Special Section
Same-Sex Marriage: Comparative Reflections

An Emerging Right to a "Gay" Family Life? The Case *Oliari v. Italy* in a Comparative Perspective

By Sabrina Ragone & Valentina Volpe[*]

Abstract

This Article analyses, through the lens of comparative law, the *Oliari and others v. Italy* judgment, which was issued by the European Court of Human Rights (ECtHR) in July 2015. The *Oliari* case is important for being the first judgment in which the ECtHR established the granting of legal "recognition and protection" to same-sex couples as a positive obligation for the Member States of the Council of Europe on the basis of Article 8 of the European Convention on Human Rights. In order to understand the role of judicial bodies in the progressive protection of homosexual rights, this Article combines an analysis of European case law with the national perspective. As it concerns the supranational facet, the authors illustrate *Oliari*'s reasoning and situate the case in the jurisprudence of the ECtHR. Elements of both continuity and innovation emerge from the analysis, as well as a relevant dimension of judicial dialogue supporting the incremental recognition of gay rights in Europe. As it concerns the national facet, this specific case was initially dealt with at the domestic level and was the object of judgment 138/2010 by the Italian Constitutional Court. The judgment is critically put into perspective through the examination of the jurisprudence of other European Constitutional Courts (France, Portugal and Spain) that were called on to decide similar cases in the same period. Therefore, the Article offers a comparative analysis of the *Oliari* judgment clarifying its relevance and speculating on the potential value of this case for the future recognition of the right to a "gay" family life in Europe.

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The Authors wish to express their gratitude to Junyu Chen and Natalia Filandrianou for their helpful research assistance. The article is the result of a common reflection; nevertheless, sections B and D are attributable to Sabrina Ragone and sections C and E to Valentina Volpe. The footnotes and Internet websites quoted in the article were updated and last accessed on February 16, 2016, when we submitted the Article to the *German Law Journal*. In May 2016, the Italian parliament passed law 76/2016, introducing for the first time same-sex civil unions in the legal system. This result is also the outcome of the international obligation recognized by the ECtHR in *Oliari and others v. Italy*, which proves and enhances the relevance of this judgment.

A. Introduction

On July 21, 2015, the Fourth Section of the European Court of Human Rights (ECtHR) unanimously held in *Oliari and others v. Italy* (*Oliari*) that Italy violated the rights of homosexual couples protected by Article 8 of the European Convention on Human Rights (ECHR or the Convention). In fact, Italy failed to ensure "a specific legal framework providing for the recognition and protection of . . . same-sex unions."[1] No party requested referral to the Grand Chamber and the judgment became final as of October, 2015.

For the first time, the ECtHR considered the provision of a "legal framework" for ensuring social recognition and legal protection to gay couples a positive obligation of the Council of Europe (CoE) Member States.[2] The Court found that Italy had violated the Convention's right to respect for family life. By doing so the ECtHR entered into several national debates about the legal recognition of same-sex unions that domestic courts throughout Europe have been engaging with over recent years.

The case had its prologue at the national level in the judgment of the Italian Constitutional Court 138/2010, which dismissed claims seeking to extend the scope of marriage to same-sex couples. Nevertheless, the Italian Constitutional Court held that these unions were constitutionally valuable social groups and urged the legislature to provide a form of legal recognition (Section B). In order to measure the influence of the *Oliari* case in the ECtHR case law, Section C will discuss the basic facts of the case and the main argumentative steps in the Court's reasoning.

In order to better understand the legal context in which same-sex couples' recognition is developing in Europe, the Article provides a comparative analysis of a series of judgments from multiple European constitutional jurisdictions, including France, Portugal, and Spain. These jurisdictions adopted similar or comparable positions, denying the existence of any constitutional obligation to recognize gay marriage, but simultaneously encouraging legislative action to create such an institution (Section D).

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[1] Eur. Court H.R., *Oliari and others v. Italy*, judgment of July 21, 2015, paragraph 185 [hereinafter the judgment].

[2] See, among the others, the commentaries by Francesco Alicino, Le coppie dello stesso sesso. L'arte dello Stato e lo stato della giurisprudenza, FORUM DI QUADERNI COSTITUZIONALI, August 22, 2015; Paul Johnson, Ground-breaking judgment of the European Court of Human Rights in Oliari and Others v. Italy: same-sex couples in Italy must have access to civil unions/registered partnerships, in ECHR Sexual Orientation Blog, July 21, 2015 available at: http://echrso.blogspot.de/2015/07/ground-breaking-judgment-of-european.html; Lorella Ponzetta, La sentenza Oliari e altri Vs. Italia: una pronuncia dai dubbi effetti, FORUM DI QUADERNI COSTITUZIONALI, November 15, 2015; Giuseppe Zago, A victory for Italian same-sex couples, a victory for European homosexuals? A commentary on *Oliari v Italy,* ARTICOLO 29, August 21, 2015, available at: http://www.articolo29.it/2015/victory-for-italian-same-sex-couples-victory-for-european-homosexuals-commentary-on-oliari-v-italy.

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In Section E, we will turn our attention at the supranational level, suggesting a set of possible answers to the question "Why does *Oliari* matter?". We will pay particular attention to the role of the Strasbourg Court in the incremental trend towards favoring gay rights recognition in Europe. The analysis of the *Oliari* case and of the relevant jurisprudence reveals: (1) traits of both continuity and innovation in the ECtHR case law regarding the legal recognition of same-sex-unions; (2) a model of horizontal global dialogue and vertical integration between supranational and domestic actors; and (3) the inner paradoxes and transformative potential of the "European consensus" in tackling complex and counter-majoritarian human rights issues.

The Article concludes by suggesting an open epilogue for the *Oliari* case, and considering whether this jurisprudence may be applicable to other CoE Member States that are still failing to ensure "a specific legal framework providing for the recognition and protection of . . . same-sex unions."[3] It will also outline possible future scenarios for the right to a "gay" family life within the CoE framework (Section F).

B. The Prologue: Judgment 138/2010 of the Italian Constitutional Court

I. The Case and the Approach

The first episode of the *Oliari* case took place at the national level. In 2010, the Italian Constitutional Court was called on to judge certain provisions of the national civil code governing marriage to decide whether the heterosexual paradigm that it implied was compatible with the Italian constitution. It was a "concrete control" (a review related to a specific proceeding), because two tribunals raised two different questions to the Court concerning the same issue.[4] In both referred cases, the tribunals were considering a municipal civil status officer's denial of publishing marriage banns for two same-sex couples because Italian law did not, and still does not, permit same-sex marriage.

The judges who challenged the validity of the civil regulation were conscious that Italian law was clearly based on the factual presumption that the spouses must be of different sex, and therefore it was impossible to extend the institution of marriage to same-sex couples. At the same time, they stated that it was also not possible

> to ignore the rapid transformation in society and customs over the last decades, which have witnessed the end of the monopoly held by the model of the

[3] Paragraph 185 of the judgment.

[4] Italian Constitutional Court, judgment 138/2010, April 14, 2010. The referring courts were the Tribunal of Venice and the Court of Appeal of Trento. Afterwards, the Court of Appeal of Florence and the Tribunal of Ferrara raised similar questions; see decisions 276/2010 and 4/2010 of the Italian Constitutional Court.

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> normal traditional family and the parallel spontaneous emergence of different, albeit minority, forms of cohabitation, which require protection, are inspired by the traditional model, and as such aim to be acknowledged and regulated. New needs, associated also with the evolution of culture and civilization, call for protection, and this requires close attention to the ongoing compatibility of the traditional interpretation with constitutional principles.[5]

In light of this situation, the referring judges argued that it would be possible for only the Italian Constitutional Court to grant same-sex couples protection.[6] In other words, the referring judges tried to obtain a sort of "creative judgment" consisting in an amendment to the legal system. The Italian Constitutional Court refused to do so; it was not entitled to fill in the gaps left by the legislature,[7] especially in areas without mandatory content arising from the constitution itself.[8] In the Court's view, only the parliament could, and actually should, provide for the appropriate protection.

[5] This is the transcript of the arguments made in the facts of the judgment, which was translated into English and is available at www.cortecostituzionale.it. For a clear reconstruction of the Italian context, also in a comparative perspective, see OMOSESSUALITÀ, EGUAGLIANZA, DIRITTI (Angelo Schillaci ed., 2014) and Francesco Alicino, The Road to Equality. Same-Sex Relationships within the European Context: The Case of Italy, SOG Working Papers 25 (2015).

[6] See paragraph 1 of judgment 138/2010. It was not possible for them to apply the so-called "interpretazione conforme" (interpretation consistent with the constitution) to automatically interpret the regulation of marriage by opening it to gay couples in light of the constitution. On the importance of the role of constitutional interpretation, see Roberto Romboli, Il diritto "consentito" al matrimonio ed il diritto "garantito" alla vita familiare per le coppie omosessuali in una pronuncia in cui la Corte dice "troppo" e "troppo poco", GIURISPRUDENZA COSTITUZIONALE 1629, 1634 (2010).

[7] See paragraph 7 of judgment 138/2010. For a wider perspective on the relationship between parliaments and courts in this sensitive field, see Sabrina Ragone, El matrimonio homosexual en Europa entre Derecho Político y Derecho Jurisprudencial. Reflexiones a raíz de la reciente Jurisprudencia comparada, 16 FORO. REVISTA DE CIENCIAS JURÍDICAS Y SOCIALES, Nueva Época 241 (2013). A similar approach is adopted in Tiago Fidalgo de Freitas, Diletta Tega, Judicial Restraint and Political Responsibility: A Review of the Jurisprudence of the Italian, Spanish and Portuguese High Courts on Same-Sex Couples, in SAME-SEX COUPLES BEFORE NATIONAL, SUPRANATIONAL AND INTERNATIONAL JURISDICTIONS, 287 (Daniele Gallo, Luca Paladini and Pietro Pustorino eds., 2014).

[8] See especially paragraph 5 of judgment 138/2010 ("The question raised by the two referral orders in relation to Article 2 of the constitution must be ruled inadmissible because it seeks to obtain a substantive judgment that is not mandated under constitutional law") and paragraph 9 ("This meaning of the constitutional rule cannot be set aside through interpretation, because to do so would not involve a simple re-reading of the system or the abandonment of a mere interpretative practice, but rather the implementation of a creative interpretation").

II. The Arguments

Judgment 138/2010 represents the premise and the counterpoint to the *Oliari* case, although the way the Italian Constitutional Court addressed the issue is more nuanced than how it is presented in the ECtHR's decision, which, in fact, used judgment 138/2010 as a tool to push the Italian legislature towards action.

Combined, the two tribunals used several constitutional articles as yardsticks to assert that the Italian civil code was unconstitutional. The articles mentioned were Article 2 (protection of rights for individuals also in social groups), Article 29 (family protection), Article 3 (principle of equality), and Article 117.1 (duty of both the national and the regional legislature to comply with the constitution and the European and international obligations).[9]

First, Article 2 recognizes the inviolable rights of individuals in those social groups where they express their personality and, among social groups, family is considered one of the most relevant, if not the primary one. The Court affirmed that the constitutional concept of a social group includes all kinds of "simple or complex communities that are capable of permitting and favoring the free development of the person through relationships, in a context that promotes a pluralist model."[10] As a consequence, this broad concept must also include homosexual unions, which the Court viewed as the stable cohabitation[11] of two individuals of the same sex who are granted the fundamental right to live freely as a couple, and to obtain rights and duties according to the law.

