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## RIGHT TO PRIVACY AND LEGAL RECOGNITION OF GENDER IDENTITY IN SERBIA – CONSTITUTIONAL COURT OF SERBIA AT WORK

*This paper discusses different issues pertaining to a 2012 landmark decision of the Constitutional Court of Serbia on the legal recognition of surgical gender reassignment. In this case, the SCC made a substantial contribution to the protection of human rights, in general, and an important contribution for the protection of the rights of transgender persons, in particular. The former was achieved by the interpretation that art. 23 of the Constitution on the right to dignity and free development of individuals included protection of the right to privacy and family life (which was omitted in the list of rights guaranteed by the Constitution), interpreting the scope of this right in accordance with ECtHR standards. The latter was done by analogous application of the existing Act on Public Registries to situations in which medical gender reassignment was conducted to enable the necessary changes be made in the birth register. By the virtue of this, the SCC took an active approach in filling a lacuna in the Serbian legal system. This paper also strives to examine impact of the SCC decision on the protection of rights of transgender persons and the current normative setting in respect to this vulnerable group in Serbia. It shows that the decision of the SCC remains the only legal basis on which transgender persons who have undergone a gender reassignment operation in Serbia can rely upon. However, bearing in mind Serbia's EU aspiration and the fact that the EU Commission has been continuously noting that Serbia lacks in regulation in this field, one should expect improvements, since EU integration seems to be the most effective tool for legislative and policy changes in Serbia.*

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## 1. INTRODUCTION

In 2012, the Serbian Constitutional Court (SCC) delivered a landmark decision<sup>1</sup> pertaining to the legal recognition of gender reassignment.<sup>2</sup> The SCC held that the refusal of relevant administrative state organs to enter changes in the birth register after a person had undergone gender reassignment surgery<sup>3</sup> – due to the fact that the Act on Personal Registry did not regulate this issue – violated the Constitution. Upon this ruling, postoperative transgender<sup>4</sup> persons in Serbia have been able to secure a gender change in their entry in the birth register.

This decision resonates beyond the transgender community in Serbia, having the importance for the enjoyment of human rights in Serbia in general. Namely, in this case the SCC used an opportunity to fill a lacuna in the Constitution as it did not contain a provision on the protection of the right to privacy. It took the position that art. 23 of the Constitution<sup>5</sup> on the right to dignity and free development of individuals includes implicit protection of the right to private life. Moreover, this decision provided a good example on how constitutional human rights provisions should be interpreted in the light of the practice of international supervisory bodies (as set by art. 18(3) of the Constitution). In this case, the SCC heavily relied on the relevant jurisprudence of the European Court of Human Rights (ECtHR).

The purpose of this article is twofold. Firstly, in Part 2, it aims to discuss different aspects of the SCC's decision, including those going beyond the issue of the protection of rights of transgender persons. Sec-

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<sup>1</sup> Decision on constitutional complaint, Už-3238/2011, 8 March 2012, *Official Gazette RS*, No. 25/12 (hereinafter: Decision Transgender).

<sup>2</sup> The decision was rendered in constitutional complaint proceedings.

<sup>3</sup> Transgenderism (unlike sexual orientation) can (but need not) be a result of a medical condition, gender dysphoria; transgender persons often themselves request medical treatment, of which gender reassignment surgery is only one kind. See more in Jelena Simić, "Medicinskopravni aspekti transseksualnosti – U susret priznavanju pravih posledica promene pola", *Pravni zapisi* 2/2012, 302, 305–308.

<sup>4</sup> The author is aware of different terminologies in this field. In this paper, the term "transgender" will be used to denote all persons who have different gender identity other than the gender (sex) assigned at their birth, regardless whether they have undergone any medical intervention or not. There is a trend emerging to use a term "trans" as an umbrella term to include all such persons. See: <http://www.ilga-europe.org/what-we-do/our-advocacy-work/trans-and-intersex/trans>, last visited 20 September 2016.

<sup>5</sup> *Official Gazette of the RS*, No. 98/06.

only, in Part 3, it strives to examine the impact of the SCC decision on the protection of rights of transgender persons and the current state of the normative setting applying to this vulnerable group, in particular to what extent the decision of the SCC was respected by the relevant state bodies and whether it was relevant in the broader context of the protection of the rights of transgender persons. Finally, Part 4 will offer concluding observations.

