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Abstract:

In countries where the institution of registered partnership has been introduced for persons of the same sex, disputes concerning the statutory regulation of this institution have been the subject of constitutional case law. The objections by applicants for constitutional review may take either of two opposite directions. The first is the conservative tendency, querying the admissibility of the institution of registered partnership as such, especially with regard to the constitutional status of marriage and the family. The second direction, which may be called innovative, seeks for removing the restrictions on rights and possibilities of the registered partners, usually with reference to the general principle of equal rights and the prohibition of discrimination. If the democratic legislator hedged his acceptance of the new institution with conditions preventing or restricting child adoption by registered partners, out of concern for the child's well-being or on other grounds, sooner or later such restrictions will come up against criticism questioning their validity from the point of view of the national constitution or the Convention for the Protection of Human Rights and Fundamental Freedoms. In some situations, constitutional courts have acted substitutively for the positive legislator in removing such restrictions.

There have been no applications to the Czech and Austrian constitutional courts against the introduction of the institution of registered partnership, presumably because the national constitutional orders of these countries – unlike the situation in Germany or Hungary – have no provisions for the special protection of marriage. The Czech judgment discussed in this article belongs to the innovative trend and is, in comparison with its counterparts in the constitutional judicature of Germany and Austria, a rather modest step on the road to making

child adoption easier for homosexuals: it sets aside the provision of the Registered Partnership Act of 2005 which has excluded individual adoption of a child by a person living in a registered partnership. The essence of the grounds for this decision boils down to the following: since the legislator admits, in exceptional cases, individual child adoption by an unmarried person regardless – according to the interpretation of the Constitutional Court – of his/her sexual orientation, even though the joint adoption of a child by a (heterosexual) married couple should be taken into consideration as a rule, then the legislator should not prohibit an individual child adoption only because the prospective adopter has entered into a registered partnership. “This statutory restriction will not stand in the light 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 registered 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...”

The author of this article observes that although the authors of the grounds for the judgment refer to *adoptio naturam imitatur* and child’s well-being as the two fundamental principles governing the law on adoption, yet they have failed to notice the provision of the Registered Partnership Act under review as a specific case of relevance of both principles. According to the prevalent opinion in the Polish doctrine on family law, a person’s manifest homosexuality has to be treated as an obstacle debarring him/her from the adoption of a child.

In his dissenting opinion, Judge Vladimír Sládeček has contested the decision of the Constitutional Court as an instance of judicial activism: “What matters is not the essence of the case but rather the approach taken by the Constitutional Court [...] it is primarily up to the democratically elected legislature whether and how it will regulate the issues of adoption by registered partners or adoptions by same-sex couples.” As to the point of view of human dignity, he observes that “... 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. [...]. 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.”