

# Maternal and Paternal Power in the Interwar Czechoslovak Civil Code Proposals

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## 1 Introduction

The following paper focuses on the issue of the legal relationship of parents and their children in interwar Czechoslovak proposals for a new civil code, with special attention paid to the legal position of mothers and their role within the family.

The first part of the paper provides the appropriate context for the main focus of the submission, namely, it aims to explain the need for a new civil code in interwar Czechoslovakia by describing the dualism of Czechoslovak law resulting from the reception of Austrian and Hungarian law in the Czech and Slovak parts of the republic, respectively. The drafting process of the civil code proposals is also mentioned, as are the individual proposals, their fate, and their relevance for the area of family law.

In the following portion of the paper, the applicable aspects of family law as provided for by the Austrian Civil Code of 1811 (ABGB) are described, especially the concepts of parental and paternal power, legal guardianship and the distinction between legitimate and illegitimate children. Both the version of the Civil Code as enacted and its revisions are considered. Certain relevant aspects of Hungarian family law are briefly mentioned as well.

The paper next focuses on its core topic of the new civil code proposals and their approach to the legal relationship of parents and children. Concentrating mainly on the proposals from 1924 and 1931, the suggestions and reasoning of both expert bodies involved in the drafting process – the Subcommittee for Family Law and the Superrevision Commission – are explored. The paper pinpoints the key differences between the Austrian Civil Code and the new proposals and describes the newly introduced concept of maternal power.

Overall, the goal of this paper is to compare the approach of the Austrian Civil Code and the interwar proposals to family law and by doing so, demonstrate how social attitudes towards the role of women in the family and their legal reflections had changed by the time of the 1920s and 1930s when compared to the 19th century and how they might differ from the views and law of today.

## 2 Czechoslovak legal dualism

Before the specifics of the proposals for a new Czechoslovak civil code may be discussed, it is necessary to explain the need for the creation of a new civil code in the first place.

In the final weeks and days of the First World War, the multi-ethnic Austro-Hungarian Empire was fracturing into a number of successor states. Among them, one of the most prominent was Czechoslovakia, encompassing a significant percentage of the former empire's population and economic capacity. The legal expression of the creation of the Czechoslovak state came in the form of its first law, the so-called „reception law“, published as No. 11/1918. In its preamble, it proclaimed that *„The independent Czechoslovak state had come into being.“* However, arguably its most important

provision was contained in Article II: „*all current land<sup>1</sup> and imperial laws and regulations remain in effect for the time being*“<sup>2</sup>

While preserving legal continuity and allowing for the continued operation of both government institutions and private subjects under established rules, this provision had the necessary implication of fracturing the new state into several territories, each with its own distinct legal system. This included Austrian law for the Czech part of the state, Hungarian law for Slovakia and Carpathian Ruthenia and even German law for a small part of formerly Prussian Silesia.<sup>3</sup>

The phrase „*for the time being*“, while of little normative importance, makes it clear that even in the first days of the new Republic, its leading figures realized the complications that would arise from this arrangement and intended to gradually replace Austrian and Hungarian law with new unified Czechoslovak legal norms.<sup>4</sup> While the applicability of Austrian law was extended to the formerly Prussian areas in 1920<sup>5</sup>, this still left Czechoslovakia in a prominent state of legal dualism, represented within the sphere of civil law by the use of the Austrian Civil Code of 1811 (ABGB) in the Czech lands, and the application of Hungarian statutes, precedents and customary law in Slovakia and Carpathian Ruthenia.<sup>6</sup>

### 3 Civil law unification attempts

It could be said that efforts to create a unified system of civil law for the entirety of Czechoslovakia began almost immediately. Several different approaches to this issue were initially considered.

The most basic one simply called for a Czech translation<sup>7</sup> of the Austrian Civil Code and the extension of its applicability to Slovakia and Carpathian Ruthenia. However, this proposal was opposed by both Slovak representatives and several Czech experts, who were concerned that ABGB was outdated in certain aspects.<sup>8</sup>

The opposite approach – creating a brand-new civil code from scratch – was also rejected, however, over fears that such an endeavour would be too protracted and could cause unnecessary discontinuity.

Therefore, a compromise path was chosen in March 1920. The core of the new civil code would be based on a translation of the Austrian Civil Code, which would be modified and modernised as needed. Influences from Hungarian law would also be considered, where appropriate.<sup>9</sup>

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<sup>1</sup> Referring to the division of Cisleithania (Austria) into *Länder*, similar to present day Germany and Austria. A satisfactory English translation seems to be lacking, with „region“ or „federal state“ being the closest terms. The territory of the Czech part of the Czechoslovak Republic was comprised mainly of the *Länder* of Bohemia, Moravia and Silesia, with small portions of Upper and Lower Austria.

<sup>2</sup> VOJÁČEK, Ladislav. *První československý zákon: pokus o opožděný komentář*. Praha: Wolters Kluwer, 2018, p. 7-8.

<sup>3</sup> *Ibidem*, p. 8.

<sup>4</sup> SALÁK, Pavel jr. et al. *Historie osnovy občanského zákoníku z roku 1937: Inspirace, problémy a výzvy*. Brno: Masarykova univerzita, 2017, p. 9.

<sup>5</sup> VOJÁČEK, p. 161.

<sup>6</sup> It should be noted that Czechoslovakia was not the only nation of the interwar period with several legal systems coexisting beside each other. Countries such as Poland, Romania and Yugoslavia faced similar issues due to the post-war territorial changes.

<sup>7</sup> The authentic, binding version of ABGB, even during the years of the Czechoslovak Republic, was in German. Several unofficial Czech translations were produced for educational and research purposes.

