



## Reflection on the recognition of marriage between persons of the same sex in the light of the ECtHR Decision in the case of “Buhuceanu and Others v Romania<sup>1</sup>”

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**Abstract:** The issue of marriage between persons of the same sex has frequently sparked both emotional and political debates between supporters and opponents, and the debates related to unions concluded between persons of the same sex continue very strongly. Analyzing these aspects, it can be observed that in the Convention for the Defense of Human Rights and Fundamental Freedoms no right is guaranteed regarding marriage between persons of the same sex, but nevertheless, an attempt is made to build a right of legal recognition for couples formed by people of the same sex. The European Court of Human Rights highlighted that it is the right of the member states to protect marriage and the family, this being done with the “specific realities of each state”. In relation to the Romanian legislative framework, we underline the fact that the only form of union accepted by Romanian law is the traditional marriage, which is concluded between men and women. Or, we raise the question, if the Convention for the Protection of Human Rights and Fundamental Freedoms does not guarantee any right regarding same-sex marriage, and the European Court of Human Rights highlights the fact that every state is obliged to protect marriage and the family in relation to the realities and own beliefs, why does the latter force the Romanian state to go over constitutional beliefs and values? In order to be able to make legal arguments on this matter, I believe that we must not give up the fundamental values of a state and force citizens to give up their traditional values and culture. I am of the opinion that before promoting any action, there must be a balance between traditional values and the law, and the legislative framework must be harmonized with the specific realities of each state.

<sup>1</sup> <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%222002-14087%22%7D>).

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## 1. Introduction

After at the beginning of 2024, the ECHR condemned Romania for violating art. 8<sup>1</sup> in the “Buhuceanu and Others v Romania” case, the topic of same-sex marriage and the recognition of same-sex relationships gained new importance, encouraging the change of the natural family and traditional values.

In order to be able to discuss the subject in this case, we should refer mainly to national legislation and traditional values. The topic of same-sex marriage is still considered by many people to be a sensitive topic, which can lead to possible conflicts between “tradition” and “modern”, going far out of the comfort zone.

Although this phenomenon is increasingly encouraged internationally, I believe that the notion of “marriage” and the notion of “family” should remain that element of tradition, and the authorities should put more emphasis on protecting the beliefs, values and traditions of the country.

Partnerships between people of the same sex are not an element of novelty, and more than that, the people who opted for such a partnership, I believe that they were respected in their privacy, and their acceptance by other people, was the more often a tacit one, as it is not comfortable for “traditional” people to easily embrace this reality.

So, returning to tradition, what is marriage and family?

## 2. ECtHR Decision in the “Buhuceanu and Others v Romania” case

“In the preamble of the judgment it is stated that “The couples had been living together for a different period of time when they notified their local registration offices (Civil Status Service) of their intention to marry. Those requests were rejected as contrary to articles 271 (“Marriage is concluded between a man and a woman”) and 277 § 1 (“Marriage between persons of the same sex is prohibited”) of the Civil Code.”<sup>2</sup>

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<sup>1</sup> Art. 8 of the ECHR provides the “right to respect for private and family life”. [https://prd-echr.coe.int/documents/d/echr/Convention\\_ROM](https://prd-echr.coe.int/documents/d/echr/Convention_ROM).

<sup>2</sup> <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%5B%22002-14087%22%5D%7D>.

In relation to article 8 regarding the right to respect for private and family life and article 14 that which regulates the prohibition of discrimination<sup>1</sup>, the applicants complained that, since it was not possible in any way to enter into any type of union legally recognized in Romania, they had no other legal way to protect their relationships. In this regard, it is stated that in the 2019-2020 interval, 21 applications were submitted to the European Court of Human Rights.

Regarding the Court's decision, regarding art. 8 of the European Convention on Human Rights, at 81<sup>th</sup> and 82<sup>nd</sup> point, The Court considered that member states are required to provide a legal framework that allows the recognition and adequate protection of the relationship of same-sex couples. He referred in this connection to the Grand Chamber judgment of *Fedotova and others v. Russia* (no. 40792/10 and 2 others) and the clear trend underway in the Member States. States had some discretion ("margin of appreciation") as to the form of recognition and the type of protection granted."<sup>2</sup>

According to Romanian law, the only form which describes family or marriage is legally recognized, the marriage between men and women. It had been attempts to change this legal situation that failed in the Romanian Parliament.

