Elena Ignovska[*]

PRIVATE AND FAMILY LIFE AND CONTESTED MORALITIES IN FRONT OF THE EUROPEAN COURT OF HUMAN RIGHTS

-abstract-

In fields of contested moralities, such as in the section between medically assisted reproduction and private and family life, the margin of appreciation of the European Court of Human Rights is still especially flexible, thus endangering (instead of protecting) individual human rights. The text will prove this to be the case via elaboration of two (among the others) cases: the case *Paradiso and Campanelli v. Italy* (2017) that involves a reproductive tourism and a lost national recognition of an adopted embryo born by surrogate woman in a foreign country and the case *Orlandi and Others v. Italy* (2018) that involves a lost national recognition to same-sex couples married abroad. The outcome in both cases is different. The author concludes that the European Court of Human Rights should interpret (as it does in recent cases) on grounds of rational and strict scrutiny in the European context, because its decisions set a European hierarchy of values, which cannot vary drastically from State to State. In this way, the Court should remain, for the Members of the Council of Europe, a guide, and not to allow overuse of the margin of appreciation in the field of conflicts between fundamental human rights.

Key words: *human rights, private and family life, contested moralities*, *European Convention of Human Rights, European Court of Human Rights.*

I. INTRODUCTION

Family law issues are at the borderline between private and public law. This is because they tackle individuals and their autonomy to make decisions about own choices regarding what kind of private and family life they want to live in. In these lines, the state should try to refrain from imposing particular lifestyle since it may infringe human rights. Therefore, there is an anthropocentric focus - on the human person that comes from within and finds it is own way out in the society. On the other hand, the society and the state via its policies regulate what is preferable way of living private and family life while protecting the vulnerable (like abandoned children, citizens under custody etc.) and avoiding what they consider inappropriate (for instance, creating children for "sole" purpose of satisfying the child wish of the their parents). Therefore, there is a thin line between the overwhelming role of the state and its justified absence.

Human rights in the realm of private and family life struggle to find their place in the categorization as relative rights (because they are out of subjective nature determined by national morals and traditions) or absolute rights (because they are significant, fundamental and universal). Yet, in different national regulations, family law matters are regulated differently. For instance, in

[*] Elena Ignovska, PhD., Associate Professor, Ss. Cyril and Methodius University in Skopje, Iustinianus Primus Faculty of Law, e-mail: e.ignovska@pf.ukim.edu.mk

majority of the Member States of the Council of Europe, same-sex marriages/civil unions are part of the internal legal system,[1] yet in others, explicitly forbidden or just not mentioned in the law (as in the Republic of North Macedonia); in very few European countries surrogacies are a regulated practice (7 overall including the Republic of North Macedonia) while in others are explicitly forbidden (14 in total, while the rest lack a regulation[2]). The concept of "margin of appreciation" of the European Court of Human Rights (ECtHR) is the flexible framework of the space for manoeuvre in which the national authorities are to apply their obligations under the European Convention of Human Rights (ECHR).[3] The concept aims to balance the sovereignty of the Member States with their undertaken obligations from the Convention while maintaining the Court's role as an arbitrator between the States and their citizens. Extending the limits of the Margin to allow such morally, traditionally and culturally driven national family law regulations is in the intersection of the individual human rights and the nationally protected values. The individual rights in the field of family law are protected in *article 8* – as rights to the respect for private and family life*; article 12* – as a right to marry and establish a family; *article 14* – as a general principle of non-discrimination; and *article 6 (1)*, as a right to access civil law courts for solving family matters (among others) and a fair trial. Nevertheless, each State has its own system of regulating them, thus promoting its own morals. Appreciating differences between the Member States sometimes collides with the protected human rights.

