

## PARENTHOOD AND HOMOSEXUALITY WITHIN THE CONTEXT OF ASSISTED REPRODUCTION – ARE WE READY FOR HOMOPARENTAL FAMILIES?<sup>1</sup>

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**Abstract:** *The article considers the issue of how the Czech legal order deals with homosexual couples and homo-parental families. The authors predominantly focus on the subject of assisted reproduction. Using the example of the legal order of United Kingdom, where the legal regulation provides the possibility to undergo assisted reproduction to nearly anybody, the authors analyse the Czech legal order and the changes introduced by the New Civil Code.*

**Keywords:** *human rights, family law, homoparental families, homosexuality, assisted reproduction, right to have children*

### INTRODUCTION

The legal regulation of family relations with regard to homosexual couples is extremely fragile. Within the framework of the legislation, there are conflicts between various opinions – liberal, modern ones versus those expressed by conservatives. These opinions are also formed by the political situation, interests of various economic or religious groups and cultural traditions. One of the arguments used in the debate is that strengthening unlimited freedom might lead to denial of indispensable obligations and ethical principles. The healthy development of mankind is generally thought to be contingent on maintaining ethical principles, however, it should not be forgotten that the notion of what is *ethical* can vary. The ethical approaches of professionals such as doctors, lawyers, sociologists, psychologists, philosophers and those representing religions often come into conflict. And above all, the most noticeable differences in ethical issues are caused by cultural variance. This divergence of opinions, enhanced by various cultural and legal traditions in the world, results in disparate legal norms regulating family matters concerning homosexual couples.

Since the “Velvet Revolution”, the Czech Republic has been facing a lack of legal continuity. Numerous legal acts created during the pre-revolutionary era have stayed in force long after the revolution and some provisions have remained practically unchanged, even though they were not consistent with the values of the post-communist society.<sup>2</sup> A solution to harmonise the values and positive law could be adoption of foreign models. However,

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<sup>2</sup> One example of such a statute could be the Family Act, Act No 93/1964, which was revoked by the New Civil Code.

such adoption should be done only after a detailed evaluation regarding the applicability of the particular institution in the Czech legal environment. Stability of the legal order and protection of acquired rights should always be a criterion before adopting an institution from a different legal order. The Czech New Civil Code adopted in 2012 was an attempt to integrate Western European values<sup>3</sup> into Czech private law. Nonetheless, the section on family law, including marriage and relations within the family, seems to be - with regard to homosexuals and homosexual couples - surprisingly outdated.

At present time, tendencies of emphasising human rights deriving from European legal culture can be strongly identified in the Czech Republic. This is closely connected with the conception of basic human rights and freedoms in the way they are formulated in the fundamental rules of the European Union and in the European Convention on Human Rights interpreted by the European Court of Human Rights (hereinafter referred to as “ECHR”). The right to have children could be derived from the right to private and family life<sup>4</sup> and right to establish a family. According to Wicks *“Article 8(2) imposes a negative obligation upon the state not to interfere with the right (subject to limitations just mentioned) but in addition Article 8(1) has been interpreted as imposing a positive obligation upon the state by virtue of the requirement of respect for private life. This may be of significance in the context of arguments that the state should positively assist (by the means of facilities and funding) rather than merely not interfere with reproduction. So, the ECHR, and thus the Human Rights Act, provides potential for the development of a strong right to reproduce in the terms of Articles 8, 12 and 14.”*<sup>5</sup>

The question is whether the right to have children should be considered as a person’s positive right, which is guaranteed by the state. The catalogue of human rights is indisputably expanding and its limits are changing along with the changes in society. In the Czech Republic, the right to have children is not mentioned in constitutional law or in any other act. It follows that if the right to have children exists, it should be considered a negative right, as there is no obligation of the state to guarantee its realisation. The difference in concept of the right to have children as a positive or negative right is essential for access to assisted reproduction treatment (hereinafter referred to as “ART”) and, subsequently, to determine the recipients of such medical care.

The concept of the right to have children and its realisation varies from state to state, with regard to its legal culture and social, historical and religious background. The aim of this paper is to analyse the legal regulation of ART, which constitutes a manifestation of the right to have children, in the Czech Republic and its impact on possible discrimination based on sexual orientation. ART under the Czech Law is reserved for heterosexual couples, which might - in the authors’ view – constitute discrimination based on sexual orientation. The authors have decided to mention the United Kingdom’s legal approach to ART to show readers how ART is regulated in a country with a rich legal tradition and long legal continuity, and above all, that provides wide possibilities for ART regardless of sexual

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<sup>3</sup> Preamble to the New Civil Code, Act No. 89/2012, Olomouc: ANAG, 2012, p 17. Available from: <[http://www.anag.cz/files/file/duvodova\\_obcz.pdf](http://www.anag.cz/files/file/duvodova_obcz.pdf)>.

<sup>4</sup> As follows from the judicature of the ECHR, see for example *Dickson v UK* (App. No. 44362/04).

