

LEGAL CONSEQUENCES OF MARRIAGE AND  
COHABITATION UNDER THE SLOVAK LAW

*CONSECUENCIAS LEGALES DEL MATRIMONIO Y DE LA  
COHABITACIÓN EN DERECHO ESLOVACO*

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Lenka DUFALOVÁ,  
Tamara ČIPKOVÁ y  
Katarína BURDOVÁ

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**RESUMEN:** The paper analyses legal consequences of marriage and cohabitation under the Slovak law. It focuses on the constitutional definition on marriage, possibility of same-sex couples to enter into marriage and on different status of married and unmarried couples in the field of private law (civil law, family law, succession law), as well as in public law. Second part of the paper analyses same-sex marriage, registered partnership and cohabitation from the perspective of the Slovak private international law. Paper gives answers to the questions whether a same-sex couple of foreigners would be allowed to get married before the Slovak authorities, whether the Slovak authorities would recognise same-sex marriage formed abroad and how Slovak private international law would deal with registered partnership and cohabitation.

**PALABRAS CLAVE:** Marriage; cohabitation; rights and obligations; private international law; Slovak law.

**ABSTRACT:** *El trabajo analiza las consecuencias legales del matrimonio y de la convivencia en el Derecho eslovaco. Se centra en la definición constitucional sobre el matrimonio, la posibilidad de que las parejas del mismo sexo contraigan matrimonio y sobre el diferente estado de las parejas casadas y solteras en el campo del Derecho privado (Derecho civil, Derecho de familia, Derecho de sucesiones), así como en el del Derecho público. La segunda parte del artículo analiza el matrimonio entre personas del mismo sexo, la unión de hecho registrada y la cohabitación desde la perspectiva del Derecho internacional privado eslovaco. El trabajo da respuestas a las preguntas sobre si una pareja de extranjeros del mismo sexo podría casarse ante las autoridades eslovacas, sobre si las autoridades eslovacas reconocerían el matrimonio entre personas del mismo sexo celebrado en el extranjero y de cómo el Derecho internacional privado eslovaco trataría a la unión de hecho registrada y a la convivencia.*

**KEY WORDS:** *Matrimonio; cohabitación; derechos y obligaciones; Derecho Internacional Privado, Derecho eslovaco.*

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## I. INTRODUCTION.

The Act No. 36/2005 Coll. on Family, as amended (hereinafter referred to as the Family Act), is the basic legal regulation governing the personal status of natural persons in the Slovak Republic. The Family Act governs marriage, relationships between parents and their children and other relatives, alimony, adoption and contains legal rules for determining paternity. The property relations between the spouses are governed by a different legal regulation - Act No. 40/1964 Coll. the Civil Code, as amended (hereinafter referred to as the Civil Code). Neither the Family Act nor any other Slovak legal regulation governs the relationships between persons living in a voluntary cohabitation, which is not a marriage. These informal relationships of same sex or opposite sex couples do not have a comprehensive legal regulation in Slovakia; they are not recognized by the state and are not subject to registration.

Article 2 of the Family Act introduces one of the basic principles of Slovak family law and an important rule of interpretation<sup>1</sup>: “a family established through the marriage is the fundamental unit of the society. The society shall protect all forms of families”. This provision follows Article 41 para. 1 of the Constitution of the Slovak Republic, under which “marriage is a unique union between a man and

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1 PAVELKOVÁ, B.: *Zákon o rodine*, Commentary, 2nd Edition, C.H.BECK, Bratislava, 2013, p. 3.

• **Lenka Dufalová**

Mgr., PhD. Assistant professor at the Faculty of Law, Comenius University Bratislava, The Slovak Republic.  
Correo electrónico: Lenka.dufalova@flaw.uniba.sk

• **Tamara Čipková**

Mgr: PhD. Assistant professor at the Faculty of Law, Comenius University Bratislava, The Slovak Republic.  
Correo electrónico: Tamara.cipkova@flaw.uniba.sk

• **Katarína Burdová**

JUDr., PhD. Assistant professor at the Faculty of Law, Comenius University Bratislava, The Slovak Republic.  
Correo electrónico: Katarina.burdova@flaw.uniba.sk

a woman. The Slovak Republic comprehensively protects and cherishes marriage for its own good. Matrimony, parenthood, and family shall be protected by the law. Special protection of children and minors shall be guaranteed.” These provisions indicate that the institution of a traditional heterosexual marriage has a privileged position in the Slovak law, but also that the Slovak law guarantees the protection of “all” forms of family, “irrespective of their basis if they provide a sense of safety and solidarity to their members”<sup>2</sup> including stable cohabitation<sup>3</sup>.

In recent years, we have been witnessing a crisis of the traditional family based on heterosexual marriage in Slovakia, which is reflected in the growing trend of cohabitations<sup>4</sup> and a relatively high divorce rate<sup>5</sup>. At the same time, we are witnessing repeated and unsuccessful legislative attempts to grant same-sex couples access to marriage or at least to a specific form of legal recognition of their relationship.

