

Evolution of the Rights of Sexual Minorities in the Jurisprudence of the European Court of Human Rights

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Abstract

*It is known that the enforcement of the rights of sexual minorities by court has presented many challenges to all parties involved. The main reason for this is that the constitutions of most countries do not contain a provision that could be applied in a non-disputable way before the judiciary. In the absence of an express constitutional provision, legal arguments for the protection of the rights of sexual minorities are meant to fill the missing constitutional provisions. So does the jurisprudence of the European Court of Human Rights (ECtHR), which is based on the prohibition of discrimination, the protection of privacy and other fundamental human rights. The aim of the research is to point out what legal progress has been made in Europe in the examined field. The analysis will begin with the first cases regarding sexual rights, continue with the case of *Dudgeon v. United Kingdom*, in which the European Court of Human Rights found that criminalizing homosexual relationships is against the principles laid down by the Convention, and finally, turn to the so called second and third line cases, such as the *Schalk and Kopf v. Austria* case, or the *Oliari and others v. Italy* case, presented in the following part.*

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1. The aim of the study

As it is well known, the constitutions of most states do not contain clear provisions for ensuring the rights of persons belonging to sexual minorities. Where this is missing, or where the state has not adopted clarifying and permissive provisions regarding the rights of sexual minorities, courts must fill these gaps. This study tries to analyze a fraction of these judicial decisions, focusing on the jurisprudence of the European Court of Human Rights (ECtHR), as a leading international human rights power.

2. The methodology used in this paper

In the present study I will rely on narratology, but mostly on critical analysis. The analysis of legal practice is a fundamental element of both dogmatic jurisprudence and the sociological study of law, so I have several research methods at my disposal. In this case, I will try to analyze the content of the judicial decisions. Besides the content, the political justifiability and acceptability of the decision may appear of significant importance.² Quantitative investigation aspects, such as the length of individual procedures and the extent of justifications, are not important from the point of view of my research, but qualitative methods are even more so. Among the methods used, the content analysis of legal cases becomes the basic methodology of the research, at the same time, the methods of historical approach and comparison are also used. The available sources, which also use the qualitative research methodology, define, and at the same time, limit the research methodologies suitable to be applied in this study.

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² Valéria Kiss and Fruzsina Tóth, “Kutatásmódszertani Megjegyzések az Alávetett Csoportok Joghoz Való Viszonyának Megismeréséhez,” *Állam és Jogtudomány* LXII, no. 3 (2021): 43–73, p. 49, <https://doi.org/10.51783/ajt.2021.3.03>.

3. Sexual rights – the definition

In the broader definition of sexual rights, we mean all human rights³ recognized by national legislation, international human rights documents, and other commonly accepted rules. These include the right of all people to live free from coercion, discrimination and violence, to have access to the highest attainable standard of sexual health, including access to sexual and reproductive health services; the ability to request, access and disseminate objective information about sexuality; receiving sex education; respect for bodily integrity; the free choice of partner; deciding on sexual activity; the right to sexual relations based on the mutual consent of the parties; the right to marry based on the mutual consent of the parties; the right to make decisions about childbearing and its timing; and the right to a satisfying, safe and enjoyable sex life.⁴ Sexual rights, however, include the right to self-identity and the right to respect it.

4. Argumentations used – a short introduction

The development of human rights jurisprudence and doctrine related to sexual rights, sexual orientation and gender identity has been examined by jurisprudence along the lines of the following: (a) the prohibition of discrimination, (b) the protection of privacy, (c) the provision of other basic human rights.⁵

The prohibition of discrimination is one of the basic principles of human rights. The UN *Universal Declaration of Human Rights* and several international and regional human rights conventions, such as the *Charter of Fundamental Rights of the European Union*, expressly prohibit discrimination, including discrimination based on sexual orientation or gender identity. These international provisions, which have been transposed into the domestic law of many countries, form one of the basic principles of the recognition of sexual rights. As we will see below, most jurisprudence takes these principles into account when discussing the provision of sexual rights or their expansion.

There are also decisions that see the protection of privacy as an appropriate legal basis for ensuring sexual rights. Since the *Universal Declaration of Human Rights*, the protection of privacy has been a fundamental human right that ensures the protection of personal data, home and individual freedom, the right to sex life and family. It includes the right of individuals to make decisions about their personal lives, including their sexual lives, without being subjected to undue interference.

The right to human dignity as a fundamental human right was recognized in various international documents and national constitutions after the Second World War. As the legal basis used to obtain sexual rights, it appears most often in the reasoning of the German Constitutional Court. The sad experience of National Socialist and Soviet-type socialist dictatorships, which completely subordinated people to state power, led to the inclusion of human dignity in the *Grundgesetz* and later in the Hungarian Constitution.⁶

The Romanian constitution does not guarantee the right to human dignity, but Article 72 of the Civil Code adopted in 2009 states that every person has the right to have their dignity respected.

³ Understood as the fundamental rights of every individual can be understood as a set of international legal norms through which the attributes and faculties of an individual are recognized, ensuring their dignity, freedom, and personal development, while benefiting from close institutional guarantee – as Prof Corneliu Birsan defined them in *Convenția europeană a drepturilor omului – comentariu pe articole*. (2005) Bucharest: C. H. Beck, p. 11. Somehow similar definitions can be found in Radu Chirita's treaty intitled *Convenția europeană a drepturilor omului – comentariu pe articole I, II* (2007) Bucharest: C. H. Beck, p. 21, or in Jean Francois Renucci, *Tratat de drepturile omului* (2009) Bucharest: Hamangiu, p.15, or in Laura Spătaru-Negură, *Protecția internațională a drepturilor omului* (2019) Bucharest: Ed. Universitatea Nicolae Titulescu, p. 5-7.

⁴ European Institute for Gender Equality, "Sexual Rights," in *Glossary and Thesaurus*, 2016, https://eige.europa.eu/taxonomy/term/1393?language_content_entity=en.

⁵ Michael O'Flaherty and John Fisher, "Szexuális Orientáció, Nemi Identitás és Nemzetközi Emberi Jogok: a Yogyakarta Alapelvek," *Fundamentum* 12, no. 3–4 (2008): 6.