Second, Article 29 defines family as the "natural union" based on marriage. The Court referred to the original intent of the drafters of the constitution to argue that they certainly had in mind the traditional family as regulated in the civil code of 1942,[12] and also added

[9] The Court dismissed the question with regard to Article 3 and Article 29, and declared it not admissible as it concerns Articles 2 and 117. See Piero Alberto Capotosti, Matrimonio tra persone dello stesso sesso: infondatezza versus inammissibilità nella sentenza n. 138 del 2010, QUADERNI COSTITUZIONALI, 361 (2010); Andrea Pugiotto, Una lettura non reticente della sent. n. 138/2010: il monopolio eterosessuale del matrimonio, in SCRITTI IN ONORE DI FRANCO MODUGNO 269 (2011); Fabrizio Mastromartino, IL MATRIMONIO CONTESO. LE UNIONI OMOSESSUALI DAVANTI AI GIUDICI DELLE LEGGI (2013).

[10] See paragraph 8 of judgment 138/2010.

[11] For more about the overruling of this specific *criterium* in the European case law, see *infra.*

[12] On the different perspective of the two sources as it concerns marriage, see Paolo Veronesi, Matrimonio omosessuale, ovvero: "È sorprendente per quanto tempo si può negare l'evidenza, di fronte a certe cose", in LA "SOCIETÀ NATURALE" E I SUOI "NEMICI". SUL PARADIGMA ETEROSESSUALE DEL MATRIMONIO, 378 (Roberto Bin et al. eds., 2010).

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that the biggest reform of family law, passed in 1975, did not take into consideration any type of "new" families.[13]

From this reconstruction, we are left with the following dilemma: Does this mean that the concept of family could never change? The Court gave a contradictory answer to this question. On the one hand, it said that the concepts of family and marriage could not be frozen in their configuration of when the constitution entered into force, because it is necessary to interpret constitutional principles taking into account the transformations of the legal system, and also, the evolution of society and customs. On the other hand, it stated that a court's interpretation could not affect "the very core of the provision, modifying it in such a manner as to embrace situations and problems that were not considered at all when it was enacted."[14] Therefore, the Court decided that it could not adopt a creative interpretation that would include same-sex couples in the scope of marriage.

Third, in the same part of the judgment, the Court made a reference to the protection of children in Article 30, which led the decision down the slippery slope of procreative potential as a premise for marriage. This element was also used to dismiss the argument linked to Article 3 and the violation of the principle of equality. The Court gave a short reasoning in this respect, stating that there was no violation of this principle because same-sex unions and married couples were not equivalent situations.[15]

Fourth, regarding Article 117 and the duty to legislate consistently with European and international obligations, the Court emphasized the role given to the legislature in the protection of gay couples. Using international and supranational sources of law—Article 12 of the European Convention on Human Rights and Article 9 of the Charter of Fundamental Rights of the European Union, in particular—the Court once again asked for parliament to intervene.[16]

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[13] On the paradox of interpreting the constitution in light of the civil code and not the opposite, see Andrea Pugiotto, Una lettura non reticente della sent. n. 138/2010: il monopolio eterosessuale del matrimonio, *supra* note 9. On the excessive importance given to the historical argument, see Francesco Dal Canto, Le coppie omosessuali davanti alla Corte costituzionale: dalla "aspirazione" al matrimonio al "diritto" alla convivenza, in SCRITTI IN ONORE DI FRANCO MODUGNO, *supra* note 9.

[14] See paragraph 9 of judgment 138/2010. On different interpretations of Article 29, see Carlo Fusaro, Non è la Costituzione a presupporre il paradigma eterosessuale, in LA "SOCIETÀ NATURALE" E I SUOI "NEMICI", SUL PARADIGMA ETEROSESSUALE DEL MATRIMONIO, 151, *supra* note 12.

[15] On this point, see Ilenia Massa Pinto and Chiara Tripodina, "Le unioni omosessuali non possono essere ritenute omogenee al matrimonio". Tecniche argomentative impiegate dalla Corte costituzionale per motivare la sentenza n. 138 del 2010, 1-2 DIRITTO PUBBLICO 16, 471 (2010).

[16] In favor of the existence of a European obligation for Italy, see Anna Maria Lecis Cocco Ortu, Same-sex unions in Italy: a European obligation?, in CURRENT SOCIAL AND LEGAL CHALLENGES FOR A CHANGING EUROPE, 38 (Cristina Benlloch Domènech, Pedro Jesús Pérez Zafrilla and Joaquín Sarrión Esteve eds., 2013).

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III. The Result

1. A Call for the Legislature

The Court did not take on the role of the legislature by adopting a creative judgment nor a so-called "*additiva di principio*"[17] which is a kind of judgment used but the Court in order to provide the referring judges—and the parliament—with guiding principles to apply in the absence of express regulation.[18] A creative judgment was considered impossible due to the lack of any constitutional duty, while the second option was not consistent with the case in absence of a law, because, in Italy, there is no constitutional control on legislative omissions. Nonetheless, it is likely that neither of those options would have been truly effective to achieve the applicability of marriage to same-sex couples. In fact, a comprehensive new regulation would have been necessary.

As the comparative overview offered in Section D will prove, taking into consideration both the constitutional framework and the state of the art of supranational case law, this was the expected result. Nevertheless, the initiative taken by the referring judges was very timely and helped to promote social and political debate on this topic. [19]

2. To Protect Same-Sex Couples as Constitutionally Valuable Social Groups

In the Court's view, same-sex couples must be considered worth protecting under Article 2 because they are social groups with constitutional value, as long as they represent the environment for the development of the personality of the partners. Nevertheless, this statement was not sufficient to declare the provisions of the Italian civil code unconstitutional because the constitutional protection did not necessarily lead to the extension of marriage to these couples.[20] In the absence of a unitary and unequivocal interpretation of a constitutional norm, the Court decided that there was space for legislative discretionary intervention.

[17] On the techniques used by the Court, see Forms and Methods of Judicial Reasoning, in ITALIAN CONSTITUTIONAL JUSTICE IN GLOBAL CONTEXT 67 (Vittoria Barsotti, Paolo G. Carozza, Marta Cartabia and Andrea Simoncini, eds., 2015).

[18] On the possibility of adopting this kind of judgment, see Roberto Pinardi, La Corte, il matrimonio omosessuale ed il fascino (eterno?) della tradizione, NUOVA GIURISPRUDENZA CIVILE COMMENTATA, 527 (2010) and Antonio D'Aloia, Omosessualità e Costituzione, La tormentata ipotesi del matrimonio tra persone dello stesso sesso davanti alla Corte costituzionale, in LA "SOCIETÀ NATURALE" E I SUOI "NEMICI". SUL PARADIGMA ETEROSESSUALE DEL MATRIMONIO, 104, *supra* note 12.

[19] See Simone Scagliarini, Un'opportuna sollevazione di questioni infondate, in LA "SOCIETÀ NATURALE" E I SUOI "NEMICI". SUL PARADIGMA ETEROSESSUALE DEL MATRIMONIO, 345, *supra* note 12.

[20] Roberto Romboli, Per la Corte costituzionale le coppie omosessuali sono formazioni sociali, ma non possono accedere al matrimonio, FORO ITALIANO, 167(2010).

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3. But Not (Necessarily) Letting them Marry

According to the Court, it would not be necessary to extend marriage to same-sex couples to grant them rights and duties.[21] In the construction of this argument, the Court used comparative law as evidence of the non-obligation of gay marriage in light of other distinct solutions adopted in the European framework.[22] As a result, to ensure the recognition of the protection of these social groups, the legislature is free to choose which legal instruments to use. Parliament was considered as the only politically accountable institution entitled to counterbalance the legal vacuum, thus regulating the corresponding legal instrument.[23]

Nevertheless, according to the judgment's constitutional concept of family, it seems difficult to extend marriage to same-sex couples, even through legislation. Both the aforementioned interpretation of Article 29, based on the original intent of the drafters of the constitution, and the non-application of the principle of non-discrimination and equality, according to Article 3 seem to indicate that the best path for the legislature was to

[21] On the potential developments after the judgment, see UNIONI E MATRIMONI SAME-SEX DOPO LA SENTENZA 138/2010: QUALI PROSPETTIVE (Barbara Pezzini and Anna Lorenzetti eds., 2011).

[22] See paragraph 8 of judgment 138/2010 ("However, the Court finds that the aspiration to this recognition—which necessarily postulates legislation of a general nature, aimed at regulating the rights and duties of the members of the couple—cannot solely be achieved by rendering homosexual unions equivalent to marriage. It is sufficient in this regard to examine—even on a non-exhaustive basis—the legislation of the Countries that have to date recognized the aforementioned unions in order to ascertain the diversity within the choices made"). The clerks of the Court had also published a comparative dossier on the issue: see IL MATRIMONIO TRA PERSONE DELLO STESSO SESSO IN ALCUNI STATI EUROPEI (Paolo Passaglia ed., 2010) available on the website of the Court. In the same sense, see also Italian Court of Cassation, judgment 2400/2015, February 9, 2015, about another case of denial of publication of marriage banns.

[23] According to paragraph 8 of judgment 138/2010, the Court would be exclusively allowed to protect specific situations, especially "within a review of a provision's reasonableness". Also in the judgment 170/2014 by the Italian Constitution Court, concerning the case of a married couple in which one of the spouses was transsexual, the Court asked for a legislative measure—in those cases, after the sex change, the marriage is no longer valid independent from the will of the subjects affected. For criticisms on this judgment, see the comment by Giuditta Brunelli, Quando la Corte costituzionale smarrisce la funzione di giudice dei diritti: la sentenza n. 170 del 2014 sul c.d. "divorzio imposto", FORUM DI QUADERNI COSTITUZIONALI, October 6, 2014.

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provide same-sex couples with a distinct form of union.[24] Only by giving parliament extreme discretionary power would it be possible to envision otherwise.[25]

Despite the broad interpretation given by some scholars to the Court's judgment, subsequent parliamentary debates have focused on gay unions and high courts' jurisprudence has generally argued against the necessity of gay marriage. The Italian parliament has been debating same-sex couples issues, through a bill presented in October 2015, after a series of similar initiatives.[26] The bill regulates gay civil unions, conferring upon them many of the rights and duties recognized for married couples by explicitly extending the applicability of specific provisions of the civil code. In general, the debate about the bill has been extremely vehement, especially with regard to the so-called "stepchild adoption". [27]

The Court of Cassation in its posterior jurisprudence—for example, in judgment 2400/2015, concerning the same core question as judgment 138/2010—has also supported the constitutional case law concerning gay couples by denying the existence of any illegitimate discrimination vis-à-vis heterosexual partners. The high court used national[28] and supranational cases and argued that even the ECtHR did not impose any obligation on States in this sense, granting them a wide margin of appreciation.[29] According to the Court of Cassation, Article 8 of the ECHR simply sets the right to live freely as a couple, and therefore, Article 12 of the ECHR does not oblige the existence and regulation of gay marriage.

