

and families. When hearing divorce cases, judges should consider contributions the women made for their families during the marriage, women's life after divorce and their needs of raising children and fairly compensate their losses'. As to the limited application of post-divorce economic compensation, we suggest expanding the entitled spouses in this system to spouses adopting the default joint property system. In another words, not only are spouses adopting the separate property system entitled to post-divorce economic compensation, but also where there is no common property or few joint properties available for division when spouses adopt the joint property system, the judge should apply economic compensation to compensate the spouse contributing more to domestic chores during the marriage. Thus, the disadvantaged can get compensatory support so as to balance both parties' economic interests during the marriage. In this way, the law not only recognises contributions of domestic chores, but also considers the different situations of recipients. Fair compensation for contributions of domestic chores will be realised.²⁸

As to the exact amount of compensation, namely, how to determine the value of housework, we suggest that judges should consider opportunity costs of the spouse doing housework, length of marriage, contributions made by the spouse doing housework, and the other spouse's benefit because of the contributions etc.

²⁸ Wei Chen and Xianxin Cao, 'On compensation for the career opportunities lost by a spouse and the value of housework during the marriage', *Gansu Social Sciences*, 2010(4), p 33.

CZECH REPUBLIC

NEW FAMILY LAW IN THE CZECH REPUBLIC: BACK TO TRADITIONS AND TOWARDS MODERN TRENDS

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Résumé

Comme dans de nombreux anciens pays communistes, on ne s'attendait pas en Tchéquie à des changements majeurs du droit familial sans passer par une recodification du Code civil. Au cours des dernières années, il y a eu plusieurs tentatives en ce sens, impliquant de nouvelles idées et de nouveaux auteurs. Tous ces projets ont en commun d'intégrer dans le Code civil le droit de la famille qui, depuis 1949, fait l'objet d'une législation particulière. Il aura fallu attendre jusqu'en 2012, après une longue «période transitoire», typique des amendements apportées aux codes en d'autres temps, pour que soit adopté le nouveau Code civil par le biais de la Loi No 89/2012 Coll. Le Code est entré en vigueur le 1^{er} janvier 2014. On peut le qualifier de «compromis raisonnable» entre tradition et modernité. Le nouveau droit tchèque de la famille est en effet marqué du sceau de la continuité avec l'ancien droit car de nombreux changements, tant dans la loi que dans son application, avaient déjà été adoptés peu de temps après 1989 dans la foulée de réformes législatives et de décisions judiciaires, notamment celles de la Cour constitutionnelle et de la Cour européenne des droits de l'Homme.

I INTRODUCTION

The *International Survey of Family Law* has already several times published articles about the development of Czech family law. It was especially Professor Jiří Haderka who criticised, in his articles, the ideological foundations and the situation of Czech family law patterned upon the Soviet model after 1948 and its 'half-hearted reforms' carried out in a series of amendments to the previous Act on the Family from 1963 after the fall of the Communist regime in 1989.¹ As in many other post-Communist countries, radical changes to family law were not expected to take place in the Czech Republic without a recodification

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¹ See JF Haderka 'The Czech Republic – New Problems and Old Worries' in A Bainham (ed) *International Survey of Family Law 1996* (The Hague, Boston, London: Martinus Nijhoff, 1996) 181–197; JF Haderka 'A Half-Hearted Family Law Reform of 1998' in A Bainham (ed) *International Survey of Family Law, 2000 Edition* (Jordan Publishing Limited, 2000) 119–130.

of the Civil Code.² In the past years there were a number of attempts to create a New Civil Code involving a lot of new ideas and authors. Nevertheless, a common feature of all the Drafts was that Family Law, since 1949 a separate legal regulation, was to be integrated into the New Civil Code. Thus, the separateness of family law ideologically substantiated for a long time was supposed to disappear.³ As late as 2012, after a long 'transitory' period typical of a great number of disparate amendments of the old codes that had been products of their times, a New Civil Code was adopted (Act No 89/2012 Coll).⁴ It came into effect on 1 January 2014.

The main authors of the *Principles and Starting Points of the New Code of Private Law*⁵ and the *Draft for the New Civil Code*,⁶ Professors Karel Eliáš and Michaela Zuklínová, implemented Family Law into the second part of the New Civil Code. In accordance with the authors' intention the above-mentioned separateness of Family Law, lasting for more than 50 years, was thus eliminated and the law returned to the basics of the General Civil Code (ABGB, 1811).⁷ The return to the tested European tradition cannot be, though, linked only with the systematic nature of the New Civil Code (NCC) but also especially with its content. The New Civil Code may be said to respect the traditional values of the European Christian-Jewish culture. However, individual institutes also include some important innovations that have been present in other European codes for a long time thanks to Human Rights Covenants, the case-law of the Constitutional Court of the Czech Republic and of the European Court of Human Rights and various academic activities originated especially in the Commission on European Family Law (CEFL).

II PRINCIPLES OF NEW CIVIL AND FAMILY LAW

Despite the fact that family law is dealt with in a separate part of the Civil Code, the second one, it is necessary to interpret and apply its rules in connection with the first one, ie the general part where the basic principles, values, starting points and interpretation and application rules can be found.

² See Z Králíčková 'Czech Family Law: The Right Time for Re-Codification' in B Atkin (ed) *International Survey of Family Law, 2009 Edition* (Jordan Publishing Limited, 2009) 157-173.

³ From a general point of view see P Bělovský 'Rodinné právo' (Family Law) in M Bobek, 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) 463 ff.

⁴ For details see 'Důvodová zpráva' (Explanatory Note) available on http://obcanskyzakonik.justice.cz/fileadmin/OZ_Duvodova_zprava_11042011.pdf (only in Czech).

⁵ See K Eliáš and M Zuklínová *Principles and Starting Points of the New Code of Private Law* (Praha: Linde, 2001).

⁶ See K Eliáš and M Zuklínová (main compilers) *Návrh občanského zákoníku (Draft for the Civil Code)* (Praha: Ministry of Justice, spring 2005).

⁷ For the theoretical questions and legal theory starting points, compare the study M Zuklínová 'Budoucí občanský zákoník a rodinné právo' ('The Future Civil Code and the Family Law') in *Otázky rekonstrukce soukromého práva (The Issues of Re-Codification of Private Law)* (Acta Universitatis Carolinae, Iuridica, 2003) No 1/2, 141 ff.

It states in the first place that 'the application of private law is independent of the application of public law' (NCC, s 1(1)). This principle is elaborated, for example, in the new civil law conception of the definition of residence based on factuality (NCC, s 80) and further in the new conception of parents deciding about the place of their child's residence due to their parental responsibility (NCC, s 858). The administrative record of persons is irrelevant.

Next, the New Civil Code puts emphasis on the application of the autonomy of the will. It provides for the principle that, unless expressly prohibited by the law, persons may agree upon rights and duties differently from the law; only agreements contravening 'good manners, public order or rights relating to the status of persons including right to protection of personality are prohibited' (NCC, s 1(2)). We may say that this formulation fully overrides the doctrine of the full force of family law except for status rules regulating the origin and termination of marriage, establishing and denying parenthood, etc. Autonomy of will is fully manifested in family law especially in marital property law (NCC, s 708), nevertheless with reasonable limits, for example if a special regime of things forming the usual equipment of the family household is at issue (NCC, s 698).

