Part 3: Constitutional, International, and European Union Law Influence on the Social Protection System in Bulgaria

A. Preliminary Considerations on the Potential Influencing Factors

I. Constitutional Law

The following part will analyze the potential of Bulgarian constitutional law as an influencing factor upon social protection. For this purpose, first, constitutional law in the country is succinctly examined through its historical dimensions. Then, the study defines the concept of Bulgarian constitutional law for the present research purposes. Once the term is specified, the current Bulgarian Constitution's structure is assessed to inform the subsequent evaluation of the relevant constitutional content for the study's goal.

The sub-section on the relevant constitutional law is structured as follows. First, the examination focuses on fundamental rights as a potentially highly relevant factor for constitutional influence. In doing so, the different types of rights in the Bulgarian Constitution are explored, and the concept of fundamental social rights is defined in line with the study's purposes. Subsequently, the concrete relevant fundamental rights are presented. Then, the further potentially important constitutional content is reviewed in two sections: constitutional principles and state objectives.

1. Bulgarian Constitutional Law: Past and Present

a. The Constitutional Genesis

The constitutional genesis can indicate why the constitutional norms were formed in a given manner, thereby contributing to the overall better understanding of the national constitutional development. Further, the historical background can hint at why some aspects were considered necessary for the Constitution while others were omitted. The historical analysis can also reveal the concerns in the drafting process of the present Constitution on the featured social rights list. Accordingly, the following will succinctly examine the main features of the three constitutions preceding the Constitution from 1991. Next, the research will turn to the drafting process of the

present Constitution to portray the most pressing concerns and aspirations at the time, especially in view of fundamental social rights.

aa. Overview of Constitutional Developments from 1879 to 1991

After it gained freedom from the Ottoman Empire, Bulgaria took on the way to its first Constitution. The Treaty of San Stefano from 3 March 1878 envisioned that an assembly overseen by the Russian commissioners was to create an "organic statute"[567] ("Органически устав") for the Principality[568] of Bulgaria. The following Treaty of Berlin from 13 July 1878 reformed the San Stefano Treaty and reduced the duration of the temporary Russian ruling in the country from two years to nine months. These changes entailed that the process of creating the organic statute needed to be speeded up. The project for the statute was to be prepared in Bulgaria but then required approval that was to be provided in Saint Petersburg. Ultimately, the organic statute was presented to the Bulgarian Constituent Assembly composed of an assembly of notables.[569]

After the draft's preparation, numerous discussions and proposals for its amendments followed, including a proposal for a creation of a two-chamber parliament. The Russian draft of the document relied on the term "organic statute" and avoided the definition of the document as "constitution". Still, a member of the assembly brought forward the proposal for the use of the term "constitution", which was subsequently accepted. Accordingly, the so-called Tarnovo Constitution[570] was adopted on 16 April 1879 by declaring the government form of constitutional monarchy and establishing unicameralism.[571]

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567 The term "organic statute" was used at the time for newly formed states after the collapse of the Ottoman Empire.

568 The concept of "principality" suggests that the country did not have full sovereignty but was rather ultimately influenced by some of the powerful states during the given period.

569 The concept refers to the French term "assemblée de notables" that indicates an assembly composed of members who were not elected but were rather appointed for the purpose. *See* Drumeva, *Constitutional Law/Конституционно право* (2018) 169.

570 This constitution was named after the town of Veliko Tarnovo where the Constituent Assembly was held.

571 Drumeva, in *Constitution of the Republic of Bulgaria/Конституция на Република България* (2009) 11.

The ideas of liberalism proved to be an inspiration for the adopted Constitution.[572] Accordingly, a comparison between the draft prepared by the Russian jurists and the final adopted version of the document demonstrates certain essential differences. First, the adopted document shared the legislative initiative between the elected members of Parliament and the "Knyaz", while the draft concentrated this power only in the "Knyaz". The adopted Constitution provided for constitutional freedoms and voting rights for all men[573] without requirements for acquired educational levels, as it was initially proposed. Further, it contained provisions on free mandatory initial education, freedom of the press, freedom of association, the old-age pension rights of civil servants, and others. Last but not least, the Tarnovo Constitution "played the role of a bourgeoisie revolution"[574] in the country due to its antifeudal character, which paved the way for free capital and a market economy. The Tarnovo Constitution was amended twice and was suspended due to military coups in 1923 and 1934. In practice, the Constitution remained suspended in the following years until it was replaced by the Constitution of the People's Republic of Bulgaria in 1947.

After the coup d'état on 9 September 1944, and given the background of the complicated international environment, the country became entangled in establishing governance framed in the likes of the Soviet Union. Based on a referendum in 1946, Bulgaria was proclaimed as a "people's republic", and the preparation of a new constitution was initiated. The initial project included a balanced scheme of the separation of powers,[575] a catalog of the citizens' rights and obligations, and, in contrast to the Tarnovo Constitution, a catalog of social and economic rights, such as the right to occupation-related and pension benefits.

572 Stoichev, *Constitutional Law/Конституционно право* (2002) 88.

573 The fact that only men (once they have reached 21 years) had voting right was not explicitly recorded in the text since for the given time period this was understood by default. Married, divorced, or widowed women were granted voting rights in 1938; women acquired full voting rights in 1944. *See* Drumeva, in *Constitution of the Republic of Bulgaria/Конституция на Република България* (2009) 11.

574 ibid.

575 Namely, the project envisioned that the National Assembly bore the legislative power and elected the government; the government was accountable to the parliament and retained legislative initiative, as did the members of parliament in the case of at least 1/5 of them engaging in it; the judicial power maintained its three instances and the High Administrative Court was preserved; and finally, the Chairman of the Republic was bestowed with functions similar to the ones of a president.

However, with the signing of the Paris Peace Treaties, it became apparent that Bulgaria, alongside the rest of the countries from Eastern Europe, would belong to the Soviet sphere of influence. Therefore, the Bulgarian Grand National Assembly formed a new commission that proposed a new project for a constitution that largely resembled the Constitution of the Soviet Union. The new project resulted in considerable alterations to the previous project because the new constitution needed to enable the country's transition to socialism.[576] The new Constitution entered into force on 6 December 1947. It established the governance form of "people's democracy" expressed in the lack of separation of powers and democratic centralism. In addition, the institutional bodies on the lower levels were subordinated to the higher ones in a strict hierarchical order. Further, the state representative was replaced by a collective body, the so-called Presidium of the National Assembly. In line with the system of soviets and their main role in the Soviet Union, the local authorities gained broad competences. Moreover, the judicial instances were reduced to two, the High Administrative Court was dissolved, and the prosecution was endowed with extensive powers.

In terms of the featured social rights, the 1947 Constitution provided in Article 75 for accessible medical care financed by joint contributions. In addition, the Constitution proclaimed the right to pensions and benefits in the cases of sickness, accident, disability, unemployment, and old age. The 1947 Constitution further introduced the idea of the special protection of mothers, which became intertwined in the country's constitutional development ever since. Namely, Article 72 provided that the (expecting) mothers were granted special protection, such as paid pre- and post-natal maternity leaves and access to free obstetric and medical care.

As stated above, the 1947 Constitution symbolized the transition to socialism. Hence, in 1971 it was decided that a new constitution was needed to reflect the completed transition and to establish socialism as the victorious socioeconomic order. This new Constitution was adopted via a national referendum on 16 May 1971. Its hallmark was the strong ideological spirit it contained, including proclaiming the Bulgarian Communist Party as the country's driving force. This proclamation represented the constitutional basis for merging state and party, which enabled the dominating role of the political party structures over the rest of the state institutions. The State Council replaced the Presidium of the National Assembly and occupied

576 Drumeva, *Constitutional Law/Конституционно право* (2018) 174 ff.

the main place among the highest bodies of the state by exercising merged legislative and executive powers.

The 1971 Constitution again contained a list of social rights such as social insurance for the classical social risks stated in Article 43(1) and the new constitutional aspect of the right to social assistance proclaimed in Article 22(5).[577] Furthermore, the research section on the history of social protection revealed that the 1971 Constitution provided the right to free medical care in Article 47(3). This constitutional proclamation symbolized the transition from health insurance to a tax-financed medical care system. Lastly, the new constitutional text also incorporated in Article 37 the special protection for mothers and the related maternity social rights from the 1947 Constitution.

bb. The Creation of the 1991 Constitution and its Social Rights

After the 1989 changes, a National Round Table of the different political parties was formed to debate the steps for the transition to democracy.[578] During the debates, it was decided that even if the 1971 Constitution were to be heavily amended, it would still not be able to meet the significant socioeconomic changes and resulting challenges. Hence, a Grand National Assembly was convened to adopt the new Constitution. Furthermore, a group of habilitated legal scholars from the Law Faculty of Sofia University "St. Clement of Ohrid" was set to support the constitution-making process and draft a constitutional project.[579] The examination of the various protocols and transcripts accompanying the Constitution's creation demonstrates considerable engagement with international law instruments, which informed the constitution-making process. In addition, examining the creation of the 1991 Constitution unveils the motivations behind the formulation and inclusion of various social rights in the constitutional text.

577 Drumeva, in *Constitution of the Republic of Bulgaria/Конституция на Република България* (2009) 12–13.

578 Ananieva, in Kaneva, Mizov and Kandilarov, *Studies on the History of Socialism in Bulgaria/Изследвания по история на социализма в България* (2011) 63.

579 To be precise, there have been several proposed projects for a new constitution. However, the one prepared by the habilitated scholars became the foundation for the new Constitution. *See* Milanov, 'On the Authorship of the New Constitution and Some Aspects of Its History/За авторството на новата ни Конституция и някои моменти от нейната история' (2015) <https://duma.bg/koy-bashta-koy-dalechen-rodnina-nl14434> accessed 18 February 2019.

First, "the guiding principles in the preparation of the new Constitution was the adherence to the achievements of the European constitutional theory and practice, as well as the former Bulgarian traditions".[580] The leading motivation behind the development of the new constitutional text was that it should enable the country's integration into the European and international legal spaces.[581] For instance, the goal of joining the Council of Europe entailed that the future constitution needed to meet the standards of the European Convention on Human Rights (ECHR) and its eight accompanying protocols.[582] Moreover, arguments based on the sixth protocol to the ECHR and the second protocol to the International Covenant on Civil and Political Rights (ICCPR)[583] contributed to the promulgation of the state obligation to guarantee human life that ultimately led to the prohibition of the death penalty.[584]

Last but not least, the constitutional project proposed an approach regarding the relationship between national law and international law that was novel for the Bulgarian constitutional development.[585] Namely, the project envisioned that an international legal instrument that has been ratified would become an inseparable part of the domestic legal order. Further, such international law instruments would take precedence over contradicting national norms. This approach intended to enable the country's plan for future accession to the European Community.[586]

International law instruments, such as the ICESC, were also of fundamental significance in the debates accompanying the inclusion of social

580 Quote by the Head of the working group of habilitated scholars for the preparation of the 1991 Constitution, prof. Zhivko Milanov (translation from Bulgarian by author). *See* ibid.

581 'Protocol of the Meeting on 13.02.1991 of the Commission on the Preparation of the Project of New Constitution, Archives of the National Assembly' 25. Initial draft versions of the Constitution contained the aspiration of the country to join the democratic world of the European community in the preamble. *See* 'Transcript of Parliamentary Plenary Session No 134, 16.05.1991' (1991) 83 <https://parliament.bg/bg/plenaryst/ns/55/ID/3357> accessed 18 February 2019.

582 'Protocol of the Meeting on 13.02.1991 of the Commission on the Preparation of the Project of New Constitution, Archives of the National Assembly' 25.

583 ibid 26.

584 Stoichev, *Constitutional Law/Конституционно право* (2002) 233.

585 'Transcript of Parliamentary Plenary Session No 133, 14.05.1991, Grand National Assembly, Archives of the National Assembly'.

586 ibid.

rights in the constitutional text.[587] The constitutional project attempted to reflect the catalog of rights included in the Covenant.[588] At the same time, however, some ICESC rights were ultimately not featured in the constitutional draft despite the initial plans. A good example in this regard is the right postulated in Article 11 of the Covenant that guarantees an adequate standard of living, adequate food, clothing, and housing.[589] The prevailing argument against the inclusion of this right maintained that the constitutional promulgation could face the danger of the lack of possibilities for the right's realization.[590] Such an inability in practice would devalue a constitutional provision to a mere unattainable political aim and, in turn, would devalue the Constitution despite it being the supreme law in the country.[591] To avoid such dangers, the right to social assistance was included in the Constitution without a definition and enumeration of the specifics featured in Article 11 of the ICESC. The abstract drafting approach aimed at ensuring that the legislature could then specify the right in a manner that would allow for its actual realization in terms of the available possibilities.[592]

There were lengthy related debates stretched out through different sessions on the exact list of fundamental rights that were to be featured in the constitutional text. Some commission members advocated for elaborating a detailed fundamental rights framework in the constitutional text. The argument favoring this approach maintained that only a detailed approach could preserve the rights' framework in case of subsequent legislative changes.[593] Other experts, however, did not support the development of a detailed list of rights and rather advocated for a more restrained approach, similar to the one undertaken by the German Basic Law. According to

587 'Protocol of the Meeting on 17.06.1991 of the Commission on the Preparation of the Project of New Constitution, Archives of the National Assembly' (1991) 14; 'Transcript of Parliamentary Plenary Session No 134, 16.05.1991' 84.

588 'Protocol of the Meeting on 13.02.1991 of the Commission on the Preparation of the Project of New Constitution, Archives of the National Assembly' 3.

589 'Protocol of the Meeting on 17.06.1991 of the Commission on the Preparation of the Project of New Constitution, Archives of the National Assembly' 14.

590 ibid.

591 ibid.

592 ibid 14 ff.

593 'Protocol of the Meeting on 13.02.1991 of the Commission on the Preparation of the Project of New Constitution, Archives of the National Assembly' 50.

this perspective, the focus had to be placed on the different constitutional guarantees for rights' protection and the limits of the protection.[594]

Furthermore, the debates on the exact social rights took into account that the new constitution would need to be able to lay the foundations of the new social protection system in the country. A particular concern in this regard was the tax-financed healthcare system inherited from socialism.[595] For instance, the debates on the right to health insurance were carried against the background of the wide-scale plans for reforming the healthcare system.[596] Therefore, it was considered crucial for the constitutional text to "promulgate" the right to public health insurance by laying the foundations for such an insurance system.[597]

In addition to the right to health insurance, the project for the constitution included the right to free medical care. Long debates accompanied the inclusion of this right.[598] According to some, the right to free medical care contradicted the right to health insurance. Such views held that healthcare should be subjected to total restructuring resulting in a contribution-based system. Hence, some saw the right to free medical care as a continuation of the tax-financed socialistic healthcare system. However, the proponents of the right to free medical care considered it an expression of the social state goal. Namely, the rights to health insurance and free medical care were not mutually exclusive but were instead complementary. While the health insurance addressed the healthcare of those paying contributions, the right to free medical care provided coverage to the more vulnerable social groups, such as those suffering from material deprivations.[599] In this sense, free medical care contributed to the social state character of the country's social protection development. Proponents of the right to free medical pointed out the solution portrayed in the Portuguese Constitution

594 ibid 12.
595 For an examination of the historical evolution of the social protection system in the country, refer to the research section on the historical development of the Bulgarian social protection.
596 'Protocol of the Meeting on 28.06.1991 of the Comission on the Preparation of the Project of New Constitution, Afternoon Session, Archives of the National Assembly' (1991) 2 ff.
597 ibid 4.
598 ibid 1 ff.
599 ibid 6.

of 1975, which explicitly and simultaneously included the rights to health insurance and free medical care.[600]

In terms of the social state principle, the draft constitutional project considered that the long list of social rights in the constitutional project reflected the goal of the social state.[601] Therefore, the social state goal included in the Preamble was intended to guide the policy in the following turbulent transition years and the rapid growth of some social risks such as unemployment.[602] Moreover, the goal of the social state was seen as fundamental for the development of the solidarity character of the future social protection system, where redistributive mechanism would provide for those in great material need.[603]

The creation of the new constitution involved the promulgation of the supplementary protection provided to groups with special needs.[604] The debates in this regard revealed that the constitution-makers considered that vulnerable societal groups like mothers, disabled people, and orphaned children should not only be solely addressed by the general social protection mechanisms. Instead, it was deliberated that the legislature should have the constitutional obligation to organize further supplementary forms of "special protection" concerning such groups.

Additionally, the constitutional project went a step further and concretized the content of special protection provided to (expecting) mothers. The debates around the elaboration on the mothers' social rights were based on the concern that the sole declaration of the right to "special protection" could still leave too much room for interpretation. This vagueness might

600 ibid 2.

601 'Transcript of Parliamentary Plenary Session No 133, 14.05.1991, Grand National Assembly, Archives of the National Assembly'. However, the proposal for the inclusion of the social state was initially met with mistrust by the debates on the constitutional project in the parliament. The political debates initially engaged with a "superficial and a very ideological discussion" that aimed at building parallels between the social state goal and the socialistic political order. *See* Belov, *Constitutional Law in Bulgaria* (2019) 32. Ultimately, the meaning of the "social state" has been clarified as being a guiding principle in the development of the state mechanisms targeting those affected by various social risks. *See* 'Transcript of Parliamentary Plenary Session No 134, 16.05.1991' 66–67.

602 ibid 72.

603 ibid 94–95.

604 'Protocol of the Meeting on 17.06.1991 of the Commission on the Preparation of the Project of New Constitution, Archives of the National Assembly' 8.

result in insufficient protection in some crucial aspects.[605] Therefore, the right of special protection for mothers was concretized as involving both pre-natal and post-natal leave.[606] The protection further included free obstetric care, alleviated working conditions, and other social protection measures. Some of the adopted constitutional solutions for defining the special protection of mothers have already been part of the Bulgarian legal tradition, such as the provision of free obstetric care.[607] Despite the planned introduction of a health insurance system, a decision was reached that the state-financed free obstetric care present in the older constitutional law should be preserved in the new constitutional project. It was considered that the free obstetric care could still target women who, for some reason, would have interrupted health insurance rights.

cc. Amendments of the Current Constitution since 1991

Since it entered into force, the Constitution has been amended five times. Some of these amendments are relevant to the present research objective as they paved the way for the European Union membership[608] and concern the relationship between its supranational body of law and national constitutional law.[609] Apart from discussing these changes, the section will also succinctly deal with the rest of the constitutional amendments that either concerned the separation of powers or the expansion of the possibilities for requesting a constitutional review.

The changes concerning the European Union membership were provided with the Constitution's second amendment of 2005.[610] In general, since its very creation, the Constitution envisioned the direct application in the domestic law of the norms of international treaties, which are ratified,

605 'Protocol of the Meeting on 28.06.1991 of the Comission on the Preparation of the Project of New Constitution, Morning Session, Archives of the National Assembly' 1.

606 ibid.

607 ibid 1ff.

608 Drumeva, *Constitutional Law/Конституционно право* (2018) 179.

609 The legal debates concerning the relationship between EU law and Bulgarian constitutional law is discussed in detail in the respective section on the potential of EU law as an influencing factor upon the social protection system.

610 Law Amending and Supplementing the Constitution of the Republic of Bulgaria, SG 18/25.02.2005.

promulgated in the State Gazette, and have entered into force with respect to the Republic of Bulgaria. Therefore, considering these international law requirements in the Constitution, the 2005 amendment introduced EU law as a new type of specific supranational legal order.[611]

The constitutional distinction between the international law instruments and EU law is visible in two main regards. First, the amendment explicitly introduced the European Union as a supranational organization, while the rest of the international organizations are left unnamed in the constitutional text. Authors consider that this approach highlights the special relationship between the national and EU law and indicates the latter as an idiosyncratic legal order that could not be equated to international law.[612] The amendments provided that the National Assembly can confer powers to the European Union that follow from the Constitution (Art. 85(1), CRB). Therefore, the constitutional changes do not contain material provisions on the EU law and its status but rather authorize the transferring of constitutional powers to the given organization in certain areas. Some scholars view that this thrift wording of the amendment enables the primacy of EU law.[613] According to this view, the constitutional provisions entail the direct applicability of EU law that renders inapplicable all contradicting national norms.[614]

Second, the 2005 constitutional amendment provided more stringent conditions for ratifying the primary sources of EU law compared to the requirements of international law ratification. For example, the ratification of international law instruments requires a majority of more than half of the present members of Parliament (Art. 81(2), CRB). In contrast, the ratification of the primary EU law instruments requires a qualified majority of two-thirds of all members of Parliament (Art. 85(2), CRB).

Moreover, the EU membership amendment introduced another significant change in the constitutional text. The change stipulated that Bulgaria is to participate in the building and development of the EU (Art. 4(3), CRB).[615] The amendment was incorporated in Article 4, which contains

611 Drumeva, 'The Primacy of EU Law over National Law/Примат на правото на Европейския съюз пред националното право' (2009) 10 Juridical World/ Юридически свят 11.
612 ibid.
613 ibid 12.
614 ibid.
615 Initially it was planned that a similar text is instead to be included in the constitutional Preamble. *See* ibid.

the foundational principle of the rule of law. Some scholars interpret this approach as entailing the supranational engagement of the country in its capacity as a state governed by the rule of law.[616] The participation in the building and development of the EU further represents an obligation for the legislature to ensure harmony between the national and the supranational legal order, including securing EU law primacy.[617]

The 2005 EU-related amendment introduced some further alterations. These included the possibility of acquiring land by foreigners following the conditions ensuing from Bulgaria's accession to the European Union or by virtue of the conclusion of an international treaty (Art. 22(1), CRB). Finally, the amendment dealt with enabling the participation of European citizens in the local elections and the elections for the European Parliament carried out on Bulgarian territory (Art. 42(3), CRB).

Prior to the amendment, the Constitutional Court was requested to provide an interpretive decision on whether the intended constitutional changes related to the planned EU Membership could be introduced by the ordinary National Assembly or instead required a Great National Assembly.[618] The former can amend and supplement the constitutional norms (Art. 153, CRB) except for the cases concerning constitutional changes in state organization and governance, which would require Great National Assembly (Art. 158.3, CRB). The Court concluded that the EU Membership would not interfere with the constitutional democratic model of state organization and the form of governance.[619] Hence, the amendments of the Constitution could be carried out by the ordinary National Assembly.[620] Furthermore, the Court considered that the already present constitutional provisions paved the way for the country's accession to the EU. Namely, Article 24(2) stipulated that the country is engaged in promoting just international order. Apart from indicating general openness towards the interna-

616 Drumeva, *Constitutional Law/Конституционно право* (2018) 182.

617 Drumeva, 'The Primacy of EU Law over National Law/Примат на правото на Европейския съюз пред националното право' (2009) 10 Juridical World/Юридически свят 13.

618 Constitutional Decision No 3/2004 on case 3/2004.

619 The reasoning of the constitutional decision also delved into the issue of the relationship between EU law and national constitutional law. The argumentation of the Constitutional Court in this regard is examined in detail in the part on the potential of EU law as an influencing factor upon social protection.

620 Constitutional Decision No 3/2004 on case 3/2004 para VI.

tional legal order, the provision was interpreted to imply a constitutional mandate for actions and measures towards building a united Europe.[621]

Apart from the EU-related amendments, a couple of further constitutional changes and reversed attempts for amendments deserve mentioning due to their general constitutional implications, mainly about the separation of powers. A 2006 constitutional amendment concerned the curtailing of the immunity of the members of parliament and the Constitutional Court judges.[622] Before the amendment, detention and criminal prosecution for these two categories of individuals could be carried out in cases of serious criminal offenses. The amendment provided a possibility of detention and criminal prosecution even in cases of general crimes.[623]

In 2006, another constitutional amendment reinforced the authority and control of the legislative power over the judicial branch.[624] The amendment introduced the constitutional requirement that the presidents of the Supreme Court of Cassation[625] and the Supreme Administrative Court, and the Prosecutor General have to all report annually to the National Assembly that has to hear and accept their reports (Article 84.16, CRB). The annual reports have to provide information on the application of the law, the activities of the courts, the prosecution office, and the investigating bodies.[626]

However, one part of the 2006 amendment was declared unconstitutional by the Constitutional Court. Namely, the amendment stated that in cases of serious infringements or systematic neglect of official duties, as well as actions undermining the judiciary's prestige, the Presidents of the Supreme Court of Cassation and the Supreme Administrative Court, as well as the General Prosecutor, could be removed from their positions. The

621 ibid para V.1.

622 Article 147(6) of the Constitution states that the judges of the Constitutional Court enjoy the same immunity as the members of the parliament.

623 § 1, Law Amending and Supplementing the Constitution of the Republic of Bulgaria, SG 27/31.03.2006 2006.

624 § 2, ibid.

625 Supreme Court of Cassation ("Върховен касационен съд") is the court exercising supreme judicial supervision in Bulgaria over civil and criminal law cases. *See* Article 108, Law on the Judicial Power, SG 64/07.08.2007 (with later amendments). The English translation of the court's name in the present research work is taken from the official English translation of the Bulgaria Constitution (available at the National Assembly's webpage at https://www.parliament.bg/en/const).

626 § 2, Law Amending and Supplementing the Constitution of the Republic of Bulgaria, SG 27/31.03.2006 2006.

state President could remove the magistrates based on a proposal of ¼ of the members of Parliament that needed to be adopted by ⅔ of the members of Parliament. The amendment envisioned that the state President could not deny the dismissal upon a second proposal for removing the given magistrates.[627] The amendment was referred to the Constitutional Court by the Plenum of the Supreme Court of Cassation for a constitutionality review. The Constitutional Court decided that the amendment was indeed unconstitutional since it interfered with the independence of the judicial system and the principle of the separation of powers.[628] Moreover, the reform attempted to grant the National Assembly powers that the Constitution had already granted to the High Judicial Council.[629]

Finally, the constitutional amendments related to fundamental rights also deserve a brief mention due to the latter's relevance to the research purpose. The changes in this regard included the extension of the possible actors that can request a constitutional review due to alleged violation of the fundamental rights and freedoms. The possibilities for requesting constitutional review initially used to include an initiative from no less than ⅕ of all members of Parliament, the Council of Ministers, the Supreme Court of Cassation, the Supreme Administrative Court, or the General Prosecutor (Art. 150, CRB).[630] In 2006, this list was enlarged with the Ombudsperson, who is allowed to request a constitutional review on legislation that violates citizens' fundamental rights (Art. 150(3), CRB).[631] In addition, in 2015, the Supreme Bar Council was also provided with the prerogative to request a review of legislation that allegedly violates fundamental rights and freedoms (Art. 150(4), CRB).[632]

627 § 6, ibid.
628 Constitutional Decision No 7/2006 on case 6/2006.
629 The High Judicial Council has the authority to appoint, promote, demote, transfer and remove from office judges, prosecutors, and investigating magistrates (Art. 129(1), CRB).
630 In terms of issues pertaining to the allocation of competences, the municipal councils can also request a constitutional review.
631 § 8, Law Amending and Supplementing the Constitution of the Republic of Bulgaria, SG 27/31.03.2006.
632 ibid.

b. Constitutional Law in Bulgaria

aa. General Considerations

A concise examination of the conceptual constitutional characteristics is required to support the subsequent process of defining Bulgarian constitutional law in a manner that enables it to serve as a potential influencing factor. Therefore, the following analysis is going to briefly examine the elements of the constitutional content and function. Next, the section will concisely analyze the main abstract considerations on the constitutional concept essential for the constitutional ability to influence social protection.

(1) Constitutional Content and Functions

In terms of constitutional content, the division between formal and material constitutional law content has been long established in the academic literature. The formal aspect understands the constitution as "a solemn document, a set of legal norms that may be changed only under the observation of special prescriptions, the purpose of which is to render the change of these norms more difficult".[633] Therefore, the first formal element is the recording of the constitutional norms in a written codified form by the competent authority in this regard. The written form of the constitutional text could be carried out in a single or several related documents. There could be no stringent requirements on the exact character of the constitutional codification. It is generally accepted that the main aspects of constitutional law should be incorporated in codification. Still, there are examples of countries with "uncodified constitutions" that have acquired their constitutional arrangements over time based on various codified statutes and conventions.[634]

The second formal aspect concerns the increased legal force of the constitution[635] reflected in the aggravated requirements for its amendment. Some consider the requirement of the special amendment as an indispens-

633 Kelsen, *General Theory of Law and the State* (1949) 124.

634 For instance, *see* Grote, 'The United Kingdom' (2017) <https://oxcon.ouplaw.com/view/10.1093/ocw/law-ocw-cm981.016.1/law-ocw-cm981#law-ocw-cm981-note-1> accessed 18 February 2019.

635 Jellinek, *Allgemeine Staatslehre* (1914) 520.

able constitutional characteristic.[636] There are ranging nuances on the issue of the difficulty of the amendment.[637] The idea of constitutional rigidity indicates the severity of the amendment procedure and the presence of entrenched clauses, as well as the rareness and difficulty of a change.[638] In this sense, some constitutions are regarded as "rigid"[639] since they contain high amendments thresholds, including a parliamentary supermajority or higher quorum requirements. In contrast, other constitutions are seen as "flexible" as their amendment processes are relatively relaxed and, for instance, involve ordinary legislative majorities. Some constitutions might contain divergent procedures for the amendment of their different principles, provisions, or parts.[640]

Third, the increased legal force of the constitution is mirrored not only in its aggravated amendment but also in its precedence over ordinary law. The increased legal force of the constitution is a conceptual element that stands between the "formal" and "material" meaning.[641] The constitution represents the highest level within the hierarchical structure of the state's legal order.[642] Since the constitution restricts the legislative power,[643] the laws which result from it also need to be subordinate to the basic norm. All other "purported" legislation that contradicts the norms of the constitution becomes legally void.[644]

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636 ibid 534; Kelsen, *General Theory of Law and the State* (1949) 124; Stern, *Das Staatsrecht der Bundesrepublik Deutschland* (1984) 78.

637 Drumeva, *Constitutional Law/Конституционно право* (2018) 148.

638 Contiades and Fotiadou, in Contiades, *Engineering Constitutional Change* (2013) 459.

639 Previously, the distinction between "rigid" and "flexible" constitutions was based on whether the constitution could be enacted or amended similarly to the ordinary laws. For instance, *see* Kelsen, *General Theory of Law and the State* (1949) 259. However, with time and the occurrence of constitutions that possessed dissimilar procedures for amendment of different parts this straightforward distinction became obsolete. *See* Roznai, 'Rigid (Entrenched)/Flexible Constitutions' (2018) <https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e18> accessed 18 February 2019.

640 ibid. These varying amendment requirements within one constitution are referred to by some as "selective rigidity" and obstruct a straightforward comparison between the constitutions on the mere basis of its "flexibility" or "rigidity".

641 Vergho, *Soziale Sicherheit in Portugal und ihre verfassungsrechtlichen Grundlagen* (2010) 214.

642 Kelsen, *General Theory of Law and the State* (1949) 124; Stern, *Das Staatsrecht der Bundesrepublik Deutschland* (1984) 105.

643 Hart, *The Concept of Law* (1961) 68.

644 ibid.

The second material conceptual aspect understands the constitution as encompassing the norms that regulate the legislation process.[645] According to some, a broader understanding of the concept would belong to the realm of political theory.[646] This broader understanding would materially define constitutions as including all of the norms regulating the establishment and the competences of the highest executive and judicial organs. In contrast, opposing views argue that focusing a definition on legal validity is ultimately unable to give insight into the role of the law in the establishing and maintaining of the state.[647] Therefore, a broader conceptual view considers the material sense as being composed of two main elements. On the one hand, the material aspects concern the fundamental regulating of a state's "organization, form, and structure".[648] On the other hand, the material sense covers the norms regulating the legal position of the individuals.[649] The extent to which the material constitution spreads, however, is unclear.[650] It is generally accepted that there could be material constitutional norms that do not form part of the formal understanding of the concept.[651]

Apart from a quick look into the constitutional contents and their characteristics, one needs to also concisely consider the constitutional functions in order to enable subsequent concept definition. There are various functions present in the literature. Still, due to the context of the present work,

645 The material understanding of the constitution "consists of those rules which regulate the creation of the general legal norms, in particular legal statutes". *See* Kelsen, *General Theory of Law and the State* (1949) 124.

646 ibid 259.

647 A main issue is that narrowing down the material understanding of the constitution to the regulation of the legislation process is unable to account for the concept of sovereignty since it "leads only to a circularity in which the state, which on the one hand exists prior to law, also presents itself as a presupposition of law". *See* Loughlin, *The Idea of Public Law* (2004) 91.

648 Stern, *Das Staatsrecht der Bundesrepublik Deutschland* (1984) 78; Stoichev, *Constitutional Law/Конституционно право* (2002) 67.

649 For instance, Jellinek states that constitutions contain norms concerning both the supreme organs of the state and the fundamental position of the individual in relation to the authority of the state. *See* Jellinek, *Allgemeine Staatslehre* (1914) 505.

650 The blurriness stems from the problem of the degree of significance that the dynamics of the domestic distribution of power have for the understanding of the concept of constitution. *See* Stern, *Das Staatsrecht der Bundesrepublik Deutschland* (1984) 108.

651 Kelsen, *General Theory of Law and the State* (1949) 260; Stern, *Das Staatsrecht der Bundesrepublik Deutschland* (1984) 78.

the following will only briefly focus on the most relevant and all-encompassing aspects. Generally, the constitution bears the functions of fundamentally organizing, stabilizing, and unifying the state. In this sense, the constitution regulates the state's order in a foreseeable manner.[652] To do so, it needs to achieve stability by establishing the right balance between continuity and openness to the challenges of the present. Since there are no universal formulas for resolving the conundrum of maintaining constitutional traditions by simultaneously responding to new social challenges, each constitution needs to find the appropriate approach. However, the issue is crucial as it illustrates whether a given constitution can maintain a state's unity.[653]

Further, another main task of the constitution is related to the legitimation of public authority.[654] The state authorities' power is not pre-set but requires legitimation in terms of its acquiring and subsequent exercise. Namely, the exercise of state power is not just subject to initial legitimation but is to remain within the lines defined by the constitution. Therefore, the legitimation of power is composed of both granting power and constraining it within certain limits.[655] Furthermore, the function of legitimation is based on the principle of popular sovereignty, which roots the constitutional power back in the people. [656] For the latter principle to apply and the constitution to fulfill its legitimizing function, the exercise of public authority must be based on democratic legitimation.[657]

Last but not least, the constitution bears the function of safeguarding the rights and freedoms of the individual.[658] The constitutional rights are traditionally[659] broadly divided into the so-called "negative rights", which protect against state intervention, and "positive rights", which necessitate state participation for their realization.[660] Different scholars have increasingly

652 Drumeva, *Constitutional Law/Конституционно право* (2018) 120–121.
653 ibid 121.
654 ibid.
655 Lindsay, 'Constitutional Limitations on Government Powers' (1915) 5 Proceedings of the Academy of Political Science in the City of New York 94.
656 Wheatley, *Democracy, Minorities and International Law* (2005) 128.
657 Beetham, in Jones and Weale, *The Legitimation of Power* (1991) 117 ff.
658 Drumeva, *Constitutional Law/Конституционно право* (2018) 120.
659 Dahlberg, 'Should Social Rights Be Included in Interpretations of the Convention by the European Court of Human Rights?' (2014) 16 EJSS 255.
660 In relation to the assumption that civil and political rights require state's restrain from action, scholars point out that civil and political rights often demand concrete legislative and administrative protection actions. *See* Eichenhofer, in Hohmann-

challenged this traditional division in the last years.[661] Still, the safeguarding of "negative rights" is considered the main motivation for creating some of the first constitutions.[662] Some scholars claim that constitutions serve first and foremost the protection of freedoms and rights of the citizens from the abuse of state power.[663] The inclusion of rights and freedoms in the constitution ensures that the constitution will be able to serve as a foundation for the state's governance.[664]

(2) Conceptual Considerations

After the constitutional content and functions have been concisely presented, the next step towards the definition of the term "Bulgarian constitutional law" concerns examining the conceptual characteristics of the concept in general. The aim is to present conceptual characteristics tightly intertwined with the study's goal. Given the purpose of the research, the term "constitution" needs to designate the constitutional norms' "ought to" purpose.[665] The concept should be able to reflect upon the aim of examining the relationship between the constitution and social protection. Then, the constitutional term needs to be understood normatively, which implies the underlining of the validity of its norms regardless of the actual situation regarding the adherence to these norms.[666] The normative understanding of the term enables the constitution to contain specifications for the different areas of the law, including social protection.

Dennhardt and others, *Grundrechte und Solidarität* (2011) 30–31. Alternatively, authors point out that social and economic right at times do require state's restrain from action. *See* Dahlberg, 'Should Social Rights Be Included in Interpretations of the Convention by the European Court of Human Rights?' (2014) 16 EJSS 256.

661 Some scholars reject the "positive" and "negative" taxonomy since they consider it to be "overtly simplistic" and "artificial". *See* Clements and Simmons, in Langford, *Social Rights Jurisprudence* (2012) 409 ff.

662 Drumeva, *Constitutional Law/Конституционно право* (2018) 665.

663 Grimm, *Constitutionalism* (2016) 4–23.

664 Stern, *Das Staatsrecht der Bundesrepublik Deutschland* (1984) 94.

665 Kelsen states that "the norm is the expression of the idea that something ought to occur, especially that an individual ought to behave in a certain way". However, this reveals nothing in relation to whether the individual really behaves in accordance to the "ought to". *See* Kelsen, *General Theory of Law and the State* (1949) 36.

666 "That is to say, the legal rule is valid even in those cases where it lacks efficacy". *See* ibid 30. More on the transition from the actual status quo to the "ought to", *see* Nenovski, *Law and Values/Право и Ценности* (1983) 46.

Further, the normative meaning of the constitutional concept also leads to the aspect of the constitutional precedence over ordinary laws.[667] The precedence is crucial for the present study since the goal of determining constitutional influence requires that the constitution and the social protection system are not positioned on the same level. The legal order's unity is founded upon the requirement that the creation of one norm is determined by another, higher norm, whose creation, in turn, is determined by an even higher norm. In this sequence, the ultimate source of dominance is the basic norm, which bears the highest rank in the legal order.[668] Hence, if the constitution did not possess the power of precedence and domination, a higher norm should have the ultimate precedence in the given legal order.[669]

When it comes to the discussed formal elements of the constitutional content, the aggravated amendment of the constitution is related to its supremacy.[670] If the constitution could be procedurally amended as the ordinary legislation, then the supposed higher ranking of the constitution compared to social protection laws would, in reality, be quite feeble. As mentioned above, the formal codification element does not amount to an indispensable feature of the constitutional concept. Still, the presence of a codified constitutional document can serve as a starting point for the research and the determination of substantive constitutional law. In the case of uncodified constitutional norms, these must also respond to the requirement for precedence over ordinary legislation.

The material content of the concept of the constitution could be composed of norms concerning the organization of the state and norms regulating an individual's legal position. Both types of norms are important for concrete research since they can have relevance for social protection. Further, the constitutional term incorporates the main functions outlined in the previous sub-section since the study's goal does not impose any restrictions on the given purposes that the constitution needs to fulfill.

In Bulgarian legal science, there is a general concord on the content of the abstract concept of constitution. Namely, it is widely accepted that the term embraces the systematized amalgamation of public law norms that determine the main features of the legal organization and governance of the

667 Grimm, *Constitutionalism* (2016) 321.
668 Adamovich and others, *Österreichisches Staatsrecht* (2011) 3.
669 Kelsen, *General Theory of Law and the State* (1949) 124.
670 Belov, *Constitutional Law in Bulgaria* (2019) 56.

state.[671] These norms are ultimately determined based on the constituent power.[672] Thus, in understanding the constitutional concept and the power of the constitutional norms, the national definitions rely on the concept of constituent power ("*pouvoir constituent*"), which indicates "the ultimate source of authority in the state".[673] Therefore, the predominant definition embraces the formal elements discussed above that rely on a codified solemn document and the material aspects of the fundamental definition of the state's order, in combination with the function of state organization.

bb. Bulgarian Constitutional Law in the Framework of the Research

For the research to examine the specific constitutional requirement for social protection, it must first be assessed which Bulgarian norms correspond to the considerations of the constitutional content, functions, and general conceptual features, as discussed in the preceding parts. To begin, there are several aspects concerning the requirement for the precedence of the constitution over ordinary legislation. First, Article 5(1) of the CRB states that the Constitution is the "supreme law"[674] and, as such, no other law can be contrary to the constitutional norms. The reliance on the adjective "supreme" implies gradation and conveys the meaning that the Constitution has the greatest legal force in comparison with the rest of the legislation.[675] The legal force is expressed in the subordination of legal acts between each other and entails that the legal act with lesser legal force should conform with the higher legal act. Given that the Constitution has the greatest legal force, then ordinary laws have to conform to it.

