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BARTOSZ ZALEWSKI

RADCA PRAWNY, ANALITYK W INSTYTUCIE NA RZECZ KULTURY PRAWNEJ ORDO IURIS. ABSOLWENT STUDIÓW PRAWNICZYCH NA WYDZIALE PRAWA I ADMINISTRACJI UNIwersYTETU MARIII CURIE-SKŁODOWSKIEJ. PRACOWNIK NAUKOWO-DYDAKTYCZNY W KATEDRZE PRAWA RZYMSKIEGO UMCS. W TRAKCIE PRZYGOTOWYWANIA ROZPRAWY DOKTORSKIEJ W ZAKRESIE PRAWA RZYMSKIEGO. AUTOR PUBLIKACJI Z ZAKRESU PRAWA RZYMSKIEGO ORAZ HISTORII PRAWA. ZAINTERESOWANIA ZAWODOWE DOTYCZĄCE PRAWA WSPÓŁCZESNEGO KONCENTRUJĄ SIĘ WOKÓŁ KOMPARATYSTYKI PRAWNICZEJ, PRAWA CYWILNEGO I ADMINISTRACYJNEGO ORAZ PRAW CZŁOWIEKA.

GLOSS TO THE
JUDGMENT
NO 13 OF THE
CONSTITUTIONAL
COURT OF THE
REPUBLIC OF
BULGARIA
ISSUED 27 JULY
2018 IN SOFIA

The Council of Europe Convention on preventing and combating violence against women and domestic violence, drawn up on 11 May 2011 in Istanbul and signed by the representatives of the Republic of Bulgaria on 21 April 2016, is incompatible with the Constitution of the Republic of Bulgaria.

1. The discussed ruling of the Bulgarian Constitutional Court was issued in the proceedings initiated by the motion of 75 members of the National Assembly who sought a declaration of incompatibility between Articles 3(c), 12(1) and 14(1) of the Council of Europe Convention on preventing and combating violence against women and domestic violence of 11 May 2011. in Istanbul

(hereinafter: Convention) , in relation to the use of the terms “socially constructed gender roles”, “stereotyped gender roles”, “gender” as objective elements of the concept of sex, and the Constitution of the Republic of Bulgaria, including Art. 46(1) of the Constitution in the context of the risk of legitimisation of the concept of “third sex” by law and creating the possibility for same-sex marriages.

2. By order of 20 March 2018, the Constitutional Tribunal accepted the request for a substantive assessment of the Convention’s compliance with the Constitution and invited institutions interested in the subject matter of the proceedings, non-governmental organisations, as well as representatives of legal science and legal practitioners to present written opinions on the case.

3. The opinion submitted by the President of the Republic of Bulgaria stated that the Convention contains vague concepts and expressions which may raise interpretation problems and be in conflict with the Constitution. The opinion submitted by the Minister of Foreign Affairs of the Republic of Bulgaria stated that the Convention was fully in line with the Basic Law and that the terms “gender”, “socially constructed roles” and “stereotyped roles” borrowed from sociology were known both to the doctrine of international law and to the internal law of Bulgaria. A similar position was adopted in the opinion of the Minister of Justice of the Republic of Bulgaria. However, the Minister of Health did not take a specific position, pointing out, however, the difficulties of interpretation and the foreseeable negative consequences connected with the use of these phrases in the Convention.

4. Five NGOs have also submitted opinions on the matter, most of which considered the Convention to be compatible with the Bulgarian Constitution. Only the Institute of Modern Policy expressed the opposite opinion, indicating that the provisions of the violated the principle of equality between women and men, the principle of legal certainty and, above all, human dignity, which is a fundamental constitutional value.

5. Opinions on the case were also submitted by representatives of the legal science: Prof. Dr. P. Penev, Prof. Dr. P. Kirov and Prof. Dr. D. Valchev. Prof. Dr. P. Penev stated that the Convention - by introducing terminological confusion related to the concept of gender - violated the Bulgarian legal order, and also stressed that its provisions are contrary to Art. 47(1) of the Constitution stating that the upbringing of children before they reach the age of majority is the right and duty of parents, whom the state is only supposed to support. Prof. Dr. P. Kirov expressed the opinion that the Convention is contrary to the Bulgarian Constitution by

introducing a state of legal uncertainty and obliging the Bulgarian State to unduly interfere in the private life of individuals, which is contrary to Art. 32(1) and Art. 47(1) and (2) of the Basic Law. Prof. Dr. D. Valchev, on the other hand, considered that the provisions of the Convention were contrary to the principle of the rule of law as defined in the Preamble and Art. 4(1) of the Constitution, the principle of equality before the law as defined in Art. 6 of the Basic Law and the obligation of the Bulgarian State to provide special protection to mothers as referred to in Art. 47(2) of the Constitution.

