

Czech family law after the Czech Republic has acceded to the European Union

Zdeňka Králíčková*

1. INTRODUCTION

After the Czech Republic has acceded to the European Union, the Czech family law has not changed much. There are more reasons for this. Especially, since May 1st, 2004 until today, a relatively short period of time has elapsed. It is also necessary to mention that major changes in the Czech legal order had already occurred and had to occur immediately after 1989.

The main reason, however, is the temporary non-acceptance of the *Treaty establishing a Constitution*

for Europe, which would have included, among other things, also the clause on *respecting family life* (Article II-67), *the rights of children* (Article II-84), and *family life* (Article II-93), and which would definitely have had, together with the judiciary, direct and indirect influence on the development of domestic legal environments, including the Czech one.

An important cause is also played by the fact that in contemporary European Union, family law plays only a minor, although not negligible, role through the human rights and freedoms, which until now on the organisational level belongs under the institutions of the

* Doc. JUDr. Zdeňka Králíčková, Department of Civil Law Faculty of Law, Masaryk University, Brno

Council of Europe. For the development in the Czech family law until now, the legal and political activities of the Council of Europe is therefore much more significant.¹ This, however, might change exactly by the accepting the proposed *Treaty establishing a Constitution for Europe* that should include – in contrast to the community law up to the present moment – also a human rights catalogue. A different issue lies in the unifying tendencies that are beginning to take shape in the *principles of the European family law*, which could play their role at the beginning, at least when opting for the law with obligations with a foreign element,² just as it is with the principles of the European law on conventions, or with the principles of international trade conventions UNIDROIT.

Until now, the acceptance of the Czech Constitution and of the originally Czech–Slovak Charter of Fundamental Rights and Freedoms and especially of a fair number of human rights conventions was of key importance for the Czech family law. The growing respect towards human rights, international conventions, and to harmonisation and unification tendencies in the sphere of the traditional institutes of the European continental family law have in a positive way influenced and still influence Czech family law and leads to the legally and politically optimistic views as regards the perspectives of its future development.³

When speaking about the individual international conventions significant for Czech family law, which the Czech Republic has acceded recently, we have to name especially the universal *Convention on the Rights of the Child*, the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, *European convention on the Exercise of Children's Rights*, *European Convention on the Legal Status of Children Born out of Wedlock*, *European Convention on Adop-*

tion of Children, the *Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption*, the *Hague Convention on the Civil Aspects of International Child Abduction*, and the *Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*, and the *European Convention on Contact Concerning Children*.

In connection with this, it is therefore also necessary to draw attention to Article 10 of the Constitution of the Czech Republic, which states that the announced international convention, to whose ratification the Parliament had consented and by which the Czech Republic is bound, form a part of the legal order; if the international convention states something different from the law, the international convention is to be used.

The acceptance of the above-mentioned international conventions led to and leads to, among other things, also to the new perception of the Czech family law, its more cultural interpretation and application, and last, but not least, to the growing interest of the Constitutional Court in the conformity of the Czech family law with European human rights standards.⁴

Last, but not least, it is necessary to mention the precedence law of the European Court of Human Rights in Strasbourg, especially in the case of Article 8 of the *Convention on the Protection of Human Rights and Freedoms* (right on respecting private and family life).⁵

The aim of this contribution is neither the criticism of the contemporary state of the Czech family law – nor of the law on family in its original wording of 1963,⁶ nor its non-conceptual, direct or in-

¹ Cf. HADERKA, J. F.: The impact of the Council of Europe norms on the modern family law [in Czech]. *Právní praxe*, 1994, No. 9, p. 507, REQUENA, M.: Activities of the Council of Europe in the area of family law [in Czech]. *Právní praxe* 1999, No. 2/3, p. 132 ff.

² Cf. BOELE-WOELKI, K.: The way to European family law [in Czech]. *Právní praxe*, 1999, No. 2/3, p. 125–126 and further references *ibid.* in remark 39.

³ To the general issues of the evolution of the Czech family law, cf. KRÁLÍČKOVÁ, Z.: Czech family law: the development, current state, and perspectives [in Czech]. *Právní obzor*, 2003, No. 5, p. 487–508.

⁴ Compare judgement of the Constitutional Court No. 72/1994 Coll., in the case of the abolition of § 46 of the Act No. 94/1963 Coll., on family, in its original wording.

Further, compare the judgement of the Constitutional Court No. 476/2004 Coll., in the case of the abolition of § 5 par. 1, last clause, § 8 par. 4, and § 41 par. 2 of the Act No. 109/2002 Coll. on the exercise of special treatment in an institution or protective education in school institution and on preventative educational care in school institutions and on the changes of other laws. These clauses enabled the court to put a child not only into an institution, but also to a “contractual family”, without further specifying the conditions and the definition of the contractual family.

⁵ For general information see BERGER, V.: The judiciary of the European Court of Human Rights [in Czech]. Praha: IFEC 2003, p. 357. On the concrete influence of Strasbourg judiciary on Czech family law, cf. HADERKA, J.: The case Keegan versus Ireland [in Czech]. *Právní rozhledy*, 1995, No. 8, pp. 311–313.

