

NATIONAL REPORT ON MULTICULTURAL CHALLENGES IN FAMILY LAW (CZECH REPUBLIC)

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Abstract: *The National Report on Multicultural Challenges in Family Law aims to provide an analysis of how multicultural phenomenon understood as a plurality of “ways of life” in society, based e.g. on cultural tradition, ethnic background, custom, religious conviction or sexual orientation, interact with family law. It served as a starting point for a comparative analysis of multicultural challenges in family law in the Civil Law Section of the 20th Congress of International Academy of Comparative Law (AIDC/IACL).*

Keywords: *plurality, family law, multiculturalism*

The published National Report represents an abridged version of the report elaborated for the 20th Congress of International Academy of Comparative Law (AIDC/IACL). It served as a starting point for a comparative analysis of multicultural challenges in family law in the Civil Law Section of the Congress. The National Report has provided the necessary information concerning the settings and functioning of the Czech legal environment in the field of family law to facilitate a following comparative analysis among twenty-one countries.²

The general aim of each national report has been to detect how “claims” based on e.g. cultural tradition, ethnic background, custom, religious conviction and sexual orientation are raised and dealt with in the field of family law in particular jurisdiction, i.e. to detect how multicultural phenomenon understood as plurality of “ways of life” in society interact with family law. Each report followed a unified textual structure: Introduction, Management of Diversity and Conclusion. “Introduction” aims to provide relevant background information of national jurisdiction, e.g. political and constitutional structure of the state, constitutional attitude towards social diversity, existence of other normative systems etc. “Managements of Diversity” focuses on concrete fields with a description and analysis of relevant legislation and court practice with special focus on four aspects: I. Two-person relationships, II. Parents and children relationships, III. Dissolution of marriage, IV. Identification of other relevant fields of family law specific for national jurisdiction. Finally, “Conclusion” sums up the findings with special focus on the question of overall interaction of the legal system, with existing social diversity.

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¹ The National Report was created under the research program of Charles University called Progress Q04 “Law in the changing world” and Q05 “Legal and social aspects of migration and problems of the position of minorities”.

² The National Reports have been further provided by national rapporteurs from Austria, Belgium, Brazil, Finland, Germany, Greece, Hungary, Iraq, Italy, Japan, Netherlands, Pakistan, Poland, Romania, South Africa, Sweden, Taiwan, Tunisia, Turkey and United Arab Emirates.

I. INTRODUCTION

The Czech Republic is a parliamentary democracy governed by the traditional model of continental legal state.³ The horizontal structure of state respects the traditional model of division of power. Parliamentary character of the state is reflected in the central constitutional position of the Parliament, that represents the legislative branch and is divided into two chambers: the Chamber of Deputies and the Senate. The vertical structure of state is based on principles of unitary state accompanied by limited territorial self-government.

The Constitution of the Czech Republic of 16 December 1992 No. 1/1993 Coll. (hereinafter referred to as “the Constitution”) creates a polylegal constitutional order with rigid character, Constitutional statutes can be amended only by two thirds majority of both Chambers. The created state legal order respects the basic principle of supremacy of constitutional laws over other sources of law. Legal duties can be imposed within constitutional limits only by statutory acts, that are exclusively passed by the Parliament.

The constitutional order of the Czech Republic creates a unified national legal order interacting with international and European law. International law is constitutionally approached as a part of national legal order due to a monistic relationship of international and national law. The ratified international treaties have applicatory priority over statute shall a treaty provide something other than that which a statute provides. Similarly, the European law is applied as stemming out of international treaties. The constitutional order does not provide space for autonomous application of other normative systems stemming from e.g. religious discourse.

The constitutional organization of the state is accompanied by the centrality of the natural fundamental rights and freedoms. The constitutional guarantees of the fundamental rights and freedoms can be found in the Charter of Fundamental Rights and Freedoms (hereinafter referred to as “the Charter”) that is an integral part of the constitutional order.⁴ The Constitutional Court enjoys privileged position as a judicial body responsible for the protection of fundamental rights. The Constitutional Court has a competence to decide via an abstract constitutional review on annulment of statutes or other legal enactments and via a concrete constitutional review on constitutional complaints of individuals against final decisions or other encroachments by public authorities infringing constitutionally guaranteed fundamental rights and basic freedoms.

