Legislation on Same-Sex Partnerships in the Post-Communist Area: Case Study of the Czech Republic

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Abstract

In the Czech context, the issue of same-sex partnerships can be viewed as a “hot potato”. After long political debates, a law allowing civil unions was adopted in 2006. In the post-communist area, there has been a political struggle over the marriage. The Czech Constitutional Court recently published two key decisions that moved this debate forward. At the same time, two major legislative bills were tabled in the Chamber of Deputies: the first extending marriage to non-heterosexual couples, the second preserving the current status quo with regard to marriage. In the article, we explain these recent Czech legal events in the broader context of the perception of marriage in the post-communist area. We argue that if the Court decides in the future on the constitutionality of same-sex marriages, it should take into account the principles of human dignity and the best interest of the child.

Keywords

Czech Republic – legislation – Constitutional Court – marriage – registered partnerships
No female charms ever have me bewitched!
To have a friend was my heart’s one desire!
My wish was granted me,
I lived sweet friendship’s dream
in Zdeněk’s company and knew no ire.
When Zdeněk mine in sacred ecstasy.
With music sweet chased all gloom from my heart,
I felt transported there, in daring fantasy.
(Bedřich Smetana’s opera “Dalibor”; libretto by Josef Wenzig, 1868)

1 Introduction

Since the legalisation of same-sex civil unions as “registered partnerships” in the Czech Republic (2006), this institution has been used, according to available statistics, by more than three thousand couples. Most of them were men, although growing interest among women has been observed recently as well. Thanks to registered partnership, partners can, for example, become statutory heirs to each other or have the right to access their partner’s health information. However, their privileges are still relatively limited compared to lawful husbands and wives. The following study outlines those limitations but also the legislative development, the legislative proposals for “equal marriage” that have been tabled and the specifics of the political discourse on them.

In the Czech context, this issue could be viewed as a “hot potato”, in view of the length of discussions of these legislative proposals in the Czech political system (the registered partnership debate started in the mid-1990s) but also more generally, in view of certain political unwillingness to deal with the topic. In the paper, we will also point to a kind of contradiction – one between politicians’ unwillingness to deal with registered partnership legislation, their generally strong conservative approach that is predominant and mostly taken irrespective of political-ideological divisions, on one hand, and the relatively liberal attitudes of the general population, on the other hand.1

1 See Conor O’Dwyer, Coming Out of Communism: The Emergence of LGBT Activism in Eastern Europe (NYU Press, New York, 2018); Adam Bodnar and Anna Śledzińska-Simon, “Between
The paper is structured as follows. Let us first state that while we focus on legislative-legal perspectives on the subject matter, we occasionally draw on approaches outside legal theory as well. Our argument is framed by the specifics of political culture and legislation in countries of the former communist bloc. There are abundant examples from countries like the Czech Republic or Hungary, on which one might demonstrate a number of divergent legal perspectives that differentiate the former eastern bloc countries from the West. In Western Europe, in particular, there is a relatively long tradition of same-sex unions, whether such legislative changes in constitutional and family law were adopted directly by parliaments or by the judiciary, especially constitutional courts. The situation has also changed in Latin America over the last more than ten years, where the courts also got involved in this issue. In the theoretical part, we operationalize the elementary concepts that regularly appear in case law in favour of same-sex couples, especially family life and non-discrimination. We also explain some of the post-socialist perspectives on these issues.

Subsequently, we will briefly outline the development and individual stages of the legislative discussion on registered partnership in the Czech Republic. In the main part of the present study, we analyse two judgments of the Czech Constitutional Court from 2016 and 2017 that concern the rights of people of non-heterosexual orientation. These judgments can be considered

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ground-breaking as they affect the intimate and family lives of thousands of couples. It should be noted that quite recently, in June 2021, the Constitutional Court rejected the proposal of the District Court for Prague 5, which could, if successful, bring the registered partnership a bit closer to the level of marriage. The Court refused to repeal the part of the Civil Code which generally sets out which areas of marriage rights and obligations apply analogously to registered partnerships. The Constitutional Court ruled out that the adoption of a child by a registered partner is not among these rights. According to most justices, the District Court’s proposal should have focused more on specific sections of the Civil Code, which regulate adoption and do not mention registered partners. The official reason for rejecting the proposal was the ineligibility of the District Court. In the Czech Republic, the ordinary courts may propose for annulment only those paragraphs which they must apply in the present case and which they consider unconstitutional. In any case, the justices were not united in their decision-making; four of them presented their dissenting opinions. However, the issue itself has already been transferred, at least temporarily, to the parliamentary level. That is why we present two legislative proposals, one to allow marriage for couples of such orientation and a counterproposal to define marriage as a union between a man and a woman that was tabled by Czech MPs of a conservative orientation.

In the paper we focus our attention on the situation in the Czech Republic and the ongoing struggle between political groups, which can be simply labelled as a liberal and a conservative. In addition, on the basis of the analysis of the breakthrough decisions of the Constitutional Court, we also indicate the possible direction of its juridical argumentation in this matter. It cannot be ruled out that one of these political groups will later apply the Court to assess the constitutionality of the adopted law. In this sense, the arguments offered in this paper may be helpful and instructive for the Court.

