A. Introduction

The aim of the paper is to explore the influence of political, social, and economic changes in the Czech Republic after the communist takeover, the collapse of communism and finally accessing the European Union and their impact on Family and Family Law.

The paper is mainly focused on the family based on marriage with its current problems such as: rejecting or postponing the decision to get married and have children, marital instability, high divorce rate and domestic violence. The main part of the paper is devoted to the increase of quasi-marital unions (“free” forms of cohabitation, both heterosexual and homosexual), and to their problems, especially after the breakdown of the relationship. This part is concluded by considering another negative aspect of these days - the phenomenon of single style and the increase of the amount of children born out of wedlock (32%), which creates a lot of problems for single mothers, for children in fatherless family and for the whole society.

Secondly, through presenting a comprehensive study with respect to historical aspects, the paper analyzes changes in family law. The so-called 1989 Velvet Revolution brought attention to human rights, mainly to the Convention on Protection of Human Rights and Fundamental Freedoms (which was signed by the former Czechoslovak Republic after 40 years since its conclusion) and its Article 8 protecting the right to respect for private and family life. That all caused a “new” interpretation and application of the old Act on Family (1963) and the Civil Code (1964) influenced by the Soviet model, mainly from the part of the Constitutional Court.

Euphoria and enthusiasm of the early 1990’s could have led to revolution changes in family law. Unfortunately, the development in the Czech Republic was different than in the countries of the former Soviet Union where all 15 republics cancelled the law designed according to the Soviet pattern and passed a new one. In the Czech Republic, the so-called great amendment of the Act on Family (1998), which had been expected for a long time, meant only a half-hearted law reform. Nevertheless, thanks to the
above mentioned amendment of the Act of Family and the Civil Code and because a long list of conventions were signed and the Charter on Fundamental Right and Freedoms (1991) became a part of the Constitution the Czech Family Law changed a lot. Anyway, changes were not only positive.

Due to the quite chaotic legislative process and strong lobbying pressure groups we have to face controversial laws being passed. Curiously, this happens after the Czech Republic joining the European Union in 2004.

The Act on the childbirth with “secret identity” of the mother is considered to be a very bad step on the way to improvement of family law (2004). This Act is in conflict with the rights of the child and of the child’s father and allows non-family behaviour. The Act on Registered Partnership, being passed after so many attempts, has been broadly criticised as a dilettantish by both supporters and opponents of any kind of registration of the same sex couples (2006). The Act against domestic violence, which was passed only recently, is not complete: the effective civil law protection is missing (it will become effective on the 1st January 2007).

The full reform of Family law within a new Civil Code has been discussed for almost 15 years with expectations by most experts while others still adore the old Act (1963). There were some attempts in history after 1989. The first commission on recodification of Civil Code was run by professor Knapp (Charles University, Prague) and professor Plank (Comenius University, Bratislava) (shortly after 1989 and before 1993). Due to the political problems which led to the split of the Czechoslovak federation in 1992, the commission could not fulfil its task. Later, both professors died. The next attempt to create a new Civil Code in the middle of the 1990’s was under supervision of professor Zoulík (Charles University, Prague). His conception was not successful either – due to the voices of quite strong opponents and mainly due to the then political crisis and the new election.

In 2001, the new Government approved the legislative intention of the new Civil Code. The draft of the new law has been finished recently by professor Eliáš (West Bohemian University, Plzeň) and associate professor Zíklínová (Charles University, Prague) and has been a topic of comments, analyses and conferences. Family law rules form the second part of the draft. Apart from the matters now codified by the Act on Family – personal rights and duties between spouses, parental right and duties towards the children and substitute family care, the draft also includes marital property law, based on the principle of full private autonomy between the spouses, further the law concerns marital and family dwellings and other connected property issues, including the private-law rules against domestic violence. The new Civil Code will also regulate the registered partnership of the same sex couples.

According to some experts, this project should return the Czech Republic again to the sphere of the European legal tradition which was broken by the communist take-over in 1948.

Shortly after this-year election, the new Minister of Justice made a statement expressing the will of the new government to support the completing of the new Civil Code and passing it to the Parliament at the end of 2007 for further legislative process.


I. Family based on marriage and its problems

1. Demography

The situation after the communist take-over in 1948. The communist take-over in 1948 was followed by many changes: political, social and economic. Those changes influenced the Czech family, family policy and family law as well.

The first Czechoslovak Constitution stated: the family based on the marriage is the basic unit of the socialist society (1960). According to the new family policy with the basic aims and ideals of socialism, the socialist family should have looked like a small unit of husband and wife, both fully equal. An emancipation of women was realised through their full employment (including mothers with young children) with underestimating the role of maintenance duty between the spouses and ex-spouses. Anyway, there was a need for “two family incomes” (the man stopped being the head of the family and its supporter) with the so-called “consumption” character became a standard. Due to the nationalisation and expropriation the Czech family rested without property, real estates, land, etc. The Czech family was allowed to own only things which were for personal use. For an explanation: the law of that time distinguished socialist, cooperative, personal and private ownerships. The last one was under the weakest legal protection. The new matrimonial property law regulated by ius cogens without possibility of antenuptial agreements and the law regulating family dwelling by the institution of flat tenancy corresponded with the new economic situation. The state policy regarding family dwelling placed Czech families in small state or co-operative flats which reduced the family to the so-called nuclear one: married couple with one or two children. That is why the social function of family had to be transferred to state institutions: institutional facilities for children’s care, their upbringing and leisure time activities, and institutional houses caring for old grandparents. The socialist paternalistic state proclaimed to help families with great support and many kinds of allowance, mainly for newly established young families.

Preferring marriage at a young age to any other form of cohabitation led to an enormous marriage rate, a very low average age of marrying and a high divorce rate.

(a) According to statistics, almost everyone got married once in their life, sometimes twice (see Appendix). The so-called single style was not accepted. It was not convenient to live without marriage. Cohabitation without marriage between young people was rare due to problems with obtaining flats (young married couples were always preferred in allocating flats by the state) and was mostly considered as a preparation for marriage or a “stage before” marriage. Cohabitation of unmarried couples used to be almost exclusively limited to older couples (surviving spouses) taking into consideration adult children and namely with regard to retain the right to widow pensions. Also persons who had experienced several marriages frequently cohabited without marriage.

There were almost no children born out of wedlock, although the discrimination of such children was cancelled (see Appendix).
(b) It was very convenient to get married “soon” because of many effects: the new young family was granted small loans with almost no interest, small flats, and after the birth of the child – small financial support of the state. The only way a young couple could be allocated a flat was to get married and have a child, a powerful inducement for an early marriage and giving birth to a child. The natality rate was very high. The “under age” brides were not exceptional (see Appendix). Since the 1970s the pregnancy of brides was no longer considered a violation of social standards, being often “included” in life plans of single women. According to sociological surveys about 51 per cent of brides were pregnant on their wedding days.

Along with all the above mentioned political, social and economic changes the impossibility of leaving the country and the impossibility to choose a different life style from the family one led to the so-called concurrence of life starts: economic activity (both the need and the duty to be employed), marital life and parental responsibilities.

