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Implementation of the Right to Same-Sex Partnerships in the Light of the Case-Law of the European Court of Human Rights

Keywords: European Court of Human Rights, same-sex relationships, right to family life, right to private life

Summary. This article analyzes the evolution of the European Court of Human Rights' (ECtHR) case law on the legal recognition of same-sex partnerships, with a particular focus on its impact on the Polish legal system. Starting with the historic shift in the Court's approach—from the absence of a legal obligation for recognition (the *Schalk and Kopf v. Austria* case) to the finding that a complete lack of legal protection violates the Convention (the *Oliari and others v. Italy* case)—the text shows how this evolution has affected Poland.

Key ECtHR judgments against Poland (*Przybyszewska and others*, *Formela and others*, *Szypuła and others*) are discussed, all of which confirm that Polish law, by not offering any form of legal recognition, violates the right to private and family life. These rulings clearly point to the systemic nature of the problem and to Poland's positive obligation to introduce appropriate regulations. The conclusion emphasizes that the Court's case-law functions as a "living document" that adapts to changing social realities, and Poland's legislative inaction is inconsistent with European standards and could lead to further consequences.

REALIZACJA PRAWA DO ZWIĄZKÓW PARTNERSKICH OSÓB TEJ SAMEJ PŁCI W ŚWIETLE ORZECZNICTWA EUROPEJSKIEGO TRYBUNAŁU PRAW CZŁOWIEKA

Słowa kluczowe: Europejski Trybunał Praw Człowieka, związki jednopłciowe, prawo do życia rodzinnego, prawo do prywatności

Streszczenie. Artykuł analizuje ewolucję orzecznictwa Europejskiego Trybunału Praw Człowieka (ETPCz) w sprawie prawnego uznawania związków partnerskich osób tej samej płci, ze szczególnym uwzględnieniem jego wpływu na polski porządek prawny. Zaczynając od historycznej zmiany w podejściu Trybunału, od braku obowiązku uznania prawnego (sprawa *Schalk i Kopf przeciwko Austrii*) do uznania, że brak jakiegokolwiek ochrony prawnej narusza Konwencję (sprawa *Oliari i inni przeciwko Włochom*), tekst przedstawia, jak ta ewolucja wpłynęła na Polskę. Omówione są kluczowe wyroki ETPCz przeciwko Polsce (*Przybyszewska i inni*, *Formela i inni*, *Szypuła i inni*), które potwierdziły,

że polskie prawo, nie oferując żadnej formy prawnego uznania, narusza prawa do życia prywatnego i rodzinnego. Wyroki te jasno wskazują na systemowy charakter problemu oraz na pozytywny obowiązek Polski do wprowadzenia odpowiednich regulacji. W podsumowaniu podkreślono, że orzecznictwo Trybunału działa jak „żyjący dokument”, który dostosowuje się do zmieniających się realiów społecznych, a brak działań legislacyjnych w Polsce jest niezgodny z europejskimi standardami i może prowadzić do dalszych konsekwencji.

1. Introduction

Upon ratifying the European Convention on Human Rights and Fundamental Freedoms, the Republic of Poland submitted to the jurisdiction of the European Court of Human Rights (ECtHR) in matters regulated by this international agreement¹. The ECtHR's interest thus extended to Polish law and to the decisions of Polish public administration bodies and courts, to the extent that they relate to the provisions of the Convention. The ECtHR's case-law plays a standard-setting role, which means that even rulings concerning other states party to the Convention are not legally indifferent to the Polish legislator and Polish courts. In practice, Polish judicial authorities often refer to ECtHR judgments in their case law. This case law also influences the legislator, who should make corrections to existing law in response to rulings that critically assess the state of legal regulations in a given field. This means that every judgment of the Court, even in cases concerning other states, impacts the Polish legal system. ECtHR judgments set standards that Poland should take into account and strive to meet.

The subject of this paper will be the evolution of the ECtHR's case law in the context of Article 8 of the Convention concerning the right to respect for private and family life in relation to marriage and the situation of same-sex couples as a manifestation of “family life”. The article will present selected ECtHR judgments, as well as those of other judicial authorities, on this issue, illustrating the legal status in force in Poland.

