

## Nature versus Nurture: ‘Sex’ and ‘Gender’ before the Romanian Constitutional Court

### A Critical Analysis of Decision 907/2020 on the Unconstitutionality of Banning Gender Perspectives in Education and Research

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#### INTRODUCTION

Anti-gender groups have proliferated around Europe and beyond.<sup>1</sup> These groups are known to advocate against ‘gender ideology’ – an umbrella term used to

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<sup>1</sup>See E. Kováts, ‘The Emergence of Powerful Anti-Gender Movements in Europe and the Crisis of Liberal Democracy’, in M. Köttig et al., (eds.), *Gender and Far Right Politics in Europe* (Springer International Publishing 2017) p. 175 at p. 175-185; R. Kuhar and D. Paternotte (eds.),

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legitimise attacks on gender equality, women's rights, particularly sexual and reproductive rights, LGBT+ rights, and comprehensive sexuality education. 'Gender ideology' is an 'empty signifier',<sup>2</sup> a vacuous catch-all term, which allows diverse actors to form coalitions precisely because of the vagueness of the term that is intended to denote a general 'rejection of the development of family policies, gender equality, gender studies, sexuality policies and sex education'.<sup>3</sup> In effect, it works as a successful rallying cry that can unite a broad range of actors with opposing ideologies to galvanise support for measures that are perceived to be protecting 'traditional values'.

Education and research on gender issues, as well as gender studies – an interdisciplinary academic area inquiring into issues concerning gender identity and representation of groups such as women, men and queer individuals – are currently a central target of the anti-gender movement.<sup>4</sup> In the summer of 2020, the Romanian Parliament adopted a bill that aimed to ban 'activities aimed at spreading gender identity theory or opinion' in 'all educational entities and institutions and all spaces that are assigned for education and professional training, including entities that provide extracurricular education'.<sup>5</sup> The 'gender identity theory or opinion' was defined as 'the theory or opinion according to which gender is a concept that is different from the biological sex and that the two are not always the same'.<sup>6</sup> This definition is in line with the anti-gender movement's rejection of the distinction between 'sex' (which designates the biological differences between men, women and intersex people) and 'gender' (a social construct influenced by economic, political, cultural and other social factors shaping the perception of what the roles and behaviours of men and women should be). In short, the definition is consistent with the anti-gender movement's rejection of the idea that gender roles are not 'natural', but 'nurtured'.<sup>7</sup>

*Anti-Gender Campaigns in Europe: Mobilizing against Equality* (Rowman & Littlefield International 2017); L. Sosa, 'Beyond Gender Equality? Anti-Gender Campaigns and the Erosion of Human Rights and Democracy', 39 *Netherlands Quarterly of Human Rights* (2021) p. 3 at p. 4.

<sup>2</sup>D. Paternotte and R. Kuhar, 'Introduction', in Kuhar and Paternotte, *supra* n. 1, p. 1 at p. 15.

<sup>3</sup>S. Mayer and B. Sauer, "'Gender ideology" in Austria: Coalitions around an Empty Signifier', in Kuhar and Paternotte, *supra* n. 1, p. 23.

<sup>4</sup>M. Antić and I. Radačić, 'The Evolving Understanding of Gender in International Law and "Gender Ideology" Pushback 25 years since the Beijing Conference on Women', 83 *Women's Studies International Forum* (2020) p. 1 at p. 5-6.

<sup>5</sup>Parlamentul României [Romanian Parliament], *Lege pentru modificarea art. 7 din Legea educației naționale nr. 1/2011* [Law for amending and completing the Law on National Education no. 1/2011], Pl-x nr. 617/2019, 17 June 2020, (<https://senat.ro/legis/PDF/2020/20L087LP.PDF>), visited 6 January 2022. Authors' translation.

<sup>6</sup>*Ibid.*, Art. 7(1)(e). Authors' translation.

<sup>7</sup>Anti-gender groups claim that the idea that gender roles are not 'natural' but 'nurtured' is not scientifically proven and instead has an 'ideological' nature, being a danger to society through its

The enactment of this legislative proposal would have banned any kind of educational activities and research on gender issues in Romania. In fact, the ban would have covered a plethora of activities, ranging from gender studies in universities to any other educational activities that touched on ‘gender’, such as activities meant to combat gender discrimination through education or gender equality trainings in the workplace. Notably, given the way it was framed, the ban could have also prohibited gender-sensitive research in any discipline, be it law, political science, sociology, history, or medicine. In practical terms this would have meant, for example, that a research project on assisted reproduction technologies could not have included a gender component willing to scrutinise ‘the natural’ role of men and women in reproduction; likewise, to give another example, research projects on the use of artificial intelligence could not have scrutinised the gender bias of different algorithms and so on. Such a ban would have also had a serious impact on Romanian universities’ ability to collaborate in international research projects with a gender component, but also on the accuracy of research itself.<sup>8</sup> Nevertheless, in December 2020, the ban was declared unconstitutional by the Constitutional Court of Romania in a decision supported by seven of the nine judges sitting on the bench.

This article provides a critical analysis of the Constitutional Court’s decision.<sup>9</sup> Following this introduction, in the second section, the paper offers an overview of the regional and national context needed to understand the origins of the Romanian ban on gender perspectives in education and research. This paves the way to the third section, which discusses the Constitutional Court’s decision, with a focus on its examination of the definition of ‘gender’ and the grounds on which it found the bill unconstitutional. To understand the reasons why the decision was not unanimous, the fourth section offers an overview of the dissenting opinion signed by two of the nine constitutional judges. Finally, in the fifth section, the paper formulates some possible hypotheses concerning the reasons why the Constitutional Court went against the regional trend of ‘anti-gender’

potential to ‘destroy’ the traditional gender roles and ‘encourage’ children to become homosexuals or change their gender. For this reason, anti-gender groups oppose any measures meant to achieve gender equality through altering gender roles.

<sup>8</sup>See the *amicus curiae* brief sent by Școala Națională de Studii Politice și Administrative (SNSPA) [National School of Political Science and Public Administration] to the Constitutional Court of Romania regarding the unconstitutionality of banning gender perspectives in education and research, nr. 516, 24 September 2020, (<http://snspa.ro/wp-content/uploads/2020/09/Amicus-Curiae.pdf>), visited 6 January 2022, p. 8–9.

<sup>9</sup>Constitutional Court of Romania, Decision 907/2020 published in the Official Gazette no. 68, 21 January 2021, ([https://www.ccr.ro/wp-content/uploads/2021/01/Decizie\\_907\\_2020.pdf](https://www.ccr.ro/wp-content/uploads/2021/01/Decizie_907_2020.pdf)), visited 6 January 2022.

measures in Eastern Europe and declared the bill unconstitutional,<sup>10</sup> thus setting some directions for further research on the topic.

#### BANNING GENDER PERSPECTIVES IN EDUCATION AND RESEARCH IN ROMANIA: THE REGIONAL AND NATIONAL CONTEXT

In the context of growing populism and the coming to power of nationalist groups, Eastern Europe has proved to be a fertile ground for conservatives fighting against 'gender ideology'.<sup>11</sup> Countries in the region have seen numerous attacks on women's reproductive rights,<sup>12</sup> LGBT+ rights,<sup>13</sup> and on gender studies. For example, in 2018, Hungary ended the accreditation of gender studies programs in higher education<sup>14</sup> and in 2021 adopted a law that bans any activities that 'promote' or 'encourage' homosexuality or gender change among children in schools or on TV.<sup>15</sup> Similarly, in 2020 in Poland a Government official called for a ban on promoting 'LGBT ideology' and gender studies in schools and universities.<sup>16</sup>

<sup>10</sup>G. Epure and E. Brodeală, 'Going Against the Tide: The Romanian Constitutional Court Rejects a Ban on Gender Studies', *International Journal of Constitutional Law Blog*, 21 March 2021, (<http://www.iconnectblog.com/2021/03/going-against-the-tide-the-romanian-constitutional-court-rejects-a-ban-on-gender-studies/>), visited 6 January 2022.

<sup>11</sup>For an article reflecting on populists, gender and national identity in Central Eastern Europe see A. Śledzińska-Simon, 'Populists, Gender, and National Identity', 18 *International Journal of Constitutional Law* (2020) p. 447-454.

<sup>12</sup>See for example the restriction of abortion in Poland in E. Łętowska, 'A Tragic Constitutional Court Judgment on Abortion', *Verfassungsblog*, 12 November 2020, (<https://verfassungsblog.de/a-tragic-constitutional-court-judgment-on-abortion/>), visited 6 January 2022.

<sup>13</sup>See for example K. Knight and L. Gall, 'Hungary Ends Legal Recognition for Transgender and Intersex People', *Human Rights Watch*, 21 May 2020, (<https://www.hrw.org/news/2020/05/21/hungary-ends-legal-recognition-transgender-and-intersex-people>), visited 6 January 2022.

<sup>14</sup>A. Zsubori, 'Gender Studies Banned at University – the Hungarian Government's Latest Attack on Equality', *The Conversation*, 9 October 2018, (<https://theconversation.com/gender-studies-banned-at-university-the-hungarian-governments-latest-attack-on-equality-103150>), visited 6 January 2022; A. Pető, 'Feminist Stories from an Illiberal State: Revoking the License to Teach Gender Studies in Hungary at a University in Exile (CEU)', in K. Bluhm et al (eds.), *Gender and Power in Eastern Europe: Changing Concepts of Femininity and Masculinity in Power Relations* (Springer International Publishing 2021) p. 35 at p. 36-37.