Quite an important provision is the one that expressly establishes the doctrine of the horizontal effect of constitutional law. By this, the New Civil Code respects the human rights dimension of civil or family law.⁸ This had been considered by many family law experts to be the key value since the adoption of a number of international covenants, especially by the Council of Europe, such as the Convention for the Protection of Human Rights and Fundamental Freedoms.⁹ The New Civil Code also establishes that each provision of private law may only be interpreted in compliance with the Charter of Fundamental Rights and Freedoms¹⁰ and with the constitutional order, with the principles on which it is based, and with values which are protected by it. If an interpretation of an individual provision, by its very wording, diverges from this order it must be abandoned (NCC, s 2(1)).

Last but not least, it is also necessary to mention the establishing of a prohibition against abuse of the law (NCC, s 8) and a prohibition against the interpretation and application of a provision in contradiction to good manners (NCC, s 2(3)) and to the protection of honest conduct and good faith (NCC, s 7). The New Civil Code then expressly mentions a subsidiary option of applying analogies and principles of justice and principles on which it is based so that a good arrangement of rights and duties can be achieved with respect to

⁸ See Z Králíčková *Lidskoprávní dimenze českého rodinného práva (Human Rights Dimension of Czech Family Law)* (Brno: Masaryk University, 2009).

⁹ The Convention was adopted in 1950. Czechoslovakia did not accede to it until the fall of the Communist regime. It was published under No 209/1992 Coll.

¹⁰ See Constitutional Act No 23/1991 Coll; for details see E Wagnerová, V Šimíček, T Langášek, I Pospíšil et al *Listina základních práv a svobod. Komentář (Charter of Fundamental Rights and Freedoms. Commentary)* (Praha: Wolters Kluwer, 2012).

the customs of private life and with respect to both the state of jurisprudence and the established decision-making practice (NCC, s 10).

However, for family law there are especially important provisions establishing that private law protects the dignity and freedom of humans and their natural right to pursue their happiness and happiness of their families or close persons in such a way that does not groundlessly cause others any harm (NCC, s 3(1)). Further, it is important that the New Civil Code expressly states that private law is based on the following principles (NCC, s 3(2)):

- (a) everyone has the right to protection of their life and health as well as freedom, reputation, dignity and privacy;
- (b) family, parenthood and marriage enjoy special legal protection;
- (c) no one may suffer groundless harm due to insufficient age, reason or dependent position; however, no one may groundlessly take advantage of their incapacity to the detriment of others; and
- (d) a promise given is binding and contracts shall be performed.

No matter how redundant the provisions of the New Civil Code above mentioned may seem we hold the view that it was necessary to establish them. They create room for a new approach to family law and especially to its values. Prohibition of discrimination, protection of the weaker party, solidarity, etc are key concepts that will be important for the interpretation and application of the rules of the new family law.¹¹ We may say that for lawyers educated at the time of the rule of the Communist law the explicit establishment of these civilised values will be quite beneficial.

Besides general principles of private and family law, it is necessary to mention special principles governing key institutions of family law, for example the principle of dissolubility of marriage (NCC, s 755) which is a specific example of the general principle according to which 'nobody can be forced to stay in a union', and the non-consumer character of maintenance which the parents are obliged to provide to their children (NCC, ss 915, 917; for more details on this, see below).

III MARRIAGE, COHABITATION AND REGISTERED PARTNERSHIP

(a) General

The New Civil Code allows marriage to be solemnised only between a man and a woman. The Code establishes that marriage is a permanent union of a man and a woman originating in a manner prescribed by this law. The main purpose of marriage is establishing a family, a proper upbringing of children – even if

¹¹ On this see F Zoulík 'Soukromoprávní ochrana slabší smluvní strany' ('Private-Law Protection of the Weaker Party of a Contract') *Právní rozhledy*, 2002, No 3, 109 ff.

marriage may also be entered into by people who are not in the 'productive' age – and mutual support and help (NCC, s 655), which fully reflects the principle of solidarity. Despite the fact that marriage is characterized by the word 'permanency' divorce is a legitimate manner of terminating marriage.

No matter how the New Civil Code expressly protects the family established by marriage (cf NCC, s 3(2)(b)), it is necessary to mention that informal unions of a man and a woman, or anyone, also enjoy protection in connection with the Convention for the Protection of Human Rights and Freedoms as they are guaranteed by the right to respect for private and family life (Art 8 of the Convention, in connection with NCC, s 2(2) referring to the constitutional order itself). It should also be mentioned that if an unmarried man and an unmarried woman have a child they principally have parental responsibility by operation of law without being discriminated against in comparison with married parents of a child.

The Principles and Starting Points of the New Code of Private Law and many Drafts of the New Civil Code also regulated the registered partnership of persons of the same sex. Nevertheless, in the course of the legislative work, conservatism prevailed and, due to that, rules regulating the status union of persons of the same sex were taken out. Thus the special law regulating registered partnership¹² will continue to be effective. We should add that in many respects rights and duties of registered partners are similar to rights and duties of spouses (eg mutual maintenance duty) and in many aspects they are identical with the position of informal unions (eg lack of matrimonial community property, non-existence of common lease of flats *ex lege*, impossibility of jointly adopting a minor or becoming joint foster parents or guardians of minors, etc).

(b) Solemnisation of marriage

It is well known that for the Communist Family Law the typical obligatory form of marriage was civil marriage and there were cases of clergymen involved in church marriages being criminally prosecuted. Even though religious marriage was reintroduced into the Czech legal order shortly after 1989, many Drafts of the New Civil Code recognised only the civil one referring to the European standards. Nevertheless, in the course of the legislative process religious marriage was included in the New Civil Code.¹³ Thus the engaged couple may be married in two manners, either civil or religious (NCC, s 657).

The marriage ceremony must be preceded in both forms by the pre-marriage proceedings before a register authority where especially the following issues are examined (NCC, s 673 ff):

¹² See Act No 115/2006 Coll, on Registered Partnership.

¹³ Religious marriage may only be solemnised before registered churches with the so-called special authorisation under Act No 3/2002 Coll.

- (a) the sex of the would-be spouses;¹⁴
- (b) the age of the would-be spouses: principally it should be 18 or over;¹⁵
- (c) legal obstacles for the marriage such as the existence of another marriage or registered partnership, family relationship in a direct line and between siblings, newly also the existence of guardianship or any other form of custody, and, finally, mental disorder and lack of legal capacity.

Marriage comes into origin at the moment when the would-be spouses publicly and solemnly declare in the presence of two witnesses that they enter together into marriage. The record in the register of marriages is only for registration purposes.

As for the surname after solemnisation of the marriage, the law makes it possible for the would-be spouses to declare at the wedding ceremony that:

- (a) the surname of one of them will be their common surname;
- (b) both of them will keep their own surnames;¹⁶ or
- (c) the surname of one of them will be their common surname, and the would-be spouse whose surname is not to be the common one will add his or her existing surname to their common surname in the second place (NCC, s 660).

If the requirements stipulated by the law for solemnization of marriage are breached the law sanctions them on the basis of seriousness of the issue:

- (a) by the regime of apparent marriage (*matrimonium putativum*) which originates ex lege, for example when the church did not have special authorization; or
- (b) by the regime of invalid marriage (*non matrimonium*) which must be decided by the court, for example in the case of bigamy or kinship.