2. The Right to Respect for Private and Family Life

Initially, it should be noted that the European Convention on Human Rights and Fundamental Freedoms does not explicitly state the right to protection of sexual orientation. It is also worth noting that fundamental acts of international human rights law do not expressly regulate this issue. However, the right to protection of

¹ Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, as amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2 (Journal of Laws of 1993, No. 61, item 284).

sexual orientation has been customarily linked to the right to privacy². According to Article 8 of the Convention:

Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as 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 protection of order or for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The cited article points to four areas covered by its protection. “Private life” is the first, and at the same time, the broadest and most diverse sphere protected by Article 8 ECHR. In the most general terms, it can be said to be connected with the idea of individual freedom in shaping one’s life, understood as autonomy in determining one’s personality and in making those decisions. This is linked to the need to “respect human dignity and certain aspects of the quality of life” (see ECtHR judgment of 11 September 2007 in the case of *L. v. Lithuania*, para. 56)³, and also to the need to respect one’s freedom, *i.e.*, both the freedom to choose one’s conduct and personal liberty [...]. The core of this idea seems to be to provide the individual with a basic sphere of privacy (autonomy), protected—as far as possible in a modern society—from public or private external interference (“the right to live in privacy, free from unwanted external interest”—judgment of 27 July 2004 in the case of *Sidabras and Džiautas v. Lithuania*⁴, para. 43)⁵.

Understanding how to interpret this area of the Convention is crucial for grasping the Court’s rulings, as it was from Article 8’s reference to the right to privacy that the protection of the rights of homosexuals initially stemmed in ECtHR case law. This situation changed in 2010 when the Court recognized that issues concerning the legal status of LGBTQ+ partnerships are covered by the protection under Article 8 of the Convention not only in the area of “private life” but also “family life”. According to the Convention, “family life” refers to a set of interpersonal relationships resulting from a permanent bond of blood or law. The scope of “family life” includes interpersonal relationships such as marriage, parent-child relationships, and other stable human bonds. The legalization of same-sex partnerships by many national legislatures and, consequently, the judgment in Schalk

² J. Sobczak, *Prawo do ochrony orientacji seksualnej. Standardy europejskie*, “Themis Polska Nova” 2012, no.1, p. 112.

³ Judgment of the ECtHR of 11 September 2007 in the case of *L. v. Lithuania*, application no. 27527/03.

⁴ Judgment of the ECtHR of 27 July 2004 in the case of *Sidabras and Džiautas v. Lithuania*, applications nos. 55480/00 and 59330/00.

⁵ See: L. Garlicki, *Art. 8*, [in:] *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności*, Warszawa 2010, Legalis.

and *Kopf v. Austria*⁶ (discussed further below) led to include the relationship of a same-sex couple living together as “family life”⁷. This aforementioned judgment was groundbreaking because, for the first time, the Court recognized that a permanent same-sex relationship falls within the scope of “family life” protected by Article 8 of the European Convention on Human Rights⁸. Although the judgment did not impose a legal obligation on states to recognize such partnerships, it paved the way for subsequent rulings that gradually narrowed the states’ margin of appreciation and ultimately led to the recognition that the lack of any form of legal protection for same-sex couples is inconsistent with the Convention.

The European Court of Human Rights is committed to developing the level of protection of fundamental rights, not reducing it. Therefore, judicial activism is inherent in the Court’s activities, the goal of which is to expand the scope of protection resulting from the Convention’s norms. In this way, the ECtHR gives rights and freedoms a new meaning and content, adequate to the changing socio-political circumstances. The Convention, through the Court, thus serves a dynamic function⁹. “The parties to the Convention have imposed on the ECtHR the duty of judicial activism, understood as the obligation to interpret the Convention dynamically, in accordance with the changing interpretative consensus”¹⁰. For this reason, the Court’s case law is evolving, also regarding the issue of protecting the rights of homosexuals. The European Court of Human Rights “is gradually expanding the scope of the term “private life” to cover more and more areas of daily life in which sexual minorities face discrimination from member states of the Council of Europe. At the same time, it is developing increasingly precise standards for the right to protection of sexual orientation”¹¹.

3. Evolution of ECtHR Case Law in Same-Sex Cases

Initially, the European Commission of Human Rights, the ECtHR’s predecessor, did not question the right of a Convention member state to penalize homosexual practices, justifying the criminalization of homosexuality on grounds of “the pro-

⁶ Judgment of the ECHR of 24 June 2010 in the case of *Schalk and Kopf v. Austria*, application no. 30141/04.

