9 The Ideological Turn in Bulgarian Constitutional Discourse

The Rise Against 'Genders'

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1 Introduction

The Constitutional Court of the Republic of Bulgaria (henceforth the Court) has proven itself to be an important player in the process of building and consolidating the democratic institutions in post-communist Bulgaria, establishing itself as an effective and respected guardian of the Constitution, "energetically reacting against the encroachments of parliamentary majorities"[1] during the turbulent times of the country's transition to liberal democracy. Despite its many achievements, however, it would be difficult to argue that the Court played the role of a potent vehicle for human rights revolution in Bulgaria during the transition and pre-EU accession period (1991-2006). In the post-accession period the Court has arguably played such a role even less. Its landmark 2018 decision declared the Council of Europe's (CoE) *Convention on Preventing and Combating Violence against Women and Domestic Violence* (*Istanbul Convention*) in violation of Bulgaria's Constitution and signals a radical turn in its human rights jurisprudence.

I will argue in this chapter that in this decision the Court moved away from its practice of cautiously interpreting rights by strictly following the text of the Constitution, towards taking an ideologically-laden activist position in defense of 'traditional values', which prompted it to depart from the text of the Constitution and engage in 'creative' jurisprudence. After a brief introduction to the Court's beginnings and aspects of its human rights jurisprudence in Part 2, Part 3 will present the political background – the rise of illiberal national populists – against which the Court took its decision will be presented. The central part of the chapter is a critical analysis of Court's reasoning in this decision, marking this ideological turn.

1 E. Tanchev, 'Constitutional Control in Comparative and Bulgarian Prospective', paper presented at the World Conference on Constitutional Justice, Cape Town, 23–24 January 2009.

2 The Constitutional Court of Bulgaria: A Cautious Defender of Rights

The Court was created immediately after the Constitution of Republic of Bulgaria was adopted in July 1992 – itself a product of the compromises of the Round Table talks in 1990 between the communist rulers of the country and the young and weak anti-communist opposition. Fearing retribution for the crimes committed by the communist regime, the ex-communists (renamed Bulgarian Socialist Party) strategically used their narrow majority in the Constituent Assembly and gave strong constitutional protection to individual rights. At the same time the issue of minority rights was shunned – a strategy also shared by the main ex-communist opposition due to the anti-Turkish sentiments in society.[2] Thus the Constitution of 1991 ended up containing no mention of minorities or minority rights. It contains, however, a long list of individual rights – including strong protection of property rights, together with an extensive list of socio-economic rights.

In constitutionally guaranteeing strong protection for individual rights and freedoms, the drafters vested an independent Constitutional Court with powers of review of legislation. As the jurisprudence from the first years of the Court demonstrates, however, that this mandate was not used for buttressing an expansionary doctrine of rights. Rather, the judges aimed to bolster the legitimacy of the newly established Court by playing it safe, restraining themselves to a narrow reading of the constitutional text on rights. Moreover, citizens were not granted the right to individual constitutional complaint, nor were the ordinary courts given access to the Court, limiting it instead to high-level political and legal players – MPs, President and Cabinet, and the high courts/the General Prosecutor. A scholar of constitutionalism may be surprised to find out that in setting up the Court in Chapter VIII of the Bulgarian Constitution, the drafters did not explicitly mention individual rights protection. Only in 2006 was this omission partly remedied with an amendment[3] granting the Ombudsman of the Republic the right to refer to the Court legislation that specifically affects individual rights and freedoms.

The Bulgarian constitutional architecture has long been criticized for failing to provide sufficiently strong instruments for human rights protection at the constitutional level. In its opinion on the draft constitutional amendment law of 2015 the Venice Commission welcomed[4] the improvement of human rights protection that would be brought about by

2 R. Kolarova, 'Tacit Agreements in the Bulgarian Transition to Democracy: Minority Rights and Constitutionalism', 1 *The University of Chicago Law School Roundtable*. 12. (1993). Available at http://chicagounbound.uchicago.edu/roundtable/vol1/iss1/12.

3 Article 150(3) (new) of the Constitution, Amendment to the Constitution, *State Gazette* No. 27/2006.

4 European Commission for Democracy through Law (Venice Commission), *Opinion on the draft act to amend and supplement the Constitution (in the field of the Judiciary) of Republic of Bulgaria*, Opinion

granting direct access to the Supreme Bar Council (SBC) to the Court, yet also suggested that further measures may be necessary.[5]

Despite these shortcomings of the constitutional design, scholars observe that in the years after Bulgaria's accession to the European Union (EU), the jurisprudence of the Court is increasingly focusing on human rights issues. This trend, however, does not warrant labeling the Court the flag-bearer of human rights revolution in Bulgaria – if indeed such revolution has ever taken place.

Already in its early days, the Court tried building an image of a self-constraining court[6] not promoting politically controversial issues such as extending rights beyond the explicit text of the Constitution. In a string of cases on entitlements from the communist past, the Court tried to strike a balance between the individual rights of those who profited from the communist past (mainly the communist nomenklatura), on the one hand, and demands for restoring historic justice and stripping the members of nomenklatura of their privileges, on the other. The Court took a cautious position with regard to pension rights and the right to be elected in governing bodies of state banks, protecting them by reference to the principle of equal protection by law and declared the legislation of the anti-communist government in these cases unconstitutional. In other cases – on stripping the Communist Party of its property and on a temporary ban on academics with high-rank positions in the Communist Party to hold governing positions in the academia, the Court took the view that the respective pieces of legislation did not violate the principle of equality before the law and were not unconstitutional.

The end of 1992 – a year of growing hostility between ex-communists and anti-communists, which brought many rights cases to the young Court's attention – was marked by an important decision[7] of the Court on the initiative of the President of the Republic, Dr. Zhelyu Zhelev. He asked the Court to provide an authoritative interpretation of Article 6(2) of the Constitution where the principle of equality before the law is guaranteed. The Court gave a conservative interpretation of the text, declaring that the list of prohibited grounds for limiting rights/granting privileges is exclusive – adding further grounds would be unconstitutional.

816/2015. 17-18. Available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)022-e.

5 In the same opinion the Venice Commission also made a strong argument for further enhancing human rights protection by including in the Constitution a balanced combination of two more instruments: indirect access of the citizens to the Court (through ordinary courts) together with direct citizen access (through careful introduction of individual constitutional complaint). These last recommendations have not yet been implemented, which leaves the constitutional protection of individual rights and freedoms to the initiative of political players and the high strata of the judicial system (the high courts, the general prosecutor and SBC), with the latter group rarely addressing the Court on human rights issues specifically.

