

Tention between legal, biological and social parentage in the light of the best interest of the child

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1. Introduction

The aim of the paper is to discuss the question whether *the natural right of the child to know his/her origin*, parents, siblings and relatives, is respected in the

Czech Republic *according to the existing as well as the designed law.*

The Czech Republic is a signatory of a number of *international human rights conventions* that are directly applicable pursuant to Article 10, *the Constitution of the*

Czech Republic.¹ First, it is necessary to mention the *United Nations Convention on the Rights of the Child* which protects the natural right of the child to life, the right to know his/her parents (i.e. natural rights – hence his/her origin), the right to have their care, the right to keep his/her family relations (Articles 6, 7 and 8).² A wider framework of the given issue is provided by the *Convention for the Protection of Human Rights and Fundamental Freedoms* passed by the Council of Europe.³ The Convention, and in particular the *case law of the European Court of Human Rights concerning the Article 8 protecting privacy and family life*, creates room for a new, human-rights conception of family law.⁴ Also through the *Charter of Fundamental Rights and Freedoms* the Czech Republic avows the *European tradition of commonly shared values of humanity and recognizes inviolability of natural rights of individuals and provides protection from an unauthorized infringement of private and family life* (Article 10, Section 2).⁵

After long years when the Communist doctrine (after 1948) propagated social relationships at the expense of natural rights of individuals the law in the Czech Republic is coming back to the philosophical foundations on which the *General Civil Code* (hereinafter the *ABGB*)⁶ was built up.⁷ That important code was drawn up on the principle of *child's origin*. For its time it was a progressive piece of work when compared with the French *Code Civil* built up on the theory of recognition of the child by his/her parents (sic!). Many authors hold the view that it was undoubtedly due to the natural law school which had special significance for the origin of the *ABGB*, especially from the humanistic standpoint.⁸ The natural law idea of one mother and one father of the child, which fully corresponds to natural laws,⁹ should be respected especially today when the *Czech family law is gaining a human rights dimension*. Let us note that the *draft of the new Civil Code* respects many philosophical *human rights values* developing them generously, and not only in the second part dealing with family law. Nevertheless, there are some *particulars* which invoke an impression that the idea of discontinuity with the preceding legal order has not been fully realized.¹⁰

The above mentioned measures taken by the Czech Republic in the area of human rights show in general that the Czech Republic is determined to respect the *European trends of the development of private law, or family law*, one of which is undoubtedly the constitutionalization, i.e. a process of a consistent protection of human rights and freedoms in all law-related situations.^{11, 12, 13}

Regarding the *human rights dimension of family law* and its *constitutionalization* the law literature often analyzes the issue of the *child's rights*, which is linked with looking for a *balance between biological, legal and social parenthoods*, and also connected with insti-

tutes of foster care.¹⁴ Due to this all-European trend family rights in many countries undoubtedly gain a new dimension.¹⁵ We may only add that constitutional courts, or general courts, of many countries take these fundamental rights seriously.¹⁶ Family rights, despite being different in particulars, thus become very *similar in their essence* due to the human rights dimension.¹⁷ The purpose of family rights cannot be anything else than protection of the weaker, harmony and balance. From the standpoint of legal philosophy family rights actually come closer to one another even if many skeptics see this issue differently.¹⁸

What is the *real situation* of protection of natural rights of children in the Czech Republic?¹⁹ When examining closer the *particulars* of the given issue some *paradoxical* facts come up to the surface. *The natural right of children to life, their right to know their origin and the right to have constant family ties* established in the *Convention on the Rights of the Child* (cf. Articles 6, 7 and 8) sometimes gets – because of the existing law – into a *conflict* with *their parents' rights* established by law. Of course, *according to the existing law* the parents do not have the so-called *right to give up their child*, i.e. to establish such a state when the child becomes the so-called *legally free*. However, it happens frequently that the legal state established by the lawmaker prevents the biological and social realities from getting in harmony with the legal state, or vice versa, regardless of the child's interests and his/her biological parents being in harmony or not. The following lines are therefore devoted to a *critical view* of the *existing legal regulation* of determining and denying motherhood and parenthood in relation to the prepared *re-codification* of the *Civil Code* and in the light of the *decision practice of the European Court of Human Rights*.

2. *Mater semper certa est!*

The *ABGB* unconditionally respected the principle of *mater semper certa est*. Pursuant to the *ABGB* the identity of the mother was indubitable in the spirit of the above mentioned philosophical foundation. It was evidenced by the birth and the *principle of the child's origin* was thus fully realized. By this important act the enlightened lawmaker reacted strongly and categorically to the ominous practice established by the principles and previously effective regulations according to which a mother of an illegitimate child did not have a duty after the birth to disclose the name of the procreator or her own name (sic!) when the child was recorded in the record of births. *Ratio legis* of the court decrees consisted undoubtedly in the idea of preventing abortions and murders of newborns.²⁰ But let us take the historical, political, social and religious contexts into account.

