

***OLIARI Y OTROS Y CHAPIN ET CHARPENTIER***

**DOS SENTENCIAS RECIENTES DEL TRIBUNAL EUROPEO DE DERECHOS HUMANOS SOBRE LAS UNIONES DE PERSONAS DEL MISMO SEXO\***

*OLIARI AND OTHERS AND CHAPIN ET CHARPENTIER*

*TWO RECENT JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS ON SAME-SEX UNIONS*

*Eduardo José Pintore\*\**

**Resumen:** En los asuntos *Oliari y otros* y *Chapin et Charpentier* el Tribunal Europeo de Derechos Humanos ha tenido la posibilidad de pronunciarse sobre el reconocimiento legal de las uniones de personas del mismo sexo, como así también de precisar si existe o no una obligación de los Estados Parte del Convenio Europeo de Derechos Humanos de reconocer el matrimonio entre personas del mismo sexo. Asimismo, tuvo la oportunidad de determinar el entendimiento del concepto de “matrimonio” contenido en el artículo 12 del Convenio.

**Palabras-clave:** Tribunal Europeo de Derechos Humanos - Convenio Europeo de Derechos Humanos - Unión de personas del mismo sexo - Matrimonio de personas del mismo sexo.

**Abstract:** In the affairs *Oliari and others* and *Chapin et Charpentier* the European Court of Human Rights had the opportunity to decide on the legal recognition of unions of persons of the same sex, as well as specify whether or not an obligation of States parties the European Convention on Human Rights to recognize the same-sex marriage. Moreover, he had the opportunity to determine the understanding of the concept of “marriage” contained in Article 12 of the Convention.

**Keywords:** European Court of Human Rights - European Convention on Human Rights - Same-sex union - Same-sex marriage.

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\*\*Abogado por la Universidad Nacional de Córdoba-Argentina. Magister Legum (LL.M.) y Doctor en Derecho, ambos por la Freie Universität Berlin-Alemania. Profesor de Derecho Internacional Público en la Universidad Católica de Córdoba y en la Universidad Nacional de Córdoba (E-mail: [eduardojpintore@hotmail.com](mailto:eduardojpintore@hotmail.com)).

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## I. Introducción

La jurisprudencia del Tribunal Europeo de Derechos Humanos (en adelante el Tribunal) en los asuntos *Oliari y otros* y en *Chapin et Charpentier* constituyen muestra reciente de su jurisprudencia sobre el tema del reconocimiento legal de las uniones de personas del mismo sexo y, sobre todo, de si existe o no una obligación para los Estados parte del Convenio Europeo de Derechos Humanos (en adelante el Convenio), de garantizar el acceso al matrimonio a esa forma de uniones. En ese sentido se resuelve la cuestión de qué debe entenderse bajo el concepto de “matrimonio”, como derecho fundamental, contenido en el artículo 12 del Convenio Europeo de Derechos Humanos. Si bien en ambos fallos se analizan los artículos 8, 12 y 14 del Convenio, en el caso *Oliari y otros* veremos un mayor análisis de la cuestión de la regulación alternativa al matrimonio para este tipo de uniones, mientras que en *Chapin et Charpentier* el centro de gravedad recae más en la cuestión de si el artículo 12 del Convenio, contiene una obligación de los Estados parte a abrir el instituto del matrimonio a personas del mismo sexo.

## II. Caso *Oliari y otros c. Italia*

### A. Los hechos

Como se trata de una demanda realizada por diversos demandantes, el Tribunal Europeo de Derechos Humanos (en adelante el Tribunal) analiza primero los hechos de cada caso.

#### 1. *Sr. Oliari y Sr. A.* (1)

En julio del 2008 los demandantes, dos personas de sexo masculino que tenían una relación sentimental estable, manifiestan su intención de unirse en matrimonio y solicitan a la oficina del registro civil de la ciudad de Trento que inicie los procedimientos a tal efecto. El 25 de julio del mismo año se les comunica la denegación de la solicitud. Los denunciados apelan la decisión ante el tribunal de Trento, con el argumento de que la ley italiana no prohíbe el matrimonio de personas del mismo sexo y que si lo hiciera, dicha normativa sería inconstitucional. El tribunal de Trento rechaza el 34 de febrero de 2009 la presentación de los demandantes. Sostiene que la Constitución Italiana no establece el requisito de que los esposos deben ser de distintos sexos, pero el Código Civil sí lo hace, por lo que el matrimonio de personas del mismo sexo no reúne uno de los requisitos

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(1) El segundo demandante solicitó ante el tribunal mantener la reserva de su nombre, es por ello que aparece sólo con la letra A.