That all brought various problems: economic dependence on parents, insufficient social maturity and the resulting high divorce rate in the first three years of marriage.

(c) While between 1919 and 1939 the number of divorces (legal termination of marriage) was about 4 500 divorces a year, after the communist take-over and passing the new law in 1949, the average number of divorces in 1950 -1954 was as many as 10 535. The divorce rate thus grew rapidly, never dropping again, and by the early 1990s it was growing almost linearly. Divorce became a fully acceptable means of solving matrimonial problems. The strong position of women led to the situation that divorce proceedings was started on their motion. According to experts, women’s behaviour in divorce court is more aggressive than that of men.

Minor children did not prevent couples to get divorced at all. As for the after-divorce-settlement, minor children were as a rule placed to the individual care of the mother who was entitled to use the former family flat as an individual tenant.

After the so-called Velvet Revolution in 1989. Due to political, social and economical changes in 1989, the Czech family started to give a completely different picture. In general, partners have started to postpone marriage and having children. There are a lot of divorces - the increase of divorces of long married couples must be especially mentioned. Quite a lot of people have decided to live together without marriage. It is accompanied by an increase of children born out of wedlock. That all brings many problems, concerning mainly property. In addition, some people prefer to stay single and childless. So, there is an increase of one person households (10% in 2004). Last but not least, we have to mention free migration of people, the increase of “mixed” couples and their problems when the partnership breaks down. We face an increase of international child abductions.

The average wedding age of brides has increased from 23,2 years in 1993 to 28 years in 2004, the average age of grooms has increased from 25,4 in 1993 to 30,5 in 2004 (the first marriage).

The divorce rate only stopped growing in 1990 after reaching the historical peak of 32,055 divorces a year. In 1991 and 1992 there was a slight decrease of divorce rate - 29,366 divorces in 1991 and 28,572 divorces in 1992. The decrease of divorce rate in the early 1990s might have been the result of feelings of uncertainty related to fundamental social changes but it
was also a result of growing numbers of lawsuits in that period (namely a
great impact of restitution disputes with many experienced judges leaving
the court practice) causing a considerably longer time needed for court pro-
cceedings.

Then the number of divorces started to grow slightly reaching the peak
of 33,113 in 1996. Surprisingly, after passing the great amendment of the
Act on Family in 1998, which brought about key change in divorce rules.
Due to the new regulation the divorce proceedings in the case of spouses
with minor children were extended and the divorce rate started to decrease –
23,657 in 1999. Nevertheless, nowadays we can again see an increase of
divorce rate: in 2004 there were 33,060 divorces (see Table II). Women are
still more active in filing the motion for divorce (2004 - women: 22,110 and
men: 10,950).

Recently, the number of divorces of long lasting marriages has in-
creased. That brings about new problems with the settlement of common
property and maintenance duty. These are mainly problems for older women
(feminisation of poverty) and an advantage for men (a new start with a new
young woman).

The number of partners living in non-marital cohabitation has been
growing significantly. Cohabitation of unmarried couples used to be almost
exclusively limited to older couples (surviving spouses) in the period of
communism. That is why couples are not used to regulating their rights and
duties by any contract, which makes problems especially when the partners
split.

Birth rates have reached a historic and prolonged low in the Czech Re-
public, straining pension plans and depleting the work force. Women post-
pone the time of having children (sometimes until it is too late to have at
all), or opt out entirely, as they have become more educated and better inte-
grated into the labour market. The fall in births is most precipitous and most
recent in the Czech Republic where Communist-era state incentives that
used to make it economically advantageous to have children – from free
apartments to subsidized child care – have been phased out despite costs of
living having skyrocketed. New possibilities – interesting labour market,
professional opportunities, travelling, etc. – provide young people with
tantalizing alternatives to family. The birth rates became the lowest one in
the world and the lowest sustained rates in history: 1.2 per woman in the
Czech Republic (in 1993 it was 1.67). There is – of course, an increase of
the age of mothers when giving birth to their first child (22.6 in 1993 and
26.3 in 2004).

Curiously, the number of children born out of wedlock has been grow-
ing rapidly, too. While in 1989 there were only 8 per cent, in 1996 it was
over 15 per cent. At present, the number of children born out of wedlock is
around 30 per cent (see Appendix). It is similar to the situation in the period
of 1918 – 1939. However, there are different reasons for that. The mothers
of such children do not live alone but very often with the fathers of the chil-
dren. There is a great amount of cohabiting couples (see above) who do not
want to get married: some of them simply reject marriages as an old institu-
tion, some of them want to take advantage of state benefits designed to sup-
port “single” mothers. It is connected with problems of economic changes:
diversity of incomes and the increase of costs of upbringing a child.
After joining the European Union in 2004. After accessing the European Union, it is mainly the bigger immigration from non-European countries that must be mentioned. Due to this phenomenon, there is an increase of the population of the Czech Republic.

As the “birth dearth” has become a political issue, this year the Czech Parliament decided to double the payment given to women on maternity leave to encourage new births. The Czech Statistics Office announced recently a slow increase of child births. Nevertheless, the increase of natality was interpreted by specialists as a result of pro-family behaviour of the so-called strong population born during the baby boom of the mid-1970s.

2. Marital law

Marital law in general, its history and present state. After the formation of the independent Czechoslovak Republic (1918), the previous Civil Code effective in the territory of the former Austrian-Hungarian Empire (Allgemeines Bürgerliches Gesetzbuch of 1811 as amended) was taken over through the so-called reception rule for the Czech lands, and old Hungarian customs law for Slovakia (Act No. 11/1918 Coll.).

According to the Civil Code, the man was the head of the family. Nevertheless, he was bound to take care of the family funding and had maintenance duty towards his wife and children. He was entitled to administer the property owned by his wife (paraphernalia) unless expressly cancelled by the wife, and property of children, too. Matrimonial property law was based on separation of property of spouses and on the wedding contract. As the Civil Code was generally based on a religion principle, the marriage dissolution was possible only for non-Catholic marriages.

Shortly after the formation of the Czechoslovak Republic, the new regulation of marital relations called Marriage Amendment of 1919 (Act No. 320/1919 Coll.) was passed as a compromise. It stipulated a new conception of marriage, legal obstacles to marriage and divorce. The Marriage Amendment introduced, in addition to religious marriage, an option of civil marriage as well as the possibility of divorce as a legal termination of marriage regardless of the religion of the spouses, and retained the earlier institute of marriage separation (separatio a mensa et thora), which, however, did not have effects of legal termination of marriage because by granting the marriage separation it was only the duty of spouses to cohabit that became extinct. Legal rules for divorce were rather complex. The so-called absolute grounds for divorce were given by the Amendment but they also recognized the so-called relative grounds (insurmountable aversion and breakdown of marital relations). The proceedings were complex and in some cases a separation suit had to be filed prior to petitioning for divorce.

As there existed the so-called legal dualism (bipartism) in the Czech lands and Slovakia the Compilation Commission on re-codification of Civil Code was established in 1937. The result of its work was the draft of Civil Code which serves as an inspiration for the experts working on re-codification of Civil Code these days. Unfortunately, the part concerning Family Law was missing because of differences between Czechs and Slovaks regarding the conception.