Nevertheless, the Slovak legal order doesn't contain a special legal institute which would be an alternative to the marriage for same sex couples, nor an institute which would comprehensively cover the legal status, rights and duties of cohabitants. However, it cannot be said that the Slovak legislation ignores factual cohabitation of same sex or opposite sex couples or their existence is without any legal consequences<sup>6</sup>.

This paper focuses on legal consequences of cohabitation in Slovakia in comparison to legal consequences of marriage and provides an overview of legislative attempts to establish a specific legal framework for the same-sex cohabitation. It also analyzes cohabitation from the perspective of the private international law.

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2 PAVELKOVÁ, B.: *Zákon o rodine*, cit., pp. 1-2.

3 KRÁLIČKOVÁ, Z.: *Autonomie vůle v rodinném právu v česko- italském porovnání*, Masarykova Univerzita, Brno, 2003, p. 81.

4 A 90,000 couples declared cohabitation in the last Slovak census in 2011, which was an increase by 60,000 couples when compared to 2001. This rapid increase may be affected by the fact that compared to 2001, the 2011 census also considered couples that lived together, but do not have the same permanent residence. Source: ŠPROCHA, B., VAŇO, B., BLEHA, B.: *Prognóza vývoja rodín a domácností na Slovensku do roku 2030*, INFOSTAT, Bratislava, 2014, p. 52.

5 In 2006 were divorced the most marriages the biggest number of divorces since the establishment of the independent Slovak Republic on January 1, 1993, when there were 49 divorces for every 100 marriages. The number of divorces has been slightly decreasing since 2010. In 2018 there were 30.7 divorces for every 100 marriages. Source: Statistical Office of the Slovak Republic.

6 PAVELKOVÁ, B., KUBÍČKOVÁ, G., ČEČOTOVÁ, V.: *Zákon o rodine*, Commentary, Heuréka, Šamorín, 2005, p. 13.

## II. MARRIAGE AS A UNIQUE UNION BETWEEN A MAN AND A WOMAN.

Opposite sex marriage is the only legally recognized formal union of two persons in the Slovak Republic and it enjoys specific constitutional protection<sup>7</sup> which was introduced by The Constitutional Act No. 161/2014 Coll., changing and supplementing the Constitution of the Slovak Republic No. 460/1992 Coll. as amended, effective since September 1, 2014.

Any future legislative amendment which would change the constitutional definition of marriage as a union between a man and a woman to a union between two persons regardless of their gender could be adopted with the consent of a three-fifths majority of all the Members of Parliament<sup>8</sup>. However, if the Slovak legislator decided to introduce specific legal category other than marriage with the purpose to legally recognize and protect same sex unions the consent only of more than half of the Members of Parliament would be required<sup>9</sup>.

Slovak law links some major legal consequences exclusively with the marriage. For example the establishment of a special matrimonial ownership regime, tenancy by the entirety<sup>10</sup>. Tenancy by the entirety comprises all property that may be owned and acquired by any of the spouses during the marriage<sup>11</sup>. Things in the tenancy by the entirety shall be used commonly by both spouses; they will also jointly bear the costs of the things or costs connected with their use and maintenance. The ordinary matters regarding the common property may be arranged by each of the spouses. Other matters require the consent of both spouses, otherwise the legal act is invalid. Both spouses are jointly and severally entitled and liable for legal acts relating the common property.

A mutual maintenance duty is exclusively established between the spouses. The extent of maintenance duty shall be determined so that material and cultural level of both spouses is principally the same<sup>12</sup>. In addition, in case of a divorce, the spouse who is not able to earn living on his or her own may ask the former spouse to maintain him adequately according to his or her abilities, possibilities and property condition.<sup>13</sup> In comparison, there are no such mutual maintenance

7 Article 41 para. 1 of the Constitution of the Slovak Republic: "Marriage is a unique union between a man and a woman. The Slovak Republic shall broadly protect and help its wellbeing."

8 Article 84 para. 4 of the Constitution of the Slovak Republic.

9 Article 84 para. 1 and 2 of the Constitution of the Slovak Republic.

10 § 143 and later of the Civil Code.

11 "...except for property acquired by inheritance or donation as well as things whose nature indicates that such serve the personal needs, or the exercise of a profession of only one of the spouses, and things returned within the scope of the regulations governing property restitution to the ownership of one of the spouses who had the thing in his ownership prior to entering into the marriage or to whom the thing was returned as a legal successor of the original owner."

12 § 71 of the Family Act.

13 § 72 of the Family Act.

duties between partners or former partners living only in cohabitation under the Slovak law<sup>14</sup>.