<sup>8</sup> SALÁK et al., p. 17-18.

<sup>9</sup> *Ibidem*, p. 18.

In the following months, prominent legal experts were approached to participate in the drafting process and eventually, five subcommittees were formed, each dealing with a specific aspect of the recodification: the first worked on the general provisions of the entire code and the general provisions for the law of obligations, the second concentrated on the specifics of obligation law, the third was tasked with family law, the fourth with absolute rights (*iura in rem*) and the fifth was to propose a new draft of the law of succession. The head of the Subcommittee for Family Law was Professor Bruno Kafka from the German University in Prague, a relative of the famous writer Franz Kafka.<sup>10</sup>

Between the years 1921 and 1924, each subcommittee published and presented its proposal. However, the result was not quite satisfactory, since their work was not well coordinated and each expert group approached the issue of modernisation differently. Some subcommittees made merely cosmetic changes while others chose to substantially alter the Austrian Civil Code. As a result, the respective parts did not work well together as a coherent legal text.<sup>11</sup>

To correct this issue, a new expert body was created in 1926 – the Superrevision Commission – including representatives of the subcommittees and other experts, tasked with creating a more systematic and consistent civil code draft based on the respective subcommittee proposals. The Superrevision Commission produced and published its proposal in 1931, sparking further academic and political debate.<sup>12</sup>

Afterwards, feedback from various government departments and other institutions was considered and work on a final draft began. The long process of preparations was finally concluded on 15th April 1937, when the new civil code was presented to both chambers of Parliament for consideration. However, the 1937 proposal was far from consensual across the political spectrum and the legislative process was not completed before the Munich Agreement and the dissolution of Czechoslovakia as a whole a few months later.<sup>13</sup>

It should be noted that certain issues proved to be so contentious they led to the exclusion of entire areas of law from the 1937 proposal. The most notable example was family law, which was omitted due to a number of disagreements, specifically over the definition of marriage itself, obligatory or optional civil marriages, property arrangements between spouses<sup>14</sup> and others.<sup>15</sup>

A little known civil code proposal was produced in 1946 after the liberation of Czechoslovakia but the issue of legal dualism was resolved only in 1950 (some 32 years after the creation of the Czechoslovak state) with the adoption of a new civil code by the nascent Communist regime. Unsurprisingly, the 1950 Civil Code differed significantly from the legal ethos of the interwar years.<sup>16</sup>

Since the 1937 proposal did not include family law, it is not considered for the remainder of this paper, which instead focuses on the 1924 proposal of the Subcommittee for Family Law and the 1931 proposal of the Superrevision Commission and seeks to compare these with the Austrian Civil Code and, to a lesser extent, Hungarian law.

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<sup>10</sup> SALÁK et al., p. 19.

<sup>11</sup> Ibidem, p. 19-21.

<sup>12</sup> Ibidem, p. 21.

<sup>13</sup> Ibidem, p. 23-26.

<sup>14</sup> Under ABGB, the respective properties of spouses remained separate, while under Hungarian law, joint property was created after marriage.

<sup>15</sup> SALÁK et al., p. 23, 25, 49-53.

<sup>16</sup> Ibidem, p. 26-27.

## 4 Legal position of mothers under the Austrian Civil Code (ABGB)

Since the legal standing of mothers and their custody of children in the interwar Czechoslovak proposals for a new civil code draws heavily from the Austrian Civil Code, this paper necessarily has to follow suit and outline the basic concepts guiding contemporary Austrian (and, to a lesser extent, Hungarian) family law before the changes made to them by the Czechoslovak drafters may be discussed.

To clarify the focus of the paper a bit further, it explores the legal relationship between a mother and her children and compares it to that of the father. Issues such as entering into marriage, divorce, property arrangements between spouses, adoption or alimony are not considered or are mentioned without an in-depth explanation.

### 4.1 General issues

It could be said that this paper revolves around several legal concepts or institutes which express the legal aspect of the parent-child relationship, namely parental power, paternal power, maternal power (which is added in the Czechoslovak proposals) and legal guardianship.

Before exploring these institutes more closely, it should be established who could be subject to them according to the Austrian Civil Code, in other words, who could we consider to be a „child“, in a broad sense. The Austrian Civil Code specified several groups of underage persons. Persons under the age of 7 were considered to be „children“<sup>17</sup> (*stricto sensu*), whereas persons between the ages of 7 and 14 were termed „immatures“<sup>18</sup>, since the age of maturity was 14.<sup>19</sup> Finally, persons between 14 and 24 were called „minors“<sup>20</sup>. The original age of majority in ABGB (24 years) was reduced to 21 in Czechoslovakia via Law No. 447/1919.<sup>21</sup> Generally speaking, both paternal power and legal guardianship ordinarily lasted until the age of majority.<sup>22</sup> Majority could be hastened by emancipation, available under certain conditions to persons over 18.<sup>23</sup> Parental power is more vague, as is noted by Professors Rouček and Sedláček in their famous commentary on Czechoslovak civil law. Nonetheless, both they and the courts agree that parental power ceases with the age of majority as well.<sup>24</sup>

To briefly touch on the understanding of marriage in ABGB, § 44 states that by entering marriage, a man and a woman „express their intention to live in a indissoluble communion, bear and raise children and to support each other“<sup>25</sup> According to § 90, „both parties are equally obligated to fulfil their marital duties, be faithful and treat each other decently“.<sup>26</sup> § 91 specifies the role of the husband as the head of the family, his duty of maintenance towards the wife and his capacity to legally

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<sup>17</sup> *Kinder* in the official text.

