Pl. ÚS 7/15 of 14 June 2016

Civil Partnership as Preclusion to Individual Adoption of a Child

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE REPUBLIC

HEADNOTES

1. The essence of the institute of child adoption rests in accepting a step-child as one's own including all related legal consequences. However, adoption and other forms of foster care should always be perceived solely as an alternative solution in the event of a crisis of the natural family and whose aim is the best interests of the child. The current legislature favours adoption by spouses (or by one of them) owing to the fact that it is in the primary interest of the children that they are provided with the possibility of living in a "complete" family in a standard concept. The Constitutional Court also perceives the preference of this particular form of cohabitation as fully constitutionally conforming, as it corresponds to the essence of the institute of marriage as the closest form of cohabitation of two persons of different sexes, which takes place on the basis of their own free decision, associated not only with a number of rights, but also duties. As a result, marriage clearly differs from other forms of cohabitation, and therefore the very institute of marriage provides a priori the biggest prerequisite for fulfilling the purpose of adoption. The possibility of adoption by "another" person, i.e. apparently also a person living alone, represents an exemption to this rule, where there must be unambiguous guarantees that the person is able to provide the child with appropriate conditions for his or her development and satisfying his or her needs.

2. The Constitutional Court proceeds from the fact that there is no fundamental right to adopt a child, either at the constitutional level or at the level of the international obligations of the Czech Republic. At the same time, the Court accepts a considerable discretion which the legislature has when regulating the relationships between same-sex partners. As a matter of fact, there is even no fundamental right to conclude a civil partnership between same-sex persons, and it is a matter of the legislature's political decision whether and in what manner this relationship is to be regulated. Special protection is in fact guaranteed only to parenthood and the family (Art. 32, para. 1 of the Charter).

3. The Constitutional Court does not intend to attempt to formulate a generally applicable and concise definition of the notion of "family". In fact, this is primarily the task of other social disciplines (e.g. sociology). From the legal perspective, it is crucial to create an environment in which the family enjoys adequate protection and which ensures all the conditions for it to be able to fulfil its basic functions. Therefore, it is sufficient to state that the notion of "family" is understood by the Constitutional Court primarily not as a kind of artificial social construct, but essentially as a biological construct, based on the blood kinship of people who live together, or possibly as a non-family relationship imitating the biological relationship (adoption or foster care).

4. The Constitutional Court cannot ignore that there are currently some fundamental changes in the manner of cohabitation and that unlike a more traditional concept of the family, commonly anticipating multiple generations living together, there are ever increasing numbers of people living on their own, the number of unmarried couples is approaching the number of married couples, and divorce is seen as something almost natural. The Constitutional Court cannot "turn a blind eye" to these phenomena and it is far from determining in any manner the union in which people should live together. On the other hand, the Constitutional Court emphasises that it has not found the slightest sensible reason for which it should actively contribute to the erosion of the traditional concept of the family and its function in any manner.

5. In the instant case, the legislature admitted, in the Civil Code, adoption by an individual who does not live in a marital relationship, while not even providing for any restrictions on whether it is a heterosexual or homosexual person. On the other hand, § 13, para. 2 of Act No. 115/2006. Coll., on Civil Partnership and on Amending Certain Related Acts, prohibits this individual from living in a civil partnership. Consequently, this results in a situation where the contested legal regulation unambiguously elevates the formal legal status (a civil partnership) over the factual state without any rational justification.

6. This statutory restriction will not stand through the prism of human dignity as a fundamental objective value of humanity and the focal point of other fundamental rights. Actually, if it is based on the fact that a certain group of persons is excluded from a certain right solely owing to the fact that they have decided to enter into a civil partnership, it thus turns them into de facto "second-rank" individuals and stigmatises them groundlessly in a certain manner, which evokes the idea of their inferiority. At the same time, the Court infers this consequence not on the basis that these persons would engage in any objectionable, unethical or even unlawful conduct, but simply from the fact that the persons have entered into a civil partnership, i.e. they behave in a manner allowed and assumed by the statute and do so in an absolutely transparent and predictable manner, while also taking on all the duties and obligations arising from such a civil partnership.

JUDGMENT

The Constitutional Court held, in the Plenum consisting of the Chairman Pavel Rychetský and Judges Ludvík David, Josef Fiala, Jaroslav Fenyk, Jan Filip, Jaromír Jirsa, Tomáš Lichovník, Jan Musil, Vladimír Sládeček, Radovan Suchánek, Kateřina Šimáčková, Vojtěch Šimíček (Judge Rapporteur), David Uhlíř, and Jiří Zemánek on the petition of the Municipal Court in Prague seeking to set aside the provision of § 13, para. 2 of Act No. 115/2006 Coll., on Civil Partnership and on Amending Certain Related Acts, with the participation of the Chamber of Deputies and the Senate of the Parliament of the Czech Republic as parties to the proceedings and the Public Defender of Rights as the secondary party to the proceedings, as follows:

The provision of § 13, para. 2 of Act No. 115/2006 Coll., on Civil Partnership and on Amending Certain Related Acts, shall be set aside as of the date of publishing this judgment in the Collection of Laws.

REASONING

I. Summary of the previous proceedings and the petition

1. By means of a petition delivered to the Constitutional Court on 5 March 2015 and filed pursuant to Art. 95, para. 2 of the Constitution of the Czech Republic (hereinafter only as the "Constitution") and the provisions of § 64, para. 3 of Act No. 182/1993 Coll., on the Constitutional Court, as amended (hereinafter only as the "Constitutional Court Act"), the Municipal Court in Prague (hereinafter only as the "Petitioner" or the "Municipal Court") seeks the annulment of the provision of § 13, para. 2 of Act No. 115/2006 Coll., on Civil Partnership and on Amending Certain Related Acts, as amended (hereinafter only as the "Civil Partnership Act").

2. The Petitioner states that the decision of the Municipal District Authority of Prague 13, the Department of Social Services and Healthcare, of 25 March 2014, no. P 13-12735/2014, discontinued the proceedings on the application of Ing. Petr Laně (hereinafter also as the "Plaintiff") seeking inclusion in the register of applicants suitable for becoming adoptive parents, as the applicant failed to satisfy the requirements of the provisions of § 800 of Act No. 89/2012 Coll., Civil Code (hereinafter only as the "Civil Code"). The Plaintiff's appeal was subsequently dismissed by the Prague City Hall, Department of Health Care and Social Services Administration, by means of a decision of 30 April 2014, no. SOC: 608555/2014. The essence of this decision consisted in the fact that the first-level administrative body had decided in accordance with the legal regulations, yet failed to mention that the prohibition of adoption by a person living in a civil partnership arose from the provisions of § 13, para. 2 of the Civil Partnership Act. The Plaintiff challenged this decision by filing an administrative action with the Municipal Court.

3. In the reasoning behind the petition, the Municipal Court states that the prohibition of adoption in such cases arises directly from the statutory regulation according to which the very existence of the civil partnership prevents one of the partners from becoming an adoptive parent of a child, and given the circumstances, no other facts are determined. The Petitioner refers to Art. 1 of the Charter of Fundamental Rights and Freedoms (hereinafter only as the "Charter") and Art. 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter only as the "Convention"), prohibiting any form of discrimination. One may also point out Art. 21 of the Charter of Fundamental Rights of the European Union, explicitly prohibiting discrimination on grounds of sexual orientation. The Petitioner summarises the general adoption regulation contained in the provisions of § 800 of the Civil Code and states that if the applicant for adoption did not live in a marriage or civil partnership, he could become an adoptive parent under certain circumstances. However, if he lives in a civil partnership, the adoption prohibition applies automatically on this ground, without assessing the circumstances whether such an applicant is capable of creating the adequate environment for the proper upbringing of a child. These facts amount to differences which are unjustified, while in addition, there are no reasonable grounds for the different approach applied.

4. For this reason, the Municipal Court petitions to have the contested statutory provision set aside.

II. Compliance with the terms of the proceedings

5. At first, the Constitutional Court addressed the compliance with the terms of the proceedings, stating that the petition had been filed under Art. 95, para. 2 of the Constitution. This provision assumes that "should a court come to the conclusion that a statute which should be applied in the resolution of a matter is in conflict with the constitutional order, it shall submit the matter to the Constitutional Court.