<sup>5</sup> WICKS, E. *Human Rights and Healthcare*. Portland, Or.: Hart Pub., 2007, p. 163.

orientation of the recipient and which could constitute an example framework for the Czech legislators in the future.<sup>6</sup>

Before analysing the legal sources and regulation of ART in the Czech Republic, the legal regulation of the United Kingdom will be described in detail and ART alternatives will be presented with references to relevant law in force.

The general society's perception of both issues - techniques of ART and discrimination on the grounds of sexual orientation - have been changing relatively recently. At the beginning of the paper, a brief historical overview will be mentioned.

### From Bible to Louise Brown

There are several accounts of surrogate motherhood in the Bible, for example: Genesis 30:1-6

When Rachel saw that she was not bearing Jacob any children, she became jealous of her sister. So she said to Jacob, "Give me children, or I'll die!" Jacob became angry with her and said, "Am I in the place of God, who has kept you from having children?" Then she said, "Here is Bilhah, my servant. Sleep with her so that she can bear children for me and I too can build a family through her." So she gave him her servant Bilhah as a wife. Jacob slept with her, and she became pregnant and bore him a son. Then Rachel said, "God has vindicated me; he has listened to my plea and given me a son." Because of this she named him Dan.<sup>7</sup>

This account constitutes proof of the fact that what we presently call surrogate motherhood has existed in human awareness for thousands of years and so conceiving a child through surrogacy cannot be considered a novelty of the last few decades.<sup>8</sup> However, in order to reach the status of general acceptance of non-biological families, society needed to undergo significant development. It could be argued that society has accepted more easily those ART techniques, where the social parents were at the same time the biological parents, and in that regard the gamete donation is a far more controversial topic in many states than the ART itself.

The origins of artificial insemination research go back to the end of the 19<sup>th</sup> century when the transplantation of a rabbit embryo was performed for the first time at Cambridge University. In 1934 Gregory Pincus created the rabbit embryo by mixing male and female gametocytes on a watch glass and then he transferred the embryo into the surrogate rabbit female. Nonetheless, the method of artificial insemination was only reproduced two decades later, in 1959, by Chinese-American scientist Min Chueh Chang, who successfully transferred an embryo from gametocytes of black rabbits into a female white rabbit, which subsequently gave birth to black kittens.<sup>9</sup> The first artificial insemination of a human being

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<sup>6</sup> The authors took into account that the United Kingdom legal order belongs to Common Law system and they believe that right to have children and access to ART is a matter of human rights, the definition of which primarily depends on the sociocultural context of a state and the interpretation they have acquired in the international context.

<sup>7</sup> Translation was adopted from BibleStudyTools.com. New International Version. Genesis 30 [online]. 2014 [2014-08-12]. Available from: <<http://www.biblestudytools.com/genesis/30.html>>.

<sup>8</sup> *Genetics and the Law III*. Boston, MA: Springer US, 1985, p 210.

<sup>9</sup> KAMEL R. M. Assisted Reproductive Technology after the Birth of Louise Brown. In: *J Reprod Infertil* [online]. 2013 [2014-04-03]. Available on: <<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3799275/>>.

was carried out in 1973 but the mother had a miscarriage during the first weeks of pregnancy.<sup>10</sup> Finally, in 1978, the first test-tube child named Louise Brown was born in Manchester. Since the birth of Louise, ART methods have spread all around the world and are a relatively commonly used treatment with more than 5 million babies born.<sup>11</sup>

During the 20<sup>th</sup> century, over the same period of time in which the main ART research took place, the tense atmosphere surrounding homosexuality, resulting from attitudes which had been rooted in humankind for many centuries, started to change. Alongside ART developments, the question of homo-parental families arose, pointing at the extension of the scope of persons who might benefit from ART. *The term “homosexuality” was coined at the end of the 19<sup>th</sup> century by German psychologist Karoly Maria Benkert,*<sup>12</sup> but ancient sources already described the mutual love of two men. *“In his adolescence he drew away the husbands from their wives, and as a young man the wives from their husbands”,* writes Greek historian Diogenés Laertios about Alcibiades, the Athenian politician of the 5<sup>th</sup> century B.C.<sup>13</sup> Homosexuality has been approached differently through the ages: it has been tolerated or ignored, but also prosecuted and persecuted. The third Lateran council in 1179 condemned homosexual acts (*“Whoever shall be found to have committed that incontinence which is against nature shall be punished”*)<sup>14</sup> and the medieval church labelled sexual intercourse with a person of the same gender as sodomy. Sodomy was not decriminalised until the Napoleonic code of 1804.<sup>15</sup> During the 19<sup>th</sup> century a certain liberalisation could have been observed and homosexuality started to be more and more accepted, or, at least, not criminalised, by society. The end of 20<sup>th</sup> century brought into discussion the idea of accepting homosexuality as a fact, as another kind of human nature and this idea seems to be accepted in the contemporary legal approach of Western democracies. Current Western civilisation seems to be the most open and we can call it, using the modern phrase, “gay and lesbian friendly”. We are witnessing a new chapter in the gay and lesbian fight for human rights – a fight for family rights.

