

CONSTITUTIONAL COURT
G 119-120/2014-12
11 December 2014

Translation in excerpts

IN THE NAME OF THE REPUBLIC

The Constitutional Court, chaired by President
Gerhart HOLZINGER,

in the presence of Vice-President
Brigitte BIERLEIN

and the members

Markus ACHATZ,
Eleonore BERCHTOLD-OSTERMANN,
Sieglinde GAHLEITNER,
Christoph HERBST,
Michael HOLOUBEK,
Helmut HÖRTENHUBER,
Claudia KAHR,
Georg LIENBACHER,
Rudolf MÜLLER,
Johannes SCHNIZER, and
Ingrid SIESS-SCHERZ

and the substitute member
Robert SCHICK

as voting members, in the presence of the recording clerk
Christopher MERSCH,

has decided today after private deliberations pursuant to Article 140 of the Constitution (*Bundes-Verfassungsgesetz, B-VG*) on the application of *** *****
**** and of **** ***** ****, both ** *, **** *****
both represented by Helmut Graupner, lawyer, Maxingstrasse 22-24/4/9, 1130 Vienna, to repeal as unconstitutional section 191 paragraph 2 of the Civil Code (*Allgemeines Bürgerliches Gesetzbuch, ABGB*), *JGS 946/1811*, as amended by Federal Law Gazette *BGBI. I 33/2014*, and section 8 paragraph 4 of the Federal Act on Registered Partnership (*Eingetragene Partnerschaft-Gesetz, EPG*), Federal Law Gazette *BGBI. I 135/2009* as amended by *BGBI. I 179/2013*, as follows:

- I. 1. Section 191 paragraph 2, first sentence, Civil Code (*ABGB*), *JGS 946/1811* as amended by Federal Law Gazette *BGBI. I 15/2013*, and section 8 paragraph 4 of the Federal Act on Registered Partnership (*EPG*), Federal Law Gazette, *BGBI. I 135/2009* as amended by *BGBI. I 179/2013*, are repealed as unconstitutional.
2. The repeal shall take effect as per 31 December 2015.
3. Earlier legal provisions shall not re-enter into force.
4. The Federal Chancellor shall immediately promulgate these sentences in Federal Law Gazette I.

Reasoning

I. Application and Preliminary Proceedings

1. Basing themselves on Article 140 paragraph 1 subparagraph 1 point (c) of the Constitution (*B-VG*) the applicants are seeking to repeal as unconstitutional section 191 paragraph 2 of the Civil Code (*Allgemeines Bürgerliches Gesetzbuch, ABGB*), *JGS 946/1811* as amended by Federal Law Gazette *BGBI. I 33/2014*, and section 8 paragraph 4 of the Federal Act on Registered Partnership (*Eingetragene Partnerschaft-Gesetz, EPG*), Federal Law Gazette *BGBI. I 135/2009* as amended

by *BGBI. I 179/2013* in their entirety, and *in eventu* section 191 paragraph 2, first sentence, *ABGB* and the phrase "jointly adopt or" in section 8 paragraph 4 *EPG*.

1.1. As to the eligibility of their application, the applicants have in essence argued that they have been living in an all-encompassing, permanent partnership since 1998 which, similar to a marital community, is characterised by mutual commitment and support, as well as mutual responsibility, devotion and care, based on a deep emotional attachment and precludes the concurrent existence of a second such union and that they entered into a registered partnership on 14 February 2011. On 13 March 2012, the second applicant gave birth to a daughter who had been conceived by medically assisted procreation in Germany. The applicants and the biological daughter of the second applicant, they argue, are living in a harmonious, stable partnership which would give the child the love, care and security it needed to thrive and develop. By way of court order of 17 January 2014, the first-instance court *Bezirksgericht Braunau am Inn* had allowed the adoption of this child by the first applicant. The applicants are now desirous of having another child, in addition to their first daughter, and would like to devote themselves – like many married couples in a comparable situation - as adoptive parents to a child in need of adoption. Unlike married couples, they are barred by the challenged provisions from jointly adopting a child.