¹⁴ As for transsexuals, the law regulates change of sex in Section 29, NCC, establishing that the change of sex of a person occurs on the surgical operation disabling the reproduction functions and changing the sex organs. It is presumed that the day of the change of sex is the day recorded in the certificate issued by the provider of health services. The change of sex does not affect the personal state of a man/woman or their personal and property situation; marriage or registered partnership ceases to exist, though. Details are included in the Act No 373/2011 Coll., on Specific Health Services.

¹⁵ Exceptions are laid down especially in NCC, s 672 establishing that marriage cannot be entered into by a minor who is not fully legally competent. In exceptional cases the court may allow a minor who is not fully legally competent and is over 16 to enter into marriage if there are serious reasons for that. Further, NCC, s 37 establishes that, if a minor who is not fully legally competent asks the court to award him or her competency, the court will do so if the minor has attained 16 years of age, if his or her ability to make a living and manage his or her affairs is attested, and if his or her legal representative agrees to that. In other cases the court agrees to the proposal if it is in the interests of the minor because of serious reasons.

¹⁶ If the spouses keep their existing surnames they will also declare at the wedding ceremony which surname will be the surname of their mutual children according to NCC, s 661. Thus children cannot have so-called double surnames.

(c) Rights and duties of spouses

Rights and duties of spouses are traditional, especially personal ones. The law is based on equality of a man and a woman in the marriage, in the family and in society, drawing on previous legal regulations.¹⁷ Spouses are obliged to respect each other, to live together, to be faithful, to respect mutually their dignity, to support each other, to maintain the family union, to create a healthy family environment, to jointly take care of their children (NCC, s 687), to represent each other (NCC, s 694), and to jointly manage the issues of the family (NCC, ss 693, 694). The law newly sets forth that either spouse has the right to be told by the other one about his or her income and the state of his or her property as well as about the existing and planned work, studies and similar activities. Further, either spouse is obliged, when choosing work, studies and similar activities, to take into consideration the interests of the family, of the other spouse and of the minors who have not attained full legal competency yet and who live with the spouses in the family household, and, potentially, also the interests of other members of the family (NCC, ss 688, 689).

As for the property aspects of marriage, the New Civil Code first of all paraphrases the previous regulations establishing that each spouse contributes to the needs of the family and the family household according to each's personal and property conditions, abilities and possibilities so that the standard of living of all members of the family can be the same. Providing property has the same importance as personal care of the family and its members (NCC, s 680). Besides the duty to contribute to the needs of the family the law also establishes a mutual maintenance duty for the spouses, to the extent of a right to the same standard of living (NCC, s 697).

There is an innovation in the institution of the usual equipment forming the common household (NCC, s 698). The law establishes that, regardless of the ownership of things that fulfil the necessary life needs of the family, a spouse needs consent of the other one when dealing with them; this does not apply if the thing is of negligible value. A spouse may claim invalidity of a legal act by which the other spouse dealt, without his or her consent, with a thing belonging to the usual equipment of the family household.

Another innovation is the regulation of a family enterprise (NCC, s 700), which is defined as an enterprise where the spouses work together, or at least with one of the spouses working with their relatives to the third degree, or persons related with the spouses by marriage up to the second degree, and the enterprise is owned by one of these persons. Those of them who permanently work for the family or the family enterprise are considered members of the family participating in the operation of the family enterprise. Members of the family participating in the operation of the family enterprise also participate in its profits and in things gained out of those profits as well as in the growth of the enterprise to the extent corresponding to the amount and kind of their work.

¹⁷ See the Act No 121/1920 Coll, Constitutional Bill of Czechoslovakia, especially s 106(1).

This right may only be waived by a person with full legal capacity making a personal declaration (NCC, s 701). If the family enterprise is to be divided within the administration of the probate estate, a member participating in its operation has a pre-emptive right to it (NCC, s 704(1)).

The key institution of the marriage property law is community of property, which was introduced into the Czech legal order by the 1998 amendment to the previous Act on the family. In the first place the law regulates the legal regime of the property gains, which includes what one of the spouses has gained or what both spouses have gained in the course of their marriage except for (NCC, s 709):

- (a) what serves the personal needs of one of the spouses;¹⁸
- (b) what only one of the spouses has gained by gift, succession or bequest unless the donor or the testator in the will expressed a different intention;
- (c) what one of the spouses has gained as compensation for a non-proprietary infringement of his or her natural rights;
- (d) what one of the spouses has gained by legal dealings relating to his or her separate property; and
- (e) what one of the spouses has gained as compensation for damage to or loss of separate property.

Community property includes profit from what is separate property of one of the spouses. It also includes an interest of a spouse in a company or a cooperative if that spouse has become a member the company or the cooperative in the course of the marriage (NCC, s 709).

Community property also includes debts assumed in the course of the marriage unless:

- (a) the debts concern the separate property of one of the spouses – to the extent that they the profit from that property; or
- (b) only one of the spouses has assumed them without the other spouse's consent and it was not within the fulfilment of everyday or common needs of the family (NCC, s 710).

The new law enables not only modifications of the legal regime of the acquired property but also the creation of the agreed regime (NCC, s 716) and establishing the regime of separated property (NCC, s 729). An innovation is to make arrangements for the case of termination of marriage due to divorce or death by making a contract of succession (NCC, s 718(2)). Both would-be spouses and spouses may do so at any time: before entering into marriage as

¹⁸ Since 1998, the things one uses for the performance of one's job have not been excluded from the scope of the legal regime. For a different attitude, see K Boele-Woelki, 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).

well as during the marriage. By this the lawmakers fully respect the principle of autonomy of will, which was completely curbed in the 1960s legal regulation. The parties to the contract are only required to keep the formality of a public deed. A record in the public list is optional (NCC, ss 698, 721).

Protection of an economically weaker spouse and third persons is expressly established in the New Civil Code in a separate provision which sets forth that a contract of marital property regime may not, due to its consequences, exclude the spouse's ability to maintain the family and may not affect, by its content or purpose, rights of a third person unless the third person agrees with it; the contract made without the third party's consent has no legal force for such a party (NCC, s 719). We consider it very important that the law further establishes that, if during the existence of community property a debt has arisen only for one of the spouses, the creditor may achieve satisfaction in the execution of the judgment recovering the debt also from what is in the community property (NCC, s 731). If a debt has arisen only for one of the spouses against the will of the other spouse who communicated his or her disagreement to the creditor without unnecessary delay after coming to know about the debt, their community property may be affected only up to the amount which would be the share of the debtor if the community property were cancelled and divided (pursuant to NCC, s 742). This also applies in the case of the spouse's duty to pay maintenance or if the debt comes from an illegal act of one of the spouses or in the case of the debt of one of the spouse having arisen before entering into marriage (Section 732, NCC).

