Evasive, Insensitive, Ignorant, and Political

The recent Czech transgender case

Zuzana Vikarská & Sarah Ouředníčková

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"*In the Czech Republic, people are divided into women and men*," stated the Czech Constitutional Court ('CCC') in its plenary ruling of 31 March 2022 (Pl. ÚS 2/20). "*The existence of men and women is also acknowledged in the constitutional order*," continues the CCC, and "*if it is constitutionally accepted that people are divided into men and women and that this division is to have some legal or practical consequences, then it is logical that the state also records, in some form, information about one' s sex, i.e., whether one is a man or a woman.*" With these statements, the CCC rejected the claims of a trans person who had initiated constitutional review of three provisions of the Czech legal order. Ironically, this long-awaited ruling was delivered on 31 March, the International Transgender Day of Visibility.

T. H. is a non-binary person, born as a man in Prague in the 1970s. T. H. does not identify as a male, nor as a female. If they had to choose, they would prefer to be addressed as female. The CCC, quite ostentatiously, addresses them in masculine form, which we will address later in our post. Importantly, T. H. has not undergone the surgical sterilisation which the Czech legal order imposes as a condition of gender reassignment; they have only undergone some aesthetic changes and are receiving hormonal treatment.

The main purpose of T. H.'s litigation was to initiate constitutional review of the forced sterilisation, i.e., of Section 29 of the Civil code which stipulates that gender reassignment must be achieved through surgery "*while simultaneously disabling the reproductive function and transforming the genitalia.*" Although a majority of judges of the CCC agreed that this requirement is clearly unconstitutional, the provision has nevertheless withstood constitutional scrutiny and remains part of the Czech legal order.

How is it possible that a minority of six judges overruled a majority of eight?

The math is simple: to declare a provision unconstitutional, the CCC needs a qualified majority of nine judges. In the case at hand, the original judge rapporteur, Kateřina Šimáčková*, proposed to strike down the controversial provision for a breach of the constitutionally guaranteed right to physical integrity and even for a breach of Art. 3 of the European Convention on Human Rights. Her draft gained support of eight judges; yet, being one vote short of the required majority, the eight judges became the dissenting voice, while a minority of six judges got to draft the ruling.

The relevant minority of six judges drafted a decision which we consider evasive, insensitive, ignorant of the ECtHR case law, and political.

1. Evasive (and not addressing the core of the issue)

T. H. initiated constitutional review of three norms: (a) a provision of the Civil code imposing sterilisation as a condition of gender reassignment; (b) a provision specifying the details of the surgery required for gender reassignment; and (c) a provision on the method of assigning 'birth numbers', i.e., unique identifiers of Czech citizens containing information about the age and the sex of each person. For T. H., as well as for the majority of CCC judges, this case mainly concerned the requirement of forced sterilisation. However, the relevant minority stated that since T. H. did not aim to undergo the surgery, the first two challenged provisions could not have been applied, and only the third provision concerning birth numbers should be subjected to review.

Admittedly, the procedural strategy of T. H. did utilise their birth number: T. H. had approached Czech

administrative authorities with a request to change the birth number to a 'neutral' or 'female' form so that this unique identifier would not present T. H. as a male person. In response to this request, the administrative authorities verified whether T. H. had undergone the sterilisation pursuant to the Civil code and since they did not, the request was rejected. T. H. challenged this decision in administrative courts, relying on the ECtHR's case law and claiming that forced sterilisation could not be imposed as a condition for gender reassignment.

Yet, the CCC only addressed the provision defining the method of assigning birth numbers. According to the CCC, "*the complainant did not fulfil the condition for a change of his birth number before submitting the request, irrespective of Section 29 of the Civil code.*" If T. H. identifies as a non-binary person, then the challenged provision on gender reassignment remains irrelevant for the dispute, states the CCC, since "*in the Czech legal order, 'gender reassignment' means a transformation from a man to a woman, or from a woman to a man.*" The CCC emphasised that the administrative procedure concerning one's birth number "*does not, and cannot, serve the purpose of allowing applicants to decide whether they are a man, a woman, or someone third, or someone else*" (para 29). Therefore, the CCC completely eluded the review of the forced sterilisation in its argumentation, while still dismissing the claims of T. H. without addressing the core of the issue at all.