esenciales para constituirlo en un acto legal. De todos modos, no existe un derecho fundamental a unirse en matrimonio ni las limitaciones establecidas por la ley italiana para contraerlo son discriminatorias, desde el momento que rigen de igual modo para todos. Por otro lado, concluyó el tribunal, el derecho de la Unión Europea reconoce a cada Estado el derecho de regular esta institución en su derecho interno. Los demandantes apelaron esta decisión ante el Tribunal de Apelaciones de Trento, quien la confirmó sosteniendo que se trata de una jurisprudencia unánime sobre el entendimiento de las leyes italianas que regulan este tema. Los demandantes elevaron así recurso de inconstitucionalidad ante la Corte Constitucional italiana, la cual se expidió el 15 de abril de 2010 (Fallo nr. 138 de ese año). La Corte Constitucional declaró inadmisibile el recurso de inconstitucionalidad interpuesto por los demandantes sobre los artículos 93, 96, 98, 107, 108, 143, 143 bis y 231 del Código Civil italiano. La Corte Constitucional recuerda el artículo 2 de la Constitución el cual reconoce y garantiza los derechos inviolables del hombre, sea como individuo, sea en el grupo social en donde se realiza su personalidad, como así también los deberes inderogables de solidaridad política, económica y social. La Corte hace notar que bajo el concepto de grupo social se entiende todo tipo de comunidad, simple o compleja, destinada a posibilitar y apoyar el desarrollo libre de la personalidad de cada individuo por medio de relaciones. Esa noción incluye uniones homosexuales, concebida como una cohabitación estable de dos personas del mismo sexo, que poseen un derecho fundamental a expresar su personalidad en una relación de pareja obteniendo, en la ocasión, con los medios y en los límites que establezca la ley, reconocimiento jurídico de sus respectivos derechos y obligaciones. Sin embargo, este reconocimiento, que requiere necesariamente una regulación legal general que establezca los derechos y obligaciones de los individuos dentro de la pareja, puede ser llevado a cabo de otras maneras distintas a la institución del matrimonio entre personas del mismo sexo. La Corte observó allí que, en los diferentes sistemas legales europeos, esta potestad fue delegada a la discrecionalidad de los respectivos parlamentos. La Corte Constitucional expresa que es verdad que conceptos tales como el de familia y de matrimonio no pueden ser considerados “cristalizados” al momento de haberse adoptado la Constitución y que los principios constitucionales deben ser interpretados teniendo en cuenta los cambios de pensamiento en el sistema legal como así también la evolución de la sociedad y de las costumbres, no obstante, la interpretación no puede ser llevada a cabo de una forma tal que afecte de manera esencial a las normas, modificándolas de modo tal que incluyan fenómenos y problemas que de ningún modo fueron considerados cuando ellas fueron elaboradas. De hecho, en los trabajos preparatorios de la Constitución se puede observar que el tema de las uniones homosexuales no fue discutido por la Asamblea Constituyente, si bien el tema no era desconocido. En el proyecto de artículo 29 de la Constitución (que establece el matrimonio), la Asamblea discutió una institución que ya tenía una forma precisa establecida en el Código Civil, y que rige hasta nuestros días, que exige que los esposos deben ser de sexos opuestos. Por lo tanto, el precepto constitucional no puede ser alterado por una interpretación creativa, con lo que el concepto constitucional de matrimonio no se extiende a las uniones homosexuales, sino que se refiere al matrimonio en un sentido tradicional. Con respecto al principio de igualdad ante la ley del artículo 3 de la Constitución Italiana, la Corte sostuvo que no hay discriminación arbitraria por parte de la legislación relevante en torno al matrimonio, dado que las uniones homosexuales no pueden ser consideradas como equivalentes al matrimonio. En cuanto al

artículo 12 de la Convención europea sobre derechos humanos y al artículo 9 de la Carta Europea de Derechos Fundamentales la Corte sostiene que no exigen la total igualdad entre las uniones homosexuales y los matrimonios entre un hombre y una mujer, sino que dejan su regulación a la discrecionalidad de los parlamentos nacionales, lo que se puede constatar con la diversa regulación que las leyes nacionales le dan a este asunto. Por todo esto la Corte de Apelaciones rechaza el recurso interpuesto por los Srs. Oliari y A. en decisión del 12 de septiembre de 2010.

## **2. *Sr. Felicetti y Sr. Zappa***

En el año 2003 los dos demandantes inician una relación sentimental. En el 2004 el Sr. Felicetti decide continuar con sus estudios, lo que pudo realizar gracias al soporte financiero del Sr. Zappa. En el año 2005 ambos deciden cohabitar. En el 2005 y en el 2007 los demandantes le escriben al Presidente de la República, solicitándole una mejora de la legislación referente a las parejas del mismo sexo. En el 2008 los demandantes registran su cohabitación frente a las autoridades y en el 2009 se inscriben recíprocamente como tutores uno del otro por causa de incapacidad. El 19 de febrero de 2011 solicitan ante el registro la celebración de matrimonio, lo que fue rechazado el 9 de abril de 2011, en base a la legislación y jurisprudencia sobre la materia. Los dos demandantes no recurrieron la decisión, ya que el recurso ante la Corte Constitucional no fue considerado efectivo por ellos, en razón de la sentencia de ese tribunal en relación el recurso de los Srs. Oliari y A., arriba desarrollada.

## **3. *Sr. Perelli Cipo y Sr. Zacheo***

Estos dos demandantes comenzaron una relación en el año 2002 y ese mismo año comenzaron a cohabitar. En el 2006 ambos abrieron una cuenta bancaria en común. En el 2007 inscribieron su cohabitación en los registros correspondientes. El 3 de noviembre de 2009 solicitaron la unión matrimonial y la persona a cargo del registro no le otorgó la posibilidad de llenar el formulario correspondiente, sino que les indicó adjuntar su solicitud con otras solicitudes ya realizadas por otras parejas que estaban en la misma situación que los demandantes. El 5 de noviembre de 2009 su solicitud fue rechazada en base a la legislación y jurisprudencia aplicable al caso. Frente a ello ambos demandantes apelaron la decisión ante el tribunal correspondiente en Milán. Por decreto del 9 de junio de 2003 el tribunal de Milán rechazó el pedido, considerando que el rechazo por parte del Registro Civil de permitir la celebración del matrimonio entre personas del mismo sexo es acorde a la sentencia de la Corte Constitucional nro. 138 del 15 de abril de 2010. Los demandantes no realizaron una apelación posterior en base al art. 739 del Código de Procedimientos, ya que lo consideraban no efectivo en vistas a la mencionada sentencia de la Corte Constitucional.

## **B. Derecho italiano, derecho comparado y jurisprudencia**

El Tribunal realiza un análisis de la legislación y jurisprudencia italianas como así también del derecho comparado y europeo sobre el tema. La situación legal ha sido aquí ya expuesta en la exposición sobre el fallo nr. 138 de la Corte Constitucional Italiana del 15 de abril de 2015 realizada más arriba. En cuanto al derecho comparado entre los Estados Parte del Consejo de Europa, el Tribunal sostiene que 11 Estados (Bélgica,