⁶ On the questions of the development and the basis of the communist law, including Czechoslovak law, see the work of RODOLFO SACCÒ: On some issues of the basis of the civil law of the communist countries [in Czech]. *Právník*, 1969, pp. 801 and following, Czech translation by OTTO KUNZ. The author states here that of all the civil law legislation valid in the communist countries, it is the Czechoslovak and the Soviet Union ones that reflect the most conscious deviation from the Roman law patterns. It might be added that it is exactly this fact that significantly inhibits the process of the transformation of the civil law in the Czech republic nowadays.

On this issue further compare the conclusions of JÁN LAZÁR, who states that the Czechoslovak civil law was a markedly totally anomalous and even for the situation before 1989 an inadequate and unsuitable system of the overall arrangement of the property

direct, amendments.⁷ Many words have already been said with respect to this.⁸

It is generally only possible to agree with the opinion that the undesirable state of the frequent legislative changes, especially the changes affecting marriage and family, weakens the stability and certainty of the legal order and in its consequences, it influences the level of law awareness.⁹ The result of the development after 1989 is a bleak provisional situation, which has been named, in the Czech literature in connection with the necessity of re-codification of the Civil Code, "an open-air museum of the Soviet understanding of the law."¹⁰

The aim of the following lines are, after the brief summary of the legislative development in the 1990s or rather the attempts at a major changes within the re-codification of the civil law, especially thoughts *de lege ferenda* on the Czech family law in European context.

2. THE INEVITABILITY OF THE RE-CODIFICATION OF THE CZECH FAMILY LAW WITHIN THE CIVIL CODE

The attempts at re-codification of the Czech family law can be counted with fingers of one hand:¹¹

In the first half of the 1990s, the abolition of the

Family Act and the implementation of the norms concerning family law into the existing Civil Code as its last part were suggested.¹² In connection with this, it has among others been stated in the literature dealing with the re-codification of the private law family relationships that the implantation of the family law into the existing Civil Code would only increase its inconsistency reached by the so-called large amendment of 1991 (compare Act No. 509/1991 Coll.).¹³ As a starting point from the bleak state of the art, the reform of the private law family regulation in two detached phases was recommended: first, the absolutely necessary changes in the existing family law regulation were to be made in the form of an amendment to the Family Act, and later on the coherent modern family law regulation was to be created, which would then be systematically integrated into the new basic private law regulation, i.e. the Civil Code.¹⁴

The first attempt at the re-codification of family law, or its inclusion into the new Civil Code, was more or less rejected by the specialists.¹⁵ Family law was to be included in the seventh part of the Civil Code under preparation.¹⁶

Basic inconsistencies of the Family Act thus began to be removed only in 1998 in connection with the acceptance of the controversial so-called large amendment of this regulation (Act No. 91/1998 Coll.).¹⁷ This amendment significantly affected the regulation of divorce, newly regulated parental responsibility, se-

and personal relationships in the society into five independent codices. See the essay The topical contemplations on the optimal conception of the private law code [in Slovak]. In: OSTRÁ, L. (ED.): A Homage to A. Kanda on his 75th birthday [in Czech]. Plzeň: A. Čeněk 2005, pp. 45-56.

⁷ The so-called large amendment to the Family Act exercised by the Act No. 91/1998 Coll. was preceded by an amendment exercised by the Act No. 234/1992 Coll., which is very limited with respect to its size, but is of key importance from the point of view of content: the possibility to enter a marriage in a church was reinstated into the legal order of the federation (§ 4a-4b of the Family Act), including the relatively problematic retroactivity (cf. § 4c of the Family Act). Further compare the most recent indirect amendment exercised by the Act No. 383/2005 Coll.

As far as the Civil Code amendments significant for the family law are concerned, it is necessary to mention the so-called large amendment exercised by the Act No. 509/1991 Coll., which significantly touched upon the issue of community property of spouses by enabling the so-called modification contracts and by adjusting the common use of a flat by a married couple, when substituting it by the traditional notion of "tenancy". By this, however, the amendment did not fully free the rigidity of the property rights either of a married couple in general, or of the dwelling of the spouses in particular.

⁸ On the problems of the development in the post-communist countries, see materials from the conference held in Prague in 1998, organised by the *International society of family law*, especially the introductory contribution; see HADERKA, J. F.: Basic features of the legal regulation of the family law in the post-totalitarian states of Central and Eastern Europe [in Czech]. *Právní praxe*, 1999, No. 2/3, pp. 71-93. For the general view on the communist family law, compare MLADENOVIC, M., JANJIĆ-KOMAR, M., JESSEL-HOLST, C.: The family in Post-Socialist Countries. In: *International Encyclopaedia of Comparative Law*. Vol. IV, Chap. 10. Tübingen 1998, pp. 3-151.

For the Czech reality, see HADERKA, J. F.: The Czech Republic - New Problems and Old Worries. In: *International Survey of family Law 1994*. The Hague - Boston - London: Martinus Nijhoff Publ., 1996, pp. 181-197. A Half-Hearted Family Law Reform of 1998. In: *International Survey of Family Law*. Bristol: Jordan Publ., 2000, pp. 119-130.

⁹ See ŠVESTKA, J., KOPÁČ, L., KNAPPOVÁ, M., KNAPP, V.: To the topical issue of codification of private family law relations [in Czech]. *Právní rozhledy*, 2005, No. 9, p. 348.