<sup>15</sup>J. Rankin, 'Hungary Passes Law Banning LGBT Content in Schools or Kids' TV', *The Guardian*, 15 June 2021, (<https://www.theguardian.com/world/2021/jun/15/hungary-passes-law-banning-lbgt-content-in-schools>), visited 6 January 2022.

<sup>16</sup>D. Tilles, 'Minister Calls for Ban on "LGBT Ideology" and Gender Studies at Polish Universities and Schools', *Notes From Poland*, 10 September 2020, (<https://notesfrompoland.com/2020/09/10/minister-calls-for-ban-on-lgbt-ideology-and-gender-studies-at-polish-universities-and-schools/>), visited 6 January 2022.

Constitutional courts in Eastern Europe have been confronted with several cases meant to further an ‘anti-gender ideology’ agenda. For instance, in 2018, Bulgaria’s Constitutional Court found that the ratification of Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention) would be unconstitutional.<sup>17</sup> According to the Bulgarian Constitutional Court, because of its references to ‘gender’ and ‘gender identity’, the Convention would have introduced ‘unclear’ or ‘ambiguous’ concepts in the domestic legal system, which would have been contrary to the principle of legal certainty.<sup>18</sup> A similar case is pending before the Polish Constitutional Tribunal after the Law and Justice Government asked the Tribunal in the summer of 2020 to examine whether the Istanbul Convention is in line with the Polish Constitution, claiming that it contains elements of an ‘ideological’ nature.<sup>19</sup> Another application contesting the ratification of the Istanbul Convention was lodged before the Moldavian Constitutional Court,<sup>20</sup> being fuelled by – among other things – the fear that the Istanbul Convention ‘denies the reality of the existence of a man and a woman’<sup>21</sup> and is ‘a Trojan Horse to introduce a “third sex” and “gay marriage”’.<sup>22</sup> The so-called gender-ideological nature of the Istanbul Convention was also invoked by Turkey

<sup>17</sup>R. Smilova, ‘Promoting “Gender Ideology”: Constitutional Court of Bulgaria Declares Istanbul Convention Unconstitutional’, *Oxford Human Rights Hub*, 22 August 2018, (<https://ohrh.law.ox.ac.uk/promoting-gender-ideology-constitutional-court-of-bulgaria-declares-istanbul-convention-unconstitutional/>), visited 6 January 2022; R. Smilova, ‘The Ideological Turn in Bulgarian Constitutional Discourse. The Rise Against ‘Genders’, in A. Sajó and R. Uitz (eds.), *Critical Essays on Human Rights Criticism* (Eleven International Publishing 2020) p. 177 at p. 177-197.

<sup>18</sup>Smilova (2018), *supra* n. 17; Smilova (2020), *supra* n. 17, p. 194-195.

<sup>19</sup>J. Plucinska, ‘Heightening EU Frictions, Poland Queries Pact on Violence against Women’, *Reuters*, 30 July 2020, (<https://www.reuters.com/article/us-poland-politics-idUSKCN24V1UU>), visited 6 January 2022; H. Wiczanowska, ‘Poland to Withdraw from the Istanbul Convention on Combatting Domestic Violence Against Women’, 2 *V4 Human Rights Review* (2020) p. 26 at p. 26-27.

<sup>20</sup>For a detailed account of the background of the application see ‘Amicus Curiae Brief for the Constitutional Court of Moldova on the Constitutional Implications of the Ratification of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention)’, adopted by the Venice Commission at its 129th Plenary Session (10-11 December 2021), p. 3-7, ([https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2021\)044-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)044-e)), visited 6 January 2022. The application was declared inadmissible by the Moldavian Constitutional Court on 18 January 2022.

<sup>21</sup>*Ibid.*, p. 6.

<sup>22</sup>*Ibid.*

to justify its decision to withdraw from the Convention, asserting that it threatens 'family values' and 'normalises homosexuality'.<sup>23</sup>

Despite the absence of a far-right party in the Parliament since 2008 until very recently<sup>24</sup> – and being an outlier in the region from this point of view – Romania has also seen the rise of conservative groups committed to fighting against 'gender ideology' on the legal and constitutional fronts.<sup>25</sup> After a smooth ratification of the Istanbul Convention in 2016,<sup>26</sup> conservative civil society actors and their lawyers have denounced the Convention for promoting gender as a socially-constructed concept, claiming – among other things – that it 'promotes' homosexuality and 'transgenderism'.<sup>27</sup> Conservative groups also managed to launch the first citizens' initiative to review the Constitution that met all the necessary legal requirements to be put to a national referendum, including a two-thirds supermajority vote in both chambers of the Parliament and two reviews by the Constitutional Court.<sup>28</sup> The initiative, which gathered nearly three million signatures from across the country, was meant to explicitly define marriage as the union between a man and a woman in the constitutional text and, thus, enshrine gender stereotypes in Romania's fundamental

<sup>23</sup> Presidency of the Republic of Türkiye, 'Statement by the Directorate of Communications on Türkiye's Withdrawal from the Istanbul Convention', (<https://www.iletisim.gov.tr/english/duyurular/detay/statement-by-the-directorate-of-communications-on-turkiyes-withdrawal-from-the-istanbul-convention>), visited 6 January 2022.

<sup>24</sup> A. Heil et al., 'Surprise "Gold" Rush Hurtles Right-Wing Party into Thick of Romanian Politics', *RadioFreeEurope/RadioLiberty*, 8 December 2020, (<https://www.rferl.org/a/romania-aur-right-wing-party-simion-voter-despair-nationalism/30990719.html>), visited 6 January 2022.

<sup>25</sup> It was only after the parliamentary election of December 2020 that the Alliance for the Union of Romanians (AUR) – a party whose program is openly opposing 'gender ideology' – obtained enough votes to enter the Parliament. On its website, AUR explicitly states that: 'We oppose gender ideology (particularly the introduction of gender-ideology-based sexual education in schools), public-funded abortion and legal abortion-on-demand (except in medically warranted and other clearly-specified cases). . . . We oppose homosexual marriage, . . . publicly-funded trans-sexual surgery, and other Freud-Marxism-inspired "innovations" meant to fluidize, relativize, and eventually abolish the traditional moral paradigm and the natural, biological realities'. See AUR, 'About AUR', (<https://www.partidulaur.ro/english>), visited 6 January 2022.

<sup>26</sup> C. Danileț, 'România a Ratificat Convenția de la Istanbul' [Romania Ratified the Istanbul Convention], *Juridice.ro*, 2 March 2016, (<https://www.juridice.ro/430430/romania-a-ratificat-conventia-de-la-istanbul.html>), visited 6 January 2022.

<sup>27</sup> A. Portaru, 'Convenția de la Istanbul: Analiză și Implicații' [The Istanbul Convention: Analysis and Implications], *Juridice.ro*, 10 August 2017, (<https://www.juridice.ro/459023/conventia-de-la-istanbul.html>), visited 6 January 2022; A.C. Săcrieru, 'Consecințele Juridice ale Normativizării Ideologiei de Gen în România' [The Legal Consequences of Regulating Gender Ideology in Romania], *Juridice.ro*, 30 July 2018, (<https://www.juridice.ro/594535/consecintele-juridice-ale-normativizarii-ideologiei-de-gen-in-romania.html>), visited 6 January 2022.

<sup>28</sup> See D. Margarit, 'LGBTQ Rights, Conservative Backlash and the Constitutional Definition of Marriage in Romania', 26 *Gender, Place & Culture* (2019) p. 1570 at p. 1570-1587.

law.<sup>29</sup> Although the referendum eventually failed (on account of not meeting the required participation quorum)<sup>30</sup> conservative groups have continued their fight against ‘gender ideology’, which ultimately materialised in a legislative proposal that sought to amend the National Education Law in order to ban ‘activities aimed at spreading gender identity theory or opinion’ in all educational settings.

Unlike in other countries in the region, such as Hungary, where attacks on studying gender issues initially targeted ‘just’ the prohibition of university gender studies programs, the ban in Romania was formulated in much wider terms. Arguably, the ban sought to eliminate any kind of educational activity, including research, teaching or professional development training that would ‘promote’ the idea that gender is a social construct different to biological sex. This means that not only gender studies per se were targeted, but also every educational, research or professional development activity undertaking a gender perspective. In the memorandum accompanying the legislative proposal, the need for such a ban was succinctly justified on the ground that the emergence of ‘gender ideology’ has rendered ‘gender and sex proselytism’ a ‘real danger’ in the educational system.<sup>31</sup> The memorandum made no reference to any studies or factual cases to support such claims. Nevertheless, according to the initiators of the legislative proposal, the ban was necessary to protect children, youth, and the teaching staff, and counter activities that breach the ‘norms of morality’.<sup>32</sup> In this context, the poorly drafted memorandum of the legislative proposal contravened the requirement of duly substantiating the need to adopt a law, as developed by the Romanian Constitutional Court in its case law.<sup>33</sup>

<sup>29</sup>See Agerpres, ‘Gheorghiu (Platforma Civică Împreună): Ideologia de Gen a Devenit în România Politică de Stat’ [Gheorghiu (Civic Platform Together): Gender Ideology Has Become a State Policy in Romania], *Agerpres*, 3 September 2018, <<https://www.agerpres.ro/social/2018/09/03/gheorghiu-platforma-civica-impreuna-ideologia-de-gen-a-devenit-in-romania-politica-de-stat-169742>>, visited 17 January 2022.