6. In the ruling voted, the Constitutional Court made a general description of the activities of the Council of Europe so far concerning the prevention of violence against women, as well as the origin and the text of the Convention itself. The Constitutional Court also pointed out that the basis for the review of the constitutionality of the Convention must be its translation into Bulgarian, which was submitted in the case by the Council of Ministers of the Republic of Bulgaria. However, in view of the shortcomings of the translation in question, the Court also refers to the authentic texts of the Convention in English and French.

7. The Constitutional Tribunal referred to the objectives of the Convention declared in Art. 1(1): to protect women against all forms of violence and to prevent, prosecute and eliminate violence against women and domestic violence; to contribute to the elimination of all forms of discrimination against women and the promotion of substantive equality in all its forms and to the effective empowerment of women and men also by means of empowering women; to develop a comprehensive framework, policies and measures to protect and assist all victims of violence against women and domestic violence; to promote international cooperation to eliminate violence against women and domestic violence; to provide support and assistance to organisations and law enforcement agencies to cooperate effectively in developing an integrated approach to the elimination of violence against women and domestic violence.

8. The Court, while emphasising the reference contained in the Preamble to the Bulgarian Basic Law to the commitment of citizens to universal values such as humanism, equality, justice and tolerance, stated that these objectives are fully in line with the fundamental constitutional principles of the Republic of Bulgaria. In support of this argument, the Court referred to several acts of Bulgarian national law which aim at protecting human rights, preventing violence against women and children and eliminating all forms of discrimination.

9. At the same time, the Court strongly emphasised that, despite numerous positive aspects which are undeniable, the Convention is an intrinsically contradictory act and that this contradiction makes the Convention a two-tier document. The content of certain provisions of the Convention goes, therefore, beyond its declared objectives.

10. The Court pointed out that in Art. 1(1)(a) and (b) of the Convention, its authors used the term ‘woman’, which is undoubtedly based on the biological meaning of sex. At the same time, Art. 3(c), in the authentic language versions of the Convention, contains the term *gender* (eng.) and *genre* (fr.), translated into Bulgarian as ‘sex’. (пол), whereas in art. 4(3), the same term *gender/genre* was translated as “social sex/gender” (социален пол), where it is used together with the biological sex (eng. *sex*, fr. *sexe*)¹. As noted by the Court, in this way, the biological sex and the social sex (gender/genre), perceived subjectively by both the individual and the society from the perspective of the roles attributed to women and men, are elevated under the Convention to autonomous and equivalent categories.

11. The Court also found that the concept of *gender/genre* appears in the Convention as a category independent of *sex*, and that the Convention, therefore, goes beyond the perception of the human sex as a binary category. The Court rightly points out that the term *gender/genre* appears in a number of provisions of the Convention (Art. 2(2); Art. 3(c); Art. 4(3); Art. 6; Art. 14; Art. 18; Art. 49(2); Art. 60(2) and (3)) and is used in various constellations: *gender equality* (in the Preamble to the Convention - however, in French, reference is made to biological sex: **égalité entre les femmes et les hommes**), *gender-based violence/violence fondée sur le genre* (Preamble and art. 2, 3, 4 as well as 14), *gender identity/l’identité de genre* (art. 4(3)), *gender-sensitive policies/politiques sensibles au genre* (art. 6), *gender perspective/perspective de genre* (art. 6), *non-stereotyped gender roles/les rôles non stéréotypés des genres* (art. 14), *gendered understanding of violence/compréhension fondée sur le genre de la violence* (art. 18, art. 49(2)), *gender-based asylum claims/demandes d’asile fondées sur le genre* (art. 60), *gender-sensitive interpretation/interprétation sensible au genre* (art. 60(2)), *gender-sensitive reception procedures/procédures d’accueil sensibles au genre* (art. 60(3))².