The new provision protecting family housing is important, too, because the previous legal regulations belittled this issue. Of course, if the family dwelling is in the common property of the spouses, their position is equal and protection is provided by the regulation analysed above. If not, the situation of the economically weaker spouse is dealt with in the new Code by defining the so-called derived legal reason for housing. The law establishes that if the spouses' dwelling is a house or a flat in which one of the spouses has an exclusive right to live, and if it is a different right from the contractual one, by entering into marriage the other spouse obtains the right to housing (NCC, s 744). If one of the spouses has an exclusive contractual right to the house or the flat, especially the lease right, by entering into marriage both spouses obtain jointly the lease right ensuring the equality of rights and duties (NCC, s 745). Nevertheless, it may be contractually agreed in a different way (NCC, s745(2)), which is fully in harmony with the principle of autonomy of will.

The law also newly regulates the prohibition of the disposal of the family dwelling in a similar way as in the case of the rules relating to things forming the usual equipment of the household (NCC, s 698, see above). If at least one of the spouses has the right to dispose of the house or the flat in which the family household is situated and the house or the flat is necessary for the dwelling of the spouses and of the family, that spouse must refrain from and prevent anything that may endanger their dwelling or make it impossible. A spouse cannot, without consent of the other spouse, misappropriate such a house or

flat, or create a right to the house, to part or the whole of a flat, the exercise of which is incompatible with the dwelling of the spouses or the family, unless he or she arranges a similar dwelling of the same standard for the other spouse or the family. If a spouse acts without consent of the other spouse contrary to this rule, the other spouse may claim invalidity of such legal conduct (NCC, s 747). If the spouses have a joint right to a house or a flat in which the family household of the spouses or of the family is situated the abovementioned prohibition applies similarly (cf NCC, s 748).

Last but not least, it is necessary to mention new civil law provisions against domestic violence.¹⁹ The law sets forth that, if dwelling jointly in a house or a flat where the family household of the spouses is situated becomes for one of them intolerable due to physical or mental violence against that spouse or anyone else living in the family household of the spouses, the court may, at the motion of the affected spouse, restrict or exclude the right of the other spouse for a specified period to dwell in the house or the flat (NCC, s 751(1)). It is possible to proceed in the same manner in the case of divorced spouses as well as in the case when the spouses or ex-spouses live jointly elsewhere than in their family household (NCC, s 751(2)), and also in the case of persons other than spouses (NCC, s 3021). Restriction or exclusion of a spouse's right to live in the house or the flat is decided on by the court for the period of 6 months at most. The court will, on a motion, decide again if there are serious reasons for doing so (NCC, s 752).

(d) Dissolution of marriage

The New Civil Code sets forth that marriage is terminated only due to reasons established by the law (NCC, s 754). Drawing on the previous legal regulations these are death, declaring somebody dead (NCC, s 26), divorce (NCC, ss 755 ff), and, newly, a surgical change of sex where the marriage terminates on the day recorded in the certificate issued by the provider of health services (NCC, s 29).²⁰

As for divorce, the new legal regulation, too, is based on irretrievable breakdown of marriage which was the only reason for divorce introduced in the Act on the Family as early as 1963. The New Civil Code sets forth that marriage may be dissolved if the joint life of the spouses is deeply, permanently and irretrievably broken down and its recovery cannot be expected (NCC,

¹⁹ The New Civil Code thus complements the previous regulation established by a special law against domestic violence from 2006 by which an administrative ordering of sb (spouse) out of the joint dwelling (home ban) was introduced into the Act on Police (10 days), and the so-called court ordering of sb out of the family dwelling by injunction was introduced into the Civil Procedure Rules (one month, with the option of lengthening up to one year), and the so-called intervention centres were established. A special criminal law protection against domestic violence is from 2004. For details see Z Králíčková, E Žatecká, R Dávid and M Kornel *Právo proti domácímu násilí (Law Against Domestic Violence)* (Praha: CH Beck, 2011).

²⁰ See n 14 above.

s 755(1)). The court deciding about the divorce of marriage shall examine the fact of the breakdown of the marriage and reasons leading to it (NCC, s 756). This is called contested divorce.

However, if the spouses have agreed about the divorce, or the other spouse has joined the petition for divorce, the court does not examine reasons for the breakdown if it comes to the conclusion that the identical statements of the spouses about the breakdown of their marriage and about their intent to achieve divorce are true (NCC, s 757). This is called uncontested divorce²¹ and the following requirements must be met:

- (a) on the day of the commencement of the divorce proceedings the marriage has lasted for one year at least and the spouses have not lived together for more than 6 months;
- (b) the spouses, who are parents of a minor without full legal capacity, have agreed on arrangements for the child for the period after the divorce and the court has approved their agreement; and
- (c) the spouses have agreed on the arrangement of their property, their housing and, if the case may be, the maintenance for the period after the divorce; the contract must be in writing with officially authenticated signatures.

Like the previous law, amended in 1998, the new law establishes the so-called clause against harshness. The law sets forth that despite the breakdown of their living the marriage cannot be dissolved if it were against:

- (a) the interest of a minor of the spouses due to special reasons; the court examines the child's interest in the existence of the marriage by inquiring of the custodian who is appointed by the court for the proceedings on the arrangement of the child's custody for the period of the divorce; and
- (b) the interest of the spouse who was not predominantly involved in the breach of marital duties and who would suffer an especially serious harm by the divorce and there are extraordinary circumstances supporting the existence of marriage, unless the spouses have not lived together for 3 years at least (NCC, s 755(2)).

If the spouses have a minor, the court will not grant divorce until deciding on the custody of the child for the period after the divorce (NCC, s 755(3)). The court dealing with custody of the minor may decide on or approve the agreement of the spouses in the matter of entrusting the child into individual custody of one parent, alternating custody or joint custody (NCC, s 907). It is

²¹ The new legal regulation does not know the so-called divorce on the basis of agreement, ie consensual divorce. Thus the Principles of European Family Law regarding Divorce were not taken into consideration (unlike the Principles of European Family Law Regarding Parental Responsibilities). For more see K Boele-Woelki, 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* (Antwerp, Oxford: Intersentia, 2004).

necessary to emphasise that the parents of the child are both principally bearers of rights and duties resulting from parental responsibility (cf NCC, ss 865 ff) and the decision about after-divorce custody only determines whom the child will live with in the common household (besides the maintenance duty towards the child).

(e) Legal consequences of dissolution of marriage

Dissolution of marriage affects not only one's status but also one's property situation. If the marriage is terminated by death, or by declaring one of the spouses dead, the deceased's property passes to the spouse in the first inheritance class together with the testator's children (NCC, s 1635). If there are no children the property passes to the spouses in the second class together with the testator's parents and the so-called cohabiting persons (NCC, s 1636). However, in keeping with the previous law the surviving spouse is not the so-called forced heir who is entitled to an obligatory share (cf NCC, ss 1642 ff). Nevertheless, if there is a will, for example in favour of third persons, the New Civil Code establishes that the surviving spouse gains possessory title to movables that form the basic equipment of the family household (NCC, s 1667) and right to maintenance from the inheritance arises for him or her (NCC, s 1666). This arrangement is similar to that in the General Civil Code (ABGB, 1811). Special protection is ensured for the surviving spouse in relation to dwelling. The law regulates the transition of the joint lease of a flat *ex lege* (NCC, s 766) and the discretion of the court to create an easement of dwelling for the surviving spouse if he or she has custody of a minor – the easement being for a definite term and for payment corresponding to the usual rent (NCC, s 767(2)).