⁶ Kinga Réka Zakariás, "Az Emberi Méltósághoz Való Alapjog, Összehasonlító Jogi Elemzés a Német és Magyar Alkotmánybírósági Gyakorlat Tükrében" (PhD, Budapest, Pázmány Péter Katolikus Egyetem, Jog- és Államtudományi Kar, Jog- és Államtudományi Doktori Iskola, 2017), 3, <http://real-phd.mtak.hu/id/eprint/481>.

Until the adoption of the new civil code, no effective domestic law stated the right to human dignity, although the criminal code wanted to protect it by regulating the crimes of insult and defamation.

The argument appeared in the literature that it would be more useful to use the argument construction of freedom to privacy and human dignity, to ensure sexual rights in a wider range.

*“The freedom-based approach gives the courts the opportunity to judge according to clear principles, since the trial courts are not forced to constantly compare distinct groups in society. Indeed, the freedom-based argument eliminates the problems arising around the identification of the “group in the same situation” which plays a central role in the discrimination approach. The number of homogeneous groups that can be considered is almost unlimited, so the choice between them is necessarily arbitrary.”*⁷

The *European Convention on Human Rights* (ECHR) does not contain clear references to the need to ensure human dignity as a fundamental right. But in the preamble to the Thirteenth Additional Protocol, member states clearly state that “full recognition of the inherent dignity of every human being” requires international recognition of fundamental rights. Although the mentioned protocol aims to abolish the death penalty, the contents of the declaration suggest that human rights can be examined based on human dignity.

This also explains the fact that the decisions of the European Commission of Human Rights, later the European Court of Human Rights only rarely mention human dignity as a fundamental right on which decisions are based, and respect for privacy as a legal foundation, and only later refer to the prohibition of discrimination.⁸

If we look at the ECtHR jurisprudence in its entirety, the conclusion can be drawn that claims based on fundamental rights are generally more unsuccessful than classic political legal or anti-discrimination-based motions. This can be explained by the fact that claims based on the protection of individual fundamental rights do not usually serve to protect or preserve the diversity of society, since most of the time the courts find mainstream ideas of social life and lifestyle preferences worthy of protection, while those affecting minorities are always pushed to the margins.⁹

5. Sexual rights - the woman's right to self-determination

Among sexual rights, one of the earliest controversial issues is the termination of pregnancy and artificial abortion. Several public debates have been started throughout Europe regarding this topic, the reasoning behind them being that legal regulation of abortion raises not only complex legal but also social, religious, and demographic issues. The long-term world order of abortion laws, which began in Northern Europe in the 1930s, is the subject of ongoing social debates. It is therefore understandable - in the absence of social and member state agreements - that the European Commission of Human Rights also started dealing with this issue late, in the second half of the 1970s¹⁰.

The first such case is *Rose Marie Brüggemann and Adelheid Scheuten v Germany*¹¹, in which the applicants allege that German criminal law rules on abortion violate the right to an undisturbed private and family life guaranteed by Article 8 of the Convention.

According to ECtHR justification, it is sufficient to examine the plaintiffs' request based on the provisions of Article 8 of the Convention, and whether the intervention of the German state with the abortion law in the private life of the plaintiffs can be considered justified or not.¹² It is also clear

⁷ Uitz, Renáta, and Orsolya Salát. “Alkotmányos Értékű-e a Melegek Autonómiája.” [Is Gay Autonomy Constitutionally Valuable?]. *Fundamentum* 12, no. 3–4 (2008), p. 20.

⁸ Of course, this has a logical explanation in relation to the jurisprudence of the European Court of Justice. Article 14 of the European Convention on Human Rights does not contain a clear reference to discrimination based on sexual orientation, which is why Article 14 is only referred to later in the justifications, at a certain level of social recognition.

⁹ Uitz and Salát, “Alkotmányos Értékű-e a Melegek Autonómiája.”, p. 21.

¹⁰ Herman Schwartz, “Van-e Helyük a Gazdasági és Szociális Jogoknak az Alkotmányban,” *Fundamentum* 2, no. 3 (1998): 5–10.

¹¹ Brüggemann and Scheuten against Federal Republic of Germany, No. 6959/75 (European Commission of Human Rights December 7, 1977).

¹² Brüggemann and Scheuten against Federal Republic of Germany paragraph 53.

that, in its opinion, the committee does not need to decide on the issue of whether an unborn child should be considered a 'life' within the meaning of Article 2 of the Convention or whether it can be a legal entity to be protected pursuant to Article 8, paragraph 2. The Commission admits that interests may arise during pregnancy that require legal protection, such as inheritance rights, which is an accepted fact in the legal systems of most member states. The Commission also recognizes that international conventions also provide special protection to the unborn fetus, so the *International Covenant on Civil and Political Rights* (ICCPR) prohibits the execution of the death sentence in the case of a pregnant woman.¹³

A conclusion that stems from this is that the Commission wanted to avoid taking a position on the circumstances under which and at which stage of pregnancy the fetus becomes a legal entity protected by the Convention and what happens if the mother's and the unborn child's rights and interests are not compatible.

Nevertheless, it came to the conclusion that, despite its severity, the German laws are far from a complete prohibition of abortion, since under certain conditions, although they are stricter than the conditions according to the provisions before the decision of the Constitutional Court, the execution of an abortion is not punishable under criminal law. Finally, the Commission also considers that the legal situation of pregnant women in terms of abortion regulations gradually improved in the period following the decision of the Constitutional Court.

Taking these arguments into account, the Commission decided, a decision that later was confirmed by the Council of Ministers, that the German state did not violate the provisions of Article 8 of the Convention.

As expected, the board did not reach a consensus on this issue. J.E.S. Judge Fawcett expressed a different opinion¹⁴, according to which there remains the "protection of the rights and freedoms of others" and the question of how far this can extend to the unborn child. The Convention does not expressly extend the right to life protected by Article 2 to the unborn child; but as he argues: "*I don't think this is the final decision. Nevertheless, I would try in vain to answer such a controversial question, and I can only say that I cannot attribute rights and freedoms under the Convention to an unborn child who is not yet capable of independent life. I can only conclude that the changes to the law on abortion, specifically the changes made because of the decision of the Federal Constitutional Court, are not justified based on the provisions of Article 8 (2) and are therefore an intervention contrary to the Convention.*"

Judges T. Opsahl, C. Norgaard and L. Kellberg, although they agreed with the commission's opinion, considered it important to emphasize that the laws regulating abortion must give the pregnant woman the right to decide on termination of pregnancy in the first stage of her pregnancy. In their opinion, this solution is most in line with the woman's right to self-determination and her right to respect for private life.¹⁵

Regarding the justification, it seems that, based on procedural reasons, and more precisely, taking into account the limits of the request, the Commission successfully avoided expressing an opinion on an issue that divided European society and on which the member states were far from reaching the same opinion.

