Deyana MARCHEVA*

Constitutional Identity and Human Rights: A Critical Examination in the Bulgarian Context

ABSTRACT: *The concept of constitutional identity was first introduced in Bulgarian Constitutional Law literature in 2017. However, following the Constitutional Courts 2018 ruling that declared the Istanbul Convention unconstitutional, this notion started to be used in civil and administrative court case law as a counterargument against human rights claims. This paper critically examines the academic and legal debates surrounding constitutional identity in Bulgaria, emphasizing how a focus on constitutional tradition in academia, combined with a judicial emphasis on traditional values, has negatively impacted protections for transgender individuals and same-sex families.*

As Bulgaria seeks to fulfill its commitments to the European Union and the Council of Europe, it faces the challenge of reconciling its constitutional identity with its obligation to uphold human rights. The developments in the Pancharevo administrative case and the 2023 reversal of three decades of civil law practice allowing legal gender change through judicial means raise pressing questions about whether the concept of constitutional identity has been misappropriated to justify the dehumanization of individuals with homosexual orientations and transgender identities.

The anti-gender doctrine developed by the Bulgarian Constitutional Court and the related rulings of the administrative and civil courts illustrate a troubling trend in which constitutional identity is leveraged to impose restrictions on fundamental rights, particularly impacting transgender individuals and same- sex families. There is an urgent need for a more inclusive interpretation of constitutional identity in Bulgaria – one that harmonizes modern human rights principles with the nation's historical and cultural context. Future discussions should aim to cultivate a dialogue that reconciles tradition with contemporary values, ensuring that Bulgarian constitutional identity evolves to safeguard the rights and dignity of all its citizens.

KEYWORDS: *Bulgarian Constitutional Identity, Traditional values, Pancharevo Case, Koilova and Bablukova v Bulgaria, Same-sex Families, Transgender Persons.*

* Associate Professor, New Bulgarian University, deyana.marcheva@gmail.com, https://orcid.org/0009-0000-1806-8028.

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1. Introduction

The concept of constitutional identity emerged as a significant topic in Bulgaria's constitutional law discourse in 2017. However, following the Bulgarian Constitutional Court's 2018 ruling that deemed the Istanbul Convention unconstitutional and embraced an anti-gender doctrine, tensions between constitutional identity and the protection of human rights have intensified. This paper critically analyses the academic and jurisprudential discussions surrounding constitutional identity in Bulgaria, emphasising how a focus on constitutional tradition in academia, alongside a jurisprudential emphasis on traditional values, has negatively impacted the human rights protections afforded to transgender individuals and same-sex families.

2. Bulgarian Academic Literature on Constitutional Identity

2.1. Constitutional Law Literature

The concept of "constitutional identity" was first introduced in Bulgarian legal literature in 2017 by Martin Belov, who framed it within the context of postmodern and supranational constitutionalism.[1] Belov's exploration begins with inquiries into the constitutional core of values and institutions shared by the state-organised community, underscoring the necessity for protection against potential derogations by supranational constitutionalism and identifying the institutions that can legitimately define this core. His ambitious aim was to establish the theoretical foundations of a universal concept of constitutional identity, with parameters broadly applicable to all EU Member States.[2]

Belov analyses the essence, content, and functions of constitutional identity,[3] distinguishing it from other types of identity and related constitutional concepts, such as sovereignty, constitutional consensus, and constitutional tradition.[4] He differentiates constitutional identity from collective social identities such as national

1 Белов [Belov], 2017.
2 Ibid., p. 11.
3 Ibid., pp. 72–96. Belov outlines the following functions of constitutional identity – namely, the legitimation function, the safeguarding function, the linking function, the differentiating function, the ideological function, and the function of constitutional and political self-understanding. For the functions, see also: Belov, 2017.
4 Белов [Belov], 2017, pp. 44–64.

and political identity, as well as from the concept of the "identity of the constitution," which pertains to the fundamental legal-political act within each constitutional system. He theorises that constitutional identity serves as a hybrid or crossroad between political identity and the identity of the constitution,[5] and views it as a specific type of political identity shaped by constitutional law, the identity of the constitution itself, and national constitutionalism. Constitutional identity captures the essence of constitutional consensus and influences the practical functioning of constitutional institutions. Thus, it is understood as a product of both the constitutional tradition and the identity of the current constitution, shaped by the ideological-political context of society, including the dominant values, principles, and institutions that govern social and political life.[6]

Contemporary theory primarily examines constitutional identity in terms of delineating and justifying legitimate boundaries that should not be infringed upon by the interaction between EU law and national laws. The idea is to use constitutional identity as a flexible yet tangible final barrier against the encroachment of supranational constitutionalism that could undermine the state-organised political community.[7] Martin Belov emphasises that the core of the discussion on constitutional identity lies in defining intrinsic, traditional, and fundamental values, principles, and institutions that serve as boundaries against the transfer of sovereignty to supranational organisations and the transplantation of foreign legal models into the national legal system.

In this context, Belov raises the question of whether a reliable and universal criterion is in place for identifying the essential elements of the constitution – its fundamental values, principles, and rules that express constitutional identity.[8] However, he does not address the well-known conundrum in constitutional theory regarding the fundamental issue of constitutive views of constitutional identities. Tushnet's question about the identity of "we the people" in the preamble of the constitution[9] is crucial for understanding that its answer cannot be derived solely from the constitution itself.[10]

5 Ibid., p. 42.
6 Ibid., p. 43.
7 Ibid., p. 21.
8 Ibid., Martin Belov borrows the question from J. L. Marti, who comments on the idea of constitutional identity *"as the identity of the constitution"*, present in German jurisprudence and scholarly literature, i.e. "our constitutional identities depend largely on the values and principles enacted and protected by, and taken to be essential for, our own constitutions, whether they are objectively correct or not". Marti highlights that determining this identity is quite challenging, involving intricate interpretations and the uses of political, moral, and legal arguments. See: Marti, 2013, p. 25.
9 Tushnet, 2010.
10 Marti, 2013, pp. 25–26.

In the introduction to his research, Martin Belov explicitly states that Bulgarian constitutional identity exists both within and beyond the text of the 1991 Constitution.[11] He adopts a socio-legal approach, intentionally diverging from prevailing legal realist and legal positivist frameworks.[12] While presenting arguments against the academic fixation on the jurisprudential dimension of constitutional identity,[13] Belov acknowledges the significance of judicial dialogue between the Court of Justice of the EU (CJEU) and the national courts in developing the concept of constitutional identity.[14]

The pioneering study on constitutional identity explores its historical development, conceptualising the idea of Europe as a key factor in shaping and evolving Bulgarian constitutional tradition.[15] Belov argues that modernisation in Bulgaria has often been equated with Europeanisation, primarily due to the interrupted state tradition and the need to construct a constitutional system almost from scratch following the Liberation from Ottoman rule in 1878. The Bulgarian constitutional system has been established through substantial waves of complete or partial reception or transplantation of European constitutional models, legal ideas, and institutions.[16] The Tarnovo Constitution of 1879 and the Constitution of 1991 are influenced by European constitutionalism,[17] whereas the Constitutions of 1947 and 1971 are direct transplants of Soviet totalitarian models. The current Constitution of 1991 is the only one, which represents not a comprehensive and massive transplantation, but rather a more creative and selective reception of legal models derived from various European

11 Белов, [Belov], 2017, p. 13. Belov explains that he shares the view and approach taken by M. Rosenfeld. See also: Rosenfeld, 2012.

