



ECHR: recognition and legal protection of stable homosexual relationships are human rights

ECHR, 21 July 2015, cases 18766/11 and 36030/11, *Oliari and others v. Italy*

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ECHR condemned Italy for not giving a status to homosexual couples. Judging through a progressive interpretation of the very content of the Convention instead of through the application of said Convention to the evolution of society, the Court of Strasbourg created a new conventional right to recognition and legal protection of stable homosexual relationships.

Article published in French in the *Revue Lamy de Droit Civil (RLDC)*, n° 132, December 2015, p. 33.

In a Chamber judgment on 21 July 2015, in the case *Oliari and others v. Italy* (ECHR, 21 July 2015, cases 18766/11 and 36030/11, *Oliari and others v. Italy*), the European Court of Human Rights (ECHR) ruled on the application lodged by six men living as couples and complaining that Italian law does not allow them to get married nor to enter another form of civil union, thus violating articles 8, 12 and 14 of the European Convention of Human Rights.

This case takes place within the framework of an internal law which already recognizes partially these relationships. Two of the applicants had brought their case to the Italian Constitutional Court, who declared in 2010 (I. Const. Court, 15 Apr 2010, decree 138) that constitutional right to marriage does not extend to same-sex couples but that they have the constitutional right to recognition of their relationship, with the related rights and duties, and that it was for the Parliament to rule on this in a timely manner, and according to the appropriate conditions. The Italian Court of Cassation, in a decision made the 15th of March 2012 (Italian C. cass. 15 March 2012, n° 4184), judged in the same way that homosexual couples who got married abroad and who benefit from family life can have recourse to the law to demand the same treatment given under law to married couples in Italy. Additionally, Italian law offers cohabiting people the possibility to sign a contract of “*convivance*” in order to prepare the practical arrangements of their life together. The Italian Government, prompted by the constitutional judge since 2010 to confer legal status to same sex couples, shared with the European court its intention to take action in this regard, while also showing the difficulties posed by the opposition of a section of the people. When before the judge from Strasbourg, the government did not cite any substantive arguments to justify their inaction and denied categorically that it was its aim to protect the traditional family or morals. In essence, they only asked the court to demonstrate goodwill by granting them the benefit “*a margin of appreciation in the timing of the introduction of legislative changes*”, as it did in 2010 for Austria in the case *Schalk and Kopf* (CEDH, 24 June 2010, c. 30141/04, *Schalk and Kopf*, § 105). On the other hand, it was firmly opposed to this grievance as regards marriage.

The Court was not convinced by the weak defense offered by the Italians, and unanimously judged that the Italian law doesn't give homosexual couples a recognition and legal protection conforming to the need in law for respect for private and family life guaranteed in Article 8 of the Convention. It also unanimously judged that this Convention doesn't impose upon States the obligation to grant homosexual couples access to marriage.

This case follows two decisions taken in the Grand Chamber: the decision in *Vallianatos v. Greece* (ECHR, 7 Nov. 2013, c. 29381/09 and 32684/09, *Vallianatos v. Greece*), in which the court judged it discriminatory to confine homosexual couples to the capacity to enter only into civil union, and the decision *Hämäläinen v. Finland* (ECHR, 16 July 2014, c. 37359/09, *Hämäläinen v. Finland*), in which it established that neither Article 8 or Article 12 of the Convention guarantee the right to marriage for people of the same gender.

It is in the light of these two solemn precedents which appear, by contrast, in their complete dimension to have the scope of the ruling in *Oliari*. The majority of the judges in the Chamber (four against three) appeared more audacious than the Grand Chamber, going as far as confirming the existence of a conventional duty to recognize homosexual couples (in this regard overtaking *Vallianatos*) and reopening the possibility of a future right to homosexual marriage (contradicting *Hämäläinen*). Otherwise, the three minority judges state in their separate opinion published in the annex of the judgement that they would have concluded to a violation of the rights of the petitioner only by reason of the internal incoherencies of Italian law.

From the moment, as outlined, the fundamental right to the legal recognition for relationships between people of the same gender is from this point onwards established in domestic Italian law, it was foreseeable that the application of the *Vallianatos* judgement would lead to the condemnation of Italy. However, it isn't so much this condemnation which is important to notice than the impact, which the majority of the judges in the Chamber wanted to give it. Likewise, the reminder of an absence of a right to homosexual marriage is less important than the relativizing of the reminder of the introduction in the dynamic of the progressive interpretation of the Convention.