In its later decisions, this caution gradually erodes. *X vs the United Kingdom*¹⁶ is already regarding the right to life of the fetus. In the case, the complainant is the husband of the woman who initiated the termination of her pregnancy, who complained that British law does not entitle him to require his consent as a future father to terminate his wife's pregnancy.

The Commission decided to examine the applicant's submission on the basis of Article 2 of the Convention, which guarantees the right to life, and Article 8, which stipulates the right to respect for private and family life.¹⁷

¹³ Brügemann and Scheuten against Federal Republic of Germany paragraph 60.

¹⁴ Brügemann and Scheuten against Federal Republic of Germany paragraph 7.

¹⁵ Brügemann and Scheuten against Federal Republic of Germany paragraph 2.

¹⁶ X v. United Kingdom, No. 8417/1978 (European Court of Human Rights May 13, 1980).

¹⁷ X v. United Kingdom paragraph 4.

In its justification, the European Commission of Human Rights examined for the first time the right to life of the fetus, guaranteed by Article 2 of the Convention, in relation to abortion. The first question that arose was: does the word 'everyone' apply to the unborn fetus? The content of this word is not defined by the Convention. This word is used in Articles 1.-5., 6., 8.-11., and 13. of the Convention, but related for persons born.¹⁸

The provisions of Article 2. regarding cases that cannot be considered as unlawful deprivation of life, are only applicable to persons already born. Considering all this, the Commission concluded that the term 'everyone' in the context of Article 2 does not refer to the unborn child. Naturally, after that, the commission examined the teleological meaning of the word life from the sentence "*The law protects everyone's right to life.*" The Convention does not specify the meaning of this term either.

As long as the date of origin of life is considered, there are different views in the member states of the Council of Europe. Their conflict is based on differences in the social, political, and religious systems. For example, the German Constitutional Court, referring to the justification of the *Rose Marie Bruggemann v. Germany* case, along with several science-based opinions, concluded that the constitutional protection of life cannot be limited either to the 'complete' person formed after birth, nor to the fetus existing before birth, who is already capable of independent existence, therefore the provisions of the Basic Law regarding life are also considered valid for the unborn child.¹⁹

In view of the different European approaches, the Commission outlined three options regarding the human rights status of the fetus: Article 2 of the Convention does not apply to the fetus, it recognizes its right to life with the limitations defined therein, or the fetus has an absolute right to life.

Resolutions of any kind can only be made on the basis of the text of the Convention. The exceptions named by Article 2 of the Convention, namely, to effect a lawful arrest or to prevent the escape of a person lawfully detained, to act in defense of any person from unlawful violence, and any action lawfully taken for the purpose of quelling a riot or insurrection, cannot be applied to the fetus.²⁰ In its reasoning, the Commission came to the conclusion that the right provided by Article 2 of the Convention is an absolute right and as such is inviolable. All exceptional situations from this are only provided by the law - in this case by the Convention - in an express and restrictive manner, and it cannot be extended through legal interpretation.

At the same time, if such an interpretation were to be accepted by the Commission so that the fetus would be considered a living person, then due to the inviolability of the right to life, this would inevitably result in the forced setting up of a hierarchy of values, in which, in the vast majority of cases, the rights of the mother would be unable to assert themselves against the right to life of the fetus. The Commission considered that this approach would not be compatible with the object and purpose of the Convention.²¹ So, the Commission rejected the last outlined option - primarily in view of the mother's right to life - but did not consider it necessary to choose between the remaining two options, and instead prioritized the examination of the complaint.

Regarding the request itself, the Commission concluded that the applicant's wife was ten weeks pregnant, and that the termination of the pregnancy was only permitted for medical reasons. In addition to medical considerations, no other - ethical, religious, or social - issues arose, therefore it does not have to make a general decision but can reflect on the circumstances of the case.

In the opinion of the Commission, the decision of the UK authorities to allow termination of pregnancy is compatible with the provisions of Article 2 of the Convention.

The two legal cases examined above, the *Bruggemann and Scheuten v. Germany*, and the *X. v. the United Kingdom*, represents well the position of the European Commission of Human Rights on abortion. Although it initially avoided expressing its opinion clearly, this became inevitable over time. Since there was still no social consensus on the matter, the Commission relied solely on the teleological interpretation of the Convention. This led to the conclusion that in order to protect the

¹⁸ X v. United Kingdom paragraph 6.

¹⁹ Tamás Bán, "Nemzetközi Fórumok Állásfoglalásai", in *Fundamentum*, No. 3 (1998):153-161, p. 160.

²⁰ Bán Tamás, p. 161.

²¹ Bán Tamás, p. 161

life, physical and mental health of the mother at a certain stage of the development of the fetus, termination of pregnancy does not violate the provisions of the Convention.²²

Nevertheless, in line with these decisions and thanks to social pressure and women's emancipation, by the 1980s abortion laws had clearly become more permissive, including in countries from the Soviet Bloc. Romania and Ireland remained exceptions - even in these years. In the case of Romania, the goal was to increase fertility and encourage childbearing, while in the case of Ireland, where we are talking about a constitutional ban, the church's strong opinion prevented the liberalization of abortion laws. While the relevant legislation of most European countries became increasingly permissive, including the communist countries, Romania tightened its abortion laws in the most dramatic way possible, first in 1966 and then in 1984.²³ Despite all these tightened provisions, the desired population growth did not occur, but the number of illegal abortions increased. At the same time, these restrictive provisions still influence today's social security systems. Members of the baby boomer generation²⁴, having reached retirement age, struggle with financial problems, but examining this is not the subject of this study.

