

A study prepared as part of the project:

The Concept of Marriage Through the Prism of Imperative Requirements Theory

Title of the study:

Definition of Marriage and Its Impact on the Institution of Parenthood in Czech and Slovak Law (expert opinion)

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Introductory remarks

Marriage is the only institution that works in a wide variety of cultures. It can be monogamous or polygamous, but in most cases it is a union between a man and a woman. When a person enters into it, he or she ceases to be an individual and becomes a member of a particular family. This special event unites the spouses with an inherently permanent bond that is realized on many levels, from the strictly intimate, spiritual sphere to the material dimension, mutual care, interaction and support of the other spouse, and living under the same roof. The lofty status of this community that is marriage obligates the state authority to create conditions that guarantee its stability and proper functioning. However, it is impossible to ignore the fact that there are individuals in the state communities who are looking for same-sex partners and declare their desire to live in homosexual unions. At present, such a situation cannot be passed over in silence, and specific legal measures are required.

The subject of this study is the analysis of the national legal systems of two countries: the Slovak Republic and the Czech Republic. The subject of the interest is the institution of marriage and the legal regulation of it.

Marriage regulations in Slovakia

Slovakia has not passed a law allowing same-sex marriage or civil unions. To date, only one political party, Freedom and Solidarity, has proposed a law to legalize civil unions, but parliament rejected the bill and there have been no further attempts to make proposals to protect the rights of LGBTQ+ people¹.

In 2022, a tragic event took place that drew attention to the political and social situation of the LGBTQA+ community. In downtown Bratislava, outside an LGBTQ+ bar, a young man fired a gun at members of the community. The incident resulted in the death of two young men. In response to the situation, a march was held in memory of those killed, attended by several thousand people. Slovak President Zuzana Čaputová said, “they are not the ones who should be afraid to walk down the street. What does not belong to Slovakia is hate”².

It seems that these tragic events will, to some extent, change the thinking about sexual minorities in the country. However, representatives of both the ruling coalition and opposition parties unanimously oppose any legal changes in favor of LGBTQA+ minorities, in terms of registering civil unions or adopting children.

¹ See: <https://www.dw.com/pl/spo%C5%82eczno%C5%9B%C4%87-lgbtq-na-s%C5%82owacji-politycy-nas-zawiedli/a-65466797> [accessed: 17.08.2023].

² See: <https://oko.press/nienawisc-teorie-spiskowe-nacjonalizm-zamach-przed-klubem-lgbt> [accessed: 17.08.2023].

The constitutional regulation excludes the possibility of marriage for same-sex couples. Article 41(1) of the Constitution of the Slovak Republic³ states that marriage is a unique union between a man and a woman. The Slovak Republic fully protects marriage and promotes its well-being. Marriage, parenthood and the family are protected by law. Children born in or out of wedlock have equal rights (para. 3). The care and upbringing of children is the right of parents. Children have the right to education and parental care. The rights of parents may be restricted, and minor children may be separated from their parents against their will on the basis of a court decision issued in accordance with the law (para. 4). The Constitution provides for state care for custodial parents and pregnant women (paras. 2 and 5).

In 2014, the phrase "marriage is the unique union of a man and a woman" was introduced into the commented article of the Constitution. Previously, such a definition of marriage was contained in the Family Code No. 36/2005 Coll⁴. Article 1 of this normative act defines marriage as the union of a man and a woman. The task of society is to protect this unique union and promote its welfare. The law states that the purpose of marriage is the establishment of a family and the proper upbringing of children. The family formed by marriage is the fundamental cell of society. The law further regulates such matters as the origin of marriage, forms of marriage (civil registry office, church), circumstances excluding marriage, relations between spouses, dissolution of marriage due to death or pronouncement of death of one of the spouses, divorce, rights and duties of parents, foster care or maintenance obligations.

After the amendment of the Constitution, the legal definition of marriage became a constitutional principle. The purpose of such an action was to introduce the definition of marriage into the act with the highest legal force in the state, since its amendment is more difficult than an ordinary law, which could be an obstacle to the legalization of civil unions in the future⁵. The process of protecting marriage in the Constitution of the Slovak Republic began in 2013⁶. Amendments to the Constitution were the result of political negotiations and

³ Constitution of the Slovak Republic of September 1, 1992, Constitutional Law No. 460/1992 Coll. <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1992/460/#predpis.hlava-tretia> [accessed: 17.08.2023].

