

DIFFERENCES BETWEEN CZECH AND POLISH FAMILY LAW – COMPERATIVE ANALYSIS

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Abstract: For Czech Family Law the most important statute is Family Code (from 1963, hereinafter called "FC"), for Polish – Family and Guardianship Code (from 1964, hereinafter called "FGC"). Those regulations are similar, but there are some important differences – connected with marriage, divorce, parental responsibility, child's protection, period of time (in each particular). The aim of this contribution is to present and to compare them.

Key words: marriage, registered partnership, divorce, fault, separation, Ombudsman for Children, parental responsibility, period of time.

Marriage

The definition of marriage is similar in Czech and Polish law. But different is the place when we can find it. §1 of FC directly defines marriage as a permanent union of man and woman founded in the way stipulated by law.

The Polish Constitution states that the Republic of Poland protects and takes care about marriage, being a union of a man and a woman (art. 18). Only this sentence directly addresses the definition of marriage. But under art. 1 of FGC we can conclude the same, because one of the prerequisites of a marriage is being opposite sex. That record in Polish Constitution (in Czech Constitution it is not written) has an important meaning, because there is no legal recognition for same-sex partners in Poland.

Legal recognition for same – sex relationships can be divided in (main groups):

- 1) marriage,
- 2) registered partnership,
- 3) registered cohabitation,

4) unregistered cohabitation.

Same-sex marriage is (still) forbidden in the Czech Republic, but this country (already) provides legal registered partnerships. It is by Zákon ze dne 26. ledna 2006 o registrovaném partnerství a o změně některých souvisejících zákonů (Registered Partnership Act, came into force in July 2006, hereinafter called "RPA"). According to §1 of RPA the registered partnership is a permanent union of two the same sex persons, solemnized in the manner laid down by the RPA (*"Registrované partnerství je trvalé společenství dvou osob stejného pohlaví vzniklé způsobem stanoveným tímto zákonem"*).

To register partnership partners must:

- 1) be at least 18 years old {§4 (4 point a)};
- 2) have Czech citizenship - at least one {§4 (2)};
- 3) not be next of kin or siblings {§4 (3)};
- 4) be competent and single - neither registered or married {§4 (4 point c)}.

There is nothing about the purpose of registered partnership (like establishment of a family and upbringing children in marriage) in RPA.

After registration, partners have the same rights and obligations and can act on behalf each other in common affairs (*„partner je oprávněn zastupovat druhého partnera v jeho běžných záležitostech, zejména za něho běžná plnění“*). Partners have many rights that are similar to spouses (inheritance, health care and alimony rights), but they cannot: adopt a child, employ each other, use common or double surname.

1998, 2001, 2003, 2005 - rejection the plans for registration partnership,



16. 12. 2005 - a new civil unions bill - passed by the Czech House of Representatives;

26. 01. 2006 - accepted by the Senate;

16. 02. 2006 - vetoed by the President Václav Klaus;

15. 01. 2006 - overturned the President's veto by the House of Representatives,



01. 07. 2006 - The Registered Partnership Act (*Zákon ze dne 26. ledna 2006 o registrovaném partnerství a o změně některých souvisejících zákonů*) came into force.

Graph 1: Registered partnership - formative stages

The registered partnership must be recorded in the identification documents of the partners (§18).

Since the partnership has been legal in Czech Republic approximately 500 couples registered their partnership.

69 % of Czech people support same – sex registered partnership, 57 % oppose same – sex marriage, 67 % oppose lesbian and gay adoption (according to a poll from June 2007).

In Poland the situation is different. The Polish Constitution ensures the prohibition of discrimination in the public, social or economic sphere for any reason whatsoever, because all people are equal by the law (art. 32). A similar reference is in art. 18^{3a} para. 6 of the Labour Code, that states about equal treatment in employment. There is no legislation concerning homosexual partnership in Poland, but there are a lot of voices saying that it should be allowed. On the other hand, it is amazing how many attacks are on people who want to protect the typical model of marriage and family. Poland is a very catholic country (the nation is 95% Roman Catholic, with 75 practicing), with a long tradition and history. A survey from 2005 found 89 % of the population stating that they consider homosexuality an "unnatural" activity, deviation from the norm. Poles are against same – sex marriages and adoption of children by those people. In my opinion, those results do not mean that we are backwards.