¹⁰ Compare ELIÁŠ, K.: The concept of the new Civil Code [in Czech]. *Právní rádce*, 2001, No. 8, p. 12.

¹¹ I am leaving aside here the activities during the era of Czechoslovakia under the leadership of professors V. KNAPP and K. PLANK.

¹² For details see the critical words by M. HRUŠÁKOVÁ: Several notes on the "family law" amendment of the Civil Code [in Czech]. *Právní praxe*, 1995, No. 6, p. 338 ff., and On the draft of the family law amendment of the Civil Code [in Czech]. *Právní rozhledy*, 1996, No. 2, p. 45 ff.

¹³ It can be fully agreed that the Civil Code of the year 1964 is a creation of legislature that from its very beginning shows low legal standards from the point of view of conception, content, and systematism and that by the amendment exercised by Act No. 509/1991 Coll. it became an inconsistent legal hybrid of two qualitatively different political and economic periods. See ŠVESTKA, J., KOPÁČ, L., KNAPPOVÁ, M., KNAPP, V.: To the topical issue of codification of private family law relations [in Czech]. op. cit. p. 345-346.

cured the protection of ownership interests of the child, again anchored the institute of a guardian, modernised the institute of adoption, improved the regulation of the relationships of alimony, and anchored a new institute of marital property law, which is the community of property of the spouses. The acceptance of the large amendment of the Family Act was shortly afterwards followed by the acceptance of the Social-Legal Protection Act (Act No. 359/1999 Coll.), which, however, has already been amended.¹⁸ By this Act, the institute of foster care was, among others, included into the Family Act and the special Act on Foster care was abolished (Act No. 50/1973 Coll.).

It is possible to say that the above stated partial changes of Czech family law prepared the grounds for a fundamental step – the re-incorporation of family law institutes into the Civil Code as the basic source of private law. The time enabling the realisation of the second detached phase could start – the phase of the private law family regulation reform recommended in specialists' studies for general discussion on the Czech family law *de lege ferenda* in such a way that it was closer to the current legal regulations of European countries.¹⁹

In the spirit of the European tendencies, the work on the re-codification of the Civil Code as the basis

of the private law is currently going on in the Czech Republic. The work should result in a unified, coherent, systematic, clear, complete, and at the same time necessarily open code.²⁰ This direction of development of the Czech family law, defined by the subject matter of the Ministry of Justice (ref. No. 2623/00-L of January 29th 2001), can be characterised as an effort to create European continental civil concept of family law. Family law norms were incorporated into the second part of the paragraphed working version of the re-codified private law code, which, apart from the matters now codified by the Family Act, also includes marital property law, based on the principle of full private autonomy between the spouses, further the rights of marital and family dwelling and other connected property issues,²¹ including the private-law norms against domestic violence.²² The new norm will regulate among others also the registered partnership of the same sex couples.²³

This concept had, has and will certainly have many adherents, but also opponents, both in the issue of returning the family law in the Civil Code at all,²⁴ and in the issue of its inclusion into the system of Civil Code,²⁵ and last, but not least, the content of the individual institutes.²⁶

¹⁴ Op. cit., item V. The suggested concrete solution [in Czech]], p. 347.

¹⁵ On the criticism of the concept compare ELIÁŠ, K.: On some basic aspects of the recodification of Czech private law [in Czech]. Právník, 1997, No. 2, pp. 105 and following and his other works cited here.

¹⁶ Compare the material on the conception of the new Civil Code, Právní rádce, 1996, No. 5–6, p. 353nn.

¹⁷ On Act No. 91/1998 Coll. see ZUKLÍNOVÁ, M.: What is new in the Family Act [in Czech]. Právní praxe, 1998, No. 5, p. 258, and HADERKA, J.: On the origin and basic problems of the Family Act amendment of 1998. *ibid.*, p. 269.

¹⁸ In connection with this, we should also draw attention to the Act No. 218/2003 Coll., on the responsibility of youths for acts violating the law and on the judiciary of the youth. For this compare ŠÁMAL, P., VÁLKOVÁ, H., SOTOLÁŘ, A., HRUŠÁKOVÁ, M.: The law on the judiciary of the youth [in Czech]. Praha: C.H. Beck 2004.

¹⁹ See ŠVESTKA, J., KOPÁČ, L., KNAPPOVÁ, M., KNAPP, V.: To the topical issue of codification of private family law relations [in Czech]. *op. cit.*, pp. 345–346.

²⁰ Compare ŠVESTKA, J., ZOULÍK, F., KNAPPOVÁ, M., MIKEŠ, J.: On the development and the contemporary state of re-codification of the Czech civil law [in Czech]. In: The issues of re-codification of private law [in Czech]. Acta Universitatis Carolinae, Iuridica, 2003, No. 2/3, p. 39.

²¹ On the subject matter of the law compare ELIÁŠ, K., ZUKLÍNOVÁ, M.: Principles and starting points of the new private law code [in Czech]. Praha: Linde 2001. On the significance of the work compare the review by I. TELEČ in the journal Právník, 2002, No. 8, pp. 906 and following. For German review see Rabels Zeitschrift, 2004, No. 4, pp. 191–221.

²² On the necessity to anchor not only the penal norms against the domestic violence, but also the civil law regulations see KRÁLÍČKOVÁ, Z.: Civil law aspects of domestic violence DE LEGE FERENDA [in Czech]. Bulletin advokacie, 2003, No. 8, pp. 84 and following.