If the marriage was terminated by divorce it is necessary, first of all, to settle and adjust the community property of the spouses. As a rule, the law prescribes an agreement between the divorced spouses. If the agreement is not achieved, the court will decide on the basis of both quantitative and qualitative criteria such as the interests of unsupported children or the extent to which a spouse was involved in achieving and maintaining the property values falling within the community of property of the spouses (NCC, s 742). If within 3 years from the divorce no agreement is made or petition filed, a legal presumption will be applied (NCC, s 741).

As for the spouses' dwelling after the divorce, it depends on the legal basis of the marital dwelling. If the family dwelling was in the community of property of the spouses what has been said above in connection with its settlement and adjustment will be applied. If it was a joint lease of a flat by the spouses they may cancel it by rescinding the contract or having recourse to the court that will determine, when deciding about cancelling the joint lease, the manner of compensation for the loss of the right considering also the situation of the unsupported children and the opinion of the lessor among others (NCC, s 768(1)). If one of the spouses was an exclusive owner of the family dwelling

the other spouse loses by divorce the so-called derived legal reason for housing and the court may decide about his or her moving out (NCC, s 769).

The maintenance duty between divorced spouses is regulated in the New Civil Code in a different manner from the previous law.²² The basic presumption is dependence on maintenance, or incapacity to maintain oneself independently. But the law newly establishes that such incapacity to maintain oneself independently has to have its origin in the marriage or in connection with the marriage (cf NCC, s 760(1)). Another innovation is the list of factors that should be taken into consideration when deciding on adequate maintenance. The court will thus consider for how long the marriage lasted and for how long it has been dissolved and whether (NCC, s 76(2)):

- (a) the divorced spouse has remained without a job even though not being prevented from finding a job due to serious reasons;
- (b) the divorced spouse could have ensured maintenance by properly managing his or her property;
- (c) the divorced spouse participated during the marriage in care of the family household;
- (d) the divorced spouse has not committed a criminal act towards the ex-spouse or a close person; or
- (e) whether there is another, similarly serious reason.

The right to maintenance for the period after the divorce terminates only when the beneficiary enters into a new marriage, or by death of the obligor or the beneficiary. If a substantial change of the situation occurs the court may decide about decreasing, increasing or abolishing the mutual duty of maintenance between the divorced spouses.

The New Civil Code, too, establishes an exceptional right to so-called 'punitive maintenance' to the extent of ensuring the same living standard. The spouse who did not cause the divorce or did not agree to the divorce and who suffered serious harm due to the divorce may file a motion to the court to determine a maintenance duty on the former spouse to such an extent that the ex-spouses can have the same living standard. The divorced spouse's right to maintenance may be considered justified only for a period adequate to the situation but for 3 years after the divorce at most (NCC, s 762).

²² On this, see Z Králíčková 'Legal Protection of Unmarried and Divorced Mothers in the Czech Republic' in B Verschaegen (ed) *Family Finances* (Vienna: Jan Sramek Verlag, 2009) 281–291.

IV KINSHIP AND PARENTHOOD

(a) General

The New Civil Code establishes that kinship is a relationship based on a blood tie or originated by adoption (NCC, s 771) which is seen as a status change (cf NCC, ss 794 ff).

The new legal regulation of blood parenthood may be characterised as a traditional one. It is grounded on the philosophy on which the General Civil Code (ABGB, 1811) was built. According to many authors it happened due to the natural law school having special importance for the origin of this code, especially from the human rights perspective.

As for adoption of a minor, the new legal regulation is in harmony with international standards established mainly by international covenants and the case-law of the European Court of Human Rights. A new thing in the New Civil Code is the adoption of a major, which continues in the tradition of the past legal regulations. As in most legal systems of the former Soviet Bloc, after 1949 the Czech legal order regulated only adoption of minor children. For political reasons, adoption of adults was abandoned as a 'bourgeois anachronism'. Thus the New Civil Code reintroduces it, in addition to the full adoption of minors.

(b) Motherhood

The old Roman law principle of *mater semper certa est* respecting the fact of birth has traditionally been considered in the Czech lands to be the basis for creating the status relationship of the mother and the child, even if *expressis verbis* it was not introduced in the legal order until 1998 by an amendment to the Act on the Family. The natural law idea of one mother and one father of the child fully corresponding to natural laws is respected by the lawmakers even today when Czech family law gains a human rights dimension but the medical science does not recognise any boundaries (see below). The child's mother is the woman who has given birth to the child (NCC, s 775). Despite being a relatively simple one, the new legal regulation of motherhood is quite apt. It is formulated as a mandatory rule from which it is not possible to divert one-sidedly (eg by giving up or abandoning a child, not expressing interest, etc) nor contractually (with or without payment).

The basis of the status condition of motherhood is the fact of birth, which includes assisted reproduction, too. The legal mother of the child is the woman who has given birth regardless of who was the donor of the egg. Legal motherhood is thus identical with biological motherhood and in the case of egg donation genetic motherhood is irrelevant.²³

²³ The key regulation of artificial insemination, or assisted reproduction, can be found in the new Act No 373/2011 Coll, on Specific Health Services. This Act defines the basic concepts such as

As for surrogate motherhood, it is not regulated in the Czech legal order except for one note in connection with adoption among close relatives (on this, see section (d)(i) below).

Undoubtedly, motherhood is the basic status condition which is important for the whole legal order. The maternal status is crucial for humans. Therefore it is necessary – in compliance with international obligations, especially Art 7 of the Convention on the Rights of the Child – to register the child soon after the birth in connection with the mother thus making the child's status in connection with the parents certain. Public law regulations establish this duty as a rule especially for the medical staff assisting with the birth. Below, we give two examples when the child's rights give way to the mother's rights. We should note that these exceptions to the rule are not accepted without reservations by legal experts or the public in general.

A relatively new thing in the Czech legal order infringing protection of status rights of the child is the institution of hidden birth regulated by law.²⁴ A quite new Act establishes that a woman with permanent residency in the territory of the Czech Republic, if not a woman for whose husband there is an assumption of fatherhood, has a right to have her identity hidden in connection with a birth (Act on Health Services, s 37). Such a woman, if she wants to hide her identity in connection with a birth, submits to the provider of the respective health service a written application for hiding her identity where she also states she does not intend to take care of the child. The child has a mother but does not know her identity because it is hidden from him or her in the register of births. Rights of biological fathers are more or less omitted there.

Another new social phenomenon are the so-called baby-boxes which are not regulated or prohibited by any law in the Czech Republic. The founder of about 50 boxes for abandoning unwanted children, which enables mothers to give birth in fact anonymously, has since 2005 been a private fund.²⁵ If the identity

assisted reproduction, infertile couple, anonymous donor, mutual anonymity of the donor, the infertile couple and their child, etc, and especially the conditions for its realisation, ie the respective informed consent but also various restrictions, eg as far as age or kinship are concerned.

²⁴ See Act No 372/2011 Coll, on Health Services. See also an older one, Act No 422/2004 Coll, so-called Act on Hidden Births. On the fierce critical comments see M Hrušáková and Z Králíčková *Anonymní a utajené mateřství v České republice – utopie nebo realita? (Anonymous and Secret Motherhood in the Czech Republic – Utopia, or Reality?) Právní rozhledy*, 2005, No 2, 53 ff.