After the communist take-over in 1948, the traditional distinguishing between Public Law and Private Law was abandoned. According to the So-
viet model, the Czech legal order was divided into relatively separated legal branches. Not only the new Constitution of May 9, 1948, but many new acts were passed in the so-called juridical two-year-plan (“právnická dvouletka”) to found the socialist law. The destructive character of traditional values of law was pointed out in the series of the International Encyclopedia of Family Law.

Provisions of family law were enacted in the new Family Law Act (Act No. 265/1949 Coll., Family Law Act, effective since January 1, 1950), which was passed beside the new Civil Code (Act No. 141/1950 Coll., Civil Code, effective since January 1, 1951). The separation of the Codes was the result of the conception of underestimating property in the family, the socialist society and the law. The new Family Law Act was concentrated only on “personal relationships among family members”. Property aspects of marriage were regulated insufficiently in the Civil Code. Protection of property rights of the child was missing at all.

The aim of the new Family Law Act was to purify family law from characteristics known in the bourgeois society and its law. That is why the Family Law Act followed the ideals embedded in the Constitution of May 9, 1948. The socialist family based on marriage was pronounced as a basis of the socialist state. Because the socialist society and the socialist law intended to eliminate the influence of the Catholic Church on social life, the form of obligatory civil marriage was stipulated as an exclusive one. The concept of marriage as a contractual relationship was disregarded and marriage was made upon the affirmation of spouses on marrying before a national committee. The hate against the clergy escalated into criminalisation of priests.

The new Family Law Act simplified the terms for concluding a valid marriage. Both, the Constitution and the Family Law Act stipulated equality of man and woman in marriage and family. As for personal rights and duties, the spouses had equal rights and duties, they were supposed to live together, to be faithful to each other and help each other. As for matrimonial property law, the regulation was based on the principle of community property with an option of contractual modifications. No ante-nuptial agreements were allowed. After-divorce maintenance was constructed as an exceptional measure.

Marriage dissolution, too, was considerably simplified. The old institution of separation was repealed. Marriage was terminated by divorce based on an objective principle which was the irretrievable breakdown of relations between the spouses. This objective principle was modified by the principle of a breakdown due to one of the spouses’ fault, namely in the case of granting divorce and its legal consequences. Married spouses could not be divorced without a consent granted by the so-called exclusively faultless spouse. If so petitioned by both spouses, the court could omit the fault to be rendered in the verdict. Family Law Act was amended twice.

Beside the Family Law Act, a discriminating law stipulating marriages with aliens was passed (Act No. 59/1952 Coll., On Marrying Aliens). Under this law marrying a person with other than the Czechoslovak citizenship was only possible on approval of the Ministry of Home Affairs or an authority empowered by it. Without such an approval marriage could not be concluded. The Act was in force until 1964.
Due to the passing of the new Constitution in 1960 (No. 100/1960 Coll.) proclaiming the victory of socialism in Czechoslovakia, all codes from the so-called juridical two-year-plan (právnická dvouletka) were substituted by new acts: both the Act on family (Act No. 94/1963 Coll.) and the Civil Code (Act No. 40/1964 Coll.) became operative on April 1, 1964. Both the new Act on family and the Civil Code are said to be even more simplified than the older ones. Some experts speak about further vulgarisation of legal culture.

As the main change, the divorce law and regulation of matrimonial property law is to be mentioned. Divorce regulated in the Act on family was based only on irretrievable breakdown of relations between the spouses. The rules of undivided co-ownership of spouses as a basic institution of matrimonial property law were introduced into Civil Code. Only things in “personal ownership” could be the object of undivided co-ownership of spouses. The law was rigid, without any possibility of making a contract. The Codes were amended several times but those changes were of minor importance.

The favourable atmosphere of the post-revolution period of the early 1990s provided the lawmakers (legislators) with a great space for a recodification of the basic codes, mainly the Civil Code and the Act on Family. Unfortunately, that advantage was missed. On the contrary, the most important codes were amended many times, partially and lacking any proper concept, which made the life of users of the law in practice very complicated disturbing the legal consciousness of the public and obstructing the full formation of „the state of law“ (rule of law) in the country.

That is why both the Act on Family and the Civil Code do not meet the requirements of the contemporary society sufficiently. Since the early 1990s there have been some projects of a family law reform. Unfortunately, the systematic ones were rejected. In general, we have to admit that the results of legislative work are far from the desire of most Czech legal theorists to have a really effective family law as part of the civil law system in compliance with the democratic tradition of Continental Europe. The first signs show that the reform has been greeted with no cheers – with a few exceptions - and that courts, solicitors, social care centre workers and other professional who have to bear the main burden of applying the Family Law in practice are rather embarrassed and hesitant about it.

Nevertheless, thanks to the role of the Constitutional Court, the “old law from the 1960s” started to be newly interpreted in harmony with the Constitution. As changes of major importance must be mentioned the following ones:

- the Charter of Fundamental Rights and Freedoms, being part of the Constitution (Constitutional Act No. 23/1991 Coll., bringing into operation the Charter of Fundamental Rights and Freedoms as a constitutional law adopted by the Federal Assembly of the Czech and Slovak Federal Republic, implemented in Constitutional Law of the Czech Republic by a ruling of the Board of the Czech National Council No. 2/1993 Coll.), promulgated (human rights) treaties to the ratification of which Parliament has given its consent and by which the Czech Republic is bound and which make due to Article 10 of Constitution part of the legal order and are directly applicable prevailing over domestic ordinary law (see Appendix),
• the small amendment of the Act on family (Act No. 234/1992 Coll.)
which re-introduced religious marriage into the legal order,
• the so-called great amendment of the Act on family and Civil Code
(Act No. 91/1998 Coll.) which brought out (regarding our topic) “re-
form” of divorce and maintenance duty between ex-spouses and mat-
rimonial property law,
• the law regulating partnership between the same sex partners - Act on
Registered Partnership (Act No. 115/2006 Coll.),
• the law against domestic violence (Act No. 135/2006 Coll.).

The nature of marriage. Marriage is defined by law as a permanent co-
habitation of man and woman. So only a man and a woman are allowed to
enter into marriage. The situation of transsexuals is not sufficiently provided
for by law. For contracting marriage it is decisive which sex is stated in the
state register of births. Under the law, the person after having officially
changed his or her sex may contract a valid marriage with a person having
in his or her birth certificate the opposite sex. As for the same sex couples
there have never been given serious thoughts in the Czech society to allow-
ing them to conclude marriage (it would be non-matrimonium, matrimo-
nium putativum according to the Act on family). The new Act on Registered
Partnership (2006) only allows the same sex couples to get registered but
stipulates neither personal rights nor property rights between registered
partners (for details see Part C/1). The new act is said not to be about part-
nership but only about its registrations.

Although the number of marriages contracted after 1989 has been de-
creasing significantly and the number of cohabitations and the number of
children born out of wedlock has been growing (see appendix), the Czech
law maker do not see any need to equalise cohabitants with spouses. From
the widely accepted standpoint the man and the woman are allowed to get
marry and through marriage have rights and enjoy legal protection. If they
do not want to conclude marriage they should not ask for any kind of protec-
tion. According to the strongest voices it would be the best way to under-
mine the institute of marriage.