12 Ibid, p. 14. Belov summarises how the three approaches view and analyse constitutional identity as follows: as an emanation of national constitutional tradition and culture (anthropological, socio-legal approach); a system of principles and norms enshrined in the active constitution (legal positivist approach); or a system of principles and norms embedded in the active constitution as interpreted by the courts (legal realist approach).

13 Ibid., pp. 14–15: 'First, the courts are not the only legitimate spokesperson for the community regarding its constitutional identity. Second, case law is often casuistic, biased, and created for various reasons. It is also highly inconsistent across different countries. Third, the analysis of case law tends to overlook its normative foundation, namely the written constitution's text. Fourth, case law does not provide sufficient clarity regarding the "living constitution" and "law in action." Judicial decisions are somewhat a sterile and isolated elitist product of expert analysis, which lacks the criteria for its own legitimacy, credibility, and validity.'

14 Ibid., pp. 97–111.

15 Ibid., pp. 121–142.

16 Ibid., pp. 136–137.

17 The Tarnovo Constitution is widely recognised as the Bulgarian version of the Belgian Constitution of 1831, transplanted through its Balkan interpretations, such as the Constitution of Greece of 1864, the Constitution of Romania of 1866, and the Constitution of Serbia of 1869. Martin Belov notes that despite some adaptations to the Bulgarian context, such as the removal of the censitary suffrage, the Senate, the State Council and the Tarnovo Constitution closely follow the above-mentioned sources of inspiration.

constitutional legal systems.[18] All participants in the constitution-making process of 1990–1991, including politicians and experts, sought constitutional solutions from both the traditions of previous Bulgarian constitutions and existing European legal mechanisms, rather than relying solely on specific constitutional models.[19]

Martin Belov characterises the Bulgarian constitutional tradition as comprising various concepts and institutions, which he categorises into three groups.[20] He identifies Europeanism, republicanism,[21] secularism, and tolerance as positive phenomena, while pointing out negative aspects such as elitist-oligarchic governance, an authoritarian-corporatist tradition, a hierarchical and pro-authoritarian political culture, a lack of civic activism, a poorly developed civil society, unrepresentative political parties, superficial media, constitutional nihilism, and constitutional fetishism.[22] Additionally, elements of the national constitutional tradition include the unitary state structure, unicameralism, egalitarianism,[23] and the belief in the expert, non-political role of judges, which cannot be distinctly classified as either positive or negative. Belov contends that understanding the Bulgarian constitutional tradition requires recognising the coexistence of two opposing trends: anti-elitism

18 Белов [Belov], 2017, p. 137. According to Belov, the Constitution of 1991 is primarily influenced by the Constitutions of Austria, Spain, Portugal, Greece, France, and Italy regarding the form of government and the institutional design of the head of state, government, and parliament. The models of constitutional justice and the judiciary have been predominantly drawn from Italy and Spain.

19 Марчева [Marcheva], 2024.

20 Белов [Belov], 2017, p. 164.

21 Ibid., pp. 166–168. It is worth mentioning that the Tarnovo Constitution established a monarchical form of governance, and the abolition of the monarchy occurred through a referendum in 1947, coinciding with the establishment of a Soviet-style totalitarian regime. However, today, the republican form of government is regarded as a fundamental component of the constitutional and political consensus. Belov points out that republicanism, in its dimension of civic activism, has limited traditions and still exhibits weak practice in Bulgaria.

22 Ibid., pp. 138–139. Belov defines constitutional nihilism as the belief that the state is a network of empirical power connections and relationships, with the official model for the distribution of power – enshrined in the constitution – serving primarily decorative functions rather than acting as a neutral mechanism for exercising political power. Constitutional fetishism, on the other hand, is based on the exaggeration of the role of the constitution and legislation as instruments for political and social reform and modernisation.

23 Ibid., pp. 168–169. Since the Tarnovo Constitution, political equality and the absence of censuses have been enduring characteristics of the Bulgarian constitutional tradition. These elements are interconnected through the shared phenomena of egalitarianism and anti-elitism, which reflect the goal of ensuring that the institutional design aligns with the presumed relatively homogeneous social structure of Bulgarian society.

and mediated governance.[24] However, a notable shortcoming in his analysis is the lack of empirical, factual, and sociological evidence to support these claims.

Until 2017, the Constitutional Court had not issued decisions directly addressing constitutional identity and had not engaged in any form of judicial dialogue with the CJEU.[25] At the conclusion of his analysis, Belov unexpectedly[26] claims that Bulgarian constitutional identity cannot be reconstructed through a legal positivist approach, either by interpreting the immutable provisions of the 1991 Constitution or by analysing the jurisprudence of the Constitutional Court.[27] Instead, he argues that 'until clearer legal indicators for the parameters of Bulgarian constitutional identity emerge, it should be defined through a critical analysis of the identity of the 1991 Constitution and the Bulgarian constitutional tradition…". Furthermore, Belov posits that "constitutional identity is part of the 'missing Constitution' in Bulgaria,'[28] a view that has been met with widespread criticism in the legal literature.[29] The open-ended and vague notion of Bulgarian constitutional identity presented at the end of the book is surprising, particularly in light of the ambitious objectives outlined at the beginning and the initial effort to distinguish the concept from related phenomena. It is also unclear why Belov suggested that the inalienability of fundamental rights was excluded from the Bulgarian constitutional identity due to its absence in the Bulgarian constitutional tradition, without addressing the significance of the identity of the 1991 Constitution in this context.[30]

Despite these complexities, Martin Belov's contribution to the concept of constitutional identity in Bulgaria provides valuable insights into its theory, history, and significance in the interplay between national and supranational legal systems. In subsequent years, Georgi Bliznashki further analysed and developed the notion in his foundational work "General Theory of the Constitution".[31] He challenged Belov's assertion that the absence of an "eternity clause" in the 1991 Constitution hindered the delineation of constitutional identity and led to the conclusion of a "missing constitution" in Bulgaria.[32] Bliznashki connects elements of constitutional identity[33]

24 Ibid., p. 168. Belov explains that "mediated governance" is not synonymous with representative government or democracy; it indicates that power in the state is exercised by a designated political elite instead of the people, nations, or citizens. This elite is not required to represent the interests of the populace, nor are they necessarily democratically elected or accountable.

25 Ibid., p. 185.

26 It is unexpected given the rhetorical rejection of the "fixation" on the "jurisprudential dimension of constitutional identity" at the beginning of research when commenting on methodology.

27 Белов [Belov], 2017, p. 194.

28 Ibid., pp. 173 and 176.

29 Друмева [Drumeva], 2018, p. 341; Близнашки [Bliznashki], 2019, p. 813.

30 Ibid., p. 184.

31 Близнашки [Bliznashki], 2019, pp. 773–817.