²³ On this issue see ZUKLÍNOVÁ, M.: Question marks on other (i.e. non-marital) co-habitation from the point of view of family law [in Czech]. Právní rozhledy, 1999, No. 6.

²⁴ When rejecting the solitary different opinions, resulting mainly from force of habit, we could agree with the words that “wilful adherents of the de-codification of private law can bring to life the already dead idea of an independent code of marital and family law” and that “the disintegration of the legislature and the disorientation of the public, including the specialists” can, according to these adherents, be prevented by creating “a series of codes, with the Civil Code leading, and build a dike to the legislative tornado, stabilise the legal order, bring legal certainty and renew the trust in the law and in the institutions of legal protection, beginning with courts of justice.” See GERLOCH, A.: Several notes to the re-codification of private law [in Czech]. In: The issues of re-codification of private law [in Czech]. Acta Universitatis Carolinae, Iuridica, 2003, No. 1/2, p. 29.

²⁵ To the reservations on the systematic inclusion of the regulation of the private (both personal and proprietary) family legal relationships into the Civil Code see the study ŠVESTKA, J., ZOULÍK, F., KNAPPOVÁ, M., MIKEŠ, J.: On the development and the current state of re-codification ... [in Czech]. *Op. cit.*, p. 61.

On the defence of the overall concept compare the work of ZUKLÍNOVÁ, M.: The future Civil Code and the family law (several contemplations *de lege ferenda*) [in Czech]. In: The issues of re-codification of private law. Acta Universitatis Carolinae, Iuridica, 2003, No. 1/2, p. 141–154.

We can only add one aspect to the issue: conceptual inclusion (returning) of the family law norms into the Civil Code is correct. It namely draws upon the status rights of people, or persons in the legal sense of the word in general. This is not changed even by the fact that in family law, a significant role is played by mandatory legal norms, as this is a phenomenon characteristic for status rights, without leaving anyone in a reasonable doubt about a private character of such rights. Also the high level of mandatory nature does not make this part of private law public.

An indubitable positive aspect of the big codes is exactly their stability.²⁷ In democratic conditions it is not easy to change them *ad hoc*, according to the topical particular interests.

In connection with the supposed system and quality changes of the family law within the framework of re-codification of the Civil Code it is necessary to mention the legislative initiative that rippled the still waters of Czech family law.

On June 6th 2004, that is after the Czech Republic acceded to the European Union, the controversial act on the so-called secret childbirths was accepted on the basis of the proposal of a group of members of Parliament (compare Act No. 422/2004 Coll., by which the following acts are changed: Act No. 20/1966 Coll. on the care of the health of people with its more recent amendments; Act No. 301/2000 Coll. on the registers, names and surname and on the change of some related acts with their amendments, and Act No. 48/1997 Coll. on public health insurance with its amendments, further only the cited Act).²⁸

As was already said, the new Act is a work of the members of Parliament, and therefore it was not

discussed by specialists.²⁹ From the explanatory note to the cited Act, the effort to create conditions for diminishing the number of abortions, preventing the murders of the newborn babies by their mothers, and lowering the number of cases when the mothers abandon their children is apparent.³⁰ In this issue, we encounter two opposing interest. The interest of the mother often lies in keeping the pregnancy, childbirth, and identity secret. The interest of the child is, however, the right to live, know his or her descent and live in the care of his or her mother and father. Saving human life is certainly a priority issue, but we cannot forget that apart from the right to live, there are also other fundamental human rights that need to be respected.³¹ The given issue cannot be trivialized and legislatively fast, briefly, and simply regulated by an institute of an "artificial foundling". We can fully agree with the opinion that the results of an effort to find an original solution at all costs can even be worse than unprofessional approach.³²

It is alarming that such a serious interference into the status rights that have their basis in the private law was done by amendments of the norms of public law, without consequent analysis of legal consequences of such a change and also without the amendment of the Family Act. The cited Act namely did not change the Family Act that regulates the establishing of motherhood in the following diction: *The mother of the child is the woman who gave birth to it* (compare the clause § 50a of the Family Act). The regulation is mandatory and quite explicit: *motherhood is based on the objective legal fact – the childbirth*.³³

A significant consequence of the new legal regulation on the possibility of childbirth with keeping

²⁶ To the partial problems of marital propriety law *de lege ferenda* see KRÁLÍČKOVÁ, Z.: Contemplation on the re-codification of the Czech family law [in Czech]. In: Proceedings Homage to M. Knappová. Praha: ASPI, 2005, pp. 225-243.

²⁷ Compare ZIMMERMANN, R.: Re-codification of private law in the Czech Republic [in Czech]. *Evropské a mezinárodní právo*, 1996, No. 5, p. 3: "From the codification we expect that it will last", p. 7: "... the codification can stand against the storms, if its clauses are sufficiently abstract and flexible and enable the judges and authors of legal texts influence the necessary adjustments".

²⁸ On the fierce critical comments see HRUŠÁKOVÁ, M., KRÁLÍČKOVÁ, Z.: Anonymous and secret motherhood in the Czech Republic – a utopia, or reality? [in Czech]. *Právní rozhledy*, 2005, No. 2, p. 53nn. S. RADVANOVÁ and M. ZUKLÍNOVÁ from the Faculty of Law of the Charles University have expressed strong agreement with the conclusions presented in the contribution.