2 Theoretical Framework

2.1 Key Legal Concepts under Scrutiny

According to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the Convention), “everyone has the right to respect for his private and family life, his home and his correspondence.” As it is clear from the case law of the European Court

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of Human Rights (ECtHR), its doctrine strictly distinguishes between positive and negative obligations of the state towards the individual, i.e. the obligation of the state to actively create conditions for realizing the individual’s right, and its obligation to refrain from unlawful interference. In practice, this leads to a different treatment by states of couples of different sexual orientations, as well as different realization of the concept of family life. As will be shown below on the example of a legislative proposal for equal marriage, the right of same-sex couples in the Czech Republic “to family life differs dramatically in its content and scope from the right of heterosexuals to family life.”

The ECtHR has repeatedly ruled that if a form of cohabitation of two persons (typically civil unions) has already been enacted, it must not be intended for heterosexuals only, and that it would be discriminatory if the degree of protection afforded to a same-sex couple was lower than that to an unmarried heterosexual couple. The Court also recognized the long-term stable relationship of two women living in a civil union who together raise a child conceived by assisted reproduction performed by one of them as a family life worthy of protection under Article 8 of the Convention.

Article 8 understands family life as the routine interaction and activities that a family shares. Current family models already take same-sex couples into account. In other words, an example of good family life is when members of a family enjoy each other’s company and spend a lot of time doing things together, regardless of gender or sexual orientation. This is in line with ECtHR’s judgment in the case Schalk and Kopf v. Austria (2010), which stipulated that same-sex relationships constitute family life under Article 8 and that the right to marry under Article 12 is not confined to opposite-sex couples under “all circumstances.”

However, the Court simultaneously ruled that Member States are under no obligation to protect family life by providing same-sex couples with access to marriage under Article 12 of the Convention, which states that “men and women of marriageable age shall have the right to marry and to found a family, regardless of sexual orientation.”

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8 ECtHR, X and others v. Austria 53 ILM 64, ECtHR Judgment (19 February 19 2013) App. No. 19010/07.
according to the national laws governing the exercise of this right." Similarly, the Court ruled in the case P. B. and J. S. v. Austria (2010) that “since 2001, when the decision in Mata Esteve was given, a rapid evolution of social attitudes towards same-sex couples has taken place in many member States. Since then a considerable number of member States have afforded legal recognition to same-sex couples. Certain provisions of EU law also reflect a growing tendency to include same-sex couples in the notion of ‘family’.

The prohibition of discrimination on the basis of sexual orientation is the second key concept that is fundamental to the discussion and arguments concerning same-sex couples. As in other cases, preferential treatment of heterosexual couples results in discriminatory action against non-heterosexual minorities that marginalizes them and, formally as well as materially, refuses to grant them and/or respect their rights equal to other members of the society. Discrimination can take the form of restrictions on access to fundamental human rights, employment, housing or public services. It can also take the form of harassment or persecution. An extreme case is the so-called hate violence, attacks motivated by intolerance and disrespect towards a minority. Discrimination on the basis of sexual orientation is a particularly harsh denial of dignity and equality because it attacks sexual intimacy, which lies at the very core of the individual’s identity and happiness. It concerns not only the right to equality but also the right to privacy and family life, and even further, the


fundamental right to the free development of one’s own personality. Therefore, non-discrimination is based on respect of the individual, his/her fundamental rights and equal treatment.

At EU level, the anti-discrimination system is based on Directive 2000/78/EC of November 27, 2000, which offers the overall protection framework for combating discrimination in employment and occupation on the grounds of religion or belief, disability, age, or sexual orientation. The ECtHR’s decisions related to this issue are, exactly as in the case of the concept of family life, quite abundant16 and have already been subject to thorough academic scrutiny.17 They are based particularly on Articles 3 and 14 of the Convention, although the Court’s decisions did not always deal explicitly with issues of sexual-orientation-based discrimination.18

The latest contribution in this area is the judgment of the Austrian Constitutional Court from 2017. In its rationale the Court states that “[the] discriminating effect is reflected in the fact that on account of the different terms used to designate a person’s marital status (‘married’ vs. ‘living in a registered partnership’), persons living in a same-sex partnership have to disclose their sexual orientation even in situations in which it is not and must not be of any significance and, especially against the historical background of this issue, they are at risk of being discriminated against.”19 In this way, the ruling takes the notion of non-discrimination to a new level, including the rejection of the symbolic stigmatization entailed by the lack of access to marital status because of legal constraints.


19 Der Verfassungsgerichthof, G 258–259/2017–9, December 4, 2017, Art. 2.5.
2.2  *Post-Communist Perspective(s) and Family Law*

There is no doubt that family policy and the legal rights of (same-sex) couples have been fundamentally transformed over the past three decades in European countries. After 1989, civil unions spread to Nordic countries. Quite later, in the late 1990s, many West European countries began following suit, adopting similar but often less generous legal provisions. For example, Germany only introduced marriages for couples regardless of sexual orientation in 2017 (“Ehe für homosexuelle Paare”), although before (since 2001) there had been an institute of registered life partnerships. Throughout the latter part of the 1990s and early 2000s, some post-socialist Central and East European countries implemented their own same-sex couples-friendly policies, including Hungary (unregistered cohabitations: 1996, registered partnerships: 2009), Slovenia (2006), and the Czech Republic (2006).