<sup>18</sup> *Unmündige* in the official text.

<sup>19</sup> For example, persons over 14 could marry under certain conditions, namely the permission of their (legitimate) father, legal guardian or a court, depending on the circumstances. See § 49 and 50 ABGB.

<sup>20</sup> *Minderjährige* in the official text.

<sup>21</sup> § 21 ABGB (as affected by Law No. 447/1919).

<sup>22</sup> § 172 and 251 ABGB.

<sup>23</sup> § 174 and 252 ABGB. § 174 was somewhat altered by Law No. 447/1919 as well, relating to the lowering of the age of majority from 24 to 21.

<sup>24</sup> ROUČEK, František, Jaromír SEDLÁČEK et al. *Komentář k československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a v Podkarpatské Rusi. Díl první, (§§ 1 až 284.)*. Praha: CODEX Bohemia, 1998, p. 729-730.

<sup>25</sup> § 44 ABGB.

<sup>26</sup> § 90 ABGB.

represent her. The wife, according to § 92, bears his name, follows his domicile, assists him in running the household and makes sure his decisions are fulfilled.<sup>27</sup>

Professor Sedláček sums up the contemporary attitudes towards marriage in his monograph on family law as follows: „*Since they [the spouses] are persons of opposite sex, it follows that the function of each of the spouses must necessarily be different, translated into legal terms, their rights and duties must be varied. Together, these duties complement each other to form a harmonic whole.*“ He notes that the basic aspects of marriage (see § 90) apply to both equally, while more specific provisions differentiate between the husband and the wife. „*These stem from the fact that the wife is more absorbed by the marriage than the husband. If we consider pregnancy, childbirth and nursing, this motherly function – socially extremely valuable – is so demanding that the woman cannot be expected to provide for the family in addition. The husband is free of these functions and is physiologically naturally predisposed to provide for the family. [...] The differentiation in these provisions does not mean, however, that one of the spouses is subservient to the other. Spouses are fully equal in our legal system [...] The couple functions outwards as one unit, therefore it must have an organ through which it acts. This organ is the husband. [...] Those who wish to introduce substantially the same rights and duties of the husband and the wife are either jesting or abolishing marriage as a social and legal unit altogether.*“<sup>28</sup>

Lastly, it should be noted that the Austrian Civil Code distinguished between legitimate and illegitimate children.<sup>29</sup> The provisions which determined the specific conditions of children being (il)legitimate are quite complex and beyond the scope of this paper. Illegitimate children did not have the same rights<sup>30</sup> as legitimate ones and, in fact, they did not have any legal relationship with their biological father beyond his duty of maintenance and were not subject to his paternal power, instead having an appointed legal guardian.<sup>31</sup> Marital and extramarital status of children could also be impacted by other legal institutes, for example legitimisation<sup>32</sup> or adoption.

## 4.2 Parental power

The term parental power (unlike paternal power) is not explicitly found in the Austrian Civil Code, instead being coined by commentaries and other contemporary family law literature. The relevant provisions may be found in § 139 through 146, jointly entitled „The joint rights and duties of the parents“.<sup>33</sup> As Rouček and Sedláček note, it is a relatively recent concept, since in earlier legal systems, parental power did not exist and was instead absorbed entirely by paternal power.<sup>34</sup>

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<sup>27</sup> § 91 and 92 ABGB.

<sup>28</sup> SEDLÁČEK, Jaromír. *Rodinné právo*. Brno: Nákladem československého akademického spolku Právnick, 1934, p. 43-44.

<sup>29</sup> For comparison, in the Czech Republic today, the rights of extramarital children are constitutionally guaranteed to be the same as of marital ones. See Article 32, Section 3 of the Charter of Fundamental Rights and Freedoms (Enacted as No. 2/1993).

<sup>30</sup> They had that same rights within the sphere of public law (such as citizenship, voting rights etc.) and were entitled to child maintenance from their parents. However, they were limited in inheritance law, for example. See § 754 ABGB (restrictions present, although slightly different, in both the version as enacted and as amended by Imperial Decree No. 276/1914).

<sup>31</sup> § 166 ABGB. Amended by Imperial Decree No. 276/1914 to emphasize the father' duty of maintenance.

<sup>32</sup> One of the methods of legitimisation was by special grace of the monarch (§ 162 ABGB). In Czechoslovakia, this prerogative was deemed to have been transferred to the Government (Cabinet). See ROUČEK, SEDLÁČEK et al., p. 821-822.

<sup>33</sup> § 139-146 ABGB. § 142 amended by No. 276/1914. Nobility (§ 146) was abolished in Czechoslovakia in 1918.

<sup>34</sup> ROUČEK, SEDLÁČEK et al., p. 729.

Professor Robert Mayr points towards the provisions of § 144 as the overall definition of parental power („*The parents are jointly empowered to direct the behaviour of their children*“). He also adds several other observations, namely that parental power extends to legitimised and adopted children as well and that if custody of a child passes to its grandparents, they are endowed with full parental power, too (making the term slightly misleading).<sup>35</sup> Rouček and Sedláček further comment that despite parental power being joint, certain responsibilities are entrusted in a greater degree to the father (the child’s maintenance and vocational direction<sup>36</sup>) or the mother (the child’s physical wellbeing and health).<sup>37</sup> Depending on the issue at hand, we can thus determine which parent’s opinion ordinarily prevails, although generally, the father has a stronger position due to his role as head of the family and its outwards representative.<sup>38</sup>