Conclusion of marriage. Since 1992 there has been the possibility of
choosing the form of concluding marriage: both civil and religious solemni-
sations are available: marriage is contracted by a free and fully consenting
declaration of a man and a woman that they are getting married before a
municipality authorized to keep registers or before an authority of a church
or a congregation registered by the state (Section 3, AF). Legal experts were
inclined to re-introduction of the obligatory civil ceremony in1998, but
political reasons led to preservation of the existing dualism. Nowadays,
there is a discussion regarding the future of church wedding in relation with
the re-codification of the Civil Code. However, there has been a kind of
state supervision over church weddings (since 1989): the obligatory pre-
matrimonial preparatory proceeding in front of the state body (civil registrar)
has to proceed. The capacity to conclude marriage (for instance the age,
legal capacity) and the legal obstacles (for instance another marriage or
registered partnership, consanguinity) are also examined. A written testi-
mony is issued for the purpose of religious matrimony. Within three work
days the priest is bound to deliver the record of marriage solemnization to
the register office in the district in which the marriage was contracted. The
register office will file the marriage contracted in the marriage register and
will issue a certificate of marriage for the married couple.

The solemnization of marriage must be carried out in presence of the
persons to be married before (a) the mayor, his deputy or an authorized
member of local council with the registrar present (civil wedding) and (b) a
person authorised by any church or religious society (congregation) regis-
tered by the state represented by the Ministry of Culture (church wedding).
The number of churches and religious societies has presently exceeded 26 in
the Czech Republic.

Czech citizens abroad are also entitled to undergo a marriage ceremony
at diplomatic offices. In the case of an immediate danger to life, the wed-
ding may be performed before the captain of a Czech ship or a plane or by
the commander of a Czech military unit abroad – one of the spouses must be
the Czech citizen.

Marriage is established just by the mutual consent of the bride and the
bridegroom. However, the record in the state register is obligatory (both
civil and church weeding). The register office will file the contracted mar-
rriage in the marriage register and issue a certificate of marriage for the mar-
ried couple.

Regarding the mutual consent, the persons to be married are bound to
declare that they are not aware of any circumstances barring their marrying
(age, bigamy, consanguinity, mental decease). This declaration substitutes
the traditional public announcement of two persons intending to marry
(banns).

The Act on Family imposes the duty of the persons to be married to
know in advance each other’s character and health condition so they can
create a marriage which will fulfil its aims. In the course of the marriage
ceremony the parties only declare that they know each other’s health condi-
tions. This declaration, however, has no legal consequences as Czech law
does not require obligatory medical checks prior to marriage. The fact that
the persons to be married did not know each other’s health conditions and
that for example one of them concealed a serious disease or disorder has no
effect upon the validity of marriage.

The persons to be married are also bound to declare that they have con-
sidered future arrangement of their property relations, dwelling and provid-
ing the family after marrying. This declaration has no legal effects, either.
The bride and bridegroom are not bound to enter into any contract concern-
ing matrimonial property or a contract concerning matrimonial cohabitation.

The persons to be married are also bound to declare how they have
agreed on using their surnames after marrying. On the marriage solemniza-
tion the parties are bound to declare how they agreed on the surnames used
after marrying. They have three options:

a) the couple will agree on a common surname for both of them,
b) both husband and wife will keep his/her original surname,
c) the couple will agree on a common surname for both of them and one
   of them will keep his/her original surname and will use it as a second
   one.

Personal rights between the spouses and maintenance duty. Provisions
governing the personal and property rights of spouses remain scattered in
Marriage in Central Europe

several places in the Act on Family and in the Civil Code. This is so even nowadays because of the conceptual defects of the so-called great amendment of the Act on Family from 1998.

Unfortunately, due to the socialist theory and the Soviet pattern of family law, the Act on family is only focused on personal rights and duties between spouses. As mentioned above, the property aspects of life were underestimated by the law makers after 1948. That is why matrimonial property regimes and the law regulating matrimonial home are stipulated in the Civil Code. Therefore there are still problems caused by political reasons.

As for personal rights and duties between the spouses the Act on Family stipulates as follows: according to the law both the husband and the wife have the right (and duty as well) to live together, to be faithful to each other, to mutually respect their honour and human dignity, to help each other, to represent each other and to create a sound living environment and background (Sections 18, 19 AF).

The right and the duty of spouses to cohabit do not mean that the wife is bound to follow her husband wherever he goes as it was imposed by ABGB. Anyway, the so-called one home and one address are typical as matrimony is considered to be a life unit. One of the spouses, non-owner of the family flat of house, is entitled to live in his/her spouses’ property during the marriage.

The duty to be faithful arises from the nature of matrimony as a union of one man and one woman. Violation of that duty bears no direct sanction. Nevertheless, such a breach may cause a marriage breakdown and influence the divorce proceedings and after-divorce settlement.

The duty to respect one another’s honour and human dignity emphasizes the equal status of both spouses. It is very important regarding the phenomenon of domestic violence.

The duty to help one another arises from the concept of family solidarity as a basic principle of family law. The principle of family solidarity forms a basis for rights of maintenance duty between spouses and ex-spouses and for the marital property regime.

The duty to jointly take care of children means the care of common children of the spouses and of children of only one of them. The step father or the step mother has a duty to help the child’s parent to bring the child up.

The duty to take care of family needs imposed by the law means that both spouses are obliged to meet the needs of the family consistent with their individual capabilities, abilities and their property situation. The law does not distinguish between financial support and personal care of the household and children. The personal care of the children and the common home is deemed equal to monetary contribution. If one of the spouses does not perform his/her duty to share the expenses of the common household the court will rule in the matter on the basis of a petition filed by the other spouse.

As spouses are principally entitled to have an equal living standard, the Act on Family provides for the maintenance duty. Both the husband and the wife have mutual maintenance duty in such a scope that their economic and cultural standard is to be on the same level (Section 91 AF). This goal can be reached within matrimony by the institution of “joint property of spouses”. When it applies both the husband and the wife are allowed to meet all their needs by making use of the “joint property”. Both theory and legal
practice agree that the institution of maintenance duty between spouses cannot be applied when there is the institution of “joint property of spouses” in the legal scope and when the spouses live together.

Because the Czech socialist family law did not provide for classic ante-nuptial agreements and the regime of separated property of spouses was exceptional, the institution of matrimonial maintenance used to apply only when there was a separation de facto. However, after the introduction of the so-called great amendment of the Act on Family (1998), mainly in connection with the so-called “divorce based on controversy - dispute with hardship clause” (tvrdostní klauzule) (Section 24b AF), the importance of the institution of maintenance duty between spouses has increased.

**Marital property law.** While for the historic civil law regulation (ABGB) was typical the separation of spouses’ property and the freedom to conclude an ante-nuptial agreement, the socialist law established the uniform legal community property regime (both the Act on Family of 1949 and the Civil Code of 1964). In general, the socialist law underestimated property aspects in family life. Property issues were considered as being of secondary importance. Thanks to political, social and economical changes in 1989, the matrimonial property law changed a lot in 1992 (Act No. 509/1991 Coll.) and considerably in 1998 (Act No. 91/1998 Coll.). Anyway, key changes are still being expected.

