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Legal union of a same-sex couple in the Slovak Republic and the scope of recognition of such unions validly established abroad

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Abstract

The paper focuses on the issue of legal regulation of unions of same-sex couples under the conditions of the Slovak legal order. The author notes that within the Slovak Republic there is no equivalent of the institution of marriage for cohabiting persons of the same sex. It is further specified on the issues of recognition of marriages of same-sex couples, respectively registered partnerships established abroad. The aim of the contribution is to summarize and stimulate a wider discussion on the issues addressed and to point out the fact that human rights must be guaranteed in a state of law, while their guarantee can be interpreted as a security granted to all and the rejection of discrimination. The lack of legal recognition for same-sex unions not only presents social challenges but also practical hindrances in daily affairs such as healthcare, taxation, and social security benefits, which can often be predicated on marital status. It is crucial to consider the implications of such legal gaps on the well-being of individuals who are part of same-sex couples, as well as their children. The evolving social fabric and changing attitudes towards same-sex relationships necessitate a reassessment of existing legal frameworks to ensure inclusivity and equality under the law. The continued efforts and discussions within the Slovak Republic highlight a growing awareness and potential for legislative change that aligns with the European consensus on human rights. Moreover, the exploration of legal avenues for recognition of same-sex unions must consider the dynamic nature of family structures in the contemporary context, where diversity in family units is becoming increasingly normative.

Keywords: registered partnership, same-sex couple, marriage, homoparentality, discrimination

1. Introduction

The legal order of the Slovak Republic has not yet codified the unions of same-sex couples as an alternative to the institution of marriage for couples of different sexes. At the same time, through no special legal institution, it does not allow the creation of homoparentality, which Sobotková I. defines as couples of the same sex who have children in common custody, whether from of previous heterosexual marriages, adopted children, or children from assisted reproduction [1], even though since the deletion of homosexuality from the list of diseases by the World Health Organization, many countries have consistently started to create institutions enabling the creation of a legal union of same-sex couples. As Pavelková, Kubíčková, Čechotová state, it is impossible to claim that Slovak law does not consider such factual relationships and does not associate any legal consequences with their existence [2].

Individual rights and obligations can be derived from concepts such as “household, “which follows the provisions of § 115 of Act no. 40/1964 Coll. The Civil Code, as amended (from now on referred to

as the “Civil Code”), consists of natural persons who live together permanently and jointly cover the costs of their needs, or a “close person, “which § 116 of the Civil Code defines, among other things, as persons to each other close, if the harm suffered by one of them is reasonably felt by the other as their harm, or the term “family member, “which the Slovak legal order understands as persons who live together in a common household and are so-called close people. In matters of inheritance, it is possible to start from the term “cohabiting person, “i.e., a person who lived with the testator for at least one year. However, a special question within this issue is whether such legislation is sufficient.

At the same time, we see the need to address the issue of whether the Slovak legal system or to what extent it accepts marriages or registered partnerships between cohabiting same-sex couples established abroad, about the harmonisation of private law and non-discrimination, even though the Slovak legal system does not recognise such institutions.

Sekerák and Novotný [3] and Gherghina and Silagadze [4] discussed legislation on same-sex partnerships in the post-communist area. After long political debates, a law allowing civil unions in the Czech Republic was adopted in 2006. In the post-communist area, there has been a political struggle over marriage.

Same-sex marriages or civil unions/registered partnerships in Slovak constitutional law and its challenges and possibilities, were discussed by Sekerák [5]. The reasoning behind the legalisation of same-sex unions should be grounded on (1) the right to privacy, and in the principles of (2) civic equality, (3) similarity, (4) equal access to the legal and social benefits of marriage, and (5) the democratic state, which constitutes one of the ‘basic principles’ of Slovak constitutionality.

