Between Dignity and Exclusion

LGBTQ+ in the Case Law of the Czech Constitutional Court

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Introduction

The protection of the position of LGBTQ+ persons often produces a bitter dilemma between the advocates of traditional values and the advocates of values brought by changes in society. It is a complex and sensitive area which touches upon tradition, religion, and morals, as well as constitutional principles such as equality, the protection of one's autonomy and privacy, and human dignity. Each side adamantly presents strong opinions which often reflect some eternal questions of constitutional democracy – such as what is public and what is the private sphere of an individual, and who should make decisions about the most intimate questions concerning one's life: the legislature or the judge?

Such heated debates are not a new phenomenon. They have accompanied all major social movements and the emergence of new rights reflecting the development of modern society. With regard to LGBTQ+ persons, this evolution has seen the decriminalization of sexual relationships between same-sex persons, legal recognition of same-sex relationships and parental rights, and the recognition of gender identity and its status. In order to enforce their rights, LGBTQ+ persons have used, just as previous social movements had done, public opinion, legislation, and legal disputes. It is clear that since the historically first judgment, in which the Hawaii Supreme Court[1] decided that it was contrary to the principle of equality to refuse to grant the permission to same-sex couples to marry, the constitutional courts have had a key role to play in the debate on the rights of LGBTQ+ persons, in fighting prejudice, and in formulating legal arguments.

This contribution explores the position and reasoning of the Czech Constitutional Court with respect to these debates surrounding the status of LGBTQ+ persons. In the last few years, the Court has had the opportunity to examine this issue from several key perspectives, namely with regard to child adoption by same-sex couples, recognition of another country's decision on parenthood, and the protection of gender identity. The contribution offers an analytic insight into the Constitutional Court's case law, as well as a critical evaluation of the development of the Court's decisions.

Child adoption by a civil partner in a conservative judgment

The Constitutional Court dealt with discrimination based on sexual orientation for the first time when it reviewed compliance of the Civil Partnership Act with the Constitution, as the act in question precluded child adoption by an individual living in a civil partnership.[2] Although the Constitutional Court repealed the contested provision, the reasoning reflects the

[1] Hawaii Supreme Court decision in Baehr v Lewin - 74 Haw. 530, 852 P.2d 44 (1993).
[2] Judgment of the Constitutional Court of 14 June 2016, file no. Pl. ÚS 7/15, Civil Partnership as Preclusion to Individual Adoption of a Child.

contemporary conservative attitude toward the institution of family and marriage.[3] In its reasoning the Court combined traditional arguments with non-discrimination and protection of human dignity for persons living in a civil partnership, thus creating a patchwork of rather contradictory arguments and implications. This approach influenced future court decisions with respect to the parental rights of same-sex couples and gender identity.

First, the Constitutional Court based its reasoning on the fact that there is no fundamental right to child adoption, at either the constitutional or international level. Under Article 32 (1) of the Charter, special constitutional protection is afforded solely to parenthood and the family. The Court understands the family not as a social construct "*but essentially as a biological construct, based on blood kinship*", as the foundation of the lineage or the continuation of life in future generations[4]. The Court supported its approach by referring to the provisions in the Austrian Civil Code of 1811. At the same time, the Court rejected a pluralist concept of family, stating that it did not intend to actively contribute to the erosion of the traditional family and its role.

The Constitutional Court adopted the same approach to marriage, characterising it 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*"[5]. Because of this specific nature of marriage, which distinguishes it from other forms of cohabitation, marriage is predestined to fulfil the ultimate objective of adoption by promoting the best interests of the child.

Nevertheless, the Constitutional Court concluded that the contested provision was discriminatory. But rather than discrimination on the grounds of sexual orientation, the Court found discrimination in the inconsistent and unsystematic regulation of child adoption in the Civil Code and the Civil Partnership Act. While the general child adoption provisions in the Civil Code allow child adoption by a person other than a married person, without stipulating any restrictions in terms of the sexual orientation of such person, the Civil Partnership Act precludes adoption by a person living in a civil partnership. The Court did not find any reasons which led the legislature to opt for this particular solution which is ultimately discriminatory in relation to persons who entered into a civil partnership.[6]

In addition to the violation of the non-discrimination principle, the Constitutional Court found that the contested provision violated human dignity, on all levels of interpretation with the exception of one which, however, directly concerns the restrictions for same-sex couples, namely the right to family life. The Court concluded that the contested provisions violated human dignity as a fundamental objective value of humanity and the focal point of other fundamental rights, because the provisions excluded a certain group of persons 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*

[3] Cf. for example the judgment file no. II. ÚS 568/06 or file no. Pl. ÚS 10/15.
[4] Judgment file no. Pl. ÚS 7/15, paragraph 36.
[5] Paragraph 39.
[6] Paragraph 41 et seq.

compared to other people."[7] The Constitutional Court supported this conclusion by referring to scientific research which implies that there is consensus about recognising homosexuality as an unchangeable sexual orientation, which is a voluntarily unselected state, independent of one's will, and as such, it should not therefore become a pretext for any discrimination. Furthermore, the Constitutional Court concluded that the contested provision was inconsistent with the concept of human dignity as a fundamental right to human dignity and protection against any unauthorized intrusion into private and family life under Article 10 (1) and (2) of the Charter. However, the Court did not find a violation of the right to the respect for family life of civil partners: "*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*". In its reasoning, the Court analysed the ECHR case law according to which the relationship of the cohabiting same-sex persons is covered by the concept of family life under Article 8 of the Convention, but in the given case the Court did not apply this approach to the relationship of civil partners.