⁷ *Ibidem*, § 79.

⁸ *Ibidem*, § 94.

⁹ P. Kuczma, *Wybrane orzeczenia sądów i trybunałów w sprawach wyborczych*, [in:] B. Stępień-Zalucka (ed.), *Polskie prawo wyborcze*, Warszawa 2025, p. 270 et seq.

¹⁰ M. Górski, *Sędziowski aktywizm ETPC a deficyty strukturalne systemu Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności*, “Polski Rocznik Praw Człowieka i Prawa Humanitarnego” 2017, no. 8, p. 11.

¹¹ J. Sobczak, *Orientacja seksualna jako prawo człowieka*, “Środkowoeuropejskie Studia Polityczne” 2009, no. 1/2, p. 87.

tection of health and morals”¹². The Convention entered into force at a time when homosexual practices were even punishable in many states. For this reason, the Commission accepted the status quo and did not attempt at that time to influence the liberalization of the legislation of the states party to the Convention. Especially since during this period, the attitude towards homosexual practices was much less tolerant than it is today in Europe, and homosexual individuals hid their sexual preferences for fear of social ostracism and legal consequences.

A breakthrough in the approach to homosexual individuals came only with the ECtHR’s 1981 judgment in the case of *Dudgeon v. United Kingdom*¹³. The case concerned a homosexual citizen of Northern Ireland in whose apartment the police found correspondence with another homosexual. At the time, Northern Irish law criminalized homosexual relations. Jeffrey Dudgeon, the applicant in the case, stated that he felt fear and despair, as well as persecution and blackmail, due to the existence of such legal solutions. He also challenged the legality of the investigation conducted against him regarding homosexual acts with other men. According to the applicant, the Northern Irish authorities, by prohibiting voluntary homosexual practices between consenting adults, committed a serious interference with the right to respect for private life. The opposing party, in turn, argued that the purpose of the regulations in force in Northern Ireland was to protect public morality¹⁴. In its judgment resolving the case, the ECtHR found that the prohibition of voluntary homosexual relations between adult men over the age of 21 constituted a violation of the ECHR, and thus an infringement of the right to privacy guaranteed by the Convention, constituting a continuous and unjustified interference with the right to respect for private life.

The Court emphasized that it did not intend to judge the moral side of homosexual relations between adult men. It found that while in a democratic society there is a need for criminal law regulation of male homosexual practices, this is only where there is a need to protect society from crime and other types of harm, even in voluntary and intimate practices, and also to protect against the exploitation and corruption of those who are particularly vulnerable due to, for example, young age. According to the Court, it is for national authorities to decide on protective measures in the field of homosexual practices, especially determining the age limit up to which young people should be protected by criminal law¹⁵.

¹² See: Decision of the European Commission of Human Rights of 17 December 1955 in the case of *X v. Federal Republic of Germany*, application no. 104/55.

¹³ Judgment of the ECtHR of 22 October 1981 in the case of *Dudgeon v. United Kingdom*, application no. 7525/76.

¹⁴ M. Skalik, *Prawnomiędzynarodowe instrumenty ochrony osób LGBT. Wybrane zagadnienia*, “Studenckie Prace Prawnicze, Administratywistyczne i Ekonomiczne” 2023, no 44, pp. 84–85.

¹⁵ J. Sobczak, *Prawo...*, p. 116.

The Court's recognition that the Northern Irish regulations criminalizing homosexual contacts between adult men were incompatible with Article 8 ECHR was associated with a change in trends in member states, which the Court did not ignore. Since then, the Convention's protection has been extended to the rights of homosexual individuals and same-sex partnerships¹⁶. The basis for this protection was Article 8 ECHR, but from the perspective of protecting private life.

As a result of the *Dudgeon v. United Kingdom* judgment, an act came into force in Northern Ireland in 1982, under which voluntary sexual practices ceased to be a crime. Exceptions applied to the mentally ill, soldiers, and sailors. The issue of the exceptions established in the act, in turn, became the subject of a ruling in the cases of *Lustig-Prean and Beckett v. United Kingdom*¹⁷ and *Smith and Grady v. United Kingdom*¹⁸. The Court dealt with the discriminatory policy of the United Kingdom regarding the presence of open homosexuals (gays and lesbians) in the military. The Court found that military police investigations conducted to verify sexual orientation constituted a direct violation of the right to respect for private life, as did dismissal from service as a result of a determination of the soldiers' homosexual orientation¹⁹.