## Legal regulation of assisted reproduction in United Kingdom

Legislation concerning issues of artificial insemination in United Kingdom<sup>16</sup> started in the 1980's in connection with criminalisation of paid surrogate motherhood.<sup>17</sup> Compre-

<sup>10</sup> IVF History: The Milestones. *IVF-WORLDWIDE.COM* [online]. 2012 [2014-04-04]. Available on: <<http://www.ivf-worldwide.com/ivf-history.html>>.

<sup>11</sup> Cf. e.g. CASTILLO, M. Report: 5 million babies born thanks to assisted reproductive technologies. In: *CBSNews.com* [online]. 2013 [2014-04-04]. Available on: <<http://www.cbsnews.com/news/report-5-million-babies-born-thanks-to-assisted-reproductive-technologies/>>.

<sup>12</sup> Pickett, Brent, "Homosexuality", *The Stanford Encyclopedia of Philosophy* (Spring 2011 Edition) [online], Edward N. Zalta (ed.), [2014-04-04]. Available on: <<http://plato.stanford.edu/archives/spr2011/entries/homosexuality/>>.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> The legal regulation regarding the ART treatment extends to England and Wales, Scotland and Northern Ireland (see s. 67 Human Fertilisation and Embryology Act 2008 and s. 1 Surrogacy Arrangements Act 1985). Hence, in spite of minor differences in the regulation, the regulation extending to the whole United Kingdom will be evaluated.

<sup>17</sup> GRUBB, A., LAING, J. M., MCHALE, J. V., KENNEDY, I. *Principles of Medical Law*. 3<sup>rd</sup> ed. New York: Oxford University Press, 2010, p. 769.

hensive legislative regulations became part of the United Kingdom's legislation at the beginning of the 1990's. These legislative regulations are relatively liberal, especially concerning the options they provide for people not living in traditional heterosexual relationships, in spite of occasional criticism from the United Kingdom's public for the great decision-making powers that they give to authorities.<sup>18</sup> However, assisted reproduction clearly deserves highly intense supervision, mainly with respect to the risks attached to it and to the fact that the law provides the possibility to undergo ART to nearly anybody.

The issue of assisted reproduction is regulated by two Acts of Parliament - Human Fertilisation and Embryology Act 1990 as further amended, which contains mainly the legal regulation of artificial insemination including the issues of parenthood, and Surrogacy Arrangements Act 1985 regulating certain issues of surrogate motherhood.

The first legislation passed in the area of assisted reproduction was the Surrogacy Arrangements Act 1985. This act does not provide comprehensive regulation of issues related to surrogate motherhood, but rather focuses on legal regulation of commercial agencies, which mediate surrogate motherhood agreements, and prohibits any commercial negotiation leading to entering into a surrogate motherhood agreement. It does not contain regulation of parenthood.

In the United Kingdom, artificial insemination was for the first time legally regulated in the Human Fertilisation and Embryology Act 1990,<sup>19</sup> within the provisions of which the Human Fertilisation and Embryology Authority was simultaneously established. This body's task is to monitor and investigate matters in the field of human embryos research and also to overview the process of licensing the clinics specialised in artificial insemination, as well as to administer the follow-up supervision over these clinics. This law was substantially amended in 2001 and 2008,<sup>20</sup> mainly incorporating new scientific knowledge and new possibilities for couples of the same sex. The aim of this act and its amendments is predominantly the regulation of all handling of human embryos and regulation of artificial insemination. This Act also contains the basic regulation of surrogate motherhood and relevant conditions.

In the United Kingdom, artificial insemination is primarily considered as a treatment for infertility and it is interpreted as such in the Human Fertilisation and Embryology Act 2008 (hereinafter referred to as "HFEA 2008"). This fact should not be taken for granted, regarding the possibilities that this legislation introduces.

At the present time, after the last amendment, HFEA 2008 allows the conception of a child by the method of artificial insemination not only to heterosexual couples but also to couples of the same sex and to people who do not live in a permanent relationship. From this perspective it may be observed that the term "treatment" is used in rather extensive interpretation. This extensive interpretation can be well documented by the fact that this "treatment" is also provided to couples who would otherwise be incapable of conceiving a child by natural means under any circumstances.

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<sup>18</sup> Ibid.

<sup>19</sup> Human Fertilisation and Embryology Act 1990 [online]. [2014-04-14]. Available on: <<http://www.legislation.gov.uk/ukpga/1990/37/contents>>.

<sup>20</sup> Human Fertilisation and Embryology Act 2008 [online]. [2014-04-14]. Available on: <<http://www.legislation.gov.uk/ukpga/2008/22/contents>>.