The ancient Roman law principle of *mater semper certa est* respecting the fact of birth is *traditionally* considered in the Czech environment as a basis for creating the *status relationship mother – child* even if it has been expressly introduced into the modern legal order only recently by the so-called Great Amendment to the Act on Family (cf. Act No 91/1998, Coll.).²¹ The principle was respected even when assisted reproduction with the help of egg donation appeared due to the development of reproduction medicine and when the biological, or genetic, reality was not in harmony with the legal state. We may only add that despite the lawmaker's saying nothing for a long time there was an obstacle to the development of the so-called surrogate motherhood on a commercial basis in the form of conclusions of an ethical commission from the 1980s. By this rights of the woman who gave birth to the child were strengthened and with that also predictability and certainty. Nevertheless, rights of the mother need not be and frequently are not identical with rights of the child. Especially today, when a big emphasis is laid on protection of natural rights of the child it is necessary to look for answers to the following questions: (a) is the regulation according to the existing law in harmony with the right of the child to know his/her origin and (b) has the child of the early 2000s the right to know he/she was conceived by the method of assisted reproduction and that his/her legal mother is not his/her biological mother?²² According to the designed law it would be desirable to regulate the issue of motherhood more precisely and to give protection to the natural right of the child to know his/her origin, but not at the expense of the status situation.²³ An inspiration might be the German constitution pursuant to which a child may take steps to find out his/her genetic origin, which will not influence his/her status, though.²⁴

As for the principal negative elements of the Czech legal order concerning motherhood it is necessary to point out an Act pursuant to which *the mother has a right to hide her identity in connection with birth*.²⁵ The Act was adopted on the initiative of members of parliament in 2004 without going through the standard legislative process. This piece of legislation did not change the Act on Family, which expressly establishes the principle of *mater semper certa est*, but amended without any conception the Act on People's Health, the Act on Records of Births, Name and Surname and the Act on the Public Health Insurance. Therefore *experts came to the conclusion* that the child, whose mother wants her personal data not to be revealed at the birth, has a mother but only does not know her identity; he/she may then demand that "an envelope with mother's personal data" should be opened, for example in the procedure about determining parenthood (cf. Section 80, Sub-Paragraphs a/o, Rules of Procedure).²⁶ We may only criticize the meaning of haphazard and non-conceptual private bills²⁷ creating a completely unsatisfactory

state undermining pro-family behavior, disrupting the legal consciousness and, last but not least, negating the traditional centuries-old conceptions of enlightened philosophers.

Moreover, both experts and the general public tolerate the abandoning of unwanted babies in the so-called baby-boxes with a reference to idealistic concepts aiming at preventing murders of newborns and thus return to the past.²⁸ We may only add that in such cases the child cannot be denied the right to bring a *status action for determining motherhood* if he/she has knowledge of who is his/her mother (cf. Section 80, Sub-Paragraphs c/o, Rules of Procedure). A lot of criticism has been provoked by that as well as by other sensitive issues that may be approached differently.²⁹ According to the designed law this problem should be solved satisfactorily.

3. *Pater semper incertus?*

The Czech legal regulation of parenthood is established on *traditional* legal ideas which are based merely on *likelihood*. Anyway, in the ancient Rome the principle of "pater incertus" was applied, too.

Is it proper to stick to the tradition with roots in the *ABGB*? Has the modern legislature reacted sufficiently to the development in the area of science, in particular genetics? No. The legal regulation of parenthood has been left in constraints of ideas that originated at the time when it was not possible to determine the father with certainty. The above mentioned 1998 Great Amendment to the Act on Family did not pay much attention to this issue. In the opinion of many it made it even more complicated.³⁰ However, the current theory and practice do not deal very often with questions of whether sticking to this strict law based on traditions *protects parenthood*, whether it is the legal or biological one. Even less frequently – which is alarming – we ask a question whether by sticking to the old conception *the child's rights and legally protected interests are not infringed*, too, in particular the natural right of the child to know his/her origin. However, it should be admitted that the Czech regulation of parenthood does not defy the conception of older European regulations. These regulations establishing the legal presumption of parenthood were made, though, in the days when legitimacy of the child was highly valued and when methods of assisted reproduction and paternity tests were still in their infancy. The child's rights as well as human rights in general were virtually non-existent.