The evolution of the ECtHR's case law was influenced not only by landmark judgments but also by legal acts issued by EU institutions and the Council of Europe, the content of which the Court later cited in its case law²⁰. The Council of Europe and EU institutions have been calling for the legal recognition of same-sex relationships since at least 1994. For example, in the Committee of Ministers of the Council of Europe Recommendation (CM/Rec(2010)5)²¹ "on measures to combat discrimination based on sexual orientation or gender identity" of March 31, 2010, member states were recommended to:

[e]nsure that these legal and other measures are adopted and effectively implemented to combat discrimination based on sexual orientation or gender identity and ensure respect for the human rights of lesbians, gays, bisexual and transgender persons and promote tolerance towards these persons²².

¹⁶ L. Garlicki, *op. cit.*

¹⁷ Judgment of the ECtHR of 27 September 1999 in the case of *Lustig-Prean and Beckett v. United Kingdom*, applications nos. 31417/96 and 32377/96.

¹⁸ Judgment of the ECtHR of 27 September 1999 in the case of *Smith and Grady v. United Kingdom*, applications nos. 33985/96 and 33986/96.

¹⁹ J. Sobczak, *Prawo...*, p. 116.

²⁰ See, e.g., judgment of the ECtHR of 16 September 2021 in the case of *X v. Poland*, application no. 20741/10.

²¹ Recommendation CM/Rec (2010)5 of the Committee of Ministers of the Council of Europe concerns measures to combat discrimination on grounds of sexual orientation or gender identity. Adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies.

²² *Ibidem.*

Furthermore, in Parliamentary Assembly of the Council of Europe Resolution 2239 (2018) on private and family life²³: achieving equality regardless of sexual orientation, member states of the Council of Europe were called upon to:

[e]nsure that their constitutional, statutory and regulatory provisions and policies governing the rights of partners, parents and children are applied without discrimination based on sexual orientation or gender identity, eliminating any unjustified differences in treatment based on these grounds²⁴.

In turn, within the EU, two resolutions concerning the issue of sexual orientation as a ground for violence and intolerance were adopted as early as 1986, namely: the *Resolution on the rise of fascism and racism in Europe* and the *Resolution on violence against women*²⁵. It is also worth pointing out the European Parliament's resolution of September 28, 2011, on human rights, sexual orientation, and gender identity in the member states of the United Nations.

The catalog of such declarations is much broader, and its discussion exceeds the scope of this paper. However, even providing examples allows for the diagnosis of certain tendencies in the bodies of international organizations that have a direct impact on ECtHR case law. Consequently, the ECtHR did not limit itself to resolving issues related to combating intolerance towards LGBTQ+ individuals, with the prohibition of criminalizing homosexual practices at the forefront, but in the Court's judgments, a desire to equalize the rights of homosexual individuals with those of heterosexual individuals can be found. This pursuit of equality is particularly visible in family law, regarding the legalization of same-sex partnerships or marriages, as well as in matters of parental authority by LGBTQ+ individuals or adoption, and also in the issue of equalizing social rights for LGBTQ+ and homosexual individuals.

4. Selected ECtHR Case-Law Concerning Same-Sex Partnerships Against Poland

In the case of *X v. Poland*, the complaint concerned the decision of Polish authorities to remove a mother's children from her parental authority, alleging discrimina-

²³ Parliamentary Assembly of the Council of Europe Resolution No. 2239 (2018) of 10 October 2018 on private and family life: achieving equality regardless of sexual orientation.

²⁴ In the explanatory memorandum, rapporteur Jonas Gunnarsson stated that „the right to respect for private and family life is a fundamental right, guaranteed by Article 8 of the European Convention on Human Rights. This right is of equal importance in everyone's life, but progress towards achieving equality in this area regardless of sexual orientation is uneven. This creates real and serious problems in the daily lives of ordinary people. Unfortunately, discrimination remains a reality for many rainbow families”.

