

VIOLATION OF THE RIGHT TO PRIVATE AND FAMILY LIFE IN CASE OF LACK OF OFFICIAL RECOGNITION OF SAME-SEX RELATIONSHIPS

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Abstract: *The present study focuses on presenting the positive obligations of the signatory states of the European Convention on Human Rights, under Art. 8 of the Convention, to provide a legal framework enabling same-sex couples to enjoy adequate legal protection of their relationship. In order to achieve the proposed research objective, we considered the most recent cases before the European Court of Human Rights, namely the case Buhuceanu et al. against Romania, respectively the case of Fedotova against Russia.*

Key words: *private and family life, same-sex relationships, margin of appreciation, positive obligations*

1. Romanian National Legislative Context

Family relations have registered, over time, spectacular developments, a tendency to extend legal protection for non-traditional families being noted at the level of the international courts.

However, the progressive Western tendencies are opposed by the conservative views of states such as Romania, which reject the legal models of formal recognition and legal protection of same-sex couples, fact that can be explained in terms of dominant religious beliefs, collective mentalities and morality standards (Nicolescu, 2021).

In the Romanian doctrine (Florian, 2021, p.8) there are listed the situations in which the legal protection of relations between persons of the same sex is generally denied.

Thus, beyond the text of art.277 Romanian Civil Code, on which the Constitutional Court ruled, as we will have the opportunity to show, there are also cited provisions in the field of human reproduction assisted with third-party donor (art.441 para.3 Civil Code) according to which only a man and a woman or a single woman can be parents within this procedure.

At the same time, the provisions related to adoption must also be taken into account, according to which two persons cannot adopt together, neither simultaneously nor successively, unless they are husband and wife, therefore they are persons of the

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opposite sex (art.462 reported to art.258 para. 4 Civil Code).

Returning to the controversial provisions of art.277 Civil Code, we mention that they formed the object of a constitutionality review, which was triggered in the known *Coman case*. We remind that according to the normative content of this text, marriage between persons of the same sex is prohibited, neither same-sex marriages concluded or contracted abroad, either by Romanian citizens or by foreign citizens, are recognized in Romania.

The same legal regime is also provided for civil partnerships between persons of the opposite sex or of the same sex concluded or contracted abroad, either by Romanian citizens or foreign citizens.

The Romanian Constitutional Court, examining the cited provisions, by Decision No.534/2018 found that they are constitutional insofar as they allow granting the right of residence on the territory of the Romanian state, under the conditions stipulated by European law, to spouses-citizens of the member states of the European Union and/or citizens of third states-from same-sex marriages, concluded or contracted in a member state of the European Union.

We recall that the aforementioned decision of the Constitutional Court came after the Romanian Court engaged in a judicial dialogue with the Court of Justice of the European Union to which it asked 4 questions for a preliminary ruling (Spîrchez, 2021, p.134).

The court of Luxembourg has concluded that an EU member state cannot rely on its national law as a justification for refusing to recognize within its territory a same-sex marriage concluded in another member state, in accordance with the law of that state, when it comes to granting the right of residence in its national territory - Dimitry Kochenov and Uladzislau Belavusau (2019, p.5-6).

Although, in this case, the Constitutional Court of Romania ruled exclusively from the perspective of granting the right of residence on the territory of Romania (Nicolescu, 2021) to the persons referred to in the operative part of the judgment rendered above, however, the cited decision still has the merit of warning the decision-makers on the positive obligation of the ECHR signatory states, arising from art.8 of the European Convention and art.7 of the Charter of fundamental rights of the European Union, to give same-sex couples the opportunity to obtain legal recognition of their relationships, in accordance with the case law of the European Court of human rights, being invoked *Case Oliari et. al. against Italy*, Judgment of 21 July 2015.

In connection with this positive obligation of the member states, conducting a query of the Romanian Chamber of Deputies' database, section "Supervising the legislative process", we found that since 2010, several legislative proposals on civil partnership have been submitted, but none have materialized in a normative act to enter into force.