6. In this respect, the Constitutional Court notes that the matter at hand represents the case of the so-called concrete, rather than abstract review of the norms. Regarding the above, the Petitioner undoubtedly has standing to file this petition, as the contested statutory provision directly concerns the matter being resolved by the Municipal Court and if the Constitutional Court did not hold on its constitutionality, it would result, in terms of the rule-of-law state, in an extremely undesirable situation in which the court would be forced to decide in accordance with the statutory provision which, according to the court's firm belief, is inconsistent with the constitutional order.

7. As the Constitutional Court does not have any doubts regarding compliance with other terms of the proceedings either, it proceeded to a substantive assessment of the petition.

III. The proceedings before the Constitutional Court and the statements of the parties to the proceedings and the secondary party to the proceedings

8. Pursuant to the provision of § 69 of the Constitutional Court Act, the Constitutional Court sent the petition to the Chamber of Deputies and the Senate of the Parliament of the Czech Republic (hereinafter only as the "Chamber of Deputies" and the "Senate") as parties to the proceedings and the Government and the Public Defender of Rights, who are entitled to intervene in the proceedings as secondary parties to the proceedings.

9. In its statement to the petition, the Chamber of Deputies noted that Act No. 115/2006 Coll. had been debated in the Chamber of Deputies as a parliamentary bill (document no. 969) and it had been enacted in the wording of proposed amendments on 16 December 2005. The wording of the provision of § 13, para. 2 of this Act has not been amended since 2005. The bill was enacted by both chambers of the Parliament; the Act was signed by the appropriate constitutional authorities and was also duly promulgated.

10. In its statement to the petition, the Senate noted that it had debated and enacted the bill on civil partnership in the wording submitted by the Chamber of Deputies it its 9th session on 26 January 2006, when 65 senators present voted for its enactment and 14 against. In the debate, some senators also addressed the contested statutory provision. The bill was thus enacted in the constitutionally prescribed manner.

11. The Government informed the Constitutional Court that it would not use its right arising from the provision of § 69, para. 2 of the Constitutional Court Act and would not participate in the proceedings.

12. The Public Defender of Rights (hereinafter also as the "Defender") notified that pursuant to the provision of § 69, para. 3 of the Constitutional Court Act, she intended to participate in the proceedings as the secondary party and referred to the report on the inquiry which she had drafted in the Plaintiff's matter (no. 2977/2014/VOP). The legal summaries contained in this

report are as follows: "I. The provisions of § 800 of the Civil Code (2012) do not preclude adoption by civil partners. However, it is excluded by means of the provision of § 13, para. 2 of the Civil Partnership Act. II. Any provision or procedure of the public authority which leads to preventing adoption merely due to the sexual orientation of the potential adoptive parent violates the constitutional order and the Convention for the Protection of Human Rights and Fundamental Freedoms." The Defender substantiated this opinion maintaining that did not find any objective or rational reason for which civil partners should be prevented from adoption, even among the claims of opponents of adoption by civil partners. The absurdity of the situation is illustrated by the fact that the legislature seeks, by means of a statute, to prevent something that may not be normatively regulated, namely children being brought up by civil partners. In fact, this situation is a reality. In addition to the possibility of biological parenthood, civil partners may manage to bring up a child in different ways as well. Most frequently, these are the cases where one of the partners becomes a parent before entering into the partnership and continues to care for the child. The legislature's ambivalence may be illustrated by the wording of § 13, para. 3 of the Civil Partnership Act, which, in such a case, imposes the duty to take care of the child on the other partner. Another option consists in the adoption of a child by one person without de facto life partners having entered into a civil partnership since adoption by a single person is legally permissible. The Defender also referred to judgments of the European Court of Human Rights (hereinafter only as the "ECHR") of Fretté v. France (judgment of 26 February 2002, no. 36515/97) or E. B. v. France (judgment of 22 January 2008, no. 43546/02), where this court concluded that the adoption of a child by homosexually oriented persons might be refused only in the event that there were also other reasons for such a decision, rather than mere sexual orientation of the applicant. In other words, the ECHR does not consider the sexual orientation of an applicant for adoption a legitimate reason for restricting their right to develop a relationship with the child suitable for adoption. As the provision of § 13, para. 2 of the Civil Partnership Act excludes civil partners from the possibility to adopt a child solely due to their sexual orientation, the Defender believes that this provision violates the right to equal treatment as declared in Article 14 of the Convention.

13. The Defender also refers to the international comparison, which shows that out of the 28 European Union countries, persons of the same sex may enter into a marriage in 11 countries and in 6 other states they may enter into a civil partnership. Out of these 17 countries, 13 countries allow joint adoption, as well as the adoption of the partner's child, and 2 countries only the adoption of the partner's child. Only Hungary and the Czech Republic completely forbid civil partners to adopt. The Defender concludes that the present issue is not only a political but also a human rights issue. In this respect, she believes that the contested statutory provision is inconsistent with the right to respect for private and family life under Art. 8 of the Convention and Art. 10, para. 2 of the Charter and the prohibition of discrimination under Art. 14 of the Convention. Finally, the Defender expresses the opinion that the contested statutory provision constituted direct discrimination on the grounds of sexual orientation, thus proposing to have it set aside as unconstitutional.

14. Pursuant to the provisions of § 44 of the Constitutional Court Act, the Constitutional Court ruled in the matter without holding an oral hearing, as it could not be expected to provide any further clarification on the matter.

IV. Assessment of competence and constitutionality of the legislative process

15. As the petition has satisfied all the requirements prescribed by the law, the Constitutional Court could proceed to a substantive review of the contested statutory provision, while in accordance with § 68, para. 2 of the Constitutional Court Act it first addressed the issue of whether it was enacted and published in a constitutionally prescribed manner and within the scope of the authority as provided for by the Constitution. In this respect, however, it did not find any relevant circumstance which would be able to challenge the constitutionality of the manner of debating and enacting the corresponding statute containing the contested provision.

16. Pursuant to the provisions of § 68, para. 2 of the Constitutional Court Act, assessing the constitutionality of the statute with the constitutional order answers three questions: whether it was enacted and published within the scope of authority prescribed by the Constitution, whether it was enacted in a constitutionally prescribed manner, and whether its contents are in compliance with constitutional acts and with statutes in the case of another legal regulation. In the case of the contested provision, there is no doubt that Parliament had the authority to enact it pursuant to Art. 15, para. 1 of the Constitution. As for the manner of enacting the Civil Partnership Act, the Constitutional Court established, on the basis of the observations of the parties to the proceedings, as well as other publicly available documents related to the legislative process, that the bill, put forward by a group of deputies (Anna Čurdová, Jitka Kupčová, Taťána Fischerová, Kateřina Dostálová, Lucie Talmanová, Kateřina Konečná, Zdeněk Jičínský, Vladimír Doležal, Pavel Svoboda, Vlastimil Ostrý, and Vladimír Koníček, Chamber of Deputies 2005, 4th term, document no. 969, in: http://www.psp.cz/sqw/text/tiskt.sqw?o=4&ct=969&ct1=0), was enacted in a constitutionally prescribed manner.

17. For this reason, there is nothing preventing the Constitutional Court from proceeding to the substantive review of the constitutionality of the contested provision.

V. Basis of the contested statutory provision review

V.1. Quotation of the contested provision and other relevant provisions

18. The provisions of § 799 of the Civil Code read as follows:
“(1) Only an adult person having legal capacity may become an adoptive parent, provided that his personal characteristics and way of life, as well as the reasons and motives which lead him to become an adoptive parent, guarantee that he will be a good parent to the child being adopted.
(2) The health condition of an adoptive parent or both adoptive parents must not limit the care for the adopted child to any significant extent.”

19. The provisions of § 800 of the Civil Code read as follows:
“(1) Both or one of the spouses may become adoptive parents. In exceptional cases, another person may become an adoptive parent; in such a case a court shall also decide that the entry concerning the other parent is deleted from the registry of births, deaths and marriages.
(2) When a child is adopted by spouses, the spouses file the application for adoption jointly as joint adoptive parents.”