6 R. Kolarova, 'A Self-Restricting Court', 2 *East European Constitutional Review*. 48-51. (1993).

7 Decision No. 14/1992.

This trend of cautious, minimalistic, interpretation of rights as close to the constitutional text as possible, continued and strengthened in the subsequent jurisprudence of the Court, giving new expression and new application – in the sphere of rights protection – to the formalistic legal culture inherited from the pre-World War II period. This allowed constitutional scholars to claim that the "judicial minimalism of the Bulgarian Constitutional Court has had profound impact on the legal culture of the country."[8] This, firstly, opened up certain disparities between constitutional jurisprudence and that of European Court of Human Rights (ECtHR) (most notably on the ban of political party 'OMO Ilinden'), and, secondly, it also does not encourage ordinary courts to address the Bulgarian Constitutional Court.[9]

Against this background it may not be surprising, that though the majority of the cases in the last decade dealt with rights protection, they were brought predominantly by MPs and – to a lesser extent – by the Ombudsman. The cases initiated by the high courts and the General Prosecutor mostly deal with the reform of the judicial system, its place in the system of government, judicial self-government etc.,[10] and not with human rights protection. What may raise concerns is not that the Court decided these cases on an initiative from the judicial system itself,[11] but, rather, the manner in which the Court decided them: more often in favor of preserving the *status quo*, or allowing the most minimal changes possible, instead of constitutionally paving the wave for a thoroughgoing reform. These developments underscore the claim of 'juristocracy' in the Constitutional Court.[12]

Not only is it the case that a growing number of judges on the Constitutioanl Court have an identity shaped by their guild membership (members of the judiciary), but they also tend to decide in favor of preserving the *status quo* of the system they represent and oppose its radical reform. The increasing influence of juristocrats prompted an observer to label the third period of Court's jurisprudence – after the first 'Counter-Majoritarian Court' (1991-1996) and the second 'Deferential Court' (1997-2001) – the 'Advent of Juristocracy' (the period since 2002).[13] For example, at the end of a string of cases in 2002 on the initiative of the Plenum of the Supreme Court of Cassation challenging the

8 D. Smilov, 'Constitutional Culture and the Theory of Adjudication' in A. Febbrajo &W. Sadurski (eds.), *Central and Eastern Europe after Transition, Towards a New Socio-legal Semantics*, Ashgate. 143. (2010).

9 Smilov, 2010, 143-144.

10 An analysis of key issues in the jurisprudence of the Bulgarian Constitutional since 2010 is part of the biannual barometer of the legal system, prepared by *Legal Barometer*. Available at https://legalbarometer.bg/.

11 This observation about the preoccupation of the high courts and the General prosecutor with the reform of a system of which they are a part does not necessarily imply a critique against representatives of the judiciary of self-serving their corporate interests. Reform of an ailing judicial system is no doubt of utmost importance for a well-functioning democratic system with strong rule of law and separation of powers.

12 D. Smilov, 'The Hybridity of Constitutional Courts: Arbiters in the Absence of Rules', in A. Kiossev & P. Kabakchieva (eds.), *"Rules" and "Roles": Fluid Institutions and Hybrid Identities in East European Transformation Process* (1989–2005), Berlin. 61. (2009).

13 Smilov, 2009, 76.

constitutionality of the proposed judicial reform amendments,[14] the Constitutional Court effectively blocked any radical changes in the judicial system because such a change would require a constitutional amendment adopted by a Grand National Assembly.[15] The sponsor of the amendments, the Saxe-Coburg and Gotha government aimed to meet the Copenhagen criteria of EU membership to streamline country's EU integration, strictly following the recommendation of the European Commission – a strong proponent of judicial reform.

This important decision of the Court also marked a new beginning in the relationship between the European Commission and other international bodies, on the one hand, and the Court, on the other. The European Commission and the institutions of the CoE – such as the ECtHR and the Venice Commission – had praised some of Constitutional Court's landmark decisions from its early period, most prominently its 1992 decision[16] on the first case brought to Court in 1991. Immediately after it was constituted, the Court declared the Movement for Rights and Freedom (MRF) – the party representing the ethnic Turks in the country – constitutional despite an explicit provision in the 1991 Constitution prohibiting political parties on ethnic or religious grounds (Article 11(4)). Decisions from the 1990s upholding the independence of the public media and the judiciary against governmental pressures were also internationally acclaimed. From 2002 onwards, however, these international organizations started following the Court's decisions on the reform of the judicial system with rising concern, an issue that has become a constant source of subdued criticism of the Court's jurisprudence, in addition to its already much criticized decision[17] to uphold the ban of political party OMO Ilinden (successfully challenged in the ECtHR multiple times).[18]

One should not, however, be misled by the Court's increasing attention to human rights issues to conclude that rights enjoyed strong constitutional protection during this period. Firstly, the number of cases brought to the Constitutional Court and decided by it is low and further declining: since 2002 they rarely reach 15, with the lowest points being in 2008 – six cases decided, and in 2016 – just five. Secondly, the constitutional initiative

14 Decision No. 13/2002, *State Gazette* No. 118/2002.

15 Such radical change would be moving the Prosecutorial office from its current place in the judicial system into the executive branch, stripping prosecutors of their immunities as magistrates and making them more accountable. Such changes in the view of the justices pertain to the form of government, and hence require decision by a Grand National Assembly – which has exclusive competence to decide on the form of government.

16 Decision No. 4/1992, *State Gazette* No. 35/1992.

17 Decision No. 1/2000, *State Gazette* No. 18/2000.

18 There are some 15 ECtHR decisions (1995 to 2018) against Bulgaria for refusing to register the party. Brushing these aside, and referring to the Court's decision, courts in the country routinely refuse to register it.

of the high courts with regard to human rights protection is rare.[19] Furthermore, the fact that the Court cannot bring cases on its own initiative explains why there are reasons for concern as to the degree of rights protection at the constitutional level. A growing consensus emerges among legal scholars, constitutional justices and other legal practitioners for introducing instruments – such as individual complaint – with the hope of strengthening the human rights protection system in the country. Some argue[20] that after the Court established itself as a strong guardian of democratic institutions during the difficult years of constitutional transition, time has come to complete the architecture of the comprehensive system of human rights protection by introducing individual constitutional complaint – its last, democratic element.[21]

This change would be beneficial as it promises to extend individual rights protection at the constitutional level by opening up the process to citizens. Yet, such a change is unlikely to happen any time soon because of a change in the societal climate with respect to human rights protection – especially of vulnerable groups (Roma, migrants, LGBTQ): After 2013 (the 'year of protests' in the country) we witness a process of backsliding, which could plausibly be linked to the rise of illiberal national-populists in the country.