Although the Constitutional Court repealed the contested provision, certain shortcomings of its reasoning soon came to the forefront. The emphasis on the biological concept rather than a pluralist concept of family, formulated in this judgment, was repeatedly used as the traditional family argument in future court decisions concerning not only parenthood of same-sex couples, but also the right to gender identity.

In his separate opinion, Judge Ludvík David pointed out that a strong preference for the traditional family which is based on blood kinship as opposed to a more pluralist approach (comprising same-sex couples living in a common household) led to certain functional difficulties. In particular, he highlighted potential consequences that the preference of a biological family could bring about: when considering the circumstances of an applicant – a person living in a civil partnership – "*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."*[8] As indicated above, these concerns turned out to be justified with respect to the case law of the Constitutional Court. But they were also justified with respect to the decisions of general courts which referred to the Constitutional Court's judgment (file no. Pl. ÚS 7/15) according to which family was primarily a biological construct based on blood kinship and only secondarily was it a social institution.[9]

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[7] Paragraph 46.

[8] Paragraph 14 of the separate opinion of Judge David to judgment file no. Pl. ÚS 7/15.

[9] This is evident, for example, from the Constitutional Court's judgment file no. III. ÚS 1741/21 in which the Court dealt with a constitutional complaint against the decisions of ordinary courts which had dismissed the complainant's child arrangements proposal after separation from her long-term partner – the mother of the child who was born upon mutual agreement of both partners and who was brough up by both of them. The courts had dismissed her proposal with the reasoning that the relationship between the complainant and the minor child was not, according to the law, equivalent to the relationship of parents; the relationship was not a family relationship in general terms and the complainant was to be regarded as a person socially close to the child in accordance with s. 927 of the Civil Code. In that case it is irrelevant that the Constitutional Court found the decisions of general courts compliant with the Constitution in terms of their factual findings; what is relevant is the fact that the Court evaluated the findings using the concept of family based on the biological criterion and traditional blood kinship. The Constitutional Court reasoned that the district court had "*explained the difference between the*

It should be added that the remaining three separate opinions (Judges Jirsa and Zemánek concerning the reasoning, and Judge Sládeček concerning the reasoning and the operative part) warn against an overly liberal and open approach of the judgment to child adoption by same-sex couples, emphasising the fact that such questions should not be decided by the Constitutional Court but by the legislature; in other words, the national legislature is much better placed than a (European) judge to change the doctrines concerning families, relationships between adults and children, and marriage. These arguments were later used in the reasoning of majority opinions concerning the repeal of statutory provisions which precluded the recognition of other countries' decisions on parental rights of same-sex persons and the right to gender identity recognition without the surgical procedure prescribed by the law.

Rainbow families and a move toward pluralism

The most progressive judgment in terms of its reasoning and operative part is the judgment of 2017 in which the Constitutional Court decided on the recognition of another country's decision regarding parenthood of same-sex couples, which is an issue that has already been settled in ECHR case law.[10] The case did not concern a repeal of statutes or provisions, but an individual constitutional complaint. The case dealt with the recognition of a judgment delivered by a US Californian court by which two married men were registered as parents in the birth certificate of a child born to a surrogate mother who carried an embryo to term resulting from artificial fertilisation from an anonymous egg donor and the semen of the complainants. The Czech Supreme Court first recognized the Californian judgment in the territory of the Czech Republic with respect to the parenthood (paternity) of the first complainant who had been registered as father/parent in the birth certificate issued by California. With regard to the second complainant who had been registered as mother/parent in the birth certificate of the child, the Supreme Court dismissed the application, and its decision was then contested by the constitutional complaint. According to the Supreme Court, it would have been contrary to s. 15 (1) (e) of Act No. 91/2012 Sb., governing private international law to grant the application, because under that provision it is not possible to recognise a foreign judgment which would clearly contravene public order. The Supreme Court argued that if the application had been granted, the situation that would have arisen would virtually amount to child adoption by same-sex persons, which is not allowed under Czech law.

The Constitutional Court inquired whether the contested judgment of the Supreme Court affected the rights of the complainants to private and family life, non-discrimination, and the principle of the best interest of the child.[11] The Constitutional Court started the review by posing the question of whether there was a family life between the complainants. In compliance with ECHR case law concerning the interpretation of Article 8 of the Convention[12], the Court stated that although Czech law did not regulate surrogacy, in the

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partner of a parent and biological parents, referring to the case law of the Constitutional Court according to which family is primarily a biological construct based on traditional blood kinship and only secondarily a social institution."

[10] The Constitutional Court's judgment file no. I. ÚS 3226/16.

[11] The complainants included both parents and the child.

[12] The ECHR judgment Wagner and J.M.W.L. v. Luxembourg from 28 June 2007, no. 76240/01; judgment Mennesson v. France from 26 June 2014, no. 65192/11; judgment Schalk and Kopf v. Austria from 24 June

given case the recognition of a family (lawfully established abroad through surrogacy) did not conflict with the Czech public order. Marriage was created between the complainants, both of them were legal parents in accordance with foreign law, and there was no doubt that the child had close ties to both of them and that all three complainants had a family life together within the meaning of Article 8 of the Convention and Article 10 (2) of the Charter.

ECHR case law further indicates that when the court adjudicates on children, abstract principles may not be preferred over the best interests of the child in a concrete case. Thus the Constitutional Court found the contested judgment flawed because the judgment did not deal with the best interests of the child at all and it only argued that the recognition of the parenthood of the second complainant would be in conflict with public order and that the Czech law did not allow child adoption for same-sex couples. Conversely, the Constitutional Court considered the case against the backdrop of the best interests of the child. The Court reasoned that although the case turned on parenthood determination, which has to do with the status of a person and as such it belongs to the competence of the legislature, the case did not entail creation of a new family relationship, but only recognition of a legal relationship.