⁴ Law on the Family and Amendments and Supplements to Certain Laws of January 19, 2005, <https://www.zakonypreludi.sk/obor/50979> [accessed: 17.08.2023].

⁵ Source: <https://www.rodinka.sk/vazne-veci/stat-pre-rodinu/ochrana-manzelstva-v-ustave-sr/> [accessed: 17.08.2023].

⁶ Source: <https://www.postoj.sk/48487/co-sa-dialo-v-politickom-zakulisi-ked-sa-pre-manzelstvo-menila-ustava> [accessed: 17.08.2023]. More on the protection of marriage in the Slovak Constitution: *Ochrana manželstva v ústave Slovenskej Republiky*, <https://drive.google.com/file/d/1VKAwG0IJ8nZf8YtFeHXhsHejzm1AbCk1/view> [accessed: 17.08.2023].

managed to be carried through to the end in exchange for support for changes in the judiciary⁷. In the end, out of 128 deputies voting, 102 voted in favor, 18 against, 3 abstained and 5 did not vote. The constitutional Law No. 161/2014 Coll. entered into force on September 1, 2014.

In parallel with the political debate on the constitutional amendment, a public campaign was launched by the NGO Alliance for the Family to collect signatures for a referendum on the protection of the family. The Slovak Constitutional Court approved three of the four questions proposed in the petition⁸. Slovak citizens were to decide whether same-sex couples or groups should be allowed to adopt and raise children, whether the term "marriage" should refer only to heterosexual couples, and whether the uniqueness of marriage should be legally protected. The petition also included a question on whether schools could require students to participate in sex education and euthanasia debates. In the end, only three questions were put to a referendum, as one was ruled unconstitutional by Constitutional Court judges. The question was whether special protection, rights and obligations should be granted only to spouses⁹. The referendum on the family was held on February 7, 2015. It was attended by 21.4% of eligible voters, and more than 90% of participants answered all three questions in the affirmative referendum was not binding since most of the voters did not participate¹⁰.

The institution of marriage is regulated by the Constitution of the Slovak Republic and the Family Code, but no act of Slovak law allows for the legalization of same-sex marriages or unions.

The events in Slovakia have reverberated internationally, including in the European Union. In light of the recent homophobic murder in Slovakia, the European Parliament (EP) adopted a resolution on the increase in hate crimes against LGBTIQ+ people across Europe (2022/2894(RSP))¹¹. The resolution, which was supported by 447 MEPs with 78 votes against and 45 abstentions, condemns hatred and violence against people based on their sex, sexual orientation, sex identity or expression and sexual characteristics in Slovakia and EU countries¹². The Parliament noted that LGBTIQ+ hatred, racism and discrimination have no place in international society. It called on the European Commission, the European Council and the Council to take a strong stand against hatred, violence and injustice in Europe. It

⁷ Ibidem.

⁸ Source: <https://www.liberties.eu/pl/stories/referendum-slowacja/312> [accessed: 17.08.2023].

⁹ Ibidem.

¹⁰ Source: <https://www.postoj.sk/48487/co-sa-dialo-v-politickom-zakulisi-ked-sa-pre-manzelstvo-menila-ustava> [accessed: 17.08.2023].

¹¹ EP Resolution of September 20, 2022, OJ.EU.C.2023.149.22, https://www.europarl.europa.eu/doceo/document/TA-9-2022-0372_SK.html [accessed: 17.08.2023].