<sup>30</sup>On some of the possible reasons for the low turnout to the referendum see S. Gherghina et al., ‘Non-Voting in the 2018 Romanian Referendum: The Importance of Initiators, Campaigning and Issue Saliency’, 71 *Political Science* (2019) p. 193 at p.193-213; E. Brodeală, ‘Why Referendums on Human Rights Are a Bad Idea: Reflecting on Romania’s Failed Referendum on the Traditional Family from the Perspective of Comparative Law’, *The Comparative Jurist*, 11 November 2018, <<https://comparativejurist.org/2018/11/11/why-referendums-on-human-rights-are-a-bad-idea-reflecting-on-romania-s-failed-referendum-on-the-traditional-family-from-the-perspective-of-comparative-law/>>, visited 6 January 2022.

<sup>31</sup>Chamber of Deputies, Memorandum of the Legislative Proposal Pl-x no. 617/2019, <<http://www.cdep.ro/proiecte/2019/600/10/7/em821.pdf>>, visited 6 January 2022.

<sup>32</sup>Ibid.

<sup>33</sup>See Constitutional Court of Romania, Decision 139/2019, paras. 79, 81. Although this could have been a ground of unconstitutionality in itself, the Court made no reference to it when analysing the compliance of the legislative proposal with the Constitution.

The legislative proposal was 'tacitly adopted' (i.e. by overpassing the deadline for debate)<sup>34</sup> by the Chamber of Deputies on 11 February 2020 and by the Senate on 16 June of the same year by a large margin (81 votes for, 22 against and 27 abstentions). Unsurprisingly, the Parliament's adoption of the legislative proposal sparked serious opposition from gender equality<sup>35</sup> and LGBT+ groups,<sup>36</sup> as well as a nationwide debate, which continued before the Constitutional Court once the President refused to promulgate it and referred it for a constitutional review on 10 July 2020.<sup>37</sup>

Going against the regional trend of 'backsliding' on gender equality in Eastern Europe,<sup>38</sup> in Decision 907/2020, the Constitutional Court found the legislative proposal to be unconstitutional.<sup>39</sup> In this rather detailed decision, the Court held that 'gender' and 'sex' are different concepts under Romania's legal system and that banning research and education touching on the difference between these concepts would contravene the Romanian Constitution.<sup>40</sup>

Before proceeding to an analysis of the Court's decision, it is important to point to the impressive engagement of civil society groups with the Constitutional Court on the issue of banning gender education and research.

<sup>34</sup>In accordance with Art. 75(2) of the Romanian Constitution.

<sup>35</sup>See for example the open letter of the Coalition for Gender Equality, 'Solicita m Presedintelui Iohannis s  nu Promulge Legea de Interzicere a Educa iei Despre Identitatea  i Egalitatea de Gen' [We Call on President Iohannis Not to Promulgate the Law Banning Education on Gender Identity and Equality], *Coali ia Pentru Egalitate de Gen*, 17 June 2020, (<https://ongen.ro/2020/06/17/solicitam-presedintelui-johannis-sa-nu-promulge-legea-de-interzicere-a-educatiei-despre-identitatea-si-egalitatea-de-gen/>), visited 6 January 2022.

<sup>36</sup>O.N., 'Senatul Interzice Orice Referire la Identitatea de Gen  n  coli' [The Senate Bans Any Reference to Gender Identity in Schools], *HotNews.ro*, 16 June 2020, (<https://www.hotnews.ro/stiri-educatie-24088690-senatul-interzice-orice-referire-identitatea-gen-scoli-alexandrescu-vor-desfiintate-masterate-asociatia-accept-cere-presedintelui-retrimiteria-parlament-legii.htm>), visited 6 January 2022.

<sup>37</sup>President of Romania, 'Sesizare de Neconstitu ionalitate asupra Legii Pentru Modificarea Art. 7 din Legea Educa iei Na ionale nr. 1/2011 [Application on the Unconstitutionality of the Law to Amend Art. 7 of the National Education Law no. 1/2011]', sent by the President of Romania to the CCR on 10 July 2020, Dosar [File] nr. 959A/2020, (<http://www.cdep.ro/proiecte/2019/600/10/7/959A.PDF>), visited 6 January 2022.

<sup>38</sup>See A. Krizsan and C. Roggeband (eds.), *Gendering Democratic Backsliding in Central and Eastern Europe. A Comparative Agenda* (CEU 2019).

<sup>39</sup>Constitutional Court of Romania, Decision 907/2020.

<sup>40</sup>Ibid. The position of the Constitutional Court of Romania is not unique. In 2020, in Brazil, the Supreme Court struck down a series of state laws that banned learning materials with information on 'gender ideology' in municipal schools, upholding children's right to comprehensive sexuality education, freedom of expression, right to health and education, and the non-discrimination principle: see C.G. Cabrera, 'Supreme Court Strikes Down Bigotry in Brazil's Schools', *Human Rights Watch*, 19 May 2020, (<https://www.hrw.org/news/2020/05/19/supreme-court-strikes-down-bigotry-brazils-schools>), visited 6 January 2022.



A remarkable number of 12 *amici curiae* briefs were submitted to the Court in this case (including from international non-governmental organisations): eight that argued for the unconstitutionality of the ban and four that argued that it was constitutional.<sup>41</sup> Whilst such civil society mobilisation before the Court deserves further analysis, in particular seeking to understand the factors that account for this serious engagement of non-governmental organisations with the Court on gender matters, as well as its impact, this is beyond the scope of this article.

### ANALYSIS OF THE CONSTITUTIONAL COURT'S DECISION

Decision 907/2020 of the Constitutional Court, adopted with seven to two votes on 16 December 2020 and made public in full on 21 January 2021, was widely celebrated by gender equality supporters in Romania. Compared to other cases in which the Court dealt with LGBT+<sup>42</sup> or gender equality issues,<sup>43</sup> the decision is unusually detailed in explaining why the legislative proposal was unconstitutional. Despite its relative thoroughness, however, the decision contains certain elliptical and unclear formulations which often make the analysis of the Court's reasoning challenging. In addition, as we argue below, the decision uses different methods of interpretation in a questionable manner. It is important to mention, nonetheless, that these are recurring shortcomings in the Constitutional Court's case law and are not characteristic to Decision 907/2020 alone.

Before engaging with the unconstitutionality complaints of the President, the Court found it necessary to clarify the meaning of 'gender' and 'sex' under the Romanian Constitution, even if, in his request for a constitutional review, the President did not invoke any explicit arguments related to gender or sex (equality). Since from a gender equality point of view this can be seen as the 'core' of the decision, this section starts by discussing the reasoning of the Court as regards the distinction between 'gender' and 'sex'. Following this, the article examines the way in which the Court positioned itself vis-à-vis each of the President's complaints.

<sup>41</sup>Constitutional Court of Romania, Decision 907/2020, paras. 41–42.

<sup>42</sup>See V. Perju, 'Neprofesionalismul Curții Constituționale: Despre Avizul Pozitiv Dat Inițiativei de Modificare a Definiției Căsătoriei în Constituția României' [The Lack of Professionalism of the Constitutional Court: On the Positive Opinion Regarding the Initiative to Change the Definition of Marriage in the Romanian Constitution], *Contributors*, 16 October 2016, (<https://www.contributors.ro/neprofesionalismul-curtii-constitutive-despre-avizul-pozitiv-dat-initiativei-de-modificare-a-definitiei-casatoriei-in-constitutia-romaniei/>), visited 6 January 2022.

<sup>43</sup>E. Brodeală, 'The Changing Status of Women as Others in the Romanian Constitution', 11 *Vienna Journal on International Constitutional Law* (2017) p. 541 at p. 542.

*Nature versus nurture: 'gender' as a social construct before the Constitutional Court*

In examining whether 'gender' and 'sex' are two different concepts under Romania's fundamental law, the Court started by analysing the text of the Constitution. While acknowledging that the constitutional text guarantees 'formal equality, regardless of sex', the Court noted that the Constitution does not refer to the distinction between 'gender' and 'sex' and generally uses masculine nouns to refer to both men and women, thus lacking gender-sensitive language.<sup>44</sup> In this context, the Court decided to look into whether it could find a distinction between these concepts in the national laws related to transsexuality, homosexuality and equality between men and women.

The Constitutional Court noted that domestic legislation allows for changing one's sex (thus implicitly recognising that 'gender' and 'sex' do not coincide), that the Civil Code refers to 'sexual orientation' (as an element of one's 'sexual identity' as opposed to biological traits), and that the Law on Equality of Opportunity and Treatment between Men and Women<sup>45</sup> defines 'gender' as a social construct as opposed to 'biological sex'.<sup>46</sup> In addition, the Court stressed that Romania ratified the Istanbul Convention, which defines 'gender' as an element of social identity and places an obligation on State Parties to eradicate harmful gender stereotypes, prejudices, customs and other practices.<sup>47</sup> Based on these legal evolutions, the Court concluded that:

the concept of 'gender' has a wider scope than that of 'sex'/sexuality in a strict biological sense, since it incorporates complex elements of a psychosocial nature. Thus, while the concept of 'sex' refers to the biological characteristics which mark the differences between men and women, the concept of 'gender' refers to a set of psychological and sociocultural traits. The latter incorporates elements of one's social identity, which change according to the evolution of society and the continuous reassessment of the interpretation of the principle of sex equality and non-discrimination. . . .<sup>48</sup> The Romanian State has enshrined this vision/approach

<sup>44</sup>Constitutional Court of Romania, Decision 907/2020, para. 57.

<sup>45</sup>Law no. 202/2002 on Equality of Opportunity and Treatment between Women and Men.

<sup>46</sup>Constitutional Court of Romania, Decision 907/2020, paras. 58, 59, 61, 62.

<sup>47</sup>Ibid., para. 60.

