

CHAPTER II

FAMILY PROTECTION IN CROATIA



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1. Introduction

A family as a basic group unit of society surely represents an undisputed value *per se* for its members as well as for society. On the occasion of *The International Year of Family*, marked by the UN, a concept of the need for family building has been adopted in 1994: “*Building the Smallest Democracy at the Heart of Society*,” which may be understood as not only building the family from the inside (via its members) but also as an impetus for building it from the outside (via the state). In the principles concerning the marking of the Year of Family, it has been pointed out that “these express the diversity of individual preferences and societal conditions.”¹

The family happens to be not only a social but also a legal phenomenon. The rights to form a family and to enter into a marriage are contained in many international documents and treaties whose purpose is to protect human rights. While the right to respect for family life, as a human right, has been addressed by international courts, such as the European Court of Human Rights (ECHR) in Strasbourg, the importance of family protection has been highlighted in many national

1 Proclamation of the International Year of the Family. See: <https://bit.ly/3acAFgT> (Accessed: 18 February 2021). The General Assembly of the United Nations adopted a number of resolutions relating to the proclamation, preparation, marking, and commemoration of the International Year of the Family and its 10th and 20th anniversaries.

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constitutions.² The family does not have a legal personality, but its members do and enjoy certain rights (and have obligations), which are derived from the status of a family member.

Due to tumultuous social changes, the notion of the family has been altered spontaneously or in a targeted manner by interpreting existing regulations or adopting new ones. Whereas recognizing the status of a family member has primarily led to the modification of the rights and duties of those persons, it has also affected the rights and obligations of other persons, most of all those of children.

This study provides a general overview of possibilities, primarily with respect to the family law protection of the family and the protection of human rights for certain persons in view of their family status, furnished with examples stemming from the international level, political and legal tendencies at the European level, and their influence at the national level. The Croatian legal regime is in many aspects specific because new legal views are imposed on a relatively traditional society.

2. Family and Marriage in the International System of Human Rights

2.1. UN Treaties and Documents

The Universal Declaration of Human Rights³ highlights the truth known from primordial times: *“The family is the natural and fundamental group unit of society”* and is entitled to *“protection by society and the State”* (Art. 16, para. 3). Paragraph

2 The first question faced by any constitution drafter is which values are to be protected. The second question is concerns how the chosen constitutional values are to be protected and formulated, i.e., what form the constitutional protection should take.

Drafters of constitutions attempt to a catalogue the fundamental rights and freedoms of different content. These may or may not encompass marriage and family protection.

Examples are the Constitution of the Republic of Croatia, Official Gazette 56/90, 135/97, 08/98, 1 13/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14 , Art. 61, par. 1.: “The family shall enjoy special protection of the state”; the Constitution of the Republic of Slovenia, Official Gazette of the Republic of Slovenia Nos. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13, Art. 53, para. 3: “The state shall protect the family, motherhood, fatherhood, children, and young people and shall create the necessary conditions for such protection”; According to Art. 6, para 1. of the Basic Law for the Federal Republic of Germany: “Marriage and the family shall enjoy the special protection of the State.”, Constitution of the Italian Republic, Art. 31: “The Republic assists the formation of the family and the fulfilment of its duties, with particular consideration for large families, through economic measures and other benefits.”, Art. 18: “Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland.” For example, there is no mention of the family in the constitutions of France and Belgium.

3 *The Universal Declaration of Human Rights*, General Assembly, 10 December 1948., United Nations.

1 of the same article points out that “men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family.” The Universal Declaration protects everyone’s private life and family, home, correspondence, honor, and reputation from arbitrary interference and prescribes everyone’s right to the protection of the law against such interference or attacks.

Among global treaties relevant to family law are the International Covenant on Civil and Political Rights⁴ and the International Covenant on Economic, Social, and Cultural rights⁵ (1966). The International Covenant on Civil and Political Rights contains a norm on privacy, i.e. family protection (Art. 17), proclaiming that the family is the natural and fundamental group unit of society and is accorded protection by society and the State (Art. 23, para. 1). Protection may differ from one state to another and depend on social, economic, political, and cultural conditions, as well as on tradition.⁶ The right of men and women of marriageable age to marry and to found a family is recognized, while the State must take appropriate steps to ensure equality of rights and responsibilities of spouses during marriage and at its dissolution, the novelty being that in the case of dissolution, they must ensure the necessary protection of any children (Art. 23, para. 4).

There is a special provision governing certain issues relating to children — the right of a child, without discrimination as to race, color, sex, language, religion, national or social origin, property or birth, to the protection appropriate to his/her age on the part of his/her family, society, and the State (Art. 24, para. 1); the duty of the State to register the birth and name of a child (Art. 24, para. 2); and the right of a child to acquire a nationality (Art. 24, para. 3). The rights of parents and legal guardians of a child to ensure the religious and moral education of their children in conformity with their own convictions is stated earlier (i.e., in Art. 18, para. 4) within the provision granting the right (and freedom) of thought, conscience, and religion.

The International Covenant on Economic, Social and Cultural Rights imposes on States the obligation to accord protection and assistance to the family “as the natural and fundamental group unit of society,” particularly for its establishment and while it is responsible for the care and education of dependent children (Art. 10, para. 1). The same paragraph provides for the duty of the State to ensure the free consent of the intending spouses when entering into marriage. Special social protection is envisaged with respect to mothers (Art. 10, para. 2) as well as special protection of children and young persons without any discrimination for reasons of parentage or

⁴ *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, Vol. 999.

⁵ *International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993.

⁶ *Aumeeruddy-Cziffra v. Mauritius* (9/35), *Human Rights Committee*, 36, 134; according to Sieghart, 1990, p. 204.

other conditions and protection from economic and social exploitation in regard to child labour (Art. 10, para. 3).

Parents, i.e., legal guardians, have the right to choose for their children schools other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State. Recognition has been given to the right of parents to ensure the religious and moral education of their children in conformity with their own convictions, and parents have the right to choose a private school for their children (Art. 13, paras. 3 and 4).

Treaties of indirect or direct relevance for the purposes of this research are the Convention on the Nationality of Married Women (1958),⁷ the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962),⁸ the International Convention on the Elimination of All Forms of Racial Discrimination (1965),⁹ the Convention on the Elimination of All Forms of Discrimination against Women (1979),¹⁰ the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990),¹¹ and the Convention on the Rights of Persons with Disabilities (2006).¹²

The Convention on the Rights of the Child (1989)¹³ in the preamble points out that “the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding” and that

the States Parties to the present Convention, ... convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community...

The principle that strongly impacts all decisions and procedures pertaining to children is the protection of the best interests of the child, which is elaborated in

7 *Convention on the Nationality of Married Women*, 20 February 1958, *United Nations, Treaty Series*, Vol. 309.

8 *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, 10 December 1962 *United Nations, Treaty Series*, Vol. 521.

9 *International Convention on the elimination of all forms of racial discrimination*, 21 December 1965, *United Nations, Treaty Series*, Vol. 660.

10 *Convention on the Elimination of all Forms of Discrimination against Women*, 18 December 1979, *United Nations, G.A. Res. 34/180, Doc. A/34/46*.

11 *Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, adopted by General Assembly resolution 45/158 of 18 December 1990.

12 *Convention on the Rights of Persons with Disabilities*, adopted by General Assembly resolution 61/106.

13 *Convention on the Rights of the Child*, 20 November 1989, *United Nations, G.A. Res. 44*.

the General Comment by the Committee on the Rights of the Child.¹⁴ In Art. 2, para. 2, the Convention requires States take all measures to ensure that “the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.” States are also required to recognize the responsibilities, rights, and duties of parents and other persons in directing and guiding the child while exercising his or her rights (Art. 5 of the Convention). The child is accorded the right to maintain family relations (Art. 7). Also of relevance is the right of the child not to be separated from his or her parents against their will, except when it is established in a corresponding judicial proceeding that this is in the best interests of the child, and that in the case of separation from the family, the child has certain rights, such as the right to have personal relations with separated parent(s) (Art. 9) and to family reunification (Art. 10). Art. 16 guarantees to the child protection from unlawful interference with his or her privacy and family, while Art. 18. recognizes the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. In case of the adoption, States are to ensure that “the best interests of the child shall be the paramount consideration” (Art. 21). As there is no hierarchy of child’s rights (except for four principles in the context of which all rights are to be considered)¹⁵, we also single out a State’s duty that child’s education be directed to “the development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own.”¹⁶

The Republic of Croatia is a signatory to the Universal Declaration of Human Rights and a party to all of the aforementioned treaties.

2.2. Conventions of the Council of Europe

2.2.1. Convention for the Protection of Human Rights and Fundamental Freedoms

The Convention for the Protection of Human Rights and Fundamental Freedoms (1950) is a “*living instrument*” since it is subject to the interpretation of the ECHR acting on the complaint of an individual considering that a Member State of the

14 General comment no. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1).

15 The four fundamental principles are the principle of the child’s best interest, the right to development, the right to expression of opinions, and prohibition of discrimination.

16 Art. 19 para. 1 line c of the Convention on the Rights of the Child.

Council of Europe has violated his or her right or freedom guaranteed by the Convention.¹⁷

In addition to the legal limitations inherent to certain provisions relating to protected interests, the case law of the ECHR is subject to findings made while examining a complaint as to the legal regime in force in the major part of the Member States of the Council of Europe and what appears to be the public opinion in a particular State and is modified accordingly. Interpretation of certain provisions is certainly subject to the rules of the Vienna Convention on the Law on Treaties (1969), particularly those from provisions of Arts. 31 and 32. of the Vienna Convention¹⁸. Nevertheless, the ECHR also applies the evolutive interpretation:

This evolutive interpretation finds its basis in the effectiveness principle If the Court did not take account of recent developments in society and technology in explaining the meaning of the Convention, it would be difficult for it to provide an effective protection of the Convention rights.¹⁹

Such an interpretation is often met by misunderstanding in some Member States of the Council of Europe, namely in some parts of the academic community. In addition to these principles, the ECHR also applies in its construction the metaleological interpretation, as referred to by Lasser²⁰ and according to which “in many cases, the Court does not specifically refer to the purposes of a particular Convention provision, but it refers to the general principles and values underlying the Convention as a whole.”²¹ The principles of interpretation must be supplemented by the principle “of autonomous interpretation,” in accordance with which one must always take into account the national level of protection or a definition of a notion in national

17 In that sense, it is interesting how the Guide of the European Court pertaining to discrimination clarifies (a lack of) justification for a difference in treatment.