These changes in family law were not easy and were closely related to major shifts in overall social attitudes. Years after Robert Putnam formulated his thesis that doubts about the lasting nature of democratic development are due to differences in “social history and social context”, we find ample evidence from the post-communist region that speaks in his favour. There is a kind of post-totalitarian syndrome that continues to affect people’s political attitudes and thinking. A result of negative practices taking place in those countries’

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political life, the syndrome helps us explain the current weariness of, aversion to, and disenchantment with politics.24

Democratisation processes in Czech society were launched by the political changes after 1989. They included an increasingly open discussion of an array of former taboos. Among them were issues of the non-heterosexual minority and advocacy for its rights in the majority society.25 The first organisations defending the rights of non-heterosexual people emerged along with the first debates on instituting registered partnership. The society or, more precisely, Czech politics were not prepared for this, especially in the 1990s. This led some to strictly oppose any concessions in this regard.

The Czech Republic and Slovenia were the first countries of the former communist bloc to legalise civil unions of non-heterosexual couples. As early as in 2006, such couples were allowed by law to enter registered partnership, a legal union that safeguarded a number of marriage-like rights for them. Those included the right to health information, mutual representation, a mutual duty to maintain and support etc. However, equality with heterosexual couples was not reached. For example, the Registered Partnership Act does not allow the couples to adopt children and no community property is established for the partners after registration. In the Czech Republic nowadays, registered partnership can be concluded by two same-sex adults (two women or two men) of whom at least one is a Czech citizen. It is concluded at a designated register office. The following part focuses on details of the development of Czech legal regulation of same-sex relationships.

3 Registered Partnerships “Made in Czechia”

Act No. 115/2006 Coll., on Registered Partnership and Amendments to Some Related Laws (hereinafter as “Registered Partnership Act”), the central legal norm that institutes same-sex civil unions in the Czech Republic, came into


effect on July 1, 2006. Before that date, an interesting evolution of legislation and social discourse took place that can be summarised into three stages: (1) the change in thinking stage, (2) the confrontation stage and (3) the acceptance stage.

3.1 The Stage of Change in Thinking
As stated above, the political upheaval of 1989 opened the door for a number of novel political issues. Communism had intentionally refused to address those issues and reinforced orthodox-conservative approaches to the rights of the non-heterosexual minority. Therefore, the emergence of the first organisations as early as in 1990 was rather shocking. Instead of a legislative focus, it was primarily the effort to spark social debate that stood out at this stage. However, the political arena was faced with the first demands as well. As early as in 1992, the SOHO Association, which had become a kind of leading initiative, published the first concrete proposal for incorporating registered partnership in the Family Act and the Civil Code. It circulated a petition to support its registered partnership initiative. In the year 1995, the association even prepared the first draft bill on registered partnership. The Ministry of Justice first refused to put the bill on the agenda of the Government of the Czech Republic; following minor adaptations, the item was eventually tabled, but it was voted down by the Government in that same year.

3.2 The Confrontation Stage
Negative positions of the Government and the Chamber of Deputies (the lower chamber of the Czech legislature) followed in the years 1997 and 1998, this time to private members’ bills on registered partnership. At that time, the expert community including academics but also celebrities joined in the public debate as well. The MPs who tabled the proposals came from the right wing (the Civic Democratic Party; ODS) as well as the left wing (the Czech Social Democratic Party; ČSSD and the Communist Party of Bohemia and Moravia; KSČM). However, it was the conservative right that yielded an above-average number of opponents of instituting registered partnership. Headed by Mr. Václav Klaus (later the country’s President), the liberal-conservative ODS criticised especially the planned tax cuts and adoptions for same-sex couples.

At the turn of the millennium, SOHO transformed into the Gay Initiative and started working on another legislative proposal. In 2003, a draft bill on registered partnership of same-sex individuals was prepared for intra-governmental consultation procedure. In the following year, however, the procedure on the bill was suspended indefinitely. In 2004, the Gay Initiative and the Gay and Lesbian League joined forces to prepare a private member’s bill on
registered partnership. In the Chamber of Deputies, the bill was met with a relatively heated debate. At the same time, the Chamber was no longer strictly opposed: a transformation of the conservative attitudes of the majority formerly seen under ODS-led governments was apparently underway. In other words, the demands of non-heterosexual people no longer fell on deaf ears in the Social Democratic government (but also more generally in the changing social climate). Yet this did not make a difference as the bill was rejected by a margin of one vote in the third reading in the spring of in 2005.26 That, however, gave rise to additional activities. Immediately, another member’s bill was tabled in which the material comments from the previous bill’s debate were incorporated. In 2006, it was passed by both the Chamber of Deputies and the Senate. Yet there are also presidential powers in the legislative process and the then President of the Czech Republic, Václav Klaus, asserted his right to veto the bill. He argued as follows: “[S]ame-sex partnerships do belong in the life of the Czech society and our legal system (as a result of our generally liberal worldview), but state-registered partnership of same-sex couples does not belong in our legal system (the institute has nothing in common with liberalism and merely takes advantage of the state to assert certain groups’ claims and demands).”27 However, as his veto was overridden by the Chamber of Deputies and the bill was finally enacted, the Czech Republic became the first post-communist country in which legal provisions on the relationships of non-heterosexual couples came into effect.

3.3 The Acceptance Stage

In 2006, the registered partnership institute meant a breakthrough for same-sex couples. Non-heterosexual partners can visit each other in the hospital and become each other’s heirs. At the same time, they continue to be merely registered, rather than married, and there is no community property. In other words: while all assets obtained by traditional married couples after their wedding belong to both partners (unless a pre-marital contract provides otherwise), registered partners cannot count on anything to that effect. Until recently, too,

adoption of children by registered individuals was out of question, although this was overturned by the Constitutional Court in 2016.28

The aforementioned judgment of the Constitutional Court, along with a follow-up one from 2017, is going to be analysed below. Nowadays, at least one of the same-sex partners can adopt a child (while a joint adoption by the couple is not allowed). There is an abundance of differences between both forms of cohabitation that continue to be in place – and those are targeted by the 2018 bill to open marriage for same-sex couples. We are going to present in detail and analyse that bill, along with an alternative bill to petrify the current definition of marriage and elevate it to the constitutional level.

