

# ADOPTION – NORMATIVE REGULATIONS FROM HISTORICAL PERSPECTIVE THE PROBLEM OF ADOPTION IN HOMOSEXUAL COUPLES

*Mihaela-Ioana TEACĂ\**

## **Abstract**

*Along history, adoption has been considered as a legal and moral solution by which personal fulfillment and duty towards society could be achieved in full accordance with the generally accepted notion of family. The regulations that followed in this subject matter were in line with the historical realities, and the international norms related to this legal institution were adopted and ratified by our country as well. The fundamental rights and the best interests of the child have been the basis underlying the international conventions that established the guarantees for adoption. Even if the lack of blood connection could lead to the assumption that family ties would be vulnerable, the family's foundation requires love, mutual respect and trust. That is why in long standing couples the adoption of a child is only a strengthening of a viable, functional family life. The legal and moral issues that have lately emerged in the field of adoption are represented by the attempts of adoption by homosexual couples. In Romania, this problem is not current, because civil partnerships between same-sex persons are not legally recognized. In the states of the European Union, this issue is increasingly acute, hence the European Court of Human Rights has been appealed to in a few cases. In February 2017, the ECHR returned a positive resolution to a couple of Austrian homosexuals who considered themselves discriminated: the two women wanted to get the right to adopt the biological child of one of them. Austria has been convicted of violating the European Convention on Human Rights by differentiating between unmarried unisex couples and unmarried heterosexual couples if one of the partners wants to adopt the other's child. However, the Court maintained its own jurisprudence, establishing that limiting adoption to heterosexual married couples is not discriminatory where homosexual couples can marry.*

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## **1. It is possible to recognize homosexual marriage in Romania?**

Discussing the issue of adoption for homosexual couples in Romania is a real challenge. Given the attempt to introduce in the Romanian Constitution the definition of marriage as the union between a man and a woman, the likelihood of recognizing same-sex marriage is more remote and the adoption by these couples in the present normative situation is almost unrealizable.

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\* Assistant Professor, PhD., University of Oradea -Faculty of Law.

In support of this statement comes the citizens' initiative to amend the Constitution<sup>1</sup>. Thus, it was proposed to amend Article 48 of the Constitution as follows: "The family is founded on the freely agreed marriage between a man and a woman, on their equality and on the right and parental responsibility to ensure the growth, education and training of children." The distinction from the current wording of the same paragraph consists in replacing the phrase "between spouses" with the phrase "between a man and a woman," a proposal "initiated to remove any ambiguity that the use of the term "spouses" in the art. 48 para. (1) of the Constitution could create in defining the notion of "family", the relationship between "family" and the fundamental right of man and woman to marry and to found a family. It is shown that by replacing the term "spouses" with the phrase "man and woman" is ensured the precise and literal implementation of established expressions with the power of immutable guarantees for family protection, recognized as "the natural and fundamental element of society."

In the Decision 580 / 20.07.2016 of the Constitutional Court pronounced on the citizens' legislative initiative on the amendment of Article 48 paragraph 1 of the Constitution, the Court finds that it is not such as to cause the disappearance or removal, elimination or annulment of the institution of marriage. Also, all the guarantees of the right to marriage, as established in the constitutional text, remain unchanged. By replacing the phrase "between spouses" with the phrase "between a man and a woman", only an explanation is made regarding the exercise of the fundamental right to marriage in the sense of expressly establishing the fact that it is concluded between different biological sex partners, this being otherwise, the very original meaning of the text.

In 1991, when the Constitution was adopted, marriage was viewed in Romania in its traditional sense of union between a man and a woman. This idea is supported by the subsequent evolution of the legislation in the field of family law in Romania, as well as by the systematic interpretation of the constitutional norms of reference. Thus, Article 48 of the Constitution defines the institution of marriage in relation to the protection of children, both "from outside marriage" and "from marriage". It is, therefore, obvious that the biological component has underpinned the constitutional legislator's view of marriage, and it is undoubtedly regarded as a union between a man and a woman, while only in such a union, whether in marriage or outside, babies can be born.

The Court makes a distinction and notes that the provisions of Article. 48 of the Constitution establishes and protects the right to marry and **family relationships resulting from marriage** distinct from the right to family life,

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<sup>1</sup> Art. 48 Constitution - The family.