20. The provisions of § 13 of the Civil Partnership Act read as follows:
(1) The existence of a partnership does not constitute an obstacle to the exercise of the parental responsibility of the partner towards his or her child, nor an obstacle to being awarded the custody of his or her child. The partner who is a parent shall guarantee the child's development and consistently protect the child's interests using adequate educational means so as not to affect the child's dignity or jeopardise his or her health and physical, emotional, intellectual, and moral development.
(2) An ongoing partnership precludes either of the partners from becoming an adoptive parent of a child.
(3) Should one of the partners care for the child and both partners reside in a common household, the other partner shall also contribute to the child's upbringing; the duties related to the protection of the child's development and upbringing shall also apply to this partner.

21. At first, the Constitutional Court finds that in this respect, the "new" Civil Code, in comparison to the regulation included in the provisions of § 63 – 66 of the now ineffective Act No. 94/1963 Coll., on the Family, tended to represent a mere change in the formulation rather than a system and content change. In fact, this Act already prescribed that only natural persons might become adoptive parents (§ 64, para. 1), while only spouses might adopt someone as their common child (§ 66, para. 1). The Act therefore allowed both individual adoption (i.e. by one person), as well as common adoption, while in the latter case, only spouses could become adoptive parents.

22. The quoted applicable legal regulation implies several conclusions. First, the legislature favours adoption by spouses or by one of the spouses owing to the fact that it is in the primary interest of the children that they are provided with the possibility of living in a "complete" family in a standard concept. The possibility of adoption by "another" person, i.e. apparently also a person living alone, represents an exemption to this rule. In this case, however, there must be unambiguous guarantees that the person is able to provide the child with appropriate guarantees for his or her development and satisfying not only material needs. To put it simply, every child should grow up in an environment where they will feel comfortable, where they will perceive the interest and love of people close to them and ultimately will have a sense of security, which is important in order that they may grow up to become a universally developed and reasonably confident personality.

23. The outlined statutory regulation also implies that the provisions contained in the Civil Code do not a priori exclude a person living in a civil partnership from becoming an adoptive parent (this case would include a so-called other person mentioned by the statute), even though this should not be a regular situation, but rather exceptional (see also the provisions of § 3020 of the Civil Code, pursuant to which the provisions of the first, third and fourth chapters concerning marriage and the rights and obligations of spouses apply mutatis mutandis to civil partnerships and the rights and obligations of the partners). For this reason, this option is actually unambiguously prohibited by the contested provision of the Civil Partnership Act. Besides, the explanatory report for the "new" Civil Code related to the provisions of § 800 implies a sketchy statement that "the exhaustive list of the possible 'types' of adoptive parents may be merely derived from the existing legal regulation. (On the contrary, the current provision implies a simple list.) 'Another person' shall mean a person who, in spite of not living alone, does not live in any legally recognised union. However, this does not include civil partners, especially with respect to another legal regulation providing for the relationships of civil partners."

24. At the same time, the course of the legislative process when adopting the Civil Partnership Act did not clearly imply the actual intention of the legislature, the motivations or the arguments and reasoning in order to satisfy the assumption of the reasonable legislature. The explanatory report related to this provision merely implies that "the adoption of a child by civil partners or either of the partners in the course of the civil partnership is to be prohibited. The reason consists in the preference of the child's foster care provided by a heterosexual couple." On the other hand, already at this point, the Constitutional Court notes that even such an abruptly conceived explanation is not appropriate as the argument of the preference of the child's foster care provided by a heterosexual couple would be relevant only if the legislature completely ruled out the adoption by an individual, which, however, is not the case with respect to the above. This applies regardless of other illogicality, when, for instance, the Defender aptly refers to para. 3 of the contested provision imposing the duty onto the other partner to participate in the upbringing of the child in the custody of the civil partner (see below).

V.2. Relevant ECHR case law

25. The issue of adoption of children has been repeatedly addressed by the ECHR case law, which was explicitly pointed out by the Defender. In particular, the ECHR judgments cited below are perceived by the Constitutional Court as the most important with respect to the present case.

26. In its above-cited judgment of Fretté v. France, the applicant applied for prior authorisation to adopt a child in 1991, while in the course of the examination before the administrative bodies, he made no secret of his homosexuality. His application was dismissed and he also failed to prevail before the administrative courts. The arguments of the national authorities referred to his lifestyle and a lack of appropriate safeguards from the perspective of the education of children, family and psychology, despite his otherwise uncontested personal qualities and preconditions to bring up children. Before the ECHR, the applicant objected that his application had been rejected solely because of prejudice about his sexual orientation. The ECHR granted his application only in respect of the right to a due process. In fact, it held (in terms of possible application of Art. 8 and Art. 14 of the Convention) that the Convention does not guarantee the right to adopt and the right to family life implies the existence of the family, and thus the desire to establish one is not sufficient. Nevertheless, the ECHR proceeded from the fact that the French Civil Code allows, in its Art. 343, adoptions by an unmarried person and that the reasons put forward by national authorities for the dismissal implicitly suggested that the applicant's sexual orientation was the decisive factor. For this reason, it assessed the applicant's objection as falling within the scope of Article 8 of the Convention, without ruling as to whether it was the issue of family or private life. Above all, however, the applicant claimed a violation of his private life (§ 28). In the next step, the Court acknowledged that the dismissal pursued a legitimate aim, i.e. the protection of health and the rights of the child. Similarly, it assessed the dismissal as appropriate to the pursued objective, as in the field of adoptions by same-sex couples, the states are provided with a wide margin of appreciation, there was no international consensus on these issues, and the national bodies legitimately and reasonably concluded that the right to adoption had been limited by the interests of the child.

27. In the already cited Grand Chamber judgment of E. B. v. France, the ECHR held on a violation of the Convention owing to the fact that the female applicant of homosexual orientation was not allowed to adopt even though an unmarried person could adopt children

pursuant to the Civil Code. The applicant was therefore discriminated against on the grounds of her sexual orientation. For this reason, it is somewhat debatable to what extent the judgment of E. B. v. France possibly overcomes the judgment of Fretté v. France. From the legal perspective, the matter of E. B. v. France, as a Grand Chamber judgment, carries greater weight and concerns an identical situation where the legal regulation does not prohibit adoption by a homosexually oriented person (i.e. the adoptive parent's sexual orientation is not examined), but in practice the adoption was rejected on the grounds of sexual orientation. In the case of Fretté v. France, however, the ECHR accepted this procedure on the grounds of the child's interests and the absence of international consensus; nevertheless, in the case of E. B., the ECHR held on the violation of the Convention, as it had not found any facts to justify discrimination on the grounds of sexual orientation. Nonetheless, in terms of the facts, there are certain differences in both situations, as pointed out by the judgment of E. B. (§ 70-71). In fact, the case of Fretté concerned a homosexual man without a partner, and the national authorities perceived difficulties in his lifestyle, noticing that he might not be capable of envisaging the practical consequences occasioned by the arrival of a child. On the contrary, the case of E. B. concerned a same-sex couple living together for a long time. Compared to the earlier case of Fretté, these facts may imply a certain distinction applied in the later judgment of E. B., even though these circumstances were not accentuated.

28. In the judgment of Schalk and Kopf v. Austria (24 June 2010, no. 30141/04) the ECHR found that the Convention does not imply an obligation for the state to allow the conclusion of marriage between same-sex couples, and as a result, there was no violation of the Convention. In fact, Article 12 of the Convention does not imply the duty to allow access to marriage to same-sex couples. However, the Court found that the relationship between the applicants (i.e. a same-sex couple living in a stable de facto partnership) fell not only under the notion of private life, but also represented a family life within the meaning of Art. 8 of the Convention (§ 90-95).