3 Rights Under Pressure: The Rise of Illiberal National Populists

The radical nationalist right made its strong entry into Bulgaria's political scene in the fall of 2014, after the mass anti-government protests of 2013 and the loss at the European Parliament elections in May 2014 forced the ruling party to call early elections. Two nationalist formations – the coalition 'Patriotic Front' (newly established between the Bulgarian Nationalist Party (VMRO, also known as IMRO-BNM) and the National Front for the Salvation of Bulgaria NFSB)[22]) and the Ataka party made it into Parliament. In 2017 in the next pre-term elections these political players formed the 'United Patriots'

19 Statistical information on the number of cases brought to the Court by the different players with constitutional mandate shows that the highest number of cases (more than twice than the rest) are initiated by MPs, followed by the Prosecutor general, by the Ombudsman (after 2006 when such powers were granted) and – with very few cases – by the Supreme administrative Court and the Supreme Court of Cassation.

20 This is the position of the former constitutional judge (2003-2012) and constitutional law scholar Emilia Drumeva, who defended it in articles and public positions in 2013 after the end of her mandate at the Court.

21 E. Drumeva, 7 Юридически барометър [*Legal Barometer*], 79. (2013). The debate among constitutional scholars, lawyers, politicians, on individual complaint is not new. Already in the early years of the Court the prominent legal scholar and chair of the Court (1997-2000) Zhivko Stalev argued for its introduction – unsuccessfully. Emilia Drumeva was a strong supporter, editing a special issue of a Bulgarian legal journal, titled Конституционната жалба и мястото ѝ в българския модел на конституционно правосъдие [Constitutional complaint and its role in the Bulgarian model of constitutional jurisprudence].

22 The National Front for Salvation of Bulgaria (NFSB) was established in 2011 by Valeri Simeonov, a former member of the radical nationalist party Ataka. Ataka was established in 2005 and led by Volen Siderov, a TV presenter on the nationalist TV channel SCAT.

coalition,[23] which earned 27 seats, just enough to become the minor coalition partner in the third government of Boyko Borissov, the leader of the winning party GERB (Citizens for European Development of Bulgaria). The United Patriots nominated two Deputy Prime Ministers, the leader of VMRO Krasimir Karakachanov was also appointed Minister of Defense, while the leader of NFSB Valeri Simeonov was given the portfolio of Deputy Prime Minister responsible for demographic and economic issues. The most controversial of the trio – the leader of Ataka, Volen Siderov – did not get into government, becoming instead the leader of the parliamentary group.

As a minor coalition partner, the nationalists have rarely managed to push their illiberal agenda in a full-fledged manner. For example, a controversial piece of legislation sponsored by the United Patriots was their proposal to amend the Judicial System Act and prohibit the professional organization of magistrates to receive any funding from foreign donors (including the EU, CoE and other international organizations the country is a member of). After a huge public outcry and international pressure, the amendment was dropped.[24] They have been, however, able to block some of the pro-European and more progressive policies sponsored by GERB, among these most notably the ratification of the *Istanbul Convention*.

The 'patriots' promote an anti-rights discourse: their illiberal national-populist agenda gradually started dominating the public debates on human rights. The growing trend of attacking human rights watchdogs verbally (and also physically)[25] in the country is very much a result of public speeches – including in Parliament and in national media – by nationalist leaders lambasting human rights watchdogs, NGOs promoting judicial reform and green policies, called them 'sorosoid' 'grant-suckers', betrayers of national interests. The Bulgarian Helsinki Committee and other human rights NGOs are routinely portrayed as traitors not just in the nationalist media and on-line forums, but also increasingly in the mainstream media.[26]

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23 Fragmentation in the nationalist camp has been the main reason the nationalists often performed below their electoral potential.

24 'Ruling Party Withdraws Controversial Revisions Affecting Foreign Financing for Professional Organizations of Magistrates', *BTA* [Bulgaria News Agency], 26 July 2017. Available at http://www.bta.bg/en/c/DF/id/1623857.

25 'Bulgarian Helsinki Committee Head Assaulted in Central Sofia', *Sofia Globe,* 27 October 2016. Available at https://sofiaglobe.com/2016/10/27/bulgarian-helsinki-committee-head-assaulted-in-central-sofia/.

26 The attacks intensified after Bulgarian Helsinki Committee nominated Jock Palfreeman, sentenced to 20 years imprisonment for killing a football fan in Sofia, for its 'Person of the Year' human rights award. The nomination was for Palfreeman's campaign for inmates' rights. The Helsinki Committee revoked the nomination after a public uproar, during which the Bulgarian Helsinki Committee were publicly called national traitors. *See* 'Bulgarian NGO Drops Controversial Nomination for Human Rights Award', 6 November 2015. Available at https://www.novinite.com/articles/171697/Bulgarian+NGO+Drops+Controversial+Nomination+for+Human+Rights+Award.

In January 2019 the Deputy PM Krasimir Karakachanov went so far as to publicly attack human rights NGOs as chiefly responsible for the failure of Roma integration in the country, demanding that they account for every lev received for Roma integration.[27] A second Deputy PM from the United Patriots, Valeri Simeonov was forced to resign already[28] in November 2018 after insulting mothers of children with disabilities. The mothers were civic activists, who protested for improved standards of treatment for people with disabilities. Simeonov's actions were supported by the largest business associations in the country that tried to limit the labor rights of people with disabilities.[29] His resignation came after weeks of protests, widely supported in Bulgarian society, and was welcomed as a victory for civil society.

The bad news for human rights protection in the country came just two months later, with the decision of the Supreme Administrative Court to acquit Valeri Simeonov of hate speech charges[30] for his speech in Parliament in December 2014 against Roma. In his speech, alongside many other insults towards the members of the Roma minority, he singled out especially Roma mothers on maternity benefits, calling them "women with instincts of street bitches." Apart from a few human rights watchdogs and Roma organizations, Bulgarian society did not react to these insults. The reasoning of the judges at the Supreme Administrative Court to reverse an earlier conviction by a lower court, was that Simeonov did not offend the litigant – a Roma activist represented by the Bulgarian Helsinki Committee – personally. This decision of a high court is just one illustration that the change in the social climate normalizing the attacks against human rights (especially the rights of Roma, migrants, and, as will be shown below – 'the genders') has reached the highest ranks of the legal profession.

27 'Каракачанов иска отчет за похарчените пари за интеграция на ромите' [Karakachanov demands audit of money spent on Roma integration], *Dnevnik*, 14 January 2019. Available at https://www.dnevnik.bg/bulgaria/2019/01/14/3374615_karakachanov_iska_otchet_za_poharchenite_pari_za/.

28 'Bulgarian Deputy PM Simeonov Resigns', *Reuters*, 16 November 2018. Available at https://www.reuters.com/article/us-bulgaria-government-resignation/bulgarian-deputy-prime-minister-simeonov-resigns-idUSKCN1NL2FS.

29 'Работодателите и Валери Симеонов се обявиха против квотите за хора с увреждания във фирмите' [Employers and Valeri Simeonov campaign against disability quotas at workplaces], *BNR*, 22 October 2018. Available at http://bnr.bg/post/101034749/biznesat-razkritikuva-predlojenieto-za-zadaljitelni-kvoti-za-naznachavane-na-hora-s-uvrejdania.