There is no other reasonable route to contest the unconstitutionality of the challenged provisions, since there are no legal remedies open against being excluded from state-run adoption placement services, an area where the state acts in a private-sector function. Without placement services by the state the applicants would be denied access to court adoption authorisation proceedings in the first place. It would be unreasonable to expect them to "look for a child at their own initiative".

1.2. In summary, the applicants have justified their concerns about the constitutionality of the challenged provisions as follows:

In general, heterosexual couples in a formalised state-registered partnership – a civil marriage, unlike the legally irrelevant religious marriage, being nothing but a state-registered partnership – are allowed to jointly adopt a child, subject to their individual eligibility, while same-sex couples in a formalised state-registered partnership are not allowed to adopt and a review of the individual case is

precluded *a priori*. Therefore, the challenged provisions differentiate based on gender and sexual orientation, which is in violation of Article 2 Basic State Law (*Staatsgrundgesetz, StGG*), of Article 7 of the Constitution (*B-VG*), and of Article 14 in conjunction with Article 8 ECHR.

The different treatment of same-sex registered partners and heterosexual married couples regarding the joint adoption of children pursues, it is argued, neither a legitimate goal nor is it necessary. The challenged provisions generally exclude same-sex couples from jointly adopting a child (and bar the courts from conducting a case-by-case review as to the best interests of the child). The legislator is unable to prove that same-sex couples, generally and as a matter of principle, are far less suitable than heterosexual married couples to successfully raise a child with stable, parental love and caring, which, if proven, would be a justification for not leaving it up to the courts to review the child's best interests in any individual case. Same-sex registered partners and heterosexual married couples face a comparable situation regarding adoption. A registered partnership, the applicants submitted, mirrors a civil marriage. The legal status of registered partners is largely that of married couples, especially in terms of the mutual duties of the partners and the dissolution of the partnership. Same-sex couples, the applicants argue, are equally suited to raise and bring up children as heterosexual ones. What children need is not heterosexual or homosexual parents, but loving and caring parents. The objective of allowing only formalised stable partners to jointly adopt a child who underlies the limitation of joint adoption to married couples can be reached also without differentiation between heterosexual and same-sex couples. Homosexual partnerships are by no means less stable than heterosexual ones. The separation rates for registered partnerships are even lower than those of marriages.

The Austrian legal system already accepts that a child grows up in a same-sex family, or that – as is the case with the applicants – same-sex partners are jointly the legal parents of a child. There is no substantive reason to justify that a person living in a registered partnership is allowed to adopt a child (who in consequence would be allowed to live with the two partners in a same-sex family) as an individual person, or that a person living in a registered partnership may adopt the biological child of the other partner, while registered partners are, as a matter of principle, not allowed to jointly adopt a child, so that a court review as

to the child's best interests in the individual case is precluded *a priori*. Since with an individual adoption by one partner in a registered partnership the child is deprived of support, succession, custody and other claims vis-à-vis the other partner, the challenged provisions are contrary to the child's best interests and are therefore discriminatory as against children who have been jointly adopted by married couples.

A large number of European and non-European jurisdictions already allow the joint adoption of children by same-sex couples. Among the member states of the Council of Europe which provide for a legally recognized, formalised partnership for same-sex couples and which allow these couples to adopt "step children", only Austria, Finland and Slovenia still bar same-sex couples from joint adoption.

2. The Federal Government informed that it would not give an opinion.

II. The Law

1. Sections 191 to 200 of the Civil Code (*ABGB*), *JGS 946/1811* as amended by Federal Law Gazette *BGBI. I 83/2014* read as follows (the challenged section 191 paragraph 2 *ABGB* is applicable as amended by *BGBI. I 15/2013*; the challenged provision has been highlighted):

"Adoption

Section 191. (1) Persons of full legal age and capacity may adopt. The adoption creates an adoptive parent-child relationship.

