

Republic of Serbia
Constitutional Court
Bulevar kralja Aleksandra 15
Belgrade

Pursuant to Article 168 paragraph 2 of the Constitution of the Republic of Serbia,

1. Association of Citizens “NGO PRAXIS”, from Belgrade, based in St. Alekse Nenadovića 7 / III, represented by Ivanka Kostic, Executive Director, and
2. European Roma Rights Centre, based in Wesselényi utca 16, Budapest 1074, Hungary, represented by Đorđe Jovanović, President, submit to the Constitutional Court of the Republic of Serbia, an

INITIATIVE TO INSTITUTE PROCEEDINGS FOR ASSESSING CONSTITUTIONALITY AND LEGALITY

This initiative is filed in order to initiate proceedings to determine the compliance of Article 23 paragraphs 2 and 3 of the Law on Registers (“Official Gazette of RS” no. 20/2009 and 145/2014) with the Constitution, with generally accepted rules of international law, and with ratified international treaties because those provisions are not in accordance with:

- Articles 21 (prohibition of discrimination), 37 (right to legal personality), 38 (right to citizenship) and 64 (rights of the child) of the Constitution;
- Article 7 (1) of the Convention on the Rights of the Child;
- Article 24 (2) of the International Covenant on Civil and Political Rights; and
- Articles 8 (right to respect for private and family life) and 14 (prohibition of discrimination) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Article 1 of Protocol no. 12 ECHR, and the related case law of the European Court of Human Rights.

REASONING

1. Article 23 of the Law on Registers (hereinafter “the Law”) provides as follows:

The registrar is obliged to register data in the register without delay.

Exceptionally, registration may be deferred in order to verify or ascertain the missing data to be entered in the register.

A separate record is kept on delayed registration.

2. Registers are the basic official records on personal status of citizens for which registers of birth, marriage, and death are kept. The facts of birth, marriage, and death, and other facts and changes foreseen by the law are recorded in the registers (Article 2 of the Law). The registrar is responsible for the registers (Article 5 of the Law).
3. Article 23 paragraph 2 of the Law gives the registrar a broad discretion to delay registration of, *inter alia*, the birth of a child in birth register (hereinafter “the BR”) for the purpose of (a) verifying, or (b) ascertaining missing data. This legal formulation suggests that registration may be deferred when there is a doubt about the accuracy of the data in order to verify them, or when data are incomplete, until their final determination.
4. However, the applicants point out that such discretion under Art. 23 paragraph 2 of the Law is unconstitutional as well as unnecessary because the registrar, when faced with incomplete information, has at its disposal the provision of Article 26 of the Law which states: *“If due to force majeure or an emergency situation or other similar reasons, some data could not be entered in the register, subsequent registration shall be made on the basis of the decision of the competent authority under Article 6 paragraph 2 and 4 of this law”*. In this way, the legislator has ensured that registration in the BR (and other registers) can be made even if certain required information is missing at the time of registration (such as citizenship), based on data readily available at the time of registration, such as the child’s name, or date and place of birth.
5. Similarly, Article 31 of the Law provides that the registrar may correct errors in the registers noted after registration, albeit only on the basis of the decision of the competent authority under Article 6 paragraph 2 and 4 of the Law. In this way, the legislator made sure that even if the data entered in the registers are incorrect, they can be corrected at the later date.
6. This initiative proceeds by setting out the arguments based on which the petitioners consider that the impugned provisions are incompatible with the Constitution (Articles 21, 37, 38, and 64) as well as with the above-mentioned ratified international treaties. The conclusion of the initiative explains why it is necessary to excise the disputed provisions of the Law.

Violation of Article 37 and 64 of the Constitution

7. Article 37 of the Constitution protects the right to legal personality and freedom of choice and use of personal name and the names of one's children. Article 64 paragraph 2 of the Constitution stipulates that every child has the right to a personal name, an entry in the birth register, to know her/his origins, and to preserve her/his identity. These constitutional rights are breached by the impugned provisions of the Law.
8. In relation to Article 64 of the Constitution, the impugned provisions of the Law allow registrars to delay the exercise of the right to be registered in the birth register of births and thus delay the formal recognition of the child's personal name as an essential element of her/his identity. Such delay also denies the parents the freedom to choose and use the names of their children under Article 37 of the Constitution, whilst a child is denied the right to legal personality (especially bearing in mind that the Law does not specify the legal nature of the separate records referred to in Article 23 paragraph 3).
9. The petitioners note that these constitutional provisions should be interpreted in the light of the corresponding provisions of the international treaties to which Serbia is a State Party, in accordance with Article 18 of the Constitution. The relevant international treaties make it clear that: (a) birth registration must be universal and immediate; and (b) States cannot justify delays in providing children with full registration of birth under law.

