

soukromého by se dle mého názoru i přesto mělo vrátit do občanského zákoníku jako jednoho soukromoprávního kodexu.

V problematice výživného existuje několik problémů, které ovšem řeší všechny právní řády s větším či menším úspěchem. První z nich je zjišťování majetkové situace povinného. V tomto smyslu se domnívám, že stanovení nevyvratitelné právní domněnky příjmu v českém právním řádu je určitě namístě. Dalším problémem je určování výše výživného, což do jisté míry řeší v některých právních systémech více či méně závazné tabulky. Tendence v českém právním řádu se začínají ubírat směrem podobným, dle mého názoru správným, když ministerstvo spravedlnosti vytvořilo určité nezávazné tabulky pro soudy. Konečně problémem pro oprávněné osoby nejvážnějším je otázkou vymáhání výživného. Výkon rozhodnutí, exekuce či postižení za trestný čin velmi často nejsou efektivní. Otázkou je tedy, zda by bylo vhodné, za podmínek v předchozí kapitole naznačených, zavést možnost, aby poskytoval pro nezletilé děti výživné ve stanovených případech stát a dlužné výživné pak na povinném vymáhal sám. Mám za to, že by tím byla lépe ochráněna práva dětí a výživné pro ně by bylo lépe zajištěno.

I přes shora uvedené se domnívám, že vyživovací povinnost, a to zejména vyživovací povinnost k dětem, je v českém právním řádu upravena správně a v souladu s uzavřenými mezinárodními smlouvami, týkajícími se výživného a práv dětí. Pokud jde o úpravu výživného na jednom místě zákona, nedělá toto současné právní praxi problémy, nicméně by možná do budoucna bylo lepší přiřadit jednotlivé druhy vyživovacích povinností k právním institutům, kterých se přímo týkají.

The maintenance obligation is currently regulated by the Family Code No. 94/1963 Coll. in contrast with the period of its origin when the social relations were entirely different from today and the Family Law was governed by a separate code following the Soviet model. However, the Czech law foundations lie in Austrian model with regulation of relations in the entire private law included in one single code, as after establishment of independent Czechoslovakia in 1918, ABGB (Civil Code of Austria) from 1811 was adopted among others. For these reasons, a number of amendments were made to the Family Law after 1989. Therefore, it is more than reasonable to establish a new Civil Code, as a uniform code of Private Law, which could govern the Family Law as well. Regarding the maintenance obligation, the new Civil Code has re-established more logic division. The maintenance obligation is regulated in respect to the institution involved and the maintenance obligation of parents and children is included in the maintenance obligation among relatives.

Existing legislation recognises five kinds of maintenance obligation: i.e. the maintenance obligation between parents and children at the first place, the maintenance obligation among other relatives, the maintenance obligation between spouses, and the maintenance from divorced husband including the maintenance contribution and covering of some expenses for an unmarried mother. The maintenance obligation is determined as a whole in one place with references to each involved institutes. Another kind of maintenance obligation is the maintenance obligation between registered partners which is governed by Registered Partnership Act. This regulation is analogical to the maintenance obligation between spouses and divorced spouses.

The maintenance obligation is an institute of the Family Law and it is understood as an obligation to provide material and psychological needs between family-legal relationship entities. Such relation can be based first on affinity and next on marriage. In several legal systems, the providing of the maintenance is also defined on the basis on the affinity and marriage related relationships (e.g. relatives by marriage or son-in-law/daughter-in-law to parents-in-law relation).

The maintenance obligation can be fulfilled by providing a personal care, taking care of common household, payment in kind, or in financial form. In the case that the maintenance obligation is decided on by court, it is always settled financially. Each payment shall be made in regularly repeating amounts payable one month in advance. In specific cases requiring particular attention, it is also possible to pay a sum of money for the maintenance payable in future so as to ensure regular maintenance obligation monthly installments.