³ The basic constitutional characteristic of the state can be found in the Art. 1 Sec. 1 of the Constitution of the Czech Republic of 16 December 1992 No. 1/1993 Coll., which states that “The Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens.” Constitution of the Czech Republic of 16 December 1992 No. 1/1993 Sb. In: *Ústavní soud* [online]. [2018]. Available at: <https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Ustava_EN_ve_zneni_zak_c_98-2013.pdf>.

⁴ The Charter of Fundamental Rights and Freedoms. Resolution of the Presidium of the Czech National Council of 16 December 1992 on the declaration of The Charter of Fundamental Rights and Freedoms as a part of the constitutional order of the Czech Republic Constitutional act No. 2/1993 Coll. In: *Ústavní soud* [online]. [2018]. Available at: <https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Listina_English_version.pdf>.

General societal plurality can be understood as being integrated into the constitutional normative framework even though it is not explicitly expressed in the constitutional texts. On one side, political plurality as a wide variety of opinions on the ways public sphere shall be governed and its expression in the political realm is presupposed by the concept of democratic state and the constitutionally admissible model of political participation,⁵ which is further enforced by the protection of political rights of individuals.⁶ On the other side, social plurality manifested as an existence of differences between individuals and groups and their “ways of life” is also presupposed by the constitutional provisions. Especially, the principle of equality and the prohibition of discrimination articulates a wide range of existing social differences, which cannot serve as a differentiating ground for the enjoyment of fundamental rights.

Additionally, the societal plurality is supported by the right to freely choose nationality,⁷ the freedom of thought, conscience, and religious conviction⁸ and the right freely to manifest her religion or faith.⁹ Special support is provided to citizens belonging to national and ethnic minorities¹⁰ via the guarantees “of all-round development, in particular the right to develop, together with other members of the minority, their own culture, the right to disseminate and receive information in their native language, and the right to associate in national associations” as well as “the right to education in their own language, the right to use their own language in their relations with officials, the right to participate in the resolution of affairs that concern national and ethnic minorities.”¹¹ At last, the guarantees of social rights, e.g. employees, children, adolescent, women and persons with disabilities, can be also viewed as supporting the existence of social plurality.¹²

The factual societal plurality in the Czech Republic can be regarded as rather limited when compared with other countries on a global scale. The traditional and prevailing delineations between individuals and groups are based on national and religious boundaries. Prevailing national identity is Czech as indicated by the census of 2011 with

⁵ Art. 5 of the Constitution states: “The political system is founded on the free and voluntary formation of and free competition among those political parties which respect the fundamental democratic principles and which renounce force as a means of promoting their interests.” Furthermore, Art. 2 Sec 1 of the Charter recalls democratic values as a foundation of the state: “Democratic values constitute the foundation of the state, so that it may not be bound either to an exclusive ideology or to a particular religious faith.”

⁶ Political rights include the freedom of expression, the right of petition, the right of assembly, the right of association, the right to form political parties, the right to participate in the administration of public affairs, the right to vote and the right to resist as formulated in the Article 17. – 23. of the Charter.

⁷ Art. 3 Sec. 2 of the Charter.

⁸ Art. 15 of the Charter.

⁹ Art. 16 of the Charter.

¹⁰ The legal differentiation of racial and national minorities reflects the presence of race and nationality as two different objective phenomenon of social reality. Racial element is considered to be primarily an objective biological criterion of a person, while nationality is on contrary considered to have a prevailing subjective criterion, i.e. composed of an objective unity of a cultural adherence to a nation and of a subjective will to be considered as a part of such nation. However, the statutory implementation of rights of racial and national minorities (the Statute on Rights of Members of National Minorities of 10 July 2001 No. 273/2001 Coll.), does not differentiate racial minorities and guarantees individual and collective rights only to national minorities.

¹¹ Art. 25 of the Charter.