1) The family is based on the freely agreed marriage between spouses, on their equality and on the right and duty of parents to ensure the raising, education and training of children.

(2) The conditions for conclusion, termination and invalidity of marriage shall be established by law. Religious marriage can only be celebrated after civil marriage.

(3) Children outside marriage are equal before the law with those in marriage.

which has a wider legal content, consecrated and protected by art. 26 of the Constitution.<sup>2</sup> The Court notes that the initiative to review the Constitution is constitutional in relation to the provisions of art. 152 para. (2) of the Constitution, since it does not suppress the right to marriage or the guarantees of it.

We appreciate that by modifying Article 48 of the Constitution in the sense indicated by the initiators has the role of removing a certain legal ambiguity and of consolidating the family in its traditional sense as the freely consented union between a man and a woman, so that this amendment would not be prejudicial to constitutional rights and freedoms relating to the protection of intimate, family and private life.

The Civil Code is the norm which states in Article 258 that "The family is founded on the freely agreed marriage between spouses, on their equality, as well as on the right and duty of parents to ensure the raising and education of their children. The family has the right to protection from society and the state. The state is compelled to support, through economic and social measures, the conclusion of marriage, as well as the development and consolidation of the family. According to the meaning of the present Code, spouses are the man and the woman united by marriage.

In strengthening the provisions of the above article, the legislator expressly states in Article 277 of the Civil Code that "The same-sex marriage is forbidden. Marriages of same sex concluded or contracted abroad either by Romanian citizens or by foreign citizens are not recognized in Romania." Thus, from a legal point of view, the persons who do not have their relationship legalized or are of the same sex are not protected by the force of the state in their patrimonial or moral relations. It follows that the decisive element for legal protection is the intention of officially assuming the relationship, namely the covenant. The family is also protected by treaties and international conventions. The Universal Declaration of Human Rights, in Article 16 states that "the family is the natural and fundamental element of society and has the right to protection from society and the state."

The International Covenant on Economic, Social, and Cultural Rights, in Article. 10 para. (1) states that "the widest possible protection and assistance must be given to the family, a natural and fundamental element of society, especially for its foundation and for as long as the responsibility for the maintenance and education of the children are in its charge".<sup>3</sup>

The International Covenant on Civil and Political Rights in Article. 23 para. (1) states that "the family is the natural and fundamental element of

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<sup>2</sup> Art. 26. Constitution: Intimate, family and private life.

(1) Public authorities respect and protect intimate, family and private life.

(2) The individual has the right to dispose of it if he does not violate the rights and freedoms of others, public order or good morals.

<sup>3</sup> DECREE no. 212 of October 31, (1974) for the ratification of the International Covenant on Economic, Social and Cultural Rights.

society and has the right to protection from society and the state”.<sup>4</sup>

Marriage is, as an institution, a problem that is regulated taking into account, in each state (with the peculiarities inherent to each other), a number of considerations that include among others traditions, social and demographic policy.

In a deeply orthodox country such as Romania, it is hard to believe that recognizing same-sex partnerships can be a legislative priority. As a matter of private life, neither the European Court of Human Rights comes up with decisions to impose a certain orientation, leaving it to the national legislator the right to dispose of the issue.

Thus, in *Chapin and Charpentier v. France* (No. 40183/07), on June 2, 2016, the Court confirmed the "non-existence" of a right to same-sex marriage. The applicants challenged the decision of the French courts to annul a marriage concluded in 2004 between two men, in violation of the then French law, which prevented two persons of the same sex from marrying. **The conclusion of the case was that the ECHR does not recognize a right to marriage for same-sex couples**, either under the right to respect for private and family life (art. 8) or under the right to marry and found a family (art. 12). The decision was made on the basis of other rulings previously made by the Court:

One of the causes of the problem of same-sex marriage was the case of *Schalk and Kopf* and it was shown that it is "the subject of the national laws of the Contracting States" (§ 36, with reference to the *Schalk and Kopf v. Austria* decision (No 30141/04)<sup>5</sup>;