30 'Bulgaria's Supreme Court Acquits Valeri Simeonov on Anti-Roma Hate Speech Charge', *Sofia Globe,* 19 January 2019. Available at https://sofiaglobe.com/2019/01/18/bulgaria-supreme-court-acquits-valeri-simeonov-on-anti-roma-hate-speech-charge/.

4 The Turn Against 'Genders': The Failed Ratification of the *Istanbul Convention*

On 27 July 2018 Bulgaria's Constitutional Court ruled[31] that the *Istanbul Convention* contradicts the Bulgarian Constitution. This decision sets a precedent in many respects. It is the first case when the Court using its mandate to decide on the constitutionality of an international treaty blocked its ratification. It is also the first convention of the Council of Europe – aimed to protect the rights of women and other victims of gender-based violence – to be declared unconstitutional by a constitutional court.

Before going into the reasoning of the majority of the Bulgarian Constitutional Court (four judges filed three dissenting opinions), a closer look at the political and societal reactions to the *Istanbul Convention* is warranted – as it can partly explain the decision of the Court, taken in an atmosphere of heated debates that exerted strong pressures on judges.

In April 2016 Ekaterina Zaharieva, Minister of Justice at the time, signed Bulgaria's accession to the *Istanbul Convention*. The government aimed to pass the ratification bill (adopted by the Cabinet on 3 January 2018) through Parliament at the beginning of the Bulgarian Presidency of the Council of EU in early 2018. Reporting on the tension within the governing coalition triggered by the ratification bill, Deputy Prime Minister Valeri Simeonov announced that eight cabinet ministers (both from the leading party GERB and from the United Patriots) opposed it.[32] The explanation given for their opposition[33] was that the *Istanbul Convention*, would, first, introduce a 'third gender' and, secondly, would force the country to change its Constitution in order to legalize same-sex marriage in contravention of Bulgaria's Constitution, defining marriage as "a voluntary union between a man and a woman" (Article 46(1)). These concerns were first raised by VMRO – a partner in 'United Patriots'. To allay the tension, Zaharieva, now Minister of Foreign Affairs in the third GERB government, promised an explanatory declaration to accompany the bill, stating that the country will not amend its Constitution to allow same sex marriage.

The Bulgarian Socialist Party (BSP) – the major opposition party – immediately declared itself to be against the ratification. This move was shocking for many observers, as BSP had long campaigned for ratifying the *Istanbul Convention*: associated with BSP women clubs organized campaigns to promote the *Istanbul Convention* in the country, Bulgarian socialist MEPs were actively involved in its promotion at the EU level: Vice-President of

31 Decision No. 13/2018.

32 'Government Adopts Draft Bill on Ratification of Istanbul Convention', *BTA*, 3 January 2018. Available at http://www.bta.bg/en/c/DF/id/1719405.

33 'Bulgarian Nationalists Rock Cabinet Fearing Third-sex Legitimation', *BulgarianPresidency.eu*, 5 January 2018. Available at http://bulgarianpresidency.eu/bulgarian-nationalists-rock-cabinet-fearing-third-sex-legitimisation/.

the Republic, Iliana Yotova – a high functionary of BSP and a former MEP – and the chair of the Party of European Socialists, Sergei Stanishev – the former leader of BSP and former Prime Minister of Bulgaria (2005-2009) – were among its strongest supporters. Nevertheless, seeing a political opportunity not to be missed in opposing a government-sponsored bill that had immediately sparked tensions in the governing coalition as well as in society, Kornelia Ninova – then the chairperson of the BSP – seized the day. In its declaration BSP said they support Bulgarian traditions and values and hence oppose the *Istanbul Convention*. More specifically, BSP objected (1) to "changes in the social and cultural patterns of behavior of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on (…) stereotyped roles for women and men", (2) to the term 'gender' and (3) to the country taking "the necessary steps to include teaching material on non-stereotyped gender roles."[34] BSP urged the Government to withdraw the bill, and also that the ratification is put through a national referendum. Soon the *President of the Republic, Rumen Radev* joined the critical voices, declaring that he 'firmly opposes' ratification.[35] The Bulgarian Orthodox Church, the leaders of the Muslim community, the heads of Evangelical Churches, and other leaders of religious groups also declared their opposition.

A media analysis of the *Istanbul Convention* news coverage demonstrates that scandal, hyperbolic presentation and outright propaganda dominated the media coverage of the public debates on the *Istanbul Convention* during the first weeks, crucial for swaying public opinion.[36] Manipulative information, deliberate fanning of fears (of 'third sex', of menacing *'gender ideology'*, of same-sex marriage) fueled negative popular reaction. In this hostile atmosphere, fearing loss of support, the GERB government did not dare to push for ratification, even though it had the necessary votes – as MVF, the party of the ethnic Turks, member of ALDE, also supported the ratification bill. Instead, 75 GERB MPs submitted the bill to the Constitutional Court to seek a decision on the constitutionality of this international treaty before its ratification. Awaiting the Court's decision, in March 2018 the GERB government withdrew the bill from Parliament: by mid-March it was obvious

34 The full text reads: "We have always struggled against violence against women and children (…) but there is no way we can accept that "parties shall take the necessary measures to promote changes in the social and cultural patterns of behavior of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on (…) stereotyped roles for women and men'. Nor can we accept the term 'gender' or that parties should take 'the necessary steps to include teaching material on issues such as (…) non-stereotyped gender roles (…) adapted to the evolving capacity of learners." Available at http://www.bta.bg/en/c/DF/id/1719826.

35 'President Radev Firmly Opposes Ratification of Istanbul Convention', *BNR*, 2 January 2018. Available at http://bnr.bg/en/post/100928206/president-radev-firmly-opposes-ratification-of-istanbul-convention.

36 'Скандалното говорене доминира отразяването на Истанбулската конвенция в българските медии [Scandal dominates media coverage of the Istanbul Convention in Bulgarian media]', 14 March 2018. Available at http://www.aej-bulgaria.org/bul/p.php?post=9481&c=328.

that the *Istanbul Convention* did not enjoy support in society – 47% opposed the ratification, while just 32% supported it.[37]

The debates were heated, with camps accusing each other of intentionally manipulating the meaning of the *Istanbul Convention*,[38] even of outright lies.[39] Several arguments hostile to the *Istanbul Convention* dominated the public debates.[40] After VMRO deployed fake news about the *Istanbul Convention* 'forcing' Bulgaria to recognize a 'third sex' and to legalize same-sex marriage (and to change its Constitution), national-populist tirades about Europe (no one cared to distinguish between the EU and the CoE) threatening Bulgaria's sovereignty and ruining Bulgarian national values and Christian morality were taken up both by the tabloids and by the mainstream media – that readily covered high-level politicians and leaders of opinion spreading manipulations about the document without caring to ask questions – to dispel the misconceptions by quoting the text of the *Istanbul Convention* or expert opinions.