²⁹ On the problems connected with proposals prepared by the members of Parliament as on of the causes of the contemporary state of the Czech legislature, see the study of ZOULÍK, F.: Essay on our contemporary legislature [in Czech]. In: In the service of the law. Collection of contribution to the 10th anniversary of the foundation of the C. H. Beck branch in Prague [in Czech]. Praha: C. H. Beck, 2003, p. 1ff.

³⁰ On this issue see SEVEROVÁ, I.: Mothers that give up their children [in Czech]. *Náhradní rodinná péče*, 2000, No. 1, pp. 38-41.

³¹ See HERMANOVÁ, M.: Legal aspects of the problems with abandoning a child anonymously [in Czech]. *Justiční praxe*, 2002, No. 6, p. 391.

³² See ZOULÍK, F.: Essay on our contemporary legislature [in Czech]. *Op. cit.*, p. 14.

³³ On this issue, see HRUŠÁKOVÁ, M. ET AL.: *The Family Act. A Commentary* [in Czech]. 3rd revised edition. Praha: C. H. Beck, 2005, pp. 181 and the following.

From the sources devoted to motherhood see further e.g. MELICHAROVÁ, D.: Determination and denial of motherhood, the issue of surrogate motherhood [in Czech]. *Zdravotnictví a právo*, 2000, No. 7-8, pp. 24 and following, from older works see FIALA, J., STEINER, V.: Theoretical aspects of the determination of motherhood according to the Czechoslovak law [in Czech]. *Právník*, 1970, No. 1, p. 33, and HADERKA, J.: On some issues of determination (and denial) of motherhood [in Czech]. *Bulletin advokacie*, 1979, July-September, pp. 14 and foll.

On the issue of motherhood, or more generally parenthood, compare the essential work by RADVANOVÁ, S.: Who the parents of a child are – only seemingly simple question [in Czech]. *Zdravotnictví a právo*, 1998, No. 5, No. 6, No. 7-8, further HADERKA, J.: The issue of motherhood and fatherhood since Act No. 91/1998 Coll. became effective [in Czech]. *Právní praxe*, 1998, No. 9, pp. 530 and following.

the identity of the mother secret in the administrative regulations is the interference with the concept of status rights in the Czech Republic, a concept based on natural legal basis of the Austrian general Civil Code (ABGB, 1811). Some foreign legal regulations following the French Code Civil (CC, 1804) rely on the concept that motherhood is based not only on the fact of giving birth, but also on the recognition of motherhood by the woman who has given birth to the child (still France, Italy). In such a way, child-birth without stating the identity of the mother in the child's document is possible. However, these regulations were accepted in social and economic conditions diametrically different from the situation in the contemporary Czech Republic.³⁴ Many countries are nowadays trying to amend the laws accepted in turbulent times.³⁵

The cited Act stimulates many questions and throws the legal order of the Czech Republic back by many years – not to the years of building communism, but much further.³⁶ This partial problem of Czech legislature documents the state of the Czech society, which is able to tolerate the suppression of the rights of children and is closing the eyes before the advocating of particular interests at all costs.³⁷ In this issue, we can only rely on the Constitutional Court and its so-called negative creation of the norms as a safety catch of the constitutionality.³⁸

3. SEARCHING FOR THE EUROPEAN STANDARDS – ON THE MARGIN OF THE HARMONISATION AND UNIFICATION OF THE EUROPEAN FAMILY LAW

In the explanatory note to the Proposal of the Civil Code it is stated several times that the Czech family law is a result of the overall Sovietisation and that one of the major programme objectives of the proposed code is the discontinuity with the communist Civil Codes of 1950 and 1964 and that it is necessary to give the Czech Civil Code a function of a “systematically integrating focus” of the legal order, as it is common in standard legal orders of the continental Europe type. We may fully agree with this. We can also fully agree with the general statement saying, “Czech private law must come closer to European standards”.³⁹ However, what are the European standards, when family law is concerned? There is no simple answer to this very simple question.

It is commonly known that family law in each country is based on the tradition, culture, religion and that it reflects the society of that country. In Europe, there exist different kinds of family law: family law influenced by the French *Code Civil*, family law of the German speaking countries, very similar family law of the Nordic countries, family law of the countries pre-

³⁴ On the arguments in favour of and against the anonymous and secret childbirths see FLÍDROVÁ, A.: An anonymous childbirth? [in Czech]. *Jurisprudence*, 2004, No. 4, p. 10ff. The author further states that in Germany, the law regulating anonymous childbirths was rejected in May 2002.

³⁵ On the situation in other European countries see HUBÁLKOVÁ, E.: Anonymous childbirths from the point of view of Article 8 of the European convention on human rights [in Czech]. In: *Proceedings from a conference Family and the law of personal status (status law)* [in Czech]. *Správní právo*, 2003, No. 5–6, p. 283. The author among other things states that the Spanish Supreme Court has recently decided, because of the discrepancy with the constitution, on the abolishment of Article 47 of the Register Act that made the entry “mother unknown” in the register possible.