(2) The adoption of a child by more than one person, whether simultaneously or – as long as the adoptive relationship still exists – consecutively, shall be permitted only if the adoptive parents form a married couple. As a rule, spouses may only adopt a child jointly. An exception may be made where the child to be adopted is the spouse's biological child, where one spouse does not fulfil the requirement of having full legal age or the required difference in age with the adoptee, where one spouse's whereabouts have been unknown for at least a year, where the spouses have not been living in matrimonial community for at least three years or where there are similar and particularly serious grounds justifying adoption by only one spouse.

(3) Persons who are entrusted with management of the assets of an adoptive child by an official order cannot adopt such child as long as they have not been released from such obligation. They must have accounted beforehand and provided evidence that they have preserved the entrusted assets.

Form; effectiveness

Section 192. (1) Adoption is established by way of a written contract between the adopting person and the adoptive child as well as by court approval upon request of a contractual party. The adoption becomes effective upon the date of the contractual agreement in case of its approval. The death of the adopting person after this date does not prevent the approval.

(2) The not legally capable adoptive child concludes the contract through his or her legal representative who does not require court approval. If the legal representative refuses his or her consent, the court has to substitute it upon application of the adopting person or the adoptive child if there are no legitimate reasons for such refusal.

Age

Section 193. (1) The adoptive parents must be twenty-five years old.

(2) The adoptive father and the adoptive mother have to be at least sixteen years older than the adoptive child.

Approval

Section 194. (1) The adoption of a child who is not legally capable has to be approved, if it benefits its welfare and a relationship comparable to the relationship between biological parents and children exists or shall be established. If the adoptive child is legally capable, the adoption shall only be approved provided that the applicants provide evidence that there is already a close relationship comparable to the relationship between biological parents and children, in particular, if the adoptive child and the adopting person lived in a joint household for five years or supported each other in a comparably close relationship.

(2) In absence of the requirements of paragraph 1, the approval must be denied if there is an adverse prevailing interest of a biological child of the adopting person, in particular if his or her maintenance or education would be jeopardized; otherwise economic concerns must not be considered, unless the adopting person is acting with the sole or predominant intent to harm a biological child.

Section 195. (1) The approval may only be granted if the following persons consent to the adoption:

1. the parents of the minor adoptive child;
2. the spouse or the registered partner of the adopting person;
3. the spouse or the registered partner of the adoptive child;
4. the adoptive child as soon as it is 14 years old.

(2) The right to consent as set out in paragraph 1 lapses if the person entitled to consent concluded an agreement relating to the adoption as legal representative of the adoptive child, if he or she is incapable of an intelligible declaration not only for a limited period of time or if the residence of a person mentioned in paragraph 1 subparagraphs 1 to 3 is unknown for at least six months.

(3) The court has to substitute the refused consent of a person referred to in paragraph 1 subparagraphs 1 to 3 upon request of a contractual party if there are no legitimate reasons for such rejection.

Section 196. (1) Following persons have a right to be heard:

1. the adoptive child not legally capable as soon as it is five years old, unless it has been living with the adopting person since that time;
2. the parents of the adoptive child being of legal age;
3. the foster parents or the director of the children's care home in which the adoptive child is resident;
4. the youth welfare authority.

(2) The right to be heard of an entitled person mentioned in paragraph 1 lapses if he or she has concluded the agreement relating to the adoption as legal representative of the adoptive child; furthermore if he or she could not be heard or only under unreasonably difficult circumstances.

Effects

Section 197. (1) The same rights as based on descent are created between the adopting person and his or her descendants on the one hand and the adoptive child and his or her, at the same time of the effectiveness of the adoption, minor descendants on the other hand.