29. In the judgment of X and Others v. Austria (19 February 2013, no. 19010/07), the ECHR concluded that Austria violated the Convention upon denying the female partner the possibility of adopting the biological child of her same-sex partner, compared to the situation of an unmarried heterosexual couple. In a similar case of Gas and Dubois v. France (judgment of 15 March 2012, no. 25951/07), the ECHR held that if the partner could not adopt the child of his same-sex partner in a civil union, it did not amount to discrimination on the grounds of sexual orientation. Their status differs from the status of married couples. However, the case of X and Others v. Austria concerns unmarried homosexual female partners, whereas pursuant to the Civil Code, unmarried heterosexual female partners had the full possibility to adopt the child of the other biological parent. The ECHR proceeded from the fact that the Convention did not require allowing unmarried couples to adopt the biological child of the other partner. Unmarried same-sex partners do not find themselves in a situation relevantly similar to a married couple, and thus there was no violation of the Convention in this respect. However, if Austrian law allows unmarried heterosexual couples to adopt the biological child of the other partner, it needs to be assessed whether denying this right to unmarried homosexual couples pursues a legitimate aim and whether it is proportionate. The applicants had lived together in a common household for a long time, and their relationship fell under the notion of family life within the meaning of Art. 8 of the Convention. At the same time, the Austrian Government admitted that same-sex couples could be, in principle, equally suitable for adoption as heterosexual couples. The Court acknowledged that the protection of the traditional family might be, in principle, a legitimate aim justifying differential treatment, as well as protecting the interests of children. In the case of differential treatment on the grounds of sexual

orientation, the government was to prove the need for a different approach to achieve these objectives. The Austrian Government, however, failed to furnish any evidence that upbringing by a same-sex couple might be harmful to the child, and in addition, adoption was also open to a homosexually oriented person, regardless of whether they entered into a civil partnership or lived on their own. The Court emphasized that it did not address the general issue of access of the same-sex partner to the biological child of the other partner, but the differences in treatment between unmarried heterosexual and homosexual couples concerning access to adoption. Provided there are no grounds for prohibition in the case of unregistered same-sex couples, one might tend to expect that courts would assess individual circumstances in particular cases following the best interests of the child. However, courts were not allowed to meaningfully address this issue, as it was legally impossible. For this reason, there was a violation of Art. 14 and 8 of the Convention.

V.3. Other relevant case law

30. In its judgment, no. G 119-120/2004 of 31 December 2015, the Austrian Constitutional Court set aside as unconstitutional the provisions of the Civil Code and the Civil Partnership Act prohibiting joint adoption by civil partners. Already in its previous judgments, the Constitutional Court took the same approach as the ECHR in the case of Schalk and Kopf, stating that the relationships of same-sex persons fall under not only the notion of "private life" but also the notion of "family life" under Art. 8, para. 1 of the Convention in the event that same-sex couples live together in a stable de facto partnership. For instance, this was the case in the decision no. B1405/10 of 22 September 2011, or the decision no. G14/10 of 2 October 2012. In addition, in the judgment no. G16/2013 of 10 December 2013, the Constitutional Court found the contested provisions of the Reproductive Medicine Act unconstitutional (Fortpflanzungsmedizingesetz), concluding that restricting access to reproductive medicine only to spouses and different-sex couples violated Art. 8 in association with Art. 14 of the Convention. And furthermore, in the judgment no. G 18, 19/2013 of 19 June 2013, it considered discriminatory the provisions of the Federal Act on Personal Status (Personenstandsgesetz), which allowed (restricted) concluding a civil partnership only in an official room.

31. In the 2015 case, the applicants included female civil partners living together for a long time, bringing up a biological child belonging to one of them and showing interest in jointly adopting another child. They argued that there was no justification for generally excluding civil partners from the possibility of joint adoption, thus being excluded in advance from the judicial review of their suitability with regard to the best interests of the child, while spouses are generally deemed to be suitable adoptive parents. The Austrian legal system accepts that the child grows up in a family of same-sex persons (in this case, the civil partners are parents of the second applicant's own daughter in legal terms), proceeding from the fact that it is not inappropriate for a child. It has not been factually justified why a person living in a civil partnership may adopt a child as an individual, regardless of whether it is the partner's biological child or step-child who then grows up in such a family of same-sex persons, i.e. also with a male or female partner of the adoptive partner, and why joint adoption is not allowed for civil partners. In their view, the contested legal regulation thus violated the principle of equal treatment and Art. 8 in conjunction with Art. 14 of the Convention.

32. The Constitutional Court concluded that by means of the contested legislation, which allows joint adoption only by spouses and excludes civil partners from joint adoption, the legislature distinguishes, in the possibility of joint adoption, on the grounds of sexual

orientation. The legislature thus treats civil partners unequally as a party to an adoption agreement and civil or life partners of the same or opposite sex in the case of adopting the biological child of the other partner. While joint adoption by civil partners is excluded even in the case when both of them have custody of the child or the partner has already adopted the child, when adopting a step-child, the statute allows parallel (legal) parenthood of biological and adoptive parents. Such unequal treatment is not objectively justified, especially with regard to the viewpoint of the best interests of the child, which derives from Art. 1 of the Federal Act on the Rights of the Child (BGBl. I 4/2011). In addition, it is not implied in Art. 8 in conjunction with Art. 14 of the Convention or Art. 7, para. 1 of the Constitution either. The best interests of the child cannot justify the substantial exclusion of civil partners from the possibility of adoption of a child; on the contrary, it creates tension with this exclusion in a certain respect. The Court labelled as "inappropriate in advance" the arguments justifying the ban that it was not in accordance with the child's interests to grow up with same-sex partners. In addition, the protection of marriage or the traditional family are not suitable arguments either. From the social perspective, civil partnerships do not at all substitute marriage and joint adoption by suitable partners in a particular case may not jeopardise marriage.

V.4. Conclusions arising from the cited case law

33. From the cited judgments, it may be essentially summarised that the Convention does not establish the right to adoption. However, if states decide to allow adoption by certain groups of people (e.g. unmarried persons), they must not take a discriminatory approach (E. B., X. and Others, § 152). For the purposes of assessing the occurrence of discrimination, when searching for a suitable comparator, the ECHR compared individual adoption by a heterosexual and homosexual (Fretté and E. B.), a civil same-sex partnership with a civil heterosexual partnership (Gas and Dubois), and an unregistered same-sex couple with an unmarried heterosexual couple (X. and Others). On the contrary, it did not consider as comparable the legal situation of a civil and married couple and it did not hold on the violation of the Convention provided that, for instance, the Austrian legal system allowed adoption by heterosexual spouses but did not allow the same-sex female partner to adopt the biological child of her partner (X. and Others). The best interests of the child were meant to result in evaluation of the individual circumstances of specific cases (X. and Others). In cases where the difference in treatment is based on sex or sexual orientation, the state must establish that this difference in treatment was justified by a legitimate aim and the means to achieve it were appropriate and necessary.

VI. Arguments of the Constitutional Court

34. The essence of the institute of child adoption rests in accepting a step-child as one's own including all related legal consequences. The origin of this institute dates back to Roman law and its key idea is that the adoption imitates the natural relationship between parents and children (adoptione naturam imitatur – adoption imitates nature, see for instance J. Sedláček in: Fr. Rouček, J. Sedláček: Komentář k československému obecnému zákoníku občanskému [Comments to the Czechoslovak General Civil Code], vol. 1, V. Linhart, Prague, 1935, p. 894). However, adoption and other forms of foster care were always meant to be perceived solely as an alternative solution in the event of a crisis of the natural family and whose aim is the best possible service to the child. We may distinguish three main types of adoption: (1) individual, (2) joint, and (3) the adoption of the biological child of the partner or spouse (the so-called "second parent adoption", "l'adoption coparentale", or "Stiefkindadoption").

35. Above all, the Constitutional Court proceeds from the fact that there is no fundamental right to adopt a child, either at the constitutional level or at the level of the international obligations of the Czech Republic. At the same time, the Court accepts a considerable discretion which the legislature has when regulating the relationships between same-sex partners. As a matter of fact, there is no fundamental right to conclude a marriage (or a civil partnership) between same-sex persons, and consequently, it is a matter of the legislature's political decision whether and in what manner this relationship is to be regulated. Special protection is in fact guaranteed only to parenthood and the family (Art. 32, para. 1 of the Charter). For this reason, the Constitutional Court has found a duty to intervene only in the event that it concludes that a specific selected solution interferes with the fundamental rights of a certain group of people.

