

Radosveta Vassileva\*

## **A Perfect Storm: The Extraordinary Constitutional Attack against the Istanbul Convention in Bulgaria**

*Article forthcoming in Osteuropa Recht; Accepted version*

### **Abstract:**

On 27 July 2018, Bulgaria's Constitutional Court delivered a judgment declaring the Istanbul Convention 'incompliant' with the country's Constitution. This article examines the origin and nature of the extraordinary constitutional attack against this convention in Bulgaria which can be described as a 'perfect storm' – diverse, unrelated factors concurred and conditioned an event with long-lasting repercussions that are difficult to overcome. It first analyses the political context which permitted a misinformation campaign and motivated Boyko Borissov's GERB party to seek a constitutional review of the document. Then, it explains why the method of appointing judges in Bulgaria's Constitutional Court and the particularities of its jurisdiction make this institution susceptible to political influences. After critically evaluating the questionable legal reasoning in the actual decision, the article explores its consequences. Among them, the most notable damage concerns the current legal impossibility to ratify the Istanbul Convention in Bulgaria. At this stage, the country can only count on piecemeal legislative solutions to introduce to Bulgarian legislation the spirit of relevant provisions of the convention that have not been contested.

**Keywords:** Istanbul Convention, Bulgaria, Constitutional Court, human rights, women's rights, violence against women, rule of law

### **I. Introduction**

The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) has faced fierce criticism and resistance in some former-communist countries.<sup>1</sup> However, it received one of the severest blows in Bulgaria – on 27 July

---

\* Visiting Research Fellow at Middlesex University; PhD in Law (University College London); Master en droit (Sciences Po Paris); Master en droit (Université de Paris 1 Panthéon-Sorbonne); Bachelor of Arts in International Relations (Tufts University).

<sup>1</sup> Hungary, Poland, the Czech Republic, Croatia, and Armenia among others.

2018, Bulgaria's Constitutional Court delivered Decision 13 on constitutional case 3/2018 declaring the Istanbul Convention 'incompliant' with the country's Constitution.<sup>2</sup> The court's opinion was supported by a majority of eight judges while four judges dissented. Unsurprisingly, this outcome is a source of concern to many. While violence against women is a systemic problem with which Bulgaria struggles, domestic legislation does not provide sufficient protection equivalent to the one envisaged in the Istanbul Convention. Recent amendments to the Bulgarian Criminal Code from 2019, which were supposed to serve as a substitute for the lack of ratification, are merely cosmetic.<sup>3</sup>

Critics of the decision by Bulgaria's Constitutional Court have focused on various narrow facets which provide insights into how and why the majority reached this peculiar conclusion. Some have analysed the propaganda based on 'family values', which preceded the judgment and persuaded many citizens that the Istanbul Convention was an attack against the traditional Bulgarian family – it could pave the way to recognising same-sex marriage.<sup>4</sup> Others have raised awareness of alleged translation issues which may have misled the court – namely, it is difficult to find a good translation of the term 'gender' in the Bulgarian language, which leads to confusion between the terms 'gender' and 'sex', and creates opportunities for speculation that the Istanbul Convention attempts to introduce 'the gender ideology' and the 'third sex' to Bulgarian legislation.<sup>5</sup>

Much of this valid criticism has been taken on board by international institutions. The Council of Europe Human Rights Commissioner and the European Parliament have expressed regret about the misinformation campaign surrounding the Istanbul Convention in Bulgaria.<sup>6</sup> The United Nations Special (UN) Rapporteur on Violence against Women has made recommendations about seeking a better translation of the Istanbul Convention and asking the Constitutional Court to 'assess the possible influence of that translation and its interpretation in the light of relevant European Union directives and the recommendations of the [UN] Committee on the Elimination of Discrimination against Women' on its judgment.<sup>7</sup>

Yet, if one adopts a macro lens, the roots of what appears to be an extraordinary attack against the Istanbul Convention seem much deeper. In retrospect, the fate of the Istanbul Convention in Bulgaria is an example of a perfect storm. The Merriam-Webster Dictionary defines the perfect storm as 'a critical or disastrous situation created by a powerful concurrence of factors'. Beyond

---

<sup>2</sup> Constitutional Court, Decision 13 of 27 July 2018 on constitutional case 3/2018, <http://constcourt.bg/bg/Acts/GetHtmlContent/f278a156-9d25-412d-a064-6ffd6f997310>.

<sup>3</sup> *Radosveta Vassileva*, Sexism and violence against women. Will this nightmare in Bulgaria end?, *New Eastern Europe*, 2 February 2021, <https://neweasterneurope.eu/2021/02/02/sexism-and-violence-against-women-will-this-nightmare-in-bulgaria-end/>, 11.10.2021.

<sup>4</sup> *Miriana Ilcheva*, Bulgaria and the Istanbul Convention – Law, Politics and Propaganda vs. the Rights of Victims of Gender-based Violence, *Open Journal for Legal Studies*, 3(1)|2020, pp. 49-68.

<sup>5</sup> *Ruzha Smilova*, Promoting 'Gender Ideology': Constitutional Court of Bulgaria Declares Istanbul Convention Unconstitutional, *Oxford Human Rights Hub*, 22 August 2018, <https://ohrh.law.ox.ac.uk/promoting-gender-ideology-constitutional-court-of-bulgaria-declares-istanbul-convention-unconstitutional/>, 11.10.2021.

<sup>6</sup> European Parliament resolution of 8 October 2020 on the rule of law and fundamental rights in Bulgaria, P9\_TA(2020)0264, paragraph 17; Report following the visit of the Council of Europe Commissioner for Human Rights in Bulgaria, 31 March 2020, CommDH(2020)8, p. 4.

<sup>7</sup> Visit to Bulgaria: Report of the Special Rapporteur on violence against women, its causes and consequences, 19 May 2020, A/HRC/44/52/Add.1, paragraphs 65(b) and 65(d).

the misinformation campaign, there are other contextual factors that are relevant – namely, the balance of power in Bulgaria at the time the judgement was delivered. The political context may not just explain why a misinformation campaign was possible and probably encouraged by the executive, but also why this campaign was in the executive’s interest and why the Constitutional Court was susceptible to being influenced by other branches of government. Furthermore, a closer look at the actual decision shows that, instead of building a solid constitutional argument, the majority was simply motivated to construct a dubious legal façade shielding a political favour.

After analysing the likely roots of the attack against the Istanbul Convention in Bulgaria (Part II) and the specifics of the Bulgarian Constitutional Court, which made it the convenient venue for discrediting this legal instrument (Part III), this article critically examines the arguments developed in the decision by Bulgaria’s Constitutional Court (Part IV). Then, it considers the repercussions of the decisions and the available solutions to this controversy (Part V). This seems important having in mind that the recommendation by the UN Special Rapporteur on Violence against Women for submitting a better translation to the Constitutional Court and asking it to re-evaluate its decision violates the principle of *res judicata*, as understood in Bulgarian law.