[24] In the same sense, see Francesco Dal Canto, La Corte costituzionale e il matrimonio omosessuale (nota a Corte cost., 15 aprile 2010, n. 138), FORO ITALIANO, 1369 (2010) and Paolo Bianchi, La corte chiude le porte al matrimonio tra persone dello stesso sesso, GIURISPRUDENZA ITALIANA, 537 (2010). Clearly supporting the constitutional obligation of the heterosexual paradigm, Antonino Spadaro, Matrimonio "fra gay": mero problema di ermeneutica costituzionale—come tale risolubile dal legislatore ordinario e dalla Corte, re melius perpensa—o serve una legge di revisione costituzionale?, FORUM DI QUADERNI COSTITUZIONALI, September 9, 2013.

[25] In favor of this option, see Barbara Pezzini, Il matrimonio same-sex si potrà fare. La qualificazione della discrezionalità del legislatore nella sent. n. 138 del 2010 della Corte costituzionale, GIURISPRUDENZA ITALIANA, 2715 (2010).

[26] Information on bill n. 2081 is available on the website of the Senate: http://www.senato.it/leg/17/BGT/Schede/Ddliter/46051.htm.

[27] See in English the New York Times, Italian Lawmakers' Vote on Same-Sex Civil Unions Stalls, February 16, 2016, available at: http://www.nytimes.com/2016/02/17/world/europe/italy-same-sex-civil-unions.html?_r=0.

[28] Quoting the abovementioned judgment 170/2014 of the Italian Constitutional Court.

[29] Judgment 2400/2015 was issued in February 2015, quoting the previous jurisprudence by the ECtHR, in particular *Schalk & Kopf v. Austria* (2010), see *infra*; *Gas and Dubois v. France,* judgment of March 15, 2012 and *Hämäläinen v. Finland,* see *infra*.

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This logic was the basis of the position adopted by the Court of Cassation when it came time to register gay marriages celebrated abroad in civil status records.[30] This Court confirmed that those couples were not entitled to register their marriages, but, in 2012, it did not rely on the traditional arguments of non-existence and violation of public order. In fact, instead of arguing that such marriages are against national public order, the Court confirmed that they cannot produce any legal effect in the Italian legal system. Still, the Court of Cassation stated that, in light of the constitutional and conventional value of these couples, there could potentially be ground in the future for fundamental rights claims asking for same or similar treatment as married couples in specific situations.

C. The *Oliari Case*: The Court's Judgment in Three Steps

I. Step 1—The Facts and the Double-Sided Content of Article 8

The *Oliari* case originated from three same-sex couples, whose requests for the issuance of marriage banns were ultimately rejected by the Italian authorities between 2008 and 2011. One of the applicant couples, Enrico Oliari and his partner, was also a party in one of the cases that reached the Italian Constitutional Court in 2010.

In 2011, the three couples appealed to the ECtHR[31] alleging that the "Italian legislation did not allow them to get married or enter into any other type of civil union" and thus "discriminated against [them] as a result of their sexual orientation."[32] To ground their claim, the applicants relied upon three articles of the Convention: Article 8 (right to respect for private and family life),[33] Article 12 (right to marry), [34] and Article 14 (prohibition of discrimination).[35]

[30] See Italian Court of Cassation, judgment 4184/2012, March 15, 2012.

[31] More precisely, the Chamber decided to join the two original applications: 18766/11 and 36030/11.

[32] Paragraph 3 of the judgment.

[33] ECHR, Article 8: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. 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 wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[34] ECHR, Article 12: "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

[35] ECHR, Article 14: "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Court rejected the claims under Article 12, both independently and in conjunction with Article 14. It found these claims as being manifestly ill-founded and declined to engage in a proper discussion on the existence of a right to a gay marriage. It neglected to analyze Article 8 in conjunction with Article 14, and instead focused its whole reasoning on the sole applicability of the right to private and family life.

The Court confirmed its previous case law with respect to the double-sided content of Article 8. It affirmed that, notwithstanding the article's "negative" dimension—its main function is "to protect individuals against arbitrary interference by public authorities"[36] —it may also impose positive obligations on States to ensure an effective respect for the protected rights.[37] These positive obligations "may involve the adoption of measures designed to secure respect for private or family life even in the sphere of the relations of individuals between themselves."[38] Framed in these terms, the question the Court had to decide was thus, "whether Italy . . . failed to comply with a positive obligation to ensure respect for the applicants' private and family life,"[39] in particular, through the provision of a legal framework allowing the applicants to have their relationship recognized and protected under domestic law.

II. Step 2—"Recognition and Protection" under the Italian Legal System?

In line with its previous case law, the Court affirmed that same-sex couples "are in need of legal recognition and protection of their relationship."[40] The ECtHR concluded that gay couples are equally capable of entering into stable and committed relationships in the same way as opposite-sex couples.[41] Given the absence of a dedicated legal framework at

[36] Paragraph 159 of the judgment. In a very early judgment of 1968 the Court affirmed that the object of Article 8 "is essentially that of protecting the individual against arbitrary interference by the public authorities in his private family life." Eur. Court H.R., *Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium*, July 23, 1968, paragraph I.B.7.

[37] Since early judgments, the ECtHR case law has constantly emphasized the double-sided content of Article 8, encompassing both negative and positive obligations for Member States. See Eur. Court H.R., *Marckx v. Belgium,* June 13, 1979, paragraph 31; Eur. Court H.R., *X and Y v. the Netherlands*, March 26, 1985, paragraph 23; Eur. Court H.R., *Johnston and others v. Ireland*, December 18, 1986, paragraph 55. c). On the articulated content of Article 8 see Cesare Pitea and Laura Tomasi, Art. 8 – Diritto al rispetto della vita privata e familiare, in COMMENTARIO BREVE ALLA CEDU - CONVENZIONE EUROPEA PER LA SALVAGUARDIA DEI DIRITTI DELL'UOMO E DELLE LIBERTÀ FONDAMENTALI, 297 (Sergio Bartole, Pasquale De Sena and Vladimiro Zagrebelsky eds., 2012).

[38] Paragraph 159 of the judgment.

[39] Paragraph 164 of the judgment.

[40] Paragraph 165 of the judgment.

[41] *Ibidem*. The Court recalls here that there is a need for legal recognition and protection as it has been underlined in relevant documents of the Council of Europe. Two such relevant documents are the Parliamentary Assembly Recommendation 1474 (2000), which already fifteen years ago called upon Member States "to adopt legislation making provision for registered partnerships", Recommendation 1474 (2000), *Situation of Lesbians and Gays in*

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the national level, the Court had to determine whether alternative forms of legal and judicial "recognition and protection" were available under domestic law to compensate for the lack of formal provisions.

The Court analyzed, and subsequently dismissed, the different sets of arguments put forward by the Italian Government. First, "local registers for civil unions," which have been adopted by less than 2% of Italian municipalities, had a mere symbolic value, lacking the capacity to grant effective rights or an official status to registered couples. Second, judicial protection of *de facto* unions is equally limited in its scope and potentially contradictory in its outcomes. And third, "cohabitation agreements" that have been introduced in the Italian system only since December 2013, after the applicants had already filed their complaints, can indeed regulate some aspects of "living together," but lack the capability of ensuring mutual rights and obligations to the affected parties. Moreover, these agreements, which are not limited to same-sex or heterosexual couples, being open to all types of cohabitating people, impose the requirement of "cohabitation," pushing the case law of the Court one step back. In fact, it already considered in 2013 "the existence of a stable union . . . independent of cohabitation."[42]

As a consequence, in the existing legal framework, the applicants' situation can only be considered a *de facto* union. To receive protection, the applicants must raise a number of recurring issues with domestic courts, whose final assessments may remain ambiguous because "while recognition of certain rights has been rigorously upheld, other matters in connection with same-sex unions remain[ed] uncertain." [43] In addition, judicial determination of same-sex couples' basic needs "amounts to a not-insignificant hindrance to the applicants' efforts to obtain respect for their private and family life"[44]—especially in an overloaded justice system, such as the Italian one. As a result, the protection available within the Italian legal system is considered deficient both in content, being unable to provide for the core needs relevant for a couple committed in a stable relationship, and in stability, considering that it depends on cohabitation prerequisites and on often incoherent judicial and administrative practices.

Council of Europe Member States, June 30, 2000; and the Committee of Ministers Recommendation of 2010, which invited member States "to consider the possibility of providing . . . same-sex couples with legal or other means to address the practical problems related to the social reality in which they live." Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States *on measures to combat discrimination on grounds of sexual orientation or gender identity*, March 31, 2010, paragraph 25.

[42] Paragraph 169 of the judgment. The ECtHR first affirmed the principle in Eur. Court H.R., *Vallianatos and others v. Greece*, November 7, 2013: "the fact of not cohabiting does not deprive the couples concerned of the stability which brings them within the scope of family life within the meaning of Article 8". Paragraph 73.

[43] Paragraph 170 of the judgment.

[44] Paragraph 171 of the judgment.

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III. Step 3—Social Reality, Margin of Appreciation, and European Consensus

By the examination of the domestic context, the Court highlighted a visible discrepancy between the "social reality of the applicants,"[45] who openly live their relationship, and the law, which fails to ensure any form of recognition to same-sex couples.

A series of surveys provided by third-party interveners, and explicitly recalled in the judgment, demonstrated that the majority of the Italian population supports the introduction of a legal framework for the recognition and protection of same-sex unions.[46] In the absence of marriage, the Court considered the adoption of legislation creating civil unions or registered partnerships as "the most appropriate way"[47] for same-sex couples to "have their relationship legally recognized."[48] The Court also considered the intrinsic value and sense of social legitimization that this would enshrine for the concerned couples. The introduction of these measures would not only "allow for the law to reflect the realities of the applicants' situations,"[49] but it would also respond to an impellent social need, affecting a remarkable number of people in the country, while, at the same time, imposing a limited burden on the State.

States certainly retain a certain margin of appreciation in defining the precise content of positive obligations, but the breadth of this margin is affected by various factors identified by the Court's jurisprudence. It is up to the Court to judge whether a fair balance between the competing interests of the individual and the community is concretely respected, and in the present case, the Italian government failed to highlight the type of community interests against which individual rights have to be counterbalanced. The Italian government did not rely on the need to protect traditional concepts such as morals,[50] but instead focused on the sole domestic margin of appreciation. In particular, it emphasized the necessity to grant society enough "time . . . to achieve a gradual maturation of a common sense . . . on the recognition of this new form of family,"[51] affirming that national

[45] Paragraph 173 of the judgment.

[46] Paragraph 181 of the judgment. The Associazione Radicale Certi Diritti (ARCD) submitted a survey carried out in 2011 by the ISTAT (Italian Institute for Statistics), which found that the statement "it is just and fair for a homosexual couple living as though they were married to have before the law the same rights as a married heterosexual couple" was supported by 62.8% of those responding. Paragraph 144.

[47] Paragraph 174 of the judgment.

[48] *Ibidem*.

[49] Paragraph 173 of the judgment.

[50] Included, in principle, among the grounds able to limit the right to respect for private and family life according to Article 8.2, ECHR.

[51] Paragraph 123 of the judgment.

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authorities are better placed to choose the modes and times of legal recognition for same-sex unions.