(2) If the adoptive child is adopted by spouses as adoptive parents, the existing family-relationships, which are not only based on relationship as such (section 40) between the biological parents and their relatives on the one hand and the adoptive child and his or her, at the time of the effectiveness of the adoption, minor descendants on the other hand, expire at this time subject to the exceptions as provided in section 198.

(3) If the adoptive child is only adopted by an adoptive father/an adoptive mother the relationships based on family-law expire only with respect to the biological father/the biological mother and to his and to his/her relatives subject to paragraph 2. The court has to declare the expiration against the biological parent who is not replaced if he or she consents. The expiration is effective upon declaration of consent, however, at the earliest with the time of the effectiveness of the adoption.

(4) If a spouse, a registered partner or a partner adopts the child of his or her spouse, of his or her civil partnership partner or partner, the relationships based on family-law expire subject to paragraph 2 only with respect to the other parent and his or her relatives.

[...]

Revocation and nullification

Section 200. (1) The court has to revoke the court approval with retroactive effect:

1. *ex officio* or upon request of a contractual party if the adopting person was not legally capable at the time of the conclusion of the adoption agreement, unless he or she has declared that he or she wishes to continue the adoptive relation upon becoming legally capable;

2. *ex officio* or upon request of a contractual party if an adoptive child who was not legally capable itself concluded the adoption agreement, unless the legal representative or, upon becoming legally capable, the adoptive child has subsequently consented or the court substitutes the refused subsequent consent by the legal representative in accordance with section 192, paragraph 2;

3. *ex officio* or upon request of a contractual party, if the adoptive child was adopted by more than one person, unless the adoptive persons were married at the time of approval;

4. *ex officio* or upon request of a contractual party if the adoption agreement has been exclusively or predominantly concluded with the intention of enabling the adoptive child to have the surname of the adoptive father or of the adoptive

mother or to create the false impression of elected kinship to disguise illegal sexual relationships;

5. upon request of a contractual party if the adoption agreement has not been concluded in writing and not more than five years have passed since the effectiveness of the decision of approval.

(2) If one of the contractual parties did not have knowledge of the reason for revocation (paragraph 1, subparagraphs 1 to 3 and 5) at the time of the conclusion of the adoption agreement, the revocation is deemed to constitute a nullification (section 201) with respect to this relationship to the other party upon his or her request.

(3) The fact that the approval has been revoked cannot be used against a third party who acquired rights prior to the revocation in good faith with respect to the validity of the adoption. A third party cannot rely on the effects of the revocation to the detriment of one of the contractual parties who did not have knowledge of the reason for revocation at the time of the conclusion of the adoption agreement."

2. Section 8 of the Federal Act on Registered Partnership (*Eingetragene Partnerschaft-Gesetz, EPG*), Federal Law Gazette *BGBl. I 135/2009* as amended by *BGBl. I 179/2013* reads as follows (the challenged provision has been highlighted):

"Rights and duties

Section 8. (1) Unless otherwise provided for in this Federal Act, the personal rights and duties of registered partners in relation to one another shall be equal.

(2) Registered partners shall mutually commit themselves to an all-encompassing partnership and to a relationship that is based on trust, in particular they shall cohabit, interact with one another with fairness and support one another.

(3) Registered partners shall organise their partnership by consensus in mutual respect of one another, with the aim of achieving an equal balance of their respective contributions. A registered partner may depart from the principle of consensus unless there is a major concern of the other partner, or even if such a concern exists, if the personal reasons of the one partner are deemed to be overriding.

(4) Registered partners may neither jointly adopt a child nor adopt the adopted children of the other partner."

...

III. Considerations

A. As to the admissibility

...