“Joint property of spouses” as a legal regime is the basic institution of matrimonial property law (Section 143 ff. CC, introduced by Act No. 91/1998 Coll.). Not only “assets” acquired by the spouses during their marriage (with the exception of assets acquired by inheritance or gift and assets which by their nature serve personal needs of one of spouses), but also “liabilities” incurred by spouses during their marriage are the object of “joint property of spouses” (Section 134 CC). Unless proved otherwise, it shall apply that assets acquired and liabilities incurred during marriage represent “joint property of spouses” (Section 144 CC).

The husband and the wife as well as the engaged couple are allowed to modify the legal object of “joint property of spouses” by a contract in the form of a notary record: to restrict it only to the usual equipment of the common household or to extend it without any limits. However, cancelling or creating a different type of “community property” by a contract is not allowed. This conception is a residuum of the original rigid conception of the Civil Code which included a great deal of ius cogent. That is why the traditional ante-nuptial agreements are not stipulated by the law.

Beside modifications, the married or engaged couples are also allowed to create a deferred community by a contract (Zugewingemeinschaft, comunione differita, coacquisita coniugum). It means that the husband and the wife or the engaged couple can fully or partly postpone the establishment of “joint property” as of the day of termination of their marriage, except for items (things) which form part of the usual equipment of their common household. It is not used in practice.

Moreover, the spouses may refer to the contracts reducing or increasing their joint property or to the contracts postponing the formation of the joint property of spouses by the day of their marriage termination towards another person only if this person is aware of the content (the text itself) of such contract.
A special registration of such a contract is not stipulated by the law, which is largely criticised. The problem is partially solved by the Commercial Code requiring filing a counterpart of the notary record on modifying the extent of the joint property in the Commercial Register Deeds Collection. The same applies for court rulings reducing the joint property.

The court may, if so requested by one of spouses, restrict the legal scope of “joint property of spouses”, except for things which form part of the usual equipment of their common household. This may happen due to:

- serious reasons (for instance drugs or spirit addiction, gambling etc., Section 148/1 CC),

- when one of spouses obtains permission (approval or licence) to carry out a business activity or becomes a partner in a company with unlimited liability (Section 148/2 CC). This instrument is used in practice quite frequently. The separation of property is a result of the court decision, in fact. This practice protects effectively neither the interests of the so-called weaker partner and the family or the third parties, mostly creditors, etc.

The term “items” (things) which form part of the usual equipment of common household was introduced into the law in 1998. Items should always form part of common property. Arising from subjective outcomes there is a prevailing interpretation that the items forming the usual equipment of a common household are derived from the property situation of a particular family.

Both the husband and the wife use and maintain enjoy assets which form part of their “joint property” (Section 145, CC).

As regards the administration of assets (management), the agreement (consent) of both spouses is required in crucial matters, otherwise an act in law would be avoidable. Other rights and duties, especially the routine management of assets which are part of the “joint property of spouses” can be exercised by either spouse.

Both spouses are entitled and liable jointly and severally in respect of acts in law relating to their “joint property” (active and passive solidarity). Both spouses fulfill jointly and severally liabilities which are part of their joint property. The spouses’ creditor may claim full compensation, or its part, jointly from both spouses or separately from each of them. Either spouse is liable for the entire debt until the creditor is fully satisfied.

During marriage the joint property of spouses becomes extinct under law in two cases:

1. Punishment in the form of property forfeiture may be included by the court when imposing a maximum penalty or a prison term for a serious intentional crime through which the convict acquired, or attempted to acquire, property gains. If the court imposes a fine, this penalty has no effect upon the existence of the joint property of spouses.

2. Joint property of spouses becomes extinct under the law also upon a bankruptcy order issued by the court. The part of joint property used in business by the bankrupt becomes part of bankruptcy assets. It means that the items serving business activities of the bankrupt will always become part of bankruptcy assets.

Dissolution of a marriage also dissolves the “joint property of spouses” (Section 149/1, CC). Such property must be settled.
The law allows the ex-spouses to settle their extinct joint property by a contract. The autonomy of will may be fully realised. An agreement of the spouses on their joint property settlement must be in writing. If their joint property includes real estate, the agreement becomes effective when registered in the Land Register (Section 150/1, CC).

The ex-spouses only have to be aware of their creditors’ interests. The rights of creditors may not be effected by the agreement. Therefore the agreements on joint property settlement made within six months prior to the declaring of bankruptcy are deemed invalid. Similarly, the settlement agreements made by a bankrupt after bankruptcy declaring are deemed invalid. The settlement agreement in the case of bankruptcy is made between the trustee in bankruptcy and the other spouse and this agreement must be approved by the creditors’ board.

When the ex-spouses are not able to reach an agreement one of them may apply to the court. The basic principle for the settlement provides that the shares of both spouses in their “joint property” are equal. The court will take into consideration the needs of the minor children, custody of the children, family and the common household (Section 149/3, CC). Either spouse is entitled to claim reimbursement for whatever he/she has contributed to the joint property from his/her own funds, namely the funds owned by him/her prior to marriage or the funds he/she acquired exclusively by gift or through inheritance. Either spouse must compensate for whatever he/she has taken from the joint property for the benefit of his/her own property.

If within three years of the termination of the spouses’ joint property no settlement has been reached, or if within three years of the said termination no petition to the court for the joint property settlement has been filed, the law regulates a settlement upon presumption: the movable things handled by the spouses will be deemed to have been settled consistently with the principle of using, namely that each spouse will be deemed an owner of such things from the joint property which he/she uses exclusively to satisfy his/her own needs or the needs of his/her family and household. Other movable and immovable things will be deemed part of the apportioned co-ownership, the shares (ownership interests) of each of the co-owners being equal. The same will apply as appropriate to their joint property rights, assets and liabilities. Thus joint property of spouses is settled directly by the law. Following three years after the divorce ruling has become effective none of the spouses may bring a suit to have the joint property settled.

Marital dwelling – matrimonial home. “Joint lease of a flat by spouses” is the basic institution of common cohabitation of spouses (Sections 703 ff., CC). The Civil Code distinguishes between (a) the lease in general and (b) the lease of a co-operative flat. Although this conception has its roots in the period of communism, it is still of great importance, mainly when one of spouses decides to leave the family flat, when the couple gets divorced or when one of spouses dies.

“Joint lease of flat by spouses” is established always when the marriage is solemnized (Section 704, CC). The rules are cogent. The impossibility of conclusion of any convention (contract) makes big problems mainly when the involved persons enter into the second or further marriages. The effect of the institution of “joint lease of flat by spouses” is that by the marriage both husband and wife obtain equal rights and duties to the flat.
“Co-ownership” (Section 136, CC) is another of legal titles of dwelling. The “joint easements” (Section 151, CC) and “joint innominal contract (a contract not-regulated by Civil Code)” (Section 51, CC) can be a basis for matrimonial living, too. Spouses can live on the basis of the so-called “derived legal reason”, for instance when one of them is an individual lessee of the flat determined for the dwelling of disabled people.

