

THE RECENT TRANSGENDER COURT DECISION IN CZECHIA: TWO STEPS FORWARD, ONE STEP BACK (A COMMENTARY ON CASE PL. ÚS 52/23) / Nikolas Sabján, Olexij M. Meterňkanyč

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The paper presents an output of the research project APVV No. APVV-23-0252 with title „Self-Determination for Intersex, Transgender and Non-Binary People“.

Submitted: 31 October 2024
Accepted: 16 December 2024
Published: 31 December 2024

Abstract: *The present commentary examines the recent transgender court decision by the Czech Constitutional Court (CCC). In this decision, the CCC held that compulsory sterilisation and/or castration in the context of legal gender reassignment constitute a violation of human rights. This could be considered as a significant development in the Central and Eastern European context. Nevertheless, the commentary also addresses some of the more problematic aspects of the CCC's decision. It begins by providing factual background and describing the Court's conclusions. Subsequently, the core part of the commentary aims to critically analyse the decision itself, both from internal and external legal perspectives. The commentary concludes by underlining the fact that on balance, the decisions is a step in the right direction and might serve as an inspiration for other constitutional courts in the region.*

Key words: *Trans People's Rights; Recent Transgender Court Decision in Czechia; Czech Constitutional Court; Legal Gender Reassignment; Sterilisation; Castration; Human Rights*

Suggested citation:

Sabján, N., Meterňkanyč, O. M. (2024). The Recent Transgender Court Decision in Czechia: Two Steps Forward, One Step Back (A Commentary on Case Pl. ÚS 52/23). *Bratislava Law Review*, 8(2), 243-264. <https://doi.org/10.46282/blr.2024.8.2.946>

1. INTRODUCTION

Despite the increasing awareness and recognition of trans people's rights in today's societies,¹ this minority is still regarded as vulnerable.² Experiencing gender identity in ways that differ from mainstream societal expectations often leads to violence

– both symbolic and physical – and discrimination across various aspects of trans people's lives.³ A key issue is the disproportionate interference in the private lives of trans individuals, which remains a reality in many European countries,⁴ including Slovakia (Batka, 2022a, pp. 6-11; Hamřík, 2022, pp. 152-155; Majerová, 2023, pp. 165-167). In this regard, countries of the so-called Visegrad Four have a poor track record, consistently ranking below the European average in studies concerning the acceptance and tolerance of LGBTIQ+ rights, particularly those of trans and intersex people.⁵ Therefore, it might come as a surprise that a major judicial authority makes a decision that will (probably?) seriously alter the current legal *status quo* regarding the rights of trans people. However, this is precisely the case with the recent ruling of the Czech Constitutional Court (CCC) from April 24, 2024, in the N.G. case (Pl. ÚS 52/23), where the CCC found that legislation mandating forced castration and sterilisation in the context of transition is incompatible with the Czech Constitution.

The decision is also surprising because less than two years earlier the CCC had ruled in a completely opposite manner, i. e. the Court had turned its position 180 degrees (Vikarská and Ouředníčková, 2024). The CCC's previous decision of 9 November 2021 in T. H. (Pl. ÚS 2/20) was subjected to considerable criticism by several human rights actors as well as the academia and was described as "evasive, insensitive, ignorant, and political" (Vikarská and Ouředníčková, 2022).⁶ The authors of this paper have also critically evaluated the CCC decision in question (Sabján, 2022; Meteňkanyč, 2022a), and

¹ Throughout this paper, we will adhere to specific terminology that we consider most appropriate in the context of this discourse, while also reflecting the current state of scientific and human rights debates. For instance, we use the term "trans people", as this seems to be the preferred term for many within this community. The adjective "trans" serves as a shorthand for "transgender" or "transsexual" people, and this term better encompasses the diversity of identities discussed in this paper. It is important to acknowledge that there is a distinction between transgender and transsexual individuals, and expression "trans people" functions as an umbrella term that includes individuals across the spectrum of gender identities. At the same time, we must highlight that experts from various fields continue to debate appropriate terminology, and this conversation is ongoing. The glossary of terms in this area is constantly evolving and being refined. Furthermore, in some instances, we will use terminology employed by certain judicial authorities (particularly the Czech Constitutional Court), such as "status" sex reassignment", "legal sex" or "sex change". While these terms may not represent the most appropriate choice in our view, we will adhere to them, as they are derived directly from the court's decision analysis.

² See Commissioner for Human Rights (2009) or General Assembly of United Nations. Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity. A/HRC/19/41, 17 November 2011. Available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Discrimination/A.HRC.19.41_English.pdf (accessed on 22.10.2024).

³ *Ibid.*, p. 3, para. 1.

⁴ See, e.g., Steering Committee on Anti-Discrimination, Diversity and Inclusion (CDADI). Thematic Report on Legal Gender Recognition in Europe. First Thematic Implementation Review Report on Recommendation CM/Rec(2010)5. In: Council of Europe, published on June 2022, pp. 11-13. Available at: <https://rm.coe.int/thematic-report-on-legal-gender-recognition-in-europe-2022/1680a729b3> (accessed on 22.10.2024); or European Commission (2020, pp. 7-10).

⁵ Recent Eurobarometer 2023 shows that in almost all indicators of discrimination against LGBTIQ+ people, Slovakia, the Czech Republic, Poland and Hungary perform worse than the European average. See more details in Directorate-General for Communication. *Special Eurobarometer 535. Discrimination in the EU*. April – May 2023. Available at: <https://europa.eu/eurobarometer/surveys/detail/2972> (accessed on 22.10.2024).

⁶ Perhaps the most controversial aspect of the decision concerns the Court's reasoning regarding Section 29 of the Czech Civil Code and related provisions in other legislation. These provisions made compulsory castration and sterilisation a necessary condition for the (legal) transition of trans people. However, the constitutional review of these provisions was rejected (and, according to some judges and critics, overlooked – see dissenting opinion of judge Kateřina Šimáčková to Constitutional Court of the Czech Republic, Pl. ÚS 2/20 (9 November 2021); Vikarská and Ouředníčková, 2022). This effectively led to an indirect affirmation of the legal *status quo* as being compatible with the Constitution of the Czech Republic.

with this commentary they intend to build upon their previous analyses and assess the progress made by the CCC in this matter.⁷

The objectives of this commentary are primarily (i) to describe and evaluate the extent to which the CCC has shifted its position on the protection of trans people's rights in the case under review, the grounds for this shift, and the legal basis for its decision; and (ii) to highlight that, despite this shift, there remain problematic aspects of the CCC's reasoning and the decision itself. With this in mind, we will first briefly introduce the recent decision and the CCC's reasoning and conclusions (Chapter 2); subsequently, our focus will turn to the positive and negative aspects of the ruling, providing a critical analysis from both internal and external theoretical-legal perspectives (Chapters 3 and 4).⁸

2. A BRIEF SUMMARY OF THE CCC'S RULING AND ARGUMENTATION

2.1 *Facts of the Case*

The circumstances of the case under review are relatively straightforward. The complainant, N.G., formerly A.V., birth name L.V., was born with the biological characteristics of a woman and, after birth, was officially registered as a woman with a female name and the corresponding birth number format. However, the complainant identifies as a trans man and seeks to change his legal gender. He wishes to have the official records reflect his true gender identity without undergoing the compulsory surgical procedure, which includes sterilisation and the compulsory alteration of genitalia.