32 Ibid., p. 813.

33 Ibid., p. 816.

to the values enshrined in the preamble of the 1991 Constitution – liberty, peace, humanism, equality, justice, and tolerance. He highlights the republic as a form of state, the parliamentary system of governance, and the unitary structure state structure, the direct effect and applicability of constitutional provisions, and the constitutional guarantees for unalienable human rights that remain inviolable by the authorities, even during a state of emergency. In a broader context, provisions regarding the Bulgarian language as the official language of the state (Article 3) and the special place and role of Eastern Orthodox Christianity as the traditional religion in Bulgaria (Article 13, paragraph 3) can also be considered elements of national constitutional identity.[34] Radoslava Yankulova further identified fundamental right to culture as an element of the Bulgarian constitutional identity – a core value that cannot be compromised or altered under the pressure of supranational processes or phenomena.[35]

2.2. EU Law Literature

In 2021, Atanas Semov, a professor of EU law and a constitutional judge, published the book "Protection of National Constitutional Identity in the European Union,"[36] prior to the CJEU's judgement in the Pancharevo case in December 2021.[37] He describes the case as "historic"[38] because it marks the first instance in which a Bulgarian national judge made a preliminary referral invoking elements of national constitutional identity. While Semov extensively cites the Opinion of Advocate General Kokott[39] in his book, none of his subsequent academic writings address the EU's judgement or the case's further developments within the national court system.

Semov asserts that the EU can only function by respecting the sovereignty and identity of its Member States.[40] He conceptualises respect for national constitutional identity as a "fundamental principle" of the EU, which counterbalances the principles

34 Ibid.
35 Янкулова [Yankulova], 2019.
36 Семов [Semov.], 2021.
37 Judgement of the Court (Grand Chamber) of December 14, 2021, V. M. A. v. Sofia Municipality, Pancharevo District, Case C-490/20.
38 Семов [Semov], 2021, p. 111.
39 Opinion of Advocate General Kokott delivered on 15 April 2021. V. M. A. v Stolichna obshtina, rayon "Pancharevo". Document 62020CC0490
40 Семов [Semov], 2021, p. 10.

of integration, loyal cooperation, and the primacy of EU law.[41] He posits that its protection can only be achieved through the CJEU[42] and emphasises the necessity of "clearly and substantively" indicating a specific element of national constitutional identity when making a preliminary referral to the court.[43] According to Semov, 'there is no national constitutional identity in general – and no one could formulate it generally,' because it 'always has specific manifestations, such as enhanced protection of human dignity, enhanced protection of the national language, a multilingual regime, constitutional protection (status) of the family, and different sexes of those entering into marriage (and/or parents), which would likely be the case, for example, with the Bulgarian Constitution, the constitutional status of religion – or the complete absence of such status (in a secular state like France), etc.'[44]

Semov contends that any reference to national constitutional identity should cite one or more specific provisions of the constitution, suggesting that the spirit of the constitution should be invoked only as a last resort and ideally derived from those specific provisions.[45] However, he does not identify the relevant provisions to support his claim that part of Bulgarian national constitutional identity includes the so-called 'constitutional protection (status) of the family and the different sexes of those entering into marriage (and/or parents).'

Even if one accepts that the definition of marriage in Article 46, paragraph 1 of the 1991 Constitution – describing marriage as a voluntary union between a man and a woman – forms part of Bulgarian constitutional identity, there is no definition of "family" or "parents" in the constitution. This lack of a normative basis undermines the assertion that the inability to recognise same-sex family relationships is an inherent characteristic of national constitutional identity, rendering it more an intuition than a scientifically grounded thesis.[46]

On the back cover of his book, Atanas Semov states, '*National constitutional identity is subject to protection in its two dimensions: formal-legal and cultural-historical (or normative and value-based).*' However, the study itself lacks a clear methodology

41 Семов [Semov], 2021, p. 11. Semov explicitly counters Hristev's view that respect for the constitutional identity of Member States is not a distinct new principle in primary EU law and that it does not restrict or derogate from the primacy of EU law over national law. Hristev contends that Art. 4, para. 2 of the Treaty on European Union merely establishes a specific right for the Union, allowing each Member State to impose proportionate restrictions on the application of certain EU law provisions, as long as such restrictions are necessary to uphold the fundamental principles of their constitutional order. See: Христев [Hristev], 2021.

42 Семов [Semov], 2021, p. 67.

43 Ibid., p. 63.

44 Ibid., pp. 56–57.

45 Ibid., p. 101.

46 Марчева, Стайкова [Marcheva and Staykova], 2024.

for implementing this value-based approach. Instead, Semov opts to "hint", as he puts it:

> *'at least a few basic elements of Bulgarian national constitutional identity,' including the assertion that 'the survival of the nation is one of the vertebrae in the backbone of the Bulgarian national spirit (and one of the main elements of our identity), which shapes our attitude toward family in its kin and national reproductive function, especially during the years of slavery.'*[47]

This approach appears to be tied to the author's subjective views and beliefs, lacking a scientific methodology while still reaching conclusions that legal scholars and practitioners might reference as authoritative.

It is also noteworthy that prior to the referral to the CJEU in the Pancharevo case, no theoretical writing had identified the constitutional definition of marriage as part of the Bulgarian constitutional identity. The European Union's responsibility to acknowledge national identity stems from a liberal commitment to respecting members of a multinational political community. In contrast, national constitutional courts uphold constitutional identity through a distinct interpretation of sovereignty. Therefore, it is crucial to understand that calls for honouring both national and constitutional identities are informed by differing theoretical frameworks.[48]

3. The Jurisprudence of the Constitutional Court and Related Case Law of the Supreme Cassation Court

The concept of "constitutional identity" first emerged in the jurisprudence of the Constitutional Court in 2018, initially invoked in the context of interpreting Article 4, paragraph 2 of the Constitution, which states that the Republic of Bulgaria participates in the construction and development of the European Union. The Constitutional Court elaborated on this notion as follows:

> *"EU law and national law together form the space in which public authority simultaneously participates in the creation of union law and develops the national legal order while respecting the values and fundamental principles of the EU and national interests. It also serves as a framework*

47 Семов [Semov], 2021, p. 226.
48 Cloots, 2016, p. 80.

for the transfer of powers, a process that is not unlimited. By emphasising "the Republic of Bulgaria," the constitutional legislator underscores that constitutional identity is preserved in the participation of the Bulgarian state in the construction and development of the EU."[49]

Subsequently, the concept of constitutional identity was referenced in the decision that declared the Istanbul Convention unconstitutional, labelling the terms "gender" and "gender identity" as ambiguous and unacceptable.[50] However, the majority of constitutional judges did not ground their reasoning in this concept; instead, they cited it while presenting the opinion of Plamen Kirov, Professor of Constitutional Law, who argued that certain provisions of the Istanbul Convention were inconsistent with the principles and norms of the Bulgarian Constitution and were "in sharp conflict with Bulgarian constitutional identity."[51] Notably, the term "constitutional identity" also appears in the Dissenting Opinion of Constitutional Judge Filip Dimitrov:

'The erroneous interpretation by the majority pertains to the concept of "gender identity." The existence of individuals whose behaviour diverges from traditional male or female roles (and who wish for it to be so) is a fact of life, not a normative one. No constitution or law – even those of the Nazis or communists – can determine whether such individuals exist; it can only dictate whether they can be exterminated (as in the case of Nazism), discriminated against, and expelled (under communism), or provided with basic protection against violence, as stipulates the Convention. Public recognition of this reality clearly aids rather than hinders the guarantee of such protection. To assert (as some of the submitted opinions do) that a "Bulgarian constitutional identity" contradicts the acknowledgment of existing life facts is absurd. It is equally incomprehensible to claim that the Constitution prohibits discussing this issue because it "does not aim to achieve equality between the sexes, but erases the differences between them, thereby rendering the principle of equality meaningless.'[52]

49 Decision No. 7, issued on 17 April 2018 by the Constitutional Court of the Republic of Bulgaria in Case No. 7/2017.

50 Decision No. 13, issued on 27 July 2018 by the Constitutional Court of the Republic of Bulgaria in Case No. 3/2018.

51 Ibid. It is important to note that Plamen Kirov has not published any theoretical works on the concept of constitutional identity.