²⁵ For statistics see www.statim.cz. On the history, the contemporary state and unfortunately also the future of the boxes for abandoned children, see M Zuklínová 'Několik poznámek k právním otázkám okolo tzv. baby-schránek' ('Several Notes on the Legal Questions on the So-Called Baby-Boxes') *Právní rozhledy*, 2005, No 7, 250 ff. Compare further especially the conclusion, which is not very complimentary of the Czech Republic and its legislative practice. In this context see Committee on the Rights of the Child Reviews Report of the Czech Republic from 31st May 2011 available on www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11098&LangID=E.

of the mother whose child was abandoned in the baby-box has not been found out the child obtains the status of a foundling. Not every child is lucky enough to be adopted.

(c) Fatherhood

The new legal regulation for determining fatherhood (NCC, ss 776–793) is, too, based on three traditional legal assumptions drawing on probability: *pater vero is est quem nuptiae demonstrant*. We may say that this regulation of fatherhood does not differ much from the concept in other European legal regulations. However, the regulations establishing the legal assumptions of fatherhood were created at the time when legitimacy of a child was highly valued and when methods of assisted reproduction and paternal tests were still in their infancy.

The first assumption is then in favour of the mother's husband, if the child is born in wedlock or within 300 days after its termination (NCC, s 776). The second assumption respects the autonomy of will of the child's parents and is in favour of the man who has stated, together with the mother, that he is the father of her child (NCC, s 779). The third assumption is based on sexual intercourse in the so-called critical period: the father of an unmarried woman's child is considered to be the man who had sex with her within the period of 160 days prior to the birth and within the period not exceeding 300 days after the birth unless his fatherhood is excluded by serious reasons (NCC, s 783). The New Civil Code introduces some innovations that break the conservatism typical of this area of family law, namely:

- (a) taking into account the fact that the Civil Code comes back to the rule of declaring someone missing (cf NCC, s 776(1)), which, within the context of the first assumption, has the same importance as the death of the mother's husband;
- (b) enabling the so-called conversion of the first assumption into the second one (cf NCC, s 777(1)), ie if a child is born in the interim period lasting from the filing of the petition for divorce until the 300th day after the divorce it is possible to consider a man to be the child's father if he declares so and his statement is in conformity with the statement of the mother's husband, or the ex-husband, and with the statement of the child's mother;
- (c) including the assumption of an unmarried mother's partner if he consented to artificial insemination (NCC, s 778);
- (d) introducing new rules for making a consenting declaration about the second assumption if the issue in question is:
 - (i) the declaration itself and its invalidity (NCC, s 782);
 - (ii) declaring someone incompetent (NCC, s 780); and
 - (iii) the declaration of a mother suffering from mental disorder, or if getting her consent is connected with serious difficulties (NCC, s 781);

- (e) extending the denial period for the mother's husband if it is a denial of the first assumption from 6 months to 6 years since the birth of the child (see NCC, s 785);
- (f) extending the denial period from 180–300 days to 160–300 days since the artificial insemination for both the husband and the partner of the mother (NCC, s 787);
- (g) introducing the option of judicially pardoning one for missing the denial preclusive period if it is required by the child's interest and by the public order requirements (NCC, s 792);
- (h) introducing the option for the court to start ex officio proceedings on denying fatherhood but only in the case of the second assumption in the situation when such a father cannot be the real father of the child and it is clearly required by the child's interest, and if the provisions guaranteeing the basic human rights are to be fulfilled (NCC, s 793).

Despite being included in the *Principles and Starting Points of the New Code of Private Law* as well as in the *Draft for the New Civil Code*, the child's denial right is not expressly regulated in the New Civil Code even if it has never been put into question by expert committees. Denial rights of putative fathers were completely omitted by the lawmakers. The number of persons actively legitimated for denying fatherhood is a traditional one – it is only the child's parents recorded in the Register of Births. We appreciate the fact that the New Civil Code does not establish an active legitimisation of the Attorney General's Office to deny fatherhood but we are aware of the fact that this loophole may lead to stalemated situations and, finally, it may be of no benefit to anyone. Another controversial drawback of the New Civil Code is the fact the court is not expressly empowered to start ex officio proceedings in the case of denial of the first assumption. As for the third assumption, conservatism prevailed even if the Constitutional Court and a lot of family law experts came to the conclusion that its traditional basis – the sexual intercourse within the critical period – has been antiquated by the revolutionary development of genetics.²⁶ Regarding rights of the putative father to establish legal fatherhood even against the will of the child's mother, they were introduced into the Act on the Family in 1998.

(d) Adoption

(i) Adoption of minors

Since 1949, adoption of minors has been understood – in relation to the concept mentioned above – as a benefit for both real and social orphans, unwanted or abandoned minor children. On the part of the adoptive parents, adoption is viewed as acceptance of a stranger's minor child as their own. Since 1963, the law regulated only full adoption of minor children. Besides, adoption of minors has been created as a status change, as an imitation of biological family ties: *adoptioe natura imitatur*. Mainly due to the Czech Republic's accession to a number of international human rights conventions after 1989,

²⁶ Cf the Judgment of the Czech Constitutional Court of 28 February 2008, I ÚS 978/07.

the Czech legal order has broadened protection of the child's natural family, of the minor parents of the child, of the putative parents or parents without full legal capacity.²⁷ Let us add, that the main creators of the New Civil Code intended to adapt the new regulation of adoption of minors in the European Convention on the Adoption of Children (Revised).²⁸

The new conception of adoption of minor children (NCC, ss 794 ff) primarily modifies the requirements of parental consent (NCC, ss 809 ff) and the option of consent withdrawal (NCC, s 817) or its expiry (NCC, s 816). The child's mother may give consent to the adoption after the expiry of 6 weeks from the delivery of child, ie after the *puerperium* (NCC, s 813). The child's father is allowed to give consent any time after the child's birth. The child's parents under 16 are not allowed to give consent to adoption (NCC, s 811(1)); any consent would be completely irrelevant. As an innovation, the law introduces the rule that the court may, while depriving the parents of their parental responsibility, also decide on the deprivation of the parental right to give consent to adoption (NCC, s 873).

As regards parents' non-interest, the law provides for a variety of situations, such as situations where a parent stays in an undisclosed location (NCC, s 818(1c)) or shows clearly no interest in the child thus permanently culpably breaching his or her parental duties (NCC, s 819). The law establishes a presumption of apparent non-interest, when non-interest lasts at least 3 months since any instruction, advice or assistance from the state authority (NCC, s 820). If there are close relatives of the child who are willing and able to provide care for the child personally, preserving family ties will always take precedence over adoption by a non-relative (NCC, s 822).

Regarding the adoptee, the child's participation rights guaranteed by international conventions have been strengthened. The law explicitly states that a child over 12 years old must always give consent to the adoption (cf NCC, s 806) and may revoke his or her consent to adoption (NCC, s 808). If, at the time during the adoption process, the child was of tender years the adoptive parents have a duty to inform the adoptee about adoption as soon as it is appropriate and no later than when the adoptee starts compulsory school attendance (NCC, s 836).

Another innovation is that the new law lifts a ban on adoption among close relatives. Close family ties used to be traditionally a disincentive for adoption. However, the lawmaker, being under quite a strong pressure, relinquished this natural, social and legal ban. The law then provides that adoption is excluded among persons who are relatives in the direct line and the siblings except for

²⁷ For details, see Z Králíčková 'Adoption in the Czech Republic: Reform in the Light of the Child Welfare Laws' in A Bainham (ed) *International Survey of Family Law, 2003 Edition* (Jordan Publishing Limited, 2003) 125-142.