To this end, the complainant initiated administrative proceedings in 2019, requesting the relevant Czech administrative authorities to: (i.) register the change of his neutral name to a male name; (ii.) register the change of his current birth number from a female to a male one; (iii.) register the change of the official designation of his legal gender from female ("F") to male ("M"). The administrative authorities did not grant the requests in question and suspended the proceedings against the complainant on the ground that he had not submitted a certificate of completion of treatment for the change of his legal sex (and thus a certificate that the complainant had been rendered incapable of reproductive function and that his genitalia had been transformed). The proceedings before the administrative judicial authorities followed a similar pattern, with the complainant's efforts culminating in the filing of a constitutional complaint with the CCC.⁹

He requested the CCC to strike down the statutory provisions that make legal gender reassignment conditional upon undergoing a surgical procedure consisting of sterilisation and genital transformation, as well as regulate the conditions for changing one's name and surname in relation to one's gender. The complainant argued that this legislation violated human dignity, the right to equality, the protection of health, as well as

⁷ For this reason, however, we will not elaborate on some aspects which we analysed in the past, and thus, we shall just refer to them here: Sabján (2022), and Meteřkanyč (2022a).

⁸ Internal legal perspectives are typical of traditional, positivist legal approaches, where law is viewed independently of social, political, economic, or ideological factors. The focus is primarily on strictly legal arguments from within the legal system. In contrast, external perspectives take these extra-legal factors into account, aiming to situate legal argumentation, reasoning, and decision-making within a broader socio-political and ideological context. For a more detailed discussion see: Douzinas and Gearey (2005, pp. 16-17).

⁹ For more on the facts of the case, see Constitutional Court of the Czech Republic, Pl. ÚS 52/23 (24 April 2024), paras. 5-16. In this regard, it appears to be the case that the complaint constituted an example of strategic litigation, that is, a type of proceeding before the relevant state authorities, the aim of which is not only to protect the rights of a particular person, but also to bring about a change at the level of the rights of a larger group of people, and thus to consciously aim to bring about a change in law, policy, practice, or public consciousness (Matiaško and Žatková, 2022, p. 103).

the right to respect for his private life and parenthood. Two key legal issues subsequently emerged in the present case, both of which were addressed by the CCC:

- (i.) whether the Plenary Chamber of the CCC has the authority to examine the merits of the complainant's request for annulment of the statutory provisions, given that the CCC has already ruled on another case seeking the annulment of partially identical provisions in the Czech legal system. This raised the question of whether the current proceedings are barred by the principle of *res iudicata*;¹⁰
- (ii.) and whether it is in accordance with the Czech constitutional order to require individuals to undergo surgical procedures consisting in sterilisation and the compulsory genital transformation¹¹ as a condition for the State to recognise their legal sex change.¹²

2.2 CCC's Decision

After addressing the first question – whether the CCC's earlier decision (Case No. Pl. ÚS 2/20) posed an obstacle to ruling on the complainant N.G.'s case¹³ – the Court turned its attention to the second, substantive legal issue: the requirement of sterilisation as a condition for legal gender reassignment under Czech law. The Court's reasoning itself can be divided into three parts.¹⁴

Initially, the CCC substantively noted that the existing legislation requires trans people to either undergo the required necessary invasive surgical procedures or to accept that the state will not officially (administratively) recognise the fact that they identify with different legal sex. In simple terms, the state will not acknowledge their affirmed sex. Both options involve human rights violations in this legal context: the first option constitutes a serious violation of bodily integrity,¹⁵ while the second interferes with an individual's right to self-determination, personal autonomy, and privacy.¹⁶

Second, the CCC¹⁷ addressed the legal conditions of "status" sex reassignment and affirmed as a legitimate aim that the state wishes to document whether individuals are male or female and to establish criteria for legal sex reassignment for the purpose of inalienability of civil status and the need to preserve the consistency and reliability of civil status records.¹⁸ The CCC expressed some concern that changes in legal sex could be inauthentic, purposeful, or even arbitrary, potentially made "according to one's mood".¹⁹ The CCC also identifies two key justifications for this legitimate aim: (i.) the existence of

¹⁰ See Constitutional Court of the Czech Republic, Pl. ÚS 2/20 (9 November 2021).

¹¹ This requirement results in the castration of trans people in the Czech Republic, as surgical procedures involving the complete removal of gonads continue to be practiced. For more on castration (including its distinctions from sterilisation) and its associated risks, see Těšínová, Doležal and Polícar (2019, pp. 211-215).

¹² Constitutional Court of the Czech Republic, Pl. ÚS 52/23 (24 April 2024), para. 4.

¹³ *Ibid.*, paras. 33-47. Although this is undoubtedly an interesting issue (and the CCC has made a number of thought-provoking points in its reasoning), we will not elaborate further in our commentary on the first issue dealing with *res iudicata*, for the reason that it is not related to the stated objectives of this commentary.

¹⁴ Following also the systematic division of Part IX.1 of the decision itself.

¹⁵ In fact, the legislation in question categorically requires every individual to comply with the requirements in question in order to render both the reproductive function and the genital transformation impossible, even in cases where this is not always medically appropriate or necessary (e.g. where the person in question is already infertile for some reason), and/or may even be a health-threatening circumstance (see Meteňkanyč, 2022a, 139-142).

¹⁶ Constitutional Court of the Czech Republic, Pl. ÚS 52/23 (24 April 2024), paras. 67-74.

¹⁷ *Ibid.*, paras. 75-81.

¹⁸ „Therefore, the State may have a legitimate interest in defining the conditions for 'status' sex reassignment, so that the status of the individual is clear and, at the same time, the authenticity of the sex status is guaranteed.“ *Ibid.*, para. 77.

¹⁹ *Ibid.*, para. 76.