This judgement, despite a superficial agreement on the finding of a violation, reveals once again the internal division present in the Court as regards its own role: international jurisdiction bound by the law of treaties and constitutional courts having a political mission. This tension is apparent particularly with sensitive topics, the court having become an efficient catalyst for social change, having recently brought the liberalization of assisted suicide, surrogacy, abortion, transsexualism, eugenics, and certain rights for lesbians, gays, bisexuals and transgender people with regard to parenthood and now statutory recognition.

I – A treaty law for the recognition and legal protection for stable homosexual relationships

A – A founding principle discussed: a treaty or domestic issue

The court gradually extended the ambit of Article 8 of the Convention to homosexual relationships. After having judged their penalization compatible with the Convention (v. Dec. Comm. EDH, 7 July 1977, case. 7215 :75), it covered them with the protection accorded to private life (ECHR, 22 Oct. 1981, case. 7525:76, *Dudgeon v The United Kingdom*), and also to family life, considering that the relationship between a “*cohabiting 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*” (ECHR, 24 June 2010, Application no. 30141/04, abovementioned, § 94).

In the *Vallianatos* case, the Grand Chamber judged the interest of same sex couples to benefit of “*having their relationship officially recognised by the State*” (§ 81) to enter the scope of article 8 of the Convention. It judged that “*same-sex couples are just as capable as different-sex couples of entering into stable committed relationships*” and they “*have the same needs in terms of mutual support and assistance as different-sex couples*” (§ 81). The potential obligation to offer a certain status to homosexual couples was, however, not decided upon. It only judged that putting in place such a regulation reserved for male-female couples is, in itself, an unjustified discrimination, accordingly concluding a violation of article 14 of the Convention, in conjunction with Article 8.

In the current case, the Chamber could have adopted the same approach, by deciding that the legal guarantee recognised to homosexual couples by the Italian Constitution doesn't meet the requirements of the Convention. However the Chamber was more autonomous, developing its reasoning as though such an independent international law had already been established in the earlier jurisprudence of the Court and that it was only confirmed, saying that “*the Court has*

already acknowledged that same-sex couples are in need of legal recognition and protection of their relationship.” (§ 165).

There were therefore two possible approaches: the first – which was defended by the minority judges – was, based on the review of the facts of the case, to identify the existence of a domestic law, the failure to respect which was assessed in light of the demands of the Convention. According to this approach, it would be less a progressive interpretation of the content and more so an application of it to the developments in society. The second approach – which eventually prevailed among the majority judges – implied, from the confirmation of the existence of a positive obligation deriving from the Convention and influencing the States, to decide on the eventual failure to respect this obligation in the view of the circumstances of the case. With the latter approach, the confirmation of this new international right was to result from the legal extension of positive obligations of States under the Convention; effectively it served to change the content of the Convention.

The decision undertaken by the majority has the effect of conferring *erga omnes* scope to the right to legal recognition and protection for stable same-sex relationships. The forty-seven member States have to therefore positively guarantee this right, any shortcoming in this regard could be sanctioned by the Court in view of the circumstances.

In the current case, in judging the details of the case and in opposition to the failure to act of the Italian Government, the Court put a particular emphasis on sociological development. It noted that a small majority of member States of the Council of Europe (24 out of 47) currently give legal recognition to same-sex couples, that the Supreme Court of the United States has confirmed the constitutional right to same-sex marriage and that opinion polls indicate that the majority of the Italian population would be in favour of such a recognition. Yet according to a sociological approach, the Court noted that *“the impact on an applicant of a situation where there is discordance between social reality and the law, the coherence of the administrative and legal practices within the domestic system being regarded as an important factor in the assessment carried out under Article 8”* (§ 161). Already, in the *Vallianatos* case, the Court had declared that the States should act as to *“take into account developments in society and changes in the perception of social and civil-status issues and relationships, including the fact that there is not just one way or one choice when it comes to leading one’s family or private life”* (ECHR, 7 Nov. 2013, Application no. 29381/09 and 32684/09, above cited, § 84). This sociological approach to law is systematic when is at stake a subject “of society” The Court would have gone, in the abovementioned case *Schalk and Kopf*, to the point of ordering itself a survey to a polling institute.

B – Imprecise content

The content of the positive obligation of States *“to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions”* (§ 185) remains relatively imprecise both as regards its object and its content.