67. A special situation arises with the aim of supporting and encouraging traditional family; indeed, if the Court in its earlier case law considered this aim in itself legitimate or even praiseworthy (*Marckx v. Belgium*, 1979, § 40) and, in principle, a weighty and legitimate reason which might justify a difference in treatment (*Karner v. Austria*, 2003, § 40). This approach changed somewhat in more recent cases interpreting the Convention in present-day conditions. As a result, the Court considered the aim of protecting the family in the traditional sense as “rather abstract” (*X and Others v. Austria [GC]*, 2013, § 139) and legitimate only in some circumstances (*Taddeucci and McCall v. Italy*, 2016, § 93). In *Bayev and Others v. Russia*, 2017, for example, the Court considered that there was no reason to consider the maintenance of family values as the foundation of society to be incompatible with the acknowledgement of the social acceptance of homosexuality, especially in view of the growing general tendency to include relationships between same-sex couples within the concept of “family life” (§ 67).”

Guide on Article 14 and on Article 1 of Protocol No. 12 – Prohibition of discrimination, updated on 31 December 2020.

18 Cf. Gerards, 2019, pp. 50–51.

Amplius.: Jacobs, Ovey, White, 2014, pp. 66–67.

19 Gerards, 2019, p. 52.

20 Cf. Lasser, 2004, p. 206 et seq., cited in Gerards, 2019, p. 60.

21 *Ibid.*, p. 59.

legislation as a point of departure for a State's own case law. In order to illustrate an example thereof, Lasser explicitly refers to the definition of marriage.²²

Understanding and protection of family are indirectly or directly affected by the provision of Art. 3 of the European Convention (protection from torture and inhuman treatment), Art. 8 (right to respect for private and family life), Art. 12 (right to marry and to found a family), Art. 2 of Protocol no. 1 (right of parents to freely decide on children's education), Art. 2 (right to life), prohibition of discrimination (Art. 14 and Art. 1 of Protocol no. 12 to the Convention), and indirectly by Art. 6 (right to a fair trial).

The European Court of Human Rights had a substantial impact on European family law legislation. Some of its judgments in the field of family law matters today represent the attained standards that cannot be called into question as to their value (prohibition of discrimination of children born in and out of wedlock,²³ right to know one's parentage,²⁴ guarantees in case of separation of children from their parents,²⁵ and positive obligations of the State to ensure exercise of personal relations between parents and children.²⁶

The biggest debate among family law theoreticians was certainly triggered by judgments that affected the restructuring of the understanding of family at the national level, such as *Schalk and Kopf v. Austria*, according to which relations of same-sex couples have been subsumed under the notion of family life, not only under that of private life.²⁷ In that judgment, the Court also pointed out that there existed no obligation on the part of the State to grant same-sex couples access to marriage.²⁸

22 Ibid., p. 67.

23 For example, *Marcx v. Belgium*, Appl. 6833/74, Judgement 13. June 1979.

24 For example, *Mikulic v. Croatia*, Appl. 53176/99, Judgment 7. February 2002.

25 Many different situations including divorce, measures for the protection of the welfare of the child.

26 For example, *Gluhakovic v. Croatia*, Appl. no. 21188/09, Judgment 12. April 2011.

27 Same-sex couples have also been recognized as enjoying a family life under Article 8. In *Schalk and Kopf v. Austria*, the Court explicitly recognized that 'a rapid evolution of social attitudes towards same-sex couples has taken place in many member States' (§93 *Schalk and Kopf v. Austria*) and because of this it considered that it would be "artificial" to maintain the view from previous cases that a same-sex couple can enjoy only a "private life and not a 'family life'" under Article 8. It concluded that "the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of 'family life,' just as the relationship of a different-sex couple in the same situation would." (§ 94.) See also *X and others v Austria*.

Cf. Guide on Article 8, 2020.

28 This position is confirmed in the case of *Orlandi and others v. Italy*, Appl. 26431/12; 26742/12; 44057/12 and 60088/12, Judgment of 14 December 2017, stating that under case law, States were still free to restrict marriage to different-sex couples (however, same-sex couples needed legal recognition and protection of their relationship). The Court accepted Italy's choice not to allow same-sex marriages could not be condemned under the Convention (but the crux of the case was that the couples had not been able to obtain any kind of legal recognition for their unions).

A complementary position is taken by the Court of Justice of the EU in the case *Coman and Others* in which it concludes that "*Member States are thus free to decide whether or not to allow marriage for persons of the same sex*" on the grounds that the rules relating to marriage fall within the exclusive competence of the Member States and that Union law does not affect competence (Case C-673/16, *Coman and others*, ECLI:EU:C:2018:385, par. 37 i 45. and the opinion of advocate general Wathelett, par. 38, 41 i 67.).

The findings of the ECHR relating to surrogate motherhood with an international element have also been moot as the Court assessed the justification for a limitation of travel with a child born to a surrogate mother,²⁹ (lack of) justification for non-recognition of child's parentage by the parents,³⁰ as well as separation of a child from the family of a couple that had abroad recourse to obtain surrogate motherhood services.³¹ The *advisory opinion* adopted by the Grand Chamber in 2019 opened up the gates to recognize the effects of surrogate motherhood with foreign elements.³²

The structure of the family may be indirectly affected by the entry of sex change of a transsexual person since it opens up the possibility that a person whose marriage had been heterosexual until then becomes homosexual (and thereby possibly contrary to the legal order) or that a person entered as a man gives birth to a child after a sex change, i.e., that a person entered as a woman becomes a parent to a child conceived by (her) sperm.

The ECHR took the view that a State not recognizing same-sex marriage is entitled to require that "married applicants convert their relationship to a registered

29 Case of D and others v. Belgium, Appl. no. 29176/13, Judgment 11 September 2014., para 59.

30 Mennesson v. France, Appl. no. 65192/11, Judgement 26. June 2011 and Labassee v. France, Appl. No. 65941/11, Judgement 26 June 2014.

31 Paradiso and Campanelli v. Italy, Appl. no. 25358/12, Judgement 247 January 2017.

32 "Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, requested by the French Court of Cassation (Request No. P16-2018-001) on 10 April 2019 (Grand Chamber). This case concerned the possibility of recognition in domestic law of a legal parent-child relationship between a child born abroad through a gestational surrogacy arrangement and the intended mother, designated in the birth certificate legally established abroad as the "legal mother," in a situation where the child was conceived using the eggs of a third-party donor and where the legal parent-child relationship with the intended father has been recognised in domestic law. The Court found that States were not required to register the details of the birth certificate of a child born through gestational surrogacy abroad in order to establish the Factsheet – Gestational surrogacy 5 legal parent-child relationship with the intended mother, as adoption may also serve as a means of recognising that relationship. It held in particular that, in a situation where a child was born abroad through a gestational surrogacy arrangement and was conceived using the gametes of the intended father and a third-party donor, and where the legal parent-child relationship with the intended father has been recognised in domestic law, 1. the child's right to respect for private life within the meaning of Article 8 of the Convention requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the "legal mother"; 2. the child's right to respect for private life does not require such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad; another means, such as adoption of the child by the intended mother, may be used."

On the other hand, the European Parliament has, in its Resolution of 5 April 2011 on priorities and outlines of a new EU policy framework to fight violence against women (2010/2209(INI)) and in the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter (2015/2229(INI)), stressed that surrogacy commodifies children and violates the legal norm of the Convention on the Rights of the Child, which protects a child's "right to know and be cared for by his or her parents." The European Parliament pointed out also that surrogate motherhood contravenes the European Convention on Human Rights and Medicine, in particular Art. 21, which provides that "the human body and its parts shall not, as such, give rise to financial gain."

partnership prior to obtaining recognition” (Hämäläinen v. Finland (2015)) given the fact that Finland provided the possibility of forming a registered partnership producing the same effects as marriage.

Additionally, the ECHR held that mandatory infertility, to obtain gender recognition, violates the right to physical and moral integrity under Article 8. Sterilization requirements place trans individuals in an “impossible dilemma (A.P. Garçon and Nicot v. France (2017)). In judgment X and Y v. Romania, “the Court observed that the national courts had presented the applicants, who did not wish to undergo gender reassignment surgery, with an impossible dilemma: either they had to undergo the surgery against their better judgment — and forego full exercise of their right to respect for their physical integrity — or they had to forego recognition of their gender identity, which also came within the scope of respect for private life. The Court held that the domestic authorities’ refusal to legally recognize the applicants’ gender reassignment in the absence of surgery amounted to unjustified interference with their right to respect for their private life”.³³

2.2.1. European Convention on the Exercise of Children’s Rights

The European Convention on the Exercise of Children’s Rights (1996) aims to enable children to exercise their rights in judicial proceedings in family law matters to express their opinions. While the Convention on the Rights of the Child deals primarily with children and parents, i.e., child’s guardians, this Convention introduces a notion of a “holder of parental responsibilities” and a possibility that, in addition to parents, other persons may also exercise parental care. Article 2(b) of this Convention contains the definition according to which “the term holders of parental responsibilities’ means parents and other persons or bodies entitled to exercise some or all parental responsibilities.”

According to the Explanatory Report of the Convention, para. 24, the term “holders of parental responsibilities” refers to not only parents who are entitled to exercise some or all parental responsibilities but also to other persons or bodies, including certain local authorities. Foster parents or establishments in which children are placed can therefore be included in this definition, where appropriate. It should be noted that Committee of Ministers’ Recommendation no. R (84) 4 on parental responsibilities defines such responsibilities as

a collection of duties and powers which aim at ensuring the moral and material welfare of the child, in particular by taking care of the person of the child, by maintaining personal relationships with him and by providing for his education, his maintenance, his legal representation and the administration of his property.

33 Press Release X and Y v. Romania, Appl. nos. 2145/16 and 20607/16, Judgment X and Y v. Romania, 19.01.2021.

The Explanatory Memorandum (para. 6) to this Recommendation provides that the term “parental responsibilities” described:

a modern concept according to which parents are, on a basis of equality between the parents and in consultation with their children, given the task to educate, legally represent, maintain, etc. their children. In order to do so they exercise powers to carry out duties in the interests of the child and not because of an authority which is conferred on them in their own interests.