6. First line of cases regarding homosexual rights

From the broad field of sexual rights, with the landmark judgments *Dudgeon v. United Kingdom*²⁵ and *Christine Goodwin v. United Kingdom*²⁶, the European Court of Human Rights stepped up and paved the way for the protection of the human rights of lesbians, gay people, bisexuals and transgender people. Since then, the Court has delivered a number of judgments on issues of sexual orientation and gender identity. On the other hand, there was some inconsistency in the case of these judgments.

In this study, I would like to focus on the issues regarding homosexual couples, and therefore I will deal in detail with the recognition of the rights of transgender persons within the framework of another study.

In the case of *Dudgeon v. the United Kingdom*, the ECtHR established for the first time that national legislation that punishes sexual relations between gay men conflicts with Article 8 from the Convention, which states the right to respect for private and family life.

In the 1970s, unlike the rest of the UK, homosexual acts were punishable by law in Northern Ireland. The plaintiff, Jeff Dudgeon, a well-known gay rights activist, fought for the decriminalization of homosexual relationships and the lowering of the age of consent. Although specific proceedings were not initiated against the plaintiff in connection with a house search initiated in a drug abuse case, which also involved the seizure of his personal documents, he felt that the proceedings constituted an unlawful interference in his private life.

After examining the case, the ECtHR found that the relevant national regulation, by punishing the sexual relationship of gay men, conflicts with Article 8 of the Convention, which states the protection of family and private life. The Court did not find well-founded the argument of the national authorities, according to which there is an urgent social need to prohibit homosexual relations, which legitimately overrides the right to privacy of others.

Also, the Court affirms for the first time that sexual orientation is a manifestation of human personality and as such is protected under Article 8. According to the ECtHR, neither the perceived harm to public morality nor the opinion of the majority of society can be the basis for this level of interference in private life.²⁷ In my opinion the importance of the *Dudgeon* case relies in this statement. For the first time sexuality is viewed as part of the private sphere, and as part of human

²² Bán Tamás, p. 161

²³ Nemzetközi Családtervezési Szövetség (IPPF) Európai Régió and Egészségügyi Világszervezet (WHO) Európai Régió, *Az abortusz Európában* (Budapest: Központi Statisztikai Hivatal, 1990), 29, <https://mek.oszk.hu/24200/24260/24260.pdf>.

²⁴ People born between 1946 and the 1960's.

²⁵ *Dudgeon v. UK*, No. 7525/76 (European Court of Human Rights October 22, 1981).

²⁶ *Christine Goodwin v. UK*, No. 28957/95 (European Court of Human Rights November 7, 2002).

²⁷ *Dudgeon v. UK* paragraph 60.

personality it must enjoy the protection offered to human dignity. As it stated: “*This case concerns the most intimate aspect of private life. Therefore, particularly serious reasons must be listed before the procedure of the national authorities can be classified as legal from the point of view of Article 8, paragraph 2 of the Convention.*”²⁸

Although the case, as I have already indicated, can be considered a landmark in terms of ensuring the right to privacy of homosexual persons, this does not mean that, from the point of view of the court, the mentioned sexual minorities enjoy the same rights as their heterosexual counterparts. In the closing thought of the justification, it clearly states that “*in a democratic society there is a legitimate need for a certain degree of control over homosexual behavior, especially in order to provide safeguards against the exploitation of those who are considered particularly vulnerable, for example due to their youth (see paragraph 49). However, it is primarily up to the national authorities to decide on the appropriate safeguards of this kind needed to protect morals in their society, and in particular on determining the age under which young people should be protected from crime law.*”²⁹ The significance of the *Dudgeon* case is undeniable from the point of view of the international protection of sexual rights. First, it irreversibly opened the possibility of applying the Convention to sexual minorities. Second, by finding that laws punishing homosexual acts are contrary to the aims and objectives of the right to respect for private life, the Court has established minimal safeguards for sexual minorities under the Convention. Third, by transforming national trends into a European norm, it encouraged other member states to change their policies accordingly.³⁰

Similar judgments were made in *Norris v. Ireland*³¹ and *Modinos v. Cyprus*³². In *Norris*, as in *Dudgeon*, the applicants challenged legal rules that criminalized consensual homosexual acts between adult males. Ireland disputed the victim status of the non-processed applicants. However, the ECtHR court found that the existence of a law, even in the absence of enforcement measures, leads to a violation of rights. The court noted that although in the period in question, no proceedings were initiated based on the relevant legislation for consensual homosexual acts between adult men, the legislation has lost none of its applicability, and this established the victim status of the applicants. The court emphasized that, in view of the applicant’s personal circumstances, “*the legislation, by virtue of its mere existence, has a continuous and direct impact on the applicant’s private life.*”³³ Therefore, the applicants do not necessarily have to wait until they actually suffer a violation of their rights due to an official action implementing a law that seriously violates their freedom. In order to successfully submit a complaint, it is sufficient to prove the risk that the contested provision directly affects the complainant, and the danger of infringement is obvious. In this case (since no actual violation has yet occurred), the exhaustion of domestic legal remedies is not a condition for the initiation of the Strasbourg procedure.

A comparable situation arose in the *Modinos v. Cyprus* case, in which the ECtHR established a violation of Article 8 of the Convention, even if the chief prosecutor publicly refused to implement the effective criminal law provisions.

In the so-called first line cases, in which I include the above detailed *Dudgeon*, *Norris* or *Modinos*, the ECtHR clearly declared that the exclusion of criminal liability due to homosexual relations between adult men is incompatible with the provisions of Article 8 of the Convention. In other words, the developed jurisprudence is aimed at the decriminalization of homosexual relations between adults in the Member States.

In parallel with these cases, the ECtHR also found a violation of Articles 8 and 14 in the *Sutherland case*³⁴, when it classified as discriminatory the English law that set the age of consent for male homosexuals at eighteen years of age, while for women the legal possibility of establishing a

²⁸ *Dudgeon v. UK* paragraph 52.

²⁹ *Dudgeon v. UK* paragraph 62.

³⁰ Henriette Jacobien Liesker, “Caught in a Balancing Act, The European Court of Human Rights and the Road to Recognition for Sexual Minorities,” *Oslo Law Review* 4, no. 3 (2017): 172–94, <https://doi.org/10.18261/issn.2387-3299-2017-03-04>. P. 175-176.