Parental power was a relatively abstract concept without clear, express boundaries, in essence consisting of the sum of responsibilities related to a child’s upbringing. A general idea of its specific contents may be discerned from the Austrian Civil Code itself. The parents must raise their children and care for them both materially and spiritually (§ 139), they determine a child’s religious affiliation (§ 140)<sup>39</sup>, they direct the child’s behaviour and the child has a duty of obedience to them (§ 144) and they may even punish and discipline them within reasonable bounds (§ 145). § 142 dealt with custody of children after a divorce or dissolution of the marriage. Originally, the law preferred for younger children<sup>40</sup> to remain with the mother; this was changed in 1914 in a novelisation by imperial decree, leaving the matter to the agreement of the spouses or eventually the court’s case-by-case decision, also newly explicitly expressing the other parent’s right of contact with the children.<sup>41</sup>

Hungarian law was more or less similar to the Austrian Civil Code, governed instead mainly by Law XX/1877 (the law on legal guardianship). Like ABGB, this included the children’s upbringing, education, upkeep, disciplining and punishment. The preference for younger children to remain with the mother in case of separation persisted here into Czechoslovak law. The father’s will was decisive in case of disagreements among the spouses as well.<sup>42</sup>

#### **4.3 Paternal power**

A much more specific and, arguably, more interesting concept was paternal power, defined in § 147 as „*The rights which specifically belong to the father as the head of the family [...]*“.<sup>43</sup> Namely, these powers included choosing the minor’s vocation (§ 148), administering the their property (§ 149-151), consenting to the minor entering marriage or other contractual obligations (§ 152-153)<sup>44</sup>, legally representing them (§ 152) and also designating the minor’s prospective legal guardian<sup>45</sup> *mortis causa*

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<sup>35</sup> MAYR, Robert. *Soustava občanského práva*. Kniha čtvrtá, Právo rodinné. Brno: Barvič & Novotný, 1926, p. 95.

<sup>36</sup> This was ruled by Czechoslovak courts to include determining in which language the child would be brought up in mixed marriages. See ROUČEK, SEDLÁČEK et al., p. 730.

<sup>37</sup> However, these duties were not exclusive and could be fulfilled by either parent as needed. See ROUČEK, SEDLÁČEK et al., p. 735.

<sup>38</sup> ROUČEK, SEDLÁČEK et al., p. 729-730.

<sup>39</sup> Ibidem, p. 738. ABGB leaves this issue to public law, represented in Czechoslovakia by Law No. 96/1925.

<sup>40</sup> Boys up to four and girls up to seven years of age.

<sup>41</sup> § 139-146 ABGB. § 142 as amended by Imperial Decree No. 276/1914.

<sup>42</sup> ROUČEK, SEDLÁČEK et al., p. 732, 753-754, 760

<sup>43</sup> § 147 ABGB.

<sup>44</sup> § 152 was slightly amended by Imperial Decree No. 69/1916, allowing for more independence of minors in labour law.

<sup>45</sup> See below.

(§ 196). The exercise of paternal power was to be directed by the interests of the child, not the father's.<sup>46</sup>

The father's decision-making regarding a child's future vocation was limited by the right of a mature child (e.g. over 14) to petition the father and, failing that, a court to alter the decision (§ 148).<sup>47</sup> Major decisions regarding the child's property could also require a court's permission and certain parts of the property were outside the father's control, such as property the child had earned themselves, which they could administer themselves (§ 149-151).<sup>48</sup> The child could also freely enter into contracts not exceeding the value of their self-administered property (§ 246)<sup>49</sup>, Sedláček likens this arrangement to the Ancient Roman *peculium*.<sup>50</sup>

Unlike the Ancient Roman *patria potestas*, as Sedláček notes, Austrian paternal power was subject to judicial oversight.<sup>51</sup> The courts had discretion in choosing the appropriate remedy, which could include placing the father into a position of a legal guardian (basically demoting him and making him subject to increased oversight) or stripping him of paternal power altogether.<sup>52</sup> The Austrian Civil Code allowed for temporary suspension of paternal power (§ 176), which included cases of the father's legal capacity being limited, him being incarcerated or missing. It could be suspended either via a court decision or directly by statute. Once the problem had been removed, paternal power was automatically restored.<sup>53</sup>

Paternal power ended definitively in several situations, ordinarily with the child's majority<sup>54</sup> or emancipation (which was understood to include both a formal declaration of the father as well as factual acts, such as establishing a separate household for a twenty-year-old son or the child entering a trade or craft<sup>55</sup>). Pursuant to § 177, fathers who abandoned the upbringing of their children for good were to lose their paternal power forever.<sup>56</sup> A father could also relinquish it with a court's permission. However, divorce or dissolution of marriage did not affect paternal power.<sup>57</sup>

Paternal power was limited in one other circumstance – when a minor daughter married, which meant that she was primarily placed under the power of her new husband, however, the management of her property remained in the hands of the father, unless it was also transferred to the husband with judicial permission.<sup>58</sup> If the marriage ended for any reason before the daughter's majority, paternal power returned to her father in its full extent.<sup>59</sup>

In Hungarian law, paternal power (based on Law XX/1877) was quite similar. A father was a child's legal representative, could name a legal guardian in his will and administered their property

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<sup>46</sup> ROUČEK, SEDLÁČEK et al., p. 765.

<sup>47</sup> MAYR, p. 97.

<sup>48</sup> SEDLÁČEK, p. 157.

<sup>49</sup> Slightly amended by Imperial Decree No. 69/1916.

<sup>50</sup> SEDLÁČEK, p. 158.

<sup>51</sup> Ibidem, p. 161.