B. On the merits

Inasmuch as it is admissible, the application is found justified:

2. The applicants consider the challenged provisions as unequal treatment which violates the principle of equality and is incompatible with Article 8 read in conjunction with Article 14 ECHR, *inter alia* because there is no apparent justification for generally forbidding registered partners to jointly adopt a child and such to preclude *a priori* a court review of the applicants' suitability for a joint adoption in the light of the child's best interests, whereas married couples are *per se* considered suitable as adoptive parents. The Austrian legal system accepts that a child grows up in a same-sex family and assumes that this has no adverse effects on the child. Individuals are allowed to adopt a child that consequently grows up in a factual family unit also with the partner of his or her adoptive parent, and the adoption of the biological child of a same-sex partner by an individual person is a guaranteed fundamental right. Denying a child the right to assert legal claims vis-à-vis the second parent is contrary to the child's best interests. There is no reason to justify why same-sex couples such as the applicants, who jointly have a daughter and who are joint legal parents of a child, should not be allowed to jointly adopt a child.

3. The principle of equality also binds the legislator (cf. e.g. VfSlg. 13.327/1993, 16.407/2001). It imposes material limits, as it disallows the enactment of rules which cannot be justified on substantive grounds (cf. e.g. VfSlg. 14.039/1995, 16.407/2001).

As a precondition for the applicability of Article 14 ECHR, according to which the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination, a matter must fall within the scope of a right

enshrined by the Convention. However, it is not required that the Convention guarantee which is applied in connection with Article 14 ECHR must have been violated or that there has been an interference with a Convention right. In particular, Article 14 ECHR is also applicable if a contracting state to the ECHR grants more extensive rights within the scope of application of a Convention right than required under the ECHR (ECtHR 22 January 2008, case *E.B.*, appl. 43.546/02 [paragraph 47 et seq.]; 19 February 2013 [GC], case *X* and others, appl. 19.010/07 [paragraph 135]; cf. e.g. also ECtHR 28 May 1985, case *Abdulaziz* and others, appl. 9214/80 and others, [paragraph 71]; 22 December 2009 [GC], case *Sejdic* and *Finci*, appl. 27.996/06 and others [paragraph 39]; 22 July 2010, case *P.B.* and *J.S.*, appl. 18.984/02 [paragraph 32]; 11 October 2011, case *Genovese*, appl. 53.124/09 [paragraph 33 et seq.] all with further references; cf. on all these *Grabenwarter/Pabel, Europäische Menschenrechtskonvention*⁵, 2012, 520 et seq.). If Article 14 ECHR is applicable, there must be an objective and reasonable justification for the different treatment of comparable facts. Differentiating provisions must pursue a legitimate goal and be proportionate (established case law since ECtHR 23 July 1968, *Belgian Linguistics Case*, appl. 1474/62 and others [paragraph 10]; see further e.g. ECtHR 28 February 1998, case *Petrovic*, appl. 156/1996/775/976 [paragraph 30]; 29 April 2008 [GC], case *Burden*, appl. 13.378/05 [paragraph 60]; 3 December 2009, case *Zaunegger*, appl. 22.028/04 [paragraph 42]; case *Sejdic* and *Finci*, paragraph 42; cf. also ECtHR 26 February 2002, case *Fretté*, appl. 36.515/97 [paragraph 34]; case *E.B.*, paragraph 91; 15 March 2012, case *Gas* and *Dubois*, appl. 25.951/07 [paragraph 58]; case *X* and others, paragraph 98; see also *VfSlg. 19.653/2012* with further references).

Under the principle of equality and Article 14 ECHR, special reasons must exist to justify unequal treatment in the law which is connected to potentially discriminating characteristics as explicitly mentioned in Article 7 paragraph 1 second sentence of the Constitution (*B-VG*) or in Article 14 ECHR (cf. in regard of the principle of equality, *VfGH* 12 March 2014, *B 803/2013*; 27 September 2014, *V 5/2014* on statutory differentiations based on gender, or in regard of Article 8 in conjunction with Article 14 ECHR, *VfSlg. 19.758/2013* on differentiating provisions based on sexual orientation).