³¹ *Norris v. Ireland*, No. 10581/83 (European Court of Human Rights October 26, 1988).

³² *Modinos v. Cyprus*, No. 15070/89 (European Court of Human Rights March 25, 1993).

³³ *Norris v. Ireland* paragraph 44.

³⁴ *Sutherland v. UK*, No. 25186/94 (European Court of Human Rights March 21, 2001).

similar relationship was tied to reaching the age of sixteen.

But the importance of the *Sutherland* case is much more complex than this. For the very first time the Commission put in discussion the issue of discrimination based on sexual orientation, arguing that Articles 8 and 14 of the Convention should be examined together. Pursuant to Article 14 of the Convention, the enjoyment of the stated rights and freedoms shall not be subject to any discrimination based on, for example, gender, race, color, language, religion, political or other opinion, national or social origin, membership of a national minority, property status, birth or other status. In other words, discrimination based on sexual orientation or identity does not appear as an *expressis verbis* prohibition. According to the ECtHR, this kind of discrimination should be classified under ‘gender’ or ‘other statuses’, since the purpose of the Convention is to be a ‘living tool’ and to provide appropriate legal remedies for current situations in society and in junction with the present case to prohibit all kinds of discrimination. Specifically, this meant that from this moment on, differences based on sexual orientation required particularly serious reasons, just like differences based on gender or race, for example.

Accordingly, in *Smith and Grady*³⁵, the same court condemned the exclusion of homosexuals from the military unconstitutional, while in the *ADT case*³⁶, the protection of Article 8 was extended to cases where the number of homosexual persons participating in private sexual activity is more than two³⁷.

6.1. Conclusions on this regard

It is a known fact that the Convention does not refer to ‘sexual orientation’ or ‘gender identity’, let alone define it. As a result, the ECtHR's human rights protection role in the field of sexual rights was considered limited. From the point of view of the examined issue, the greatest difficulty is that the criteria of sexual orientation and gender identity are missing from the list of prohibited grounds of discrimination, which are stated in Article 14 of the Convention. Otherwise, equal treatment is guaranteed regardless of gender, race, color, language, religion, political or other opinion, national or social origin, belonging to a national minority, financial status, birth, or other status.

This explains the fact that until the *Dudgeon* case, all complaints regarding sexual minorities were rejected, and even in the justification of the so-called first line of cases, i.e., the *Dudgeon*, *Norris* or *Modinos* cases, the court declares a violation of Article 8, while in case of article 14 does not reach the same conclusion.

Within this apparent legal vacuum, the Court must derive such safeguards from the extant corpus of human rights as implicit within it. In effect, this means that the Court must strike a balance between, on the one hand, interpreting the Convention creatively when faced with complaints relating to sexual orientation and gender identity issues and, on the other hand, not overstepping its boundaries by appropriating for itself a role as legislator. It is through such judicial creativity that the Court has been able to play a pivotal role in the progressive development of LGBT rights in contemporary Europe, albeit not an uncontested one.³⁸

7. Second line of cases

In the group of so-called second line of cases, I refer to those cases whose purpose is to fit the relations between same-sex couples into an institutionalized framework. The question of gay marriage first came to the table of the Strasbourg court in 2010. At that time, the majority³⁹ of the member states did not allow same-sex marriage, but most of them had some kind of legal framework for the

³⁵ *Smith and Gray v. UK*, No. 33985/96, 33986/96 (European Court of Human Rights December 27, 1999).

³⁶ *ADT v. UK*, No. 35765/97 (European Court of Human Rights July 31, 2000).

³⁷ Gábor Halmai and Gábor Attila Tóth, eds., *Emberi jogok*, Osiris Tankönyvek (Osiris Kiadó, 2008), p. 408.

³⁸ Liesker, “Caught in a Balancing Act, The European Court of Human Rights and the Road to Recognition for Sexual Minorities.”, p. 174.

³⁹ Only in six Member States was it permitted, such as Netherlands, Belgium, Spain, Sweden, Norway, and Portugal.

institutional acceptance of their relationship, which is known as a registered partnership.⁴⁰ At the same time, several member states wanted to tighten their domestic provisions on marriage, raising to a constitutional level the definition of marriage as a union between a man and a woman, including Hungary, Bulgaria, Latvia, Lithuania, the Republic of Moldova, Montenegro, Poland, Serbia, Slovakia, Ukraine and Macedonia.⁴¹

On the background of a divided Europe in this matter, the Court first dealt with the issue of same-sex marriage in the *Schalk and Kopf v. Austria case*⁴², when it concluded that a registered partnership can replace the possibility of same-sex marriage.

Due to the facts of the case, the plaintiffs, an Austrian couple, applied to the Austrian authorities for permission to marry. As Austrian law only allowed marriages between persons of different sexes, their request was rejected. According to the Austrian Constitutional Court, neither current laws nor international conventions obliged Austria to expand the concept of marriage. In the meantime, in 2010, the Austrian parliament passed the Law on Registered Partnerships, which, however, maintained the distinction between same-sex and opposite-sex couples in some matters, such as adoption or artificial insemination.

In the interpretation of ECtHR, same-sex relationships are directly affected by the interpretation of two articles of the Convention. Article 8, which guarantees respect for private and family life, and Article 12, which guarantees the right to marry and found a family. In addition to the two mentioned articles, Article 14 of the Convention - concerning the prohibition of discrimination - is also applicable.

Although according to the decision, the absence of same-sex marriage does not violate Article 12 of the Convention, it is important that the Strasbourg court changed its position on marriage, when affirming: “Regarding Article 9 of the Charter⁴³, the Court will no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of different sexes. Consequently, it cannot be said that Article 12 is inapplicable to the applicants’ complaint. However, as matters stand, the question whether to allow same-sex marriage or not is left to regulation by the national law of the Contracting State.”⁴⁴

The ECtHR notes that since the *Mata Estevez v. Spain*⁴⁵ case, the social perception of same-sex couples has developed rapidly in many member states. Since then, a considerable number of member states have legally recognized same-sex couples. Accordingly, “in light of this development, it would be artificial to maintain the position that unlike heterosexual couples, the concept of “family life” contained in Article 8 of the Convention does not include same-sex couples. Therefore, the relationship of the applicants, as a same-sex couple living in a stable *de facto* relationship, falls under the concept of family life, just as it would in the case of opposite-sex couples in the same situation.”⁴⁶ Nevertheless, because of the lack of European consensus⁴⁷, the question of whether to allow same-sex couples to enter into a relationship recognized by law belongs to the wide discretion of the member states.