52 Dissenting Opinion of Constitutional Judge Filip Dimitrov regarding Decision No. 13, issued on 27 July 2018 by the Constitutional Court of the Republic of Bulgaria in Case No. 3/2018.

Shortly after the Constitutional Court declared the Istanbul Convention unconstitutional, the Supreme Cassation Court, in a three-judge panel, extensively referenced the concept of Bulgarian constitutional identity to deny the legal recognition of sex change in civil registration acts, as follows:

> *'Constitutional identity represents a specific identity of the nation, expressed, defined, and delineated through its national constitution. The core values enshrined in the national constitution are upheld and protected, and for the Republic of Bulgaria, this is rooted in the supremacy of the Constitution (Article 5, paragraph 1 of the Bulgarian Constitution).'*

The Supreme Cassation Court asserts that an element of Bulgarian constitutional identity is the legal understanding of "sex," which is consistently interpreted across all constitutions of the Third Bulgarian State, the Constitution of 1879, the Constitutions of 1947 and 1971, and the currently active Constitution from 1991.[53] The legislative body has consistently associated this concept solely with biological sex, which is genetically encoded and does not change from birth to death. For this reason, national law does not explicitly define the terms "sex," "man," or "woman." The rationale for this approach, including that of the constitutional legislator, is rooted in Christianity. The beginning of the process of adopting this religion as the official one for the Bulgarian state dates back to 864 AD. Christianity forms the basis of Eastern Orthodox belief, which is the traditional and official religion of the Republic of Bulgaria (Article 13, paragraph 3 of the Constitution). Christianity links sex to the divine origins of the male and female principles. Regarding sex determination, other religious communities in Bulgaria similarly align their religious doctrine. The constitutional enshrinement of biological sex as a legal category throughout the 140-year existence of the Third Bulgarian State should be viewed as an element of Bulgarian constitutional identity. No supranational or international legal act can oppose this identity.[54]

53 Such a conclusion is highly contentious, as none of the Bulgarian constitutions focus specifically on "sex" and its interpretation. The first Tarnovo Constitution of 1879 uses the term "sex" in the context of determining the parliamentary representation quota in Art. 86, stating, 'The Ordinary National Assembly is composed of representatives elected directly by the people, with one representative for every ten thousand individuals of both sexes.' The 1947 Constitution asserts that women are equal to men in all areas of state, private law, economic, social, cultural, and political life (Art. 72, para. 1), and it employs the term "sex" solely to define suffrage rights for all Bulgarian citizens "regardless of sex." The second Constitution of the People's Republic of Bulgaria, enacted in 1971, reiterates the principle of equality between women and men (Art. 36). The democratic Constitution of 1991 is notable for being the first to define marriage as a voluntary union between a man and a woman (Art. 46, para. 1) and uses the term "sex" exclusively in the anti-discrimination clause of Art. 6, para. 2, as one of the protected characteristics.

54 Decision No. 119 of February 14, 2019, of the Supreme Cassation Court in civil case No. 4104/2017, III Civil Panel.

The Supreme Cassation Court uses the term "constitutional identity" eleven times in its justification and, for the first time, incorporates historical and religious reasoning. In her Dissenting Opinion, Judge Daniela Stoyanova does not directly address the concept of constitutional identity but points out that the majority of judges[55] have deviated from the established practice of the Supreme Cassation Court, which previously allowed for the legal change of sex in civil records through judicial means. She criticises their conservative approach to understanding gender, primarily based on objective physiological criteria, as being at odds with advancements in science, particularly in medicine and psychology, as well as contemporary views on gender division and the rapidly evolving processes of internationalisation and globalisation within the legal framework. Judge Stoyanova embraces a more flexible understanding of gender, which gives significant weight to the individual's will and self-identification.[56]

The division among civil judges became so pronounced that in 2021, the General Assembly of the Civil College of the Supreme Cassation Court initiated a constitutional case seeking a mandatory interpretation of several constitutional provisions. The Constitutional Court agreed to consider the request for a mandatory interpretation of Article 6, paragraph 2 (the anti-discrimination clause) and Article 46, paragraph 1 (definition of marriage) of the Constitution. The key question posed was: How should the term "sex," as used in the Constitution, be understood, and does it have a meaning distinct from biological sex? The Constitutional Court concluded that the term "sex" under the Constitution is to be understood solely in its biological sense.[57]

55 Dissenting Opinion of Judge Daniela Stoyanova regarding Decision No. 119 of February 14, 2019, of the Supreme Cassation Court in civil case No. 4104/2017, III Civil Panel: 'In its ruling, the majority of the judicial panel concludes that a Bulgarian citizen's identification as a gender different from their biological sex, along with the reasons for this (such as transsexuality, transgenderism, homosexuality, transvestism, and others) or its consequences (including hormonal and/or surgical modifications to align the body with a different gender, as well as sexual or social behaviours characteristic of the other gender) do not provide sufficient grounds (material legal prerequisites) for making changes to civil status records through administrative or judicial means. The ruling also states that only the existence of an error, specifically an incorrect entry of biological sex, constitutes a material legal basis (condition) for permitting a corresponding change in the names and personal identification numbers of the Bulgarian citizens in civil status records via judicial means.'

56 Ibid.: 'When a person's psychological self-perception sharply conflicts with their legal gender to the extent that it causes suffering, and when both criteria are established – a medical criterion (the condition of transsexuality) and a legal criterion (a serious and unwavering decision to change biological sex due to the fulfilment of a psychological and social gender role) – the requested change of gender should be permitted. Consequently, this should also allow for a change of names and the corresponding notation in the birth certificate. A contrary resolution would be incompatible with the guaranteed inviolability of personal life, leading to an imbalance between public interest and the individual's interest, thus violating Art. 8 of the Convention.'

57 Decision No. 15, issued on 26 October 2021 by the Constitutional Court of the Republic of Bulgaria in Case No. 6/2021.

In its reasoning, the majority of the constitutional judges did not cite a specific provision of the 1991 Constitution as part of constitutional identity. Instead, they referenced “the value understandings of society, shaped by religion and morality” and “the established values that guided the constitutional legislator,” which defined marriage in the constitution as a voluntary union between a man and a woman. Rather than treating the constitutional definition of marriage as an element of constitutional identity, the Court used it as a basis for a broader discussion of non-listed value understandings rooted in religion and morality. This raises significant questions about whether such broad references can genuinely be considered part of constitutional identity, as they lack clear parameters.