<sup>48</sup>Here, the Court also (ambiguously) noted that: 'Gender identity is also related to traditional social roles and sex/gender discrimination. Being aware of one's sexual orientation is also a component of one's gender identification, but biological factors are complemented by social ones, gender identity including sexual identity and adapting it to social demands'. Authors' translation.

in its legislation undertaking essentially to combat gender stereotypes and enforce in an effective manner the principle of equality and non-discrimination.<sup>49</sup>

While this clarification regarding the distinction between ‘sex’ and ‘gender’ under Romanian law is important, the Court’s interpretation of the Constitution according to legislation that is lower than the fundamental law in the hierarchy of norms is problematic. Indeed, in Romania, the constitutional provisions on fundamental rights and freedoms have to be interpreted and applied in accordance with all human rights covenants and treaties the country is party to, including the Istanbul Convention, which was referred to by the Court. In addition, these human rights covenants and treaties – including the Istanbul Convention – have priority in application over the Constitution, unless the latter offers a higher level of protection.<sup>50</sup> Yet, unlike the Istanbul Convention – which should be a point of reference in the interpretation of the Constitution and could even override it in application – the other domestic legal norms referred to by the Court on the question of ‘sex’ versus ‘gender’ are part of legislation subordinated to the Constitution. In a legal system that is hierarchical in a Kelsenian sense – such as the Romanian one – it is for the adopted laws to be in accordance with the Constitution and not the other way round. In this context, the Court’s interpretation of the Constitution in accordance with legislation that is lower than it in the hierarchy of norms goes against legal logic. However, it must be mentioned that this problematic ‘method’ of interpretation is not unique to the case at hand. Scholars have previously criticised the Constitutional Court for ignoring the hierarchy of norms in building its legal reasoning in numerous other decisions.<sup>51</sup>

To clarify, the Constitutional Court of Romania did not, in our opinion, need to look at regular legislation to reach the conclusion that ‘gender’ is a social construct. As the Court itself observed, it already had case law supporting this idea and international human rights law (which, as shown above, should guide the

<sup>49</sup>Constitutional Court of Romania, Decision 907/2020, para. 64. Authors’ translation.

<sup>50</sup>This is by virtue of Art. 20 of the Romanian Constitution, which grants a special status to ratified human rights treaties within the Romanian constitutional order. More precisely, Art. 20 of the Romanian Constitution reads as follows: ‘(1) Constitutional provisions concerning the citizens’ rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to. (2) Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions’: Official translation taken from the website of the Romanian Presidency, (<https://www.presidency.ro/en/the-constitution-of-romania>), visited 6 January 2022.

<sup>51</sup>See D.C. Dănişor, ‘Utilizarea Problematică a Metodelor de Interpretare în Jurisprudenţa Curţii Constituţionale’ [The Problematic Usage of Interpretation Methods in the Case Law of the Constitutional Court], 11 *Pandectele Romane* (2011) p. 15 at p. 16.

interpretation of the Constitution and should generally be applied with priority over it) also refers to 'gender' as a social construct. Yet, the drafting of the decision gives the impression that the Court analysed its previous case law and binding international legal norms only to confirm the conclusion that had already been reached by looking at lower legislation and that these were not indispensable in building the reasoning of the Court.

In this sense, after reaching the conclusion that 'gender' is a social construct, the Court further looked at its previous case law on equality between men and women, highlighting that this also supports the idea of 'gender' as a social construct changing over time.<sup>52</sup> Indeed, in previous cases related to the extension of parental leave to men in the military and equalising the retirement age between men and women, the Court noted that gender roles are changeable (and changing) and defined them in non-stereotypical ways.<sup>53</sup> Considering the Constitutional Court's previous case law, it was only logical that the Court would further support the idea that 'gender' is a social construct and, in our view, this should have been the core of the Court's argument. This, in the context in which remaining coherent and consistent with its previous case law (and not departing from it without good cause), is a requirement imposed on the Court by the principles of legal certainty, foreseeability and equality before the law.<sup>54</sup>

Furthermore, to uphold the conclusion already reached, the Court took stock of developments in the field of gender equality and LGBT+ rights at the level of the European Court of Human Rights and the EU, noting that these

<sup>52</sup>See Brodeală, *supra* n. 43, p. 541 at p. 554-559.

<sup>53</sup>Constitutional Court of Romania, Decision 907/2020, paras. 65-68. *See also* Brodeală, *supra* n. 43, p. 554-559.

<sup>54</sup>Bianca Selejan-Guțan and Simina Tănăsescu, two leading constitutional law scholars in Romania, explain that the Constitutional Court of Romania is often seen to be 'cherry-picking', i.e. referring to previous case law only selectively to reach a desired outcome, rather than following 'a general idea held in a line of cases', as it should have done in this case. They connect this practice of the Court with the fact that 'there is no constitutional or legal provision' to require it to remain 'coherent and consistent in its case law': B. Selejan-Guțan and E.-S. Tănăsescu, 'The Role of Precedents and Case-Based Reasoning in the Case-Law of the Romanian Constitutional Court', in M. Florczak-Wątor (ed.), *Constitutional Law and Precedent: International Perspectives on Case-Based Reasoning* (Routledge, forthcoming). Yet, we believe that no legal or constitutional provision is needed for the Court to remain consistent in its case law, this obligation being imposed by the principles of legal certainty, foreseeability and equality before the law, which, as the European Court of Human Rights has noted, require that courts 'should not depart, without good reason, from precedents established in previous cases': ECtHR 12 November 2010, No. 34503/97, *Demir and Baykara v Turkey*, para. 153. *See also* 'Opinion of the Venice Commission on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina', Adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012), p. 7, ([https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)014-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)014-e)), visited 6 January 2022.

also support its finding that ‘gender’ and ‘sex’ are different notions.<sup>55</sup> The reference to the European Court of Human Rights’ case law and EU provisions on gender issues is not surprising. Not only have the main developments in the field of gender equality and LGBT+ rights generally taken place under European influence<sup>56</sup> but, since Romania is an EU member state, EU law should have priority over national law,<sup>57</sup> just as ratified international human rights treaties do.<sup>58</sup> Yet, despite referring on over two pages to gender and LGBT equality European case law and legislation, the Court did not truly engage with them. Instead, the Court only outlined these legal materials in a descriptive fashion, without explaining how they support its analysis or are related to the issue under examination. A thorough interpretation of and engagement with these legal materials would have been very much needed given that none of them referred explicitly to the distinction between ‘sex’ and ‘gender’. Instead, they only concerned general aspects of gender and LGBT equality.<sup>59</sup> This, and the fact that the European case law and legal norms were mentioned only marginally, after a conclusion on the distinction between ‘sex’ and ‘gender’ was reached, is a clear sign that the Romanian Constitutional Court is still engaging with European law only formally to make a statement that it does not ignore norms that are relevant to the case it adjudicates, rather than genuinely applying them. As Bianca Selejan-Guțan explains, this is in line with the broader attitude of courts in Romania towards European and international law.<sup>60</sup>

Moreover, while in Decision 907/2020 the Constitutional Court mentioned – albeit formally – European legal standards, it completely disregarded relevant international law, particularly the Convention on the Elimination of all Forms of Discrimination against Women (known as CEDAW), although its provisions

<sup>55</sup>Constitutional Court of Romania, Decision 907/2020, paras. 69-76.

<sup>56</sup>I. Borza, ‘A Lacking Legitimacy in the Transposition of the EU’s Equal Opportunity Directives: The Case of Romania’, 33 *Women’s Studies International Forum* (2010) p. 47 at p. 47-53; ‘Romania’s Gays Celebrate End of Ban’, *BBC News*, 20 December 2001, (<http://news.bbc.co.uk/2/hi/europe/1721661.stm>), visited 6 January 2022.

<sup>57</sup>Art. 148(2) of the Constitution. In addition, EU law has priority over Romania’s Constitution and national law, regardless of whether these comprise more favourable provisions or not.

<sup>58</sup>See Art. 20 of the Constitution. The primacy of European law and international human rights law was also emphasised in some of the *amici curiae* briefs sent before the CCR, such as those sent by SNSPA and the Coalition for Gender Equality together with Accept (on file with the authors).

<sup>59</sup>The European case law and norms the Court referred to included violence against women, granting parental leave to men in the military, the question of retirement age for men and women, discrimination regarding family names, homophobic violence, discrimination against transgender people or gender discrimination in the labour market. See Constitutional Court of Romania, Decision 907/2020, paras. 69-75.

<sup>60</sup>B. Selejan-Guțan, *The Constitution of Romania: A Contextual Analysis* (Hart Publishing 2016) p. 212-214, 232.

were raised in some of the *amici curiae* briefs sent by civil society actors before the Court.<sup>61</sup> This Convention is the most important international treaty on women's rights and was ratified by Romania in 1982. It obliges state parties to eliminate harmful gender-based stereotypes,<sup>62</sup> highlighting that gender is a social construct imposing stereotypical roles on men and women. In addition, in 2010 the Committee on the Elimination of Discrimination against Women (i.e. the monitoring body of the Convention, known as CEDAW Committee) also issued a General Recommendation in which it explained the difference between 'sex' and 'gender' in the following terms:

The term 'sex' [...] refers to biological differences between men and women. The term 'gender' refers to socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women. This social positioning of women and men is affected by political, economic, cultural, social, religious, ideological and environmental factors and can be changed by culture, society and community.<sup>63</sup>

Apart from denoting the Constitutional Court's reticence to engage (meaningfully) with international law, the disregard for the Convention on the Elimination of all Forms of Discrimination against Women is symptomatic of the broader lack of awareness of legal professionals in Romania regarding this important instrument. Such lack of awareness was also documented in the 2017 concluding observations of the CEDAW Committee that noted 'with concern' that the 'the Convention has not been directly invoked, applied or referred to in court proceedings' in Romania.<sup>64</sup>

<sup>61</sup>See the *amicus curiae* briefs sent to the Constitutional Court of Romania by Accept (i.e. one of the most influential LGBT+ organisations in Romania) and the Coalition for Gender Equality (a group of NGOs promoting women's rights in Romania), which focused heavily on women's rights and CEDAW's legal standards (on file with the authors).