2 Legal union of a same-sex couple in the Slovak legal environment

The institution of a registered partnership, or a similar alternative to the creation of a legal union of a same-sex couple, is currently not implemented into the legal order nationally at the level of the European Union, only in the following countries, which are Bulgaria, Latvia, Lithuania, Poland, Romania and the Slovak Republic. Since 2001, when the Netherlands was the first in the world to extend the right to marry to same-sex couples, other countries have begun to expand legal rights for same-sex couples. In general, the perception of homosexuality in society is changing more and more fundamentally, which causes a social need to adjust these issues at the legislative level as well.

Back in 2014, the European Parliament approved the EU plan (2013/2183(INI)) against homophobia and discrimination based on sexual orientation and gender identity, calling on all member states to support the rights of LGBTI people, including marriage for same-sex couples, free access to adoption, assisted reproduction and surrogacy, Tománek P. [6] However, in the same year, marriage in the Slovak Republic was constitutionally defined as a unique union between a man and a woman. As Tománek states: *“marriage is defined as the union of a man and a woman who have committed to sharing their lives on every level of their being (physical, emotional, spiritual) in the type of union that will be filled with the joint procreation and upbringing of children. The complex nature of this union and its natural orientation to procreation distinguishes marriage from other types of communities. It provides the basis for the norms of exclusivity and permanence of marriage.”* [6] The perception of marriage and family in our conditions is based on traditional formulas.

Within the framework of the Slovak Republic, however, the implementation of an institute that would allow a same-sex couple to form a legal union has been negotiated several times. Still, the efforts have yet to be successful. Likewise, an effort was made to create a similar institute of registered partnership under the name. life partnership, while the intention of modifying this institute was to develop a union different from marriage, which would also be available to couples of different sexes (similar to the French institute “pacte civil de solidarité”).

So far, the last proposal for creating an institute legalizing a same-sex couple's union was supposed to grant rights to partners in the sense of joint ownership and certain rights concerning access to health documentation and inheritance. As part of the regulation of inheritance, the Civil Code grants the right to inheritance to cohabiting persons, but this is difficult to prove in practice. At the same time, the legal order of the Slovak Republic does not regulate the mutual maintenance obligation of life partners, and the institution of joint ownership applies exclusively to spouses; any contract cannot be negotiated.

The proposal in question for introducing the institution of cohabitation was gender-neutral. Thus, just like the previous attempt, it would assume its use both by couples of the same sex and by couples of different sexes, while such a union would be concluded by writing down an expression of will in a notary minutes. It can be assumed that an institute that would apply not only to same-sex couples but also to opposite-sex couples would be more easily socially accepted. On the other hand, the consequence would again be the disadvantage of same-sex couples, as they could only use one institute to adjust their relationships.

From the above, it is clear that the current legislation is insufficient for cohabiting same-sex couples. Legislation that would make it possible to regulate the union of a same-sex couple would, however, bring facilitation in everyday life in terms of the granted rights that should belong to such a couple in the same way as they belong to a couple of persons of different sexes. Still, at the legal level, these rights are neglected, and the Slovak legal regulation of the union does not know people of the same sex.

It might seem that the decision of the European Court of Human Rights *Fedotova and others v. Russia*, according to which Russia must recognize homosexual unions. At the same time, the European Court of Human Rights states the need to achieve a fair balance. It adds that the contracting states must ensure same-sex couples' legal protection through legal recognition of their unions [7], and that the Slovak Republic must deal with the issue in question. However, because Russia was excluded from the Council of Europe, this decision can no longer be considered and does not result from the obligation of its application and implementation in our legal framework. At the same time, however, we believe that despite this, the decision in question may be crucial in the development of the legalization of unions of same-sex couples since it can be assumed that if the European Court of Human Rights were to deal with a similar issue again, the conclusion would not be significantly different than in the given case.

There is no doubt that in the future, it is also necessary to resolve the question of the extent to which traditions should be guaranteed, whether the traditional family should be formed exclusively by a man and a woman, and to what extent unions should be secularized from traditions.