a. Birth registration must be immediate

10. Serbia is a State Party to the UN Convention on the Rights of the Child. According to Article 7(1), *"The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents"*. The Convention is unequivocal in requiring "immediate" registration, yet, the impugned provisions of the Law allow arbitrary delays in registration. The Committee on the Rights of the Child has stated in its General Comments that *"Birth registration should be free and universally accessible"*¹; yet the impugned provisions of the Law allow registrars to render registration inaccessible for an unregulated period of time. Likewise, Article 24(2) of the International Covenant on Civil and Political Rights, to which Serbia is also a State Party, provides: *"Every child shall be registered immediately after birth and shall have a name"*. According to the UN Human Rights Committee, the guardian of the ICCPR, *"this provision should be interpreted as being closely linked to the provision concerning the right to special measures of protection and it is designed to promote recognition of the child's legal personality... The main purpose of the obligation to register children after birth is to reduce the danger of abduction,*

¹ General comment No. 11 (2009), § 41.

sale of or traffic in children, or of other types of treatment that are incompatible with the enjoyment of the rights provided for in the Covenant”².

11. The petitioners recognise that some space of time may be allowed to pass between the moment of birth and the registration, for practical reasons and also so that the parents have the necessary time to exercise their rights, such as the right to give a name to their child. The petitioners nonetheless submit that the requirement to register the child “immediately” after birth prevents the State from delaying birth registration for any reason, once the parents of children appear in order to carry out the formalities of registration. The impugned provisions of the Law nonetheless allow the State to do just that. The legal position is made clear in UNICEF’s *Implementation Handbook for the Convention on the Rights of the Child* (2007), which states that “According to article 7, the child should be registered ‘immediately after birth’ which implies a defined period of days rather than months” (page 100). The *Handbook* goes on to state that “Universal registration requires that domestic law makes registration a compulsory duty both of parents and of the relevant administrative authorities” (page 100). Although Serbian law makes registration mandatory for parents, the impugned provisions enable registrars to delay registration indefinitely.

12. The existence of a “separate record” on delayed registration and the data contained in that record do not meet the standard of registration in birth register immediately after birth. Given that the Law and by-laws do not regulate the legal nature of the “separate record”, that record does not constitute an official record of the personal status of citizens and a copy from that record does not represent a public document; as such entry in the “separate record” cannot be said to constitute registration in a “birth registry” as that term is used in the Constitution, nor can it be said to comply with the notion of “registration” found in international instruments.

b. Delays in registering births cannot be justified

13. The law does not specify the reasons for which registrars may delay birth registration. International treaties and related case law, however, make it clear that delays in birth registration cannot in any event be justified. The European Court of Human Rights recently dealt with a case, *Mennesson v. France*³, where the French authorities refused to register children who were born abroad to two French citizens and registered in their country of birth (the United States), because the children had been born through a surrogacy arrangement that would not be permitted in France under French law. The European Court of Human Rights held that by refusing birth registration in France, the authorities prevented the children from establishing a legal relationship with their parents, and thus interfered with the substance of their identity and

² General comment No. 17 (1989), § 7.

³ *Mennesson v France*, Application No. 65192/11 (judgment of 26 June 2014)

their private life. The Court found in particular that preventing the establishment, under the framework of domestic law, of the legal relationship between children and their parents was contrary to the best interest of the child, amounting to a violation of the right to respect for private life under Article 8 ECHR.

14. According to the *Mennesson* judgment, under the terms of the ECHR, it was unjustifiable to refuse to register the birth of the child, despite the fact that French law does not recognise a legal parent-child relationship stemming from surrogacy arrangements. The Court rejected arguments made by the French Government that there was no violation because the children were registered in a birth registry in the USA. The impugned provisions of the Law allow an even worse situation to arise: children can be born in Serbia and remain unregistered in the birth registry of any country in the world.
15. The proposition that delaying the registration of the birth of children breaches their rights finds further support in the findings of UN bodies that the residence or nationality status of a child or her/his parents cannot justify delays in birth registration. The UN Committee on the Rights of the Child has made clear to several States that they are acting contrary to the Convention by refusing or delaying the registration of children born on their territory because the children's parents do not have residence or identity documentation themselves.⁴ In 2013, UNHCR's Executive Committee issued a "Conclusion on Civil Registration". The conclusion, "*Reaffirming that every child shall be registered immediately after birth, without discrimination of any kind*", urged States to give effect to that right, particularly in the context of protracted refugee situations.