## 2. DECISION OF THE CONSTITUTIONAL COURT OF SERBIA

The constitutional complaint of 8 September 2010 was filed because local administrative organs refused to make the necessary changes in the birth register in the case of the applicant who underwent gender reassignment surgery, because the Act on Personal Registries<sup>6</sup> did not provide for such a possibility.<sup>7</sup> In this way, they denied legal recognition of the gender reassignment. The applicant claimed he was denied his constitutional rights by the omission of the National Assembly to regulate the legal consequences of gender reassignment, namely the right to equality and prohibition of discrimination (art. 21 of the Constitution) and right to dignity and free development of individuals (art. 23 of the Constitution).<sup>8</sup> He also complained of the violation of the right to private and family life under art. 8 European Convention on Human Rights<sup>9</sup> (ECHR).<sup>10</sup> The applicant asked the Court to order the National Assembly to adopt legislation that would regulate legal recognition of the sex reassignment in the expedited proceedings.<sup>11</sup> He also asked the SCC to award him non-pecuniary damages and to rule that the said constitutional complaint applied to all persons in the same legal situation.<sup>12</sup> The SCC rendered its decision on 8 March 2012.

It is important to note that the applicant claimed that said violations were due to the conduct of the National Assembly, i.e. its omission in regulating gender reassignment and not the conduct of local administrative organs, which refused to make the changes in the birth register.<sup>13</sup> Nevertheless, the SCC viewed this complaint as lodged *both* against the

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<sup>6</sup> *Official Gazette RS*, No. 20/09.

<sup>7</sup> Constitutional complaint, para. 46. Available in the archives of the Belgrade Centre for Human Rights (BHCR), which represented the applicant in this case.

<sup>8</sup> Complaint, n 7, para. 46.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Official Gazette SCG (International Agreements)*, No. 9/03.

<sup>11</sup> Constitutional Complaint, para. 46

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*, para. 2.

National Assembly and other state organs.<sup>14</sup> It rejected the constitutional complaint with respect to the omission of the National Assembly, on the basis of reasoning that this legislative body's omission to adopt certain legislation or regulate a specific area or question cannot be viewed as an *individual action* in the context of the admissibility criteria for constitutional complaints (art. 170 of the Constitution and art. 82 of the Act on Constitutional Court<sup>15</sup>).<sup>16</sup> However, the SCC considered whether the omission of other state bodies led to the violation of constitutional rights and the ECHR, despite the fact that the applicant did not complain of their actions,<sup>17</sup> and consequently deliberated on the substantive part of the complaint.

### 2.1. Interpretation of the scope of the constitutional provision on the right to dignity in the context of legal recognition of gender reassignment

The substantive part of the complaint was primarily based on art. 8 of the ECHR and art. 23 of the Constitution, which respectively guarantee the right to protection of private and family life and the right to dignity and free development of individuals.<sup>18</sup> The reliance on the ECHR's provision was due to the fact that there was no constitutional provision expressly guaranteeing the right to privacy. In this decision, the SCC corrected this constitutional deficiency, taking the position that art. 23 of the Constitution includes implicit protection of the right to private and family

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<sup>14</sup> Decision Transgender, para 5.

<sup>15</sup> *Official Gazette RS*, Nos. 09/07, 99/11, 18/13 (decision of the SCC), 40/15 and 103/15. Namely, art. 170 of the Constitution and art. 82 of the Act on Constitutional Court provide that 'a constitutional complaint may be lodged against *individual* acts or actions of state bodies.' (emphasis added).

<sup>16</sup> Decision Transgender, para 5.1. The opinion was based on the reasoning that the exclusive legislative competence of the National Assembly was executed by the adoption of general legal acts, which regulate a specific area or issue in a general manner. This reflects the position of the SCC that the attribute 'individual', from art. 170 of the Constitution and art. 82 of the Act on Constitutional Court (n. 15), is to be applied to both acts and actions of state organs. However, the text of these provisions does not exclude the interpretation that the qualification "individual" is only to be applied to "acts" and not "actions". Additional important point is that the practice of the ECtHR stands on the position that the failure of the state to regulate access to reassignment surgery results in a violation of the state's positive obligations under art. 8 of the ECHR in *L. v. Lithuania*, App. No. 27527/03 (11 September 2004), para. 56–60. Nevertheless, one can conclude that the SCC's interpretation of the admissibility requirement (from art. 170 of the Constitution art. 82 of the Act on Constitutional Court) prevented it to adopt such an approach. See: Marija Draškić, "Prava transseksualnih osoba u Srbiji: prva odluka Ustavnog suda Srbije", *Sveske za javno pravo*, br. 10/2012, 6, napomena 13, [http://www.fcjp.ba/templates/ja\\_avi-an\\_ii\\_d/images/green/Marija\\_Draskic.pdf](http://www.fcjp.ba/templates/ja_avi-an_ii_d/images/green/Marija_Draskic.pdf), last visited 5 December 2016.