Piggybacking on a long-standing campaign against NGOs and experts as paid by foreign donors conspiring against national interests (the billionaire-philanthropist George Soros being the main villain), a second trope was the alleged conspiracy of international 'gender' NGOs and lobbies, using European institutions to push through their agenda and impose their values on the only remaining 'true European', true Christian nations – the Eastern Europeans. Fanning another potent fear, spurred by demographic decline in Bulgaria in the post-communist and post-EU accession period – that of a shrinking nation on the verge of extinction – the opponents of the *Istanbul Convention* also portrayed it as yet another conspiracy of Europe to 'steal our kids' by turning them into 'genders'.[41] All in all,

37 'Societal Attitudes Survey', *Alpha Research Agency*, March 2018. Available at https://alpharesearch.bg/userfiles/0318-Alpha_Research_Public_Opinion.pdf.

38 The misconceptions around the *Istanbul Convention* provoked even deeply religious people – such as Kalin Yanakiev, an influential voice among intellectuals with Eastern-Orthodox religious convictions, to try to dispel those misconceptions and argue in favour of the *Istanbul Convention*'s ratification. *See* K. Yanakiev, 'Фалшивият скандал с Истанбулската конвенция' [The fake scandal about the Istanbul Convention], *Kultura.bg*, 7 January 2018. Available at https://kultura.bg/web/фалшивият-скандал-с-истанбулската-ко/.

39 The day the public scandal on the *Istanbul Convention* broke out, the spokesperson for the Ministry of Defense Alexander Urumov (an evangelical pastor and VMRO activist, who as publicly exposed as a former agent of the communist secret services) published a virulent attack on the *Istanbul Convention*, accusing its promoters of lying about its true intentions and scope. *See* A. Urumov, 'Ето някои от лъжите за Истанбулската конвенция' [Here are some of the lies about the Istanbul Convention], *Glasove.bg*, 3 January 2018. Available at http://glasove.com/categories/skandalyt/news/eto-nyakoi-ot-lyzhite-za-istanbulskata-konvenciya.

40 The analysis of media coverage of the *Istanbul Convention* demonstrates that just 17% were neutral and the negative coverage strongly dominated (54% to just 29% positive) in the media.

41 At the protests one could read posters comparing the Europe-sponsored *Istanbul Convention* with the practice of kidnapping boys from Christian families to be made part of elite infantry units (Janissaries) in the Ottoman Empire.

resistance to the *Istanbul Convention* was portrayed as a heroic act against the conspiracy aimed at destroying the nation.

With regard to the substance of the *Istanbul Convention* – protection of women against domestic and gender-based violence – the negative arguments focused on dismissing the problems with gender-based violence in Bulgaria as hugely exaggerated. Citing reports on the higher levels of gender-based violence in Western and Northern Europe than in Eastern Europe as evidence of the moral decline of the West, these critics were entirely disregarded the fact that there are no reliable reports on such violence in the post-communist countries, making any such comparison spurious. But even when the problem with gender-based violence was recognized as meriting attention, it was further argued that Bulgaria already has the necessary legislation to counter these problems, and hence there is no need for signing yet another convention.

Taking an even more skeptical position, some critics addressed their attacks against international human rights instruments more generally. Some disputed the positive impact of international human rights conventions, claiming these are yet further legal texts that will likely not produce change in social practices. Some critics went further, rehearsing the 'realist' position circulated by the attacks of 'the patriots' against human rights NGOs, arguing that the *Istanbul Convention* would provide opportunities for further 'grants-sucking' by traitors (i.e. human rights watchdogs) and would be yet another occasion for tarnishing Bulgaria in international organizations.

In this hostile environment, the concept 'gender', which was at the center of the manipulations and misunderstandings that plagued the public debates on the *Istanbul Convention* in the country, started a new, fantastic life of its own: 'genders' derogatively were called (1) the defenders of the *Istanbul Convention*, (2) the liberals, (3) the supporters of 'Gayropa' (a neologism coined by anti-EU propaganda outlets of Russian pedigree,[42] promoting the view that Europe is decaying as it is being taken over by 'perverts'), (4) the homosexuals, or LGBTQ+ more generally.

Proponents of the *Istanbul Convention* – in (parts of) the government, academia and expert community, human-rights NGOs, activists – were touring the media explaining its purpose, scope and content and deflecting the misconceptions around it. To strengthen their case among the pro-EU Bulgarian public, some of its defenders argued that opposition against the *Istanbul Convention* is part of Russia's hybrid attack on the EU, aimed to breed anti-European sentiments: The highest concentration of anti-*Istanbul Convention* content was in media with a record of vocal Euroscepticism (along with all kinds of conspiracy

42 "The notion of 'Gayropa' has become a means to define Russia's place in the modern world and plays an important role in geopolitical discourse and to legitimize the powers that be", O. Riabov & T. Riabova, 'The Decline of Gayropa? How Russia Intends to Save the World', *Eurozine,* 5 February 2014. Available at https://www.eurozine.com/the-decline-of-gayropa/.

theories circulated). Exposing Russian manipulation did not prove particularly successful, as the spread of anti-*Istanbul Convention* attitudes was not primarily along the pro-/anti-EU cleavage – though such attitudes may have been more pronounced among euroskeptics.[43] In any case the anti-*Istanbul Convention* hysteria in the country seems to not have had a negative impact on the attitudes of Bulgarians towards the EU more generally.[44]

5 'Gender Ideology' Revealed

5.1 The Reasoning of the Court

In mid-March 2018 the Bulgarian Constitutional Court found the case admissible. It also invited opinions from a wide array of stakeholders – legal and other experts, law professors, human rights watch-dogs, NGOs – all of them made public on the Court's webpage.[45] There has not been to date a Court case that has attracted so much attention and so many opinions.

The Court took its decision on 27 July 2018. The decision was uncharacteristically long and was based on a *flawed*, unofficial translation of the *Istanbul Convention*. The translation[46] deserves special mention here, before addressing the reasoning of the Court. The problem is not just that the translation was not official,[47] but that it translated the concepts 'sex' and 'gender' (distinct in the *Istanbul Convention*) using just one term in Bulgarian – '*пол*', a word by which biological 'sex' alone is denoted. Only once (in Article 4(3), specifying the excluded grounds for discrimination in applying Convention provisions) an attempt is made to distinguish 'sex' from 'gender', by attaching the qualification 'social' to '*пол*'. Thus 'gender' is translated there as '*социален пол*', i.e. as 'social sex', triggering speculations that the *Istanbul Convention* is introducing a 'third sex' along with male and female sexes. The issue of this flaw in the translation was constantly brought up during

43 It is impossible to quote reliable data to support a firmer conclusion here. The problem is that the first poll measuring public attitudes on the *Istanbul Convention*, widely cited in the media to 'prove' Bulgarians are against the ratification, was done by an entirely unknown polling agency. Later surveys were commissioned from agencies that are sometimes accused of partiality, more likely to be exhibited on such a controversial, divisive issue. Further, neither of the polls gave much detail about the spread of such attitudes among different categories of population – by age, political preferences, pro-/anti-EU attitudes, etc.