671 Vladikin, *General Theory of the State/Общо Учение За Държавата* (2000) 87; Drumeva, *Constitutional Law/Конституционно право* (2018) 27.

672 Vladikin, *General Theory of the State/Общо Учение За Държавата* (2000) 87; Drumeva, *Constitutional Law/Конституционно право* (2018) 27; Spasov, *Study on the Constitutuion/Учение за Конституцията* (1997) 27.

673 Loughlin, *The Idea of Public Law* (2004) 2. For a comprehensive review of the concept, please, *see* ibid 99–113.

674 The usually utilized descriptive adjective for the constitutions as a "highest" ("висш") norm, which indicates its precedence, has been replaced by the even stronger adjective in terms of the degree of precedence by the reliance of the word "supreme" ("върховен"). For overview on the difference in the usage of these adjectives in the Bulgarian Constitution, *see* Nenovski, 'The Individual Rights in the 1991 Constitution of the Republic of Bulgaria/Правата на личността в Конституцията на Република България от 1991 г.' (1995) 36 Legal Thought/Правна мисъл 7–8.

675 Stoichev, *Constitutional Law/Конституционно право* (2002) 65.

What's more, the constitutional precedence also stems from Article 4(1), which provides that the state is governed by the rule of law, thereby implying the state's commitment to the Constitution as a law with the greatest legal force. The principle of the rule of law is strongly pronounced since it is part of the highest values in the Preamble[676] and is further featured in Article 4 as one of the fundamentals of the constitutional order. The requirement for adherence to the Constitution is mentioned several times throughout the text in definitions of the highest state organs' organization and functions that are tied to the requirement for conformity with the constitutional provisions.[677]

Last but not least, the precedence of the CRB is also reflected in Article 5(2), providing that the constitutional provisions "shall apply directly".[678] According to the Constitutional Court, the "shall apply directly" provision entails that all citizens and legal entities can rely directly on the constitutional norms in defense of their rights and legal interests.[679] The direct application of the Constitution is also expressed in the annulment of pre-existing legislation that contradicts the basic law.[680]

676 Drumeva, *Constitutional Law/Конституционно право* (2018) 134.

677 For instance, Article 67(2) on the National Assembly or Article 103(1) on the President or Vice-President, CRB.

678 In the national scholarship, there are conflicting views on which constitutional provisions could be considered as directly applicable. Some believe that all constitutional provisions fall under this category, as there is no exception to the provision on direct applicability. *See* Stoichev, *Constitutional Law/Конституционно право* (2002) 69. Other scholars argue that only some of the provisions are capable to be directly applicable as the CRB itself provides that legislation needs to be enacted for the realization of some of its provisions. *See* Spasov, *Study on the Constitution/Учение за Конституцията* (1997) 35. Finally, scholars point that there could be contradictory interpretations of Article 5(2) of the CRB when it is examined together with Chapter VIII of the Constitution that establishes the concentrated constitutional control in the country through the Constitutional Court. Namely, the direct effect of the CRB could be interpreted in a way allowing all courts to directly apply the constitutional provisions in case of doubt of unconstitutionality. However, the Constitutional Court is the only institution allowed to declare unconstitutionality. Regular courts are instead only allowed to disregard "pre-existing laws" on grounds of unconstitutionality. *See* Belov, *Constitutional Law in Bulgaria* (2019) 56.

679 Constitutional Decision No 10/1994 on case 4/1994.

680 If the pre-existing legislation which was contradictory to the Constitution was not annulled by the new highest law but remained in force until it was annulled by a law enacted on the basis of the new Constitution, the pre-existing law would weaken the new Constitution by obstructing its direct applicability. Thus, the old legislation that contradicts the constitutional provisions should be considered as annulled on the day of the entry into force of the new Constitution. *See* Constitutional Decision

In addition to being the supreme law in the country, the Constitution provides the fundaments of the state organization. The Constitution defines the foundations of the form of government and the economic organization, legitimatizes and limits state power, and organizes the highest state organs.[681] The constitutional text also establishes the basics regarding the individual's position, including through a wide-ranging list of fundamental rights and safeguarding mechanisms for rights' protection such as the Constitutional Court, the administrative justice, and the Ombudsperson.[682]

When it comes to the formal feature of the aggravated amendment of the constitution, it could be observed that changes to the CRB are more difficult than reforms of ordinary laws. Namely, there are two-track procedures[683] built upon material criteria, which entail different formal and material amendment aspects. While the ordinary National Assembly can carry out the first type of amendment, the second amendment procedure concerns issues of such crucial importance for the state and society that only a Grand National Assembly can execute it. According to Article 154(1) of the Constitution, the first type of amendment procedure initiative should be introduced by either ¼ of the members of parliament or the President. Then, the proposal is approved if it is supported by ¾ of all members after undergoing three-stage voting on different days.

If the proposal received less than ¾ but not less than ⅔ from the votes of all members, it could be reintroduced for voting after at least two months but not more than five months. The new voting requires the support of ⅔ of the votes of the members of parliament (Art. 155(2), CRB). The other amendment procedure requires the Grand National Assembly and concerns areas that have been exhaustively listed in Article 158. Some issues that belong to this amendment procedure deal with the changes in the state's territory and changes in the forms of state structure and state government. The main purpose of the Grand National Assembly is the enactment of a new constitution. The Grand National Assembly is composed of 400 members who have been elected following the election law in force (Art. 157, CRB).

No 10/1994 on case 4/1994 para I. For more on this issue, *see* Stalev, *Problems of the Constitution and Constitutional Jurisprudence/Проблеми на Конституцията и конституционното правосъдие* (2002) 13–14.

681 Stoichev, *Constitutional Law/Конституционно право* (2002) 95; Spasov, *Study on the Constitutuion/Учение за Конституцията* (1997) 95.

682 Belov, *Constitutional Law in Bulgaria* (2019) 31.

683 ibid 42.

Apart from the formal aspect of codification, constitutional norms stemming from customary constitutional law can also be found outside the body of the codified document. To clarify, through the case law of the Constitutional Court, the principle of proportionality is now firmly established as a constitutional requirement for the legislature.[684] Apart from the proportionality principle, further unwritten constitutional principle stemming from the rule of law includes the aspect of legitimate expectations.[685] Additionally, international conventions that have been ratified according to Article 5(4) of the Constitution and have thus become part of the national law can be viewed as sources of constitutional law.[686] Moreover, further legal sources and even regulations on the organization of supreme state organs, like the Regulation on the Organization and Activity of the National Assembly, are also regarded as sources of constitutional law.[687] Last but not least, the judgments of the Constitutional Court on constitutional interpretation or norm control represent sources of law and are attributed to a constitutional law rank.[688]

To wrap it up, the concept of Bulgarian constitutional law in the research framework includes norms that hold precedence over ordinary law and concern fundamental state organization and the rights and freedoms of the individual. Hence, it can be expected that, in a normative sense, the constitutional law can represent an influencing factor in the social protection system. The set of constitutional norms serves the functions of organizing and stabilizing the state and aim at maintaining its integrated unity. A further component of the definition is the constitutional law's ability to legitimize state power and the limitation of its exercise predominantly expressed in the function of protecting individual rights. The Bulgarian constitutional law contains both codified and unwritten norms in terms of

684 For instance, *see* Constitutional Decision No 7/2012 on case 2/2012; Constitutional Decision No 2/2015 on case 8/2014.

685 Constitutional Decision No 10/2012 on case 15/2011.

686 Stoichev, *Constitutional Law/Конституционно право* (2002) 47.

687 Spasov, *Study on the Constitutuion/Учение за Конституцията* (1997) 84–85. In this regard, even some decisions of the National Assembly, which generally have no normative character, could be considered sources of constitutional law if they, for instance, deal with procedural rules for the election of the prime minister or Constitutional Court judges. *See* Stoichev, *Constitutional Law/Конституционно право* (2002) 47.

688 The decisions on the institutional conflicts on the separation of powers may have normative character since they can contain important interpretations on the respective constitutional provisions. See Belov, *Constitutional Law in Bulgaria* (2019) 290.

formal characteristics. Compared to ordinary law, the codified constitutional document is characterized by a more aggravated amendment procedure. Still, the constitutional law concept embraces both uncodified norms and further sources, such as principles of customary constitutional law, ratified international treaties, and decisions of the Constitutional Court.

c. Structure of the Current Bulgarian Constitution

Generally, the structure of constitutions tends to be divided into two main parts.[689] On the one hand, a considerable part often deals with the state organization that includes the state's economic, social, and political foundations, as well as the separation of powers and the work and interactions of the supreme state organs. On the other hand, the other part addresses the regulation of the legal position of the individual. Further, the material order of the Constitution contains other norms, such as constitutional principles and state objectives, which have significance for the shaping of the state tasks but cannot be simply assigned to one of the groups of constitutional parts mentioned above.[690]

The Bulgarian Constitution is divided into 10 Chapters, preceded by a Preamble and followed by "Transitional and Concluding Provisions". The latter provisions represent an organic part of the constitutional text, even if they are not incorporated in the Constitution's main body.[691] The Preamble poses greater difficulties in determining its exact relation to the constitutional norms, especially when it comes to its legal status. The question of whether the provisions of the Preamble can result in legal rights and duties has been debated by different authors.[692] In the Bulgarian legal scholarship, the views on the matter are polarized.[693] Still, the greater part of the scholars concludes that the Preamble of the CRB is not just a political declaration but represents an abstract synthesis of the main constitutional principles, which are foundational for the whole constitution.[694] Even if

689 Stern, *Das Staatsrecht der Bundesrepublik Deutschland* (1984) 121.
690 ibid 122.
691 Drumeva, *Constitutional Law/Конституционно право* (2018) 155.
692 Orgad, 'The Preamble in Constitutional Interpretation' (2010) 8 Int. J. Const. Law 714; Drumeva, *Constitutional Law/Конституционно право* (2018) 157.
693 Drumeva, *Constitutional Law/Конституционно право* (2018) 157.
694 Koicheva, *Survivor Pensions/Наследствени пенсии* (2009) 79–80; Drumeva, *Constitutional Law/Конституционно право* (2018) 157–158; Mrachkov, in *Top-*

the provisions of the Preamble do not have the legal character of the legal norm, they have a key role in interpreting the logic and content of the constitutional norms.[695] In assessing the legal status of the Preamble, the research will predominantly rely on the Constitutional Court's interpretation of the legal force of the Preamble's provisions.

Returning to the main body of the CRB, the Constitution begins with a chapter on the fundamental principles of state order, containing the main principles for the state's governance, including the economic foundations of the state. The CRB does not contain a separate chapter on the economic basis but rather intertwines the economic organization with the rest of the basic principles of state organization. This approach toward the constitutional structure can be explained by the historical moment in which the document was created. The CRB was destined to serve as one of the main tools for transitioning from socialism to democracy and building a market economy. Accordingly, the new free-market economy became intertwined with the fundamental organization of the state in the constitutional text.[696]

The chapter also contains some state objectives, characterized as general policy objectives documented in the Constitution. Some of these state objectives include protecting families, motherhood, and children (Art. 14, CRB). The state objectives impose an obligation to the extent that the state needs to pursue the declared objectives.[697] However, state objectives could not be seen as a requirement for creating subjective rights.[698] In fact, the creators of the Constitution found it necessary to formulate some of the mentioned state objectives also as rights[699] in the next chapter of the CRB, rather than considering that it would be enough to leave them just as state objectives.

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ical Issues of the Labour and Social Insurance Law/Актуални проблеми на трудовото и осигурителното право (2016) 39; Mrachkov, in *Topical Issues of the Labour and Social Insurance Law/Актуални проблеми на трудовото и осигурителното право* (2017) 43; Tanchev, *Introduction to Constitutional Law/Въведение в Конституционното Право* (2003) 333–334; Spasov, *Study on the Constitutuion/Учение за Конституцията* (1997) 42–43.

695 Mrachkov, in *Topical Issues of the Labour and Social Insurance Law/Актуални проблеми на трудовото и осигурителното право* (2016) 39.

696 Drumeva, *Constitutional Law/Конституционно право* (2018) 155.

697 Sommermann, *Staatsziele und Staatszielbestimmungen* (1997) 377.

698 ibid 418–419.

699 For instance, the state objective for the protection of the family, motherhood and children has been concretized in different subjective rights in the provisions of Article 47 of the CRB.

The chapter on the fundamental state order principles is followed by the chapter on citizens' fundamental rights and duties. The chapter contains all rights without grouping them by some criteria. The CRB includes the most extensive catalog of fundamental rights in the history of Bulgarian constitutional law.[700] In addition to the fundamental rights chapter, the CRB further contains certain fundamental principles that can shape the common obligations of the state, including in view of fundamental rights. Some of these principles include the principle of human dignity part of Article 4(2) and Article 6(1), the principle of equality stated in Article 6(1), and the rule of law proclaimed in Article 4(1). Generally, constitutional practices have demonstrated that principles can result in a multitude of material consequences, thereby enabling them to reach out far into the substantive law.[701]

The following chapters of the CRB deal with the issues of the organization of the state power and set the norms for the work of the National Assembly, the President of the Republic, the Council of Ministers, and the judicial power. The next chapter on the local self-government and administration introduces the constitutional decentralization aspects of the vertical separation of powers in the state.[702] The norms establishing the work of the Constitutional Court have been placed in a separate chapter.[703] Then, in ten articles, chapter nine deals with constitutional amendment issues and the adoption of a new constitution.[704]

700 Mrachkov, in *The International Labour Organization and Bulgaria/Международната организация на труда и България* (2020) 52.

701 Stern, *Das Staatsrecht der Bundesrepublik Deutschland* (1984) 122.

702 Drumeva, *Constitutional Law/Конституционно право* (2018) 631.

703 The structure of the constitutional text and more precisely the separate chapter on the Constitutional Court became an important aspect in an interpretative decision of the Constitutional Court discussing whether the Court is part of the judicial system (*see* Constitutional Decision No 18/1993 on case 19/1993). The Court concluded that it itself is not a component of the judicial system as it falls outside of the three powers enlisted in Article 8 of the CRB. The Constitutional Court rather considered that it exercises its prerogatives independently and alongside the supreme organs of the three powers. The reasoning of the judgment was sharply criticized by some scholars who argued that the Court positions itself as a "fourth power" which is against the provisions of the CRB which in Article 8 divides the power of the state into legislative, executive and judicial branches. *See* Stalev, *Problems of the Constitution and Constitutional Jurisprudence/Проблеми на Конституцията и конституционното правосъдие* (2002) 69–89.

704 The Constitution continues with a short chapter on the national state symbols and finishes with the transitional and concluding provisions.

To conclude, the main content of the Bulgarian Constitution resonates with the general constitutional structure by encompassing two main constitutional contents concerning the state organization and the legal position of the individual. The chapters regulating the work of the supreme state organs and the articles dealing with the bases of the economic organization from the "Fundamental Principles" chapter tend to belong to the constitutional content on state organization. The chapter on the fundamental rights and duties of the citizens belongs to the content concerning an individual's legal position. Finally, the first chapter's constitutional principles and state objectives represent material constitutional content that cannot be assigned to the previously differentiated sections on fundamental rights or state organization.

2. The Constitutional Norms Relevant to Social Protection

In line with the purpose of the research, the need arises to examine the constitutional norms relevant to social protection more closely. Therefore, the relevant fundamental rights are examined below by first analyzing Bulgaria's different types of constitutional rights. Next, based on the uncovered differences between the various fundamental rights, the concept of fundamental social rights is succinctly clarified due to its pertinence in examining the concrete influences on social protection. However, fundamental rights are not the only aspect that could be relevant in examining constitutional law's role.[705] Often, when immediate legislative action is required due to a given critical situation, additional constitutional provisions that protect the principle of democracy and the rule of law could also be violated.[706] Accordingly, the further related constitutional content is assessed by delving into the relevant principles and state goals.

Naturally, a question arises on determining the constitutional content that could be considered relevant to social protection.[707] A delimitation of the relevant norms needs to consider the provided definition of social

705 Becker, in Becker and Poulou, *European Welfare State Constitutions after the Financial Crisis* (2020) 8.

706 ibid.

707 Fichtner-Fülöp, *Einfluss des Verfassungsrechts und des Internationalen Rechts auf die Ausgestaltung der sozialen Sicherheit in Ungarn* (2012) 250; Vergho, *Soziale Sicherheit in Portugal und ihre verfassungsrechtlichen Grundlagen* (2010) 224.

protection.[708] However, the reliance on the apparent connection to the definition cannot comprehensively embrace all of the constitutional norms that may influence social protection. First of all, further written and unwritten norms may be relevant, despite their prima facie unrelatedness. Second, social protection is, after all, governed by the state bodies, and hence in principle, the whole constitutional body of law may be relevant. Therefore, there can be no abstract definition of which norms will be considered relevant. Instead, the analysis of the relevant constitutional norms below closely follows the constitutional interpretation of their relevance for social protection. Fundamental rights that, at first glance, are not explicitly connected are going to be considered germane to the extent that they can have relevance for social protection issues.[709]

a. Fundamental Rights

aa. Types of Fundamental Rights in the Bulgarian Constitution

In general, there are different ways in which legal scholarship has divided fundamental rights.[710] Still, no single approach comprehensively covers fundamental rights since the different classifying methods have varying guiding criteria.[711] Rights are frequently reflected upon and examined concerning their negative and positive aspects.[712] On the one hand, rights can protect against the state's intrusion in the individual's private life and enable free participation in social life and political processes. On the other hand, subjective rights deducted from state obligations that on their own have been concretized in positive state actions, contribute to making this

708 For more on this, refer to the provided social protection definition in the part on the functional systematization.

709 For instance, the right to property can be relevant to social protection to the extent that it protects certain private law entitlements.

710 Stern and Sachs, *Das Staatsrecht der Bundesrepublik Deutschland* (1988) 451; Stoichev, *Constitutional Law/Конституционно право* (2002) 231.

711 For instance, some authors divide the rights on the basis of the group to whom they are granted, others rely on the function that the rights are supposed to fulfil. *See* Stern and Sachs, *Das Staatsrecht der Bundesrepublik Deutschland* (1988) 451; Stoichev, *Constitutional Law/Конституционно право* (2002) 231.

712 Klatt, 'Positive Rights: Who Decides?' (2015) 13 Int. J. Const. Law 354.

participation in social and political life possible.[713] It was generally assumed that all classical liberal rights represent negative rights, while the social and socioeconomic rights belong to the group of positive rights. However, such a simplified division could be misleading since classical liberal rights can possess positive dimensions. Analogically, social rights can have negative dimensions.[714] The authors further underline the objective and subjective dimensions of rights due to the related differences in the respective legal effects.[715] Such distinction is relevant to the present research due to its ability to focus on constitutional provisions' different influences.

The examination of the structure of the 1991 Constitution revealed that the CRB does not formally distinguish between different types of rights. Instead, the Constitution covers all of the rights in a chapter on the fundamental rights of citizens. Some scholars consider this lack of grouping as an expression of overcoming the anachronistic rights' separation into positive and negative.[716] However, this is not to say that no difference is drawn between the various constitutional rights. On the contrary: since its very beginning, the Bulgarian constitutional theory has adopted the classification of rights that is ultimately based on Jellinek's status theory and thus distinguishes between "negative", "positive", and "active" rights' statuses.[717] This separation is so entrenched in the legal discourse that it has informed the writing of the fundamental rights sections of the 1947, 1971, and 1991 constitutions.[718] The Constitutional Court has also taken on

713 It is generally accepted that "positive rights" require state action in contrast to "negative rights" that entail the refraining from unjustified interference. *See* ibid. This differentiation is rooted in Jellinek's initial classification of statuses. *See* Bumke and Voßkuhle, *German Constitutional Law* (2019) 44–45.

714 Klatt, 'Positive Rights: Who Decides?' (2015) 13 Int. J. Const. Law 355.

715 Subjective rights stem from norms with objective dimension. At the same time, however, not all normative obligations of the state correspond to an individual subjective right. Hence, norms with objective content could "possibly but not necessarily entail subjective rights". *See* Ehlers, in Ehlers, *European Fundamental Rights and Freedoms* (2007) 193.

716 Drumeva, *Constitutional Law/Конституционно право* (2018) 676.

717 Balamezov, *Constitutional Law/Конституционно Право* (1993) 69–71; Stoichev, *Constitutional Law/Конституционно право* (2002) 231; Drumeva, *Constitutional Law/Конституционно право* (2018) 677–678; Gabrovski, 'Axiology of the Philosophy of Law/Аксиологически проблеми на философията на правото' (2010) 18 'Diogenes' Library/Библиотека "Диоген" 232–234.

718 Namely, despite that the rights are grouped together, their order of presentation in the last three constitutions always begins with the civil rights then continues with

this systematization approach. The Court tends to juxtapose[719] the so-called "defense" or "negative" rights against "participatory" or "positive" rights when assessing the differences of the latter in terms of resulting state obligations.[720] Further, the Bulgarian constitutional jurisprudence distinguishes the rights based on their historical occurrence following the theory of Karel Vasak[721] and considers them as distinctive "generations" of rights.[722]

The constitutional fundamental rights provisions can also be divided based on their different addressees.[723] However, there is no explicit demarcation of the addressed groups in the CRB. Classical civil rights are provided to all individuals regardless of their nationality.[724] The political rights could

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the political rights and ultimately ends up with the social, economic and cultural rights. *See* Belov, *Constitutional Law in Bulgaria* (2019) 325 ff.

719 On the problems of contrasting participatory rights with the classical rights and the balancing of the ranks of the two categories, *see* Zacher, in Kurzrock, *Menschenrechte* (1982) 121.

720 The Constitutional Court has stated that "[i]t is generally accepted that the fundamental constitutional rights have a defensive character against the state on the basis of which they are also called negative, since their exercise requires the state to refrain from action…" (translation from Bulgarian by author). *See* Constitutional Decision No 7/1996 on case 1/1996 para II.8. In another decision the Court stated that "… unlike personal fundamental rights, which are called "defensive" and "negative", the essence of [positive] rights is not a defense against the encroachment of public power into the reserved private sphere, but a demand for positive action in the social sphere by the State and for participation in its achievements; these rights are therefore called "participatory" and "positive". They can only be realised if the state takes the necessary and expected measures and creates the conditions and guarantees" (translation from Bulgarian by author). *See* Constitutional Decision No 2/2006 on case 9/2005 para II.11. The distinction between the participatory and defensive rights has also been adopted by the Bulgarian scholarship. In this regard, *see* Mrachkov, *Social Security Law/Осигурително право* (2014) 54–55; Balamezov, *Constitutional Law/Конституционно Право* (1993) 71–75.

721 Belov, *Constitutional Law in Bulgaria* (2019) 863.

722 "On the basis of their genesis and legal nature… the first generation of fundamental rights are directed towards the protection of the physical and spiritual integrity of the person and especially the autonomy and the private sphere of the individual" (translation from Bulgarian by author). *See* Constitutional Decision No 4/2006 on case 11/2005 para I. For more, *see* Kolev, 'On the Fundamental Human and Citizen Rights/Още веднъж за основните права на човека и гражданина' (2016) 12 International Politics/Международна политика 68.

723 Drumeva, *Constitutional Law/Конституционно право* (2018) 680–681; Nenovski, 'The Individual Rights in the 1991 Constitution of the Republic of Bulgaria/Правата на личността в Конституцията на Република България от 1991 г.' (1995) 36 Legal Thought/Правна мисъл 5 ff.

724 Belov, *Constitutional Law in Bulgaria* (2019) 331.

concern different nationality holders depending on the type of political right and whether it concerns matters related to the country's EU membership.[725] Social rights are provided only to Bulgarian citizens. The restricted scope in this regard is justified since these rights give access to benefits based on national solidarity and, as such, concern "national security in the wider sense".[726]

In terms of possible limitations of human rights, the Constitution establishes one general restriction in Article 57(2) prohibiting misuse of a fundamental right that results in an infringement upon the rights and legal interests of others. The provision establishes the horizontal application of constitutional rights in the country.[727] The constitutional possibilities for further restriction on fundamental constitutional rights could be examined by separating the rights into three main groups.[728] The first group of rights contains the so-called "absolute rights" that do not allow any restrictions.[729] Then, there are those rights whose realization could be temporarily curtailed in the exceptional cases of the proclamation of war and the introduction of martial law or state of emergency (Art. 57(3) CRB). The last third group of fundamental rights contains rights that could be restricted based on the previously mentioned extreme occasions and could also be curtailed on other grounds. There are two distinguishable branches in this regard. The first incorporates rights whose grounds for restrictions are expressly referred to by the Constitution.[730] The other encompasses rights that can be limited according to reasons and order left to the discrepancy of the legislature.[731]

The fundamental social rights fall in the group of rights that could be restricted temporarily on the grounds enlisted in Article 57(3) and could be subject to certain limitations imposed by the legislature. To prevent unnecessary curtailment, however, restrictions upon social rights must be

725 ibid.

726 ibid. However, as the research section on the functional systematization of social protection has demonstrated, the legislature has extended social rights also to European citizens and third-country nationals with long-term or permanent residence in the country.

727 ibid 333.

728 Constitutional Decision No 10/2018 on case 4/2017 para 3.

729 Those are enlisted in Article 57(3) and include rights such as the right to life, the prohibition of torture, and others.

730 For instance, Article 34(2), Article 40(2), and Article 42(1), CRB.

731 For instance, Article 25(6), Article 27(1) and (3), Article 30(2), and Article 31(5), CRB.

established or examined in view of the principles of proportionality[732] and equality, especially regarding the social grounds of inadmissibility of restrictions of rights or privileges outlined in Article 6(2).[733] Moreover, social rights limitations must be imposed only through parliamentary law.[734] Last but not least, the imposed restriction could not drain the social right of its core and revoke them in their entirety.[735]

bb. The Concept of Fundamental Social Rights

The term "fundamental social rights" has been utilized to convey a plethora of meanings[736] and has even been accused of general vagueness.[737] Indeed, the term does require some clarification, given its importance for this research. In the Bulgarian legal scholarship, fundamental social rights are still primarily characterized as "positive" rights,[738] although some authors tend to abstain from such clear-cut separation and instead stress the positive and negative dimensions of a right.[739] Still, there is a consensus that these rights are not automatically realizable based on their inclusion in the Constitution but require explicit development through a law regulating the conditions for the rights' exercise.[740] The establishment of the fundamental conditions and procedures for realizing these rights needs to be carried out by laws rather than by a normative instrument of lower rank.[741]

732 Constitutional Decision No 7/2019 on case 7/2019.
733 Constitutional Decision No 3/2013 on case 7/2013.
734 Mrachkov, *Social Security Law/Осигурително право* (2014) 54.
735 Drumeva, *Constitutional Law/Конституционно право* (2018) 786; Petrova, in Belov, *Peace, Discontent and Constitutional Law* (2021) 227.
736 Mrachkov, *Social Rights of the Bulgarian Citizens/Социални права на българските граждани* (2020) 25–29.
737 For instance, academics argue that the term "social rights" in general needs refinement due to the different legal senses in which it is used. For instance, it could be used to indicate international social rights, social rights in ordinary law, or constitutional social rights. *See* King, *Judging Social Rights* (2012) 17–19.
738 Mrachkov, *Social Security Law/Осигурително право* (2014) 55.
739 Drumeva, *Constitutional Law/Конституционно право* (2018) 676.
740 Mrachkov, *Social Rights of the Bulgarian Citizens/Социални права на българските граждани* (2020) 26–27; Drumeva, *Constitutional Law/Конституционно право* (2018) 675; Mrachkov, *Social Security Law/Осигурително право* (2014) 54; Koicheva, *Survivor Pensions/Наследствени пенсии* (2009) 83.
741 Mrachkov, *Social Security Law/Осигурително право* (2014) 54.

Even after the procedures and conditions for the realization of the fundamental social rights have been established in legislation, these rights continue to serve as a benchmark for state action and cannot be simply annulled. A characteristic of the fundamental social rights, stemming from their fundamental and constitutional character, is that they are irrevocable.[742] Their existence follows directly from the supremacy of the CRB in the hierarchy of laws and the direct applicability of its provisions promulgated in Article 5(1). Fundamental social rights entail constitutional mandates for their implementation by the enactment of a respective normative framework.[743] The implementation of this mandate is carried out with due respect to the available resources and possibilities of the state.[744] Nevertheless, it is largely recognized that the available resources of the state could not be the grounds for the restriction of acquired legal positions.[745] This latter requirement discloses the simultaneous "defensive" or "negative" dimension of fundamental social rights.

Accordingly, the present research requires a definition that can reflect upon the related objective and subjective aspects of social rights. The definition needs to address the state's role in social rights realization[746] and depict the relationship between social rights and the constitutional mandates for their implementation through institutions. Some understand social rights as "claims to benefits, which include establishing state institutions, and therefore a right to legislative action".[747] Such a definitional approach is compatible with the present research goal. Namely, this understanding entails the objective obligations for the state stemming from social rights that can enable subjective right claims through the enactment of statutes. As it will be examined in more detail in the methodology for the studying of influence, the examination of influences on social protection is inevitably

742 Article 57(1), CRB. The "irrevocability" of the human rights has become an integral part of the Bulgarian legal doctrine. *See* Drumeva, *Constitutional Law/Конституционно право* (2018) 673; Kirov, *The Rights of the Bulgarian Citizens/Правата на българските граждани* (1942) 3–7.

743 Koicheva, *Survivor Pensions/Наследствени пенсии* (2009) 83; Mrachkov, *Social Security Law/Осигурително право* (2014) 56–57.

744 Drumeva, *Constitutional Law/Конституционно право* (2018) 675; Tanchev and Belov, *Comparative Constitutional Law/Сравнително конституционно право* (2009) 290.

745 Mrachkov, *Social Security Law/Осигурително право* (2014) 55.

746 Wipfelder, 'Die verfassungsrechtliche Kodifizierung sozialer Grundrechte' (1986) 6 ZRP 140.

747 Becker and Hardenberg, in Becker and others, *Security* (2010) 100.

intertwined with the actions of state institutions and the respective prerogatives through which influence can be bestowed upon subjective rights to social protection.

Furthermore, only rights stemming from the constitutional level can be considered as forming part of the concept required for the present research. Social rights that result from ordinary law[748] cannot be considered part of the term. Finally, certain rights can be regarded as "fundamental social rights" on the international level, but this would not immediately imply that they form part of the concept. Rather, they would be considered if they have become part of the domestic law through the ratification of the international instruments bearing them.[749]

cc. Fundamental Rights relevant to Social Protection

Before delving into the concrete relevant rights, it needs to be mentioned that already the constitutional Preamble defines the fundamental rights of the individual as the essence and goal of the constitutional framework. Further, this general goal is reiterated and concretized as a state obligation in Article 4(2).[750] The constitutional provision establishes that the state guarantees the life, dignity, and rights of the individual and has to create conditions conducive to the free development of the individual and civil society. The coupling of this provision with the direct applicability of the Constitution expressed in Article 5(2) leads to the conclusion that fundamental rights cannot be treated simply as state goals. Rather, the fundamental rights in the Constitution entail objective dimensions that directly bind the legislature.[751]

Rights and obligations worded to target social protection are naturally of particular importance for the present research. In this relation, Articles 51 and 52 of the Constitution take a central position in forming state obligations. Article 51(1) introduces the rights to social insurance and social assistance together in a single provision. This approach is not based on

748 Certain social goals may be carried out on the basis of ordinary law rather than based on constitutional rights. *See* Thamm, *Probleme der verfassungsrechtlichen Positivierung sozialer Grundrechte* (1990) 25–26.

749 For more information on this issue, please refer to the research section on the relationship between international law and Bulgarian constitutional law.

750 Drumeva, *Constitutional Law/Конституционно право* (2018) 682.

751 ibid.

the sameness of the rights or on the assumption that one of these rights results in the other. Rather their grouping stems from the rights' closeness as fundamental social rights and the idea that when an individual has no claim to one of the rights, the other could be a potential option.[752] The Constitution recognizes these two rights but does not determine their content. Furthermore, the CRB does not explicitly provide the objective duty of the state to establish the realization of this right through the enactment of appropriate legislation. The state's duty is rather implied indirectly. A related obligation for rights' realization further stems from Article 4(2) of the Constitution postulating that the state shall, among others, guarantee individual rights.[753]

Concerning the right to social insurance, the constitutional provision confers the state with an objective obligation to establish a public social insurance system.[754] The existence of private social insurance options is not prohibited;[755] however, the constitutional requirement solely concerns enacting a public system. The objective state requirement is a precondition for the subjective realization of the right to social insurance.[756] However, the constitutional right does not impose any financial obligations upon the state apart from overseeing and guaranteeing the work of the social insurance funds.[757] Namely, public social insurance represents a system of mutual help and solidarity to protect the common interest.[758] The constitutional jurisprudence has confirmed that the right to social insurance covers in its different forms the protection provided in the cases of the realization of the classic social risks.[759] The second provision of Article 51(2) stipulates the concrete right to social insurance against unemployment. In this regard,

752 Mrachkov, in *Topical Issues of the Labour and Social Security Law/Актуални проблеми на трудовото и осигурителното право* (2018) 56; Mrachkov, *Social Rights of the Bulgarian Citizens/Социални права на българските граждани* (2020) 47. There are also other constitutional rights which have also been positioned together in the constitutional text; for instance, Article 17(1) introduces both the right to property and the right to inheritance.

753 Machkov, in *Topical Issues of the Labour and Social Security Law/Актуални проблеми на трудовото и осигурителното право* (2018) 58.

754 Constitutional Decision No 5/2000 on case 4/2000.

755 Constitutional Decision No 7/2011 on case 21/2010.

756 Constitutional Decision No 12/1997 on case 6/1997.

757 Drumeva, *Constitutional Law/Конституционно право* (2018) 784.

758 Constitutional Decision No 5/2000 on case 4/2000 para I.A.1.

759 ibid.

the constitutional text is explicit that the conditions and provisions for the right to unemployment benefits must be set in law.

Similar to the right to social insurance, the right to social assistance results in the objective obligation for the enactment of a system that can realize this right in a case of need.[760] The holder of the subjective right to social assistance is the person of material distress, regardless of the reason that has brought him or her into such a dire situation.[761] Article 51(3) then introduces several specific social groups placed under the special care of the state and the society. Special care can comprise social assistance and support benefits and measures.[762] The groups include elderly people who have no relatives and cannot support themselves and the physically and mentally disabled.

Article 52 is dedicated to the right to health[763] and its main aspects, although the constitutional text does not formulate this right directly as the "right to health".[764] The right is composed of two main aspects: the right to health insurance and the right to free medical care.[765] To clarify, on the one hand, Article 52(1) introduces the right to health insurance that includes the need for the state to guarantee and provide citizens with affordable medical care. On the other, the constitutional provision also stipulates free medical care under the conditions and order prescribed by law. The obligations for the state stemming from this provision imply the requirement for legislative action and the establishment of state institutions through which the rights can be realized.[766] Regarding the right to health insurance, the state is obliged to create a targeted and compatible with the Constitution financing

760 Mrachkov, in *Topical Issues of the Labour and Social Security Law/Актуални проблеми на трудовото и осигурителното право* (2018) 58.

761 Constitutional Decision No 2/2006 on case 9/2005.

762 Drumeva, *Constitutional Law/Конституционно право* (2018) 786–787.

763 The Constitutional Court has stated that Article 52 of the CRB formulates the fundamental right to health despite the lack of explicit reference in the constitutional text. *See* Constitutional Decision No 7/2011 on case 21/2010 para IV.

764 Some authors consider that the lack of explicit reference to the right to health is an omission of the Constitution. This omission is attributed to the Bulgarian legal history and the lack of tradition in the usage of the terminology "right to health" ("право на здраве"). *See* Mrachkov, *Social Security Law/Осигурително право* (2014) 56.

765 Mrachkov, *Social Rights of the Bulgarian Citizens/Социални права на българските граждани* (2020) 350.

766 Drumeva, *Constitutional Law/Конституционно право* (2018) 787–788.

model based on public health insurance.[767] However, the situation is different when it comes to the right to free medical care. In this regard, the state is obliged to not only establish the relevant institutional setting but to further secure the financing of the system.[768]

In addition, Article 52(2) provides the sources of financing for "healthcare". The term "healthcare" stands for the state policy, as well as the state's governing and organizing role in the realization of the right to health.[769] Financing for the purpose could be obtained from the state budget, from employers, from personal and collective insurance contributions, and based on other sources, which are to be defined and organized through law. The Article continues with the objective that the state must protect the health of all citizens, including by the development of sports and tourism. In addition, no one is to be subjected to forcible medical treatment or sanitary measures except in the circumstances established by law. The right to health also includes the state's objective to exercise control over all medical facilities and the production and trade of pharmaceuticals, biologically active substances, and medical equipment.

Apart from rights with a direct link to social protection, further provisions can still be of potential importance to studying influence. To begin, Article 47 deals with the general protection of children and mothers. Article 47(1) postulates that the upbringing of children until reaching the age of majority is a right and duty of the children's parents and is assisted by the state. This issue is further featured in the Constitution as a state goal that declares mothers, children, and the family to be under the protection of the state and the society (Art. 14, CRB).

Then, Article 47(2) reiterates but also reinforces the state's objective from Article 14 to provide "special protection" to mothers. The provision goes a step beyond the declaration of a state goal and establishes the fundamental right of mothers to special protection.[770] To ensure that the special protection will not remain just as a program goal, the Constitution explicitly lists the forms of protection. This protection includes the guaranteeing of pre-natal and post-natal leave, the provision of free obstetric care, alleviated working conditions, and other social assistance. The different forms of

767 ibid.
768 Mrachkov, *Social Rights of the Bulgarian Citizens/Социални права на българските граждани* (2020) 350.
769 ibid.
770 Drumeva, *Constitutional Law/Конституционно право* (2018) 767.

special protection involve measures from the realms of labor law, social insurance law, social assistance, and medical care support. The enlisting of the different forms of "special protection" suggests that the goal of the provision can only be achieved in the complex application and the complementary of the different laws.[771]

Moreover, additional family and children-related constitutional provisions can bear relevance to different branches of social protection. For example, Article 47(4) provides the provision of special protection by the state and society to the children left without the care of their parents and relatives.[772] Further family and children rights that can contribute to various social protection rights include the right to matrimony (Art. 46, CRB) and the equality of spouses (Art. 46(1), CRB), the already mentioned support of the family provided by the state and society (Art. 47(1), CRB) and the equal position of children born out of marriage (Art. 47(3), CRB). These rights reflect the state's duties for setting up schemes that support family life and the financial aspects, such as different family and children's benefits.[773]

A number of different further rights can also be considered in view of social protection. First, the foundational right to life (Art. 28, CRB) needs to be mentioned, particularly in terms of the preservation of human dignity and the right to social assistance.[774] In addition, judging by the comparative constitutional experience,[775] the right to property provided for in Article 17 could potentially confer state obligations when it comes to certain social protection rights. Interestingly enough, Article 17 is featured in the constitutional section on the fundamental principles of state order rather than in the section on the fundamental rights of citizens. Still, the Constitutional Court has confirmed that the right to property is a fundamental right that safeguards positions in both the public and private law realms.[776] Last but

771 Koicheva, *Social Insurance of Maternity/Социално осигуряване на майчинството* (2012) 46.

772 The requirement for the provision of special protection to such children could be seen as a constitutional foundation on children's rights to survivor pensions. *See* Koicheva, *Survivor Pensions/Наследствени пенсии* (2009) 85.

773 Drumeva, *Constitutional Law/Конституционно право* (2018) 765.

774 Mrachkov, in *Topical Issues of the Labour and Social Security Law/Актуални проблеми на трудовото и осигурителното право* (2018) 53.