In the course of time the Czechoslovak, or Czech, lawmakers only made *partial changes* in the legal regulation of parenthood dating back to the early 1960s (cf. Act No 94/1963 Coll. on Family, hereinafter AF). The Act on Family was amended only very little in connection with adopting the possibility of artificial

fertilization (cf. Act No 132/1982 Coll.). The regulation established in Section 58, Paragraph 2, AF, has been criticized many times, especially for its brevity.³¹ Other changes were brought about by the year 1998. Following the decision practice of the *European Court of Human Rights* concerning the Article 8, *Convention for the Protection of Human Rights and Fundamental Freedoms*, in the case of *Keegan vs. Ireland*,³² the above mentioned Great Amendment introduced provisions aiming at *strengthening the status of the man who thought himself to be the child's father, even against the will of the mother* who had given consent to the adoption of the child in the given thing. The provision of Section 54, Paragraph 1, AF, was added to by the active legitimacy of the alleged father to bring an action for determining fatherhood. This *strengthened the child's right to know his/her origin and natural family*. Nevertheless, *the third presumption keeps to be based on sexual intercourse at the time at issue* (cf. Section 54, Paragraph 2, AF) even if it would be better to consider *the fact of genetic relationship in connection with the social reality as the basis for a court ruling about determining fatherhood*. Such a conception would certainly correspond more to the *Strasbourg decision practice concerning the Article 8, Convention for the Protection of Human Rights and Fundamental Freedoms*, giving protection to privacy and family life.

The above mentioned Amendment to the Act on Family further established the possibility to consider fatherhood of the mother's husband as excluded on the basis of the agreeing declaration of the child's mother, her husband and the man who thinks himself to be the child's father (cf. Section 58, Paragraph 1, AF). The wording of the Act provoked a negative reaction from the part of the experts even if the intention of the drafters had been undoubtedly praiseworthy.³³ The prevailing interpretation is that such a declaration, which may only be made by the persons mentioned in the Act during the procedure about denying fatherhood, may only function as evidence that the fatherhood of the mother's husband is excluded but not as an agreeing declaration of the parents about determining fatherhood.³⁴ The regulation with its contradictory interpretation and application does not make the situation easier for anyone. The child's right to know his/her origin as soon as possible is not fully respected by this approach.

The above mentioned Amendment also substituted the wording "*the interest of the society*" with "*the interest of the child*" in Section 62, which is interpreted by the Supreme Public Prosecutor's Office "traditionally" in the spirit of the General direction of the Supreme Public Prosecutor's Office No 6/2003 on the procedure of public prosecutors in examining prerequisites of an action pursuant to Section 62 or 62a, Act No 94/1993 Coll. on family as amended by Act No 91/1998 Coll., even if the development in the area of human rights should be respected. A new provision of Section 62a

was also introduced into the Act on Family giving rise to interpretation and application problems since the very beginning. According to the existing law it is established that the Supreme Public Prosecutor may bring an action for denying fatherhood of the man whose fatherhood was determined according to the second presumption by the agreeing declaration of the parents even before the expiry of the six-month preclusive periods of the parents established by the law if the determined man cannot be the child's father and if it is in the apparent interest of the child and in harmony with provisions guaranteeing fundamental human rights.

A *partial conclusion* in this issue could undoubtedly be the statement that within the above mentioned Amendment to the Act on Family *no conceptual change of the Act on Family occurred*, in particular concerning *the establishment of the child's right to deny fatherhood of the recorded father, the prolonging of the so-called denying periods* for the child's parents written in the record of births, *the excluding of the Supreme Public Prosecutor's Office* from private law matters and *a new attitude to fatherhood* in general (taking DNA tests into consideration). No attention was paid to *defects of will manifestation* in connection with the establishing of the second presumption, in particular *an error*, despite the fact that in a number of works experts criticized these defects resulting from the removal of family law relationships from the Civil Code.³⁵

The legislative development in the area of paternities was finished last year by the establishment of *the so-called first and half presumption* which reacted to a high number of children born outside wedlock and which was for the benefit of a man who gave his consent to an artificial insemination of his partner. Nevertheless, this novelty gives rise to interpretation and application problems, too.³⁶

It is possible to give a considerably large *list of problematic provisions* as an answer to the question *what prevents establishing, preserving and protecting harmony in status among the closest family members and what impedes a wider protection of the child's right to know his/her origin*.³⁷

The point is that the lawmaker has:

- a) not expressly established the child's right to deny fatherhood of his/her father written in the record of births in accordance with the right to know his/her origin guaranteed by the Convention on the Rights of the Child,
- b) not revised considerably short preclusive periods for the parents written in the record of births for denying fatherhood established on the basis of the first and second presumption,
- c) not dealt with quite an unsystematic and rarely applied right of the Supreme Public Prosecutor's Office to deny fatherhood established on the basis

of the first and second presumptions in the cases when preclusive periods for denying fatherhood expired for the parents written in the record of births,

- d) not taken into consideration how easy it is to use DNA tests in connection with rulings about determining fatherhood on the basis of the third presumption which were made by courts on the basis of the sued men's "failing to bear" the burden of proof in procedures at a time when DNA tests were not available and which established the problem of *res iudicata*,
- e) not taken into consideration the possibility of artificial insemination of the wife after the husband's death,
- f) not reacted satisfactorily to the increase of the number of unmarried relationships and children born out of wedlock due to assisted reproduction, and not guaranteed stabilization of their status,
- g) not dealt with the possibility of the so-called passive legitimacy of more men who could be fathers of the child,
- h) not expressly enabled denying and determining fatherhood within one procedure in the situation when the so-called written state in the record of births does not correspond with the biological one and there is a will to solve the problem within the shortest time as possible after the birth of the child,
- i) not regulated the issue of will manifestations in establishing the second presumption and in particular the so-called simulated fatherhood,
- j) not reviewed the conception of three presumptions, in particular the third one which is based on sexual intercourse at the time at issue, i.e. on probability, even if it could be based on a DNA analysis, i.e. on high probability bordering with certainty,

and thus not fulfilled his duty to protect natural rights of the child to know his/her parents and to achieve an equilibrium among biological, social and legal parenthoods.

We hold the view that this issue must be considered *in the spirit of its human rights dimension*, especially in accordance with the decision practice of the European Court of Human Rights concerning the Article 8, *Convention for the Protection of Human Rights and Fundamental Freedoms*. This approach does not apply only to an interpretation and application of the existing legal regulation but also to considerations about the designed law, in particular the Civil Code under preparation whose second part should include a family law regulation.

First of all it is necessary to emphasize that the child has the right to know his/her origin according to the Convention on the Rights of the Child (cf. Article 7, Paragraph 1). He/she has the right to know his/her parents. This natural right of the child, which is only pro-

TECTED by the Convention, should be a *priority* in any activity of the state – whether it may be the legislative, judicial or executive one. It is not decisive whether these rights are executed by the child himself/herself or by his/her parents. *It is always the child and consistent protection of his/her natural rights what matters.* It is not decisive on which presumption the fatherhood is determined. We believe that the existing law, under which the child is not actively legitimated to denying fatherhood of his/her father, is in conflict with the child's natural right to know his/her origin. In connection with fulfilling the child's rights there is a question whether the child should be given the right to deny fatherhood of his/her father only in the case of the first and second presumptions, or whether the right to bring a suit for denying fatherhood should be extended to those cases when the paternity issue has been decided by the court according to the third presumption, however, in the situation when a DNA test as evidence has not been carried out. We are aware of the fact of *rei iudicata*, but in accordance with the decision practice of the European Court of Human Rights in the case *Paulík vs. Slovakia* we may only agree with the conclusion that *"a lack of a procedure by which it would be possible to bring in balance the legal state and the biological reality in denying fatherhood is in the given case in conflict with interests of the persons involved and, in fact, is not beneficial for anyone."*³⁸

The extent of this paper does not allow a deeper analysis of the problems touched upon in the above mentioned overview of issues *according to the designed law*.

Nevertheless, let us pay attention to the issue of *re-assessing the conception of presumptions of fatherhood in favor of a certainty based on DNA*. As mentioned above, the construction of presumptions of fatherhood is based on such a state of knowledge when it was not possible to determine positively the child's father. The question remains whether it is necessary and reasonable to follow such a conception *according to the designed law*. Unfortunately, the draft of the new Civil Code does not know an alternative in this matter. Inspiration for considerations according to the designed law may found in the work *Model Family Code*³⁹ which sets up the so-called *intentional parentage*, thus replacing the system of presumptions that is a product of its time according to the author.⁴⁰ However, if the determination of fatherhood was not made on the basis of the autonomy will of the child's parents it is necessary to guarantee the child's rights by the dictum *"The child's father is the man determined by the court as a genetic parent"*. In our opinion, this would provide a better protection for the rights of the alleged father as well as the natural rights of the child. Nevertheless, *we are aware of the problem which may be provoked by strictly preferring the biological parenthood to the social one.*