States' margin of appreciation is broader when sensitive moral and ethical issues are at stake—although the present case does not address highly divisive issues, such as child adoption for same-sex couples—and it is narrower as far as important facets of the individual existence and identity are considered. The existence of a "European consensus" is also a factor limiting a State's margin of appreciation and a movement towards legal recognition of same-sex couples "has continued to develop rapidly in Europe since the Court's judgment in *Schalk & Kopf*"[52] in 2010. As of July 2015, "a thin majority" of CoE Member States, 24 out of 47, have introduced some forms of civil unions for same-sex couples and a similar trend is noticeable globally,[53] as seen in the U.S. Supreme Court case *Obergefell v. Hodges*.[54]

IV. In Conclusion

Lacking any evidence of a prevailing community interest in preventing legal recognition of same-sex partnerships, Italian authorities "have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions."[55]

Domestic authorities may be better placed, in principle, to assess community interests, but "in the present case the Italian legislature seems not to have attached particular importance to the indications set out by the national community."[56] This community includes the general Italian population, whose support to same-sex unions is reflected by several domestic surveys, and the highest judicial authorities—in particular, the Constitutional Court and the Court of Cassation, whose repetitive calls for the introduction of a legal framework remained unheeded.

[52] Paragraph 178 of the judgment. See also *infra*.

[53] *Ibidem.*

[54] Paragraph 65 of the judgment.

[55] Paragraph 185 of the judgment.

[56] Paragraph 179 of the judgment.

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D. A Comparative Outlook: European Constitutional Courts Between Self-Restraint and Endorsement of Social/Legal Change

The approach taken by the ECtHR reinforced the position of the Italian Constitutional Court in its judgment 138/2010 (see Section E), a position that was not an isolated doctrine in the European comparative landscape. In fact, other Courts had been called to decide on similar issues in the same period and adopted similar views.

Among the potential examples, three systems can be considered more comparable with Italy: Portugal, France and Spain. They are all legal systems belonging to the civil law family and present relatively similar social and legal backgrounds, embedded in the European framework.

The main common characteristic shown by this case law is that the courts did not adopt creative judgments, but they endorsed the decisions of the corresponding legislatures when taken. All of them prove that in Europe, until now, the recognition of same-sex unions was the domain of political actors.

In Portugal and France, the control was twofold: First, a case concerning the civil code itself and its compatibility with the constitution, i.e. issues similar to the Italian judgment 138/2010; second, a case on the new norms after the adoption of the regulation on gay marriage.[57] In Spain, the Constitutional Court was called to evaluate a reform of the civil code passed seven years before, so exclusively *a posteriori*.

I. Square One: Gay Marriage Is Not Constitutionally Obligatory

1. Judgment 359/2009 of the Portuguese Constitutional Court

The first case decided by the Portuguese Constitutional Court again originated from the denial of marriage banns. In absence of any specific regulation of same-sex unions, the appeal contained a challenge to the civil code, which stipulated that marriage was a contract between a man and a woman in order to build a family and a common life (Article 1577).

The Portuguese Constitutional Court argued that it was impossible to derive from the Portuguese constitution any clear and univocal obligation to provide same-sex couples with the institution of marriage; marriage could only be considered one of the potential instruments for legal recognition of these couples.[58] From this perspective, this judgment is

[57] See Paolo Passaglia, Matrimonio ed unioni omosessuali in Europa: una panoramica, FORO ITALIANO, 272 (2010).

[58] Portuguese Constitutional Court, judgment 359/2009, July 9, 2009.

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very similar to the Italian one because it refers to the constitutional concept of marriage as it was conceived in 1976. Article 36 of the Portuguese constitution does not mention the gender of the spouses, but it does state the right to form a family and get married. The regulation of the requisites is left to ordinary legislation.

While the reasoning centered on the historical perspective, the Portuguese Constitutional Court argued against the crystallization of the concept of marriage and endorsed an evolutionary exegesis of the constitution through the modification of the legal system by the legislature.[59] Choosing a different configuration of marriage—such as a union between two adults who decide to share their lives, instead of the traditional vision—was considered to be beyond the mandate of the Court which was limited in scope to exclusively judge the constitutionality of legislation.[60] As in the Italian example, the Portuguese judges denied themselves the ability to adopt a creative decision, deeming it legitimate only in the case of constitutional obligations.[61]

In addition to using arguments based on the original intent of the drafters, the Portuguese Constitutional Court's judgment was also similar to the Italian judgment with respect to how they used the comparative argument.[62] The judgment mentioned both European and non-European legal systems—especially case law from Canada, the United States, and South Africa. On the one hand, these references were made to prove that there were distinct potential regulations for same-sex couples and, on the other hand, they were made to highlight the differences between the role of the judiciary in civil law and common law systems.

In conclusion, according to judgment 359/2009, changing the concept of marriage could not be considered a mere removal of a restriction to the exercise of a right, but an entire reform of the legal order that must be left to representative institutions and not to judicial bodies.

[59] See paragraphs 10 and 11 of judgment 359/2009. Concerning the evolution of families in Portugal, see for example Anna Ciammariconi, Le dinamiche evolutive della tutela giuridica della famiglia e del matrimonio nell'ordinamento portoghese, DIRITTO PUBBLICO COMPARATO ED EUROPEO, 676 (2010). On the domestic debate, see the book, published before the judgment, by Luís Duarte d'Almeida, Carlos Pamplona Côrte-Real and Isabel Moreira, O CASAMENTO ENTRE PESSOAS DO MESMO SEXO (2008). For a political and sociological approach, see Anna Maria Simões Azevedo Brandaõ and Tânia Cristina Machado, How equal is equality? Discussions about same-sex marriage in Portugal, 15 SEXUALITIES, 662 (2012).

[60] See paragraph 13 of judgment 359/2009.

[61] See paragraph 14 of judgment 359/2009.

[62] See paragraph 7 of judgment 359/2009.

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2. Judgment 2010-92 of the French Constitutional Council

Another case comparable to the Italian and the Portuguese aforementioned decisions was judgment 2010-92 of the French Constitutional Council (January 28, 2011). Again, the applicants in this case raised the issue of marriage regulation in the country's civil code within a concrete control by the Court of Cassation.

The goal of the appeal was that the Council overrule the traditional interpretation of the clauses of the country's civil code that governed marriage requirements, as elaborated in prior case law.[63] The referring judges invoked the constitutional clause on personal freedom in Article 66, qualifying the right to marry as a consequence of this freedom. Nevertheless, as it is common in the jurisprudence analyzed in this paper, the Council relied on Article 34, to allot discretionary power over the regulation of marriage to the legislature, thereby denying the existence of any violation of personal freedom.[64]

The French Constitutional Council added that the family life of gay couples was already recognized in the legal order through the existence of the so-called "PACS" or civil pacts of solidarity—a relevant factual aspect, especially in comparison with Italy.

As it concerns one of the other arguments often invoked with regard to same-sex couples, i.e. the principle of equality, judgment 2010-92 stated that it was compatible with the constitution to regulate different instruments for same-sex couples and heterosexual couples.[65] Only the legislature was free to extend the scope of marriage by amending Article 34, but the Constitutional Council was not entitled itself to exercise legislative discretion.

II. Square Two: But it is Constitutionally Possible if the Legislature Decides So

1. Judgment 121/2010 of the Portuguese Constitutional Court

After judgment 359/2009, the Portuguese parliament passed a law amending Article 1577 of the civil code, in order to delete any reference to wife and husband, adopting the expression of "two individuals."[66] Before promulgating this law, the President of the

[63] See in particular the decision 05-16627 of the First civil section of the French Court of Cassation, March 13, 2007.

[64] See paragraphs 5, 6 and 7 of judgment 2010-92. In this respect, see also the analysis by Daniele Ferrari, La Corte costituzionale e il Conseil Constitutionnel davanti ai matrimoni omosessuali, 2-3 POLITICA DEL DIRITTO, 495 (2012).

[65] See paragraph 9 of judgment 2010-92.

[66] On the previous debate and evolution, see Rosa Martins, Same-sex partnerships in Portugal. From de facto to de jure?, 4 n. 2 UTRECHT LAW REVIEW, 194 (2008).

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Republic initiated the abstract review process and the Portuguese Constitutional Court issued judgment 121/2010.[67]

The Court essentially repeated that the country's constitution gives the legislature the power to regulate marriage. According to the Court, the parliament is entitled to modify and update the legal concept of marriage, so long as the new regulation is not contrary to any other constitutional norm. Again, despite the original intent argument, the Court could endorse an evolutionary interpretation of the constitutional clause on marriage.[68] Most interestingly, the Court focused on the individuals' free choice of sharing their lives with their spouses, thereby removing procreative potential as a constitutionally necessary element of the union.[69]

2. Judgment 198/2012 of the Spanish Constitutional Court

In 2005, the Spanish civil code was modified to regulate gay marriage and this reform was immediately appealed. The Spanish Constitutional Court issued the judgment concerning this amendment in November 2012: this temporal gap is an important factual element to take into account when analyzing the outcome of the decision.[70] Another aspect which must be considered is that the abstract control on this reform was activated by the Popular Party—at the opposition in 2005—who argued for an application of the principle of equality. In their view, heterosexual couples were experiencing discrimination caused by a lack of differentiation.[71]

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[67] Portuguese Constitutional Court, judgment 121/2010, April 8, 2010. On the evolution of the Portuguese case law, see Elisabetta Crivelli, Il matrimonio omosessuale e la ripartizione di competenze tra legislatore e organo di giustizia costituzionale: spunti da una recente decisione del Tribunale costituzionale portoghese, RIVISTA DELL'ASSOCIAZIONE ITALIANA DEI COSTITUZIONALISTI (2010); Elena Sorda, Same-sex marriage: il caso portoghese, 4 IANUS, 173 (2011) and again Paolo Passaglia, Matrimonio ed unioni omosessuali in Europa: una panoramica, *supra* note 57.

[68] See paragraph 18 of judgment 121/2010. On the evolution of the concept, see Duarte Santos, MUDAM-SE OS TEMPOS, MUDAM-SE OS CASAMENTOS? O CASAMENTO ENTRE PESSOAS DO MESMO SEXO E O DIREITO PORTUGUÊS (2009).

[69] See paragraph 22 of judgment 121/2010. For a comparison with the Spanish case law in this respect, see Miguel Ángel Presno Linera, El matrimonio: ¿garantía institucional o esfera vital? A propósito de la STC 198/2012, de 6 de noviembre, sobre el matrimonio entre personas del mismo sexo y la jurisprudencia comparada, 19 REVISTA DE DERECHO CONSTITUCIONAL EUROPEO, 403 (2013).

[70] Spanish Constitutional Court, judgment 198/2012, November 6, 2012. Among the many studies published between the appeal and the judgment, see María Martín Sánchez, MATRIMONIO HOMOSEXUAL Y CONSTITUCIÓN (2008) and Francisco Javier Matia Portilla, Matrimonio entre personas del mismo sexo y Tribunal Constitucional: un ensayo sobre la constitucionalidad del primero y los límites en la actuación del segundo, 15 REVISTA GENERAL DE DERECHO CONSTITUCIONAL, 2 (2012).

[71] On this point, see for instance Fabrizio Mastromartino, IL MATRIMONIO CONTESO. LE UNIONI OMOSESSUALI DAVANTI AI GIUDICI DELLE LEGGI, 41 (2013).

The core of the judgment was Article 32 of the Spanish constitution, which granted men and women the right to get married.[72] As usual, opponents of the reform employed the argument of the original intent of the drafters of the constitution, but the Court dismissed it. After saying that, in 1978, the heterosexual couple was the only model of marriage that could be envisioned, the Court stated that the mere text of the article does not automatically mean that same-sex marriage must be forbidden. According to the Court, in a very strict sense, the reference to men and women only indicates the holders of the right, and the legislature had not changed that.