However, it also found that under Article 12, together with Articles 14 and 8, “states remain empowered” to limit marriage to opposite-sex couples, and that in the case of same-sex relationships, the development of alternative means of legal recognition falls within the discretion of the participating states.⁴⁸

⁴⁰ For instance, Andorra, Austria, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Iceland, Luxembourg, Slovenia, Switzerland and the United Kingdom.

⁴¹ Liesker, “Caught in a Balancing Act, The European Court of Human Rights and the Road to Recognition for Sexual Minorities.”, p. 193.

⁴² *Schalk and Kopf v. Austria*, No. 30141/04 (European Court of Human Rights June 24, 2010).

⁴³ *Charter of Fundamental Rights of The European Union*, adopted in 2000 and came into force in December 2009 along with the Treaty of Lisbon.

⁴⁴ *Schalk and Kopf v. Austria* paragraph 61.

⁴⁵ *Mata Estevez v. Spain*, No. 56501/00 (European Court of Human Rights, 10.05.2001).

⁴⁶ *Schalk and Kopf v. Austria* paragraph 93.

⁴⁷ Alina Tryfonidou, “EU gender politics and law: the case of minorities” in Rossana Deplano et al. (eds.) *Interdisciplinary Research Methods in EU Law. A Handbook*. (2024) Cheltenham: Edward Elgar Publishing, 20–38, p. 20, ISBN 9781802205848.

⁴⁸ *Schalk and Kopf v. Austria* paragraphs 94, 108–109.

As a result of introducing registered partnerships in 2010, Austria avoided being condemned by the courts on the ground Articles 8 and 14 of the Convention.

As expected in this case, several members of the judicial council expressed parallel or partial dissenting opinions. In their parallel opinions, judges Malinverni and Kovler shared the position of the majority but considered it necessary to voice their disagreement regarding the changed interpretation of Article 12. In their opinion, the 1969 *Vienna Convention on the Law of Treaties* should be the guiding principle for the interpretation of the provisions of the ECHR, more specifically: the literal interpretation should be considered the main rule. Accordingly, the definition given by Article 12 cannot be extended to marriage between two people of the same sex.⁴⁹

Three judges⁵⁰ disagreed with the court's conclusion that there was no violation of the Convention by interpreting Articles 8 and 14 together. According to them, the court should have followed its previous jurisprudence regarding the interpretation of the articles, i.e. after the court recognized that the applicants' situation falls within the scope of 'family life' protected by Article 8., it should have considered whether there is a 'strong reason' for different treatment of same-sex couples.⁵¹ The dissenting opinion concluded that there was no 'compelling reason' justifying the different treatment of same-sex couples, thus Austria violated Articles 8. and 14. of the Convention.

In the case of *Vallianatos and Others v. Greece*⁵², several applicants applied to the ECtHR for a declaration that a Greek civil partnership law that came into force in 2008 violated their rights under Articles 8. and 14. of the Convention, as it only applied to opposite-sex couples. The Greek government's justification reflects the classical religious theory, that is, that the parties in same-sex relationships are not capable of having children.

Referring to the *Schalk and Kopf* case, the Strasbourg court recalls that the cohabitation of same-sex couples is considered a family in the same way as in the case of opposite-sex couples, so no distinction can be made between them. Based on these, the ECtHR finds that the Greek law is in collision with Article 8. and Article 14. of the Convention. It found that the Greek government did not provide an adequate explanation as to why it excludes same-sex couples from forming a legally recognized partnership open to opposite-sex couples.

In this case, however, the court also found that the *plaintiffs' complaint does not refer to a general obligation* on the Greek state to ensure some form of legal recognition of same-sex relationships, but to the distinction it makes between same-sex and opposite-sex couples, which in the spirit of the Convention is considered discrimination based on sexual orientation and as such is not allowed.

7.1. Conclusion regarding second line of cases

As I have already mentioned above, according to the *Schalk and Kopf* case, a registered partnership can replace the possibility of same-sex marriage, i.e. same-sex couples can also enjoy the right to the protection of family life guaranteed in Article 8. of the Convention, and not only the right to privacy. This shifts the focus from the individual to the couple, which in turn can serve as a basis for the recognition of other practical rights, such as the right to inherit, the right to health insurance, having children, artificial insemination, or adoption.⁵³

In the *P.B and J.S v. Austria*⁵⁴ case, the Court ruled that it constitutes prohibited discrimination

⁴⁹ Vasily Lukashevich, "Egy új európai család – Az Emberi Jogok Európai Bíróságának ítélete Schalk és Kopf kontra Ausztria esetben," *Fundamentum*, no. 3 (2010): 118–24, p. 119.

⁵⁰ Rozakis, Spielmann and Jebens judges.

⁵¹ Lukashevich, "Egy új európai család – Az Emberi Jogok Európai Bíróságának ítélete Schalk és Kopf kontra Ausztria esetben," p. 120.

⁵² *Valliantos and others v. Greece*, No. 29381/09, 32684/09 (European Court of Human Rights July 11, 2013).

⁵³ Emese Florian, *Dreptul familiei. Căsătorie. Regimul matrimonial. Filiația* (2022) Bucharest: C. H. Beck, p. 51, ISBN 978-606-18-1225-7; Bujorel Florea, Vlad Teodor Florea, *Dreptul familiei și actele de stare civilă* (2019) Bucharest: Hamangiu, p. 38, ISBN 978-606-27-1260-0; Cristian Mareș, *Dreptul familiei* (2022) Bucharest: C.H. Beck, p. 51, ISBN: 978-606-18-1151-9; Cristina Codruța Hageanu, *Dreptul familiei* (2017) Bucharest: Hamangiu, p. 28-29, ISBN 978-606-27-2437-5.

⁵⁴ *P.B and J.S v. Austria*, No. 18984/02 (European Court of Human Rights July 22, 2010).

based on sexual orientation if the insurance provided by an employer does not cover same-sex partners. The interesting thing about the case is that the judicial panel declared a violation of Article 8. of the Convention and the first Protocol in this case with a *unanimous* decision.