"objective" biological characteristics corresponding to the sex of the person registered by the state;²⁰ and (ii.) the preservation of the "traditional" concept of parenthood (particularly motherhood) within the legal framework.²¹

Third, the CCC concluded that, although the legitimate aim described above can be pursued, the existence of the statutory conditions of legal sex reassignment under review (aiming at the sterilisation and castration of trans people) is contrary to the fundamental right of trans people to the protection of their bodily integrity and personal autonomy, in particular because it violates their human dignity.²² The legislation objectifies trans individuals by treating them as mere objects, particularly by failing to allow for individual assessments of their cases. As a result, the means used to achieve the goal of status stability are "manifestly disproportionate".²³ The Court emphasised that this goal can be achieved by less invasive means. Additionally, the CCC pointed out that requiring a person's genital transformation is inappropriate, since in normal interpersonal contact his/her genitals are not exposed, and their appearance remains routinely concealed from other people. The CCC also briefly noted that it is constitutionally unacceptable for the state to treat a person's reproductive function instrumentally, depriving individuals of the opportunity to become parents solely based on their identity, without allowing them to make that decision independently.

In the light of the above, the CCC subsequently ruled that the legal requirements of genital surgical alteration and disabling of reproductive function for the purposes of "status" change of legal sex are contrary to the fundamental right of trans people to the protection of their bodily integrity, personal autonomy and their human dignity, and struck down the relevant statutory provisions establishing these requirements, albeit with a stay of execution. Indeed, in the conclusion of the decision (paras. 103-112), the CCC emphasised its commitment to respect the principle of minimal interference in the parliament activity and provided no specific guidance on how legal sex reassignment should be regulated in the future. Additionally, the Court deferred the effects of its decision for over a year, meaning the problematic statutory requirement will remain in effect until the end of July 2025.

3. CASE PL. ÚS 52/23 – ANALYSIS FROM AN INTERNAL LEGAL PERSPECTIVE

The decision itself contains several positive elements that should be highlighted. From the fact that the Court was sensitive in its decision to reflect the preferred way of referring to the party (the complainant N.G.) and not proceeding in the manner it did in its earlier 2021 decision; through to its reasoning as to why it is unacceptable to continue to uphold legal conditions for the 'status' change of legal sex, which from a human rights perspective are clearly contrary to the idea of human dignity and the right of every individual to bodily integrity and personal autonomy, and the CCC's rejection of the objectification of trans people in the process of (legal) transition;²⁴ to pointing out that the physical appearance of genitalia falls within the deeply intimate sphere of each person

²⁰ Constitutional Court of the Czech Republic, Pl. ÚS 52/23 (24 April 2024), para. 79.

²¹ *Ibid.*, para. 80.

²² *Ibid.*, para. 82.

²³ *Ibid.*, paras. 85-87.

²⁴ Opinions within the academic and legal community (for instance see dissenting opinion of judge Kateřina Šimáčková, 2021, paras. 62-63) were voiced even before the CCC decision, highlighting that the previous Czech legislation on transition objectified transgender individuals and was deemed contrary to, among other principles, the prohibition of inhuman and degrading treatment. For more see also Nechvátalová (2021) and Kratochvíl (2012).

and remains routinely hidden from others, as the correspondence between state-registered gender and actual genitalia is not detectable in ordinary intercourse. Thus, it has been emphasised that the (legal and biological) sex of a particular individual should not be excessively perceived as a public matter.²⁵

However, despite the positive aspects of the CCC decision, there are also problematic elements that should be critically analysed. In this section, we will focus on the negative aspects from an internal legal perspective, i.e. one that is characterised by traditional (dogmatic), positivist approaches and the main emphasis is put upon strictly legal arguments from within juridical field.²⁶

3.1 Absence of the Term "Gender" in the CCC's Decision

Contrary to the ECtHR's jurisprudence, the CCC works with the notion of "legal sex" and deliberately avoids the notion of "gender", "gender identity", *et cetera*. We can only speculate why the Court refused to work with these terms. One argument could be that the above-mentioned terms proved to be particularly controversial in the public discourse in Czech Republic (the same applies to the Slovakian context). The Court apparently wished to avoid the controversy in question and declined to address the issue of the relationship between sex and gender/gender identity, which is both extremely complex and has proved to be rather divisive.²⁷

On the other hand, however, the decision also uses the formulation "subjective perception of gender".²⁸ It can thus be assumed that the CCC implicitly works with or accepts the notion of gender identity, much like the ECtHR,²⁹ but chooses a less explicit name for essentially the same phenomenon.

Although the CCC does not directly address the question of the relationship between sex and gender, it is reasonable to believe that it accepts the objectivity of biological sex and a kind of subjective character of gender identity, the incongruency between these being the reason for transgenderism. In addition, the CCC similarly avoids the term "transgender", "transgender person", and instead speaks of trans people/trans man/trans woman. This complements the aforementioned hesitancy of the CCC to invoke any term somehow connected with "gender". In this context, it is worthwhile to mention that the CCC has not avoided some of the myths surrounding transgenderism –

²⁵ *Ibid.*, paras. 73-73 and 88. Meteňkanyč (2023, p. 76), following the ideas of Andrea Baršová (2020, p. 991), pointed out that society perhaps too easily accepts the belief that an individual's legal sex/gender must be treated as a public matter. If we carefully examine selected decisions from other constitutional authorities (e.g., the Austrian Constitutional Court, G 77/2018-9 (15 June 2018), para. 31), we see that they approach legal sex/gender with caution, recognising it as part of the intimate, private sphere of the individual. It is unsurprising that, for individuals belonging to sexual minorities, the disclosure of gender or gender identity is not always perceived as unproblematic (Kišoňová, 2022, p. 85).

²⁶ Naturally, other avenues of critical reflection on the decision of the CCC can be pursued, particularly along the lines of argumentation presented in the dissenting opinions of Judges Hulmák and Fiala. These focus on criticising anti-essentialist perspectives in the interpretation of the principle of self-determination. However, due to the limited scope of this commentary, we can only briefly highlight this point.

²⁷ However, we admit that these conclusions are more of a speculative nature and the aim of this commentary is not a complex analysis of this issue. In other words, further research is needed to address this question more in-depth.

²⁸ Constitutional Court of the Czech Republic, Pl. ÚS 52/23 (24 April 2024), para. 69.

²⁹ In its older case-law, the ECtHR relied on the term "transsexualism". However, this has changed and currently it refers to transgender persons, right to gender identity, *et cetera*. See for instance ECtHR, A.P., Garçon and Nicot v. France, app. nos. 79885/12, 52471/13 and 52596/13, 6 April 2017, ECtHR, S.V. v. Italy, app. no. 55216/08, 11 October 2018, For a further analysis of case-law on this issue see von Arnould, von der Decken and Susi (2020); Bassetti (2020); Horvát (2021, pp. 122-123, 128-130); or Erdősová (2023, pp. 30-33; 2024, pp. 93-94).

one of the well-known, for instance, is the 'born in the wrong body' myth (further discussed in section 4.3).³⁰ Nevertheless, a positive aspect of the decision is that the CCC does not rely on a kind of biological determinism (Batka, 2022b, pp. 7-10) in the form of a complete rejection of gender/gender identity, but instead accepts it, while also considering gender identity (at least implicitly in the sense described above) as part of the right to privacy.