775 Pieters, *Navigating Social Security Options* (2019) 18.

776 Constitutional Decision No 15/2010 on case 9/2010. Also *see*, Drumeva, *Constitutional Law/Конституционно право* (2018) 771.

not least, the right to respect for private and family life (Article 32 (1), CRB) can also prove influential upon certain social protection benefits.

b. Constitutional Principles

In addition to the fundamental rights, the further constitutional content of potential relevance to the researched matter needs to be quickly examined. The overview has to begin with the "rule of law" principle due to its strong presence in the national constitutional jurisprudence.[777] It needs to be clarified that the present study relies on the official English translation of the CRB that refers to the term in Article 4(1) as the "rule of law".[778] However, the Bulgarian version of the used term rather belongs to the dominating continental concept of "Rechstaat" ("правова държава").[779] Although the two terms bear certain conceptual differences, they do tend to yield similar requirements.[780] Accordingly, the present research will adhere to the official English translation of the term as the "rule of law".

The "rule of law" is mentioned two times in the constitutional text, namely in the framework of the Preamble, where it forms part of the foundational values of the State, and then in Article 4(1), where it is proclaimed that the State is to be governed in accordance to the Constitution and the laws (Art. 4(1), CRB). That being said, the constitutional jurisprudence has provided a plethora of the rule of law understandings that have evolved through time.[781] At the beginning of the Constitutional Court's existence, the rule of law was understood in the sense of the constitutional supremacy and impossibility of the basic law to be contradicted by ordinary law.[782] In this sense, the direct application of the constitutional provisions forms the

777 The Constitutional Court has referred to the principle in almost half of its decisions. *See* Shumanov, 'Fundamental Aspects of the Principle of the Rule of Law/ Основни аспекти на принципа на правовата държава' (2019) <http://gramada.org/основни-аспекти-на-принципа-на-правов/#_ftnref1> accessed 18 February 2022.

778 Official English translation of the CRB can be found at the National Assembly's webpage at https://www.parliament.bg/en/const.

779 On the same issue, *see* Belov, *Constitutional Law in Bulgaria* (2019) 31.

780 Tanchev and Belov, *Comparative Constitutional Law/Сравнително конституционно право* (2009) 263.

781 Sheljaskow, *Das Rechtsstaatsprinzip im bulgarischen Verfassungsrecht am Maßstab der deutschen Verfassungsrechtslehre und -Praxis* (2012) 142–143.

782 Constitutional Decision No 14/1992 on case 14/1992 para I.

foundation of the principle of the rule of law.[783] What is required based on this principle is thus not a mere declaration of the constitutional rights but rather the establishment of the possibilities for the protection of these rights through judicial means.[784]

Throughout the years, the rule of law has grown to be understood as a term that is a collection of a multitude of elements that concern issues such as the democratic order, the separation of powers, political pluralism, and many others.[785] The rule of law translated into the requirement to build a unitary, consistent and unambiguous legal system[786] based on the principle of the hierarchy of the normative acts. Further, the rule of law implied that the legal rules must apply equally to the legislative, executive, and judicial powers and all subjects of law.[787] According to the Constitutional Court, the principle of the rule of law, as a dynamic concept, is not responsive to a precise definition; instead, its development shows that it has grown historically and represents a term that is multifaceted and bound by values.[788] Nevertheless, the term must not be overburdened by qualifying every violation as a violation of the principle of the rule of law. Otherwise, the content and applicability of the term would be defied.[789] In any case, the principle contains both the material element of justice and the formal elements of legal certainty and legitimate expectations.[790] The latter generally implies that the State is to act in a consecutive and foreseeable manner.[791] Although the principle of legitimate expectations does not result in absolute requirements, the legislative power has to respect it when it

783 Constitutional Decision No 12/1995 on case 15/1995.

784 ibid.

785 Constitutional Decision No 8/2010 on case 2/2010; Constitutional Decision No 3/2012 on case 12/2011; Constitutional Decision No 1/2018 on case on 3/2017. Further examples include the implications of the rule of law for the clarity and consistency of the legal framework, the prohibition of retroactive laws that lead to curbing of rights and many others. For a more detailed examination, *see* Sheljaskow, *Das Rechtsstaatsprinzip im bulgarischen Verfassungsrecht am Maßstab der deutschen Verfassungsrechtslehre und -Praxis* (2012) 143.

786 Constitutional Decision No 1/2018 on case on 3/2017.

787 Tasseva, 'Die Rechtsprechung des Bulgarischen Verfassungsgerichts zum Rechtsstaat und zu den Grundprinzipien der Verfassung' (2005) 46 Jahrbuch für Ostrecht 79.

788 Constitutional Decision No 5/2014 on case 2/2014.

789 Constitutional Decision No 2/2013 on case 1/2013; Constitutional Decision No 7/2004 on case 6/2004.

790 Constitutional Decision No 1/2007 on case 9/2006.

791 Constitutional Decision No 8/2013 on case 6/2013; Constitutional Decision No 1/2005 on case 8/2004; Constitutional Decision No 3/2008 on case 3/2008; Consti-

comes to recognizing the legally acquired rights and abstaining from altering them to the detriment of the citizens and the legal entities.[792]

Next, similarly to the "rule of law", "equality" is also mentioned both in the Preamble and in the main constitutional body. In the Preamble, "equality" is proclaimed as one of the universal values of the constitutional order alongside liberty, peace, humanism, justice, and tolerance. Then, in Article 6(2), the equality of citizens before the law is formulated both as a principle and as a fundamental right. In terms of the former, equality as a constitutional principle is foundational for the interpretation and application of the CRB and the legislative activity.[793] Equality as a fundamental right entails equality before the law and results in the objective obligation for equal treatment by the state power. The right to equality is further concretized in a range of constitutional provisions, such as in the establishing of the equal rights of spouses (Art. 46(2), CRB) or the equal rights of children who are born out of marriage with the rights of children born in marriage (Art. 47(3), CRB). The constitutional text provides characteristics that cannot be grounds for unequal treatment to guarantee the equality principle.[794] Those include the grounds of race, national or social origin, ethnic self-identity, sex, religion, education, opinion, political affiliation, personal or social status, or property status.[795]

The principle of proportionality is part of the CRB in the material sense but is not present in its formal dimension. Nevertheless, even if it is not explicitly expressed in the text,[796] the Constitutional Court has established it as one of the foundational constitutional principles to be abided by the authorities.[797] In the interpretation of the proportionality principle, the

tutional Decision No 3/2017 on case 11/2016; Constitutional Decision No 10/2012 on case 15/2011.

792 Constitutional Decision No 8/2013 on case 6/2013; Constitutional Decision No 1/2007 on case 9/2006.

793 Constitutional Decision No 14/1992 on case 14/1992 para I.

794 ibid II.

795 The first five of the listed grounds stem from Article 1 of the Human Rights Declaration whereas the rest are subject to the social realization of the given individual. *See* ibid.

796 Despite not being explicitly expressed in a separate constitutional norm, the principle of proportionality is still observable in different constitutional articles. For instance, *see* Article 31(4) and (5), CRB.

797 Constitutional Decision No 1/2002 on case 17/2001; Constitutional Decision No 5/2003 on case 5/2003. Also *see* Drumeva, *Constitutional Law/Конституционно право* (2018) 687.

Constitutional Court relied on the constitutional traditions of the European states,[798] such as the German Federal Constitutional Court[799] and the jurisprudence of the European Court of Human Rights.[800]

The Constitutional Court has also relied on EU law proportionality-assessment approaches in elaborating the proportionality principle.[801] In general, when it comes to examining the proportionality of measures curtailing fundamental rights, the Constitutional Court understands the proportionality principle as the assessment of whether the undertaken measures are admissible, justifiable, suitable, and optimal for the intended purpose.[802] Accordingly, the general constitutional practice has established that the fundamental rights of citizens that may be restricted can be limited in the following cases: when there is a legitimate aim, when the ground for restriction is established by law and falls within limits provided for in the Constitution, and when the restriction ground complies with the principle of proportionality in view of the pursued aim.[803]

c. State Objectives

Apart from the relevant fundamental rights and principles, certain state goals provided for in the Constitution could also have some reflection on social protection. As already mentioned, state goals do not secure subjective rights. State objectives only provide that the legislature and the overall policy development should pursue a certain goal.[804]

798 Constitutional Decision No 5/2005 on case 10/2004.

799 For instance, in examining the margin of appreciation and the proportionality of legislation on the allowing of temporary storage of telecommunication data, the Constitutional Court referred to how the German Federal Constitutional Court assessed through proportionality test whether analogical provisions of the German legislation corresponded to the pursued goal. *See* Constitutional Decision No 2/2015 on case 8/2014 para 6.

800 Constitutional Decision No 13/2012 on case 6/2012 para III.

801 Constitutional Decision No 5/2017 on case 12/2016.

802 Constitutional Decision No 5/2005 on case 10/2004; Constitutional Decision No 3/2014 on case 10/ 2013.

803 Constitutional Decision No 20/1998 on case 16/1998; Constitutional Decision No 15/2010 on case 9/2010; Constitutional Decision No 2/2011 on case 2/2011; Constitutional Decision No 7/2016 on case 8/2015; Constitutional Decision No 8/2016 on case 9/2015; Constitutional Decision No 3/2019 on case 16/2018.

804 Sommermann, *Staatsziele und Staatszielbestimmungen* (1997) 377.

To begin, the characteristic of the Bulgarian country as a "social state" in the Preamble, which is placed right next to its characteristic of being "democratic", could be relevant to the design of the social protection system. Namely, constitutional jurisprudence has defined the social state as a state objective that should drive policy development.[805] In assessing the potential influencing role of the "social state", it needs to be kept in mind that it is not part of the main body of the Constitution and thus does not possess the legal character of the legal norm. However, as mentioned in the discussion of the constitutional structure, the content of the Preamble embodies the synthesized constitutional foundations and potentially could serve in the interpretation of the constitutional norms.[806] Authors argue that the social state has been implicitly given actual legal force through the fundamental social rights of the Constitution, such as the rights to social and health insurance.[807]

The Bulgarian scholarship underlines the absence of the social state from the constitutional body in contrast to the rule of law principle.[808] Namely, the latter is part of the Preamble but is further elaborated in the constitutional body, thereby resulting in obligations for the state. Conversely, during the drafting of the CRB, a decision was taken for the social state's sole proclamation in the Preamble due to the social state's vague nature.[809] This approach was based on the belief in the varying legal force of the Preamble and the constitutional body.[810]

Still, despite being just a state objective mentioned in the Preamble, the understanding of the legal force of the "social state" characteristic marked a visible expansion in the case law of the Constitutional Court. In the first 20 years of the Court's existence, the "social state" was almost not present

805 Constitutional Decision No 8/2012 on case 16/2011 para V.

806 Drumeva, *Constitutional Law/Конституционно право* (2018) 158; Nenovski, 'The Individual Rights in the 1991 Constitution of the Republic of Bulgaria/Правата на личността в Конституцията на Република България от 1991 г.' (1995) 36 Legal Thought/Правна мисъл 8–9.

807 Tanchev and Belov, *Comparative Constitutional Law/Сравнително конституционно право* (2009) 289.

808 ibid 287–288.

809 ibid. On the one side, it was argued that the term's vagueness can only serve as base for various speculations. On the other side, the social state was seen by some to represent a bridge to the socialist past. For more on this issue, please refer to the research section on the historical overview of the constitutional law development in Bulgaria.

810 ibid.

in the judgments' reasonings in line with the unofficial assumption that it lacked legal force.[811] However, since 2012 authors have noticed a turn in the reliance on the "social state" in the case law of the Constitutional Court. The social state became a topic of elaboration for the Court and turned into a supplementing or accompanying criterion in assessing the constitutionality of the laws.[812] The constitutional jurisprudence has established that the pursuit of a social state should be a goal and a principle for policy and legal development in the country, especially in terms of social protection.[813]

Apart from the social state, Article 14 of the Constitution introduces the state objective of protecting the family, motherhood, and children by the state and the society. The state objective has also been translated into fundamental rights, such as the discussed above right of mothers to special protection provided in Article 47(2). Still, this is not to say that the state objective could not be considered a potential influencing factor. Similar to the social state objective, the Constitutional Court has used the family life objective as a supplementary tool to reflect on the constitutional obligations stemming from the related fundamental rights.[814] In general, the constitutional jurisprudence has provided that the family life needs to be minded in social policy development.[815]

II. International Law

The presentation of international law as a potential influencing factor begins with examining the relationship between international law and Bulgarian constitutional law. In doing so, the examination aims at informing the subsequent definition of the term "international law" in the context of the research purpose. Finally, the concrete potential international law influencing factors are briefly presented after the concept is defined.

811 Mrachkov, in *Topical Issues of the Labour and Social Security Law/Актуални проблеми на трудовото и осигурителното право* (2016) 38–39.
812 For instance, *see* Constitutional Decision No 9/2017 on case 9/2016.
813 Constitutional Decision No 8/2012 on case 16/2011 para V.
814 For instance, *see* Constitutional Decision No 32/1998 on case 29/1998.
815 Constitutional Decision No 3/2013 on case 7/2013; Constitutional Decision No 13/2003 on case 11/2003.

1. International Law and Bulgarian Constitutional Law

In the last century, legal scholarship has been heavily involved in the debate on the relationship between international law and domestic law. On the one side, the proponents of the dualistic theories view the international and the national law as separate legal orders.[816] For international norms to apply in the national sphere, they must be transposed into the domestic legal order. On the other side, the supporters of the monism theories consider that the international and domestic laws are parts of the same legal order.[817] These traditional theories are based on the assumption of hierarchy between the national and international legal orders. In the case of monism, international law tends to take supremacy over national law,[818] while in the case of dualism, the domestic legal framework is to regulate international law's rank at the national level.[819]

Some contemporary authors tend to see these traditional theories as capable of reflecting only upon static legal orders.[820] However, when it comes to the current dynamics of interaction between national and international law, such traditional views fall short of explaining factors such as the dispersing of authority beyond the nation-state[821] or the influence of international courts and institutions on the legal systems.[822] Hence, the reality of state practice can demonstrate a plethora of competing perspectives that transcend the question of the divide between national and international law and cannot be accommodated by the traditional views on monism and dualism.

816 Starke, in Paulson and Litschewski-Paulson, *Normativity and Norms* (1999) 541; Nijman and Nollkaemper, in Nijman and Nollkaemper, *New Perspectives on the Divide Between National and International Law* (2007) 341.

817 Most notably in this regard, *see* Kelsen, *General Theory of Law and the State* (1949) 366 ff.

818 Starke, in Paulson and Litschewski-Paulson, *Normativity and Norms* (1999) 546. Being one of the main traditional proponents of monism, Kelsen tends to be inclined towards the view of the primacy of international law. In Kelsen's view, the idea that domestic law has supremacy can lead to state solipsism and the assumption that the state is the center of the world, which fails to recognize the existence of other sovereign states. *See* Kelsen, *General Theory of Law and the State* (1949) 386–387.

819 Petersen, 'Determining the Domestic Effect of International Law through the Prism of Legitimacy' (2012) 72 ZaöRV 225.

820 ibid.

821 Nijman and Nollkaemper, in Nijman and Nollkaemper, *New Perspectives on the Divide Between National and International Law* (2007) 348.

822 Petersen, 'Determining the Domestic Effect of International Law through the Prism of Legitimacy' (2012) 72 ZaöRV 225.

The Bulgarian 1991 Constitution states that international law instruments that have been ratified, promulgated, and have come into force in the country are considered part of the domestic legislation. Such international law takes precedence over any domestic legislation that may be contrary to the international instrument (Art. 5(4), CRB). Therefore, the nationally adopted constitutional approach toward international law could be identified as leaning towards the monistic view.[823] An interpretative constitutional decision has extended the validity of the constitutional provision on the precedence of international law to treaties signed before the enactment of the 1991 Constitution that comply with the requirements set in Article 5(4) of the CRB.[824]

It needs to be clarified that the Constitution differentiates between two types of treaties. Treaties that are of particular significance require ratification or denouncing by an act of Parliament. These types of treaties are enlisted in Article 85(1) of the Constitution. The rest of the treaties not concerning the scope of Article 85(1) are subject to approval or denouncement by a governmental decree issued by the Council of Ministers. The constitutional provision on the precedence of international law applies only to the international treaties subject to Article 85(1) of the Constitution.[825]

International treaties, which have been ratified, promulgated, and have entered into force with respect to the Republic of Bulgaria, bear an immediate sub-constitutional ranking and take precedence over ordinary law based on Article 85(4) and Article 149(1)4 of the CRB when taken in connection with Article 5(4).[826] The general principles of international law are also part of the domestic legal order and occupy the same hierarchical rank as the international treaties.[827] Therefore, general principles of international law have a hierarchical standing below the Constitution and above the rest of the legislation. According to the Constitutional Court, different

823 Tanchev, 'Competing Hierarchies' (2015) 3–4 <https://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2015)020-e> accessed 18 February 2019.

824 Constitutional Decision No 7/1992 on case 6/1992.

825 Stalev, 'The Constituton and the International Human Rights and Freedoms Treaties/Конституцията и Международните съглашения за човешки права и свободи' (1999) 1 Juridical World/Юридически свят 14; Belov, *Constitutional Law in Bulgaria* (2019) 65 ff.

826 Tanchev, 'Competing Hierarchies' (2015) 4. On the same issue *see* Belov, *The Bulgarian Constitutional Identity/Българска конституционна идентичност* (2017) 208.

827 Belov, *Constitutional Law in Bulgaria* (2019) 88.

constitutional provisions indicate the "openness"[828] of the Bulgarian legal framework toward international law[829] and the integration of international law into the domestic law, such as the goal of promoting a just international order (Art. 24(2), CRB). In terms of incorporating the international law norms in domestic law, the *jus cogens* principles of international law are directly implementable.[830] The direct implementation also applies to international treaties for which there is no need to establish certain implementing national mechanisms.

Following Article 149(1)4 of the Constitution, the acts of the National Assembly need to comply with ratified international treaties, as well as the general principles of international law. Accordingly, the Constitutional Court can declare parliamentary legislation void if it contravenes the aforementioned international law sources. Apart from the Constitutional Court, the Supreme Court of Cassation and the Supreme Administrative Court can also play a crucial role in securing the precedence of international law over contradicting administrative acts or judgments.[831] The courts can apply the international law norm instead of the contradicting national norm based on Article 5(4) of the Constitution.[832] Still, such adjudication will concern just the concrete case at hand. Therefore, the judgments of the Constitutional Court are essential for the ending of inconsistent national administrative and judicial practice in terms of eventual international law contradiction. In this relation, the authors underline that the decision of the Constitutional Court would just be declarative since the precedence of the international law already stems from Article 5(4) of the Constitution.[833]

828 On the issue of the openness of constitutions in a broader sense, *see* Carrozza, in Loughlin and Walker, *The Paradox of Constitutionalism* (2008) 171.

829 Constitutional Decision No 3/2004 on case 3/2004. For further discussion on the relation between the national law and international law, *see* Konstantinov, in Marinova and others, *Implications of International and EU Law on the Bulgarian Legal Framework/ Въздействие на международното право и правото на ЕС върху българската правна система* (2019) 30–31.

830 Borissov, in Marinova and others, *Implications of International and EU Law on the Bulgarian Legal Framework/Въздействие на международното право и правото на ЕС върху българската правна система* (2019) 97.

831 Stalev, 'The Constituton and the International Human Rights and Freedoms Treaties/Конституцията и Международните съглашения за човешки права и свободи' (1999) 1 Juridical World/Юридически свят 16–17.

832 ibid.

833 ibid; Penev, 'The Bulgarian Constitutional Justice and the Protection of Human Rights/Българското конституционно правосъдие и защитата на основните права' (2013) 12 Lawyers' Review/Адвокатски преглед 20–21.

2. International Law in the Framework of the Research

There are varying definitions of the international law concept. The International Court of Justice declared that international law "governs relations between independent States…in order to regulate the relations between these co-existent communities or with a view to the achievement of common aims".[834] A wider definition of international law stipulates that it represents the legal order which organizes "the interaction between entities participating in and shaping international relations".[835] This general wording could be understood in the light of the numerous debates on which actors can be considered subjects of international law.[836]

However, the diverging and broad views on the general definition of the term cannot immediately contribute to the particular goal of the present research. Similar to the previously discussed concepts in this study, the concept of international law needs to be defined in line with the goal of studying the constitutional and international law's influence on social protection. Establishing the research-relevant concept requires that the sources of international law that are relevant for the research need to be identified. Nevertheless, the question of the range of international law sources is not an easy one since there are as many theories on this issue as there are on the definition of the concept of "international law".[837]

The tackling of this issue can begin by examining which sources of law[838] belong to the understanding of the term which will be relevant to the research. The previous part has revealed that, according to Article 5(4) of the CRB, international treaties become part of the domestic law through their ratification, promulgation, and coming into force. Article 5(4) also applies to the generally recognized principles of international law. Therefore, the term used in the research should encompass generally recognized principles of international law and international treaties that have normative

834 SS 'Lotus' (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) para 44.

835 Besson, in Besson and Tasioulas, *The Philosophy of International Law* (2010) 163.

836 On this specific problem, *see* Alston, in Alston, *Non-State Actors and Human Rights* (2005); Weissbrodt, 'Business and Human Rights' (2005) 74 University of Cincinnati Law Review 55.

837 Besson and D'Aspremont, in Besson and D'Aspremont, *The Oxford Handbook of the Sources of International Law* (2018) 4.

838 On definition of the term "sources of law", *see* Kelsen, *General Theory of Law and the State* (1949) 365; Wuerth, in Besson and d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (2018) 1121.

character, implying that they are capable of creating, changing, or annulling given norms of the national law.[839] Treaties with normative character also address the individuals falling under the respective state's jurisdiction.[840] As elaborated above, these international instruments have precedence over ordinary national law in Bulgaria and hence have the potential capacity to influence the social protection system.

In addition, a concise assessment is required of what will not be covered by the concept. A relevant question in this regard is whether the European Union law can be regarded as a source of international law. Already back in 1963, the European Court of Justice has declared that the law of the back then European Economic Community constitutes "a new legal order of international law", for the sake of which the Member States have limited their sovereignty rights in certain respects.[841] The unique nature of EU law, based on the transferring of sovereign powers to the EU and its institutions,[842] has resulted in an order that has replaced general principles of international law with its own rules.[843] Hence, the interaction processes between, on the one hand, international law and the domestic legal orders, and on the other EU law and the law of the Member States, differ significantly.[844] Therefore, EU law represents a special body of law, which is examined below as a separate potential influencing factor upon social protection.

There are different general arguments on what constitutes the sources of international law, with some options, such as soft law, falling outside the list in Article 38 of the Statute of the International Court of Justice.[845] In general, there are diverse debates in relation to the binding nature of the so-called "hard" and "soft" international law instruments. "Hard law" encompasses sources generally recognized as possessing binding character. In

839 Hence, international law instruments with no normative character that are not part of the scope of Article 5(4) of the Constitution cannot be considered as belonging to the concept of international law in framework in this research.

840 Stalev, *Problems of the Constitution and Constitutional Jurisprudence/Проблеми на Конституцията и конституционното правосъдие* (2002) 52–55.

841 Case 26-62 NV *Algemene Transport -en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECLI:EU:C:1963:1 para II B.

842 More on this and the specific implications for Bulgarian constitutional law, *see* Tanchev and Belov, in Albi and Bardutzky, *National Constitutions in European and Global Governance* (2019) 1101.

843 Bleckmann, *Europarecht* (1997) 232; Tanchev, 'Competing Hierarchies' (2015) 4.

844 Tanchev, 'Competing Hierarchies' (2015) 4.

845 Besson and D'Aspremont, in Besson and D'Aspremont, *The Oxford Handbook of the Sources of International Law* (2018) 6.

contrast, "soft law" is described as a range of "quasi-legal instruments" that do not have a binding character or at least have a weaker binding capacity in comparison to "hard" international law.[846] Soft law sources could not be addressed as higher-ranking norms belonging to the *jus cogens* principles of international law that are recognized by the Bulgarian Constitution and hence cannot result in binding obligations for the state. Analogically, soft law cannot be expected to result in a clearly traceable influence[847] upon social protection. Therefore, soft law is excluded from the potential sources of international law.

To wrap it up, it can be concluded that the research understands the term "international law" as consisting of the generally recognized principles of international law and the international treaties and conventions with normative character. In addition, the term includes the international law instruments that have become part of the national legal framework. Finally, the relevance of the sources of international law to the research goal will be assessed based on their relation to the researched field of social protection.

3. Potential Influencing International Law Factors

The sources of international law that are of particular significance as potential influencing factors would target fundamental rights. The list of potential influencing factors is long due to the already mentioned openness of the country towards international law instruments. The development of the social protection system after the fall of socialism coincided with the overall opening of the Bulgarian legal framework to relevant international and EU law in the context of the country's aspirations of becoming an EU member state.[848] It could be argued that the process of building new social protection was predisposed to seek some international law influences and answers

846 Sekalala, *Soft Law and Global Health Problems* (2017) 50.

847 Soft law might be taken into account in the interpretation of international law norms. *See* Olivier, 'The Relevance of "Soft Law" as a Source of International Human Rights' (2002) 35 The Comparative and International Law Journal of Southern Africa 306–307. However, the role of soft law in international law is still too vague and fluctuating in order for it to serve as potential influencing factor upon social protection in the present research.

848 On the importance of the goal of EU membership for the formation of the post-socialist Bulgarian constitutional development that also includes the general openness towards international law, *see* Belov, *The Bulgarian Constitutional Identity/ Българска конституционна идентичност* (2017) 121 ff.

since the system had to quickly detach itself from the past solutions. Hence, the system was exposed to social insurance models already developed in western countries. However, this is not to say that during socialism, the country was sealed against any relevant international law factors. On the contrary, even during this period, the country continued incorporating ILO conventions in the domestic legal order.[849] The historical examination of the development of social protection demonstrated that the ILO membership and the ratification of the international labor standards have served as a bridge connecting the country internationally through various historical stages.[850]

Nowadays, Bulgaria is in the top ten countries regarding the number of ratified ILO conventions.[851] Of all of the ratified conventions, 64 are currently in force.[852] Among them are the ratifications of the complete eight conventions considered fundamental and three of the four priority governance conventions.[853] In terms of the conventions that are of particular relevance to the present research, the country has ratified the Social Security (Minimum Standards) Convention, 1952 (No. 102).[854] In addition,

849 For an extensive overview on this issue, *see* Mrachkov, in *The International Labour Organization and Bulgaria/Международната организация на труда и България* (2020) 43 ff.

850 Mincheva, in *The International Labour Organization and Bulgaria/Международната организация на труда и България* (2020) 88.

851 In this regard, however, scholars underline that the number of ratifications cannot be in any way indicative in relation to the state of social and labor rights protection. The indication on social rights protection is evident in the implementation of the relevant international and national law that faces numerous hurdles in Bulgaria. *See* Mrachkov, *Social Rights of the Bulgarian Citizens/Социални права на българските граждани* (2020) 24.

852 The rest of the ratified conventions that are not currently in force include three conventions that were denounced during socialism (since the domestic law did not meet the conventions' standards), 24 conventions that were automatically denounced since the country has ratified other conventions with greater level of protection, and ten old conventions that ILO itself has declared to have lost their force. *See* Mrachkov, in *The International Labour Organization and Bulgaria/Международната организация на труда и България* (2020) 48–49.

853 These include the Labour Inspection Convention, 1947 (No. 81), the Employment Policy Convention, 1964 (No. 122), the Labour Inspection (Agriculture) Convention, 1969 (No. 129), and the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144). Bulgaria has still not ratified Convention 129.

854 The 102 Convention has been ratified in two waves: Parts II, III, V, VI, VII, VIII and X were ratified in 2008, and Part IV was ratified on 12 July 2016. *See* Mrachkov, in *The International Labour Organization and Bulgaria/Международната организация на труда и България* (2020) 48–49.

the relevant conventions that have been ratified and are still in force are No. 2 and No. 44 on unemployment, No. 17 on compensation for industrial accidents, No. 18 on compensation for occupational diseases, No.19 on equality treatment in terms of occupational accidents, sickness insurance for employees in trade and commerce, sickness insurance for domestic servants (No. 24) and agricultural workers (No. 25), old-age insurance regarding the employed in industrial and commercial (No. 35) and the agricultural undertakings and households (No. 36), invalidity insurance regarding industry employees (No. 37) and in the agriculture sector (No. 38), survivor insurance in the industry (No. 39) and the agricultural sector (No. 40), No. 42 on compensation for occupational diseases (revised), No. 71 on seafarers' pension, No. 161 on occupational medical services, and No. 183 on maternity protection.[855]

Apart from the ILO conventions, there are a number of further regional and international treaties that Bulgaria is a part of and that may have an influence on the social protection system. Bulgaria has ratified the two human rights conventions of the Council of Europe, namely the ECHR,[856] with additional protocols[857] and the revised version of the European Social Charter.[858] Concerning the ECHR and its inclusion in the list of potential influencing factors, it needs to be clarified that the Convention's catalog does not include any substantial right to social security. Still, already back in the days, the case law of the ECtHR has demonstrated that civil and political rights bear inherent social and economic aspects that are to be

855 ILO, 'Ratifications for Bulgaria' <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102576 > accessed 24 February 2020.

856 Law on the Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and the Supplementary Protocol from 20.03.1952, SG 66/14.08.1992.

857 For an overview of the ratified protocols, *see* Council of Europe, 'Treaty List for a Specific State: Bulgaria. Status as of 04/05/2021.' (2012) <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/country/BUL?p_auth=XvYEvzNw> accessed 24 February 2020.

858 Bulgaria has accepted to be bound by the following provisions of Part II of the Charter: Article 1, Article 2(2) and (4) to (7), Article 3, Article 4(2) to (5), Article 5, Article. 6, Article 7, Article 8, Article 11, Article 12(1) and (3), Article 13(1) to (3), Article 14, Article 16, Article 17(2), Article 18(4), Article 20, Article 21, Article 22, Article 24, Article 25, Article 26, Article 27(2) and (3), Article 28, and Article 29. *See* Law on the Ratification of the European Social Charter (revised), SG 30/11.04.2000.

taken into consideration.[859] Hence, the ECHR needs to also be included as a factor that might exude some influence upon national social protection. Finally, Bulgaria has ratified the main human rights covenants from the treaties of the United Nations. In this regard, the instruments that will be considered as potential influencing factors include the ICCPR[860] and the ICESCR,[861] as well as the Convention on the Rights of the Child (UN CRC)[862] and the Convention on the Rights of Persons with Disabilities (CRPD).[863]

III. European Union Law

Similar to the above examination of international law, the following will deal with the potential of EU law as an influencing factor on the national social protection system. For this purpose, the relationship between European Union law and Bulgarian constitutional law will be initially examined. Next, the term European Union law will be clarified for the research framework. Finally, the research will provide an overview of the concrete EU law instruments considered as potential influencing factors.

859 Already back in 1979, the ECtHR stated in a judgement that "[w]hilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. [...] [T]here is no water-tight division separating that sphere from the field covered by the Convention." *See Airey v Ireland,* App. No. 6289/73, 9 March 1977 para 26. In the recent years the Court tends to take more restrained positions in relation to the human rights' social and economic nuances. Still, the latter have become part of the Convention through three main pathways undertaken by the ECtHR: first, through the prism of the right to fair trail (Art. 6); next, with the help of the non-discrimination provision (Art. 14); and third, on the basis of broad interpretation of civil and political rights, such as interpretating certain social benefits as "property". *See* Dahlberg, 'Should Social Rights Be Included in Interpretations of the Convention by the European Court of Human Rights?' (2014) 16 EJSS 256 ff.

860 Decree No 1199 of the National Assembly Presidium for the Ratification of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, SG 60/31.07.1970.

861 ibid.

862 Decision of the Grand National Assembly on the Ratification of the Convention on the Rights of the Child, SG 32/23.4.1991.

863 Law on the Ratification of the Convention on the Rights of Persons with Disabilities, SG 12/10.02.2012.

I. European Union Law and Bulgarian Constitutional Law

The overview of the amendments of the 1991 Constitution already revealed how the constitutional text was adapted to the requirements of the EU membership. Both in the light of the constitutional amendments and on later occasions, the Constitutional Court has provided some elaboration on the status of European Union law in the national hierarchy of norms. In general, the relationship between European Union law and the national constitutional law systems has been feverously debated for decades in international scholarship.[864] The Bulgarian scholarship is no exception to this observation. Some authors consider that the question of the relationship between European Union law and the national Constitution has been settled by the constitutional amendments and the Constitutional Court.[865] Others, however, consider that there is still a range of significant issues that have not been addressed.[866]

As stated in the discussion on the constitutional amendments, the Constitutional Court did not consider that the EU membership would entail alterations to the model for the state organization and the form of governance.[867] Therefore, the Court reasoned that the amendments did not violate the country's sovereignty. Namely, Article 1(2) of the Constitution provides that the entire power of the State is derived from the people and is then exercised directly and through the bodies established by the Constitution. Accordingly, the people may decide through its elected National Assembly to delegate part of its sovereign rights to the EU following a given international treaty. Thus, the ratification of the accession treaty to the EU represents an expression of the people's will. Consequently, the primary sources of EU law require ratification to become part of the Bulgarian law. However, the secondary sources of EU law do not require ratification since

864 For a summary on some of these debates, *see* Komárek, 'The Place of Constitutional Courts in the EU' (2013) 9 EuConst 420. And on the importance of the conflicting views for the state of constitutional dialogues in the EU, *see* Martinico, 'The "Polemical" Spirit of European Constitutional Law' (2015) 16 GLJ 1343.

865 Drumeva, 'The Primacy of EU Law over National Law/Примат на правото на Европейския Съюз пред националното право' (2009) 10 Juridical World/Юридически свят 18–24.

866 Belov, *Constitutional Law in Bulgaria* (2019) 62 ff.

867 Constitutional Decision No 3/2004 on case 3/2004 para V.1.

they are the results of the acts of the EU institutions functioning within the parameters of the already granted competences within the treaties.[868]

The status of EU law vis-à-vis the national constitutional law has been feverously debated in the Bulgarian scholarship. Namely, on a couple of occasions, the Constitutional Court has built parallels between the ratification requirements of EU primary sources and Article 5(4) of the Constitution that concerns the ratification of international treaties.[869] The parallels were built despite the presence of the special EU law ratification requirements in Article 85(2) of the CRB.[870] This approach seemed to equate EU law primary sources to international law treaties. The ambiguity has led scholars to argue that the Constitutional Court has left unanswered the question of the relationship between European Union law and the 1991 Constitution.[871] The lack of an answer leaves the question of the exact EU law status in the national hierarchy of norms open.

On the one hand, the EU law implies the "relative primacy" over the national law, including the Constitution, except for the national constitutional identity.[872] On the other, however, the Constitutional Court implicitly equates the statuses of EU and international law in the national legal order, which positions the EU law below the Constitution. In addition, apart from building parallels between EU primary law and international treaties, the Constitutional Court has explicitly stated that secondary EU law sources do not bear the characteristics of international treaties.[873] Some scholars consider that such statements create even more confusion since the Court does not go on to assert what is the status of these secondary sources within the national legal order.[874] Nevertheless, other scholars do not share the outlined critical readings of the constitutional decisions. Instead, such views consider that the combined analysis of the constitutional EU integration provision (Art. 4(3), CRB) and the EU-related provisions featured in Article

868 ibid.
869 Constitutional Decision No 1/2014 on case 22/2013; Constitutional Decision No 3/2012 on case 12/2011 para II.
870 The special procedure of Article 85(2) was already discussed in the course of the historical examination on the constitutional law development in the country in view of the EU constitutional amendments.
871 Belov, *Constitutional Law in Bulgaria* (2019) 62 ff.
872 ibid.
873 Constitutional Decision No 3/2004 on case 3/2004 para V.1.
874 Belov, *The Bulgarian Constitutional Identity/Българска конституционна идентичност* (2017) 187.

85 conclude the primacy of EU law, including in relation to the Constitution.[875]

In contrast to the unresolved issues on the status of EU law concerning the Constitution, the relationship between European Union law and ordinary national law has been firmly settled in the national legal doctrine. The jurisprudence of the Constitutional Court has recognized the "supranational, direct, immediate, and horizontal effect of EU law"[876] upon the national legal system. The Court further considered that this special character of the European legal order necessitated the introduction of the discussed above amendments of the Constitution. The supranational, direct, immediate, and horizontal effect of EU law relates to the primary sources of EU law. The precedence[877] of EU law over national law is "unconditional".[878] Moreover, the Constitutional Court has clarified that secondary EU law sources, such as regulations, also have a direct effect, while others, such as directives, possess a direct vertical effect.[879]

2. European Union Law in the Framework of the Research

Similar to the constitutional and international law factors, the utilization of the term "European Union law" in the research framework requires some clarification. General definitional approaches in the scholarship continue to collide on the issue of the legal nature of the EU. Some consider European Union law to still be confined to the legal nature of international law

875 Drumeva, *Constitutional Law/Конституционно право* (2018) 139 ff; Belov, *The Bulgarian Constitutional Identity/Българска конституционна идентичност* (2017) 205.

876 Translation from Bulgarian by author. *See* Constitutional Decision No 5/2005 on case 10/2004 para 6.

877 In defining EU law's status in the national hierarchy of norms, the Constitutional Court utilizes different terms that seem to be used as synonyms, such as "primacy" ("примат") and "precedence" ("предимство"). Authors argue that the term "primacy" suggest indeed the ability of precedence, while "supremacy" is the adjective to describe the highest stance in the hierarchy of norms. The "supremacy" adjective has been used to define the power of the 1991 Constitution in Article 5(1) of the constitutional text. *See* Drumeva, 'The Primacy of EU Law over National Law/Примат на правото на Европейския Съюз пред националното право' (2009) 10 Juridical World/Юридически свят 16–17.

878 Constitutional Decision No 3/2012 on case 12/2011 para II.

879 Constitutional Decision No 5/2005 on case 10/2004 para 6; Constitutional Decision No 7/2018 on case 7/2017 para IV.

despite being an advanced bearer of peculiar legal characteristics.[880] Others vehemently oppose the equating of European Union law to international law. According to this view, European Union law has evolved in such an idiosyncratic way that it has ultimately formed a *sui generis*[881] legal system.[882] Debates also spill into the related topic of the constitutional standing of European Union law and its relation to the national constitutional orders.[883]

Such broad debates could hardly contribute to the concrete goal of studying the influence of European Union law on Bulgarian social protection. Henceforth, as with the clarification of the term "international law", the following will frame the concept of European Union law for the specific present research purposes. To begin, the European Union law explicitly related to social protection needs to naturally form part of the understanding of the term. In this regard, it needs to be clarified that the foundation of both the EU law and policy entails the prerogative of Member States to organize their social protection systems freely.[884] The explicit legislative competence of the Union in the field of social protection stems from Article 48 TFEU. On this basis, legislation can be introduced that pertains to the inter-state coordination of social security in the framework of the free movement of persons. Accordingly, the Treaty provision has been implemented through regulations aiming to coordinate the different national social security systems.[885] These primary and secondary EU law sources need to form the core of the term of EU law in the present research.

880 De Witte, in Barnard and Peers, *European Union Law* (2017) 197.

881 ibid 185.

882 On the topic of the idiosyncratic EU law nature that does not fit the international law definition, *see* Pescatore, 'International Law and Community Law' (1970) 7 CML Rev 177 ff; Mancini, 'Europe: The Case of Statehood' (1998) 4 Eur. Law J. 33; Schütze, *European Constitutional Law* (2012) 66.

883 In this regard, some scholars focus on the lack of "genuine constitutionalism" at EU law level. *See* Lindseth, 'Equilibrium, Demoi-Cracy, and Delegation in the Crisis of European Integration' (2014) 15 German Law Journal 563–567; Lindseth, 'The Perils of "As If" European Constitutionalism' (2016) 22 Eur. Law J. 701–702. Others rather adopt constitutional perspective on the EU and its law and tend to see the CJEU's rulings as being the "end-points" in debates with constitutional importance. *See* Tuori, *European Constitutionalism* (2015) 116.

884 Article 153(2), TFEU. For more on the topic of the competences of the EU in the field, *see* Verschueren, 'The Role and Limits of European Social Security Coordination in Guaranteeing Migrants Social Benefits' (2020) 22 EJSS 359.