4 The 2016 Decision of the Czech Constitutional Court

The Constitutional Court of the Czech Republic ruled in June 2016 that single non-heterosexuals can apply for individual adoption of a child. The judgment does not relate to joint adoption by couples, which the Civil Code allows only for married, i.e. heterosexual couples. Registered partners were thus disadvantaged compared to other persons without there being a reasonable reason. Therefore, the Plenum of the Court complied with the petition of the Municipal Court in Prague and, as of the day of the publication of the ruling in the Collection of Laws, it abolished the provision of para. 13 Section 2 of the Registered Partnership Act (No. 115/2006) which prevented the adoption by registered, i.e. non-heterosexual partners.

4.1 Court’s Position and Reasoning

The Court concluded that the contested legal provision contradicted the right to human dignity. The fundamental reason for finding a violation of the right to equal treatment under Art. 1 of the Charter of Fundamental Rights and Freedoms, which is an inherent part of the Czech constitutional order, was mainly the irrationality of the legislation. An individual person in no legal relationship could become an adoptive parent, regardless of his or her sexual orientation, but by entering a registered partnership he/she lost that possibility. The Municipal Court in Prague was dealing with a lawsuit of a person who lived in a registered partnership and had not been included in the register of applicants eligible to become adoptive parents because such a possibility

was explicitly forbidden for registered partners, as mentioned above. The Municipal Court stayed the proceedings on this action and brought the case before the Constitutional Court because it considered the legal provision in question to be discriminatory and therefore unconstitutional.

The Constitutional Court based its reasoning primarily on the notion and value of human dignity. This is not surprising since the objective system of constitutional values is organized hierarchically with a privileged position of human dignity, which “is superior to all other values, and therefore (...) these values must be defined and interpreted in boundaries delimited by human dignity.”

The Court explicitly stated in its 2016 judgment that “the contested statutory provision [i.e. para. 13, section 2 of the Registered Partnership Act; added by author] 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.”

This argument may also be crucial in future decisions made by the Constitutional Court in cases of non-heterosexual people’s rights. Indeed, in one of its previous judgments, the Court stated expressis verbis that “one of the cornerstones of our constitutional order and the content of the whole Charter of Fundamental Rights and Freedoms – which is a part of it – is the equality of the free individual in dignity and rights.”

A very similar line of argument was also adopted by the Portuguese Constitutional Court in its 2010 decision dealing with same-sex marriage: “When it regulates marriage, the ordinary legislator is not only obliged to guarantee free access to this legal relationship under conditions of full equality, but also to comply with other constitutional parameters, such as that of respect for the founding principle of the Republic and of the system of fundamental rights – the dignity of the human person.”

Another key argument of the Czech Constitutional Court on child adoption by a person living in a same-sex union was that there is no fundamental right

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to adopt a child, either at the constitutional level or at the level of the Czech Republic’s international obligations. At the same time, the Court accepted the considerable freedom the legislature has in regulating relations between same-sex partners. There is no fundamental right to marriage between such persons and therefore, according to the Court, it is up to the legislator to decide whether or not to regulate this relationship at all. In the case, the Court built on the fact that it is clear directly from the legislation that the legislature prefers a marital relationship (i.e. partnership between partners of different sex) when it stipulates that the spouses or one of the spouses may become adoptive parents. Almost immediately after this decision, calls for greater equality began to emerge in professional circles, i.e. “just as the ban on individual adoption has been lifted [by the Court], [same-sex] partners should also be allowed to adopt (children) jointly. After all, enabling the adoption of unrelated children by registered partners will not lead to their actual adoption but will only allow registered partners to apply for adoption.”

According to the Court, the essence of the problem is that current Civil Code on the one hand allows exceptional adoption by an unmarried person but, at the same time explicitly excludes a person living in a registered partnership. With its decision to repeal the aforementioned provisions of the Registered Partnership Act, the Court changed this materially. It should be kept in mind, however, that the Civil Code (unlike the Constitution, as will be clarified later) is very clear about what can be deemed a marriage in the Czech Republic: “Marriage is a permanent union of a man and a woman formed in a manner provided by this Act. The primary purpose of marriage is the foundation of a family, proper upbringing of children and mutual support and assistance.”

However, it should be noted that the Civil Code is subordinate to the Constitution. This is one of the reasons why, in the Czech Republic, a few years after this decision, a legislative proposal was introduced by conservatively-oriented parliamentarians in order to “protect” the so-called traditional marriage by its explicit definition in the Constitution. That proposal was inspired by some other Eastern European post-socialist countries.