³⁶ On the history, the contemporary state and unfortunately also the future of the boxes for abandoned children see ZUKLÍNOVÁ, M.: Several notes on the legal questions on the so-called baby-boxes [in Czech]. *Právní rozhledy*, 2005, No. 7, pp. 250 and following. Compare further especially the conclusion, not very complimenting to the Czech Republic and its legislative practice.

³⁷ The gravity of the problem is underlined a.o. by the significant initiative of the Health Ministry in the form of the Methodical directive No. 9487/05/OZP/3 in the gazette of the Health Ministry No. 6/2005, effective from June 1st 2005, which emphasises that the law imposes on the health facilities the obligation to inform the bodies of social and legal protection of children about the fact that the mother abandoned her child after the birth and that substitute family care is mediated by the state and its bodies (Article 5). Compare also the activities of the Ministry of Work and Social Affairs. Further see KRÁLÍČKOVÁ, Z.: The case of the so-called legally free child [in Czech]. *Právní rozhledy*, 2004, No. 2, pp. 52 and following.

³⁸ See Footnote 4.

³⁹ See the explanatory note, I. general part, pp. 1 and following, and the partial explanatory notes to the individual clauses of the Second Part – Family law, pp. 92 and following of the Draft for the Civil Code. Part One to Four. Draft of the working committee. Praha: Ministry of Justice, without reference, without year (spring 2005) [in Czech]. [Main compilers: K. ELIÁŠ and M. ZUKLÍNOVÁ] (in further footnotes referred to only as the “Draft”).

⁴⁰ Compare JEMOLO, A. C.: *La Famiglia e il Diritto*. *Annali della Facoltà Juridica della Università di Catania II*, 1948.

viously under Soviet influence, etc. In Italian sources, the quotation of the important Italian family law specialist is often paraphrased, that "family is a rocky island which the family law can only wash with its waves".⁴⁰ Also the renowned Czech family law author *Jiří Haderka* developed some thoughts on the limits of the family law.⁴¹ It is certain that anywhere in the world, family law cannot be changed, so to speak, over night and at all costs, and even less so by experimental institutes.

However, for the legislature in many European countries, the essential changes in the relationships of the family and the society, especially after the 2nd World War and mainly in the 1970s and 1980s, signified the necessity to look for common paths. The emphasis on the protection of human rights, on the advocating of full equality of men and women in the society, marriage, and family, equal rights for children born out of wedlock with the so-called legitimate children, globalisation, migration, new problems in life, assertion of the principle of private autonomy, as well as its limits, were and are discussed for a long time especially in connection with the need to transform family law⁴² and following the ideas on the need of harmonisation and unification of the law of the EU members and the ideas of European family law.⁴³

The first step towards European family law is considered to be the activity of the academics and the comparative analysis, which should lead to the understanding of the differences and similarities contained in the legislature of the member states and towards the comparative synthesis.⁴⁴ The results of jurisprudence

should be formulated into the *Principles of European family law* and should serve as inspiration for the domestic and international legislators or as an alternative or supporting law. First areas of research are the propriety law aspects of marriage and divorce, propriety law aspects of co-habitation outside marriage, the rights of the minors, and the protection of minors.⁴⁵ For this purpose, the *Commission on European Family Law (CEFL)* was created, whose aim is to reach the truly European identity.⁴⁶

The Czech Republic does not stand aside the harmonisation and unification tendencies of the family law. The Czech society and Czech family have also changed and are still changing.⁴⁷ As was already said above, Czech legal order undergoes radical changes. As far as Czech family law is concerned, many positive steps were taken especially thanks to the above-cited conventions, especially the Council of Europe ones. However, the Czech law is still awaiting the essential steps.⁴⁸

It is not only the fact that *lex scripta*, the law is paying tribute to the time in which it has originated and that it is marked by non-conceptual and often chaotic amendments, but especially the interpretation and application that should have already been performed within the framework of the principles on which the Civil Code is to be built.⁴⁹ Family law as a whole is to be regarded as a value that must be protected and developed. The proposal of the new Civil Code gives the family law a dignified place – the second part. As far as the content is concerned, we may at a glance see that the creators aimed at a comprehensive and syste-

⁴¹ See HADERKA, J.: LIMITS OF THE POSSIBILITIES OF THE LAW IN REGULATING FAMILY RELATIONSHIPS [in Czech]. Speech before the Lower House of the Czech Parliament. *Právní praxe*, 1995, No. 6, pp. 330 and following.

⁴² The opinion that full transformation of family law was not reached anywhere in the world thanks to the "strength of traditional institutions" and with the scepticism as regards the European family law can be found in CHLOROS, A. G.: The reform of family law in Europe. Deventer – Holland, Boston – London – Frankfurt: Kluwer 1978; especially in the Foreword, p. vii.

⁴³ From the rich foreign sources, compare MARTINY, D.: Europäisches Familienrecht – Utopie oder Notwendigkeit? *Rabels Zeitschrift*, 1995, No. 3–4, pp. 419 and following, MARTINY, D.: Is Unification of Family Law Feasible or Even Desirable? In: HARTKAMP, A. ET AL. (EDS.): Towards a European Civil Code. 2nd edition. The Hague, London, Boston: Kluwer Law Int. 1998, pp. 151 and following, ANTOKOLSKAIA, M.: The Harmonisation of Family Law: Old and New Dilemmas. *European Review of Private Law*, 2003, No. 1, pp. 28 and following, JEPPESEN, CH., SUMMER, I.: Perspectives for the Unification and Harmonisation of Family Law in Europe. *European Review of Private Law*, 2003, No. 2, pp. 269 and following, PINTENS, W.: Grungedanken und Perspektiven einer Europäisierung des Familien- und Erbrechts. *Zeitschrift für das Gesamte Familienrecht*. 2003, Teil 1: pp. 331 and following, Teil 2: pp. 417 and following, Teil 3: pp. 499 and following.