Coming back to marriage between man and woman in our Codes: it seems obvious that an engaged couple should first know each other in order to enter into a marriage (characters, information about health and it is connected with fulfilling its purpose – §2 FC), so that notation does not exist in FGC.

If there is a church wedding – the authority of the church or religious society (registered by state) must deliver the report of marriage to the relevant register office in whose administrative district the marriage was solemnized into. According to §4b point 3 FC he has 3 days to do so, but according to art. 8 para. 3 FGC he has 5 days to do so. If there is *vis minor* and it is not possible to deliver it during those 5 days the runs of the termin is suspended.

That difference in period of time is small, but in my opinion, Polish regulation - with longer time – is better.

The marriage is invalid if the declaration of entrance into marriage was made as a result of unlawful threats, error concerning identity of one of the engaged couple or error concerning the nature of the legal act of marriage (according to §15a FC). On the basis of a petition of any spouse the court shall declare that such marriage is invalid. It must be petitioned before the lapse of time of 1 year from the day when he or she learned of the facts making it invalid. FGC states that marriage can be invalid because of very similar reasons, but the spouse (in which declaration of will is defect) has the right to assert invalidity of marriage:

- 1) before the lapse of time six months when the state of not permitting a conscious expression of will for any kind of reason, detection of an error, cessation of wrongful threat
- 2) before the lapse of time three years after contracting a marriage – in every case.

In the Czech Republic descendants of a spouse (who filed the petition for declaration of an invalid marriage before his or her death) can ask for it within one year after his or her death. In Poland it is also possible, but according to art. 450 Polish Civil Procedure Code the proceedings of annulment of a marriage is suspended if one of the spouses dies. Later there is a discontinuance of legal proceedings if the descendants of spouse who died – will not petition of reopening of suspended proceedings within six months after announcement of a suspension.

The public prosecutor can also enter an action for nullification of a marriage (according to art. 22 FGC).

Marriage can not be contracted between direct relations in an ascending or descending line or between sister and brother (§12 FC). Polish FGC adds that there can be a consent of the court to the marriage between in – laws because of important reasons.

Our family codes say about rights and duties of spouses, but FGC does not mention about duties to mutually respect their dignity and to create a healthy family niveau – but it also seems obvious.

Divorce

Our codes similar define divorce (irretrievable – in both - and completely – in Polish - disintegration of matrimonial life) and state that a divorce will not be granted if the welfare of common minor children of the spouses can be harmed because of that. FGC adds also prerequisite discrepancy divorce with the principles of social intercourse, and says that a divorce is not allowable if it has been requested by the spouse who is the sole guilty party for the disintegration of matrimonial life, unless the other spouse has expressed his or her consent thereto, or the refusal of such consent by the other spouse is - in the given circumstances - contrary to the principles of social intercourse.

A court – deciding on a divorce - has a duty to establish whether one of the spouses - and if so which one – is to be blamed for break-up of the marriage, but omits the ruling on responsibility at the request of both spouses (art. 57 FGC).

The Central Statistical Office announces that 70% divorces is no – fault divorces (it is also because of shorter and less bitter divorce procedure).

But established guilt in the disintegration of matrimonial life is important for some reasons. The divorced spouse who has not been found exclusively blamed for the breakdown of the marriage and who is in inshortage may demand from the other spouse maintenance (corresponding to his/her justifiable needs, earning capacity, and financial possibilities of the other – obliged – spouse). The spouse who is found to be exclusively responsible for the breakdown of the marriage is obliged to satisfy needs of the spouse who is not responsible and whose material situation substantially deteriorated because of divorce, even if he is not in inshortage.

The maintenance obligation expires when:

- 1) the spouse entitled to it enters into a new marriage;
- 2) with the lapse of time 5 years after the divorce, but where the spouse who was obliged to it was not be found to blame for the disintegration of matrimonial life.

