

THE FUNDAMENTAL RIGHTS OF LGBT PERSONS - A CURRENT CHALLENGE IN ROMANIA

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Abstract: *In several litigations at the European level, either before the Court of Justice of the European Union or the European Court of Human Rights, the issue of the LGBT persons' fundamental rights was raised. Romania was targeted by several recent cases such as "Coman" or "Buhuceanu". Our paper analyzes the particularities of these cases, their effects in the legal order and the challenges of a legislative, administrative and judicial system that is constantly adapting to guarantee fundamental rights in a non-discriminatory manner.*

Key words: *fundamental rights, non-discrimination, recognition*

1. Introduction

In several litigations at the European level, either before the Court of Justice of the European Union or the European Court of Human Rights, the issue of respecting the rights of people of the same sex was raised.

Romania was also targeted by several causes.

With the removal of the communist regime, the Romanian legislation "underwent a reconfiguration of the principles and values underlying the legal system, the normative system being reconfigured in such a way as to receive and integrate the standards of protection of fundamental human rights" (Barbu et al, 2021, p. 234).

Romania, after December 1989, with the fall of the communist regime, had a legislative evolution oriented mainly towards the removal of the criminal character of same-sex relationships.

Until 1996, according to Article 200 of the Romanian Penal Code published in the Official Journal no. 79-79 bis of June 21st 1968, sexual relations between persons of the same sex were punished with imprisonment.

The provision was repealed by the Law no. 140 of November 5th 1996, published in the Official Journal no. 289 of November 14th 1996 and replaced with a clause punishing homosexual relations with imprisonment if they were conducted in public or if such conduct caused public scandal.

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The provision was also repealed in 2001 by the Government ordinance no. 89/2001 published in the Official Journal no. 338 of June 26st 2001.

According to Article 48 para. 1 of the Romanian Constitution, <https://www.ccr.ro>, the family is founded on the freely consented marriage of the spouses.

In 2018, a popular initiative to support the traditional family issued the Law of September 18th 2018 of the revision of the Constitution, published in the Official Journal no. 798 of September 18th 2018 in order to define the family as founded on a marriage between a man and a woman. A referendum was held. The results of the referendum could not be validated due to low turnout.

Currently, same-sex marriage is prohibited in Romania. Such a marriage concluded abroad is not recognized in Romania. This means that the respective marriage has no legal effects in Romania.

For example, the said marriage is devoid of the effects of a personal nature - such as the possibility of adopting a child based on the quality of the spouse, as well as those of a patrimonial nature - such as the rights regarding the conjugal home, maintenance or those that derive from the legal or conventional matrimonial regime, as well as the right to inheritance. Although the Civil Code, Law no. 287/2009, published in the Official Journal no. 505 of Julyth 2011, does not recognize the marriage concluded abroad between persons of the same sex, nor the registered partnership, according to Article 277 paragraph 4 of the Civil Code, the status of spouse, acquired according to foreign law, is equated in Romanian domestic law with the status of a person (other than a family member) dependent on the EU citizen or with that of a partner (*de facto*) and can serve, for the needs of free movement, as a basis for obtaining the right of residence and permanent residence in Romania, in this capacity.

2. The Limits of the European Union's Competence in Family Law

The European Union is not competent in terms of material family law and, in particular, the regulation of the institution of marriage. Member States are competent to regulate this matter. According to Article 9 of the Charter of Fundamental Rights of the European Union, https://www.europarl.europa.eu/charter/pdf/text_en.pdf, the right to marry and the right to found a family are guaranteed in accordance with the domestic laws that regulate the exercise of these rights. According to Article 6 para. (1) of the Treaty on the European Union, <https://eur-lex.europa.eu>, and according to Article 51 para. (2) of the Charter, the provisions of the latter do not extend, in any way, the competences of the Union as defined in the treaties.

In the judgment in case C-443/15, Parris, para. 57-61, <https://curia.europa.eu>, the Court of Justice of the European Union (CJEU) underlined that the marital status and benefits deriving from it are matters that fall under the competence of the member states.

Member States are free to provide or not to provide for same-sex marriage an alternative form of legal recognition of their relationship.

According to the mentioned jurisprudence of the CJEU, there is direct discrimination based on sexual orientation, according to Directive 2000/78 establishing a general

framework for equal treatment in employment and occupation, published in the Official Journal L 303, 02/12/2000, only if the partners' life is in a legal and factual situation comparable to that of a married couple, according to the applicable internal provisions.

The assessment of comparability rests with the national court.

3. European Court of Human Rights' General Jurisprudence on LGBT Persons

According to the European Court of Human Rights' case of *Schalk and Kopf v. Austria*, para. 61-63, <https://www.echr.coe.int>, states do not have the obligation to open the institution of marriage to LGBT couples.

In the decision returned in the case of *Tadeucci and McCall v. Italy*, especially at para. 81-86, the European Court assessed the possible difference in treatment under Article 14 referred to Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, https://www.echr.coe.int/documents/d/echr/convention_eng.

The Court considered the hypothesis of a similar treatment for persons in different situations. In this regard, the Court established that, in terms of eligibility for obtaining a residence permit, a LGBT couple was treated in the same way as persons in a significantly different situation, namely heterosexual partners who did not formalize their relationship.

The European Court of Human Rights did not take into account the existence of a comparable situation between people of the same sex who have concluded a marriage and people of the opposite sex who have concluded a marriage. The terms of comparison to establish the existence of discrimination were: an unmarried same-sex couple and an unmarried opposite-sex couple.

The Court established that the same treatment regarding the right of residence cannot be applied to those terms, as Italy did (the reason being that, while a heterosexual couple could regularize their situation, that of same-sex persons does not have this possibility in Italian family law).