¹² Source: <https://www.postoj.sk/116803/dnes-treba-vediet> [accessed: 17.08.2023].

called on the Government of Slovakia and the National Council of the Slovak Republic to take measures to protect LGBTIQ+ people from all forms of hate crimes and homophobia and to take a firm stand against violations of the human rights of LGBTIQ+ people. The Parliament noted the frequent use of offensive, aggressive and homophobic language against the LGBT community living in Slovakia, including by former and current members of the Government and the National Council of the Slovak Republic, as well as some former Prime Ministers. It called for an end to the further polarization of society in the country and for the rejection of any form of cooperation with right-wing extremist forces. Parliament also called on the authorities to guarantee respect for all rights, in particular the right to private and family life, including the legal recognition of same-sex couples. It called on Member States to take steps to provide education that promotes civic values of acceptance, tolerance, diversity, equality and respect on issues of sexual orientation, identity and sex expression.

One year after the EP resolution, the National Council of the Slovak Republic adopted a resolution reminding the European Parliament and all parliaments of EU member states that the legal regulation of family law issues without a cross-border element is the exclusive competence of national law. Accordingly, the National Council, in adopting the resolution, considered the EP resolution on the terrorist act, of which two Slovaks were victims, as a resolution that ignores the principle of subsidiarity and does not respect the sovereignty of the Slovak Republic in related areas¹³. The Slovak Parliament stated that by adopting the resolution it had drawn the attention of the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament to the fact that the primary response to the terrorist act and the measures taken in its aftermath were under the exclusive jurisdiction of Slovakia. At the same time, the Parliament assured that Slovakia's priority is access to education and respect for fundamental human rights and freedoms. Moreover, the responsibility for a terrorist act, hate crimes or individual acts of violence cannot be attributed to the entire society or its political representation, churches and public institutions¹⁴. For this reason, the National Council declares that Slovakia does not agree with the assessment of the situation in the EP resolution in question and considers it incorrect and misleading¹⁵.

Legal solutions for marriage and parenthood in the Czech Republic

¹³ Source: <https://europske.noviny.sk/2023/03/28/nr-sr-prijala-uznesenie-k-uzneseniu-europskeho-parlamentu-orastucom-pocte-trestnych-cinov-z-nenavisti-voci-lgbtq-osobam/> [accessed: 17.08.2023].

¹⁴ Ibidem.

¹⁵ Ibidem.

The Constitution of the Czech Republic of December 16, 1992 does not regulate marriage or parenthood¹⁶. Legal protection of the family and parenthood is included in the Charter of Fundamental Rights and Freedoms, which is part of the constitutional order of the state¹⁷. Article 32(1) of the Charter states that parenthood and the family are protected by law. The special protection of children is guaranteed and adolescents. The Charter guarantees the same rights to children born in wedlock and out of wedlock Article 32(3).

The institution of marriage is regulated by the Family Code¹⁸ and the and the Civil Code¹⁹ in the national legal system. The institution of marriage is regulated by the Family Code and the Civil Code in the national legal system. According to Section 1 of the Family Code, marriage is a permanent partnership between a man and a woman established in the manner prescribed by law. The main purpose of marriage is the establishment of a family and the proper upbringing of children. Part Two of the Civil Code, Section 655, states that marriage is a permanent union between a man and a woman, established in the manner prescribed by this law. The main purpose of marriage is the establishment of a family, the proper upbringing of children, and mutual support and assistance.

The above-mentioned legal acts, both constitutional and statutory, define marriage as a permanent union between a man and a woman for the purpose of founding a family. The Czech law, like the Slovak law, lists the permanence of the union and the sex difference of the persons entering into the marriage as the two basic features of the definition of marriage. It is a bond established between two persons of opposite sex – a man and a woman. In practice, it is the requirement of the opposite sex of the partners that prevents same-sex couples from marrying²⁰.

In 2006, the Czech Republic introduced a so-called registered partnership for same-sex couples only, which differs from marriage in terms of rights and obligations²¹. Paragraph 1 of

¹⁶ Constitutional Law No. 1/1993 Coll. as amended by Constitutional Laws No. 347/1997 Coll., 300/2000 Coll., 448/2001 Coll., 395/2001 Coll., 515/2002 Coll., 319/2009 Coll., 71/2012 Coll. and 98/2013 Coll. The text of the Constitution available at: <https://www.psp.cz/docs/laws/constitution.html> [accessed: 20.08.2023].