44 Between September 2017 and June 1018 the negative attitudes dropped by 6 points to just 10%, and the positive strengthened by 15 points, reaching 65%. Available at https://alpharesearch.bg/monitoring/12/?lang=en.

45 All the case materials are published at http://www.constcourt.bg/bg/Cases/Details/541.

46 Available at https://rm.coe.int/168046246f.

47 Even though the translation was commissioned by the CoE, the document explicitly says that "the translation presented here is for information only."

the debates, and the CoE promised a new, improved translation already in mid-January,[48] which was, however, never delivered. The government itself never commissioned an official translation, where the mistake could have easily been corrected, using an established translation of 'gender' as 'the social role of the sexes' ['*социални роли на пола*'], which was already used in Bulgarian anti-discrimination legislation.[49] Nor did the Court object that they could not review the constitutionality of an international treaty using an unofficial translation. Instead, based on an unofficial translation, eight judges declared the *Istanbul Convention* unconstitutional. Four dissented.

5.2 Interpreting 'Gender' and 'Gender Identity'

The majority of the Court stated that "despite its undoubtedly positive features, the Convention is internally incoherent and this contradiction creates a second layer in it," shifting its meaning beyond its declared aims.

This statement repeated, in a less explicit way, a claim often advanced by critics of the *Istanbul Convention*: that even if it declares to be about protecting women against violence, by 'smuggling in' controversial and ill-defined concepts, such as gender, and 'gender identity,'[50] it also smuggles in the associated concept of 'gender ideology'. Thus, the noble cause of 'protection of women against domestic violence' is just a smoke screen to hide more sinister aims. The alleged conspiracy revealed by the Court is that the *Istanbul Convention* is in fact a vehicle planned to introduce a controversial 'gender ideology' into Bulgarian society through its incorporation in the legal system. What that 'gender ideology' is was never clearly spelled out, yet in the public (sub)conscious it was associated with promoting the idea of a 'third sex' as a matter of personal choice along with legalizing same-sex marriage. The Court followed this conspiratorial route, unearthing the element of 'gender ideology' that constituted the 'second layer' in the *Istanbul Convention*, which would, in Court's view, ultimately prove the *Istanbul Convention* to be unconstitutional.

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48 'Подготвя се нов превод на Истанбулската конвенция' [New translation is prepared for the Istanbul Convention], *BNT,* 16 January 2018. Available at http://news.bnt.bg/bg/a/podgotvya-se-nov-prevod-na-istanbulskata-konventsiya.

49 Equality of Women and Men Act, *State Gazette* No. 33/ 2016, defines the concept in Article 1(1) as "the social roles of women and men".

50 Such was the position of some constitutional law scholars and practitioners, who submitted opinions to the Court. For example, Borislav Tsekov, a former politician, lawyer, chair of the Institute for Modern Politics argued, referring to debates in philosophy, social sciences and wider society, that because the concepts used in the *Istanbul Convention* ('gender', 'gender identity') were liable to multiple interpretations – some of which (notably 'gender identity') pointing towards the controversial 'gender ideology' – this could not only bring in dangerous uncertainty in their interpretation, threatening the principle of rule of law in its formal aspect – legal certainty, but could also serve the purpose of introducing such 'gender ideology' in the legal system.

The concept of 'gender' was a major point of contention. The Court interpreted the concept widely, in stark contrast with its narrow and clear definition in Article 3(c) of the *Istanbul Convention* as "socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men." This narrow definition is already part of Bulgarian law, a fact never mentioned by the Court (though stressed in the dissenting opinions).

Substituting their own definition of 'gender' for that in Article 3(c), the judges argued that by mentioning in Article 4(3) of the *Istanbul Convention* both the biological category of 'sex' and 'gender' as a social construct,[51] determined by the subjective perceptions and notions of the individual and society for the role of men and women, both terms are "elevated into autonomous and equal in their value categories in the Convention, having their own separate legal being." This statement of the Court starkly departs from the text of the *Istanbul Convention* (either in its original or in its Bulgarian translation) by stating that 'gender' is defined as a 'social construct'. Instead, the majority interpreted 'gender' not as defined in the *Istanbul Convention* as socially constructed (see Article 3(c)), but as a matter of *personal* choice. In the judges' own words: 'gender' refers to 'the subjective perceptions and notions of the *individual* and society', although the individual's subjective attributes of 'gender' are never mentioned in the text of the *Convention* itself.

Aware (though never admitting it openly) that their interpretation of 'gender' as a matter of subjective individual choice of social roles departs from the explicit definition of the concept in the text of the *Istanbul Convention*, the Court tried to substantiate its interpretation by postulating a close link between 'gender' and 'gender-identity' – the latter concept being used only once in the text of the Convention (Article 4(3)). In contrast to the central role the term 'gender' plays in determining the *Istanbul Convention*'s goals, content, scope etc., the concept of 'gender identity' is marginal. Yet despite its marginal status, the judges insisted that 'gender' must be understood in terms of 'gender identity', rather than the other way around.

This is a strange choice, not just because of the primary, central place of 'gender', and the marginal role of 'gender identity' in the text of the *Convention*. It is doubly strange to define 'gender', with its clear, well-articulated definition in Article 3(c), using a concept that is derivative of it – and which, as the Constitutional Court stressed, does not have its definition in the *Istanbul Convention*. 'Gender identity' is mentioned in Article 4(3), in addition to 'sex' and 'gender', as a further ground for non-discrimination in applying *Istanbul Convention*. Contrary to what the judges in the majority claimed, however, the

51 Art. 4(3), *Istanbul Convention*: "The implementation of the provisions of this Convention by the Parties, in particular measures to protect the rights of victims, shall be secured without discrimination on any ground such as *sex, gender*, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, migrant or refugee status, or other status." (emphasis added.)

concept is well defined in paragraph 53 of the *Explanatory Report*, accompanying the text of the *Istanbul Convention*. There, 'discrimination based on gender identity' refers to cases where one is discriminated against due to the fact that 'the gender one identifies with does not correspond to the gender assigned at birth'. Instead of concluding that there are instances of violence due to such gender identity, and that this is a problem that needs addressing (the obvious reasons for mentioning gender identity in a Convention against gender-based violence), the Constitutional Court spent pages to refer to legally non-binding Council of Europe documents to excavate the exact meaning of 'gender identity' and its application in the jurisprudence of the ECtHR.