Even more interesting than the Court’s decision to allow adoption by an individual living in a registered partnership is the narrative on the family it uses, as well as its socially conservative reasoning. On the one hand, the Court claims that “it does not intend to attempt to formulate a generally applicable


34 Act No. 89/2012 Coll., the Civil Code, para. 655.
and concise definition of the notion of ‘family’;\textsuperscript{35} on the other hand, it highlights that “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)... 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.”\textsuperscript{36} The cohabitation of two non-heterosexual persons, although in an official form of registered partnership, is not implicitly regarded by the Court as a family relationship: “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.”\textsuperscript{37}

\subsection*{4.2 Interpretation of the 2016 Decision}

We are going to argue that this is an unnecessarily engaged view strongly beyond the perception of marriage as written in the Charter of Fundamental Rights and Freedoms. The Charter merely states that “[p]arenthood and the family are under the protection of the law” and that “[i]t is the parents’ right to care for and bring up their children; children have the right to parental upbringing and care.”\textsuperscript{38} In this case, the Court abandoned the doctrine of judicial self-restraint. Judge Ludvík David also pointed this out in his dissenting opinion on the decision where he wrote that “[a] strong preference for the traditional heterosexual family with a child has been substantially expressed in the judgment three times.”\textsuperscript{39} The Court’s arguments centred on an anachronistic, conservative and very romantic notion of marriage and its current societal quality. Here we mean the different and varied forms of family life, as well as the relatively high divorce rate seen today.

The Court admitted that the society has been changing but insisted on its ideal legal form of coexistence, which, according to the Court, is limited to the marriage of two persons of different sexes. It perceived its preference of this 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

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\textsuperscript{35} The Constitutional Court of the Czech Republic, file No. Pl. ÚS 7/15 of 14 June 2016, Art. 36.
\textsuperscript{36} Ibid., Art. 37.
\textsuperscript{37} Ibid.
\textsuperscript{38} Charter of Fundamental Rights and Freedoms of the Czech Republic, Art. 32 (1, 4).
\textsuperscript{39} Ludvík David’s dissenting opinion to the Decision of the Constitutional Court of the Czech Republic, file No. Pl. ÚS 7/15 of 14 June 2016, Art. 5.
\end{flushleft}
decision, associated not only with a number of rights, but also duties, and the decision to marry is therefore crucial.”

It should be noted, then, that this kind of argument does not take into account the fact that “marriage has unfolded across human history in markedly different ways, not only in terms of what acts or rituals constitute the threshold of marriage but also what relationships obtain between people in marriages, how children are understood in relation to their parents, and what duties parents have toward their children.”

Although the Court prefers the so-called traditional, i.e. heteronormative family as the “ideal type”, its decision allowing the adoption of a child by single non-heterosexuals was heavily criticized by a group of lawyers who base their reasoning on conservative political ideology. According to them, “the decision is flawed in particular by ignoring the fact that the family based on a lasting communion of one man and one woman is the fundamental unit of the state, implying the state’s serious positive obligation to protect the family...” It can be concluded that the Constitutional Court built its judgment on the assumption that the state’s task is to fulfil the wishes of individuals, and if any group of individuals wishes to have a child and call themselves parents, it is the state’s obligation to comply. In doing so, the Court arbitrarily placed itself above the constitution-maker, violating the principle of officiality in a serious way.

5 The 2017 Decision of the Czech Constitutional Court

5.1 Court’s Position and Reasoning

In 2017, the Constitutional Court of the Czech Republic issued its breakthrough decision recognizing both spouses of the same sex as parents of a child. The Court decided in the case of a Czech man and a Danish man who married in the U.S. and were bringing up a child. This child was given birth by a surrogate mother. Both men had been registered as the child’s parents in a State of California birth certificate since its birth. The fathers attempted to have them both included in the Czech birth certificate. The Supreme Court dismissed it because it would be contrary to “public order”, a so-called indefinite legal term that has different interpretations in the Czech legal system. Thanks to the

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ruling of the Constitutional Court, both parents could obtain equal rights to their child in the Czech Republic. The case was subsequently returned to the Supreme Court of the Czech Republic. Only on the basis of its decision can the second parent be entered in the Czech population register and in the Czech birth certificate of the child.

The Constitutional Court was well aware of the existing case law of the European Court of Human Rights, according to which family life can exist between non-heterosexual couples as well as between heterosexual couples.\textsuperscript{43} Thus, the Court found that in the “California-Czech” case, “family life between the first and second complainants and the third complainant was established using the institute of the surrogate mother.”\textsuperscript{44} The Court further stated that “[s]ince the marriage was concluded between the complainants under foreign law and legal parenthood applies in relation to both of them and there is no doubt that the child has close bonds to both of them, all three of them have a family life...”\textsuperscript{45} However, the Constitutional Court’s ruling concerns only parenthood arising abroad. In the Czech Republic, non-heterosexual couples cannot adopt a child together and the Czech legal system does not allow the adoption of a biological child by the other partner in such a couple.

The Court also, once again, operates with the already mentioned term of “traditional family”, which is particularly popular with the right-wing, conservative part of the political spectrum and also appeared in the Court’s previous rulings. This term exists in the current civic and political discourse in a broader geographical context. As is well known, “Eastern Europe has unexpectedly become a battleground for the social-conservative agenda and actors that support traditional families and limited access to abortion, oppose gender parity, same-sex marriage, and adoption of children by same-sex couples.”\textsuperscript{46} There are several reasons for this. In particular, there is a link between the post-socialist societal heritage and religiously determined morality, although in the case of the Czech Republic, it cannot be unequivocally argued that “morality of our culture is especially Christian morality, [the] legal system built on it includes many areas of discriminatory politics in [the] life of homosexuals and homosexual couples.”\textsuperscript{47} As pointed out by the Czech jurist Jiří Baroš, “the