Again, the Court based its reasoning on settled ECHR case law which stipulates that if there is a family life between certain persons, all public bodies are obligated to act so as to let this relationship develop, and legal safeguards must be put in place to enable the integration of a child within the family. *"[S]tates cannot neglect the legal status created in another country on the basis of which there is a family life within the meaning of Art. 8 of the Convention.*" [13] The Constitutional Court concluded that "*failure to recognise a foreign decision determining parenthood to a child of two persons of the same sex in a situation in which family life was de facto and legally constituted between them in the form of surrogacy on the grounds that Czech law does not allow the parenthood of two persons of the same sex is contrary to the best interest of the child protected by Article 3 (1) of the Convention on the Rights of the Child*."[14]

The Constitutional Court further concluded that the contested judgment, which refused to recognize a family bond between the second complainant and the child, violated their right to family life under Article 10 (2) of the Charter. It was to a certain extent a departure from the existing approach for the Constitutional Court to conclude that although the protection of a traditional family is a strong legitimate interest, it does not always prevail over any other (conflicting) interests. The Constitutional Court referred to the previous judgment file no. Pl. ÚS 7/15:. "*Even though the complainants enjoy a family life, then when visiting the Czech Republic, at the moment of disembarking an aircraft at Václav Havel Airport, any legal relationship between the second and third complainant ceases to exist as a consequence of the contested judgment. This is solely due to the fact that the first and second complainants are a homosexual couple, i.e., on the grounds of their sexual orientation. In the Czech Republic, the contested judgment thus turns the first and second complainant into second-class individuals on the grounds of their sexual orientation, even though, as already adjudicated by the*

2010, no. 30141/04, paragraph 94; see also e.g. judgment Oliary and others v. Italy from 21 July 2015, no. 18766/11, paragraph 103.

[13] Judgment file no. I.ÚS 3226/16 paragraph 34.

[14] Paragraph 55.

Constitutional Court, sexual orientation is not a matter of choice but rather a personal characteristic which cannot be changed (see the … judgment file no. Pl. ÚS 7/15)".[15]

Despite that reference, in the judgment file no. Pl. ÚS 7/15 the Constitutional Court addressed the protection of family life differently; in fact, the Court did not find that there was a family life between cohabiting same-sex persons. It was only in this later judgment that the Constitutional Court detailed the conditions under which other interests can prevail over the protection of a traditional family. In line with ECHR case law, the Constitutional Court stated that since a de facto and legal family relationship already existed between the complainants, the legitimate interest in the protection of a traditional family was overridden by the duty of public bodies to act so as to let the existing family relationship develop. With regard to the creation of new family relationships between homosexual couples and children, that issue was "*at the full discretion of the legislature, which is not obliged to lay the legal foundations for such relationships if substantiated by the protection of the traditional family*".[16]

In this judgment the Constitutional Court raised an important and underdiscussed question: How is a traditional family, in other than abstract terms, threatened by the existence of same-sex parenthood? The Court argued that in the given case there was no threat because no new family bond was created, and the recognition of parenthood under those circumstances had no negative impact on the interests of third persons. Next, the Constitutional Court raised the same question in connection with s. 15 (1) (e) of the Act Governing Private International Law, according to which it is not possible to recognize a foreign decision if such recognition clearly contravenes public order. The Court emphasised that the word "clearly" means that this provision is limited to "*to exceptional cases in which it has been established that there is a genuine and sufficiently serious threat to any of the fundamental interests of society*".[17] However, the Supreme Court did not clarify in the contested judgment why the recognition of a foreign decision on the parenthood of the second complainant amounted to such a genuine and serious threat to the fundamental interests of society.

Although this Constitutional Court judgment has offered so far the most pluralist approach to family life, it has raised a number of questions. Firstly, the Constitutional Court once again (just as in the judgment file no. Pl. ÚS 7/15) avoided the issue of discrimination on the grounds of sexual orientation. On the one hand, the Court stated that "*the contested judgment thus turns the first and second complainant into second-class individuals on the grounds of their sexual orientation";* on the other hand, the Court stated that it was not necessary to address this question because the first complainant's right was not affected through discrimination as the Supreme Court had granted his application, and with regard to the second complainant, the Constitutional Court recognized his parental rights.

Another issue is the repeated argument (used already in the judgment file no. Pl. ÚS 7/15) that sexual orientation is not a matter of choice but rather a personal characteristic which cannot be changed, and therefore it should not serve as a pretext for discrimination. This raises the question of whether sexual orientation would not have enjoyed constitutional protection if it

[15] Paragraph 46.
[16] Paragraph 47.
[17] Paragraph 57.

had been a matter of choice; in other words, whether non-heterosexual sexual orientation is constitutionally protected solely if it is inborn and not a matter of choice.

The Constitutional Court had no opportunity to elaborate on these ideas because the subsequent decisions took a different direction. While this and the previously mentioned judgment were quite accommodating towards same-sex couples with regard to the interpretation of constitutional principles, the following decisions became very restrictive both as regards the protection of the family life of same-sex couples and later gender identity. This became apparent in the next judgment dealing with the recognition of a foreign decision on child adoption by civil partners.