36. Furthermore, the Constitutional Court notes that it does not intend to attempt to formulate a generally applicable and concise definition of the notion of "family". In fact, this is primarily the task of other social disciplines (e.g. sociology), which distinguishes, for instance, the so-called complete and incomplete family, nuclear family, two- and multi-generational family, harmonious or pathological family, etc. From the legal perspective, it is crucial to create an environment in which the family enjoys adequate protection and which ensures all the conditions for it to be able to fulfil its basic functions. Therefore, it is sufficient to state that the notion of "family" is understood by the Constitutional Court primarily not as a kind of artificial social construct, but essentially as a biological construct, based on the blood kinship of people who live together, or possibly as a non-family relationship imitating the biological relationship (for more details on adoption, fostering, see for instance S. Radvanová in: S. Radvanová et al.: Rodina a dítě v novém občanském zákoníku [The Family and Child in the New Civil Code], C. H. Beck, 2015, p. 3 et seq.). As regulated already in the General Civil Code, "the family shall mean the grandparents with all their descendants. The relationship between these persons is called kinship; however, the relationship arising between a spouse and the other spouse's relatives is called affinity (§ 40). At present, however, the Civil Code does not legally define the concept of family, which is explained, for instance, by the fact that there are significant "ambiguities in how the family is actually defined within the concept of individual social sciences owing to the fact that in our legal system, the family itself is not a legal entity, unlike its individual members" (M. Hrušáková in: M. Hrušáková, Z. Králíčková: České rodinné právo [Czech Family Law], 3rd edition, Doplněk, 2006, p. 12).

37. The Constitutional Court obviously cannot ignore the fact that there are currently some fundamental changes in the manner of cohabitation, that unlike a more traditional concept of the family, commonly anticipating multiple generations living together, there are ever increasing numbers of people living on their own (so-called singles), the number of unmarried couples (the cohabitation of a male and female partner or any other forms of cohabitation) is approaching the number of married couples, and divorce is seen as something almost natural (for more detailed statistical data, see for instance I. Kohoutová: Socio-demografická homogamie sezdaných a nesezdaných párů [Socio-demographic Homogamy of Married and Unmarried Couples], CSO, 2014). The Constitutional Court cannot "turn a blind eye" to these phenomena. As recently stated by the Constitutional Court in its judgment no. Pl. ÚS 10/15 (19 November 2015, No. 44/2016 Coll.), "it is far from determining in any manner the union in which people should live together. It is undoubtedly the right of every individual." On the other hand, the Constitutional Court emphasises that it has not found the slightest sensible reason for which it should actively contribute to the erosion of the traditional concept of the family and its function in any manner. As expressed by the sociologist I. Možný, "the family

changes but it always serves as a stabilising element in society" (I. Možný: Rodina a společnost [Family and Society], SLON, 2006, p. 14), as "the family is the foundation of the lineage or the continuation of life in future generations" (S. Radvanová, ibid, p. 3). The family therefore arises on the basis of a marriage or common cohabitation of unmarried parents and children, or the cohabitation of only one parent with the child (M. Hrušáková, ibid, p. 13).

38. In the instant case, the Constitutional Court notes that the applicable legal regulations directly imply that the legislature prefers marital relationships, prescribing that only spouses or one of the spouses may become adoptive parents. In addition, this preference follows Art. 6 of the European Convention on the Adoption of Children (No. 132/2000 Coll. of international treaties, hereinafter only as the "Convention on the Adoption of Children"), under which "the law shall not permit a child to be adopted except by either two persons married to each other, whether they adopt simultaneously or successively, or by one person".

39. The Constitutional Court also perceives the preference of this particular form of cohabitation as fully constitutionally conforming, as it corresponds to the essence of the institute of marriage as the closest form of cohabitation of two persons of different sexes, which takes place on the basis of their own free decision, associated not only with a number of rights, but also duties, and the decision to marry is therefore crucial. As a result, marriage clearly differs from other forms of cohabitation, and therefore the very institute of marriage provides a priori the biggest prerequisite for fulfilling the purpose of adoption, which is and must primarily be the best interests of the child. In addition, the Czech Republic is also obliged to do this by the Convention on the Adoption of Children, whose Art. 8, para. 1 and 2 reads that "the competent authority shall not grant an adoption unless it is satisfied that the adoption will be in the best interests of the child. In each case, the competent authority shall pay particular attention to the importance of the adoption providing the child with a stable and harmonious home." It is also necessary to refer to Art. 3 and Art. 21 of the Convention on the Rights of the Child, which imply that in the course of adoption (as well as in the case of any other activity concerning children), the best interests of the child shall be the primary consideration.

40. In the instant case, the essence of the problem consists in the fact that the Civil Code, on the one hand, allows the child to be adopted in exceptional cases by another person (rather than the spouse), whereas at the same time, the Civil Partnership Act expressly excludes that this person should be someone living in a civil partnership. This leads to a situation where the legislature admitted adoption by an individual who does not live in a marital relationship and did not even provide for any restrictions on whether it is a heterosexual or homosexual person. On the other hand, however, the legislature prohibits this individual from living in a civil partnership. Consequently, this results in a situation when, for instance, a person who jointly lives with another same-sex person may apply, without any further conditions, to be included in the register of applicants suitable to become adoptive parents, and this application will be granted provided all the conditions have been met; nevertheless, if in a different (yet factually entirely similar) case, these persons enter into a civil partnership, they are prohibited this option by the statute. This may also result in substantially illogical cases where the same person submits the application about which the administrative proceedings will be initiated, and only after submitting it do they "legalise" their longer-term relationship upon concluding a civil partnership, and consequently they cease to satisfy the basic condition for being included in the relevant register of adoption applicants.

41. In other words, the contested legal regulation unambiguously elevates the formal legal status (a civil partnership) over the factual state. Yet the regulation itself or the explanatory report do not at all clearly imply the rationale which led the legislature to opt for this particular solution, which, owing to the reasons described above, seems illogical, irrational, and ultimately discriminatory in relation to persons who entered into a civil partnership.

42. The afore-mentioned illogicality of the existing legal regulation also has substantial effects in the fact that the contested statutory provision, on the one hand, prohibits any of the civil partners from becoming an adoptive parent of a child, but on the other hand, para. 3 of the same provision explicitly provides that the legislature envisages the factual custody of a child provided by civil partners, and in this respect, it even imposes on the other partner the duties concerning the protection of the child's development and upbringing. Consequently, this results in a situation where, on the one hand, the legislature prohibits the civil partner from adopting a child for a not completely comprehensible reason (the case of the so-called second parent), while simultaneously imposing a duty to take care of them. Furthermore, in this case, the professional literature highly critically states that "with respect to the otherwise legally emerging homoparental childrearing environments, the impossibility of adopting the biological child of the partner appears to be an absurd obstacle to full upbringing of the child in a harmonious family environment" (D. Elischer, in: S. Radvanová, ibid, p. 181).

43. Beyond the scope of the arguments concerning the infringement of the right to equal treatment under Art. 14 of the Convention (and the corresponding regulation contained in the Charter), offered, in this sense, in her statement by the Public Defender of Rights, the Constitutional Court perceives the fundamental constitutional law deficit of the contested statutory provision in its inconsistency with Art. 1, sentence one and Art. 10, para. 1 of the Charter. These provisions stipulate that "all people are free and equal in their dignity and rights" and "everyone has the right to demand that their human dignity, personal honour, and good reputation be respected, and that their name be protected". It is human dignity that the Constitutional Court perceives as the basis of the entire regulation of fundamental rights and freedoms.