²⁵ M. Skalnik, *op. cit.*, p. 85.

tion based on her sexual orientation²⁶. Polish courts found that a positive assessment of the applicant's competence as the main caregiver for her child depended on the termination of her relationship with her partner—another person of homosexual orientation. In its judgment, the Court found that the discriminatory references to the importance of a male role model in a boy's upbringing were a decisive factor in dismissing the applicant's requests for custody of her son. The Court found that by refusing to grant the applicant full parental authority and custody of her child, the national authorities had engaged in a difference in treatment based solely or predominantly on considerations related to her sexual orientation, which is a difference in treatment not permissible under the Convention.

The case of *Kozak v. Poland* concerned the social rights of a homosexual individual²⁷. After the death of his homosexual partner, the applicant filed a complaint against the local government authorities, that did not consider his request to succeed to the tenancy of a municipal apartment in place of his deceased partner, who was the previous tenant. Polish courts found the complaint unfounded, reasoning that the applicant had moved out of the apartment and stopped paying rent before his partner's death, and in any case, de facto marital cohabitation, which is a prerequisite for legal succession in the tenancy of a municipal apartment, can only take place between persons of the opposite sex. The ECtHR, in its ruling on the case, found that:

[t]here had been a violation of Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private and family life) of the Convention. Despite the importance of the legitimate aim pursued in the applicant's case, namely the protection of traditional families, in choosing the means to provide such protection, the state should take into account the evolution and changes occurring in society, including the fact that there is no single path or single choice in the sphere of a person's private and family life. Given the narrow margin of appreciation in cases of differences in treatment based on sexual orientation, the automatic exclusion of persons living in same-sex partnerships from legal succession in a tenancy cannot be considered permissible²⁸.

In the case of *Formela and others v. Poland*²⁹, the Court once again found a violation of Article 8 ECHR. The judgment was issued by a three-person Committee, which, in accordance with Article 28(1)(b) ECHR, means that this issue is already the

²⁶ Judgment of the ECHR of 16 September 2021 in the case of *X v. Poland*, application no. 20741/10.

²⁷ Judgment of the ECHR of 2 March 2010 in the case of *Kozak v. Poland*, application no. 13102/02.

²⁸ https://www.echr.coe.int/documents/d/echr/FS_Sexual_orientation_POL [Accessed on: 30.09.2024].

²⁹ Judgment of the ECHR of 19 September 2024 in the case of *Formela and others v. Poland*, applications nos. 58828/12 et al.

subject of “well-established case law of the Court”³⁰. This judgment strengthens Poland’s obligation to act, indicating that this issue no longer requires a detailed legal analysis. The lack of regulations is an obvious and repeated violation of the Convention. It is worth noting that in its judgment, the European Court clearly stated that the Polish authorities had violated the rights of the applicants by refusing to recognize their relationship. The ECtHR found that the lack of any legal form for same-sex couples, whether as marriage or civil partnership, created a “legal vacuum”³¹. The Court emphasized that the state has an obligation to provide basic legal protection for stable and long-term relationships. None of the arguments of the Polish government aimed at justifying the lack of such regulations were strong enough to outweigh the interests of couples who demand legal recognition and protection. The Court also emphasized that although states have some freedom in deciding how to regulate same-sex relationships, the protection provided must be adequate and effective³². This means that a state that has not introduced any solutions does not fulfill its obligations under the European Convention.

Another ruling by the Court against Poland, confirming the violation of Article 8 ECHR due to the lack of legal recognition of same-sex partnerships, was the judgment of February 27, 2025, in *Szypuła and others v. Poland*³³. This case was combined with the case of *Urbanik and Alonso Rodriguez v. Poland*³⁴. The applicants accused Poland of violating Articles 8, 12, and 14 of the European Convention. The complaint concerned, in particular, the refusal to issue a certificate of no impediment to marry abroad, which prevented them from formalizing their relationship in another country, while Poland did not offer any alternative form of legal recognition³⁵. The Court found that the lack of any form of legal recognition and protection for stable, same-sex partnerships in Poland constitutes a violation of Article 8 of the Convention and is a systemic problem³⁶. The judgment emphasizes that in light of the well-established case law and legislative progress in most member states of the Council of Europe, Poland has exhausted its margin of appreciation in this matter. Legislative inaction can no longer be justified³⁷. According to the aforementioned ECtHR judgment, Poland has a positive obligation to introduce a legal framework

³⁰ <https://hfhf.pl/aktualnosci/wyrok-etpc-formela-v-polska-zwiazki-partnerskie-lgbt> [Accessed on: 10.08.2025].