<sup>17</sup> Complaint, n 7, para. 2.

<sup>18</sup> *Ibid.*, para. 32.

life.<sup>19</sup> Moreover, the SCC interpreted the scope of this right and the corresponding obligation of the state by relying on the jurisprudence of the ECtHR<sup>20</sup> – as required by art. 18(3) of the Constitution.<sup>21</sup> The ECtHR recognised the right to legal recognition of gender change in the case of *Christine Goodwin v. UK*,<sup>22</sup> as protected by the right to privacy from the art. 8 of the ECHR.

Thus, the SCC concluded that gender identification falls within the scope of private life, so the right to privacy also encompasses “the right to sex reassignment in line with one’s gender identity.”<sup>23</sup> Consequently, the SCC found that the protection of the rights from art. 23 of the Constitution and art. 8 of the ECHR included not only the negative obligation of the state to refrain from interference in the enjoyment of these rights, but also entailed a positive obligation to ensure their protection.<sup>24</sup>

Against such legal background, the SCC concluded that the refusal of relevant administrative state organs to enter changes in the birth register, after the gender reassignment surgery, was in violation of art. 23 of the Constitution and art. 8 of the ECHR.<sup>25</sup>

The SCC was of the opinion that although the Act on Personal Registry did not regulate changes in the birth register in cases of gender reassignment, it still provided grounds for such changes. Namely, the view of the SCC was that the existing provision on entry of fact of birth – requiring a medical institution to report to the administrative organ the fact of birth and the gender of a child (art. 47(1)) – could be analogously applied in the situations when changes in the birth book were required due to the surgical gender reassignment of a transgender person.<sup>26</sup> Therefore, the SCC took the position that changes in the birth register could be made when the administrative organ was provided with documentation from a medical institution evidencing that it conducted the intervention of gender reassignment.<sup>27</sup>

<sup>19</sup> Decision Transgender, para 6.

<sup>20</sup> For a short overview of the ECtHR’s caselaw and international law standards see respectively David Harris et al., *Harris, O’Boyle & Warbrick Law of the European Convention on Human Rights*, Oxford University Press, Oxford 2014, 536–537.

<sup>21</sup> This provision requires the interpretation of the human and minority rights provisions in accordance to the international standards in force and the practice of international bodies, which supervise their implementation.

<sup>22</sup> App. No. 28957/95 (11 July 2002), para. 89–93.

<sup>23</sup> Decision Transgender, para 6.

<sup>24</sup> *Ibid.*, para 7.

<sup>25</sup> The SCC did not deem it necessary to rule on other claims of human rights violations from the constitutional complaint (right to equality and prohibition of discrimination). *Ibid.*, para 10.

<sup>26</sup> Decision Transgender, n 1, para 8.

<sup>27</sup> *Ibid.*

## 2.2. Measures SCC deemed appropriate as redress in this case

The SCC ordered the local administrative authority to decide on the applicant's request by applying the provisions from the Act on Personal Registry in accordance with the interpretation given in this decision within 30 days.<sup>28</sup>

The SCC viewed that the just satisfaction in this case was a declaration of a violation of rights.<sup>29</sup> The request for the award of non-pecuniary damages was rejected.<sup>30</sup> Moreover, the SCC rejected a request to hold that this constitutional complaint pertained to all persons in the same legal situation in accordance with art. 87 of the Act on Constitutional Court,<sup>31</sup> but ruled that the decision was to be applied to all persons in the similar situation.<sup>32</sup>

In addition to these measures, the SCC also decided: (1) to send the decision to the ministry dealing with public administration so that it could be disseminated to the relevant state administrative bodies;<sup>33</sup> (2) to send a letter to the National Assembly in which it would indicate all shortcomings of the lacuna concerning gender reassignment, emphasizing that the lack of legislation in this regard was contrary to the practice of the ECtHR;<sup>34</sup> and (3) to send a letter to the Ombudsperson, with similar content,<sup>35</sup> so this institution could initiate adoption of legislation<sup>36</sup> dealing with the issue.