12. The Court also referred to the Explanatory Report to the Convention, which states that Art. 4(3) of the Convention also applies to persons who do not identify themselves with neither male nor female sex³. As stated by the Bulgarian court of law: “although the Convention does not regulate the specific rights of *transgender people*, it is the first international treaty signed by the

1 Similarly, the Polish translation uses the terms “sex” [pl. *pleć*], “socio-cultural sex” [pl. *pleć społeczno-kulturowa*] and “biological sex” [pl. *pleć biologiczna*], which leads to a far-reaching terminological disorder, making it difficult to interpret the provisions of the Convention systematically.

2 In total, the term *gender* is used 25 times in the English language version of the Convention.

3 Council of Europe, *Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence*, Treaty Series No. 210, § 53.

Republic of Bulgaria which explicitly includes in Art. 4(3) the attribute of «gender identity» as a ground for non-discrimination.” The Court concludes that the incorporation into the Convention of such constructs as the *gender* (*genre/социален пол*) and *gender identity* (*l’identité de genre/идентичност, основана на пола*) can result in the suppression of sex in the biological sense and lead to a situation, wherein the choice of sex depends on the will of the individual. In the Court’s view, such a state “expresses aspects of «gender ideology» - a set of ideas, convictions and beliefs that biologically determined gender characteristics are irrelevant and that only gender self-identification is relevant”. In the Court’s view, the introduction of separate sex concepts (biological and socio-cultural) weakens the possibility of achieving the main objective of the Convention, which is to protect women against all forms of violence.

13. The Court points out that Art. 6(2) of the Constitution, which states that all citizens are equal before the law and that special preference or, on the contrary, restriction of individual rights on account of circumstances such as, inter alia, sex, is prohibited, refers to sex as a biological category which, in the light of the case-law of the Court to date, is not of an acquired nature or subject to change in the course of socialisation processes⁴. The Court also referred to Art. 47(2) of the Constitution, under which mothers are granted special protection by the State, which guarantees them a leave both before and after childbirth, free maternity care, reduced working conditions and various other social welfare measures. The Court points out that it is clear from that provision that ‘woman’, as a biological sex, is linked to the social role assigned to it (mainly that of ‘mother’, to whom the State guarantees ‘obstetric care’). In the Bulgarian Constitution - concludes the Court - sex is a holistic concept, as it covers both the biologically determined aspect and the social role assigned to women. The Court also pointed out that the same is true of the Rome Statute of the International Criminal Court, which expressly states that: “For the purposes of this Statute, the term «gender» refers to two sexes, male and female, within the context of society. The term «gender» does not indicate any meaning different from the above” (Art. 7(3))⁵.

14. As further indicated by the Court: “Traditionally, human society has been based on sex binarism, that is, on the existence of two opposing sexes, each of which is burdened with specific biological and social functions and duties. Biological sex is determined at birth and is the basis for the establishment of civil sex. The importance of civil sex for the legal regulation of social relations (co-existence, parenthood) requires clarity, undeniability,

⁴ Judgment of the Constitutional Court of the Republic of Bulgaria No 14 of 11 October 1992 on constitutional case no. 14/92.

⁵ United Nations, Treaty Series vol. 2187, New York 2004.

stability and security.” The Court also referred to Art. 46(1) of the Bulgarian Constitution, which indicates that the essential feature of marriage is the difference between the sexes of spouses. According to this provision, marriage is a “voluntary union of a woman and a man”.

15. Significantly, the Bulgarian Constitutional Court challenged the compatibility of the provisions of the Convention with the principle of the rule of law. To date, the Court’s jurisprudence has distinguished between the substantive and formal rule of law. The material aspect of the rule of law - in the jurisprudence of the Court - means the obligation to enact a just law, while the formal aspect refers to the postulate of legal certainty⁶. The Convention infringes the principle of legal certainty, according to which the content of the terms used by the legislator must be clear and unambiguous. “The requirement of legal certainty and predictability excludes the existence of two parallel and mutually exclusive concepts of «sex»” - stated the Court.

16. The decision of the Bulgarian Constitutional Court should be applauded. The Court rightly recognises that the “two-tier” nature of the Convention is its greatest weakness, and the ideologically based provisions related to the construction of the gender, which determine the understanding of the entire legal act, constitute a significant threat to the traditional social order. The need to take into account the *gender perspective* when implementing the Convention (see Art. 6) makes it a kind of interpretative directive for all provisions of the Convention.

17. Therefore, although the Convention fails to create direct rights and obligations on the part of individuals⁷, it may contribute to the decomposition of the existing social order based on a bipolar distinction between the male and the female sex, which should be established on the basis of data from the human genotype, where satisfactory results cannot be obtained from external examination of gender characteristics. In principle, the Convention is addressed to States Parties, which are obliged to modify their national legislation in a manner consistent with the provisions of the Convention.

