative
- 2) socialization (upbringing, interaction with the environment preparing children for life, career, regenerative and supportive function, material and emotional support)



Definition of Family Law and Family

Q: Is Family defined in Civil Code?



Definition of Family Law and Family

Q: Is Family defined in Civil Code?

Compare:

Czech Civil Code, BGB: NO

X

ABGB: Sect. 40: Unter Familie werden die Stammältern mit allen ihren Nachkommen verstanden.

(The term family refers to the ancestors and all their descendants.)



Definition of Family Law and Family

No general definition in the Czech legal system. However, see for example:

Civil Code Sect. 3 para 2 letter b): Family, parenthood, and marriage enjoy special legal protection.

Civil Code Sect. § 655, second sentence: The main purpose of marriage is to establish a family, proper upbringing of children, and mutual support and assistance.

Criminal Code Sects. § 194–204: Crimes against the **family**

Act on Funeral Services Sect. 8a para 6: For the purposes of this Act, **family members include** spouse, partner, parents, children, grandparents, grandchildren, and great-grandchildren

Labour Code Sect. 187: For the purposes of travel allowances, **a family member of the employee** is considered to be their spouse, partner, biological child, adopted child, foster child, biological parent, adoptive parent, guardian, and foster parent. Another person is considered equivalent only if living in the same household.



Definition of Family Law and Family

Q: Who is considered a child?



Definition of Family Law and Family

Q: Who is considered a child?

United Nations Convention on the Rights of the Child (20th November 1989)

Art. 1: For the purposes of the present Convention, a **child means every human being below the age of eighteen years** unless under the law applicable to the child, majority is attained earlier.



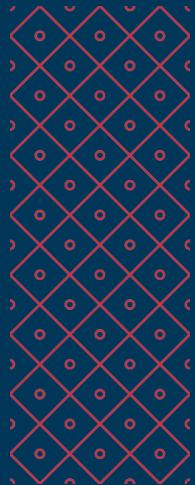
Definition of Family Law and Family

Q: Who is considered a child?

Issue in Sect. 30 of Czech Civil Code:

- (1) An individual acquires full legal capacity upon reaching the age of majority. The age of majority is reached upon reaching eighteen years of age.
- (2) Before reaching the age of majority, full legal capacity is acquired by being granted legal capacity or by entering into marriage. Legal capacity acquired by entering into marriage is not terminated upon termination or invalidation of marriage.

Thus, minors with full legal capacity are still considered children under the CRC and remain under its protection! Strange!



Chapter 2

Historical Development



Historical Development – Roman Law

Unity of persons and property, **pater familias** (equipped with *patria potestas*), singularity of paternal power

Marriage: differing status of the wife

- a) if subject to the husband's power (*in manum conventio*) = *mater familias (filiae loco)*
- b) if not subject to the husband's power = *uxor*
not agnatic relative of the children, children are only under paternal power



Historical Development – Roman Law

De facto cohabitation:

2 forms of cohabitation

- 1) *concubinatus: libidinis causa, non liberorum quaesundorum* (for lust, not for procreation)
- 2) *contubernium* (“slave marriage”) – cohabitation of a male and female slaves, or a free person with a slave



Historical Development – Roman Law

Two kinds of kinship:

Agnation (*adgnatio*) – legal kinship

Relationship between persons connected by the same family authority, or who would be so connected if the common father were still alive

***Cognatio* – blood kinship**

quot (sunt) generationes, tot (sunt) gradus
as many generations, as many degrees



Historical Development – Roman Law

Two kinds of adoption (adoption in the broad sense):

1) Adrogatio (into a *familia*)

Only an adult male could be adrogated, entering the *familia* with all persons subject to his *potestas* and with his entire property (*adquisitio per universitatem*)

2) Adoptio (in the narrow sense)

Change of family affiliation (*mutatio familiae*)

Legal consequences apply only to the adopted person



Historical Development – Middle Ages

Estate-based character of medieval law

Marriage as one of the **sacraments** – governed by canon law and ecclesiastical courts

1545–1563: Council of Trent (25 sessions)

24th session: Decree on Marriage (*Tametsi*), replaced 1908 (*Ne temere*)

Marriage must be concluded before a priest and two (even three) witnesses

Austrian Empire: 1783: Marriage Patent of Joseph II (No. 117/1783 Coll.)