This concept has also been adopted by the Directive Brussel II bis and the European Commission for Family Law in Principles regarding parental responsibility.³⁴

It is interesting to note that the further step in the definition of parents after lobbying the Member States of the Council of Europe, whose policies protect traditional family values, was the reason why the Council of Europe failed to adopt the Draft recommendation on the rights and legal status of children and parental responsibilities (2011).³⁵ According to Principle 2, the notion of parents was defined as follows: “For the purposes of this recommendation, parents’ mean the persons who are considered to be the parents of the child according to national law.” Moreover, Principle 22 states: “For the purposes of this recommendation, holders of parental responsibilities are: a) the child’s parents and b) other persons, or bodies having parental responsibilities in addition to or instead of the parents.” Such views are remote in the sense that only parents may hold a *titulus* for parental responsibility, while certain elements of childcare may be exercised by some other third person.

2.2.3. *European Convention on the Adoption of Children (Revised)*

The Convention on the Adoption of Children (Revised), 2006,³⁶ in Art. 7, para. 1(a) provides that the law must permit a child to be adopted by two persons of different sex who are married to each other, or where such an institution exists, have entered into a registered partnership together, or by one person.

It is obvious that this convention differentiates between an informal and a formal (registered) heterosexual, non-marital union and mentions only the registered union,

34 Principle 3:2 Holder of parental responsibilities (1) A holder of parental responsibilities is any person having the rights and duties listed in Principle 3:1 either in whole or in part. (2) Subject to the following Principles, holders of parental responsibilities are:

(a) the child’s parents, as well as

(b) persons other than the child’s parents having parental responsibilities in addition to or instead of the parents. (underlined by the author)

Pursuant to Principle 3:9, third-person parental responsibilities may in whole or in part also be attributed to a person other than a parent.

<https://ceflonline.net/wp-content/uploads/Principles-PR-English.pdf>.

35 Draft recommendation on the rights and legal status of children and parental responsibilities (2011).

36 *Convention on the Adoption of Children* (Revised) Strasbourg, 27 November 2008, Council of Europe Treaty Series – no. 202.

while there is no mention of the informal union. With regard to same-sex unions (Art. 7, para. 2) states that states are free to extend the scope of this Convention to same-sex couples who are married to each other or who have entered into a registered partnership together. They are also free to extend the scope of this Convention to different sex couples and same sex couples who are living together in a stable relationship,³⁷ but there exists no obligation on the part of the State to grant same sex couples the same possibility to adopt.

2.2.4. Istanbul Convention

The Council of Europe Convention on preventing and combating violence against women and domestic violence³⁷ (Istanbul, 2011) contains commendable purposes referred to in Art. 1 in view of protection from violence against women and protection from violence in the family.

After strong opposition voiced by the public due to the understanding that it introduced the gender ideology into the Croatian legal system,³⁸ the government of the Republic of Croatia provided a specific interpretative declaration on the occasion of the ratification:

The Republic of Croatia considers that the aim of the Convention is the protection of women against all forms of violence, as well as the prevention, prosecution, and elimination of violence against women and domestic violence. The Republic of Croatia considers that the provisions of the Convention do not include an obligation to introduce gender ideology into the Croatian legal and educational system, nor the obligation to modify the constitutional definition of marriage. The Republic of Croatia considers that the Convention is in accordance with the provisions of the Constitution of the Republic of Croatia, in particular with the provisions on the protection of human rights and fundamental freedoms, and shall apply the Convention taking into account the aforementioned provisions, principles, and values of the constitutional order of the Republic of Croatia.

2.3. European Union

At the outset, the European Union showed no interest in family law. Although there existed ideas on harmonization and even on the unification of European family law,³⁹ the approach highlighting the pointlessness of creating a unique European codex pertaining to family law prevailed.⁴⁰ It was maintained that the family law of a particular

37 Council of Europe Convention on preventing and combating violence against women and domestic violence *Council of Europe Treaty Series - no. 210*, Istanbul, 2011.

38 Cfr. Hrabar, 2018.

39 Cf. Pintens, 2004, p. 548.

40 Cf. Martiny, 2011, pp. 429–457.

state was closely related to national tradition and that family relations in many states were regulated in an entirely specific manner.⁴¹ After the Treaty of Amsterdam entered into force, the field of family law was partially subsumed under EU law, which began to be regulated by European secondary law. Judicial cooperation in certain family matters (as part of civil matters) facilitated a transition from the so-called “third pillar”, i.e., intergovernmental cooperation, into the “first pillar” consisting of the common policies.

2.3.1. Charter of Fundamental Rights of the EU

By adopting the Charter of Fundamental Rights of the EU, the EU opened up the possibility of indirect effects through protection of human rights, as well as certain legal fields, such as family law, whose substantive provisions of law lie within the competence of the Member States.⁴²

Many rights from the Charter overlap with those from the European Convention, so that the right to respect for private and family life (Art. 7) is, content-wise, almost identical. The right to marry and to found a family (Art. 9) omitted any reference to the heterosexual characteristic of marriage: “The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.” Still, it does not impose on member states the obligation to introduce same-sex marriage; conditions for entering into marriage are enumerated via national regulations (as long as they do not call into question that very right).

The literature indicates that the drafting of this article was being fiercely debated and that the last sentence was a concession to accent the sovereignty of a particular state. This is the reason why this provision is one of the rare ones, containing an additional limitation of a right explicitly referring to national legislation.⁴³

The Charter recognizes everyone’s (and thereby a child’s — author’s remark) right to education, which includes the possibility to receive free compulsory education. In doing so, it contains a requirement that, in case the State provides compulsory

41 Cf. Büchler, A., Keller, and H., *Synthesis*, 2016, p. 514, Tomljenović and Kunda, 2014, pp. 209–220; Šimović and Čurić, 2015, pp. 175–176 and 184; Micković and Ristov, 2013, pp. 186–188.

In a still pending Case V.M.A. v. Stolichna obshtina, rayon ‘Pancharevo’ (Sofia municipality, Pancharevo district, Bulgaria), C-490/20, ECLI:EU:C:2021:296, par. 77, Advocate General Kokott concluded in her Opinion: “*This is because family law is a particularly sensitive legal area which is characterised by a plurality of concepts and values at the level of the Member States and the societies within them. Family law – whether based on traditional or more ‘modern’ values – is the expression of a State’s self-image on both the political and social levels. It may be based on religious ideas or mark the renunciation of those ideas by the State concerned. To that end, however, it is in any event an expression of the national identity inherent in fundamental political and constitutional structures.*”

42 Poland gave Declaration No. 61 relating to Protocol 30, on the Application of the Charter of fundamental Rights of the European Union to Poland and the United Kingdom: “The Charter does not affect in any way the right of the Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity.”

43 Cf. Wöfl, 2005, p. 779.

education, it has to be free. Parents are accorded the right “to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right” (Art. 14, para. 3). In the unofficial commentary, Wagner⁴⁴ points out that the rights of parents have to be compatible with children’s rights, particularly with the best interest of the child, from Art. 24, para. 2 of the Charter.

A special provision of the Charter entitled “The Rights of the Child” (Art. 24) indicates, in principle, in para. 1. that “[c]hildren shall have the right to such protection and care as is necessary for their well-being.” This further indicates the children’s right to participate at a general level. The third paragraph of Art. 24 protects a child’s [...] right to maintain on a regular basis a personal relationship and direct contact with both his or her parents unless that is contrary to his or her interests.”

The significance of social law in the Charter is reflected in the provision of legal, economic, and social protections of the family (Art. 33, para. 1). The Charter does not venture into the determination of the notion of the family. Thus, no problem arises when the recognition of rights is claimed by members of traditional families, while problems may be expected when family members enjoying rights in one state claim the same rights in another state that does not recognize such unions as family.

2.3.2. EU Regulations on Family Law and Notion of Family

In the field of international private law governing family relations, regulations primarily regulate issues of jurisdiction as well as the recognition and enforcement of foreign judicial decisions:

- Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions, and cooperation in matters relating to maintenance obligations and
- Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Regulation Brussels II bis).⁴⁵

Conflict-of-laws rules in certain family law matters include:

⁴⁴ Cf. Wagner, 2006, p. 148.

⁴⁵ All Member States are parties to the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorizing certain Member States to make a declaration on the application of the relevant internal rules of community law, which is why its conflict-of-laws rules apply to matters of parental responsibility throughout the EU.

- Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes;
- Council Regulation (EU) 2016/1104 of 24 June 2016, implementing enhanced cooperation in the area of jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships; and
- Council Regulation (EU) No 1259/2010 of 20 December 2010, implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III).

Of relevance for the purpose of this paper is the *Directive on the Right to Family Reunification*⁴⁶ since it regulates matters involving right to family reunification of a sponsor who holds a valid residence permit in the EU for at least one year and has reasonable prospects of obtaining the right to permanent residence.

The key issue is certainly who is to be regarded as a family member with respect to which Art. 4, para. 1 of the Directive is relevant:

sponsor's spouse⁴⁷, the minor children of the sponsor and of his/her spouse, including adopted children ... ; the minor children including adopted children of the sponsor where the sponsor has custody and the children are dependent on him or her; ... children of whom custody is shared, provided the other party sharing custody has given his or her agreement; the minor children including adopted children of the spouse where the spouse has custody and the children are dependent on him or her...

Article 4 paras 2 and 3 contain *optional* provisions indicating first-degree relatives in the direct ascending line of the sponsor or his/her spouse may be allowed as family members, where they are dependent on them and do not enjoy proper family support in the country of origin. Also mentioned are the adult unmarried children of the sponsor or his or her spouse in the case that they are objectively unable to provide for their own needs on account of their state of health.

Under the notion of family, the member state may also consider:

the unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who

⁴⁶ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

⁴⁷ Considering the definition of “spouse”, attention should be paid to paragraphs 32, 51-53, 66, 68, 71-72, 76-77 and 100 of the Case Relu Adrian Coman and others v. Inspectoratul General pentru Imigrări i Ministerul Afacerilor Interne, C-673/16, ECLI:EU:C:2018:385.

According to the Court, the spouse of a European Union citizen is a member of his family and given that “the term spouse within the meaning of Directive 2004/38 is gender neutral” may include a same-sex spouse of a European Union citizen.”

is bound to the sponsor by a registered partnership in accordance with Article 5(2), and of the unmarried minor children, including adopted children, as well as the adult unmarried children who are objectively unable to provide for their own needs on account of their state of health, of such persons. Member States may decide that registered partners are to be treated equally as spouses with respect to family reunification (Art. 5, para. 3).