\textsuperscript{44} The Constitutional Court of the Czech Republic, file No. I. ÚS 3226/16 of 29 June 2017, Art. 19.
\textsuperscript{45} Ibd., Art. 24.
\textsuperscript{46} Guasti and Bustikova, \textit{op. cit.} note 26, at 16.
5.2 **Interpretation of the 2017 Decision**

In many cases, “what made state language conservative and biased was a complex of socio-cultural factors.” 49 Like the year before, the Constitutional Court’s 2017 decision failed to give up certain stereotypical concepts, including the term traditional family, and interpreted its judgment in the face of the alleged danger to such a heteronormatively constructed family that might come from one direction or another. “[T]he interest in protecting the traditional family, even though it is generally a strong legitimate interest, cannot outweigh all contradictory interests,” 50 the constitutional judges say in their decision, and continue: “According to the Constitutional Court, in this specific case, it is unacceptable that such a stigmatisation of the complainants should occur under the pretext of maintaining traditional family values.” 51 (…) Recognising the parenthood of the second complainant does not have a negative impact on the interests of any third parties, and it is not capable of jeopardising the traditional family either.” 52

Furthermore, the Court takes into account an important legal concept, namely “the best interest of the child”. In that regard, the Court points out that “in this case it has not even found any arguments to suggest that the best interest of the child could consist in a decision other than the recognition of the complainants’ parenthood.” 53 It was outside the Court’s remit to assess the legitimacy of the marriage of two non-heterosexual persons and the direct psychological impact of this life union on the child’s life and health. The Court merely stated that this type of partnership had been duly concluded in accordance with applicable U.S. law. In any case, it would be “prejudicial to allege that the ‘best interests’ of children are incompatible with same-sex marriage.” 54

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50 The Constitutional Court of the Czech Republic, file No. pi. ÚS 3226/16 of 29 June 2017, Art. 43.
51 Ibid., Art. 47.
52 Ibid., Art. 48.
53 Ibid., Art. 36.
54 Murphy, op. cit. note 41, at 302.
Paradoxically, the best interest of the child, hand-in-hand with the constitutional value of human dignity, could be the strongest arguments which the Constitutional Court could rely upon in its future decision making, whether it would concern the constitutional conformity of same-sex marriage (or the non-conformity of its indirect prohibition through a heteronormative constitutional definition of marriage), or the joint adoption of children by such couples. It does not have to refer merely to the definition of family life and the prohibition of discrimination, as described above in the theoretical part. Marriage strengthens the mutual love and belonging of the couple that concluded it and should, if functional, also has positive consequences for society and national economy. Differently put, “marriage adds stability to a relationship. The more stable, solid relationships there are, the better for society. (...) Not only does legalizing same-sex marriage improve the lives of children with same-sex parents, it encourages those parents to be more committed to each other.”\(^55\) The Court can be expected to play an important role in this area, as in many other countries in similar cases, considering that “it has so far acted as an active (even activist) body that has extended both its powers and the consequences of its decision making.”\(^56\)

In a broader context of the Czech legal system, such an argument could be even more important vis-à-vis the potential abolishing of the institute of registered partnership and its replacement with full-fledged marriage because “the scope of the rights guaranteed by registered partnerships is not fully comparable to marriage and it is generally viewed by the homosexual community as a lower form of marriage (inferior bond).”\(^57\) This can be hardly surprising when looking at the debate on the topic in the more progressive American society decades ago. In a student note from 1973, which is among the first pieces of legal scholarship laying out the case for same-sex marriage and was published by the Yale Law Journal, a very similar reasoning can be seen: “A quasi-marital


status might satisfy many of the interests of homosexuals in gaining marriage licenses, but it would inevitably fall short of fully normalizing their relationships. A legislative stigma of deviance would remain.\textsuperscript{58}

Undoubtedly, marriage is a special type of \textit{social good} governed by the state and reserved by it to its citizens. The emancipatory struggles of non-heterosexual persons across history have naturally been resulting in being granted the right to marry. From a sociological perspective, “the social group of those who do not hold a given \textit{good} is trying to interpret a particular social valuation formula (actually a formula of recognition), propose its redefinition, or even apply a different social valuation formula or another form of recognition. It does so mostly by articulating certain values that it presents as fundamental or key.”\textsuperscript{59} Among such values is without any doubt the value of human dignity and, in the potential case of joint child adoption, the best interests of the child.

6 \hspace{1cm} \textbf{Equal Marriage Act: the Proposal}

The first legislative proposal aimed at amending the Civil Code was submitted by a group of Czech MPs on 13 June 2018.\textsuperscript{60} Its purpose is to modify the definition of marriage so that it is not a union of a man and a woman but merely of “two people”. In the Czech Republic, a dualistic model of life partnership exists, i.e. in addition to marriage there is also an institution open to same-sex couples only. This model can be compared to the legal doctrine of “separate but equal”. The explanatory memorandum to the proposal then states that there are many differences between the existing registered partnership and marriage as it is currently regulated by Czech law: “These differences in the scope of rights and obligations exist both at a level that can be described as symbolic and at a


\textsuperscript{59} Ondřej Lánský, \textit{Je třeba zavrhnout liberalismus? K jednomu problému modernity} (Filosofia, Prague, 2015), at 46.