The Spanish Constitutional Court added that, in light of the numerous examples from other legal systems, different options would also have been compatible with the constitution, but that, if this option—marriage—was the choice of the legislature, it could not be overruled.[73]

Reality played a paramount role in this judgment: The Court had to take into account to what extent gay marriage had permeated Spanish legal culture and society. After seven years, it was possible to say that there was a clear social acceptance of those unions. The judges quoted surveys showing that 66% of the population was in favor—more than the European average of approximately 55%. Also, the evolutionary interpretation of Article 32 of the Spanish constitution was partially driven by this practical perspective.[74]

3. Judgment 2013-669 of the French Constitutional Council

In 2013, the French civil code was amended to establish total equivalence between heterosexual and homosexual couples, and the Constitutional Council judged the constitutionality of this law that same year.

Referring again to Article 34 of the French constitution, judgment 2013-669 (May 17, 2013) restated that parliament enjoys discretionary power to fix requisites and conditions for marriage, while the Constitutional Council is exclusively given the possibility to verify the

[72] On the need for a conjunct interpretation of Article 32 of the Spanish constitution with Article 9 and Article 14 (equality and non-discrimination), see Blanca Rodríguez Ruiz, Matrimonio, género y familia en la Constitución Española: trascendiendo la familia nuclear, 91 REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL, 80 (2011).

[73] See paragraph 9 of judgment 198/2012.

[74] See paragraph 5 of judgment 198/2012. On the contents of the judgment, in this perspective, see Francisco Javier Matia Portilla, Interpretación evolutiva de la Constitución y legitimidad del matrimonio formado por personas del mismo sexo, 31 TEORÍA Y REALIDAD CONSTITUCIONAL, 541 (2013). For a critical approach, see Abraham Barrero Ortega, El matrimonio entre ciudadanos del mismo sexo: ¿Derecho fundamental u opción legislativa?, 163 REVISTA DE ESTUDIOS POLÍTICOS, 41 (2014).

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constitutionality of legislative choices but not their political opportunity.[75] If the legislature considered that there were not enough differences between same-sex couples and traditional families to justify distinct legal regimes, it was not for the Council to issue an overlapping opinion.[76]

As it was expected and consistent with judgment 2010-92, the Council highlighted that no constitutional norm fixed the heterosexual paradigm as necessary, so there was no clear constitutional parameter against this political choice.

III. Some Reflections in Light of the Comparison Among the Courts

The joint analysis of the jurisprudence of the Constitutional Courts leads us to some conclusions. The first one is related to the (non) use, by all judges involved in the cases, of the principle of equality. In every judgment where the tribunals were called to apply this principle in order to expand the scope of marriage to include same-sex couples, they considered it insufficient to ground such a claim. More precisely, all Courts determined that equalizing the two situations was not constitutionally obligatory and stated that it was potentially acceptable to differentiate between them.

The second common point was built on this basis. Because there was no direct application of the principle of equality, to grant homosexual couples the same instrument given to heterosexual ones had to depend on a discretionary choice of the legislatures. Through this doctrine, domestic Courts recognized that only the corresponding parliaments, being representative institutions, were entitled to decide on this sensitive issue, at least in absence of an unequivocal constitutional yardstick. As a consequence, they established a sort of dialogue with the legislatures and they then endorsed the legitimacy of same-sex marriage, when regulated.

The third relevant aspect is that there is still a difference, both in national and supranational case law, between the right to marry and the right to form a family. At the moment, only the latter has been broadly granted to same-sex couples, while the extension of marriage remains a discretionary decision to be taken by national parliaments.

[75] See paragraph 14 of judgment 2013-669.

[76] See paragraph 22 of judgment 2013-669.

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E. Why *Oliari* Matters?

I. Continuity and Innovation in the ECtHR Same-Sex Unions Case Law

Before the *Oliari* case, the ECtHR had dealt with the issue of same-sex legal recognition on at least two other relevant occasions: in 2010 with the case *Schalk & Kopf v. Austria* (*Schalk & Kopf*),[77] and in 2013 with the case *Vallianatos and others v. Greece* (*Vallianatos*).[78] Comparing the *Oliari* case with these two precedents, elements of both continuity and innovation emerge in the ECtHR case law, confirming the incremental path the Court has undertaken with regard to same-sex unions recognition since 2010.

1. "Recognition and Protection"

In the *Schalk & Kopf* case, the Court had to determine whether the refusal by State authorities to grant same-sex marriage might represent a violation of the Convention. On that occasion, despite denying the existence of such an obligation for Member States,[79] it affirmed for the first time that same-sex couples "are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship,"[80] as these couples are "just as capable as different-sex couples of entering into stable, committed relationships."[81]

The principle was later restated in the *Vallianatos* case, when the Court deemed that the Greek authorities' decision to limit civil partnerships to only heterosexual couples was illegitimate, precisely on the assumption that "[s]ame sex couples sharing their lives have the same needs in terms of mutual support and assistance as different-sex couples"[82] and

[77] Eur. Court H.R., *Schalk and Kopf v. Austria*, June 24, 2010. See also Loveday Hodson, A Marriage by Any Other Name? Schalk and Kopf v Austria, 11 HUMAN RIGHTS LAW REVIEW, 170 (2011); Sarah Lucy Cooper, Marriage, Family, Discrimination & Contradiction: An Evaluation of the Legacy and Future of the European Court of Human Rights' Jurisprudence on LGBT Rights, 12 GERMAN LAW JOURNAL, 1746 (2011).

[78] Eur. Court H. R., *Vallianatos and others v. Greece*, November 7, 2013; See also Ilias Trispiotis, Discrimination and Civil Partnerships: Taking 'Legal' out of Legal Recognition, 14 HUMAN RIGHTS LAW REVIEW, 343 (2014); Delia Rudan, Unioni civili registrate e discriminazione fondata sull'orientamento sessuale: il caso *Vallianatos*, 8 DIRITTI UMANI E DIRITTO INTERNAZIONALE 232 (2014).

[79] "[A]s matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State; . . . marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society". *Schalk and Kopf v. Austria*, paragraphs 61- 62.

[80] *Schalk and Kopf v. Austria*, paragraph 99.

[81] *Ibidem.*

[82] *Vallianatos and others v. Greece*, paragraph 81.

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that within the Greek system, opening the option of entering into a civil union to same-sex couples would offer them the only opportunity "of formalizing their relationship by conferring on it a legal status recognized by the State."[83]

The principle of equal "affective capacity" and its reflection in terms of a need for legal "recognition and protection" was eventually affirmed, with even more emphasis in the *Oliari* case. The applicants could rely on this five-year-old case law of the ECtHR to support the argument that Italy was denying the kind of recognition the Court had begun to consider implicit in Article 8 of the ECHR since 2010. Nonetheless, the innovative element in *Oliari* lies in the concrete application of this principle, which acknowledged a breach of the Convention by omission. It was indeed the first time that a country was condemned for failing to fulfill its "positive obligation to ensure . . . a specific legal framework providing for the recognition and protection of . . . same-sex unions."[84]

2. From Private Life to Family Life

In *Schalk & Kopf,* the Court had recognized for the first time that same-sex couples were entitled to enjoy the protection of "family life". Departing from a long established jurisprudence, [85] it considered that a "same-sex couple living in a stable *de facto* partnership, falls within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would."[86] It would be "artificial" –affirmed the Court– "to maintain the view that, in contrast to a different-sex couple, a same-sex couple [could not] enjoy 'family life' for the purposes of Article 8".[87] It has consistently followed this approach in both *Vallianatos*[88] and *Oliari.*[89]

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[83] *Ibidem.*

[84] Paragraph 185 of the judgment.

[85] "The relationship of a homosexual couple falls within the scope of the right to respect for private life, but not that of family life." Eur. Comm. H.R., *X. and Y. v. the United Kingdom*, May 3, 1983. For a long time, the Strasbourg judges affirmed that "a stable homosexual relationship . . . does not fall within the scope of the right to respect for family life ensured by Article 8 of the Convention". See Eur. Comm. H. R., *S. v. the United Kingdom*, May 14, 1986, paragraph 2; Eur. Court H.R., *Dudgeon v. the United Kingdom*, October 22, 1981; Eur. Comm. H. R., *Kerkhoven and Hinke v. the Netherlands*, May 19, 1992, paragraph 1. "A person's sexual life is undoubtedly part of his private life", Eur. Comm. H.R., *X. v Federal Republic of Germany,* September 30, 1975; See also Paul Johnson, 'An Essentially Private Manifestation of Human Personality': Constructions of Homosexuality in the European Court of Human Rights, 10 HUMAN RIGHTS LAW REVIEW 67, 97 (2010).

[86] *Schalk and Kopf v. Austria*, paragraph 94.

[87] *Ibidem.*

[88] *Vallianatos and others v. Greece*, paragraph 73.

[89] Paragraph 103 of the judgment.

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For a long time "the Court's case law has only accepted that the emotional and sexual relationship of a same-sex couple constitutes 'private life' but has not found that it constitutes 'family life', even where a long-term relationship of cohabiting partners was at stake."[90] This long-established case law, considering homosexuality as "a most intimate aspect of private life,"[91] emphasized the private dimension of the rights involved. This approach consequentially minimized the need for "recognition and protection" in the public sphere, supporting a process of "privatization of homosexuality"[92] at both the international and the domestic level. Symmetrically, the notion of "family life" enshrined in Article 8, with its implicit social and public dimensions, requested for a long time, the presence of marriage[93] or children[94] in order to find applicability. The Court used to say "Article 8 . . . presupposes the existence of a family."[95] Some observers have criticized the fluid borders of the ECtHR contemporary notion of family life, condemning a conceptual framework in which, independently from a public commitment, the presence of children, and–since the *Vallianatos* case–even cohabitation, "the existence of feelings [is considered] enough to establish family life."[96]

The Court, more than fostering legal change within the notion of family life, is probably reflecting the factual and legal evolutions experienced by this institution at the national level. In this bottom-up dynamic, the concept of "European consensus" is indeed playing a meaningful role.

[90] Eur. Court H.R., *P.B. and J.S. v. Austria,* July 22, 2010, paragraph 28.

[91] *Dudgeon v. the United Kingdom*, paragraph 52.

[92] Paul Johnson, HOMOSEXUALITY AND THE EUROPEAN COURT OF HUMAN RIGHTS, 120 (2013).

[93] "Whatever else the word "family" may mean, it must at any rate include the relationship that arises from a lawful and genuine marriage." Eur. Court H.R., *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, May 28, 1985, paragraph 62.

[94] "By guaranteeing the right to respect for family life, Article 8 presupposes the existence of a family." It applies when children rights are at stake "to the 'family life' of the 'illegitimate' family as it does to that of the 'legitimate' family." Eur. Court H.R., *Marckx v. Belgium*, paragraph 31. See also Eur. Court H.R., *Elsholz v. Germany*, July 13, 2000, paragraph 43; Eur. Court. H.R., *Keegan v. Ireland*, May 26, 1994, paragraph 44; *Johnston and others v. Ireland*, paragraph 55; 72.

[95] *Marckx v. Belgium*, paragraph 31; see also *Johnston and others v. Ireland*, paragraph 55.a).