Three factors are guiding principles when the possible infringements of the Convention are allowed: (1) the European consensus standard, as a comparison among the regulations of the other Member States; (2) the nature of the right (absolute or relative character); and (3) the aim to be achieved by the contested measure enacted by the State.[4] The European consensus standard sets the limits of the margin of appreciation even further if, comparatively, particular breach is present in the national legal systems of more Member States. The space for calling upon this standard could be especially manifested, and even manipulated in the field of family life.[5] The European consensus standard has been criticized for not possessing enough grounds on which the human rights protected by the Convention could be infringed.[6] On the other hand, the standard has also been favored as a tool that allows evolutive interpretation of the ECHR, thus, striking a balance

[1] As of June 2021, sixteen Contracting States to the Convention legally recognize and perform same-sex marriages: Austria, Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom. Additional fourteen Contracting States legally recognize some form of civil union for same-sex couples: Andorra, Croatia, Cyprus, the Czech Republic, Estonia, Greece, Hungary, Italy, Liechtenstein, Monaco, Montenegro (the relevant legislation enters in force in July 2021), San Marino, Slovenia, and Switzerland. The most recent case that constituted infringement of art. 8 and art. 14 in conjunction with art. 8 is the case of *Fedotova and Others v. Russia*, ECtHR, No. 40792/10, 30538/14 and 43439/14, Judgment of 17 January 2023.

[2] From the comparative analyses of the case *Paradiso and Campanelli v. Italy*, ECtHR, No. 25358112, judgment of 24.1.2017.

[3] Greer S., *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, Council of Europe, 2000, pg. 5.

[4] *Ibid.*

[5] For instance in the case of *Marckx v. Belgium*, ECtHR, No. 6833/74, judgment of 13.6.1979. The case concerned an illegitimate daughter possessing minor legal status in Belgium. The Court remarked that the distinction between "legitimate" and "illegitimate" children was regarded as permissive and normal in many European countries, while recognizing the developmental path towards their full recognition as equal.

[6] Helfer L.R., Consensus, "Coherence and the European Convention on Human Rights", *Cornell International Law Journal*, Vol. 26, No 133, 1993, pp. 133-165.

between development and stability.[7] Family life has developed in a manner to respond to all kinds of modern issues, looking at the Convention as a living and evolving instrument. Family matters are present in many fields of life and do not only concern article 8 of the Convention but also other articles depending on the context in each particular case.[8] Even though family life is often connected with traditions and culture, for the ECtHR, it is an autonomous concept.

The possible interferences with the rights guaranteed under the umbrella of the Convention are always judged on an individual case basis, recognizing the diversity of circumstances that add value to particular cases. Therefore the margin of appreciation can possibly pose limits only within specific cases.[9] The State's national regulations have to satisfy several requirements to qualify as permitted infringements of the Convention.[10]

The first requirement is existence of *prescribed law* in the national legal system, so that the consequences are foreseen and clear, while the information is accessible for people to guide their actions, thus, avoiding arbitrary decisions. In this line, *article 12* of the Convention allows infringements on the right to marry and to start a family if it is in concordance with the nationally prescribed law, stipulating: "men and women of marriageable age have the right to marry and to start a family, *according to the national laws governing the exercise of this right."*

The second requirement is that the infringing norms should have *legitimate aims and purposes*, strengthened by the requirement of their *necessity in a democratic society*. In this line, *article 8* of the Convention allows infringements on the right to respect private and family life, stipulating that while "everyone has the right to respect for his private and family life [...]" without interference by a public authority, the exception is allowed if "it is *in accordance with the law and is necessary in a democratic society*, in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder of crime, for the protection of health or morals, or the protection of the rights and freedoms of others". This formulation explicitly depicts the tension between balancing individual *versus* collective rights[11] and opens the space for the manoeuvre of the margin of appreciation even more, claiming the right to respect for private and family life to be far from being an absolute right.

The third principle requires that the infringing norms are *proportionate* (have reasonable proportionality between the objectives meant to be achieved by interfering with the Convention and the means used to achieve it.[12] This means that no restrictions in the law should be automatically justified if they are not related to the achievement of normative goals.[13] In this line, *article 6* of the Convention imposes a positive obligation on the States to ensure *the right to access to the courts* in civil and criminal matters. Still, the Court has acknowledged that the right is also not absolute, especially if its restrictions are in concordance with a legitimate aim, establishing a *proportional relationship* between the means that are used and the goals that are to be achieved.

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[7] Dzehtsiarou K., "European Consensus and the Evolutive Interpretation of the European Convention of Human Rights", *German Law Journal*, Vol. 12, No. 10, 2011, pp. 1730-1745.

[8] Laffranque J., HELP Family Law, European Court of Human Rights, 14.12.2018.