\textsuperscript{60} In this context, it should be added that the EU has one of the most extensive anti-discrimination legislations in the world; see Resolution of the European Parliament of 7 February 2018 on protection and non-discrimination with regard to minorities in the EU Member States (2017/2937(rsp)). The Court of Justice of the European Union ruled in June 2018 that EU countries that have not legalised same-sex marriage must at least respect the residency rights of same-sex spouses who want to live together in their territory; ECJ, Case C-673/16, \textit{Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Others} (2018) ecli:EU:C:2018:385. See also Alina Tryfonidou, “The EU Top Court Rules that Married Same-Sex Couples Can Move Freely Between EU Member States as ‘Spouses’”; Case C-673/16, \textit{Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne}, 27 \textit{Feminist Legal Studies} (2019), 211–221.
practical level, but in particular these differences negatively affect the position of children reared by lesbian and gay couples. There are dozens of existing differences; they can be found in more than a hundred pieces of legislation.61

These differences include the status of the union before the law and in a broader social context, both with regard to the title of the union and to the formal acts associated with its conclusion. Second, different value is attached by Czech law to these two types of unions. While marriage is regarded as an "essential element of family law",62 registered partnership is just an "administrative act".63 Third, an engaged couple can marry at almost any register office,64 whilst same-sex partners can only be registered by 14 designated government offices.65 The marriage ceremony is celebrated with two witnesses,66 while there are no witnesses in a registered partnership ceremony. Marriage grants an in-law relationship between one spouse and the relatives of the other spouse,67 but the law, for example, does not recognize siblings-in-law of registered partners. A marrying couple is entitled to two days off, but the law does not regulate any time off for registering partners. Registered partnership does not give rise to community property, partners can only be co-owners. There is no arrangement for the settlement of co-ownership in the event of a break-up of a relationship, unlike in marriage. When marrying, the engaged couple can determine what common surname they will use,68 but this is not possible with a registered partnership and it can only be requested after registration ceremony. Moreover, spouses are entitled to widow’s and widower’s pension69 but registered partners are not. After a husband/wife’s death, the entitlement to various social benefits (pension, sickness benefits, etc.) is transferred to the surviving wife/husband,70 but this is not the case in a registered partnership.

In relation to children, the spouse can adopt the child of his/her spouse (for example, from a previous relationship), spouses can jointly adopt a child from

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61 The legislative proposal of Mps Radka Maxová and others for promulgation of an Act amending Act no. 89/2012 Coll., the Civil Code, at 6.
62 Act No. 89/2012 Coll., the Civil Code, para. 3.
63 Act No. 115/2006 Coll. on registered partnership, para. 2.
64 Act No. 89/2012 Coll., the Civil Code, para. 664.
65 Act No. 301/2000 Coll. on register offices, names and surnames, para. 3; Annex No. 4 of the Decree of the Ministry of the Interior implementing the Act on register offices, names and surnames.
66 Act No. 89/2012 Coll., the Civil Code, para. 656.
67 Act No. 89/2012 Coll., the Civil Code, paras. 22, 774.
68 Act No. 89/2012 Coll., the Civil Code, para. 660.
69 Act No. 155/1995 Coll. on pension insurance, para. 49.
70 Act No. 187/2006 Coll. on sickness insurance, para. 51.
institutional care and can become common foster parents.\(^\text{71}\) None of this is possible for registered partners. In the event of the death of a husband or wife, the testator’s children are both his/her legal heirs and forced heirs;\(^\text{72}\) in marriage, children are entitled to an orphan’s pension in relation to their parent. In a registered partnership, children are not legally allowed to inherit from a partner who raises them but is not their rightfully recognized parent. Children are not entitled to an orphan’s pension in relation to the partner who is not their biological parent. A solution to the existing unequal status of these two types of life partnerships may be to “equalize” the rights. On the other hand, “even the granting of the same rights and obligations, but under a different heading, still confers only secondary status on the same-sex couples, inter alia at a symbolic level, when they are denied to marry, with marriage having the symbolic meaning of a union of two persons.”\(^\text{73}\)

The proponents of the Equal Marriage Act argue: “At the marriage ceremony, the engaged couple usually promises love, respect, fidelity and sharing of all good and evil until death. These are the values whose fulfilment is one of the main factors influencing the quality of marriage. Lesbian and gay couples have been proven not only to fulfil these values in the same way as others, but they have been statistically more stable than marriages over the existence of a registered partnership.”\(^\text{74}\) They perceive the family “as a dynamic societally and culturally conditioned system changing in time and space. It is a system of relations with a complex internal structure and links, even to its environment. At the same time, a conclusion about the functionality of a family cannot be drawn from its appearance. There is no single ‘right’ model of healthy family functioning.”\(^\text{75}\)

People simply choose different models of common or individual life. Consequently, the role of law is to respond flexibly to these facts. More than a decade ago, some scholarly studies highlighted the fact of changing socio-economic conditions of the Czech families: “Demographic statistics and sociological surveys show a reduced willingness of today’s young people to marry and, on the contrary, their tendency to remain in unmarried cohabitation or so-called Living Apart Together, which does not always end in marriage; they postpone the starting of a family, choose single motherhood and childlessness.