In the *case of Schalk and Kopf v. Austria*, adopted on 24 June 2010, the ECHR stated that same-sex couples can enjoy the «**right to family life**» in the same way as couples of different sex: «*The Court considers it artificial to continue to consider that a homosexual couple, unlike a heterosexual couple, would not enjoy a «family life» within the meaning of Article 8. Consequently, the relationship between the applicants, a homosexual couple who de facto cohabitates in in a stable way, reveals the notion of «family life» in the same way as a heterosexual couple who finds itself in the same situation.* »

Another case in which **the traditional concept of marriage is confirmed, that it is a union between a man and a woman and "does not impose an obligation on the governments of the Contracting States to grant same-sex couples access to marriage"** is the case of *Gas and Dubois v. France* (§ 36, with reference to the decision in the case *Gas and Dubois v. France*, No 25951/07, § 66)<sup>6</sup>;

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<sup>4</sup> On 16 December (1966), the United Nations General Assembly adopted the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights - known as the Human Rights Pact.

<sup>5</sup> Adopted in (2010).

<sup>6</sup> Adopted on 15 March (2012) case no. 25951/07.

In *Oliari and Others v. Italy*, the Court had considered Article 12 of the Convention and stated that "it can not be interpreted as imposing on the governments of the Contracting States an obligation to give same-sex couples access to marriage" - *Oliari and Others v. Italy* (No 18766/11 and 36030/11) - has a strong impact because it recognizes the theoretical limitations of the interpretation of the right to marriage<sup>7</sup>;

The case of *Oliari and Others v. Italy* refers to three couples of Italian homosexuals who wanted to marry or to conclude a civil partnership in Italy but were refused by its authorities. Thus, they addressed the national courts. Ultimately, the Constitutional Court has recognized that «*family*» and «*marriage*» can not be interpreted so as to alter the very essence of these notions: marriage is only a union between a man and a woman for the purpose of founding a family. The Court has held that plaintiffs can not be considered as discriminated against, because «*homosexual unions can not be considered homogeneous with marriage*». However, the Constitutional Court has ruled that homosexual couples enjoy the «*right to private life*», which establishes «*the right to express their personality in a couple by obtaining - in time and by the means provided by law - a judicial recognition of the appropriate rights and duties. However, this recognition could be achieved in ways other than the institution of gay marriage*». The ECHR has relied on constructing its reasoning on the conclusions of the Italian Court which recognized same-sex couples as «*the right to private and family life*», deciding that they should enjoy a legal status: «*The Court notes that, in Italy, the highest judicial authorities, including the Constitutional Court and the Court of Cassation, have given a high priority to recognizing and protecting these relationships. Reference is made in particular to the Judgment of Constitutional Court no. 138/10 in the case of the first two plaintiffs, conclusions which were later reiterated in a number of decisions adopted in the following years. In such cases, the Constitutional Court has requested, in particular and repeatedly, the legal recognition of the rights and obligations relevant to homosexual unions, a measure that could only be implemented by Parliament*». The states "enjoy a certain margin of appreciation regarding the exact status conferred by the alternative means of recognizing" same-sex relationships and the differences between them and the rights and obligations conferred by marriage (§ 58).

By making a parallel between perceiving the liberalization of morals (primarily concerning sexual habits) in the Romanian and French society, it has been shown, in the French case-law, that in the case of concubinage we are not in the presence of an illicit cause. The idea underpinning the positive assessment of this solution is that of the contractual nature of marriage and the relative nature of the effects of this contract with third parties. The exposed

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<sup>7</sup> *Oliari and Others v. Italy* (no. 18766/11 and 36030/11) referring to the legalization of civil / marriage partnerships between same-sex couples in Italy.

point of view can not be accepted in the current Romanian law”<sup>8</sup>.

By its judgments, the Court has established that, from the point of view of human rights, the states can not be compelled to permit same-sex marriage<sup>9</sup>. It has also showed that the states remain free to restrict marriage only to the opposite sex persons<sup>10</sup>.

Of the 47 member states of the Council of Europe, in a number of 12 states, the law allows same-sex marriage (Netherlands 2001, Belgium 2003, Spain 2005, Sweden 2009, Norway 2009, Portugal 2010, Iceland 2010, Denmark 2012, France 2013, UK 2013, Luxembourg 2015, Ireland 2015; Finland will be in the same situation 2017)<sup>11</sup>.