¹⁷ The Charter of Fundamental Rights and Freedoms is part of the Constitution of the Czech Republic; it was promulgated on December 16, 1992, Constitutional Law No. 2/1993 Coll. as amended by Constitutional Law No. 162/1998 Coll and Constitutional Law No. 295/2021 OJ, <https://www.psp.cz/docs/laws/listina.html> [accessed: 20.08.2023].

¹⁸ Family Law Act of December 4, 1963, Law No. 94/1963 OJ, <https://www.zakonyprolidi.cz/cs/1963-94> [accessed: 20.08.2023].

¹⁹ Civil Code Law of February 3, 2012, Law No. 89/2012 OJ, <https://www.zakonyprolidi.cz/cs/2012-89> [accessed: 20.08.2023].

²⁰ *Austria to kolejny kraj sąsiadujący, który dopuszcza małżeństwa homoseksualne. Zmiany spodziewane są w Czechach*, <https://pravo21.cz/pravo/rakousko-je-dalsim-sousednim-statem-umoznujicim-snatek-homosexualum-v-cesku-se-na-zmenu-ceka> [accessed: 20.08.2023].

²¹ Law on Civil Partnerships and Amendments to Certain Related Laws of January 26, 2006, Law No. 115/2006 OJ, <https://www.zakonyprolidi.cz/cs/2006-115> [accessed: 20.08.2023].

the above-mentioned law stipulates that a registered partnership is a permanent union between two persons of the same sex, established in the manner prescribed by the law. This means that such a partnership applies only to persons of the same sex, so it is not possible for a man and a woman to enter into it, for example, because the legal consequences are less than those of entering into a marriage. A partnership is formed by the expression of the will of two persons of the same sex in the form of a voluntary declaration by these persons to enter into it. Such declaration is made in person at the registry office (para. 2). Section 4 specifies the conditions which exclude the possibility of entering into such a union. A person wishing to enter into a civil partnership must be: an adult (over 18 years of age), not a direct relative or sibling of the partner, and at least one of the partners must be a citizen of the Czech Republic. Persons who are married in another partnership or similar same-sex relationship entered into abroad may not enter into such a relationship if such a relationship is still ongoing. A registered partnership is terminated by the death of one of the partners or by the recognition of the death of one of the partners as a result of the annulment of the partnership by a court decision. In a registered partnership, the partners have the same rights and obligations²². Thus, matters of cohabitation are decided jointly by both partners, and if they cannot agree on important issues, the court may settle them at the request of one of them²³.

The Czech Constitutional Court emphasized in its June 14, 2016 ruling²⁴, that the country's legislature only allows joint adoption by spouses. The law allows individual adoption, i.e. by a single person, but a person in a registered partnership cannot become an adoptive parent. Adoption may be carried out by a single person if certain conditions are met, but he or she may not be in a legally recognized relationship (para. 23).

In justifying its opinion, the Constitutional Court pointed out that, of course, it should not be overlooked that fundamental changes are currently taking place in the way people live together, that, in contrast to the more traditional concept of the family, which usually involves several generations living together, more and more people are living alone (so-called singles), the number of unmarried couples (cohabiting spouses or other forms of living together) is approaching the number of married couples, and divorce is regarded as something almost natural. On the other hand, however, the Constitutional Court emphasizes that it does not see

²² Source: <https://www.pravnlinka.cz/bezplatna-pravni-poradna-zdarma/prava-a-povinnosti-registrovanych-partneru.html> [accessed: 20.08.2023].

²³ News source: <https://www.zakonyprolidi.cz/blog/vzajemna-prava-a-povinnosti-registrovanych-partneru.html> [accessed:20.08.2023].

²⁴ Judgment of the Constitutional Court Pl.ÚS 7/15 of June 14, 2016, 234/2016 Coll. N 110/81 SbNU 729 Registered partnership as an obstacle to individual child adoption, https://nalus.usoud.cz/Search/GetText.aspx?sz=Pl-7-15_1 [accessed: 20.08.2023].

the slightest reasonable reason why it should actively contribute to the erosion of the traditional concept of the family and its functions (para. 37). The Court notes that the legislature has preferred the marriage relationship as the appropriate relationship for the adoption of children (para. 39).