\(^\text{71}\) Act No. 89/2012 Coll., the Civil Code, paras. 800, 832, 964.
\(^\text{72}\) Act No. 89/2012 Coll., the Civil Code, paras. 1633, 1635, 1643.
\(^\text{73}\) The legislative proposal of MPs Radka Maxová and others for promulgation of Act amending Act no. 89/2012 Coll., the Civil Code, at 16.
\(^\text{74}\) Ibid., 11–12.
\(^\text{75}\) Ibid., 12.
They exhibit relatively frequent break-up of marriage and the emergence of single-parent families with small children, often poor, especially if they are headed by mother, and lacking the economic involvement of fathers in the lives of children.76 It is then clear that overall family life as such is part of social processes and subject to alterations. In a way, the development of Czech families copies, with some delay, the trends coming especially from Western countries – although with some specific dissimilarities and peculiarities.77

7 Constitutional Protection of “Traditional Marriage”

Another legislative proposal came just two days after the previous one. Its purpose is to provide a constitutional regulation of marriage as a union of man and woman. The authors of the proposal want not only to preserve the status quo, but also to strengthen the existing form of marriage by incorporating it, in addition to the Civil Code, in the Constitution of the Czech Republic, along the lines of some other Central-Eastern European countries.78 Their parliamentary effort is part of a wider religiously driven political movement that conceives the legalization of same-sex marriages as a direct threat to religious freedom.79 They perceive the family based on the marriage of partners of two different sexes primarily through an economic lens. The functions of the family, according to the proposal, include, in particular, “reproductive functions, ensuring reproduction and generational exchange of the population, socialization functions, ensuring universal upbringing of children, socio-economic functions, i.e. functioning of the family as a distinct and self-sufficient economic unit and regenerative and supportive functions...”80 “It is a legitimate

80 The legislative proposal of MPs Marek Výborný and others for promulgation of Constitutional Act amending Resolution no. 2/1993 Coll. of the Presidency of the Czech National Council on Declaration of the Charter of Fundamental Rights and Freedoms as part of the constitutional order of the Czech Republic, at 3.
requirement of the state that the funds it spends on social security and family support go first and foremost to an environment in which there are legal safeguards for its stability, since it can best and most effectively serve its purpose. In particular, a [heteronormative; added by author] marriage-based family provides such guarantees.”81 The authors of the proposal refer to the historical tradition of marriage and look for its roots in ancient Israel and the Bible. Their argument is not only historical but also based on natural law.

Although the authors of the proposal do not openly admit that it is a measure aimed at preventing the legalization of equal marriage, we are going to argue that this precisely is its purpose. Indirectly, this can be traced in the explanatory memorandum which states: “The proposed constitutional protection of marriage, in addition to the protection of marital cohabitation as such, also protects the concept of marriage, exclusively as a union of a man and a woman. This aspect of the proposed constitutional norm is also extremely important, as it prevents ill-judged legislative or interpretative experiments that could otherwise potentially affect sub-constitutional marriage legislation.”82 In these views, we can clearly identify and hear echoes of those ideas that were presented in the 1990s in a part of American legal science where the same-sex marriage issue was vividly discussed:

“Thus, the definition of marriage as a cross-gender union is not merely a matter of arbitrary conception or semantic wordplay; it is fundamental to the concept and nature of marriage itself. A same-sex relationship is something else; it may have many good partnership qualities, even some similar-to-marriage qualities, but it does not possess the unique nature of the cross-gender union that is marriage.”83

It is quite symbolic that, unlike the previous proposal of Equal Marriage Act, the authors of this one do not argue with any current scientific studies or the case law of constitutional courts in the Euro-Atlantic area. Their arguments are anchored, as seen above, in the Judeo-Christian religious tradition. The proposing MPs see the role of constitutional law in protecting the status quo, not in responding to the changing conditions and circumstances of society. It was precisely against such rigid interpretations of the family and marriage that the Supreme Court of Canada claimed in its key decision more than a decade ago:

81 Ibid., 4.
82 Ibid., 5; italics in original.
“The reference to ‘Christendom’ is telling. ...a society of shared social values where marriage and religion were thought to be inseparable. This is no longer the case. Canada is a pluralistic society. Marriage, from the perspective of the state, is a civil institution.”

8 Conclusion

We introduced our study with an account of the post-communist social situation. Then we described the evolutionary stages of registered partnership in the Czech Republic and discussed analyses of two pieces of case law and two bills related to marriage. We can conclude that approximately since the year 2020, the Czech society has exhibited increasing support for liberalising the cohabitation of non-heterosexual couples, which spans across society and has grown among middle-aged people.

While the bill on equal marriage no longer divides society so much, the rift among legislators continues to exist. When proponents tabled a bill so that gay or lesbian couples can conclude marriage, the conservatives argued that the constitution should provide for marriage as an exclusive union of a man and a woman, in line with the constitutional definitions in some other post-communist countries of Eastern Europe. The opponents of officially legalised and state-sanctioned same-sex partnerships argue that children must have both a male and a female model in their family. In contrast, the proponents want to give them a chance to make full use of this model of cohabitation.

At the end of April 2021, the Chamber of Deputies decided that the two bills, namely that one liberalizing the concept of marriage, as well as the conservative one concerning the “protection” of the current form of marriage through an amendment to the Charter of Fundamental Rights and Freedoms, will go into the second reading stage. As indicated above, their legislative path in the Chamber of Deputies has been very complicated. In October 2021, the general election took place, which generated a new composition of the Chamber of Deputies. Given the emerging right-wing and largely conservative cabinet, it is unlikely that a legislative proposal for equal marriage will be resubmitted or even adopted. In any case, no matter which of the bills is adopted, the “defeated” political group could ask the Constitutional Court for its opinion regarding the law’s constitutionality. On the basis of its existing case law, it can be assumed that in any future decision-making on the matter the Court will rely on the values of human dignity and best interest of the child.

84 2004 SCC 79, p. 713, para. 22.
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