¹² Chapter 4 of the Charter.

quantitatively limited presence of other national minorities.¹³ Religious identity remains in favor of secular and atheistic approach when only one fifth of the inhabitants consider themselves as believers.¹⁴ Recent European developments in the area of migration have widely contributed to the rise of social plurality of many European societies. However, the Czech Republic has so far remained on the sidelines of such developments while applying restrictive political approach. The number of persons with international protection, i.e. asylum and subsidiary protection, and the number of admitted economic migrant's remains low.¹⁵

The constitutional regulation directly connected with family law is included in the Charter. The Charter guarantees the protection of private and family life in the context of traditional liberal freedoms against the state.¹⁶ Special protection is provided under the provisions contained in the IV. Chapter of the Charter, that guarantees economic, social and cultural rights. That includes the protection of parenthood, family, children and adolescents under Art. 32. Pregnant women are guaranteed special care, protection in labor relations, and suitable labor conditions and the children born out of wedlock shall have equal status.¹⁷ Parents are guaranteed the right to care for and bring up their children and children have the right to parental upbringing and care.¹⁸ Any limits of these rights are acceptable only on ground of a decision of a court based on law.¹⁹ Finally, the state is obliged to provide the assistance to parents who are raising children.²⁰ Article 32 is applied in the statutory limits.²¹

The major statutory regulation of family relationships, is integrated into the statute No. 89/2012 Coll., civil code (hereinafter referred to as “the Civil Code”).²² Accompanying

¹³ The census of 2011 indicates following distribution of major nationalities of the total of 10 230 060 inhabitants of the Czech Republic: 6 711 624 (73,1 %) Czech, 521 801 (5 %) Moravian, 147 752 (1,4 %) Slovak, 53 253 (0,5 %) Ukrainian, 39 096 (0,4 %) Polish, 29 660 (0,3 %) Vietnamese, 18 658 (0,2 %) German, 17 872 (0,2 %) Russian, 8 920 (0,1 %) Hungarian, 5 135 (0,0 %) Roma and 2 642 666 (25,3 %) non-specified. Information accessible in Czech: ČESKÝ STATISTICKÝ ÚŘAD. Národnostní struktura obyvatel. In: *Český statistický úřad* [online]. 30. 6. 2014 [2018]. Available at: <<https://www.czso.cz/documents/10180/20551765/170223-14.pdf>>.

¹⁴ The census of 2011 indicates following distribution of religious beliefs of the total of 10 230 060 inhabitants of the Czech Republic: 2 168 952 (20,8 %) identified as believers, 3 604 095 (34,5 %) identified as non-believers, 4 662 455 (44,7 %) did not specified. Out of believers only a portion identifies with a particular church: 1 082 463 (10,4 %) Roman Catholic Church, 51 858 (0,5 %) Evangelical Church of Czech Brethren, 39 229 (0,4 %) Czechoslovak Hussite Church, 20 533 (0,2 %) Czech and Slovak Orthodox Church, etc. The total number of existing registered churches and religious societies equals 40. Information accessible in Czech: ČESKÝ STATISTICKÝ ÚŘAD. Náboženská víra obyvatel podle výsledků sčítání lidu. In: *Český statistický úřad* [online]. 27. 2. 2014 [2018]. Available at: <<https://www.czso.cz/documents/10180/20551795/17022014.pdf/c533e33c-79c4-4a1b-8494-e45e41c5da18?version=1.0>>.

¹⁵ The number of application for international protection in 2017 was 1450. The competent executive organ has decided 1508 applications in 2017. Asylum was granted in 29 cases and subsidiary protection in 118 cases. Information accessible in Czech: MVČR. Souhrnná zpráva o mezinárodní ochraně za rok 2017. In: *Ministerstvo vnitra ČR* [online]. 1. 3. 2018 [2018]. Available at: <<http://www.mvcr.cz/clanek/souhrnna-zprava-o-mezinarodni-ochrane-za-rok-2017.aspx>>.

¹⁶ Art. 10 Sec. 2 of the Charter.

¹⁷ Art. 32 Sec. 1 and sec. 2 of the Charter.

¹⁸ Art. 32 Sec. 3 of the Charter.

¹⁹ Ibid.

²⁰ Art. 32 Sec. 5 of the Charter.

²¹ Art. 41. of the Charter.

²² Available in English: <http://obcanskyzakonik.justice.cz/images/pdf/Civil-Code.pdf>.

norms of family law can be found most notably in the statute on social and legal protection of children²³ and in statute on registered partnership.²⁴ The constitutional and statutory framework is accompanied by relevant international treaties, such as the European Convention for Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union, the Convention on the Rights of the Child and the European Convention on the Exercise of Children's rights.