It is clear that the Directives differentiate between various family members — with respect to the most inner circle from Art. 4, para. 1, which requires the Member State to enable family reunification, and for the others entitles the Member to do so, thereby indirectly establishing a hierarchy among individual family members. In the field of law applicable to family relations, one has to refer to the Hague Convention of November 23, 2007, on the International Recovery of Child Support and Other Forms of Family Maintenance⁴⁸ and the Hague Protocol of November 23, 2007, on the Law Applicable to Maintenance Obligation.⁴⁹

3. Family in Crisis?

It is often submitted in the literature that the family goes through a crisis. In support of that thesis, some point out, for example, the increasing number of single-person households, postponed marriage, postponed birth of the first child, climbing divorce rates, and an increase in the number of single parent families either at the child's birth or after dissolution of family union.

The changes that came about in Croatia in families, household structure as a result of fewer contracted marriages, and increased nuptiality (marriage conclusion) and divortiality (divorce) rate are related to natural tendencies. These include changes in population age structure, rapid urbanization, rural exodus, transition from an agrarian to a tertiary society, and other pertinent processes.⁵⁰ Marriage and family disintegration has been facilitated by socio-cultural and psychological changes after the sudden industrialization and urbanization that ensued in the 1960s of the 20th century.⁵¹ At the beginning of the 1990s, the Republic of Croatia fell into the Homeland War, which caused destruction and economic stagnation, and thereafter substantial emigration to the EU states. The COVID-19 pandemic reversed

48 Council decision of 9 April 2014 amending Annexes I, II and III to Decision 2011/432/EU on the approval, on behalf of the European Union, of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (2014/218/EU).

49 Council Decision of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (2009/941/EC).

50 Cf. Nejašmić, 2005, p. 27.

51 Cf. Aračić, 1995; Živić, 2002, cited in Majstorić, 2019, p. 20.

economic growth, which continues to contribute to the drop in the birth rate. The already poor demographic picture of Croatia is aggravated not only by the low fertility rate (1.47⁵²), which falls below the EU average but also by increased emigration caused by the economic crisis.

In addition to these events, the social perception of family is affected by the understanding of the post-modern society: relativism, scepticism, liberalism, and individualism, which seriously impacts marriage and the family.

The State protects individuals, as members of the family, through social contributions, but a long-term, real, and continuous family policy does not exist. The only national family policy⁵³ was adopted back in 2003 under the auspices of the State Institute for Protection of Motherhood, Family and Youth, which existed for only a short time and was dissolved thereafter. The National Population Policy was adopted in 2006,⁵⁴ while in subsequent activities, family policy is not supported in an integral and consistent manner and is often confused with demographic policy.

If we observe changes in the Croatian family law, then we can perceive, at the national level, a continuous development of the legal system that was advanced, from today's perspective, due to the socialist legacy. Since 1978, the system has been based on the (at least declaratory) principle of equality between women and men and equality of children born in and out of wedlock since 1978 in both family and inheritance law, as well as on the equality of their parents in view of the possibility of exercising parental responsibility. Under the influence of the Convention on the Rights of the Child, the principle of protection of the child's rights and the principle of shared parental responsibility were introduced in 1998.⁵⁵ Marriage was a privileged institution with regard to the legal effects of marriage,⁵⁶ whereas until 2014, non-marital unions and same-sex unions had limited effects, primarily at a private level between non-marital spouses and same-sex partners.

52 Eurostat, Available at: <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20210323-2> (Accessed: 18 April 2021).

53 Nacionalna obiteljska politika, ed. Puljiz, Bouillet, 2003.

"Family policy is an integral and systematic set of measures whose effects favour family, in particular families with children. Those measures aid them in problematic situations of economic, social, health, housing or similar nature, alleviate financial burden that children represent for a family, enable coordination of family and labour-based obligations, protect pregnant women and children..." Stropnik, 1996, p. 105.

54 National Population Policy, Official Gazette No. 132/2006.

55 Cf. Hrabar, 2004.

56 In that vein the Act on Discrimination Prevention from 2012 provides in Art. 9:

(2) By way of derogation from paragraph 1 of this Article, disadvantage shall not be regarded as discrimination in the following cases:

10. disadvantage in regulating rights and obligations prescribed by the Family Act, in particular for the purposes of legitimate protection of rights and well-being of children, protection of public morale and favouring marriage, whereby used means have to be appropriate and necessary.
..."

The development of family law that occurred until then has deviated from the original path after the adoption of the Family Act in 2014,⁵⁷ which was suspended in 2015 by the Constitutional Court of the Republic of Croatia on the account of many ambiguities and omissions and was subsequently replaced by the Family Act in 2015,⁵⁸ which managed to remedy only major omissions that had initially led to its suspension. The 2014 Family Act modified the fundamental principles set forth in family law legislation in force until then and abandoned the principle of marriage protection, thereby abandoning reconciliation attempts between spouses before divorce, forgoing the rules on shared parental responsibilities for the child after termination of family union, and equalizing the legal effects of marriage and cohabitation.

As the “Olah paper” (a report prepared for the United Nations Expert Group Meeting in 2015) correctly observes in assessing the phenomenon of new forms of unions in Europe, “The new partnership patterns have also had implications for family stability. Couple relationships have become less stable over time as consensual unions, which are more fragile than marriages, have spread and divorce rates increased.”⁵⁹ In this report is further stated that declining partnership stability may reduce fertility given the shorter time spent in couple relationships and/or people choosing to have fewer offspring due to the prospect of having to raise their children alone or not being able to be involved with the children because of divorce or separation.⁶⁰

The Croatian state also finances civil society; for this reason we live in a pluralistic society: non-governmental organizations have different programmes, some of which favour family and preservation of awareness of the importance and values of family.⁶¹ By invoking human rights and non-discrimination, some of them introduce new social views that redefine traditional forms of unions and their relationships (e.g., the so-called Rainbow families).

It is interesting to note that one of the associations protecting traditional family values organized the first national referendum by virtue of which a provision defining marriage as a heterosexual union was introduced into the Constitution of the Republic of Croatia in 2013.⁶²

57 Family Act, Official Gazette nos. 75/2014, 83/2014 and 5/2015.

58 Family Act, Official Gazette nos. 2013/2015 and 98/2019.

59 Olah, 2015, p. 5.

60 Cf. *ibid.*

61 These are organizations which deal with projects such as providing information on family subsidies, psychological counselling for family members, organizing family mediation, assisting parents with impaired children, providing accommodation to single mothers, providing support to adopting families, helping parents to exercise shared parenting after termination of the family union, providing support in cases of family violence, etc.

62 This referendum divided the society, but 65.87% of the citizens who voted did so in favor of the amendment to the Constitution. The left-wing government of the Republic of Croatia, e.g., EU parliamentarians Ulrike Lunacek i Michael Cahman had voiced their opposition to the referendum. Available at: <https://vimeo.com/79656001> (Accessed: 20 April 2021).

Regardless of the insufficient systematic family protection at the level of social policy and family law, individuals (citizens) hold family in high regard in terms of social values (similar to the majority of the other European states). According to the *European Study Values* in 2017, a total of 98.47% of surveyed persons in the Republic of Croatia (with similar outcomes to other states)⁶³ found the family to be important or very important in personal life. In that respect, it is interesting to observe that 75.5% of the surveyed persons in Croatia in the same study considered that a happy childhood required that the child have mother and father.⁶⁴ Furthermore, the study showed that “in the last 20 years, Croatian citizens have become increasingly aware of the legitimacy of divorce (separation).” Hence, in 2017, every fourth surveyed person justified separation or divorce. Comparison of data with the number of *de facto* separated persons in 2017 leads to the conclusion that the life theory on possible separation and life practice of realized separation or divorce gradually come closer.”⁶⁵ Despite liberalization of the views on divorce, marriage ranks high on the value ladder: although the number of children born out of wedlock continues to rise, which allows for the conclusion that the number of non-marital unions rises, only 21% of children were born out of wedlock in the Republic of Croatia in 2020. These data do not indicate whether those children were born in a family union or outside of it.

4. Definition of Family

During the socialist period (1945–1990) family law legislation was separated into a specific legal field outside of civil law, and remained as such in the transitional and post-transitional periods. In its norms, the Croatian family law legislation does not contain a definition of family. The reason for that lies in the theoretical understanding “that is difficult to identify a phenomenon which is not static and is affected by socio-economic and other factors in the social environment. In addition, family relations among members also change during life.”⁶⁶

Despite this challenge, theorists have attempted to provide a very broad definition: “From a legal point of view, family is constituted by a group of people who are

63 Surveyed persons in the Netherlands scored the lowest percentage of positive answers — 94.03%, which is still an exceptionally high percentage.

64 Aračić, Baloban, Nikodem, 2019, pp. 336 and 337.

Original study: <https://europeanvaluesstudy.eu/>, study carried out in four waves in a certain number of the European States.

65 Ibid. p. 343. In 2017 there were 6,265 divorces out of 20,310 marriages entered into that year.

Natural Change in Population, 2017, Statistical Reports. Available at: https://www.dzs.hr/Hrv_Eng/publication/2018/SI-1618.pdf (Accessed: 3 April 2021).

66 Cf. Alinčić et al., 2007, p. 7.

related among themselves based on kinship, marriage, or any other legally relevant point of reference and among whom there exist, therefore, legally defined rights and duties.”⁶⁷

It is interesting that after the attempt to define the family in Art. 1, para. 2 of the Draft Family Act in 2017: “For the purposes of this Act, the family is constituted by the mother, the father, their children, mother with the child or the father with the child although not living together, and other relatives living with them,” that the draft has never been released by the government into the legislative procedure due to the strong opposition of the public, which designated it as conservative. This provision in itself would not have had any practical effects since it is limited by the scope of the Family Act, particularly due to the parallel existence of the Same-Sex Life Partnership Act (2014), which recognizes the existence of family life to same-sex partnerships (in line with the case law of the European Court for Human Rights). Furthermore, extra-marital unions were regulated by the same draft and recognized as the basis for the formation of family.