Ecclesiastical form of marriage retained

Marital disputes assigned to **secular courts**



Historical Development – ABGB

1811 original wording (before amendments)

The husband is the head of the family. In this quality he has especially the right to manage the household; but he is also bound to procure a respectable maintenance to the wife, according to his means, and to represent her in all occurrences (Sect. 91 ABGB).

The rights, which belong especially to the **father, as head of the family**, form the **paternal authority** (Sect. 147 ABGB).

= *still Roman Law-like shape of patriarchal family*



Historical Development – ABGB

1811 original wording (before amendments)

A valid marriage between Catholic persons can only be dissolved by the death of one spouse. A marriage is also indissoluble if even one party was a member of the Catholic religion at the time of the marriage. (Sect. 111 ABGB)

= **confessional principle**

= **indissolubility of catholic marriage**
abolished in Czechoslovakia in 1919



Historical Development – ABGB

indissolubility of catholic marriage abolished in Czechoslovakia in 1919:

"We place moral imperatives so high that we judge every religion from an ethical standpoint, and if it does not meet this standard, we declare it morally inadequate."

"We demand the separability of marriage in order to make it indissoluble."

Tomáš Garrigue Masaryk



Historical Development – BGB

Enacted in 1896, effective from January 1, 1900

Pandect system

1. Buch: Allgemeiner Teil (§ 1–240)
2. Buch: Schuldverhältnisse (§ 241–835)
3. Buch: Sachenrecht (§ 854–1296)
4. Buch: **Familienrecht** (§ 1297–1921) (*the notion Family Law appears for first time*)
5. Buch: Erbrecht (§ 1922–2385)



Historical Development – Czechoslovakia

The beginnings of modern Family Law in Czechoslovakia:

Constitutional Act No. 150/1948 Coll., Constitution of the Czechoslovak Republic:

§ 1

(1) All citizens are equal before the law.

(2) Men and women have equal status in the family and in society, and equal access to education and all professions, offices, and ranks.

Act No. 265/1949 Coll., on Family Law:

In marriage, man and woman have equal rights and duties (Sect. 15)

Parental authority belongs to both parents (Sect. 55 para 1)

!!! regardless of whether the child is legitimate or illegitimate !!!

!!! even after a divorce of parents !!!

very progressive these times within the European context



Historical Development – Czechoslovakia

Act No. 265/1949 Coll., on Family Law

full separation of Family Law from Civil Law (Civil Code 141/1950 Coll.)

X

Act No. 94/1963 Coll., on the Family, Sect. 104:

Provisions of the Civil Code shall apply unless this Act provides otherwise.

Introduced **subsidiarity of the Civil Code** (Act No. 40/1964 Coll.)

(This provision was not included in the previous Family Law Act)



Historical Development – Summary

Relationship Family Law – Civil Law: possible systematic approaches

1) Personal vs. Property Law

e.g., Code Civil, ABGB

2) Personal and Property Law combined under Family Law

e.g., BGB, Netherlands, Italy, Spain, current Czech Civil Code

3) Separation of family law into a special statute

e.g., USSR 1917, Czechoslovakia post-1948, Slovakia, Poland, Russia



Chapter 3

Specific Nature of Family Law



Specific Nature of Family Law

Diversity of regulation

(personal status, property law, personal-property relations, e.g. maintenance)