The rate of the maintenance obligation is not determined to any specific amount, percentage or fraction or clearly determinable in any other way. It is only stated that the court shall account the criteria defined by the Family Law. For all kinds of maintenance obligation applies that legitimate needs of the obligee and capabilities, potential and financial circumstances of the obligor shall be accounted. Legitimate needs depend on marital status, age, potential, circumstances and environment in which the obligee lives with regard to their possible development. The potential of the obligor is considered as an objective measure, such as real opportunities to find work, average earnings in the field, etc. Capabilities are, on the other hand, considered as subjective measures, such as age, health condition, experience, etc. Aspects of financial circumstances, to a certain degree, overlaps criterion of capabilities and possibilities of the obligor. The main focus is on determining the assets of the obligor, whether he/she owns any movable or immovable assets and of what kind. Also, whether he/she has any revenue from his/her assets and to what extent. In practice, the main relevant criterion is an evident income, such as wages or salary.

Any efforts towards decreasing the maintenance obligation shall be prevented by the court, as it is obliged to control, while evaluating the capabilities, the potential and financial circumstances of the obligor, whether he/she did not leave a convenient job, a gainful employment or property benefits, or alternatively whether he/she is undergoing any financial risks. At the same time, the maintenance obligation will not be granted if that is in conflict with good manners.

The amount in each kind of maintenance obligation is defined differently by the law also taking into account other circumstances. The children have right of contributing to their parents' standard of living, the parents have right for a decent maintenance, the spouses have right for an equal standard of living fundamentally, the relatives are obliged by a necessary maintenance, an unmarried mother has right for an adequate contribution and divorced spouses has right for equal standard of living or an appropriate maintenance.

Another condition for determining the maintenance obligation among other relatives is the aspect of an absolute necessity of the maintenance. In case of the maintenance obligation between spouses, the common household care is considered. Between divorced spouses, the maintenance obligation is determined in the case that one of the divorced spouses is not capable to subsist him/herself. Its amount is determined in case that one of the spouses caused the divorce, in consequence of which serious damage was caused to the other spouse. The maintenance obligation can be settled as a single payment. The children are obliged to provide a decent maintenance for their parents in case they need it and on condition that the children are capable to subsist themselves.

Regarding the relation of the maintenance obligation, it is expressly provided by the law that the maintenance obligation to children precedes the maintenance obligation between spouses/divorced spouses. The maintenance obligation to children, in the case of marriage of the child, has only a supportive form. The maintenance obligation between spouses also precedes the maintenance obligation between divorced spouses. Closer relatives and descendants has more preferable obligation to provide maintenance than distant relatives; after them, this obligation falls on the ancestors.

A specific case of the maintenance obligation is a contribution towards maintenance and covering of some expenses to an unmarried mother. Single mother or a mother married to different man that is the child's father is entitled to claim a contribution towards maintenance and costs related to pregnancy and confinement for a two year period. The limitation of the claim is expressly defined for three years after the confinement.

In the case that someone else fulfils the maintenance for the obligor, and then the obligor is liable to claim the maintenance on that person in compliance with a special provision of the Family Law. The Civil Code provision on unjust enrichment does not apply in such case.

The claims for the maintenance obligation can be counted only under contract; however this is strictly excluded in cases of the claims of maintenance obligation for under-aged children.

The court may make a decision on fulfilling the maintenance obligation on the day when proceedings were initiated. However, in the case of the maintenance obligation in respect of children, it can be granted up to three years from the initiation of the proceedings. According to the law, the right for the maintenance do not forfeit, however the rights for individual repeating fulfilments do, within the limitation period of 10 years.

In the case the circumstances change, the court may change agreements and its decision on maintenance for under-aged children for the past period even without proposal. When

deciding about maintenance for children for the past period, it is expressly stated that the used maintenance cannot be reimbursed, only in case of the under-aged children. Regarding other maintenance obligations, when circumstances changed, it is possible to change a decision only on the proposal. According to the circumstances, an increase, a decrease or even a cancellation of the maintenance may be proposed.

The maintenance obligation of parents to their children is in the first place among individual kinds of the latter. The maintenance obligation rises with the birth of the child (in some cases, with the determination of paternity) or with decision on adoption by legal force. The court, by its decision, determines only the beginning of maintenance payments in each particular case. Parents are obliged to provide maintenance to the child until he/she is capable to subside him/herself. The right for the maintenance is not limited by reaching any particular age. Savings can be also considered as reasonable needs of a child.

The main issue in the legal practice is determining the obligor's income. Regarding the maintenance for children, the parent is obliged to prove his/her income and provide appropriate documents in case his/her incomes come from other activity than employment. Failing to fulfil this obligation, his/her income will be considered as 12.7 times the subsistence minimum of an individual.