Decision No. 15 of 2021 of the Constitutional Court extensively references the concept of constitutional identity, linking it to the so called Bulgarian traditional values:

> *‘…The third point of reference is related to Bulgarian traditional values, specifically to the predominant religion practiced by the majority of Bulgarian citizens – Eastern Orthodox Christianity. This religion is designated as “traditional” in Article 13, paragraph 3 of the Constitution,*[58] *which supports the conclusion that the constitutional legislator in 1991 aimed to embed the value systems established in Eastern Orthodox Christianity into the constitutional legal order. In this regard, the position presented in the case by the Holy Synod of the Bulgarian Orthodox Church connects Eastern Orthodoxy with “ancient moral values” and with “the national and constitutional identity of Bulgaria,” including those that have historically served as a source of normative regulation. It is not coincidental that the provision of Article 14, which places family, motherhood, and children under the special protection of the state and society, is systematically positioned immediately after Article 13, which proclaims the significance of Eastern Orthodoxy in shaping Bulgarian cultural, spiritual, and value identity. This role of Orthodoxy has been repeatedly emphasised in statements made by members of the National Assembly during the adoption of Article 13, paragraph 3 of the Constitution, asserting that: Orthodoxy “is indeed the foundation of our culture”…; “Orthodoxy is closely tied to the national*

58 1991 Constitution of the Republic of Bulgaria, Article 13:
(1) Religious denominations are free.
(2) Religious institutions are separate from the state.
(3) The traditional religion in the Republic of Bulgaria is Eastern Orthodox Christianity.
(4) Religious communities and institutions, as well as religious beliefs, cannot be used for political purposes.

idea. It represents a tradition that has permeated the consciousness of the Bulgarian people…

…As an exception to the general model of modern European constitutions, the provision of Article 13, paragraph 3 holds specific significance for delineating Bulgarian cultural and spiritual uniqueness, a consideration taken into account by the constitutional legislator when adopting the Fundamental Law, which should be considered in its interpretation. This is particularly relevant given that in Article 37 of the first Bulgarian Constitution – the Tarnovo Constitution of 1879 – the Orthodox Christian religion of Eastern Confession is defined as "dominant," thus establishing a constitutional tradition that is essential for shaping Bulgarian national constitutional identity.

…The Court considers that the value understandings of society, formed by religion and morality, are characterised by stability as a regulator of behaviour, whereby the imposition by the state of legal permissions in conflict with established moral and/or religious norms and principles would be characterised by questionable legitimacy and would compromise their regulatory potential. This should also be borne in mind when interpreting the Basic Law, the preamble of which states that its drafters were driven by the desire to express the "will of the Bulgarian people"[59], which cannot be considered without taking into account their established values, which guided the constitutional legislator. It is in this context that the understanding of sex in its biological sense embedded in the Bulgarian Constitution is a manifestation of the Bulgarian national constitutional identity…'[60]

The Constitutional Court's reasoning places excessive emphasis on tradition, particularly the role of Eastern Orthodox Christianity, as a defining aspect of Bulgarian national constitutional identity. This perspective, however, fails to acknowledge the dynamic nature of culture and identity, which evolve over time, and risks suppressing contemporary values and the contributions of diverse groups within Bulgarian society.

It is an overinterpretation of Article 13, paragraph 3 of the Constitution, which designates Eastern Orthodox Christianity as "traditional", to assert that the framers intended to embed its value systems i.e. "traditional human society, built on binary sex" and "traditional family values," into the legal order, as identified in the new anti-gender doctrine of the Constitutional Court. Such a claim regarding a religious

59 1991 Constitution of the Republic of Bulgaria, Preamble: 'We, the members of the Seventh Grand National Assembly, in our effort to express the will of the Bulgarian people…'.

60 Decision No. 15, issued on 26 October 2021 by the Constitutional Court of the Republic of Bulgaria in Case No. 6/2021.

belief system linked to Bulgarian constitutional identity disregards the principle of secularism, which has never been disputed in Bulgarian public law. This approach risks marginalising non-Orthodox citizens, including those of other faiths, atheists, agnostics, and individuals who do not share the same values. The intention behind Article 13, paragraph 3 of the Constitution was solely to acknowledge the historical significance of Eastern Orthodox Christianity within the new democratic, pluralistic, and diverse society, rather than to impose a singular moral framework that reflects the beliefs of a majority.

Ultimately, the Constitutional Court's argument implies that prioritising traditional moral values over individual rights aligns with Bulgarian constitutional identity. However, while this may resonate with the totalitarian frameworks of the 1947 and 1971 Constitutions of the People's Republic of Bulgaria, it contradicts the 1991 Constitution, which highlights "the rights, dignity, and security of the individual" as its "foremost principle" in the Preamble.

By anchoring constitutional identity in historical and traditional views, the Court fails to navigate the complexities of gender and sexuality and to strike a balance between tradition and modernity, as well as between societal prejudices and individual rights. This exclusivist approach raises important questions about the role of the Constitutional Court in shaping Bulgarian constitutional identity. It raises doubts about whether the Court is truly safeguarding this identity, not in relation to the supranational EU legal framework, but rather against its citizens who may not share the vision and values of the twelve Constitutional judges.

In 2024, the Constitutional Court shifted away from relying on broad traditional values to define Bulgarian constitutional identity and introduced the term "Bulgarian constitutional specificity (identity)," emphasising the second sentence of Article 1, paragraph 2 as a key element: 'The entire power of the State shall derive from the people. The people shall exercise this power directly and through the bodies established by this Constitution.'[61] This provision on the principle of popular sovereignty reflects the understanding that the sovereign (the people) can decisively express their will in national referendums on specific governance issues, rather than merely offering opinions for others – such as Parliament – to consider. The Court indicates that "the constitutional legislator has established two main forms of exercising state power with equal constitutional rank – direct and representative (Article 1, paragraph 2 of the Constitution) – which mutually complement each other and enhance the stability of the modern democratic state."[62]

61 Decision No. 3, issued on 8 February 2024 by the Constitutional Court of the Republic of Bulgaria in Case No. 13/2023.

62 Ibid.

The jurisprudential concept of constitutional identity in Bulgaria was significantly advanced by the Constitutional Court in its landmark Decision No. 13/2024, which introduced a nuanced perspective while reviewing the 2023 constitutional reform enacted by the National Assembly. In this ruling, the Court used the terms "genuine essence" and "core of values" almost interchangeably with "constitutional identity," emphasising these as fundamental, inviolable elements of the Constitution that cannot be altered by the derivative constituent authority, the National Assembly.