Partly private law, partly public law

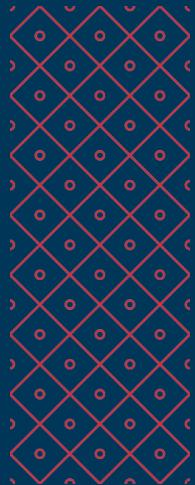
(property law X personal status, social and legal protection of children)

Predominantly mandatory provisions

Legal regulation often lags behind social developments

Close connection with procedural law, often special judicial proceedings (a contr. contentious proceedings)

= so-called “special branch private law”



Chapter 4

Principles of European Family Law



Principles of European Family Law (PEFL)

Developed by the **Commission on European Family Law (CEFL)** since 2001

Aim: harmonization of substantive family law across Europe

Based on comparative research from over 20 European jurisdictions

Soft law: non-binding model rules to inspire national legislation / academics

Reflect European values: dignity, equality, and family protection



Principles of European Family Law (PEFL)

Five sets of principles published by CEFL:

- 1) Divorce and Maintenance Between Former Spouses**
- 2) Parental Responsibilities**
- 3) Property Relations Between Spouses**
- 4) Rights of Couples in De Facto Unions**
- 5) Succession and Maintenance Rights in Informal Relationships**



Principles of European Family Law (PEFL)

X Model Family Code

Other soft law to be distinguished from PEFL

Taken from a **GLOBAL** (not only European) perspective

Inspired also by Canadian, Australian and New Zealand legal systems

Three parts:

- 1) Partnerships
- 2) Domestic Violence
- 3) Parents and Children



Chapter 5

Principles of Czech Family Law



Principles of Czech Family Law

General principles of private law:

Autonomy of will (note: not about personal status!)

Protection of the weaker party (especially: child)

Rights belong to the vigilant (cf. time limits for challenging paternity)

Protection of privacy (privacy of family members, prohibition of corporal punishment of children)



Principles of Czech Family Law

Principles of family law

1) Special legal protection of family, parenthood, and marriage

(Sect. 3 para 2 letter b) Civil Code

2) Protection of family life (esp. Article 8 ECHR)

includes illegitimate children (ECtHR: Marckx v. Belgium)

includes de facto unions (ECtHR: Keegan v. Ireland)

includes alternative forms of cohabitation (ECtHR: Schalk and Kopf v. Austria)

3) Solidarity (mutual help and support)

4) (Best) interests of the child (ensuring the child's welfare)

5) Right to maintenance



Principles of Czech Family Law

Principles of family law – related to marriage:

- 1) Equality of men and women in marriage**
- 2) Equality of children (regardless of legitimacy)**
- 3) Monogamy**
- 4) Annulability**
- 5) Spouses of opposite sex only**



Chapter 6

ECtHR Case Law: Protection of Family Life



ECtHR Case Law: Protection of Family Life

Marckx v. Belgium (Application no. 6833/74, decided 1979)

45. In the Court's opinion, "**family life**", within the meaning of Article 8 (art. 8), **includes at least the ties between near relatives, for instance those between grandparents and grandchildren**, since such relatives may play a considerable part in family life.

"Respect" for a family life so understood implies an obligation for the State to act in a manner calculated to allow these ties to develop normally (see, mutatis mutandis, paragraph 31 above). Yet the development of the family life of an unmarried mother and her child whom she has recognised may be hindered if the child does not become a member of the mother's family and if the establishment of affiliation has effects only as between the two of them. (Art. 8 of ECHR has been violated)



ECtHR Case Law: Protection of Family Life

Keegan v. Ireland (Application no. 16969/90, decided 1994)

44. The Court recalls that **the notion of the "family" in this provision is not confined solely to marriage-based relationships and may encompass other de facto "family" ties** where the parties are living together outside of marriage [...]. A child born out of such a relationship is ipso iure part of that "family" unit from the moment of his birth and by the very fact of it. There thus exists between the child and his parents a bond amounting to family life **even if at the time of his or her birth the parents are no longer co-habiting or if their relationship has then ended [...].**