II. MANAGEMENT OF DIVERSITY

a) Two-person relationships (marriage and other forms of cohabitation)

Marriage constitutes the preferred form of a legal statutory family relationship. The civil code regulates the definition of marriage, the creation of marriage, the functioning of statutory and property rights as well as the dissolution of marriage. Marriage is defined as *“a permanent union of a man and a woman formed in a manner provided by this Act. The primary purpose of marriage is the foundation of a family, proper upbringing of children and mutual support and assistance.”*²⁵ The provision presupposes two basic limits by introducing the definition of marriage. Firstly, marriage is a bilateral relationship. Consequently, the criminal code sanctions the existence of multiple marriages.²⁶ Secondly, marriage is a union of a man and a woman. While retaining the traditional character of marriage, same sex couples and their families are excluded from the access to marriage as a legal form for their family.

Marriage is formed by free and full affirmative expressions of will by a man and woman who have the capacity to enter into marriage, i.e. who lack legal impediments to marriage such as having the legal capacity to enter into marriage limited or having previously entered into marriage or registered partnership. Furthermore, marriage is excluded in case the relationship between the fiancés is a relationship of ancestors and descendants, of siblings or based on the ground of other forms of parental care. We can conclude that the access to marriage is relatively open as it is limited, by rational grounds of existing family relationships or by limited legal capacity. There are no limits based on cultural, racial, religious or national identity of individuals or groups.²⁷ Therefore, marriage can be considered as a general status accessible transversally across most of the social groups except for cases of polygamous claims and same sex couples.

The ways of establishing marriage include the state marriage act or religious marriage act. Religious marriage can be provided by registered churches and religious organizations, that have gained the so called “specific rights of churches and religious

²³ Statute No. 359/1999 Coll., Statute on Social and Legal Protection of Children.

²⁴ No. 115/2006 Coll., on Civil Partnership.

²⁵ Art. Section 655. of the Civil Code.

²⁶ Art. Section 194 of the statute No. 40/2009 Coll., Criminal Code.

²⁷ Section 666 of the Civil Code.

organizations”.²⁸ Fiancés that intend to have a religious marriage legally recognized as a marriage on ground of Civil Code must fulfill all legal requirements applied to civil marriage together with specific requirements set forth by individual churches and religious organizations.

The only legal statutory form standing next to marriage is registered partnership introduced in the year 2006. It remains excluded from the Civil Code even after the recodification of civil law.²⁹ Registered partnership is limited only to same sex persons and thus stands as a direct supplementary institute next to marriage. The proposer of the statute, based its reasoning for the adoption of the statute on the idea that the absence of registered partnership “*is a structural expression of homophobia (fear of homosexuality and hatred towards its bearers) and is in direct conflict with the principles of personal freedom and equality, non-discrimination on the basis of another status and the attainment of the law guaranteed by the constitution.*”³⁰ On background of strong political controversies induced by the proposal, the statute was vetoed by the president who argued that registered partnership lacks in essence the aim of family and undermines the overall value character of society by threatening the functioning of traditional family relations.³¹ While the registered partnership can be considered as a direct supplementary institute for same sex-couples, it does not provide the same legal regime as marriage. The range of provided rights and associated duties is limited when compared to marriage, most notably in the sphere of property rights. However, most of the arising legal controversies connected with registered partnership are not focused on the sphere of property rights between registered partners but are concerned with the question of upbringing of children and the statutory relationships to them.

b) Parents and children relationships (and other forms of care)

Recalling the constitutional protection of children and parents in the context of family law, the Charter provides for the protection of parenthood by the law, special protection to children and adolescents, equality of children born in or out of wedlock, parents’ right to care for and bring up their children as well as their right to assistance from the state and children’ right to parental upbringing and care. Parental rights may be limited and minor children may be removed from their parents’ custody against the latter’s will only by the decision of a court on the basis of the law.³²

²⁸ The specific rights of churches and religious organizations can be granted only to those churches and religious organizations that have been registered for at least 10 years, have published annual report for at least 10 years, have properly fulfilled its obligations towards state and third parties and have not been criminally convicted. See § 11 of the statute No. 3/2002 Coll., on the Religious Freedom and the Position of Churches and Religious Organizations.