The Court reasoned that amendments made without the original constituent authority's participation risk enabling shifting political majorities to reinterpret or distort the Constitution in ways that undermine its "genuine essence." To prevent this, constitutional drafters deliberately designate the Constitution's spirit – its "core of values" or "constitutional identity" – as immutable, thereby protecting the supremacy of the Constitution from dilution by derivative authorities. The Court explained:

> *'Since changes to the constitutional regulation made without recourse to the original constituent authority bear risks of different political majorities interpreting the constitution contrary to its genuine essence, the creators of constitutions declare the spirit of the constitution, its 'core of values', or 'constitutional identity' unchangeable, thus protecting its supremacy against the derivative constituent authority... In short, there is a core value on which the constitution is premised and which defines its essence and identity, hence the principles that translate this value are in general stable – should they be eliminated, a qualitative change will occur, which is not simply a change of the constitution but in fact substituting it with another constitution. The substantive limitations are the criteria for establishing unconstitutionality of constitutional amendments. The scope of 'matters' immune to changes by the derivative constituent authority is intended to protect the constitutional continuity and constitutional identity...'*[63]

Further, the Constitutional Court acknowledged that while no universally fixed constitutional core exists regarding the precise content and scope, there are broadly accepted fundamental values common to modern democratic constitutions. These values are "translated" into the fundamental law through constitutional principles, described as the "very heart of the constitution."[64] Without providing an exhaustive list, the Court identified the following foundational principles, constituting "the basis of the constitutional order" and "basic constitutional characteristics":

63 Decision No. 13, issued on 26 July 2024 by the Constitutional Court of the Republic of Bulgaria in Case No. 1/2024.

64 Ibid.

'*national sovereignty, separation of powers, rule of law of which the constitution is the ultimate manifestation, political pluralism, protection of human rights and fundamental freedoms, independence of the judiciary.*'[65]

This jurisprudence effectively blurs previously maintained theoretical distinctions between constitutional identity, constitutional values, and constitutional principles, equating them substantively. Such conflation is problematic because it risks conceptual confusion, undermining clarity and precision in constitutional adjudication. While principles and values denote fundamental norms underpinning the constitutional order that can gradually evolve alongside societal changes, constitutional identity is intended to capture the core, defining features – its "essence" that ensures continuity and distinguishes the constitution from others. Equating constitutional identity with principles or values threatens to render all fundamental principles immune to amendment or reinterpretation, effectively freezing the constitution. This rigidity may hinder necessary constitutional evolution and reform, undermining democratic self-governance and adaptability.

Moreover, conflating constitutional identity with principles and values may grant constitutional judges excessively broad discretion to invalidate constitutional amendments based on vague or subjective interpretations of "core values." This heightens the risk of judicial overreach, enabling the Constitutional Court to encroach on the legislative or constituent authority's domain and entrench particular political or ideological positions under the pretext of defending constitutional identity. Consequently, this conflation threatens the functional differentiation vital for nuanced constitutional balancing, as it blurs the scope and firmness of protections afforded to constitutional identity.

4. Bulgarian National Constitutional Identity and the First Referral to the CJEU on Pancharevo Administrative Case

The Pancharevo case marked the first instance in which a Bulgarian national judge made a preliminary referral to the Court of Justice of the European Union (CJEU), invoking the protection of national and constitutional identity. The case involved the refusal of Bulgarian authorities to recognise the family relationship of a same-sex couple and the rights of the child born to and raised by that couple.

Initially, the Sofia Administrative Court established that "baby Sara" was born in Spain in December 2019, where Spanish authorities issued a certificate listing two mothers, one a Bulgarian citizen and the other a British citizen, who were married in

65 Ibid.

Gibraltar in 2018. According to Article 25, paragraph 1 of the Constitution, any person whose parent is a Bulgarian citizen is automatically granted Bulgarian citizenship at birth. Thus, the court determined that baby Sara acquired Bulgarian citizenship.

Following this, the Bulgarian mother submitted a request to the Sofia Municipality, Pancharevo district, for the issuance of a birth certificate for her daughter, which was necessary for obtaining a passport and facilitating travel within the EU for both mother and child. However, the municipal authorities required evidence that she was the "biological mother" of the child, a requirement she did not fulfil, as Bulgarian laws do not impose such a legal obligation on parents. The administrative body justified its refusal to issue a birth certificate by citing a lack of information regarding the identity of the child's biological mother, arguing that registering two female parents on the birth certificate contradicted "public order" in Bulgaria.

In this context, the administrative court sought clarification from the CJEU regarding the potential adverse effects on public policy and national identity in Bulgaria that might result from mandating Bulgarian authorities to recognise two mothers as parents on a child's birth certificate. The judge aimed to balance Bulgaria's constitutional and national identity with the interests of the child, particularly the child's right to a private life and free movement.[66]

The use of meta-legal concepts such as "national identity" is unavoidable in the case law of the domestic court, invoking Article 4, paragraph 2 of the TEU. The CJEU notes that the respect for the national identity of Member States under Article 4, paragraph 2 TEU pertains to elements that are "inherent in their fundamental structures, political and constitutional".[67] However, defining Bulgarian national identity through the lens of Bulgarian constitutional and public law is challenging due to its origins in the reception and transplantation of foreign legal models, which began in the late nineteenth century with the establishment of the Bulgarian national state under the Tarnovo Constitution and continued during the totalitarian regime, which mirrored the Soviet model. Bulgarian judges cannot rely on broad and amorphous concepts such as "societal values shaped by religion and morality" when defining Bulgarian national and constitutional identity, as these concepts cannot be substantiated by legal sources or any scientifically recognised methods for establishing facts.

The CJEU has repeatedly emphasised the need for a contextual approach and analysis that provides a clear and specific reference to national identity as a legitimate objective. Furthermore, the concept of public policy, when invoked to justify a derogation from fundamental freedom, must be interpreted strictly, and applied only in cases where there is a genuine and sufficiently serious threat to a vital interest of

66 Judgement of the Court (Grand Chamber) of 14 December 2021, V. M. A. v. Sofia Municipality, Pancharevo District, Case C-490/20, paras. 28–30.

67 Ibid., para. 54.

society.[68] The court concluded that a Member State's obligation to issue a passport to a child who is its national, as well as to recognise the parent-child relationship, even when the child's parents are of the same sex, does not undermine national identity or pose a threat to the public policy of that Member State, particularly in the context of the child's right to free movement.[69]

According to the CJEU, depriving "baby Sara" of her relationship with one of her parents would violate her fundamental rights under Articles 7 and 24 of the Charter, which protect the respect for family life and require consideration of the child's best interests. Such deprivation would contradict her right to move and reside freely within the territory of the EU, particularly if her ability to exercise that right was rendered impossible or excessively difficult solely because her parents are of the same sex.[70]

After the CJEU determined that there was no applicable protection of Bulgarian national and constitutional identity or public order in the Pancharevo case, the first-instance administrative court directed the municipal authorities to issue a birth certificate for the child.[71] However, the municipal authority challenged this decision and the Supreme Administrative Court (SAC) distorted the facts, by denying the Bulgarian citizenship of the child, in order to disregard the EU law established by the CJEU.[72] The SAC justified its conclusion that "baby Sara" was not recognised as a Bulgarian citizen, and was therefore not an EU citizen entitled to free movement, by stating that the Bulgarian citizen listed as the mother on the birth certificate issued in Spain failed to prove that she was the child's "biological mother."

In a surprising final comment, the SAC concluded that since the child had not acquired citizenship from either of her two mothers, she had become a citizen of the host country – Spain. Thus, the supreme judges contradicted their initial finding that the child was not an EU citizen and that the rights under the TFEU and Directive 2004/38/EC did not apply to her.

Most notably, the SAC narrowed the definition of "mother" to "biological mother," reducing the legal concept of "descent" to a purely biological interpretation. In doing so, and in an effort to maintain their prejudices against same-sex families, the supreme administrative judges overlooked the fundamental legal principles regarding descent in Bulgarian law:

68 Judgement of the Court (Grand Chamber) of 14 December 2021, V. M. A. v. Sofia Municipality, Pancharevo District, Case C-490/20, para. 55.