## 2.3. Commentary of the Decision

There are several important aspects of this decision.

Firstly, it should be noted it is an example of an active approach of the SCC, which filled a lacuna in the Serbian legal system, which is rare in its practice.<sup>37</sup> By adopting such an interpretative decision, the SCC turned itself into a positive legislator as opposed to the primary function

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<sup>28</sup> *Ibid.*, para 9.

<sup>29</sup> *Ibid.*, para 10.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> In accordance with art. 108 of the Act on Constitutional Court, n 15; Decision Transgender, para 10.

<sup>34</sup> In accordance with art. 105 of the Act on Constitutional Court, n 15; Decision Transgender, para 11.

<sup>35</sup> *Ibid.*, para 12.

<sup>36</sup> This falls within the mandate of the Ombudsperson, in accordance with Art. 18 of the Act on Ombudsperson, *Official Gazette RS*, No. 79/05 and 54/07.

<sup>37</sup> *Ibid.*, 212.

of a negative one that it has usually exercised.<sup>38</sup> In this way, it contributed to the stability of the legal order and protection of human rights.<sup>39</sup>

Secondly, by this decision, the SCC interpreted the scope of its competence to rule on legislative actions of the National Assembly only to the situations in which rights and freedoms were already subject to legislative action,<sup>40</sup> reiterating its approach of “a negative legislator”<sup>41</sup>. Thus, potential victims of human rights violations that resulted from the lack of legislation are without redress in the Serbian legal system. However, the SCC also demonstrated an active approach by deciding to adjudicate the case by considering the conduct of administrative organs for which was not the subject of the applicant’s constitutional complaint.

Thirdly, the SCC has also shown judicial activism in respect to the question of the application of existing constitutional and legislative framework to the issue of the gender reassignment. There it made a substantial contribution to the protection of human rights, in general, and an important contribution to the protection of the rights of transgender persons, in particular. The former was achieved by the interpretation that art. 23 of the Constitution on the right to dignity and free development of individuals included the protection of the right to privacy and family life (which was omitted in the list of rights guaranteed by the Constitution), thus interpreting the state obligations in accordance with the ECtHR standards. The latter was achieved through by analogous application of the provision of the existing law to situations in which the medical gender reassignment was conducted, so to enable the necessary changes be made in the birth register.

### 3. THE IMPACT OF THE SCC DECISION AND BEYOND

After the relevant ministry disseminated the decision of the SCC,<sup>42</sup> administrative organs changed their practice on requests of transgender persons related to the changes of gender in the birth register. To that extent the decision was implemented and had effects.

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<sup>38</sup> A. Kartag-Odri, “On Legal Gaps and New Interpretative Techniques of the Court’s Decision-Making”, *Courts, Interpretation, the Rule of Law* (eds. M. Jovanović, K. E. Himma), Eleven International Publishing, The Hague 2014, 208.

<sup>39</sup> *Ibid.*, 215.

<sup>40</sup> See: n. 16.

<sup>41</sup> H. Kelsen, *General Theory of Law and State*, Harvard University Press, Cambridge, 1945, 268, 269.

<sup>42</sup> See the interview with Prof. Jelena Jerinić conducted for the purposes of the project “Courts as Policy Makers?” under the auspices of the *Regional Research Promotion Programme 2014*. Archives of the BCHR.

However, other measures that the SCC deemed appropriate in this case failed. In particular, the National Assembly, as of the time of writing, has not adopted legislation as recommended by the SCC. Moreover, Ombudsperson did not initiate adoption of a new legislation but only drafted ‘Recommendations for Amending Regulations of Relevance to the Legal Status of Transgender Persons’<sup>43</sup> (together with the Commissioner for the Protection of Equality).<sup>44</sup> These Recommendations comprehensively deal with the issue of the legal status of transgender persons, going beyond the issue of the legal recognition of the medical gender reassignment procedure.<sup>45</sup>