Violation of Article 38 of the Constitution

16. According to Article 38, "*Any child born in the Republic of Serbia shall have the right to citizenship of the Republic of Serbia unless conditions have been met to acquire citizenship of some other country*". This entitlement to citizenship for children born in Serbia who would otherwise be stateless implements Serbia's commitment under Article 1 of the 1961 Convention on the Reduction of Statelessness. The legislator has given effect to this provision through Article 13 of the Law on Citizenship: "*A child born or found in the territory of the Republic of Serbia (foundling) acquires citizenship of the Republic of Serbia by birth if both his parents are unknown or of unknown citizenship or without citizenship or if the child is without citizenship*".
17. The impugned provisions of the Law violate Article 38 by depriving children (or, rather, their parents acting on the children's behalf) of the means of demonstrating that they do not meet

⁴See, e.g., Japan CRC/C/15/Add.231, para. 31 ("*The Committee is concerned... that undocumented migrants are unable to register the birth of their children*").

the requirements to acquire the citizenship of another country. As long as the registration of the birth of a child born in Serbia to known parents (i.e. not a foundling) is delayed, that child will be unable to prove, in accordance with Article 13 of the Law on Citizenship, that both her/his parents are of unknown citizenship or that the child her/himself is without citizenship.

18. Furthermore, according to Article 47 of the Law on Citizenship, "*Citizenship of the Republic of Serbia is proved by the extract from the register of births*". Yet the impugned provisions allow registrars to delay the registration of children who meet the requirements of Article 13 of the Law on Citizenship, making it impossible for them to prove their constitutional right to Serbian citizenship.

Violation of Article 21 of the Constitution

19. The impugned provisions of the Law breach the prohibition on discrimination found in Article 21 of the Constitution by introducing a distinction based on birth; the parents' status (i.e. whether the parents have personal identity documents) and the circumstances of the child's birth determine whether the child is included in the BR immediately or if registration is delayed and the child is registered in a "separate record". Those children born in circumstances where the registrar might feel the need to verify or ascertain certain details of their identity (e.g. those born to internally-displaced persons or parents without documents) are left in an inferior position to those children born in clearer circumstances (e.g. those whose parents are Serbian citizens in possession of a complete set of identity documents). The unequal position is reflected in the absence of legal capacity for children in the first group, leading to hindered or no access to basic rights such as the right to education, health care, or social welfare. The inferior position is also manifested in the state of uncertainty in which these people are left until they are entered in the birth registry.
20. The petitioners note that the UN Committee on Economic, Social, and Cultural Rights has interpreted the prohibition on discrimination based on birth in the International Covenant on Economic, Social, and Cultural Rights (to which Serbia is a State Party) as follows: "*Distinctions must therefore not be made against those who are born out of wedlock, born of stateless parents or are adopted or constitute the families of such persons*"⁵. The impugned provisions, however, are designed to ensure registrars make such a distinction: children of stateless persons and those at risk of statelessness due to a lack of identity documents are inherently more likely to be the subject of delayed registration because of a perceived need to verify and ascertain further details of their birth.

⁵General Comment No.20 (2009), § 26.

21. The discrimination is direct: the provision creates a distinction based on the circumstances of birth between those children who are registered immediately and those children whose registration is delayed.

The Appropriateness of Declaring the Impugned Provisions Incompatible with the Constitution

22. Declaring the impugned provisions of the Law incompatible with the Constitution will not interfere with the appropriate functioning of the Law as a whole. Article 23(1) of the law, requiring immediate registration of births, will remain in place. Three mechanisms ensure that the Law can continue to be applied smoothly once the impugned provisions are excised:
- a. There is no requirement in the Law for registrations to be complete, so if data (for example, citizenship, or the identity of the father) is missing, a registration can still take place.
 - b. Article 26 of the Law, cited above, allows data to be added later if the circumstances do not allow it to be included at the time of registration.
 - c. Article 31 sets out a procedure for rectifying data that turns out to have been incorrect.

Based on the abovementioned, we propose that the Constitutional Court accepts the initiative, issues a decision to initiate the procedure for assessing the compliance of impugned provisions of the Law on Registers with the Constitution, with generally accepted rules of international law, and with ratified international treaties, and reaches a decision that the impugned provisions are not in compliance with the aforementioned legal instruments.

NGO PRAXIS

In Belgrade, 7 March, 2016

Ivanka Kostic, Executive Director

European Roma Rights Centre

Djordje Jovanovic, President