As for other problems that the draft of the new Civil Code omits or deals with insufficiently, we may say that *the draft of the new Civil Code unfortunately sticks to continuity – it continues to involve the Supreme Public Prosecutor in private law paternity matters leaving the periods set for denying fatherhood untouched, i.e. for six months only.*

4. Conclusion

We hold the view that the whole matter has to be considered *in a complex manner*, in the spirit of *its human rights dimension*.⁴¹ Finally, we may add that the amended or completely new legal regulation should strengthen *the natural right of the child to know his/her origin* in connection with the principle of *mater semper certa est* and to replace the principle of *pater incertus* with the principle of *pater semper certus est* as it is already possible with the available technology at the beginning of the 21st century. This would undoubtedly provide protection not only to parents' rights but in particular to *natural rights of the child*.⁴²

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¹ Cf. the Constitutional Act No 1/1993, Coll., the Constitution of the Czech Republic.

² Cf. the information of the Federal Ministry of Foreign Affairs No 104/1991 Coll.

³ Cf. the information of the Federal Ministry of Foreign Affairs No 209/1992 Coll. Towards that *Haderka, J. F.*: The impact of rules of the Council of Europe on the modern family law. *Právní praxe*, 1994, No 9, p. 507, *Requena, M.*: Activities of the Council of Europe in the area of family law. *Právní praxe*, 1999, No 2/3, p. 132 and further, *Čapek, J.*: The European Court and the European Commission of Human Rights. Praha, Linde, 1995.

⁴ Viz *Berger, V.*: *Judikatura Evropského soudu pro lidská práva*. (Decision practice of the European Court of Rights) Praha: IFEC, 2003.

⁵ Compare the resolution of Czech National Council No 2/1993 Coll. on declaration of the Charter of Fundamental Rights and Freedoms.

⁶ See the *Allgemeines bürgerliches Gesetzbuch* (the *ABGB*, Austrian Civil Code) from 1811 which was adopted after the establishment of the Czechoslovak Republic by the so-called reception rule (Act No 11/11918 Coll. of Laws) into the legal order of the new state. In the Czech lands it was in force until 1 January 1950 when a new Civil Code came into effect (the so-called Middle Code).

⁷ For details, see the key work by *Kubeš, V.*: *Filosofický základ a celková výstavba obecného zákona občanského z roku 1811 a vládního návrhu občanského zákona*. (Philosophical foundations and the overall makeup of the 1811 General Civil Code and the government bill of the new Civil Code)

Vědecká ročenka právnické fakulty Masarykovy univerzity v Brně, XIV. (1936–1937), p. 37 and further.

⁸ For example a comparative study influenced by the liberal atmosphere of the Prague Spring *Másilko, V., Vaněček, S.*: *Určování otcovství v evropských právních řádech*. (Determining fatherhood in European legal orders) Komparatistická studie. Praha: SEVT, 1969, p. 47.

⁹ *Ibid*, p. 76.

¹⁰ *Eliáš, K., Zuklínová, M.*: *Principy a východiska nového kodexu soukromého práva*. (Principles and foundations of the new Code of Private Law) Praha: Linde, 2001. Konsolidovaná verze viz ww.justice.cz dne 1. září 2008. (See a consolidated version form 1 September 2008 on www.justice.cz).

¹¹ In the Czech Republic this conception is based on application of Article 41, Constitution of the Czech Republic, pursuant to which “*The fundamental rights and freedoms are protected by the judicial power*”. A mandatory legal rule results from this provision according to which the fundamental rights and freedoms are protected by the judiciary and there is no possibility for a restrictive interpretation according to which the protection should only be provided by the Constitutional Court. Lawyers commonly speak of *horizontal constitutionality* in this respect.

¹² See for example *Kühn, Z.*: *Budování horizontálního konstitucionalismu: tři středoevropské strategie*. (Building up horizontal constitutionalism: three Middle-European strategies) In *Tichý, L. (ed.)*: *Základní lidská práva v jednotlivých právních odvětvích*. Grundrechte und einzelne Rechtsgebiete. Praha: Univerzita Karlova, 2006, p. 93–104.

¹³ Towards this a key work by *Holländer, P.*: *Ústavněprávní argumentace*. Ohlédnutí po deseti letech Ústavního soudu. (Constitutional law argumentation. A glance back at ten years of the Constitutional Court.) Praha: Linde, 2003.

¹⁴ Towards this, see in particular *Van Bueren, G.*: *Children Rights in Europe*. Strasbourg: Council of Europe 2007.