69 Ibid., paras. 56–57.

70 Ibid., paras. 63–65.

71 Decision No. 3251, issued on 13 May 2022, by the Administrative Court of the City of Sofia, in administrative case No. 3654/2020.

72 Decision No. 2185, issued on 01 March 2023, by the SAC, III panel, in administrative case No. 6746/2022.

Firstly, descent is not exclusively a biological concept and cannot be limited to the existence of a blood relationship; it is not solely defined by whether a parent is a “biological mother” or “biological father”. Secondly, when acknowledging a child by a father, the administrative body never requires evidence that he is the “biological father”. Thirdly, legal relationships of descent can also be established through adoption, where the mother has neither given birth nor has any biological connection to the child.

Notwithstanding, the SAC arbitrarily decided to limit the legal concept of descent to a single aspect, biological descent, solely to avoid recognising the child’s Bulgarian citizenship and, consequently, the rights arising from EU citizenship. This operation of rendering the child rightless is executed simply because two mothers are listed as parents in the child’s birth certificate, issued in a foreign country.

The SAC also violated the provisions of the Code of Private International Law (CPL) concerning the applicable law for descent. The supreme judges contradictorily applied Article 83, paragraph 1 of the CPL[73] by denying that the child acquired Bulgarian citizenship at birth while simultaneously regulating the child’s descent according to Article 60, paragraphs 1 and 2 of the Bulgarian Family Code.[74] They even went so far as to attribute the extraterritorial effect to the Bulgarian legal norm on maternal descent within Spain, where the child was born and where descent from two mothers was recognised, solely to deny the legal relationship of descent from the Bulgarian citizen and, consequently, the child’s Bulgarian citizenship.

Furthermore, Article 83, paragraph 2, item 1 of the CPL requires that the Bulgarian court, “if it is more favourable for the child,” must apply the law of the state where the child has habitual residence at the time of establishing descent (i.e., Spanish law). This means that Bulgarian state authorities, both administrative and judicial, are obligated to recognise the descent as established by the Spanish authorities in the birth certificate. However, the SAC deliberately disregarded the CJEU’s preliminary ruling through a series of manoeuvers that mimicked the interpretation and application of the law, ultimately leading to a predetermined outcome: the denial of the child’s Bulgarian and European citizenship and the refusal to register the child in Bulgarian civil status records, simply because the child has a Bulgarian mother who established her legal relationship of descent abroad within a same-sex marriage.

73 Code of Private International Law, Art. 83:
(1) Descent shall be governed by the law of the state whose citizenship the child acquires at the time of birth. (2) Notwithstanding the provision of para. 1, it may be applied if it is more favourable for the child: 1. the law of the state of which the child is a citizen or where the child has habitual residence at the time of establishing descent, or 2. the law applicable to the personal relationships between the parents at the time of the child’s birth.(3) Reference to the law of a third state shall be accepted, if that law recognises the establishment of the child’s descent.

74 Family Code, Art. 60: (1) Maternal descent is established at the time of birth. (2) The mother of the child is the woman who has given birth to the child, including in cases of assisted reproduction.

As a result, the case reveals blatant intersectional discrimination against women with homosexual orientations, reflecting a disregard for their personal and family lives. Such stringent requirements for proof of biological descent were never applied to men within the administrative procedure for recognising an already established descent abroad. Moreover, Bulgarian authorities act discriminately based on "sexual orientation"; when foreign birth certificates list parents of different sexes, the administration never questions the facts established or certified by the foreign act, nor does it seek ways to refuse its recognition.

The entire progression of the Pancharevo case in the Bulgarian courts raises critical questions why non-recognition of same-sex families began to be considered as a component of Bulgarian national and constitutional identity and public order. If so, does this imply a fundamental denial of certain rights, such as the right to respect for private and family life, as well as the prohibition of discrimination based on gender and sexual orientation?

5.
Protection of Human Rights as an Integral Aspect of Bulgarian Constitutional Identity: The Koilova and Babulkova v. Bulgaria Case at the ECtHR

Martin Belov doubts whether the inalienability of fundamental rights constitutes an integral part of the Bulgarian constitutional identity, arguing that this connection cannot be established within our constitutional tradition. However, it seems implausible to separate the identity of the current Bulgarian Constitution from the protection of human rights, particularly when considering the Preamble of the 1991 Constitution, its fundamental provisions, and Chapter 2, which is dedicated to fundamental rights.

Given that the constitutional definition of marriage is a union between a man and a woman, it is clear that same-sex marriage cannot be recognised under Bulgarian legislation, as it contradicts the 1991 Constitution. However, the terms "family" and "parents" are not explicitly defined in the constitutional provisions, meaning that the recognition of same-sex family relationships and the protection of the human rights of their members cannot be deemed unconstitutional. Generally, the Constitutional Court interprets fundamental rights in the Bulgarian Constitution, in alignment with

international human rights treaties and the jurisprudence of the European Court of Human Rights (ECtHR),[75] while also striving to avoid conflicts with EU law.[76]

In its judgement in the case *Koilova and Babulkova v. Bulgaria*, the ECtHR found a violation of Article 8 of the ECHR, determining that Bulgaria has a "positive obligation to provide legal recognition and protection for same-sex couples".[77] The case revolves around the municipal mayor's refusal to update Darina Koilova's marital status in the civil records by registering her marriage to Lilia Babulkova, which took place in the United Kingdom. The administrative body and all levels of domestic administrative courts cited the concept "constitutional tradition"[78] and "conflict with Bulgarian public order"[79] to justify their denial of the applicant's request.

The first-instance administrative court broadly and vaguely linked the conflict with public order to "fundamental imperative norms essential to the legal order and administration of justice," yet it failed to identify any specific norms.[80] Nevertheless, the judge hastily concluded, without justification, that violating such norms would

75 This approach of conforming the interpretation of the Constitution with international treaties is explicitly established in many decisions of the Constitutional Court. See, for instance, among others: Decision No. 1, issued on 1 March 2012 by the Constitutional Court of the Republic of Bulgaria in Case No. 10/2011; Decision No. 6, issued on 14 June 2016 by the Constitutional Court of the Republic of Bulgaria in Case No. 1/2016; Decision No. 14, issued on 17 November 2022 by the Constitutional Court of the Republic of Bulgaria in Case No. 14/2022.
The conforming interpretation of the constitution with international treaties is analysed explicitly in the constitutional doctrine. See: Цеков [Tsekov], 2021.

76 On the reserved position and the judicial self-restraint of the Constitutional Court of the Republic of Bulgaria, see: Белов [Belov], 2017, pp. 102–103.

77 Koilova and Babulkova v. Bulgaria. Application No. 40209/2020. European Court of Human Rights, 5 Sept. 2023, para. 38.