The applicants, like other same-sex couples, were unable to access social programs and civil rights available under the law to married couples and access to various areas such as property, inheritance, etc. The Court supported the Government's argument that these rights could be acquired through private contractual agreements, but found the argument lacking in detail and, in any case, had already been rejected in the Court's case law.

The Court ruled that the negative attitudes of heterosexuals may not outweigh the plaintiffs' interests in having their relationships recognized, and allowing same-sex unions to be recognized would not affect the institution of marriage because opposite-sex couples can still marry.

In general, no argument invoked by the Government to justify the legal restriction on heterosexual unions could outweigh the applicants' interest in having recognized relationships. Related to this aspect, a violation of Article 8 of the Convention was found.

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<sup>1</sup> European Convention on Human Rights, accessible on <http://ier.gov.ro/wp-content/uploads/2018/11/Conven%C5%A3ia-pentru-ap%C4%83rarea-drepturilor-omului-%C5%9Fi-a-libert%C4%83%C5%A3ilor-fundamentale.pdf>.

<sup>2</sup> <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22002-14087%22%7D>).

So, Romania has the obligation to recognize and protect relationships between same sex couples, and the form and content of the protection granted remains at the discretion of the state.

### **3. Overview of Family Law and Marriage**

According to the science of law, the “family” is a biological reality because the union is achieved between a man and a woman, as well as through procreation, social because it represents the framework of the community of life and interests of those who compose it, united by the moral essence of marriage and by descent in - a unique model of human and legal solidarity thanks to its recognition and protection by legal norms (Emesse, 2021).

Marriage, both from a religious and legal point of view, represents an institution of great importance, being also considered by the Declaration of the Rights of Man and Citizen, a secular institution (Emesse, 2021).

Analyzing the legislative framework, according to art. 271 Romanian Civil Code, “Marriage is concluded between a man and a woman by their personal and free consent.”, and the provisions of art. 277 para. (1) Romanian Civil code, firmly prohibit marriage between persons of the same sex. Also, in the light of art. 266 para. (5) Romanian Civil Code, “engagement, as a mutual material promise, can only be concluded between a man and a woman”.

The Constitution of Romania provides in art. 48 para. (1) “The family is based on freely consented marriage between spouses, on their equality and on the right and duty of parents to ensure the growth, education and training of children.”

We observe the year 2001, as a year of maximum importance regarding the destabilization of the legislative framework through the legalization by the Netherlands of marriage between persons of the same sex, followed by other states and through the repeal of art. 200 of the Criminal Code of the “crime concerning sexual life - sexual relations between persons of the same sex”.<sup>1</sup>

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<sup>1</sup> In the old Criminal Code, sexual relations between people of the same sex, committed in public or if they caused a public scandal, were punishable by imprisonment. It was also punishable by imprisonment for the act of an adult having sexual relations with a minor of the same sex.

This legislative change, regarding the decriminalization of homosexuality, I believe encouraged more and more LGBTIQ+ couples, and the Romanian legislator forgot to protect their traditional values.

Reviewing the old normative acts regarding marriage and the family, we notice that there was no emphasis and there was not even the intention to formulate an express provision regarding the prohibition of marriage between persons of the same sex, although homosexuality existed on throughout history, becoming notable in many fields such as artists, scientists, military, etc.<sup>1</sup>

“With the publication of his memoir, Gleed’s “confirmed bachelor” status caused concern for his memoir editor, so he agreed to create a fictitious girlfriend named Pam. She was a surprise to his family and friends, but Gleed explained that she didn’t exist and that he introduced her because “readers like a splash of romance”. What his family probably never knew was that Gleed was gay and could not be open about his sexuality and talk about his lovers. It wasn’t until the 1990s, when one of her lovers, Christopher Gotch, was interviewed for BBC television that the truth came out. (...) Gotch explained that no one ever talked about same-sex relationships because they were against the law. In the armed services, offenses were court-martialled, and servicemen could be expelled if discovered. It was widely believed that homosexuality would destroy morale, which Gotch condemned as “a load of rubbish”. (...)”<sup>2</sup>

Regarding the fact that “It was widely believed that homosexuality would destroy morals”, I believe that this consideration is still relevant, because by accepting and encouraging same-sex marriage, protecting same-sex relationships, we forget the true values and beliefs.