Specific health prerequisites and conditions<sup>21</sup> for access to the assisted reproduction program are outlined, besides in the law, by the National Health Service (usually abbreviated as “NHS”) and other Government authorities<sup>22</sup> and further in the internal documents<sup>23</sup> of individual clinics providing artificial insemination, always to be understood together with taking into account every individual case. In accordance with the law and further conditions currently set, all women meeting the required prerequisites should have equal access to conception by artificial insemination without regard to their sexual orientation or the actual state of their relationship. Fundamental statutory conditions are stated in s. 13 (5) HFEA 2008, which stipulates that “*treatment will not be provided to the woman unless she proved that she will take account of the welfare of the child who may be born as a result of the treatment*”. The interpretation of this provision leads us to the conclusion that when evaluating the admission of a woman to the treatment of artificial insemination, not only her personal assets will need to be taken into consideration, but also whether the child will have the relevant social background to ensure his/her healthy growth and integration into society. Whether the woman is in a homosexual relationship, or whether she is in any relationship at all, should not play any significant role without further context.

### Parenthood in the United Kingdom’s legislation within the context of assisted reproduction

The United Kingdom addresses the determination of parenthood directly in the Human Fertilisation and Embryology Act 1990 as amended in 2008. This amendment contains detailed specifications in relation with conception by artificial insemination. The rule is that the mother of a child is the woman who gives birth to the child, unless the child is subject to further adoption. In regards to paternity, the regulation provides that the father is the man who was in wedlock with the mother at the time of artificial insemination of the woman,<sup>24</sup> and if there is none, it is the man who has given consent to register his paternity. Nevertheless, legislative regulations of United Kingdom, as of 2009, when the above mentioned amendment came into effect, provide a new prospect to homosexual couples.

According to s. 42 HFEA 2008 it is possible that if two women live in registered partnership,<sup>25</sup> or, currently, also in wedlock, the second woman would be considered as a parent of the child who was conceived by artificial insemination. This parenthood is conditioned on the following prerequisites:

1. The couple must be in registered partnership at the time of the conception of the child. Therefore in the case that the couple enters into registered partnership during the course of the pregnancy, the non-pregnant partner will not qualify for parenthood.

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<sup>21</sup> See, for example, Guidelines of The National Institute for Health and Care Excellence [online]. [2015-08-14] available on <http://www.nice.org.uk/guidance/cg156>, or Interim Clinical Commissioning Policy Assisted Conception [online]. [2015-08-14]. Available on: <<http://www.england.nhs.uk/wp-content/uploads/2013/11/N-SC037.pdf>>.

<sup>22</sup> Such as The National Institute for Health and Care Excellence.

<sup>23</sup> These rules are commonly referred to as “code of practice”.

<sup>24</sup> “At the time of the placing in her of the embryo or of the sperm and eggs or of her artificial insemination” HFEA 2008, p. 35.

<sup>25</sup> In original text “civil partnership”.



2. The conception must be achieved by artificial insemination or by other similar options and not by sexual intercourse with a sperm donor.
3. The woman who is going to be a parent but, at the same time, will not give birth to the child, has to give assent for her parenthood on record, nevertheless in the case of registered partners this assent is presumed and as such it does not have to be issued explicitly.

According to s. 43 HFEA 2008, it is even possible that a woman who has neither been living in registered partnership nor in wedlock with the mother, may be considered a parent, on condition that no man was determined as father and after fulfilling the requirements for declaration of parenthood as prescribed in s. 43 and s. 44, HFEA 2008. These conditions for declaration of parenthood are as follows:

1. Both female partners have to sign prescribed forms in which they state that they are willing to become parents of the child. These forms have to be filled in by the partners before the conception of the child. If these forms are signed after the conception, then this requirement is deemed not to be met.
2. The couple has to undergo artificial insemination at a licensed clinic in UK. A couple who undergoes artificial insemination at a clinic which does not have a license in accordance with this regulation or at a clinic abroad will not be entitled to obtain legal determination of a second mother.

In both these cases the second mother is stated in the certificate of birth of the child as a parent and her legal relationship with the child is equal to that of a father whose child was born in the traditional manner.

Because of the very nature of artificial insemination it is not possible that two male partners can become parents. That is why the law regulates, in connection with artificial insemination, only those cases in which the second woman becomes a parent. Nonetheless, HFEA 2008 provides male homosexual couples with the opportunity to become parents of a child. Any two human beings who fulfil requirements set out by HFEA 2008 may become parents of a child born to a surrogate mother on the basis of a surrogacy agreement.

In principle the legal rule of determining parenthood contained in HFEA 2008 will also be applied to the cases of surrogate motherhood where the embryo comes into being by the technique of artificial insemination. According to s. 33 (1), the surrogate mother will become the mother of the child. To acquire parental rights it is necessary either to adopt the child or to ask the court to issue a “parental order”.<sup>26</sup>

A “parental order” transfers the parenthood from the surrogate mother and, if necessary, also from her husband or partner, to the commissioning couple.<sup>27</sup> It concerns an act of the court performed on the basis of an application of two individuals supposing that all the conditions contained in subs. 54 (1) - (8) HFEA 2008 are fulfilled. In order for the request to be met, the child has to be born to a mother who is not an applicant for the “parental order” and, at the same time, one of the applicants has to be a biological parent of the child. The

<sup>26</sup> DIDUCK, A., KAGANAS, F. *Family law, gender and the state*. 3<sup>rd</sup> ed. Portland, Oregon: Hart, 2012, p. 131.