Rainbow families as a threat to sovereignty

In 2020 the Constitutional Court revisited the question of recognition of a foreign decision on the parenthood of same-sex couples in proceedings on the repeal of statutes or provisions thereof. In the judgment file no. Pl. ÚS 6/20 the Constitutional Court dismissed the application of the Regional Court in Prague to repeal a part of s. 63 (1) of the Act Governing Private International Law, namely the words "*and if the adoption would also be permissible according to the substantive law provisions of Czech law*."[18] It was argued in the application that the contested provision, in conjunction with s. 800 of the Civil Code, precluded in the Czech Republic the recognition of another country's decision on the adoption of minor children if the adopters were not married or if they lived in a civil partnership. The applicant contended that the contested provision was inconsistent with Article 3 of the Convention on the Rights of the Child because it prevented the court deciding on the recognition of the adoption decision from considering the best interests of the child; likewise, the contested provision was inconsistent with Article 10 (2) and Article 36 (1) of the Charter because it prevented the court from guaranteeing the protection of family life to adopters and adoptees who had a legitimate interest in addressing the legal status of such family in the territory of the Czech Republic.

The reasoning of the Constitutional Court can be summarised as follows: the Czech Republic is a sovereign state and it is a typical expression of such sovereignty that the conditions for child adoption and recognition of foreign adoption decisions in the CR are at the hands of the legislature. If the legislature may lay down conditions for adoption, it may essentially also prevent circumvention of the rules when Czech citizens would adopt children or be adopted abroad, either purposefully or because potential adopters have been living abroad for some time. It follows from previous Constitutional Court's case law that there is no fundamental right to child adoption, and the statutory preference for child adoption by married couples is consistent with the Constitution and international obligations. Conversely, it does not follow from ECHR case law that non-recognition of a foreign decision on adoption by civil partners violates the Convention, and there are no cases that would be applicable in this respect. But even if the ECHR's approach should change in the future, the legislature is better placed than the ECHR and the Constitutional Court to address such questions as the basic circumstances of a human being as a biological species, and his/her life and relationships including such issues as family, parenthood, and marriage. The principle of the best interests of the child

[18] The Constitutional Court's judgment file no. Pl. ÚS 6/20 from 15 December 2020, no. 47/2021 Sb., on the recognition of a foreign decision on child adoption by civil partners.

cannot be used to confer exclusive powers on the courts to adjudicate all cases against the backdrop of the best interests of the child, without any boundaries laid by the legislature.

This reasoning is not convincing, in particular in the light of the conclusions of the previous judgment (file no. I. ÚS 3226/16) which were expressly invoked by the applicant, claiming that the granting of the application would not open the door to parenthood of same-sex persons, but would merely recognize a *de facto* and legal reality.

Furthermore, the reasoning is not entirely convincing in the way it strictly formulates the role of the legislature in the protection of human rights, and in the way it interprets ECHR case law. It is certainly legitimate to see the political level as the basic platform for addressing fundamental human rights issues, because decision-making through citizens or the legislature ensures that the prevailing public opinion is reflected in statutes. At the same time, however, constitutional courts are expected to balance out the majority opinion in situations when such an opinion can be detrimental to a vulnerable minority and when a member of such minority applies to a constitutional court for the protection of his/her fundamental rights. This conflict of roles in the protection of human rights goes back to the very beginnings of the institutionalisation of constitutional justice and seems to be eternal. This problem can be resolved, however, by exploring the history of human rights law. The answer favours neither the legislature nor courts. A number of rights, including those of sexual minorities, have been promoted through legislature, and others through courts. The political and social context plays an important role as well, because both the legislature and courts are responsive to social problems and their decisions are influenced by opinions in society – and yet these decisions also help to influence opinions in society. Thus the solution is a certain balance between public opinion, legislature, and constitutional courts in the protection of human rights. The balance does not have a universal character and needs to be found again in every specific case. But such balance cannot be simply rejected by raising the exclusive role of the legislature in addressing "such questions as the basic circumstances of a human being as a biological species, and his/her life and relationships". Likewise, if the constitutional courts have the power to guarantee the protection of constitutionality, including human rights, it is not possible to exclude certain issues from the protection of constitutionality by claiming that such issues are predominantly of a political nature. All major social changes must become political in order to be implemented and institutionalised. But if we accept that constitutional courts should merely check whether the protection of human rights is implemented within the rules laid down through political decisions, then we greatly reduce the role of the Constitutional Court as the protector of constitutionality.

Yet the greatest flaw in the reasoning of this Constitutional Court's judgment lies in its interpretation of ECHR case law. It is true that according to the ECHR, member states may decide whether they allow individuals and various types of couples to found a family, and how a family can be founded. The ECHR stated, in the case of E.B. v. France, that "*the provisions of Article 8 do not guarantee either the right to found a family or the right to adopt […]. The right to respect for "family life" does not safeguard the mere desire to found a family*."[19] However, when realizing these rights, the margin of appreciation of member states has its limits. According to the ECHR, these limits consists in the fact that once the member

[19] ECHR judgment E.B. v. France from 22 February 2008, no. 43546/02, 2008, paragraph 41.

states decide which individuals or couples have the right to found a family, they may not discriminate against them on any ground stipulated in Article 14 of the Convention, including sexual orientation.

With regard to the recognition of a foreign decision on child adoption by same-sex couples, the Wagner and Others case clearly indicate that the ECHR requires that member states seek to maintain cross-border continuity of family ties in order to prevent a situation where personal status is recognized under the law of one state, but not recognized in another state.[20] As the facts of the cases show, this rule should apply whether or not the child and parent(s) are genetically related. This was recently clearly confirmed by the ECHR in its advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother.[21] It should be added that this ECHR approach has at its forefront the best interests of the child in the protection of his/her family life.