Somehow a similar decision was reached in the case of *Kozak v. Poland*⁵⁵, regarding the succession of the tenancy rights of the deceased partner, or in the case of *Pajic v. Croatia*⁵⁶, regarding the same-sex partner's right of residence due to family reasons.

In the *E.B. v. France*⁵⁷ case, the ECtHR ruled that the refusal of adoption based on sexual orientation violates Articles 8 and 14 of the Convention. While in *Gas and Dubois v. France*,⁵⁸ he reached the same conclusion regarding the simple possibility of adoption for same-sex couples.

8. Third line of cases

Shortly after the *Schalk and Kopf* and *Valliantos* cases, the ECtHR reconsidered the above position and in the *Oliari and others v Italy*⁵⁹ found that the silence, or more precisely the absence of provisions that would serve to institutionalize the relationship of same-sex couples, is not compatible with the provisions of Article 8 of the Convention. In ruling so, the ECtHR significantly expanded the scope of Article 8 by setting a precedent which now states that member states have a *positive obligation to provide some form of legal recognition of same-sex relationships*.

The decisions made in the *Oliari case*, as well as those that followed, belong to the so-called *third line of cases*, in which the ECtHR draws attention to the fact that the member states must also ensure an *institutional recognition*, similar to marriage, for homosexual couples.

The Court did not condemn Italy for the lack of the possibility of marriage, but for the lack of the possibility of establishing any recognized, registered relationship. So, the source of the legal dispute is the lack of recognition and legal protection of the existing homosexual relationship, as well as the lack of ensuring the rights arising from such relationships.

Considering all the circumstances of the case, the ECtHR found that Italy violated its obligation to respect private and family life arising from Article 8 of the Convention, when it did not allow same-sex couples to establish relationships in any form, within a legal framework.

In addition, relying on previous judgments, such as the *Schalk and Kopf*, *Vallianatos cases* - where it granted family life status to cohabiting same-sex couples - the Court made further progress in extending family life to non-cohabiting same-sex couples as well.

From the plaintiffs' point of view, the most important aspect of the decision is that, as if in compliance with the ECtHR's decision, Italy passed a bill in 2016 on same-sex partnerships.

In the case of *Orlandi and others v. Italy*⁶⁰, the plaintiffs complained that the Italian state refused to recognize their legally contracted marriage in another country.

The ECtHR reiterates that according to Article 12 of the Convention, as well as Article 14 read in conjunction with Article 8, states are still free to restrict the marriage of different-sex couples. Nevertheless, the Court states that same-sex couples need legal recognition and protection of their relationship. In fact, the ECtHR has already concluded, in the *Oliari case*, that the Italian government had exceeded its discretion and failed to fulfill its positive obligation to ensure that the applicants had a special right to recognize and protect their same-sex relationships.⁶¹

According to the court's interpretation, while the basic purpose of Article 8 is to protect the individual against the arbitrary measures of the authorities, it is also the source of the positive obligation inherent in the actual '*respect*' of family life. However, the boundaries between the state's positive and negative obligations under this provision cannot be precisely defined or demarcated. A

⁵⁵ Kozak v. Poland, No. 13102/02 (European Court of Human Rights February 3, 2010).

⁵⁶ Pajic v. Croatia, No. 68453/13 (European Court of Human Rights February 23, 2016).

⁵⁷ E.B. v. France, No. 43546/02 (European Court of Human Rights January 22, 2008).

⁵⁸ Gas Dubois v. France, No. 25951/07 (European Court of Human Rights March 15, 2012).

⁵⁹ Oliari and others v. Italy, No. 18766/11 and 36030/11 (European Court of Human Rights 21.10 2015).

⁶⁰ Orlandi and others v. Italy, No. 26431/12, (European Court of Human Rights 14.12 2017).

⁶¹ Orlandi and others v. Italy paragraph 192.

fair balance between the interests of the individual and the community must be considered; and thereby the state enjoys a certain discretionary power.⁶²

As for the legal recognition of same-sex couples, according to the conclusions of the ECtHR, since the ruling in the *Schalk and Kopf case*, it has been provided in several member states. In fact, at the same time as the judgment in the case of *Oliari and others*, most member states have already accepted legal recognition of same-sex couples and provided adequate protection.⁶³ On the contrary, the same cannot be said about the official recognition of same-sex marriages concluded abroad. There is no consensus in Europe regarding this. The lack of consensus confirms that states should in principle have a wide margin of discretion in deciding whether to register marriages concluded abroad as marriages.⁶⁴

Nevertheless, as a result of refusing to register same sex marriages concluded abroad in any form, the plaintiffs' relationship did not receive any legal protection. And this cannot be justified by any social interest. The Italian state did not find a fair balance between the competing private and perceived social interests, as it did not ensure that the applicants had a specific legal framework for the recognition and protection of their same-sex relationships.⁶⁵ This consists in violation of Article 8 of the Convention.

In this case too, the opinion of the judicial council was divided, but only one parallel and two opposing opinions were formulated. This also proves that some sort of consensus is emerging among the members of the judicial councils.

Along similar lines of reasoning, in 2023, the ECtHR declared that Article 8 of the Convention had been violated in *Fedotova and others v. Russia*⁶⁶, *Buhuceanu and others v. Romania*⁶⁷ or *Maymulakhin and Markiv v. Ukraine*⁶⁸.

In the *Fedotova case*, the ECtHR boldly states that, given that particularly important aspects of the *personal and social identity of same-sex persons* are at stake and that a clear, continuous trend can be observed in the states of the Council of Europe in the direction that homosexual couples are provided legal recognition and protection of their relationship, the discretionary power of the member states is significantly reduced.⁶⁹ However, the room for discretion is much greater if deciding on a specific form of legal recognition and protection, which clearly does not have to take the form of marriage.

Against the defenses of the Russian state, which relied on the fact that the institutional acceptance of the relationship of same-sex couples contradicts the traditional family theory, the Strasbourg court took a clear stand. According to the ECtHR, there is no basis in the case for the assumption that the legal recognition and protection of same-sex couples living in a stable and committed relationship can harm traditionally formed families or threaten their future or integrity. In fact, the recognition of same-sex couples does not in any way prevent different-sex couples to marry or start a family according to their conception of the concept. In a broader sense, securing the rights of same-sex couples does not in itself mean weakening the rights granted to other persons or other couples.⁷⁰ In a similar way, it rejected the arguments of the Russian authorities regarding public scandal and preventing the development of homosexual tendencies in children.