885 Authors state that the strong focus on coordination of social security systems meant to reconcile the goals of promotion of the free movement of workers (as intended by

Social security entitlements, the right to social security in freedom of movement situations, and social assistance are also featured in Article 34 of the EUCFR. According to Article 51(1) of the Charter, its provisions only apply when the implementation of European Union law is concerned.[886] In general, case law development on socio-economic rights has demonstrated that the CJEU pays special attention to the legal consequences of the Charter's distinction between rights and principles.[887] Based on the distinction between rights and principles,[888] it cannot be claimed that the right to social security entitlements in Article 34(1) constitutes a right under the EUCFR.[889] While principles are not automatically judicially cognizable, rights are justiciable and can benefit from the effective remedy provided by Article 47 of the EUCFR.[890] Article 34(2) reflects an already existing right in EU law to social security in the exercise of the freedom of movement. Scholars point out that Article 34(2) does not represent a right on its own but instead is conditional upon existing Union law.[891] The provision has a rather declaratory role and could thus be considered a principle that could not lead to the expansion of the EU's competences.[892]

Similarly, Article 34(3) could not be deemed to embody a right but rather entails a principle for the EU (and the Member States when implementing EU law) concerning combating social exclusion and poverty.[893] The CJEU's case law in the field also suggests that the evolution of an emancipated

Art. 48, TFEU) and the Member States' strive for preservation of the independence of the national social security. *See* Paju, *The European Union and Social Security Law* (2017) 71.

886 Still, the case-law practice has demonstrated that the Charter could be applicable even when Member States are not *per se* implementing EU law. *See* Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECLI:EU:C:2013:105 para 34.

887 Razzolini, 'Constitutionalization of Socio-Economic Rights at the EU Level' (2015) 98 KritV 301–302.

888 Article 52, EUCFR.

889 Paju, *The European Union and Social Security Law* (2017) 167.

890 For an elaborate discussion on the difference between rights and principles in the Charter, *see* Lock, 'Rights and Principles in the EU Charter of Fundamental Rights' (2019) 56 CML Rev. 1201.

891 Paju, *The European Union and Social Security Law* (2017) 168–169.

892 ibid.

893 Case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and others* [2012] ECLI:EU:C:2012:233 para 80. For more on why the provisions of Article 34 could hardly be considered as rights, *see* White, in Peers and others, *The EU Charter of Fundamental Rights* (2014) 970 ff.

right to social security based on the Charter is improbable.[894] One of the most exemplary cases on whether Article 34 could be viewed as a right or principle,[895] namely case C-571/10 *Kamberaj*,[896] demonstrated how the inclusion of the Charter in the CJEU's line of reasoning was "dependent on the existence of a Directive".[897] Namely, instead of having an autonomous stance, the reference to Article 34 was rather secondary and mentioned only in view of the preamble of Directive 2003/109.[898]

Apart from the rights vs. principles discussion, the further restricting aspect for the potential influence of the Charter pertains to the development of the CJEU case law that excluded the EUCFR's relevance to special non-contributory benefits for non-economically active Union citizens.[899] Namely, the case law has demonstrated that Union citizens can only rely on equal treatment for social benefits with nationals of the host Member State if the residence on the host territory is in line with the requirements of Directive 2004/38.[900] The coordination Regulation 883/2004 does not provide the right to special non-contributory benefits; [901] instead, it is up to the Member States to define the conditions of these benefits, and the Charter is not applicable in this regard.[902]

Given the standpoint of Article 34(1) and Article 34(3) as principles and the division of competences between the Member States and the EU in the social protection realm, it is evident that the respective provisions could

894 Paju, *The European Union and Social Security Law* (2017) 190; Kornezov, in Vandenbroucke, Barnard and De Baere, *A European Social Union after the Crisis* (2017) 408.

895 Paju, *The European Union and Social Security Law* (2017) 163.

896 Case C-571/10 *Kamberaj* para 80.

897 Paju, *The European Union and Social Security Law* (2017) 164.

898 Case C-571/10 *Kamberaj* paras 89-92.

899 Case C-333/13 *Dano* paras 85-92.

900 ibid para 69; Case C-67/14 *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others* [2015] ECLI:EU:C:2015:597 para 63.

901 *Case C-333/13 Dano* paras 90-91.

902 Scholars have criticized the reasoning of the Court by arguing that despite the Member States' prerogative to determine the qualifying conditions, the question on under what conditions would Union citizens be entitled to the given benefit could not be deemed to fall outside of the application of EU law. For such criticism, *see* Vonk, 'EU-Freedom of Movement' (2014) <https://europeanlawblog.eu/2014/11/25/eu-freedom-of-movement-no-protection-for-the-stranded-poor/> accessed 24 February 2020; O'Brien, 'Civis Capitalist Sum' (2016) 53 CML Rev. 937.

not result in enforceable rights for the Union citizens.[903] In addition, the case law development has also restricted the relevance of the EUCFR for the coordination rules. Scholars have heavily criticized the narrow scope of application of the EUCFR[904] and have argued that the latter cannot escape its role of being a shadow to the internal market developments.[905] All of this has led some to argue that the EUCFR could not be expected to considerably influence national social security systems.[906]

At the same time, however, the CJEU case law has also demonstrated that Charter provisions concerning social protection could still be used in interpreting Union law[907] and can also entail subjective rights.[908] Thus, even if the EUCFR provisions do not form a supranational layer of social rights, they could nevertheless contribute to protecting national social rights against certain austerity trends.[909] Consequently, the Charter can serve as a basis for national and secondary legislation interpretation.[910] In that sense, the Charter is relevant for studying potential European Union law influence on national social protection systems. Besides Article 34(1), a number of further provisions of the EUCFR may also be pertinent to the research purpose, such as the rights of the child (Art. 24) and the elderly (Art. 25), prohibition of discrimination (Art. 21), fair working conditions (Art. 31), social protection of families (Art. 33), as well as healthcare (Art. 35).

Apart from the legal provisions outlined above, the understanding of European Union law cannot be confined solely to the legal instruments directly targeting social security. The development of the CJEU jurisprudence

903 Becker, in Becker and Poulou, *European Welfare State Constitutions after the Financial Crisis* (2020) 10.

904 Kalaitzaki, in Cambien, Kochenov and Muir, *European Citizenship under Stress* (2020) 44.

905 Paju, *The European Union and Social Security Law* (2017) 174.

906 ibid 167.

907 For instance, in relation to the paid annual leave as provided in Article 31(2) of the Charter. *See* Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal v Bauer and Willmeroth* [2018] ECLI:EU:C:2018:871.

908 ibid para 88.

909 Becker, in Becker and Poulou, *European Welfare State Constitutions after the Financial Crisis* (2020) 11.

910 Lenaerts, 'The Court of Justice of the European Union and the Protection of Fundamental Rights' (2011) 31 Polish Yearbook of International Law 81. For an opposite view that concentrates on the limited powers of the Charter, *see* Weatherill, in Vries, Bernitz and Weatherill, *The EU Charter of Fundamental Rights as a Binding Instrument* (2015) 213 ff.

has demonstrated that EU internal market law may also have implications for the national social security systems.[911] The latter is especially evident in the area of healthcare service that has been consistently brought under the scope of internal market regulation by the relevant case law.[912] Therefore, the study of potential influence needs to be mindful of EU law's ability to influence national social protection systems through a combination of its provisions, such as a simultaneous and synergetic impact of requirements stemming from both freedom of movement and internal market law. Furthermore, the EU prerogatives in terms of internal market regulation should also be minded in relation to the general tendency for the integration of more private providers in the social protection systems. It could be expected that the abundant EU rules on the free movement of capital are to shape the financing and investment national laws concerning certain private law social protection providers.[913] In this regard, it needs to be clarified that EU law regulations related to internal market goals do not apply to institutions that manage social security schemes falling under the coordination regulations and operate on a PAYG basis.[914]

Apart from the internal market, the understanding of European Union law within the present research framework should also be aware of the implications of the Union citizenship and its freedoms[915] as well as the related secondary EU law sources. The freedom of movement and residence of migrant workers had proved to be levers for altering the national systems when the latter contained measures that could otherwise dissuade Union citizens from exercising their right to freedom of movement.[916] A related aspect includes the principle of equal treatment, which is a foundational

911 Paju, *The European Union and Social Security Law* (2017) 98.

912 Dawson and de Witte, in Chalmers and Arnull, *The Oxford Handbook of European Union Law* (2015) 972–973.

913 For instance, *see* Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision, OJ L 235, 23.9.2003, 10–21.

914 For more, *see* Article 2, Directive (EU) 2016/2341 on the activities and supervision of institutions for occupational retirement provision (IORPs), OJ L 354, 23.12.2016, 37–85.

915 For a detailed examination on the impact of Union citizenship in the CJEU's interpretation of the social security legislation, *see* Paju, *The European Union and Social Security Law* (2017) 116 ff.

916 Case C-3/08 *Ketty Leyman v Institut national d'assurance maladie-invalidité* [2009] ECLI:EU:C:2009:595 para 50.

base for EU citizenship.[917] Equal treatment in the European Union law can impact the national level through the principle of non-discrimination on the grounds of nationality[918] and is also of relevance due to the EU law on gender equality in occupational and social security matters.[919] Naturally, the related case law of the CJEU also forms an important part of the concept of EU law in this regard.

This concise examination suggests the need for an understanding of the term European Union law that is aware of the various channels by which this supranational legal order can influence the national social protection system. The previous section revealed that the Bulgarian Constitutional Court had recognized the "indisputable" precedence of EU law over the national law. Hence, certain influences on the national system are expected, especially given the outlined broad range of pathways through which EU law can impact social protection. The examination of the influence on Bulgarian social protection requires recognizing the various limitations of these different pathways to better understand the specific case of detected EU influence.

3. Potential Influencing European Union Law Factors

After the term European Union law has been clarified for the purposes of the research, the following will briefly sketch the concrete EU law sources that will be considered. In terms of the relevant primary sources, the TFEU is of considerable natural relevance, especially when it comes to Union citizenship (Art. 20), freedom of movement and the prohibition of discrimination on the grounds of nationality (Art. 45), the freedom of establishment (Art. 49), the freedom to provide services (Art. 56), and the free movement of capital (Art. 63). Apart from the TFEU, the other primary source that will be examined as an influencing factor is the Charter of Fundamental Rights.

917 Bruzelius, Reinprecht and Seeleib-Kaiser, 'Stratified Social Rights Limiting EU Citizenship' (2017) 55 JCMS 1240; White, 'Free Movement, Equal Treatment, and Citizenship of the Union' (2005) 54 ICLQ 885.

918 Paju, *The European Union and Social Security Law* (2017) 78 ff.

919 For instance, *see* Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ L 6, 10.1.1979, 24–25. The concrete EU influencing factors are reviewed in the following research section.

Next, there are a plethora of secondary law sources that could be considered as potential influencing aspects due to the explained above various channels of potential EU law influence. Hence, the following will not represent an exhaustive overview but will outline some of the most important secondary sources that will be contemplated as influence factors. To begin, nowadays, the coordination of social security and healthcare for mobile workers and citizens is carried by Regulation No 883/2004[920] and its implementing Regulation No 987/2009. In terms of the cross-border application of patients' rights, Directive 2011/24/EU needs to be taken into account, especially given the different consequences of this Directive for cross-border healthcare when compared to the coordination Regulation. Furthermore, concerning the Union citizenship and the rights stemming from it, the research also needs to consider Directive 2004/38/EC. The latter secondary source has also proven to be essential for social security coordination through its limiting effect upon Regulation No 883/2004.[921]

Since the EU rules on coordination do not apply to most occupational pension schemes, additional rules on these pension rights of mobile workers were created. Hence, the list of the potential influencing factors should include the different secondary sources dealing with supplementary and occupational pension schemes.[922] The EU law on gender equality in occupational matters should be mentioned in this regard[923] as it has proven to have an influence upon both public and private occupational schemes in the Member States.[924] In terms of the secondary legislation resulting from the free movement of capital, the research is to be mindful of instruments

920 The "predecessors" of the Coordination Regulation, such as Regulation No 1408/71, will be also taken into consideration for the older possible influences.

921 Paju, *The European Union and Social Security Law* (2017) 125.

922 Directive 2014/50/EU on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights, OJ L 128, 30.4.2014, 1–7; Council Directive 98/49/EC on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community, OJ L 209, 25.7.1998, 46–49.

923 Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L 204, 26.7.2006, 23–36.

924 Furthermore, the definition of "occupational" scheme adopted by the CJEU was so broad that it managed to bring even schemes concerning public civil servants under its umbrella. *See* Case C-559/07 *Commission v Greece* [2009] ECLI:EU:C:2009:198 para 55.

that regulate investment activities in insurance businesses and institutions related to occupational retirement provision.[925]

Last but not least, as clarified in the previous section, the judgments of the CJEU have been at times instrumental in determining the scope of EU law application in social protection matters. Accordingly, the research will also naturally consider the judgments of the CJEU that have dealt with social protection and have resulted in some influence on the Bulgarian system.

B. The Influence of Constitutional, International, and EU Law on the Social Protection System

Before the concrete influence on the social protection system can be examined, some fundamental issues need to be settled. First and foremost, the aim of the present research necessitates a clarification of the concept of "influence". Further, the methodology for studying influence has to be elaborated. In doing so, the influence on social protection will also be systematized. Finally, the institutions responsible for applying influence in the national legal sphere need to be examined.

I. Abstract Definition of the Concept of Influence

The concept of "influence" is used in a variety of disciplines, but explanations or definitions are seldomly provided. Alternatively, in the case of attempts to clarify the term, varying opinions emerge on the specific conceptual content.[926] Various legal studies also utilize the concept of "in-

925 For instance, Directive 2016/2341.

926 In sociology, the term can be used to indicate "a way of having an effect on the attitudes and opinions of others through intentional (though not necessarily rational) action". *See* Parsons, 'On the Concept of Influence' (1963) 27 Public Opin. Q. 38 ff. In the realm of political philosophy, there are debates whether "influence" is a concept identical to the one of "power". Some consider that "power" propositions "are threats or promises". Conversely, "an influence proposition takes the form, 'If you do X, you or he will do (feel, experience, etc.) Y' where Y is the anticipation of a consequence that results from an action". Accordingly, authors conclude that influence "stems from adumbrating the consequences of an action". *See* Adelman, 'Authority, Influence and Power: A Discussion' (1976) 6 Philos. Soc. Sci. 338 ff.

fluence". However, legal definitions of the term again tend to be rarely provided.[927] Still, it appears that the term "influence" illustrates the ability of a legal factor to modify another one. This ability is frequently perceived as a continuous action or a process.[928] The concept can be further relied upon to describe how the enactment of new "ordinary" norms is carried out with reference to and in conformity with the respective higher norms.[929] All in all, in the legal scholarship, the concept of "influence" tends to indicate a relationship between two norms characterized by the ability of a higher norm to affect the enactment of an ordinary norm or to lead to the ordinary norm's reform based on the higher one.

Therefore, legal studies are often prone to engaging with the concept of influence concerning the idea of the hierarchy of norms. Yet, such an approach might overlook the different actors carrying the creation and application of the various interacting norms. Hence, a more comprehensive definition of the term should not solely focus on the norms and their capacity to alter each other based on their hierarchy but should additionally possess an understanding of the institutions that enact, reform, and/or interpret the law and control its conformity with constitutional standards.

927 Some of the few studies that actually define the term "influence" in relation to the influence of constitutional law on international law define the term as "the incorporation of constitutional principles into international instruments". *See* Bindi and Perini, 'Legal Effect of Constitutions' (2017). Furthermore, different legal studies often use the concepts of "influence", "impact", or "effect" as interchangeable synonyms. For instance, on the synonymous usage of "effect" and "influence", *see* Safjan, in Purnhagen and Rott, *Varieties of European Economic Law and Regulation* (2014) 123–151. There are others who seem to distinguish between "effect", "impact", and "influence", even if there are no definitions provided. Still, "effect" seems to indicate the direct binding effect of one norm on another, while "impact" hints toward indirect interaction between two norms leading to one of them impacting the other. "Influence" seems to rather be used as an overarching term that builds upon the previous two concepts and indicates that a legal order is not completely autonomous but is rather influenced by another legal order. In this regard, *see* Soussan, in Weiß and Thouvenin, *The Influence of Human Rights on International Law* (2015) 3 ff; Lamour, in Weiß and Thouvenin, *The Influence of Human Rights on International Law* (2015) 27 ff; Bergthaler, in Wessel and Blockmans, *Between Autonomy and Dependence* (2013) 195–196.

928 For example, some legal scholars utilize the term "influence" when describing the process of influence of international law on EU law in the process of increasing engagement of the latter with international treaties and organizations. *See* Wessel and Blockmans, in Eeckhout and Escudero, *The European Union's External Action in Times of Crisis* (2016) 223–248.

929 Comella, 'The European Model of Constitutional Review of Legislation' (2004) 2 Int. J. Const. Law 470.

Through their powers vis-à-vis the law, such institutions become the main driving forces behind influence realization.

Political science could provide useful insights for elaborating the institutional side of the concept of influence. First, the term "influence" is central to the political science realm.[930] In a general sense, "influence" tends to indicate the ability of actors to realize a certain outcome according to their intentions.[931] Such ability includes the potential to modify one actor's behavior in accordance with the will of another actor.[932] Power is a concrete variation of the idea of influence that is distinguished by the threat of sanction.[933]

Influence, then, could be seen as one of the key prisms through which political scientists, and especially the so-called institutionalist, study the process of law's creation and change.[934] Such an approach allows for analysis not only of the institutional cover and the normative matrix but also of the institutions' functioning and the institutionalization of the power dynamics.[935] As stated above, influence is always exercised by a particular actor. Therefore, from the political science perspective, understanding legal influence requires the study of the institutional actors which have the power to apply constitutional and international law influence to ordinary law.

The study of these institutional actors necessitates that they need to be identified. Moreover, the regulations binding these actors have to be elaborated to unveil the influence mechanisms in the process of law's creation and

930 Lasswell and Kaplan, *Power and Society* (2013).

931 Berg, 'A Note on Power and Influence' (1975) 3 Political Theory 216.

932 Rommetvedt , in Goverde and others, *Power in Contemporary Politics* (2000) 126.

933 Lasswell and Kaplan, *Power and Society* (2013) 76.

934 For instance, *see* Whittington, Kelemen and Caldeira, in Goodin, *The Oxford Handbook of Political Science* (2011) 242 ff; March and Olsen, in Goodin, *The Oxford Handbook of Political Science* (2011) 160 ff; Strøm, in Döring, *Parliaments and Majority Rule in Western Europe* (1995) 51 ff; Scharpf, *Games Real Actors Play* (1997) 1 ff.

935 For application of the institutionalist political theory that centers on the role of the actors in studying the power dynamics in constitutional law, see Belov, 'The Veto Actors in the History of the Bulgarian Constitutionalism/Вето Актьорите в Историята На Българския Конституционализъм' (2010) 21 Contemporary Law/Съвременно право 40. More on the political theory of institutionalism, which focuses on the role of the actors, see Scharpf, *Games Real Actors Play* (1997) 1 ff; Strøm, in Döring, *Parliaments and Majority Rule in Western Europe* (1995) 51 ff.

change.[936] Institutions are characterized in political science as "collections of structures, rules, and standard operating procedures"[937] which regulate legislative deliberation.[938] The political order is constituted by different institutions intended to organize the polity, mainly by regulating "how authority and power is constituted, exercised, legitimated, controlled, and redistributed".[939] Therefore, a crucial point in understanding the dynamics of law's creation and alteration, as well as how influence works and thereby impacts law's creation or alteration, is the clarification of the role of institutions. Further, a sole focus on the role of one institution does not suffice the understanding of influence's mechanics. Instead, there is a need to recognize the interaction between different institutional structures[940] behind the realization of influence.

Naturally, many institutional actors could potentially play some role in the influence mechanisms. The research will focus on the institutions that possess the decisive competence and legal power to apply influence to ordinary law to demarcate the actors which will be considered. These are the supreme organs of the state entrusted with legislative power[941] or institutions with the power to scrutinize the conformity of legislation with constitutional or international law. The concrete actors in this regard, part of the Bulgarian legal system, will be reviewed below in the "Institutional Actors" section.

In general, constitutional influence may lead to the creation, expansion, or halting of curtailment of social protection rights[942] and can be applied by the respective institutional actors in several ways. First, the concept of "influence" can signify constitutional, international, and EU law requirements taken into account by the respective institution in enacting a new law and developing the respective benefits it grants. Next, the term can indicate

936 Strøm, in Döring, *Parliaments and Majority Rule in Western Europe* (1995) 58; March and Olsen, in Goodin, *The Oxford Handbook of Political Science* (2011) 160–162.

937 March and Olsen, in Goodin, *The Oxford Handbook of Political Science* (2011) 160.

938 Strøm, in Döring, *Parliaments and Majority Rule in Western Europe* (1995) 59.

939 March and Olsen, in Goodin, *The Oxford Handbook of Political Science* (2011) 163.

940 ibid 168; Whittington, Kelemen and Caldeira, in Goodin, *The Oxford Handbook of Political Science* (2011) 247.

941 On the engagement of the legislative process with constitutional norms, *see* Appleby and Olijnyk, in Levy and others, *The Cambridge Handbook of Deliberative Constitutionalism* (2018) 88 ff; Williams and Reynolds, in Levy and others, *The Cambridge Handbook of Deliberative Constitutionalism* (2018) 72 ff.

942 Becker, in Becker and others, *Alterssicherung in Deutschland* (2007) 605–610.

that already existing rights were preserved from curtailment since the given institution indicated and considered related obligations stemming from certain higher norms. Finally, influence may indicate that constitutional, international, and EU law norms have been applied by the responsible actors leading to the enlargement of the scope of social protection rights.

One may wonder whether the concept of "influence" could signify a causal link between the constitutional and international law and the ordinary law of the social protection system. The answer must be negative since the study cannot prove that the constitutional, international, and EU laws represent a *conditio sine qua non* for the formation of social protection.[943] Moreover, it could hardly be argued that constitutional or international law requirements have directly caused certain social protection systems since social rights and social state objectives, in general, lack the required strength and precision to oblige the legislature to act in a specific way in terms of social protection design.[944]

In addition, some aspects of the influence on the social protection system could either be described as unintentional or "informal". Namely, a given change in the system might not be introduced as a direct result of requirements stemming from certain higher norms. Political science is increasingly engaging with the idea that formal institutional outcomes are not always (entirely) stirred by formal pathways.[945] Moreover, political pressures can also contribute to social protection reforms.[946] The situation becomes even more complicated and blurry when there is an interplay between different legal and political levels. EU policy research is a good example in this regard. Political scientists are reluctant to attribute certain policy changes in the national spheres as direct effects of EU public policy due to the difficulties of proving causality between the two.[947] For instance, concerning the field of healthcare, authors claim that it is "[v]irtually impossible to determine a clear 'cause and effect' relationship between the EU's public

943 For a similar approach, *see* Vergho, *Soziale Sicherheit in Portugal und ihre verfassungsrechtlichen Grundlagen* (2010) 252–253.

944 Becker, in Becker and others, *Alterssicherung in Deutschland* (2007) 606.

945 Radnitz, 'Review: Informal Politics and the State' (2011) 43 Comparative Politics 355.

946 Becker, in Becker and Poulou, *European Welfare State Constitutions after the Financial Crisis* (2020) 350.

947 Radaelli, 'The Domestic Impact of European Union Public Policy' (2002) 5 Politique européenne 131.

health policies and national health care policies".[948] Outside of the realm of the EU's legal competences in view of healthcare, it is conceivable that the EU was able to affect national healthcare systems through a myriad of "incentive measures" such as public health programs, including financial enticements.[949] However, causality could hardly be argued since such supposed influences did not occur based on EU law's "supremacy" or "direct effect".[950] Moreover, influence impulses can trigger "unintended effects"[951] and foster reform efforts in spheres that exceed above and beyond the scope of the initial formal influence. Such unintentional and informal influences can especially occur in a country like Bulgaria, which opened itself to international and then EU law and simultaneously had to develop and extensively reform its social protection system after the fall of socialism.

Hence, by looking at the institutional background, rather than striving to prove causality, the research will attempt to demonstrate separate events when there are "clear hints"[952] for the influence of constitutional, international, and EU law on social protection. These influence events on the social protection system do not represent isolated occurrences. On the contrary, social protection systems are generally in an unceasing state of adjustment.[953] Hence, the influence on social protection cannot be static, especially when seen in relation to the also evolving interpretation of constitutional and international law norms. Accordingly, the concept of "influence" is understood as a process driven by the respective institutions, which will continue after the research's time scope.

Therefore, in the framework of the present study, the concept of influence is defined as the concrete events when institutions apply constitutional, international, and EU law norms to ordinary law, thereby affecting the latter. Hence, constitutional, international, and EU law influences occur in these institutions' work processes. The application of influence needs to be evidenced by the related materials produced by the different institutional actors. The following section will deliberate the methodology of studying

948 Hervey and Vanhercke, in Mossialos and others, *Health Systems Governance in Europe* (2010) 90.

949 ibid.

950 ibid.

951 ibid 92.

952 For a similar approach on the studying the influence of the financial crisis on national social protection systems, *see* Becker, in Becker and Poulou, *European Welfare State Constitutions after the Financial Crisis* (2020) 6.

953 Becker, 'Private und betriebliche Altersvorsorge zwischen Sicherheit und Selbstverantwortung' (2004) 59 JZ 847.

the institutional processes on the application of influence and the scope of materials to be considered in the course of research.

II. Methodological Questions: The Phases of Influence

After the definition of influence was provided, the question arises of how constitutional, international, and EU law influence can be studied systematically. The definition of the concept of influence indicates that the latter is applied to ordinary law during the procedural phases of the work of the respective institutional actors. Thus, a possible systematization approach for the research on influence can distinguish three different procedural phases.[954] These three stages pose a resemblance to the model of separation of powers.[955] Nevertheless, they do not completely correspond to the three powers since they are connected to the actions linked to these powers rather than to the actors performing them.[956] The first stage encompasses the creation of norms that build the social protection system.[957] The second stage refers to the application of norms. Lastly, the third stage corresponds to the control of norms.

In the phase of norm creation, eventual constitutional and international law influence can be detected in the reports and motives accompanying the draft legislation, the reports of the respective parliamentary commissions, and the parliamentary discussions carried out prior to the adoption of the given law. The research in the legislative phase will seek to detect references to constitutional law, international law instruments, and judgments or decisions of international courts or bodies. The phase on norm creation will also examine the influence of European Union law on the domestic social protection system. Since the present research utilizes a national per-

954 Vergho, *Soziale Sicherheit in Portugal und ihre verfassungsrechtlichen Grundlagen* (2010) 253; Fichtner-Fülöp, *Einfluss des Verfassungsrechts und des internationalen Rechts auf die Ausgestaltung der sozialen Sicherheit in Ungarn* (2012) 207–209.

955 For an overview of the legal philosophy behind the separation of powers, refer to Kavanagh, in Dyzenhaus and Thorburn, *Philosophical Foundations of Constitutional Law* (2019) 221–239.

956 Vergho, *Soziale Sicherheit in Portugal und ihre verfassungsrechtlichen Grundlagen* (2010) 253.

957 Some scholarly works rather refer to the to "levels" of the studying of influence, namely "Einflussebenen". *See* ibid. However, the present research work relies on the phrase "phases of influence" as the concept of influence is related to different procedural phases that could affect legal norms, such as during laws' creation, amendment, constitutional review and eventual repealing.

spective and assesses potential influences on national social protection, the influence of European Union law will be considered in terms of how the national system has adapted to and incorporated relevant EU law requirements. Given the chosen methodological approach of phases of influences, examination of the EU law influence can be thus carried through the norm creation phase. This approach allows for the detection of relevant changes and influences in the national law that occurred due to compliance with primary and secondary EU law sources.

Naturally, the phase of norm creation contains a great number of reforms, especially given the tendency for constant alteration of social protection. Yet, the methodologically sound empirical research requires an examination of every legal act in order to detect references to influence.[958] As already discussed, these references will be considered as the presence of some influence but will not automatically entail causality between the given influence and the given change in the law. The time scope of the research spreads from 1991, being the year for the adoption of the present Constitution, and reaches 2021 in terms of the considered enacted legislation, legal reforms, and decisions of the Constitutional Court. Given the study's time frame, the examination of the legal acts requires that some of the research is to be carried out in the official archives of the National Assembly of the Republic of Bulgaria due to the lack of digitalized versions of the supporting materials to the older legal drafts.

While, in principle, all reforms are reviewed in search of influence, more significant reforms in the field are handled with special care due to their greater altering potential. For a reform to be considered a more "significant" one, an assessment is made on its altering prospective vis-à-vis the preceding state of social rights. Accordingly, special attention is paid to reforms that create new social benefits and measures, enlarge and enrich the scope of existing social protection benefits and measures, and introduce structural changes or changes in the benefit's function.

Further, it has to be considered that the legislative phase may include the enactment of subordinate laws or other legal instruments which occupy lower positions in the hierarchy of norms in comparison to ordinary laws. Consequently, only a direct reference to constitutional, international, or European Union law instruments can be examined concerning these subordinate laws. If the creation of the subordinate laws, however, only reiterates

958 For a similar methodological approach, *see* Becker, in Becker and Poulou, *European Welfare State Constitutions after the Financial Crisis* (2020) 6.

the considerations taken into account in the enactment of the related higher law, then no original influence could be detected.

If the first methodological phase comprises the creation of social protection system, then the second one deals with the individual application of these abstract norms. However, this phase generally does not contain considerations on influence. Hence, no comprehensive conclusions about the significance of constitutional, international, or EU law norms could be anticipated. Accordingly, the phase on the application of norms should be excluded from the scope of the study.

In relation to the norm control,[959] influence is manifested in the constitutional review decisions based on the assessment of the law's compatibility with the Constitution and international law norms. It can be assumed that a considerable part of the detected influence can be revealed at this stage since the process of norm control is exclusively concerned with legal considerations. In contrast, the phase of norm creation always entails the possibility of containing non-legal arguments. The intensiveness of the control of norms will naturally depend on the legal and constitutional traditions[960] and the given institutional setup[961] of the constitutional review in the concrete country.

Therefore, the study of the influence on the social protection system will focus on the phases of norm creation and control of norms. At the same time, the phase on the application of norms is excluded from the scope of research since no well-founded conclusions on influence could be made in this regard. It is expected that the greatest legal insights are to be obtained in the phase of control of norms. Simultaneously, in the phase of norm creation, the assessment of whether there is a presence of influence or not needs to consider that, in principle, not every reference to a higher norm automatically entails an influence of constitutional, international, or EU law. Vice versa, not every omission of explicit mentioning immediately implies a lack of influence. The analysis of references to the Constitution and international law in the debates before the enactment of law or subsequent reforms needs to be carried out with caution since such discussions are

959 The term norm control has been utilized by the Bulgarian constitutional law scholarship in relation to the constitutional review powers of the Constitutional Court. *See* Belov, *Constitutional Law in Bulgaria* (2019) 290.

960 Bruzelius, 'How EU Juridification Shapes Constitutional Social Rights' (2020) 58 JCMS 1492.

961 Becker, in Becker and Poulou, *European Welfare State Constitutions after the Financial Crisis* (2020) 5 ff.

often ultimately motivated by non-legal arguments. Moreover, the research needs to be mindful of informal influence. Namely, formal influences can spill over and trigger reform processes that exceed the initial area of influence. Thus, the final decisions on whether indications for influence are present or not will be based on an overall consideration of the development in the legal area.

III. Institutional Actors

As explained above, the methodology for the study of influence will consider the phases of norm creation and control of norms. The provided definition of the concept of "influence" has underlined the importance of the institutions behind applying constitutional, international, and EU law influence on ordinary law. Therefore, the following will provide insight into the institutional background behind the phases of norm creation and norm control.

1. Norm Creation: The Legislature

The first phase, when constitutional or international influence can be applied, belongs to the stage of the norm's creation or the legislative process. According to Article 62 of the Constitution, the National Assembly has been vested with legislative authority. The Bulgarian Constitution does not provide for the option of delegated legislation.[962] Instead, Article 114 of CRB states that the Council of Ministers can only adopt decrees, ordinances, and resolutions pursuant to and in the implementation of the laws. However, this does not imply that the government cannot considerably affect the legislative process. On the contrary - some scholars claim that the main driving force behind the legislative process is the tandem of the government and its majority in the parliament.[963] In addition, apart from its general power to propose draft legislation, the Council of Ministers also has the exclusive authority to propose the draft law on the annual state budget (Article 87(2), CRB).

962 Belov, *Constitutional Law in Bulgaria* (2019) 143.
963 ibid.

The Constitution adopted in 1991 continued the Bulgarian tradition of structuring the Parliament as a unicameral one.[964] The Constitution further stipulates three compulsory main stages in the legislative process,[965] namely a pre–parliamentary, a parliamentary, and a post-parliamentary one. Regarding the pre–parliamentary stage, the legislative initiative belongs to the single MPs, the political groups, or the Council of Ministers (Article 87(1), CRB). The submission of a draft law needs to meet a list of formal criteria, and if it fails to do so, it cannot progress in the legislative process. In addition to the motives for the proposal, according to Article 28 of Law on the Normative Acts (LNA), the formal requirements include, among others, the preliminary evaluation of the effect of the draft law and the required resources for its implementation and an evaluation of the compliance of the proposal with the Constitution, as well as with international and European Union law.[966] During the parliamentary stage, the draft law which meets the abovementioned formal criteria is distributed by the Chairman of the National Assembly to the respective standing committee(s) depending on the proposal's subject matter. The committees then prepare an expert opinion on the proposal.

The legislative procedure is organized in two readings (Art. 88(1), CRB), both consisting of preparatory work of the assigned standing committees and subsequent plenary reading of the draft law. The first plenary reading concerns the draft's "general philosophy, principles and basic merits".[967] The second reading is very concrete since it concerns the details of the law and involves a discussion of the law article by article. The laws are adopted with an absolute majority, i.e., more than half of the present MPs, in the case of the presence of the necessary quorum of 50% of the MPs (Art. 81, CRB). In the post-parliamentary stage, the adopted law has to be promulgated by the President and published in the State Gazette (Art. 98, CRB). Then, the President may apply a suspensive veto to the adopted proposal and send it back to the National Assembly for reconsideration. If the proposal is successfully voted for again, the President must publish it in the State Gazette within seven days (Art. 101(3), CRB).

All in all, this brief overview of the legislative process clarifies a methodological point from the preceding subsection, namely which sources of law

964 ibid 147.
965 ibid; Drumeva, *Constitutional Law/Конституционно Право* (2018) 383.
966 In this regard, also *see* Article 76, Rules of Organization and Procedure of the National Assembly, SG 35/2.05.2017 (with later amendments).
967 Belov, *Constitutional Law in Bulgaria* (2019) 184.

are to be considered in the research on the constitutional, international, and EU law influence on social protection. Accordingly, the legislation to be examined in the norm creation phase will be predominantly parliamentary due to the originality of the influence in the legal source. The rest of the normative acts, which are also lower in the hierarchy of norms, are enacted with due regard to and in service of the parliamentary laws. Hence, even if there are cases when these lower normative acts contain references to constitutional, international, and EU law considerations, these references, instead of being original influence sources, represent a repetition of what was originally brought by the parliamentary law.

2. Norm Control: The Constitutional Court

The Constitutional Court is the sole institution in the Bulgarian legal system which has the competence to examine the constitutionality of legal norms. When in doubt over the constitutionality of a given norm, both the Supreme Court of Cassation and the Supreme Administrative Court suspend the proceedings and refer the matter to the Constitutional Court and cannot examine the constitutionality themselves (Art. 150(2), CRB). Analogically, when courts from the lower instances are in doubt over the constitutionality of a law, they must refer the question to the respective supreme courts, which on their own are to request a review by the Constitutional Court.[968] Therefore, the Constitutional Court is the only institution that could be considered in the phase of norm control.

a. Development, Structure, and Proceedings of the Constitutional Court

The 1991 Constitution established the institution of the Constitutional Court, which was previously unknown in the national legal sphere. In doing so, the Constitution created the centralized system for constitutional control in the country.[969] Furthermore, the VII Grand National Assembly intended for this institution to support the development of the constitutional model during the years of transition to democracy.[970] Some scholars

968 Article 15, Law on the Judicial Power, SG 64/07.08.2007 (with later amendments).
969 Drumeva, *Constitutional Law/Конституционно право* (2018) 569; Belov, *Constitutional Law in Bulgaria* (2019) 278.
970 Belov, *Constitutional Law in Bulgaria* (2019) 272.

argue that the Constitutional Court and its jurisprudence were crucial for the country's constitutional development on the way to democracy and accession to the European Union.[971]

There are different opinions on how the Constitutional Court developed throughout the years. In general, some argue that the Constitutional Court serves well the will of the constitution-maker by establishing itself as the authority in the country on constitutional interpretation.[972] However, others claim that the Court has also become an "activist jurisprudence".[973] According to these views, the Court has turned into a "quasi-constituent power", especially based on its interpretative decisions. The extensive interpreting can even lead to the ascribing of meaning to the constitutional text.[974]

Generally, the Constitutional Court has made it clear that it is not part of the judicial power[975] and that it exercises its competences independently of and alongside the legislative, executive, and judicial powers.[976] Indeed, this independence of the Court is also structurally reflected in the institution's organizational and budgetary autonomy.[977] In terms of structure, the Court represents a unicameral institution consisting of 12 judges, each elected for a period of nine years. The judges are appointed based on quotas, which aim at avoiding the concentration of power: 1/3 of the judges are elected by the National Assembly, 1/3 are appointed by the President, and 1/3 are chosen by the general assembly of the judges of the Supreme Court of Cassation and the Supreme Administrative Court.

The options for requesting a constitutional review or binding interpretation are enlisted in Article 150 of the Constitution. The Constitutional

971 Drumeva, *Constitutional Law/Конституционно право* (2018) 569.
972 Belov, *Constitutional Law in Bulgaria* (2019) 272.
973 ibid.
974 ibid.
975 Some legal scholars agree with this view by claiming that formally speaking the Constitutional Court is not part of Chapter VI 'Judicial Power' of the Constitution. In addition, substantially the Court is not in any administrative and hierarchical relations with the other courts in the country and does not represent a superior instance of the justice system. See ibid 269 ff. Other scholars criticize this position of the Constitutional Court by stating that the Court is indeed a special type of court that nevertheless belongs to the judicial system. See Stalev, *Problems of the Constitution and Constitutional Jurisprudence/Проблеми на Конституцията и конституционното правосъдие* (2002) 65–91.
976 Constitutional Decision No 18/1993 on case 19/1993 para II.
977 Drumeva, *Constitutional Law/Конституционно право* (2018) 573.

Court can act on an initiative from not less than one-fifth of all members of Parliament, the Council of Ministers, the Supreme Court of Cassation, the Supreme Administrative Court, or the General Prosecutor. The municipal councils can also request a constitutional review on an issue concerning the allocation of competences. As stated above, in case of doubt about the unconstitutionality of a given law, the Supreme Court of Cassation or the Supreme Administrative Court must suspend the proceedings on a case and refer the matter to the Constitutional Court. The Ombudsperson may also approach the Constitutional Court with a request to declare a law unconstitutional on the grounds that it infringes human rights and freedoms. Finally, the Supreme Bar Council may request a constitutional review of a law that allegedly violates the rights and freedoms of citizens. The option for individual constitutional complaint is not provided for in the Bulgarian legal system.[978] Therefore, the lack of a constitutional complaint option could be seen as a certain impediment to reviewing a greater range of laws, limiting the potential scope of the eventual constitutional influence.[979]

The proceedings' procedure of the Constitutional Court is defined by the Constitution, the Law on the Constitutional Court (LCC),[980] and the Rules for the organization of the Activity of the Constitutional Court. The last one is adopted by the Constitutional Court itself as a token of its organizational autonomy.[981] The two main phases of the procedure in front of the Court consist of the admissibility stage and a stage of discussing the

978 Different legal scholars criticize the lack of the constitutional complaint, as it deprives the citizens from an important remedy against human rights violations. See Belov, *Constitutional Law in Bulgaria* (2019) 283; Penev, 'The Bulgarian Constitutional Justice and the Protection of Human Rights/Българското конституционно правосъдие и защитата на основните права' (2013) 12 Lawyers' Review/Адвокатски преглед 24. The only possibility for citizens to indirectly request a constitutional review is for them to file a complaint to the Ombudsperson who acts as a filter and can decide which of the complaints are to be addressed to the Constitutional Court. Still, scholars are of the opinion that this possibility is still very limiting and incapable of substituting the constitutional complaint mechanism.