2. Insensitive (and disrespectful)

On the substance, the CCC's argumentation proceeds as follows: if T. H. does not wish to undergo the surgery, the provision on surgery will not be discussed (and reviewed) at all. What remains to be examined is the provision on birth numbers. Birth numbers divide the population into men and women. There is nothing unconstitutional about dividing people into men and women. The CCC does not dispute that a person can self-identify differently from their biological sex; but the purpose of a birth number is to record one's biological sex, not one's self-identification. The latter information is, in the CCC's opinion, "*in principle meaningless*," and the CCC fails to see "*what purpose would be served by dividing people into those who identify as male and those who identify as female*." The CCC seems to have no doubts that "*such categories have no origin in legal or social reality*" (para 50). Therefore, while the information about someone's biological sex is "*useful*" to the state, the information about that person's sexual identity "*does not have any objective, meaningful use for the state and remains outside the state's reach or record, because there is no rational reason for this record*" (para 52).

The CCC's argument then crescendos to a climax: the right to self-determination contains everyone's right "*to identify and perceive themselves however they wish*" but this right "*cannot be confused with the right for reality to be different than it is, i.e., with the right to some kind of fiction*" (para 55). Boom! The state knows best, the law reflects the objective social reality, and anyone who is different, can be different at home, in secret, but not in the streets, and definitely not in interaction with the state.

For those who never felt different, the CCC's reasoning may sound acceptable. That is called implicit bias or privilege. For the others, these statements may come across as disrespectful and insensitive. T. H. had referred to themself in feminine form in their submissions. This was respected by the first instance court and in the dissenting opinion of Judge Šimáčková. Yet, both the Supreme Administrative Court and the CCC referred to T. H. in masculine form. The CCC opened its ruling by stating that the Czech language lacks gender neutral expressions and that the generic masculine is "*neutral in terms of biological sex*" (para 2). Did the CCC miss that the main point of the complaint does not concern biological sex, but precisely the inability to have one's gender recognised irrespective of their biological sex? What is more, the CCC had already referred to T. H. in feminine form in previous proceedings in 2016 and 2020. Opting for the masculine form is not only a sign of inconsistency, but also disrespect. The use of the gender form preferred by the complainant would not prejudge the merits of their claim (as to whether their gender should be recognised), as dissenting Judge Šimáčková noted.

The CCC then offers another insensitive argument: a parallel between sex/gender and age in relation to the birth number. The CCC stated that just as a person who is (officially) male cannot demand their birth number not to carry this information simply because it is inconvenient to them, another person cannot demand his birth number not to carry the date of birth because it does not correspond to his own idea of his age. This parallel shows a complete lack of understanding of what it means to be trans and/or nonbinary. It undermines the potential of suffering and discrimination due to being forced to reveal one's legal sex. The CCC's arguments are deeply disrespectful to trans and nonbinary people.

3. Ignorant (of ECtHR case law)

The relationship between identity numbers (similar to Czech birth numbers) and gender reassignment has been addressed in *Hämäläinen v Finland*, factually similar to the present case. While dealing with a dispute over the form of the identity number, the ECtHR also dealt substantively with the issue of gender recognition (§ 64 et seq.). To us, it seems impossible to deal with T. H.'s claims without either applying the ECtHR's approach in *Hämäläinen* or distinguishing the present case from this precedent.

In fact, both the Supreme Administrative Court and the CCC were ignorant of ECtHR case law in T. H.'s case. The SAC did not see any need to follow the relevant *A. P., Garçon and Nicot v France*judgment, labelled it surprising, claimed that it had disproportionately narrowed the margin of appreciation of the member states, and decided to prioritise the dissenting opinion in that case over the judgment itself. In response, dissenting Judge Šimáčková elaborated on how the ruling follows from previous case law, dating back to *Goodwin v UK*, and emphasised that this legal opinion has been confirmed in later cases, such as *S. V. v Italy, X v Macedonia*, or *X and Y v Romania*. She explained that the ECtHR – mindful of the lacking European consensus on forced sterilisation for gender reassignment – based its argumentation on the international trend towards removing this condition, as well as on the argument that gender recognition affects the most intimate spheres of an individual's life.