Some of these facts were noted in a separate opinion regarding the operative part and reasoning, provided by three judges: Pavel Šámal, Kateřina Šimáčková, and Vojtěch Šimíček. They challenged all major arguments given in the reasoning. It is noteworthy that for the first time in case law the judges argued that in accordance with Article 10 (2) of the Charter it is "*necessary to promote equal access to social, biological, and legal parenthood, also as regards child adoption rules."*[22]

Victory of the birth number over a "fiction"

The following two judgments concerning the status of LGBTQ+ persons had to do with gender identity and sex change. In the first judgment, the Constitutional Court dealt with an application to repeal several statutory provisions: s. 29 (1) of the Civil Code which imposes sterilisation as a necessary condition for sex change: "*surgery while simultaneously disabling the reproductive function and transforming the genitalia*"; s. 21 (1) of the Specific Health Services Act which defines the term "sex change" and "transsexual patient"; and s. 13 (3) of the Population Registration Act which regulates the form of the birth number indicating a (female) sex.[23]

In this case, the applicant had been treated as a male since his/her birth, but he/she did not identify as male. In fact, the applicant identified neither as male nor as female, but rather as a non-binary person. If necessary, the applicant preferred to be treated as female. The applicant did not undergo sex reassignment surgery which would amount to sterilisation, because he/she did not consider that necessary, and he/she underwent hormonal treatment and aesthetic procedures. Because his/her personal identification documents identify him/her as a male, he/she repeatedly applied to the Ministry of the Interior to have his/her birth number changed

[20] ECHR judgment Wagner and J.M.W.L. v. Luxembourg from 28 June 2007, no. 76240/01; judgment Mennesson v. France from 26 June 2014, no. 65192/11; judgment Labassee v. France from 26 June 2014, no. 65941/11, judgment Laborie v. France from 19 January 2017, no. 44024/13.

[21] ECHR Grand Chamber advisory opinion from 10 April 2019, requested by the French Court of Cassation, no. P16-2018-001.

[22] Paragraph 24 of the separate opinion of Pavel Šámal, Kateřina Šimáčková, and Vojtěch Šimíček to the Constitutional Court's judgment file no. Pl. ÚS 6/20.

[23] The Constitutional Court's judgment from 9 November 2021 file no. Pl. ÚS 2/20.

into a neutral form (or at least a female form) without being forced to undergo a surgery that would lead to a loss of reproductive functions as stipulated in s. 29 (1) of the Civil Code.

The Ministry of the Interior found that the conditions for commencing the proceedings to change the birth number had not been met, because the applicant had failed to produce a health service certificate confirming that a sex change had been made. The municipal court in Prague dismissed the application in which the applicant had challenged the unlawful interference of the Ministry of the Interior and the Supreme Administrative Court dismissed the appeal on points of law against that decision. The courts found that the existing legal regulation of sex change and the related regulation of personal identification following the sex change were compliant with the constitution. The applicant joined his/her constitutional complaint against the decisions of administrative courts and the actions of the Ministry of the Interior with an application to repeal the above-mentioned statutory provisions.

The facts of the case, the legal situation, and the applicant's objections thus clearly indicate that the main purpose of his/her application was to have his/her gender officially/legally recognized through change of his/her birth number from male to neutral or female so that the number does not identify him/her as male, without the need to undergo sterilisation. In fact, both steps are linked because under the current legal regulation, it is necessary to undergo sterilisation in order to have one's birth number changed. That was the understanding of the application by the original judge-rapporteur K. Šimáčková (as well as by administrative courts) who claimed that the review before the Constitutional Court should focus primarily on the provision governing sex change (the first sentence of s. 29 (1) of the Civil Code) that the judge sought to have repealed because it violated the constitution.[24]

Because Šimáčková's proposal to have the provision of s. 29 (1) of the Civil Code repealed received a majority eight votes during the deliberation of the full court, but not the nine votes necessary for the repeal of a statutory provision, the proposal was dismissed, and by virtue of s. 55 of the Constitutional Court Act a new judge-rapporteur was appointed who prepared a proposal adopted under file no. Pl. ÚS 2/20. The conclusions in that judgment thus express the opinion of the so-called relevant minority which, according to the Constitutional Court's case law, refers to a minority that failed to receive the votes of nine judges necessary for the repeal of a statutory provision.[25]

The relevant minority's opinion took a completely different direction, both in the starting point and with respect to the protection of non-binary persons and gender identity in general. In particular, the Constitutional Court concluded that it was irrelevant to pose the question of whether the sterilisation requirement for the recognition of sex change was in compliance with the constitution. In fact, according to the Constitutional Court, the contested provision of s. 29 (1) of the Civil Code was not relevant to the case because it merely regulated sex change

[24] Furthermore, Šimáčková in her separate opinion correctly pointed out that the contested provision of s. 13 (3) of the Population Registration Act ("increased by 50 for women") had not been applied in the case of the applicant because "administrative bodies and courts dealt solely with the question of whether the conditions for changing the birth number had been met, rather than what form the applicant's birth number should take; thus the provision of s. 13 (3) of the Population Registration Act had not been applied in the applicant's case. Consequently, the facts challenged by the applicant in her constitutional complaint cannot have resulted from the application of that provision, and therefore the applicant was not entitled to seek its repeal." Separate opinion of K. Šimáčková, paragraph 6.

[25] See, for example, the judgment file no. Pl. ÚS 11/17 or Pl. ÚS 3/96.

from male to female or vice versa. The applicant felt like a person of neutral sex, so he/she could not meet the sex change requirement anyway, irrespective of that provision. No other sex than male or female and no other form of sex or gender identification is recognized under Czech law; thus even if the provision of s. 29 (1) of the Civil Code were repealed, the Constitutional Court (as the so-called negative legislature) could not change anything about that situation.