44. After all, a similar approach is typical for other countries founded on the rule of law. In this respect, it is sufficient to refer, for instance, to the fact that, pursuant to Art. 79 par. 3 of the German Basic Law, as for the area of fundamental rights, the so-called material core (in addition to the principle of federalism, democracy, welfare state, people's sovereignty, and the separation of powers) also expressly includes Art. 1, para. 1, under which human dignity shall be inviolable and respecting and protecting it shall be the duty of all state authorities. As convincingly argued by Jiří Baroš (Wagnerová/Šimíček/Langášek/Pospíšil et al.: Listina základních práv a svobod – komentář [The Charter of Fundamental Rights and Freedoms – Comments], Wolters Kluwer, 2012, p. 55 et seq.), the concept of human dignity as a fundamental building block of social order could only promote itself when social hierarchies collapsed. Its legal concept was developed primarily in response to the horrors of the Holocaust and, in its present form, it is based on the perception of a human being as a unique personality who is simultaneously a social being as well. Human dignity represents an inviolable value, being part of supra-positive law (see judgment no. II. ÚS 2268/07).

45. In addition, the case law of the Constitutional Court places human dignity at the core of the legal system, defining it as part of the person's "humanity". For this reason, human dignity is violated "in a case where the state power places a specific individual in the role of an object where he becomes merely a means, and is reduced to the form of an interchangeable

quantity" (judgment no. I. ÚS 557/09). For this reason, the Charter also recognises the specific quality of man as an entity and prohibits conduct that would cause a person to question their affiliation to the human family. People's equality in dignity and rights serves as the basis of recognising the value of every human being, regardless of their other characteristics and usefulness or benefit for the whole (judgment no. Pl. ÚS 83/06).

46. It is through the prism of human dignity as a fundamental objective value of humanity and the focal point of other fundamental rights that the contested statutory provision will not stand. In fact, if it is based on the fact that a certain group of persons is excluded from a certain right (albeit stemming not from the constitutional order but a sub-constitutional statute) solely owing to the fact that they have decided to enter into a civil partnership, it thus turns them into de facto "second-rank" individuals and stigmatises them groundlessly in a certain manner, which evokes the idea of their inferiority, fundamental differences from others (apparently "the norm"), and probably also the inability to properly take care of children compared to other people.

47. Nevertheless, the legislature infers this consequence not on the basis that these persons would engage in any objectionable, unethical or even unlawful conduct, but simply from the fact that the persons have entered into a civil partnership, i.e. they behave in a manner allowed and assumed by the statute and do so in an absolutely transparent and predictable manner, while also taking on all the duties and obligations arising from such a civil partnership. After all, as it is implied in scientific research, "consensus rests in recognising homosexuality as an innate unchangeable sexual orientation, which is due to a plurality of factors. The issue of societal reflection on homosexuality may be concluded with a statement that in any case, it is a voluntarily unselected state, independent of the will, and as such, it should not therefore become a pretext for any discrimination in civil society" (see D. Elischer, in: S. Radvanová, ibid, p. 173). Moreover, as the Constitutional Court has already stated above, the legislature opted for this entirely unjustified discrimination against civil partners in a situation where it simultaneously imposed educational obligations concerning the child who has already been taken care of by the other partner (see the repeatedly cited § 13, para. 3 of the Civil Partnership Act).

48. At the same time, the Constitutional Court has found a violation of human dignity (as a fundamental right, interpretive guideline and objective value) also in conjunction with the provisions of Art. 10, para. 1 and 2 of the Charter, under which everyone has the right to demand that their human dignity be respected and the right to be protected from any unauthorised intrusion into their private life and similarly with Art. 8, para. 1 of the Convention, guaranteeing the right to respect for private life. However, the contested statutory provision could not violate the right to protection of family life, also guaranteed by the cited articles, as there is no fundamental right to adoption of a child, and thus a negative decision in an adoption case cannot understandably violate the right to family life either.

49. It remains true that people living in a civil partnership have the undisputed right to privacy, both in its internal and external concept. On the side of the state, however, the protection and respect cannot be fully satisfied if these persons continue to be stigmatised owing to the fact that the statute completely excludes that any of them even apply for adoption. As a matter of fact, the right to privacy also contains the provision of space for development and self-realisation, thus including "the self-determination guarantee in the sense of crucial decision-making on oneself, including decision-making on arranging one's own life (E. Wagnerová in: Wagnerová/Šimíček/Langášek/Pospíšil et al.: Listina základních

práv a svobod – komentář [The Charter of Fundamental Rights and Freedoms – Comments], pp. 281-282). The Constitutional Court is therefore convinced that the contested statutory provision, excluding a group of people (civil partners) from the possibility of adoption of children without any justification, results in an interference with their human dignity and a violation of their right to respect for private life.

VII. Conclusion

50. Due to the fact that the Constitutional Court found the contested statutory provision inconsistent with the right to human dignity, with the right to private life, and with the prohibition of discrimination, as enshrined in Art. 1, Art. 3, para. 1, and Art. 10, para. 1 and 2 of the Charter and Art. 14 of the Convention, pursuant to the provisions of § 70, para. 1 of the Constitutional Court Act, the Constitutional Court has granted the petition filed by the Municipal Court in Prague and has held that the contested provision shall be set aside on the date of publishing this judgment in the Collection of Laws.

Instruction: Judgments of the Constitutional Court may not be appealed (§ 54, para. 2 of the Constitutional Court Act).

In Brno, 14 June 2016

Pavel Rychetský
Chairman of the Constitutional Court

Separate opinion of Judge Ludvík David

I completely agree with the outcome of the judgment but owing to the fact that I disagree with certain parts of its reasoning, I would like to offer the following concurring opinion.

1. As opposed to the judgment, and the dissenting and concurring colleagues, I have looked at the matter from a different perspective. I do believe that more (and positive) attention should be paid to the holder of the fundamental right in the favour of whom it has been decided.

2. The text of the judgment should also have included a comparative section in which the Judge Rapporteur explained the differences and solutions in the relevant regulations of other countries, especially EU Member States. It would have been documented that for instance, the Western European countries, particularly "seaside" countries (Belgium, France or Spain) are significantly more liberal in their approach to civil partnership and the related institutes than the centre of the continent.

3. It is remarkable that the judgment is somehow impersonal. When setting aside the contested legal regulation, even though it relied on the principles (values) of equal treatment and human dignity, it did not hold on the eligibility of the civil partner to properly bring up a child, either individually or in a couple. It would be appropriate to emphasise that the potential of a civil partner is not or may not be any lower than anyone else's.

4. The essence of the judgment consists in providing a civil partner with a possibility of becoming an adoptive parent of a child. In this context, however, the Plenum of the Constitutional Court excessively addressed the institute of the family and it did so in accordance with its existing and conservative trend as far as the extent of the family is concerned (cf. judgment no. Pl. ÚS 10/15 on the (non-) eligibility of the "social father" to adopt the child despite being the biological mother's partner).

5. A strong preference for the traditional heterosexual family with a child has been substantially expressed in the judgment three times.

6. Paragraph 34 addresses adoption and other forms of foster care solely as an alternative solution in the event of "a crisis of the natural family".

7. Pursuant to paragraph 36, the Constitutional Court perceives the family primarily "not as a kind of artificial social construct, but essentially as a biological construct, based on the blood kinship of people who live together".

8. And finally, in paragraph 37, the Constitutional Court absolutely unnecessarily guarantees that "…it has not found the slightest sensible reason for which it should actively contribute to the erosion of the traditional concept of the family and its function in any manner".

9. Therefore, in the concept of the family as a "primarily biological union", the Constitutional Court follows its earlier approach expressed, for instance, in judgment no. II. ÚS 568/2006. However, the European definition of the family (not to mention the US definition) is broader; family relationships also include relationships of siblings or other close relatives, relationships

arising from foster care, as well as stable relationships of same-sex couples living in the common household.

10. The living constitution guides us to respond to the societal development; the margin of appreciation of the Member States of the Council of Europe is not large; pursuant to the well-known judgment no. Pl. ÚS 36/01, this gives rise to an "unsurpassable" standard binding for the Czech Republic as well.