²⁸ See Convention CETS No 058 from 1967, revised as CETS No 202 in 2008 - entry into force in 2011. For more see <http://conventions.coe.int/Treaty/en/Treaties/Html/202.htm>. However, the Czech Republic has not yet signed the revised version (11 November 2013).

kinship based on surrogate motherhood (NCC, s 804). It should be noted that medical law has never regulated surrogate motherhood.²⁹ The new Acts passed only recently do not deal with it, either.³⁰ However, surrogacy is a reality today. Private clinics, particularly, provide surrogacy without legal regulation. As mentioned above, the child's mother is a woman who delivered the child (NCC, s 755 for details see above, section IV(b)).

Discussions regarding same-sex adoption and adoption by de facto couples did not lead to any changes in the conception of the regulation of joint adoption. Only married couples may adopt a child jointly, although the Czech legal order regulates registered partnerships of persons of the same sex (see above, section III(a)). Besides adoption by a married couple, the law enables adoption by one of the spouses and exceptionally adoption by 'another person' (NCC, s 800).

The obligatory pre-adoption care was extended from 3 months to not less than 6 months (NCC, s 829). The new legal rule says that after the parents' consent to adoption and placing of the child to the pre-adoption care of the prospective adopters the exercise of parental responsibility of the child's parents is suspended by operation of law (NCC, s 825) and the court must appoint a guardian for the adoptee. The maintenance obligation of the child's parents or other persons is also suspended as the prospective adoptive parents are required to have the child with them at their own expense (NCC, s 829).

The new legislation also establishes the option of adoption and its circumstances to be kept secret from the child's original family. The option of secrecy applies for the child's parents and their consent to adoption, to (NCC, s 837). However, once the child reaches the age of majority and legal capacity, he or she is entitled to know the details of the adoption file (NCC, s 838). Regardless of this new rule, the traditional regulation on vital registers allows adoptees over 18 years old to inspect the registry books and collections of documents.³¹ This is evidence that adoption has never been explicitly based on the principle of anonymity.

Another new feature of the new regulation is the possibility for the court to order surveillance on the success of the adoption for a necessary period, usually through the Child Protection Office (NCC, s 839).

A key change concerns the consequences of adoption, ie the conversion of revocable adoption into an irrevocable one by operation of law if within 3 years after the adoption order becomes effective there is no petition for revocation of adoption (NCC, s 840(2)). An exception applies to situations when the

²⁹ See J Haderka 'Surogační mateřství' ('Surrogate Motherhood') *Právní obzor*, 1986, No 10, 917 ff.

³⁰ See Act No 372/2011 Coll, on Health Services, and Act No 373/2011 Coll, on Specific Health Services.

³¹ See Act No 301/2000 Coll, on Registers, Name and Surname.

adoption is in conflict with the law. However, the court may decide upon irrevocability of the adoption even before the expiry of 3-year period from the adoption order.

With regard to the surname of the adopted child, previously quite a rigid rule strictly ordered the change of the child's original surname to the adopters' surname. This was altered, too. The court may allow the adoptee to use both surnames together: the old one and the surname of the adopters (NCC, s 835(2)).

The new regulation, following tradition, allows so-called re-adoption: an adoption of an already adopted child (cf NCC, s 843).

(ii) Adoption of adults

As indicated above, the New Civil Code returns to the possibility of adopting an adult as it used to be regulated in the past (see ABGB, 1811, effective in Family Law matters till 1950).

The law distinguishes between two types of adoption of adult persons:

- (a) adoption that is analogous to the full adoption of minors (NCC, s 847); and
- (b) adoption that is not analogous to the full adoption of minors (NCC, s 848), ie not full adoption when the adoptee remains – especially with regard to property – connected with his or her family of origin (cf NCC, s 849).

(e) Parental responsibility

Parental responsibility is a key institution of Czech family law which was introduced into Act on the Family in 1998.³² However, both the precursors of parental responsibility after the communist take-over in 1948 were built on the principle of equal rights and duties for fathers and mothers of a child, regardless of whether the child was born in or out of wedlock and regardless of the terms of personal rights and rights to property including rights of succession. This attitude of the legislature adopted in family codes was seen as a progressive step which led to the elimination of discrimination against children born outside marriage. Nevertheless, both old Acts on the Family were full of ideology and problematic issues.³³ The adoption of the Convention on the Rights of the Child and other conventions undoubtedly meant a turning

³² See J Haderka 'Rodičovská zodpovědnost a související otázky od účinnosti zákona č. 91/1998 Sb' ('Parental Responsibility and Connected issues since the Act No 91/1998 Coll Coming into Effect') *Právní praxe*, 1998, No 8, 482.

³³ For details see P Bělovský *Rodinné právo (Family Law)* above n 3.

point in this field.³⁴ Thanks to the case law of the Czech Constitutional Court, and in particular thanks to the case law of the European Court of Human Rights, a new perception of children's rights was introduced in the Czech Republic. The purpose of parental responsibility is (a) the protection of the child and his or her rights on the one hand and (b) giving the parents a free space for the realization of parenthood on the other hand. However, it should be in harmony with the best interests of the child and his or her welfare. We can say that the concept of parental responsibility reflects the legislature's efforts to anchor, to maintain and to protect the balance between the rights of children and their parents.

Let us add that the main creators of the New Civil Code, when writing the final version of the concept of parental responsibility (Section 865 NCC), reflected a major part of the Principles of European Family Law regarding parental responsibilities made by the Commission of European Family Law (CEFL).³⁵ Parental responsibility is now based not on the simple trichotomy like the current and originally proposed future concept of parental responsibility, but on following categories of rights and duties of parents, which are: (a) care; (b) protection of a child; (c) maintenance of personal relationships; (d) upbringing and education; (e) determination of the residence a child; (f) legal representation and (g) administration of property. This approach seems preferable as it takes into account the particular problem of 'open borders' and their negative consequences, ie the illegal transfer of children and the international child abductions, etc.

Parental responsibility arises from and belongs only to the legal parents of the child (as for the details see above, Part IV(b) and Part IV(c)). The parents must have in principle full legal capacity to do legal acts. If the parent is a minor the parental responsibility is vested in that parent but administration of parental responsibility of such a parent is suspended (Section 868, Sub-Section 1, NCC). There is only one exception; namely, such a parent is allowed to take personal care of the child. As for the parents limited in legal capacity due to a court order such a decision must take parental responsibility into consideration as well (Section 865, Sub-Section 2, and Section 868, Sub-Section 2, NCC).

The New Civil Code regulates rules for administration of parental responsibility in harmony with the best interests of the child and his or her welfare (Section 875, NCC) and special rules for the separated parents (Section 908, NCC) and the divorced ones (Section 906 and 907, NCC). The 'agreement and cooperation' of both parents are the key words in the New Civil Code. However, if the parents are not able to come to an agreement on the

³⁴ See M Hrušáková *Dítě, rodina, stát (The Child, Family and the State)* (Brno: Masarykova univerzita, 1993).