The reference to the ‘institutional practice’ of administrative bodies based on the SCC decision found its place in the documents the Serbian government adopted in the context of its EU aspiration: the National Anti-Discrimination Strategy 2013–2018<sup>46</sup> (of June 2013) and the Action Plan for its Implementation<sup>47</sup> (October 2014). Moreover, the Action Plan envisages a measure of continuous guarantee of the implementation of this SCC decision.<sup>48</sup>

These documents also deal with other issues pertaining to the promotion and protection of transgender persons’ rights. Hence, the Strategy recognizes that “there are no legal solutions to protect their rights and clearly ensure a quick change of identity documents” and that this amounts to “the denial of numerous other rights to transgender persons.”<sup>49</sup> Therefore, the Strategy notes that all statuses of transgender persons are uncertain, such as “marital and parental relationships, employment, the issue of violence motivated by hatred, continuation of education, etc.”<sup>50</sup> Thus, the Strategy, *inter alia*, envisages future “amendments of a large number of laws (the Law on Registers of Births, Marriages and Deaths, the Family Law, the Law on Pension and Disability Insurance, the Law on Foundations of the Education System, the Labour Law, etc.) [...] or regulating all issues related to the status of transgender (including transsexual) persons with a special law.”<sup>51</sup>

<sup>43</sup> See: <http://www.ombudsman.rodnaravnopravnost.rs/images/stories/preporuke%20transpolne%20osobe.doc>, last visited 19 September 2016.

<sup>44</sup> See: V. Petrović (ed.), *Human Rights in Serbia 2014*, Belgrade Centre for Human Rights, Belgrade 2015, 327.

<sup>45</sup> See: n 41.

<sup>46</sup> *Official Gazette RS*, No. 107/14, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016801e8db9>, last visited 19 September 2016.

<sup>47</sup> *Official Gazette RS*, No. 107/14.

<sup>48</sup> *Ibid.*, measures 3.1.6. and 3.1.14.

<sup>49</sup> Anti-Discrimination Strategy, section 4.4.2.2.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*, point 4, section 4.4.4. The NGO sector provided two model laws: the Center for Advanced Legal Studies (2012) and the Geyten-LGBT (2013). The former



Furthermore, the Action Plan provides that there should be legislative changes,<sup>52</sup> along with other measures pertaining to the normative regulation of the protection of rights of transgender persons,<sup>53</sup> including promotion of equality in social care,<sup>54</sup> health,<sup>55</sup> education,<sup>56</sup> sports<sup>57</sup> and etc.

However, until the time of the closing of this paper, available data show that only two measures have been implemented:<sup>58</sup> one dealing with the continuous execution of the SCC decision; and the one that has envisaged the adoption of the Rules of Procedure on concrete criteria for identifying discrimination in educational institutions.<sup>59</sup>

Additional normative improvement in this field is noted in respect to the adoption of the new Act on Police, which is tangentially connected to the Anti-Discrimination Strategy and its Action Plan.<sup>60</sup> The anti-discrimination clause (art. 5) of the said Act, which requires employ-

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provides a proposition on regulation of legal consequences only in the cases of gender reassignment, while the latter contains comprehensive regulation of different legal issues pertaining to gender identity. See: *Model zakona o priznavanju pravnih posledica promene pola i utvrđivanja transseksualizma: Prava trans osoba – od nepostojanja do stvaranja zakonskog okvira* (ed S. Gajin), CUPS, Beograd 2012 and *Trasn\* osobe u Srbiji: Analiza položaja i predlog pravnog rešenja*, Geyten-LGBT, <http://www.transserbia.org/images/2015/dokumenti/Trans%20osobe%20u%20Srbiji%20%20analiza%20poloaja%20i%20predlog%20pravnog%20reenja.pdf>, last visited 23 September 2016.

<sup>52</sup> The Action Plan is unclear and contradictory when it comes to the deadlines for this activity. Measures 3.1.6. and 3.1.14. overlap in substance (drafting the legislation), while providing different deadlines for the implementation of the said measure (second quarter of 2016 and fourth quarter of 2017, respectively).

<sup>53</sup> For an analysis of different issues pertaining to the protection of transgender persons see: Slavoljupka Pavlović, “Analiza pravnog položaja transrodnih i transseksualnih osoba u Srbiji”, *Model zakona o priznavanju pravnih posledica promene pola i utvrđivanja transseksualizma*, n 49, 50.