³¹ Judgment of the ECtHR in the case of *Formela and others*, § 26.

³² *Ibidem*, § 28.

³³ Judgment of the ECHR of 27 February 2025 in the case of *Szypuła and others v. Poland*, application no. 78030/14.

³⁴ <https://www.gov.pl/web/sprawiedliwosc/wyrok-w-sprawie-szypula-i-inni-przeciwno-polsce-skarga-nr-7803014> [Accessed on: 10.08.2025].

³⁵ *Ibidem*.

³⁶ Judgment of the ECtHR in the case of *Szypuła and others*, §§ 21-23.

³⁷ *Ibidem*, § 23.

that will provide adequate protection for same-sex couples, resolving legal issues such as inheritance, healthcare rights, or the right to information about a partner's health status³⁸. This ruling is another reminder of the need to adapt Polish law to European standards regarding the rights of LGBTQ+ individuals.

5. Same-Sex Partnerships in ECtHR Case-Law

The European Court has issued a number of fundamental rulings on the legal recognition of partnerships, especially same-sex ones, thus shaping the standards within the Council of Europe. This case law is based primarily on Article 8 of the European Convention on Human Rights (ECHR)—the right to respect for private and family life—and Article 14, which prohibits discrimination. The Court has consistently developed its line of case law, moving from a lack of a direct legal obligation for the legal recognition of same-sex partnerships to imposing a positive obligation on states.

In the case of *Schalk and Kopf v. Austria*³⁹, the Court in its 2010 judgment found that:

[t]he European Convention on Human Rights does not oblige member states to legislate or to recognize same-sex marriages, but for the first time it explicitly accepted same-sex relationships as a form of “family life”. [The Court] ruled that the European Convention on Human Rights requires member states to provide legal recognition, but does not require the availability of marriage for same-sex couples⁴⁰.

In this case, the Court found that same-sex couples are in a sufficiently similar situation to opposite-sex couples when it comes to their need for formal recognition and protection of such a relationship. A key point from this judgment was that the Court for the first time recognized that issues concerning the legal status of LGBTQ+ relationships are covered by the protection under Article 8 of the Convention not only in the area of “private life” but also „family life”⁴¹. In this way, it expressed the concept that LGBTQ+ individuals living in partnerships form a family. This is of significant importance for extending a similar scope of protection to LGBTQ+ partnerships as that enjoyed by heterosexual partnerships (*e.g.*, marriages) regarding family rights (*e.g.*, parental authority, adoption, *etc.*). Thus, the Court found that states have an obligation to provide legal protection for such relationships, but did not impose a specific form (*e.g.*, marriage). States were

³⁸ *Ibidem*.

³⁹ Judgment of the ECtHR of 24 June 2010 in the case of *Schalk and Kopf v. Austria*, application no. 30141/04.

⁴⁰ *Ibidem*.

⁴¹ *Ibidem*, § § 94-95.

granted a so-called “margin of appreciation” in choosing the appropriate institution in this area (*e.g.*, in the form of a registered civil partnership, *etc.*)⁴².

A groundbreaking judgment was the case of *Oliari and others v. Italy*⁴³. The applicants were three same-sex couples who, in July 2008, applied to the Civil Registry Office in Trent for the announcement of their marriage banns. The office, however, refused to grant the request. The Court in Trent, which heard the appeal, indicated that under the Italian Civil Code, marriage can only be contracted by persons of the opposite sex. The complaint alleged that Italian law prevented the applicants from marrying, and therefore discriminated against them on the basis of their sexual orientation. The applicants alleged a violation of Articles 8, 12, and 14 of the Convention due to the refusal to register marriages concluded abroad and because they could not marry or obtain any other legal status for their family relationship in Italy. They claimed that this situation amounted to discrimination based on sexual orientation. In its judgment, the Court found that a European consensus on the institutionalization of same-sex cohabitation had been reached, so Italy should implement appropriate legislation, and the lack thereof violated Article 8 of the Convention. This landmark judgment influenced the Court’s subsequent case-law in similar cases. The Court referred to the findings in this case when resolving other, similar issues. It should be noted that this case law is well established. It should be emphasized that this judgment significantly narrowed the states’ margin of appreciation. The Court found that since most Council of Europe countries had already introduced some form of legal recognition, the lack of such a solution in a given country is already a violation of the Convention.