The first such legislative initiative was withdrawn, 3 are listed as definitively rejected, and 3 of them are sent for opinions and other reports to the specialized committees.

As we have already pointed out (Spîrchez, 2021, p.133), the current state of the Romanian legislation, in the subject matter of this study, could be justified within the so-called margin of appreciation that is recognized by each member state in matters of civil status.

Regarding the extent of the margin of appreciation, it was found (Avram, 2022, p.30)

that the intervention of the Court has become, over time, more and more extensive, but that the principle of subsidiarity, expressly enshrined, with a general character, in Protocol no.15 to the European Convention on human rights, "could serve as the basis for a potential reflux in the jurisprudence of the European Court, in the sense of its return to its own origins".

In this respect, on the one hand, the provisions of art.9 of the Charter of fundamental rights of the European Union are also relevant according to which the right to marry and the right to start a family are guaranteed in accordance with the domestic laws governing the exercitation of these rights.

Furthermore, the recognition of that margin of appreciation is also based on the case-law of the European Court of human rights by which it has been established that: "marriage has deep-rooted social and cultural connotations which may differ largely from one society to another.

The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society" (*Case of Schalk and Kopf v. Austria*).

2. Interpretations of the European Court of Human Rights in case of *Fedotova v. Russia*, respectively *Buhuceanu et.al. v. Romania*

In *case Fedotova and others v. Russia* the plaintiffs - three same-sex couples - complained to the European Court about the lack of the possibility of formal registration of their relationships.

Thus, they showed that they were not legally protected for the most common needs that arose in the context of a couple's life, namely the right to access together financing programs for the purchase of housing, the legal right to inherit the deceased partner, were also deprived of the guarantees in criminal proceedings (for example: the right not to be a witness against the partner), etc.

The European Court was told by the representative of the Russian government that the majority of Russians disapproved the same-sex unions, being necessary to preserve the traditional institutions of marriage and family, these being fundamental values of Russian society, protected by the Constitution (par.206).

In relation to this reasoning, the European Court reiterated that the support of the traditional family is in itself legitimate, but that the objective of protecting the family in the traditional sense is rather abstract, the concept of the family being necessarily evolutionary, that means it must be interpreted in the light of current conditions (par.207-209).

In this regard, we must bear in mind that the notion of family covered by art.8 of the European Convention on Human Rights refers both to relationships based on marriage and to other family ties, for example *de facto* ones (par.145).

At the same time, the Court did not identify any grounds for considering that the legal protection of same-sex couples in a stable relationship could, in itself, harm traditionally constituted families (par.212) and pointed out that, although sometimes individual interests must be subordinated to group ones, democracy does not simply mean that

the opinions of a majority must always prevail, but that a just balance must be reached in order to ensure fair and equitable treatment of persons belonging to a minority (par.216).

So, the trenchant conclusion, also based on art.14 of the convention, (par.217) was that the dominant traditions, stereotypes and social attitudes, in a given country, cannot by themselves be considered a sufficient justification for the difference in treatment, based on sexual orientation.

The Court also held that it would be contrary to the values underlying the European Convention on human rights that the exercise of the rights provided, by the Convention, for a minority group, be conditional on acceptance by the majority, on the ground that, to the contrary, they would become theoretical, therefore not effective (par.218).

Therefore, the Grand Chamber of the Strasbourg Court ruled that the lack of any legal recognition of same-sex relationships is tantamount to a violation of art.8 of the convention.

As just pointed out in the comments that followed this judgment (Vikarská, 2023), for 30 member states of the Council of Europe this judgment does not change anything, as 18 of them already allow same-sex couples to enter into marriages, and 12 legally recognize other forms of same-sex relationships. However, the Fedotova ruling is expected to represent external judicial pressure for the other countries to change their regulatory framework in a sensitive area.

The principles in Fedotova case were also reiterated in *Buhuceanu case against Romania*, something that could be easily anticipated (Nicolescu, 2021) given the “similarity of the national coordinates (Russian and Romanian) regarding the conservative, traditionalist vision and the hostile attitude of the majority of the population towards the regulation of civil unions dedicated to same-sex couples”.