Spouses are prioritized as adoptive parents in cases of child adoption. According to the provision § 100 para. 1 of the Family Act, a child may be adopted by “spouses, by one spouse living with one of the adopted child’s parents in marriage or by a survivor of an adopted child’s parent or adoptive parent.” A single person can be an adoptive parent only exceptionally and under the condition that the adoption will be in the child’s interest. The Family Act does not define a single person for the purposes of adoption, but when we interpret provisions of the Family Act teleologically, it can be assumed that a single person is any unmarried person.<sup>15</sup> This means in practice that in case of an unmarried couple, only one of the partners can become an adoptive parent of a child registered in the birth certificate and his or her partner can participate on child’s upbringing only factually. In this way, respecting recent legal state, in a same-sex cohabitation it will also be only one of the partners officially registered as a parent of a child.

The Slovak law prefers marriage also in the issue of determination of fatherhood. According to the Family Act, “the mother’s spouse is presumed to be the father if the child was born during the period from entrance into the marriage to the lapse of the three hundredth day after the termination of the marriage or after declaration of its invalidity”<sup>16</sup>. This presumption may be rebutted only by court action. The fatherhood in case of unmarried parents may be determined by a consent declaration of parents done before the register office or before the court. If there is no consent declaration, the court may determine the fatherhood<sup>17</sup>.

A surviving spouse enjoys a priority status in case of statutory succession. He or she inherits in the first group an equal share with the children of the deceased. If the deceased did not have any children, the spouse is moved into the second group, where he or she always inherits at least half of the inheritance and the second half is divided in equal shares among the parents of the deceased and persons who lived with the deceased in a common household for at least one year prior to their death thus maintaining a common household or who were dependent on the maintenance by the deceased. Under this definition we include cohabitants which means they inherit in the second group together with the spouse and parents of the deceased. If the spouse and/or parents of the deceased do not inherit, cohabitant cannot inherit in the second group but moves into the third group

14 The contribution to maintenance and coverage of several costs of an unmarried mother in § 74 Family Act is a specific one. This type of maintenance duty can be granted only to a mother of a child, who is not married to the father of the child and only for a period no longer than two years after the child’s birth.

15 Compare PAVELKOVÁ, B.: *Zákon o rodine*, cit., p. 591.

16 § 85 Section 1 of the Family Act.

17 § 90 and later, § 94 and later of the Family Act; § 104 and later of Civil Non-Contentious Procedure Code.

and inherits together with the siblings of the deceased in equal shares<sup>18</sup>. If the siblings do not inherit, the cohabitant can inherit the entire inheritance only in the third group. The deceased may dispose with his or her property by a will but the minor descendants shall obtain at least as much as their statutory share and adult descendants shall obtain at least one half of their statutory share, unless they are disinherited or ex lege excluded from inheritance<sup>19</sup>.

After the death of the individual, the right to the protection of their personal rights may be only exercised by his or her spouse and children or by his or her parents if the person has neither a spouse, nor any children<sup>20</sup>. The surviving cohabiting partner is not entitled to assert such right after the death of his or her partner.

From the point of public law, the spouses are entitled to several rights and privileges. For example according to The Income Tax Act, the tax base calculated from the income of a person shall be reduced by tax allowance per spouse.<sup>21</sup> According to the Social Insurance Act, the spouse is entitled to care allowance on the ground of personal and all-day nursing care of the sick spouse who is in need of nursing care claimed by the medical specialist<sup>22</sup>. The spouse has also the right to access the medical file after the death of his or her spouse. The same right has an adult, who lived together with the deceased in time of his or her death, but only in case that there is no spouse, child or parent of deceased. The right to access the medical file is guaranteed also to a person authorized on the basis of a written authorization that could be a spouse, a cohabitant or any other person<sup>23</sup>.

A certain disadvantage of the marriage when compared to cohabitation may be seen upon the termination of the cohabitation. When both spouses are alive, a valid marriage ends only by the court decision<sup>24</sup>. There is no legal entitlement to divorce and it depends on a court consideration whether the legal preconditions for the divorce have been fulfilled. In this respect, it is much easier to end the cohabitation. There are no formal procedures that would need to be followed. Likewise, in relation to the regulation of the exercise of parental responsibility to the child after the divorce, the court intervenes in the event of the divorce itself. Before issuing a decision on the divorce of spouses having a minor child, the court shall regulate the parental responsibility to the child after the divorce. A

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18 PAVELKOVÁ, B.: *Manželské právo*, Právnická fakulta Univerzity Komenského v Bratislave, Bratislava, 2003, pp. 17-19.

19 § 469, § 469a, § 479 of the Civil Code.

20 § 15 of the Civil Code.

21 § 11 Section 3, 4, 5 of the Income Tax Act.

22 § 39 Section I letter a) of the Social Insurance Act.

23 § 25 of the Health Care Act.