<sup>27</sup> FAQ on birth registration and parental orders. [online]. Human Fertilisation and Embryology Authority, 02.09.2009 [2014-09-05]. Available on: <<http://www.hfea.gov.uk/2936.html>>.

applicants have to be husband and wife or registered partners, or have to cohabit permanently and must not be in any family relationship to each other which would constitute an obstacle in conclusion of the bond, and the application must be submitted within 6 months of the birth of the child. A surrogate mother and any other person who is the parent of the child has to unconditionally consent to the “parental order” and the consent of a surrogate mother cannot be given before 6 weeks after the birth of the child.

A family can be considered to have been established as a consequence of artificial insemination, as well as surrogate motherhood. In relation to homosexual couples, a homoparental family is established, yet a typical designation of parents as mother and father is not appropriately applicable, therefore United Kingdom’s legislation uses just the term “parent” in such cases.

As has been shown, the United Kingdom regulation ensures the access to ART under the condition that welfare of the child is ensured regardless of the sexual orientation of a person or a couple. According to the European Society of Human Reproduction and Embryology Report<sup>28</sup> (hereinafter referred to as “ESHRE Report”), only 9.4% of patients were leaving the United Kingdom to obtain ART in another country because of legal reasons.<sup>29</sup> The patients leaving the United Kingdom were not, according to the data provided in the study, of homosexual or bisexual orientation.<sup>30</sup> These two facts demonstrate that people of different sexual orientation than heterosexual were not seeking ART outside the United Kingdom because of legal barriers preventing them from accessing the treatment. Thus, it could be argued, the United Kingdom’s regulation of ART is very open and the right to have children is guaranteed as a positive right of a person.

### The Czech New Civil Code – a step forward?

In the Czech Republic, ART is regulated mainly by the Specific Health Services Act<sup>31</sup> (hereinafter referred to as “SHSA”). The SHSA regulates only artificial insemination in detail and the other ART methods are left unregulated. In s. 6 SHSA it is explicitly stated that for artificial insemination of a woman to be done, a written request made by a woman and a man who wish to undergo this service together is required. Any special status or relation between the requesting man and women is not needed, unless they are in the forbidden degree of relationship to enter into marriage. The question of fatherhood is regulated in the New Civil Code (hereinafter referred to as “NCC”<sup>32</sup>). The man requesting treatment together with the woman will be presumed to be the father of the child, unless the woman is married to another man. In that case, her husband will be presumed to be the father of the child conceived and that presumption will apply as long as it is not proved that the treatment was provided at the request of someone other than her husband.<sup>33</sup>

<sup>28</sup> European Society of Human Reproduction and Embryology. *Comparative Analysis of Medically Assisted Reproduction in the EU: Regulation and Technologies* [online]. Grimbergen (Belgium), 2009 [cit. 2015-08-13]. Available on: <<http://www.eshre.eu/~media/emagic%20files/Guidelines/MAR%20report.pdf>>.

<sup>29</sup> ESHRE Report, p. 82.

<sup>30</sup> ESHRE Report p. 81. 0.0% respondents seeking ART outside the United Kingdom described themselves as homosexual or bisexual.

<sup>31</sup> Act No. 373/2011, Specific Health Services Act.

<sup>32</sup> Act No. 89/2012, New Civil Code.

<sup>33</sup> NCC, s. 776 et seq.



As follows from this regulation, the scope of patients who could undergo the artificial insemination treatment, is limited on the grounds of civil status,<sup>34</sup> mainly whether the person is part of a couple (regardless of whether he/she is married or cohabiting) or single. It clearly discriminates against persons with no partner and those with a partner of the same sex. The question is whether such discrimination is justifiable.

In order to understand the complexity of ART regulation in relation to regulation of parenthood, it is necessary to take into consideration superior statutes such as the NCC. The Czech Republic had a great opportunity to take a big step forward in connection with the NCC, however, the final version of the code, which came into force in January 2014, is considerably more conservative than the original draft. The legislator's intention was to move all family law matters to the NCC. However, registered partnership has been omitted and has remained in a separate Act. The Registered Partnership Act came into force in 2006 and as it mainly regulates family law matters it was supposed to be included in the NCC. Concerning ART, only the regulation of fatherhood in case of artificial insemination is explicitly mentioned in the NCC and other ART methods are left unregulated. The only reference to surrogate motherhood in the Czech legal order can be found in NCC s. 804, which states that adoption is forbidden between lineal ancestors and descendants and between siblings, with the exclusion of surrogate motherhood. The provisions of the NCC do not constitute a complex system and thus the principles mentioned in the introductory provisions, including the fundamental principles of private law, are crucial for the interpretation and application of the NCC.