Further, see papers in proceedings from the conferences organized by the Commission on European Family Law held in Amsterdam in 2006, especially *Forder, C., Saarloos, K.*: *The Establishment of Parenthood: A Story of Successful Convergence?* In *Antokolskaia, M. (ed.)*: *Convergence and Divergence of Family Law in Europe*. Antwerpen – Oxford: Intersentia, 2007, p. 169 ff., and national reports in proceedings from the XVIIth Congress of the International Academy of Comparative law held in Utrecht in 2006 in *Schwenzer, I. (ed.)*: *Tensions Between Legal, Biological and Social Conceptions of Parentage*. Antwerpen – Oxford: Intersentia, 2007.

¹⁵ Cf. *Stalford, H.*: *Concepts of Family Law under EU Law – Lessons from the ECHR*. *Int'l J. L. & Pol'y & Fam.*, 2002, p. 410. *Caracciolo Di Torella, E., Masselot, A.*: *Under Construction: EU Family Law*. *European Law Rev.*, 2004, p. 32; also *Pintens, W.*: *Europeanisation of Family Law*. In: *Boele-Woelki, K. (ed.)*: *Perspectives for the Unification and Harmonisation of Family Law in Europe*. Antwerpen-Oxford-New York: Intersentia 2003, p.3 and further.

Towards this, see especially the collection of proceedings and final evaluations from the international conference held in Amsterdam in 2006 and organized by *Commission on European Family Law (CEFL)*, see *Antokolskaia, M. (ed.)*: *Convergence and Divergence of Family Law in Europe*. Antwerpen-Oxford: Intersentia 2007.

¹⁶ Cf. especially the finding of the Constitutional Court of the Czech Republic from 20 February 2007, File II US 568/06. Further, see diploma theses defended at the Law Faculty, Masaryk University, especially the thesis by *Martin Blažek*

entitled Family law in the decision practice of the Constitutional Court available at www.law.muni.cz, Archives of School-Leaving Works for 2007/2008 (as of 3 June 2008).

¹⁷ Cf. the following papers representing the development in selected countries in which a similarity of trends may be seen.

As for the Netherlands, see *Vlaardingerbroek, P.*: General Trends in Dutch Family Law. The Continuing Influence of Human Rights Conventions upon Dutch Family Law. In *Taekema, S. (ed.)*: Understanding Dutch Law. Den Haag: Boom Juridische uitgevers (BJu), 2004, p. 217 and further; and also *Sumner, I., Forder, C.*: Bumper Issue: All You Ever Wanted to Know about Dutch Family Law (and Were Afraid to Ask). In *Bainham A. (ed.)*: The International Survey of Family Law. 2003 Edition, Jordan Publishing Limited, 2003, p. 263 and further.

As for England and Wales, see *Welstead, M.*: Influence of Human Rights and Cultural Issues. *Ibid.*, p. 143 and further.

As for France, see *Ferré-André, S., Gouttenoire-Cornut, A., Fulchiron, H.*: Work in hand for the Reform of French Family Law. *Ibid.*, p. 163.

As for trends and our topic, see especially *Dethloff, N.*: Improving the Position of Women in German Family Law: The Violence Protection Act of 2002 and Landmark Decisions in Maintenance Law. *Ibid.*, p. 187 and further, and *Dethloff, N., Kroll, K.*: The Constitutional Court as Driver of Reforms in German Family Law. In *Bainham A. (ed.)*: The International Survey of Family Law. 2006 Edition, Jordan Publishing Limited, 2006, p. 217.

¹⁸ Cf. selected passages from *Antokolskaia, M.*: Harmonisation of Family Law in Europe: A Historical Perspective. A tale of two millennia. Antwerpen-Oxford: Intersentia, 2006.

¹⁹ Cf. for example *Králíčková, Z.*: Popírání otcovství a subjektivní přirozená práva dítěte (Denying parenthood and natural rights of children). *Bulletin advokacie*, 2007, No 5, p. 32 and further. Přirozené právo dítěte znát svůj původ a jeho ochrana v českém civilním právu (The natural right of children to know their origin and its protection in Czech civil law). In *Ficová, S. (ed.)*: Ochrana práv maloletých. Univerzita Komenského: Bratislava, 2007, p. 68 and further. For details, see *Hrubá, M.*: Lidskoprávní aspekty procesu sladování biologického a právního rodičovství (Human rights aspects of the process of harmonizing biological and legal parenthoods). *Sborník z konference Dny veřejného práva*. Dostupný v elektronické verzi na www.law.muni.cz (A collection from the conference Days of Public Law. Available at www.law.muni.cz. As of 3 June 2008).

²⁰ Cf. the court decree from 5 November 1788 and another one from 19 February 1820.