³⁵ Cf K Boele-Woelki, 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).

personal care (custody) of the child the court takes a decision concerning (a) individual custody by one of the parents, (b) alternative custody, or (c) joint custody by both of them.

Parental responsibility is a dynamic phenomenon. That is why the law allows the court to change a judicial decision or court-approved agreement relating to changes in the child's family and the child's wishes and needs. So the child must get all the relevant information in a manner consistent with his or her age and intellectual maturity. The child must also be given room for expressing an opinion. The views of the child must be taken into consideration regardless of age or intellectual maturity. At the same time the court decision must be in the best interests of the child, which need not always correspond with the wishes of the child. However, the court must always take the child's opinion into consideration. In this context the right of everyone to fair trial should be emphasized. Thanks to the Czech Constitutional Court there is no model for judicial decision-making on child custody, on determining the intervals of visitation rights, or for family life in general.³⁶ Therefore, each case must be treated individually and in the light of the Convention for the Protection of Human Rights and Fundamental Freedoms that guarantees the right to respect to family life of everyone.

Parental responsibility terminates on the child's reaching maturity. Parental responsibility may also terminate by adoption of a minor child by another person (*adoptioe natura imitatur*) or by death of a parent or a child. However, parental responsibility of one of the parents does not terminate when the child is placed into the individual custody of the other parent or to some form of substitute care: foster care (Section 958 NCC), institutional care (Section 971 NCC), etc. This issue must be considered in the light of its human rights dimension. The child is an integral part of his or her family of origin. Both parents have the right of exercising their parentage, not only theoretically but also practically. Therefore, the rights of parents to an essentially direct contact with the child must not be downplayed, fogged or circumvented.

Finally, we should mention the possibilities of intervention by the court in the administration of parental responsibility. There are three options:

³⁶ See the decision of the Czech Constitutional Court of 20 January, No II US 363/03:

'From the constitutional point of view it is not possible to give precedence to models of arrangement between separated parents and minor children used by public authorities over the interests of the child which are defined in Article 3 of the Convention on the Rights of the Child. However, these models, no matter how useful and usable they may be in many cases, cannot cover the situation of every minor. It is therefore up to the courts to take into account all the specific circumstances of the case and the consequent interests of the child that must always be primary in consideration of all the activities concerning children, whether undertaken by public or private social welfare institutions, courts or administrative authorities deciding the specific form of the most suitable arrangement of the relationship between parents and children. The fact that the parents are unable to make an agreement cannot change this rule.'

- (a) suspension: if there is a serious obstacle for a parent to exercise parental responsibility and it is possible to assume that it is necessary for the interests of the child, the court may decide that the exercising of the parental responsibility is suspended for such a parent (Section 869, Sub-Section 1, NCC);
- (b) limitation: if the parent does not exercise parental responsibility properly and if it is required by the interest of the child, the court will limit that parent's parental responsibility or the exercise of it while determining the extent of such a limitation (Section 870, NCC);
- (c) deprivation: if a parent abuses parental responsibility or its exercise or neglects parental responsibility or its exercise in a serious way, the court will deprive that parent of parental responsibility (Section 781, Sub-Section 1, NCC). If a parent committed an intentional criminal act towards his or her child or made use of the child who is not criminally liable for committing a criminal act, or if a parent committed a criminal act as an accomplice, an abettor, a helper or an organizer of a criminal act committed by his or her child, the court will consider the circumstances deciding whether there are reasons for depriving such a parent of parental responsibility (Section 871, Sub-Section 2, NCC).

Legal experts appreciate a completely new provision that the previous legal regulations did not know at all, which caused many a problem in practice. The New Civil Code establishes that, before a judicial decision about limiting parental responsibility, the court will always consider whether it is necessary, with regard to the child's interest, to limit the right of the parent to have personal contact with the child. If a parent is deprived of parental responsibility the parent may have contact with the child only if the court decides to preserve this right for the parent in the interest of the child (Section 872, NCC).

(f) Maintenance duty towards children

The maintenance duty of parents towards children has not traditionally been part of parental responsibility. Both parents have a duty to maintain and support their child until he or she is able to make a living (Section 911, NCC), and it is supposed to be to the extent of the same standard of living (Section 915, NCC) including the option of making savings out of the maintenance (Section 917, NCC). Thus the New Civil Code fully respects the principle of solidarity and non-consumption aspect of maintenance as included for the first time into the Czech legal order by the 1998 amendment.³⁷

To avoid the situation of a mere 'law in books' the lawmakers complemented the new legal regulation with other effective elements responding to two key problems confronted in the practice. The issue was:

³⁷ For more see Z Králíčková 'Legal Protection of Unmarried and Divorced Mothers in the Czech Republic', above n 22.

- (a) how to detect the income and property of the parents, especially when they get cash-in-hand pay for unreported work, when they are self-employed, etc.;
- (b) how to enforce judgments ordering maintenance.

First, to make detection of income easier the lawmakers introduced a legal presumption of income of the liable parent (or grandparent) in order to 'improve' the minor child's position. The law provides that a parent must prove his or her income in court submitting documents necessary for the evaluation of his or her property situation and must enable the court to find out other facts, too, necessary for deciding the issue, by making the data protected by special acts accessible. If a parent fails to fulfil this duty, his or her average monthly earnings shall be presumed to amount to 25 times the minimum standard of living required for ensuring the maintenance and other fundamental personal needs of such a parent pursuant to a special act³⁸ (Section 916, NCC).

Regarding the enforcement of judgments, it is stated, as an innovation, that if a debtor fails to maintain and support a minor child an executor shall issue a writ of execution to suspend the debtor's driving licence. The executor will serve the writ on the driver and will deliver it to the registry of drivers. The debtor, ie the driver, is not allowed to drive until he or she pays the overdue maintenance (Section 71a).³⁹

In addition, the criminal law traditionally considers failure to pay mandatory maintenance a criminal offence which may be punished in various ways including imprisonment (Section 196); recently, a new remedy has been introduced: preventing a person from driving for a certain period (Section 196a).⁴⁰

V CONCLUSION

As mentioned above, the New Civil Code was adopted after a long period of legislative work and many twists and turns. It may be said to be 'a reasonable compromise' taking into account traditions and new phenomena, models and tendencies. After all, the family is considered to be a relatively conservative area of law which is interlinked with culture, religion, traditions and myths. The new Czech Family Law may then be characterized with the word 'continuity' with the previous legal regulation⁴¹ because many changes of law or its application occurred shortly after 1989 as a consequence of amendments and the case law of the Constitutional Court and the European Court of Human Rights, among others. With the word 'discontinuity' we may characterize

³⁸ See Act No 110/2006 Coll, on Living and Subsistence Level.

³⁹ See Act No 120/2001 Coll, on Enforcement Officials and their Activities.

⁴⁰ See Act No 40/2009 Coll, Criminal Code.

⁴¹ With regard to the current legislation on Czech Family Law, see M Hrušáková³ and L Westphalov *Family Law in the Czech Republic* (Alphen aan den Rijn: Kluwer Law International, 2011).

changes in civil law introduced into the New Civil Code, in particular, and also changes being brought about by the so-called accompanying legislation.⁴²

⁴² See Act No 292/2013 Coll, on Special Civil Proceedings, and Act No 202/2012 Coll, on Mediation.