3.2 Following the Decision-Making of the ECtHR (in Good and Bad Aspects)

The CCC largely accepted the reasoning of the ECtHR in relation to the issue of compulsory sterilisation as a condition for legal gender reassignment, as explained in 2.2 above. However, in comparison to the ECtHR, the CCC explicitly found that the legislation in question was contrary to the human dignity of the complainant. Notably, the ECtHR does not explicitly use the concept of human dignity in its case-law on questions of legal gender reassignment. Unlike the CCC's previous decision in 2021, in which the Court laconically stated that the ECtHR's jurisprudence did not seem appropriate as it had "*considerable doubts about the transferability of some of the conclusions of the ECtHR to the environment of the Czech legal system*"³¹ without any further reasoning, in the present decision the CCC has explicitly relied on the ECtHR's reasoning, which is undoubtedly commendable, although on the other hand it should be considered as the bare minimum.

However, a negative aspect of the CCC's inspiration from the ECtHR may be the fact that the Court did not reflect some of the criticised elements of the ECtHR's decision-making practice and adopted them anyway. The first one can be found in paragraph 87 of the decision, where it states that "*for the purposes of 'status' sex reassignment, for example, it would be possible to use the diagnostic opinions of several independent specialist sexologists demonstrating the irreversibility of the individual's beliefs regarding his or her sex reassignment.*"

The ECtHR in its decision *A.P., Garçon v. France* also stated that the said requirement falls within the margin of appreciation that States enjoy in this regard.³² This conclusion of the ECtHR has been criticised on several occasions on the grounds that this approach of the Court to transgenderism is "pathologising" (see Cannoot, 2019; Hansen, 2022, pp. 154-155; Mikulová, 2023, pp. 50-52). Relatedly, both the ECtHR and the CCC speak of the "right to (gender/sex) self-determination" as being part of the right to privacy, not explicitly addressing the definition of this concept in the first place. Rather, it is implicitly accepted that gender self-determination can/should be subject to certain conditions in the context of legal gender reassignment (such as the aforementioned medical examination condition). This is a significantly different understanding of the concept of the right to (gender/sex) self-determination compared to the prevailing view in the academic or human rights discourse. In any case, the ECtHR is criticised for refusing to move towards the understanding of right to (gender/sex) self-determination more in line with the understanding in academia or by international and regional organisations and NGOs.³³

Another aspect of the CCC decision that could be problematised/criticised is its conclusion in paragraph 69 of the decision, in which it states that "*if an individual is to*

³⁰ Constitutional Court of the Czech Republic, Pl. ÚS 52/23 (24 April 2024), para. 87.

³¹ Constitutional Court of the Czech Republic, Pl. ÚS 2/20 (9 November 2021), para. 61.

³² ECtHR, *A.P., Garçon and Nicot v. France*, app. nos. 79885/12, 52471/13 and 52596/13, 6 April 2017, paras. 145-154.

³³ Essentially, it is defined as a possibility for a person to provide "a statutory declaration affirming that they have a stable connection with the gender in which they wish to be recognised." (van den Brink and Dunne, 2018, p. 59).

have a genuine right to self-determination and if he is to have a real say in the organisation of his life, he should also have the space to experience his **permanent** perceived belonging to a particular sex." The CCC implicitly excludes the possibility to experience gender-fluidity since it considers transgenderism as something "permanent", i.e. unchangeable. The issue at hand would require more space, but one may mention in this context, for example, the 2019 decision of the Belgian Constitutional Court, in which this Court concluded that legislation excluding gender-fluidity is contrary to the principle of equality/the prohibition of discrimination.³⁴

Finally, it is worth briefly noting that the Court did not consider another potential avenue in this case: the issue of a potential violation of the principle of equality and non-discrimination, which the complainant also raised. Similarly, the ECtHR has so far neglected this aspect of gender identity cases. This omission was already highlighted and criticised³⁵ As for instance Lena Holzer argues, the added value of a decision on a violation of the prohibition of non-discrimination could be that "it would highlight that trans persons' gender identities are currently not recognised on an equal basis with cis persons' gender identities" (Holzer, 2022, p. 179).

3.3 Postponement of the Enforceability of a Court Decision

The CCC's rather surprising move was to postpone the enforceability of the decision, on the grounds that the immediate repeal of the legislation under review could create undesirable situations in which legal certainty and the stability of the legal order would be undermined. The Court considered that by taking this step it was giving the legislator sufficient time of more than one year to regulate the conditions of legal sex reassignment in the Czech Republic in a dignified and constitutionally compatible manner, as well as to adjust the relevant regulation in various related areas accordingly.³⁶ At the same time, the CCC openly admitted³⁷ that until the decision becomes enforceable (either by 30 June 2025 or once new legislation is enacted and comes into effect), the existing legal conditions for legal sex reassignment should be applied as a still (intertemporally) valid and effective part of the legal order.³⁸

The CCC's solution can be criticised on several grounds. First, other national constitutional courts³⁹ have made their rulings regarding invasive medical requirements for the transition process immediately enforceable, recognising the obvious and fundamental interference with the human rights of trans persons. This approach was taken despite the associated risks to the principle of legal certainty. However, the serious and irreversible damage to bodily integrity, the objectification of trans persons and the obvious interference with their human dignity and personal autonomy should outweigh the aforementioned risks.

Secondly, several lawyers⁴⁰ and the dissenting CCC judge, Dr. Milan Hulmák, have pointed out that the Court could have proceeded differently, which would have provided

³⁴ For a more extensive analysis see Sabján (2023).

³⁵ Constitutional Court of the Czech Republic, Pl. ÚS 52/23 (24 April 2024), para. 2.

³⁶ *Ibid.*, paras. 108-111.

³⁷ *Ibid.*, paras. 110-112.

³⁸ „Strictly speaking, until this ruling is enforceable, "status" sex reassignment cannot occur without surgical intervention, with concomitant disabling of reproductive function and transformation of sexual organs." *Ibid.*, para. 112.