979 Over the years, different Bulgarian legal scholars have argued in favor of the introduction of the constitutional complaint. *See* Stoichev, *Constitutional Law/Конституционно право* (2002) 573; Penev and Zartov, *Constitutional Jurisprudence in the Republic of Bulgaria/Конституционно правосъдие на Република България* (2004) 54; Penev, 'The Bulgarian Constitutional Justice and the Protection of Human Rights/Българското конституционно правосъдие и защитата на основните права' (2013) 12 Lawyers' Review/Адвокатски преглед 24.

980 Law on the Constitutional Court, SG 67/16.08.1991 (with later amendments).

981 Belov, *Constitutional Law in Bulgaria* (2019) 282.

merits of the given case.[982] The admissibility phase contains an assessment of whether all formal and procedural requirements are kept, in addition to deliberation on whether the Constitutional Court is the right institution regarding the raised matter. The next phase in the proceedings begins with the appointment of a judge rapporteur[983] on the case by the Constitutional Court's Chairman. Usually, there is a single judge rapporteur. However, more rapporteurs could be appointed in some more complicated cases, including in relation to interpretive decisions.[984]

In very broad terms, the discussion of the merits phase consists of three steps. In the elaboration part, the Court constitutes the different interested parties to the case that can voluntarily present written statements that will serve as additional information for the Court. The following discussion of the merits part is usually executed behind closed doors without the presence of the institutions and other interested parties, which have submitted written statements.[985] In the discussion of the merits, the Constitutional Court must address only the made referral but is not limited to solely adhering to the referred argument for unconstitutionality.[986] In the last stage, the adoption of the decision is carried out through open voting. Decisions are adopted by an absolute majority (amounting to seven judges), meaning that parity of the votes leads to no adoption of the decision.

b. Types of Decisions

The Constitutional Court is endowed with competences that could be summarized into five groups.[987] First, it can provide an interpretation of the constitutional text in accordance with the current social and political realities. Next, the Court observes the order of the hierarchy of norms in Bulgarian law. Third, it contributes to the functioning of the institutional framework based on its competence to deal with questions on vertical and

982 ibid.

983 The judges rapporteurs have general freedom in laying out of the legal arguments of the given judgements. Whenever the judgments are structured through the use of paragraphs, the present research work reports the respective paragraph in the citing of the judgement. When no paragraphs are used, the present research work instead refers solely to the respective constitutional decision.

984 ibid 287.

985 ibid 285 ff.

986 As it becomes obvious from Article 22(1), LCC.

987 Belov, *Constitutional Law in Bulgaria* (2019) 272 ff.

horizontal separation of powers between institutions. Fourth, the Court also has the function of addressing threats to the integrity of the state by having the ability to impeach the President and ban political parties if these are found to be unconstitutional. Last but not least, the Court acts as one of the guardians of the system of representative democracy due to its competence to decide on elections' legality.

The Constitution does not explicitly provide for control on constitutionality concerning the acts of the government. Neither does it explicitly provide for the control of their compliance with international treaties and generally recognized principles of international law. The acts of government are ultimately subject to the control of the Supreme Court of Cassation and the Supreme Administrative Court.[988] Based on Article 15(3) of the LNA,[989] whenever a government act contradicts another legal instrument of higher rank, the judicial authorities apply the latter and disregard the former. Naturally, the acts adopted by the Council of Ministers or the separate Ministers must comply with the constitution and the applicable international law; when this is not the case, the government acts would automatically become void as they contradict the higher-ranking legal instrument.[990]

As per its competences, the Constitutional Court can adopt three types of decisions.[991] These are interpretative decisions, judgments regarding the hierarchical norm control, and decisions on concrete matters, which are part of the competences of the Constitutional Court listed in Article 149(1) of the Constitution.[992] The decisions of the Constitutional Court regarding interpretation or norm control produce judgments that represent sources of law and are attributed a constitutional rank.[993] This conclusion is not provided by some constitutional provision but rather follows from the logical interpretation that if the Constitutional Court's decisions are to be able to block the derogating provisions, then the judgment itself should

988 The constitutional legislature avoided to grant such explicit rights to Constitutional Court due to the fear of the latter's overburdening. *See* ibid 276 ff.

989 Law on the Normative Acts, SG 27/3.04.1973 (with later amendments).

990 Belov, *Constitutional Law in Bulgaria* (2019) 279 ff.

991 ibid.

992 The concrete matters include the already mentioned vertical and horizontal institutional disputes, impeachment of President, and constitutionality of political parties, as well as the legality of elections.

993 The decisions on the institutional conflicts on the separation of powers may have normative character since they may contain important interpretations on the respective constitutional provisions. See Belov, *Constitutional Law in Bulgaria* (2019) 290.

possess the rank of the superior constitutional norm.[994] The following discussion will provide some insight into the two most important types of decisions of the Constitutional Court, i.e., the interpretative decisions and the decisions on hierarchical norm control. The two types of decisions will be of great research interest for the present work due to their potential for applying constitutional and international law influence.

aa. Hierarchical Norm Control

The power of the Constitutional Court to safeguard the normative hierarchy of the sources of law undeniably represents its most essential competence.[995] Based on this prerogative provided for in Article 149(1) of the Constitution, the Court can control the constitutionality of the parliamentary legislation and the legal acts of the President. The Court can also examine *ex-ante* the compatibility of international treaties with the Constitution before their ratification. Further, it can control the compliance of legal acts of the Parliament and the President with international law treaties as well as with the generally recognized principles of international law.

The hierarchical norm control can be divided into concrete and abstract controls for constitutionality.[996] Both types of controls result in legally binding decisions for all subjects of the Bulgarian constitutional law. The difference lies in the procedure preceding the constitutional review, namely whether it was a result of a pending lawsuit (which was halted due to suspicion of unconstitutionality) or not.[997] The concrete and the abstract norm controls represent *ex-post* types of constitutional review. Hence, the only preliminary type of control the Constitutional Court may exercise is in terms of the constitutionality of international treaties. Such *ex-ante* review

994 ibid.

995 Belov, *Constitutional Law in Bulgaria* (2019) 272 ff; Drumeva, *Constitutional Law/ Конституционно право* (2018) 590; Drumeva, 'Das Bulgarische Verfassungsgericht. Rechtsgrundlagen und erste Entscheidungen' (1993) 53 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 121.

996 Belov, *Constitutional Law in Bulgaria* (2019) 272 ff; Drumeva, *Constitutional Law/ Конституционно право* (2018) 590.

997 Some legal scholars argue that there is no differentiation between abstract and concrete norm control: both reviews are abstract, with the difference that one of them is exercised due to a concrete reason. See Drumeva, *Constitutional Law/ Конституционно право* (2018) 590.

prior to ratification is exercised to evade subsequent violation of the principle of *pacta sunt servanda*.[998] In terms of international law, throughout the years, the Constitutional Court was approached with referrals claiming unconstitutionality and violation of international law concerning human rights issues, with the ECHR, the ICCPR, and the ICESCR being the most frequently referred sources.[999]

The consequences of the decisions of the Constitutional Court are based on the supremacy of the Constitution. Article 5(1) of the Constitution states that the Constitution is the supreme law, and no other laws can contradict it.[1000] Therefore, as the sole authority which has the competence to safeguard the supremacy of the Constitution in the hierarchy of norms in the country, the Constitutional Court needs to be able to issue decisions that have legal consequences ensuring the supremacy of the Constitution.[1001] Then, if a decision of the Constitutional Court has established the unconstitutionality of a law, the law in question loses its "legal force" and is no longer considered to belong to the legal sphere. Such law ceases to apply *ex nunc* on the day of the entering into force of the Court's decision (Article 151(2), CRB).[1002]

The legal consequences stemming from the law that was declared unconstitutional must be addressed by the institution responsible for the unconstitutional law's enactment (Art. 22(4), LCC). In the reasoning of one of its judgments, the Constitutional Court has addressed the situation when the contested law, which was declared unconstitutional, is subject to pending court proceedings.[1003] When the Constitutional Court's decision is still not in force or the responsible institution has not yet addressed the legal consequences of the decision adjudicating unconstitutionality, the courts are to continue their work by grounding themselves directly on the Constitution or the general principles of law.[1004]

998 Belov, *Constitutional Law in Bulgaria* (2019) 279.
999 ibid.
1000 Constitutional Decision No 3/2020 on case 5/2019.
1001 ibid.
1002 The decision enters into force three days after its promulgation in the State Gazette (Art. 151(2), CRB).
1003 Constitutional Decision No 3/2020 on case 5/2019 para II.2.
1004 ibid.

bb. Interpretative Decisions

The power of the Constitutional Court to provide interpretative decisions is detailed in Article 149(1) of the Constitution. The importance of such case law is considerable for the national legal system: interpretative decisions are not only binding but also, in practice, become part of the Constitution itself,[1005] as the latter can no longer be properly understood without recourse to the respective interpretative decisions.[1006] In terms of their number, the interpretative decisions of the Constitutional Court are the second-largest group of case law, right after the decisions on hierarchical norm control issues.

The founders of the 1991 Constitution considered that the interpretative power of the Constitutional Court would be an important one in two main regards. First, it was believed that after the end of socialism, there would be a need for a constitutional authority that would be able to unveil the meaning of the constitutional norms given the new political realm.[1007] Such interpretative power was to contribute to constitutional supremacy by the provision of uniform and authoritative constitutional interpretations. In addition, the interpretative power was seen as an important tool for clarifying the vagueness of the constitutional norms.[1008] It was considered that the interpretative function would provide a reading of the Constitution that evolved with time and took into account the changing social reality.[1009]

Some scholars consider the interpretative powers of the Constitutional Court as essential for the stable and unambiguous application of the Constitution.[1010] Others challenge this view.[1011] As mentioned above, the Constitutional Court's use of the interpretative power is at times criticized for judicial activism and provision of new meanings of the constitutional

1005 Drumeva, *Constitutional Law/Конституционно право* (2018) 603; Stoichev, *Constitutional Law/Конституционно право* (2002) 595.

1006 Belov, *Constitutional Law in Bulgaria* (2019) 275 ff; Penev and Zartov, *Constitutional Jurisprudence in the Republic of Bulgaria/Конституционно правосъдие на Република България* (2004) 94.

1007 Dimitrov, 'The Bulgarian Constitutional Court and Its Interpretive Jurisdiction' (1999) 37 CJTL 504.

1008 Drumeva, *Constitutional Law/Конституционно право* (2018) 604.

1009 Belov, *Constitutional Law in Bulgaria* (2019) 273 ff.

1010 Penev and Zartov, *Constitutional Jurisprudence in the Republic of Bulgaria/Конституционно правосъдие на Република България* (2004) 93.

1011 Belov, *Constitutional Law in Bulgaria* (2019) 274 ff.

text, the latter being an action that lacks democratic legitimacy.[1012] There are some potential limitations to the extensive use of interpretative power. The Constitutional Court cannot act *ex officio* and has to be requested for an interpretative decision by one of the competent institutions.[1013] Still, the wide range of institutional actors that may request an interpretation contributes to the greater possibility for the referral of a request for constitutional interpretation.[1014]

The Bulgarian legal scholarship has debated the principles observed in interpretative decision-making that can prevent ascribing of meanings to the constitutional text.[1015] Among them is the requirement for the uniform interpretation of the used terminology and the need for interpretation targeting the given context in which the request for interpretation was made. In addition, some scholars consider that the Constitution itself sets parameters and limits for its interpretation.[1016] For instance, the interpretative decisions need to abide by the fundamental principles included in Chapter 1 of the Constitution.[1017] Moreover, the decisions should, to some extent, be mindful of the Preamble as the latter possesses a synthesized representation of the main values and goals of the Constitution.[1018] Further, the Constitutional Court can provide an interpretation only of the concrete constitutional provision addressed by the referring institution and the specific question.[1019] However, some scholars point out that such principles could be circumvented due to the usual general way in which interpretation

1012 ibid. There are authors who do not support such criticism and argue that the interpretative decisions cannot lead to the inscribing of new meaning of the constitutional text. *See* Stoichev, *Constitutional Law/Конституционно право* (2002) 595.

1013 ibid 595.

1014 Namely, on the basis of Article 150 of the Constitution, referrals can be requested by 1/5 of the MPs, the President, the Council of Ministers, the Supreme Court of Cassation, the Supreme Administrative Court or the Prosecutor General. The Ombudsman and the Supreme Bar Council can also approach the Constitutional Court but can only do so when in doubt about the unconstitutionality of a given law in relation to fundamental rights (Art. 150(3) and (4), CRB).

1015 Drumeva, *Constitutional Law/Конституционно право* (2018) 605; Spasov, *Study on the Constitutuion/Учение за Конституцията* (1997) 55.

1016 Drumeva, *Constitutional Law/Конституционно право* (2018) 605.

1017 ibid 605.

1018 ibid.

1019 ibid.

requests are framed.[1020] Namely, the general wording of the posed questions can allow the Court broad room for shaping its answer.[1021]

IV. Concrete Influences

1. Creation of Norms

a. Contribution-based Systems: Framework Laws

After examining the concept of influence and the methodology for its studying, the research proceeds to investigate the concrete influences detected in the phases of norm creation and norm control. In terms of the phase of norm creation, the research will progress to study the influence on the systematized social protection branches. As the systematization part has revealed, the framework laws in the Contribution-based Systems are the Social Insurance Code and the Law on Health Insurance. In unveiling influences, the research will consider the introductory and motivating considerations of the legislative drafts of the laws and their following reforms, as well as the related reports of the respective parliamentary committees and the corresponding debates in Parliament during the legislative process.

aa. Social Insurance Code

In general, the motives for the draft law and the subsequent reform of the Social Insurance Code did not comprehensively engage with constitutional considerations.[1022] This observation is already exemplified in the legal draft of the Social Insurance Code. The motives for the draft briefly implied the importance of setting public social insurance,[1023] thereby implying the relevance of the right to public social security provided for in Article 51(1) of the Constitution.[1024] Still, despite that the importance of the Constitution

1020 Belov, *Constitutional Law in Bulgaria* (2019) 723.
1021 ibid.
1022 'Draft of the Social Insurance Code, No 902-01-63, Archives of the National Assembly' (1999).
1023 'Motives in Draft of the Social Insurance Code, No 902-01-63, Archives of the National Assembly' (1999) 1.
1024 ibid.

was generally assumed, there was no explicit and detailed engagement with the relevance of the constitutional provisions in terms of the system's design. The report of the leading parliamentary Committee on this draft law, namely the Labor and Social Policy Committee, noted that the draft utilized the constitutional principle of solidarity as a legal basis for the proposed social insurance system.[1025] The report claimed that the draft's combination of the solidarity principle with the principle for mandatory participation in the system would contribute to the development of social insurance and its specialized funds.

In contrast, the political debates concerning the law's enactment and its following reforms demonstrated greater engagement with constitutional arguments. First, the political discussions on the legal draft during the first reading in the parliament referred to the constitutional principle of solidarity as being a guiding one for the legislative proposal.[1026] During the political debate, the Union of the Democratic Forces ("UDF") indicated the explicit mentioning of this constitutional principle in the legal draft as an argument in favor of adopting the proposal.[1027]

Second, the social state objective and the constitutional right to social insurance were debated in view of the envisioned structural changes in the pension system. Namely, the draft proposed the integration of private capital-funded schemes into mandatory pension insurance, which became a point of political tension. The legal draft provided that part of the mandatory pension contribution would be mandatorily directed to capital-funded private schemes based on individual accounts. The Bulgarian Socialist Party ("BSP") attacked this aspect since redirecting some of the mandatory pension contributions to the capital-funded schemes deprived the public pension insurance of an income. Therefore, the redirecting of finances could potentially destabilize the functioning of the PAYG public pensions fund.

Moreover, private insurance placed the insurance risk mainly upon the individual, which, according to the BSP, was incompatible with the so-

1025 'Report of the Committee on Labor and Social Policy for the First Reading of the Draft of the Social Insurance Code, No 902-01-63, Archives of the National Assembly' (1999) 1.

1026 'Transcript of Parliamentary Plenary Session No 310, 13.10.1999' (1999) <https://www.parliament.bg/bg/plenaryst/ns/6/ID/1318> accessed 24 February 2020.

1027 ibid.

cial state objective promulgated in the Constitution.[1028] Another argument against this structural reform was the high administrative costs it allowed, which would slow down the accumulation of capital in the schemes and would thus affect the future benefits' amounts. The high administrative costs, in turn, would lead to a violation of the constitutional right to social insurance and would be incompatible with system development in line with the social state objective. In response to these critiques, the UDF opted not to rely on constitutional arguments but instead chose fiscal reasoning. The political party claimed that the integration of capital-funded schemes in the mandatory pension insurance was a symbol of modernizing the pension system in the country.[1029] Also, the UDF maintained that a developed capital-funded pension system would contribute to the higher old-age income of the retirees, especially in a society with a tendency for aging demographics. Ultimately, the fiscal argumentation prevailed, and the integration of private schemes in the mandatory pension system was approved.

The following reforms on the already enacted Social Insurance Code did not profoundly engage with constitutional considerations. An exception to this observation was the reforming of the paid maternity leave duration. Namely, a reform aiming to extend the number of prenatal and postnatal paid leave days implied the significance of the provision of special protection for mothers,[1030] which is entailed in Article 47(2) of the Constitution. The legal proposal planned an increase from 135 days of paid maternal leave to 200 days.[1031] A competing reform proposal submitted at the same time envisioned an increase to 400 days.[1032] The plenary discussions, which

1028 'Transcript of Parliamentary Plenary Session No 329, 01.12.1999' <https://parliament.bg/bg/plenaryst/ns/55/ID/870> accessed 24 February 2020.

1029 The introduction of the private schemes in the country was strongly advocated by the World Bank. For more on this topic, *see* Petrova, in *The International Labour Organization and Bulgaria/Международната организация на труда и България* (2020) 369.

1030 'Draft of the Law Amending and Supplementing the Social Insurance Code, No 654-01-73, Archives of the National Assembly' (2006); 'Motives in Draft of the Law Amending and Supplementing the Social Insurance Code, No 654-01-73, Archives of the National Assembly' (2006).

1031 'Draft of the Law Amending and Supplementing the Social Insurance Code, No 654-01-73, Archives of the National Assembly'; 'Motives in Draft of the Law Amending and Supplementing the Social Insurance Code, No 654-01-73, Archives of the National Assembly'.

1032 'Transcript of Parliamentary Plenary Session No 151, 09.08.2006' <https://parliament.bg/bg/plenaryst/ns/2/ID/183> accessed 24 February 2020; 'Draft of the Law

accompanied the draft's reading, focused on the meaning of special protection for mothers in the social insurance system, given the demographic problems in the country.[1033]

According to the parliamentary debates, special protection, in general, was expressed in the state's obligation to guarantee targeted forms of protection by different systems, depending on whether the (expecting) mother was entitled to social insurance benefits or not. The debates led to the prevailing understanding that considering the demographic problems in the country, the state could further support child-raising through the social insurance system by increasing the time of the paid maternity leave. Accordingly, the initially proposed increase to 200 days was viewed as insufficient. A compromise on the increase and its related costs for the state was reached and led to the leave's increase to 315 days.[1034] Just two years later, yet another reform of the Social Insurance Code again addressed the provision of paid leave to mothers and proposed an increase of the 315 days of paid leave to 410 days.[1035] The debates on the draft once again quickly touched upon the constitutional obligation for the special protection of mothers.[1036]

bb. Law on Health Insurance

In contrast to the Social Insurance Code, constitutional considerations played a more prominent role in the enactment of the Law on Health Insurance. The constitutional aspects were of no particular importance in the subsequent reforms of the Law on Health Insurance over the years. However, when it comes to the law's enactment, constitutional arguments were present both in the draft law's motives and the subsequent reading

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Amending and Supplementing the Social Insurance Code, No 653-08-42, Archives of the National Assembly' (2006).

1033 'Transcript of Parliamentary Plenary Session No 151, 09.08.2006'.

1034 ibid; 'Draft of the Law Amending and Supplementing the Social Insurance Code, No 653-08-42, Archives of the National Assembly'.

1035 'Draft of the Law on the Budget for the Public Social Insurance for 2009, No. 802-01-84' (2008) <https://www.parliament.bg/bg/bills/ID/8493> accessed 24 February 2020; 'Motives in Draft of the Law on the Budget for the Public Social Insurance for 2009, No. 802-01-84' (2008) <https://www.parliament.bg/bg/bills/ID/8493> accessed 24 February 2020.

1036 'Transcript of Parliamentary Plenary Session No 433, 19.11.2008' <https://parliament.bg/bg/plenaryst/ns/2/ID/500> accessed 24 February 2020.

and debating of the draft. It was claimed that the constitutional principles of solidarity and equality were foundational for the draft and were indicative of the proposed health insurance model.[1037] Namely, the draft law introduced an insurance system based on solidarity between the participants, mandatory participation through contributions, and equality in terms of access to the covered medical services and goods. In contrast, the healthcare system at the time functioned through centralized financing covered by the state budget and involved no payment of contributions.[1038]

The debate in the National Assembly on the relevant constitutional provisions was held with corresponding passion. In the first reading of the legal proposal, the Healthcare Committee, which had a leading role in preparing a report on the legal draft, raised the question of the general meaning of the concept of "healthcare", including in constitutional terms.[1039] The debate originated in the fact that Article 52(1) of the Constitution indirectly provided that the right to healthcare in the country consisted of two main components. Namely, healthcare included health insurance, which should guarantee affordable medical aid based on insurance rights, and further entailed free medical care, which was to be provided either to all or to certain groups in some concrete cases.[1040] The UDF maintained that the right to healthcare should be understood based on the definition provided by the World Health Organization ("WHO"). The definition recognized "health" not only as being the absence of a given illness but also deemed it to be the condition of complete physical, psychological, and social wellbeing. It was pointed out that, according to the WHO, the state was responsible for the overall health condition of the population. This responsibility entailed the undertaking of social- and health-related measures. Therefore, the debates concluded that healthcare should not just involve developing a health insurance system. Instead, healthcare should be understood as a broader concept necessitating the leading of a broad state policy for the overall health wellbeing of the nation. Such an understanding was viewed as compatible with the constitutional objective of the state to protect the health

1037 'Motives in Draft of the Law on Health Insurance, No 02-01-49, Archives of the National Assembly' (1997) 1.

1038 For more on this, please refer to the research section on the history of the social protection system in the country.

1039 'Transcript of Extraordinary Parliamentary Plenary Session No 20, 16.12.1997' <https://www.parliament.bg/bg/plenaryst/ns/6/ID/1411> accessed 24 February 2020.

1040 ibid.

of citizens (Art. 53(2), CRB). In addition, health insurance should strive to realize the constitutional right to health insurance and accordingly could not be interpreted as a business model for providing services governed by microeconomic rules. On the contrary, the constitutional right to health insurance implied that healthcare must strive for state governance which minimized the need to rely on the health insurance system.

Moreover, the lengthy parliamentary debates concentrated on the concrete requirements for realizing the constitutional right to health insurance, particularly in terms of access to medical care.[1041] A particular point of political disagreement represented the proposal's inclusion of the requirement for payment of a small fee by the insured individuals for every visit to the general practitioner and every day spent in the hospital. According to the draft law, the fee to be covered by the insured individual represented a flat-rate amount determined by law that did not depend on the received medical service. Certain groups of citizens were excluded from paying this additional minimum fee, such as children, unemployed family members, and others.[1042]

Some members of parliament saw the introduction of this additional fee as a violation of the constitutional right to health insurance. According to this view, once the individuals had provided the required contributions and were insured, there could be no further impediments to their right to access the medical services covered by the public health insurance. Nevertheless, other parliamentarians claimed that the introduction of additional fees was in line with the constitutional requirements. These arguments maintained that, after all, according to Article 52(2) of the CRB, medical care "shall be financed from the state budget, by employers, through private and collective health insurance schemes, and from other sources in accordance with conditions and procedures established by law". Accordingly, the proponents claimed that the constitutional provision allowed the legislature the freedom to delineate these "other sources" of financing. Thus, the introduction of further small fees belonged to the enlisted category of "other sources" and was constitutionally permissible. The debates on the constitutionality of the introduced fee ended in the Constitutional Court.[1043]

1041 ibid.

1042 ibid.

1043 A group of 52 members of parliament referred the debated issue on the fees to the Constitutional Court. The Court decided that the introduction of the fees to

In addition, the parliamentary discussions during the enactment of the Law on Health Insurance engaged with further constitutional considerations. Some members of the parliament pointed out that the constitutional principles of solidarity and equality both represented some of the main foundations of the legal draft. These principles allowed insurees to contribute to the system based on their income. Individuals could then equally benefit from medical services in line with their medical needs and not according to the amount of the made contributions. The state was to take over the financing of some medical services, thereby allegedly adhering to the social state objective in the legal draft. These services were provided in line with the constitutional provision for free medical care. Additionally, the social state objective was to be adhered to by covering the health insurance's financing for certain social groups like pensioners and people in material need.

b. Social Compensation

The part on the systematization of social protection in Bulgaria showed that the branch of Social Compensation is constituted by the military and civil disability pensions. The expression of explicit constitutional considerations in the respective legislation's enactment was quite limited. The constitutional influence in the field could be boiled down to a reform of the Social Insurance Code, which introduced higher pensions to the survivors of disabled militaries.[1044]

In the parliamentary debates, some defended the reform as representing a group-specific interpretation of the requirement stemming from Article 51(3) of the Constitution. The constitutional provision entails the goal that the state and society should provide special protection to certain vulnerable social groups, including disabled persons.[1045] It was considered that the combined basis of the special protection for people with disabilities and the value of the military service should extend the right to a military pension to the survivors. Such an approach is a precedent in the country since,

be constitutional. The Constitutional Court's decision is reviewed in detail in the research section on control of norms.

1044 'Draft of the Law Amending and Supplementing the Social Insurance Code, No 054-01-11 and No 053-08-12, Archives of the National Assembly' (2000).

1045 'Transcript of Parliamentary Plenary Session No 400, 16.06.2000' <https://parliament.bg/bg/plenaryst/ns/55/ID/1398> accessed 24 February 2020.

as discussed in the social protection system's analysis, non-contributory pensions do not result in survivor rights. Apart from establishing survivor pension rights based on the military pension, the reform also increased survivor benefit amounts.

c. Minimum Protection

The social protection's systematization demonstrated that a minimum level of protection in Bulgaria is provided through general social assistance benefits and social pensions for the destitute elderly. Examining the enactment and subsequent reforms of the social assistance legislation illustrates that its development was reportedly intertwined with constitutional and international law influences. In contrast, the non-contributory social pensions and their reforms were not explicitly associated with constitutional or international law influences.

The following overview will begin with the detected influences in the social assistance legislation that occurred before the enactment of the current Law on Social Assistance and shaped some of the aspects of the current legislation. Then, the examination will continue with assessing the influence of the creation of the Law on Social Assistance. Finally, the analysis will discuss the influences encountered in the law's reforms.

aa. Influences Prior to the Law on Social Assistance

The analysis of the social protection system revealed that social assistance in the country is currently mainly regulated by the Law on Social Assistance. The rules on social assistance used to be scattered in different regulations before the law entered into force in 1999.[1046] A case dating back to when there was no unified regulation concerned the limited appeal procedures regarding certain social assistance administrative decisions. The case ended up in the European Commission of Human Rights, [1047] an institution that used to represent a specialized body of the Council of

1046 Mrachkov, *Social Rights of the Bulgarian Citizens/Социални права на българските граждани* (2020) 371.

1047 *Sekul Kovachev against Bulgaria*, App. No. 29303/95, 10 April 1997.

Europe.[1048] The applicant was a recipient of a social pension for disability. The social disability pension used to provide minimum income to all those above the age of 16 who had more than 71% of disability but were not eligible for any other pension.[1049] The applicant was denied a request for entitlement to several additional social assistance allowances for medications and transportation to and from rehabilitation centers.

One of the relevant social assistance laws, which were in force during a period of time concerning the applicant's claims, provided that people with disabilities who were already recipients of minimum income benefits had a right to certain additional allowances. The decision to grant these further allowances could be taken by district social care centers, and appeals to those decisions could be addressed to a commission appointed by the district's mayor. The European Commission of Human Rights concluded that the provided options for an appeal in the law did not represent "impartial tribunals" in the sense of Article 6, para. 1 of the ECHR.[1050] As a result, it was unanimously agreed that there was a violation of Article 6, para. 1 of the Convention.[1051] The Bulgarian authorities have subsequently reported that the case had been taken into account in the national law's amendment. The reforming of the national law included the preparation of new social assistance legislation, i.e., the Law on Social Assistance.[1052] In particular, it was underlined that Article 29(2) of the Regulation for the application of the newly enacted Law on Social Assistance explicitly stated that the decisions of the district authorities could be appealed in courts in accordance with the Law on the Administrative Procedure.[1053] Accordingly, the ECHR's influence allegedly led to the extended possibility for judicial appeal in the field of social assistance.

1048 Prior to 1998, the European Commission on Human Rights assisted the European Court of Human Rights. After 1998 and the entry into force of Protocol 11 of the European Convention on Human Rights, the Commission was abolished. For more on the history of the Commission, see United Nations, 'International Norms and Standards Relating to Disability' (2003) < https://www.un.org/esa/socdev/enable/comp301.htm> accessed 24 February 2020.

1049 The entitlement to this pension was terminated with the entering into force of the Law on People with Disabilities. *See* Article 70, LPD.

1050 *Kovachev against Bulgaria* para 41.

1051 ibid paras 43–44.

1052 Council of Europe, 'Human Rights Information Bulletin No. 52, November 2000 – February 2001' (2001) 14 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680096f3f> accessed 24 February 2020.

1053 ibid.

bb. Enactment of the Law on Social Assistance

Both the motives and debates on the legal draft[1054] of the Law on Social Assistance were heavily painted in constitutional arguments. First, the motivating considerations accompanying the draft clearly stated that the proposal was based on the right to social assistance enshrined in Article 51(1) of the Constitution.[1055] The foundational importance of the constitutional provision was reiterated numerous times during the document's discussion in the course of the first and the second readings in the Parliament.[1056]

In addition, apart from focusing on the underlying role of the right to social assistance, the debates on the legal draft's content were further concerned with other constitutional principles and related objectives, namely solidarity, social state, and preservation of human dignity. Concerning the principle of solidarity, the debates united under the argument that the creation of the law was a necessity stemming from the social state objective declared in the Constitution's Preamble. According to the parliamentary discussion, the social state entailed the state's obligation not to abandon the persons who were unable to deal with some hardships, despite their best efforts.[1057] A lack of measures addressing such members of the society would just condemn them to severe poverty. Therefore, the social state was seen as the state's duty to interfere in life situations when, due to the materialization of certain social risks, the individuals would end in a precarious situation and would be unable to lead a life compatible with the idea of the human dignity. Accordingly, it was accepted that one of the main

1054 'Draft of the Law on Social Assistance, No 853-08-6, Archives of the National Assembly' (1998).

1055 'Motives in Draft of the Law on Social Assistance, No 853-08-6, Archives of the National Assembly' (1998).

1056 'Transcript of Parliamentary Plenary Session No 105, 04.03.1998' <https://www.parliament.bg/bg/plenaryst/ns/6/ID/984> accessed 24 February 2020; 'Transcript of Parliamentary Plenary Session No 127, 16.05.1998' <https://www.parliament.bg/bg/plenaryst/ns/6/ID/1038> accessed 24 February 2020.

1057 Some scholars argue that the definition of the social state is a political task ("Den Sozialstaat zu definieren, ist ein politisches Geschäft."). The aforementioned does not imply that the social state cannot be used in legal arguments since it can be used to guide political actions or to point out the directions in which given politics should be further developed. *See* Zacher, in Stödter and Thieme, *Festschrift für Hans Peter Ipsen zum siebzigsten Geburtstag* (1977) 266–267.

goals of the proposed law was to support "citizens who without someone else's help would not be able to satisfy their basic living necessities".[1058]

The discussion on the social state spilled over the linked topics on the principle of solidarity and the meaning of human dignity. The proponents for the legal draft believed that the principle of solidarity was a fundamental part of the law as it embodied the main driving force behind the realization of the law's aim. It was pointed out that solidarity stood for society's commitment to interfere and provide help once an individual could not continue to live with human dignity. Consequently, in the further definition of the legal draft's goals, the proposal declared that it aimed to "strengthen and reinforce social solidarity in difficult life situations".[1059] The inclusion of this goal in the law was ultimately approved.[1060]

The deliberations on the social state and solidarity touched upon "human dignity". While the members of parliament were predominantly univocal on what the terms "social state" and "solidarity" stood for, the reliance on the concept of "human dignity" in the legal draft caused disagreements. In particular, the initial proposal used to state that the purpose of the law was to secure the human dignity of citizens who, without the help of others, could not afford the basic necessities of life. However, in the second reading of the legal draft, concerns about the broad character of the "human dignity" concept were raised. Moreover, it was argued that "human dignity" rather represented a moral category, and as such, it was unable to bring clarity to the main goal of helping those who are not able to satisfy their basic living necessities.[1061] Nevertheless, counterarguments pointed out that guaranteeing human dignity was one of the state's constitutional obligations (Art. 4(2), CRB). Therefore, the term's inclusion in the text of the law became imperative to ensure that recipients of social assistance would be treated in a manner respecting their sense of dignity. Ultimately, a compromise was reached, and it was accepted that the inclusion of the term in the law entailed the "provision of social assistance […] in a way which preserves the human dignity".[1062]

1058 Nowadays, the main goal of the law is featured in Article 1(2)1, LSA.

1059 'Motives in Draft of the Law on Social Assistance, No 853-08-6, Archives of the National Assembly'.

1060 Nowadays, the goal of strengthening and reinforcing social solidarity is featured in Article 2(1)2, LSA.

1061 'Transcript of Parliamentary Plenary Session No 127, 16.05.1998'.

1062 Translation from Bulgarian by author. Nowadays, the goal related to human dignity is featured in Article 1(5), LSA.

In addition to the constitutional references, the debates on the draft of the Law on Social Assistance revealed certain international law influences. The plenary statements presented in the second reading demonstrated that the members of the leading commission on the draft, namely the Labor and Social Policy Committee, engaged in long discussions on the material scope of the solutions proposed by the law in addressing the needs of destitute individuals.[1063] The leading committee considered that the scope of the offered benefits should reflect the country's international law obligations in view of the ICESCR. More concretely, recourse was made to Article 11.1 of the Covenant, which postulates that state parties need to "recognize the right of everyone to an adequate standard of living", which included food, clothing, and housing. In addition, another Covenant obligation underlined by the Committee provided that states should strive for the continuous improvement of living standards.[1064] The Labor and Social Policy Committee proposed that the law should enlist as one of its goals the aim to "support citizens who themselves cannot afford the basic necessities of life". To translate the idea behind Article 11.1 of the ICESCR into the draft law, the phrase "basic needs of life" was defined in the spirit of the Covenant as standing for "enough food, clothing, and housing in accordance with the social and economic development of the country".[1065] This proposed wording was adopted on the second reading of the legal draft, albeit the critiques from the left that the used language is too vague and unclear and thus may not sufficiently address the needs it should target.[1066]

Some scholars also criticized tying up the law's aim of providing basic protection to the conditionality of the "social and economic development

1063 'Transcript of Parliamentary Plenary Session No 127, 16.05.1998'.

1064 Article 7 of the ICESCR provides that: "[t]he States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent".

1065 Nowadays the definition of the "basic needs of life" is stated in §1.1, LSA.

1066 Legal scholars point out that according to the ICESR general social protection policies and strategies are up to the state's discretion. However, the international obligations are "far more intense" when it comes to the minimum level of protection and become more "diluted" when it comes to the provision of more entitlements. *See* Vonk and Katrougalos, in Vonk and Tollenaar, *Social Security as a Public Interest* (2010) 74.

of the country".[1067] In particular, the point of critique was that this onset restriction included in the definition limited the right to social assistance, thereby restricting the constitutional right to social assistance expressed in Article 51(1). Understandably, the conditions for the provision of the right to social assistance represented an expression of the limited public resources allocated for social assistance. Still, scholars argued that such a definitional limitation in the law condemns the social assistance benefits to remain at extremely low levels, thereby reinforcing the condition of poverty instead of aiming to eliminate it.[1068]

cc. Subsequent Reforms and Further International Law Influences

The enactment process of the Law on Social Assistance demonstrated multifaceted engagement with various constitutional and international law influences. An examination of the subsequent reforms of this law reveals that, at times, changes occurred under the impact of international law instruments. First, a reform in 2010[1069] was motivated by a decision of the European Committee of Social Rights which found that Bulgaria violated Article 13§1 (right to social assistance) of the ESCR.[1070] The decision was issued concerning complaint No 48/2008 of the European Roma Rights Centre. The complaint was submitted in accord with the system of collective complaints that is part of the control mechanism of the Charter. The collective complaint concerned reform of the Law on Social Assistance on the duration of the entitlement to monthly social assistance to unemployed persons of working age who lacked adequate resources. The reform limited the previously unlimited period for granting the monthly benefit to a maximum of 18 months. The complaint pointed out that the introduced limitation will have a "disparate impact on Roma who are substantially

1067 Mrachkov, in *Topical Issues of the Labour and Social Security Law/Актуални проблеми на трудовото и осигурителното право* (2018) 61.

1068 Mrachkov, *Social Rights of the Bulgarian Citizens/Социални права на българските граждани* (2020) 402.

1069 'Motives in Draft of the Law Amending and Supplementing the Law on Social Assistance, No 902-01-57' (2010) 1 <https://parliament.bg/bg/bills/ID/9632> accessed 24 February 2020.

1070 'Decision of the Merits, European Roma Rights Centre v. Bulgaria, Complaint No. 48/2008' (2009) para 46.

overrepresented among the beneficiaries of monthly social assistance", thereby also violating Article E, Part V of the Charter.[1071]

In its decision, the European Committee of Social Rights established that a refusal for payment continuation of monthly social assistance to unemployed persons due to the above-mentioned legal restrictions might cause such individuals to lose their principal means of livelihood,[1072] thereby violating Article 13§1.[1073] The Committee considered it unnecessary to examine whether the adopted legal changes led to a violation of Article E, Part V (concerning non-discrimination) of the Revised Charter, given that established violation of the right to social assistance of all those persons affected by the amendments to the Law on Social Assistance.[1074] Still, the Committee pointed out that the reform would predominantly affect the most disadvantaged in the society, including the Roma population, especially given the difficult access to the labor market of this group and the statistical evidence of the dependence of Roma families on social assistance.[1075]

The decision of the European Committee of Social Rights and the expected related Resolution by the Committee of Ministers were the main motives for a subsequent reform of the Law on Social Assistance. In that sense, the main motivation behind the reform could be attributed to a mix of formal influence based on ESCR and related political aspects. In general, even though the ESCR articles (that the state has agreed to) have a legally binding character, when the European Committee of Social Rights establishes non-compliance, the final consequences of its finding are political and rest with the Committee of Ministers.[1076]

These political consequences were the main argument in the parliamentary debates on a proposed reform that aimed to address the non-compli-

1071 'Complaint No. 48/2008, European Roma Rights Centre v. Bulgaria' (2008) 5.

1072 'Decision of the Merits, European Roma Rights Centre v. Bulgaria, Complaint No. 48/2008' (2009) para 46.

1073 Article 13§1 of the ESCR provides that "[w]ith a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake […] to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance".

1074 'Decision of the Merits, European Roma Rights Centre v. Bulgaria, Complaint No. 48/2008' (2009) para 46.

1075 ibid.

1076 Schlachter, in Countouris and Freedland, *Resocialising Europe in a Time of Crisis* (2013) 108.

ance findings of the European Committee of Social Rights.[1077] Specifically, the debates focused on what reform efforts should be undertaken in order to mitigate the pending Resolution of the Committee of Ministers. Accordingly, the discussed legal draft aimed at targeting the ESCR non-compliance findings and proposed abolishing the introduced time restrictions for receiving social assistance by persons of working age.[1078] The opposition to the proposed reform attacked the draft on the grounds that the abolition would result in the creation of a category of people who utilize the receiving of social assistance as a "professional occupation".[1079] Despite such counterarguments, however, the majority opted to remove the time limit for receiving the minimum income benefits.