Similar dilemmas appear to exist in the international community since the Human Rights Council defined the family in 2014 as “the natural and fundamental group unit of society and is entitled to protection by society and the State.” An amendment that aimed to introduce the concept of “different family forms” was rejected.⁶⁸

Certain legislation provides particular effects derived from the family law relationship, but the circle of persons who belong to family is determined only for the purposes of regulating legal relations within the scope of that particular law. We cite only a few of them.

Among the members of the nuclear family entitled to a just pecuniary compensation in case of death or particularly severe disability, Art. 1,101 of the Law on Obligations (2005)⁶⁹ includes the spouse, children, and parents, and thereafter enumerates brothers and sisters, grandparents, grandchildren, and non-marital spouse, if between them and the deceased i.e. the injured person, there existed a more durable union, as well as a parent with respect to a conceived, but unborn child.

The Same-Sex Partnership Act⁷⁰ (2014) defines life partnership as the family union between two persons of the same sex entered into before a competent body. Pursuant to this Act, the legal positions of the (registered) life partners and those of informal partners are equalized.

According to the most recent amendment from 2019, the Act on Protection against Violence in Family⁷¹ encompasses a large number of persons, determining it as being applicable to:

67 Ibid.

68 Resolution adopted by the Human Rights Council 26/11 Protection of the family, 16 July 2014.

69 Law on Obligations, Official Gazette nos. 35/05, 41/08, 125/11, 78/15 and 29/18.

70 The Same-Sex Partnership Act, Official Gazette nos. 92/2014 and 126/2019.

71 The Act on Protection against Violence in Family, Official Gazette Nos. 70/2017 and 126/2019.

A spouse, non-marital spouse, life (same sex) partner, informal life partner, their common children and children of each of them, blood relatives of lineal kin relationship, relatives in collateral kin relationship up to the third degree, relatives by marriage up to the second degree, adoptive parent and adoptee ... a former spouse, former non-marital spouse, former life partner,⁷² former informal life partner, persons having a common child and persons living in the same household (Art. 8, paras. 1 and 2).

Pursuant to Art. 4, para. 1 (3) of the Social Welfare Act⁷³:

The *family* is the union consisting of spouses or non-marital spouses, children, and other relatives living together, earning, making income in some other way, and consuming it together. The child not living with the family shall also be regarded as its member, provided he or she undergoes education, until he or she completes his or her education, yet not beyond the age of 29.

Since 2014, family law has equated the effects of the non-marital union with those of the marital union, not only in family relationships but also principally in provisions of other acts (Art. 11, para. 2 of the Family Act), *see infra*.

Article 4, para. 3 of the Foster Care Act⁷⁴ defines the foster family as:

a union consisting of spouses or non-marital spouses, children, and other relatives living together, earning, making income in some other way, and consuming it together. The child not living with the family shall also be regarded as its member, provided he or she undergoes education, until he or she completes his or her education, yet not beyond the age of 29.

After a family center (division of a center for social welfare) had allowed them to undergo the required preparation procedures for foster parents, a same-sex couple tried to foster a child but were denied during the administrative proceedings conducted by the social welfare center, because the life partnership (of same-sex persons) was not included in the law relating to foster families.

In the parliamentary debate for the adoption of the Act it was pointed out that “the goal of the Act is to reinforce foster care capacities, quality and scale of foster care, protecting thereby exclusively the best interest of children” (adult beneficiaries were mentioned sporadically). Opponents of allowing same-sex couples to be foster parents put forward the view that socio-cultural reasons, i.e., “the fact that in Croatian society the phenomenon of same-sex foster parents would still not be

72 Life partner is considered as homosexual partner.

73 Social Welfare Act, Official Gazette nos. 157/2013, 152/2014, 99/2015, 52/2016, 16/2017, 130/2017, 98/2019, 64/2020 and 138/2020.

74 Foster Care Act, Official Gazette No. 115/2018.

accepted, cause indignation and rejection, and further stigmatise foster children who are already traumatised by their experience and stigmatised by social conditions in which they live.” The Constitutional Court also concluded: “In addition, the fact that by already mentioned other acts the members of that same social group have already been accorded the legal status of the family union in the legal order of the Republic of Croatia, together with corresponding legal effects in all walks of life, is undeniable.”⁷⁵

In addition, Art. 11, para. 3 of the Foster Care Act did not provide that persons living in a same-sex partnership, as beneficiaries of traditional foster care, can be accommodated together (as opposed to marital or non-marital spouses), from which the Constitutional Court inferred that based on the Life Partnership Act, providing that life partnership produces in the field of social welfare system the same effects as non-marital union, life partners “have a legitimate right to expect that in a traditional type of foster care they be accommodated together, already due to the fact the Life Partnership Act protects family unity of same-sex partners in the same way as it protects the marital union” (para. 27 of the decision of the Constitutional Court).

Finally, the Constitutional Court held that the exclusion of life partners from being able to become a foster family, i.e., be accommodated together as beneficiaries of foster care, was discriminatory and concluded that

competent authorities conducting administrative and judicial proceedings and directly deciding on the rights and obligations of citizens in particular cases have a duty to interpret and apply every law, including the Foster Care Act, pursuant to its legitimate purpose and adopt decisions in accordance with the Constitution, treaties and other legal sources in force, inter alia according to legal views of the Constitutional Courts expressed in this decision and order (para. 29(3) of its decision).

4.1. Croatian Family Law Legislation and Family Protection

4.1.1. Definition and Significance of Marriage

In Art. 62, para. 2 the Croatian Constitution provides: “The marriage is a union of a woman and man,” and in Art. 62, para. 3: “The marriage and legal relationships in the marriage, non-marital union and family shall be regulated by law.”

As a condition for the existence of the marriage, the Family Act provides that the bride and the groom shall be persons of different sex (Art. 23, para. 1). If this condition is not met, the marriage has never been entered into and does not produce legal effects, while a determination from the court to that effect may be sought by a declaratory action.

There is a possibility in the Republic of Croatia to have a sex change entered as a modification of data in the base entry of the birth registry, which is to be decided by

⁷⁵ Paragraph 24 of Decision of the Constitutional Court no. U-I-144-2019 of 7 February 2020.

an order (decision) adopted by a competent administrative authority. An order on the entry of a sex change into the birth registry is to be adopted based on the opinion of a competent authority relating to sex change or to life under another gender identity pursuant to medical documentation of the competent medical doctor or a health institution (Art. 9a of the Act on Civil Status Registries).

Relevant regulation (the By-Law on Collection of Medical Documentation and the Determination of Conditions for Sex Change or Life under Another Gender Identity)⁷⁶ prescribes conditions for the implementation of a sex change entry into the birth registry and provides that “nobody shall be forced to undergo a medical procedure, including surgical sex adaptation, sterilization, or hormonal therapy as a condition for recognition of sex change or life under another gender identity.” This implies that if the National Health Council finds that the required conditions have been met, it should issue a positive opinion.

After a three-year procedure initiated by a request of a then 14 year-old child, represented by the mother as the legal guardian, to have a sex change for the purposes of life under another gender identity, in 2017, the Constitutional Court decided (U-III/361/2014) that the competent administrative authority violated the applicant’s right to a trial within a reasonable time (Art. 29, para. 1 of the Constitution of the Republic of Croatia) and the right to respect for and legal protection of personal life (Art. 35 of the Constitution of the Republic) in relation to which there is also a positive obligation on the part of the State. This change in the base entry of the birth registry of the applicant leads to the possibility that, although entered as a man, he may get pregnant and give birth to a child, creating confusion in civil status registries of new-born children concerning the “mother” and “father” fields. Such a case in the Republic of Croatia was still unbeknown to a professional or broader public.

No regulation requires a person wishing to change his/her sex to not be married, which makes it possible for an uneducated civil registrar to modify the entry on sex in the birth registry of a married person. In that case, it would be possible that two persons of the same sex enter into marriage, which would contravene the public order in view of the constitutional and statutory determination of marriage as a heterosexual union. There is no way to subsequently terminate such a marriage due to the fact that the conditions for the existence of the marriage have to be met only when entering into the marriage.

Generally speaking, marriage is held in high regard in Croatia, which is why the 2008 Discrimination Prevention Act,⁷⁷ Art. 9, para. 2(10), accorded a higher level of protection to the institution of marriage by setting forth that

disadvantage in regulating rights and obligations in family relations when provided for by the law, in particular for the purposes of protection of rights and interests of

76 By-Law on Collection of Medical Documentation and Determination of Conditions for Sex Change or Life under Another Gender Identity, Official Gazette, no. 132/2014.

77 Discrimination Prevention Act, Official Gazette, nos. 85/2008 and 112/2012.

children, to be justified by a legitimate purpose, protection of public morale and favouring marriage, as well favouring of marriage pursuant to the provision of the Family act will not be regarded as discrimination.

The 2012 amendment to this act added that “used means have to be appropriate and necessary.”

4.2. Other Forms of Unions

4.2.1. Non-Marital unions

From a historical point of view, recognition of property effects of the non-marital union (initially through the institution of *condictio sine causa*) was based on the idea of protecting women abandoned after the termination of a non-marital union without remuneration for the property acquired during the non-marital union.

The informal non-marital union was introduced for the first time into the family law system in 1978⁷⁸ in such a way that non-marital spouses had the right to mutual maintenance and to acquire and separate property acquired by labor during the non-marital union, whereas in other legal fields, no effects of the non-marital union were envisaged.

In 1990, the non-marital union became a constitutional category: “The marriage and legal relationships in marriage, non-marital union and family shall be provided for by law” (Art. 62, para. 3 of the Constitution of the Republic of Croatia).

Over time, the effects of recognizing non-marital unions started to extend spontaneously and in a chaotic manner to other legal fields, partially due to the action on the part of the Constitutional Court, which had been extending the *effects* of the non-marital union to other legal fields.⁷⁹ The lack of a clear family policy as to what status should the non-marital union enjoy in other legal fields has led to a difference in requirements for the purposes of demonstrating different effects of the non-marital union, different manners of demonstrating its existence, and incompatible relations among certain regulations, which is why today the answer to the question of who are non-marital spouses under Croatian law and how they can prove their non-marital status is not quite clear. The unclear (family) law status of persons exercising

⁷⁸ The Act on Marriage and Family Relations, Official Gazette, nos. 11/1978, 45/89. and 59/1990.