4. Pursuant to section 191 paragraph 1 Civil Code, unmarried persons having legal capacity may conclude an adoption contract with an adoptive child, while

spouses may generally adopt a child only jointly (section 191 paragraph 2 second sentence, Civil Code) – apart from the exemptions stipulated in section 191 paragraph 2, third sentence, Civil Code, in particular the adoption of the biological child of a spouse. Conversely, the challenged first sentence of section 191 paragraph 2 Civil Code permits the joint adoption of a child by two persons with the effect that the same rights as those based on descent are created between the adopting persons and the adoptive child (section 197 paragraph 1 Civil Code) only if the adopting persons are married. Since the entry into force of the Adoption Law Amendment Act 2013 (*Adoptionsrecht-Änderungsgesetz 2013*) on 1 August 2013 (Federal Law Gazette *BGBI. I 179/2013*) it is legally possible, in addition to the constellations mentioned, to adopt the biological child of a same-sex partner or registered partner without the legal relations between the child and his or her biological parent becoming extinct (on the previous legal situation, according to which registered partners were not allowed to adopt the child of the other partner pursuant to section 8 paragraph 4 Registered Partnership Act (*EPG*) as amended by Federal Law Gazette *BGBI. I 135/2009*, and pursuant to section 197 paragraph 2 Civil Code as amended by Federal Law Gazette *BGBI. I 15/2013* [and before the entry into force of the 2013 Adoption and Name Change Amendment Act (*Kindschafts- und Namensrechtsänderungsgesetz*), Federal Law Gazette *BGBI. I 15/2013*, pursuant to section 182 paragraph 2 Civil Code] in the event that an adoptive mother adopted a child, the legal relations to the biological mother and in the case of an adoption by an adoptive father, the legal relations to the biological father would become extinct, see Supreme Court *OGH 27 September 2006, 9 Ob 62/06t*; ECtHR, case *X and others*, paragraph 114 et seqq.; Explanatory Notes on Government Bill *RV 2403 BlgNR 24. GP, 4; Gitschthaler*, in: Gitschthaler/Höllwerth [ed.], *Kommentar zum Ehe- und Partnerschaftsrecht*, 2011, section 8 *EPG*, paragraph 6 et seqq.).

The conclusion of an adoption contract with an adoptive child is therefore not exclusively reserved to spouses (together or individually, if the requirements are satisfied), but also possible for individuals – irrespective of their sexual orientation – whether they live in a partnership or registered partnership or not, with the court approval of the adoption contract between an adoptive child and an adopting person being conditional upon the consent of the registered partner in the case of a registered partnership pursuant to section 195 paragraph 1 subparagraph 2 Civil Code. Even though in such cases, unlike in a joint adoption

by spouses, the legal effects do not unfold simultaneously, as the creation of legal parenthood by adoption chronologically follows descent, unmarried heterosexual partners may be the legal parents of a joint child, without that child descending from both parents, just as well as registered partners and same-sex partners may be the joint legal parents of a child.

Hence, the legislator does not allow only spouses to adopt, but also individual persons, irrespective of their sexual orientation and permits the simultaneous legal parenthood of same-sex partners vis-à-vis a child through adoption. Moreover, one should bear in mind that – following a ruling by the Constitutional Court on the relevant provisions of the Reproductive Health Act (*Fortpflanzungsmedizingesetz, FMedG*) Federal Law Gazette *BGBI. 275/1992* as amended by *BGBI. I 111/2010*), judgment of 10 December 2013, *G 16/2013* and others – limiting the right to resort to medically assisted reproduction by artificial intrauterine insemination to married couples and heterosexual partners is against Article 8 read in conjunction with Article 14 ECHR, so that constellations in which the biological child of one partner of a same-sex registered partnership grows up with both partners without legal paternity having previously existed, have become possible just as, in general terms, the individual adoption of one partner's biological child by the other partner.