Dinamarca, Francia, Gran Bretaña, Islandia, Luxemburgo, Holanda, Noruega, Portugal, España y Suecia) reconocen la figura legal del matrimonio entre personas del mismo sexo, mientras que 18 Estados (Alemania, Andorra, Austria, Bélgica, Croacia, La República Checa, Eslovenia, España, Finlandia, Francia, Gran Bretaña, Holanda, Hungría, Irlanda, Liechtenstein, Luxemburgo, Malta y Suiza) reconocen otras formas de uniones entre personas del mismo sexo. En algunos de estos últimos Estados, como por ejemplo en Malta, este tipo de uniones son iguales en derechos y deberes que el matrimonio, difiriendo sólo en el nombre de la institución. Con ello, concluye el Tribunal, de 47 Estados que constituyen el Consejo de Europa, 24 reconocen el matrimonio u otra forma de unión civil entre personas del mismo sexo, mientras que el resto no lo hace. Por otra parte, el Tribunal menciona también las recomendaciones en el ámbito del Consejo de Europa. Especialmente cita párrafos de la recomendación CM/Rec (2010) del Comité de Ministros, sobre las medidas para combatir la discriminación en base a la orientación sexual o identidad de género, solicitando a los Estados regular jurídicamente las uniones civiles de personas del mismo sexo. Esta recomendación distingue entre tres diversas situaciones legislativas distintas: \*si la legislación interna regula uniones civiles no matrimoniales, lo debe hacer de forma tal que no haya discriminación entre parejas de distinto sexo frente a parejas del mismo sexo; \*\*si la legislación interna regula uniones civiles de personas del mismo sexo, lo debe hacer reconociendo los mismos derechos y obligaciones que las uniones civiles de parejas de distinto sexo, en situaciones comparables; \*\*\*si la legislación interna no reconoce o no otorga derechos ni obligaciones a parejas civiles de personas del mismo sexo y parejas no casadas, se invita a esos Estados miembros a considerar la posibilidad de proveer, fuera de toda discriminación, incluso frente a parejas de distintos sexos, a parejas del mismo sexo con medios legales o de otra clase para solucionar los problemas prácticos relativos a la realidad social en que ellos viven. Como es de observar, ninguna de las recomendaciones insta a los Estados miembros a adoptar en su orden jurídico interno la figura del matrimonio entre personas del mismo sexo, sino a regular diversos tipos de uniones civiles de personas del mismo sexo, sin realizar discriminación frente a aquellas uniones civiles de personas de distinto sexo.

En cuanto al derecho de la Unión Europea, párrafos de 62 a 64, el Tribunal cita los artículos 7 (2), 9 (3) y 21 (4) de la Carta de los Derechos Fundamentales de la Unión Europea, del 7 de diciembre del 2000, que entró en vigor el 1 de diciembre de 2009. Realiza también una cita textual del Comentario de la Carta de los Derechos Fundamentales

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(2) El que expresa: “*Respeto de la vida privada y familiar.* Toda persona tiene el derecho al respeto de su vida privada y familiar, de su domicilio y de sus comunicaciones”.

(3) El que expresa: “*Derecho a contraer matrimonio y derecho a fundar una familia.* Se garantizan el derecho a contraer matrimonio y el derecho a fundar una familia según las leyes nacionales que regulen su ejercicio”.

(4) El que expresa: “*No discriminación.* 1. Se prohíbe toda discriminación, y en particular la ejercida por razón de sexo, raza, color, orígenes étnicos o sociales, características genéticas, lengua, religión o convicciones, opiniones políticas o de cualquier otro tipo, pertenencia a una minoría nacional, patrimonio, nacimiento, discapacidad, edad u orientación sexual. 2. Se prohíbe toda discriminación por razón de nacionalidad en el ámbito de aplicación del Tratado constitutivo de la Comunidad Europea y del Tratado de la Unión Europea y sin perjuicio de las disposiciones particulares de dichos Tratados”.



de la Unión Europea concluido en el 2006 por la Red de expertos independientes en derechos fundamentales de la Unión Europea sobre el artículo 9, cuya conclusión final sostiene: “No hay, sin embargo, ningún requisito explícito de que las leyes nacionales deben facilitar este tipo de matrimonios. Los tribunales y comités internacionales han dudado hasta el momento de extender la aplicación del derecho al matrimonio a las parejas del mismo sexo...” (5).

A continuación de este análisis del derecho comparado y de la jurisprudencia, el Tribunal analiza algunas cuestiones procesales previas, tales como falta de legitimación activa, falta de agotamiento de los recursos internos, el vencimiento de los 6 meses de plazo para presentarse ante el Tribunal, etc., en las cuales aquí no nos detendremos ya que no hacen a la sustancia del tema analizado en este trabajo.

### C. Derecho de fondo

En cuanto a la cuestión del derecho de fondo, el Tribunal analiza el reclamo de los demandantes, esto es, la violación del artículo 8 tomado individualmente y del artículo 8 en relación con el artículo 14, ambos del Convenio.

El artículo 8 dice:

*“Derecho al respeto a la vida privada y familiar*

1. *Toda persona tiene derecho al respeto de su vida privada y familiar, de su domicilio y de su correspondencia.*
2. *No podrá haber injerencia de la autoridad pública en el ejercicio de este derecho sino en tanto y en cuanto esta injerencia esté prevista por la ley y constituya una medida que, en una sociedad democrática, sea necesaria para la seguridad nacional, la seguridad pública, el bienestar económico del país, la defensa del orden y la prevención de las infracciones penales, la protección de la salud o de la moral, o la protección de los derechos y las libertades de los demás.”*

Mientras que el artículo 14 establece:

*“Prohibición de discriminación*

*El goce de los derechos y libertades reconocidos en el presente Convenio ha de ser asegurado sin distinción alguna, especialmente por razones de sexo, raza, color, lengua, religión, opiniones políticas u otras, origen nacional o social, pertenencia a una minoría nacional, fortuna, nacimiento o cualquier otra situación.”*

Otra norma no incluida en este tramo del fallo es el artículo 12 del Convenio, al cual nosotros incluimos aquí, ya que viene varias veces mencionado en los alegatos. El mismo expresa:

*“Derecho a contraer matrimonio*

*A partir de la edad núbil, el hombre y la mujer tienen derecho a casarse y a fundar una familia según las leyes nacionales que rijan el ejercicio de este derecho.”*

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(5) Parágrafo 63 de la sentencia. El texto original reza: *“There is, however, no explicit requirement that domestic laws should facilitate such marriages. International courts and committees have so far hesitated to extend the application of the right to marry to same-sex couples...”*

En contra de lo alegado por el gobierno italiano, el Tribunal sostiene que el artículo 14 del Convenio no tiene una existencia independiente, sino que complementa a las demás normas sustantivas del Convenio y los Protocolos. Luego el Tribunal afirma que es claro que la relación entre personas del mismo sexo cae dentro del concepto de “vida privada” del artículo 8. Del mismo modo, continúa el Tribunal, él ya se ha pronunciado en jurisprudencia precedente que la cohabitación de personas del mismo sexo que se encuentran en una relación estable está comprendida bajo el concepto de “vida familiar” contenido en ese mismo artículo. Al caer el objeto de la demanda tanto dentro de un concepto como del otro del artículo 8, la contienda se encuentra regulada tanto por el artículo 8 tomado individualmente como por ese artículo en conjunción con el 14 del Convenio, por lo que declara admisibles las demandas de acuerdo con el artículo 35, 3 (a) del Convenio.