We can find a different regulation connected with divorce in Czech law . FC does not mention about fault, but also protects a spouse who "did not predominantly take part in breakdown of the marriage through violation of marriage duties" (if the spouses have been living with each other at least for three years, if the divorce would lead to considerable harm

to him/her and if he/she opposes the divorce petition, and, the court shall reject the petition if exceptional circumstances indicate that the marriage should be preserved) .

There is also a "uncontested/agreed divorce" (§ 24a FC). It is a quite fast and popular (70% of all divorces) procedure, because, the court will not investigate the causes for the breakdown and will divorce the marriage - that has lasted at least one year, the couple has not been living with each other for at least six months, and the other spouse joins the petition for divorce - if the spouses submit:

- 1) written agreement (with their officially verified signatures) regulating settlement of mutual property relationship, rights and duties from their common dwelling and possibly an agreement on maintaining the spouse divorced;
- 2) a final decision by with the court approved the agreement of parents about regulation of the condition of minor children after the divorce.

A petition for a divorce is submitted to the District Court for the district in which the couple had its last place of cohabitation in the Czech Republic, provided at least one of the spouses lives in the district, but in Poland it must be lodged with the regional court with jurisdiction for the most recent place of joint residence of the spouses.

The Czech regulation connected with maintenance to a divorced spouse is similar to Polish, but the spouse, who did not significantly contribute to the breakdown of the marriage by breaching his or her marital responsibilities and who would suffer significant loss due to the divorce may be awarded maintenance by the court against his/her former spouse in the same scope as the spousal maintenance duty (and this is determined so that material and cultural level of both spouses is principally the same) – but for no more than three years after the divorce.

A divorced spouse who changed his/her surname (by contracting the marriage) may notify the manager of registry office that he/she wants to revert to the surname that was borne before marriage (FGC) or that or that he/she will no longer append the other spouses surname to his/her original surname. In Poland the spouse has for this three months after the divorce ruling takes final effect, in Czech Republic – one month. It seems that longer time is again better.

According to the report of Eurostat, the Czech Republic belongs to the countries in the European Union where people get divorced the most. 67 married couples out of 100 get divorced. The number of divorces stood at 31.1 thousands in 2007. Divorce rate in Poland is low compared to other countries of EU (33 married couples out of 100 get divorced). Over 80,000 marriages were divorced in 2007.

The institute of legal separation does not exist in the Czech Republic but it exists in Poland. Separation is a situation in which the partners in a married couple live apart (they no longer reside in the same dwelling, even though they may continue their relationship). Legal separation has (almost) the same consequences as divorce, but it does not terminate the marriage, so spouses cannot marry again (art. 61⁴ of FGC). It is "easier" to go through a separation process than a divorce, because the only one prerequisite to obtain separation is complete breakdown of the marriage (spouses are not obliged to prove that the breakdown of their marriage is irretrievably and has occurred in emotional, physical and economic terms).

If the spouses do not have common minor children, the court may decree a separation at the request of both of them. However the court will not grant a separation - even if there is the complete breakdown of the marriage - if the welfare of the common minor children of the spouses may suffer because of that or if granting the separation would be contrary to the principles of social intercourse.

If one of the spouses demands a separation and the second divorce and this demand is justified, then the court grants divorce. But if the adjudication of divorce is unallowable, and demand for a separation is justified, the court grants separation.

During separation - if required for reasons of fairness - the spouses are obliged to help each other.

A separated spouse has no possibility to revert to his/her previous surname and to notify the manager of registry office about it (like within the period of time three months after the divorce ruling takes final effect).

Separation is also tolerated by the Catholic Church.

Ombudsman for Children

The Constitution of The Republic of Poland ensures protection of the rights of the child (defence against violence, cruelty, exploitation, demoralization; assurance care and assistance by public authorities if a child is deprived of parental care).