78 Decision No. 180, issued on 08.01.2018, by the Administrative Court of the City of Sofia, in administrative case No. 7538/2017: 'It is undisputed that the ECtHR fully respects the domestic regulations of each state, acknowledging the right of the State Parties to guarantee and regulate marriage and the right to establish a family in accordance with national laws governing the exercise of these rights. In the context of marriage, no evaluation based on "public interest" or individual interests is required. This is because recognition of fundamental rights stems from the common *constitutional traditions* of the State Parties, and these rights should be interpreted in harmony with those traditions…'.
It is clear that the ECtHR fully respects the domestic regulations of each state, acknowledging the right of contracting states to guarantee and regulate marriage and the establishment of a family in accordance with their national laws. In the context of marriage, no evaluation based on "public interest" or individual interests is required. This is because fundamental rights are recognised, arising from the common constitutional traditions of the Member States, and these rights are interpreted in harmony with those traditions (Art. 52 of the Charter). Additionally, there is no consensus among member states regarding same-sex marriages.

79 Art. 117 of the Code of Private International Law sets out the conditions for the recognition and enforcement of decisions and acts from foreign courts and authorities. One key requirement is that such recognition or enforcement must not conflict with Bulgarian public order.

80 Decision No. 180, issued on 08.01.2018, by the Administrative Court of the City of Sofia, in administrative case No. 7538/2017.

harm the "public and personal interests of citizens" and lead to an "unacceptable infringement of fundamental values", which were also unnamed. No examples were provided of public or personal interests that could potentially be violated by a same-sex marriage conducted abroad. Simultaneously, the court declined to address the applicant's concerns that the refusal to change her marital status could result in legally prohibited situations, such as polygamy, or non-compliance with other obligations mandated by Bulgarian law, such as the requirement to submit accurate declarations.

The Supreme Administrative Court presented a similar line of reasoning, completely confusing the logical sequence between the recognition of a marriage conducted abroad and the generation of legal effects in Bulgaria.[81] While it is evident that the purpose of "recognition" is to generate effects in Bulgaria, the supreme judges assert that "a marriage that has not produced legal effects in Bulgaria cannot be recognised and subsequently registered." It is unclear why they believe that a marriage conducted abroad must first produce effects in Bulgaria before it can be recognised; this reasoning is both absurd and nonsensical – akin to "putting the cart before the horse." Why would anyone need recognition of a legal act that has already produced effects within the territory of Bulgaria? This flawed reasoning reveals an inherent rejection of same-sex marriages conducted abroad, rooted in the judges' prejudices and biases, ultimately leading to a fundamental denial of the human right of Bulgarian citizens to marry abroad.

The Supreme Administrative Court explicitly rejected the applicant's claim of a violation of Article 8 of the ECHR, emphasising that *'the regulation of family relationships, as a fundamental unit of society that pertains to reproduction and individual development, is a matter of national significance that necessitates public consensus, as evidenced by positive normative legislation'*.

Unlike Bulgarian courts, which maintain that each state has full discretion in deciding whether to provide legal recognition of the family life of same-sex couples in its legislation and legal system, the European Court of Human Rights underscores that the margin of appreciation for states is significantly reduced when it comes to granting same-sex couples the opportunity for legal recognition and protection. States enjoy broader discretion regarding the "choices of means", used in the specific legal regime concerning both the form of recognition of same-sex relationships and the content of the protection provided to same-sex couples. Moreover, since the aim of the European Convention on Human Rights is to protect rights that are "concrete, not theoretical or illusory," it is essential that the legal protection for same-sex families be "adequate." In this regard, the ECtHR has addressed issues related to maintenance,

81 Decision No. 17003, issued on 12.12.2019, by the SAC, III panel, in administrative case No. 4245/2018.

taxes, inheritance, and moral obligations (mutual duties of support) that are specific to family life, which would benefit from being regulated within a legal system open to same-sex couples.

The ECtHR highlights that the official recognition of a same-sex couple's relationship holds intrinsic value for the applicants and contributes to the affirmation of their personal and social identity, as guaranteed by Article 8 of the ECHR.[82] It provides the couple with existence and legitimacy in the eyes of the outside world, independent of the legal consequences – whether broader or more limited – that recognition entails.[83] In addition to the need for official recognition, a same-sex couple, like a heterosexual couple, also has "ordinary needs" for protection, as 'the recognition of a couple cannot be separated from its protection.'[84]

This serves as a lesson from the ECtHR to the Bulgarian courts: individuals entitled to legal protection under the ECHR cannot be dehumanised,[85] and the scope of that protection cannot be restricted, even under justifications related to constitutional traditions and the margin of appreciation of Member States. The ECtHR clarifies that the absence of legal recognition for same-sex couples, relegating them to de facto unions that can only regulate their relationships through contracts, fails to provide adequate protection.[86] Consequently, they are unable to assert the existence of their relationship before administrative and judicial authorities or third parties.

In this context, the ECtHR addresses the claims made by the Bulgarian authorities that individuals of same-sex couples possess the same rights as Bulgarian citizens, including the ability to seek protection for their rights and "ordinary needs" from national courts. The necessity to pursue such legal steps is interpreted as an obstacle to respecting their personal and family lives. Given this, the ECtHR concludes that

82 *Koilova and Babulkova v. Bulgaria*. Application No. 40209/2020. European Court of Human Rights, 5 Sept. 2023, §50.

83 Ibid., para. 51.

84 Ibid., para. 52.

85 Frick, 2021, p. 188: '…dehumanisation is defined as an activity that consists of a denial of status as a true/real human being and can be subdivided along the lines of different possible actions and practices. The term "activity" here is used in a broad sense in order to span as many phenomena that constitute a denial of belonging to the group that would be considered (fully) "human." A low-key denial of this sort can already occur where someone holds the view that another person or group of others is not (fully) human. The holding of views, particularly when anthropological/biological and evaluative/normative beliefs conjoin, are hardly ever accidental. Denying that someone is (fully) human presupposes a complex set of beliefs as to what a human being is or should be like. Granted that the thought processes in our minds are not entirely passive but are, in fact, (at least in parts) governed by the choices we make in sorting out and combining (sensual and non-sensual) information as well as reviewing and reiterating it, we can speak of latent dehumanisation. It consists of the holding of views and attitudes according to which another person or group is not ("fully") human.'

86 *Koilova and Babulkova v. Bulgaria*. Application No. 40209/2020. European Court of Human Rights, 5 Sept. 2023, para. 53.

the protection available to same-sex couples in stable relationships in Bulgaria, as reflected in the analysis of national law and the government's description, fails to meet the fundamental needs of the affected individuals.[87]

The judgement in the *Koilova and Babulkova v. Bulgaria* case exposes the shortcomings of the prevailing Bulgarian legal discourse, which undermines the application of Article 8 of the ECHR through vague references to Bulgarian constitutional tradition and public order.

6. Conclusion

The exploration of constitutional identity in Bulgaria reveals a complex interplay between its prevailing understanding rooted in constitutional tradition and traditional values and the protection of human rights. As Bulgaria navigates its role within the European Union and the Council of Europe, the challenge lies in reconciling its constitutional identity with the obligation to uphold human rights. The jurisprudence of the Constitutional Court and the case law of domestic courts illustrate a disturbing development where constitutional identity is invoked to justify restrictions on fundamental rights, particularly affecting transgender individuals and same-sex families. There is a need for a more inclusive understanding of constitutional identity in Bulgaria that embraces contemporary human rights standards while honouring the nation's historical and cultural context. Future discourse should strive to foster a dialogue that bridges the gap between tradition and modernity, ensuring that Bulgaria's constitutional identity evolves to protect the rights and dignity of all its citizens.

87 Ibid., § 54.

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