18. The introduction of the concept of *gender* into national legislation will lead to the approval of the thesis that it would be possible to make a subjective individual choice between the male and the female sex (or even the so-called ‘third gender’) independently of biological conditions⁸. The effects of such legislative changes are difficult to predict, nonetheless, one may assume that this will lead to the distribution of the natural identity of marriage as a relationship between a man and a woman, and will violate a number of norms of procedural nature, serving to

⁶ Judgment of the Constitutional Court of the Republic of Bulgaria No 1 of 27 January 2005 on constitutional case no. 8/2004.

⁷ Council of Europe, *Explanatory Report...*, § 47; J. Banasiuk [red.] *et al.*, *Czy Polska powinna ratyfikować Konwencję Rady Europy o zapobieganiu i przeciwdziałaniu przemocy wobec kobiet i przemocy domowej?*, Warszawa 2014, p. 23.

⁸ For example, the German Constitutional Tribunal held that the German Constitution (Grundgesetz) does not preclude the introduction of the concept of “third sex” - see the judgment of the First Senate of the Federal Constitutional Tribunal of 10 October 2017, Case 1 BvR 2019/16, par. 3, letter a.

protect public morals and the intimacy of individuals, which, in connection with the need for separation of women and men on the basis of an assessment of their biological characteristics, may be regarded as discriminatory measures (such as, for example, the selection of prisoners in prisons on the basis of their sex) and will contribute, paradoxically, to undermining the measures aimed at providing women with specific protection against the various forms of violence that are mainly used against them because of their specific biological characteristics.

19. The consequences of the acceptance of the term *gender* in the legal system can already be seen in certain countries, including, inter alia, the Federal Republic of Germany, where already in 2011 it was recognised that human sex is not determined by biological factors, but by socio-cultural ones, and, therefore, the requirement that the change of the registered sex must be preceded by a surgical procedure to change one's phenotypical characteristics⁹.

20. What should be particularly welcomed, is the Court's recognition that the provisions of the Convention are contrary to the principle of the rule of law in the formal sense. Even because of its editorial shortcomings, the Convention introduces a far-reaching state of legal uncertainty with regard to the concept of sex, which is fundamental from the social point of view. The use of the term *gender* (fr. *genre*) and *gender identity* (fr. *l'identité de genre*), which are at least synonymous in their content, by the authors of the Convention should be considered the most troublesome. However, the inclusion thereof in a single provision (Art. 4(3) of the Convention) explicitly suggests that they refer to a different set of characteristics on the basis of which an individual may be discriminated against. The authors of the Explanatory Report to the Convention, failed, nevertheless, to undertake a precise assessment of the relationship between these concepts.

21. On the contrary, what constitutes the Court's failure, is the fact that the question of the contradiction between Art. 14(1) of the Convention and Art. 47(1) of the Bulgarian Constitution has not been raised. Art. 14 of the Convention provides that, where appropriate, States Parties shall take the necessary measures to introduce into official curricula at all levels of education materials concerning, inter alia, *non-stereotyped gender roles* (*l'identité de genre*). This raises a fundamental reservation from the point of view of the right of parents to raise their child in accordance with their own convictions, which should be derived from Art. 47(1) of the Constitution. This may also undermine the child's right to freedom of thought, conscience and religion as referred to in Art. 14(1) of the Convention on the Rights of the Child¹⁰. Given that the

⁹ See judgment of the First Senate of the FTC of 11 January 2011, Case 1 BvR 3295/07.

¹⁰ United Nations, Treaty Series vol. 1577, New York 1999.

Convention itself is strongly ideological in nature, it is likely that the educational programmes implementing its recommendations will bear the same burden.

22. In conclusion, it should be stated that the voted ruling deserves to be approved. Significantly, most of the reservations raised by the Bulgarian Constitutional Tribunal would remain valid also in Polish conditions. The Convention remains an act completely incompatible with the axiology of the Polish Constitution and, as it appears, is contrary to its numerous provisions (such as Articles 2, 18, 25 and 48 of the Constitution of the Republic of Poland).

SŁOWA KLUCZOWE/KEYWORDS

Konwencja Rady Europy o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej, Trybunał Konstytucyjny Republiki Bułgarii

The Constitutional Court of the Republic of Bulgaria, Convention on preventing and combating violence against women and domestic violence