[96] Grégor Puppinck, The dilution of the family in human rights: Comments on *Vallianatos* and other ECHR cases on "family life," EJIL: *TALK!*, March 25, 2014, available at: http://www.ejiltalk.org/the-dilution-of-the-family-in-human-rights-comments-on-vallianatos-and-other-echr-cases-on-family-life/.

3. The European Consensus

The concept of "European consensus" is a key interpretive instrument used by the ECtHR in the three main cases dealing with legal recognition of same-sex couples and, indeed, in the Court's entire case law on homosexuality.[97]

European consensus "can be conceptualized as a tool of interpretation of the Convention which prioritizes a particular solution to a complex human rights issue if this solution is supported by the majority of the 47 Contracting Parties."[98] It lives in a dynamic relationship with the margin of appreciation, because a lack of consensus will result in a wider margin of appreciation and vice-versa. The case of gay marriage and civil unions is a paradigmatic example of this unsteady balance between States' autonomy and the Court's intervention across the cases under consideration.

In 2010, in *Schalk & Kopf*, the Court relied on the "European consensus" in order to deny the existence of an obligation to regulate same-sex marriage. Even recognizing that "the institution of marriage has undergone major social changes since the adoption of the Convention, the Court notes that there is no European consensus regarding same-sex marriage,"[99] because at the time of the judgment "no more than six out of forty-seven Convention States allow[ed] same-sex marriage."[100] In a similar manner, this concept led the Court to exclude in the judgment even the obligation to introduce civil partnerships, because "there [was] not yet a majority of States providing for legal recognition of same-sex couples."[101] In the eyes of the Court, the area in question should be regarded as one of evolving rights with no established consensus, allowing States a wider margin of appreciation in the timing of the introduction of legislative changes.

In 2013, in *Vallianatos*, the Court confirmed that "a trend is currently emerging with regard to the introduction of forms of legal recognition of same-sex relationships,"[102] but that a real consensus among the legal systems of CoE Member States was still lacking. In order to

[97] Paul Johnson, HOMOSEXUALITY AND THE EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 92, 77- 83.

[98] Kanstantsin Dzehtsiarou, EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE EUROPEAN COURT OF HUMAN RIGHTS, 2 (2015).

[99] *Schalk and Kopf v. Austria,* paragraph 58. The ECtHR also meaningfully affirmed that "the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex . . . However, as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State." Paragraph 61.

[100] *Schalk and Kopf v. Austria*, paragraph 58.

[101] *Schalk and Kopf v. Austria*, paragraph 105.

[102] *Vallianatos and others v. Greece*, paragraph 91.

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assess this trend, the Court listed how many Member States had provided for either same-sex marriage or some form of civil partnership for same-sex couples (9 and 17 respectively). The analysis showed that a consensus existed at least on one point: with the exception of Greece and Lithuania, "Council of Europe Member States, when they opt to enact legislation introducing a new system of registered partnership . . . include same-sex couples in its scope."[103] This comparative analysis supported the Court's conclusion that Greece had violated Article 14 of the Convention (prohibition of discrimination), in conjunction with Article 8 (right to respect for private and family life).

It is the same notion of European consensus, or lack thereof, that allowed the Court to dismiss any claim by the applicants in the *Oliari* case based on Article 12—right to marry—considering still valid what was affirmed five years before in *Schalk & Kopf*. The Court said that Article 8 cannot be interpreted as imposing an obligation to grant same-sex couples with access to marriage. It was still true that only a minority—11 out of 47—of CoE Member States recognizes gay marriage and therefore "[t]he Court felt it must not rush to substitute its own judgment in place of that of the national authorities,"[104] declining to engage in a proper discussion about the issue and dismissing the claims as manifestly ill-founded.

The discourse regarding civil unions for gay couples has been different. In line with the European consensus approach, the Court noted in *Oliari* that a "thin majority" made of 24 out of 47 CoE Member States had legally recognized same-sex unions. The transformation that occurred at the domestic level—in the majority of CoE Member States—allowed the Court to impose the fulfillment of positive obligations based on Article 8 of the ECHR, on countries, like Italy, that were lagging behind in the "recognition and protection" of same-sex couples.

There is ultimately a sort of circularity in the European consensus discourse between domestic political actors and supranational judges. In a bottom-up phase, national legislatures and governments influence the Court and its jurisprudence through typically majoritarian dynamics. Once a consensus among CoE Member States emerges, the Court influences national parliaments in a top-down fashion, urging unaligned countries to adopt CoE shared standards, such as in the *Oliari* and *Vallianatos* cases.[105] Whether intended or unintended, the propulsive role of the Court's case law in this discourse should not be

[103] *Ibidem.*

[104] Paragraph 191 of the judgment. The reference is to *Schalk & Kopf v. Austria*, paragraph 62.

[105] Concerning the Italian discussion on the adoption of a legal framework for homosexual couples see *supra* section B of this Article. The Greek parliament–in compliance with the *Vallianatos* judgment–passed a law allowing civil partnerships for same-sex couples on December 23, 2015. See The Guardian, December 23, 2015, available at: http://www.theguardian.com/world/2015/dec/23/greece-passes-bill-allowing-same-sex-civil-partnerships.

underestimated, as it may promote a faster diffusion of shared standards with regard to the recognition of same-sex unions,[106] which had continued to develop "rapidly in Europe since the Court's judgment in *Schalk & Kopf*."[107]

II. Global-National Integration: Horizontal and Vertical Dialogues between Domestic and Supranational Actors

1. Vertically

The *Oliari* judgment opens a dimension of dialogue and integration between the domestic and the supranational sphere. By addressing the Italian legislature, the ECtHR entered into a dialogue with the domestic parliament. In doing so, it behaved similarly to those national courts— the Italian Constitutional Court and the Court of Cassation—that stimulated legislative action but experienced parliamentary inertia. In this perspective, the Court strengthened the voice of domestic judicial actors that previously "remained unheeded" by the legislature in their request for legal recognition of same-sex unions.[108] This passage is important because the ECtHR also assumed a role of supranational guarantor of domestic rule of law.[109] As stated in the *Oliari* case, preventing "the implementation of a final and enforceable judgment . . . is capable of undermining the credibility and authority of the judiciary and of jeopardizing its effectiveness."[110]

Nevertheless, the endorsement that the judgment provided to domestic judicial actors–strongly emphasized in the concurring opinion[111]–may also represent a way to de-politicize

[106] "ECtHR judgments increase the likelihood that all European nations–even countries whose laws and policies the court has not explicitly found to violate the European Convention–will adopt pro-LGBT reforms. The effect is strongest in countries where public support for homosexuals is lowest." Laurence R. Helfer and Erik Voeten, International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe, 68 INTERNATIONAL ORGANIZATION, 77, 105 (2014).

[107] Paragraph 178 of the judgment. In this sense also Francesco Alicino, Le coppie dello stesso sesso. L'arte dello Stato e lo stato della giurisprudenza, *supra* note 2.

[108] Paragraph 43 of the judgment, quoting Franco Gallo, Relazione del Presidente della Corte Costituzionale, April 12, 2013, paragraph 4. On the role of courts in the global legal arena see Sabino Cassese, I TRIBUNALI DI BABELE. I GIUDICI ALLA RICERCA DI UN NUOVO ORDINE GLOBALE (2009); Elisa D'Alterio, LA FUNZIONE DI REGOLAZIONE DELLE CORTI NELLO SPAZIO AMMINISTRATIVO GLOBALE (2010).

[109] Valentina Volpe, *La Corte Europea dei diritti dell'uomo e l'indipendenza del potere giudiziario*, 1 GIORNALE DI DIRITTO AMMINISTRATIVO, 43, 47 (2015).

[110] Paragraph 184 of the judgment, referring to Eur. Court H.R., *Broniowski v. Poland*, June 22, 2004, paragraph 175.

[111] Judge Mahoney joined by Judges Tsotsoria and Vehabović, concurring opinion of the judgment.

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the influence of the ECtHR on domestic dynamics, especially when the introduction of positive measures are at stake and when the requested reforms would reflect, as argued, the alleged sentiments of the majority of the Italian population.

The judgment recognized an important role to surveys brought by third-party interveners, emphasizing the vertical dimension—supranational judges/Italian society—of the *Oliari* case, as well as the role of the Court as interpreter of domestic social change. One may ask, however, whether domestic surveys should be considered reliable instruments for measuring democracy and popular support, and whether both roles of guarantor of democracy and connector between law and society may be suitable positions for a supranational Court.

2. Horizontally

Regarding gay rights recognition, the Court seems to be actively participating in a dense "horizontal" global conversation taking place at the supranational level with both international organizations and non-CoE jurisdictions.

It is remarkable, for example, that in the *Schalk & Kopf* case*,* in extending the notion of "family life" to same-sex couples, the Court relied on developments in European Union (EU) law[112] to support the idea of an existing "growing tendency to include same-sex couples in the notion of 'family.'"[113] In *Vallianatos*, both Council of Europe[114] and European Union materials[115] were invoked to demonstrate the emergence of a "clear" trend towards the recognition of same-sex unions.[116] In the *Oliari* case, the same materials were again considered a benchmark against which to assess the legitimacy of same-sex couples' exclusion from legal recognition in Italy.

[112] Council of the European Union, Directive 2003/86/EC *on the right to family reunification*, September 22, 2003; European Parliament and Council of the European Union, Directive 2004/38/EC *on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, April 29, 2004. *Schalk and Kopf v. Austria* paragraph 26. The point is critically highlighted in the joint *Dissenting Opinion* by Judges Rozakis, Spielmann and Jebens, paragraph 2.

[113] *Schalk and Kopf v. Austria*, paragraph 93.

[114] In particular, see Parliamentary Assembly, Resolution 1728 (2010), *Discrimination on the basis of sexual orientation and gender identity*, April 29, 2010, calling on Member States to "ensure legal recognition of same-sex partnerships when national legislation envisages such recognition," paragraph 16.9. See Recommendation CM/Rec(2010)5, *supra* note 41, asking, *inter alia*, that "[w]here national legislation recognizes registered same-sex partnerships, Member States should seek to ensure that their legal status and their rights and obligations are equivalent to those of heterosexual couples in a comparable situation"; paragraph 24.

[115] In particular Articles 7, 9 and 21 of the Charter of Fundamental Rights of the European Union and the Commentary of the Charter of Fundamental Rights of the European Union, along with the EU Directives 2003/86/EC and 2004/38/EC, *supra* note 112.

[116] *Vallianatos and others v. Greece*, paragraph 91.

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The latter judgment also quoted the U.S. Supreme Court case from June 26, 2015, *Obergefell v. Hodges*.[117] A transatlantic dialogue on homosexual rights has been ongoing between European and U.S. courts since 2003, when for the first time the U.S. Supreme Court considered the European Court of Human Rights' jurisprudence in the overruling of a constitutional precedent.[118] The case was *Lawrence v. Texas,*[119] in which the U.S. Supreme Court recalled the *Dudgeon* jurisprudence in order to support the overruling of *Bowers v. Hardwick*[120] and eventually legalize same-sex intercourse between consenting adults throughout the United States. Even more interestingly, in this judicial debate the U.S. Court of Appeals for the Sixth Circuit recalled the *Schalk & Kopf* jurisprudence in order to deny the existence of a right to gay marriage in the case at the origin of *Obergefell v. Hodges,*[121] which ultimately recognized the fundamental right to marry to same-sex couples.