<sup>52</sup> ROUČEK, SEDLÁČEK et al., p. 885. As the commentary notes: „[...] a legal guardian has much more limited powers regarding the child's matters than a father.“ Originally, § 178 only called for an appropriate remedy, since 1914, it explicitly mentioned placing the father into the position of a legal guardian.

<sup>53</sup> SEDLÁČEK, p. 162.

<sup>54</sup> However, paternal power could be extended by a court beyond the age of majority in certain cases, such as a child's mental impairment. See MAYR, p. 110.

<sup>55</sup> SEDLÁČEK, p. 164.

<sup>56</sup> § 177 ABGB.

<sup>57</sup> MAYR, p. 112.

<sup>58</sup> SEDLÁČEK, p. 163.

<sup>59</sup> MAYR, p. 113.

with few restrictions.<sup>60</sup> Like in Cisleithania, a minor administered property they had earned themselves.<sup>61</sup> The rules for the termination of paternal power were likewise similar.<sup>62</sup>

#### 4.4 Legal guardianship

Legal guardianship can be best thought of as a substitute for paternal power, being established whenever a minor was not under anyone's paternal power. Guardianship was typically established for illegitimate children, children whose father had died or lost his paternal power, whether temporarily or definitively.<sup>63</sup>

A legal guardian was always appointed by a court *ex officio*, however, the court's decision on whom to appoint was guided by a set hierarchy of „appointment reasons“ (§ 196-199). Foremost, a father with intact paternal power could designate a legal guardian in his will. If he had not done so, the same could be done by the mother<sup>64</sup>, however, only if she herself had been the legal guardian before her death. If there was no designation *mortis causa*, the law established a succession of relatives to be appointed.<sup>65</sup> Before 1914, this was the paternal grandfather, followed by the mother, the paternal grandmother and then the closest male relative. In 1914, this provision was altered with the succession of the mother, the paternal grandfather, the paternal grandmother and lastly the closest relative, regardless of sex.<sup>66</sup> If there were no relatives, the court was free to consider the child's needs.<sup>67</sup> In certain cases, a municipality or a state organ could be the guardian.<sup>68</sup> It was possible for several persons to be the guardians of a single minor.<sup>69</sup>

It should be noted that legal guardianship was considered a civic duty and specific reasons had to be stated in order to excuse oneself from appointment.<sup>70</sup> The parents could exclude certain persons from guardianship in their wills (§ 194). Certain other groups of people were generally incapable of assuming guardianship: the physically or mentally impaired (§ 191), those with criminal convictions (§ 191), monks and foreigners (§ 192)<sup>71</sup> or those with a legal conflict of interest with the minor (§ 194). Wives generally needed the permission of their husband to assume guardianship (§ 193)<sup>72</sup>. Certain persons could (but did not have to) excuse themselves: women with the exception of mothers and grandmothers<sup>73</sup>, priests, soldiers, public officials, the elderly over 60, those already raising five children, those already a guardian or persons living too far away (§ 195).

Until 1914, a mother or grandmother acting as a guardian had to have a male co-guardian appointed (§ 211). In 1914, this was relaxed to specific cases: if the guardian was the mother and the deceased father ordered the appointment of a co-guardian in his will, if the female guardian requested it or if the court deemed it necessary (such as extensive property management or a conflict of

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<sup>60</sup> ROUČEK, SEDLÁČEK, p. 765-766.

<sup>61</sup> Ibidem, p. 779.

<sup>62</sup> Ibidem, p. 873.

<sup>63</sup> SEDLÁČEK, p. 181.

<sup>64</sup> This option was not present in ABGB as enacted and was added by Imperial Decree No. 276/1914.

<sup>65</sup> SEDLÁČEK, p. 183-184.

<sup>66</sup> § 198 ABGB (as amended by Imperial Decree No. 276/1914).

<sup>67</sup> MAYR, p. 122-123.

<sup>68</sup> SEDLÁČEK, p. 186.

<sup>69</sup> Ibidem, p. 194.

<sup>70</sup> MAYR, p. 123.

<sup>71</sup> The provision also included the words „persons of the female sex“ until 1914.

<sup>72</sup> Obviously, this restriction was added only in 1914, after women became generally eligible for guardianship.

<sup>73</sup> Since 1914.



interest).<sup>74</sup> Ordinarily, a co-guardian was merely an advisor and helped the court supervise the guardian.<sup>75</sup>

The guardian took care of the minor's upbringing, gave consent to their marriage, administered their property and legally represented them, therefore, the contents of legal guardianship were more or less the same as with paternal power.<sup>76</sup> The key difference was that the legal guardian was much more limited in their freedom of action. The guardian had to obtain judicial permission for most major actions taken in relation to the upbringing and could be bound to act pursuant to the court's orders (§ 216). The court kept track of the minor's property<sup>77</sup>, the guardian had to make yearly financial reports (§ 239) and they could not, for example, sell immovable property or rent it out without the court's permission.<sup>78</sup>

Guardianship ended with the minor's death, establishment (for example by adoption) or restoration of paternal power, the minor's majority or emancipation or the court removing the guardian from office for various causes. One of these could be the female guardian's husband rescinding their consent to her wife's guardianship.<sup>79</sup>

Under Hungarian law, the concept of legal guardianship was comparable. Primarily, a legal guardian was determined by the father's testament or a formal declaration made to a public notary. However, failing that, legal guardianship devolved onto the mother as the „natural and legal guardian“, followed by the grandfathers and other male relatives.<sup>80</sup> Similarly to the Austrian Civil Code, certain groups of persons were excluded from guardianship (notably all women with the exception of mothers and adoptive mothers).<sup>81</sup> The termination of guardianship was virtually the same as in Austrian law,<sup>82</sup> as were the contents of guardianship itself (legal representation, upbringing and education and property management).<sup>83</sup> There was little difference in the need to seek court approval for major decisions<sup>84</sup> and the duty to present yearly financial records.<sup>85</sup> Hungarian law did not include the concept of co-guardianship and mothers could be sole guardians of their children.