Generally, it can be said that the legal regulation of dwelling is non-systematic, rather chaotic and problematic due to being spread in a lot of institutions and mainly due to being a residuum of the period of socialism. The umbrella institution of family dwelling is missing as well as its protection known from the traditional legal regulation.

Divorce law. Matrimony ceases to exist by death which is to be proved by a declaration issued by state registers. Matrimony also becomes extinct by a declaration of the death pronounced by the court (Section 22, AF). The court can declare the death of one of the spouse when it is possible to find out the death in other ways or when the spouse is missing for one year (Section 195, Civil Procedure Code). During the lifetime of the spouses the matrimony can be cancelled only by divorce.

The development of the legal regulation of divorce was quite interesting. As a great “achievement of socialist law” it was considered that the „fault-based divorce” totally disappeared from the legal order after the Act on Family was passed (1963). Since then the divorce regulation has not enabled to penalize the erring spouse. Divorce is only taken as a remedy. Since the early 1960s the divorce has been based on irretrievable breakdown without specific grounds.

Important changes of the substantive legal regulation of divorce were made by the so-called great amendment of the Act on Family (1998). The law of divorce is still based on “irretrievable breakdown” but because of the need to prove it the new law distinguishes:

Divorce based on a dispute. (Sections 24, 24b, AF). The general legal regulation establishes that the court may divorce the matrimony on the motion of one of spouses when matrimony is so deeply and permanently disturbed that re-cohabitation cannot be expected (Section 24, AF). The court takes into consideration the cause of the breakdown of the matrimony which may be objective (for instance infertility) or subjective (drugs or alcohol addiction, gambling, etc.). The spouse petitioning for divorce has to prove the breakdown. However, the court does not examine the „fault “ related to divorce. A disadvantage of this kind of divorce is that “all marital problems” have to be discussed in court. Another difficulty is caused by the fact that this type of divorce can only solve the problem of “personal status”. It means that the divorce proceedings cannot be connected with the settling of joint property of spouses or maintenance duty after the divorce. This is exceptional in practice. The so-called “hardship clause” was introduced into the legal order of the Czech Republic for the first time by the great amendment of the Act on Family (1998). According to the new regulation the court will not divorce the matrimony unless one of spouses disagrees. This provision applies only when this spouse proves:

- that it was not he/she who predominantly caused the matrimonial breakdown,
- that the divorce would cause him/her exceptionally serious loss,
• that there are extraordinary circumstances which support preservation of the marriage (Section 24b, AF).

The legal protection of the person who is against the divorce is not absolute. If the couple have not been living together for a period longer than three years the court will grant divorce. The spouse who seeks divorce have to prove separation de facto. This is exceptional in practice.

Divorce beyond dispute or divorce by mutual agreement - uncontested divorce, (Section 24a, AF). This kind of divorce is novelty in the Czech family law (since 1998). The designation of this type of divorce is not precise, though. It is also based on a totally irretrievable breakdown of marriage. However, the breakdown does not have to be proved when the husband and wife agree on:

• settlement of mutual propriety relations, rights and duties of matrimonial home and (facultative) on maintenance duty after the divorce,
• determination of the rights and duties in relation to minor children after the divorce.

Further, the new provision contains the irrebuttable presumption of irretrievable breakdown of the marriage. The spouses only have to prove that their marriage lasted for at least one year and that they have lived apart for more than six months. The court has to examine only the length of the matrimony and the separation, which can only be proved by mutual declaration of the spouses. Then the court examines whether the above mentioned agreements were submitted and whether the other of couple has joined the motion.

The positive aspect of this new regulation is that the so-called “divorce beyond dispute or divorce based on agreement” can serve as a complex and final arrangement of right and duties based on marriage.

Problems and negative aspects of the new type of divorce are caused by the fact that the law is brief. It causes serious interpretation and application problems, mainly as regards the content of the contracts, implementation of autonomy of will when concluding these contracts, legal protection of the so-called economically weaker partner, interests of minor children, etc. The question whether the “divorce contracts” are to be built as “pactum de contrahendo” or “a contract with a suspense condition” has been largely discussed.

Another defect of the new legal regulation is that the “role” of the court is “not clear”. The law says that the court takes into consideration the submitting of the contracts, that they are in writing and that the signatures of spouses are verified. This can lead to the conclusion that the court only examines formal aspects of the contracts. Regarding the content of the contracts, unfortunately, the law does not say anything. The practice is different. Courts mostly examine only whether the contracts follow the basic provisions regulating acts in law. Serious problems were caused by the fact that the amendment of the Act on Family was not followed by changes in civil procedural law. The so-called “divorce beyond dispute or divorce based on agreement” is dealt with within the framework of “controversy proceedings”. It means that even when spouses are “beyond dispute” in matters concerning divorce and after-divorce settlement they have to play
roles of “plaintiff” and “accused”. The spouses are not allowed to file a motion to that effect jointly because of the problematic conception of the Civil Procedural Code (1963).

If spouses have minor children a “special” court determination of the after-divorce parental care (custody) and maintenance liability has to precede the divorce itself (Section 25, AF).

The decision of custody (“rozhodnutí o svěření dítěte do výchovy” - the decision on entrusting somebody with the upbringing of minor children) may be made by judgements or by approved agreements when the parents entitled with parental responsibility do not live together or do not want to live together (see Section 26, AFk, regulating divorce, Section 50, AF, regulating separation of the parents).

The court may decide even without a petition to whose custody the child shall be placed (who of the parents will take care of the child in his/her household and who will be participating in care during the access to the child):

- the court shall determine who—mother or father—shall be entrusted with individual custody of the child;
- if both parents are able to bring up the child and are interested in the upbringing, the court may put the child into a common custody of both parents if it is compatible with the child’s interest and if it leads to a better security of his or her needs;
- if both parents are able to bring up the child and are interested in the upbringing, the court may put the child into an alternative custody of both parents if it is compatible with the child’s interest and if it leads to a better security of his or her needs.

The separation of the two proceedings, one concerning the divorce and one concerning the arrangement for children, is to be considered as a novelty in Czech law (since 1998), In fact, it is a comeback to the legal regulation introduced by the Family Law Act (1949). Unfortunately, the changes in substantive law were not followed by changes in civil procedural law. This fact caused considerably serious problems in practice, particularly in the diversity of courts procedure and final decisions.

After divorce, the rights and duties of the former spouses cease to exist, namely the duty to live together. When the divorce sentence comes into force, the institutions of “joint property of spouses”, “joint lease of flat by spouses” and “maintenance duty between spouses” terminate as well. The spouse, whose surname was changed due to matrimony, is allowed to declare that he/she takes back to his/her prior surname or that he/she ceases to use the double-surname.