## **D. Los argumentos de las partes**

### **1. Los argumentos de los demandantes**

#### *a. Los demandantes de la demanda nr. 18766/11 (Oliari y A.)*

El Tribunal recuerda que los demandantes hacen referencia a una evolución, observable en varios Estados, de regular jurídicamente las uniones de personas del mismo sexo y a que en algunos Estados se les reconoce los mismos derechos y obligaciones que al matrimonio, por lo tanto, según los demandantes, no hay razón por qué ese tipo de uniones no son reconocidas en Italia. Los demandantes recuerdan que la Corte Constitucional italiana ha considerado que el Estado tiene la obligación de reconocer en su sistema legal ese tipo de uniones y sostienen que el gobierno no ha dado explicaciones suficientes por esa falta de legislación. Por último, los demandantes manifiestan no entender la conexión entre la protección de la familia en su sentido tradicional y el reconocimiento legal de una relación estable entre personas del mismo sexo. Los demandantes consideran también que el reconocimiento legal de la vida familiar es crucial para la existencia y bienestar del individuo y de su dignidad. A falta de matrimonio, el Estado debe, al menos, dar acceso a una unión reconocida por medio de una institución legal, basada en un compromiso público y capaz de otorgar seguridad jurídica. Como esa regulación no existe, las parejas del mismo sexo sufren un estado de incerteza, librado a la discrecionalidad judicial. Los demandantes afirman que el gobierno desea confundir al Tribunal cuando argumenta en el sentido de que algunos municipios, como el de Milán, registran uniones civiles. Ese registro tiene sólo efectos a los fines estadísticos, pero no tiene nada que ver con un estado civil individual y solo sirve de prueba de cohabitación. Este registro no tiene efectos frente a terceros, ni con respecto a las sucesiones, ni con respecto al derecho de adopción, ni al derecho de crear un negocio familiar. En relación con el artículo 14, los demandantes sostienen que el margen de apreciación del Estado es demasiado estrecho como para fundamentar la falta de legislación en la orientación sexual de los individuos, y que se necesitan razones de gran peso para justificar una diferencia de trato basada en ese motivo. Los demandantes remarcan que no es un fundamento el afirmar que tampoco existe una previsión legal para uniones de parejas de distinto sexo, ya que ellas pueden contraer matrimonio mientras las parejas del mismo sexo no.

*b. Los demandantes de la demanda nro. 36030/11  
(los demás demandantes) (6)*

Los demandantes esgrimen -en primer lugar- que, en vista de un desarrollo positivo en ese sentido en Europa, el Tribunal debe imponer a los Estados una obligación de asegurar a las parejas del mismo sexo en su orden jurídico interno el acceso a una institución, cualquiera fuera el nombre, que sea equiparable al matrimonio. Esto había sido reconocido, según los demandantes, por la Corte Constitucional italiana, si bien el legislador de ese país permaneció inactivo. Al igual que los anteriores, estos demandantes también sostienen que el gobierno italiano no pudo demostrar de qué forma el reconocimiento legal de una unión entre personas del mismo sexo puede afectar negativamente al matrimonio en su sentido tradicional. Remarcan, que el caso no toca a elementos más sensibles de la moral y la ética (citando el aborto como ejemplo), como así tampoco afecta una cuestión de derechos de terceros, en particular los niños (citando aquí los demandantes como ejemplo el tema de la adopción dentro de una pareja homosexual). El presente caso toca sólo los derechos y obligaciones de cada uno de los integrantes de la pareja de personas del mismo sexo, con total independencia del reconocimiento de otros derechos tales como el de paternidad, de adopción o al acceso a la procreación asistida. Los demandantes también remarcan que en el antecedente *Schalk and Kopf* una de las salas rechazó una violación al artículo 8 en conjunción con el 14, afirmando que la determinación del momento del reconocimiento a ese tipo de uniones era una facultad discrecional del Estado, sólo por una pequeña minoría (4-3) y remarcando que, en ese momento, no había una mayoría de Estados que poseyeran en su orden interno un tal reconocimiento (7). En este fallo la Sala adopta un criterio de mayoría, siendo que, en un caso anterior, *Christine Goodwin*, ella no le dio importancia a este argumento, sino que le dio mayor relevancia a la existencia de una tendencia internacional. En este sentido, sostienen los demandantes, el Tribunal no debe fijarse sólo en las “mayorías”, sino que es el guardián del Convenio y los valores en él contenidos, entre ellos el de protección de las minorías.

Los demandantes afirman que aún existía una parcialidad en toda Europa y que estaba presente con mayor fuerza en algunos países en donde el prejuicio contra los homosexuales se basa en tradicionales -si no arcaicas- convicciones y en donde los ideales y prácticas democráticas se han establecido en tiempos recientes. Allí señalan que evidencias empíricas prueban que la falta de reconocimiento de las uniones de personas del mismo sexo se corresponde con una menor aceptación de la homosexualidad en un país dado, esto es, que algunas medidas legislativas son tomadas en virtud de una actitud discriminatoria en contra de homosexuales, más que en el marco de un proceso guiado en lo que es estrictamente necesario en una sociedad democrática.

Los demandantes llaman la atención al hecho de que pese a fallo de la Corte Constitucional (n°138/10), que reconocía un derecho fundamental de las parejas del mismo

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(6) Ellos son el Sr. Felicetti, el Sr. Perelli Cippo, el Sr. Zacheo y el Sr. Zappa.