## II. Staging a Perfect Storm: The Origins of Hysteria

As explained in the introduction, there was indeed a visible misinformation campaign about the Istanbul Convention in Bulgaria. However, claiming that this campaign has influenced the decision of Bulgaria’s Constitutional Court, as some authors and international institutions allege, and attributing the sad development of events to the rise of a populist wave scratches only the surface of the problem. I argue that one may discern a deliberate attack against the Istanbul Convention which was conditioned and propelled by the political dynamics in the country.

Before providing more details, it should be noted that what happened in Bulgaria does not seem to be an isolated case. Scholars have already shed light on how in recent years, ‘anticonstitutional communications’ are made with ‘the participation of state legislative and judiciary powers, which legislate and interpret constitutional norms, as well as through the rule of autocrats who seek the corrosion of basic constitutional principles’.<sup>8</sup> All of these ingredients can be identified in the Bulgarian case – that is why, their concurrence created an explosive combination.

It should be stressed that since coming to power for the first time in 2009, Boyko Borissov’s GERB party started undermining the country’s rule of law by capturing institutions, removing checks and balances, and essentially building an autocratic regime.<sup>9</sup> By 2018, when the Constitutional Court delivered its judgment on the Istanbul Convention, Bulgaria had plummeted in all reputable rankings – it was 77<sup>th</sup> in the Corruption Perceptions Index by *Transparency*

---

<sup>8</sup> *Mauricio Palma*, Trans-constitutionalism, in: Miguel Nogueira de Brito/Carina Calabria/Fábio Portela L. Almeida (eds), *Law as Passion: Systems Theory and Constitutional Theory in Peripheral Modernity*, Springer 2021, p. 139; See also ‘Opposing the Istanbul Convention: Actors, Strategies and Frames’, in: *Andrea Krizsán and Conny Roggeband*, *Politicizing Gender and Democracy in the Context of the Istanbul Convention*, Palgrave MacMillan 2021, pp. 55-119.

<sup>9</sup> *Radosveta Vassileva*, Threats to the Rule of Law: The Pitfalls of the Cooperation and Verification Mechanism, *European Public Law*, 26(3)|2020, pp. 741-768.

*International*,<sup>10</sup> it was 55<sup>th</sup> in the Rule of Law Index by the *World Justice Project*,<sup>11</sup> it was ranked 111<sup>th</sup> in the World Press Freedom Index by *Reporters Without Borders*,<sup>12</sup> and it was downgraded to a semi-consolidated democracy in the Nations in Transit Report by *Freedom House*.<sup>13</sup> One can easily suspect that in this political climate and given the lack of media freedom in Bulgaria, a negative campaign against the Istanbul Convention was tacitly approved or even encouraged by the government.

In this light, it should be underlined that Boyko Borissov's second government (in office between November 2014 and November 2016) signed the Istanbul Convention on 21 April 2016. Nevertheless, the mass negative coverage, which induced public hysteria, could be observed in pro-government media at the end of 2017 and early 2018, near the time when Borissov's third government submitted a Draft Bill for ratification of the Istanbul Convention to Parliament (12 January 2018). In 2018, Borissov's autocracy was going strong, albeit with two caveats. First, Borissov's third government (May 2017-April 2021) was a coalition between his GERB party and three other parties – VMRO-Bulgarian National Movement, Ataka (Attack), and NFSB (National Front for the Salvation of Bulgaria). While these coalition partners do not formally define themselves as far-right parties, their rhetoric as well as the policies they endorse fit the typical far-right narrative – xenophobia, nationalism, and denial of LGBTI rights.<sup>14</sup> Borissov had to balance between this marriage of convenience with the far-right and make concessions to preserve his government while keeping a good relationship with his partners from the European People's Party (EPP).<sup>15</sup> Second, in November 2016, GERB's candidate Tsetska Tsacheva lost the presidential election to Rumen Radev who was backed by the Bulgarian Socialist Party (BSP), the biggest opposition party at the time. As it is well-known, opposition parties look for opportunities to criticise the government.

This political background is necessary to navigate the more formal attack against the Istanbul Convention, which started in late December 2017 when Borissov's far-right allies in government stated they did not support ratification.<sup>16</sup> Shortly after, on 23 January 2018, the Bulgarian National Assembly organised a public discussion in response to the alleged public debate observed in the media.<sup>17</sup> As visible from the Verbatim Report,<sup>18</sup> this discussion was suspiciously imbalanced. Few participants who supported the Istanbul Convention were present. The debate was dominated by obscure conservative groups, and church representatives.<sup>19</sup>

---

<sup>10</sup> Bulgaria had the worst score among members of the European Union, <https://www.transparency.org/en/cpi/2018/index/dnk>, 11.10.2021.

<sup>11</sup> Bulgaria had the worst score among members of the European Union, [https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition\\_0.pdf](https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf)

<sup>12</sup> World Press Freedom Index 2018 available <https://rsf.org/en/ranking/2018>, 11.10.2021.

<sup>13</sup> In 2018, Bulgaria was downgraded to a semi-consolidated democracy as visible from the report available at <https://freedomhouse.org/report/nations-transit/2018/confronting-illiberalism>, 11.10.2021.

<sup>14</sup> *Radosveta Vassileva*, Bulgaria's dangerous flirtation with the far-right, New Eastern Europe, 21 May 2019, <https://neweasterneurope.eu/2019/05/21/bulgarias-dangerous-flirtation-with-the-far-right/>, 15.10.2021.

<sup>15</sup> The EPP has expressed support for the Istanbul Convention on numerous occasions.

<sup>16</sup> VMRO declared it would not support the ratification of the Istanbul Convention, Bulgarian National Radio, 27 December 2017, <https://bnr.bg/post/100913561/vmro-se-obavi-protiv-ratificiraneto-na-istanbulskata-konvencia>, 20.10.2021.