In this context, the conclusions of the Court can be interpreted as obliging states to grant a right of residence to same-sex couples, without imposing on the national authorities the obligation to assign these persons a quality in terms of marital status.

It is important, therefore, that a marriage or a partnership between persons of the same sex, although unrecognized/unregulated on the territory of a state, can be taken into account, in order to ensure in the specific case the respect of a fundamental right.

4. The Romanian Experience: Cases Coman and Buhuceanu

In the Court of Justice of the European Union's case C-673/16, *Coman*, <https://curia.europa.eu>, one of the issues of interpretation of EU law was related to the notion of spouse from Article 2 point 2 letter a) of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, published in the Official Journal L 158, 30.4.2004.

The question was whether the notion of spouse also includes the spouse of the same sex.

In the judgment on the Coman case, the CJEU clarified that the notion of spouse, within the meaning of the directive, is gender neutral and is therefore likely to include the same-sex spouse of the Union citizen in question.

This observation, however, does not lead to the conclusion of the mandatory regulation, at the national level, of marriage between persons of the same sex.

Thus, it must be understood that the recognition of a marriage between persons of the same sex does not entail the obligation of an EU member state to regulate in its national law the marriage between such persons, but, to the extent that marriages of this kind have been concluded in other states, the member state must not create a discriminatory regime insofar as it concerns the respect of rights conferred on these persons by Union law.

The CJEU emphasizes in para. 45-46 of the judgment that the obligation of a member state to recognize a marriage between persons of the same sex concluded in another member state according to the law of that state, exclusively for the purpose of granting a derived right of residence to a national of a third state, does not affect the institution of marriage in this first Member State, which is defined by national law and falls within the competence of the Member States.

It does not imply the provision by the said Member State, in its national law, of the institution of marriage between persons of the same sex.

It is limited to the obligation to recognize such marriages, concluded in another member state according to the law of this state, exclusively for the purpose of exercising the rights that Union law confers on these persons.

Thus, such an obligation of recognition for the purpose of granting a derived right of residence to a national of a third country does not affect the national identity, nor does it threaten the public order of the Member State in question.

Therefore, according to the jurisprudence of the CJEU, the member states retain the autonomy to regulate or not marriages between same-sex partners.

From the recent jurisprudence of the European Court of Human Rights, we note the judgment of May 23, 2023 in the case of *Buhuceanu and others v. Romania*, <https://www.echr.coe.int>.

The plaintiffs, same-sex partners, argued that the lack of recognition of same-sex unions whether in the form of marriage or civil partnership affected and disadvantaged them in many specific ways.

The Court found the absence of any form of legal recognition and protection for same-sex couples and that Romania did not respect its positive obligation to guarantee the applicants' right to respect for their private and family life.

5. The Consequences of the European Jurisprudence on Future Legislation Regarding LGBT Persons

We believe that what results from the decisions of the European courts, especially in the cases against Romania, is that both the ECHR and the CJEU preserve Romania's autonomy to regulate the legalization of marriages or partnerships between LGBT persons.

The ECtHR in the Buhuceanu case condemned the Romanian state for an incomplete legislation regarding the recognition of fundamental rights of LGBT couples, while rights similar to those they claim before the authorities are legally recognized for spouses of different sexes.

We note that, although the ECtHR states the situation at the European level regarding the legislative recognition of same-sex marriage partnerships, the Court does not intervene in the national autonomy regarding the states' option to regulate or not the possibility of concluding marriages or partnerships between these persons.

From this perspective, the jurisprudence of the ECtHR and that of the CJEU reveal a unified opinion: both European courts retain within the national regulatory autonomy the legalization of marriages or partnerships between persons of the same sex.

The reasoning in Buhuceanu is based on non-discrimination, on equal treatment between spouses of different sexes and partners of the same sex who must be recognized with a similar legal regime in terms of civil, pension and insurance rights, etc.

In other words, whenever the legislator regulates rights in consideration of the quality of a person's spouse, the legislator should do so in a similar way with regard to same-sex couples, who should enjoy of the same rights as spouses of the opposite sex.

According to the ruling in *Fedotova and others v. Russia*, <https://www.echr.coe.int>, the legal recognition of same-sex couples is not equivalent to registration.

States can choose from several possible ways to grant legal recognition to same-sex couples.

As pointed out in the dissenting opinion in the Buhuceanu case, states can either create the possibility for same-sex couples to register their union - recognition by registration, or grant *ex lege* recognition in different branches of law, so that such couples to acquire *ex lege* certain specific rights and obtain their protection - *ex lege* recognition.

It follows from the judgment in the case of *Fedotova and others* that it is essential that rights and protection are granted *ex lege*, without the need to go to national courts of protection, so that couples can rely on the mere existence of their relationship in dealing with the judicial or administrative authorities.

In the Buhuceanu case the ECtHR's analysis started from the claim regarding the lack of effective legislative protection of his rights.

The conclusion that would result from this case is that the risk of a violation is not excluded given that there is no legislation that predictably and sufficiently guarantees the rights of LGBT couples.

ECtHR underlines that same-sex couples may lack inheritance rights, a LGBT person may not be entitled to a survivor's pension, to a living partner's health insurance or to continue living in the home of a deceased partner.

If someone is hospitalized, the person's partner may be denied visitation rights or access to the medical file.

If partners of a same-sex couple choose to separate, there is no framework to regulate maintenance rights and duties toward each other etc.

6. Conclusion

It follows, from what has been presented, that neither the Court of Justice of the European Union, nor the European Court of Human Rights requires a state to regulate marriage between persons of the same sex. However, Romania is facing a new challenge, to identify an adequate regulation to recognize and guarantee the rights of people of the same sex, similar to the rights that are recognized to spouses of the opposite sex.

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