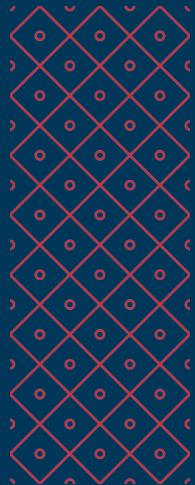
ECtHR Case Law: Protection of Family Life

Schalk and Kopf v. Austria (Application no. 30141/04, decided 2010)

93. The Court notes that since 2001, when the decision in *Mata Estevez* was given, a rapid evolution of social attitudes towards same-sex couples has taken place in many member States. Since then, a considerable number of member States have afforded legal recognition to same-sex couples [...]. Certain provisions of European Union law also reflect a growing tendency to include same-sex couples in the notion of “family” [...].

94. In view of this evolution, **the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy “family life” for the purposes of Article 8. Consequently, the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of “family life”, just as the relationship of a different-sex couple in the same situation would.**

95. The Court therefore concludes that the facts of the present case fall within the notion of “private life” as well as “family life” within the meaning of Article 8. [...].



Chapter 7

Systematics and Sources of Czech Family Law



Systematics and Sources of Czech Family Law

Art. 32 of the Charter of Fundamental Rights and Freedoms:

- (1) **Parenthood and the family** are under the protection of the law. Special protection is guaranteed to **children and adolescents**.
- (2) **Pregnant women** are guaranteed special care, protection in labor relations, and suitable labor conditions.
- (3) **Children**, whether born in or out of wedlock, enjoy equal rights.
- (4) It is the parents' right to care for and bring up their children; children have the right to parental upbringing and care. Parental **rights may be limited, and minor children may be removed from their parents' custody against the latter's will only by the decision of a court on the basis of the law**.
- (5) Parents who are raising children have the **right to assistance from the state**.
- (6) Detailed provisions shall be set by law.



Systematics and Sources of Czech Family Law

International Conventions

Convention on the Rights of the Child (1989), No. 104/1991 Coll.
(predecessor: Declaration (Charter) of the Rights of the Child, 20 Nov 1959)

Convention for the Protection of Human Rights and Fundamental Freedoms (1950),
No. 209/1992 Coll.

**Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of
Marriages (1962)**, No. 124/1968 Coll.



Systematics and Sources of Czech Family Law

International Conventions

Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993), No. 43/2000 Coll. int. treaties

Convention on the Adoption of Children (1967), No. 132/2000 Coll. int. treaties

European Convention on the Legal Status of Children Born out of Wedlock (1975, Strasbourg), No. 47/2001 Coll. int. treaties

... and others



Systematics and Sources of Czech Family Law

Convention on the Rights of the Child (1989)

“3Ps” (“4Ps”): Provision, Protection, Participation, (Prevention)

Art. 3(1): In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, **the best interests of the child shall be a primary consideration**

Art 36: States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of **the child's welfare**.



Systematics and Sources of Czech Family Law

Statutes

Act No. 89/2012 Coll., Civil Code

Act No. 292/2013 Coll., on Special Judicial Proceedings

Act No. 99/1963 Coll., Code of Civil Procedure

Act No. 115/2006 Coll., on Registered Partnership and Amendments to Certain Related Acts

Act No. 301/2000 Coll., on Registers, Names and Surnames, and on Amendments to Certain Related Acts (Registry Act)

Act No. 359/1999 Coll., on Social and Legal Protection of Children

Act No. 91/2012 Coll., on Private International Law



List of Sources – Civil Code, Case Law

Relevant provisions of Czech Civil Code:

Sects. 3, 30 and 655

Case law:

ECtHR: Marckx v. Belgium, Application no. 6833/74

ECtHR: Keegan v. Ireland, Application no. 16969/90

ECtHR: Schalk and Kopf v. Austria, Application no. 30141/04



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