The Constitutional Court's exegesis concluded that: "introducing in *Istanbul Convention* the term 'gender identity' flows from the idea that the social dimension of gender is independent from the biological." Based on this conclusion, the Constitutional Court interpreted the *Istanbul Convention* to define 'gender' as *individual choice* of social roles, disconnected from biological sex at birth. This turbocharged understanding of 'gender' was then identified as the hidden 'gender ideology' of the *Istanbul Convention*:

> The opportunity of individual, free choice of gender identity, which may turn out not to coincide with the biologically determined one, expresses aspects of 'gender ideology' – set of ideas, convictions and beliefs, that the biologically determined characteristics of one's gender are irrelevant, what matters in only one's gender self-identification.

The conclusion of the Constitutional Court directly contradicts paragraph 43 of the *Explanatory Report*, which explicitly builds the socially constructed roles (gender) on the two biological 'sexes' – male and female,[52] and adds to them the roles society deems appropriate for those two biologically determined sexes.

The meaning of Article 4(3) of the *Istanbul Convention* is clear: it recognizes that there are people who do not identify with the gender assigned to them at birth and requires that the *Istanbul Convention* be applied without discrimination to such cases as well.[53] The Constitutional Court's conclusion (that in the *Istanbul Convention* social roles are assigned entirely independently from the biological differences between the two sexes) does not follow. From the alleged total independence of social gender from biological sex, the Constitutional Court drew another far-reaching conclusion: "distancing from the concept

52 "In the context of this Convention, the term gender, based on the two sexes, male and female, explains that there are also socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men." Available at https://rm.coe.int/16800d383a.

53 This does not prejudge what the treatment of people with 'atypical' gender-identity should be in other contexts: the definitions and measures in the *Istanbul Convention* are explicitly and narrowly defined, and they apply to the *Istanbul Convention* only.

of '*пол*' as a biological attribute – man/woman, distances the Convention from its declared objectives of defending women against all forms of violence. The internal contradiction is apparent when the objectives of the *Istanbul Convention* are compared to the given definition of 'gender' ('*пол*')."[54]

It is this view of the social roles of the sexes as radically detached from biological sex – i.e. the 'gender ideology' that the Constitutional Court saw hidden in the *Istanbul Convention*, and it is this position which in the Court's opinion contradicts the Constitution. After creatively interpreting the *Istanbul Convention*, the Court engaged in a 'creative' interpretation of the text of the Constitution as well, uncovering its underlying ideology. The judges in the majority speculated that the Constitution rests on two fundamental positions: Firstly, that sex is binary: "the Constitution and the whole Bulgarian legislation are built on the understanding of the *binary* existence of the human species" and, secondly, that "the social roles" of the two sexes, particularly of women, are determined by their biological sex alone. The second position was established by an argument that provoked the angry reaction of human rights activists and intellectuals: the Court (including all five female justices sitting on it) saw in the Constitution a narrow link between biological female sex and the social roles of women, speculating that its text defines 'woman's social roles' as 'mother' 'giving birth' and 'midwifery'.

Based on these speculative interpretations of the two 'ideologies": of the *Istanbul Convention* (exemplified by how 'gender' is defined there as fully independent from biological sex) and of the Constitution (defining social roles of women as identical with their biological functions), the Constitutional Court found the *Istanbul Convention* unconstitutional – as violating fundamental constitutional positions with regard to women and their social roles. Here the judges went further than just pointing out the *Istanbul Convention*'s 'incompatibility' with the Constitution. They speculated that the internal contradictions of the *Istanbul Convention*, due to its 'distancing from the biological understanding of sexes', prevent it from achieving its aims of protecting women from all forms of violence:

> this duplicity of the conceptual apparatus, of the content imputed in the concepts used, in practice does not lead to achieving equality between sexes, but blurs their differences, and thereby the principle of equality loses its meaning.

54 In this part of the decision it is very difficult to tell when by using the term 'пол' the judges meant the biologically determined 'sex' and when they referred to 'gender' instead: they continued to use 'пол' to refer to both, playing with the resulting ambiguities whenever this served their interpretation.

The Court here argued that the use of 'gender' in the *Istanbul Convention* makes the *Istanbul Convention* counterproductive. Further exploiting the ambiguous translation of 'gender' and its own over-interpretations of it, in an emotionally charged plea the judges concluded that

> defining sex as social construct would relativize the border between the two sexes… And when society loses its capacity to distinguish between woman and man, the struggle with violence against women would remain a formal unenforceable commitment.

This series of highly controversial, at times speculative arguments of the Court, especially the one narrowly circumscribing the social role of women to their biologically-determined functions, provoked human rights activists to declare the Court's decision the worst to date.[55]

5.3 The Rule of Law Argument

In the last sections of the judgment, the majority of the Constitutional Court engaged in constitutional legislation, elevating the principle of 'sexual binarity' to a fundamental principle of human society, not just of the Bulgarian legal system. They further argued that building 'civil sex' ('*граждански пол*') on two biological sexes determined at birth is crucial for "the legal regulation of civil relationships (marriage, parenthood), which require clarity, indisputability, stability and certainty." This last argument allowed the Court to bridge its interpretation of 'gender' with its 'master argument' for declaring the *Istanbul Convention* unconstitutional.

The master argument goes deeper than establishing the substantive contradictions of the *Istanbul Convention*'s 'gender ideology' with the alleged 'binary biological sex-based ideology' of the Bulgarian Constitution. The majority argued that the *Istanbul Convention* contradicts a major constitutional principle, pronounced in Article 4(1) of the Constitution: that of the rule of law.

The Court relied on the 'formal aspect' of the rule of law principle, which requires legal certainty and prohibits the introduction in the legal system of unclearly defined ambiguous concepts. As the ratification of the *Istanbul Convention* would introduce 'gender'/'gender-identity' into the Bulgarian legal system – which in the view of the Court are unclear and ambiguous – this would lead to a violation of the 'formal aspect' of the

55 The declaration of human rights NGOs and activists, titled "The Decision of the Constitutional Court Humiliated Us All!", 27 July 2019. Available at http://bghelsinki.org/en/news/bg/single/decision-constitutional-court-humiliated-us-all/.

rule of law principle. And as the rule of law principle is both the fundament and grounding value of Bulgaria's constitutional order and does not allow adopting the Convention's fundamental concept – 'gender' – (because of its alleged unclarity and ambiguity), the Court ruled the whole Convention in conflict with the Constitution, blocking in principle its possible ratification.

This 'legal uncertainty' argument was the favorite line of attack of the legal experts (some of them - former constitutional justices[56]) who opposed the *Istanbul Convention* and submitted their expert opinions upon the Court's invitation. There were a few legal scholars who publicly argued that there are no good arguments for declaring the *Istanbul Convention* unconstitutional, yet they either failed to submit their expert opinion upon the Court's invitation[57] or were never invited to do so.