²¹ Cf. also *Haderka, J.*: Otázka mateřství a otcovství od účinnosti zákona No 91/1998 Sb. *Právní praxe*, 1998, No 9, p. 530 ff (The question of motherhood and parenthood since the Act No 91/1998 coming into effect).

²² Cf. Sections 27d – 27h, Act No 20/1966, Coll. on care of people's health as amended by Act No 227/2006 Coll. on human embryo and stem cell research and related activities and a change of some related Acts. Towards this in detail, see *Frinta, O.*: Asistovaná reprodukce – nová právní úprava (Assisted reproduction – a new legal regulation). *Právní fórum*, 2007, No 4, p. 123 and further.

²³ Towards this, cf. www.justice.cz from 1 September 2008.

²⁴ Cf. Articles 1 and 2, Constitution of the Federal Republic of Germany, and also Section 1591, German Civil Code, establishing that the mother of a child is a woman giving birth to the child, and Section 256, German Rules of Procedure,

establishing that the child may take steps to find out his/her genetic origin. Cited according to *Kohnen-Trawny, I.*: Postavení rodičů dítěte při osvojení a právo dítěte na znalost svého původu (spojeno s otázkou anonymního porodu) (The position of parents when adopting a child and the child's right to know his/her origin – linked with the issue of anonymous birth). In: *Sborník příspěvků ze semináře „Rodina a práva osobního stavu (statusová)“*. *Správní právo*, 2003, No 5–6, p. 293.

²⁵ See the Act No 422/2004 Coll. changing the Act No 20/1966 Coll. on care of the people's health as amended.

²⁶ Towards this, see *Hrušáková, M., Králíčková, Z.*: Anonymní a utajené mateřství v České republice – utopie nebo realita? (Anonymous and hidden motherhood in the Czech Republic – utopia or reality?) *Právní rozhledy*, 2005, No 2, p. 53 and further.

²⁷ Towards the issue of private bills as one of reasons of the current state of the Czech legislation, see *Zoulik, F.*: Úvaha o naší současné legislativě. Ve službách práva. (Considerations about the current Czech legislation. In the service of the law.) *Sborník příspěvků k 10. výročí založení pobočky nakladatelství C. H. Beck v Praze*. Praha: C. H. Beck, 2003, p. 1 and further.

²⁸ See *Zuklínová, M.*: Několik poznámek k právním otázkám okolo tzv. baby-schránek (A few notes on legal aspects of the so-called baby-boxes). *Právní rozhledy*, 2005, No 7, p. 250 and further. See in particular the conclusions that are not flattering for the Czech Republic and its legislative practice.

As for the operators of the so-called baby-boxes and relevant statistical data, see www.statim.cz from 1 September 2008.

²⁹ As for literature on motherhood, see e.g. *Melicharová, D.*: Určení a popření mateřství, problematika surrogáčního mateřství (Determining and denying motherhood, questions of the surrogate motherhood). *Zdravotnictví a právo*, 2000, No 7 – 8, p. 24 and further, and from among the older works, see *Fiala, J., Steiner, V.*: Teoretické otázky určení mateřství podle československého práva (Theoretical problems of determining motherhood according to the Czechoslovak law). *Právník*, 1970, No 1, p. 33, and *Haderka, J.*: K některým problémům určení (a popření) mateřství (Towards some problems of determining and denying motherhood). *Bulletin advokacie*, 1979, červenec – září, p. 14 and further.

Towards the issue of motherhood, or parenthood in general, cf. the cardinal work by *Radvanová, S.*: Kdo jsou rodiče dítěte – jen zdánlivě jednoduchá otázka (Who are the parents of a child – only a seemingly simple question). *Zdravotnictví a právo*, 1998, No 5, No 6, No 7–8, and *Haderka, J.*: Otázka mateřství a otcovství od účinnosti zákona No 91/1998 Sb (The problem of motherhood and fatherhood since the effectiveness of the Act No 91/1998, Coll.). *Právní praxe*, 1998, No 9, p. 530 and further.

³⁰ See *Králík, M., Svák, J.*: K právní možnosti změnit pravomocné soudní rozhodnutí o určení otcovství (Towards the legal possibility of changing an ordinary court ruling about determining parenthood). *Jurisprudence*, 2007, No 3, p. 51 with references to other works.

³¹ Cf. a number of works by *Jiří Haderka*, an overview in *Hrušáková, M. a kol.*: Zákon o rodině (The Act on Family). *Komentář (Commentary)* 3rd ed., Praha: C. H. Beck, 2005.