<sup>62</sup>See Arts. 5 and 10(c) of the Convention on the Elimination of all Forms of Discrimination against Women.

<sup>63</sup>Committee on the Elimination of Discrimination against Women, 'General Recommendation No. 28: The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' (2010) CEDAW/C/GC/28, para. 5. For more legal instruments on 'sex' versus 'gender' see G. Gilleri, 'Gender as a Hyperconstruct in (Rare) Regional Human Rights Case-Law', 12 *European Journal of Legal Studies* (2020) p. 25 at p. 27-30.

<sup>64</sup>Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Seventh and Eighth Periodic Reports of Romania* (2017), para. 8, ([https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/ROU/CO/17-8&Lang=En](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/ROU/CO/17-8&Lang=En)), visited 6 January 2022.

Despite the above-mentioned shortcomings, what is laudable in the Constitutional Court's discussion on 'gender' is the connection it makes between it and the principles of non-discrimination and equality, as well as the anti-stereotyping approach that the Court took.<sup>65</sup> In doing so, the Court accepted that 'gender' as a social construct lies at the root of inequality and discrimination due to the roles and stereotypes it assigns to men and women.<sup>66</sup>

Overall, despite its limitations, the Court's reasoning concerning the distinction between 'sex' and 'gender' stands in stark contrast with developments in the region, particularly with the above-mentioned case of the Constitutional Court of Bulgaria on the unconstitutionality of the Istanbul Convention. In that case, the Bulgarian Constitutional Court held that 'sex' and 'gender' cannot be separated, gender being directly determined by biological sex:

The Constitution and the whole of Bulgarian legislation is based on a binary understanding of the existence of the human species... The social dimension of sex is unambiguously perceived in interaction with the biological one (Art 47(2) Bulgarian Constitution [on special protection to mothers]). In that constitutional provision, the biological sex of 'a woman' is connected with her social role—'mother,' 'giving birth,' and 'obstetric care.' In short, the term 'sex' is used by the constitution-maker as a unity of the biologically determined and the socially constructed.<sup>67</sup>

Interestingly, Barbara Havelková connects the Bulgarian Constitutional Court's lack of understanding of social constructivism with the legacy of communism, which did not allow for the development of theories in social sciences and humanities scrutinising the 'objectivity' of what is perceived as 'natural', as it happened in the West in the 1960s and '70s.<sup>68</sup> While this 'intellectual isolationism' clearly characterises communist Romania too,<sup>69</sup> the Constitutional Court's decision shows that the communist legacy is not necessarily the only factor that explains the lack of understanding of 'gender' as a social construct by institutions in certain Eastern European countries.<sup>70</sup>

<sup>65</sup>See Constitutional Court of Romania, Decision 907/2020, paras. 58, 76, 77, 100.

<sup>66</sup>Ibid., paras. 64-68.

<sup>67</sup>Quote and translation taken from B. Havelková, 'The Struggle for Social Constructivism in Postsocialist Central and Eastern Europe', 18 *International Journal of Constitutional Law* (2020) p. 434 at p. 438.

<sup>68</sup>Ibid., p. 439.

<sup>69</sup>E. Brodeală and S. Şuteu, 'Women and Constitution-Making in Post-Communist Romania', in H. Irving and R. Rubio-Marín (eds.), *Women as Constitution Makers: Case Studies from the New Democratic* (Cambridge University Press 2019) p. 81 at p. 89-90.

<sup>70</sup>Nevertheless, the resistance to social constructivism, and post-positivist epistemological approaches in general, is stringent in the dissenting opinion attached to the Constitutional

*The unconstitutionality of banning gender perspectives in education and research: the reasoning of the Court*

Following its detailed discussion on gender, the Court examined each of the arguments raised by the President in his referral of the bill for constitutional review. In short, the President claimed that the legislative proposal should be declared unconstitutional for breaching: (a) freedom of conscience; (b) the principle of equality before the law (of those who want and those who do not want to study gender issues) in conjunction with the right to education and the protection of children and youth; (c) university autonomy; (d) freedom of expression and the prohibition of censorship; (e) the principle of separation of powers (given that in the President's view it was a responsibility of the executive and not of the Parliament to regulate educational curricula); and (f) the rule of law (given that the proposed legal amendment contradicted other legal norms defining 'gender' as a social construct different from 'sex', which refers to a biological fact) and Article 20 of the Constitution according to which international human rights treaties (in this case the Istanbul Convention) have priority over national law, including the Constitution, unless the later contains more favourable provisions.<sup>71</sup> This section critically analyses the Court's reasoning regarding each of these arguments.

(a) Freedom of conscience as 'an inherent dimension of human dignity'

The Court concurred with the President and held that the proposed legal amendment violated freedom of conscience as guaranteed by Article 29(2) of the Constitution. The Court explained that freedom of conscience presupposes 'the possibility of individuals to possess and publicly express an outlook about the outside world'.<sup>72</sup> Since education plays an important role in the formation of one's understanding of the world, the Court emphasised that the educational system must be open to new ideas and encourage their free and critical expression.<sup>73</sup> Hence, the Court held that legally imposing a 'distorted knowledge of reality [claiming that 'sex' and 'gender' have the same meaning] as the basis for forming one's outlook about the outside world' is incompatible with freedom of conscience.<sup>74</sup>

The Court strengthened its reasoning by emphasising that freedom of conscience is 'an inherent dimension of human dignity', which would be violated

Court's decision. See the discussion of the dissenting opinion further in this article and paras. 8-14 of the Dissenting Opinion of Justice Marian Enache and Justice Atilla Varga in Constitutional Court of Romania Decision 907/2020.

<sup>71</sup>President of Romania, *supra* n. 37.

<sup>72</sup>Constitutional Court of Romania, Decision 907/2020, para. 79. Authors' translation.

<sup>73</sup>*Ibid.*, para. 81.

<sup>74</sup>*Ibid.*, paras. 79-80. Authors' translation.



by ‘the disregard for the person’ through imposing a ban on gender studies that may ‘contravene one’s opinions, beliefs or even one’s gender identity’.<sup>75</sup> The reference to ‘human dignity’ in this case is used as a trump card invalidating any other argument. It is unclear why the Court based its argumentation solely on human dignity and not on other equally important constitutional values enumerated in Article 1(3) of the Constitution, such as ‘the free development of human personality’, which is particularly relevant in matters regarding education. Furthermore, freedom of conscience is a qualified right, which warrants a proportionality test to determine whether limiting it is lawful and legitimate or not. This is a requirement of Article 53 of the Constitution, which sets out the conditions that have to be met in order to restrain qualified rights or freedoms.<sup>76</sup> Despite this requirement, the Constitutional Court’s decision lacks such a proportionality test when analysing whether the legislative proposal violated freedom of conscience.<sup>77</sup> As Sebastian Rădulețu has noted, the use of ‘human dignity’ as a way of avoiding balancing concurring fundamental rights and the failure to carry out a proportionality test when qualified rights are at stake are recurring flaws in the legal reasoning of Court that can be observed in numerous other cases.<sup>78</sup>

(b) Equality before the law, access to education and the protection of children and youth

In his referral to the Constitutional Court, the President argued that the bill could exclude from the enjoyment of the right to education those who want to study

<sup>75</sup>Ibid., para. 83.

<sup>76</sup>According to Art. 53 of the Romanian Constitution, any limitation of a constitutional right must be required by law, have a well-justified legitimate aim, be necessary in a democratic society, proportional to the situation having caused it and applied without discrimination, and must not infringe on the existence of the right or freedom to be restrained. The legitimate aims that justify the restriction of a right are strictly enumerated in Art. 53. These are: the defence of national security, of public order, health, or morals, of the citizens’ rights and freedoms; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe.

<sup>77</sup>The need for a proportionality test was also emphasised in some of the *amici curiae* briefs sent before the Constitutional Court, which referred to relevant case law of the European Court of Human Rights. In this context, the Constitutional Court’s disregard for the requirement to undertake a proportionality test is even more puzzling given that, as Bianca Selejan-Guțan explains, the wording of Art. 53 of the Constitution was inspired by the relevant provisions of the European Convention on Human Rights (as well as the derogation clause – found in Art. 4 – of the United Nations’ International Covenant on Civil and Political Rights): Selejan-Guțan, *supra* n. 60, p. 214.