11. The origins of the considerations of the European Court of Human Rights concerning the protection (and the extent) of family life may be traced back to the judgment of its Grand Chamber in the case of Marckx v. Belgium (13 June 1979, no. 6833/74). The issue of the family in terms of cohabitation of homosexual couples was later strongly accentuated before the ECHR, for instance, in the case of Schalk and Kopf v. Germany (judgment of 24 June 2010, no. 30141/04), followed by the case of Vallianatos and Others v. Greece (GC judgment of 7 November 2013, nos. 29381/09 and 32684/09), and more recently in the case of Oliari and Others v. Italy (judgment of 21 July 2015, nos. 18766/11 and 36030/11).

12. At least briefly: Oliari followed the case of Schalk and Kopf by stating that a stable de facto relationship of the same-sex partners sharing a common household falls within the notion of "family life". In a similar situation, Vallianatos concluded that when taking into account the changes of societal perception of civil unions, there is no single manner how to lead a private or family life. Even though the passages of judgment no. Pl. ÚS 7/15 cited above do not expressly dispute this interpretation, they imply a different "inner" preference, while also following the Recommendation CM/Rec(2010)5 of the Committee of Ministers of the Council of Europe on measures to combat discrimination on grounds of sexual orientation or gender identity, as well as the report on its implementation.

13. In my view, the presented considerations are not an end in itself.

14. It cannot be overlooked that through the current judgment, the Constitutional Court (only) enables a person living in a civil partnership to apply for adoption. Any such potential adoptive parent will undoubtedly be subject to considerations of an ordinary court in terms of their suitability or their personality profile, to put it differently. Perhaps it will not be possible to exclude a collision of the adoption application filed by such an individual and an application of any other person. On condition that their eligibility and prerequisites to bring up a child are then considered, it may occur that the court will feel bound not only by the fundamental reasons of the currently published judgment, but also by its conservative value postscripts, which are very close to these reasons and might be mixed up with them. Then, however, a civil partner, as a potential adoptive parent, may end up in a disadvantageous position.

15. The ideas summarised in paragraphs 6 – 8 of this opinion, or possibly closely related considerations, should not have been included in the plenary judgment.

Separate opinion of Judge Jaromír Jirsa

On 14 June 2016, the Plenum of the Constitutional Court unambiguously approved the judgment no. Pl. ÚS 7/15, which sets aside the provision of § 13, para. 2 of Act No. 115/2006 Coll., on Civil Partnership and on Amending Certain Related Acts, on the date of publishing this judgment in the Collection of Laws.

Although I completely agree with the reasons for the decision, I consider it appropriate to offer my brief concurring opinion on the reasoning behind the judgment. It will be brief owing to the fact that I also agree with the reasoning behind the judgment, I only perceive as important that it also emphasises the following aspects:

The essence of the decision rests in the fact that it is humanly degrading and discriminatory that certain persons be excluded from the possibility of individually (rather than jointly) adopting a child exceptionally solely and exclusively due to the fact that they have decided to act in a civically responsible manner and have used the possibility of legalising (i.e. publicly and officially "admitting") a same-sex union by concluding a civil partnership.

On the side of the Constitutional Court, it may not be at all interpreted as a "leap" towards the possibility of joint adoption of a child by civil partners, as it is a purely political issue and it will be up to the legislature to take an appropriate approach. In my view, what matters above all is that individual civil partners may individually adopt a child who will be better cared for provided the custody is granted to an adoptive parent rather than in institutional care.

In addition, the decision of the Constitutional Court does not even mean that one of the civil partners, upon adopting the child of the other partner, would become a "common parent" – in this case, the individual adoption would mean deleting the biological parent from the civil register pursuant to the provision of § 800, para. 1, sentence two of the Civil Code, which reads as follows: "in exceptional cases, another person may become an adoptive parent; in such a case, the court shall also decide on deleting the entry of the second parent from the civil register."

I consider it important that the Constitutional Court emphasises in the reasoning (paragraph 37) that "it has not found the slightest sensible reason for which it should actively contribute to the erosion of the traditional concept of the family and its function in any manner", also in association with the citation that "the family is the foundation of the lineage or the continuation of life in future generations; (S. Radvanová in: S. Radvanová et al.: Rodina a dítě v novém občanském zákoníku [The Family and Child in the New Civil Code], C. H. Beck, 2015, p. 3). This is becoming even more important as in the current "clash of civilisations", various cultures and religions, there have been frequent calls for traditional Christian values, which undoubtedly include the traditional family as well.

Separate opinion of Judge Vladimír Sládeček

Pursuant to § 14 of Act No. 182/1993 Coll., on the Constitutional Court, I hereby submit a dissenting opinion on the decision and the reasoning behind the judgment.

I.

1. I do not support the decision contained in the judgment, not only due to the fact that I have found the reasoning unconvincing. What matters is not the essence of the case but rather the approach taken by the Constitutional Court when addressing the instant case. I do believe that it is primarily up to the democratically elected legislature whether and how it will regulate the issues of the adoption by civil partners or adoptions by same-sex couples.

2. I do not believe that the Constitutional Court should decide on this matter, thus replacing the will of 281 Members of the Parliament of the Czech Republic. In my view, fifteen (or in this case 13) Judges of the Constitutional Court should not assume the status of a body or council of the (impartial) wise or fair, let alone sages, nor take on the role of the third chamber of the Parliament, as is sometimes reproached to the Constitutional Court. In a democratic rule-of-law state, the role of the state authorities (which also applies to the Constitutional Court) is defined by the Constitution and the laws. Under Art. 83 of the Constitution, the Constitutional Court is a "mere" judicial body responsible for the protection of constitutionality.

3. After all, if we put aside the bill currently debated in the Government and concerning the contested provision, it is necessary to point out document no. 320 (Chamber of Deputies, 2014), which contains the bill of the amendment to the Civil Partnership Act, thus directly concerning the issues at hand. Discussion of this document has been put forward to the agenda of the 48th session (starting from 28 June 2016). The Constitutional Court should take a wait-and-see attitude or dismiss the petition, as it has frequently done in the past.

4. In addition, it must be noted that the reasoning behind the decision states (paragraph 35) that in the opinion of the Constitutional Court, there is no fundamental right to adopt a child, whereas at the same time, the Constitutional Court "accentuates a considerable discretion which the legislature has when regulating the relationships between same-sex partners. As a matter of fact, there is no fundamental right to conclude a marriage (or a civil partnership) between same-sex persons, and consequently, it is a matter of the legislature's political decision whether at all and in what manner this relationship is to be regulated". After all, this is also confirmed by the fact that there is no legal regulation of civil partnerships (not to mention adoptions) in quite a high number of EU Member States (e.g. Italy, Lithuania, Latvia, Slovakia, Hungary, and Poland).

5. Furthermore, a similar conclusion has also been implied from the judgment of the European Court of Human Rights in the case of Fretté v. France, which states that "in the field of adoptions by same-sex couples, the states are provided with a wide margin of appreciation" (paragraph 26). An even more cogent opinion may be found in the decision of the French Constitutional Council of 17 May 2013. Among other things, the Constitutional Council declared that it did not have the same authority as the legislature to judge whether the existence of the same sex of the adoptive parents does not constitute an obstacle to creating a

bond between the adoptive parents and children (the decision included in the document drafted by the analytical department of the Constitutional Court upon the request of the Judge Rapporteur).

6. It may be concluded that the Court should respect the autonomous will of the legislature and maintain the judicial self-restraining doctrine, “the key principle governing the constitutional judiciary in democratic rule-of-law states” (judgments nos. Pl. ÚS 11/16 and Pl. ÚS 17/14), i.e. avoiding excessive activism and not interfering with the regulations of the issues belonging to the legislature. The reference to this principle may be found (even though they did not always concern the review of the regulations) in certain judgments of the Constitutional Court (apart from those mentioned above, for instance, in judgments nos. Pl. ÚS 54/05 and Pl. ÚS 50/04), yet unfortunately, though, it may be more frequently found in separate dissenting opinions (judgments nos. Pl. ÚS 15/04, Pl. ÚS 8/07, Pl. ÚS 1/08, Pl. ÚS 25/12, and Pl. ÚS 29/11 and decision no. ÚS 26/11). It seems appropriate to quote again the dissenting opinion of Judge J. Musil (decision no. Pl. ÚS 24/09) and the extract of the judgment of the Federal Constitutional Court (BVerfGe 36, 1, 14 f.): “The principle of judicial self-restraint, to which the Federal Constitutional Court is subjected, does not mean restricting or weakening its … competences but rather stepping down from “running the politics”, i.e. interfering with the space of free political creation as provided and defined by the Constitution. It thus intends to leave open the space of free political creation which the Constitution guarantees for the constitutional bodies.”