Maintenance duty between ex-spouses. Unlike the law of many West European countries, the law of the former socialist countries did not regulate the duty to maintain the divorced spouse as an usual effect of divorce. Legal regulation of post-divorce maintenance duty underwent quite a dramatic development. It was due to an almost full-employment of women in the former Czechoslovak Socialist Republic from the early 1950s on. At that time the institution of after-divorce maintenance duty was consider as exceptional. Therefore the Act on Family in its original wording (1963) recognized the divorced spouse’s right to be maintained in the situation when the
spouse was not able to support himself/herself. The entitlement was limited to the so-called necessary maintenance and to five years following the divorce with the option for the judge to prolong the duty to maintain in exceptional cases. The statutory limit of five years was based on an unrealistic presumption that such a period would be sufficient for the majority of divorced spouses, especially women, whom it mostly concerned, to become economically independent. If the women looked after young children, the period of five years was considered to be long enough to put the children to collective upbringing facilities so their mothers could get employed in turn. It turned out, though, that the situation at the time of deciding on maintenance allowance for the divorced spouse justifying the grounds for its granting continued to exist in most cases even after the expire of the five-year period.

The Act on Family as amended in 1982 revoked the statutory time limit and the entitlement to be maintained was extended by so called “adequate”, “appropriate” or “reasonable” maintenance. The so-called great amendment of the Act on Family of 1989 brought about big changes: the general provision and the so-called “sanctioning” maintenance.

General legal regulation of post-divorce maintenance is based on the “state of need” and is not limited in time. The key presumption in claiming the duty to maintain between the divorced spouses is the fact that one of the spouses is not able to support himself/herself after the divorce. The person dependent on maintenance is mainly the one looking after a child younger than three years or an older child, but impaired or in need of special care. A person can also be dependent in the case of his/her illness, loss of qualification due to taking care of the matrimonial home during a longer marriage, etc.

The former spouse, who is not able to provide the maintenance for himself, can ask the other one for the rent of “adequate”, “appropriate” or “reasonable” allowance (Section 92, AF). The court practice holds “reasonableness” as considered in relation to abilities and the situation of the person liable, i.e. his/her living standard, health condition, age, etc. There are no tables, percentages fixed by law, etc. In fact, the amount of maintenance is based on possibilities (objective category), abilities (subjective category) and property conditions on the part of the obliged and on reasonable needs of the entitled.

The allowance must not be settled when it is in contrary to the principle of proper manners. It is to be proved by the potential obliged. Therefore along with determining maintenance the court also will have to deal with the grounds that led to the marriage breakdown.

The law regulates specifically the so-called “sanctioning” maintenance (Section 93, AF). The former spouse, who by violating the matrimonial duties did not cause prevalently the breakdown of marriage and who suffered a serious (non-proprietary) loss by the divorce, can require from the other former spouse a maintenance in the scope of “the same living standard” - an amount so that the material and cultural living standard of both spouses should be principally the same, i.e. as if no divorce occurred. This provision is connected with the new regulation of divorce and mainly with the problem called “feminisation of poverty”. Such an extended maintenance may be granted for no more than three years following the divorce. In
determining the extent of maintenance the court does not investigate whether the divorced spouse is able to support himself/herself.

When the divorce is realised by the variant of “divorce beyond dispute or divorce by mutual consent”, all rights and duties of former spouses should be settled within the contract previously passed to the judge.

But if the divorce proceeded as “divorce based on controversy or dispute” and the divorced couple failed later to make any agreement regarding the settlement of common property and housing and maintenance, it is necessary to file a motion to the court for the settlement. In this case, no “umbrella settlement” is unfortunately available. In fact, different motions should be brought to the court, as this variant of divorce changes only “civil status”.

Right of the divorced spouse to be maintained may also cease to exist due to his/her receiving a lump sum of money on the basis of a written agreement (Section 94/2, AF), when the obliged spouse dies or when the entitled spouse re-marries.

II. Family not based on marriage and its problems

1. The Act on Registered Partnership

After many futile attempts the Parliament of the Czech Republic passed the Act on Registered Partnership (No. 115/2006 Coll.). The President of the Czech Republic applied his power of veto but it was overridden in the second proceeding and the Act was passed. The main point of President’s objections was that the draft did not regulate partnership - rights and duties of the partners but just registration itself. He was right. In addition, the new law is said to be without any conception as it is typical for drafts based only on deputies’ activities. We can ask whether the Czech Republic needs such a law.

The new act has three sources: (a) the drafts from 1990s, (b) the present Act on Family regarding regulation of marriage (some articles are identical) and (c) the draft of new Civil Code regarding registered partnership. The act is more or less a mixture of conceptions.

The idea, terminology, systematic and logic nature are problematic, too. Registered partnership is sometimes similar to marriage (maintenance duty between the partners and ex-partners) and sometimes similar to cohabitation within marriage (no duty to live together, no duty to be faithful to each other, no duty to help each other, no community property, no common tenancy of flat by operation of law, no right to adopt a child as common one, no right to become common foster parents and guardians, no right to have a child put into joint custody, etc.).

According to the new Act, registered partnership is a permanent community of two persons of the same sex established in the manner stipulated by the Act (Section 1, ARP). Under the new law, couples of identical sex, older than 18 years, with full legal capacity, no brothers, no sisters, no descendents, no ascendants, at least one citizen of the Czech Republic, are allowed to get registered (Section 4, ARP).

Registration shall be done in front of a state registrar (Section 3/1, ARP).
The extinction of a registered partnership is similar to the extinction of marriage:

(a) death of one of the partners and  
(b) cancellation (not divorce) of the relationship by the court on the motion of either partner (Section 14, ARP).

There are two grounds for the court decision: (aa) proof that the relationship between the partners in fact ceased to exist (Section 16, ARP) and (bb) there does not have to be made any proof of relationship if the second partner joins the motion of the plaintiff – then the court shall not examine whether the relationship between the partners in fact ceased to exist or not (Section 17, ARP). The partners (or spouses) are not allowed to file a motion to this effect jointly because of the problematic conception of the Civil Procedural Code (1963).

The Act on Registered Partnership does not include an article declaring that “the Act on Family or Civil Code shall apply in the case when the Act does not provide otherwise”. So, it will be quite difficult to overcome its gaps.

Due to a lot of defects of the Act on Registered Partnership an amendment is being prepared.

2. Cohabitation of a man and a woman without marriage and its legal aspects

Although marriage is highly valued in Czech Republic, the number of persons living as unmarried couples has been growing. Polls show that more and more people wish to live with his/her partner without marriage in the so-called factual cohabitation, or independently without a partner. To a great extent this is a reaction to the previous closed society where the family life based on marriage considerably prevailed as a way of life. During communism, it was only older people – divorced or widowed – that used to live as unmarried couples. That is why there is neither legal definition of cohabitation nor a catalogue of rights and duties of unmarried couples in the Act on Family. There is no legal regulation of a family law contract (a nominal contract) between cohabitants either in the Act on Family or in the Civil Code.

In the legal order there is no right between unmarried spouses to be maintained. If the spouses manage their finances together by informal factual agreement (de facto, an implied one), their needs are factually satisfied within this framework. The problems is that almost no couples have formal innominal (see above) agreements or a pension contract (according to Section 842, CC) in writing. That is why after the extinction of such a relationship the weaker party of a couple has no legal entitlement towards the other partner, not even when they have a child. The Act on Family provides for the entitlements of an unmarried mother towards her child’s father only to a very limited extent. The duty to maintain the mother is limited to the period of two years (for details see Part C/3). A factual voluntary maintenance, despite not being provided for in Act on Family, may be of significance in regard to recovery of damages, though. If a physical injury resulted in death, the defendant is bound to refund by monetary allowances the maintenance
costs of the survivors whose maintenance was factually provided or was owed under the law by the deceased person (Section 448/1 CC).