³⁹ See, e.g., the decision of German Federal Constitutional Court, Order of the First Senate of 11 January 2011, 1 BvR 3295/07, the court's verdict and paras. 79-80

⁴⁰ Leviathan vs. Judikatura vs. podmínka operace a sterilizace pro úřední změnu pohlaví. In *České podcasty*, from 42 min, 45 sec. Available at: <https://ceskepodcasty.cz/epizoda/426916> (accessed on 22.10.2024).

a solution to the persons concerned immediately and not only in the unknown future (dependent on uncertain and external political and social circumstances – this aspect is discussed in the next chapter). The solution would have consisted in narrowing the interpretation of Section 29 of the Czech Civil Code, whereby the said provision was to be constitutionally interpreted in light of the injunction clearly formulated in Section 2(1) of the said Code,⁴¹ as well as with *“minor interventions in the Registry Act and the adopted intervention in the Act on Specific Health Services in its essence declaring the state of affairs that should apply here even without the intervention of the Constitutional Court.”*⁴² Thus, one possible interpretation of section 29(1) of the Civil Code is that it was intended to regulate “sex change” only in the case of persons interested in changing their biological sex, but not for other cases of official “sex change”. In doing so, it was urged to overcome the strict interpretation linking “official” change exclusively to biological sex by employing a *ratione legis* interpretation.⁴³

Thirdly, the CCC itself has already predicted how legal sex reassignment will take place if the Czech legislature remains inactive. Specifically, “status” sex reassignment will continue to be regulated only by the remaining (unrepealed) provisions of Section 29(1), second sentence of the Civil Code, while “operative” gender reassignment will be regulated only by the remaining provisions of the Act on Specific Health Services. Thus, legal certainty, the stability of the legal order and the effective protection of the rights of trans people need not be affected (although this is, of course, far from an ideal solution, and the regulation in question has significant gaps that will need to be addressed through practice, which can be risky).⁴⁴ However, it would not be the first time that a CCC decision striking down a piece of legislation has come into immediate effect. Yet, within the Court’s reasoning is an explicit acceptance of an interim legal state of affairs that allows for the continued compulsory castration and sterilisation of trans individuals. To put it slightly provocatively, we could say that these invasive surgical procedures in question will now be performed with the “sanctification” of the CCC. Consequently, permitting and perpetuating a situation where compulsory castration and sterilisation is a prerequisite for the completion of transition appears to be a relic of a eugenic mindset that should have no place in the 21st century.⁴⁵ In the Czech Republic, however, this requirement will still be part of the legal system until at least the end of June 2025.

⁴¹ It imposes an obligation to interpret all provisions of private law in conformity with the Charter of Fundamental Rights and Freedoms, the constitutional order as a whole, the principles underlying the Civil Code, and with consistent regard for the values it protects. If the literal interpretation of a provision diverges from this mandate, it must be subordinated to these higher principles.

⁴² Dissenting opinion of judge Milan Hulmák to Constitutional Court of the Czech Republic, Pl. ÚS 52/23 (24 April 2024), para. 5.

⁴³ In principle, it involves the application of teleological reduction (Melzer, 2009, pp. 248-251; Mrva and Turčan, 2024, pp. 96-97) to determine the limits of interpretation. In this context, the CCC would, by its authority and in accordance with Section 2(1) of the Czech Civil Code, purposefully narrow the interpretation of Section 29, as scholars have pointed out several ways to interpret the provision in question (Baršová, 2013, p. 26; Doležal, 2013, p. 19).

⁴⁴ This could also pose a problem in light of ECtHR case-law, which calls for a clear and predictable legal procedure that would “provide quick, transparent and accessible procedures” in the context of legal gender recognition. See ECtHR, *X a Y v. Romania*, app. nos. 2145/16 and 20607/16, 19 January 2021.

⁴⁵ In his research, Peter Dunne (2017) outlines the various justifications previously presented by legislators or the legal professional community for requiring mandatory sterilisation/castration as a part of the transition process for trans individuals. With some degree of simplification, these are three central justifications: preserving the principle of legal certainty, ensuring the welfare of children, and protecting the natural form of reproduction. Nevertheless, it is clear that none of the justifications are convincing and sterilisation

4. CASE PL. ÚS 52/23 – ANALYSIS FROM AN EXTERNAL LEGAL PERSPECTIVE

4.1 *The Need for Court Restraint and the Rejection of Judicial Activism (?)*

The CCC's decision was perceived by many as activist, and we shall turn to this question in this section. In the aforementioned 2021 decision, the Court declined to address the issue of the inconsistency of the condition of sterilisation in a legal sex reassignment on the grounds that "*if it had dealt with these questions, it would have led to politicisation of the judiciary.*" It is not too much of a surprise that the CCC's decision under analysis has also been subject to such criticism, i.e., judicial activism. First of all, however, it must be emphasised that the CCC has chosen a relatively cautious and "minimalist" approach even for the context of the Czech Republic. In principle, it merely adopted (as mentioned above) the reasoning of the ECtHR, which has become settled case-law. The CCC itself states in paragraph 107 that "*the legislator's inaction is unsustainable in a situation where the Czech Republic remains one of the few European countries where the legal requirement for sex reassignment surgery persists. Of the 27 EU Member States, only six either do not allow official sex reassignment at all (Hungary - on the incompatibility of the Hungarian legislation with Article 8 of the Convention, cf. the ECtHR judgment in R.K. v. Hungary, 22.6.2023, no. 54006/20, § 77) or make it conditional on sterilisation or castration (Bulgaria, the Czech Republic, Latvia, Romania and Slovakia). Finland, for example, has responded to the ECtHR case-law by adopting new legislation in 2023.*" Thus, we can see that the Czech Republic had one of the strictest legal regulations and the CCC basically only adopted the current developments of the ECtHR case-law. Moreover, as we indicate below (section 4.2.), the CCC kept to the role of a negative legislator, as stated in paragraph 104 of the decision: "*by repealing the regulation in question, the Constitutional Court respects the principle of minimal interference in the activities of the Parliament - it does not indicate how concretely sex reassignment should be regulated in the future.*"

But what's more important is the assumption of the argument concerning judicial activism: it is that if the CCC would have upheld the existing legal framework, this would have somehow been *apolitical* or *non-ideological* and the CCC would have shown restraint and avoid judicial activism. The fact of the matter is that whatever the CCC had decided on this matter, it would still have been perceived as ideological or political.⁴⁶ Here we shall refer to Duncan Kennedy's term „hermeneutics of suspicion“. By that he means that "*contemporary elite jurists pursue, vis-à-vis one another, a 'hermeneutic of suspicion', meaning that they work to uncover hidden ideological motives behind the 'wrong' legal arguments of their opponents, while affirming their own right answer allegedly innocent of*

requirements rely upon a weak, discriminatory, and logically inconsistent framework. As Dunne (2017, p. 28) points out, "*European policymakers have failed to offer a compelling rationale for trans sterilisation and such requirements should not form part of Europe's gender recognition rules.*" This is confirmed by the fact that of the current 27 Member States of the European Union, there are only six that either do not allow official "sex change" at all (Hungary) or make it conditional on the requirement of castration and/or sterilization (Bulgaria, Latvia, Romania, Slovakia and still the Czech Republic). Over the last two decades (also following ECtHR case-law), most EU states have dropped this condition, most recently Finland and Spain. For more see Trans Rights Map. Europe & Central Asia 2024. LGR cluster. Available at: tgeu.org/home/legal-gender-recognition/cluster-map (accessed on 22.10.2024). However, the situation in Slovakia has become more complex due to recent developments, which are discussed in greater detail in the following subchapter. At present, it is difficult to assert that transition is conditional upon the requirement of castration and/or sterilization, as a legal vacuum has emerged, complicating the understanding of current practices. The authors of this commentary rely on media reports from the first half of this year, when the Ministry of Interior of the Slovak Republic declared that legal transitions are not currently being processed. According to the Ministry, no official sex changes have been recorded since the relevant administrative acts were repealed (as of December 2023). For more see Zdút (2024).