24 § 22 and later of the Family Act; § 92 and later of the Civilian Out-of-Court Order.

decision regulating the exercise of parental responsibility may be replaced with an agreement of the parents. The validity of such agreement requires a consent of the court<sup>25</sup>. The unmarried parents of the child who do not live together can agree on exercise of parental rights and obligations, court approval of such agreement is not mandatory. The court decision is necessary only if unmarried parents are not able to come to an agreement<sup>26</sup>.

### III. COHABITATION.

The term cohabitation is used to describe a “informal, factual living of a man and a woman without marriage”<sup>27</sup>. There is no special legal institute (registered partnership or civil union) established in the Slovak legal order for this type of coexistence. Therefore, it is necessary to apply legal provisions referring to the “household” or a “close person” or “persons living together” to identify particular legal consequences of cohabitation according to the Slovak law. When we define rights and obligations of cohabitating couples through the above mentioned terms, it is not significant whether they are of the same or opposite sex. However, the significant difference is that opposite sex couples can freely choose between cohabitation and marriage, whereby Slovak law does not provide access to any form of legal recognition for same sex couples.

The undeniable fact is that same sex couples have been trying to get access to marriage, or at least to alternative form of legal recognition of their union. The long-term nature of these efforts can be observed through legislative attempts to formally recognize same sex unions. Several proposals dealing with the issue of same sex registered partnerships have been submitted to the National Council of the Slovak Republic, but without any success. The first draft of the act was submitted to the legislative body in 1997 as a Draft of Registered Same Sex Partnerships Act. This draft, as well as the Draft of Life Partnership Act from 2001, included only the legal regulation of same sex registered partnership; it did not include the possibility for same sex couples to get married. Nevertheless, the process of formation of a registered partnership, as well as its legal consequence were largely inspired by the legal regulation of marriage. The Draft of Registered Partnership Act essentially equated same sex life partnership to marriage when proposed specific tenancy by the entirety regime between partners, specific regime for common flat renting or mutual maintenance duty between partner<sup>28</sup>. However, these proposals excluded registered partners from the possibility to adopt a child (with the exception of

25 § 24 Section I, 3 of the Family Act.

26 § 36 Section I Family Act.

27 GREGOROVÁ, Z., KRÁLIČKOVÁ, Z.: “Nesezdané soužití v právním řádu České republiky”, *Právní rozhledy*, 1998, vol. 6, num. 5, p. 211.

28 Mentioned only demonstratively.

the second-parent adoption, i.e. adoption of a partner's biological child without terminating the first parent's legal status as a parent).

The Draft of Registered Partnership Act submitted in 2012 proposed only a few modifications, especially in the regulation of ownership, but it was discussed in the National Council of the Slovak Republic only in the 1<sup>st</sup> of the three readings. All the legislative initiatives have one thing in common, namely that the registered partnership was limited only to same sex couples. It can be only assumed that it is a reaction to the case law of the ECHR, which held that allowing access to registered partnership only to opposite sex couples and not to same sex couples is a violation of Article 14 of the Convention together with Article 8 of the Convention<sup>29</sup>.

In 2018 a draft of Act, which amends the Civil Code, was submitted to the National Council of the Slovak Republic. This draft proposed the introduction of a partnership cohabitation and its regulation by the Civil Code and not by the Family Act, which governs marriage. Partnership cohabitation was defined as a union of two natural persons regardless of their sex which compared to marriage would be formed on the basis of consenting declaration of the partners in the form of a notarial record. It was proposed to limit the rights and duties of the partners to the area of inheritance, the care allowance and the right to access the partner medical file after the death of the partner. This legislative effort was still as unsuccessful as the previous one.

Nowadays there is an undergoing recodification of civil law in Slovakia, which includes the recodification of family law. Within the recodification process there are proposals to introduce the institution of registered partnership for same sex couples, but there is no national consensus. Therefore, the Recodification Committee is focusing more on the definition of the term of a close person, which would help solving some of the practical issues of cohabitation of same sex or opposite sex partners<sup>30</sup>.

As mentioned above, especially terms like "household", "close persons" or "persons living together", to which the Slovak law links certain legal consequences, are important for cohabitants.

The legal definition of the term "household" is provided in § 115 of the Civil Code, under which "A household consists of natural persons who live together on a permanent basis and jointly share the cost of their needs." It is obvious from the

29 Applications Nos. 29381/09 and 32684/09, *Vallianatos and others v. Greece*, judgment of 2013, para. 92.

30 Minutes of the Presidium of the Commission for Recodification of private law with the participation of the Deputy Prime Minister and Minister of Justice Lucia Žitňanská and coalition partners from April 20, 2017. Available at: <https://www.justice.gov.sk/Stranky/Nase-sluzby/Nase-projekty/Obciansky-zakonnik/Obciansky-zakonnik.aspx>

definition that the legal term is quite broad and includes not only stable opposite sex or same sex couples, but also friends and relatives. Essential is the economic nature of their coexistence. Household members share their income and all the possessions<sup>31</sup> in comparison with the common living of different subtenants who indeed share the rent and housing costs but otherwise do not share their income. The case law of the Slovak courts regulates that this term covers also situations, where household members are not living together, e.g. due to health or housing reasons, even though they are in stable relationship and take care of the common household<sup>32</sup>. Although the stability of the relationship is determined primarily by the person's intent to coexist in a household for unlimited time, the particular duration of common household is required under some provisions of the Civil Code to grant specific rights, e.g. a cohabitant inherits in the second group under § 474 Section I of the Civil Code only if he or she had lived with the deceased person at least one year before his or her death in a common household<sup>33</sup>.