<sup>17</sup> Public Discussion of 23 January 2018, National Assembly, <https://parliament.bg/bg/discussion>, 20.10.2021.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

One of the most biased speeches came from Metropolitan Kiprian from the Holy Synod of the Bulgarian Orthodox Church. He deemed that the ratification of the convention ‘raised concern about the future of the European Christian civilisation’ and that it ‘opened the doors to moral decay’, which would eventually lead to the ‘spiritual death’ of humanity.<sup>20</sup> Some media quickly noted that this extreme position contradicted the support which the Bulgarian Church had expressed for the Istanbul Convention two years beforehand – they tried to explain this suspicious 180 degree turn with Russian disinformation campaigns and an alleged dependence of the Bulgarian Church on the Russian Church.<sup>21</sup> While this criticism should not be ignored, it seems that one may find a more prosaic explanation. It is possible that the Bulgarian Church was simply doing Borissov a favour – in recent years, the same Metropolitan Kiprian has gone beyond the call of duty to defend Borissov and to support his policies even after the rise of mass protests against Borissov’s autocracy in 2020.<sup>22</sup>

Meanwhile, possibly because it saw a window of opportunity in the discussion organised by Parliament,<sup>23</sup> BSP decided to ride on a populist wave and submit a proposal to the National Assembly to hold a national referendum on whether the Istanbul Convention should be ratified.<sup>24</sup> The new President Rumen Radev, who, at the time, was faithful to the BSP party line also supported this idea. However, neither BSP nor Radev were probably aware that GERB had a different agenda – they had planned a perfect storm. On 8 February 2018, 75 Members of Parliament from the GERB party submitted a request for a constitutional review of the Istanbul Convention to the Constitutional Court. In this way, GERB could have their cake and eat it too – appease their far-right allies and save their face before the EPP political family by presenting the controversy as a constitutional question. Furthermore, one should also remember that between January and June 2018, Bulgaria held the rotating presidency of the Council of the European Union – all eyes were on the rampant corruption of Borissov’s government, so making noise about an unrelated topic could deviate public attention.<sup>25</sup> It is difficult to imagine that a political party which engaged in deliberate assaults against the rule of law that have been documented in literature and that resulted in a powerful resolution on Bulgaria’s rule of law deficiencies by the European Parliament<sup>26</sup> would have genuine constitutional concerns.

### III. A Politicised Court: A Perfect Location for a Perfect Storm?

---

<sup>20</sup> Ibid.

<sup>21</sup> How and Why Bulgaria’s Church Transformed from a Supporter to a Fervent Opponent of the Istanbul Convention, Kapital, 23 January 2018, [https://www.capital.bg/politika\\_i\\_ikonomika/bulgaria/2018/01/23/3116939\\_kak\\_ot\\_zashtitnik\\_na\\_istanbulskata\\_konvenciiia\\_curkvata/](https://www.capital.bg/politika_i_ikonomika/bulgaria/2018/01/23/3116939_kak_ot_zashtitnik_na_istanbulskata_konvenciiia_curkvata/), 21.10.2021.

<sup>22</sup> For instance, Kiprian was recently quoted saying ‘I want to hug you as a brother, with a huge gratitude that we have a Prime Minister like you’ in the pro-Borissov tabloid *Trud* on 5 March 2021.

<sup>23</sup> It is difficult to find a different plausible explanation because the Party of European Socialists of which they are members supports the Istanbul Convention.

<sup>24</sup> Proposal by Members of Parliament for Holding a National Referendum, 31 January 2018, <https://www.parliament.bg/bills/44/854-02-9.pdf>, 12.12.2021.

<sup>25</sup> *Radosveta Vassileva*, On same-sex marriage and corruption in Bulgaria and Romania, New Eastern Europe, 31 October 2018, <https://neweasterneurope.eu/2018/10/31/sex-marriage-corruption-bulgaria-romania/>, 10.12.2021.

<sup>26</sup> European Parliament resolution, Fn. 6.

The particularities of Bulgaria's Constitutional Court shed light on why, under certain conditions, it may be weaponised for a political agenda. Bulgaria's Constitutional Court is not part of Bulgaria's justice system – its jurisdiction and the method of appointment of its judges are defined in the Constitution (Chapter VIII).

Pursuant to Article 147(1) of the Constitution, the court is composed of 12 judges – 4 are elected by Parliament, 4 are appointed by the President, and 4 are elected by the general assembly of the Supreme Court of Cassation and the Supreme Administrative Court. In theory, this court is independent – pursuant to Article 147(6), constitutional judges benefit from the same immunity as Members of Parliament. However, the practice may significantly differ. If the President and the majority in Parliament are affiliated with the same political party, this means that this party will indirectly dominate the majority in the Constitutional Court. The longer this party dominates the political stage, the longer it will maintain an indirect influence upon this court – pursuant to Article 147(2) of the Constitution, the term of a constitutional judge is 9 years long.

The eligibility requirements for serving as a constitutional judge are rather vague, which allows the promotion of politically convenient members. According to Article 147(3) of the Constitution, 'jurists with high professional and moral qualities and at least fifteen years of legal experience' should be appointed. This means that neither experience as a judge nor an in-depth background in constitutional law is required. The evaluation of the level of professionalism and morality is left to the subjective assessment of the three entities vested with the power to elect these judges. In this light, it is already revealing that the judge-rapporteur in the case concerning the Istanbul Convention was Atanas Atanasov who was a Member of Parliament from GERB between 2009 and 2012 when he was elected as a constitutional judge by the National Assembly upon the proposal of his own GERB party.<sup>27</sup> It seems that party allegiance played a key role in this appointment since, at the time, there were public concerns about his qualifications – namely, he earned a degree in 'Defence of the national security of the People's Republic of Bulgaria' from the Academy of the Ministry of Interior in Sofia.<sup>28</sup>

The opportunities to request a review by this court are significantly limited and depend on the political climate in the country. According to Article 150(1) of the Constitution, the Constitutional Court may be approached by one-fifth of the Members of Parliament,<sup>29</sup> the President, the Council of Ministers, the Supreme Court of Cassation, the Supreme Administrative Court, or the General Prosecutor. In some limited cases, it can be approached by the Ombudsman or the Supreme Bar Council (Articles 150(3) and 150(4)). The individual constitutional complaint does not exist in Bulgaria. Individual judges or judicial panels may not submit questions to this court, either. In other words, this court remains as a venue that can be exploited by the dominant political parties while the majority of its judges are also, technically, chosen by these parties.

---

<sup>27</sup> Press Release of 31 October 2012, National Assembly, <https://parliament.bg/bg/news/ID/2519>.

<sup>28</sup> GERB elected scandalous people to the Constitutional Court, Faktor, 31 October 2012, <https://faktor.bg/bg/articles/obshtestvo/zakon-i-red/gerb-izbra-skandalni-litsa-za-konstitutsionniya-sad-3383>, 5.11.2021.

<sup>29</sup> Bulgaria's Parliament has 240 seats, which means 48 signatures are necessary. This closes the door for small opposition parties to request constitutional review of legislation.

Finally, beyond the politicisation of this court due to its composition and method of appointment of its judges, there was one other significant factor which made it the perfect venue to discredit the Istanbul Convention. Pursuant to Article 5(1), ‘The Constitution is the supreme law and no other laws can contradict it’. Pursuant to Article 5(4) of the Constitution:

International treaties which have been ratified in accordance with the constitutional procedure, promulgated and having come into force with respect to the Republic of Bulgaria, shall be part of the legislation of the State. They shall have primacy over any conflicting provision of the domestic legislation.