According to the Constitutional Court, the whole case turned solely on the form of the birth number. Thus the constitutionality review should be limited solely to the provision of s. 13 (3) of the Population Registration Act in which the applicant sought deletion of the words "*increased by 50 for women*". The rest of the reasoning of the judgment provided an analysis of the content and meaning of birth numbers as an expression of the binary existence of the human species.

Indeed, the binary existence of the human species is the starting point in the reasoning. However, the Constitutional Court highlighted that binary existence was not a concept created by the public authority, but was rather a recognition of social reality: "*In the territory of the Czech Republic, people are either men or women. This understanding of the binary existence of the human species did not originate in the will of the state, i.e., the will of the public authority, because the public authority has merely accepted such understanding as social reality."*[26] Consequently, the law does not expressly define (and need not expressly define) the existence of two sexes, or the characteristics defining a man and a woman respectively, because according to the Constitutional Court, this is generally clear and for most individuals this categorization does not cause any problems. The consequences of the binary understanding of sexes are recognized by the constitution and in the legal system, and this division has certain legal or practical effects (e.g., special protection of women at work, separation of prison cells, female categories in sport, or female-only train compartments). It is therefore logical that there is a need to record the fact that a person is a man or woman. The Constitutional Court does not find it unconstitutional that such information is recorded through the birth number as a unique identifier which is assigned to a person at birth.

The Constitutional Court acknowledges that the sex indicated by the birth number need not necessarily correspond to the gender that a person identifies with, but these two issues are separate; while the information about the sex indicated through the birth number can be significant with respect to the functioning of the state and society in cases where it is desirable to distinguish between men and women, the information about the gender that a person identifies with is essentially irrelevant. A differentiated treatment of individuals according to gender would lack any objective and reasonable justification: "*During the proceedings no logical explanation was provided to the Constitutional Court as to what purpose it would serve to divide people into those who identify as male and those who identify as female. Such categories reflect neither the legal nor social reality."* stated the Constitutional Court.

While the defence of the binary approach to society is legitimate in the gender identity debate, such defence should be placed in the context of social development and backed up by arguments that go to the roots of a particular legal issue. Law is a dynamic system (which has been noted in the Constitutional Court's case law in connection with the position of same-sex

[26] Judgment file no. Pl. ÚS 2/21, paragraph 39.

couples and the right to gender identity) that has to address questions brought about by the changes in society. But in the reasoning such context is missing with respect to the right to gender identity. The Constitutional Court sees the right to gender identity as a "right to a certain fiction": "*The inviolability of the person and of her privacy under Article 7 (1) of the Charter may not be confused with the right to a different reality than the existing reality, in other words the right to a certain fiction."*[27] But this argument completely misses the point of what gender identity represents, and thus fails to establish an appropriate legal context and legal reasoning.[28] Furthermore, this argument disregards the international context (which the Constitutional Court explicitly acknowledges towards the end of the judgment) although international organisations such as the UN or the Council of Europe have been recognizing the right to gender identity since the 1990s.

Some parts of the reasoning, rather than offering legal arguments, sound almost sarcastic, in particular when referring to the applicant (who is referred to as male) and to gender identity in general. For example, we can take the comparison to age which aptly illustrates the Constitutional Court's approach to gender identity: "*Just as a person who is (officially) male cannot seek to have that information removed from his birth number only because it does not make him feel comfortable, so that person cannot seek to have removed from the birth number the information about his date of birth (or to record a different date of birth in his birth number) by claiming that it does not correspond with his own idea about his age."*[29] Another example is the final thought about the relationship between gender identity and the protection of privacy and personal autonomy: "*Respect to privacy which is contingent on several years of expert examination is not respect; self-determination which is contingent on a psychiatric diagnosis is not self-determination; and personal autonomy which is contingent on a doctor's approval is not autonomy."*[30]

Considering the previous arguments, the attitude to ECHR case law expressed in the judgment is hardly surprising. The Constitutional Court stated that it "*had serious doubts about the transferability of some of the ECHR conclusions regarding sex and gender to the Czech legal context"*[31]; however, due to space constraints the Constitutional Court could not provide a detailed discussion of this issue, because the ECHR cases dealt with different facts and different legal issues, and the Constitutional Court addressed only the form of the birth number in its judgment.

At the end of the judgment the Constitutional Court pointed out that its conclusion (that having the birth number indicate the sex of the person is compliant with the constitution) does not prevent the legislature from adjusting the form of the birth number or from regulating gender identification or sex change. "*Since the beginning of its existence, the Constitutional Court has sought to fulfil its role – the protection of constitutionality under Article 83 of the Constitution. Therefore the Constitutional Court has repeatedly emphasised that it should be the responsibility of the Czech Parliament to address the basic circumstances of a human being as a biological species, and his/her life and relationships […]. If these issues are*

[27] Paragraph 55.
[28] The term "gender identity" offers an opportunity to understand that the sex assigned to a person upon birth need not correspond to the innate gender identity that develops as the child grows.
[29] Paragraph 55.
[30] Paragraph 60.
[31] Paragraph 61.

brought under the responsibility of the courts, the Constitutional Court can become politicized and thus weakened in its position as an impartial and independent judicial body which protects the constitution."[32]

The argument that the human species has a binary existence leads to a conclusion that non-binary persons are not entitled to the protection of their position, because they are excluded from the system that is considered an established social fact and that is merely reflected by the law and constitutional law. It does not matter whether a case has to do with the birth number or sex change, as both are conditional on the binary existence of the human species which is a social reality that the Constitutional Court is not allowed to change. It is solely the legislature that can make changes because "*since the beginning of its existence, the Constitutional Court has sought to fulfil its role – the protection of constitutionality"*.[33]

This relevant minority opinion was accompanied by seven separate opinions, including the separate opinion of the original judge-rapporteur. The separate opinions in particular emphasize the fact that it is totally inappropriate in the 21st century to make the sex change conditional on such a forceful and unexceptional intervention in bodily integrity which can cause unacceptable suffering and humiliation to the individuals concerned. In other words, the Constitutional Court was divided when adjudicating on a surgical procedure being a necessary condition for the sex change.