3. Legal relations established abroad affecting the national legal order concerning the harmonization of private law

Since the legal regulations of individual states are different and the European Union leaves the regulation of family law issues to national law, questions arise as to whether relationships that were validly established abroad are accepted and recognized in the Slovak Republic, which does not legally regulate such relationships.

The answer to this question can be found in the decision of the European Court of Human Rights, according to which the Convention for the Protection of Human Rights and Fundamental Freedoms (from now on referred to as the “Convention“) does not impose an obligation on the parties to provide same-sex couples with the opportunity to enter into marriage, but a stable de facto relationship between by same-sex couples living together falls within the application framework of Art. 8 of the Convention as the right to family life, which implies that legal recognition and legal protection of same-sex partnerships is part of the right to private and family life. In another judgment, the European Court of Human Rights also recognized that there are no qualitative differences between the partnership of heterosexual couples and same-sex couples [8].

Following the above, it can be concluded that the state is not obliged to have a legislatively enshrined possibility to marry or start a family for persons of the same sex, even though the European Parliament declared the European Union as an LGBTI zone of freedom in 2021 with the fact that LGBTI people everywhere in the European Union should have the freedom to live publicly and express their sexual orientation and gender identity without fear of intolerance, discrimination or persecution and that authorities throughout the European Union should protect and promote equality based on the right of all, including LGBTI people [9].

In the resolution on the rights of LGBTI persons in the European Union, the European Parliament also emphasizes that all marriages or registered partnerships concluded in one member state should be uniformly recognized in all of them [10]. It further argues that the freedom of movement of LGBTI persons cannot be restricted by national laws, such as by banning same-sex marriage.

4. The issue of granting a residence permit based on the status of a family member

Although the Slovak Republic does not even recognize marriages or registered partnerships validly concluded abroad, it must grant the right of residence for more than three months to a citizen of a third country who has validly entered into a marriage with a person of the same sex in another member state of the European Union. This union is partially recognized but exclusively to grant the derived right of residence to the spouse or wife as a non-member of the European Union. In contrast, other rights, e.g., Property, inheritance, or family rights, are not granted to this couple.

The mentioned obligation of the state results from the judgment of the Court of Justice of the European Union from 2018 in the case of *Coman and Hamilton v. Romania*, according to which, if a member state refuses to recognize the marriage of a citizen of a third country with its citizen of the same sex, which was legally concluded in another member state, it may the right of the concerned citizen to move freely and stay in the territory of the member states of the European Union [11], thereby recalling his interpretation from the judgment in the *Lounes* case [12], the member states of the European Union cannot therefore refuse to grant the right of residence for a period longer than three months to a citizen of a third country who has entered into a marriage with a person of the same sex who is a citizen of the European Union for the reason that the legal order of the given state does not recognize such a marriage. Freedom of movement and residence must not depend on national laws defining the institution of marriage.

The King adds to the judgment above that in a member state that does not recognize same-sex marriages, the judgment in question not only discriminates against its non-immigrant citizens against its migrating citizens but also reverses discrimination against its non-immigrant citizens against (to this state) migrating citizens from other member states. At the same time, according to his claims, the judgment favors same-sex marriage over registered same-sex partnerships. In contrast, the registered partner of a migrant citizen of the same sex, unlike her husband or wife who is not a member of the European Union, has the right for a long time with him, as a member of his family, to live only in those member states where a registered partnership is legalized or recognized [13].

It should be added that member states are also not obliged to regulate the institution of registered partnerships or other equivalents between persons of the same sex in national law.

Although the Court of Justice of the European Union expressed certain conclusions in the case of *Coman and Hamilton*, namely that the state is obliged, even if it does not recognize same-sex marriage, to respect these relationships within the framework of granting the right of residence, specific problems appear on the territory of the Slovak Republic. Four of the six European Union countries without same-sex unions said they recognized freedom of movement for same-sex couples. In contrast, Poland and Slovakia refused to recognize such freedom of movement. We believe freedom of movement should not be a question but a certainty granted to everyone. The European Union, the Council of Europe, and the United Nations have repeatedly expressed the need for non-discrimination and equality for LGBTI people.