⁴⁶ For a more extensive analysis, see Sabján (2022, pp. 131-133).

ideology" (Kennedy, 2015, p. 91). He further points out that judicial decision-making is an ideological struggle, and he distinguishes between "activist judges", "difference-splitting judges", "bipolar judges" or simply "centrists" (Maňko, 2021, p. 182). The ideological struggle applies, presumably, to lawyers, academics and other legal actors alike (Kennedy, 2007). Simply put, Kennedy is pointing to the ideologically motivated legal practice (and theory too) since, as he puts it, "*judges who claim they are ideology free are either acting in bad faith, or simply in denial in the psychoanalytical sense*" (Maňko, 2021, p. 184). Although Kennedy is working in a different legal context (common law system) and mostly focusing on appellate courts, his view is, we believe, correct. This description is especially accurate when it comes to, for instance, human rights/constitutional law (our case).

Consequently, to demonstrate this on a specific example, it is very likely that a conservative legal theorist/practitioner will criticise this decision on the basis of judicial activism, as the CCC's conclusion will not be in alignment with his/her/their ideological position, whereas a legal theorist/practitioner with a more liberal/socialist bent will most likely come to the opposite conclusion, even arguing that the CCC showed too much restraint. Put simply, the critique of decisions on the grounds of judicial activism is almost always ideologically motivated, especially in cases involving certain moral, ethical, or human rights issues (as is the case here).

4.2 Constitutional Courts as Negative Legislators

As previously mentioned, the CCC explicitly relied on the concept of negative legislator⁴⁷ in its reasoning, emphasising the necessity for the legislature to "*use the available scientific knowledge to resolve at the legislative level a sensitive social problem related to the sex reassignment of trans people*".⁴⁸ Although the CCC does not want to present the legislator with the specifics of how future regulation will be implemented (in line with the principle of minimal interference in the Czech Parliament), the Court actively admits to playing the role of a 'catalyst' for democratic debate in areas where it has not yet taken place or where it has long been dysfunctional.⁴⁹ But the CCC has left it to the responsibility of the Czech Parliament and the Czech government to prevent the emergence of opaque situations that could undermine legal certainty and the stability of the legal order in the absence of intervention (*de facto* this will be our model case No. I, examined below).

We believe that the CCC could have been more expansive in delineating the boundaries within which the Czech legislator could "constitutionally operate". Failing to do so might risk creating situations where opaque legal and political situations actually arise that would benefit neither the transgender persons nor stability of the legal order. The CCC should not only have stuck to the so-called concept of a negative legislator, i.e. this is a function in democratic societies where constitutional courts correct the normative (in)activity of the legislative and executive branches by assessing its results or even the process of normative activity in terms of compliance with the constitution and constitutional laws (Berdisová, 2016, p. 554), but the CCC should have also embraced the role of a so-called positive legislator. While the traditional concept of the negative

⁴⁷ Constitutional Court of the Czech Republic, Pl. ÚS 52/23 (24 April 2024), para. 109.

⁴⁸ *Ibid.*, para. 108.

⁴⁹ *Ibid.*

legislator is well known and established⁵⁰ (cf. Bujňák, Gaňa and Hodás, 2023, pp. 58-62), some theorists have argued (Brewer Carias, 2011, chapter 3; Berdisová, 2016, pp. 555-557) that constitutional courts are in a sense not only negative legislators but also positive legislators, for a number of reasons. It is not necessary to address all of them at this point. It is sufficient to mention one of the main justifications, namely that constitutional courts, in their decisions on the (in)compatibility of lower-level legislation with higher-law legislation, often indicate to the legislative body what form of legislation would align with the constitutional framework of the state. In some cases, this is done in an indirect way, while in other cases the selected constitutional courts directly describe the preferred legislative changes (Berdisová, 2016, p. 555). Admittedly, this approach would limit the political discretion of the Czech legislator, which may not fully align with the principle of self-restraint mentioned earlier. However, such action would demonstrate the CCC's efforts to uphold the compliance of statutes with the constitution. Otherwise, it risks scenarios that may be problematic, two of which we outline below.

4.2.1 Model Case No 1: The Czech Parliament's Inactivity

First, we will present a scenario from our Slovak context that could be an "inspiration" for the Czech parliament. In Slovakia, although selected parts of the legal order have not been repealed by the Constitutional Court, the existing administrative acts on legal gender reassignment has been derogated through a series of political steps. In particular, the Ministry of Health of the Slovak Republic's Professional guidance on the unification of procedures for the provision of health care for gender reassignment before the issuance of a medical opinion on the change of a person's sex administratively recorded in the registry office from 2022, as well as the follow-up Standard Procedure for the Diagnosis and Comprehensive Management of Health Care for Adults with Transsexualism from 2022, both of which were repealed: the guidance at the end of 2023, the standards again in April 2024.⁵¹ It is worth adding that in justifying this, the Ministry of Health made no secret of the fact that these were politically motivated steps that had to be taken for the functioning of the ruling coalition. Although it was pointed out that the acts in question would be revised and subsequently put into effect, it is questionable when this will happen and what the content of these revised acts will be.⁵² However, it is clear that the legal vacuum in which transgender persons living in Slovakia find themselves is also due to deliberate interference from certain political actors, and the subsequent inaction in this area is not all that surprising.

In this respect, we do not want to predict a similar result in the Czech Republic, but we believe that the above is a possible alternative. There is certainly a huge temptation to politically abuse the issues discussed and amplify the existing divisions.

⁵⁰ This concept is traditionally associated the Central European context with Hans Kelsen, who already in 1928 published an article entitled "La garantie juridictionnelle de la constitution (La justice constitutionnelle)", in which he introduced the concept of constitutional courts as "negative legislators" to non-German-speaking readers, a perception that had and still has a far-reaching significance in Central Europe. See Kelsen (1928).

⁵¹ See Ministry of Health to repeal gender reassignment guidance. Published on 21.11.2023, available at: <https://www.health.gov.sk/Clanok?mzsr-usmernenie-pohlavie-zmena-zrusenie> (accessed on 22.10.2024) and Notice of termination of the standard procedure of "Standard Procedure for the Diagnosis and Comprehensive Management of Health Care for Adults with Transsexualism (F.64.0)". Published on 02.04.2024, available at: <https://www.health.gov.sk/Zdroje?/Sources/dokumenty/SDTP/standardy/ops-transsexualizmus/SP-pre-diagnostiku-a-komplexny-manazment-zdravotnej-starostlivosti-o-dospelu-osobu-s-transsexualizmom-F64-0.pdf> (accessed on 22.10.2024)

⁵² We would only add here that the adoption of the above guidance and standards alone has taken several years, and it is likely to take a considerable period of time to revise them as well. For more see Batka et al. (2023) or Vašečková (2022, pp. 12-13).