1 – As regards the protected reality

According to the Chamber, this positive obligation benefits people who have a *“stable same-sex relationship”* (paras. 165-169). The Court doesn’t give any direction on what it is to be understood by *“stable relationship”*, apart from reminding that stability doesn’t require cohabitation. In a previous case, the Court decided that two sisters living together could legitimately be prohibited from entering a civil union (ECHR, 29 April 2008, Application

no. 13378/05, *Burden v. United Kingdom*). As regards same-sex couples, it is the emotional relationship which is protected under Article 8, unlike marriage which principally aims at protecting the family under Articles 8 and 12 (ECHR, 30 July 1998, Application no. 22985/93 and 23390/94, *Sheffield and Horsham v. United Kingdom*, § 66). The purpose of the right to recognition is in this sense subjective, to the stability of the relationship, which seems to constitute the objective element, is less a condition than a cause to it. It is the commitment of the couple which indicates its stability and deserves, according to the Chamber, the *recognition* and *protection* of society.

2 - As regards the rights guaranteed

a) The right to protection

The Court does not specify precisely the components of that protection which States have an obligation to offer to same-sex couples. It qualifies them as “core rights”, as opposed to “additional rights”, and quotes in particular the mutual rights and duties of moral and material support, maintenance obligations and inheritance rights (§ 169).

The Court defines these core rights in a negative way: those which the State cannot deny and which are not the subject of “fierce controversy” (§ 177) within society. The Chamber does not say more, reserving the right to extend the content of these core rights in the future in the light of its sociological appreciation of reality. The Chamber seems to indicate that it is only with respect to “additional rights” (that is, controversial and non-essential to the relationship) that States keep a certain margin of appreciation (§ 177). These rights could be the rights of children, bearing in mind that the Court has already stated in the case of *X and others v. Austria* that it is not aware of “evidence to show that a family with two parents of the same sex could in no circumstances adequately provide for a child’s needs” and that “Differences based solely on considerations of sexual orientation are unacceptable under the Convention” (ECHR, 19 Feb. 2013, Case 19010/07, *X and others v. Austria*, § 142 and 99).

b) The right to recognition

Unlike common-law partners, who, according to the famous formula of Napoleon, ignore the law and deserve that the law ignores them in return, some homosexual couples seek the recognition of the law. This recognition, now guaranteed as a right by the Court, covers two aspects:

- a practical aspect: the Court considers that the possibility for applicants to obtain recognition in Italy of their rights through various judicial and contractual procedures is too burdensome and that the imposition of a global statute is necessary for the legal safety of couples, whatever the designation of that status;
- a symbolic aspect: the Court justifies the creation of this new right inasmuch as such “*civil partnerships have an intrinsic value for persons in the applicants’ position, irrespective of the legal effects, however narrow or extensive, that they would produce*”. It adds that “*(t)his recognition would further bring a sense of legitimacy to same-sex couples*” (§ 174).

Human rights have acquired an essential role in the formation and the formalization of the common consciousness. In fact, they define not only morality, but man as well, for so close is the correlation between the definition of *rights* and that of *man*. In 1948 and 1950, it was on the

basis of a certain idea of man and his nature that his rights were defined, in order to guarantee what in everyone makes man a man. Today, it is the evolution of rights that provokes an evolution of the social definition of man. If homosexuality is a human right, then it is consistent with human nature, and therefore fully and universally legitimate.

Here appears one of the issues of the choice of the basis of the analysis of violation in this case, since a judgment of violation based only on domestic law would not have given the recognition of the homosexual relationship a fully symbolic dimension.

II – Convention guarantees marriage only to man and woman.

The Court was invited once again to rule on the impossibility for homosexual couples to get married, the applicants alleging a violation of articles 12 and 14 of the Convention.

A – The chamber reopens, against the High Chamber, the perspective of a future right

Once again, the difference in approach on the substance has as its corollary a difference in the interpretative method of the Convention. The *conservative* approach is both social and legal, and similarly the *progressive* approach is both sociological and legal as well. Article 12 reads: “*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*”

In a case brought to it by two men complaining of a breach of Article 12 on account of their inability to marry in Austria, the Court in *Schalk and Kopf* did not consider the applicants to be manifestly inadmissible *ratione materiae*. The Court “*observes*” that “*in isolation*” –that is, without applying the rules of international law relating to the interpretation in good faith of treaties, in the ordinary meaning to be given to the terms in their context and in light of their object and purpose (Conv. Vienna, 23 May 1969, on the law of treaties, Article 31 (1)–, “*the wording of Article 12 might be interpreted so as not to exclude the marriage between two men or two women*” (§ 55). The Court added right after that that such an interpretation was unfair; “*The choice of wording in Article 12 must thus be regarded as deliberate. Moreover, regard must be had to the historical context in which the Convention was adopted*” (§ 55). The Court found, however, that “(h)owever, 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.” (§ 61). It added that “it must not rush to substitute its own judgment in place of that of the national authorities” (§ 62). The Chamber concluded “that States are still free, under Article 12 of the Convention as well as under Article 14 taken in conjunction with Article 8, to restrict access to marriage to different-sex couples” (§ 108). This wording placed the Court in the perspective of a gradual reduction in the freedom of States to restrict access to marriage to only complementary sex couples.