<sup>54</sup> *Ibid.*, measures 4.4.2.

<sup>55</sup> *Ibid.*, measures 4.4.1. The special emphasis was given to the abolition of sterilization until the fourth quarter of 2015. *Ibid.*, measure 4.4.5.

<sup>56</sup> These encompass amendments to the Act on Foundation of Educational System and adoption of Rules of Procedure on criteria for identifying discrimination in educational institutions to include ‘gender identity’ as explicit ground in their anti-discrimination clauses. Furthermore, it envisages the adoption of rules on change of name in diplomas and certificates on the basis of the Commissioner for the Protection of Equality opinion 297/2011. See: Action Plan, measure 4.1.3 and 4.1.4. The deadline for the implementation of this measure was the first quarter of 2015.

<sup>57</sup> This encompasses amendments to the Act on Sports to include ‘gender identity’ as explicit grounds in anti-discrimination clause. See: Action Plan, measure 4.5.1.

<sup>58</sup> Interviews with relevant experts conducted on 19 and 20 September 2016, and information provided by the Ministry of Education on 23 September via e-mail. On file with author.

<sup>59</sup> *Official Gazette RS*, No. 22/16.

<sup>60</sup> The Strategy, measure 4.4.4, point 3; Action Plan, measure 3.2.10.

ees of the Ministry of Interior and the police to treat everyone equally, now includes explicit reference to ‘gender identity’ as prohibited ground of differential treatment.<sup>61</sup>

#### 4. CONCLUSION

Among other vulnerable groups, transgender persons remain the most discriminated against in Serbia.<sup>62</sup> Although the European Commission has been observing improvements<sup>63</sup> in its progress reports since 2014 in respect to the protection of LGBTI population,<sup>64</sup> it has also continuously emphasized that persistent efforts to ensure “effective and consistent promotion and protection” of the LGBTI persons have to be undertaken by state authorities.<sup>65</sup>

As has been shown, in the decision on legal recognition of gender reassignment, the SCC not only provided the basis for the protection of postoperative transgender persons by taking an active approach in the interpretation of the Act on Personal Registry, but also gave a substantial contribution to the constitutional protection of human rights in going beyond purely textual interpretation of the constitutional human rights guarantees.

This decision can be viewed in a broader political setting, in particular Serbia’s EU integration aspirations, which required promotion and protection of human rights. This setting, as Beširević noted,<sup>66</sup> contributes to a growing assertiveness of the SCC in human rights cases, which is also backed by the authority of the ECtHR jurisprudence that is referred to in the SCC’s rulings.<sup>67</sup>

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<sup>61</sup> *Official Gazette RS*, No. 6/16. See: n 54.

<sup>62</sup> See: European Commission, *2015 Progress Report*, [http://ec.europa.eu/enlargement/pdf/key\\_documents/2015/20151110\\_report\\_serbia.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_serbia.pdf), last visited 21 June 2016, 56. Others are Roma, lesbian, gay, bisexual, intersex persons, persons with disabilities and persons with HIV/AIDS. *Ibid.*

<sup>63</sup> For example, since 2014 the Pride Parade in Belgrade has been taking place without major incidents. Moreover, some improvements can be noted in the respect to the state health insurance coverage of gender reassignment surgery. See more in J. Simić, 299.

<sup>64</sup> See: European Commission, *Serbia 2014 Progress Report*, [http://ec.europa.eu/enlargement/pdf/key\\_documents/2014/20140108-serbia-progress-report\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2014/20140108-serbia-progress-report_en.pdf), last visited 21 June 2016, 51 and *Serbia 2015 Progress Report*, 57.

<sup>65</sup> *Ibid.*, 17.

<sup>66</sup> See: V. Beširević, “Governing without Judiciary: The politics of the Constitutional Court of Serbia” *International Journal of Constitutional Law* 12/2014, 954, 966.

<sup>67</sup> *Ibid.* See also T. Papić, V. Đerić, *Uloga Ustavnog suda Srbije u procesu demokratske tranzicije*, Beogradski centar za ljudska prava, Beograd 2016, 74–75. On the influence of the ECtHR on national legislative changes in respect to LG-

On the basis of the SCC decision, there was a positive development in processing requests of transgender persons related to changes of gender in the birth register. However, other measures the SCC deemed appropriate – pertaining to the adoption of necessary legislation<sup>68</sup> – have failed.