We believe that if the Slovak Republic allows the husband or wife of its citizen to obtain permanent residence because they have a heterosexual marriage, as far as this partner, or the husband of a Slovak citizen to a family member, he has to provide the same opportunity to a same-sex couple who cannot enter into a heterosexual marriage, as otherwise, they commit discrimination, about directive no. 2004/38/EC of the European Parliament and the Council, which in Art. 2 par. 2 a) defines the term “family member”; as a spouse, but according to Art. 3 par. 2, other family members with whom the citizen of the European Union has a duly certified permanent relationship will be allowed to enter any member state of the European Union. At the same time, under § 2 (5) h) of Act no. 404/2011 Coll. on the Residence of Foreigners and on Amendments and Supplements to Certain Acts (from now on referred to as the “Law on the Residence of Foreigners“), a family member of a citizen of the European Union is a national of a third country with the right of residence in the same member state as a citizen of the Slovak Republic, with by which this person returns to stay (or joins him for stay) and fulfills one of the conditions vis-à-vis a citizen of the Slovak Republic, while the condition of § 2 (5) g) applies to this relationship, or is his partner with whom this citizen has permanent, properly proven relationship.

Although the legal system of the Slovak Republic already significantly restricts the recognition of unions of same-sex couples formed abroad, exclusively for the recognition of the right of residence or free movement, the wording of the Act on the Residence of Foreigners brings complications in practice. In this context, Patakyová M. turned to the Constitutional Court, stating that the non-recognition of the right to permanent residence interferes with the fundamental rights and freedoms of both spouses, which is not changed by the fact that according to the legal order of the Slovak Republic, it is not possible to enter into a marriage between persons of the same sex. He adds, "*The legal system of several countries currently allows same-sex marriages. The fact that the Slovak Republic refuses to consider the person in this union as a family member to grant permanent residence means interference with the fundamental rights and freedoms of such spouses.*" Finally, he adds that, in this context, the National Council of the Slovak Republic recommended adopting a change in legislation, but the legislative change was not adopted [14].

In this matter, the Regional Court in Žilina annulled the decision of the Banská Bystrica Border and Aliens Police Directorate and the decision of the Aliens Police Department of the Žilina Police Force in its entirety while confirming that the rejection of the application in this case resulted in unjustified discrimination based on sexual orientation and a violation of the right to respect for private and family life and freedom of residence, and at the same time obliged foreign police authorities to proceed not only by national legal standards but also with the jurisprudence of the European Court of Human Rights [15].

Although the jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights takes a clear position on the given issue, and even if the Family Act does not allow same-sex couples to enter into marriage, it should be added that other legal regulations than the Constitution of the Slovak Republic, but also Convention that guarantees a broader range of rights than the legislation of the Slovak Republic. In the conditions of the Slovak Republic, however, this is a relatively unique decision, which we perceive as a good prediction of the development within the issue being addressed.

5. Conclusion

The legal recognition and creation of a legal union of same-sex couples is an important human rights issue addressed within the right to private and family life, guaranteed by Art. 8 of the Convention. The level of cohabitation protection provided to same-sex couples is increasing in the European Union states, and today, the Slovak Republic is among the last European Union states without any legal arrangement for same-sex couples that would be like the marriage of different-sex couples. At the same time, the legal absence of recognition of cohabitation of same-sex couples does not respect the human rights obligations of the Slovak Republic.