²⁹ Act No. 115/2006 Coll., on Civil Partnership.

³⁰ See the explanatory memorandum of the proposer at Sněmovní tisk 969/0, část č. 1/2. Návrh zákona o registrovaném partnerství. In: *Poslanecká sněmovna Parlamentu České republiky* [online]. [2018]. Available at: <<http://www.psp.cz/sqw/text/tiskt.sqw?o=4&ct=969&ct1=0>>.

³¹ See Prezident republiky Václav Klaus vetoval zákon o registrovaném partnerství. In: *Václav Klaus* [online]. [2018]. Available at: <<https://www.klaus.cz/clanky/47>>.

³² Art. 41. of the Charter.

The general legal principle for the moderation of relationships between parents and children as well as for all other situations concerning children's care and upbringing is the best interest of the child. The principle is explicitly stated in the Art. 3, sec. 1 of the Convention on the Rights of the Child. It states that *“in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”*. According to the authoritative interpretation of the Committee on the Rights of the Child of UN, *“whenever a decision is to be made that will affect a specific child... the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. ... The justification of a decision must show that the [best interest of the child] has been explicitly taken into account.”*³³ Similarly, the Constitutional Court has been for long times emphasizing the need to take into account the best interests of the child in all actions concerning the child, including judicial decision-making.³⁴

While the general principle of the best interest of a child is of a very abstract nature, it must be rationally articulated and identified in all actions concerning children in context of particular circumstances. In the General comment No. 14 the Committee on the Rights of the Child formulated the following factors that need to be taken into account when formulating the best interests of the child: the child's attitude, child's identity, maintaining the family environment and bonds, caring for the child's protection and safety, child's membership in a vulnerable group, the right of a child to health, and the right of a child to education.³⁵

Parental care

The pivotal point is the constitutional guarantee of parent's right to upbringing and care and its reciprocal expression on the side of a child via children's right to parental upbringing and care. *“The essence of family life is the coexistence of children and parents, in which the right of children to parental education and care is exercised according to art. 32, para. 4 of the Charter.”*³⁶ The application of this principle is very often litigated before the courts including the Constitutional Court.

The problematic sections of the judicial adjudication in area of parental care can be found in deciding the situation of a child situation after divorce. During the courts proceedings concerning the decision over the parameters of parental care after divorce the children are perceived more as subject than the rights entity. There is a general lack of the right of the child to be heard and participate on the proceeding that inherently touches his being. Although the judicature has been trying to overcome this approach, decisions

³³ General comment No. 14 on the right of the child to have his or her best interests taken as primary consideration, dated 29 May 2013, CRC/C/GC/14, § 6, similarly § 29.

³⁴ See for instance Judgment file reference Pl. ÚS 23/02 dated 30 June 2004 (N 89/33 SbNU 353; 476/2004 Coll.); Judgment file reference Pl. ÚS 15/09 dated 8 July 2010 (N 139/58 SbNU 141; 244/2010 Coll.).

³⁵ General comment No. 14 on the right of the child to have his or her best interests taken as primary consideration, dated 29 May 2013, CRC/C/GC/14, § 6, similarly § 29.

³⁶ Judgment file reference I. ÚS 1506/13 dated 30 May 2014 (N 110/73 SbNU 739).

can still be found, that have a restrictive interpretation of the right of a child to be heard. Thus, the best interest of the child is not investigated in the light of the self-determination of the child but is substituted by the indirect investigation of parental interest. This problem has a very common and general character and occurs without respect to different social groups. Nevertheless, it constitutes a serious problem in the protection of the children rights.³⁷

Other forms of family care

The legal regulation of the other forms of family care is based on the principle according to which the upbringing in the biological family is primary. However, other forms of family care, such as foster care, custody, guardianship and adoption, must always take precedence over growing up in infant and similar substitute care institutions, that is the ultimate extreme measure and must be regarded as the *ultima ratio* measure. In cases of actual absence of parental care of child, the court must give priority to the care of a relative person or to a person close to a child via the institutes of adoption, custody and foster care. The case law of the Constitutional Court indicates that these principles of priority were not in practice of the institutions for the social and legal protection of children and was not firmly adjudicated by general courts.³⁸