## 2. The problem of adoption in homosexual couples

Given the fact that the concubinage is not legally recognized in our country, the recognition of partnerships concluded abroad is forbidden and, at legislative level, it is aimed at amending the Constitution for the recognition of only heterosexual marriage, speaking in our country about adoption in homosexual couples is impossible.

If on the domestic adoption, on the model of the traditional family, there are natural developments in their dynamics<sup>12</sup>, we can discuss on the issue mentioned above only on cases at the European level.

In the theme, the Court has stated that adopting a child by homosexuals can take three forms. The first is the adoption by one person (monoparental adoption); the second is the coparent adoption through which a member of a couple adopts the other's child, the purpose being that each member of the couple has the status of legal parent; and the third form is the joint adoption by the two members of the couple (*E.B. v. France*, paragraph 33). So far, the Court has examined two cases concerning homosexual monoparental adoption requests (*Fretté and E.B. v. France*) and a case concerning a request for coparent adoption by a homosexual couple (*Gas and Dubois v. France*)

In the case of *Gas and Dubois v. France* (judgment of 15.03.2012) this case concerns two women living in a registered couple as a legal partnership in which one of them was the mother of a child conceived through assisted medical procreation. Under French law, she was the only parent. The plaintiffs complained, on the field of art. 14 of the Convention combined with art. 8, in the sense that it is impossible for a child of one of them to be adopted by the

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<sup>8</sup> Ionuț Florin Popa, *Discuții privind cauza morală și ilicită în raporturile juridice contractuale dintre concubini*, in *Dreptul (Law)*, no. 10/2001, year XII, series III, p.52.

<sup>9</sup> Case Hamalainen versus Finland of (2008).

<sup>10</sup> Schalk and Kopf versus Austria of (2010).

<sup>11</sup> <https://crisidanilet.wordpress.com/2016/01/12>.

<sup>12</sup> For further discussions, see Carmen Oana Mihailă, *Noile regulamente privind procedura internă de adopție*, *Journal of The Faculty of Law of Oradea*, no. 1/(2017), Editura Pro Universitaria, București, (2017).

other. More specifically, they wanted to be authorized to adopt the child by applying the simple adoption regime, to create a bond of filiation between the child and the mother's partner, which would have allowed them to exercise parental authority together. The domestic authorities refused to consent to this adoption project on the grounds that it would imply, for the benefit of the partner of the child's mother, a transfer of parental authority rights, inconsistent with the interest of the child. The Court examined the plaintiffs' situation by comparing it to that of a married couple and pointed out that under French law only married couples could exercise joint parental authority in the context of simple adoption. Observing that the contracting states were not required to open the marriage of homosexual couples and that marriage gave a particular status to those who were engaged in it, the Court held that the plaintiffs were not in a legal situation comparable to that of married couples. Recognizing that child adoption was not open to heterosexual couples who, like the plaintiffs, had entered into a legally registered partnership, the Court concluded that there was no difference in treatment based on sexual orientation and non-infringement of art. 14 of the Convention combined with art. 8 of the Convention<sup>13</sup>.

In another case, *X v. Austria*, three plaintiffs, of which the first and the third plaintiff were in a stable relationship and the second was the 15 year old daughter of the third plaintiff placed under her parental authority, and legally recognized by her biological father, brought an action before the competent district court to approve the adoption agreement concluded between the first plaintiff and the second plaintiff represented by her mother, who was the third plaintiff, a convention aimed at creating a legal link reflecting the relations between them, without breaking the ties between the child and the mother, the third plaintiff. The court refused to approve the adoption convention, pointing out that art. 182 para. (2) of the Austrian Civil Code did not provide for any form of adoption capable of producing the effects desired by the plaintiffs. According to art. 179 of the Austrian Civil Code, the adoption can be made by a single person or by a married couple.

It should be noted that the decision *X v. Austria* was pronounced with the partially dissenting opinion of seven judges who, at the end of their reasoning, stated that the meaning of the Court's evolving interpretation must be to accompany, to channel changes, not to precede them, and much less to try to impose them.

In conclusion, we can see that the ECHR does not create an obligation for national legislations prohibiting same-sex couples from adopting minors.

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