At the time of *Schalk and Kopf*, six of the forty-seven Member States had made marriage sexually neutral. There are now eleven (Belgium, Denmark, France, Ireland, Iceland, Norway, Portugal, Spain, Sweden, the Netherlands and the United Kingdom), while 13 have, on the contrary, and often in recent years, constitutionalized the heterosexual and monogamous definition of marriage.

By virtue of its judgment in *Hämäläinen v. Finland*, cited above, of 16th of July 2014, the Grand Chamber, by fourteen votes to three, terminated the prospect of this reinterpretation of the

Convention by stating, in a wording which appears to be final that neither article 8 nor article 12 of the Convention can be understood as “imposing an obligation on Contracting States to grant same-sex couples access to marriage” (§ 71 and 96). The Court specified that “the fundamental right of a man and woman to marry and to found a family” guaranteed in article 12 “enshrines the traditional concept of marriage as being between a man and a woman”. The High Chamber added “(w)hile it is true that some Contracting States have extended marriage to same-sex partners, Article 12 cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples” (§ 96).

The Committee of Ministers of the Council of Europe (Cons. Europe, Min. Committee, Doc. 13450, 24 March 2014) and the Venice Commission (Cons. Europe, Venice Commission, Opinion No. 779, Sept. 25, 2014), seized of the constitutionalization of the heterosexual definition of marriage by Croatia and Macedonia, declared that “Article 12 of the Convention does not impose [...] the obligation to open marriage to a homosexual couple” for the former, and that the definition of marriage falls under national jurisdiction for the latter. The question therefore seemed settled.

In *Oliari*, however, the majority of the judges of the Chamber expressed their intention to reopen this question by replacing it with the evolutionary approach of the *Schalk and Kopf* judgment, and even surpassing it, by affirming in a new interpretation that the Court had “*found under Article 12 that it would no longer consider that the right to marry must in all circumstances be limited to marriage between two persons of the opposite sex.*” (§ 191). The Chamber then concluded, based not on the letter of article 12 but on the lack of consensus, that “*despite the gradual evolution of States on the matter [...] the findings reached in the cases [(Schalk and Kopf and Hämäläinen)] mentioned above remain pertinent.*” The Chamber adds that “*(i)n consequence the Court reiterates that Article 12 of the Convention does not impose an obligation on the respondent Government to grant a same-sex couple like the applicants access to marriage.*” (§ 192). The difference is subtle but nevertheless important between “*does not impose*” (which applies only to the case) and “*cannot be understood as imposing*” (which asserts itself as final), according to the wording of the Grand Chamber.

Accordingly, the Chamber concludes unanimously that the complaints based on Article 12 invoked alone and in conjunction with Article 14 are manifestly ill-founded.

The Court, in its judgments in 2010 and 2015, reinterpreted the Convention by adopting the approach developed by the applicants in the *Schalk and Kopf* case, according to which “Article 12 did not necessarily have to be read in the sense that men and women only had the right to marry a person of the opposite sex” (ECHR, 24 June 2010, 30141/04, *Schalk and Kopf*, § 44). It was through this interpretation that the Spanish Constitutional Court ruled that the introduction of homosexual marriage was in conformity with the Spanish Constitution (Constitutional Court of Spain, 6 Nov. 2012, aff. 198/2012); and it is against this interpretation that states such as Slovakia and Macedonia have undertaken to define marriage constitutionally as “the union between a man and a woman”.

More fundamentally, until *Schalk and Kopf*, homosexual relationships enjoyed the protection of the Convention in respect of “privacy”; it is by extending this protection under “the notion of “family life”, just as the relationship of a different-sex couple in the same situation would.” (ECHR, 24 June 2010, 30141/04, *Schalk and Kopf*, § 94), that the Court has introduced these relationships in the perspective of rights related to the family, that is to say, marriage and children. But can society have an obligation to respect the “*family life*” of these couples without recognizing them the “*right to marry and to found a family*”?