(7) Los demandantes sostienen que en ese momento 22 de los 47 Estados reconocían esas uniones, esto es, un 49%.



sexo a ser reconocidas en el orden interno, el gobierno italiano no había actuado en consecuencia, lo cual ha afectado a los demandantes en diversas formas. En ese sentido reclaman que las uniones de hecho, aplicables tanto a parejas de distinto sexo como del mismo sexo, tienen una función más bien de registro y sólo se ha reconocido un reducido número de derechos a favor de ellas, fallando en regular los derechos y deberes que le corresponden a cada individuo, dentro de estas uniones, en las diversas situaciones. Rechazan también el argumento de que los derechos de las partes pueden ser regulados por medio de acuerdos privados, ya que éstos son costosos y consumen mucho tiempo, generando stress, lo que no les ocurre a las parejas de sexo distinto que pueden celebrar matrimonio o también optar por convivir sin ningún tipo de reconocimiento legal. Remarcan los perjuicios que se generan para ellos al no poder realizar una ceremonia pública de reconocimiento de su unión. Sostienen que, a diferencia de una pareja de sexos opuestos, la cual puede optar por matrimonio, las parejas del mismo sexo no, hecho que constituye una discriminación de parte del Estado basada en la orientación sexual de los individuos. Alegan también que, incluso en el caso que la diferencia de tratamiento tenga como finalidad la protección de la familia en su sentido tradicional, una restricción de derechos basada en la orientación sexual para proteger la moral pública sería inaceptable. Esto se opondría a las demandas de pluralismo, tolerancia y amplitud de criterio, sin las cuales no habría una sociedad democrática.

## 2. Los argumentos del gobierno

El gobierno ha sostenido que si bien el Tribunal reconoció el derecho de las parejas del mismo sexo a que su unión sea reconocida legalmente, considera empero que las provisiones pertinentes, esto es, artículos 8, 12 y 14, no contienen una obligación convencional para el Estado ya que éste dispone de un amplio margen de apreciación en las modificaciones legislativas que reflejen el cambiante sentido común de la sociedad. Como antecedente menciona el fallo en *Schalk and Kopf*, en donde, ante toda ausencia de legislación sea con respecto al matrimonio o a otras formas de reconocimiento de uniones de personas del mismo sexo, el Tribunal no condenó al Estado de Austria. El gobierno trae aquí también a colación, que en *Gas and Dubois v. France* (nro. 25951/07, ECHR 2012) el Tribunal sostuvo que el Estado no está obligado a reconocer el matrimonio de personas del mismo sexo, ni a prever en su derecho interno otras formas de uniones de personas del mismo sexo. El gobierno observa que el mismo margen de discrecionalidad de cada Estado miembro fue reconocido en el derecho de la Unión Europea, en especial en el artículo 9 de la Carta de los Derechos Fundamentales de la Unión Europea (8), ya que sólo el Estado individual es capaz de conocer el “sentido común” (“*common sense*”) de su propia comunidad, sobre todo en un tema que afecta tanto a la sensibilidad de los individuos y sus identidades culturales. El Gobierno sostiene también que, en el momento de la presentación de sus observaciones, menos de la mitad de los Estados Parte del Convenio Europeo habían proporcionado las previsiones legales de protección para las parejas de hecho, incluidas las homosexuales, y muchos lo habían hecho sólo

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(8) El artículo 9 de la Carta dice: “Derecho a contraer matrimonio y derecho a fundar una familia. Se garantizan el derecho a contraer matrimonio y el derecho a fundar una familia según las leyes nacionales que regulen su ejercicio.”

recientemente, mientras que en la otra mitad de los Estados no había previsión legal alguna. El gobierno es de la opinión que, si al final de una evolución en ese sentido sólo un Estado no prevé un reconocimiento legal de las uniones de personas del mismo sexo, eso no estaría en absoluto en colisión con la Convención, ya que ella no contiene ninguna obligación de legislar sobre las uniones de este tipo. Ese mismo panorama, sostiene el demandado, que observa que en los EE.UU. la regulación en materia de este tipo de uniones es discrecionalidad de cada estado federado. El gobierno también hace referencia al fallo 138/10 de la Corte Constitucional en donde se remarca la importancia del reconocimiento legal de las parejas del mismo sexo, mas deja a la discrecionalidad del parlamento el decidir el tiempo, los métodos y los límites de esa regulación. Contrario a lo que han sostenido los demandantes, el gobierno expresa que la Corte Constitucional no estableció ninguna obligación constitucional, y menos inmediata, de regular en ese sentido. El gobierno remarca que el Estado italiano había participado activamente en el debate sobre este tema y que en su parlamento se encontraban varios proyectos de leyes presentados por diversos partidos políticos. También hace notar lo difícil que es encontrar un equilibrio entre las diversas sensibilidades sobre un tema social tan delicado y profundo. El gobierno afirma que las decisiones políticas y jurídicas sobre esta temática deben alcanzar un consenso entre las diferentes corrientes de pensamiento como así del sentimiento religioso presente en la sociedad, por lo que no se puede culpar al Estado italiano por el tortuoso camino hacia el reconocimiento de uniones de personas del mismo sexo. Por otra parte, el demandado señala que el gobierno había reconocido las uniones del mismo sexo como existentes y relevantes y que había ofrecido diversas formas de reconocimiento, ya sea a través de medios judiciales como no judiciales, como así también la protección de algunos intereses que surgen de la convivencia. En ese sentido cita jurisprudencia italiana. También argumenta que, en el derecho italiano, las parejas del mismo sexo que deseen darle un marco legal a su convivencia, pueden celebrar pactos de convivencia (*contratti di convivenza*). Estos acuerdos regulan diversos aspectos de la vida común, como la forma de compartir los gastos comunes, cómo se asignará la propiedad de los bienes adquiridos durante la convivencia, si el lugar de residencia se considerará en posesión de uno o ambos convivientes, cómo se repartirán los bienes en caso de disolución de la convivencia, la cuestión de los derechos en casos de enfermedad física o mental o incapacidad, como así también los actos de disposición testamentaria en caso de fallecimiento de uno de los convivientes. El gobierno también llama la atención al hecho de que varios municipios dispusieran un registro de uniones civiles, en las cuales también podían anotarse las parejas del mismo sexo, no sólo a los fines del registro, sino también a los fines administrativos, políticos, sociales y de bienestar social, a ese nivel municipal. Por otra parte, el gobierno niega categóricamente que el objeto de las medidas criticadas o de la falta de medidas alegadas por los demandantes, tuvieran como objeto la protección de la familia en su sentido tradicional o la moral de la sociedad. En relación al artículo 14 del Convenio (prohibición de discriminación) en conexión con el tratamiento jurídico de las parejas del mismo sexo, el gobierno sostiene que no hay una posición común sobre el asunto en Europa y que de hecho la mayoría de los Estados europeos no prevén una regulación especial en esta cuestión. Por otra parte, la existencia de diversas regulaciones sobre las uniones de facto en el derecho italiano son las mismas tanto para las parejas de distinto como del mismo sexo, por lo que no pueden ser consideradas como discriminatorias.