Some of the parameters of the adoption have been recently challenged by the decision of the Constitutional Court. The constitutional review concerned a provision that prohibited an adoption of child by a person who had entered into the registered partnership.³⁹ Even though the legal framework admitted adoption by an individual who does not live in a marriage and without regard to the sexual orientation of such person. The Constitutional Court by way of introduction stated that there have been currently some fundamental changes in the manner of cohabitation and that unlike a more traditional concept of the family, commonly anticipating multiple generations living together, there are ever increasing numbers of people living on their own, the number of unmarried couples is approaching the number of married couples, and divorce is seen as something almost natural.

The Constitutional Court's assessment recognized the unconstitutional character of the provision. It based its reasoning on the of human dignity as a fundamental objective value of humanity and the focal point of other fundamental rights. It further stressed that the limit was based on a fact that a certain group of persons is excluded from a certain right solely due to the fact that they have decided to enter into a civil partnership. Such provision thus turns them into *de facto* "second-rank" individuals and stigmatizes them groundlessly in a certain manner, which evokes the idea of their inferiority. At the same time, the Court inferred this consequence not on the basis that these persons would en-

³⁷ "Among many see for instance Judgment file reference IV. US 3305/13 dated 15 October 2014; Judgment file reference I. US 1506/13 dated 30 May 2014 (N 110/73 SbNU 739); or Judgment file reference III. US 3363/10 dated 13 July 2011 (N 131/62 SbNU 59)."

³⁸ "See for instance Judgment file reference I. US 1764/16 dated 3 November 2016 (N 207/83 SbNU 289)."

³⁹ The former provision of § 13, para. 2 of Act No. 115/2006 Coll., on Civil Partnership.

gage in any objectionable, unethical or even unlawful conduct, but simply from the fact that the persons have entered into a civil partnership, i.e. they behave in a manner allowed and assumed by the statute and do so in an absolutely transparent and predictable manner.⁴⁰

Nevertheless, it is necessary to stress that the parental relationship remains limited only to a man and woman. Therefore, it is not legally possible to adopt a child by two persons of same sex regardless their status. This regulation has been marginally weakened during a constitutional review of a case that stemmed from a denial of recognition of a foreign birth certificate. The case concerned a child who was born under a surrogacy contract with a surrogate mother who carried an embryo to term resulting from artificial fertilization from an anonymous egg donor and sperm of one of the complainants. The governmental institutions denied recognizing the birth certificate with the argument recalling the limited form of parenthood to man and woman.

The Constitutional Court concluded that the failure to recognize a foreign decision determining parenthood to a child of two persons of the same sex in a situation in which family life was *de facto* and legally constituted between them in the form of surrogacy on the grounds that Czech law does not allow the parenthood of two persons of the same sex is contrary to the best interest of the child protected by Article 3, Para. 1 of the Convention on the Rights of the Child. In the case that there has already been a family life established between individuals on a foreign legal basis, it is the duty of all public authorities to act in such a manner that this relationship may develop, and it is necessary to respect the legal guarantees protecting the relationship of children and their parents.⁴¹

Substitute care institutions

The general use of substitute care institutions has been accompanied by several problems. The most notable one includes the division of family due to an inadequate assessment of economic conditions of the original parents. This problem most strongly manifests in relation to economically weaker categories of citizens and it obviously has excessive impact on Roma families. When assessing the conditions for the application of substitute care institution the state organs preferred the existence of insufficient material and housing conditions as an exclusive reason for the use of substitute care institutions. This approach has been wide spread between governmental authorities until it has been reviewed by the European Court of Human Rights (further as “ECHR”).

The fundamental influence on the change of this practice had the decisions of the ECHR in case *Wallova and Wall vs. the Czech Republic* and *Havelka and others vs. the Czech Republics*. In both cases the ECHR found violation of Article 8 of the European Convention.⁴² The ECHR emphasized the priority of the state’s positive commitment to help with the solution of the social situation of the family before attempting to divorce the fa-

⁴⁰ Judgment file reference Pl. ÚS 7/15 dated 28 June 2016 (N 110/81 SbNU 729; 234/2016 Coll.).