## **5 Legal position of mothers in the 1924 and 1931 proposals**

### **5.1 The 1924 Subcommittee Proposal**

Somewhat anticlimactically, the 1924 proposal of the Subcommittee for Family Law was very similar to the Austrian Civil Code it sought to supersede, following a similar composition and relying on the same concepts, such as parental and paternal power and legal guardianship, which differed only slightly from the legal regime described above.

In regards to the topic of this paper, undoubtedly the most prominent dilemma the Subcommittee faced was the question of whether to abolish paternal power as a separate legal institute and subsume it into joint parental power. The German and Swiss civil codes were mentioned

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<sup>74</sup> § 211 ABGB. Compared before and after amendment by Imperial Decree No. 276/1914.

<sup>75</sup> SEDLÁČEK, p. 195.

<sup>76</sup> Ibidem, p. 190-192.

<sup>77</sup> Ibidem, p. 188.

<sup>78</sup> Ibidem, p. 192.

<sup>79</sup> MAYR, p. 135-137.

<sup>80</sup> ROUČEK, SEDLÁČEK et al., p. 1139-1140.

<sup>81</sup> Ibidem, p. 1141.

<sup>82</sup> Ibidem, p. 1142.

<sup>83</sup> Ibidem, p. 1147-1151.

<sup>84</sup> Ibidem, p. 1151.

<sup>85</sup> Ibidem, p. 1153.

as possible inspirations and the Subcommittee was in agreement that their goal was to strengthen the legal position of the mother compared to the Austrian Civil Code. However, the Subcommittee's commentary notes that while both the German and Swiss models lack paternal power, in Germany, the mother only possesses her parental power in the absence of a father and in Switzerland, the father's opinion overrules the mother's in case of disagreement. In light of these observations, the abolition of paternal power and an embracing of the German and Swiss models would be more of a change of nomenclature rather than a substantial change in the eyes of the drafters. Instead, they opted to strengthen the mother's position when it came to legal guardianship and certain other issues.<sup>86</sup>

The joint rights and responsibilities of the parents (parental power) were virtually unchanged with a mere rearrangement of the provisions. The moral obligation of children's respect for their parents was omitted as a legally unenforceable proclamation. Relics of noble status were removed as well, considering the republican nature of the Czechoslovak state.<sup>87</sup>

One of the increases in the influence of the mother can be found in her strengthened position in regards to the children's vocation (choice of career). Under the Austrian Civil Code (§ 148), only the child could formally challenge the father's decision regarding this issue. The Subcommittee proposal extends this right to the mother in § 93 (and even assumes it to be a more likely occurrence).<sup>88</sup>

Regarding the conditions for the end of paternal power, the Subcommittee considered abolishing the reestablishment of paternal power over daughters whose marriage had ended before majority (21 years old), but ultimately decided against it, arguing that the institute of emancipation had more strict criteria than merely being married and that the age of majority was already sufficiently low. The other provisions regarding the suspension and removal of paternal power remained more or less the same.<sup>89</sup>

Arguably the most prominent changes were concentrated in the area of legal guardianship. The most noteworthy for the status of women included a rephrasing of spousal consent for the assumption of legal guardianship. Under the Austrian Civil Code, wives needed their husband's permission to become legal guardians, while the opposite was not the case. In the 1924 proposal, this was balanced out, simply stating that „married persons“ generally needed the consent of their spouses.<sup>90</sup>

On the other hand, the exclusion of women from the civic duty aspect of legal guardianship was retained. While men needed a special justification to refuse legal guardianship, otherwise being obligated to accept it, women retained the ability to refuse it without any justification (save for mothers and grandmothers).<sup>91</sup>

In addition, the Subcommittee debated including illegitimate mothers in the succession of relatives to be appointed as legal guardians (the Austrian Civil Code mentioned merely the legitimate mothers), but ultimately decided to retain the exact phrasing, opting for more decision-making freedom for the appointing court and arguing that if the illegitimate mother was competent enough, she would be chosen by the court regardless.<sup>92</sup>

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<sup>86</sup> KAFKA, Bruno Alexander [ed.]. *Právo rodinné: návrh subkomitétu pro revisi občanského zákoníka pro Československou republiku*. Praha: Nákladem ministerstva spravedlnosti, 1924, p. 108.

<sup>87</sup> *Ibidem*, p. 107.

<sup>88</sup> *Ibidem*, p. 29, 108-109.

<sup>89</sup> *Ibidem*, p. 122-123.

<sup>90</sup> *Ibidem*, p. 41.

<sup>91</sup> *Ibidem*, p. 42.

<sup>92</sup> KAFKA, p. 130.

The concept of co-guardianship, taken from the Austrian Civil Code but unknown to Hungarian law, was retained, however, in an altered form. Under the Austrian Civil Code, female guardians had male co-guardians appointed under certain conditions. The reasons for appointing a co-guardian remained roughly the same in the 1924 proposal (if requested by the late parents, the guardian themselves or deemed necessary by the court), however, the proposal no longer differentiated between the guardians based on sex, thus a male guardian could have a co-guardian appointed, if needed, and a woman could become co-guardian without limitations.<sup>93</sup>

As is evident from above, the changes made to the legal status of women in family law by the 1924 proposal were quite limited in scope, nonetheless, they removed some of the more prominent restrictions applied to women, especially in the area of legal guardianship.