After the increase in the number of states that legalized marriage between same sex couples, and at the national level several associations began to promote this phenomenon, the authors of the current Civil Code designed some rules aimed at eliminating the extensive interpretation of the provisions of art. 48<sup>3</sup> para. (1) of the Constitution, such as: establishing the meaning of the term “spouses”, establishing the right of men and women to marry, the prohibition of marriage between persons

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<sup>1</sup> <https://www.historyextra.com/period/second-world-war/on-the-same-side-homosexuals-during-the-second-world-war/>.

<sup>2</sup> <https://www.historyextra.com/period/second-world-war/on-the-same-side-homosexuals-during-the-second-world-war/>.

<sup>3</sup> The Constitution of Romania. European Convention on Human Rights, updated 14<sup>th</sup> edition on February 15<sup>th</sup> 2021, Rosetti International Publishing House, Bucharest, 2021, p. 27.

of the same sex and the absolute nullity of marriage between persons of the same sex.

Unfortunately, the legislative gap still exists, the Romanian legislator not wanting, perhaps, to strongly defend its traditional values. We remind you of the 2018 National Referendum for the revision of the Constitution, in the sense of amending art. 48 para. (1), by replacing the expression “between spouses” with the expression “between a man and a woman”<sup>1</sup>, a referendum that failed, not having reached the validation threshold.

According to art. 12 of the European Convention on Human Rights, “Starting with the age established by law, men and women have the right to marry and found a family according to the national legislation that regulates the exercise of this right.”<sup>2</sup>, and to art. 16 para. (1) of the Universal Declaration of Human Rights „Starting from reaching legal age, men and women, without any restrictions regarding race, nationality or religion, have the right to marry and found a family. They have equal rights to contract the marriage, during the marriage and to dissolve it.”<sup>3</sup>

Regarding to the European Court of Human Rights, the condition of gender difference of future spouses does not contravene art. 12 of the Convention which enshrines expressis verbis, the right of men and women, starting from marriageable age, to marry and found a family. The developments registered in the legislation of some European states, either by opening up to same-sex marriage, or by institutionalizing some forms of union close to marriage in terms of effects, accessible to same-sex couples, do not justify the abandonment of the classic conception of marriage, nor the expansion the protection of art. 12 on homosexual rights (Emesse, 2021, p. 48).

Thus, in relation to the previously mentioned, traditional marriage is concluded between a man and a woman, being the only form of union recognized by law.

Related to the normative acts that regulate marriage and the family, it is unequivocally clear that the family represents the “natural element of society”, it must be normal and natural, and the legislator should protect the natural family by any means.

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<sup>1</sup>[https://ro.wikipedia.org/wiki/Referendumul\\_de\\_modificare\\_a\\_articolului\\_48\\_din\\_Constitu%C8%9Bia\\_Rom%C3%A2niei](https://ro.wikipedia.org/wiki/Referendumul_de_modificare_a_articolului_48_din_Constitu%C8%9Bia_Rom%C3%A2niei).

<sup>2</sup> The Constitution of Romania. European Convention on Human Rights, updated 14th edition on February 15th 2021, Rosetti International Publishing House, Bucharest, 2021, p. 83.

<sup>3</sup> [https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR\\_Translations/rum.pdf](https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR_Translations/rum.pdf).

In this sense, the European Court of Human Rights ruled in the case of *Chapin et Charpentier v. France* that the right of same-sex couples to marry is not a right within the meaning of the Charter of Fundamental Rights of the European Union and it is not mandatory to be implemented in the legislation of the member states.”<sup>1</sup>

#### **4. Homosexuality - Sexual Minority**

In the light of the ECtHR Decision mentioned above, it is unequivocally clear that the protection of same-sex relationships is a complex and controversial issue, in which Romania must issue a final point of view. The Romanian legislator must identify a reliable legislative solution that must relate to both moral and traditional elements and international standards.