S. 3(1) of the NCC<sup>35</sup> introduces fundamental principles and reads as follows: “*Civil law protects the dignity and freedom of a human being as well as his/her natural rights to pursue his/her own happiness and the happiness of his/her family or other people close to him/her in any manner which will not cause unreasonable harm to others.*” Subs. 2 specifies the principles of civil law and in paragraph f) it is stressed that no one can be denied what he/she is legally entitled to. In subs. 3 it is stated that civil law also results from other generally accepted principles of justice and law.

Criticism of the application of s. 3 of the new Civil Code has focused on its extreme vagueness and various legal interpretations, in contrast to the previous legislation in force, which stressed the consideration of whether a legal act was in accordance with good morals. When deciding about the exercise of rights and discharge of duties arising out of civil disputes, which could not interfere with the rights and justified interests of another, judges could rely on the established practice of the courts guiding a uniform judicial interpretation of law and of the term “good morals”. The concept of the new version in force is much broader; it is based on clarifying the forms of civil law.

From the above wording, the intention of the legislature that the legal regulation should arise out of natural rights is clearly noticeable. At the same time, the legislature carries the banner for the conservative assumption that legal protection is provided only to the traditional family and marriage, which could be determined mainly from two facts. Firstly,

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<sup>34</sup> Division of the civil status was adopted from the ESHRE Report. The ESHRE Report divides patients' civil status into (a) married, (b) cohabiting and (c) single.

<sup>35</sup> Part 1., Title I., Chapter 1., s.3 subs. 1 of the NCC.

the issue of homosexual couples is completely ignored in the family law part of the NCC. Registered partnership regulation remains in a separate statute,<sup>36</sup> which has not received major amendment since the NCC came into force, and there is no elaborate connection between this statute and the NCC. Secondly, the Registered Partnership Act does explicitly prohibit adoption by registered partners or a person in a registered partnership.<sup>37</sup> Whether it would be possible to successfully invoke the rights of homosexual individuals to have a family is highly questionable.

The above mentioned s. 3 of the new Civil Code confirms the principle that: “*everybody has the right to protect his life and health as well as his freedom, honour, dignity and privacy*”. The Czech Republic has a rich tradition in protecting human rights. Still, when securing the rights for homosexual individuals to private and family life and to establish a family, the legislature tends to be rather restrained.

The right of homosexual couples to raise children is being constantly questioned throughout the whole society. Adoption by a homosexual couple is practically impossible. According to Registered Partnership Act, adoption by registered partners is prohibited. A single person could occasionally be granted an application for adoption provided that he/she did not enter into registered partnership, regardless of whether he or she is *de facto* in a couple or not. The right of homosexual couples to assisted reproduction is not regulated at all, and, as far as it is known, providing new legal regulation is not part of the current government agenda.

This results in a situation where in legal practice a homosexual citizen asserting the protection of his/her desired rights would find very few legal tools providing him/her with the possibility of legally creating a family or raising a child with his/her same-sex partner. The NCC contains in s. 2956 et seq. generally formulated compensation for harm to the natural rights of an individual, however, it relates to compensation under the first part of the Code and not to the family law part.

As the Czech legal order does not provide sufficient protection to grant the right to private and family life, right to establish a family as well as the right to not be discriminated against, the international legal regulation regarding those rights could be applied. International legal protection of human rights cannot actually be put into effect unless it is accompanied by effective judicial mechanisms. Effective guaranties are provided by the ECHR, which has the jurisdiction to hear and settle complaints of individuals concerning breaches of rights ensured by the European Convention on Human Rights<sup>38</sup> as amended by Protocols, and to render decisions which are legally binding on individual states.

Considering the Convention on Human Rights, access to ART techniques can be viewed through Article 14 of the Convention, which prohibits discrimination on the basis of different criteria. The ECHR has provided a decision concerning discrimination on the basis of sexual orientation in the case of adoption. In the case *X and Others vs. Austria*,<sup>39</sup> the

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<sup>36</sup> Act No. 115/2006, Registered Partnership Act.

<sup>37</sup> S. 13 subs. 2 of the Registered Partnership Act.

<sup>38</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, shortened as European Convention on Human Rights, published under No. 209/1992.

<sup>39</sup> *X and Others v. Austria*, [online] [2015-08-18]. Available on: <[http://hudoc.echr.coe.int/eng?i=001-116735#{"itemid":\["001-116735"\]}](http://hudoc.echr.coe.int/eng?i=001-116735#{)>.

ECHR has stated that Austrian bodies have violated Article 14 of the Convention by not allowing the adoption of the child by the same-sex partner of the mother. The applicants in the case claimed that they were discriminated against, since they were not allowed to adopt a child, with whom they lived for an extended period of time in the same household in a stable relationship, while under same conditions adoption would be allowed to an unmarried heterosexual couple. The Austrian government claimed that if there were any differences in the treatment, they were made in order to recreate the child's biological family and well-being. The court ruled that if the state decides to treat a certain group of people differently, this treatment needs to be justified and serve a legitimate aim and be proportionate. In the case of adoption by homosexuals, the ECHR did not find any justification for different treatment on the basis of sexual orientation, and, in addition, the Austrian legislation recognized homosexuals as adoptive parents and found the Austrian treatment discriminatory. The Court ruled that a homosexual couple can, under certain circumstances, have the same right to establish a family as a heterosexual couple and violation of this right with regard to sexual orientation will be considered as discriminatory.