## 5.2 The 1931 Superrevision Commission Proposal

Like its 1924 predecessor, the 1931 proposal maintained virtually the same structure, nomenclature and overall ethos of the Austrian Civil Code. However, there were certain noteworthy changes, including, but not limited to, the brand new concept of maternal power. The Commission notes in its commentary to the proposal: „[We] could not ignore the continuing evolution of legal equality between the sexes [...] neither could [we] ignore the rapidly changing social position of women in the present time [...] therefore [we] sought equality between mothers and fathers in the family. [...] Still, it ought to be noted that a majority of the population nonetheless seems to favour something of a slight dominance of the father in the family.”<sup>94</sup>

The contents of parental power in the 1931 proposal were virtually the same as in the Austrian Civil Code and the 1924 proposal. However, the 1931 proposal is the first to explicitly name it as such (since earlier, it was mostly an umbrella term coined by the academia). The proposal also highlights the special role of the mother in caring for the well-being and health of the children and emphasizes consent of the spouses in regards to decision-making.<sup>95</sup>

Special paternal power is retained in the proposal, consisting of the traditional responsibilities for the children’s vocation and legal representation, administration of the children’s property and consenting to contracts. Familiar institutes such as the right of the mother and the child to appeal the father’s vocational decisions, the *quasi-peculium* concerning property gained by the child themselves or the norms relating to emancipation contain little to no changes.<sup>96</sup> The provisions for the suspension or outright termination of paternal power are maintained as well, including the possibility of prolonging it for the physically or mentally impaired or the right of the courts to suspend paternal power or strip it from the father, as well as the option to „demote” him to guardian status. These provisions were held to apply similarly to parental and maternal power as well.<sup>97</sup>

Maternal power was a new addition by the Superrevision Commission, considered by the drafters to be a compromise between radical changes on one hand and the status quo on the other. It was described in § 112 of the proposal and its content was exactly the same as with paternal power, the difference being that maternal power was not meant to be a continuously present institute. As long as a child was under the father’s power, maternal power did not apply. It came into consideration

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<sup>93</sup> Ibidem, p. 46, 131-132.

<sup>94</sup> *Zákon, kterým se vydává všeobecný zákoník občanský: návrh superrevisní komise. Díl I., Text zákona.* Praha: Nákladem ministerstva spravedlnosti, 1931, p. 73. Henceforth cited as: „SUPERREVISION COMMISSION“.

<sup>95</sup> Ibidem, p. 45, 73-74.

<sup>96</sup> Ibidem, p. 46-48, 77-78.

<sup>97</sup> Ibidem, p. 54-55.

only if the father had died or paternal power had ceased to apply for another reason. In that case, the courts had the discretion of granting the mother maternal power if they deemed her „*fully competent to autonomously administer the child's affairs*“.<sup>98</sup> Basically, the introduction of maternal power gave competent mothers the opportunity to assume the father's legal position, instead of being merely a legal guardian. Since the proposal only speaks of „mothers“, there was no limitation on mothers of illegitimate children when it came to assuming maternal power (this is affirmed in § 132 of the proposal).<sup>99</sup>

Lastly, legal guardianship was provided for in case when a minor was under neither paternal nor maternal power. The proposal continued the tradition of treating legal guardianship as a civic duty. A prospective guardian could excuse themselves based on age, illness, distance, already taking care of several minors or other difficulties. Women could also excuse themselves, with the exception of mothers and grandmothers. Generally excluded from guardianship were incompetent persons, as well as foreigners. The father and, under certain circumstances, the mother could exclude persons from guardianship. However, the court was not bound by the father's decision to exclude the mother, which is a new protection of the mother's position, not present in either the Austrian Civil Code or the 1924 proposal.<sup>100</sup>

Notably absent is the provision requiring the consent of a woman's husband (or generally one's spouse in the 1924 proposal) to assume guardianship. The drafters' commentary to the 1931 proposal notes: „*It is certainly not appropriate to require a husband's consent to assume such a role in a time when women may hold eminent public office*<sup>101</sup>, especially since the role often consists of helping to raise the minor, something women tend to be especially well suited for.“<sup>102</sup>

The proposal further strengthens the position of mothers by placing them at the top of the list of prospective guardians (§ 170 of the proposal simply states: „*Before anyone else, legal guardianship belongs to the mother.*“). Only then come the guardians designated by the father or by a mother (who had to possess maternal power or be a guardian to designate a guardian). Next in line are the paternal grandfather and grandmother, followed by the next closest relatives with a preference for older ones.<sup>103</sup> Therefore, even if a mother was denied maternal power by the court, she was still in a strong position to at least assume legal guardianship of her child.

The Commission included provisions for guardianship by institutions, as well as the possibility for one minor to have multiple guardians (in that case, one of them would be selected to take care of the minor's person and direct the guardianship). Co-guardianship was also retained as a supervisory and advisory position, to be established when requested by the father or mother, the guardian or at the court's discretion. The responsibilities of the guardian did not see significant change (still including responsibility for education and upbringing, property management and legal representation). The proposal emphasized that a mother was to participate in the upbringing of the child even if she was denied both maternal power and guardianship.<sup>104</sup>

Overall, it might be observed that the 1931 proposal was more egalitarian in its approach than the earlier Subcommittee proposal, placing greater emphasis on the role of the mother, preferring her

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<sup>98</sup> SUPERREVISION COMMISSION, p. 48, 74.

<sup>99</sup> Ibidem, p. 53.