[9] Lavender N., "The Problem of the Margin of the Appreciation", *European Human Rights Law Review*, No. 4, 1997, pg. 382.

[10] See *The Margin of Appreciation*, Council of Europe, available online: http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp.

[11] Ostrovski A.A., "How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimizes International Human Rights Tribunals", *Hanse Law Review*, Vol. 1, No. 1, 2005, pg. 50.

[12] Clayton R., Tomlinson H., *The Law of Human Rights*, Oxford, 2000, pg. 278.

[13] Storrow R., "The Pluralism Problem in Cross-Border Reproductive Care", *Human Reproduction*, Vol. 25, No. 12, 2010, pp. 2939-2943.

Moreover, the restrictions of the right to access the Court and therefore greater flexibility of the margin of appreciation is allowed in civil law cases when the authority of the national sovereignty is greater in comparison to criminal law cases.[14] A relevant factor for interpreting if an act is discriminatory is to compare if the same act is considered discriminatory in other democratic societies too.[15] The non-discrimination prerogative has also the challenge to balance individual rights and rights of the community. The case law of the Court distinguishes between two categories: *difference* and *discrimination,* arguing that if there is a reasonable and objective basis for the different treatment, it does not imply that the treatment is discriminatory *per se.*[16]

In fields of contested moralities, the Margin is especially flexible, thus sometimes endangers individual human rights.[17] This text will move forward by proving this statement via elaboration of two cases: the case *Paradiso and Campanelli v. Italy* (2017)[18] that involves a reproductive tourism and a lost national recognition of an adopted embryo born by surrogate woman in a foreign country and the case *Orlandi and Others v. Italy* (2018)[19] that involves a lost national recognition to same-sex couples married abroad. The outcome in both cases is different.

II. PARADISO AND CAMPANELLY V. ITALY

1. Facts of the case

The case deals with a legal battle of an elderly married couple who could not conceive for years (naturally or with assistance of in vitro fertilization), nor could they adopt a child in Italy (due to shortage of children eligible for adoption). Finally, they decided to hire a company that brought them to a Moscow-based clinic for reproductive tourism, providing them with a service that was illegal in Italy but legal in Russia: conceiving an embryo from anonymous sperm and oocyte donation, carried through pregnancy and delivered by a paid surrogate woman. Due to the non-existence of a genetic link between the spouse and the child, the Italian authorities started a formal investigation for "altering civil status" and forgery after returning home. The State Counsel's Office asked for proceedings to declare the child as abandoned and free for adoption. While the applicants protested against such measures and asked at least to be able to adopt the child, the Youth Court decided to remove the child from them. The child was placed in a children's home in a place unknown to the applicants and had no official identity for more than 2 years. Afterwards he received another name and birth certificate and was placed with a foster family with an intention to adopt him. The couple was now facing double illegality: forgery of the birth certificate and consequently bringing a child to Italy that was not theirs. The Italian authorities considered it necessary to take rather severe urgent measures to remove the child from the intended parents regardless of their not yet proven criminal liability.

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[14] See: *Golder v. The United Kingdom,* ECtHR, No. 4451/70, judgment of 21.02.1975; *Bellet v. France*, ECtHR, No. 23805/94, judgment of 04.12.1995; *Z and Others v. The United Kingdom*, ECtHR, No. 29392/95, judgment of 10.05.2001.

[15] See also *Runke and White v. The United Kingdom*, ECtHR, No. 42949/98, judgment of 10·05.2007; *Rasmussen v. Denmark*, ECtHR, No. 8777/79, judgment of 28.11.1984. The Court here also applied the European consensus standard, by referring to the way that the matter was regulated in the other Member States as being a relevant factor for interpreting discrimination.

[16] *Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v. Belgium,* ECtHR, No. 2126/64, judgment of 23. 06. 1968.

[17] Van Hoof, Pennings G., "Extraterritorial Laws for Cross-Border Reproductive Care. The Issue of Legal Diversity", *European Journal of Health Law*, Vol. 19, No. 2, 2012, pp. 1-14.