This judgment was also a breakthrough for Italy because as a result of the *Oliari and others* judgment, through Act No. 76/2016, the Italian legislator introduced civil unions in Italy. Subsequently, decrees provided for the possibility for persons who had married, entered into a civil union, or any other appropriate relationship abroad to register it as a civil union under Italian law. These regulations came into force in 2017.

It is worth noting that in Poland, same-sex couples tried to apply an identical mechanism as in Italy and circumvent the existing national regulations that recognize marriage exclusively as a union of a woman and a man by marrying abroad, in a country where such unions are legal, and then applying to the Head of the Civil Registry Office in Poland for the transcription of the marriage certificate. A ruling on the admissibility of such a substantive technical matter would lead

⁴² *Ibidem*, § 105. See more, <https://sip.lex.pl/komentarze-i-publicacje/monografie/zwiazki-osob-tej-samej-plci-konsekwencje-braku-regulacji-w-prawie-369572219> [Accessed on: 15.08.2025].

⁴³ Judgment of the ECHR of 21 July 2015 in the case of *Oliari and others v. Italy*, applications nos. 18766/11 and 36030/11.

to the preparation of a marriage certificate that would contain the personal data of same-sex persons, which in practice would mean the legalization of same-sex marriages in Poland. Such practices in Poland have received several rulings from administrative courts in recent years, including the Supreme Administrative Court⁴⁴. For example, in its judgment of May 17, 2023, ref. no. II OSK 1461/20, the Supreme Administrative Court found that there was no violation of Article 8(1) and (2) and Article 14 ECHR, due to the content of Article 12 of this Convention and the resulting right of individual states to regulate the right to marry by national laws⁴⁵. However, it is only a matter of time before the ECtHR issues a judgment against Poland in which a ruling similar to the one in the *Oliari and others* case is made.

Another judgment that introduced a formalized, universal European standard binding all states of the Convention, in the form of the obligation of states parties to legally institutionalize same-sex partnerships, is the judgment in the case of *Fedotova and others v. Russia*⁴⁶. This judgment “brought a clear establishment of the European standard, and can be summarized in four findings:

- Article 8 of the Convention on Human Rights and Fundamental Freedoms implies a positive obligation for all member states of the Convention to establish and implement regulations establishing the legal status of same-sex relationships;
- Article 8 ECHR implies a positive obligation to adopt regulations providing these relationships with an “adequate” degree of protection, which leaves a certain “margin of protection” to the national legislator;
- Article 8 ECHR leaves a “margin of appreciation” to the national legislator in determining the legal form of recognition of same-sex relationships; in light of Article 12 ECHR, it does not have to, but may take the form of marriage;
- These decisions of the Court should be treated as a uniform judicial precedent applying to all states of the Convention⁴⁷.

This judgment is of great importance for the entire European community, which in turn will influence the formulation of a universal standard. From Poland’s perspective, this means the need to introduce appropriate regulations in the Republic

⁴⁴ For example, the judgment of the Supreme Administrative Court of 22 June 2021, ref. no. II OSK 2608/19, the judgment of the Voivodeship Administrative Court in Łódź of 24 May 2023, ref. no. III SA/Łd 43/23, and the judgment of the Voivodeship Administrative Court in Warsaw of 24 January 2023, ref. no. VII SA/Wa 2295/22.

⁴⁵ P. Kuczma, *Glosa do wyroku Naczelnego Sądu Administracyjnego z 17 maja 2023 r., sygn. akt II OSK 1461/20*, „Przegląd Prawa Konstytucyjnego” 2024, no. 2.

⁴⁶ Judgment of the ECHR of 17 January 2023 in the case of *Fedotova and others v. Russia*, application nos. 40792/10, 30538/14, and 43439/14. See an extensive discussion of the judgment by L. Garlicki, *Fedotova i inni przeciwko Rosji, czyli sformowanie europejskiego standardu nakazującego prawne uznanie związków monoseksualnych*, “Europejski Przegląd Sądowy”, February 2023, pp. 27 et seq.

⁴⁷ L. Garlicki, *Fedotova...*, p. 27.

of Poland that will formalize the status of same-sex relationships, under the threat of finding violations in the implementation of the Convention's provisions⁴⁸.