In Czech see the study BOELE-WOELKI, K.: The path to European family law [in Czech]. *Op. cit.*, pp. 119 and foll.

⁴⁴ See the study BOELE-WOELKI, K.: The path to European family law [in Czech]. *Op. cit.*, pp. 120–123 with reference to the relatively extensive list of sources cited there.

⁴⁵ *Ibid.*, p. 126.

⁴⁶ For details see <http://www.law.uu.nl/priv/cefl> of September 12th 2005.

⁴⁷ On this issue see RADVANOVÁ, S.: The state of the Czech family and the family law in contemporary era [in Czech]. *Právní praxe*, 1999, No. 2–3, pp. 94–102, Portrait of a family (on the background of the legal order) [in Czech]. *Zdravotnictví a právo*, 2004, No. 2, pp. 15–22 and other publications by the same author.

⁴⁸ On this compare KRÁLÍČKOVÁ, Z.: Harmonisation and unification of European family law [in Czech]. *Právo a rodina*, 2003, No. 3, pp. 1 and following, Czech family law on the way to the traditional institutes (on the margin of the harmonisation and unification) [in Czech]. In: BLAHO, P., ŠVIDROŇ, J. (EDS.): *Kodifikácia, europeizácia a harmonizácia súkromného práva*. Proceedings of a conference VIII. Lubyho dni. Bratislava: Iura Edition 2005, pp. 415 and following.

⁴⁹ The necessity to anticipate the interpretation was mentioned also by Prof. TYMEN J. VAN DER PLOEG in his contribution in connection with the re-codification process of the Dutch civil law. See his contribution Pro's and Contra's of the New Civil Code. In: HURDÍK, J., FIALA, J. (EDS.): *Východiska a trendy vývoje českého práva po vstupu České republiky do Evropské unie*. Proceedings of a conference held in Brno on October 5th 2005. Brno: Acta Universitatis Brunensis, Iuridica, No. 294, Masarykova universita 2005.

mic attitude. There can be reservations to individual parts, the whole, however, fully respects and develops the values stated below.

It is not the aim of this contribution – and with regard to the limited space, it cannot be – to provide a detailed analysis of the special institutes of the Czech family law included in the prepared Civil Code.

However, in general it can be said that the European standards, to which we should hold while performing the reform, undoubtedly include the following principles:

- a) indivisible and general values of human dignity, freedom, equality, and solidarity,⁵⁰
- b) respect to the family life of a person, regardless of which form they opt for,⁵¹ including the so-called single-style,
- c) autonomy of will of an individual and its free application in all matters where there is no reason to limit it, either in the form of *ius cogens* or *legal* institutes in the case of status laws,⁵² or other limitations caused by the natural assertion of the principle of solidarity in marriage and family and the unhurried assertion of the principle of the protection of the weaker one⁵³ – the so-called economically weaker of the partners,⁵⁴
- d) separation of any kind of co-habitation by consent as a comprehensive and final solution of personal and propriety matters between the partners,⁵⁵ with suitably drafted “hardship” clause,⁵⁶
- e) the best interest of the child, including the right to know the parents and live with them (*joint custody*) and other relatives in a common dwelling in joint custody, the right to the regular contact with both parents, the right to substitute care secured by the state – however always as a subsidiary to the care provided by the family and looked upon as the service to the child,⁵⁷
- f) participation rights of the child,⁵⁸
- g) propriety interests of the child, the right to the same standard of living as the parents,⁵⁹
- h) solidarity in the propriety law of the spouses,⁶⁰ in the law of marital and family dwelling,⁶¹ and in the case of alimony between the spouses as well as divorced spouses,⁶²
- i) effective civil-law protection against domestic violence,⁶³
- j) alternate forms of solution to the marital and family conflicts or arguments (mediation).⁶⁴

⁵⁰ See the *Treaty establishing a Constitution for Europe*, part II Charter of Basic Rights of the Union. Preamble. From Italian sources devoted to the Treaty establishing a Constitution for Europe, human rights, and family law compare RESCIGNO, P.: *Convenzione Europea dei diritti dell'uomo e diritto privato (famiglia, proprietà, lavoro)*. Rivista di diritto civile, 2002, pp. 325 and following, VETTORI, G.: *Carta Europea e diritti dei privati (diritti e doveri nel nuovo sistema delle fonti)*. Ibid., p. 669, ZENO-ZENCOVICH, V.: *Le basi costituzionali di un diritto privato europeo*. Europa e Diritto Privato, 2003, pp. 19 and following., VACCA, L.: *Cultura giuridica e armonizzazione del diritto europeo*. Europa e Diritto Privato, 2004, pp. 53 and following.

⁵¹ Compare the regulation of the marital status in clause in § 528 and following of the draft and the institute *Registered partnership* anchored in § 836–854 of the draft.