Under Article 149(1), point 4 of the Constitution, the Constitutional Court is competent to examine the ‘conformity of the international treaties concluded by the Republic of Bulgaria with the Constitution before their ratification...’.

In this light, it is helpful to underline that the principle of *res judicata* applies to decisions by the Constitutional Court. Notably, Article 149(1), point 1 of the Constitution stipulates that the ‘interpretation of the Constitution’ delivered by the court is ‘binding’. In addition, Article 14(6) of the Law on the Constitutional Court develops this idea: ‘The decisions of this court are binding for all state bodies, artificial legal persons, and citizens’. Zhivko Stalev, one of the great masters of Bulgarian law, has argued:

... all manifestations of the force of *res judicata* – namely its law-finding and regulatory effect – as well as the prohibition of retrial of a dispute, which has already been resolved with the force of *res judicata*, apply to the decisions of the Constitutional Court on legal disputes, regardless of whether the request addressed to it has been deemed admissible or not.<sup>30</sup>

This conclusion can also be derived from the principles of legal certainty and the rule of law (Article 4(1) of the Constitution) as well as with the specific role assigned to the Constitutional Court – namely, it has a monopoly on authoritative constitutional interpretation.

Having these particularities in mind, one can understand better the smart trap, which GERB and its allies carved for the Istanbul Convention. If a contradiction between the Istanbul Convention and the Constitution could be established, not only the convention could not be ratified but also the spirit of the Istanbul Convention could be introduced to domestic legislation through the back door with great difficulty. Any contradiction established by the court could prevent the enactment of domestic legislation conveying the spirit of the principles or provisions which are put into question by the court. Furthermore, because of the principle of *res judicata*, the Constitutional Court cannot be asked to rule on this issue again unless changes to the Constitution are made.

#### IV. The Storm: A Controversial Decision

---

<sup>30</sup> Zhivko Stalev, The Force of Decisions by the Constitutional Court Declaring a Law as Anti-Constitutional, 18 May 2019 available on the Sudebno pravo website, an initiative of the Bulgarian Judges Association, <http://www.sadebnopravo.bg/biblioteka/2019/3/18/-?rq=%D0%B6%D0%B8%D0%B2%D0%BA%D0%BE%20%D1%81%D1%82%D0%B0%D0%BB%D0%B5%D0%B2, 1.12.2021>.

As highlighted in the introduction, in Decision 13 of 27 July 2018 on constitutional case 3/2018, Bulgaria's Constitutional Court held that the Istanbul Convention was incompliant with the Constitution. The judgment merits unpacking since its legal reasoning is suspect and leaves the bitter taste that judges struggled to build a façade for politically motivated conclusions.<sup>31</sup> Moreover, there are dissenting opinions, which also merit attention, especially because all of them accuse the majority of allowing public opinion to influence the outcome.

### 1. Building a Strawman?

The strawman is a well-known logical fallacy that is often employed in public disputes. The Merriam-Webster Dictionary defines the strawman as 'a weak or imaginary opposition (such as an argument or adversary) set up only to be easily confuted'. This metaphor may be helpful to understand why the decision by Bulgaria's Constitutional Court is problematic – the majority constructed a strawman, which has little to do with the Istanbul Convention, and mercilessly tore it apart.

Even though the decision in question is not formally divided into sections, one can roughly discern three semantic parts. In the first part, the Constitutional Court summarises in a succinct manner the history of the dispute and the various opinions by state institutions, NGOs, and experts that it has invited. One should note that the choice of whom to invite to submit an opinion depends on the discretion of the court and is prone to subjectivism.<sup>32</sup> On this occasion, it is interesting that one of the invited institutions is the ministry of health since it is unclear why their stance on the Istanbul Convention should matter. In the second part, the Constitutional Court surveys various initiatives by the Council of Europe aimed at promoting gender equality and the rights of transgender people because it deems that they are 'relevant' for the consideration of the 'substance of the request [submitted by the GERB Members of Parliament]'. The majority concludes that there is a clear 'link between the Council of Europe's policy on preventing and combating violence against women, as a form of discrimination against women based on sex, and the protection of certain rights of "transgender" people'. This is where the strawman becomes noticeable since it is unclear how this alleged link is relevant to the question, which the court has been asked to examine: the Constitutional Court had been asked to determine whether the Istanbul Convention itself was compatible with the Bulgarian Constitution, not whether other initiatives by the Council of Europe, which may be linked to it, were compatible with the Constitution. Already in this part of the decision, one perceives prejudice against the LGBTI community because the majority has put the word transgender in quotation marks – this appears intentional. In the third part of its decision, the Constitutional Court proceeds to argue why the Istanbul Convention contradicts Bulgaria's Constitution.

The majority states that the aims 'declared' by the Istanbul Convention are fully compliant with 'the basic constitutional principles of the Republic of Bulgaria'. It refers to the preamble of Bulgaria's Constitution, which underlines the 'fidelity of the Bulgarian people' to 'humanism,

---

<sup>31</sup> See also *Radosveta Vassileva*, Bulgaria's Constitutional Troubles with the Istanbul Convention, *Verfassungsblog*, 2 August 2018, <https://verfassungsblog.de/bulgarias-constitutional-troubles-with-the-istanbul-convention/>, 1.12.2021.

<sup>32</sup> See Article 20a of the Law on the Constitutional Court.

equality, justice, and tolerance'. It highlights that human rights, human dignity, and the security of the person are 'a supreme constitutional principle'. It underscores that Bulgaria's commitment to the protection of victims of violence, including women and children, as well as to the removal of all forms of discrimination is evidenced by the country's legislation. However, the court also states:

...despite its indisputable positive aspects, the [Istanbul] Convention is internally contradictory, and this contradiction creates a two-layered nature. Thus, the content of some of its provisions goes beyond the declared objectives of the [Istanbul] Convention and its title.

The majority develops its argument by interpreting some provisions of the Istanbul Convention in the light of the strawman that it built in the second part of the decision and by pushing the limits of Bulgaria's Constitution.

## 2. The Majority's Arguments

While the actual attack against the Istanbul Convention in the third part of the decision is repetitive and messy, one can discern two main clusters of arguments:

—The Istanbul Convention has a broader scope than its title suggests, uses contradictory terms, and promotes the 'gender ideology'.<sup>33</sup> The court is especially concerned about Articles 3(c) and 4(3) and the use of 'women', 'sex', and 'gender' in the same document;

—The hidden principles underpinning the Istanbul Convention are incompatible with Bulgaria's Constitution.