⁴¹ Judgment file reference I. ÚS 3226/16 dated 24 July 2017.

⁴² *Wallova and Wall v. the Czech Republic*, ECHR Ruling No. 23848/04, from 26 October 2006 and *Havelka and others v. the Czech Republic*, ECHR Ruling. No 23499/06, from 21 June 2007.

mily. Arguments of lack the social conditions of the family did not find the ECHR to be so serious as to justify the division of the family. This conception is also expressed in the current legal regulation of the substitute care institution regulations contained in the new the Civil Code, according to which insufficient housing conditions or property conditions of the child's parents or the persons to whom the child was entrusted cannot per se be the reason for the decision.

a. Dissolution of marriage

The legal regulation concerning the of dissolution of marriage has not been controversial from the perspective of the social diversity given the fact that the conditions of the dissolution of marriage do not consider any of the existing diversity delineations in the society, i.e. they apply equally to all individuals being in marriage without regard to diversity delineations.

b. Additional relevant problems

When legal challenges of family law in respect to diversity there has been serious additional problems that do not fit into the outlined thematic structure. Firstly, there is a problematic practice of collecting racial information in relation to children. Secondly, the general practice of children placement into educational institutions that ultimately leads to an excessive presence of Roma children in special schools.

There is somewhat hidden controversial practice of determining and recording children's ethnic origin by governmental bodies for social and legal protection of children when arranging substitute family care. The ethnic classification of children is based on an external assessment carried out by social workers. The classification of children as being Roma or "half-Roma" is a suspicious method of racial classification based on physical features (color of skin, hair, etc.). Moreover, the classification that determines the ethnicity of a child provides opportunity to discriminate such children in terms of their chances of being placed in substitute family care⁴³.

Furthermore, a question of constitutionality of such practice arises as it empowers authorities to carry out expert assessments of the ethnic background of children. In a democratic society integrating into its legal realm the principle of nondiscrimination it is evidently impossible to use the information about ethnic or national origin irrespective of the will of the person whose ethnicity or nationality is in question. Likewise, there are no 'objective' criteria that can be applied when classifying people into various ethnic groups and subgroups. The criterion of a child's ethnic origin and its use by the state authorities excludes the children from possibility of being placed into substitute family care. The practice of determining and recording children's ethnicity by social-legal protection bodies' reinforces the segregation of children of different ethnicity and deprives them of the chance of being brought up in family care.

⁴³ "For details of the practice see Hofmannová, H. Taking into Account Ethnicity in Continuity in Upbringing when Arranging Substitute Family Care in the Czech Republic in the Context of Article 20 (3) of the Convention on the Rights of the Child. *The Lawyer Quarterly*. Vol 7, No 4 (2017), p. 269-281. Available at: <https://tlq.ilaw.cas.cz/index.php/tlq/article/view/264/249>."

The second outlined additional problem concerns general practice of the placement into education institutions that ultimately leads to an excessive presence of Roma children in special schools. In 2007 the European Court of Human Rights in the case of *D. H. and others against the Czech Republic* found discrimination based on ethnic origin in relation to the right to education.⁴⁴ In its opinion indirect discrimination took place, i.e. a situation where an apparently neutral provision (placement of a child to a special school for children with minor mental disabilities) would put members of one group, in this case the Roma pupils, at a particular disadvantage, while this impact could not be explained by the mandatory use of expert testing of children, nor by the condition of the parents' consent. The Grand Chamber also noted that the Roma constitute a disadvantaged and vulnerable group that requires special protection. According to the Grand Chamber the process of admission to special schools was not accompanied by guarantees to ensure that the specific needs of Roma children arising from their disadvantaged position will be considered.⁴⁵

It took excessively long time to modify the systematic structure of the educational system and implement the decision of ESLP. Significant steps have been taken in the year 2016 via the introduction of inclusive education model. The main aim was to reduce the overall number of children in special schools in case such children are capable of being educated in the standard curriculum with supportive measures. Even before the modification of the school system could fully take place we can see a strong backlash against the model of inclusive education. The backlash comes from an absence of a social consensus over the model of inclusive education. Therefore, wide range of political actors after the most recent Parliamentary elections in 2017 have presented amendments to step back from the model of inclusive education.