[18] *Op. cit.*

[19] *Op. cit.*

2. Judgement

The Court in the final judgment considered that immediate and irreversible separation of the child from his parents is tantamount to interference with their *private life and family life* (right to personal development through the relationship with the child). Nevertheless, it also considered that the opposite scenario would have been tantamount to legalizing the situation created by them in breach of important rules of the Italian law. As a result, the Court decided that the national interests to prevent illegality and protect public order were in accordance with the law and therefore prevailed over the applicants' right to *private and family life a*nd concluded that there has been no violation of article 8 of the ECHR.

This judgment sends an intimidating message to couples who cannot access to reproductive technologies in their home countries and wish to travel for reproductive purposes elsewhere, since the later domestic recognition will anyhow be against the positive law and the "proclaimed" public order, even though the Court has recognized many times before that both criteria: blood and factual mutual life based on intention to parent could be enough *per se* to claim existence of private and family life.

The Court brought substantially different decisions though in two prior similar cases: *Mennesson v. France*[20] and *Labasse v. France*[21]. Both French cases are very important because they do not impose an obligation on the national States to regulate surrogate agreements nor to recognize them for the sake of the parents' *family life*, but they rather impose the very same obligation for the sake of the children's *private life* (children were applicants before the ECtHR, unlike in the later case where the applicants did not have the standing to act before the court on behalf of the child).[22] However, there are other important distinctions between these prior cases and the later one, and that is the fact that in the French cases at least one of the parents (the father) was proven to be genetically related with the child, while the French authorities had never separated the children from the parents.

III. ORLANDI AND OTHERS V. ITALY

1. Facts of the case

The case[23] concerns six same-sex couples who complained that the refusal of the Italian authorities to register their marriages contracted abroad, and more generally the impossibility of obtaining legal recognition of their relationship in Italy (as it is now in the Republic of North Macedonia) - violated their rights under Articles 8, 12 and 14 of the Convention. After the request for recognition of their marriages and following the case *Oliari and Others v. Italy*[24] in 2016, Italy was obliged to introduce civil unions for same-sex couples. Eventually, their marriages were recognized as civil unions. Nevertheless, the applicants complained that in the meanwhile they were left in legal

[20] *Mennesson v. France*, ECtHR, No. 65192111, Judgment of 26.9.2014.
[21] *Labasse v. France*, ECtHR, No. 65941, Judgment of 26.9.2014.
[22] For more see Ignovska E. *Paradiso and Campanelli v. Italy: Lost in Recognition. Filiation of an Adopted Embryo born by Surrogate Woman in a Foreign Country*, Strasbourg Observers, 4.4.2017: https://strasbourgobservers.com/2017/04/04/paradiso-and-campanelli-v-italy-lost-in-recognition-filiation-of-an-adopted-embryo-born-by-surrogate-woman-in-a-foreign-country/.
[23] *Orlandi and Others v. Italy*, ECtHR, No. 26431/12, 26742/12, 44057/12, 60088/12, judgment of 14.12.2014.
[24] *Oliary and Others v. Italy*, ECtHR, No. 18766/11, 36030/11, judgment of 21.7.2015.

vacuum that infringed their private and family life. Even more, they requested full recognition of their status as married couples instead of civil union partners that according to them was an element of their personal and social identity, as well as psychological integrity (which also falls under art. 8 of the ECHR).

2. Judgment

The Court stated that the previous case *Oliari and Others v. Italy* affirmed that there is a need for same-sex couples to be legally recognized and protected by a Member State. Accordingly, applicants' rights under the Convention would be fulfilled if they could register their overseas marriages as civil unions as this would provide the applicants with 'the opportunity to obtain a legal status equal or similar to marriage in many respects'. Nevertheless, refusing decisions to register their marriage under any form, thus leaving the applicants in a legal vacuum (prior to the new laws), failed to take account of the social reality of the situation. Because of that, the applicants encountered obstacles in their daily life and their relationship was not afforded any legal protection. No prevailing community interests have been put forward to justify the situation where the applicants' relationship was devoid of any recognition and protection. Therefore, the Court judged that their private and family life was infringed.