In current legal practice, the decision inconsistency in similar cases is problematic. In May 2010, non-binding general tables were sent to individual courts, distinguishing five different age categories; determine the amount in percentage deducted from the salary of the obligor which shall fall to the maintenance. At the same time, the maintenance act is in its second hearing including a proposal that the government shall define maintenance conditions and establish a minimum rate.

The maintenance obligation of parents to their children is needed to be distinguished from so called coadjutorium, which is an obligation of contribution to cover common family needs and an obligation to help the family with an under-aged child.

The proceedings in matters of the maintenance are in accordance with the Civil Procedure Code. Decision making actions on the maintenance for an under-aged child are taken in compliance with specific provisions on under-aged children care non-contradictory type of procedures. Reaching the lawful age reflects in applying of proceedings provisions defined by Civil Procedure Code. The decision on maintenance can be made only when based upon a proposal, however in case of an under-aged child, the court can make a decision even without the proposal. The agreement of parents on the maintenance for an under-aged child must be approved by the court. Usually, the court deals with an issue of a child upbringing and maintenance in the case of a divorce while an arrangement on the upbringing and maintenance shall be made or, alternatively, a decision of the court shall be made without the agreement. If one of the parents fails to fulfil his/her maintenance purposely, the decision of the court shall be also made. A possibility of a decision made by the court on the maintenance for the under-aged child without a proposal is also based upon the fact that the court is not bound by the possible proposal and may adjudge higher amount than requested. The proceeding on the maintenance for the under-aged child is obligatorily combined with the

proceeding on determination of paternity and with the proceedings on placement into institutional or protective care. The proposal in matters of determination or increase of the maintenance is exempt from the court fees similar to the proceedings on the mutual maintenance obligation of parents and children; however the proposal on decrease or cancellation of the maintenance is not.

The form of the decision on the maintenance is a judgement and the decision of the court may be concluded with a judicial settlement or agreement of both parents on the maintenance for an under-aged child. The judicial settlement cannot be concluded in case of an under-aged child.

Maintenance recovery is certainly the main issue that occurs in practice. The law determines an opportunity to file a proposal to the obligee on enforcement which is not partly or entirely fulfilled by the obligor. Judgements convicting to the fulfilment of the maintenance for the past three months prior to the judgement belong to the provisionally enforceable and can be enforced before they enter into force. Another possibility how to recover the maintenance is a proposal of the obligee on the enforcement under the execution order. The obligee does not have to state the method of enforcement and it depends on the executor what method of execution uses. The obligor may be also punished under the Criminal Law governing criminal offence of neglecting the maintenance obligation, while not fulfilling of the obligation shall last longer than four months.

In cases of the maintenance with a foreign element apply regulations of Private International Law and particularly international contracts the Czech Republic is bound by. Private and Procedural International Law governs relations with a foreign element via conflicting provisions and determines applicability of law in cases when such issue is not regulated by any international contract.

International multilateral conventions which regulate the maintenance obligation in certain way, the Czech Republic being one of the parties, are the following: Convention on the Recovery Abroad of Maintenance of 1956 which shall facilitate maintenance recovery in another contracting state; Convention on Civil Procedure of 1954 governing the procedural issues; Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations towards Children of 1958, governing the recognition and enforcement of the maintenance for a child until 21 years of age or marriage; Convention on the Recognition and Enforcement of Maintenance Obligation of 1973 which replaces the previous convention and governs the recognition and enforcement of the maintenance also in respect of adult persons. In Europe applies a European Convention on the Exercise of Children's rights of 1996 regulating procedural rights of children until 18 years of age; European Convention on the Legal Status of Children born out of Wedlock of 1975 and European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children of 1980.

European legislation is usually based on the continental legal system and the maintenance obligation regulation differs only in details. There are differences in various types of the maintenance obligation or in assigning the regulation of maintenance obligation to individual

legal institutes. To determine the maintenance, in some countries, more or less binding tables apply and the amount of maintenance is valorised annually according to various criteria. Some legal regulations also govern the maintenance of the heir in respect of the deceased or the maintenance obligation between the siblings or relatives by marriage. In the United States, only certain principles are defined on federal level and in each individual state, the method of calculating the maintenance can be determined by the court in a different way.