In the legal state, for which the Slovak Republic by Art. 1 of Act no. 460/1992 Coll. The Constitution of the Slovak Republic, as amended, considers that human rights must be guaranteed, while it is necessary that the principle of equality of citizens of the state before the law applies, while this cannot be interpreted only concerning possible violations of the law, but also within the framework of equal protection within the meaning of the law and at the same time in the same acknowledgment and respect of rights for all. In the rule of law, protection should not be provided only to the majority, but the interests of all citizens must be protected if this protection does not harm others. If a particular right is granted to the majority, it should be a certainty for all. Otherwise, there is discrimination and, at the same time, disrespect for the codes that guarantee this. At the same time, discrimination against same-sex couples contradicts the declared model of a free and democratic society.

However, the paper aimed not to answer current problems but to summarize the solved issues and simultaneously stimulate a more comprehensive discussion about ongoing attempts at change. How the view of the issue will develop further is a question of the future.

References

1. Sobotková, I. (2012) *Psychology of family*. 2nd ed. Prague: Portal, 2012.
2. Pavelková, B., Kubičková, G., Čechotová, V.: *Family Law. Commentary with jurisprudence*. Hureka, 2005, 13 p.

3. Sekerák, M., & Novotný, L. (2021). Legislation on Same-Sex Partnerships in the Post-Communist Area: Case Study of the Czech Republic. In *Review of Central and East European Law* (Vol. 46, Issues 3–4, pp. 374–399). Brill. <https://doi.org/10.1163/15730352-bja10054>
4. Gherghina, S., & Silagadze, N. (2021). Selective Equality: Social Democratic Parties and the Referendums on Same-Sex Marriage in Eastern Europe. In *Europe-Asia Studies* (Vol. 74, Issue 1, pp. 140–158). Informa UK Limited. <https://doi.org/10.1080/09668136.2021.1902481>
5. Sekerák, M. (2017). Same-Sex Marriages (or Civil Unions/Registered Partnerships) in Slovak Constitutional Law: Challenges and possibilities. In *Utrecht Law Review* (Vol. 13, Issue 1, p. 34). Utrecht University School of Law. <https://doi.org/10.18352/ulr.340>
6. Tománek, P.: Heteronormality in relation to socialization and adoption of children by homosexual parents. In: *Lifelong Learning – celoživotní vzdělávání* (vol. 6, no. 1, pp. 215).
7. *Decision of the European Court of Human Rights in the case of Fedotová and others against Russia of July 13, 2021, complaint no. 40792/10*
8. *The decision of the European Court of Human Rights in the case of Schalk and Kopf v. Austria of 24 June 2010, complaint no. 30141/04, decision of the European Court of Human Rights in the case of Vallianatos and others v. Greece dated November 13, 2013, complaint no. 29381/09 and complaint no. 32684/09*
9. *European Parliament: European Union an ‘LGBTIQ Freedom Zone’, [online]. [quoted. 2022.10.09.], available on the Internet: <https://www.europarl.europa.eu/news/en/press-room/20210304IPR99219/parliament-declares-the-european-union-an-lgbtiq-freedom-zone>*
10. *European Parliament: Same-sex marriages and partnerships should be recognized, , [online]. [quoted. 2022.10.09.], available on the Internet: <https://www.europarl.europa.eu/news/en/press-room/20210910IPR11913/same-sex-marriages-and-partnerships-should-be-recognised-across-the-eu>*
11. *Decision of the Court of Justice of the European Union in the case of Coman and Hamilton v. Romania dated June 5, 2018, no. complaint C-673/16.*
12. *Decision of the Court of Justice of the European Union in the Lounes case, dated November 14, 2017, no. complaints C-165/16.*
13. Král, R. (2019). What does the controversial judgment of the ECJ in the Coman case actually bring? In: *Jurisprudence*, (Vol. 2019, no. 1, pp. 41-42).
14. Patakyová, M. (2023). Activity of the Public Defender of Rights during the term of office 2017-2022, p. 18
15. Onáčilla, J. (2023). Permanent residence for same-sex couples, [online]. [quoted: 2023.12.06.], available on the Internet: <https://www.pravnenoviny.sk/trvaly-pobyt-pre-pary-rovnakeho-pohlavia>

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