The CCC noted it "*has considerable doubts about the transferability of some of the conclusions of the ECtHR to the environment of the Czech legal system*," without any further explanation. The second dissenting opinion (signed by six judges) responded to this argument, pointing out that the challenged provision of the Civil code "*does not conform to the case law of the ECtHR*" and that if the relevant minority has considerable doubts about the transferability of this case law, "*we* [the dissenting judges] *have no such doubts and we consider the ECtHR's case law binding*". Both dissenting opinions thus argued that no compelling reason had been given for not following the ECtHR's case law.

4. Political (because any outcome would be political)

In the last paragraph, the CCC reiterated its conclusion that fundamental questions concerning humans as a biological species, their life and their relationships, ought to be solved by the legislature. "*The judicialisation of these issues may lead to the politicisation of the CCC and thus to the weakening of its position as an impartial and independent judicial body protecting the constitutional order*," states the CCC at the very end. This conclusion is worrying and potentially dangerous for two main reasons.

First, the issue at hand concerns a minority. While fundamental value matters should be decided primarily by the popularly legitimised legislature, matters concerning a minority require special judicial attention. The issue at hand relates to a small number of individuals and remains completely marginal for the majority population and for the political representation. This makes a legislative solution very difficult and unlikely. The role of courts is then to effectively protect the fundamental rights of minorities, as pointed out by the six dissenting judges. The experience in several countries shows that change in these cases is brought about precisely by constitutional courts. Specifically, the requirement of sterilisation has been eliminated by court decisions in all three neighbouring states which do not require sterilisation

– Germany, Austria and Poland, as dissenting Judge Šimáčková pointed out. The position of the CCC as an impartial and independent judicial body is not threatened by deciding on human rights, as the ruling claims; its position is rather threatened when it denies its role as the guardian of fundamental rights. The CCC's failure to fulfil its role may have serious consequences for the future of LGBTQ+ people's rights.

Second, the political context makes the decision even more worrying. The political representation elected in the parliamentary elections in autumn 2021 takes a conservative stance on LGBTQ+ people's rights. The President has even publicly called transgender people "disgusting". Continuing to give a free hand to the legislature, especially given the political backlash against LGBTQ+ rights in the region, is dangerous. The Czech population has been traditionally liberal towards LGBTQ+ people's rights. But that does not mean masses of the majority population would be willing to defend LGBTQ+ people's rights, neither on the street nor in elections. And – as the six dissenters noted – if the CCC does not protect them, no one will.

This issue thus remains deeply political irrespective of its substantive outcome. In other words, the CCC would get its hands dirty on a political issue, regardless of whether it would grant T. H.'s request or not. Refusing to engage in a discourse on the constitutionality of the challenged provisions does not make the ruling any less political. Quite the contrary, by stepping on one of the sides of the dispute, the judges are sending an important signal to the political actors who will shortly be deciding about the composition of the so-called 'fourth' constitutional court, since the (renewable!) mandate of most of the judges is coming to an end. There was no *apolitical* option in the case at hand.

Conclusion: four consolations

We remain disappointed by the outcome of the commented ruling and by the four attributes we have used in the title. However, four circumstances can boost our spirits. First, as a minority decision, this ruling is not endowed with any precedential force. Second, T. H. can still challenge the final ruling (yet to be issued) in Strasbourg, relying on the well-established case law of the ECtHR. Third, the CCC will soon be re-staffed by a new generation of judges, appointed by the new president of the republic elected in early 2023. And fourth, there is always a chance that the legislator will live up to the international obligations and amend the legal order; a draft bill was drafted already in 2018 but it fell under the table with the 2021 elections and needs to be reintroduced.

Obviously, things can take a wrong turn in all these aspects – but hope dies last and ECtHR case law remains clear!

** Both authors worked in the chambers of Judge Šimáčková in the past. However, neither of the authors was involved in the drafting of the commented decision and this analysis is written from an external perspective.*

ABOUT THE AUTHORS

Zuzana Vikarská
Zuzana Vikarská is an assistant professor of constitutional law and human rights at Masaryk University in Brno and a tutor in EU law at Palacký University in Olomouc. She is currently completing a project on preliminary rulings from Czech and Slovak courts, and launching a new EU-funded project on strategic litigation in Central and Eastern Europe.
Sarah Ouředníčková
Sarah Ouředníčková is a DPhil candidate at the University of Oxford and holds an MJur degree from Oxford and a Master's Degree in law from the Masaryk University in Brno.



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