### a) A 'Contradictory' Convention?

The first line of arguments put forward by the Constitutional Court reads like a mishmash of thoughts on gender and its implications for society and demonstrates intolerance towards transgender people. Here it should be clarified that it is difficult to translate the term 'gender' in Bulgarian – in the Bulgarian version of the Istanbul Convention, it has been translated as *sotsialen pol* (социален пол), which literally means 'social sex'. The word for 'sex' in Bulgarian is *pol* (пол). It is usually used in a biological context.

The court is first worried that the Istanbul Convention uses both the words 'gender' and 'women'. In its view, the Istanbul Convention 'separates the biological and social dimensions of sex and goes beyond the framework of the sexual binarity of the human species'. It asserts that depending on interpretation, the use of expressions, such as 'gender-based' and 'gender-sensitive', may lead to 'different and contradictory understandings of the philosophy of the [Istanbul] Convention'. Surprisingly, the court sneaks in the topic of the rights of transgender people which it touched upon in the second part of its decision. The court maintains that 'while the [Istanbul]

---

<sup>33</sup> It has been underscored that '[t]he movements mobilizing against 'gender ideology' are frequently understood as a conservative backlash against achieved levels of equality between women and men and/or LGBTQ rights'. See *Eszter Kováts*, Questioning Consensuses: Right-Wing Populism, Anti-Populism, and the Threat of 'Gender Ideology', *Sociological Research Online*, 23(2)|2018, p. 529.

Convention does not settle the rights of “transgender” people, it is the first international treaty signed by the Republic of Bulgaria which explicitly includes the gender identity attribute’.

As the court is concerned that the Istanbul Convention itself does not contain a definition of the term ‘gender identity’ mentioned in Article 4(3), it refers to §53 of the Explanatory Report to the Istanbul Convention.<sup>34</sup> The paragraph itself includes a long list of ‘non-discrimination grounds which are of great relevance to the subject-matter of the Convention’. However, Bulgaria’s Constitutional Court quotes only the following two sentences:

Certain groups of individuals may also experience discrimination on the basis of their gender identity, which in simple terms means that the gender they identify with is not in conformity with the sex assigned to them at birth. This includes categories of individuals such as transgender or transsexual persons, cross-dressers, transvestites and other groups of persons that do not correspond to what society has established as belonging to “male” or “female” categories.

The court adds that the term ‘gender’ should not only be understood in light of the definition, in the Explanatory Report, but also in view of the Council of Europe’s policy to protect ‘some rights of “transgender” people’. It stresses that the fact that an individual can choose a gender, which does not coincide with their biological sex, illustrates the values of the “gender ideology”, which the court describes as ‘a collection of ideas, convictions, and beliefs that the biologically determined sexual characteristics are irrelevant and only gender self-identification matters’.

The court also emphasises that since the Istanbul Convention uses both the terms ‘sex’ and ‘gender’, it departs from its own title because it does not attempt to combat violence only against women. Even further, in the eyes of the majority, the alleged two-layered nature of the document’s terminology does not ‘lead to the achievement of equality between the sexes, but blurs the differences between them, thus depriving the principle of equality of any meaning’. The majority is troubled that

...if society loses the ability to distinguish between women and men, the fight against violence against women remains a formal but unenforceable commitment.

## b) Dissecting the Arguments against the Istanbul Convention

The approach of the Constitutional Court towards the interpretation of the Istanbul Convention as well as its conclusions on the question of gender can be criticised on diverse grounds. First, Bulgaria has ratified the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 1979. Pursuant to its Article 5(a), Bulgaria is bound to

... modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

---

<sup>34</sup> Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11 May 2011.

CEDAW does not use the term ‘gender’, but the authoritative General Recommendation No. 19 on ‘Violence against Women’ issued by the UN CEDAW Committee in 1992 uses both the terms ‘gender-based violence’ and ‘gender-specific violence’.<sup>35</sup> In fact, it has been argued that the two conventions complement each other – the Istanbul Convention contains ‘more detailed standards’ which ‘reinforce the global CEDAW standards’.<sup>36</sup> In this light, one may wonder why there was no backlash in Bulgaria against the terminology used in the context of the CEDAW for more than 25 years after General Recommendation No. 19 was published if this is such a threat to Bulgaria’s constitutional order and its alleged binary understanding of the sexes. Needless to say, ‘gender’ is a term used in EU legislation, too.<sup>37</sup>

Moreover, the Istanbul Convention contains a straightforward definition of ‘gender’ in its Article 3(c): ‘the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men’. One may ponder if, in prioritising contextual interpretation, the majority has not ignored Article 32 of the Vienna Convention on the Law of Treaties (1969) which allows a recourse to supplementary means of interpretation, such as contextual analysis, only when interpreting a treaty ‘leaves the meaning ambiguous or obscure’ or ‘leads to a result which is manifestly absurd or unreasonable’. ‘Gender identity’ is mentioned only once in the entire convention as part of a long list of grounds which may underpin discrimination in Article 4(3).<sup>38</sup> It should be stressed that the Explanatory Report to the Istanbul Convention is not binding on Bulgaria, but merely illustrative. One aspect, which is exploited by critics of the Istanbul Convention, is that unlike other explanatory reports by the Council of Europe, this one does not have a disclaimer that it does not constitute ‘an instrument providing an authoritative interpretation of the text of the Convention although it may facilitate the understanding of the Convention’s provisions’.<sup>39</sup> Be it as it may, it is difficult to argue this report imposes obligations on the countries which ratify the convention and present it as an insurmountable obstacle to ratification.

More importantly, even if gender identity is interpreted to cover the identity of transgender people or other sexual minorities, it is unclear why this is problematic in the context of violence. As noted by the majority itself, the protection of human rights, human dignity and the security of the person are inherent values of Bulgaria’s constitutional order. Moreover, as a European Union (EU) member, Bulgaria is bound by the Charter of Fundamental Rights (EU Charter) whose Article 21 states:

---

<sup>35</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 19: Violence against women, 1992, available at: <https://www.refworld.org/docid/52d920c54.html>.

<sup>36</sup> *Dubravka Simonovic*, Global and Regional Standards on Violence against Women: The Evolution and Synergy of the CEDAW and Istanbul Conventions, *Human Rights Quarterly*, 36(3)|2014, p. 606.

<sup>37</sup> See, for instance, Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

<sup>38</sup> ‘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’.

<sup>39</sup> See, for instance, Explanatory Report to the Council of Europe Convention on Offences relating to Cultural Property, Nicosia, 19 May 2017.

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

This requirement closes the door to treating any human being differently. In addition, under Bulgaria's Criminal Code, bodily harm against any person entails criminal liability irrespective of their identity.