While the CCC has stated that it is the responsibility of the Parliament and the Government of the Czech Republic to prevent the emergence of undesirable situations that would undermine legal certainty and the stability of the legal order, the changes must in fact be made by the legislature by the end of June 2025 at the latest, which might lead to several complications.

Firstly, it is questionable whether the legislative changes in question will be ready by that date and whether there will even be the political will to enact legislation that respects the content of the CCC decision under analysis (especially given that a significant portion of the current Czech coalition consists of conservative politicians). Won't some political actors assess this complication in such a way that it would be better to remain inactive in the matter, after all, what sanction do they face if they fail to respect the CCC's requirements? Secondly, even if there is political will to adopt certain changes, there is a risk that politicians might only implement minimal adjustments that do not fundamentally alter the situation for transgender individuals in the Czech Republic.⁵³ And thirdly, the CCC has failed to take into account the particular political context in the Czech Republic; specifically, we are referring to the parliamentary elections in the autumn of 2025. Is there a possibility this issue will be abused by populist political actors if less than a few months before the elections the status of transgender persons as well as the overall position of sexual minorities in society will be addressed? Hopefully this will not be the case and that the Czech political scene will show a higher degree of political culture in this regard as opposed to the latest Slovak parliamentary elections, where such abuse indeed occurred.⁵⁴

4.2.2 Model Case No 2: Minimal Changes

At the same time, it is appropriate to elaborate not only on the scenario described in the previous section, in which the Czech legislator would remain inactive, even in the long term, but also on the possibility of adopting only minimal changes, while it would remain questionable whether such a minimally changed legislation would withstand (next) constitutional scrutiny.

Upon a careful reading of the CCC's ruling, it becomes evident that one of the most significant shortcomings of the repealed legislation is the requirement for individuals to undergo specific surgical procedures, often resulting in castration, as a prerequisite for completing their legal gender reassignment. The legislation in question requires all persons seeking to change their legal status to undergo, automatically and without exception, "surgical transformation of the genital organs and disabling of the reproductive function and prevents consideration of the individual situation of specific individuals and their interests."⁵⁵ Thus, the regulation in question objectifies trans people, which is contrary to their human dignity.

The CCC's stance is commendable, but less so the fact that it did not further define the boundaries within which the Czech legislator should operate. What if, due to the political context described above, the legislator was to adopt only minimal modifications, such as retaining the obligation to sterilise, but no longer castrating, individuals who wish to undergo a legal gender reassignment? Alternatively, the legislation would not automatically require surgical genital transformation and

⁵³ We discuss this scenario below.

⁵⁴ And it has been going on for some time – demonstratively see for example: Kiššová (2023); Zdút (2023); Zábajniková (2024); or Tomečková (2024).

⁵⁵ Constitutional Court of the Czech Republic, Pl. ÚS 52/23 (24 April 2024), paras. 85-86.

disablement of reproductive function from every individual but would introduce certain exceptions (e.g. that no longer infertile persons would not have to undergo the procedures in question or those who might have health complications related to the procedure), but the sterilisation condition would still be present. What would happen in such a situation?

It is more likely that if the Czech legislator respects the authority of the CCC, it will drop the condition of compulsory sterilisation/castration. However, how is the Czech legislator expected to address other invasive (particularly medical) conditions often imposed during the legal gender reassignment process? These include selected surgical procedures required to approach or confirm one's preferred legal gender, the obligation to undergo placement in a medical facility for a certain period "for observation," the performance of medical tests (including Real Life Experience tests) to prove the irreversibility of one's sexual/gender identity, or mandatory hormone treatment for a specified period. To what extent is it constitutionally permissible, from the perspective of the CCC, to pathologise the process of legal gender reassignment, despite considerable criticism from numerous human rights organisations? It seems that the CCC has opened up more questions than it has answered with its reticence. One could therefore argue that the CCC has underestimated his role as a negative and positive legislator, as it could have better/clearer/more precisely delineated in his reasoning the "constitutional boundaries" within which the Czech legislature should subsequently operate.

4.3 Persistent Myths (even) in the Court's Decision

To conclude our analysis, we cannot fail to mention briefly the fact that even in the Court's reasoning we can find a number of persistent myths or stereotypes about the trans community that continue to appear in legal discourse, but which many experts have recently sought to dispel (Dušková, 2020, p. 962; Nitra, 2021, pp. 228-230). We shall mention only two "myths" that the CCC mentions together in its justification, presenting them as a "more appropriate way" of securing "status" sex reassignment (as opposed to the current Czech regulation).⁵⁶ These are the need for a person to prove that he or she is permanently "suffering from life in a bad body", with permanence also to be proved by a "time test".⁵⁷ That test is commonly referred to as the "real-life experience" (RLE) or "real-life test" (RLT; for more details see Levine, 2009).

Whatever the myth of 'born in the wrong body', or both RLE and RLT combine problematic pitfalls. The myth of being "born in the wrong body" is based on the persistent body/mind dichotomy that is the legacy of René Descartes and representatives of Cartesian thought. This perception supports the narrative that if one experiences gender non-conformity, one automatically desires to fully transition one's gender/legal sex to the opposite (Nitra, 2021, pp. 218-222). Dušková (2020, p. 962) correctly points out that we can metaphorically imagine this situation as a transgender person being forced to wear, as it were, a mask of the opposite sex until the time of transition, when they can finally shed this mask through the procedure of changing their legal gender.

However, the "born in the wrong body" narrative continues to support the current binary understanding of subjectivity, law and society, but we know that this binary does not reflect the diversity of the trans community and the existence of intersex/non-binary

⁵⁶ Constitutional Court of the Czech Republic, Pl. ÚS 52/23 (24 April 2024), para. 87.

⁵⁷ This is a time requirement placed on the process of legal gender reassignment and is a fairly common practice in a number of Council of Europe countries and can be applied at different stages of transition. In some cases, applicants must demonstrate that they have lived publicly in accordance with their new gender identity/legal sex for a period of time. See Meteňkanyč (2022b, pp. 108-109).

individuals.⁵⁸ Despite the dominance of such an understanding of the trans phenomenon (both in public and academic discourse), it is now recognised that the given narrative does not correspond to social or biological reality and is considered outdated (Dušková, 2020, p. 963). The goal of the trans person's transition is not to "fix" a "biological anomaly", but to be able to freely define and express one's identity.