Tendencies favouring an expansive interpretation of the Charter of Fundamental Rights and Freedoms<sup>40</sup> are also evident in the judicial decisions of the Czech Constitutional Court. The Constitutional Court draws upon copious judgments by the ECHR, the judgments which concern new rights as well as new aspects of older rights. In addition to this, the rights guaranteed just by the law are being framed by judicial decisions into broader constitutional terms while some of these rights can be thought over as their concrete manifestation.

This issue is also demonstrated by the collection “Protection of fundamental rights and freedoms in terms of changes in law at the beginning of the 21<sup>st</sup> century in the Czech, European and international context”.<sup>41</sup> In the article “*The Interpretation of the European Convention on Human Rights in Judicial Decisions of the European Court of Human Rights*”,<sup>42</sup> Šturma states that terms declared permissible by the Convention should be implemented in a meaning which reflects the present democratic society, and not 60 years ago, when the Convention was set up. Šturma identifies “*the shift of the interpretation which enabled the separation of marriage from purely biological needs criteria and enabled solemnisation of marriage to transsexuals.*”

We might take this statement as a starting point for further reflection on the rights of homosexuals, mainly on “the right to happiness”.

S. 2957 of the new Civil Code regulates the mode of calculation and the amount of reasonable satisfaction which “*must be specified in such a way that even the circumstances of specific cause will be compensated.*” Discrimination against the injured person with respect to his/her gender, state of health, ethnic origin, religion and to other relevantly significant grounds are included into this scope by the legislature. It is difficult to include sexual ori-

<sup>40</sup> Constitutional Act No. 2/1993, (“Charter”).

<sup>41</sup> GERLOCH, A., ŠTURMA, P. et al. *Protection of fundamental rights and freedoms in terms of changes in law at the beginning of the 21<sup>st</sup> century in the Czech, European and international context*. Praha: Auditorium, 2011, p. 351.

<sup>42</sup> *Ibid.*, p. 349 ff.

entation in the category of circumstances “*of special cause*”. However, it constitutes, without any doubt, the natural right of any human being, which should be provided with relevant legal protection as it is in the case of other natural rights.

The relations between parents and children are regulated in the NCC by s. 855, et. seq. In the previous concept, when deciding about the welfare of a child, the opinion that both the father and the mother shall take an active part in the upbringing of the child was promoted. The child deserves to enjoy both components for his/her health and proper upbringing – this constituted the major objection and argument why homosexual couples were not allowed to raise a child.

The NCC does not consider this topic at all and does not address the issue of registered partnership. Basically it only includes the legal regulation from the repealed Act on Family.<sup>43</sup>

Even though from the technical legal point of view the wording of new statutory provisions can also be applied, in any respect, to relationships between children and homosexual parents, the text of the Act demonstrates the standpoint of the legislature. Currently the Czech Republic has officially come to be more or less on the conservative, we could say out-of-date, side of contemporary Europe on this issue.

### Deficiencies in the Czech regulation

Czech legislation is based on a relatively rigid traditional model that each child has one mother and one father, the paradigm that arises from the very nature of human reproduction. It seems to be quite surprising that the authors of the NCC either neglected, or intentionally omitted more complex discussion about bringing more flexible approach towards the family matters, which leaves the Czech homosexual community with very limited options and a long fight for equality with heterosexual couples ahead. While it is still quite radical to say that the right to have children should belong to any couple, regardless of sexual orientation or sex, the authors of this paper hold the position that in the light of the recent developments, it will become increasingly obvious that the Czech legislation creates a discriminatory environment, especially with regard to judicature of the EHRC, such as *X vs. Austria*. This decision is the latest contribution to equalising same-sex couples with heterosexual couples and gives the legal ground to the family rights of homosexuals.

As has been shown on the case of adoption, Czech legal regulation discriminates against those who are in registered partnership. Even though sexual orientation is not mentioned as a criterion for adoption, it indirectly constitutes an obstacle for same-sex couples. Sexual orientation also constitutes one of the barriers to ART. In the Czech Republic, ART or more specifically artificial insemination, which is the only ART method regulated under Czech law, can be provided to a woman at the joint request of herself and the man who will be considered as father to the child. The SHSA excludes from the ART those without partner or with a partner of the same sex. The reason for this regulation seems to be the conviction that the welfare of a child requires growing up within a traditional family

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<sup>43</sup> Act No. 94/1963, Act on Family.

model. However, evidence of non-traditional family can be found in the legal order. S. 885 of the NCC states that the parent's partner has a duty to take care of the child in the case that only one of the child's parents takes care of the child and the parent's partner is living in the same household with the child. This section shows a deviation from the concept of traditional family in the Czech law. Homosexual partners are legally allowed to raise a child of one of the partners. It follows that every condition to family matters built on sexual orientation, directly or indirectly, will be, sooner or later, subject to test whether it is legitimate. The argument that homosexual parents cannot rear a child as heterosexual parents and thus are banned from ART is becoming more fragile than ever before.