### 3. *Los argumentos de los terceros intervinientes*

En el proceso tomaron también parte terceros intervinientes con una representación legal unificada. Las organizaciones no gubernamentales que tomaron parte en este proceso fueron: FIDH (*Fédération Internationale des ligues de Droit de l'Homme*), AIRE Centre (*Advice on Individual Rights in Europe*), ILGA-Europe (*European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association*), ECSOL (*European Commission on Sexual Orientation Law*), UFTDU (*Unione forense per la tutela dei diritti umani*) and LIDU (*Lega Italiana dei Diritti dell'Uomo*).

Los intervinientes sostuvieron que existía un consenso emergente, tanto en Europa como en otras democracias, de que el gobierno no puede limitar un determinado derecho, beneficio u obligación de las parejas casadas, con exclusión de las parejas del mismo sexo que se ven privadas legalmente de casarse. Reseñaron que hacia marzo de 2014 el 44,7% de los Estados del Consejo de Europa regularon lo atinente a la unión de las parejas del mismo sexo y que fuera de Europa otros Estados, como Argentina, Australia, Canadá, México, Nueva Zelandia, Sudáfrica y Uruguay lo habían hecho, al igual que 21 de los 50 Estados (42%) de los Estados Unidos. Los intervinientes rechazaron la solución jurisprudencial de otorgar una regulación especial a las parejas del mismo sexo ante la imposibilidad del matrimonio legal, argumentando que esa imposibilidad ya constituía una discriminación indirecta en razón de orientación sexual. En apoyo de esto, los intervinientes, citaron jurisprudencia de los EE.UU., Sudáfrica, Brasil, México y, en Europa, de Portugal, Eslovenia, Alemania y Austria. Es de notar empero que en no toda la jurisprudencia citada por los intervinientes se observa la exigencia de parte de los tribunales del reconocimiento de matrimonio de personas de igual sexo, sino que, como en el caso de Eslovenia, Alemania y Austria, se habla del reconocimiento de iguales derechos en este tipo de uniones con respecto a los matrimonios en sentido tradicional. Se citan también recomendaciones de la Asamblea Parlamentaria del Consejo de Europa, del Parlamento Europeo y del Consejo de la Unión Europea. Los intervinientes sostuvieron que existe una discriminación indirecta ya que no hay una necesidad para establecer una diferenciación que lleva a que una pareja de diferentes sexos pueda contraer matrimonio, mientras que una pareja del mismo sexo no.

## E. Análisis del tribunal

### 1. *Aplicación del artículo 8*

El Tribunal comenzó aclarando que el artículo 8, que tiene por objeto proteger ciertos derechos del individuo, impone al Estado obligaciones positivas para asegurar los derechos por él reconocidos. Estas obligaciones pueden incluir la toma de medidas para asegurar el respeto de la vida individual y familiar, como así también en la relación entre individuos. Los principios de evaluación tanto de las obligaciones positivas como de las negativas a cargo del Estado son los mismos. Aquí se debe encontrar un equilibrio entre los intereses que le competen al individuo y aquellos que le competen a la comunidad en su conjunto. Los objetivos establecidos en la segunda parte de este artículo son de relevancia en esta evaluación. El concepto de “respeto”, que debe tener el Estado hacia los derechos reconocidos en el Convenio, no tiene límites claros,

especialmente en lo que se refiere a las obligaciones positivas y teniendo en cuenta la diversidad de prácticas seguidas por los Estados Parte del Convenio, los requisitos de ese concepto pueden variar considerablemente de caso en caso. De relevancia en este caso es el impacto que la discrepancia entre la realidad social y la ley tiene sobre el demandante, como así también la coherencia de las prácticas administrativas y legales dentro del orden jurídico interno del Estado. Otro elemento a tener en cuenta es si la obligación está definida de forma precisa y clara o de forma amplia e indeterminada. En la implementación de ciertas obligaciones positivas del artículo 8 el Estado tiene un amplio margen de apreciación. El Tribunal sostiene que en el contexto “vida privada”, que atañe a un aspecto importante de la existencia e identidad del individuo, el margen de aplicación del Estado es restringido. Sin embargo, no hay consenso entre los Estados del Consejo de Europa tanto en la importancia de los intereses en juego como en la mejor manera de protegerlos. Sobre todo, si se plantean cuestiones morales o de ética, el margen de apreciación del Estado deberá ser más amplio. También habrá un amplio margen en donde el Estado deberá conseguir un equilibrio entre los intereses privados, los intereses públicos y los restantes derechos de la Convención.