The Civil Partnerships Act stipulates that the existence of a civil partnership does not prevent a partner from exercising parental authority over a child or from entrusting the child to his or her upbringing. A partner who is a parent is obliged to take care of the child's development and to consistently protect the child's interests, taking appropriate educational measures so that the child's dignity is not violated and the child's health and physical, emotional, intellectual and moral development are not endangered. If a child is cared for by one of the partners and both partners live in the same household, the other partner shall also participate in the child's upbringing; the obligations to protect the child's development and upbringing shall also apply to this partner (para. 13). However, this provision shall not be understood as a right to adopt a child. This follows directly from the provisions of the Constitution, which exclude the legal possibility of equating civil unions with the institution of marriage, understood as the union of a man and a woman.

In 2018, a group of deputies in Parliament proposed a bill to change the state of the law so that marriage is a union of “two people”²⁵. The bill would formally give civil unions the same status as marriage. However, the discussion of this proposal was inconclusive.

The European Parliament, in a resolution on LGBTIQ+ people in the EU²⁶, urged the Commission to propose legislation requiring all Member States to recognize, for the purposes of national law, adults named on a birth certificate issued in another Member State as the legal parents of a child, regardless of the legal sex or marital status of those persons, and to require all Member States to recognize, for the purposes of national law, marriages or registered partnerships contracted in another Member State in all situations where spouses or registered partners are entitled to equal treatment under ECHR case law. It emphasizes the importance of recognizing birth certificates in all Member States, regardless of the sex of the parents, to ensure that children do not become stateless when they move to another Member State (para. 8). Then, in April 2021, the European Commission announced the start of work on a Regulation on the recognition of parentage between Member States. The preliminary draft

²⁵ *Austria to kolejny kraj sąsiadujący*, op. cit.

²⁶ European Parliament resolution of September 9, 2021 on the rights of LGBTIQ people in the EU (2021/2679(RSP)), https://www.europarl.europa.eu/doceo/document/B-9-2021-0431_PL.html [accessed: 20.08.2023].

already indicated that the regulation would aim at the recognition of adoptions carried out by same-sex couples in another country²⁷.

The Czech Constitutional Court stated in 2020 that it is a manifestation of the sovereignty of the Czech Republic to recognize the supremacy of Czech law within the territory of the state. The court ordered the ordinary courts to recognize the decision of an authority of a foreign state in accordance with domestic law (para. 23). In this judgment, the court ruled that the Czech judiciary could not recognize a foreign decision on the adoption of a child by a registered same-sex couple.

The ruling is also relevant for the actions of the EU institutions. According to the previous jurisprudence of the Czech Constitutional Court, the Constitution takes precedence in the system of national law and the recognition of EU law is only conditional.

Summary

In both legal systems, the institution of marriage is understood as a union between a man and a woman, which is constitutionally protected. However, the Czech Republic has gone further in its legal solutions and decided to recognize same-sex unions in the form of so-called registered partnerships, which do not correspond to the institution of marriage. The Czech legislature regulates the possibility of registering such unions only in the form of an ordinary law.

Among post-communist countries, only Slovenia has decided to legalize same-sex unions. In 2022, the Slovenian Parliament amended the Family Code, legalizing same-sex couples and allowing them to adopt children. In the case of the Czech Republic, so-called registered partnerships cannot adopt children.

Analyzing the legal systems of the two neighboring countries, one can notice quite large differences in the perception of the need to adapt the provisions of the Constitution to changing social conditions, justifying a departure from the traditional institution of marriage.

Bibliography

Legal acts:

Family Law Act of 4.12.1963, Law No. 94/1963 Coll.
<https://www.zakonyprolidi.cz/cs/196394>

²⁷ Source: <https://ordoiuris.pl/rodzina-i-malzenstwo/krok-komisji-europejskiej-w-strone-wymuszania-na-panstwach-uznawania-0> [accessed: 25.08.2023].