A lot of other provisions of the Civil Code refer to the household e.g. § 706 of the Civil Code which states, that if the lessee dies and the flat is not in the joint lease of spouses, then the persons who maintained the common household of the deceased lessee or who were dependent on maintenance by the deceased lessee shall become the lessees (joint lessees) if they lived with him in a common household for at least three years prior to his or her death and do not have their own flat.

The term close person is defined in § 116 of the Civil Code as "a relative in a direct line of descent, sibling and spouse. Other persons in a family or similar relation shall be deemed to be close to each other if an injury suffered by one is reasonably felt by the other as his own". Under the Slovak legal theory the term close person includes stable cohabitation of partners despite of their sexual orientation. It is essential to examine whether the cohabitants are interested in one another, whether they help each other, if they live in a common household, the conditions in which they live together, etc."<sup>34</sup>

In general, the status of a close person, without differentiating if it is a spouse or other person, is significant in several legal institutions, e.g. under the § 140 of the Civil Code, if a co-ownership share is to be transferred, the co-owners shall have the right of pre-emption except where a transfer to a close person is concerned<sup>35</sup>.

31 FEKETE, I.: *Občiansky zákonník, I. Zväzok*, Commentary, 3rd Edition, Eurokódex, Bratislava, 2017, p. 945.

32 R 12/1968.

33 ŠTEVČEK, M., DULÁK, A., BAJÁNKOVÁ, J., FEČÍK, M., SEDLAČKO, F., TOMAŠOVIČ, M. ET AL: *Občiansky zákonník II, § 451 – 880*, Commentary, C.H.Beck, Prague, 2015, p. 726.

34 ŠTEVČEK, M., DULÁK, A., BAJÁNKOVÁ, J., FEČÍK, M., SEDLAČKO, F., TOMAŠOVIČ, M. ET AL: *Občiansky zákonník*, cit., p. 721.

35 § 140 of the Civil Code.

Under the Civil Procedural Code the witness is entitled to refuse to testify if their testimony would thereby cause the possibility of criminal prosecution of persons close to him<sup>36</sup>, etc.

However, neither the status of a close person, member of the household, or persons living together in general, will provide the cohabitant with several significant benefits in the property and non-property areas that the legal order grants only to the spouses and which were mentioned above<sup>37</sup>.

The question is whether it is possible and if so in which areas to achieve the legal consequences similar to the legal consequences of marriage through an agreement concluded between cohabitants.

The Slovak legal theory came to the conclusion that if the cohabitants live in a household and satisfy their needs together or the voluntarily provide maintenance for one another, such situation does not give rise to liability for unjust enrichment under § 451 of the Civil Code, because there is an implicitly concluded agreement between partners which provide the legal basis for such performance<sup>38</sup>.

Cohabitants can conclude also formal pension agreement according to the § 842 of the Civil Code that shall establish the right of a person to be paid a certain pension for life or for an indefinite period of time stipulated in another manner. The reason for providing a pension does not have to be explicitly stated in the pension agreement and the contractual obligation to provide pension can exist without any reciprocal obligation. Unlike spousal maintenance obligation, the disadvantage of this contractual pension is that this income is taxable and must be declared<sup>39</sup>.

According to the Slovak case law, it is not possible to establish tenancy by the entirety between cohabitants by contract because it is reserved only to married couples. Therefore, under the Slovak law, cohabitants acquire property to sole ownership or to common ownership<sup>40</sup>.

Furthermore, it is possible to contractually achieve mutual representation of cohabitants based on power of representation<sup>41</sup>. In comparison, spouse may represent the other spouse in usual affairs and receive usual performances without

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36 § 201 of the Civil Dispute Order.

37 See chapter I.

38 GREGOROVÁ, Z., KRÁLIČKOVÁ, Z.: "Nesezdané soužití", cit., p. 211.

39 ŠTEVČEK, M., DULÁK, A., BAJÁNKOVÁ, J., FEČÍK, M., SEDLAČKO, F., TOMAŠOVIČ, M. ET AL: *Občiansky zákonník*, cit., pp. 3039- 3040.