³² See the judgment from 25 May 1994, 16/1994/411/ Series A, No 209. A legal sentence could be as follows: An adoption of the child born out of wedlock and against the will of his/her father breaks Article 8, Convention for the Protection of Human Rights and Fundamental Freedoms. See *Haderka, J.*: Případ Keegan versus Irsko (The case of Keegan vs. Ireland). *Právní rozhledy*, 1995, No 8, p. 311 and further.

³³ For example, *Haderka, J.*: Ke vzniku a základním problémům novely zákona o rodině v r. 1998 (Towards the origin and the basic problems of the Amendment to the Act on Family in 1998). *Právní praxe*, 1998, No 5, p. 269 and further.

³⁴ Cf. *Hrušáková, M. a kol.*: Zákon o rodině (Act on Family). op. cit., p. 253.

³⁵ Cf. for example *Haderka, J.*: K některým potížím s druhou domněnkou (Towards some difficulties with the second presumption). *Správní právo*, 1998, p. 327 and further, *Langer, P.*: Právní povaha souhlasného prohlášení rodičů podle § 52 ZOR a právní důsledky jeho vad (Legal nature of the agreeing declaration of the parents pursuant to Section 52 AF and legal consequences of its imperfections). *Právní rozhledy*, 2005, No 18, p. 667 and further.

³⁶ Cf. Act No 227/2006 Coll. on human embryo and stem cell research and related activities and on a change of some related Acts. Towards this in detail see *Hořinová, A.*: Otazníky nad přijetím zákona o výzkumu na lidských embryonálních kmenových buňkách (Questions about the adoption of the act on human embryo and stem cell research). *Právní rozhledy*, 2007, No 3, p. 101 and further.

³⁷ The author identifies with a number of inspiring opinions concerning the issue of paternity in *Pavelková, B., Smyčková, R., Srebalová, M.*: Otcovstvo (Paternity). In: Sborník příspěvků ze semináře „Rodina a práva osobního stavu (statuová)“. *Správní právo*, 2003, 5–6, p. 319 and further, and *Winterová, A.*: Určení otcovství nad rámec zákonných domněnek (Determining fatherhood outside legal presumptions). *Ibid.*, p. 314 and further.

³⁸ Cf. the ruling from 10 October 2006, Complaint No 10699/05 concerning the right to respect to privacy and family life, prohibition of discrimination and the right to peaceful enjoyment of property.

For details, see *Kopalová, M.*: Právo na popření otcovství na základě nově zjištěných biologických dat (The right to deny fatherhood on the basis of newly found biological data). *Právní fórum*, 2007, No 1, appendix, p. 1 and further, *Bálintová, M.*: Možnosť zapretia otcovství v kontexte práva na rešpektovanie súkromného života (The option of denying father-

hood in the context of the right to respect to private life). *Justičná revue*, 2007, No 4, p. 527 and further., *Králík, M., Svák, J.*: K právní možnosti změnit pravomocné soudní rozhodnutí o určení otcovství (Towards the possibility of changing an ordinary court decision about determining fatherhood). *Jurisprudence*, 2007, No 3, p. 46 and further.

³⁹ Cf. *Schwenzer, I., Dimsey, M.*: *Model Family Code. From a Global Perspective*. Antwerpen – Oxford, Intersentia, 2006, and a review of the author in the journal *Právník*, 2007, p. 1142 and further.

⁴⁰ *Model Family Code* deals not only with family law in European countries but also with family law regulations worldwide. The author was looking for inspiration, in her own words, for example in the family law of New Zealand, Australia and Canada. Various solutions may be revolutionary for a number of European experts in Roman Law. According to the author, *Model Family Code* is an important step forward because it goes beyond the *common core of all solutions*, i.e. it attempts to find the *best solution*. In doing so *Model Family Code* strives to overcome various discrepancies in national systems of family law that have evolved in a sort of *patch-work* over years and to create an autonomous and consistent system of family law based on modern solutions – models that could be followed by national lawmakers.

⁴¹ Towards this, see e.g. *Králíčková, Z.*: Evropský kontext vývoje českého rodinného práva po roce 2004 (The European context of the development of the Czech family law after 2004). In *Hurdík, J., Fiala, J., Selucká, M. (eds.)*: *Evropský kontext vývoje českého práva po roce 2004 (The European context of the development of the Czech law after 2004)*. Sborník příspěvků z workshopu konaného na Právnické fakultě MU dne 26. 9. 2006 (Collection of papers from a workshop held at the Faculty of Law, Masaryk University on 26 September 2006). Brno: Masarykova univerzita, 2006, pp. 202–222.

⁴² Towards this, see *Svák, J.*: *Základy európskej ochrany ľudských práv (Foundations of the European protection of human rights)*. Svazek 2. Banská Bystrica: Univerzita Mateja Bela, 2002.