Constitution of the Slovak Republic of September 1, 1992, Constitutional Law No. 460/1992 Coll. <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1992/460/#predpis.hlava-tretia>

Constitution of the Czech Republic of December 16, 1992 Constitutional Act No. 1/1993 Coll. as amended by Constitutional Acts No. 347/1997 Coll., 300/2000 Coll., 448/2001 Coll., 395/2001 Coll., 515/2002 Coll., 319/2009 Coll., 71/2012 Coll. and 98/2013 Coll. The text of the Constitution is available at: <https://www.psp.cz/docs/laws/constitution.html>

The Charter of Fundamental Rights and Freedoms is part of the Constitution of the Czech Republic, it was promulgated on December 16, 1992 Constitutional Act No. 2/1993 Coll. as amended by Constitutional Act No. 162/1998 Coll. and Constitutional Act No. 295/2021 Coll. <https://www.psp.cz/docs/laws/listina.html>

Law on the family and on amendments and additions to certain laws of January 19, 2005 <https://www.zakonypreludi.sk/obor/50979>

Law on Civil Partnerships and Amendments to Certain Related Laws of January 26, 2006, Law No. 115/2006 OJ. <https://www.zakonyprolidi.cz/cs/2006-115>

Law Civil Code of February 3, 2012, Law No. 89/2012 OJ No. <https://www.zakonyprolidi.cz/cs/2012-89>

European Parliament resolution of September 9, 2021 on LGBTIQ rights in the EU (2021/2679(RSP)), https://www.europarl.europa.eu/doceo/document/B-9-2021-0431_PL.html

EP Resolution of September 20, 2022, OJ.EU.C.2023.149.22. https://www.europarl.europa.eu/doceo/document/TA-9-2022-0372_SK.html

Articles:

Austria to kolejny kraj sąsiadujący, który dopuszcza małżeństwa homoseksualne. Zmiany spodziewane są w Czechach, <https://pravo21.cz/pravo/rakousko-je-dalsim-sousednim-statem-umoznujicim-snatek-homosexualum-v-cesku-se-na-zmenu-ceka>.

Ochrana manželstva v ústave Slovenskei Republiky, <https://drive.google.com/file/d/1VkAwG0IJ8nZf8YtFeHXhsHejzm1AbCk1/view>.

Websites:

<https://www.dw.com/pl/spo%C5%82eczno%C5%9B%C4%87-lgbtq-na-s%C5%82owacji-politycy-nas-zawiedli/a-65466797>

<https://oko.press/nienawisc-teorie-spiskowe-nacjonalizm-zamach-przed-klubem-lgbt>

<https://www.rodinka.sk/vazne-veci/stat-pre-rodinu/ochrana-manzelstva-v-ustave-sr/>
<https://www.postoj.sk/48487/co-sa-dialo-v-politickom-zakulisi-ked-sa-pre-manzelstvo-menila-ustava>
<https://www.liberties.eu/pl/stories/referendum-slowacja/3121>
<https://www.postoj.sk/48487/co-sa-dialo-v-politickom-zakulisi-ked-sa-pre-manzelstvo-menila-ustava>
<https://www.postoj.sk/116803/dnes-treba-vediet>
<https://europske.noviny.sk/2023/03/28/nr-sr-prijala-uznesenie-k-uzneseniu-europskeho-parlamentu-o-rastucom-pocte-trestnych-cinov-z-nenavisti-voci-lgbtiq-osobam/>
<https://ordoiuris.pl/rodzina-i-malzenstwo/krok-komisji-europejskiej-w-strone-wymuszania-na-panstwach-uznawania-0>
<https://www.pravnilinka.cz/bezplatna-pravni-poradna-zdarma/prava-a-povinnosti-registrovanych-partneru.html>
<https://www.zakonyprolidi.cz/blog/vzajemna-prava-a-povinnosti-registrovanych-partneru.htm>

Case law of the constitutional courts:

Judgment of the Constitutional Court PI.ÚS 7/15 of June 14, 2016, 234/2016 Zb. N 110/81 SbNU 729 Registered partnership as an obstacle to the individual adoption of a child,
https://nalis.usoud.cz/Search/GetText.aspx?sz=PI-7-15_1.

Judgment of the Constitutional Court PI. US 6/20-1 of 11.12.2020 in the dispute on the recognition of the decision to adopt a child by registered partners,
<https://next.codexis.cz/judikatura/JD403858#L1>.