As a sexual minority, homosexuality is a sexual orientation characterized by aesthetic, romantic or sexual attraction to a person of the same sex. Men with such inclinations are called “homosexuals”, while women are known as “lesbians”, or generically, since the second half of the 20<sup>th</sup> century, the term “gay” is known, following the events of Stonewall.<sup>2</sup>

In the opinion of Prof. Dr. Univ. Ilie Bădescu, homosexuality “is an “exclusive” and “stigmatized” minority. From this point of view, this stigma cannot be annulled by law, precisely because it is a social phenomenon. Defenders of homosexuality hope that this stigma could be eradicated through schools, the military and the Church. That is why they demand that homosexuality be admitted in schools, in the army and be admitted by the Church. And indeed, homosexuality could come out from under the public stigma, if the highest levels of “public morality”, i.e. of “common conscience”, i.e. Education, the military spirit and the Church (the highest institution) would admit it and would define it as a “natural phenomenon” (in accordance with nature) and “usual” (non-contradictory with the norm and tradition, with its morals and customs, etc.). So, if the law would positively sanction homosexuality, it could not, by doing so, eradicate its public stigma, precisely because the legal law has no effectiveness if it is contrary to morals and religion, respectively the community spirit. Where the population rejects homosexuality, in proportion to 90%, the law cannot make it accepted and, as such, homosexuality will remain a “stigmatized minority” (Bădescu, 2020).

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<sup>1</sup> [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-163436%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-163436%22]}).

<sup>2</sup> <http://rictornorton.co.uk/though23.htm>.

Why has the sexual minority gained momentum, is the question that appears perhaps, on the lips of several people?

As I mentioned in the first part of this article, this identity has been known since ancient times, considering that it gained momentum with the 19th century, when there began to be a public recognition of this homosexual inclination.

Later, there were social movements in various European countries in 1950, or the New York social movement in 1969, also known as the “Stonewall Uprising”<sup>1</sup>. Throughout history, we remember that in the 1980s the first homosexual partnerships were solemnized in the Netherlands, and in 1997 it became the first country to legalize homosexual marriages.

Lately, the LGBT movements, which are the subject of numerous conflicts in society, have gained momentum.

From a religious point of view, the Spokesman of the Romanian Patriarchate, Vasile Bănescu, declared that homosexuality “will never be accepted in Orthodox Christianity, at least. It is not Catholic Christianity, I think, that poses the problem of accepting homosexuality, but the societies in which this Christianity exists. (...)”<sup>2</sup>

Referring to the Vatican’s announcement where it was mentioned that Roman Catholic priests can officiate blessings of same-sex couples, we note that the attitude of today’s religions varies.

Let’s remember that the Bible vehemently condemns homosexuality, and if we go back to Genesis, God created a male part and a female part.

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<sup>1</sup> [https://ro.wikipedia.org/wiki/Revolta\\_de\\_la\\_Stonewall](https://ro.wikipedia.org/wiki/Revolta_de_la_Stonewall).

<sup>2</sup> <https://www.digi24.ro/stiri/actualitate/vasile-banescu-homosexualitatea-nu-va-fi-niciodata-acceptata-in-crestinismul-ortodox-2655487>.



## 5. Conclusions

Given that homosexuality is becoming an increasingly mediatized topic, Romanian society, I believe, is not yet ready to embrace this change, so, in my humble opinion, I believe that demonstrations aimed at promoting LGBT activities.

I support the idea of not being discriminated in public or at work, however, I do not embrace the idea of encouraging the change of the natural order of the notion of family.

Although we often hear that individuals are influenced by religion, I believe there is still a difference between maintaining traditions and trying to forget true beliefs.

As long as the regulations of the Council of Europe do not require national governments to guarantee same-sex couples the right to marry, I am of the opinion that the harmonization of legislation must take into account mainly traditional values and laws related to the specific realities of each state.

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