<sup>78</sup>S. Rădulețu, ‘Limitele Libertății de Exprimare în Jurisprudența Curții Constituționale’ [The Limitations of Freedom of Expression in the Case Law of the Constitutional Court], *Pandectele Romane* (2011) p. 125 at p. 130-131.

gender identity theories or viewpoints which do not correspond with the legislator's understanding of 'gender'.<sup>79</sup> This, in the President's view, was discriminatory and unduly restricted access to education without respecting the principle of proportionality between the measures taken and the public interest that the legislative proposal sought to protect, namely the 'protection of children and youth'.<sup>80</sup> Following the President's line of argument, the Constitutional Court held that the amendment to the National Education Law discriminates against those who want to study alternative gender theories in Romania (as opposed to studying abroad), which breaches the right to education and goes against the protection of children or youth, as well as the principles of organising the educational system in a democratic state.<sup>81</sup>

The Court criticised the poorly argued rationale of the proposed amendment, which claimed that 'gender theory' is a new development, and showed that the issue of gender identity and 'its multiple dimensions' have been long present in the social and judicial landscape, both at the national and European level.<sup>82</sup> Setting the record straight on this matter enabled the Court to underline that the prohibition of educational activities that examine the difference between 'gender' and 'sex' would appear 'almost anachronistic'.<sup>83</sup> Furthermore, the Court added that since the concept of 'gender' has judicial, sociological, and psychological implications, the adoption of the legislative proposal would result in the prohibition of a variety of areas of study and research, which would restrict access to both scientific information and education.<sup>84</sup>

In its reasoning, the Romanian Constitutional Court also showed that since the legislative proposal was meant to impose an 'absolute ban' on gender education and research, it was incompatible with 'the protection of children and youth'.<sup>85</sup> The Court noted that repressing a theory would not make it disappear, and neither could it protect individuals from its alleged 'harmful effects'.<sup>86</sup> Despite these important remarks, the Court did not provide additional details as of why rejecting a ban on gender education and research would actually protect

<sup>79</sup>President of Romania, *supra* n. 37, p. 5-6.

<sup>80</sup>*Ibid.*

<sup>81</sup>Constitutional Court of Romania, Decision 907/2020, paras. 87, 88.

<sup>82</sup>*Ibid.*, para. 86.

<sup>83</sup>*Ibid.*

<sup>84</sup>Guaranteed by the right to education enshrined in Art. 32 of the Constitution; *see also* Constitutional Court of Romania, Decision 907/2020, paras. 85-86.

<sup>85</sup>Guaranteed by Art. 32 of the Constitution on the right to education and Art. 49 on the protection of children and young people, *see also* Constitutional Court of Romania, Decision 907/2020, para. 87.

<sup>86</sup>Constitutional Court of Romania, Decision 907/2020, para. 87.

children and youth despite this being the declared purpose of the law. This lacuna in the Court's decision is problematic since undertaking a 'best interests of the child' assessment would have been not only appropriate but also a requirement in this case according to the UN Convention on the Rights of the Child,<sup>87</sup> which has priority over the Constitution in virtue of Article 20 of the fundamental law. The Court's lack of proper engagement with the 'best interests of the child' principle allows for the introduction of future similar bills formulated in different terms under the pretext of 'protecting' children.<sup>88</sup>

Finally, the Constitutional Court noted that, according to the memorandum accompanying the legislative proposal, the bill's initiators sought to ban 'proselytism', i.e. to 'prohibit acts to persuade youth to embrace a particular idea/theory'.<sup>89</sup> Had the bill been drafted to actually meet this goal, the Court stated that it could have analysed its constitutionality through the lens of the restriction of rights and freedoms. The adopted bill, however, aimed to ban the expression or knowledge of different opinions than those imposed by the legislator,<sup>90</sup> which the Court found to be incompatible with the organisation of education in a democratic state and the protection of children and youth.<sup>91</sup> The Court's reasoning suggests that had the bill been drafted according to the language used in the

<sup>87</sup>According to Art. 3(1) of the UN Convention on the Rights of the Child, the 'best interests of the child' is a fundamental principle in the protection of children's rights. As the UN Committee on the Rights of the Child has stressed, 'the best interests of the child' is a threefold concept: it is a substantive right, a fundamental interpretative legal principle, and a rule of procedure. Assessing and determining the best interests of the child requires procedural guarantees and state authorities must explain what criteria have been used and how the child's best interests have been weighed against other considerations. Importantly, this principle has been codified in Art. 2 of Romania's Law no. 272/2004 on the Protection and Promotion of the Rights of the Child. See Committee on the Rights of the Child, 'General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as Primary Consideration (Article 3, para. 1)', 29 May 2013, CRC/C/GC/1, paras. 6(c), 37, ([https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf)), visited 6 January 2022.

<sup>88</sup>For example, in the summer of 2021, Romania's far-right party, the Alliance for the Union of Romanians, announced that it aims to initiate legal changes similar to the 2021 law in Hungary which bans references to homosexuality and gender issues in schools to 'protect' children: see O. Ganea, 'Asociația Accept: AUR Joacă Ruleta Rusească cu Viitorul European al României / În Lipsă de Idei, Copiază Politicile Radicale din Rusia și Ungaria' [Accept Association: AUR Plays Russian Roulette with Romania's European Future/ In Absence of Ideas, It Copies Radical Policies from Russia and Hungary], *G4Media*, 28 July 2021, (<https://www.g4media.ro/asociația-accept-aur-joacă-ruleta-rusească-cu-viitorul-european-al-româniei-in-lipsa-de-idei-copiaza-politicile-radicale-din-rusia-si-ungaria.html>), visited 6 January 2022.

<sup>89</sup>Constitutional Court of Romania, Decision 907/2020, para. 87. Authors' translation.

<sup>90</sup>Ibid.

<sup>91</sup>Ibid., as provided by Arts. 32 and 49 of the Constitution.

memorandum, it might have taken a different approach in adjudicating on its constitutionality.<sup>92</sup> Whether this meant employing a different method of interpretation (e.g. undertaking a proportionality test) and/or reaching a different conclusion is unclear. This statement also leaves the door open for similar legislative proposals drafted in different terms.

(c) University autonomy

The Court concurred again with the President when it concluded that the bill infringes upon university autonomy, as guaranteed by Article 32(6) of the Constitution, because it prohibits universities from deciding on matters concerning gender studies, regardless of developments at international or European level in this area of study and regardless of possible collaboration programs of Romanian universities with foreign institutions on this topic.<sup>93</sup> Unfortunately, on this issue, the Court's argumentation is very short (only one paragraph).<sup>94</sup> The Court missed the opportunity to engage with its own case law on university autonomy<sup>95</sup> and with different European and international standards on this matter,<sup>96</sup> which were highlighted in the President's referral to the Constitutional Court and in some of the third-party interventions before the Court.<sup>97</sup> A more thorough reasoning on this topic could have provided useful comparative material for other courts in countries where similar issues are contested. For example, gender studies have also been under attack in Poland,<sup>98</sup> and in France, where such attacks also targeted research on race and colonialism;<sup>99</sup> at the same time, in the

<sup>92</sup>Ibid.

<sup>93</sup>Constitutional Court of Romania, Decision 907/2020, para. 90.

<sup>94</sup>Ibid., para. 90. For a translation in English of the relevant part of the paragraph see M. Safta, 'The Constitutional Court of Romania (CCR): Selection of Case Law (January-June 2021)', 1 *Constitutional Law Review* (2021) p. 82-83.

<sup>95</sup>A.N. Popa and A.I. Tuță, 'Limitele Constituționale ale Autonomiei Universitare' [Constitutional Limits of University Autonomy], 6 November 2019, (<https://www.juridice.ro/660447/limitele-constituționale-ale-autonomiei-universitare.html>), visited 6 January 2022.

<sup>96</sup>See Art. 13 of the International Covenant on Economic, Social and Cultural Rights and *Committee on Economic, Social and Cultural Rights*, 'General Comment No. 13: The Right to Education (Article 13)', E/C.12/1999/10 (1999), paras. 38-40; Art. 13 of the Charter of Fundamental Rights of the European Union; and soft law instruments such as the Bologna Declaration or the Prague Declaration.

<sup>97</sup>See, for example, the *amicus curiae* brief sent by the National School of Political Science and Public Administration, *supra* n. 8; President of Romania, *supra* n. 37.

<sup>98</sup>Tilles, *supra* n. 16.

<sup>99</sup>T. Perroud, 'A Witch Hunt in French Universities', *Verfassungsblog*, 24 February 2021, (<https://verfassungsblog.de/a-witch-hunt-in-french-universities/>), visited 6 January 2022.

USA, several states have passed legislation to ban critical race theory and gender education in schools, higher education and other settings.<sup>100</sup>

(d) Freedom of expression and prohibition of censorship

The President also claimed that the amendment to the National Education Law was equivalent to censoring research and education on gender identity by distorting knowledge and imposing certain pre-defined research findings.<sup>101</sup> Hence, according to the President, the amendment was contrary to Article 30(2) of the Constitution, which prohibits censorship, and violated domestic laws in the field of education, as well as Article 10 of the European Convention on Human Rights and Article 19 of the International Covenant on Civil and Political Rights.

The Court agreed with the President and found that the legislative proposal violates both professors' and students' freedom of expression, particularly academic freedom, which encompasses the right to freely express scientific opinions and freedom of research.<sup>102</sup> Without engaging with the relevant provision of the International Covenant on Civil and Political Rights, but citing the case law of the European Court of Human Rights, the Court emphasised that freedom of expression must be respected even when ideas are considered to be 'shocking' or 'concerning'.<sup>103</sup>

Although the Court acknowledged that freedom of expression is not absolute, it stopped at noting that none of the permitted constitutional limitations to freedom of expression apply in this case,<sup>104</sup> without undertaking a proportionality test as required by Article 53 of the Constitution. As highlighted in the section discussing the Court's reasoning regarding freedom of conscience, the lack of a proportionality assessment in the Court's analysis is not unique to this case. This flaw can be observed in other freedom of expression cases of the Romanian Constitutional Court.<sup>105</sup>

(e) Separation of powers

The President further argued that the establishment of disciplines and fields of study is a prerogative of the Government, not of the Parliament, which implies

<sup>100</sup>R. Ray and A. Gibbons, 'Why are States Banning Critical Race Theory?', *Brookings*, November 2021, (<<https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/>>), visited 6 January 2022.