III. Protect Majoritarian "European Consensus" or Protect Counter-Majoritarian Human Rights?

The concept of European consensus, with its comparative law dimension, has been a constant interpretative device in the ECtHR case law related to gay rights. Since the *Dudgeon* case of 1981, the Court has considered, so to say, what other CoE Members States do, one of the main criteria to address homosexual rights issues. In *Dudgeon*, the Court compelled Northern Ireland to decriminalize sodomy because "in the great majority of the Member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices . . . [as] a matter to which the sanctions of the criminal law should be applied."[122] Symmetrically, for a long time, "the existence of little common ground between the Contracting States" regarding legal and judicial recognitions

[117] 576 U. S. ___ (2015).

[118] William N. Eskridge Jr., United States: *Lawrence v. Texas* and the imperative of comparative constitutionalism, 2 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, 555 (2004).

[119] 539 U.S. 558 (2003).

[120] 478 U.S. 186 (1986).

[121] "[F]oreign practice only reinforces the impropriety of tinkering with the democratic process in this setting. The great majority of countries across the world . . . still adhere to the traditional definition of marriage. Even more telling, the European Court of Human Rights ruled only a few years ago that European human rights laws do not guarantee a right to same-sex marriage. *Schalk & Kopf v. Austria* . . . 'The area in question,' it explained in words that work just as well on this side of the Atlantic, remains 'one of evolving rights with no established consensus,' which means that States must 'enjoy [discretion] in the timing of the introduction of legislative changes'. . . . Our Supreme Court relied on the European Court's gay-rights decisions in *Lawrence.* . . . What neutral principle of constitutional interpretation allows us to ignore the European Court's same-sex marriage decisions when deciding this case? If the point is relevant in the one setting, it is relevant in the other, especially in a case designed to treat like matters alike." *Deboer v. Snyder*, 722 F.3d 388,417 (6th. Cir. 2014).

[122] *Dudgeon v. the United Kingdom,* paragraph 60.

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of same-sex partnerships[123] prevented the adoption of the decision eventually held in *Oliari*.

It seems that the existence of a European consensus is a determining factor in decisions regarding the endorsement of certain gay rights claims. This attitude of the ECtHR[124] has a democratic flavor, suggesting the idea of a supranational judicial body that enters into domestic political debates only when the majority of CoE Member States' parliaments have already expressed a shared view on the rights at stake.[125] One may ask, nonetheless, whether this *sui generis* application of a quasi-democratic, majoritarian principle is an appropriate mechanism to address typically counter-majoritarian human rights, such as those of sexual minorities. As the applicants contended in the *Oliari* case, can "the Court . . .be reduced to being an 'accountant' of majoritarian domestic views"?[126] Should it not be "[o]n the contrary. . . the guardian of the Convention and its underlying values, which include the protection of minorities"?[127]

Moreover, the European consensus approach presupposes a certain uniformity of values and legal standards among CoE Member States, while, western and eastern countries of the Council of Europe are still deeply divided.[128] The mathematical approach, implicit in this interpretative tool, may result in the supranational endorsement of lower levels of human rights protection when these are shared by a majority of Member States.

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[123] Eur. Court H.R., *Mata Estevez v. Spain*, May 10, 2001.

[124] Remarkably, the notion of "European" consensus has not always been determinant in the past. In several cases, the Court relied on the notion of "international" consensus regarding, for example, transsexual people's rights. "The Court . . . attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favor not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals." Eur. Court H.R., *I. v. the United Kingdom,* July 11, 2002, paragraph 65 and Eur. Court H.R., *Christine Goodwin v. United Kingdom*, July 11, 2002, paragraph 85.

[125] CoE Member States are moreover–at least theoretically–all full democracies.

[126] Paragraph 113 of the judgment.

[127] *Ibidem*.

[128] Gay rights recognition is a good example of divisions crossing Europe. Even within the restricted EU club, at the beginning of 2016, with the sole Italian exception, only Eastern European countries (Bulgaria, Latvia, Lithuania, Poland, Romania, Slovakia) did not provide for registered partnerships (or gay marriage). See Registered Partnerships, European Union official website, February 3, 2016, available at: http://europa.eu/youreurope/citizens/family/couple/registered-partners/index_en.htm. Moreover, Eastern European States often have much stricter legislation regarding gay rights, such as "Russia's gay propaganda law". See Human Dignity Trust, Russia: The Anti-Propaganda Law, April 24, 2014, available at: http://www.humandignitytrust.org/uploaded/Library/Other_Material/Briefing_on_Russias_federal_anti-propaganda_law.pdf. See also Eur. Court H.R., *Alekseyev v. Russia*, October 21, 2010, in which the Court unanimously found that the prohibition to hold gay pride marches in Moscow was a violation of Articles 11, 13, and 14 of the Convention.

The European consensus, collocating as a middle ground between a broad margin of appreciation and an unconstrained dynamic interpretation of the Convention, has been applied multiple times on divisive topics. It has been used to encourage decriminalization of homosexual practices,[129] deny the existence of a right to same-sex marriages,[130] open up registered partnerships to gay couples,[131] advance legal recognition for gender reassignment,[132] and equalize the age of consent for homosexual and heterosexual relations.[133]

The use of the consensus mechanism can be seen as the attempts of an international court to reinforce its own legitimacy before domestic authorities[134] as well as a potential remedy against never-implemented decisions at the national level. Nonetheless the "European consensus" tool has been criticized from additional angles,[135] such as (a) the mechanism's intrinsic selective component, (b) the depth of comparative investigation conducted to assess the existence of a consensus, and (c) the implicit remissive approach of a Court that endorses legal changes at the national level, without necessarily triggering them. The European consensus mantra ultimately seems to hide a defensive attitude of the ECtHR, which is questionably consistent with the indispensable audacious aspirations of a human rights court.

F. Epilogue

I. Future Applicability?

The *Oliari* case represents a significant development in ECtHR case law. With this decision, the Court affirmed for the first time that failing to provide same-sex couples with some

[129] See *Dudgeon v. the United Kingdom,* paragraph 61; Eur. Court H.R., *Norris v. Ireland,* October 26, 1988, paragraph 46.

[130] *Schalk & Kopf v. Austria,* paragraph 63; Eur. Court H.R., *Hämäläinen v. Finland*, July 16, 2014, in which the Court reaffirmed: "[I]t cannot be said that there exists any European consensus on allowing same-sex marriages", paragraph 74.

[131] *Vallianatos and others v. Greece*, paragraph 91.

[132] Eur. Court H.R., *Christine Goodwin v. the United Kingdom,* paragraph 84*;* See also Eur. Court H.R., *Sheffield and Horsham v. the United Kingdom,* July 30, 1998. Although it was not a determining factor, the Court notes that there was an emerging consensus among the Contracting States of the Council of Europe on providing legal recognition following gender reassignment; paragraph 35.

[133] Eur. Court, H.R., *L. and V. v. Austria*, January 9, 2003, paragraph 50.

[134] Kanstantsin Dzehtsiarou, EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 98.

[135] Paul Johnson, HOMOSEXUALITY AND THE EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 92, 77; 80.

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forms of legal recognition may amount to a violation of States' positive obligations under the Convention. While innovative, this jurisprudence raises questions regarding its future applicability to other CoE Member States—in particular non-EU Member States—that still fail to provide a legal framework for "recognition and protection" of same-sex unions. In the *Oliari* judgment, the Court implicitly recognizes that almost half of the Contracting States—23 out of 47—fall under this category.

There are at least two reasons to doubt that the Court will follow the *Oliari* jurisprudence in similar cases: One results from the judgment itself (1), and the other from the Court's more recent international attitude (2). There is, however, also a potential alternative explanation suggesting that further application of the *Oliari* jurisprudence may be *sic et simpliciter* an unavoidable consequence of the right to a gay family life that the Court already recognized in 2010 (3).

1. Openly focusing on the Italian experience, the case seems to have little potential validity outside that specific domestic context. The judgment constantly refers to the Italian legislature, the Italian Constitutional Court, and the specific social situation of Italy. It is unclear whether the Court may reach the same result in a country with a different domestic courts' orientation and a different public opinion. This limitation to the Italian context may be supported by not considering Article 8 in conjunction with Article 14,[136] and by the restrictive reading of the judgment—as simply tailored to the Italian experience—emphasized in the concurring opinion.[137]

2. The Court seems to be less and less willing to challenge Member States on highly divisive issues, including gay rights, which have different impacts on the variegated European societies. The Court was brave in the past, both in framing sexual orientation in terms of human rights and in raising awareness about sexual minority rights. Even compared to a powerful domestic court like the U.S. Supreme Court, the ECtHR has led the discourse on gay rights at the international level for a long time. Nevertheless, as it has been underscored, this dynamic has inverted and the latter overcame the former in terms of boldness regarding gay rights' recognition with *Obergefell v. Hodges* in 2015.[138]

[136] See Giuseppe Zago, A victory for Italian same-sex couples, a victory for European homosexuals? A commentary on *Oliari v Italy* and Paul Johnson, Ground-breaking judgment of the European Court of Human Rights in Oliari and Others v. Italy: same-sex couples in Italy must have access to civil unions/registered partnerships, *supra* note 2.

[137] "Our colleagues are careful to limit their finding of the existence of a positive obligation to Italy and to ground their conclusion on a combination of factors not necessarily found in other Contracting States." Concurring opinion of the judgement, paragraph 10.

[138] Marko Milanovic, Living Instruments, Judicial Impotence, and the Trajectories of Gay Rights in Europe and in the United States, EJIL: TALK!, July 23, 2015, available at: http://www.ejiltalk.org/living-instruments-judicial-impotence-and-the-trajectories-of-gay-rights-in-europe-and-in-the-united-states/.

3. There is at least one element in favor of the future applicability of the *Oliari* jurisprudence. Since the *Schalk & Kopf* case, the ground for the protection of stable and committed gay unions changed from the right to "private life" to the right to "family life." It moved from the typically negative content of privacy that characterized the Court's earlier jurisprudence (gay rights "inside the closet") to the notion of family life, which is characterized by public dimension and social recognition, thus implying the need for Member States' action.[139] This evolution from State's abstention to State's intervention is necessary in order to fulfill the new positive obligation of legal recognition, which lies at the core of "family life" protection. In this sense, the *Oliari* case seems to be the logical consequence of the jurisprudence initiated by the Court in 2010 and fully realized in 2015, recognizing States' concrete duty to ensure the right to a gay family life.

II. How Far Will the Right to a "Gay" Family Life Be Able to Go?

In 1992, Kees Waaldijk suggested a five-step path, or "standard sequences," that the process of legal recognition of homosexuality traditionally follows at the national level.[140] Interestingly enough, the ECtHR played a relevant role for each of these steps: (1) repeal of the ban of sodomy;[141] (2) equalization of ages of consent;[142] (3) introduction of anti-discrimination legislation;[143] (4) adoption of legal partnership;[144] and (5) recognition of homosexual parenthood.[145]

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[139] See also Loveday Hodson, A Marriage by Any Other Name? Schalk and Kopf v Austria, *supra* note 77, 179; Sarah Lucy Cooper, Marriage, Family, Discrimination & Contradiction: An Evaluation of the Legacy and Future of the European Court of Human Rights' Jurisprudence on LGBT Rights, *supra* note 77; Jens M. Scherpe, The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights, 10 THE EQUAL RIGHTS REVIEW 83, 91 (2013).