5. Following established case law of the European Court of Human Rights, the European Convention on Human Rights, specifically Article 8 ECHR, does not provide for a right to adoption (see ECtHR, case *Fretté*, paragraph 32 [with reference to the decisions of the ECtHR of 10 July 1975, case *X.*, appl. 6482/74 and of 10 July 1997, case *Di Lazzaro*, appl. 31.924/96]; case *E.B.*, paragraph 41; case *Gas und Dubois*, paragraph 37). As the existing legal provisions permit adoption by individual persons irrespective of their sexual orientation as well as simultaneous parenthood of same-sex partners vis-à-vis a child which is based on adoption when it comes to adopting a stepchild, the legal provisions governing adoption fall within the scope of application of Article 8 ECHR as regards those persons (and any children to be adopted by them), so that they must satisfy the requirements of Article 14 (as regards the provisions governing adoption by an individual person see ECtHR, case *X* and others, paragraph 136; case *E.B.*, paragraph 49; cf. moreover ECtHR, case *Fretté*, paragraph 32 et seq.).

6. With the challenged provision which allows only married couples to jointly adopt a child and precludes registered partners *a priori* as joint adoptive parents, the legislator differentiates by sexual orientation where the possibility of joint adoption is concerned. On top of that, the legislator creates unequal treatment between registered partners as adopting parties in an adoption contract as against registered partners or (same-sex or heterosexual) partners in the case of step-child adoption. Whereas the challenged ban precludes joint adoptive parenthood of registered partners, even if both have a foster child or one partner has already adopted the child, the law allows for simultaneous legal parenthood of the biological and the adoptive parent in step-child adoption by adding the contractual adoption relationship for the same child.

There is no objective justification for this unequal treatment – specifically when considering the best interests of the child as required by Article 1 of the Federal Constitutional Law on the Rights of Children (*Bundesverfassungsgesetz über die Rechte von Kindern*), Federal Law Gazette *BGBI. I 4/2011*. Neither Article 8 in conjunction with Article 14 ECHR, nor Article 7 paragraph 1 of the Constitution provide for an objective justification to exclude registered partners as joint contracting parties to an adoption contract as a matter of principle.

6.1. Adoption is designed to find the best suited adoptive parents for a child (ECtHR, case *Fretté*, paragraph 42; see Explanatory Comments on Government Bill, *RV 107 BlgNR 9. GP, 11* according to which "*The main purpose of adoption is to promote the best interests of the adoptive child that does not have legal capacity [principle of protection]*"). In any given case, it is always the protection of the child's best interests which is the primary concern, both with adoption placement services and in court proceedings for the approval of an adoption contract with an adoptive child that does not have legal capacity. Accordingly, court approval will be granted only, if the adoption is in the best interests of the child and if a relation comparable to the one between natural parents and children exists or is to be established (section 194 paragraph 1 first sentence, Civil Code, cf. *Höllwerth*, in: Schwimann/Kodek [Hrsg.], *ABGB*⁴, volume 1a, 2013, section 194, paragraph 4 et seqq.). In the approval proceedings, the court will have to review in the case at hand, amongst other things, whether the adoptive child can be assured of a stable and balanced home and whether his or her physical, intellectual and emotional wellbeing will be fostered (Supreme Court

OGH 29 April 2002, 7 Ob 68/02d with further references). The statutory provisions governing adoption serve a legitimate interest, i.e. that of protecting the child's best interests (cf. ECtHR, case *Fretté*, paragraph 38; case *E.B.*, paragraph 70 and paragraph 76; *X. and others*, paragraph 138; cf. also in the context of guardianship provisions ECtHR, case *Zaunegger*, paragraph 52) and a special reason in keeping with the Constitutional Court's case law on the principle of equality and Article 14 ECHR.