⁷⁹ For example, the Constitutional Court (U-III-1233/2017, judgment of 10 July 2019, para. 13, 16, 17, and 19) held that there is no objective and reasonable justification for the difference in tax treatment of non-marital spouses in relation to marital spouses.

In the field of pension law, the Constitutional Court (U-X-1457/2007, judgment of 18 April 2007) held that the State should use the Family Act and the Inheritance Act as a framework for the regulation of the right to a pension for non-marital widows and widowers because the Pension Insurance Act, at that time, did not recognize them as beneficiaries of the aforementioned right to a pension.

non-marital cohabitation who do not meet the conditions to validly enter in marriage, primarily those lacking legal capacity, is highlighted as a specific problem.⁸⁰

In the positive family law legislation, a non-marital union is defined as a “union of an unmarried woman and an unmarried man lasting for at least three years or shorter if the common child had been born therein or has been continued by entering into the marriage” (Art. 11, para. 1 of the Family Act). This article further indicates in para. 2 that a non-marital union “produces personal and property effects like a marital union and provisions of this Act governing personal and property relations of the marital spouses as well as provisions of other acts governing tax matters, personal, property and other relations of marital spouses apply *mutatis mutandis* thereto.”

According to the family law regulation, a non-marital union is exclusively a factual union, which is why there is no prescribed way to determine its formal termination, which is entirely the case law. In some other legal fields, a declaratory judicial decision on the existence of the non-marital union (e.g., for the purposes of exercising the right to a family pension) is required, while others require a declaration of non-marital spouses certified by a notary public that they live in the non-marital union (in order to be able to benefit from medically assisted procreation).

In the context of equalizing marital and non-marital unions, non-marital spouses have been allowed to adopt (*see infra* “Adoption”), whereas non-marital spouses may be beneficiaries under the Act on Medically Assisted Procreation⁸¹ pursuant to the conditions set forth by the law (*see infra*).

Acting entirely outside of the usual norm setting standards, the legislature decisively ventured into the field of discrimination prohibition, declaring that “disadvantageous treatment of non-marital spouses in respect to not only access to benefits, privileges but also to obligations guaranteed to marital spouses which cannot be justified by objective reasons and which is not necessary to exercise them, represents discrimination on the grounds of the family status” (Art. 11, para. 3). This applies not only in the field of family law but also in the legal field as a whole.

The Explanatory Memorandum of the Final Draft of the Family Act indicates that it is necessary to

guarantee the recognition and protection of personal and family life and to show respect for their human dignity expressing the legal recognition for the equivalence of their autonomous choice, i.e. personal decision to jointly build personal and family life with a particular person in the same qualitative manner and with the same far-reaching effects as the marital spouses. The difference in the administrative form as to founding of marital and non-marital unions cannot justify disadvantageous treatment of either of those two unions.

80 Cf. Lucić, 2015, pp. 101–132; Hrabar, 2010, pp. 41–48, more on non-marital union: Lucić, 2020.

81 The Act on Medically Assisted Procreation, Official Gazette No. 96/2012.

According to the most recent population census conducted in 2011,⁸² there were 959,487 couples living in marital unions and 48,886 couples in non-marital unions (out of the total number of heterosexual family unions, 95% were married, whereas 5% were in non-marital unions).

In the same year, 14% of children were born out of wedlock (20.7% in 2020),⁸³ but there are no data on how many children have been recognized, which might point to a higher possibility that they were born in a non-marital union. On the other hand, according to one of the rare studies conducted among youth in 2017, slightly over half of surveyed people agree that it is easier for non-marital partners to terminate their relationship than for marital partners, and that this is precisely the reason why the marital union is more appropriate to raise children than the non-marital union (62.2%).⁸⁴ In addition, it is significant that “men are more prone to the view that non-marital union is not a stable one and that they harbour a stronger conviction that non-marital union is more liberal than the marriage.”⁸⁵

In conclusion, the last four decades witnessed the development of the non-marital union from its institutional recognition in family law legislation to it being equated as a *de facto* institution with the legal effects of marriage throughout the entire legal system in a chaotic manner, which has brought about the overall legal uncertainty. Legal uncertainty is reflected in prescribing different conditions for the recognition of the status of non-marital spouses, different ways to determine the existence of the non-marital union, as well as in all problems that the aforementioned issues cause to the non-marital spouses and third persons.

4.2.2. Formal Same-sex Partnership and Informal Same-Sex Partnership

In 1998, the Republic of Croatia regulated for the first time certain family law effects of *de facto* same-sex union by the Same-Sex Union Act.⁸⁶ By modelling it after a heterosexual non-marital union, homosexual partners’ mutual right to maintenance and property effects of their union has been recognized.

As opposed to the primordial development in some other systems, care has been taken that the name of the institution remains different for non-marital (heterosexual) couples and same-sex partners, and the legal provisions governing same-sex unions have been separated from the Family Act.

In 2014, the Same-Sex Partnership Act defined the same-sex partnership as the union of family life and named it a “life partnership.” This act was also supported by the Communication of the Constitutional Court on the occasion of the referendum on marriage, which pointed out that:

82 Population and housing census. Available at: <https://bit.ly/301uv1k> (Accessed: 17 April 2021).

83 Statistical Information, Zagreb, 2020, p. 20. Available at: <https://bit.ly/3Bd5A8C>.

84 Bandalović, 2017, p. 52.

85 Ibid., p. 55.

86 The Same-Sex Union Act, Official Gazette no. 116/2003.

a possible amendment to the Constitution based on a provision that the marriage is the union between a woman and a man must not affect by any means further development of the legal framework of the institution of the same-sex union in accordance with the constitutional requirement that anyone in the Republic of Croatia has the right to respect for, and legal protection of, his or her private and family life, and his or her human dignity (Art. 11).⁸⁷

After the referendum, a professor of constitutional law, Ms. Sanja Barić, rightly concluded in the media that the introduction of the constitutional definition of the marriage protected only the notion of “marriage” in the sense of the institution designed for heterosexual persons, whereas all the effects of the life partnership were virtually equated with the marriage. A review of the constitutionality of the Same-sex Partnership Act is still pending before the Constitutional Court of the Republic of Croatia, having been initiated in 2015.

The legislature envisaged two types of life partnerships: life partnership, which can be entered into the registry of partnerships (similar to the marriage being able to be entered into the registry of marriages) and the informal life partnership, which was constructed via an analogy to the legal regime of the non-marital union. “The life partnership is the union of the family life of two persons of the same sex entered into before a competent authority pursuant to the provisions of this Act” (Art. 2). “The informal life partnership is the union of family life of two persons of the same sex who haven’t entered into the life partnership before a competent authority, if the union lasts for at least three years and has from the outset met the conditions provided for in respect of the validity of the life partnership” (Art. 3, para. 1). Its existence is to be demonstrated in the same way as the non-marital union (in case of a dispute between the partners before a competent court in relation to the effects in other legal fields, the same as the non-marital union) according to Art. 3, paras. 2 and 3 of the Act on Same-Sex Life Partnership.

The conditions for entering into a life partnership and the conditions for its validity have been *mutatis mutandis* from nuptial law. The difference lies in the fact that minors cannot enter into a life partnership and that the competent authority for forming the life partnership is only the civil registrar (there is no possibility of a religious ceremony).

The Act envisages the following effects of the life partnership: personal rights and obligations; maintenance; relations regarding children in view of the exercise of care and property relations (which are dealt with by family law); inheritance; fiscal status of life partners; effects of the life partnership within the context of retirement insurance; status of life partners within the social welfare system; rights and obligations in the system of compulsory health insurance and health care; rights and

87 Communication of the Constitutional Court of the Republic of Croatia regarding the people’s constitutional referendum on the definition of the marriage No.: SuS-1/2013 of 14 November 2013, Official Gazette no. 138/2013.

obligations regarding access to employment and labor relations; access to public and commercial services, as well as public law status of the life partnership (temporary residence permit for the purposes of family reunification; freedom of movement within the European Economic Area; status of the unions of same-sex persons entered into outside of the European Economic Area; international protection; acquisition of Croatian nationality; and rights and obligations of life partners during execution of a custodial sentence and the guarantee to prohibit less favorable treatment).

If one of the partners in the life partnership has his or her own child, it is possible for the life partner to be entitled to exercise parental responsibility so as to be entrusted by parent(s) exercising parental responsibility to exercise it in part or entirely (Art. 40, para. 3). The other possibility is that a court decides that the life partner together with the parents or instead of one of them is entitled to exercise parental responsibility or some of its elements pursuant to the provisions of a family law regulation (Art. 40, para. 1). Such a solution contradicts the Family Act from 2015 pursuant to which only parents exercise parental responsibility and opens up the possibility that three persons exercise it for the child (his or her parents and the parent's life partner).

The Same-Sex Partnership Act also introduced an institution that is content-wise similar to *adoptio minus plena*: terminable adoption with limited effects regarding adopting parents' relatives, according to which a life partner may in judicial proceedings claim partnership-based care and become partner-guardians. In principle, partnership-based care may be provided by a life partner as a form of care for the minor child after the death of the life partner of the child's parent and, exceptionally, during the life of the child's parent, if the other parent is unknown or he or she has been stripped of parental care due to child molestation (Art. 44). Partnership-based care has the effects that "permanent rights and duties existing under law between parents and children and their descendants are constituted between partner guardian of the child, on one side, and his or her descendants on the other" (Art. 48 of the Act). While the partner-guardian cannot be entered as the parent in the child's birth registry he or she has all rights as the parent of the child.

Life partners are not entitled to jointly adopt a child pursuant to the Family Act (although nothing prevents the life partner from adopting the child of his or her partner after the latter's death as any other person). Moreover, life partners cannot be joint or individual beneficiaries of the Act on Medically Assisted Procreation. As they have not been envisaged as foster family pursuant to the Foster Care Act while this was assessed by the Constitutional Court as meaning that courts had the duty to interpret the law *in favorem* of life partners, one may expect further proceedings before the Constitutional Court. Some of the applications have already been filed, although they are still pending. The latest decision from May 5, 2021 of the Administrative Court enabled homosexual couples to go through the procedure to approve that they might be capable adoptive parents. This decision has not yet been finalized.

In the 2016 case *Paić v. Croatia*, the ECHR found that the Republic of Croatia had violated the prohibition of discrimination because it failed to accord to the applicant, a national of Bosnia and Herzegovina, temporary residence for the purposes of family reunification, although she had maintained a stable relationship with the same-sex partner from the Republic of Croatia, because same-sex partners did not enjoy the legal status of a family member for the purposes of the Foreigners Act.