[140] Kees Waaldijk, Standard Sequences in the Legal Recognition of Homosexuality–Europe's Past, Present and Future, 4 AUSTRALASIAN GAY AND LESBIAN LAW JOURNAL 50, 51-52 (1994).

[141] *Dudgeon v. the United Kingdom,* paragraph 61 and *Norris v. Ireland,* paragraph 46. As early as 1982, Northern Ireland complied with the Court's requests. Few years later, in 1993, Ireland as well decriminalized homosexuality, complying with the ECtHR judgment.

[142] Eur. Comm. H.R., *Sutherland v. the United Kingdom*, July 1, 1997, paragraph 60; see also *L. and V. v. Austria*, paragraph 52.

[143] Eur. Court. H.R., Kozak v. Poland, March 2, 2010, paragraph 99; *Vallianatos and others v. Greece;* The contributions of the European Union law and the Court of Justice of the European Union (ECJ) have been particularly meaningful regarding anti-discrimination in employment. Jeneba H. Barrie, European Union Law and Gay Rights: Assessing the Equal Treatment in Employment and Occupation Directive and Case Law on Employment Benefits for Registered Same-Sex Partnerships, 6 JOURNAL OF CIVIL LAW STUDIES, 618 (2013). See in particular the ECJ case C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen,* April 1, 2008, regarding the right to receive a survivor pension for homosexual registered partners. The ECJ considered that pension denial constitutes a form of direct discrimination based on sexual orientation, if surviving spouses and surviving life partners are in a comparable situation as regards that pension. See also ECJ case C-147/08, *Jürgen Römer v. Freie und Hansestadt Hamburg,* May 10, 2011, regarding access to the same employment benefits available to married couples for same-sex couples in civil partnerships. Council Directive 2000/78/EC, November 27, 2000, *Establishing a General Framework for Equal Treatment in Employment and Occupation*; Article 21 of the Charter of

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Gay marriage was noticeably absent from this sequence. Almost ten years passed before the Netherlands, in 2001, became the first country in the world to open up marriage to homosexual couples.[146] Before that, no State envisaged this possibility. Homosexual marriage, as Waaldijk foresaw, only became likely "after first a form of 'registered partnership' ha[d] been introduced with some of the legal consequences of marriage."[147] This has indeed been the path.

Over a short period of time, a global trend towards extending marriage to gay couples has rapidly developed.[148] In this swiftly evolving legal area, supranational requests for recognition of civil partnerships at the national level, as in the *Oliari* case, may paradoxically slow down this process, offering arguments to those domestic actors—like the Italian Constitutional Court—that support the permanence of differentiated regimes between heterosexual and homosexual couples.[149] In the long run, however, it will be hard

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Fundamental Rights of the European Union explicitly forbids discrimination based on sexual orientation.

[144] See paragraph 185 of the judgment and *Vallianatos and others v. Greece,* paragraph 91.

[145] In *E.B. v. France,* the Court overturned its previous *Fretté* jurisprudence affirming that "in rejecting the applicant's application for authorization to adopt, the domestic authorities made a distinction based on considerations regarding her sexual orientation, a distinction which is not acceptable under the Convention", Eur. Court H.R., *E.B. v. France*, January 22, 2008, paragraph 96; Eur. Court H.R., *Fretté v. France*, February 26, 2002. The ECtHR also ruled that Austria had violated Article 14 in conjunction with Article 8, because it excluded second-parent adoptions by same-sex partners, while permitting them for different-sex partners, see Eur. Court H.R., *X and others v. Austria*, February 19, 2013, paragraph 153. In the case *Salgueiro da Silva Mouta v. Portugal*, December 21, 1999, the Court found in favor of the applicant, a homosexual father, who complained that domestic authorities awarded parental responsibility to his ex-wife only because of his sexual orientation, paragraphs 35 - 36.

[146] Kees Waaldijk, Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands, in LEGAL RECOGNITION OF SAME - SEX PARTNERSHIP. A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW, 437 (Mads Andenaes & Robert Wintemute eds., 2001).

[147] Kees Waaldijk, Standard Sequences in the Legal Recognition of Homosexuality–Europe's Past, Present and Future, *supra* note 140, 65.

[148] The European countries that followed the Netherlands' example in subsequent years are the following: Belgium (2003), Spain (2005), Norway (2009), Sweden (2009), Iceland (2010), Portugal (2010), Denmark (2012), France (2013), United Kingdom (2014), Luxembourg (2015), Ireland (2015), and Finland (approved by the parliament in 2014, effective 2017). At the global level, these countries followed the Netherland's example: Canada (2005), South Africa (2006), Argentina (2010), some Mexican States (starting from 2010), Brazil (2013), New Zealand (2013), Uruguay (2013), United States (2015).

[149] In judgment 170/2014, the Italian Constitutional Court recalled the *Schalk & Kopf* case to support the absence of a right to gay marriage and to emphasize the discretion left to the domestic legislature, in absence of a European consensus, to recognize "possible forms of protection for same-sex couples." Paragraph 5.3. "It is for the legislature to introduce an alternative form (and different from marriage) that would allow the couple to avoid the transition from one condition of maximum legal protection to a condition, in this sense, of absolute indeterminacy." Paragraph 5.6. The Italian Council of State, in a recent judgment (4547/2015, October 26, 2015),

to defend the existence of separate institutions as non-discriminatory when couples are treated differently on the sole basis of their sexual orientation.[150] Ultimately in *Vallianatos*, the Court affirmed that once an institution is created, such as civil partnership, it should also be accessible to homosexual couples.[151] Why not apply this reasoning to marriage as well?

If it is for legislatures to introduce the range of legal choices open to couples, it is then for courts, at both national and supranational level, to verify whether such differentiation between different-sex and same-sex couples is to be considered discriminatory according to constitutional and conventional equality principles.[152]

Since *Christine Goodwin* in 2002, the ECtHR has not considered procreative potential as a necessary prerequisite of the right to marry.[153] In 2010, *Schalk & Kopf* affirmed the right to

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in order to deny legitimacy to the transcriptions of gay marriages contracted abroad, recalled precisely the *Oliari* jurisprudence: "the Strasbourg Court has expressly and clearly denied the existence and, therefore, *a fortiori*, the breach of that (alleged) right [to marry], merely requesting the State to provide legal protection to same-sex unions (but, again, recognizing a margin of appreciation, albeit more limited, in the declination of its forms and intensity)." The same judgment considered Article 29 of the Italian constitution about the right to marry an "unbreakable barrier." Paragraph 2.5. Translated by the Authors.

[150] This reasoning has been at the basis of several domestic developments, such as in Denmark, Norway, and Sweden, which opened up marriage to homosexual couples and symmetrically abolished registered partnerships, see Jens M. Scherpe, The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights, *supra* note 139, 86. The restriction of marriage to heterosexual couples has been considered a violation of the equality provisions of the Canadian Charter of Rights and Freedoms by several domestic courts, paving the way to the adoption of the Civil Marriage Act by the Parliament of Canada in 2005 (Bill C-38, *An Act respecting certain aspects of legal capacity for marriage for civil purposes*, July 20, 2005); Deborah Gutierrez, Gay Marriage in Canada: Strategies of the Gay Liberation Movement and the Implications it will have on the United States, 10 NEW ENGLAND JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 175, 228 (2004). See also Veronica Valenti, Principle of Non-Discrimination on the Grounds of Sexual Orientation and Same-Sex Marriage. A Comparison Between United States and European Case Law, in GENERAL PRINCIPLES OF LAW – THE ROLE OF THE JUDICIARY, IUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE 215 (Laura Pineschi ed., 2015).

[151] *Vallianatos and others v. Greece*.

[152] Robert Wintemute, International Trends in Legal Recognition of Same-Sex Partnerships, 23 QUINNIPIAC LAW REVIEW, 577 (2014).

[153] In *Christine Goodwin v. the United Kingdom* the Court affirmed that: "Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy the first limb of this provision". Paragraph 98. See also *I. v. the United Kingdom*, paragraph 78. Note the diametrically opposite approach of the Italian Constitutional Court on the issue in the judgment 138/2010, (see *supra* section B in this Article) that seems isolated in comparison with other constitutional and supreme courts' case law, such as the Portuguese Constitutional Court (see *supra* section D) or the U.S. Supreme Court. In the case *Obergefell v. Hodges,* the U.S. Supreme Court affirmed clearly how "the right to marry is [not] less meaningful for those who do not or cannot have children. An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or

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respect family life for gay couples. Three years later, the Court opened registered partnerships to same-sex unions in the *Vallianatos* case. Ultimately, with *Oliari* in 2015, the Court imposed the creation of a legal framework for the "recognition and protection" of homosexual unions. Given this trend of jurisprudence, it is not impossible to imagine a future in which Article 12 of the Convention will be read to fully protect the right to gay marriage, complementing the right to a gay family life protected by Article 8.

All over the western world "[t]here seems to be a general trend of progress; where there is legal change it is change for the better. Countries are not all moving at the same time and certainly not at the same speed, but they are moving in the same direction—forward."[154] There is no reason to think that this trend, visible at both the international and the domestic level, will soon decline. Demographic data reinforce this prediction; young people are the most supportive segment of the population with respect to gay marriage.[155] Supranational courts, such ad the ECtHR, will also have a role to play in this process,[156] likely relying on the transformative potential of the "European consensus" mechanism that has been so consistently used by the Court in homosexual rights matters. After a majority of Member States introduce gay marriage, the ECtHR will be able to "close the circle," thereby guiding the remaining objecting minority States to align domestic legislation with higher human rights standards, just as it did for same-sex partnerships in *Oliari*.

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commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2590 I2015.

[154] Kees Waaldijk, Standard Sequences in the Legal Recognition of Homosexuality–Europe's Past, Present and Future, *supra* note 140, 51.

[155] Two surveys, conducted in 2013 and 2015 by Ipsos, indicate that internationally, groups of younger ages tend to have a higher support rate towards gay marriage than other social groups. The 2013 survey conducted on behalf of Reuters News indicates that among 16 countries surveyed "support for full legal marriage equality is more prevalent . . . among those under the age of 35 than among those aged 35-64 (58% vs. 45%, a 13-point gap)." And the 2015 survey conducted jointly with BuzzFeed News indicates that among 23 countries surveyed, the proportion of people under 35 whose opinion is that "same-sex couples should be allowed to marry legally" is 53%, statistically higher than the proportions of those aged 35-49 (44%) and those aged 50-64 (42%) who share this opinion. In the case of Italy, for the age group under 35, 52% of respondents agreed that same-sex couples should be allowed to marry legally, a number significantly higher than group of age 35-49 (45%) and group of age 50-64 (48%). The source of the 2013 survey can be found at: Strong International Support (73%) Among Developed Nations for Legal Recognition of Same-Sex Couples: Majorities in All 16 Countries Support Recognition, June 18, 2013, available at: http://www.ipsos-na.com/news-polls/pressrelease.aspx?id=6151. The authors are grateful to Nicholas Boyon, Senior Vice President, Head of Health Services Research, Ipsos Public Affairs, for providing the data conducted during the survey of April - May, 2015.

[156] "It should be expected that, in the long run, some international court or human rights body will start to apply these two principles [the right to respect for private life and prohibition of discrimination] also to claims that marriage should not be the exclusive privilege of different-sex couples." Kees Waaldijk, Same-Sex Partnership, International Protection, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, March 2013, paragraph 33.

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