*a. Reciente jurisprudencia y la finalidad del caso presente*

Bajo este título el Tribunal recuerda que en *Schalk and Kopf*, en el momento que debió tomar una decisión, los demandantes ya habían recibido la posibilidad de registrar su unión, por lo que el Tribunal debía decidir si el Estado había provisto con anterioridad a esa fecha (1 de enero de 2010) de un medio alternativo de reconocimiento legal de esa unión. El margen de apreciación que tenía el Estado en ese momento, teniendo en cuenta la evolución del derecho comparado europeo también en ese momento, era mayor por lo que el Tribunal concluyó que no podía culparse al legislador austríaco de no haber introducido un registro legal de parejas del mismo sexo con anterioridad al año 2010. En este caso, recuerda el Tribunal, él decidió que el artículo 14 en concordancia con el artículo 8 no establecen una obligación para los Estados Parte del Convenio, de garantizar a las parejas del mismo sexo un acceso al matrimonio. En cambio, en el presente caso, los demandantes aún en oportunidad del pronunciamiento (año 2015) no tienen en Italia oportunidad de celebrar una unión civil o unión registrada, a falta de matrimonio. Por lo tanto, en este caso el Tribunal debía decidir si Italia había incumplido con su obligación positiva de garantizar el respeto de la vida privada y familiar de los demandantes, proveyendo en su fuero interno un marco legal que le permitiera tener una relación reconocida y protegida por el derecho nacional.

*b. Aplicación de los principios generales en el caso*

El Tribunal recuerda que en jurisprudencia anterior ya ha reconocido la necesidad que tienen las parejas del mismo sexo de reconocimiento y protección legal de su relación. Remarcó que, en el caso, los demandantes, imposibilitados de contraer matrimonio, también están imposibilitados de acceder a un marco legal que les permita proteger su relación. El Tribunal expresó su conocimiento de la situación dentro del derecho italiano sobre el tema. En ese sentido sostuvo que la posibilidad de inscribirse en los registros locales de uniones civiles, posibilidad existente sólo en el 2% de los municipios italianos, tenía sólo un carácter simbólico y fines estadísticos: este acto no le provee a



los demandantes un estado civil y no le confiere ningún derecho a las parejas del mismo sexo, no teniendo ni siquiera valor probatorio de una convivencia estable ante los tribunales nacionales. El estado civil de los demandantes de frente al derecho italiano en la actualidad puede ser sólo calificado como una unión *de facto* la cual puede ser regulada por ciertos acuerdos contractuales privados de alcance limitado. El Tribunal sostuvo que esos acuerdos privados no eran suficientes para regular las necesidades básicas de una vida de pareja estable como, por ejemplo, los derechos y obligaciones recíprocos que le corresponden a los integrantes de la pareja, incluido el apoyo moral y material, las obligaciones de mantenimiento y los derechos de herencia. Esto es así, remarcó el Tribunal, desde que estos acuerdos son previstos para todo tipo de cohabitación, no sólo para una cohabitación en una relación de pareja. Por otra parte, estos acuerdos requieren una cohabitación siendo que, recordó el Tribunal, una relación estable puede darse sin existir cohabitación. Por todo ello el Tribunal concluyó que esos acuerdos de cohabitación no daban a las parejas del mismo sexo ni reconocimiento legal, ni protección de su unión. El Tribunal remarcó lo decidido por diversos tribunales internos que solicitaban una regulación sobre el tema. Esa jurisprudencia mostraba que, si bien algunos derechos eran reconocidos, otros permanecían dudosos y que el mismo gobierno alegó que algunos aspectos de las uniones de personas del mismo sexo recibían más aceptación que otros. Por todo ello, el Tribunal afirmó que las protecciones actuales de las relaciones estables del mismo sexo no eran suficientes en cuanto a contenido ya que no cubrían todas las necesidades de dichas relaciones y eran inestables, porque dependía del pronunciamiento de los tribunales en un país en donde la jurisprudencia no tiene carácter de precedente como en el *common law*. En ese sentido el Tribunal recordó que la coherencia de la práctica administrativa y judicial en el sistema legal interno es un factor de importancia en la evaluación contenida en el artículo 8 del Convenio. En esta parte de la decisión se hace referencia a uno de los principios enunciados por el Tribunal en el párrafo 161, esto es, que se debe tener en cuenta el impacto que tiene sobre los intereses del demandante la discrepancia que pudiera existir entre la realidad social y la ley. En ese sentido el Tribunal sostuvo que existe una discrepancia entre la realidad social de los demandantes, quienes pueden vivir su relación de forma abierta en Italia, y la falta de reconocimiento legal de esa relación. En consideración de todo esto, el Tribunal expresó que, a falta de matrimonio, las parejas del mismo sexo tienen un interés particular en tener una opción de ingresar en alguna forma de unión civil o de pareja registrada, ya que esta sería la forma más adecuada en la que ellos podrían tener reconocida legalmente su relación y que les garantizaría la protección de los aspectos más relevantes de la misma. Por otro lado, ese reconocimiento legal tiene un importante valor intrínseco para los individuos de esa relación y que a la vez legitimaría esa unión. En este punto del razonamiento, el Tribunal recuerda que, en la evaluación de la obligación positiva a cargo del Estado, se deben sopesar los intereses de los individuos y los de la comunidad en su conjunto. Por lo que a continuación de la valoración de los intereses individuales que vino realizando, debe pasar a evaluar los intereses de la comunidad. En este tema, el Tribunal sostuvo que el gobierno de Italia no pudo poner de manifiesto de forma clara los intereses de la comunidad que eran afectados. El gobierno -recordó el Tribunal- había sostenido que se necesitaba aún tiempo para que esa nueva forma de familia sea aceptada por la sociedad, que hacía referencia a las diferentes sensibilidades sociales y que se debía aún buscar un consenso entre las diferentes