Obviously, this decision of the SCC does not solve other legal issues arising from the cases of the gender reassignment, such as those concerning marriage or parental rights. These questions were at issue in another constitutional complaint filed with the SCC, pertaining to the same issues but related to a transgender person who was married with a child.<sup>69</sup> The SCC rejected the complaint relying on the reasoning from the previous decision – that the omission of the National Assembly could not be the subject of a constitutional complaint.<sup>70</sup> Thus, the ball remains in the court of the political branches of the government to deal with other issues pertaining to the protection of transgender persons.

This was recognised in the 2013 Anti-Discrimination Strategy and its 2014 Action Plan. However, the measures provided thereof, aimed at the promotion and protection of transgender persons, have not been implemented so far. Against such a background the decision of the SCC remains the only legal base on which transgender persons who have undergone gender reassignment operation in Serbia can rely upon.<sup>71</sup>

Bearing in mind Serbia's EU aspirations and the fact that the EU Commission has continuously noted that the Anti-Discrimination Strategy and its Action plan need to be implemented and specifically emphasized that Serbia lacks "procedures for legal gender recognition in place, even

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BTI population, see: L. R. Helfer, E. Voeten, "International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe", *International Organization* 68/2014, 77.

<sup>68</sup> See: M. Draškić, "Evolucija u jurisprudenciji Evropskog suda za ljudska prava u pogledu transseksualnih osoba: Evolucija i u Srbiji", *Perspektiva implementacije evropskih standarda u pravni sistem Srbije* (knjiga 2) (ed. S. Lilić), Pravni fakultet Univerziteta u Beogradu, Beograd 2012, 57, 73–75.

<sup>69</sup> Decision on constitutional complaint, UŽ-4111/2010, 28 January 2014, available in the archive of the BCHR.

<sup>70</sup> *Ibid.*, para. 3. Due to prolonged proceedings before the SCC, the applicant in this case decided to get a divorce in order to be able to secure gender change in the birth register while the case was still pending. Consequently, the applicant was able to change gender in the birth register. Archive of the BCHR, March 2013.

<sup>71</sup> There is also a Commissioner for the Protection of Equality Recommendation 335/2012 of 15 March 2012 directed at universities in Serbia to enable change of name in diplomas in the cases of transgender persons who have managed to change their name and sex in the birth register, see: <http://ravnopravnost.gov.rs/rs/preporuka-univerzitetima-za-usvajanje-mera-za-sticanje-ravnopravnog-tretmana-lica-koja-su-nakon-sticanja-diploma-promenila-ime-zbog-promene-pola/>, last visited 23 September 2016.

in cases of gender reassignment,<sup>72</sup> improvement in this field will eventually come. The requirements of EU institutions seem to be the most effective tool for legislative<sup>73</sup> and policy<sup>74</sup> changes in Serbia. Hopefully, the political majority, when eventually embarks on a mission to adopt relevant legislation, will justify it by referring to the decision of the SCC and not just the EU progress reports, as was previously the case.<sup>75</sup>

Finally, one should be aware of the following. There were two administrative civil servants working in two municipalities in Belgrade, who, behind the closed doors, were analogously interpreting the Act on Personal Registry to cases of gender reassignment years before the SCC. They were an example of civil servants who – contrary to common public perception – creatively secured the protection of human rights. Postoperative transgender persons who were able to afford to change their residence and move to Belgrade, could benefit from their creativity and secure the gender changes in the birth register. Others had to continue to live in an intermediate zone between the postoperative gender and the one assigned to them at birth, which was discriminatory on the grounds of their residence and property. Viewed from that perspective, the SCC decision serves as multiple vindication of the principle of equality in Serbia.

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<sup>72</sup> *Ibid.*, 57.

<sup>73</sup> See: T. Papić, V. Đerić, 44–45.

<sup>74</sup> For example. see the change in respect to the issue of Kosovo in Tatjana Papić, “Political Aftermath of the ICJ Advisory Opinion on Kosovo,” *The Law and Politics of the Kosovo Advisory Opinion* (eds. M. Woods, M. Milanović), Oxford University Press, Oxford 2015, 259, 266–267.

<sup>75</sup> In the case of the amendments to the electoral legislation. See: T. Papić, V. Đerić, 44–45.

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