5.4 The Dissenting Opinions: The Majority Was Politically Motivated

Judges Georgy Angelov, Rumen Nenkov, Konstantin Penchev and Philip Dimitrov submitted three dissenting opinions.[58] In emotionally charged yet persuasive opinions, at times using strong language, these judges declared the majority's ruling to be ideologically charged and serving political interests.

Judges Angelov and Nenkov accused their colleagues in the majority of intimating deep conspiratorial meaning behind the *Istanbul Convention* instead of providing constitutional review of its legal text… and of taking up "the role of political and ideological judges inappropriate for a Constitutional Court." In their dissenting opinion one also reads: "the decision of the Constitutional court 'serves' politicians of all stripes – preventing conflict in the governing coalition and coinciding with the position of the parliamentary and extra-parliamentary opposition." They accused their colleagues of inexcusably succumbing to public and other pressures and of fear mongering in presenting the legally respectable term 'gender' as a threat to constitutional values and principles. The dissenting judges also expressed their disappointment that as a result of the Constitutional Court's decision Bulgaria is isolating itself from the international community during a time when "brutal aggression has become part of our everyday life."

In his dissenting opinion, the shortest and least emotional of the three, Judge Penchev briefly demonstrated the inconsistencies in the majority's decision, pointing out both that

56 Former Constitutional Court judges Plamen Kirov (2006-2015) and Pencho Penev (1991-1997) both advanced the argument of legal uncertainty. Emilia Drumeva (2003-2012), in her capacity as the chief legal adviser of the President Radev, must also have been consulted in preparing the President's negative opinion on the *Istanbul Convention*.

57 The Court invited ten professors and experts on constitutional law, only 3 submitted their opinions – all of whom argued for the *Istanbul Convention*'s unconstitutionality.

58 The dissenting opinions are available at http://www.constcourt.bg/bg/Cases/Details/541.

the term 'gender' is already part of Bulgarian legislation without introducing legal uncertainty there, and also showing that 'gender-identity' may plausibly be interpreted as 'personal circumstances' – a class of prohibited grounds of discrimination, written in Article 6(2) of the Constitution. He however admitted that in view of the strong opposition in Bulgarian society to the *Istanbul Convention*, there might be political arguments for not ratifying it at present. Yet he insisted that these considerations are not constitutional arguments.

Judge Dimitrov pointed out that the concepts in the *Istanbul Convention* are narrowly defined and their application is explicitly limited to the prevention of violence against women and domestic violence only. Hence, the Court's central argument about the *Istanbul Convention* violating the rule of law principle because of introducing legal uncertainty in the whole legal system is unfounded. So are many of the other arguments of the majority – as, for example, the position about the strictly biologically determined social roles of women and men – a position that in Judge Dimitrov's opinion has no ground in the Constitution.

In brief, in the opinion of the four dissenting judges, the *Istanbul Convention* contradicts neither the letter nor the spirit of Bulgaria's Constitution. Indeed, the general character of the Court's arguments against the concept 'gender' – that it is unclearly defined and ambiguous in scope – as well as the alleged violation of legal certainty and the rule of law leave one wondering why no other constitutional court in an EU and CoE country followed the line of argument that was obvious for the majority of Bulgaria's Court: that the *Istanbul Convention*'s concepts are unclear and that this lack of clarity threatens the principle of legal certainty. It is the minority, not the majority of the Court, which seems in agreement with those constitutional scholars, who do not see a threat in the *Istanbul Convention* but, rather, an opportunity for extending rights protection in an important sphere – domestic and gender-based violence. This is not a happy conclusion for the prospect of a human rights promoting Constitutional Court in Bulgaria.

6 Conclusion

There are decisions in the jurisprudence of a constitutional court that define its character and direction for a whole term and beyond. The decision of the Bulgarian Constitutional Court finding the *Istanbul Convention* unconstitutional will probably prove to be such a decision. In contrast to its brave 1992 decision to declaring the Movement for Rights and Freedom, the party of the ethnic Turks in Bulgaria, constitutional, which strengthened the level of rights protection in the country and helped raise the prestige of the country and the Court internationally, the controversial decision from 2018 marks a low point in the Court's jurisprudence. This is a low point both in terms of the quality of the legal arguments

produced – as the Court 'creatively' interpreted both the Constitution and the *Istanbul Convention* to discover contradicting ideologies in them, but also in terms of the disservice done to one of Court's central mandates – to be the strongest guardian of human rights in the country.

The decision has immediately started producing political and legal consequences. These go beyond simply blocking the ratification of the *Istanbul Convention* – both nationally, but also for the EU.[59] As the *Istanbul Convention* is the most comprehensive legal instrument for addressing the problem of violence against women and domestic violence, blocking its ratification is consequential if not in any other respect, then in combating and preventing such violence. Yet the legal and political consequences of this decision go beyond the immediate sphere of its application. Quoting this decision, for example, the Bulgarian Ministry of Education is stopping programs promoting 'gender equality' in schools out of fear that parents will object to programs promoting 'unconstitutional gender ideology'. Using similar arguments the Bulgarian Academy of Sciences has also terminated a project studying 'gender equality'. There were also attempts to stop an MA program in gender studies at Sofia University, which proved unsuccessful only because of the mobilization of academics to stand up for their academic autonomy. The 'gender hunt' grows strong and is threatening the many international commitments the country had undertaken to promote 'gender' equality, etc. Most importantly, it puts pressure on courts, human rights watchdogs, NGOs and activists, hinders the cause of countering gender-based violence and of promoting gender equality and, generally, subverts the efforts to strengthen human rights protection in the country.

Thus, instead of serving its mission to counter the negative trend of rights erosion, characterizing the recent growth of illiberal national populisms, through this ideologically laden decision the Court had been one of its central vehicles in Bulgaria. This threatens to undermine Court's authority, built over more than 25 years of human rights supporting decisions – often taken in no less difficult times of intense partisan strife. It also undermines the Court's role of a guardian of human rights in a crucial period, when the fragile liberal democracy in the country is under strong political and ideological pressure from illiberal critics.

59 This is the position of the Minister of Foreign Affairs Ekaterina Zaharieva, who announced that due to the Court's decision, Bulgaria cannot vote in support of EU ratifying the *Istanbul Convention*, which requires unanimity. 'Bulgaria Will Be the Reason Why the EU Will Not Be Able to Apply the Istanbul Convention: Ekaterina Zaharieva', *BNR*, 7 November 2018. Available at http://bnr.bg/en/post/101042995/bulgaria-will-be-the-reason-why-the-eu-will-not-be-able-to-apply-the-istanbul-convention-ekaterina-zaharieva.