⁵² For details see KRÁLÍČKOVÁ, Z.: *Autonomy of will in the family law in Czech–Italian comparison [in Czech]*. Brno: Masarykova univerzita, 2003.

⁵³ On this see ZOULÍK, F.: *Private-law protection of the weaker party of a contract [in Czech]*. Právní rozhledy, 2002, No. 3, pp. 109 and following.

⁵⁴ Compare e.g. the limits of the autonomy of will to the advantage of the ability of the husband to provide for the family anchored in § 586 par. 1 of the draft.

⁵⁵ Compare the right of the spouses to file a common motion on divorce and arrange the proprietary matters, dwelling, alimony for the time of the divorce, if applicable, by a contract, anchored in § 624 of the draft.

⁵⁶ See the clause of § 622 par. 2 of the draft, regulating the cases when the marriage cannot be divorced.

⁵⁷ Compare the legal regulation of motherhood and fatherhood in the clauses of § 643 to 663 of the draft. Further compare the new concept of the adoption of a minor child anchored in the clauses of § 664 to 719 of the draft, especially the thorough regulation of the consent of the parents in § 680 and following of the draft.

⁵⁸ See especially § 746 par 1 of the draft and § 100 par. 3 of the civil procedure code.

For published sources, see HRUŠÁKOVÁ, M.: *The child, the family, and the state. Essays on the legal position of a child [in Czech]*. Brno: Masarykova univerzita, 1993.

⁵⁹ Compare the relatively extensive institute *Care of the child's property* anchored in § 766 and following of the draft and *Alimony obligations* regulated in § 871 and following of the draft.

⁶⁰ See the institute of *Usual equipment of the common dwelling* regulated in § 571 of the draft and the rules for dealing with exclusive property in the regime of separated property of the spouses in § 592 of the same draft. Compare the limits of the autonomy of will to the advantage of the ability of the husband to provide for the family anchored in § 586 par. 1 of the draft.

⁶¹ See *Some clauses on the dwelling of spouses* anchored in § 609 and following of the draft, namely the institute of the *right to dwelling* and a number of limitations of the rights of the exclusive owner, or the tenant of the dwelling, e.g. 613 and following of the draft.

⁶² See the institute of *Alimony of the divorced spouses* in § 627 and following of the draft.

⁶³ See the relatively comprehensive protection in the form of *Special clauses against domestic violence* anchored in § 617–619 of the draft.

4. CONCLUSION

In spite of the above-mentioned problems with searching for European standards, the Czech family law *de lege ferenda* moves towards the traditional family law institutes included in the Civil Code as the basis of the private law. The new regulation of the family relationship will namely be very similar in its concept to the large codices of private law, i.e. also the Austrian general Civil Code (ABGB), which is the basis of civil jurisprudence⁶⁵ and whose institutes are still in the minds of wide public of both specialists and laymen. We can agree with the opinion that the new private law code should include, as a principle, all the private law matters, i.e. also family law in such a way that is usual in countries with comparable legal environment, with the reference to the necessity of unity of private law.⁶⁶

As was already said with reference to the explana-

tory note on the Proposal of Civil Code, the creators' effort aiming at discontinuity with the communist law and the aim to create a code comparable with European cultural convention is perceivable at first glance. As far as the future Czech family law incorporated into the Civil Code is concerned, it must in essence be a spiral-like return into the civilized bosom of the propriety law. Family law must be comprehensive – from the legal regulation of status matters in marriage and family, including the registered partnership, it must also regulate propriety relationships including the marital and family dwelling, and must contain clauses against domestic violence. The individual traditional institutes must be enriched with such elements that will contribute to the development of a person and the cohesiveness and solidarity in the family. The proposal of the Civil Code, on which the general discussion has been going on now, is a work that fully accepts these essential values.

⁶⁴ Compare especially the new concept of the institute of *Decision taking on the family affairs* anchored in § 565 of the draft and the explanatory note to it, in which it says: "The court should ... lead the spouses to agreement, if necessary, even by using a mediator (intermediary in family matters)" and the institute of *Exercise of the parental duties and rights after divorce* in § 778 of the draft, which says: "When deciding on entrusting child to care, the court will always recommend the parents the help of an intermediary in family matters", including the explanatory note to it.

⁶⁵ Compare ELIÁŠ, K.: Nobility of the civil law tradition and the post-modern approaches to civil law [in Czech]. *Právní rozhledy*, 2003, No. 8, p. 413, and ELIÁŠ, K.: The Civil Code and the Czech legal culture [in Czech]. In: GERLOCH, A., MARŠÁLEK, P. (EDS.): *The Act in the Continental law* [in Czech]. Proceedings of an international conference "The place and the role of law in the continental culture: tradition, present, and developing tendencies." Praha: Eurolex Bohemia, 2005, pp. 213 and following, and ELIÁŠ, K.: Theoretical questions of the reform of the private law (and its practical problems) [in Czech]. In: ELIÁŠ, K. (ED.): *Soukromé právo v pohybu*. Plzeň: A. Čeněk, 2005, pp. 54 and following.

⁶⁶ For the theoretic questions and legal theory starting points compare the study ZUKLÍNOVÁ, M.: The future Civil Code and the family law. In: *The issues of re-codification of private law* [in Czech]. *Acta Universitatis Carolinae, Iuridica*, 2003, No. 1/2, pp. 141 and following.