Victory of the birth number over gender identity

In the subsequent order in which the applicant's constitutional complaint was dismissed, the Constitutional Court elaborated on the arguments from the previous full court's decision.[34] The Court repeated that in the proceedings which gave rise to the constitutional complaint the issue was not an official sex change, and then the Court went on to discuss the connection between the birth number and the information on a person's sex. On the one hand, the Court stated that the birth number did not explicitly indicate that the complainant was a man, because s. 13 (3) of the Population Registration Act introduced a special form of birth number only for women. Consequently, the birth number indicated only that the complainant was not a woman, but not that the complainant was a man. As the complainant did not identify as a woman, this correctly expressed his/her self-identification. On the other hand, the Constitutional Court admitted that given the binary understanding of sex in the Czech Republic, the fact that the complainant did not have a female birth number did suggest that the complainant was a man. Nevertheless, that was not due to the birth number, as the birth number was neutral, but it was due to the generally accepted binary understanding of human existence.

The Constitutional Court did not find it necessary to consider whether the contested decisions had violated Article 8 of the Convention and to undertake a "test" (to use the exact word of the Court) assessing compliance with positive obligations under that provision. The reason was that "*although gender identity may be understood as an important aspect of one's life, the given case turns solely on the applicant's interest in a specific form of birth number."*[35] In the

[32] Paragraph 63.
[33] Paragraph 63.
[34] Judgment file no. II.ÚS 2460/19 from 7 June 2022, Birth number as an identifier of sex II.
[35] Paragraph 41.

following part the Court contends that it is possible and impossible to obtain from the birth number the information as to whether a person is male or female; that such information is important (because it is included in personal ID documents) and unimportant (because the birth number is not a primary source of information about a person's sex, as such information tends to be provided in a separate box, and the birth number provides such information in a rather covert, inconspicuous way). Moreover, the complainant can hardly claim that upon presentation of his/her birth number he/she was always put under pressure to come out of the closet; in fact, that would be the case if he/she had achieved his/her goal and was given a non-binary birth number. The Constitutional Court added that the complainant had been living abroad for a long time, and thus it was highly improbable that anyone abroad would be able to infer his/her sex from the Czech birth number. The creation of a third category of birth numbers for non-binary persons would negatively affect the otherwise binary legal order.

Towards the end of the reasoning the Constitutional Court addresses international trends in ECHR case law which promise greater social acceptance of transgender people and legal recognition of their post-surgery identity (case Christine Goodwin v. UK from 2002), as well as removal of the sterilisation requirement for official sex change (case A. P., Garçon and Nicot v. France from 2017). The Constitutional Court considers those international trends irrelevant because they may entail a lack of consensus of the member states in the interpretation of the Convention. In this way, the ECHR (in particular in the case Garçon) has "*assigned itself the leading, decisive role with respect to social and ethical questions*."[36] And all that in a situation, paraphrases the Constitutional Court the dissenting ECHR judge Ranzoni, when at the time when the Garçon case was determined, only 18 countries of the Council of Europe allowed sex change without the sterilisation requirement.[37]

A few facts should be added to this interpretation made by the Constitutional Court in order to clarify the context in which the ECHR had used that argument and in order to arrive at the correct interpretation. In the Garçon case, the ECHR stated that the states were divided as regards the sterilisation requirement for official sex change, and there was no consensus on the subject. At the same time, the ECHR pointed out that the approach of the states was developing in this respect, because between 2009 and 2016 the sterilisation requirement was removed in eleven member states of the Council of Europe. According to the ECHR, this development underpins the existence of an international trend, and similar voices are heard from European and international institutions: "*The Court also notes that numerous European and international institutional actors involved in the promotion and defence of human rights have adopted a very clear position in favour of abolishing the sterility criterion, which they regard as an infringement of fundamental rights. These include the Commissioner for Human Rights of the Council of Europe, the Parliamentary Assembly of the Council of Europe, the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the World Health Organisation, the United Nations Children's Fund, the United Nations High Commissioner for Human Rights and the OHCHR, UN Women, UNAIDS, the United Nations Development Programme, and the United Nations*

[36] Paragraph 47.
[37] ECHR judgment Garçon and Nicot v. France from 6 April 2017, no. 79885/12, 52471/13 and 52596/13, paragraph 7 of Ranzoni's separate opinion.

Population Fund".[38] Many of these declarations were made prior to or around the same time as the contested French Court of Cassation's judgments.

The existence of a trend should be understood as the direction of development of a certain phenomenon which itself reflects the dynamics of a certain situation. The information about the situation at the time when the Garçon case was adjudicated should be put into perspective with the direction of that development. At the time when the Constitutional Court was adjudicating the cases file nos. Pl. ÚS 2/20 and II.ÚS 2460/19, only seven member states of the Council of Europe prescribed sterilisation (i.e., a surgical procedure disabling reproductive capacity), and two of those countries (Montenegro and Finland) were adopting measures to remove that requirement.[39] This fact illustrates the trend in a more reliable manner than the fact that in 2017 (i.e., five years before the Constitutional Court's determination of the case) a sex change without sterilisation was possible in only 18 countries of the Council of Europe.