<sup>101</sup>President of Romania, *supra* n. 37, p. 9-10.

<sup>102</sup>Constitutional Court of Romania, Decision 907/2020, paras. 94-95.

<sup>103</sup>*Ibid.*, para. 92.

<sup>104</sup>*Ibid.*, para. 94.

<sup>105</sup>Rădulețu, *supra* n. 78, p. 130-131.

that the legislative proposal breached the principle of separation of powers.<sup>106</sup> This was the only argument raised by the President with which the Court did not agree. The Court held that the Parliament did not exceed its competences and did not overstep into the executive's role, since the legislative proposal did not refer to establishing the content of the curricula (a competency of the Government) but rather set out a principle of organising the educational system, which is within the Parliament's area of competence.<sup>107</sup>

(f) Respecting the rule of law

Finally, the President argued that the bill breaches the rule of law on account of the lack of coordination and harmony with the existing body of domestic law and with human rights treaties ratified by Romania,<sup>108</sup> such as the Istanbul Convention.

Based on the analysis made in the first part of the decision (discussed above), the Court concluded that both domestic law and the international human rights treaties that Romania has ratified prohibit gender and LGBT+ discrimination and distinguish between 'sex' and 'gender'.<sup>109</sup> Hence, the Court held that the bill under discussion was at odds with the principle of rule of law enshrined in Article 1(5) of the Constitution since it came into contradiction with Romania's existing legal obligations and would have resulted in a confusing and contradictory legal framework, thus not conforming to the requirements of legal clarity and certainty.<sup>110</sup> More precisely, in the Court's view, adopting the amendment to the National Education Law would have made the relevant legal provisions on 'sex' and 'gender' incoherent and unforeseeable, as people in Romania would not have known which provisions to follow: the ones prohibiting discrimination (and supporting the distinction between 'sex' and 'gender') or the ones penalising activities that counter gender stereotypes and discrimination (and reject the idea that 'gender' is a social construct).<sup>111</sup>

The Romanian Constitutional Court's conclusion that a ban on gender studies, education and research is against the rule of law is remarkable. Only three years ago, in neighbouring Bulgaria, the Constitutional Court declared the ratification

<sup>106</sup>President of Romania, *supra* n. 37, p. 11.

<sup>107</sup>Constitutional Court of Romania, Decision 907/2020, para. 97.

<sup>108</sup>As required by Art. 20(2) of the Constitution, which states that 'where there are inconsistencies between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations take precedence, unless the Constitution or national laws comprise more favourable provisions' (official translation).

<sup>109</sup>Constitutional Court of Romania, Decision 907/2020, para. 99.

<sup>110</sup>*Ibid.*

<sup>111</sup>*Ibid.*, para. 100. For a translation in English of the relevant part of the decision see Safta, *supra* n. 94, p. 83.

of the Istanbul Convention unconstitutional on account of breaching the rule of law due to Convention's so-called 'ambiguous' definition of 'gender' as a social construct, which would create 'confusion' within the domestic legal order.<sup>112</sup> Future comparative research could focus on these two decisions when analysing how constitutional courts make use of the concept of 'rule of law' in gender equality cases and the factors that influence the (mis-)use of this concept.

#### THE DISSENTING OPINION: IN DEFENCE OF 'OBJECTIVE REALITY' AND THE STATE'S OBLIGATION TO ENSURE NEUTRALITY OF PUBLIC EDUCATION

Two judges, namely Justice Marian Enache and Justice Attila Varga, refused to join the decision of the majority and wrote a dissenting opinion. Based primarily on the state's obligation to ensure the neutrality of public education, they argued that the legislative proposal under examination was constitutional. Said in different words, in the view of the dissenting judges, the legislative proposal was a means for the state to keep education 'neutral', meaning free from 'ideological influences', such as those claiming that 'biological sex' and 'gender' are different.<sup>113</sup> As we detail in the following paragraphs, unlike the majority, the dissenting opinion did not systematically engage with the President's arguments regarding the unconstitutionality of the criticised law, focusing only on some of them.

In line with the way the legislative proposal was presented by its initiators, the dissenting judges saw it as aiming to ban 'proselytism',<sup>114</sup> understood as the 'active promotion' or 'spreading' of 'ideologies' that seek to convince children and youth of their rightfulness.<sup>115</sup> Based on this interpretation, they argued that the state 'must intervene' in order to preserve the ideological neutrality of education, otherwise it would mean that the state acquiesces to these theories and backs their veracity.<sup>116</sup> At the core of the dissenting opinion was the vaguely articulated 'need' to protect children and youth from the 'risk' that the 'theory/opinion of gender identity' would pose to shaping their personality and intellect.<sup>117</sup> The exact 'risks' that were alluded to were not explained and there was no mention of any sociological or psychological studies that would provide evidence of said 'risks'. Instead,

<sup>112</sup>See more in Smilova (2020), *supra* n. 17, p. 194-195.

<sup>113</sup>Constitutional Court of Romania, Decision 907/2020, Dissenting Opinion, paras. 6, 7.

<sup>114</sup>*Ibid.*, para. 17.

<sup>115</sup>*Ibid.*, paras. 6, 22.

<sup>116</sup>*Ibid.*, paras. 6, 9.

<sup>117</sup>*Ibid.*, para. 7.

the judges went beyond empirical and legal arguments<sup>118</sup> and asserted that the 'gender identity theory/opinion' countered by the legislative proposal is not grounded in academic or 'conventional knowledge',<sup>119</sup> but is part of a 'controversial' ideological movement that could seriously impact the minds and the value system of children and youth.<sup>120</sup>

The dissenting judges argued that gender theories lack academic validity, since – in their view – they contradict biological determinism and the 'uncontested objective reality' of 'biological sex', as well as the 'universal' and ahistorical, strictly positivist, understanding of how social sciences knowledge production and knowledge consumption work.<sup>121</sup> Contrary to the majority, the two judges believed that the terms used in the Constitution to refer to sex discrimination or equality between men and women cannot be 'relativised',<sup>122</sup> meaning interpreted as to also refer to 'gender' as a social construct. This latter interpretation, in their view, would mean accepting 'that the whole Constitution operates with confusing terms',<sup>123</sup> whose meaning would constantly change in accordance with social trends and developments 'which are more or less subjective/transitory/temporary'.<sup>124</sup> In this context, similar to the decision issued by the Bulgarian Constitutional Court in 2018, the dissenting judges argued that 'combating/refuting natural realities by ideologies of a social nature is unacceptable'.<sup>125</sup> The dissenting opinion reveals, thus, a stringent resistance to social constructivism, and post-positivist epistemological approaches in general, which might have implications for adjudicating on similar cases.

Justice Enache and Justice Varga also endeavoured to respond to the majority's argument that the legislative proposal would breach freedom of expression.<sup>126</sup> They showed in this sense that freedom of expression is not absolute, but can

<sup>118</sup>This approach is very similar to the one employed by the Bulgarian Constitutional Court when it declared the Istanbul Convention unconstitutional by going well beyond legal or scientific arguments: Smilova (2020), *supra* n. 17, p. 190-194.

<sup>119</sup>Constitutional Court of Romania, Decision 907/2020, Dissenting Opinion, para. 8. Authors' translation.

<sup>120</sup>*Ibid.*

<sup>121</sup>*Ibid.*, para. 12. For example, the dissenting opinion asserts that 'human beings, in the context of their development and emancipation, have preserved their identity despite all changes and environmental variables, precisely because of adequate education provided and guaranteed by the state' (para. 12) and that '[e]ven if social realities do not reflect biological/natural reality, these must be accepted as such, and cannot be valued and justified by theories and ideologies constructed around them, because this would call into question the very essence of an objective reality, which cannot be distorted through social experiments' (para. 13). Authors' translation.

<sup>122</sup>*Ibid.*, para. 13.

<sup>123</sup>*Ibid.*

<sup>124</sup>*Ibid.*

<sup>125</sup>*Ibid.*

<sup>126</sup>*Ibid.*, paras. 20-21.



be limited – particularly in this case – ‘to protect the rights of other legal subjects’,<sup>127</sup> which most likely refers to protecting children and youth’s right to an education free from ‘ideological’ influences. Similar to the majority’s holding, the dissenting opinion also lacked a proportionality assessment to show why limiting freedom of expression would be constitutional in this case.<sup>128</sup> In addition, the dissenting opinion did not explicitly refer to the other issues examined by the Court such as university autonomy or the question of rule of law.

Lastly, the dissenting judges argued that the legislative proposal did not contravene the Istanbul Convention. They explained that the Convention does not require states to ‘spread/promote’<sup>129</sup> the theory or opinion that ‘gender is a concept distinct from biological sex and that the two concepts are not the same’,<sup>130</sup> but rather requires states to include gender sensitive themes in education, which, according to the judges, is ‘an absolutely different issue’.<sup>131</sup> Interestingly, in this sense, the two judges interpreted the legislative proposal as only prohibiting ‘spreading or propagating’ the ‘theory/opinion of gender identity’ and not its study ‘in a regulated framework’.<sup>132</sup> This reveals that there was disagreement between the dissenting judges and the majority on the actual meaning and purpose of the legislative proposal, the majority interpreting it as imposing an absolute ban on any activity of gender education or research and not only a ban on spreading gender theory. This is a clear sign of the problematic drafting of the legislative proposal which, arguably, did not meet the requirements of clarity and foreseeability imposed by both the fundamental law<sup>133</sup> and the European Convention on Human Rights. Hence, the legislative proposal could have been declared unconstitutional first and foremost for not meeting the requirements of ‘quality of law’ imposed at both domestic and international level.<sup>134</sup>

#### GOING AGAINST THE TIDE: SOME POSSIBLE EXPLANATIONS FOR THE CONSTITUTIONAL COURT’S RULING

As discussed above, the Constitutional Court’s position on ‘gender’ and the ban on gender perspectives in research and education goes against the regional tide of

<sup>127</sup>Ibid., para. 21.