In the case of *Przybyszewska and others v. Poland*⁴⁹, the subject of the review was the alleged lack of any form of legal recognition and protection available to same-sex couples in Poland. The applicants were 10 Polish citizens forming five same-sex couples living in stable relationships. Marriage is the only way to formalize a relationship in Poland. The applicant couples decided to get married several years ago and applied to local civil registry offices to complete the necessary formalities. According to Polish law, each of the applicants declared before the head of the civil registry office that there were no impediments preventing them from marrying their same-sex partner. This declaration is a condition for marriage in Poland. In each case, the head of the civil registry office issued a decision to refuse to accept the declarations, citing national law, which defines marriage exclusively as a union of a woman and a man. Relying on Article 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination) in conjunction with Article 8, the applicants complained about the lack of any form of legal recognition and protection for same-sex couples in Poland. They argued that the vast majority of Council of Europe member states offer same-sex couples the right to marry or enter into a registered civil partnership and claimed that they were at a disadvantage due to the lack of adequate recognition of their relationship – for example, in the fields of taxation, social rights, and family law. The case was therefore identical, in terms of the subject of the complaint, to the case of *Oliari and others v. Italy*. In its ruling, the Court did not accept the Polish government's argument that “the traditional concept of marriage as a union of a woman and a man constituted Poland's social and legal heritage”. The Court drew attention to the ECtHR's previous case law, according to which member states were able to determine the exact nature of the legal regime to be made available to same-sex couples, but had much less discretion when it came to legal recognition and protection in general, which was visible in the clear trend towards legal recognition of same-sex couples observed in the Contracting Parties to the Convention. It was important that the protection provided by member states to same-sex couples was adequate. In this case, the Court found that the Polish legal framework cannot be considered to provide for the basic needs of recognition and protection of same-sex couples in a stable and committed relationship. Same-sex partners were unable to regulate basic aspects of their common life, such as property, maintenance, tax, and inheritance issues. Furthermore, in most situations, their relationship had no significance in contacts

⁴⁸ *Ibidem*, pp. 27 et seq.

⁴⁹ Judgment of the ECtHR of 12 December 2023 in the case of *Przybyszewska and others v. Poland*, application no. 11454/17 and 9 others.

with judicial or administrative authorities. In other words, the Court indicated that the Convention does not impose on states an obligation to introduce same-sex marriages, but any recognition of their rights. The Court in its judgment also drew attention to another aspect, namely that the Convention, adopted in 1953 as a “living document”, does not provide a basis for limiting the institution of marriage only to heterosexual relationships. The decision in this matter was left to the member states. Currently, Poland is one of five European Union countries (along with Lithuania, Bulgaria, Romania, and Slovakia) that does not recognize any legal possibility of legalizing same-sex relationships⁵⁰.

Conclusion

The repeated ECtHR judgments are a clear signal that Poland can no longer remain in a “legal vacuum”. Further legislative inaction may result in further judgments and the need to pay compensation, which is not an effective or satisfactory solution.

In accordance with Article 46(1) of the ECHR, Poland has a legal obligation to execute the final judgments of the ECtHR. This means that the government and parliament must take legislative action to introduce a form of legal recognition for same-sex relationships that will provide them with adequate protection and stability⁵¹.

The Court does not require the state to introduce same-sex marriages, but it does demand that an appropriate legal framework be provided. In practice, this means regulating property, inheritance, social security, access to medical information, and other rights that are standard for heterosexual couples⁵². It should be noted that the introduction of civil partnerships does not violate Article 18 of the Polish Constitution, which concerns only marriage as a union of a woman and a man. A civil partnership is a separate legal institution whose purpose is to secure the rights and obligations of couples who are not (or cannot be) married.

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⁵⁰ <https://hfhr.pl/aktualnosci/wyrok-etpc-zwiazki-partnerskie-i-malzenskie-lgbt> [Access on: 15.08.2025].

⁵¹ <https://hfhr.pl/aktualnosci/wyrok-etpc-formela-v-polska-zwiazki-partnerskie-lgbt> [Accessed on: 10.08.2025].

⁵² See more: *M. Wąsik, Związki osób tej samej płci. Konsekwencje braku regulacji w prawie polskim*, Warszawa 2024.

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