Conclusion: from potential colourful variety to a gloomy picture

With respect to LGBTQ+ case law, the Constitutional Court sees primarily the protection of traditional family, heterosexual marriage, and a binary understanding of sex as values of public interest that make it legitimate to reject the claims of LGBTQ+ persons. All these reasons, including the difficulties that will arise in many legal areas by the major changes to traditional structures, have been explored in ECHR case law in an attempt to strike the right balance between the protection of traditional family and the rights of LGBTQ+ persons. Modern history has shown that the legal system was able to cope with the difficulties when substantial changes occurred in the past, for example when equality was introduced or when certain rights were recognized for persons who had been excluded from the enjoyment thereof.

The fundamental and crucial question is how the protection of a traditional family and other related values can be threatened if legal protection is provided to LGBTQ+ persons. The Constitutional Court's decisions discussed above do not address the question of whether there is an objective (i.e., backed by sociological data) causal link that would prove that the protection of human rights of LGBTQ+ persons has an objective negative impact on the ostensibly contradictory values. In other words, how does – in concrete terms – the recognition of the rights and position of LGBTQ+ persons in the area of civil, family, and property law (negatively) affect the position of a traditional family? Would traditional Czech families be threatened if it were possible to recognize parenthood that *de facto* and *de jure* exists in another state? Does a non-binary birth number cast doubt on the sex identification of binary men and women when they see it?

[38] Garçon and Nicot v. France, paragraph 125.
[39] Cf. the separate opinion by Kateřina Šimáčková file no. Pl. ÚS 2/20, paragraph 64, or the separate opinion by Vojtěch Šimíček, Ludvík David, Jaromír Jirsa, Pavel Šámal, David Uhlíř, and Jiří Zemánek to the same judgment, paragraph 9.

These thoughts are nothing new in the area of human rights debates. The question of whether a specific instrument restricting human rights (in this case the right to a private and family life) is necessary to achieve the protection of contradictory values underlies the principle of proportionality. In most cases, the protection of a traditional family is realized in abstract terms, covering the existing social status, majority tradition and consensus, and natural gender roles; all of them have the character of axioms, not allowing and not envisaging a critical constitutional review.

Constitutional courts can overcome such an axiomatic effect of traditional public values by applying critical rationality. In this way it could be possible to remove prejudice and let the protection of LGBTQ+ persons trigger effects that would be backed by sociological data. In all likelihood, the Constitutional Court would realize that the argument of protection of a traditional family does not entail any specific rational reason (beyond political symbolism) as to why the recognition of rights of same-sex/trans persons should lead to erosion of a traditional family. Moreover, a commentator on ECHR case law and on the approach of the states aptly noted that the defence of a traditional family indicates that the restrictions of the rights of non-heterosexual families by national laws which are designed to prefer heterosexual marriages have a deterrent effect for non-traditional family structures and promote a socially optimal family model. Yet this argument is flawed and completely out of touch with social reality. If it is not allowed to legally recognize family relationships of same-sex couples and if the legal status of trans persons is not guaranteed and their rights are not protected, then those people will still not be persuaded to contract a heterosexual marriage or to stop dealing with their gender identity, and live their lives in accordance with the binary understanding of sex and gender. Instead of strengthening the actual social superiority of a traditional family, marriage, and gender binarism, the absence of rights of LGBTQ+ persons has no noticeable impact on the traditional family and heterosexual marriage. But it certainly makes life more difficult for LGBTQ+ persons.[40] As a consequence of the protection of a traditional family, LGBTQ+ persons tend to be marginalised.

In this respect, the dilemma between traditional values and the rights of LGBTQ+ persons can be seen against the backdrop of the ECHR's discussion of a fair balance between public interest and legal recognition of a sex change: "*No concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status of transsexuals and, as regards other possible consequences, the Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.*"[41]

The Constitutional Court's decisions discussed above, albeit few in terms of numbers, can be subjected to criticism from many other angles, both substantive and procedural. At the heart there are basic conceptual problems which determine the resulting particular arguments. A judicial approach which defines family as a community based on blood kinship is hardly reflective of life in current society. Likewise, the opinion that the human species is based on

[40] Dunne, P. (2017). Who Is a Parent and Who Is a Child in a Same-Sex Family? – Legislative and Judicial Issues for LGBT Families PostSeparation, Part I: The European Perspective. Journal of the American Academy of Matrimonial Lawyers, 30(1), p. 20.
[41] ECHR judgment Christine Goodwin v. the United Kingdom from 11 July 2002, no. 28957/95, paragraph 91

gender binarism is rather simplistic and superficial. Although such views may be statistically prevalent, in the former case they are substantially undermined by the plurality of lifestyles in society today, and in the latter case they are inconsistent with the state-of-the-art medicine and anthropology (as many cultures are not based on strict sexual dichotomies, both in biological and psychological terms).

Finally, with regard to procedural justice, the last two analysed decisions of the Constitutional Court in particular and their reasoning seem rather excessive. Neither decision addresses the question that these issues may be absolutely crucial for the quality of life of such persons and that they affect the most intimate areas of human life. Conversely, the applicant is informed that throughout history, human species has been perceived as consisting of man and woman. Thus the applicant is made to feel like an oddity or anomaly in the history of humankind. Subsequently, the applicant is told that the Czech state system and social system are legitimately based on the differentiation between man and woman. As if the applicant with his/her claims to an alternative reality (see above the non-binarism argument as a right to fiction) could not exist in Czech society. The decisions display a lack of understanding of the concept of gender identity as distinct from biological sex, and in fact they make no attempt to at least try to understand.