<sup>128</sup>Ibid., paras. 20-21.

<sup>129</sup>Ibid., para. 23.

<sup>130</sup>Ibid.

<sup>131</sup>Ibid.

<sup>132</sup>Ibid, para. 22.

<sup>133</sup>Constitutional Court of Romania, Decision 845/2020, paras. 92-95.

<sup>134</sup>As explained by the European Court of Human Rights, to meet the requirement of ‘quality of law’ domestic legislation has to ‘be sufficiently clear in its terms’ (among other requirements): ECtHR, 12 June 2008, No. 78146/01, *Vlasov v Russia*, para. 125.

attacks on gender studies, gender equality and LGBT+ rights. The reasons why the Romanian Constitutional Court did not follow this trend warrant further research and analysis. Qualitative research, in particular interviews with Constitutional Court judges and civil society organisations which followed or were involved in the debates around the ban on gender perspectives in education and research in Romania, could shed more light on the factors that influenced the Court's decision and reasoning. In our view, such inquiries could build on several facts and/or hypotheses, as highlighted below.

First, as reputable Polish rule of law scholar Wojciech Sadurski noted, compared to other countries in the region such as Hungary or Poland, in Romania the Constitutional Court was able to adjudicate the way it did due to a still relative functioning of the separation of powers.<sup>135</sup> There was an independent President who could ask for a constitutional review, as well as an independent Constitutional Court – which was not packed by the ruling party, as in Hungary and Poland<sup>136</sup> – that could adjudicate in an impartial manner.<sup>137</sup>

Second, from a purely legal point of view, despite some notable shortcomings, it can be argued that the decision reached by the Constitutional Court is simply the outcome of accurate legal reasoning, in line with Romania's obligations under European human rights law. Said in different words, an independent constitutional court could not have reached a different outcome. For example, in the case of the definition of 'sex' versus 'gender', not only did the Court draw on relevant previous case law pointing to the fluidity of 'gender', but European human rights law – which has priority over national law, including the Constitution – also supports the definition of gender as a social construct. A departure from previous case law and European norms in this case would have been difficult to justify.

Third, from a legal realism perspective, it might be possible that the Constitutional Court was mindful of the social and political context and did not give in to conservative agendas seeking to restrain fundamental rights. As we noted in the second section above, there has been a remarkable mobilisation of civil society organisations before the Constitutional Court and in the public space, demanding the rejection of any ban on gender perspectives in education and research. Furthermore, far-right parties and political groups openly pushing

<sup>135</sup>Wojciech Sadurski commenting on a blog post we wrote on the CCR's decision (*see* Epure and Brodeală *supra* n. 10) at the launch event of the 'Good Lobby Profs' (an academic network aimed at countering major rule of law violations and abuse of power within and across Europe), 22 March 2021, (<https://www.thegoodlobby.eu/events/launch-of-the-good-lobby-profs/>), visited 6 January 2022.

<sup>136</sup>For the effect of court packing on a ruling on abortion in Poland *see* A. Gliszczyńska-Grabias and W. Sadurski, 'The Judgment That Wasn't (But Which Nearly Brought Poland to a Standstill)', 17 *EuConst* (2021) p. 130 at p. 135-138.

<sup>137</sup>Sadurski, *supra* n. 135.

for an anti-gender agenda were not as strong or as visible as in other neighbouring countries so as to put undue pressure on the Court. In addition, it might be possible that the Court was sensitive to the broader European context and legal norms promoting gender equality and LGBT+ rights as fundamental human rights. This happened in a context in which some of the most important advancements in LGBT+ rights and gender equality in Romania have taken place under the influence of European actors,<sup>138</sup> rendering these advancements to be associated with the country's allegiance to Europe and its values.

Fourth, it is possible that the thorough *amici curiae* briefs sent to the Constitutional Court by civil society organisations, as well as the communication sent by six United Nations Special Rapporteurs who denounced the proposed ban,<sup>139</sup> played a role in expanding the Court's understanding of the implications of the legislative proposal and of the European and international legal standards that must be taken into account in the adjudication of the case.

Finally, it might be worth inquiring into the extent to which the Court's position could be explained by the composition of the bench and the degree to which justices sitting in this case were trained in or had a good understanding of legal and social issues related to gender, equality, and human rights. Future research on this decision could examine to what extent the gender composition of the bench has made a difference in adjudication, in the context in which three of the nine justices sitting on this case were women<sup>140</sup> and the dissenting opinion was signed by two men.<sup>141</sup> The expertise of justices sitting on the bench might also be relevant. For example, one of the female justices, Justice Simina Tănăsescu, is a reputable scholar with an important record of research on the principle of equality in

<sup>138</sup>For example, homosexuality in Romania and Romania's law on equality between men and women were products of the conditionality package for the country's EU accession. See C.F. Stychin, 'Ch. 6 "We Want to Join Europe, Not Sodom": Sexuality and European Union Accession in Romania', in *Governing Sexuality: The Changing Politics of Citizenship and Law Reform* (Hart Publishing 2003) p. 115-138; Borza, *supra* n. 56.

<sup>139</sup>They are: Koumbou Boly Barry, Special Rapporteur on the right to education; Irene Khan, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Tlaleng Mofokeng, Special Rapporteur on the right of everyone to access the highest standard of health physical and mental health; Victor Madrigal-Borloz, Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity; Dubravka Simonovic, Special Rapporteur on violence against women, its causes and consequences; and Elizabeth Broderick, President-reporter of the Working Group on Discrimination against Women and Girls. The text of the communication of 11 September 2021 can be consulted at <<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25554>>, visited 6 January 2022.

<sup>140</sup>Justice Mona-Maria Pivniceru, Justice Livia-Doina Stanciu and Justice Elena-Simina Tănăsescu.

<sup>141</sup>Justice Marian Enache and Justice Atilla Varga.

Romanian law.<sup>142</sup> She has also been actively involved in debates on gender equality in Romania<sup>143</sup> and has published on the topic of gender and the law in Romania.<sup>144</sup> Another (male) justice sitting on the bench, Justice Daniel Marius Morar, has previously written a strong dissenting opinion in one of the two decisions of the Constitutional Court on the citizens' initiative meant to define marriage strictly between a man and a woman (as opposed to 'spouses') in the constitutional text.<sup>145</sup> His dissent – written to show disapproval with the constitutionality of such initiative – shows a good understanding of the national and international norms prohibiting discrimination against LGBT+ persons, which is particularly relevant to the case at hand. Interviews with constitutional court justices might reveal the degree to which justices, such as Justice Tănăsescu or Justice Morar, have influenced the outcome in this case through the equality and non-discrimination expertise they brought to the bench.

## CONCLUDING REMARKS

The decision of the Romanian Constitutional Court, which found the ban on gender perspectives in education and research unconstitutional, is a milestone in the adjudication of such matters in Eastern Europe, representing a departure from the trend of curtailing gender equality advancements in the region. The Court affirmed the centrality of equality, non-discrimination, and fundamental rights, as well as the importance of European human rights standards in the legal debates around gender issues. The Court's detailed analysis of 'gender' and 'sex' cements the legal distinction between these two concepts and keeps the door open to the advancement of gender equality.

Whilst the Court's decision is in line with European and international human rights standards, the Court's reasoning is marked by a number of limitations – which are not necessarily characteristic to this case alone but have been observed and criticised by scholars in other cases of the Constitutional Court on different topics. Notably, these include: disregard for the hierarchy of norms and

<sup>142</sup>See for example E.S. Tănăsescu, *Principiul Egalităţii în Dreptul Românesc [The Principle of Equality in Romanian Law]* (All Beck 1999).

<sup>143</sup>For example, before becoming a constitutional justice, Professor Simina Tănăsescu spoke favourably about gender quotas in politics at an event organised by women members of the Parliament that brought together high officials and representatives of civil society (including feminist organisations) as well as of academia to debate the adoption of gender quotas. The meeting took place on 17 December 2015 and can be watched at ([https://www.youtube.com/watch?v=FWND\\_zkJgqI](https://www.youtube.com/watch?v=FWND_zkJgqI)), visited 6 January 2022.

<sup>144</sup>E.S. Tănăsescu and I. Băluţă, 'Romania (Roumanie)', 34 *Annuaire international de justice constitutionnelle* (2019) p. 391.

<sup>145</sup>Constitutional Court of Romania, Decision 539/2018.

interpreting the Constitution in accordance with regular/subordinated legislation; the lack of a proportionality test when analysing the breach of qualified rights such as freedom of conscience or freedom of expression; the lack of reference to key international documents on the topic of the case, particularly the Convention on the Elimination of Discrimination against Women; and the failure to undertake a 'best interest of the child' assessment when discussing the protection of children and youth.

As highlighted above, further research is needed to better understand the context of the Constitutional Court's decision and test the hypotheses outlined above regarding the factors that influenced the Court's decision not to follow the regional trend of gender backsliding. Such inquiries could contribute to the development of 'gender and constitutionalism' as a field of study in Romania. This development would be necessary not only to better understand the status of women and sexual minorities under Romanian constitutional law and the factors that influence it, but also to assist the Court in approaching future gender-related cases.