At the same time, even today's practices in RLE or RLT exhibit several problematic moments that are not reflected by legislators, but also by judicial authorities, namely the tests in question are usually carried out without the applicant being issued with personal documents that reflect their preferred gender identity (Köhler and Ehr, 2016, p. 25). Thus, there is a test of living in the preferred identity, but without legal "support".⁵⁹ In these temporal "trials" of trans persons, it is also worth mentioning the (often purposeful) time delays that are caused either by procedures (this is especially the case in court proceedings), but also by medical experts who, in the case of their general negative attitude towards the trans community, can prolong medical tests and procedures quite dramatically.

However, let us add that the above two myths are really only mentioned in passing by the CCC, as part of a broader argument. We believe it is crucial to highlight that if these myths are accepted uncritically, they will only perpetuate stereotypes about what a "proper" trans person is supposed to look like. Furthermore, they imply that individuals must demonstrate the seriousness of their gender identity through an RLE or RLT-type test, but without providing for the legal side of this "testing".

5. CONCLUSION(S)

Although we have been more critical of the CCC's decision itself in previous chapters, it is important to emphasise that we welcome the CCC's action and that this is indeed a landmark decision by a major judicial authority, the first of its kind in our Visegrad region, and a significant step in the recognition and protection of the rights of trans people in the Czech Republic.⁶⁰ We would not want to diminish the importance of such a step, since our "Visegrad" space has long been criticised for its attitude towards the protection of the human rights of sexual minorities. We have already mentioned a number of positive aspects of the decision in the present commentary (e.g., the adoption of a sensitive way of addressing the parties, the rejection of the objectification of trans and intersex persons, the rejection of the invasive medical procedures of sterilisation/castration in the case of transition, the respect for and following of the case law of the ECtHR, the CCC's way of

⁵⁸ The narrative in question thus excludes other possibilities of gender and sexual fluidity, and the question arises as to what direction to take in grasping corporeality if we are to abandon the mind-body dichotomy. Many point to poststructuralist approaches (e.g., as presented by M. Foucault), whereby it is declared that both mind and body are largely products of sociocultural construction and cannot be effectively separated. Being in and experiencing gender is the result of cultural, social and individual variables and actions that necessarily respond to each individual's experience and cannot always legitimately meet the parameters set by the ideal version of that gender. However, if societies were to move in this direction, there would have to be a fundamental rethinking of cultural and social practices. For more detailed analysis see Dietz (2018), Hartline (2016), Nitra (2021) and Meteňkanyč (2022b).

⁵⁹ This can be particularly burdensome for trans people who must already live in their desired gender, but without legal recognition (i.e. without proper documentation), and thus have to "prove" that they actually identify with that gender. See European Commission (2020, p. 115).

⁶⁰ Such decisions are rather exceptional. However, similarly in Slovak circumstances, see Supreme Administrative Court of the Slovak Republic, 1 Sžk 38/2021 (19 October 2022).

communicating with the public,⁶¹ etc.), but we particularly appreciate that the decision reflects the growing awareness of the courts to respond to legislative shortcomings and the realisation of the need to protect the fundamental rights and freedoms of all members of society from outdated and discriminatory legal frameworks.

In this regard, some scholars (e.g., Vikarská and Ouředníčková, 2024) have pointed out that the CCC's actions can also be seen through the lens of the concept of responsive judicial review. This concept emphasises the important role that courts play in the process of democratic constitutional deliberation, particularly because even relatively well-functioning legislative processes are subject to various forms of dysfunction (Kosař and Ouředníčková, 2023, pp. 446-447). It focuses on the importance of judicial review to be responsive to majority constitutional understandings as well as to minority rights claims (especially in cases that legislators have long neglected, as they tend to want to address primarily issues of concern to the majority in society or seek to avoid controversial issues for reasons of political preferences).

Abolishing the unconstitutional conditions that objectify trans people is viewed by many as a sexual minority claim that will not be given due consideration by the majority, as it does not score "political points". If anything, only negative ones. Therefore, the CCC's intervention in this matter, following the identification of fundamental legislative shortcomings, is also adequate and legitimate in our view in this regard. Indeed, since the Czech Parliament did not address the issues raised (despite having had several opportunities to do so⁶²) it is commendable that the CCC did not remain passive and in line with the responsive role of judicial review reacted to an issue that the Czech legislature did not address, despite the fact that it is certainly a fundamental human rights issue. The CCC's responsiveness in N.G. case is an important change (see as well: Vikarská and Ouředníčková, 2024). And this is where we see a possible inspiration not only for the Slovak legal context, but for the Central European one in general, where it is not excluded that the highest judicial authorities will act reactively in protecting the fundamental human rights of the majority and minorities, including sexual ones.

Therefore, we believe that the CCC decision described above could potentially be a major turning point in the approach of Central European judicial authorities to LGBTIQ+ rights, although it remains to be seen what the reaction of other judicial authorities will be, at least in our own, Slovak context. It will also be interesting to see whether the CCC will act similarly in situations involving less serious and irreversible harm (after all, the scientific and human rights consensus on the necessary condition of compulsory sterilisation/castration is widely accepted and not too controversial today).

At the same time, however, we aimed to avoid an uncritical celebration of the said decision and pointed towards several shortcomings. These include (from both internal and external legal perspectives) the reticence on the part of the Court in relation to the use of the notion of gender/gender identity (or to be more explicit about the relationship between the above-mentioned notions), the failure to discuss some problematic aspects of the ECtHR's decision-making practice (the question of the right to gender self-determination, the acceptance of a pathologising approach, the absence of an assessment of a possible violation of prohibition of discrimination), the CCC's excessive

⁶¹ The CCC has also established a Q&A to the decision which is certainly a positive step and a source of inspiration for other courts. See CCC (2024). *Otázky a odpovědi ohledně nálezu Ústavního soudu ve věci podmínek pro změnu pohlaví: (nález sp. zn. Pl. ÚS 52/23 ze dne 24. 4. 2024)*. Available at: https://www.usoud.cz/fileadmin/user_upload/Tiskova_mluvci/Publickovane_nalezky/2024/Q_and_A_52-23_002_.pdf (accessed on 22.10.2024).

⁶² As the CCC itself pointed out. See Constitutional Court of the Czech Republic, Pl. ÚS 52/23 (24 April 2024), paras. 105-108.

reluctance in the role of a negative legislator, and, last but not least, upholding some of the myths regarding transgenderism (RLT and the narrative about being „born in the wrong body“) and giving them an appearance of legitimacy. This may have been an unintentional move by the CCC, nevertheless it shall be pointed out that such „myths“ are indeed not helpful in any way and lack any scientific basis.

Thus, on balance, despite these shortcomings, the CCC has made several positive steps towards improving the recognition and provision of protections for the rights of trans people in this matter. However, it has also taken some problematic turns. As the Czech legal landscape continues to evolve, we shall see how the decision reviewed above will affect the lived realities of trans people, as well as whether other judicial authorities in the Central European area will be inspired by the CCC's decision.

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