Thus, also in the Buhuceanu case, the court confirmed that the member states must ensure a legal framework allowing same-sex couples to benefit from adequate protection, even if there is an attitude of opposition on the part of the heterosexual majority, as was also invoked in this file.

The following findings of the court in Buhuceanu case, contained in the par.74, are relevant with regard to the discretion available to states to implement positive obligations incumbent on them: “[...] given that particularly important facets of the personal and social identity of persons of the same sex were at stake and that, in addition, a clear ongoing trend towards legal recognition of same-sex couples has been observed within the Council of Europe member States, the States Parties’ margin of appreciation was significantly reduced when it came to affording same-sex couples the possibility of legal recognition and protection [...]. In this context, the Court considered that where the States Parties have a more extensive margin of appreciation, was in determining the exact nature of the legal regime to be made available to same-sex couples, which does not necessarily have to take the form of marriage, the States having the choice of the means to be used in discharging their positive obligations inherent in Article 8 of the Convention.

The discretion afforded to States in this respect relates both to the form of recognition and to the content of protection to be granted to same-sex couples [...].”

In the construction of the court, therefore, it was noted (par.82) that the discretion of the state parties to the Convention is significantly reduced when it comes to offering same-sex couples the specific legal path, the margin being wider as regards determining the exact nature of the legal regime to be made available to same-sex couples, meaning in which the social and cultural context of Romania will be taken into account.

This means, as already revealed (Nicolescu, 2021), that states can choose their legal models for recognizing same-sex couples, both in terms of name (registered civil partnership, consensual union, etc.) and related personal and patrimonial effects.

It is worth mentioning, in this context of analysis, that the judgment in the case *Buhuceanu vs. Romania* was adopted by a majority of five votes, with two votes against, being useful to replay the common divergent opinion of judges Wojtyczek and Harutyunyan, but also the partially divergent opinion of Judge Guerra Martins.

Regarding the partially divergent opinion of Judge Guerra Martins, we show that he did not join the majority that concluded that it was no longer necessary to examine the complaint also under art.14 of the European Convention on human rights, taking the view that, on the contrary, discrimination on grounds of sexual orientation is a fundamental aspect of the case and should be given the necessary attention.

As regards the common divergent opinion of judges Wojtyczek and Harutyunyan, they noted, first of all, that art. 34 of the Convention does not admit complaints *in abstracto*, being necessary, beyond invoking the shortcomings of the legislation in this matter, to demonstrate concretely how the applicants have been personally affected by the national legislation criticized.

Then, although the judgment in the *Buhuceanu* case reiterates the principles in the *Fedotova* case, the two judges are of the opinion that the two cases differ in some aspects, the judgment in the *Fedotova* case being delivered in specific factual circumstances.

There were observed some beneficial changes at the Romanian national level, such as the provisions of the legislation sanctioning all forms of discrimination, but also the more generous interpretation offered to the notion of family life by the Constitutional Court of Romania, as well as the fact that the legal recognition of same-sex couples is being expanded.

Defining, in relation to the conclusion also stated in the *Fedotova* case, is the argument related to the principle of subsidiarity according to which "...it is above all for the Contracting States to decide on the measures necessary to secure the Convention rights to everyone within their 'jurisdiction', and it is not for the Court itself to determine the legal regime to be accorded to same-sex couples ..."

3. Conclusions

Over the past decade, at least, sexual minorities have received positive answers from the European Court of Human Rights, supporting their legal protection. No less true is the fact that the movement towards legal recognition of same-sex couples is constantly developing at the level of the European Union, and concrete measures are being taken.

However, the national realities, including those in Romania, do not seem to align with

those edicted at supranational level, there being the risk of non-compliance with the European Court's judgments in this sensitive area, and therefore, as noted (Vikarská, 2023) the risk for the very legitimacy of the Court.

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