II.

7. As for the reasoning behind the petition itself, a few observations may be raised. Let me start with a rather general note: if the majority of the Plenum actually wished to realistically assess the course of the legislative process (paragraph 24), it should not forget that it frequently results in a compromise (yet not always completely rational) solution, preceded by political negotiations. The explanatory report, drafted before debating the bill in the Parliament, hardly provides any relevant information (the same applies to the possible proposed amendments).

8. Section V.3. is entitled “Other relevant case law”, which I perceive as somewhat misleading, as the following text (paragraphs 30 – 32) quotes a single judgment of the Austrian Constitutional Court, the inclusion of which leads to a suspicion that it has been selected on a purely utilitarian basis in order to support the majority opinion. There is no doubt that one could find “other relevant case law” which would not comply with the adopted decision, though, such as the afore-mentioned decision of the French Constitutional Council.

9. Paragraphs 41 and 42 allege the illogicality or irrationality of the regulation; yet it does not have to necessarily mean that the regulation is unconstitutional. Undoubtedly, one might find a number of illogical or irrational provisions in a significant number of laws (cf. also paragraph 7). However, it is appropriate to note that the new Civil Code has contributed to the illogicality to some extent.

10. I consider it somewhat paradoxical to argue using the German Basic Law (paragraph 44), when the Federal Republic of Germany does not explicitly admit adoption by same-sex couples (the document drafted by the analytical department implies that there is an accepted procedure allowing circumvention of the ban).

11. What I also perceive as problematic are the constitutional law arguments themselves. In terms of its content, I do not consider it absolutely consistent, as initially, it seems to be heading towards dismissal of the petition (paragraphs 34 – 39), while suddenly paragraph 40 offers a certain turning point and the following text already "defends" the annulment decision.

12. The majority of the Plenum found an inconsistency with Art. 1, Art. 3, para. 1, and Art. 10, para. 1 and 2 of the Charter of Fundamental Rights and Freedoms and Art. 9, para. 1 and Art. 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms. However, in terms of the actual discrimination (in relation to dignity), the Constitutional Court merely accepts the arguments "offered" by the Public Defender of Rights and "complemented" with citations of the relevant provisions (paragraph 43), which is supposed to be supported with the citation of D. Elischer (paragraph 47). Even compared to the case law of the European Court of Human Rights or the decision of the Austrian Constitutional Court, the constitutional law arguments are rather poor, to put it euphemistically. In essence, the reasoning has failed to address the basic conclusions drawn from the case law of the European Court of Human Rights, i.e. the non-existence of the fundamental right to adopt a child and the fact that the legal regulation concerning the relationships of same-sex couples is left to the national legislation of the Member States. The limit for the legislature, stemming both from the international commitments of the Czech Republic and the case law of the European Court of Human Rights, as well as the Charter of Fundamental Rights and Freedoms and the case law of the Constitutional Court, consists in the prohibition of discrimination and the best interests of the child. The reasoning addresses the review of the contested regulation in terms of these limits only superficially, while not addressing the criterion of the best interests of the child at all. The reasoning even failed to follow the standard practices of the existing case law of the Constitutional Court, such as, for instance, the test of direct discrimination or at least a more thorough analysis of the legitimacy of the distinction, which the issue of adoptions by homosexual couples would certainly deserve.

13. It thus seems that the core of the argumentation (paragraph 43 et seq.) focuses on the violation of human dignity pursuant to Art. 1, para. 1 and Art. 3, para. 1 of the Charter of Fundamental Rights and Freedoms, which I do not perceive as quite appropriate. In fact, the modern concept of human dignity, enshrined in international human rights treaties and the constitutions of democratic states after World War II, is based on the idea according to which every human being has value, emerging solely and exclusively from the very essence of their existence. In addition to the prohibition of torture and other inhuman or degrading treatment or punishment, the existence of basic living conditions, and the issues of protection of the freedom of the individual, the protection of human dignity is also associated with the protection of group identity and non-discrimination. In this respect, the protection of human dignity focuses on protecting the differences arising from natural characteristics of the human being or created by their will or the social environment. The essence of the protection of human dignity results precisely in respecting these differences. In other words, the protection of human dignity consists not in protecting the rights or possibilities which some human beings do not have owing to their nature or due to a social situation, but rather in respecting the fact that they cannot have them. In the reasoning, the violation of human dignity is related to persons of the same sex living in a civil partnership in terms of the (im-) possibility to apply for adoption. The possibility of rearing a child (whether their own or adopted), however, is not a condition for preserving human dignity, not only in the case of homosexual persons, but also heterosexual persons. It is very difficult to accept the conclusion that the person who "formally" does not take care of a child (which may be substantiated by objective reasons) lacks dignity.

14. To conclude, it is worth recalling judgment no. Pl. ÚS 10/15 (the prohibition of the adoption of a child by the partner's parent living in an unmarried union), adopted nearly a year ago and referred to in the reasoning (paragraph 37). When assessing the constitutionality of § 72, para. 1, sentence one of Act No. 94/1963 Coll., on the Family, the Constitutional Court, in the reasoning behind its dismissal, also stated that "the contested legal regulation was not inconsistent with Art. 10, para. 2 of the Charter or Art. 3, para 1 of the Convention on the Rights of the Child. Amending this regulation and possibly allowing adoption by the other parent in the case of an unmarried couple fall completely within the authority of the legislature. At this point, it is appropriate to cite from the concurring opinion of Judge Costa, joined by Judge Spielmann, in the aforementioned judgment in the case of Gas and Dubois v. France: "… there are areas in which the national legislature is better placed than the European Court to bring about change in institutions concerning the family, relations between adults and children, and the concept of marriage." The Constitutional Court shares the same opinion…

Separate opinion of Judge Jiří Zemánek

I share the supporting reasons for the judgment, including the main argument that if the legislature allows the possibility of including homosexual persons in the register of individual applicants suitable for adoption, the prohibition of adoption by persons of the same orientation living in a civil partnership amounts to constitutionally inadmissible discrimination, justifying setting aside the contested statutory provision.

The evolutionary interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms offered by the European Court of Human Rights, the results of which are referred to in this judgment in a balanced manner, is limited by the doctrine of the margin of appreciation, according to which the Court acknowledges that national authorities are in close contact with life in their countries, and thus may better assess the conditions for applying the Convention in terms of local needs than the Court itself. The Court thus does not enforce its unifying role in the application of the Convention unilaterally to the detriment of the principle of subsidiarity, which in this respect, leads to a proper consideration of the historical and cultural differences of individual countries, as reflected in their administrative and judicial case law.

In particular, this applies in area of legislation areas still sensitively perceived in society such as status issues of the lives of same-sex couples. Although it is impossible to categorically oppose the forms of heterosexual and homosexual cohabitation in terms of preconditions for adopting a child, it is inappropriate not to remember objective differences between them, either, which should be taken into consideration by the court when deciding on the adoption of a child whenever there are both alternatives of the adoption solution, thus assessing the individual circumstances of the specific case with respect to the "best interests" of the child, i.e. the (non-) presence of the male and female educational patterns in a couple applying for adoption.

As obiter dictum, pointing out to the ambiguous state of public opinion on this issue in the current Czech society would not explicitly contradict the Court's case law, the consistency of which has not been, after all, stated even in the reasoning behind the judgment (V.4.). Owing to its restraint reflected in the judgment and concerning the definition of the civil partnership as a form of cohabitation which satisfies some important, yet not all the constitutive prerequisites for exercising the right to family life, the Constitutional Court has not facilitated the dialogue on setting the terms and conditions for interpreting the right to respect for private and family life under Art. 8 of the Convention, which needs to be carried out with the European Court of Human Rights and the courts of the State Parties.