To assess the state of the society, one should observe data from the Ministry of Justice and Administration, according to which, in 2020, there were 66 life partnerships in total, 28 of which were between men and 38 of which (20 more than in 2019) were between female persons. These data show that 32 life partnerships were entered into between nationals of the Republic of Croatia as well as 30 life partnerships between a Croatian national and a foreign national. In four cases, foreign nationals entered into life partnerships.

Life partnerships with international elements are governed by the Act on International Private Law.⁸⁸ Pursuant to Art. 32, para. 2 “[t]he marriage entered into abroad by persons of the same sex shall be recognized as the life partnership, provided it has been entered into pursuant to the law of the State in which it has been entered into.”

Since the effects of the registered life partnership have been rendered equivalent to the effects of the marriage of persons having entered into a same-sex marriage abroad, it is “translated” into a life partnership without affecting their rights and duties arising from marriage. Same-sex registered partnership is recognized in the Republic of Croatia as a life partnership if it has been entered into pursuant to the law of that State (Art. 39, para. 2 of the Act on International Private Law, whereas pursuant to Art. 40, para. 3)

the law applicable to property relations in life partnership is to be determined according to Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (OJ 2016, L 183, 8. 7 2016).

4.3. Determining the Child’s Origin

4.3.1. Mother’s Status

Motherhood may be determined by virtue of a presumption or a judicial decision. Since 2014, the presumption has been defined as the *praesumptio iuris*: “The woman having given birth to the child shall be regarded as the mother of the child” (Art. 58 of the Family Act).

Since most children are born in a healthcare institution, the fact that the child has been born is, in principle, reported to the civil registrar by the health institution

88 The Act on International Private Law, Official Gazette No. 101/2017.

that the child has been born by a particular woman who is to be entered as his or her mother in the birth registry. Childbirth outside a healthcare institution is to be reported by the child's father, i.e., the person in whose household the child has been born, the mother as soon as she becomes capable of doing so, or a midwife or a medical doctor who participated in the birth, i.e., the person who became aware of the child's birth (Art. 11, para. 2 of the Act on Civil Status Registries). To prevent possible manipulation of the child's parentage, the person reporting a child's birth outside a health institution has a duty to provide the civil registrar with medical documentation on the birth or the proof of motherhood (Art. 11, para. 3 of the Act on Civil Status Registries).

Motherhood may also be established in judicial proceedings. An action may be filed by the child (until he/she reaches 25 years of age — Art. 383, para. 1 of the Family Act) or the woman considering herself to be the child's mother and a social welfare center (until the child's 18 years of age — Art. 59 in connection with Art. 384, para. 1 and Art. 387 of the Family Act), if the box containing data on the child's mother has been left empty. The woman considering herself as the child's mother may contest motherhood of the woman entered into the birth registry but has to seek simultaneously that her own motherhood be established. If it appears from a medical expert report that the applicant is not the mother of the child with respect to whom she contests motherhood, the court will discontinue the proceedings for contesting motherhood, resulting in preservation of the child's parental responsibility.

In court proceedings, one is always required to submit, in practice, DNA evidence that indicates with exceptionally high precision who is the biological mother of the child, although formally the court is not bound by this evidence.

4.3.2. Father's Status

Fatherhood may be established by virtue of presumption, recognition, or judicial decision. Not all particulars of fatherhood determination will be elaborated, save for those considered essential for the purposes of this study.

The general rule reads *pater est quem nuptiae demonstrant* meaning that "the mother's husband shall be regarded as the child's father, if the child has been born in wedlock or within the period of 300 days after marriage termination" (Art. 61, para. 1 of the Family Act).

In case of *perturbatio sanguinis*, i.e., "if within the period of 300 days after the termination of marriage by death the child's mother entered into a subsequent marriage," the mother's husband from the marriage last entered into will be regarded as the child's father (Art. 61, para. 2 of the Family Act). If the child was born in wedlock or within the period of 300 days after marriage termination by virtue of divorce or annulment, the man considering himself as the child's father may recognize the child with the consent of the mother and mother's husband (Art. 61, para. 3). The man considering himself as the child's father is not permitted to contest marital fatherhood.

Criticisms may be submitted with respect to the provisions that recognition of fatherhood of the child who had a marital status has been allowed without the fatherhood of the child having been contested in court beforehand.⁸⁹

If the child was born out of wedlock, fatherhood may be determined by recognition or a judicial decision. The civil registrar in charge of birth registry is competent to enter recognized fatherhood, whereas, among other conditions for entering of fatherhood recognition Art. 64, requires, depending on a particular case, consent of the adult mother independent of her legal capacity, consent of the minor mother younger than 16 years of age (together with her legal guardian's consent), consent of the child of 14 years of age with respect to whom fatherhood is being recognized, or consent of the mother and her husband if fatherhood of the marital child is being recognized by the man considering himself as the child's father. If the mother is not alive or her residence is unknown, consent of the child's guardian is required, together with the prior approval of the social welfare center.

By obtaining appropriate consent, one strives to ensure there are no abuses of fatherhood recognition since consent confirms the veracity of recognition. In addition, if the civil registrar official harbors doubts as to the veracity of the application or it proves to be necessary, he or she is entitled to suspend execution of the entry to verify the veracity of the data contained in the application.⁹⁰

Neither the professional nor the broader public is aware of cases of false fatherhood recognition. In addition, changes in the child's family status by planting, replacing, giving false information, or in some other way, represents a criminal offense with a custodial sentence of up to three years (Art. 175, para. 1 of the Penal Code)⁹¹.

4.3.3. Medically Assisted Procreation

Medically-assisted procreation is regulated by a special regulation⁹² in which a married woman and a man, a woman and a man in a non-marital union, or a woman not living in a marriage, non-marital union or same-sex union whose treatment of infertility failed or has no prospect of succeeding are indicated as the beneficiaries (social infertility is not relevant). Each beneficiary has to be an adult with legal capacity, i.e., not being limited to making declarations concerning their civil status (Art. 10, para. 1–3. of the Act on Medically Assisted Procreation).

The guarantee that the child will enjoy parental responsibilities of both parents is provided in such a way that marital or non-marital unions must exist when implanting sex cells or embryos into women's bodies (Art. 11, para. 1). The existence of the non-marital union is to be demonstrated by non-marital spouses by means of

⁸⁹ Cf Hrabar, 2019, p. 135.

⁹⁰ Para. 5.6 of the Order on Implementation of the Act on Civil Status Registries and Entry of Adoption into Birth Registry, Official Gazette, no. 26/2008.

⁹¹ Penal Code, Official Gazette, nos. 125/2011, 144/2012, 56/2015, 61/2015, 10120/17, 118/2018 and 126/2019.

⁹² The Act on Medically Assisted Procreation, Official Gazette, no. 86/2012.

a declaration certified by a notary public (Art. 11, para. 3); the man has to give a declaration on fatherhood recognition, while the woman has to give a certified declaration on consent for the recognition of that child's fatherhood (Art. 16, para. 2).

Parentage of the child conceived by medically assisted procreation is regulated by the Family Act in the sense that "the mother of the child conceived by donated ovum or donated embryo within a procedure of medically assisted procreation is the woman having given birth to him or her" (Art. 82, para. 1), as the *praesumptio iuris et de iure*, which is nonetheless theoretically inconsistent because already at the next point, contestation of motherhood is permitted.

If the child conceived by donated semen has been born in wedlock or up to 300 days after marriage termination, the mother's husband is to be regarded as the child's father, while in the case of a child born out of wedlock, the mother's non-marital spouse has given written consent for the appropriate procedure and the declaration on the recognition of the child in accordance with medical procedure shall be regarded as the child's father (Art. 83, para. 1 and 2).

The mother's husband is to be regarded as the father of the child conceived by donated semen or embryo if the child has been born in wedlock or within 300 days after termination of the marriage, provided he has given appropriate consent.

After the required consent has been obtained, it is no longer possible to contest either motherhood or fatherhood (Art. 82, para. 2 and Art. 83, para. 3), and had the required consent not been obtained, motherhood of the child may be contested by the woman entered as the child's mother, the woman considering herself as the child's mother (Art. 82, para. 3), the man entered as the child's father, and the man considering himself as the child's father (Art. 83, para. 4), under the conditions provided for by the law.

Surrogate motherhood is not permitted, and contracts, agreements, and other forms of written and oral arrangements on donation of sex cells or embryos between donors of the sex cells or embryos are forbidden, while any contract or agreement to cede sex cells or embryos is null and void (Art. 21.).⁹³

It is important that the child has the right to know his/her origin, so he/she has the right to inspect medical documentation, including the information of the donor's identity (Art. 15, para. 1 of the Act).

It is a reality that primarily due to the revealed anonymity of a donor (but also to some other medical reasons) heterologous methods are not applied and that many beneficiaries seek to transfer their genetic material to other countries (the most common being the Czech Republic, Macedonia, and the Ukraine) in which they have recourse to those medical services not available to them in Croatia.

The professional public is now aware of the case of a woman who sought maternity leave after her return from the Ukraine with a child in whose civil status registries she was entered as the mother but did not have the required medical

93 Regarding the view that surrogate motherhood is the new form of exploiting women and child trafficking cf. Hrabar (2020).

documentation on her pregnancy and the birth (everything was leading to the use of surrogate motherhood abroad). Upon the intervention of the ombudswoman for children, the woman was allowed to use maternity leave. The authorities did not intervene in the family life of that family, questioning the biological origin of the child.⁹⁴

5. Adoption

Adoption is a “specific form of family law care and protection of the child without appropriate parental care with whom a permanent parent-child relationship is formed,” based on which adopting parents become entitled to parental responsibility (Art. 180, para. 1 and 2 of the Family Act).

Eligible to adopt are marital spouses jointly, non-marital spouses jointly, persons who are married or have entered into a non-marital union, upon consent of the marital or non-marital spouse, as well as persons who are not married or have not entered into a non-marital union (Art. 185 of the Family Act). Family law experts have voiced substantial opposition as a precaution to a proposed solution that non-marital couples may adopt a child. Due to the case law of the ECHR, which is constantly extending the rights of non-marital spouses to same-sex couples (*see supra*), such a solution might lead the Constitutional Court to decide that same-sex couples have to be included as prospective adopting parents, such as the Constitutional Court in Germany. As mentioned above, the new approach led to the request of the Administrative Court toward centers for social welfare that homosexual couples should be allowed to go through the process of approval and that they have the capacity to adopt a child (although that is *contra legem*).