40 KRÁLIČKOVÁ, Z.: *Autonomie vôle*, cit., p. 206.

41 § 31 of the Civil Code.

power of representation or special agreement. Conduct of one spouse in arranging for usual affairs of the family binds both spouses jointly and severally.<sup>42</sup> In other than usual affairs, the spouses like the cohabitants, can be represented by power of representation.

#### **IV. MARRIAGE, REGISTERED PARTNERSHIP AND SLOVAK PRIVATE INTERNATIONAL LAW.**

The Slovak Private International Law is codified in the Act on Private International Law and Rules of International Procedure (PILA)<sup>43</sup>, and reflects the Slovak substantive regulation analysed above since it contains conflict-of-law rules only regarding the institution of marriage. There is no conflict of law regulation regarding registered partnerships, civil unions or cohabitation, and no legislative proposal exists for changing the current autonomous Slovak conflict-of-law rules.

The Slovak Republic is a contracting party to the Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations; however, is not a contracting party to the Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes, nor to the European Convention on the Recognition of Registered Partnerships. Slovakia does not participate in enhanced cooperation in the area of the law applicable to divorce and legal separation<sup>44</sup>, nor that of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes<sup>45</sup>, nor that of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships<sup>46</sup>.

The conflict-of-law rules on marriage are also contained in bilateral agreements on mutual legal assistance that are binding on the Slovak Republic and Ukraine, Russia, Hungary, etc. However, there is no conflict-of-law rule concerning same-sex marriage, registered partnerships or cohabitation in any of these bilateral agreements, which is most likely a consequence of the fact that they were concluded before 1990.

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42 § 20 of the Family Act.

43 Act No. 97/1963 Coll. on Private International Law and Rules of International Procedure as amended.

44 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.

45 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.

46 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.

Given the above, this section will focus on determining the basic theoretical backgrounds for clarifying possible Slovak approaches to three questions, namely:

1. Whether a same-sex couple consisting of two foreigners would be allowed to get married before the Slovak authorities;

2. Whether same-sex marriage valid under foreign law would be recognised under the Slovak law and/or same-sex spouses would be granted particular rights based on such marriages; and

3. How can a registered partnership and cohabitation be qualified under the Slovak Private International Law?

### **I. Access of same-sex Couples to marriage under the Slovak Private International Law.**

To consider the question of whether a same-sex couple of foreigners would be allowed to get married before the Slovak authorities, it is necessary to refer to provisions § 19 and 20 of PILA<sup>47</sup>.

PILA stipulates that the form of celebration of a marriage shall be governed by the law of the place where the marriage is celebrated (*lex loci celebrationis*), but the legal capacity of a person to marry and the conditions of validity of such a marriage shall be governed by the law of the state of nationality of the parties to be married (*lex patriae*). The question of whether a same-sex marriage may be validly concluded shall be assessed under the conflict-of-law rule relating to the conditions of validity of the marriage and, if the spouses are foreign nationals, the law of their nationalities will govern this decision. If the foreign applicable law allows same-sex couples access to marriage, the question becomes whether the effects of the application of such foreign provisions would be incompatible with the fundamental principles of the Slovak political, social and legal systems.

To answer this question it is necessary to start with the constitutional definition of marriage as a unique union of a man and a woman, and to consider the opinion of the Constitutional Court of the Slovak Republic that marriage is a matter of public interest<sup>48</sup>. It is also important to bear in mind that the principle that marriage is a union between one man and one woman is a fundamental principle of Slovak family law. Therefore, we consider that the Slovak authorities would reject the application of foreign law that would allow a same-sex marriage, because this violates Slovak *ordre public*. The implications of the application of

<sup>47</sup> There are only some bilateral treaties e.g. concluded with Bulgaria, Poland, Hungary or Romania that take precedence over § 19 and 20 of PILA in particular case.

<sup>48</sup> Constitutional Court of the Slovak Republic, decision PL. of the CC 24/2014 from October 28, 2014.

foreign law would create a situation in Slovakia that is not compatible with one of the fundamental principles of the Slovak law.

This conclusion is also supported by the wording of provision § 22a of the Act on Registries as amended<sup>49</sup>, which explicitly excludes the formal registration of marriages that are contrary to the Slovak law.

## 2. Recognition of same-sex marriage celebrated abroad and the Slovak Private International Law.

First, it is necessary to emphasise that the Slovak Private International Law shall have the widest possible respect for the legal traditions and legal orders of other States. This should ensure legal certainty for the parties of cross-border legal relationships that have been created abroad in a bona fide manner<sup>50</sup>.

However, the concept of public policy (*ordre public*) implies that subjective rights acquired abroad, as well as legal relationships established abroad, which are unacceptable for the domestic law cannot be legalised in the area of domestic law<sup>51</sup>.

These theoretical assumptions are reflected in § 20a of the PILA, which states that: "Marriage concluded abroad by a Slovak national before an authority other than an authority of the Slovak Republic duly authorized is valid in the Slovak Republic provided it is valid in the State before whose authority it was concluded and none of the circumstances excluding the conclusion of marriage under the Slovak substantive law existed".