In the *Buhuceanu and Maymulakhin* cases, the ECtHR, in fact, reiterated the above set down argumentation.

⁶² Orlandi and others v. Italy paragraph 193.

⁶³ Orlandi and others v. Italy paragraph 204.

⁶⁴ Orlandi and others v. Italy paragraph 205.

⁶⁵ Orlandi and others v. Italy paragraphs 208–210.

⁶⁶ Fedotova and others v. Russia, No. 40792/10, 30538/14 and 43439/14) (European Court of Human Rights January 17, 2023).

⁶⁷ Buhuceanu and others v. Romania, No. 20081/19 (European Court of Human Rights 23.05 2023).

⁶⁸ Maymulakhin and Markiv v. Ukraine, No. 75135/14 (European Court of Human Rights June 14, 2023).

⁶⁹ Fedotova and others v. Russia paragraph 187.

⁷⁰ Fedotova and others v. Russia paragraph 212.

9. Final conclusions

An analysis of the Court's almost five decades jurisprudence on gender identity and sexual orientation shows that, step by step, the Court helped to ensure the rights of sexual minorities. It was not happening in a continuous way, but with pauses and careful balancing. In all cases, it has shaped its legal practice in such a way as to keep up with the ongoing social changes.

The majority of the Court's rulings dealing with same-sex sexuality have been decided from a perspective centered on the right to respect for private life. In fact, the Court explicitly tended to base these decisions on the belief that sexuality is an important part of an individual's private life. Nonetheless, the scope of the right to a private life in Article 8 is much wider than the traditional conception of privacy.⁷¹ As the ECtHR stated in the *Niemietz v. Germany* case, it does not consider it necessary to define private life, but it would be too restrictive to limit this concept to the 'inner circle' in which the individual can live his personal life as he pleases and to completely exclude this circle from the external world. Respect for privacy must include, to some extent, the establishment and extension of human relationships.⁷²

In the *Dudgeon case*, the court considered *homosexuality to be a part of personal identity and as such a part of privacy*. So far, the Court has not dealt with the sexual identity of the individual.⁷³ In the *Dudgeon case*, it not only urged the decriminalization of homosexuality, but also paved the way for the recognition of the rights of other sexual minorities. Thus, in the *Goodwin case*, the ECtHR already defines a minimum standard of protection for transsexuals, but at the same time imposes a positive obligation on member states to ensure that transgender people have the right to decide whether they wish to have a full gender transition or not.

While until the beginning of the 2000's, cases related to individual sexual rights have been approached by the ECtHR, and in which cases the legal basis for the vast majority of decisions was provided by Articles 8 and 14 of the Convention, the 20th century brought *new types of cases* and, accordingly, a new approach to the jurisprudence of the ECtHR. *The second line cases examine same-sex relationships not only from the point of view of sexual identity and the right to privacy, but also from the point of view of social bonds*.

In this respect, the ECtHR gradually recognized the right of homosexual persons to openly recognize and accept their sexual identity⁷⁴, and then the right to promote their sexual identity.⁷⁵

From 2002 the institutionalization of relationships between homosexual persons was also on the agenda. Concurrent with the social changes that have been happening in Europe, the Court has gradually shifted its focus from private to family matters. This made the practical interpretation of Articles 12 and 14 of the Convention inevitable. Thirty years after the *Dudgeon* ruling, which recognized and protected homosexuality as part of sexual identity and, as such, private life, and seven years after the *Karner* decision, which implicitly suggested the existence of family life in same-sex relationships, the *Schalk and Kopf* case, the ECtHR definitively stated that same-sex couples undoubtedly enjoy the protection of family life within the meaning of Article 8.⁷⁶

Family life is now freed not only from the requirement of marriage, but also no longer depends on the gender of the persons entering it. Thus, the distinguishing characteristic of the family is the relationship between two persons, whether of the same or opposite sex, based on continuous and lasting emotional bonds, sexual relations, and the sharing of a common life.⁷⁷

From there, it was only one step to the adoption of the third line cases, in which they no longer refer only to the negative obligations of the state and authorities, i.e. not to interfere in the private and family life of individuals, but also to *the duty* to protect the individual from any type of interference

⁷¹ Damian A. Gonzales-Salesberg, *Sexuality and Transsexuality Under the European Convention on Human Rights – A Queer Reading of Human Rights Law*, 1st ed. (Portland: Hart Publishing, 2019), 62.

⁷² Gonzales-Salesberg, 62.

⁷³ Gonzales-Salesberg, 64.

⁷⁴ *Alekseyev v. Russia*, No. 4916/07 (European Court of Human Rights October 21, 2010).

⁷⁵ *Bayev v. Russia*, No. 67667/09, 44092/12, 56717/12 (European Court of Human Rights June 20, 2017).

⁷⁶ Lukashevich, "Egy új európai család – Az Emberi Jogok Európai Bíróságának ítélete a Schalk és Kopf kontra Ausztria esetben," 121.

⁷⁷ Lukashevich, 123.

that is not justified under the Convention, imposing positive obligations towards the member states. In summary, the conclusion can be drawn that the 20th century brought great advances in the field of protecting the rights of homosexuals, and LGBTQI persons, in general. Although there was a great deal of time till the *Dudgeon* case was adopted, after that the ECtHR began to show a greater degree of openness towards the issue. Despite this, a long deliberation was necessary for the Court to boldly express an opinion in the *Schalk and Kopf* case. Almost 25 years passed between the two judgments, which proves that the ECtHR tried to manage the situation as cautiously as possible and wanted to wait with the *Schalk* decision for sufficient social maturity. After the *Schalk* ruling, things were evaluating rapidly. The temporal distance between the second and third line of cases is small, but this can also be explained by the rapid change in social conditions.

These social relations have been in a continuous dynamic since then, which the ECtHR cannot keep up with. Looking at the jurisprudence of recent years, the Court has not made another breakthrough judgment since the *Oliari* case, but it consistently applies the basic principles laid down so far.

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