There is no obstacle for a single homosexual person to adopt a child. There is no obstacle for a person who is the life partner of the child’s parent to adopt the child after the termination of the life partnership, after which he/she thus can acquire parental responsibility. Adoption is not rescindable, and the adopting parents may be entered as parents, while the legal effects also arise between the relatives of the adopting parents and the child. Regarding the *adoptio minus plena* under the new name partnership-based care, it is available only to partners of the child’s biological parents or child’s adopting parents (*see supra*).

94 More on international aspects of surrogacy: Šimović, Čulo, and Preložnjak, 2019.

5.1. Legal Framework of Parent-children Relationship

5.1.1. Content of Parental Responsibility

Parental responsibility is acquired as soon as the child's origin from the parents is determined and consists of responsibilities, duties, and rights of the parents for the purposes of promoting the child's personal and property rights and welfare. The fundamental elements of parental responsibility comprise the right and duty to protect the child's personal rights to health, development, care, and protection; upbringing and education; contacts; determination of the place of residence; asset management; and the right and duty to represent children's personal and property interests (Arts. 91 and 92 of the Family Act). Although maintenance is not mentioned in the Act as an element of parental responsibility, in theory, it is considered as one of its elements.

Since 1978, Croatian family law legislation has provided equality for children regardless of whether they have been born in the wedlock, as well as the equality of their parents regarding parental responsibility. The only difference lies in the way in which fatherhood is to be determined.

Exercising parental responsibility should not be confused with parental responsibility (*nudum ius*). Parents exercise parental responsibility jointly and by agreement until a contrary agreement is reached by parents or a judicial decision is adopted thereon, regardless of whether the child has been born in or out of the wedlock. By virtue of its most recent amendments, the Family Act derogated from the principle of joint parental responsibility in the sense that, after the termination of the family union, the parent living with the child exercises parental responsibility autonomously whenever no agreement on joint parental care has been reached during court proceedings.

Such a legislative solution was modified by the case law pursuant to which a court is empowered to award "exercise of joint parental responsibility in case of parents not living together and in case the matter has not been regulated by an agreement based on joint parental care plan under Art. 106 of the Family Act or by parents' agreement reached during the judicial proceedings, if it appears to be in the best interest of the child," as cited in the Legal Opinion of June 4, 2019 of the Zagreb County Court. Although such competence is not derived from Art. 104, para. 3 of the Family Act, it is entirely compatible with the Convention on the Rights of the Child.

The parent not living with the child and in the case of parents having failed to reach an agreement is substantially deprived in terms of exercising parental responsibility and has significantly limited rights even if he or she shares parental responsibility,⁹⁵ which is undoubtedly detrimental to his or her legal situation as compared to the earlier legislative solution.

⁹⁵ Cf. Korać Graovac, 2017.

The stepfather and the stepmother are expressly referred to in the Family Act only as the persons who mutually enjoy with child the right to maintenance under the conditions provided for by the law (Arts. 281, 283, 293 *et al.*). In addition, just like the other family members living with the child, they may, upon parents' consent, make day-to-day decisions concerning the child (Art. 110, para. 4). What is to be subsumed under the notion of "day-to-day decisions" has to be determined according to the circumstances of a particular case, but that should certainly cover taking decisions on a day-to-day regime in the family and the like.

With regard to the rights to contact after the termination of the family union, stepfather and stepmother are entitled to personal relations provided they can be subsumed under "other persons if they have lived for a longer period in the family with the child, taken care of the child during that period and have an emotionally developed relation with the child" (Art. 120, para. 2).

The non-marital spouse and children of the non-marital spouse are not referred to at all as pertaining to the circle of persons enjoying mutual rights to maintenance, which may be interpreted only teleologically from the provisions on the effects of the non-marital union (Art. 11), whereas the non-marital spouse of the parent may in the same manner as the stepfather or the stepmother be included in the circle of persons entitled to make day-to-day decisions concerning the child as well as into the circle of persons entitled to contact with the child.

Although the Same-Sex Partnership Act has regulated these matters separately as well, life partners have life partnership effects regulated in more detail and to a greater extent in relation to the children of his or her life partner (see *supra*), including the possibility of exercising parental responsibility, whereby they are privileged in relation to marital and non-marital spouses in their relationship with the child.

In the context of the targeted interest of this study, one has to single out the case of parents' influence on the so-called health (sexual) education of children in schools, where, on the occasion of the attempt to introduce a curriculum containing sexual education, a part of the public voiced its opposition, considering that sexual education was conceived contrary to their freedom to freely decide on the upbringing and education of their children. Critics referred to it as "homosexual education" and "sexual re-education."⁹⁶ The justification for introducing of sexual education was based on the prevention of infectious diseases and pregnancy among minors as well the promotion of understanding of homosexuality, transgenderism, and other similar issues.⁹⁷ In an attempt to reconcile the opposing parties, the Ministry of Education proposed a model according to which parents would have the right to be informed on individual lessons and thereafter withdraw their children from them should they so choose. The debate on this issue was resolved in 2013 by the Constitutional Court decision that "until the adoption of the health education curriculum

96 Mrnjaus, 2014, p. 317.

97 Štulhofer, 2012.

in a procedure compatible with the constitutional requirements, content of health education shall be taught in primary and high schools in the Republic of Croatia pursuant to the programme” which had existed until then, due to the inability to engage in a public debate and include parents in the decision-making process involved with adoption of the curriculum (which has not yet been adopted).

5.1.2. Child's Right to Freedom of Conscience and Religion and Own National Identity (religion, language, culture, homeland)

Owing to the Constitution (Art., para. 40), the child has the right to freedom of conscience and religion, just like any other person. Notably, “all religious communities are equal before the law and separated from the State,” whereby they are free to perform religious services, and “in their activity they enjoy protection and support of the State” (Art. 41. of the Constitution of the Republic of Croatia).

If parents wish to choose or change the religious affiliation of the child, they must do so together when they share parental responsibility in so far as it relates to representation concerning the child's essential personal rights. Moreover, the written consent of the other parent is always required (Art. 100, para. 1(3) and para. 2 of the Family Act). Family law experts are unaware of court disputes between parents on these issues, nor does there exist a case law thereon, although the norm has been applied since 2014.

In several recent annual reports, the ombudswoman for children warned of the opposition voiced by some parents not allowing their children to attend school simultaneously with a priest present therein⁹⁸:

We have been apprising the individual institutions for upbringing and education as well as the Ministry of Science and Education of our view that inclusion of religious content into the programmes and content designed for all the pupils to be contrary to the interest of children of other worldviews. Such an inclusion contravenes also one of the more important dimensions of the right to education which, pursuant to the Convention and the National Strategy for Rights of Children in the Republic of Croatia for the period 2014–2020, should be discrimination-free...⁹⁹

In a situation where, according to the most recent population census, 86% of the surveyed citizens declared themselves to be Catholics¹⁰⁰ and bearing in mind the fact that society is marked by Christianity in cultural terms, the conclusion that

⁹⁸ In that vein she alleges that those reports pertained to inclusion of children into programs of religious content (in kindergartens and schools, for example when marking the Bread Day accompanied by prayer and blessings) outside the approved religious education programme, i.e., religious education in the school. Cf: Report of the Ombudswoman for Children, 2019.

⁹⁹ Ibid.

¹⁰⁰ Population census, 2011.

exposure of children to religious activities constituting a part of a pluralistic society is discriminatory is somewhat surprising.

From a general point of view, the rights of children belonging to national minorities are protected by the Constitutional Act on Rights of National Minorities, which guarantees the use of language, preservation of cultural identity, the right to education and upbringing in the mother tongue, and the right to express their own faith and to found religious communities, etc. (Art. 7). Multiple educational models are available to members of national minorities. In each report, the ombudswoman for children indicates particular cases of discrimination toward children belonging to national minorities (mainly Roma), whereas in the field of school, Croatia was unsuccessful in cases brought before the European Court for Human Rights.¹⁰¹

6. Concluding remarks

Croatian society is still a relatively traditional one in relation to European developments, whereby marriage and family rank high in terms of values. Legal protection of family values may be reflected in many legal fields, out of which only the selected ones have been presented in this study, mainly those pertaining to family law.

With the most recent family law reforms, Croatia has abandoned the development of traditional marriage thus far, and in terms of legal effects equated the marriage and informal non-marital union (in all the legislative fields), which further contributed to legal uncertainty. Proceedings to establish fatherhood have been brought into a disarray because it enabled the fatherhood presumption to be modified by means of recognition, abolished the principle of shared parental responsibility, and conferred on to the parent not living with the child substantially limited rights — to mention but a few contentious solutions relating to the subject matter of the research.

Partners in same-sex unions, both formal and informal, are included in the notion of family, which produces legal effects equated to marriage, while partners have even more rights toward the children of their homosexual partners compared to heterosexual marital and non-marital spouses. The *adoptio minus plena* of the partner's child has been enabled (under a different name) and the Constitutional Court has provided same-sex couples the possibility to foster children, contrary to the fact that such individuals have been knowingly omitted from legislation. The doors toward the possibility to adopt are wide open, as the Administrative Court in May 2021 allowed same-sex couples to approach the proceedings if they were eligible to adopt a child.

101 Oršuš and others v. Croatia, Appl. no. 15766/03 Judgment 16 March 2010.

The parents are the first to be called upon in providing care for their children and deciding on their upbringing and education, while children's rights to faith, national identity, religion, language, and culture in the educational system and beyond are protected by the constitutional act; however, in practice, there are still cases of discrimination at the individual or institutional level.

The last few years have witnessed an obvious tendency to broaden the notion of family, family members' freedom of choice favoring individual interests over the interests of the family union (principle of the autonomy of will), as well as family law liberalization.

In order to gain a better insight into the legal protection of the family, it would be advisable to broaden the scope of the research and to focus on measures promoting marriage perpetuity, parents' cooperation after the termination of the family union, protections against family violence, ensuring effective maintenance, protection of the elderly within the family, promoting legal certainty, and determining effective social incentives that the State is capable of providing, and finding examples of good practices.

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