The reform in the national social protection was adopted in January 2010, and the Bulgarian side informed the Committee of Ministers of the initiated changes in the national system. As a result, soon after, in March 2010, the Resolution of the Committee welcomed the changes in the law and stated that it looked forward to seeing how the new legislation would be implemented.[1080] It could be concluded that while the decision on the non-compliance with the ESCR formed the foundation for the change in the national law, the political side related to the Committee of Ministers additionally greatly contributed to the reform in question. The latter is further evidenced in the speedy time frame in which the reform was adopted so as to be able to form part of the Committee of Ministers' decision on a Resolution.

d. Support and Social Inclusion

As established in the systematization of social protection, the Support and Social Inclusion Benefits represent measures targeting special needs situations. These needs are seen as important for leading life and the achievement of generally accepted public purposes. The systematization of the Bulgarian social protection demonstrated that this field includes family

1077 'Transcript of Parliamentary Plenary Session No 60, 20.01.2010'.
1078 'Draft of the Law Amending and Supplementing the Law on Social Assistance, No 902-01-57' (2010) <https://parliament.bg/bg/bills/ID/9632> accessed 24 February 2020.
1079 'Transcript of Parliamentary Plenary Session No 60, 20.01.2010'.
1080 Committee of Ministers, 'Resolution ResChS(2010)2 of the Committee of Ministers on 31 March 2010, Collective Complaint No. 48/2008 (European Roma Rights Centre against Bulgaria)' (2010).

benefits for children, benefits and services for people with disabilities, as well as a variety of social services aiming at social integration, prevention or overcoming of social exclusion, and overall improvement of the quality of life. The analysis of the influences will look below in each of these three support and social inclusion branches.

aa. Children Benefits

Starting with the children's benefits, the motives[1081] for the draft[1082] of the Law on the Family pointed out that the proposed legislation aimed at financially supporting the upbringing of children raised in a family environment. According to the motives, this objective represented a special public purpose which was also based on the constitutional principle for the protection of the family and the children. Namely, the draft aimed to develop the constitutional requirement expressed in Article 47(1), which stated that raising children is a right and duty of the children's parents and is supported by the state. The aim of the draft was reportedly further built upon the constitutional goal that the family is to be protected by both the State and the society (Art. 14, CRB) since, as the motives pointed out, the family represented the best environment for the raising of children.

In addition to the pointed constitutional foundations, the draft's motives considered that the legal draft was able to implement the obligations of the country stemming from the ratification of the UN CRC. The draft law envisioned integrating both the international law and constitutional requirements into the law by establishing different forms of support. This support included the universal provision of some benefits for all families, regardless of the family's financial situation. However, the logic behind other proposed benefits, which were mainly of regular monthly character, was that the state should focus its limited resources and provide support where it is needed the most. The targeted support was to be established by introducing a leveled mean-test on the family income.

Some views challenged the draft's assertion that it aims to synchronize the legal framework with constitutional and international law requirements.

1081 'Motives in Draft of the Law on the Family Benefits for Children, No 102-01-42, Archives of the National Assembly' (2002) 1.

1082 'Draft of the Law on the Family Benefits for Children, No 102-01-42, Archives of the National Assembly' (2002).

Namely, a report on the legal proposal[1083] issued by the parliamentary Advisory Council on Legislation[1084] questioned the statements that the draft law was indeed entirely congruent with the respective constitutional and international law requirements. On the one side, the Advisory Council believed that, generally, the legal proposal was an expression of the constitutional requirement for providing state support to parents and children, as declared in Article 47 of the Constitution. On the other side, however, the Council criticized that the draft relied on the unclear concept of "family" instead of sticking to the constitutional wording of supporting "parents" in raising children. The opinion clarified that the benefits provided by the law should not be connected to the "family", but should be directed towards the actual parents, including custodians, who are raising the child in reality. The Council pointed out that the related Law on the Protection of the Child also did not rely on the concept of "family", but instead referred to "parents, custodians or others who take care of a child". Finally, it was argued that the UN CRC adopted a similar approach that referred to the child's parents (or guardians). Therefore, the Council concluded that the provision of benefits should not follow the "family" but rather needs to be connected to the children themselves or to the parents who raise them. Still, despite these raised critiques, the majority in the Parliament chose to stick with the "family" terminology in the legal draft.

In addition, the constitutional requirement for the provision of special protection to mothers was instrumental for a reform that relocated traveling subsidies for mothers from the Law on Social Assistance to the Law on the Family Benefits for Children.[1085] The arguments expressed both in the motives of the legal draft and during the first parliamentary reading of the reform proposal considered that these subsidies were not a form of social assistance. Instead, the subsidies pertained to the obligation of the state to provide additional support to mothers in line with the related constitution-

1083 Advisory Council on Legislation, 'Opinion on the Draft Law on Family Benefits for Children, No 102-01-42' (2002) <https://parliament.bg/bg/parliamentarycommittees/members/88/standpoint/ID/7901> accessed 24 February 2020.

1084 The Advisory Council on Legislation used to represent a consultative parliamentary body that issued supplementary opinions on the legality of legal drafts. The Council could be requested to issue an opinion of recommendatory character by one of the parliamentary committees.

1085 'Motives in Draft of the Law Amending and Supplementing the Law on Social Assistance, No 902-01-57'.

al obligation for ensuring special protection and the state objective for the protection of children, mothers, and families (Art. 14, CRB).

bb. People with Disabilities

The motives for the draft of the Law on the People with Disabilities entailed a number of references to international law influences. Moreover, similar references can also be tracked throughout the text of the enacted law itself. The legal framework in the sphere was substantially reformed in 2018. Before the reform, the field was regulated by the Law on the Integration of the People with Disabilities. The UN Committee on the Rights of Persons with Disabilities criticized the old law for its failure to establish a regulatory framework in line with the Convention on the Rights of the People with Disabilities (CRPD).[1086] Among others, the law has been criticized for the lack of an individualized approach leading to omissions in providing adequate protection to those in need.[1087] The Committee on the Rights of People with Disabilities advocated for adopting a new legal act in the country, which was to ensure "compliance with the principles and provisions of the [CRPD]" by bringing the national legislation "into line with the human rights model of disability".[1088]

In 2018, the Law on People with Disabilities was enacted and established a range of non-contributory benefits and services for people with disabilities. The motives for the draft law made it clear that the proposal claimed to be created in congruence with the CRPD. Namely, the motives proclaimed the intent of the draft law to bring the Bulgarian legislation in line with the obligations stemming from this international law instrument.[1089] In its report, the parliamentary Committee on Labor, Social and Demographic

1086 For instance, *see* Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Bulgaria CRPD/C/BGR/CO/1' (2018) <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsk80ZBJx%2BmVEa%2BXQpyKbrX6eiw%2FONDuhjOleQ0WS4ZCou%2F8e0LnMpan4%2FdVYURMuW4m5XiBzJIDxfa0hBsK%2FFlxXg2LE6I3Y%2FwmkUJ%2FZAlza> accessed 24 February 2020.

1087 ibid para 40.

1088 ibid paras 10–12.

1089 'Motives in Draft of the Law on People with Disabilities, No 802-01-41'.

Policy likewise underlined that according to its assessment, the draft law met the requirements of the CRPD.[1090]

First, the draft had literally incorporated some provisions of the CRPD, such as adopting word by word the Convention's definition of the purposes of the legislation.[1091] The CRPD also contributed to the revision of the benefit calculation method. Namely, Article 28 of the Convention stipulated the goal of continuous improvement of living conditions. The national benefits used to be calculated based on the "guaranteed minimum income" indicator determined by the Council of Ministers. The reliance on this indicator translated into low benefit amounts that were not indexed in accordance with the increasing costs of living. Accordingly, the motives of the draft law argued for calculating benefits by relying on the at-risk-of-poverty threshold for the country.[1092] This approach allowed for greater benefits that would be altered with the changes in the at-risk-of-poverty threshold.

Furthermore, in line with the CRPD's logic, the proposal introduced a new legal framework for protecting the rights of people with disabilities based on individual approaches and assessment of their respective needs.[1093] This individual assessment included a range of factors, including a self-assessment carried out by the individuals on the hardship they face throughout their daily lives at home and outside and an examination of their inclusion in social life. In contrast, the preceding Law on the Integration of the People with Disabilities[1094] used to define the benefit and service levels solely in relation to the level of disability established by the specialized medical commission.

The draft of the Law on People with Disabilities also introduced a quota for the employment of workers with disabilities which intended to guarantee and increase their employability both in the public and private sectors. The draft law underlined that it considered the quota to be in line with

1090 'Report of the Committee on Labor, Social and Demographic Policy for the First Reading of the Draft Law on People with Disabilities, No 802-01-41' (2018) <https://www.parliament.bg/bg/parliamentarycommittees/members/2585/reports/ID/9627> accessed 24 February 2020.

1091 Namely, Article 2 of the legal draft incorporated the purposes of the convention "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity".

1092 'Motives in Draft of the Law on People with Disabilities, No 802-01-41'.

1093 ibid.

1094 Law on the Integration of People with Disabilities, SG 81/17.09.2004; repealed with the Law on People with Disabilities SG 105/18.12.2018.

the requirements for work and employment stemming from Article 27 of the CRPD. Finally, the draft introduced the national Committee on the Rights of Persons with Disabilities, which according to Article 11(1) was to promote, protect, and monitor the application of the CRPD in the country.

Nevertheless, during the first reading of the law, the parliamentary debates presented a more diversified picture concerning the ability of the legal draft to implement the CRPD goals in the Bulgarian legislation.[1095] A particular point of criticism from the leftist BSP political party was that the access to services was still based on the initial acquiring of an official medical assessment on the level of disability. The coverage of the proposed law was thus very similar to the coverage of the preceding legal act that also relied on the technical and lengthy process of disability recognition. Despite that the medical attestation approach used to be a subject of critique by the Committee on the Rights of Persons with Disabilities for not being in line with the CRPD,[1096] the legal draft did not foresee related remedies.

The opponents of the proposed law considered that the narrowed coverage created the possibility that people with no attested disability assessment would continue to be marginalized in society. According to this view, the international law instrument possessed a more inclusive character that targeted all kinds of people with disabilities and did not limit itself only to those with attested disabilities. As discussed during the analysis of the Bulgarian social protection system, the medical assessment procedures carried out by the respective National or Territorial Expert Medical Commissions have been criticized for years due to their slow bureaucratic pace and extensive (reassessment) requirements. Similar critiques were also raised during the debates on the proposed draft law. Despite these critiques, however, the attested level of disability remained the general precondition for entitlement to the support and social inclusion disability benefits.[1097]

1095 'Transcript of Parliamentary Plenary Session No 120, 26.10.2018' <https://www.parliament.bg/bg/plenaryst/ns/52/ID/6491> accessed 24 February 2020.

1096 Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Bulgaria CRPD/C/BGR/CO/1' (2018) para 9.

1097 Namely, as discussed in the research section on benefits and coverage, people with permanent disabilities who can claim benefits on the basis of the law are those with more than 50% disability that has been attested by the National or Territorial Expert Medical Commissions. *See* Supplementary Provisions, §1.1 and 2, LPD.

cc. Social Services

The last strand of measures belonging to the realm of the Support and Social Inclusion Benefits includes the social services provided for the purposes of "prevention and/or overcoming of social exclusion,[1098] the realization of rights and improvement of the quality of life".[1099] The services are provided regardless of the beneficiary's financial situation (Art. 7, LSS). The systematization of social protection revealed that the variety of these measures is extensive and includes services provided to individuals who need assistance in the performance of their daily activities.

Previously these social services used to form part of the Law on Social Assistance but, as of 2019, were transferred to a separate legal act that further developed their regulation. The logic for the reform was based on the different functions of the services. These were not grounded on the social assistance aim of safety net provision but rather intended to prevent or overcome social exclusion.[1100] The related constitutional and international influence will be examined under the sub-title of "social services" regardless of whether the influence occurred while the social services were still part of the Law on Social Assistance or were already established in separate legislation.

An examination of the social services' reforms portrays certain international law influences regarding the institutionalization of people with mental conditions. A reform in 2015 (when the social services were still a part of the Law on Social Assistance) was triggered by a decision of the European Court of Human Rights ("ECtHR"). The case of *Stanev v. Bulgaria*[1101] concerned the plaintiff, Mr. Stanev, who was diagnosed with schizophrenia. Following his diagnosis, Mr. Stanev was declared partially incapacitated by the Ruse Regional Court. He was appointed a municipal council officer as a legal guardian due to the lack of a family member willing to take the responsibility. The legal guardian decided that Mr. Stanev was to be placed for an indefinite time in a social care home for adults without the involvement

1098 In §1 of the "Additional Provisions" section of the Law on Social Services the term "social exclusion" is defined as a "state when the individual due to personal or objective reasons does not have the conditions or abilities for full participation in the different spheres of the social life" (translation from Bulgarian by author).

1099 The mentioned purposes are enlisted in Article 3, LSS (translation from Bulgarian by author).

1100 'Motives in Draft of the Law on Social Services, No 802-01-57'.

1101 *Stanev v Bulgaria*, App. No. 36760/06, 17 January 2012.

and consent of the plaintiff. The home where Mr. Stanev was placed had extremely poor living conditions. Mr. Stanev submitted numerous requests to seek release from partial guardianship and to reinstate his legal capacity, which were all denied.

Mr. Stanev's case at the ECtHR concerned numerous issues, some of which fall outside the work's scope. Hence, the whole decision of the Court will not be discussed in detail here. Instead, the focus would be on the decision aspects that are important for examining international law's influence on social services. In this relation, the ECtHR concluded that the placement of Mr. Stanev in the social care home amounted to a deprivation of liberty and, therefore, a violation of Article 5.1 of the ECHR.[1102] In particular, the Court considered that Mr. Stanev's legal guardian could not legally decide to undertake such a measure without the plaintiff's consent. However, the lack of legal capacity of the persons did not entail that the plaintiff could not comprehend the situation and express his opinion. Further, the Court found a violation of Article 5.4 since there was no direct access to a court that Mr. Stanev could use to challenge the lawfulness of his detention.[1103]

Apart from the Article 5 violations, the judgment established that the poor conditions in the care home amounted to degrading treatment, thereby violating Article 3.[1104] Moreover, since Mr. Stanev's institutionalization in the care facility was not understood as detention under national law, he was not provided an effective remedy in accordance with Article 13 of the ECHR. Hence, the violation of Article 3 could be taken alone or in conjunction with Article 13.[1105] The ECtHR also established a violation of Article 6.1 (right of access to courts) because of Mr. Stanev's *de facto* lack of access to court where he could seek restoration of his legal capacity.[1106]

In an attempt to address some of the violations established by the ECtHR's decision, a reform introduced different changes into the domestic law, including in the Law on Social Assistance concerning the provision of some social services.[1107] One of the changes introduced a multidisciplinary

1102 ibid paras 159-160.
1103 ibid para 258.
1104 ibid para 213.
1105 ibid para 221.
1106 ibid para 246.
1107 'Draft of the Law Amending and Supplementing the Law on Social Assisstance, No 502-01-65' (2015) <https://parliament.bg/bg/bills/ID/15515> accessed 24 February 2020; 'Motives in Draft of the Law Amending and Supplementing the Law on

team that had to prepare an assessment of the situation of the person in need. The team was also responsible for compiling a follow-up plan. Depending on the given case, this team was to be composed of different specialists.

Further, the options for indefinite placement of people with a lack of legal capacity in specialized facilities were limited by introducing a deadline of a maximum of three years stay in such institutions (with some exceptions). Another important change was the introduction of the clarification into the law that the individual's wish was to take precedence in the assessment of the placement decision in a residential care service or a specialized institution. Still, during the first reading of the draft in the Parliament, it was debated whether the proposed decisions were appropriate for accommodating the gaps in the legal framework exemplified by the *Stanev v. Bulgaria* case.[1108] In particular, the reform did not address the ECtHR's conclusion that the placement in a specialized facility without the person's consent amounted to a deprivation of liberty. Finally, it was further argued that the changes did not sufficiently address the conclusion of the ECtHR on the curbed possibilities for access to justice for people placed in a specialized facility.

Four years after this reform, the social services were placed in a legislation of their own that considerably developed the regulation of social services provision. For comparison, while the regulation of the social services in the Law on Social Assistance was provided in five articles, their current regulation in the separate Law on Social Services is carried out in 172 articles that establish the respective legal framework. The enactment of the law revealed generally assumed the relevance of the Constitution in the course of the parliamentary discussions. Namely, the draft law aimed at regulating social services for categories of the population that are constitutionally subjected to special protection on the part of the state, such as children (Art. 14 and Art. 47, CRB) or people with disabilities (Art. 51(3), CRB).

Social Assisstance, No 502-01-65' (2015) <https://parliament.bg/bg/bills/ID/15515> accessed 24 February 2020.

1108 'Transcript of Parliamentary Plenary Session No 126, 05.11.2015' <https://parliament.bg/bg/plenaryst/ns/51/ID/5449> accessed 24 February 2020.

The discussions in the Parliament[1109] focused on the nature of the social services and the difference between the functions of the Law on Social Assistance and the proposed draft law.[1110] It was underlined that, on the one side, the Law on Social Assistance addressed situations of poverty when beneficiaries were unable to provide for their basic necessitates. On the other side, the Law on Social Services, through a variety of social services,[1111] intended to provide individualized support for minimizing or eliminating social exclusion and aimed at motivating the beneficiary towards independence from family or public support. Accordingly, the social services aimed to empower the different beneficiaries they targeted. The empowerment aspect entailed that the state budget would only partly finance the services, and the given individual would pay the rest in the form of a fee. The services for some particular groups would be entirely covered by the state budget, which was seen as an expression of the social state objective.[1112] In addition, it was underlined that the social services aimed at an individualized approach towards the beneficiaries concerning the specific services they require.

The enactment of the Law on Social Services stirred numerous social debates on the law's content and proposed solutions.[1113] Some attributed the high public interest to the insufficiencies of the previous social services regulation. An additional point of public concern was the fact that the proposed Law on Social Services envisioned the involvement of private companies in the social services provision that could potentially presuppose the interference of such private providers in the private life of beneficiaries. In

1109 'Transcript of Parliamentary Plenary Session No 217, 18.01.2019' <https://parliament.bg/bg/plenaryst/ns/52/ID/6778/> accessed 24 February 2020.

1110 'Draft of the Law on Social Services, No 802-01-57' (2019) <https://parliament.bg/bg/bills/ID/156809> accessed 24 February 2020.

1111 In accordance to the main types of activities, the different groups of social services are enlisted in Article 15 of the LSS and involve: informing and consulting; advocacy and mediation; community work; therapy and rehabilitation; training for acquiring skills; support for acquiring work skills; day care; residential care; the provision of shelter; support by an assistant.

1112 Namely, services provided to children under the age of 18, people between the ages of 18 and 21 if they have lived in a residential institution until reaching of 18 years of age, and people who do not have incomes or savings (Art. 103, LSS).

1113 Mrachkov, *Social Rights of the Bulgarian Citizens/Социални права на българските граждани* (2020) 407–423.

reply, a group of members of parliament requested a constitutional review of a range of provisions of the Law on Social Services.[1114]

The proposed draft law was also criticized for lack of compliance with international law requirements. Namely, the report of one of the leading parliamentary committees (the Committee on Labor, Social and Demographic Policy) pointed out that the proposed draft still did not address the main weakness in the service provision to people with mental disabilities.[1115] Even though the draft considered the "prevention of institutionalization" as a guiding principle,[1116] it failed to tackle one of the main conclusions of the *Stanev v. Bulgaria* judgment concerning the deprivation of liberty. Additionally, the draft law did not provide a mechanism for assessing the individual's ability to provide consent in case of intended institutionalization. The critique, however, was not addressed further in the parliamentary discussions and did not result in relevant changes in the draft law.

A subsequent reform of the already enacted Law on Social Services demonstrated some constitutional influence. Namely, the motives of the draft law argued that the social services were an expression of different constitutional obligations for the provision of protection to families, mothers, and children, as well to the elderly and the people with physical or mental disabilities.[1117] Accordingly, it was proposed that the Law on Social Services should explicitly state that the social services are not commercial services in the sense of the regulated matter by the Law of Commerce. The proposal was accepted, and the explicit provision on the non-commercial character of the social services was incorporated in Article 3(3) of the Law on Social Services.

1114 The decision of the Constitutional Court is discussed in the research section on control of norms.

1115 'Report of the Committee on Labor, Social and Demographic Policy for the First Reading of the Draft of the Law on Social Services, No 802-01-57' (2018) <https://parliament.bg/bg/parliamentarycommittees/members/2585/reports/ID/9867> accessed 24 February 2020.

1116 Nowadays, the principle on prevention of institutionalization is featured in Article 2, LSS.

1117 'Draft of the Law Amending and Supplementing the Law on Social Services, No 054-01-55' (2020) <https://www.parliament.bg/bg/bills/ID/157483> accessed 24 February 2020.

e. Laws Concerning Risk-specific and Non-contribution Benefits

The Bulgarian healthcare provision consists of two main aspects: health insurance services belonging to the *Contribution-based Systems* and the free medical care system. The latter still addresses a classical social risk but at the same time is financed by taxes and does not refer to an individual's contributory record. The examination of the social protection system revealed that the Law on Health regulates the provision of free medical care in the country. In addition, the institutional organization of healthcare demonstrated that the Law on Health regulates the general management of the healthcare in the country and sets the policy objectives in certain healthcare fields, such as emergency medical aid, reproductive health, and treatment of people with mental health conditions and others.

In the process of the law's enactment, the Minister of Healthcare was invited to the Parliament to present the legal proposal during the first reading.[1118] The presentation stated that the draft implemented the constitutional state objective of protecting citizens' health (Art. 52(3), CRB). Next, the Minister explicitly highlighted that the legal draft[1119] is based on the constitutional right to free medical care as stated in Article 52(1) of the CRB.[1120] Accordingly, the draft law understood the right to free medical care as either addressing certain medical services provided for all citizens or as providing certain medical services to persons who were not covered by health insurance. The presentation highlighted that the right to free medical care provided to all citizens entailed services beyond mandatory health insurance. These services included emergency medical care, inpatient psychiatric care, services entailing blood and blood-derivative products, as well as organ, tissues, and cells transplantation, and compulsory treatment and expertise on the degree of disability.

Furthermore, the draft law translated the constitutional right to free medical care to imply financing of certain free medical services only for persons without health insurance rights. These services included intensive care and obstetric care. In this regard, the Minister stated that the draft envisioned the provision of special protection to mothers. Although this

1118 'Transcript of Parliamentary Plenary Session No 40, 02.12.2003' (2003) <https://www.parliament.bg/bg/plenaryst/ns/1/ID/823> accessed 24 February 2020.

1119 'Draft of the Law on Health, No 302-01-35' (2003) <https://www.parliament.bg/bg/bills/ID/10695> accessed 24 February 2020.

1120 'Transcript of Parliamentary Plenary Session No 40, 02.12.2003'.

statement did not explicitly refer to the relevant Article 47(2) of the CRB, the legal draft addressed the given constitutional requirement for ensuring access to obstetric care for all (expecting) mothers by targeting individuals who would not be covered by the health insurance system.[1121]

Further, the presentation stated that the legal draft aimed at guaranteeing the "special healthcare"[1122] for people with mental health conditions in line with the state objective for provision of "special protection" to such people, as stated in Article 51(3) of the Constitution. In addition, the draft's motives claimed that the legal draft had taken inspiration from the principles featured in two recommendations of the Council of Europe on persons with mental health conditions. Namely, reference was made to Recommendation R (83)2 concerning the legal protection of persons suffering from mental disorders placed as involuntary patients and Recommendation 818 (1977) on the situation of the mentally ill.[1123] However, the presentation of the Minister of Healthcare did not go into detail on how exactly the proposed Law on Health implemented the principles of the said recommendations. The Law on Health indeed stipulates a number of principles for the treatment of patients with mental health conditions in Article 148.[1124] At the same time, however, both the legal draft and the enacted law left open to further regulation different key questions raised by the recommendations on placement of individuals in specialized establishments.[1125] Moreover, some years later, the discussed above judgment of *Stanev v. Bulgaria* demonstrated how the related national legal framework was insufficient and violated several ECHR provisions.

1121 Nowadays, the provision on the right to free obstetric care to women without health insurance rights is featured in Article 82(1)2, LH.

1122 Nowadays, the requirement for provision of "special healthcare" for people with mental health conditions is stated in Article 146(1), LH.

1123 The motives of the legal draft also referred to the principles for the protection of persons with mental illness and the improvement of mental health care adopted by General Assembly in Resolution 46/119 of 17 December, 1991.

1124 These principles include, among others, minimum restriction of personal liberty and respect for patient's rights and reducing the institutional dependence of persons with mental disorders on prolonged hospital treatment, provided that this does not conflict with established medical standards.

1125 For instance, some of the principles of Recommendation R (83)2, which were not addressed by the national law at the time, pertained to ensuring of a right to access to court in line with Article 4 of Recommendation R (83)2.

f. Analysis of the European Union Law Influence

The examination of EU law as a potential influencing factor revealed the various ways through which it could impart influences upon national social protection systems. In addition, the methodology section for the study of influence determined that the EU law influences will be examined in the phase of norm creation through the detection of influences that managed to impact the norm creation process. The following section will thus focus below on how each of the identified channels of EU law influence contributed to certain alterations in the national system.

The general influence of European Union law on social protection in Bulgaria occurred through three broad EU law channels of influence. The first one pertains to freedom of movement and the related issues of exportability of rights and benefits as well as the coordination of social security systems. In this regard, EU law concerning the exportability of occupational and supplementary pension rights was instrumental for the more comprehensive development of the regulation of occupational pension insurance in the country. The EU influence further contributed to a reform that improved the conditions for exportability of short-term benefits and developed the needed national administrative mechanisms to realize social security coordination. Moreover, a judgment of the CJEU found certain aspects of the Bulgarian pension system to violate the freedom of movement and establishment. The judgment was instrumental in motivating the finalization of a long-standing reform process in the statutory pension insurance on the requirement for employment termination for the purpose of pension entitlement.

The second strand concerns the influence of EU law's equal treatment requirements regarding employment and occupation. This strand also spills over occupational and supplementary pension insurances. The equal treatment requirements greatly shaped the capital-funded pension insurance in the country. Namely, due to reforms motivated by EU law considerations, certain equal treatment elements were introduced in the traditionally unequal (in terms of qualifying conditions) Bulgarian pension system.

Next, the third channel of influence is related to the internal market rules. This influence concerns the free movement of capital and the changes accompanying the opening of the national system to the internal market. The EU law's influence resulted in a range of technical changes to social protection that fundamentally altered the financing practices in capital-funded pension insurance and voluntary health insurance.

Finally, apart from the three broad channels of EU law influence, there has been a fourth strand of intended influence, located in-between the identified influence channels of cross-border social security and internal market regulation. EU law intended to trigger changes in the national system that would extend the reimbursement options concerning the healthcare rights of Bulgarian patients seeking treatment in the other Member States. However, in comparison to the rest of the EU influences outlined above, this latter strand of EU law did not result in a direct observable influence on the national system. On the contrary, the EU requirements were transposed quite slowly in the related Bulgaria legislation. As a matter of fact, the national legislature abstained from reforms even when the CJEU established certain aspects of the national regulations to violate EU law.

aa. Freedom of Movement

(1) Coordination and Exportability of Benefits

As mentioned, European Union law does not entail the harmonization of social security systems but instead targets their coordination. Accordingly, aligning the Bulgarian law with the related EU law requirements naturally resulted in administrative changes. These changes included the establishment of mechanisms enabling the coordination and export of benefits in light of the right of freedom of movement. Apart from that, however, the implementation of some EU rules triggered wider reforms in the national system that led to the establishment of greater occupational pension rights in the country.

Regarding administrative alterations, the secondary EU legislation on benefits coordination and social security application motivated the setting of certain administrative mechanisms that enabled the implementation of relevant EU rules. First of all, EU law enthused changes in the national system that enabled the exportability of short-term benefits through the Union in accordance with the relevant secondary law requirements. Namely, in terms of the acquired rights, Regulation No 1408/71 provided for waving off the residence clauses for the payment of different pensions and benefits.[1126]

1126 *See* Article 10 and Articles 19 to 36, Regulation No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 149, 5.7.1971, 2–50.

The Regulation requirements became part of a national reform of the Social Insurance Code back in 2004. The reform was part of a broader strategy for accelerating the negotiations for Bulgaria's accession to the EU.[1127] A particular pre-accession concern was the fact that the Bulgarian legal framework did not secure enough mechanisms for the cross-border payment of short-term social insurance payments in the case of sickness or maternity.

Prior to the discussed 2005 reform, such payments were processed through the employer. However, this payment mechanism could not satisfy the obligation for guaranteeing trans-border payment as required by Regulation No 1408/71. In particular, Article 10 of the Regulation entailed that the payment of cross-border benefits must be carried through an appointed responsible institution. Hence, the reform introduced the NSII as the institution responsible for paying short-term benefits for maternity and sickness, including by transferring payments abroad in case the individuals have exercised their freedom of movement.[1128]

Second, in 2013, further national institutions were officially involved[1129] with the coordination of benefit payments in light of Regulation No 883/2004 and its implementing Regulation No 987/2009. Namely, the NSII was assigned as the liaison body responsible for coordinating contribution-based pensions and short-term benefits. Due to the institutional organization specifics of the Bulgarian social protection system,[1130] the liaison body for the coordination of the family benefits in the sense of Article 1(z) of Regulation No 883/2004 was assigned to the SAA. The NHIF has been assigned as the liaising institution for the "benefits-in-kind" stipulated in Article 1(va) of the coordination Regulation.

Next, the EU rules on the possibility of export of occupational pension insurance motivated a considerable development of the respective national legal framework. A 2006 reform[1131] presented a range of changes in the sup-

1127 See 'Motives' in 'Draft of the Law Amending the Social Insurance Code, No 402-01-44' (2004) <https://parliament.bg/bg/bills/ID/11026> accessed 24 February 2020.

1128 This cross-border responsibility of the NSII is stated in Article 40(3), SIC.

1129 Regulation No 144 of 11 July 2013 on Determining the Functions of the Bulgarian Organs and Institutions in the Light of Regulation (EC) No 883/2004 of the European Parliament and the Council, SG 63/16.07.2013.

1130 For more, refer to the examination of the institutional organization in the research section on the analysis of the Bulgarian Social Protection System.

1131 Law Amending and Supplementing the Social Insurance Code, SG 56/11.7.2006.

plementary pension insurance in Bulgaria in an effort to synchronize the national law with the EU legislation on occupational pension schemes.[1132] The intention was for the reform to implement requirements stemming from the relevant Council Directive 98/49/EC. The requirements included ensuring the possibility for exportability of occupational pension rights in the case of exercising freedom of movement and ensuring the option of cross-border payments to supplementary occupational pension schemes located in the other Member States.

The endeavor on the translation of the EU law requirements faced the insufficient national regulation on voluntary occupational pension insurance. Prior to the discussed reform, voluntary pension insurance in Bulgaria had been limited to private pension schemes.[1133] Employers used to be able to contribute to the voluntary private insurance of employees, and the employers' contributions could have been subject to collective negotiations and agreements.[1134] Still, there was no separate legal regulation of voluntary occupational schemes per se. Therefore, the efforts to implement the EU legislation in the national law triggered the refinement of the national regulation of voluntary occupational pension insurance in the country. [1135]

1132 'Draft of the Law Amending and Supplementing the Social Insurance Code, No 602-01-37, Archives of the National Assembly' (2006); 'Motives in Draft of the Law Amending and Supplementing the Social Insurance Code, No 602-01-37, Archives of the National Assembly' (2006). The reform was not solely limited to introducing EU rules on the retention of occupational pension rights in case of freedom of movement. The rest of the reform goals concerned EU requirements on equal treatment in occupational matters as well as the supervision of activities of providers of occupational insurance. These further reform points are reviewed in a following research section below.

1133 Staykov, in *Bulgaria in the EU/България в ЕС* (2007) 391.

1134 § 101, Law Amending and Supplementing the Mandatory Social Insurance Code, SG 67/29.07.2003.

1135 The reports of two of the assigned parliamentary committees both underlined the fact that the effort on harmonizing the Bulgarian law with the EU law requirements in the field of voluntary occupational pension insurance prompted the development of this type of pension insurance option in the country. *See* 'Report of the Committee on European Integration for the First Reading of the Draft of the Law Amending and Supplementing the Social Insurance Code, No 602-01-37, Archives of the National Assembly' (2006) 1 ff; 'Report of the Committee on Labor and Social Policy for the First Reading of the Draft of the Law Amending and Supplementing the Social Insurance Code, No 602-01-37, Archives of the National Assembly' (2006) 1 ff.

(2) Pension Entitlement

From a comparative perspective, the interpretation of the fundamental freedoms by the CJEU, including the freedom of movement, was one of the most meaningful ways through which EU law was able to indirectly influence national social protection laws.[1136] The freedoms were an effective way of circumventing the retained competences of the Member States in the social protection field.[1137] Bulgaria was no exception to this observation. The rights to freedom of movement and the establishment of Union citizenship became the incentive for an essential change in the Bulgarian statutory pension insurance. Specifically, the EU law freedoms contributed to the completion of a long-simmering national reform concerning the relationship between employment and pension entitlement.

The public pension system used to follow the old-fashioned regulation that a person needed to terminate the occupational activity and the connected social insurance in order to become entitled to the statutory old-age pension.[1138] Although several smaller reform steps aimed at emancipating the pension insurance and making it compatible with the occupational activity,[1139] the termination of employment continued to be a precondition for pension entitlement. The reform process only led to the possibility that after individuals had ceased the occupational activity for the sake of pension entitlement, they could subsequently again engage in employment.

A judgment by the CJEU related to this subject matter was finally able to cut the link between pension entitlement and occupational activity.[1140] The case concerned the Bulgarian citizen Mrs. Somova who used to live and work in Bulgaria. Later in her life, she moved and commenced an occupational activity as a self-employed person in Austria, where she was insured according to Austrian legislation. However, when she applied for the Bulgarian statutory old-age pension, Mrs. Somova did not inform the Bulgarian authorities that she was currently insured in Austria based on her self-employment activity. Once this information was finally brought to the attention of the Bulgarian authorities, the pension payment was

1136 Bruzelius, 'How EU Juridification Shapes Constitutional Social Rights' (2020) 58 JCMS 1490.
1137 ibid.
1138 Mrachkov, *Social Security Law/Осигурително право* (2014) 345.
1139 ibid.
1140 Case C-103/13 *Snezhana Somova v Glaven direktor na Stolichno upravlenie 'Sotsialno osiguryavane'* [2014] ECLI:EU:C:2014:2334.

ceased on the grounds that Article 94(1) of the Social Insurance Code made the entitlement to an old-age pension subject to the discontinuance of the affiliation to social insurance. As Mrs. Somova had not terminated her self-employment upon pension entitlement, the Bulgarian authorities ceased the pension payment and informed her that she needed to pay back all received benefits.

The CJEU underlined in its judgment deliberations that Regulation No 1408/71 did not establish a common scheme for social security but rather aimed at coordinating the different national systems.[1141] Nevertheless, the TFEU precluded national measures which placed people in a disadvantaged position when they exercised their rights as Union citizens related to the freedom of movement.[1142] Therefore, the Bulgarian legislature was free to determine the rules of its pension system as long as these rules were not deterring persons from exercising their Union citizenship rights provided by the Treaty.[1143] The requirement of the Bulgarian legislation for a discontinuance of the payment of social insurance contributions might place someone who has exercised their freedom of movement, such as Mrs. Somova, in a precarious situation that might even lead to the loss of the given occupational activity.[1144] Accordingly, the CJEU concluded that the requirement of the Bulgarian pension legislation represented an impediment to freedom of movement and freedom of establishment.[1145]

The judgment of the CJEU gave the decisive impetus for the finalization of the long-standing reform process concerning the relationship between pension entitlement and social insurance due to occupational activity.[1146] The national law was reformed to comply with the judgment by abolishing Article 94(2) of the Social Insurance Code, which used to contain the requirement for termination of the insurance status for the purposes of pension entitlement.[1147] As a result, the discontinuation of occupational activity is no longer a precondition for pension entitlement, and one may

1141 ibid para 33.
1142 ibid para 36.
1143 ibid para 39.
1144 ibid paras 43-44.
1145 ibid para 45.
1146 §3.24, Law on the Budget for the Public Social Insurance for 2015, SG 107/24.12.2014.
1147 The changes in the national law concerning the compliance with EU law were introduced with the Law on the Budget of the Public Insurance for 2015. During the first reading of the proposed changes, the abolishment of Article 94(2) of the Social Insurance Code was argued for on the basis of the CJEU judgment.

continue to work and still acquire the old-age pension according to the national legislation (Art. 94, SIC).

bb. Equal Treatment and Pension Insurance

European Union law generally applies to occupational pension schemes when it comes to free movement and the acquisition and preservation of occupational pension rights.[1148] EU law is also applicable concerning the rules for the institutions for occupational retirement provision.[1149] Moreover, EU law further influences occupational pension regulation through primary[1150] and secondary law[1151] concerning the equal treatment and equal opportunities of men and women in employment and occupational matters. Equal treatment in pension insurance proved to be a highly influential EU law channel in Bulgaria in terms of the pension insurance operated by private providers in both the voluntary and mandatory social insurances.

A reform based on introducing relevant EU law requirements into national law[1152] established the equal treatment between men and women in voluntary capital-funded occupational pension schemes, including in terms of qualifying conditions. This development was novel for the national pension system where, from a historical point of view, the rights of men and women were always not equal in the public pension insurance.[1153] The unequal treatment in the statutory old-age pension scheme is based on two

See 'Transcript of Extraordinary Parliamentary Plenary Session No 3, 09.12.2014' <https://parliament.bg/bg/plenaryst/ns/55/ID/5324> accessed 24 February 2020.

1148 Directive 2014/50/EU on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights, OJ L 128, 30.4.2014, 1–7.

1149 For instance, *see* Directive (EU) 2016/2341.

1150 The European Court of Justice has developed a line of case law arguing that benefits of occupational pension schemes constitute pay, which brings them under the scope of Article 141 of the EC Treaty concerning equal pay requirements for male and female workers. *See*, for instance, Case C-351/00 *Niemi* [2002] ECLI:EU:C:2002:480 para 56; Case C-559/07 *Commission v Greece* para 55.

1151 Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L 204, 26.7.2006, 23–36.

1152 'Draft of the Law Amending and Supplementing the Social Insurance Code, No 602-01-37, Archives of the National Assembly'.

1153 Sredkova, *Social Security Law/Осигурително право* (2016) 629.

main factors: on the one side, the physiological differences between men and women, and on the other – the traditional obligations of women in households and the taking care of children.[1154] The unequal public pension conditions are expressed in women's lower retirement age and minimum insurance periods.[1155] Based on reforms in the 2010s, a progressive increase of the retirement age will eventually equalize it for both sexes.[1156] However, the minimum insurance periods, which are also progressively increasing, will remain unequal.[1157]

The introduction of the equal treatment in voluntary capital-funded occupational pension due to EU law was expressed in the equal qualifying conditions and the equalizing of the pension plan requirements for men and women. Moreover, equal treatment resulted in the prohibition of the usage of sex as an actuarial factor in calculating the amount of lifetime pension benefits. However, the equal treatment requirement was not immediately extended to also cover the voluntary individual pension insurance. On the contrary, the legislature attempted to avoid implementing EU law concerning private individual pension insurance. A reform in 2007 aimed at fulfilling the deadline for implementation of Directive 2004/113/EC on equal treatment between men and women in the access to and supply of goods and services. The reform opted for the exception provided by the Directive in Article 5(2)[1158] in relation to implementing the principle of equal treatment to private individual pension insurance.[1159]

However, a couple of years later, the CJEU's decision in Case-236/09 provided that the exception of the Directive is invalid since it allowed mem-

1154 ibid 414.

1155 ibid.

1156 The analysis on the social protection system demonstrated that the statutory retirement age increases to 65 until 2037 for women (born after 31/03/1972) and until 2029 for men (born after 31/01/1964).

1157 The analysis on the social protection system demonstrated that the minimum insurance periods increase until 2027 to 37 years for women and 40 years for men.

1158 Article 5(2) of the Directive provided that "Member States may decide [...] to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data".