In contrast, under the United Kingdom's ART regulation, the only condition to access ART is ensuring the welfare of the child, which includes sufficient assets to maintain the child and social background which would ensure the child's healthy growth and integration into society. Access to ART depends on the circumstances of the particular case and not, as in the Czech Republic, on a general limitation based on sexual orientation or civil status.

The Czech legal regulation concerning family matters, especially regulation of parenthood and upbringing of a child, as well as regulation of ART, lacks the essential interconnectedness and as such does not provide a sufficient framework for family relations. Provisions of Acts concerning family matters do not establish one coherent system and due to gaps legal rules can be evaded. The most evident examples are the non-existence of surrogate motherhood regulation (surrogate motherhood is neither allowed nor forbidden, and the absence of regulation makes the situation of parties concerned unstable) and the factual existence of homoparental families, which is not reflected in the law at all. This omission on the part of legislators results in lack of clarity and certainty of relations and moves the child's welfare principle behind other rules in force. The principles of private and family law could be applied as a means to fill the gaps in regulation, but their interpretation and application does not constitute instant certainty either. The Czech regulation should be reworked in order to correspond to reality.

In the case of the United Kingdom's regulation, it has been demonstrated that legislators have accepted such measures as reflect the needs of the society. Any person could apply and could be granted an application, which reduces the need for evading the law. As the ESHRE Report shows, patients from the United Kingdom do not seek the ART abroad because of legal barriers to access the treatment.

As stated above, foreign legal regulation could be adopted only after a detailed evaluation with regard to the similarities between two legal orders in question, and if there is a chance that a particular regulation would be applicable in the recipient state. The United Kingdom's legislative model of ART regulation cannot be adopted as a whole. The difference between these legal orders is enormous and this fact cannot be forgotten. The role of judiciary and the doctrine of judicial precedent makes the United Kingdom's system more flexible to react to potential gaps in the regulation and to social evolution. Czech law is based mainly on written statutes, and thus there should be an even higher emphasis on the quality of statutory regulation. What could be adopted from the United Kingdom's legislation is the approach to discrimination including prohibition of discrimination based on sexual orientation. The prohibition of discrimination can be found in Czech constitutional law<sup>44</sup> as well from the NCC. However, sexual orientation is not explicitly mentioned

in the provisions and has not been applied to family matters so far. In spite of that, sexual orientation should belong to the “*discrimination on the grounds of another status*” and as sexual orientation constitutes grounds to discrimination under other branches of law, family law and related issues should not be excepted unless appropriately justified.

A thorough application of prohibition of discrimination would cause the same rights to be granted regardless of any status of a person. If the state would guarantee the right to have children through ART and also through adoption to certain groups of people, with regard to prohibition of discrimination such rights would be given to everybody and hence would acquire the protection as a positive right.

The right to have children is seen as a negative right in the Czech Republic. However, according to Wicks, Article 8(1) of Convention on Human Rights it “*has been interpreted as imposing a positive obligation upon the state by virtue of the requirement of respect for private life*”<sup>45</sup> and the right to have children in relation to homosexual couples falls within the scope of this Article.<sup>46</sup> That would potentially mean that the right to have children would be guaranteed as a positive right and would have a stronger position than the protection under the prohibition of discrimination.

## CONCLUSION

Family law matters in the Czech Republic are still being affected by a traditional view of family. The indirect discrimination on the ground of sexual orientation is present in the law and the legislation regulating family rights of homosexual couples is either very restrictive or non-existent. The right to have children has not been granted the protection of a positive right and thus the law limits the right to ART only to heterosexual couples. Even if the right to have children did not acquire the protection of a positive right, the discrimination against persons of homosexual orientation should be removed from the Czech legal order or justified by the legislators.

The United Kingdom’s legislation, which might serve as an inspiration, brings into this area a new approach concerning the basis of parenthood, which is not deduced from purely biological principles and enables the status of parenthood to be reached even by two individuals of the same gender.

Czech legislation has not accepted homoparentality as equal to heteroparentality in attaining parenthood under the law. Nevertheless, homoparental families do exist in the real world. The question arises: for how long might the present state of affairs be ignored and for how long might it be pretended that the forms of human cohabitation are not evolving in current society? There is the certain risk that the law will become distant from the reality which it should regulate.

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<sup>44</sup> s. 3 Constitutional Act No. 2/1993.

<sup>45</sup> WICKS, E. *Human rights and health care*. Portland, Or.: Hart Pub., 2007, p. 163.

<sup>46</sup> see EHCR case E.B. vs. France, [online] [ 2015-08-18] available on: [http://hudoc.echr.coe.int/eng?i=001-84571#{"itemid":\["001-84571"\]}](http://hudoc.echr.coe.int/eng?i=001-84571#{).