IV. CONCLUSION

The concept of the margin of appreciation aims to balance the sovereignty of the Member States with their undertaken obligations from the Convention while maintaining the Court's role as an arbitrator between the States and their citizens.[25] The principles under which the concept operates are (1) *Effective protection* (the priority is to effectively protect human rights and not to enforce mutual obligations between Member States)[26] and (2) *Subsidiarity and review* (the State should for itself decide the appropriateness of the national regulation,[27] while the ECtHR only subsidiary reviews and reassures that the State has remained within the limits, thereby safeguarding human rights).[28] In both cases, the Court did not impose on the States to regulate what they consider against their public order (to introduce surrogacies or same/sex marriages) Nevertheless, in the first case it failed to safeguard a situation that was already created elsewhere, while in the second case it did that precisely. Nowadays, more and more authors are criticizing the overwhelming role of the principle of subsidiarity, claiming that the ECtHR should interpret on grounds of rational and strict scrutiny in the European context, because its decisions set a European hierarchy of values, which cannot vary from State to State.[29] In this way, the Court should remain, for the Members of the Council of Europe, a guide, and not to allow overuse of the margin of appreciation

[25] Fenwick H., *Civil Liberties and Human Rights*, Cavendish Publishing Limited, London, 2005, pp. 34-37.
[26] Van Dijk, Van Hoof, *Theory and Practice of the European Convention on Human Rights*, Kluwer, 1998, pg. 74.
[27] *Op. cit.* Clayton R., Tomlinson H., 2000, pg. 285.
[28] Schokkenbroek J., "The Basis, Nature and Application of the Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights", *Human Rights Law Journal*, Vol. 19, No. 30-31, 1998.
[29] Marauhn T., Ruppel N., "Balancing Conflicting Human Rights: Konrad Hesse's Notion of "Praktische Konkordanz" and the German Federal Constitutional Court", pp. 246 and 247, Brems E. (ed.) *Conflicts Between Fundamental Rights*, Intersentia, 2008. See also Lester L. Herne H. Q.C., "Universality *v.* Subsidiarity: A Reply", *European Human Rights Law Journal*. Vol. 3, No. 1, pp. 73-81, 1998.

in the field of conflicts between fundamental rights.[30] Even though, very often, sensitive national matters are involved, making appreciation of certain rights also a political decision; the subsidiarity principle must be a result of rational examination, rather than a legal loophole.[31]
On the one hand, where there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wide. On the other hand, where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted.[32]
In other words, the wide interpretation of the Margin regarding private and family life (e.i. tolerance) as it was more often a case in the past than nowadays - relativizes human rights.
As to the case of the Republic of Macedonia and the issue on private and family life of same-sex couples, there is a critical case law of the ECtHR that if interpreted accordingly will turn into a legal source in the national legal system (having in mind that ratified conventions and their interpretations by the ECtHR are/should be an integrated part of the national legal system). The Court offered a wide margin of appreciation in the case of *Schalk and Kopf v. Austria*[33], recognizing that the national authorities are not infringing article 12 of the ECHR if they do not regulate same sex marriage (if other legal form of recognition is available, as in the case – registered partnership) because of the deeply rooted cultural differences. The case of Coman[34] in front of the Court of Justice questioned even that because it clarified that the meaning of the term 'spouse' in Directive 2004/38 was gender-neutral, opening up the door for same-sex marriage recognition for immigration purposes all around the EU.[35] When it comes to the ECtHR in all other more recent cases regarding article 8 of the ECHR (such as: *Vallianatos and Others vs. Greece*[36], *Oliary and Others vs. Italy*[37] *or Fedotova and Others v. Russia*[38]) the Court made it clear that if there is no (any) legal recognition of same-sex partnerships that offers similar protection, rights and responsibilities as those guaranteed by marriage, the national authorities are infringing rights of citizens, and therefore a positive obligation to change that should be imposed for the purposes of protecting universal human rights. Originating from this rationale of the ECtHR, it is almost certain that an application of similar nature against the Republic of North Macedonia will be successful, even though, unfortunately, according to many, it is still (arguable) against the nationally proclaimed values and morals.

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[30] *Ibid.* pg. 246.
[31] *Ibid.*, pg. 247.
[32] See more in *Guide on Article 8 of the European Convention on Human Rights, Right to Respect for Private and Family Life, Home and Correspondence*, European Court of Human Rights, 31 August, 2018.
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[36] *Op. cit.*
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