The access to the right to education, irrespective of the elected educational model, is further aggravated by complicated access to judicial protection. Even though there are measures to be taken under the non-discrimination protection or under the administrative adjudication, the standard judicial proceedings take long period of time and in their impact are post-factum very limited. Finally, the process of deciding the placement of children into special or standard school is not fully transparent and information concerning individual proceedings is to be demanded under conditions of the fundamental right to information.

III. CONCLUSION

When thematizing the condition of the Czech Republic in respect to multicultural challenges in family law it is necessary to say that the scholarly discourse does not produce wide variety of research. The same applies to the judicial adjudication. There has not been a fundamental decision of Constitution Court since the establishment of the Czech Re-

⁴⁴ Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, in conjunction with article 2 of Protocol no. 1 to this document.

⁴⁵ *D.H. and Others v. the Czech Republic*, ECHR Ruling No. 57325/00, from 13 November 2007.

public that would concern the question of the position of national or racial minorities' position. Besides, the general societal discourse does not consider the question of diversity in family law and its application as fundamentally crucial.

To fully understand the reality of family law and plurality it is necessary to see that the family law functions in a society which is traditionally homogenous. This character is partly consequence of homogenous political structure under socialist regime that had limited the openness towards other forms of individual identity and exercised pressure against identities contradicting the overall communist ideology. Such historical developments have strongly influenced the perception and presence of diversity not only in past generations but also in presence. The diversity is limited only to small number of traditionally present cultural, national, racial and religious identities. In this sense it is necessary to stress that all various forms of family life stemming from these alternative forms of identity are subjugated to one legal framework and exercised inside its limits.

Even though the constitutional identity can be formally understood as based on liberal democratic model, the society lacks a long-term experience of social practice which bring into life the principles and values of liberal democratic arrangement. Diversity is present as a normative constitutional value and to a certain degree is exercised in social reality. However, the objective absence of multicultural plurality reduces the variety of social practices which the model of liberal society presupposes.

Moving beyond the argument of homogeneity we can identify several general prevailing trends in recent years. Firstly, when concerning individual groups of persons, the most problematic situation concerns Roma people. Not insignificant part of political and public discourse considers Roma persons as having a way of life which is incompatible with the way of life of majority of the population. They are presented as alien un-integrable elements, stigmatized as abusers of social welfare benefits and their discrimination is widely socially tolerated. In this context we can look for the reasons why the problems manifesting itself in family law are not adequately answered, such as preferential placement of Roma children to substitute care institutions and special schools. As a result they face a social segregation that is supported by the application of family law and related statutory provisions, even though the law from a normative point of view retains its anti-discriminatory character. Secondly, a special form of paternalism is present in the state's attitude towards family relations. This manifests strongly in a general tendency of state organs to prefer substitute care institutions as a form of alternative child care over other less infringing forms. Furthermore, a degenerate form paternalistic approach can be seen in the practice of placing Roma children to special schools. Thirdly, the state policies retain certain degree of conservative approach unlike the recent developments in other Western countries. That applies mostly to the lack of alternative forms of family statuses beyond registered partnership. There is also lack of will to open marriage beyond the limit of opposite-sex status. Manifestation of such tendency was a decision not to include the norms relating to registered partnership in the Civil Code.

Furthermore, the judicature of the Constitutional Court has in many cases played an important role in adoption of more liberal approach as well as rectification of some of the mentioned doubtful and frequently unconstitutional practices. Thus, there has been a certain degree of limitation of the conservative, static and rigid character of some of the institutes of family law.

Multicultural challenges in family law have become in recent years potentially more complex as the overall attitude of society and political discourse towards diversity has dramatically changed. Most notably the Migration crisis has provoked a strong opposition to alternative forms of national, racial and religious identity. All those forms are not considered as value of an individual in open society but are portrayed as alien and hostile social groups. That attitude is changing not only the approach of the Czech Republic towards the solution of Migration crisis on European level but also provokes more radical political stances towards internal existing forms of diversity. Therefore, certain forms of racism, homophobia and anti-liberal hatred have successfully penetrated the public and political discourse and can be considered as a future problematic points for the retention or further development of achieved social plurality and its ensuring via family law.