No community property similar to joint property of married spouses may arise between unmarried spouses on the basis of a law or a contract. According to an explicit provision of the Civil Code, joint property may arise only between a married couple (Section 136/2 CC). When unmarried spouses have lived together in a factual long term union each of them acquires property into his/her own individual ownership and may dispose of this property without the consent of the other spouse. If they obtain something together co-ownership may arise between them like among other persons. If not stipulated by the law or agreed by the parties otherwise the portions of the property owned by them are equal (Sections 137/2 CC).

Unlike married spouses no common tenancy of flat shared by unmarried spouses may arise by operation of the law. The other spouse may only live in the flat as a close person or as a family member (Sections 115, 116, CC). In order to accept an unmarried spouse to the flat the tenant needs no consent of the owner of the flat or the house. Only upon the death of the tenant the tenancy of flat may pass by operation of the law to the surviving person supposing he/she proves that he/she lived with the dead partner for three years prior to his/her death and he/she does not have a flat of his/her own (Section 706/1, CC). As for co-operative flats, it holds that in the case of death of the tenant the tenancy is passed to an heir of the share.

3. Single mother and her entitlements towards the child’s father

Within the Czech legal order the single mother has always had entitlements towards the child’s father. That regulation had origins in the ABGB which provided non-married mothers with a small number of limited rights.

Since 1998 the rights of the non-married mothers stipulated in the Act on Family have been broadened (Section 95, AF). The child’s father to whom the mother is not married is obliged to contribute appropriately to covering the costs for her maintenance in the period of two years and to reimburse her expenditures related to her pregnancy and confinement.

The costs related to pregnancy and child delivery include the costs of the mother to purchase clothing and shoes for the period of pregnancy, medical care costs that are not covered by her health insurance, etc. The mother may claim the costs as stated if and only after the child has been delivered and paternity established either by the common affirmation of the parents or by the court ruling.

Regarding the maintenance duty to the child, the child has the right to enjoy the living standard of the parents (it does not matter whether they are married or not) until he/she gets a chance to manage his/her maintenance by himself/herself (see Section 85, AF). That is why the mother can claim the costs towards the child’s father incurring from purchasing the necessary items for the child like a baby pram, a baby cot, baby clothing, etc.

To avoid the difficult social situation of a pregnant unmarried woman the law grants her the entitlement in court prior to the child’s delivery towards the man whose paternity is probable: (a) the costs of her maintenance, (b) the costs related to pregnancy and child delivery and (c) the costs of the
III. The law against domestic violence

The Act on Family imposes a duty on the spouses to create a sound living environment and background (since 1963). The amendment of the Act of Family broadened spouses’ duties with the duty to respect one another’s dignity (1989). However, there are no sanctions for breaching the duties either in the Act on Family or in Civil Code. Of course, there are general rules protecting personality in the Civil Code (see Section 11 ff, CC) but they are difficult to use in practice.

The Communist state kept its eyes closed before the problem called domestic violence nowadays although experts were proving that homes were not as safe as they should have been. There have been no big changes after 1989. The parliament of the Czech Republic does not consider domestic violence as a big problem and that is why the Czech legal order does not include a complex regulation of that phenomenon. The draft No. 828 of 2004 could have been a good solution bringing the Czech Republic closer to the European standards.

Anyway, there are some important steps on the way to the complex protection against domestic violence:

- the amendment to the Criminal Code (No. 91/2004 Coll.) introduced a new Section 215a: battering of a person cohabiting in the common flat of house,
- the amendment to the Act on the Police of the Czech Republic, Civil Procedural Code, Criminal Code and others (No. 135/2006 Coll., in force since 1 January 2007) introduced a possibility: to banish (expel) from the family home and to prohibit returning there.

According to the new law, the policeman is entitled (ex lege, ex offo) to banish a suspected person and prohibit his/her return to the flat or house shared with the victim and its surroundings for 10 days. The civil court is authorized to impose, on the motion of a victim and by an interlocutory injunction, the duty on defendant to leave temporarily the flat or house and its surroundings and the duty to refrain from meeting the victim and creating contacts with the victim for one month. The court may prolong the period on a motion. The interlocutory injunction ceases to be effective by the expiry of time (not longer than 1 year). The court must immediately organise the execution of its decision.

IV. Re-codification of Family Law within the new Civil Code

It is possible to say that the above mentioned partial changes of Czech family law (see Part B/2, i. Marital law – in general, its history and presence) prepared the ground for the decisive step – the re-incorporation of family law institutes into the Civil Code as the basic source of private law. The time for enabling the realisation of the second detached phase could
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come – the phase of the private law family regulation reform recommended in specialists’ studies for a general discussion on the Czech family law according to designed law so that it should get closer to the current legal regulations of European countries.

In the spirit of the European tendencies, the work on the recodification of the civil code as the basis of the private law has currently been proceeding in the Czech Republic. The work should result in a unified, coherent, systematic, clear, complete, and at the same time necessarily open code. This direction of development of the Czech family law, defined by the subject-matter of the Ministry of Justice (ref. No. 2623/00-L of January 29th 2001), can be characterised as an effort to create a European continental civil concept of the family law. Family law rules were incorporated in the second part of the paragraphed working version (draft) of the re-codified private law code, which, apart from the matters now codified by the Act n Family (the divorce by mutual consent will be novelty), also includes marital property law, based on the principle of full private autonomy between the spouses, further the right of marital and family dwelling and other connected property issues, including the private-law rules against domestic violence. The new Civil Code will also regulate, among others, the registered partnership of people of the same sex. The draft should be submitted to the Parliament at the end of 2007 for a further legislative process.

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

We can only emphasize one point that the conceptual inclusion (returning) of the family law rules into the civil code is correct. It specifically draws upon the status rights of people or persons in general in the legal sense of the word. This is not changed even by the fact that in family law, a significant role is played by mandatory legal rules, as that is a phenomenon characteristic of status right without leaving anyone in doubt about the private character of such rights. We may say that private law cannot be considered public only because of a high number of mandatory rules.

An undoubtedly positive aspect of big codes is their stability. In a democratic situation it is not easy to change them ad hoc according to topical particular interests.

V. Conclusion

In spite of the problems with meeting the European standards, the Czech family law according to designed law is moving towards the traditional family law institutes included in the Civil Code as the basis of private law. The new regulation of family relationships will be very similar in its concept to large codes of private law, i.e. to the General Civil Code (ABGB, 1811) which is the basis of the Czech civil law and institutes of which are still in minds of the public, both specialists and lay people. We can agree with the opinion that the new private law code should include, as a principle, all the private law matters, i.e. also family law in such a way that is usual in countries with a comparable legal environment and with a reference to the necessity of the unity of private law.
When looking at the explanatory note on the draft of the Civil Code the creators’ efforts aiming at making discontinuity with the communist law and at the creation of a code comparable with European cultural conventions is perceivable at the first sight.

Appendix:

Data from the Statistical Year Book