1159 'Draft of the Law Supplementing the Law for the Protection against Discrimination, No 702-01-29' (2007) <https://parliament.bg/bills/44/702-01-9.pdf> accessed 24 February 2020; 'Motives in Draft of the Law Supplementing the Law for the Protection against Discrimination, No 702-01-29' (2007) <https://parliament.bg/bills/44/702-01-9.pdf> accessed 24 February 2020.

ber states to "maintain without temporal limitation an exemption from the rule of unisex premiums and benefits",[1160] which defeated the very original purpose of the Directive. Accordingly, the exception was incompatible with Articles 21 and 23 of the EUCFR, and Article 5(2) of Directive 2004/113/EC was declared invalid. A 2013 reform of the Bulgarian legislation[1161] on the Insurance Code was motivated by the discrepancies in the national law with EU law, given the decision in Case-236/09.[1162] Among others, the reform also introduced changes in the Social Insurance Code by declaring that sex cannot be used as an actuarial factor in calculating the amounts of the lifetime pension benefits in the voluntary private pension insurance.[1163]

Apart from influencing voluntary pension schemes, European Union law also affected the capital-funded scheme part of the mandatory private pension insurance, namely the UPFs, where 5% of the mandatory pension contributions could be directed.[1164] Entitlement to a pension from the UPFs occurs upon qualifying for the pension of the statutory old-age pension scheme. A reform in 2017 prohibited the utilization of sex as an actuarial factor in calculating the pension benefits from the UPFs.[1165] The motives[1166] for the draft law pointed out that the reform was based on Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security.[1167]

The 2017 reform was further based on the CJEU's judgment in case C-318/13.[1168] The decision established that Article 4(1) of Directive 79/7/EEC precluded national legislation allowing the utilization of different life expectancies for men and women as an actuarial factor for calculating a

1160 Case C-236/09 *Association belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v Conseil des ministres* [2011] ECLI:EU:C:2011:100 para 32.
1161 Law Amending and Supplementing the Insurance Code, SG 20/28.02.2013.
1162 'Motives in Draft of the Law Amending and Supplementing the Insurance Code, No 202-01-70' (2013) <https://www.parliament.bg/bg/bills/ID/14176> accessed 24 February 2020.
1163 § 3, Law Amending and Supplementing the Insurance Code, SG 20/28.02.2013.
1164 For more on the UPFs, refer to the analysis of the social protection system.
1165 § 53, Law Amending and Supplementing the Social Insurance Code, SG 92/17.11.2017.
1166 'Motives in Draft of the Law Amending and Supplementing the Social Insurance Code, No 702-01-9' (2017) <https://www.parliament.bg/bg/bills/ID/77721> accessed 24 February 2020.
1167 'Draft of the Law Amending and Supplementing the Social Insurance Code, No 702-01-9' (2017) <https://parliament.bg/bills/44/702-01-9.pdf> accessed 24 February 2020.
1168 Case C-318/13 *X* [2014] ECLI:EU:C:2014:2133 para 40.

statutory social benefit payable due to an accident at work.[1169] Although the concrete case concerned accidents at work, the motives of the national legal draft stated that one of the main arguments of the CJEU was applicable to the actuarial nature of the capital-funded pension insurance. Namely, the different treatment of men and women in terms of sex-based generalizations on life expectancy could be discriminatory to one of the genders.

cc. From Cross-border Healthcare to Internal Market

After the accession to the EU, Bulgaria had to comply with the EU rules on cross-border healthcare, which included compliance with the freedom to provide services. In general, Member States' social security systems are mostly excluded from the EU law concerning the internal market and competition regulation.[1170] Nevertheless, the jurisdiction of the CJEU managed to bring health services within the scope of internal market law. The related case law demonstrated that national law must comply with EU law despite the general formula that the "community law does not detract from the powers of the Member State" in terms of social protection organization.[1171] The CJEU jurisprudence in the field of health services has been consistent in interpreting patients looking for medical help in another Member State as "receivers of services".[1172] One of these cases concerned the failure of Bulgaria to synchronize its legislation with European Union law concerning cross-border healthcare. Shortly after the EU accession, a judgment of the CJEU established that Bulgaria had to comply with the obligation of transposing relevant EU law into the national legal framework in a way that is compatible with the freedom of services.[1173]

The concrete case concerned the Bulgarian citizen Mr. Elchinov who required specialized medical care concerning an eye tumor. The offered

1169 'Motives in Draft of the Law Amending and Supplementing the Social Insurance Code, No 702-01-9' 6.

1170 Dawson and de Witte, in Chalmers and Arnull, *The Oxford Handbook of European Union Law* (2015) 971–972.

1171 Case C-158/96 *Raymond Kohll v Union des caisses de maladie* [1998] ECLI:EU:C:1998:171 paras 17 ff.

1172 Dawson and de Witte, in Chalmers and Arnull, *The Oxford Handbook of European Union Law* (2015) 972–973.

1173 Case C-173/09 *Georgi Ivanov Elchinov v Natsionalna zdravnoosiguritelna kasa* [2010] ECLI:EU:C:2010:581.

treatment to Mr. Elchinov in Bulgaria consisted of removing the eye. Yet, Mr. Elchinov established that some treatment options would avoid eye removal.[1174] The concrete medical treatment, however, was available only in Berlin, Germany. According to the Administrative Court, Sofia City, the treatment available in Germany for the medical condition of Mr. Elchinov still fell under the services covered by the NHIF. Namely, the national health insurance law did not explicitly and precisely stipulate the covered treatment methods but rather indicated the generally related area of medical services. Consequently, the treatment of Mr. Elchinov did fall under the covered category of "high-tech radiotherapy of oncological and non-oncological diseases".[1175]

According to the procedure under the Bulgarian law at the time, Mr. Elchinov was supposed to apply to the NHIF for permission to undergo treatment in Germany. If the NHIF had granted the permission, the procedure would then be reimbursed by the NHIF. However, due to a sudden worsening of the patient's health condition, he had to undergo the given treatment in Germany before receiving the answer from the NHIF. Subsequently, the NHIF argued that it would not fund the treatment of Mr. Elchinov since he underwent treatment before receiving an official authorization. The case was referred to the CJEU by the Administrative Court, which sought to establish, among others, whether Article 22(2) of Regulation No 1408/71[1176] precluded national legislation which excluded, in all cases, reimbursement in respect of hospital treatment given in another Member State without prior authorization.

The opinion of the Advocate General argued that if the Bulgarian system "is so strict that it impedes or renders less attractive the freedom to

1174 The details of the case can be found in the deliberations of the Administrative Court - Sofia City, which referred the case to the CJEU. *See* Decision No 1707/2011 of Administrative Court, Sofia City.

1175 ibid.

1176 The text of the concrete provision back then used to state: "The authorization required under paragraph 1 (b) may be refused only if it is established that movement of the person concerned would be prejudicial to his state of health or the receipt of medical treatment. The authorization required under paragraph 1 (c) may not be refused where the treatment in question is among the benefits provided for by the legislation of the Member State on whose territory the person concerned resided and where he cannot be given such treatment within the time normally necessary for obtaining the treatment in question in the Member State of residence taking account of his current state of health and the probable course of the disease". The Regulation has been subsequently amended.

provide services", this would necessarily lead to a conclusion that it is not compatible with EU law.[1177] In addition, the opinion stated that the case law of the CJEU has already shown that Article 22 of the Regulation is to be interpreted in the Treaties' light regarding the freedom to provide services.[1178] Moreover, the case law demonstrated that if a request was initially refused, but the refusal was later judged to be contrary to Article 22 of Regulation No 1408/71, then the concerned individual was able to claim the reimbursement provided for by Article 22.[1179]

The CJEU followed the logic of the opinion of the Advocate General and underlined that the discussed medical services fell within the scope of the freedom to provide services.[1180] The freedom for the provision of services entailed the possibility of the recipient of such services to go to another Member State to receive this service. Therefore, despite the fact that the case concerned Article 22 of Regulation No 1408/71, this did not imply the irrelevance of the freedom to provide services. Accordingly, even if the national legislation conformed with the relevant Regulation, the national law was not removed from the scope of the provisions on the freedom to provide services. Member States could organize their social security systems as they see fit. However, in doing so, they still had to comply with the freedom to provide services and abstain from introducing or maintaining restrictions to this freedom in the healthcare sector.[1181]

The Court mentioned that the requirement for prior authorization generally constituted an impediment to the freedom to provide services.[1182] Such obstacle, however, was justified if, without it, there would be a "possible risk of seriously undermining the financial balance of a social security system".[1183] Nevertheless, the CJEU considered that the reimbursement in the present case is not likely to undermine the balance of the national system.[1184] Moreover, the contested national rule deprived potential reimbursement for all insured persons in urgent situations similar to the one of Mr. Elchinov when they were unable to wait for authorization to receive

1177 Opinion of AG Cruz Villalón in Case C-173/09 *Georgi Ivanov Elchinov v Natsionalna Zdravnoosiguritelna Kasa* [2010] ECLI:EU:C:2010:336 para 49.
1178 ibid para 46.
1179 ibid para 48.
1180 Case C-173/09 *Elchinov* para 36.
1181 ibid para 40.
1182 ibid para 41.
1183 ibid para 42.
1184 ibid para 46.

a service despite meeting all other conditions for the reimbursement.[1185] Accordingly, the CJEU concluded that the relevant national law constituted an unjustified restriction on the freedom to provide services.[1186] Like the Advocate General, the Court referred to previous case law[1187] and argued that when a request for reimbursement according to Article 22(1)(c) of Regulation No 1408/71 was unjustifiably refused, the patient was entitled to reimbursement.[1188] Moreover, since the same or equally effective treatment could not be provided without undue delay in the Member State of residence of the insured individual, the reimbursement request could not be refused by the national authority.[1189] Therefore, in the case of an unjustified refusal of the national authority according to Article 22(1)(c)(i) of Regulation No 1408/71, the national court had to oblige the competent institution to reimburse the expenses of the insured person in the amount determined by rules of the Member State where the medical treatment was provided.[1190]

Despite the CJEU judgment, the national system was not subsequently reformed. To be precise, there were changes in the related legislation in the aftermath of the judgment, but they abstained from addressing the subject matter of case C-173/09. Some members of Parliament even criticized the subsequent reform processes for their failure to remedy the elements declared as violating EU law by the CJEU.[1191] The related issues of the national law were amended only two years later with a reform[1192] that was reportedly not motivated by compliance with the judgment but instead aimed at translating Directive 2011/24/EU into the Bulgarian legislation.[1193] In particular,

1185 ibid para 45.
1186 ibid para 47.
1187 More specifically, the Court referred to Case C-368/98 *Abdon Vanbraekel and Others* [2001] ECLI:EU:C:2001:400.
1188 Case C-173/09 *Elchinov* para 48.
1189 ibid paras 65-67.
1190 ibid para 81.
1191 'Meeting Protocol of the Committee on Healthcare, Protocol No 96/18.12.2012' (2012) <https://parliament.bg/bg/parliamentarycommittees/members/233DANIELA/steno/ID/2703> accessed 20 May 2020.
1192 'Motives in Draft of the Law Amending and Supplementing the Law on Health, No 302-01-1' (2013) <https://parliament.bg/bg/bills/ID/14416> accessed 20 May 2020; 'Draft of the Law Amending and Supplementing the Law on Health, No 302-01-1' (2013) <https://parliament.bg/bg/bills/ID/14416> accessed 20 May 2020.
1193 Law Amending and Supplementing the Law on Health, SG 1/3.1.2014.

the Law on Health Insurance was amended by repealing Article 36,[1194] which was subject to the findings in the judgment of Case C-173/09. Further, the reform implemented some of the Directive 2011/24/EU provisions in a new section of the Law on Health Insurance titled "Cross-border Healthcare".[1195]

The reform settled the rules on receiving medical services in another member state that can be subsequently reimbursable by the NHIF.[1196] Regarding services requiring prior authorization, the national law relied heavily on Article 8 of Directive 2011/24/EU. The law adopted the Directive's wording on which healthcare might be subjected to prior authorization[1197] and the conditions when a refusal for prior authorization may be granted.[1198] The reform further envisioned that the medical services requiring prior authorization would be made public on the website of the NHIF (Article 80g(2), LHI). Most importantly, the amendment introduced the requirement that prior authorization cannot be refused when the national health insurance system covers the medical service and when the service cannot be provided in Bulgaria within a time considered acceptable from a medical point of view (Article 80g(6), LHI).

dd. Free Movement of Capital and the Internal Market

The European Union law further resulted in alterations of the national system through its free movement of capital and internal market requirements. These channels of EU law influence resulted in two major impacts. First of all, the national system opened up to allow different private social protection providers located in the other Member States. Second, the EU law contributed to a considerable diversification of the financing mechanisms of private providers.

The opening of the national social protection system to the EU internal market entailed adaptation to the freedoms of provision of services. One of the preparations for the accession to the EU involved a reform of

1194 §15, ibid.
1195 Section XII, LHI.
1196 § 15, Law Amending and Supplementing the Law on Health, SG 1/3.1.2014.
1197 Article 80g(3), LHI, literally adopted the wording of Article 8(2) of the Directive 2011/24/EU.
1198 Article 80g(5), LHI, literally adopted the wording of Article 8(3) of the Directive 2011/24/EU.

the Law on Social Assistance that enlarged the scope of social services providers.[1199] Namely, the reform stipulated that companies established in the other Member States would be eligible to become providers of social assistance services in the country. Such service providers would need to comply with the same conditions as the national providers of social assistance services. In addition to social service providers, the national system similarly opened up to institutions of occupational retirement provision registered in other Member States[1200] due to the requirements of Article 20 of Directive 2003/41/EC.[1201]

Moreover, EU law considerably affected the financing practices of private providers registered in the country. A major strand of EU influence in this regard occurred in the pre-accession period before 2007. A reform in 2006[1202] managed to diversify the investment process involved in the financing of supplementary pension insurance schemes in line with Directive 2003/41/EC.[1203] After the accession to the EU, further reforms aiming at opening up the national social protection to the EU's internal capital markets affected considerably the organization of the financing of companies offering voluntary health insurance plans and private and occupational pension insurance. A reform of the Social Insurance Code in 2007 continued with implementing Directive 2003/41/EC requirements by enriching and modifying the financing mechanisms of voluntary occupational pension schemes in the country.[1204] Implementing the Directive in the national law entailed creating the possibility for institutions offering occupational pension plans to be allowed to appoint licensed custodians established in the other Member States.

Similarly, a reform in 2012 was triggered by a procedure initiated by the European Commission against Bulgaria for non-fulfillment of obliga-

1199 *See* 'Motives' in 'Draft of the Law Amending and Supplementing the Law on Social Assistance, No 550-01-251, Archives of the National Assembly' (2005).

1200 § 3, Law Amending and Supplementing the Social Insurance Code, SG 56/11.7.2006.

1201 'Draft of the Law Amending and Supplementing the Social Insurance Code, No 602-01-37, Archives of the National Assembly'; 'Motives in Draft of the Law Amending and Supplementing the Social Insurance Code, No 602-01-37, Archives of the National Assembly'.

1202 Law Amending and Supplementing the Social Insurance Code, SG 56/11.7.2006.

1203 'Draft of the Law Amending and Supplementing the Social Insurance Code, No 602-01-37, Archives of the National Assembly'.

1204 *See* 'Motives' in 'Draft of the Law Amending and Supplementing the Social Insurance Code, No 750-01-26, Archives of the National Assembly' (2007).

tions[1205] and failure to bring the voluntary health insurance in line with the free movement of capital (Article 63, TFEU) and the provisions of two related directives.[1206] The national reform introduced the possibility for companies licensed to provide voluntary health insurance services to engage in investment activities in the EU internal market. Previously, this option used to be a limited possibility available only through explicit permission granted by the national Commission of Financial Regulation.[1207] Moreover, the reform introduced a wide variation of investment instruments, in contrast to the narrow and limited investment possibilities offered before the introduced change. In addition to enlarging the investment possibilities, additional technical changes in the national law translated the EU requirements regarding solvency and asset management for insurance companies, such as companies engaging in the provision of supplementary health and pension insurance.[1208]

2. Control of Norms

a. Contribution-based Systems: Common Questions

After examining the concrete constitutional, international, and European Union law influences in the phase of norm creation, the research turns to how the phase of control of norms has influenced social protection in Bulgaria. In examining this issue, the following will group the main questions reviewed by the Constitutional Court based on their subject matter and on whether the concrete case concerned a more general and structure-relevant matter or rather dealt with a concrete benefit or measure. The analysis will also bring forward the main legal problem that came to the fore in

1205 *See* 'Motives' in 'Draft of the Law Amending and Supplementing the Law on Health Insurance, No 202-01-28' (2012) <https://parliament.bg/bg/bills/ID/13984> accessed 20 May 2020.

1206 Directive 73/239/EEC on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance, OJ L 228, 16.8.1973, 3–19 1973; Directive 92/49/EEC on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC, OJ L 228, 11.8.1992, 1–23.

1207 Prior to the reform, investment activities outside of the national market were subject to a permission of the Commission for Financial Supervision.

1208 The changes were introduced with Law Amending and Supplementing the Social Insurance Code, SG 92/17.11.2017.

the discussion. Accordingly, the examination will begin with the common institutional problems reviewed by the Constitutional Court in terms of coverage and general financing of the Contribution-based Systems (i.e., the social and health insurance). Next, the specific legal questions and resulting constitutional influences concerning social and health insurance will be reviewed separately. Third, the research will examine the constitutional influence concerning the Risk-Specific, Non-contributory Benefits in terms of the constitutional interpretation of the right to free obstetric care. Fourth, the Minimum Protection and Support and Social Inclusion Benefits will be initially examined together since the related constitutional jurisprudence has provided insight into the similarities and differences between the two systems. Finally, the constitutional influences concerning concrete Support and Social Inclusion Benefits will be analyzed.

aa. Mandatory Participation in Social and Health Insurance

The obligation for mandatory participation in social and health insurance always includes a certain restrain of personal freedom.[1209] This restriction is necessary for the functioning of the social insurance systems.[1210] However, the restrain of personal freedom entails that the coverage of the systems is carried out in a way complying with constitutional requirements. In Bulgaria, the mandatory coverage of social and health insurance has been constitutionally assessed in terms of its appropriateness and compliance with the principles of equality and the rule of law. On the one hand, the principle of equality detected whether the law had adopted an oversimplified approach towards mandatory participation that neglected certain crucial differences between some social groups. On the other, equality would also prevent similar situations from being treated in a way that placed one group in an unjustifiably privileged position. In addition, the application of the rule of law assessed whether the mandatory inclusion of certain groups in the mandatory insurance would not create incoherencies in the legal framework. In deliberating on mandatory coverage, the constitutional jurisprudence has also touched upon the differences between the mandatory character of social and health insurance systems.

1209 Becker, 'Verfassungsrechtliche Vorgaben für Sozialversicherungsreformen' (2010) 99 ZVersWiss 592–593.

1210 ibid.

To begin, soon after the enactment of the Social Insurance Code back in 2000, the Constitutional Court was requested to review the law's requirement for mandatory participation in the social insurance system.[1211] Namely, 53 members of Parliament argued that the right to social security, provided for in Article 51(1) of the Constitution, established a right instead of an obligation for mandatory participation. Hence, according to the claimants, the principle of mandatory participation, which laid the foundation of a great part of the Social Insurance Code, was unconstitutional.

The Constitutional Court did not accept this argument.[1212] The Court pointed out that the Constitution provided the right to social insurance but did not determine how this right would be realized. Hence, the Constitution gave freedom to the legislature to create a normative framework for the realization of the right to social security. This normative framework needed to guarantee the actual possibility of the citizens to benefit from their constitutional right to social insurance. The Court pointed out that the social insurance system is based on mutual help and solidarity. Thus, the system protected the common interest through the gathered contributions that ensured the financial protection of individuals in situations when social risks occurred. The mandatory character of the social insurance is, therefore, a necessary precondition for the realization of the constitutional right to social insurance. A voluntary participation character of the social system could undermine the realization of this constitutional right. In its argumentation, the Constitutional Court also referred to the fact that the mandatory character of social insurance is a fundamental element of a range of ILO conventions that Bulgaria had ratified.

After declaring that mandatory participation in social insurance was constitutional, the Constitutional Court examined the coverage of mandatory participation.[1213] The Court concluded that it was unconstitutional to include two particular groups under the scope of Article 4(3) of the Social Insurance Code that provided for mandatory insurance against the risks of disability due to general sickness, old age, and death. The first group was comprised of Ph.D. students.[1214] The Social Insurance Code provided that the mandatory social insurance contributions were owned based on the income obtained from an occupational activity. However, according

1211 Constitutional Decision No 5/2000 on case 4/2000.
1212 ibid para I. A.1.
1213 ibid para I. A.2.
1214 ibid para I. A.2.2. b).

to the Law on High Education, the PhDs received grants that cannot be considered an income from an occupational activity. The inclusion of this group in the scope of mandatory insurance thus created incoherence in the legal framework and, in doing so, violated the rule of law principle stated in Article 4(1) of the Constitution.[1215]

Self-employed pensioners or pensioners exercising liberal professions represented the second group that was unconstitutionality included in the scope of mandatory insurance against the risks of disability due to general sickness, old age, and death.[1216] In general, the employed population needed to be placed under the same conditions in terms of social insurance and taxing requirements.[1217] Accordingly, the Constitutional Court considered that the employed pensioners could not be relieved from the mandatory social insurance contributions since this would place them in an unequal position compared to employed individuals who were not pensioners.

However, the Court also reasoned that concerning the self-employed retirees, the law has misinterpreted the principle of equality and mistakenly sorted together diverging groups. Namely, the legislative solution had neglected the differences between labor and social law requirements for employed pensioners and pensioners who worked as self-employed or exercised a liberal profession.[1218] First, the two groups of pensioners exercised activities founded upon different legal bases, such as, for instance, labor law basis versus the self-employment basis. Next, the employed pensioners were mandatorily insured against all social risks. In contrast, the self-employed and liberal professions retirees were insured against the risks of disability due to general sickness, old age, and death. Third, while the first group shared the payment of their social insurance contributions with their employers, the second group needed to carry the burden of contribution payment only by themselves.

Consequently, the considerable differences between the two groups did not allow for their subjecting to equal mandatory participation requirements. While the employed pensioners could not be removed from mandatory social insurance since this would violate the principle of equality concerning the rest of the employed population, the case would be different regarding the self-employed pensioners. The Court considered that the

1215 ibid para I. A.2.2. b).
1216 ibid para I. A.2.2. c).
1217 ibid para I. A.2.2. a).
1218 ibid para I. A.2.2. c).

inclusion of the second group of pensioners in the scope of mandatory insurance did not possess a social character but was instead fiscal in its motivation. Therefore, the pensioners working as self-employed or exercising liberal professions needed to be removed from the requirement for mandatory insurance. The Court concluded that these persons should be provided with the possibility to voluntarily insure themselves should they like to increase the amount of their pension benefit.

Mandatory health insurance coverage concerning certain social groups has also been subject to constitutional review. Curiously enough, the health insurance coverage became a subject of disagreement between the High Administrative Court and the Constitutional Court.[1219] The concrete reason for the constitutional review was a referral by the High Administrative Court and concerned the mandatory health insurance contributions paid by self-employed pensioners. According to the Bulgarian pension system, the health insurance contributions of pensioners are covered by the state budget.[1220] Thus, the review request pointed out that if self-employed pensioners had to pay health contributions, this would imply that there would be two health contributions made for them since the public budget also covered their health insurance.

Moreover, the referral stated that by the time of reaching pension entitlement, the principles of reciprocity and solidarity in the public health insurance have already been realized in regard to the people who have acquired the right to a pension. These people have fully complied with their obligations to the health insurance system due to their previous contributions. A final argument was that the payment of the health insurance contributions by the self-employed pensioners violated the equal treatment principle since it represented a differentiated treatment between working self-employed pensioners and non-working pensioners.

However, the Constitutional Court did not agree with the arguments of the High Administrative Court and considered the self-employed retirees' obligation for health insurance contributions as constitutional.[1221] Regarding the argument on equal treatment, the Court pointed out that the legislature had provided that all people who receive income from an occupational activity were subjected to payment of contributions to the

1219 Constitutional Decision No 7/2017 on case 2/2017.

1220 Article 40(1)4, Law on Health Insurance, SG 70/19.06.1998. For more on this issue, refer to the analysis of the social protection system.

1221 Constitutional Decision No 7/2017 on case 2/2017.

public health insurance. If self-employed pensioners were exempted from payment of contributions, this would lead to unequal treatment since the rest of the economically active population (including the employed retirees) would have to continue to mandatorily contribute to the health insurance system. Like the rest of the working pensioners, the self-employed pensioners who continued to work had retained their working capacity. Therefore, the protection of the public interest would imply that the self-employed pensioner should pay health insurance contributions based on their additionally acquired income from the labor activity. Furthermore, for the working pensioners, the risk for health problems could be relatively greater than for the ones who do not work.

The Constitutional Court also addressed the fact that the self-employed pensioners could voluntarily contribute to the social insurance system but at the same time had to mandatorily contribute to the public health insurance. On the one side, the constitutional social and health insurance rights were close in nature since they both provided protection to citizens in some kind of need. On the other side, however, these rights differed considerably in their subject and content. While the social insurance was directed towards the individual's insurance against social risks, the health insurance concerned the biological survival. The legislation had defined that social insurance was paid by the recipients of income, while health insurance contributions were owed even by the unemployed. Furthermore, the health insurance system provided equal access to all insured and did not tie the benefits it provided to the levels of the made contribution. Therefore, these fundamental differences allowed for certain varying regulation approaches in the social and health insurances.

bb. Questions Regarding Social and Health Insurance Financing

The Constitutional Court had the chance to rule several times on general financing questions regarding health and social insurance. The Court engaged with the issue of the fund-structured financing of the Contribution-based Systems and, by doing so, contributed to fortifying the institutional structure of social and health insurance. In this regard, the reasoning of the Court was adamant that contributions are the vital connection between the realization of a given risk and the individual's rights to social and health insurance benefits. The funds of the different branches of the Contribution-based Systems accumulate their budget mainly based on contributions.

Accordingly, the funds' finances could only be spent for the funds' legally specified purposes.

First of all, from a constitutional point of view, no reallocation of the funds' finances to other institutions was permissible as this violated the principles of the rule of law and legitimate expectations. In 2011, the Law on the Budget of the National Health Insurance Fund (NHIF) for 2012 stipulated that the NHIF could provide transfers of 100 million BGN to the Ministry of Healthcare for expenses that the Ministry made in 2011 for medical services, devices, and products.[1222] The Constitutional Court declared the introduced transfer of resources unconstitutional.[1223] The Court argued that the health insurance was built upon the so-called "fund" principle ("фондовия принцип") that entailed that the fund's incomes can only be spent for the strictly defined fund's purposes.[1224] This principle was indirectly clarified in the Law on Health Insurance. Namely, Article 24 of the latter stated where the incomes of the fund could be spent, and there was no provision allowing for the transferring of NHIF's finances to other institutional bodies. The financing mechanism of the fund involved the receiving, storing, and spending of the capital for the realization of the health insurance. According to the Court, the so-called "fund principle" was characterized by the specificity of the fund's incomes (primarily based on contributions) and the targeted spending of incomes specified in Article 24 of the Law on Health Insurance. Thus, diverting incomes from their targeted usages for financing the budget of another institution violated the principles of the rule of law and legitimate expectations.[1225]

Second of all, in another judgment, the Constitutional Court decided that the fund's sources of financing, coming from contributions, were intended only for the funds' accounts themselves.[1226] Accordingly, it was constitutionally not permissible for these sources of financing to be assigned

1222 Constitutional Decision No 8/2012 on case 16/2011 para IV.
1223 ibid para V.
1224 ibid.
1225 ibid. The request for constitutional review also claimed that the Law on the Budget for the NHIF further violated the right to property of the insures as well as their right to health insurance. The Constitutional Court rejected both of these claims. The health insurance contributions to the National Health Insurance Fund were not accumulated in individual accounts and did not benefit from the right to property; the contributions became part of a solidarity pool ensuring equal access to all insured individuals. The Court also considered that there was no related violation of the right to health insurance.
1226 Constitutional Decision No 2/2014 on case 3/2013 para I.

some other purpose since this led to a violation of the rule of law and the constitutional social protection rights. A reform in 2012 of the Tax-Insurance Procedural Code merged the accounts for payment of mandatory social insurance contributions and health insurance contributions with the account for the payment of the accrued tax debts.[1227] In addition, the changes introduced automatic payment through this unified account of the oldest pending public law debt, regardless of whether the debt was of tax or social or health insurance nature. The reform proponents stated that the unified account would significantly lower the administrative burden of managing social insurance and tax payments and liabilities. However, the members of Parliament who requested a constitutional review claimed that the merging of the accounts created the possibility that social and health insurance contributions could be used to cover pending tax debts. Such probability could lead to interruptions of the individuals' insurance status and the inability to rely on the health or social insurance system in case of a given social risk. Therefore, it was claimed that there is a violation of the rights to social and health insurance (respectively, to Articles 51(1) and 52(1) of the Constitution).

In its deliberations, the Constitutional Court stepped on its previous reasonings regarding the "fund principle" by stating that the latter was fundamental for financing social and health insurance.[1228] The mixing of social and health insurance contributions and the merging with the tax revenue incoming means posed the danger that contributions might not be used for the purpose for which they were originally paid. The mixing of public payments with different characters thus represented a potential violation of the constitutional rights to social and health insurance.

The Court further reiterated that, according to the Constitution, the legislature indeed had relative freedom in designing health and social insurance financing, including by determining how the contributions would be collected. However, the legislature was limited in this freedom by the constitutional requirement to provide a legal framework where the rules were unambiguous and did not create the possibility that the paid contributions might not be used for their targeted purpose. The social and health insurance fund principle demanded the law to take care of where the incomes came from. Further, the law had to be precise concerning the contributions'

1227 Law Amending and Supplementing the Tax and Insurance Procedure Code, SG 94/30.11.2012.

1228 Constitutional Decision No 2/2014 on case 3/2013 para I.

spending.[1229] Consequently, mixing duties on tax and social and health insurance payments violated the rule of law principle.

Moreover, the Court underlined that people were provided with constitutionally guaranteed rights through their obligation to pay social and health insurance contributions.[1230] However, mixing contributions and tax payments created unclarity for the individuals on whether their social and health insurance contribution obligations are met. Respectively, there could be ambiguity on whether persons would be able to benefit from their rights to health and social insurance in case of the occurrence of social risk. Hence, the Court concluded that the reform violated the constitutional rights to social and health insurance.[1231]

The Constitutional Court had to also separately engage with the questions on the financing of health insurance in the country.[1232] Namely, the Court was requested to provide a constitutional review on the introduced possibility for payment of medical services in public medical establishments. The change in the law envisioned that insured or uninsured patients would be able willingly to pay for medical services in case they wanted specific (specialized) treatment in a given medical establishment. The referral to the Constitutional Court argued that the possibility of payment of medical services in public medical establishments violated the right to health insurance of those already insured. However, the Court disagreed; the possibility for payment of medical services in public medical establishments did not violate the right to health insurance.[1233] Instead, the reform provided the option to those who were insured to either pay for the services themselves or cover their treatments through the NHIF, which would imply observing the respective health insurance procedures on medical access, such as the medical referral process to a specialist.[1234]

A further case[1235] concerned the introduction of a requirement by the Law on Health Insurance for the payment of a fee for every visit to the doctor or dentist and for each day of treatment at a medical establishment.[1236]

1229 ibid.
1230 ibid para II.
1231 ibid.
1232 Constitutional Decision No 8/1998 on case 3/1998.
1233 ibid para II.
1234 ibid.
1235 Constitutional Decision No 32/1998 on case 29/1998.
1236 The fee's amount for visit to the doctor/dentist used to be determined as 1% of the minimum wage. Currently, the fee amount is determined by a decree of the

The referral to the Constitutional Court argued that the fee violated the right to health insurance of the insured individuals since the law introduced a double payment for the same service. Further, it was claimed that the changes undermined the requirement of Article 52(1) of the CRB that medical care needed to be affordable.

Despite such arguments, the Constitutional Court concluded that the introduction of the fee was constitutional. The Court reasoned that the principles of solidarity, mandatory participation, and equality in medical treatment are foundational for guaranteeing the affordability requirement of the constitutional right to health insurance. The fee indeed represented a condition for accessing doctors or dentists. However, the medications and services provided during the treatment of health-insured patients were not set in relation to the level of contributions to the system. Instead, medical treatment continued to be determined only based on the disease's type.

Additionally, the introduced fee was quite modest as its amount depended on the minimum wage and was not based on the provided medical treatment. Thus, the payment of additional fees did not interfere with the principles of solidarity and equality. The law also foresaw that certain special and more vulnerable societal groups were exempted from the fee payment (such as those receiving social assistance, juveniles, children, etc.). Hence, the law did not limit health insurance coverage and did not interfere with the constitutional requirement for the affordability of medical care.[1237]

Nevertheless, the dissenting view of one of the judges pointed out that despite the currently small amount of the fee, its introduction was unconstitutional.[1238] The judge reasoned that the issue did not lie in the modest fee amount but in its function as an additional barrier to accessing medical care. The judge argued that the unconstitutionality in the case followed from the fact that the reform implied that people who were already health insured could still be barred from accessing healthcare. In this regard, the judge provided as an example the possible scenario in which this fee was increased several times. In addition, it could be the case that people might not have the amount for the fee with them when they visit a doctor or dentist. Then, these people could actually be deprived of their right to health insurance despite having made health insurance contributions.

Council of Ministers (Art. 37(1), LHI). For more, refer to the analysis of the social protection system.

1237 Constitutional Decision No 32/1998 on case 29/1998.

1238 Dissenting Opinion of Judge Thodorov on Constitutional Decision No 32/1998 on case 29/1998.

b. Social Insurance Questions

aa. Protected Positions in Pension Insurance

In general, pension insurance represents the social insurance branch with the largest divergence periods between contribution payment and benefit entitlement. [1239] This considerable divergence has been involved with numerous controversial issues in different countries. Bulgaria is no exception to this observation, as evidenced by the number of pension-related rulings of the Constitutional Court. Namely, the cases on pension issues represent the category with the greatest number of constitutional judgments in the field of social protection in the country. The Constitutional Court had to deliberate on various pension insurance matters and, in doing so, was able to delineate the protected positions in pension insurance that cannot be subject to legislative interference.

First and foremost, the protected positions included the constitutional safeguard against the limiting of already acquired individual benefit entitlements. Nevertheless, the constitutional right to social insurance fell short of influencing the amounts of future benefits entitlements and could not prevent the introduction of a pension ceiling. Next, the disputed issues established the irrevocability status of the constitutional right to social insurance (and the derived right to pension), thereby implying that this right cannot be infringed upon in an arbitrary manner. Finally, the legislature was not allowed to differentiate between acquired qualification periods based on characteristics that violated the principle of equality.

Two of the outlined conclusions were already reached in the first-ever social protection decision of the Constitutional Court. At the beginning of the period of the country's transition to democracy, a reform targeted the insurance periods of individuals who used to work in leading positions in the structures of the former socialist regime.[1240] Namely, the law intended to exclude the insurance periods from the pension qualifying periods for such individuals. The Constitutional Court declared this reform unconstitutional. The Court argued that the legislature aimed at sanctioning the moral choice of a group of persons, i.e., the choice of individuals who worked for the structures of communist organizations. However, the legislature had not made it clear how this moral choice was able to trigger legal repercussions.

1239 Becker and Hardenberg, in Becker and others, *Security* (2010) 110–111.
1240 Constitutional Decision No 11/1992 on case 18/1992.

The absence of such an explanation implied that the legislature's actions were arbitrary. Thus, the reform violated the principle of equality provided in Article 6(2) of the Constitution, as the population was arbitrarily placed in two categories regarding the recognition of their insurance periods.

Moreover, the right to pension belonged to the scope of the right to social insurance.[1241] As a result of the change in the law, certain individuals' insurance periods were excluded from the qualifying conditions, thereby leaving those persons without a right to a pension. Nevertheless, as part of Article 51(1), the right to pension was irrevocable. As such, the right could not be stripped out of its core and could only be temporarily limited based on the constitutional provisions for temporary restrictions in emergency or military situations (Art. 57(3), CRB), which did not concern the given case.

The Court pointed out that if the legislature aimed at targeting some aspects of the insurance history of the respective groups of individuals, then this needed to be done within the borders of what was allowed by the Constitution.[1242] For instance, a possible aspect of the then applicable Law on Pensions that could be tackled influenced the size of some pensions based on the priority amounts of salaries. These amounts included remunerations such as those paid to individuals who worked in leading positions of the former socialist regime. Hence, the Court considered that the legislature's aim could be to remove unjustified privileges. Still, in doing so, the legislature had to act within the margins of discretion allowed by the Constitution.

On a later occasion, the Constitutional Court adjudicated that a provision intending to limit or reduce the amount of the pension benefit of pensioners who receive income from the occupational activity was also unconstitutional.[1243] The case concerned a well-established approach in the Bulgarian pension law that had its roots in the 1957 Law on Pensions. The law initially postulated that the working pensioners could not receive a pension. This provision was eventually softened over time. In 1994, the law was reformed, and working pensioners were entitled to receive their pensions if the monthly income from that activity did not exceed twice the minimum wage for the relevant period. Any income that surpassed this amount was to be reduced from the pension benefit and its supplements.

1241 ibid.
1242 ibid.
1243 Constitutional Decision No 12/1997 on case 6/1997.

The Court considered that this legislative solution violated the 1991 Constitution. Namely, the legislature had to refrain from curtailing rights that had already been acquired. Furthermore, the state had an obligation to preserve the acquired right once the conditions for its realization were met. The right to old-age pension was a constitutional right falling under the umbrella of the constitutional right of social insurance and, as such, represented an irrevocable right (Art. 57(1), CRB). The constitutional protection involved both the requirement for the state to foresee and create a public system for pension insurance and an obligation to guarantee the concrete realization of the right when the given entitlement conditions had been met. Once a right had been realized, it could only be curtailed when this was provided for in the Constitution, such as if some significant social interest might justify certain curtailment (Art. 57(2), CRB).

In some countries, the acquired pension rights can benefit from the constitutional protection of the right to property.[1244] In the given case, however, the constitutional debate was rather framed alongside the lines of the beneficiaries' legitimate expectations, even if the Court did not explicitly state this. The constitutional logic focused on the fact that the individuals have complied with the law's conditions. The compliance with the conditions and their fulfillment resulted in a given pension benefit. Hence, infringement upon the acquired right to pension can interfere with the beneficiaries' legitimate expectations (given the further entailed aspect of the limited individual freedom), which follows from the objective principle of the rule of law.

In the case proceedings, the government placed forward the argument that the necessity for limiting pension benefits of working pensioners was grounded on the PAYG character of the public pension system. The mode of financing implied that the incomes from the working population were needed to cover the benefits of the current pensioners. Therefore, the government considered that the PAYG character allowed a limitation of the acquired rights to a pension because of the rights of the rest of the participants in the system. Yet, according to the Court, an argument on the mode of financing was not of constitutional nature and thus could not be used to justify the interference with a constitutional right. Accordingly,

1244 Pieters, *Navigating Social Security Options* (2019) 18. On extent of protection of social rights in Germany through the right to property, *see* Becker and Hardenberg, in Becker and others, *Security* (2010) 197 ff.

it was concluded that the incursion upon the size of the already acquired right to pension was a violation of Article 51(1) of the Constitution.[1245]

The legislature, however, was allowed to adjust the amounts of future pensions through the introduction of a pension calculation ceiling.[1246] In a judgment concerning the respective reform, the Court stated that as long as the constitutional principles and requirements were observed, it was up to the legislature to determine the order and conditions for the right to a pension, including its amount. The key argument of the judgment was that the legislative measures did not concern already acquired rights and therefore did not violate the right to social insurance.