There is also a special public authority which takes care about children's rights - Ombudsman for Children (Rzecznik Praw Dziecka). Art. 72 para. 4 of Polish Constitution states that the competence of the Commissioner for Children's Rights shall be specified by statute. That statute is "The law on the Ombudsman for Children" (from 01. 06. 2000, hereinafter called "LOCh").

According to Art. 1 LOCh, Ombudsman for Children guards the rights of the child defined in the Constitution of the Republic of Poland, the Convention on the Rights of the Child and other rules of law. He undertakes his actions (provided in the LOCh on his own initiative, in the interest of the child, with due respect his dignity and subjectivity) to protect that rights (in particular the rights: to life and health protection, to be brought up in the family, to decent social conditions, to education) and to protect the child against violence, cruelty, exploitation, depravity, neglect and any other evil treatment. He extends special care and assistance to handicapped children. In exercising his powers he also respects the responsibilities, rights and duties of parents, and takes into consideration the fact that the family is the natural milieu for the full and harmonious child's development.

The Ombudsman for Children may apply to:

- 1) public authority agencies, organizations or institutions for explanations and the necessary information, also for access to files and documents including those personal data;
- 2) the relevant bodies, organizations or institutions (within the scope of their competencies) to undertake actions to the benefit of a child;
- 3) the respective bodies to undertake a legislative initiative or issue or amend other legal acts.

He also presents his reviews and motions (to relevant public authority agencies, organizations and institutions) to ensure effective protection of the rights and the interest of the child and the Report (to Parliament - every year) on the state of the observance of children's rights.

The Ombudsman for Children is appointed for 5 years. That function cannot be performed by the same person for more than two terms of office.

Those persons held the Ombudsman for Children office:

Marek Piechowiak - from 08. 06. 2000 till 12. 11. 2000,

Paweł Jaros - from 16. 04.2000 till 07. 04. 2006,

Ewa Sowińska – from 07. 04. 2006 till 22. 04. 2007 (resignation).

The function of Ombudsman for Children exists in many countries of the world (with exactly the same or similar name, for example *Defenseur des Enfants* in France, Deputy Ombudsman for Children's Rights in Greece).

In the Czech Republic there is the general Ombudsman (in Poland also - Civil Rights Ombudsman – *Rzecznik Praw Obywatelskich*), which is known as *Veřejný ochránce práv* (Public Defender of Rights), but the separate Ombudsman for Children is not established.

According to art. 7 LOCh, he is independent in his activities from other state bodies and is responsible only to the Sejm in accordance with the rules defined in the LOCh.

That function is another instrument for protecting children's rights (which are humans rights), by making it more visible - so this is an advantage of polish family law.

Other differences:

According to § 31 FC parental responsibility collects rights and duties that concern:

- minor child's care (especially about his/her health, physical, emotional and moral growth),
- minor child's representation
- managment of minor child's property

The definition of parental responsibility does not exist in FGC Code, but it seems that this term is similar to Czech regulation.

A court - granting the divorce - also decides about parental responsibility (art. 58 FGC), but in Czech Republic that decision may be replaced with an agreement of the parents - the validity of such agreement requires a consent of the court (except contact of the parents

with the child – if it is not required by the interest in his/her upbringing or by condition of the family).

In Poland district courts - family and juvenile cases divisions competent on the grounds of a child's domicile - are competent to decide in cases relating to parental responsibility, but in Czech Republic it is the District Court which is pertinent to the district where the child is resident.

The court may suspend the performance of the parental responsibility, if:

- a significant impediment prevents a parent from carrying out his/her parental responsibilities
- it is in the welfare of the child

FGC mentions only about a passing impediment.

The father of the child of an unmarried mother is obliged (according to circumstances) to contribute the cost connected with the pregnancy and childbirth and cost of three months living of mother in the period of childbirth. For important reasons a mother may demand a contribution to her cost of living for a period more than three months. According to FC that men must provide an adequate contribution for two years.

What our codes say also about guardianship is similar, but also there is a difference in the period of time, because in Czech law the guardian must give the court a final statement about the management of the child's property within two months after the end of guardianship; in Polish law he has three months to do so. It seems that two months is a good solution, to better protect the child's interest.

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