The same question arises in relation to other types of stable affective relationships. In the name

of what should consented homosexuality be more acceptable than consented polygamy? The Court has already recognized that a polygamous family has a family life (CEDH, 2 Nov. 2010, Case 3976/05, *Serife Yigit v. Turkey*, § 90). Why deny to some what is granted to others, since the conjugal family has been rejected as a standard of reference? Numerous in Europe, polygamous families are also faced with practical difficulties due to their exclusion from civil union regimes and certainly feel a need for protection and social recognition.

B – Towards transnational recognition of same-sex marriages?

A Chamber composed within the same Section of the Court is expected rule in the near future on other cases (ECHR, Case 26431/12, *Orlandi and Others v. Italy*) introduced with those which gave rise to the *Oliari* judgment, but by six same-sex couples complaining this time of the refusal of the Italian authorities to recognize their marriage contracted abroad, as well as, more generally, the impossibility of obtaining recognition of their relationship. They rely on Articles 8, 12 and 14.

The occasion seems appropriate to push a new nail in the coffin of the traditional institution of marriage; Not (yet?) frontally, but by condemning Italy to recognize the effects of marriages concluded abroad, as opposed to marriage itself, against its internal public order.

The Section may always seek - and find - some inconsistencies in Italian law since, in practice, it recognizes some effects on same-sex marriages held abroad. The question then arises as to whether the decision to reserve the respectable institution of marriage for heterosexual couples is not in itself a discrimination all the more as its difference with the civil union is now, mainly only symbolic.

Lastly, since this question is firstly political, the first Vice-President of the European Commission, in charge of fundamental rights, undertook to try to get all Member States “to unreservedly accept same-sex marriage” denouncing in particular the difficulties encountered by married homosexual couples when they move to a country that does not recognize their marriage (Timmermans F., Speech at ILGA-Europe's Equality Gala, June 24, 2015, online on the website of the European Commission¹).

Conclusion

Once the right to civil partnership has been established, the question arises of the justification of the difference in rights and obligations relating to marriage and civil unions. In *Schalk and Kopf* the applicants argued that if a State decides to offer homosexual couples another form of legal recognition it would then be obliged to grant them a status which, even if it bears a different name, corresponds in all respects to marriage. The Court stated that it was not “convinced by that argument. It considers on the contrary that States enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition.” (§ 108). In *Johnston and others v. Ireland* (ECHR, 18 Dec. 1986, Case 9697/82, *Johnston and others v. Ireland*, § 68), the Court had already stated that it was not “possible to derive from Article 8 an obligation [...] to establish for unmarried couples a status analogous to that of married couples.” Nevertheless, one can question the legitimacy of the existence of two statutes and their

¹ https://ec.europa.eu/commission/2014-2019/timmermans/announcements/keynote-speech-first-vice-president-frans-timmermans-equality-gala-organized-ilga-europe-brussels_en

differences. Yet, when procreation and filiation are separated from sexual complementarity and marriage, the difference between civil union and marriage is bound to disappear, and civil union to absorb marriage.

Indeed, civil union certainly corresponds more than marriage to the contemporary Western society marked by individualism and by an inclination for “short term”. Moreover, in Europe between 1970 and 2010, the absolute number of marriages decreased by 36%, while the gross divorce rate doubled from one to two divorces per 1 000 inhabitants. As for the proportion of births outside marriage, it also more than doubled between 1990 and 2010, from 17.4% to 38.3%. In France, three marriages are celebrated for two civil union contracts (sources: Eurostat and INED).

However, the differences between marriage and civil union remain fundamental, since these unions are based on contrary conceptions of liberty and society. Indeed, for some, freedom is perceived more as an absence of definitive commitment, while for others it is constitutive of commitment (freedom is exercised through commitment). As for society, for some, marriage is the legal support of families, which organically (naturally) constitute the society from which the state emanates; for others, society is an aggregate (supposedly voluntary) of free individuals who formally access social existence through the state.

If the Court perceives a growing consensus in Europe in favor of the civil union approach, international law maintains an organic understanding of society. As solemnly stated in various international instruments, and recently recalled by the Human Rights Council (UN, Human Rights Council, Resolution on “Protection of the Family”, 1 July 2015, A / HRC / 29 / L.25), the family is recognized and protected as a “*the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children*” (CRC, Preamble). Protection does not apply only to the couple but to the family, which “*is entitled to protection by society and the State.*” (International Covenant on Civil and Political Rights, article 23, § 1) “*while it is responsible for the care and education of dependent children*” (International Covenant on Economic, Social and Cultural Rights article 10, § 1). The recognition accorded by society to the couple results in fact from its contribution to the common good through the founding of a family and not from the existence of feelings between the persons constituting the couple, these being part of private life.