The circumstances excluding the conclusion of the marriage are defined in provisions § 9 to 17 of the Family Act and include marriage impediments sanctioned by the nullity of marriage<sup>52</sup> as well as marriage impediments sanctioned by the non-existence of marriage<sup>53</sup>. Spouses being of the same sex is not explicitly mentioned as a marriage impediment, but current Slovak legal theory supports the view that circumstances excluding the conclusion of marriage result also from § 1<sup>54</sup> of the Family Act, which expresses the essence of marriage under the Slovak law. Hence, marriage may not be concluded between two people of the same sex according

49 Act No. 154/1994 on Registries as amended.

50 VARŠO, J.: *Ordre public v medzinárodnom súkromnom práve*, Candidate dissertation thesis, Univerzita Jána Ámosa Komenského v Bratislave, Košice, 1985, p.195.

51 VARŠO, J.: *Ordre public*, cit., p. 188.

52 E.g. violation of the monogamy principle, consanguinity, incapacity.

53 E.g. *vis absoluta*, concluding a marriage with a person younger than 16 years.

54 § 1 of the Family Act stipulates: "1. Marriage is a union of a man and of a woman entered into based on a free and complete consenting declaration of the man and woman that they jointly enter into a marriage".

to Slovak substantive law<sup>55</sup>. From § 20a of the PILA, this means that marriage of a Slovak national to another person of the same sex, even if concluded legitimately abroad, will not be valid in Slovakia. We suppose that this provision is applicable also in cases where the validity of a marriage arises as a preliminary question in the context of private law disputes on matters such as maintenance or succession.

The validity of same-sex marriages concluded by foreign nationals abroad shall be considered under § 19 and § 20 of PILA, as mentioned above. We suppose that Article 41, Section I of the Constitution of the Slovak Republic, which allows only a union between a man and a woman to be legally labelled as marriage<sup>56</sup>, prevents same-sex marriage concluded by foreign nationals abroad from being considered valid in Slovakia. Nevertheless, this conclusion applies only to full recognition of same-sex marriage; i.e., a full equalisation of a foreign same-sex marriage with an opposite-sex marriage concluded before Slovak authorities.

However, there is another situation to consider – that where a proceeding is brought by the foreign spouse in domestic court to obtain spousal maintenance or to claim a right to inheritance based on a same-sex marriage concluded abroad<sup>57</sup>. In such cases, the validity of marriage arises as a preliminary question.

Current Slovak legal theory does not offer any comprehensive theoretical approach to such a situation. However, we assume that an analogy can be drawn with polygamous marriage cases, which have been considered in the (Czech)Slovak legal theory by Varšo<sup>58</sup>, Valentovič and Tomko<sup>59</sup>, Ďuriš<sup>60</sup>, Kučera<sup>61</sup>, and Rohlík<sup>62</sup>, especially in the context of public policy exceptions and preliminary questions.

Tomko and Valentovič state that: ... in case that several wives of a deceased who was foreign national or children from a polygamous marriage claim an inheritance before the Slovak court, it should recognize the effects of the foreign polygamous marriage and acknowledge the right to them. In this case, the provisions of Slovak law on monogamy will not have a character, which would exclude the possibility

55 CÍRÁK, J., PAVELKOVÁ, B., ŠTEVČEK, M.: *Rodinné právo*, Heuréka, Šamorín, 2010, p. 53.

56 Constitutional Court of the Slovak Republic, decision PL. of the CC 24/2014 from October 28, 2014.

57 VARŠO, J.: *Ordre public*, cit., p. 192.

58 VARŠO, J.: *Ordre public*, cit., p. 195.

59 TOMKO, J., VALENTOVIČ, Z.: *Medzinárodné právo súkromné: všeobecná časť*, 3rd Edition, Právnická fakulta Univerzity Komenského v Bratislave, 1989, p. 251.

60 ĎURIŠ, M.: "Výhrada verejného poriadku v slovenskom medzinárodnom práve súkromnom" in LYSINA, P., ĎURIŠ, M., HAŤAPKA, M. et al: *Medzinárodné právo súkromné*, C.H.BECK, Bratislava, 2016, pp. 548-576.

61 KUČERA, Z.: *Medzinárodní právo soukromé*, 7th Edition, Doplněk Publishing, Brno, 2009, p. 196.

62 ROHLÍK, J.: "Preliminární a incidenční otázky v československém mezinárodním právu soukromém", *Časopis pro mezinárodní právo*, 1968, vol. 12, pp. 80-90.

of granting legal effects to foreign acts based on otherwise non-applicable foreign law<sup>63</sup>.

Kučera suggests the same approach, further adding: It would not be correct to impose our ideas about what is a proper family constellation on the foreign social environment. In such cases, a refusal of the effect of a polygamous marriage concluded abroad would lead to harsh and unfair treatment for a woman from such marriage. The relation of this case to the forum state is not as intensive as the application of a foreign law deemed to be unacceptable<sup>64</sup>.