The claim that the Istanbul Convention is underpinned by the 'gender ideology' is also suspect. Undoubtedly, the convention is 'based on a gendered understanding of violence against women and domestic violence'.<sup>40</sup> In principle, from a sociological perspective, the use of both terms 'sex' and 'gender' is justified with the fact that what is male and female 'may vary considerably from society to society, which means that social, cultural, and historical differences influence what is considered the expression of maleness and femaleness within any one society'.<sup>41</sup> Moreover, 'women's social roles not only differ between societies but also within the same society throughout history'.<sup>42</sup> *In concreto*, interpreting the Istanbul Convention as requiring the promotion of LGBTI rights, such as the recognition of same-sex marriage, which is at the core of much criticism against this convention by those who fear the alleged gender ideology, is clearly overstressing its actual text. This was established by the Venice Commission in its opinion on the compatibility of the Istanbul Convention with the Armenian Constitution – in essence, Armenia had similar concerns to the Bulgarian ones.<sup>43</sup>

Finally, in his dissenting opinion which is surveyed in more detail below, judge Filip Dimitrov vehemently disagreed with the peculiar conclusion of the majority that society would lose its ability to distinguish between men and women if it accepts the term 'gender':

... it turns out that recognising the mere fact of life that there are lesbian or transgender people means that men and women will become the same. Thank God, nothing in the text of [Bulgaria's] Constitution shows [our] legislators had such concerns!<sup>44</sup>

It is unclear why judge Dimitrov mentions lesbians – the majority has challenged the Istanbul Convention solely from the perspective of transgender people. However, his irony towards his fellow judges shows through – it is certainly difficult to understand how admitting the obvious truth that transgender people exist can confuse citizens to such extent. To add, it is also a fact of life that there are people who defy traditional binary understandings biologically – for instance, intersex people. Not only do these people exist, but also by virtue of Bulgaria's Constitution, they benefit from the same fundamental constitutional rights, such as the protection of dignity and physical integrity, as anyone else.

---

<sup>40</sup> Ibid, p. 602.

<sup>41</sup> *Martina Bosaka and Maja Munivrana Vajdab*, The Reality behind the Istanbul Convention: Shattering Conservative Delusions, *Women's Studies International Forum*, 74|2019, p. 79.

<sup>42</sup> Ibid.

<sup>43</sup> Venice Commission, Opinion No. 961 / 2019, 14 October 2019; See also *Mariam Ghazaryan*, Armenia and the Battle to Defeat Ethno-Nationalist Attacks on the Istanbul Convention, *Southwestern Journal of International Law* 27(1)|2021, pp. 167-186.

<sup>44</sup> Dissenting Opinion by judge Filip Dimitrov on constitutional case 3/2018, <http://www.constcourt.bg/bg/Acts/GetHtmlContent/70f0d483-1d21-45af-ba1e-776f56540baa>.

### c) The (In)compatibility with Bulgaria's Constitution

In the second line of arguments, the Constitutional Court pushes the limits of Bulgaria's Constitution. It maintains that the Constitution and Bulgarian legislation alike are based on the understanding of the 'binary existence of the human species'. To prove its claim, the majority pinpoints two articles of the Constitution – Article 47(2) and Article 46(1). The court states that in Article 47(2) of the Constitution, 'the biological sex of women is connected to their social role – "mother", "birth", and "obstetric care"'. In principle, Article 47, which is part of Chapter II dedicated to the 'Rights and Obligations of Citizens', merely enumerates various rights of children. The full text of Article 47(2) stipulates:

A woman who is a mother benefits from the special protection of the State, which ensures she has paid maternity leave before and after giving birth, free obstetric care, alleviated working conditions and other social care.

How this article promoting the safe birth and initial upbringing of children can be deemed to define the social role of women in general is a mystery. Moreover, there are women who choose not to have children, women who cannot have children for medical reasons, and women who have delayed having children for personal reasons – the conclusion of the court implies that they are not women from a social perspective. So, what are they, then? There are also women who become mothers without giving birth and receiving obstetric care – for instance, by adopting.

The majority also mentions the definition of marriage in Article 46(1) of the Constitution as a 'freely entered union between a man and a woman'. It draws the conclusion that '[t]he understanding of marriage as a relationship between a man and a woman is deeply rooted in the Bulgarian legal consciousness and as such is at the core of the constitutional framework'. On the one hand, the subsequent Article 46(2) of Bulgaria's Constitution stipulates that '[s]pouses have equal rights and obligations in marriage and in the family' and does not separate these obligations based on social or biological role. On the other hand, it is unclear why the definition of marriage is relevant to the ratification of the Istanbul Convention, which only refers to marriage in the context of forced marriage (e.g. Article 37) and residence in case of dissolution of marriage (Article 59).

Amidst its messy narrative, the majority also makes a striking comment in passing:

The requirements of Article 4(3) of the [Istanbul] Convention would impose on the Republic of Bulgaria to set forth procedures ensuring the legal recognition of a sex different from the biological one which violates the Constitution.

It also deems that the introduction of terms, such as 'gender' and 'gender identity', which are incompatible with the Bulgarian Constitution, is a threat to the rule of law and legal certainty.<sup>45</sup> It stresses that the principle of the rule of law 'does not allow the existence of two parallel but mutually excluding terms for sex'. This is the final nail in the coffin of the strawman which the Constitutional Court built in this very decision. Considering that 'gender' is clearly defined in the

---

<sup>45</sup> The principle of the rule of law is mentioned in the preamble as well as Article 4(1) of the Constitution.

Istanbul Convention, that Bulgaria has ratified CEDAW in whose context this term is also used, and that, as argued in the dissenting opinions, combatting the stereotypical views on the role of women underpins different pieces of current Bulgarian legislation, it is unclear why Bulgaria's rule of law was deemed to be endangered only in 2018.

### 3. Dissenting Opinions

When faced with a controversial opinion by the majority in a court, one usually takes the existence of dissenting opinions as a ray of hope. In the case at hand, four judges dissented in three separate opinions; nevertheless, two of the opinions are rather brief and not necessarily well-argued.

The most emotional dissent comes from judge Filip Dimitrov.<sup>46</sup> One of his helpful remarks concerns the true motivation behind the decision of the majority – he argues that the majority was ‘confused’ amidst a ‘noisy political campaign’. Dimitrov also summarises the two biggest fears of society linked to the Istanbul Convention as follows: legalising same-sex marriage and ‘opening the door to extravagant non-governmental organisations to instil “ultraliberal” ideas in children in a “legal” manner’. He contends that the first fear cannot materialise without an amendment to the Constitution, so it is groundless. By contrast, he maintains that the second one is reasonable, but concludes that ‘the fear that some government would not do its job or some parents cannot educate their children’ cannot serve as grounds to declare an international convention which does not contradict the Constitution as anti-constitutional. It is visible that while Dimitrov disagrees with the majority, he is also biased against the LGBTI community and their allies: ‘It is a fact that sometimes sensible classical liberal ideas are defended by narrow-minded liberal fanatics or extravagant adventurers in a manner in line with their mentality’. These remarks may be deemed to be out of place since Dimitrov’s personal views on the work of any NGOs or the education of children is legally irrelevant to the concrete case.