6.2. The best interests of the child cannot serve as justification for precluding registered partners *per se* from jointly adopting a child; to some extent these best interests even provoke tension by such exclusion:

In light of the already existing legal provisions, fundamental concerns that it would be detrimental to the child's best interests if he or she had to grow up with same-sex parents are unsuitable *a priori* to justify the challenged provisions. Constellations in which a child has two legal mothers – as is the case of the joint daughter of the applicants – or two legal fathers are no longer generally inadmissible pursuant to current adoption law as amended by the Adoption Law Amendment Act 2013 (on the original text of the Registered Partnership Act, see also the Explanatory Comments on Government Bill *RV 485 BlgNR 24. GP, 9 et seq.*). Consequently, it does not stand to reason why the best interests of a child can be served only when the adoption mirrors the biological descent of a child from two persons of different sex as against an adoption of a child by two persons with the effect that both establish legal parenthood vis-à-vis a child that is not of their own biological descent (see further Explanatory Comments on Government Bill *RV 107 BlgNR 9. GP, 11*).

In view of the statutory provisions governing registered partnerships, which aim at institutionalising a permanent, stable relationship of two persons similar to a marriage (cf. in particular sections 2, 8 paragraph 2 *EPG*; Explanatory Comments to Government Bill *RV 485 BlgNR 24. GP, 8 et seq.*), it is not necessary, and hence substantively not justified, with a view to protecting the best interests of the child in terms of an existing stable relationship of the adoptive parents vis-à-vis each other, to allow registered partners to establish joint legal parenthood only if one partner adopts the biological child of the other partner, while excluding registered partners *a priori* from joint parenthood for an adopted child – including the partner's adopted child (cf. in this context also ECtHR,

case *Zaunegger*, paragraph 52 et seqq.; ECtHR 3 February 2011, case *Sporer*, appl. 35.637/03 [paragraph 86 et seqq.], and subsequently *VfSlg. 19.653/2012* on custody after parental separation; cf. also ECtHR, case *X* and others, paragraph 132 et seq.). It defies understanding why it should be in the best interests of the child if children in any such given constellation are not only barred *a priori* from legally institutionalising the relationship to an (existing or future) caregiver by means of an adoption contract, but are thereby also deprived *a priori* of support and maintenance entitlements.

The general exclusion by law of registered partners from jointly adopting a child as contracting parties to an adoption contract, while allowing the joint parenthood of registered partners in other constellations, is therefore inconsistent (cf. ECtHR, case *X* and others, paragraph 144) and cannot be justified on the grounds of protecting the child's best interests.

6.3. Besides, there is no apparent objective reason which would justify denying, by law, registered partners joint adoptive parenthood for an adopted child in general. In particular, the challenged provisions cannot not be justified by invoking the protection of marriage or the traditional family as a reason (cf. ECtHR 24 July 2003, case *Karner*, appl. 40.016/98 [paragraph 40]; case *X* and others, paragraph 138 et seq.), as registered partnerships are not likely to substitute marriage as an institution from a social angle, and the joint adoption of an adoptive child by registered partners, found to be suitable parents in a given case, does not threaten the institution of marriage. (cf. *VfGH* 10 December 2013, *G 16/2013* and others, paragraph 54).

7. The challenged provisions which lead to unequal legal treatment of registered partners vis-à-vis spouses and vis-à-vis persons living in a same-sex and heterosexual partnership and of registered partners as regards step-child adoption, and hence also of adopted children as regards registered partners vis-à-vis adopted children as regards persons in the other constellations mentioned, therefore lack the required objective justification.

IV. Result

1. Section 191 paragraph 2, first sentence, Civil Code (*ABGB*), *JGS 946/1811* as amended by Federal Law Gazette *BGBI. I 15/2013*, and section 8 paragraph 4 of the Federal Act on Registered Partnership (*Eingetragene Partnerschaft-Gesetz, EPG*), Federal Law Gazette *BGBI. I 135/2009* as amended by *BGBI. I 179/2013*, are therefore to be repealed as unconstitutional for violating Article 8 in conjunction with Article 14 ECHR and the principle of equality.

...

Vienna, 11 December 2014

The President:

HOLZINGER

Recording clerk:

MERSCH