Ďuriš expands these conclusions even to cases of polygamous marriage concluded by a Slovak national abroad<sup>65</sup>. Varšo<sup>66</sup> comes to the same conclusion, albeit following a different line of legal reasoning. He states that, in cases of preliminary questions, the impact of domestic *ordre public* on legal relationships created abroad is minimal and domestic courts shall recognise legal relationships created abroad and valid under the applicable law, determined by either the conflict-of-law rules *legis causae* or *legis fori*<sup>67</sup>.

Given the above, we suppose that, in cases where the question of the validity of a foreign same-sex marriage is considered by the Slovak courts as a preliminary question, the intensity of relation of the case is not sufficient, in many cases, to activate the public policy reservation. However, we suppose that this conclusion cannot be expanded to cases of same-sex marriages concluded by a Slovak national abroad. In such cases, it would be necessary to apply § 20a of the PILA, as discussed above.

We can assume that a marriage of foreign same-sex nationals concluded abroad cannot be fully recognised in Slovakia. However, it is likely that if the question of the validity of the marriage is raised in other proceedings, the same-sex couple can be granted particular rights applicable to a valid marriage, where these are not in breach of Slovak public policy (e.g., inheritance rights, maintenance obligations, etc.).

63 TOMKO, J., VALENTOVIČ, Z.: *Medzinárodné právo súkromné*, cit., p. 102.

64 KUČERA, Z.: *Mezinárodní právo soukromé*, cit., p. 196.

65 ĎURIŠ, M.: "Výhrada verejného poriadku", cit., p. 132.

66 VARŠO, J.: *Ordre public*, cit., p. 188.

67 Current Slovak legal doctrine on preliminary questions is unsettled. Under the prevailing opinion, conflict of law rules of *lex fori* should be preferred. However, conflict of law rules of *legis causae* could be admitted but exceptionally. Compare CSACH, K., GREGOVÁ ŠIRICOVÁ, L., JÚDOVÁ, E.: *Úvod do medzinárodného práva súkromného a procesného*, 2nd Edition, Wolters Kluwer, Bratislava, 2018, p. 102.

### **3 Registered partnership and cohabitation under the Slovak Private International Law.**

The registered partnership is an unknown legal category in Slovak substantive and private international law; therefore, a problem arises in terms of applying the existing Slovak conflict-of-law rules when, for example, a claim is based on a registered partnership concluded abroad.

Two possible solutions to this characterisation problem should be taken into consideration. The first is to apply the autonomous conflict-of-law rules concerning contractual relationships, and the second is to invoke conflict-of-law rules governing the personal and property relations of spouses.

We propose that the preferable solution is to extend the scope of the conflict-of-law rule concerning personal and property effects of marriages to also cover personal and property effects of registered partnerships, because such classification better corresponds to the function of this legal institution in foreign law than a mere contract.

However, it is possible that the provision of Article 41 of the Slovak Constitution may prohibit such a solution. We assume that this provision is relevant in the context of public policy reservations, but not before the determination of an applicable conflict-of-law rule. Therefore, the term 'spouse' as used in the scope of § 21 of PILA should be interpreted extensively to cover legal concepts unknown to Slovak law, such as registered partnerships and civil unions.<sup>68</sup> At the same time, we believe that referring to the law of the state of the common nationality of the parties in a registered partnership corresponds more appropriately with the reasonable and just regulation of such relationships than the applicable law governing contractual obligations.

The same qualification problem arises concerning cohabitation because there is no special conflict-of-law rule on cohabitation in PILA. In this case, the intentionally informal nature of the relationship could be used as an argument for the application of autonomous conflict-of-law rules regarding contractual obligations.<sup>69</sup>

## **V. CONCLUSION.**

In May 2019, the governing political party SMER-SD announced the preparation of a constitutional amendment on the ban of child adoption by same-sex couples,

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<sup>68</sup> Current Slovak legal doctrine is unsettled concerning the qualification of registered partnership.

<sup>69</sup> Cohabitation is excluded from the scope of Rome I Regulation.

which could have a particular impact on the Slovak Private International Law in terms of recognition of foreign adoption judgments.

The legal recognition of same-sex couples in the Slovak Republic is a current and polarising issue of debate. Academic discussions on this topic are also ongoing within the framework of the recodification of Slovak civil law, which should include family law.<sup>70</sup> However, some voices in academic circles are claiming that it is only a matter of time until the legal institute of registered partnership is introduced into Slovak law.

The improvement of legal regulation of cohabitation is also under discussion within the recodification process but only in terms of its consequences for property.

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<sup>70</sup> Members of the Recodification Committee consider the sensitivity of family law topic including same-sex relationships to be the main reason why the process of recodification is so time-consuming.

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