Similarly to judge Dimitrov, judge Konstantin Penchev also raises awareness of the public opinion which has influenced the majority:

The existing negative emotional attitude towards the [Istanbul] Convention in society should be taken into account when making the political decision whether to ratify this international treaty. However, public opinion cannot influence the legal assessment of the convention’s constitutionality.<sup>47</sup>

Penchev’s recommendations about the political dimension of ratification clearly go beyond the mandate of a constitutional judge. Moreover, his main line of criticism against the opinion of the majority is based on Article 2(5) of Bulgaria’s Law on the Equality between Women and Men which established ‘overcoming of gender-based stereotypes’ as a key principle of Bulgaria’s State-policy towards equality. Penchev also stresses that Section 1(1) of its Additional Provisions to this law stipulate that ‘men and women are free to develop their personal abilities and make choices without limitations of the social role of their sex’. In other words, what the majority feared had already made its way to Bulgarian legislation. It should be noted that the law which Penchev mentions was enacted in April 2016 when Borissov’s second government was in power – at the

---

<sup>46</sup> Dissenting Opinion, Fn. 44.

<sup>47</sup> Dissenting opinion by judge Konstantin Penchev on constitutional case 3/2018, <http://constcourt.bg/bg/Acts/GetHtmlContent/6422a11f-6ec6-4929-9e84-e14c28ac9f8c>.

time, there was no public hysteria about this terminology. In addition, while Penchev's argument seems reasonable, it is striking that he does not mention CEDAW considering the hierarchy of the sources of law. This is a weakness since, as explained above, Bulgaria's Constitution explicitly states that international conventions and treaties, which have been ratified, have primacy over national legislation in case of contradiction.

Finally, judge Rumen Nenkov and judge Georgi Angelov dissented in a joint opinion in which they argued that the question raised before the court had a constitutional, a political, and a culturological layer, but the court could only occupy itself with the first one.<sup>48</sup> Their opinion is the most well-argued among the dissents since it puts forward a variety of legal arguments. The judges highlight that the goals of the Istanbul Convention are fully compliant with the spirit of the Constitution, stress that 'sexual minorities' are protected by virtue of the Constitution and Bulgarian legislation against discrimination and remind the majority of Bulgaria's obligations under CEDAW and the EU Charter. They underline that it is 'disturbing' that the court assumed an 'unfitting role' of a 'political and ideological arbitrator'. The judges conclude that 'the decision of the Constitutional Court constitutes a "favour" for politicians of all colours'.

Overall, all four dissenting judges concurred that public opinion had entered the courtroom and that the majority had assumed a responsibility which is not enshrined in the competences of the court defined in the Constitution.

## V. The Aftermath: Is There a Rainbow after the Storm?

The political events preceding the decision by the Constitutional Court, the peculiar legal reasoning of the majority, and the allegations about the true motivation behind this outcome by the dissenting judges do not paint a flattering picture of the Bulgarian legal order. Even more importantly, because of the principle of *res judicata* explained above, this outcome is irreversible at this stage – it is legally impossible to ratify the Istanbul Convention without amendments to the Constitution. The repercussions of the judgment go beyond leaving vulnerable victims without adequate protection against violence. On the one hand, this decision has put constraints on ordinary courts when examining questions of discrimination. On the other hand, the Bulgarian legislator is pushed to the wall – while this was the intention of Borissov's party, Bulgaria's new parliamentary majority which formed after Borissov fell from power in 2021 is left with limited options.<sup>49</sup>

### 1. A Downward Spiral

Bulgarian courts are traditionally uncomfortable when confronted with questions of discrimination, especially when the LGBTI community is involved. However, the binding nature

---

<sup>48</sup> Dissenting opinion by judge Rumen Nenkov and judge Georgi Angelov on constitutional case 3/2018, <http://constcourt.bg/bg/Acts/GetHtmlContent/2bd285ed-1544-4190-835a-4a15b4fe7be4>.

<sup>49</sup> In 2020, Bulgaria saw mass protests against Borissov's regime and plunged into a political crisis. In 2021, the country faced parliamentary elections three times. The first two times opposition parties were unable to form a government. As of 13 December 2021, Bulgaria has a new regular government dominated by anticorruption parties which emerged from the protests.

of the decision on the Istanbul Convention by the Constitutional Court has opened a Pandora's box. It has also poured water in the mill of more conservative constitutional judges. The results of this combination can be seen in a recent decision by the Constitutional Court of October 2021 in which the General Assembly of the Civil Chamber of the Supreme Court of Cassation asked several questions linked to the interpretation of the term 'sex' in the Bulgarian legal order.<sup>50</sup> The Supreme Court of Cassation approached the Constitutional Court in relation to a decision on interpretation regarding transgender people wanting to change their legal sex which it has to deliver.<sup>51</sup>

The Constitutional Court extended some of its arguments from the decision on the Istanbul Convention but added a surprising religious twist. First, the Constitutional Court approached diverse religious entities to submit their views on what 'sex' means – the Bulgarian Orthodox Church, the Catholic Church of Bulgaria, the Muslim Denomination, the Religious Community of Bulgarian Jews, and the Armenian Apostolic Orthodox Church. This is striking considering that Bulgaria is not a religious republic and religious representatives have played no role in the genesis of the Constitution. Even worse, one may wonder if soliciting opinions from religious groups is not part of an agenda of the majority in this court because a priori one may reasonably assume what representatives of religious institutions will say on questions related to defining 'sex'.

The word 'sex' is used only once in Bulgaria's Constitution. Article 6(2) is meant to promote equality and to prohibit discrimination:

All citizens are equal before the law. No restrictions on rights or privileges based on race, nationality, ethnicity, sex, origin, religion, education, beliefs, political affiliation, personal and social status or financial circumstances are permitted.