In developing its reasoning, the Court relied on argumentation based on public financing character. Namely, in its argumentation, the Constitutional Court underlined that the reform not only set a pension ceiling but further introduced a minimum pension.[1247] The pension ceiling provided for the payment of minimum pensions and contributed to their increase. Consequently, the Court considered that the ceiling's introduction was necessary to support the proper functioning of the PAYG financing of the pension system. In contrast to the reasoning in the case discussed above, the Court allowed the PAYG mode of financing to serve as an argument that could limit future pension benefits. This future limitation was constitutional since it did not interfere with acquired positions and additionally aimed at securing a minimum statutory pension level.

bb. Private Pension Insurance

The integration of private insurance schemes into social insurance represents a general European tendency.[1248] The section on the history of national social protection revealed that Bulgaria is also part of this trend. Following the work of the World Bank in the country in the 1990s, a new so-called "pillar" of capital-funded pensions was introduced as a part of the mandatory pension insurance.[1249] Right from the very beginning of the

1245 Constitutional Decision No 12/1997 on case 6/1997.
1246 Constitutional Decision No 21/1998 on case 18/1997.
1247 ibid.
1248 Pieters, *Navigating Social Security Options* (2019) 7.
1249 Petrova, in *The International Labour Organization and Bulgaria/Международната организация на труда и България* (2020) 369.

functioning of the multi-pillar system in the country, the Constitutional Court considered that insurance in private schemes did not violate the constitutional right to social insurance.[1250] The state, however, had an obligation to continue to regulate and oversee the insurance process carried out by private providers.[1251] In addition, the integration of special regulatory provisions was needed to secure the rights of the individuals from the risks of the capital-funded financing of private insurance.[1252]

However, the pension model in the country was partially reversed in 2014 by the establishment of the opting-out possibility from the capital-funded pension schemes, i.e., people were provided with the opportunity to relocate all of their mandatory pension insurance contributions towards the statutory old-age pension insurance.[1253] The High Administrative Court posed the question to the Constitutional Court[1254] of whether the introduced possibility for opting out from the capital-funded schemes violated constitutional provisions.[1255] The main argument of the High Administrative Court was that by taking advantage of the opting-out option, individuals would be, at times probably unknowingly, changing the nature of their pension insurance rights. Namely, the pension insurance in the capital-funded schemes was characterized by certain rights which were not available in the statutory pension insurance. The rights concerned the accumulation of the capital in an individual account, different possibilities for the payment of the accumulated capital after reaching the statutory retirement age, as well as survivor rights over the amount in the individual account. All of these rights were lost when a transfer to the statutory pension insurance would occur. Therefore, the option for the relocation of the contributions could violate the rule of law principle, as well as the right to social insurance (Article 51(1), CRB) and the right to property (Article 17(1), CRB).

1250 Constitutional Decision No 5/2000 on case 4/2000 para VI.

1251 In general, scholars point out that private pension insurance models are permissible in constitutional terms. However, the state must provide for the proper forms of private insurance regulation, especially given the risks involved with this type of insurance. *See* Becker, 'Verfassungsrechtliche Vorgaben für Sozialversicherungsreformen' (2010) 99 ZVersWiss 601–602.

1252 Constitutional Decision No 5/2000 on case 4/2000 para VI.

1253 The changes to the pension insurance were based on the adoption of the following laws: Law on the Budget for the Public Social Insurance for 2015, SG 107/24.12.2014; Law Amending and Supplementing the Social Insurance Code, SG 61/11.08.2015.

1254 Constitutional Decision No 9/2017 on case 9/2016.

1255 ibid.

Furthermore, the opting-out option could potentially violate the rights of the companies that managed private schemes. In particular, Article 19(2) of the Constitution established that there should be equal conditions for business activities in the country and that the state needed to establish protection against unfair competition.

The Constitutional Court did not establish any constitutional violation in the case.[1256] The Court defined as "paternalistic" the argument that by opting out of the capital-funded schemes, persons might be changing their pension rights without realizing the consequences of their choice. This paternalistic approach did not conform with the idea of the freedom of individual choice and the responsibility for the consequences of making a certain choice.[1257] The legal consequences of the choice to opt out were illustrated in the respective legal norms, and a person who was unaware of them was not excused from the consequences of the law.

Regarding the argument that the right to social insurance was violated, the Constitutional Court pointed out that the constitutionally proclaimed right to social insurance referred to the public insurance system.[1258] Hence, private pension insurance was allowed to exist under the Constitution but was not constitutionally provided for, in contrast to the public right to pension insurance that fell under the scope of Article 51(1). The Constitution established the public insurance model and did not require the setting of private social insurance. Furthermore, the public social insurance model complied with the goal of creating a social state as provided in the constitutional Preamble.

Still, even though private pension insurance did not fall within the scope of the constitutional right to social insurance, it benefited from the safeguards of other constitutional provisions. Namely, since private pension insurance had a concrete monetary value even before the realization of the given social risk, it entailed property rights in the sense of Article 17(1) of the Constitution.[1259] Moreover, the right to property necessitated that the insured individual would have the freedom to decide how the accumulated capital in the individual account was to be administered. Therefore, the right of individuals to opt out of one type of pension insurance and relocate

1256 ibid para V. 1.
1257 ibid.
1258 ibid para I. 2.
1259 ibid para II.

to another did not infringe their pension rights but rather enriched them since it provided greater choice.

Finally, the Court also addressed the claim that the reform had infringed the principle of fair competition. The Constitutional Court reasoned that while the private pension insurance indeed engaged in competition practices, this was not the case in the conduction of public pension insurance.[1260] Public social insurance represented a *conditio sine qua non* for all who remained in the private pension schemes. Therefore, there can be no competition between the public and private pension insurance models.

cc. Right to Property and Pension Insurance

The case discussed above implied that the right to a public pension could not benefit from the protection of the right to property since this right could not be associated with a concrete amount in the public insurance process.[1261] However, the case on the right to opt-out from the private pension schemes clarified that private pension insurance fell under the umbrella of the constitutional right to property. This argument was developed further by the constitutional jurisprudence. The constitutional case law demonstrated that the right to property could affect private pension insurance by prohibiting legislative interference in private insurance that would violate the property right of the insured individuals.

To elaborate, the Constitutional Court was confronted with a reform that relocated the sums from the individual accounts of a private pension scheme as part of the mandatory pension insurance to the public pension fund. Namely, the reform transferred the capital accumulated until 2011 in the accounts of certain age groups of women (born after 1954 and before 1960) and men (born after 1951 and before 1960).[1262] The explanation for the reform was that the given age groups were nearing the specific early retirement age for the 1st and 2nd labor categories. Hence, these persons working under hazardous conditions were soon to be provided with the option to retire earlier and receive a fixed-term early pension until qualifying for the standard old-age pension. The said individuals were to be the first wave of recipients of a fixed-term early pension from the PPF scheme. Provisionary calculations estimated that their pension benefit amounts would

1260 ibid para IV.
1261 ibid para II.
1262 Constitutional Decision No 7/2011 on case 21/2010.

be greater if their accumulated capital were instead transferred to the public fund. Therefore, for the sake of greater benefits, the legislature opted for transferring the accumulated capital in the individual accounts to the public fund.

The Constitutional Court declared the reform as being unconstitutional in two main regards.[1263] First, the insurance in the capital-funded schemes was based on private law principles. The private nature was evidenced in the necessity for the conclusion of an insurance contract between the individual and the pension company managing the given private pension fund. In addition, the private insurance rights were characterized by a concrete numerical value even before the benefit entitlement. In contrast, the public social insurance rights in the pension insurance were organized in a public system of solidarity where they could not be guaranteed a concrete benefit amount. The private law character of the pension insurance and the concrete accumulated capital in the individual account implied that the private pension insurance rights possessed property character and thereby benefited from the protection of Article 17(2) of the Constitution. Thus, transferring the accumulated capital in the individual accounts to the public fund could not be done without the owners' permission. Hence, the legislature had trespassed the constitutional limits, and the transfer had violated both the rule of law principle and the right to property provided for in Article 17(2) of the Constitution.[1264]

Second, the reform selectively targeted the individual accounts of particular generational groups. In doing so, it deprived these groups of the early pension provided by capital-funded schemes by treating the said individuals differently on the grounds of age. In comparison, all other age groups working in similar conditions continued to be mandatorily insured in the capital-funded schemes. Consequently, due to the differentiated treatment based on the individuals' age, there was also a violation of the constitutional principle of equal treatment as provided in Article 6(2) of the Constitution.

dd. Legitimate Expectations in Pension Insurance

The discussed case law on the financing of the social and health insurance systems demonstrated that the rule of law and the derivative principle of

1263 ibid.
1264 ibid.

legitimate expectations could halt reforms aiming to fundamentally alter the institutional structure.[1265] The profound character of the changes could destabilize the financing organization of the given systems. The legitimate expectations principle could then be potentially violated since the financial reorganization could undermine the possibility of social rights realization. However, the constitutional debate in the country has demonstrated that legitimate expectations do not result in an absolute right to preservation of the existing conditions. In that sense, the constitutional principle of legitimate expectations has not been particularly influential in halting a given reform when the latter would not endanger social rights realization.

In general, the protection of legitimate expectations is especially crucial for long-term insurances, such as pension insurance, where confidence can be acquired through the continuous existence of the given system.[1266] The Bulgarian constitutional jurisprudence also deliberated on the implications of legitimate expectations of pension reforms. The Constitutional Court demonstrated that the legislature was not absolutely bound by the principle of legitimate expectations and had the freedom to initiate changes to the pension system in order to be able to preserve its future functioning.[1267] The legitimate expectations would instead entail the need for smooth transition periods accompanying the initiated reforms.

Accordingly, a reform increasing the retirement age and the minimum insurance periods for the statutory old-age pension was judged to be constitutional.[1268] The Constitutional Court argued that the introduced increase was an expression of the social state declared in the Preamble of the Constitution. The social state goal involved maintaining the provision of social protection. The measures strived to adapt the PAYG-financed pension system to the changing social realities given the demographic and social challenges, such as the aging population and higher unemployment rates, that affected the incomes used for pension payments.[1269]

A couple of years later, the Constitutional Court was confronted again with the issue of the retirement age increase. The given reform jumpstarted a progressive increase of the retirement age nine years earlier than what was

1265 Constitutional Decision No 8/2012 on case 16/2011.
1266 Becker and Hardenberg, in Becker and others, *Security* (2010) 117.
1267 Constitutional Decision No 5/2000 on case 4/2000 para IV. A.1.
1268 ibid.
1269 ibid.

initially planned in the law.[1270] The Court one more time concluded that the raised qualifying requirements were constitutional and the necessity for the alterations in the qualifying conditions followed from the social state objective.[1271] The social state represented the constitutional framework and basis for social protection in the country. The main feature of social protection was maintaining the functioning of its different systems. Henceforth, the Constitutional Court argued again that given the PAYG character of the statutory old-age pension system and the challenging demographic conditions in the country, the state had to undertake measures to maintain the functioning of the statutory pension system.

The Court acknowledged that, in general, reform measures needed to be foreseeable, and thus the earlier beginning of the increase could be seen as a challenge to the principle of the legitimate expectations that was a hallmark of the rule of law. Still, the Court pointed out that the legitimate expectations did not represent an absolute requirement for the legislature. Correspondingly, in challenging times, social protection could be altered more abruptly as long as the state continued to enable the conditions for the realization of constitutional rights.[1272]

ee. Disability Pension Rights

The constitutional control over the conditions for general sickness disability pension led to the introduction of international law influence in this social insurance sector. The Constitutional Court examined the qualifying insurance periods for entitlement to disability pension due to general sickness. The examination was carried out in the light of the respective international law requirements[1273] stemming from ILO's conventions on invalidity insurance, i.e., conventions No. 37[1274] and No. 38.[1275]

The Court reasoned that both ILO conventions allowed the state parties to require certain minimum insurance periods for the entitlement to a disability pension. However, according to the conventions, the maximum

1270 Constitutional Decision No 10/2012 on case 15/2011.
1271 ibid II. 1.
1272 The Court also cited some recommendations of the Council of the European Union that advised the increase of the actual retirement age in Bulgaria. *See* ibid.
1273 Constitutional Decision No 5/2000 on case 4/2000 para V.
1274 C037 - Invalidity Insurance (Industry, etc.) Convention, 1933 (No. 37) 1933.
1275 C038 - Invalidity Insurance (Agriculture) Convention, 1933 (No. 38) 1933.

length of these insurance periods could not exceed five years. Yet, the Bulgarian legislation established that the minimum insurance periods for disability pension entitlement reached up to seven and even ten years, depending on the individual's age. Therefore, the Constitutional Court established that the provisions of the national legislation were not in conformity with the international law requirements.[1276] The conventions did not only serve as programs for legislative action but entailed subjective positions that had to be reflected in the national legislation. The discrepancy had to be addressed by the legislature. The Social Insurance Code was reformed accordingly,[1277] and the maximum requirement for insurance periods was limited to five years (Art. 74(1), SIC).

ff. Paid Maternity Leave Rights

Apart from the pension-related problems, the Constitutional Court has further engaged with social insurance rights related to maternity. The examination of influences in the norm-creation revealed that reforms on the social insurance for maternity considered the content of Article 47(2) of the Constitution, which provides that, among others, mothers are to benefit from the special protection of the state. The Constitutional Court also deliberated on Article 47(2) in terms of the Article's requirement that (expecting) mothers are to benefit from prenatal and postnatal paid leave from work.[1278] The concrete case resulted from a request from the Prosecutor General for a constitutional review on a reform of the Social Insurance Code. The reform specified that mothers needed to have a minimum of six months of insurance periods to benefit from prenatal and postnatal leave from work. The Prosecutor General argued that the constitutional requirement on providing "special protection" to (expecting) mothers implied that there could be no conditions for minimum insurance periods regarding the right to prenatal and postnatal leave.

Nonetheless, the Constitutional Court considered that introducing the minimum insurance requirement was constitutional. The social insurance system was built upon solidarity and mandatory participation principles.

1276 Constitutional Decision No 5/2000 on case 4/2000 para II.

1277 § 16, Law Amending and Supplementing the Mandatory Social Insurance Code, SG 64/04.08.2000.

1278 Constitutional Decision No 2/2006 on case 9/2005 para II. 6.

The payment of contributions to the respective funds was thus a measurement of the persons' actual participation in the system. The completion of the participation time indicated with the minimum insurance periods led to entitlement to certain subjective rights. Hence, the insurance periods were fundamental for the social insurance rights and determined the content and the limits of these rights.[1279] The requirement for insurance periods was further congruent with the social insurance principles.[1280] The Constitutional Court pointed out that the minimum insurance periods did not need to be acquired immediately before the occurrence of the given social risk.

In case of missing minimum insurance periods, the mother would not be covered by the social insurance. Still, even in such cases, the state had the positive obligation to guarantee her protection according to Article 47(2) of the Constitution. The constitutional requirement for the provision of special protection for mothers was not equated with the system of social insurance.[1281] Therefore, if the mother did not qualify for the social insurance system, special protection could be provided by other means, such as through the social assistance system. Providing protection through this alternative system was not a violation of the Constitution.[1282]

c. Health Insurance Questions

aa. Legislature's Discretion in Health Insurance Organization

Similar to the right to social insurance, the constitutional jurisdiction on the right to health insurance demonstrated the legislature's disposal of wide discretion in terms of the health insurance's organization. The legislature's freedom was further strengthened due to the latter's ability to assess the system's organization based on the available resources. However, this discretion was limited in a narrower sense as it had to comply with the rule of law principle. This restriction implied the obligation of the legislature to realize the constitutional right to health insurance through the enactment of laws that settled the fundamentals of the system in a clear fashion and did not allow for contradictory interpretations. The constitutional character of the right to health insurance did not allow for its fundamental organ-

1279 Constitutional Decision No 11/1992 on case 18/1992.
1280 Constitutional Decision No 2/2006 on case 9/2005 para II. 10.
1281 ibid para II.12.
1282 ibid para II.14.

ization through administrative acts. These main constitutional influences resulted from two constitutional judgments.

First, the Constitutional Court had a chance to rule on the constitutionality of a reform that introduced fundamental changes to the organization of the health insurance system. In an effort to alleviate the pressure upon the limited capacity of the healthcare establishments, the reform aimed at introducing two "packages" in the Law on Health Insurance. The first and main one of these packages are intended to provide fast and priority access to treatment of certain major diseases. The medical care and services provided by this main package were to be entirely covered by the NHIF. The second "supplementary" package was to provide coverage for treatments that could be delayed in time so that the workload of the healthcare establishments could be eased down. The treatments belonging to the supplementary package were to be carried out based on waiting lists. Those who did not wish to wait for their treatment could obtain these services faster by paying for them. The precise medical services falling in the main and the supplementary packages were to be determined by an ordinance issued by the Minister of Healthcare.

A group of 61 members of the Parliament requested a constitutional review of the reform.[1283] A main argument for the request was that it undermined the rule of law principle. Namely, the law did not provide clear requirements and definitions on how it would be decided which services were to be featured in the two packages. Furthermore, fundamental aspects of the Law on Health Insurance, such as the precise content of the two packages, were to be established with an executive act of the Minister of Healthcare, which ranked lower in the hierarchy of norms. The lack of criteria for the content of the two packages further violated the principles of legitimate expectations and foreseeability. Finally, the Constitution stated in Article 52(1) that the right to health insurance should guarantee affordable medical help. The separation of the medical services into two packages under such unclear conditions posed the threat that the affordability aspect of the right to health insurance could be undermined.

The Constitutional Court adjudicated that the reform indeed violated the principle of the rule of the law and the constitutional right to health insurance.[1284] The reform did not clarify the basis on which the two pack-

1283 Constitutional Decision No 3/2016 on case 6/2015.
1284 ibid para I.

ages could be distinguished and the consequences of this distinction. In addition, there were no legal definitions of what the terms "main" and "supplementary" package stood for. Therefore, the unclarities contained in the reform violated the rule of law principle enshrined in Article 4(1) of the CRB. Such omissions could only enable the contradictory interpretation of the newly introduced legal provisions. These lacks also presupposed the incomplete regulation of the financial coverage of the included services, especially the services belonging to the supplementary package. Moreover, the Constitutional Court pointed out that the right to health insurance contained in Article 52(1) required that the realization of this right must be regulated by law. The Constitutional Court considered that the legislature had not upheld this requirement due to the lack of legal criteria for the formation of the two packages.[1285]

In a second decision, where no unconstitutionality was found, the Constitutional Court engaged with the issue of the health insurance's territorial organization.[1286] A reform in 2016 aimed at introducing a National Health Map (NHM), which intended to reorganize the healthcare system in the country based on the varying population numbers in the different regions of the country. The reform aimed at more targeted territorial resource allocation. For this purpose, in cases where the available number of beds for hospital treatment exceeded the specific needs for the number of beds by type defined by the NHM, the NHIF could choose with which medical establishments to conclude a contract according to the criteria and procedure adopted by a regulation of the Council of Ministers.

Fifty-seven members of Parliament, however, requested a constitutional review. The claimants argued that the possibility of the NHIF to conclude agreements only with some medical establishments violated the right to health insurance since it limited the choices of the individuals in terms of the medical establishment. By choosing to conclude agreements only with some medical establishments, the health insurance regulation created unequal market conditions and hence also interfered with Article 19(2) of the Constitution. Furthermore, the opponents of the reform claimed that Article 52(1) of the Constitution required that the right to health insurance is regulated by law. Therefore, the National Assembly could not delegate an essential aspect for realizing the right to health insurance, such

1285 ibid.
1286 Constitutional Decision No 8/2016 on case 9/2015.

as determining the criteria for the conclusion of agreements with medical establishments, to the executive competences of the Council of Ministers.

The Constitutional Court did not establish any unconstitutionality.[1287] Namely, the Court did not see the reform as infringing upon the right to health insurance. On the contrary, given the limited public resources, there was a need to optimize the system so that the medical care was available in amounts and specifications corresponding to the varying territorial demands. The right to healthcare, which encompassed the rights to health insurance and free medical help stated in Article 52(1), represented a public good. The market forces were not always able to secure this public good. Thus, the state needed to interfere in order to ensure that the right to healthcare was properly guaranteed. When public resources were limited, the right to healthcare took precedence over economic freedom, which was not absolute.

Moreover, the Court pointed out that the decisions on which medical establishments were to conclude agreements with the NHIF were not permanent due to the foreseen actualization of the NHM and the criteria for the conclusion of agreements. Hence, the ultimate effect of the adopted reform would be that it promoted competition between the medical establishments in the different parts of the country. The Court concluded that the adopted measures were, therefore, proportionate given the legitimate goal of ensuring healthcare and did not violate Article 19(2) of the Constitution.[1288]

bb. Affordability of Health Insurance

Apart from engaging with concrete health insurance problems, the Constitutional Court has also provided interpretation on the constitutional adjective of "affordability" of the public health insurance. Even though this constitutional reasoning did not result in a concretely traceable influence upon the social protection system, it still indicates a constitutionally bind-

1287 ibid.

1288 ibid. Interestingly enough, the High Administrative Court later on decided that the NHM violated the Administrative Procedure Code since the NHM was not promulgated in the State Gazette. According to the Court, the NHM represented a statutory administrative act which required promulgation in the State Gazette. *See* Decision No 12271/2017 of the High Administrative Court on case 8076/2017.

ing interpretation of this term. The Court reasoned that the right to health insurance consisted of the individuals' right to be included in the public health insurance system. Hence, the legislature had to establish the pathways for the right's realization by creating appropriate legal frameworks and mechanisms.[1289] According to the constitutional text, this right needed to be able to guarantee "affordable" medical care. The Constitutional Court clarified that "affordable" did not imply "cheap" medical care. Instead, the term indicated medical care that each citizen could pay for in order to benefit from it when needed.[1290]

It needs to be pointed out that the adjective used in the Bulgarian text of Article 52(1) of the Constitution is broader in meaning than the adjective used in the official English translation of the constitutional text.[1291] On the one hand, the used Bulgarian adjective ("достъпна") implies something that is "affordable". On the other hand, the Bulgarian adjective also has the broader meaning of "accessible". The Constitutional Court seemed to recognize this second broader meaning of the term. The Court explicitly pointed out that the aspect of the medical care's cost was not sufficient to reflect the essence of Article 52(1). Namely, the price factor represented just one of the nuances of the constitutional expression of "affordable medical care".[1292] Consequently, the Court pointed out that the expression of "affordable medical care" stated in Article 52(1) implied that all citizens could receive the required medical help in case of need. "Affordable medical care" also entailed that access to medical care would be equal for all and organized based on the same conditions.[1293]

Apart from engaging with the term "affordable" medical care, the Constitutional Court also connected the right to health insurance with the social state. The Court pointed out that apart from logically stemming from Article 52(1) of the Constitution, the right to health insurance was further

1289 Constitutional Decision No 8/2012 on case 16/2011 para VI.

1290 ibid.

1291 Official English translation of the CRB can be found at the National Assembly's webpage at https://www.parliament.bg/en/const.

1292 Some authors argue that the "affordability" aspect concerns first and foremost to the poorest members of the society and results in obligations for the legislature to secure the affordability of the medical care for these people. *See* Mrachkov, *Social Rights of the Bulgarian Citizens/Социални права на българските граждани* (2020) 358–359.

1293 Constitutional Decision No 8/2012 on case 16/2011 para VI; Constitutional Decision No 32/1998 on case 29/1998.

based on the social state stated objective in the Preamble since public health insurance represented an expression of the latter objective. Consequently, all changes to the health insurance law needed to be carried out following the social state objective.[1294]

cc. Limitation of Claims

As explained above, the Constitutional Court understood the constitutional right to health insurance as resulting in an obligation for the legislature to establish a health insurance system. Another constitutional case highlighted that this system could not provide boundless access to claims for health services. More concretely, given the system's limited resources, it was constitutionally permissible that there could be a monthly limit to the number of available specialized nonhospital medical and medical-diagnostic services covered by public health insurance.

Namely, a reform in the health insurance introduced by the annual Law on the Budget of the Health Insurance Fund for 2007 established a concrete number of medical referrals to specialized nonhospital medical and medical-diagnostic services. [1295] The exact number of such available referrals, usually issued by the general practitioner,[1296] was to be decided every three months by the NHIF. The respective request for constitutional review was made by 53 members of Parliament and was to a great extent supported by the Bulgarian Doctors' Association.[1297] The request for constitutional review claimed that introducing a limited number of specialized nonhospital medical and medical-diagnostic services violated the constitutional right to health by limiting access to such services. The introduction of this limited package of services placed the general practitioner in front of the dilemma of balancing, on the one side, the needs of the patients for specialized nonhospital medical services and, on the other side, the number

1294 Constitutional Decision No 8/2012 on case 16/2011 para V.

1295 Constitutional Decision No 2/2007 on case 12/2006.

1296 For more on the medical referrals, refer to the analysis of the social protection system.

1297 The Bulgarian Doctors' Association is the professional organization of the doctors in the country that develops and accepts the Code of Professional Ethics for the doctors in the country. The Constitutional Court has declared the Association as public body which has some public law functions on "organizing, controlling and disciplining" these medical professionals. *See* Constitutional Decision No 29/1998 on case 28/1998 para II.2.

of remaining referrals for services covered by the public health insurance. A further concern raised by the constitutional review request was that NHIF held a monopolistic position in the national market.

Interestingly enough, prior to the proceedings in front of the Constitutional Court, the newly introduced provisions into the health insurance law became subject to a judgment of the High Administrative Court.[1298] The High Administrative Court repealed the contested provisions and declared that they limit rights provided by higher legal acts, namely the Law on the Health Insurance and the Constitution. The Court reasoned that both of these laws guaranteed the right to health insurance and in no way placed some limit on the right's exercise.

Nevertheless, the Constitutional Court took a more conservative view, which was later highly criticized by some legal scholars. In tacitly-fashioned reasoning, the Court began its argumentation by stating that the 'Fundamental Rights" Chapter of the Constitution enlisted different kinds of rights. Social rights did not belong to the classical rights since they were not directly applicable, and their realization entailed the state's actions. The Court considered that the constitutional social rights were not universal since they tended to refer to "specific groups, such as the mothers, children without parental care and elderly without relatives, or like in the concrete case – only to those in need of medical help".[1299] Accordingly, the Constitution provided that social rights were to be realized in accordance with conditions and procedures established by law.

The annual Law on the Budget of the Health Insurance represented, according to the Court, a reflection on the economic situation in the country. Consequently, the budgetary law sought to enable the realization of the right to health insurance through the available resources. The legislature had the freedom to determine how the right to health insurance would be realized. The Law on Health Insurance postulated that health insurance guarantees free access to a determined package of health services. Hence, the law did not promise unlimited access to health services. According to the Court, social rights were "hard to realize"[1300] and the changes in the health insurance did not infringe upon the right to health insurance.

1298 Decision No 12098/2006 of the High Administrative Court on case 3696/2006.
1299 Translation from Bulgarian by author. *See* Constitutional Decision No 2/2007 on case 12/2006 para III.
1300 ibid para III.

As mentioned above, the Bulgarian Doctors' Association brought forward the claim that the NHIF occupied a monopolistic position in the country. In this regard, the Court argued that the NHIF did not exercise economic activity in the sense of Article 19(2) of the Constitution and did not make profits.[1301] All in all, the Constitutional Court also referred to the subject-related judgment of the High Administrative Court and stated that the differences in the conclusions of the courts were to be naturally solved by the hierarchy of norms and the supremacy of the Constitution and its interpretations by the Constitutional Court.[1302] Three judges presented dissenting opinions. The general argument in these dissenting opinions was that the introduced changes could mean that the medical referrals might be less than the current need. Such a scenario would mean that only a part of the insured individuals will, in practice, have access to health insurance.[1303]

The judgment was criticized in the academic literature. In particular, the claim of the Court that social rights are not universal was rejected with the argument that the universal character of the fundamental rights did not imply that those were rights applicable to everyone.[1304] The universality of the social rights, including the rights of the specific groups, enlisted in the judgment of the Constitutional Court, followed by the fact that these rights concerned all (vulnerable) persons who would fall into a given group. Hence, the rights stemming from Article 47(2) of the Constitution would apply to all pregnant women in the country. Similarly, the rights resulting from Article 47(4) and 51(3) of the Constitution would apply to, respectively, all children without parental care and all elderly who do not have relatives and cannot provide for themselves.

d. Free Medical Care: Scope of the Right to Free Obstetric Care

The research revealed that in addition to the right to health insurance, the healthcare system further envisions certain free medical care services following Article 52(1) of the Constitution. The Constitutional Court was

1301 ibid para IV.
1302 ibid para V.
1303 Dissenting Opinion of Judge Neykov on Constitutional Decision No 2/2007 on case 12/2006; Dissenting Opinion of Judges Gotsev and Slavov on Constitutional Decision No 2/2007 on case 12/2006.
1304 Mrachkov, *Social Rights of the Bulgarian Citizens/Социални права на българските граждани* (2020) 53–54.

approached with a request for a binding interpretation of some of these free medical care services. The request for interpretation concerned the material scope of the provision that (expecting) mothers needed to be guaranteed free obstetric care, as stated in Article 47(2) of the Constitution.[1305]

The Constitutional Court reasoned that the term "free obstetric care" included medical care that was to be provided to the woman in three phases, namely pre-birth, during birth, and post-birth period.[1306] Furthermore, the Court emphasized that the constitutional provision was not only limited to preventive and medical care associated with the pregnancy, birth, and post-birth period. Instead, the constitutional provision covered all other accompanying complications that threatened the woman's health in this period. The provision was relevant even if the health problems were not directly related to the pregnancy and birth. The free obstetric case further included miscarriages, as well as abortions due to medical grounds, abortions of high school and university students, and minors' abortions. Abortions outside of these enlisted options, which were performed willingly, were not covered by the scope of Article 47(2).

e. Minimum Protection & Support and Social Inclusion Benefits

aa. Constitutional Similarities and Differences

So far, there has been no constitutional jurisprudence concerning a concrete case of Minimum Protection benefits. The constitutional case law, however, has touched upon this social protection branch in the course of the deliberations in cases concerning Support and Social Inclusion Benefits. Namely, relevant judgments demonstrated the constitutional similarities and differences between these two types of social protection branches and, in doing so, also provided important interpretations.

1305 Constitutional Decision No 8/1998 on case 3/1998 para II. The analysis of the social protection system revealed that the obstetric care may be provided either by the health insurance system (in case of the presence of health insurance) or the system of Free Medical Care if the individual lacks health insurance.

1306 As pointed out in the research section on the concrete benefits in the mandatory health insurance, the pregnancy and birth benefits are either provided by the health insurance system (in case the individual has interrupted health insurance rights), or is covered by the tax-financed system of free medical care.

The Constitutional Court has clarified that Minimum Protection and Support and Social Inclusion Benefits rest upon different constitutional logic and different constitutional provisions.[1307] For instance, because of their special nature, the benefits provided to children and families did not necessarily address a situation of material need and thus could not be defined as belonging to the realm of social assistance.[1308] The logic behind these measures was not grounded in Article 51(1) of the Constitution, which contained the right to social assistance. According to the Constitutional Court, the different constitutional foundation behind the benefits for children was twofold. First, such measures expressed the social policy goal provided in Article 14 of the Constitution that children, motherhood, and families were protected by the state. Second, these social benefits embodied the constitutional provision of Article 47(1) that the state must support the parents in child-raising.

Moreover, in its constitutional jurisprudence, the Constitutional Court has established that the development of the Support and Social Inclusion Benefits and the social assistance measures represented an important expression of the social state objective.[1309] Accordingly, the social state entailed that special care needed to be provided to the vulnerable groups in society. Such groups included children, elderly persons, and people with disabilities. The Court went on to add individuals in a situation of material need to this list. Hence, the constitutional similarity between the Support and Social Inclusion Benefits and the social assistance measures was that they were both embodiments of the development of the social policy in line with the social state objective. The Constitutional Court further pointed out that the social state realization was not a single act but entailed a goal that was to continuously guide the policy in the respective fields.[1310]

bb. Equality and Support and Social Inclusion Benefits

The present research repeatedly mentioned that the Support and Social Inclusion Benefits intend to ameliorate given social inequality and support greater social inclusion. Over the years, measures aimed to achieve these goals through different legislative approaches. The resulting legislation be-

1307 Constitutional Decision No 3/2013 on case 7/2013.
1308 ibid.
1309 Constitutional Decision No 8/2012 on case 16/2011 para V.
1310 ibid.

came subject to constitutional review based on its consistency with the constitutional principle of equality. On the one side, the benefits' aim of addressing specific situations of inequality implied that some of the related measures could have varying coverage regarding different groups. On the other side, the state's constitutional requirement to organize and set financing sources for the provision of such measures could not be carried out in a manner that violated the principle of equality.

Namely, a constitutional review of monthly and one-time benefits provided to children with one living parent examined the personal scope of the benefits against the equality principle. The reform, which introduced this specific type of children-benefits in the Law on Family Benefits for Children, established these benefits as not means-tested. In general, when it came to the monthly benefits, the law stipulated that depending on the beneficiaries, some of these benefits were means-tested. Others, such as those provided to children with one alive parent and children with disabilities, were not means-tested.

The request for constitutional review argued that the provision of non-means-tested benefits only to children with one alive parent violated the principle of equal treatment. The claim was that the legislative change treated children in similar situations differently. For instance, the law failed to consider the equal situation of children raised by a single parent. Yet, the Constitutional Court was not of the same opinion.[1311] Instead, the Court contemplated that families, where one of the parents had passed away, were placed in exceptional, stressful, and unforeseen circumstances. Hence, the state needed to provide greater support. The Court has already established the introduction of certain differentiation does not automatically imply that the principle of equality is violated.[1312] On the contrary, in certain instances, differentiation between groups is required so as to contribute to greater equality. Accordingly, the situations of the children with only one alive parent were not comparable to other scenarios, and there was no violation of the principle of equal treatment.[1313]

Another constitutional judgment in the lane of the principle of equality concerned the Support and Social Inclusion Benefits, intending to provide disadvantaged groups with more equal opportunities. However, the provision of such special protection to vulnerable social groups could not be

1311 Constitutional Decision No 3/2013 on case 7/2013.
1312 Constitutional Decision No 6/2010 on case 16/2009 para IV.
1313 Constitutional Decision No 3/2013 on case 7/2013.

made at the expense of the principle of equality. This conclusion was portrayed by a constitutional judgment[1314] concerning the financing of social integration disability benefits. The said benefits used to be regulated by a law-predecessor[1315] to the Law on the People with Disabilities.[1316] This older law envisioned a range of non-contributory benefits and services for people with disabilities. The law established a separate social fund for its purposes called the "Rehabilitation and Social Integration" fund. The law established that the incomes to the fund were to be acquired by sources such as the state budget, voluntary donations, and insurers providing insurance against civil liability in respect of the use of motor vehicles. The insurers were supposed to provide 1% of their incomes from the owners of motor vehicles who insured themselves for this risk of civil liability.

The Constitutional Court declared that the insurers' obligation to contribute to the "Rehabilitation and Social Integration" fund violated the principle of equality since it burdened with contributions only these specific business owners.[1317] The state was indeed constitutionally obliged to foresee the provision of protection to people with disabilities. Yet, this could not be done in a way violating Article 19(2) of the Constitution, which stipulated that the state should establish and guarantee equal legal conditions for the carrying out of economic activity.[1318] Thus, the Court considered that introducing the financing obligation only for the particular insurers also undermined the general idea of the trust in the law.

cc. Social Services & Support and Social Inclusion Benefits

The analysis of the social protection system portrayed that the social services form part of the *Support and Social Inclusion Benefits* and target

1314 Constitutional Decision No 31/1998 on case 24/1998.
1315 The legislation that the judgment concerned was the Law on the Protection, Rehabilitation and Integration of People with Disabilities which was repealed in 2005 by the Law on the Integration of People with Disabilities. The Law on the Integration of People with Disabilities was then also repealed in 2018 by the Law on People with Disabilities.
1316 The Law on People with Disabilities is discussed in the section on norm creation and is also elaborated upon in the part on the analysis of the Bulgarian social protection system.
1317 Constitutional Decision No 31/1998 on case 24/1998.
1318 ibid.

different needs for greater social inclusion. It was already mentioned that different provisions of the recently enacted Law on Social Services were submitted for a constitutional review by a group of 54 members of Parliament.[1319] The request for constitutional review argued that a range of the provisions in the law violated different constitutional provisions. The allegedly violated provisions included, among others, the rule of law principle and the right to social assistance (Art. 51(1), CRB) due to the broad definition of the subject matter of the law. In addition, it was argued that the law violated the right to private life (Art. 32(1), CRB) since social services providers could interfere with beneficiaries' personal life and acquire extensive personal data.

The Constitutional Court decided that some of the referred provisions were indeed unconstitutional but did not agree with all of the claims for unconstitutionality. The reasoning of the Court started from the position that, in contrast to the classical civil and political rights, the constitutional social rights required the state actions for their realization. Social rights were a projection of the social state objective, and the legislature had to undertake measures ensuring a social system in the country that was "as much as possible capable of guaranteeing social justice and social security".[1320]

Regarding the argument that the definition of social services was too broad and could encompass a range of activities, the Court mentioned that the legislature was free to design the social model in the country by observing the constitutional norms and principles. The Law on the Social Service represented an expression of the legislature's freedom to organize the order and the conditions for providing this form of social protection. Still, the formulation of the legal provisions had to be done in a clear and uncontroversial way to be compatible with the rule of law principle.

The social services were defined in Article 3(1) of the draft law as "activities for the protection of individual" with the purposes of: "prevention and/or overcoming of social inclusion; realization or rights; improvement of the quality of life".[1321] The Constitutional Court considered that the subject matter of the given law enlisted in Article 3 was clear. First, the goal of "prevention and/or overcoming of social exclusion" was a clear purpose on its own. Second, the goals of "realization of rights" and "the improvement of the quality of life" had to be understood in light of other provisions, such

1319 Constitutional Decision No 9/2020 on case 3/2020.
1320 Translation from Bulgarian by author. *See* ibid.
1321 Translation from Bulgarian by author.

as Articles 5, 6, and 7, which outlined the right to social services and the involved individual approach in assessing need. Moreover, Article 3 should be read in conjunction with Articles 15 and 17 of the same law, which listed the types of social services and the places where they are provided. The Court underlined that it was not in its powers to assess the suitability of the chosen norm formulation by the legislature; the Constitutional Court was empowered to only assess whether in the formulations the legislature had indeed abided by the norms of the Constitution.

However, the Constitutional Court established that Article 87 of the Law on Social Services was unclear and vague and thus violated the rule of law principle. The Article entailed the prohibition for a provider of social services to deny the provision of support to a child, including when the parents had no knowledge of the requested social service. Furthermore, Article 87(4) stipulated that if the child was above the age of 14, the social services provider could inform the parents of the child's decision to seek social services only with the child's agreement. The Constitutional Court considered that Article 87 would result in limited information for the parents regarding their child. In doing so, the legal provision violated Article 47(1) of the Constitution, which provided that raising children is a right and duty of their parents. Hence, the introduction of a child's right to seek social services without the parents' knowledge had to specify the nature of the cases in which this was permissible. However, the provisions of the Article were framed in a very broad manner, thereby presupposing differing interpretations by the institutions which were to implement the law in practice. Hence, the given Article also violated the rule of law principle due to its lack of clarity.

The other legal aspect found to be unconstitutional was Article 81(1) that concerned the preparation of an individual assessment of beneficiaries' specific needs and the development of an individual plan for support. According to Article 81(1), in the assessment preparation, the social service provider could ask for information, cooperation, and opinions from a variety of institutions and persons related to the beneficiary.[1322] The Constitutional Court considered that the lack of clarity and preciseness of the legal provision on what type of data may be requested and from

1322 The social services provider could ask for information from state bodies, municipalities, general practitioners, family and relatives, medical establishments, institutions in the system of pre-school and school education, and other institutions and providers of social services.

whom it may be requested entailed that the social services providers would have access to a great amount of data concerning the beneficiary. This unlimited access to personal data could represent a serious interference in the individual's personal life, thereby violating the right to personal life enshrined in Article 32(1) of the Constitution. The Constitutional Court acknowledged that the social services had to address the needs of very different categories of people, which could not be done without the needed information on the concrete case and individual. However, the adequate protection of citizens' rights implied the need to request the beneficiary's consent for the gathering of personal data.

Finally, two further provisions of the Law on Social Services were incompatible with the right to private life enshrined in Article 32(1) of the Constitution. The provisions of Article 116 of the Law on Social Services pertained to the control functions of the Executive Agency on the Quality of the Social Services. Article 116(1)3 stipulated that in the execution of monitoring functions, the employees of the Agency could visit the beneficiaries in their homes.[1323] Additionally, Article 116(1)7 stated that the Agency's employees could receive the needed information directly from the social service beneficiaries.[1324] Once again, the Court reasoned that the provisions were too vague and could broaden the control mechanisms to an inadmissible interference with the private life of the beneficiary. Accordingly, the provisions were incompatible with Article 32(1) of the Constitution.

1323 Former Article 116(1)3 (subsequently declared as unconstitutional).
1324 Former Article 116(1)7 (subsequently declared as unconstitutional).