<sup>100</sup> Ibidem, p. 60-61.

<sup>101</sup> Czechoslovak women could vote (and be elected) for the first time in the local elections of 1919. Women's suffrage was constitutionally enshrined in 1920.

<sup>102</sup> SUPERREVISION COMMISSION, p. 95.

<sup>103</sup> Ibidem, p. 61-62.

<sup>104</sup> Ibidem, p. 64-71.

as the legal guardian, removing many of the previous restrictions on women and even allowing mothers to assume the legal position of fathers in certain circumstances. Still, it differs significantly from contemporary family law in many aspects.

Despite its modernizing tendencies, the proposal did not escape criticism, an example of which is a short pamphlet written by dr. Jarmila Papežová, a female lawyer from Slovakia, on behalf of several feminist organisations. It laments the exclusion of family law from the final civil code proposal of 1937, but also presents a critique of many of the aspects of the 1931 proposal. Papežová opposes basing the family law provisions of the new code primarily on the Austrian Civil Code, claiming instead that the Hungarian law in force in Slovakia is much more progressive in regards to women's rights (especially when it comes to property arrangements). She pays significant attention to the issues of divorce and dissolution of marriage and many others, but also makes several remarks on the institute of maternal power. She notes that a man's qualifications to possess paternal power are not examined unless put in doubt and wishes to apply the same approach to women, proposing to amend § 112 of the proposal to automatically grant women maternal power if paternal power is absent and provide for judicial oversight in the same manner as over a father, instead of having a court judge the mother's capability beforehand.<sup>105</sup>

## 6 Conclusion

The presented paper sought to examine the legal (and, by extension, social) position of women towards their children in interwar Czechoslovakia. After a brief summary of the relevant political and legislative context, the core of the paper was focused on a comparative analysis of the various legal texts related to the issue, both valid law and legislative proposals.

The Austrian Civil Code of 1811 as enacted was, perhaps unsurprisingly due to its age, the least liberal towards women by today's standards and featured a strong role of the father. Unless emancipated, children generally remained under paternal power until 24 years of age. Only the father, not the mother, could designate a prospective legal guardian. Women were generally excluded from legal guardianship, however the wording of § 192 did leave room for judicial discretion. Mothers could become guardians, however, the law preferred paternal grandfathers for the role (§ 198). Female guardians were further limited by the need to have a co-guardian to oversee them at all times (§ 211). Hungarian law was overall quite similar, with the noteworthy difference of more strongly preferring the mother as the legal guardian before any other relatives, unless the father had designated someone else (§ 34-35 of Law No. XX/1877), and the absence of co-guardianship.

The position of mothers was noticeably strengthened for the first time at the outbreak of the First World War, when the Austrian Civil Code was amended by Imperial Decree No. 276/1914. The revision provided for several small changes, including explicitly providing for the „demotion” of the father to the position of a legal guardian in case of misconduct (§ 178) and, more importantly, removing the general exclusion of women from guardianship (§ 192), allowing mothers to designate guardians under certain circumstances (§ 196), preferring legitimate mothers over paternal grandfathers as guardians (§ 198) and removing obligatory co-guardianship for women (§ 211). However, female guardians were still limited by the requirement of spousal consent (§ 193), which could be revoked at any time (§ 255). Of note is also the post-war lowering of the age of majority in Czechoslovakia from 24 to 21 years (Law No. 447/1919).

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<sup>105</sup> PAPEŽOVÁ, Jarmila. *Osnova rodinného práva v občianskom zákoníku*. Bratislava: Novina, 1937, p. 1, 6-7.

The 1924 Subcommittee proposal continued the slight liberalising trend by allowing mothers to appeal certain decisions of fathers wielding paternal power, instead of only the child being entitled to do so. Spousal consent for guardianship was balanced out between the sexes, as was the institute of co-guardianship, which now allowed for female co-guardians as well as the appointment of co-guardians to male guardians. Overall, however, the changes made by the Subcommittee were relatively minor in scope.

The 1931 Superrevision Commission proposal altered the Austrian Civil Code more significantly than its predecessor, yet retained the same overall structure. The completely new concept of maternal power allowed mothers to attain a stronger position when compared to legal guardianship, allowing them to assume the same legal position as the father in case of his death or loss of paternal power for other reasons. Spousal consent for assuming guardianship was omitted completely and mothers could not be excluded from guardianship *mortis causa* by the father, either. Courts were instructed to prefer mothers as guardians even ahead of those designated by the father and mothers of illegitimate children were no longer treated differently from those of legitimate ones when it came to guardianship. Lastly, protections were in place for mothers who were neither legal guardians nor possessed maternal power, so that they still retained the right to participate in the child's upbringing.

In conclusion, we may clearly observe that both the 1914 amendments to the Austrian Civil Code and the Czechoslovak interwar proposals moved in the direction of legal equality for women, and mothers in particular, although the intensity of this move varied. Overall, all three could be characterized as evolutionary, rather than revolutionary developments. Throughout the first half of the 20<sup>th</sup> century, the core structure of family law did not change dramatically (as exemplified by the retention of paternal power throughout the various amendments and proposals), instead relying on minor adjustments to certain institutes considered outdated by that time. As noted by the drafters of the proposals as well as contemporary academia<sup>106</sup>, the roles of the spouses were still very much viewed in complementary terms, with each of the partners having specific and distinct rights and responsibilities, rather than an egalitarian approach, which is more common nowadays.

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<sup>106</sup> See for example ROUČEK, SEDLÁČEK et al., p. 462-466. SEDLÁČEK, p. 43-44. SUPERREVISION COMMISSION, p. 73.

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