To define the term 'sex', not only the majority referred to its decision on the Istanbul Convention and its conclusions vis-à-vis the definition of marriage and the social role of women as mothers, but also emphasised the importance of 'traditional Bulgarian values', such as the Eastern Orthodoxy whose beliefs had to be taken into consideration when interpreting the Constitution. In the view of the majority, this is the case because Article 13(3) of the Constitution states: 'The traditional religion of the Republic of Bulgaria is the Eastern Orthodox religion'. The majority ventures into an inexplicable historical survey of the role of the Bulgarian Church in Bulgarian society in the past century and concludes that the legislator could only have implied the biological meaning of the word 'sex' which is based on 'sexual binarity'. The majority proceeds to construct a baffling narrative implying that being transgender is some form of medical condition of which relatively little is known, lamenting the demographic crisis in the country, and mentioning in

---

<sup>50</sup> Constitutional Court, Decision 15 of 26 October 2021 on constitutional case 6/2021, <http://www.constcourt.bg/bg/Acts/GetHtmlContent/5aca41e4-659e-42dc-80a5-c3f31746898b>.

<sup>51</sup> Decisions on interpretation by the Supreme Court of Cassation are not related to a concrete dispute, but to questions of principle and are binding. Leading doctrinal writers consider them a primary source of law. See *Vitali Tadjer*, On the Character of Interpretative Decrees by the Plenum of the Supreme Court, *Pravna misul*, 1|1978, pp. 66-76; *Ivan Rushev*, The Interpretative Acts of the General Assemblies of the Colleges of the Supreme Court of Cassation and the Supreme Administrative Court and the Question about the Sources of Law, *Scientific Work of the University of Ruse*, 57(7)|2015, p. 203.

passing that only those who were born with both male and female characteristics can choose their legal sex.

The reasoning of the majority can be questioned on multiple grounds. If Eastern Orthodoxy is of such primordial importance, why did the court invite representatives of other religions to submit opinions? Moreover, Bulgaria's Constitution was enacted in 1991, right after the end of communism. It is highly unlikely that the legislator implied that Eastern Orthodox views had to be taken into account when interpreting it. Rather, this was a powerful symbolic statement against communism during which the practising of religion was forbidden, priests were murdered, and citizens were arrested for going to church. It is also striking why the Constitutional Court deemed that religion was so important for interpretation only in 2021. As visible from the above-quoted Article 6(2), the legislator aimed at writing a detailed, broad provision targeting all types of discrimination. Judge Georgi Angelov who dissented maintained that the term 'sex' should be understood in its 'biological, psychological, and social sense' in light of the preamble of the Constitution calling for tolerance and equality and in view of the fact that the biological sex does not exist in real life by itself.<sup>52</sup> Not only a person has to be psychologically aware of their sex, but also the sex is perceived by society and thus has a social dimension.

## 2. Any Solutions in Sight?

Decision 13 of 27 July 2018 on the Istanbul Convention and Decision 15 of 26 October 2021 on the definition of 'sex' have closed the door to ratification of the Istanbul Convention in Bulgaria. They have also put constraints on other courts because they are binding. In this light, the only reasonable solution seems to be introducing the various measures of protection against violence envisaged in the Istanbul Convention based on a piecemeal approach. If there is a ray of hope, it lies in the fact that Bulgaria has seen dramatic political changes since 2020 and, as of 13 December 2021, has a new coalition government which is not related to Borissov's GERB party and far-right allies.

The participants in the coalition have signed a detailed coalition agreement which is publicly available. Annex 19 of this agreement includes a list of legislative initiatives – item 47 envisions the introduction of the 'elements' of the Istanbul Convention 'directly related to violence against women and domestic violence'.<sup>53</sup> While this formulation is vague, it indicates that there is political will to tackle the challenges in this area. At the time of writing of this article, there is no available Bill, so one can only make conjectures about its future shape. One may suspect, however, that the drafters will consider the detailed recommendations made in the latest periodic report by the UN CEDAW Committee on Bulgaria and the report by the UN Special Rapporteur on violence against women.<sup>54</sup>

---

<sup>52</sup> Dissenting Opinion by Judge Georgi Angelov on constitutional case 6/2021, <http://www.constcourt.bg/bg/Acts/GetHtmlContent/c4ba4fd1-687a-4773-9fc5-83bfd4c9f7c7>.

<sup>53</sup> Annex 19 of the Agreement on Joint Governance in the Period 2021-2025, [https://promeni.bg/wp-content/uploads/2021/12/3\\_koaliczionno\\_sporazumenie\\_prilozhenie\\_19\\_v.03\\_clean\\_final.pdf](https://promeni.bg/wp-content/uploads/2021/12/3_koaliczionno_sporazumenie_prilozhenie_19_v.03_clean_final.pdf), 12.12.2021.

<sup>54</sup> Committee on the Elimination of Discrimination against Women, Concluding observations on the eighth periodic report of Bulgaria, 10 March 2020, CEDAW/C/BGR/CO/8; Visit to Bulgaria, Fn. 7.

In my opinion, the most urgent changes that are needed are the creation of a database to systemically collect data on domestic violence (Article 11 of the Istanbul Convention) as well as ensuring the provision of shelter and psychological and medical support for victims (Chapter IV). It is also indispensable to support members of civil society that are dedicated to helping victims – the UN CEDAW Committee was concerned that organisations promoting women’s rights faced pressures by Borissov’s government.<sup>55</sup>

Sadly, the consequences of the attack against the LGBTI community and especially transgender people by the Constitutional Court are difficult to reverse. As the decisions of this court are binding, any legislative initiative has to comply with them. The only sure-fire solution is amending the Constitution itself which is tricky to do because of the threshold – the votes of three-quarters of the members of parliament are needed pursuant to Article 155(2) of the Constitution.

## VI. Conclusion

This article analyses the roots and nature of the constitutional attack against the Istanbul Convention in Bulgaria that culminated into Decision 13 of 27 July 2018 which declared the convention incompliant with Bulgaria’s Constitution. It argues that this development is an example of a perfect storm – diverse, unrelated factors concurred and conditioned an extraordinary event with long-lasting repercussions.

The article first examines the political context, which not only allowed a misinformation campaign, but also motivated Borissov’s GERB party to respond to criticism by far-right coalition partners and conservative groups by submitting the Istanbul Convention for a constitutional review. Then, it showcases why Bulgaria’s Constitutional Court can be influenced by the dominant political parties under certain conditions because of the particularities of how judges are appointed and the specifics of its jurisdiction. Afterwards, it critically evaluates the reasoning of the majority in the decision in question to highlight inconsistencies and disregard for relevant legislation. It also pays attention to the merits and weaknesses in the three dissenting opinions whose main common point is the allegation that the majority was influenced by public opinion and political considerations. Finally, the article discusses the palpable consequences of this decision and why they are difficult to overcome from a legislative perspective.

Overall, the Constitutional Court has jeopardised the ratification of the Istanbul Convention, has expressed questionable views on LGBTI rights which can serve as an obstacle to their protection in the future by constraining the courts and the legislature, and has invited religion in the courtroom of a parliamentary republic for no convincing legal reason.

---

<sup>55</sup> Ibid.