corrientes de pensamiento y sentimientos, algunos de inspiración religiosa, presentes en la sociedad italiana. Por otro lado, el gobierno había negado que la falta de regulación de las parejas del mismo sexo tuviera como finalidad la protección de la familia en su sentido tradicional o de la moral social. En lugar de todo eso, remarcó el Tribunal, el gobierno hizo hincapié en el margen de apreciación que poseía para determinar el momento y los medios del reconocimiento legal de las uniones de parejas del mismo sexo, como así también que él era el mejor capacitado para conocer el sentimiento de su comunidad. En cuanto a la extensión del margen de apreciación que le compete a un Estado en la regulación de esta cuestión, el Tribunal expresó que depende de varios factores. Por un lado, comprende que los temas de las uniones de parejas del mismo sexo pueden afectar sensibilidades morales o éticas, lo que favorece el reconocimiento de un mayor margen de apreciación a favor del Estado cuando no se observa un consenso dentro de la sociedad sobre el tema planteado. Por otro lado, en el caso, se cuestionan los derechos básicos de la unión de personas del mismo sexo y no otros asuntos que pueden o no surgir de ese tipo de uniones (aquí el Tribunal hace referencia, sin mencionarlo expresamente, a cuestiones como la adopción de niños, etc.). El Tribunal recordó que ya en *Schalk and Kopf v. Austria* sostuvo que los Estados tienen un cierto margen de apreciación en relación con el estatus exacto conferido en los medios alternativos de reconocimiento y los derechos y obligaciones otorgados a dicho tipo de uniones. El Tribunal sostuvo también que no puede pasarle totalmente desapercibida la tendencia que llevó a la mayoría de los Estados Parte del Consejo de Europa a legislar a favor del reconocimiento de las uniones de personas del mismo sexo. A la par de ello afirmó que si bien, según su opinión, el gobierno es el que está en mejores condiciones de conocer los intereses de la comunidad nacional, en el presente caso la legislatura italiana parece no haberle dado mayor importancia a los requerimientos que provenían de la comunidad e incluso del máximo tribunal interno, esto es, la Corte Constitucional. Todo esto sería, según el Tribunal, una muestra de la aceptación de que las uniones de personas del mismo sexo tendrían aceptación por parte de una mayoría dentro de la sociedad italiana, tal como lo demostrarían estadísticas oficiales introducidas al proceso (para. 144). El Tribunal recordó que el mismo gobierno italiano admitió esta tendencia y la necesidad de la protección a este tipo de uniones. Sin embargo, la legislatura italiana no fue capaz de proveer esa regulación, a pesar de los insistentes requerimientos realizados en diversos fallos por la Corte Constitucional. El Tribunal concluyó que, a falta de demostrar por parte del gobierno italiano de un interés superior de la comunidad en su conjunto frente al interés particular de los demandantes y a la luz de los reclamos del máximo tribunal interno italiano, que fueron desoídos, el gobierno italiano había traspasado los límites del margen de apreciación que le corresponde y falló en cumplir con su obligación positiva de asegurar que los demandantes tengan a disposición un marco legal que le otorguen reconocimiento y protección a su unión. En consecuencia, el Tribunal sostiene que ha habido una violación del artículo 8 del Convenio.

## ***2. Aplicación del artículo 14 en relación con el artículo 8***

En razón de la violación constatada del artículo 8, el Tribunal consideró que no había necesidad de analizar una posible violación del artículo 14 en relación con el artículo 8 del Convenio.

### 3. *Violación alegada del artículo 12 y del artículo 14 en relación con el artículo 12 del Convenio*

En esta parte del fallo, el Tribunal comienza resumiendo los argumentos sostenidos por los demandantes con respecto al artículo 12 tomado aisladamente y al artículo 14 en relación con el artículo 12 del Convenio, esto es, el reclamo de los demandantes de la obligación que tendría el Estado de reconocer el matrimonio de personas del mismo sexo en su ordenamiento interno. Así se remarca que los demandantes de la demanda 18766/11 (*Oliari y A.*) habían invocado el artículo 12 del Convenio recordando que desde el fallo *Schalk and Kopf* muchos Estados del Consejo de Europa habían legislado a favor del matrimonio entre personas del mismo sexo, y que el Convenio era un instrumento con vida propia, el Tribunal debía redeterminar la cuestión a la luz del estado actual de la misma. El Tribunal notó también que todos los demandantes sostuvieron que sufrieron discriminación a causa de la prohibición de casarse aplicable a ellos. No obstante que los demandantes conocían el hecho de que en *Schalk and Kopf* el Tribunal declaró que el artículo 12 del Convenio no establece ninguna obligación para el Estado de reconocer en su derecho interno el matrimonio de personas del mismo sexo, ellos habían solicitado que el Tribunal examinara si esta posición era justificable a la luz de todas las circunstancias relevantes actuales. Los demandantes habían argumentado que, en el presente caso, no existía para ellos otra opción distinta al matrimonio para el reconocimiento de su unión y que esa exclusión no estaría más legitimada teniendo en cuenta la realidad social de Italia (según un estudio de Eurípses del año 2010, mencionado en esta parte del fallo, 61,4 % de la población estaría a favor del reconocimiento de uniones de personas del mismo sexo y un 20,4 % estaría a favor del reconocimiento del matrimonio para este tipo de uniones). Al persistir en el no reconocimiento legal de las uniones de personas del mismo sexo, se estaría discriminando y estigmatizando un grupo minoritario en favor de una mayoría munida de tendencias discriminatorias. Incluso asumiendo que esta situación era legítima, no era proporcional en vistas al estrecho margen de apreciación que le corresponde al Estado cuando establece tratamientos diferenciados basados en la orientación sexual de las personas. Ese margen de apreciación debía ser considerado estrecho, según los demandantes, debido al gran número de Estados que habían regulado ese tipo de uniones civiles.

Frente a estos argumentos, el Tribunal sostuvo que en *Schalk and Kopf* reconoció que de acuerdo al artículo 12 la posibilidad del matrimonio no debía ser limitada en todos los casos a la unión de personas de sexo opuesto. Sin embargo, de acuerdo a cómo estaba la situación de las cosas (en ese momento sólo 6 de los 47 Estados miembros del Consejo de Europa habían reconocido la posibilidad del matrimonio de personas del mismo sexo), el Tribunal sostuvo que la cuestión de si se reconocía o no el matrimonio de personas del mismo sexo fue dejado libre a la legislación interna de los Estados Parte del Convenio. El Tribunal recordó que él mismo sostuvo allí que no debía imponer su propio juicio reemplazando el juicio de las autoridades nacionales, quienes eran las que estaban en mejores condiciones de conocer y cubrir las necesidades de sus sociedades. De allí se sigue que el artículo 12 del Convenio no impone a los Estados Parte una obligación de reconocer en sus ordenamientos internos el matrimonio de personas del mismo sexo. También recordó el Tribunal que a la misma conclusión

llegó en un caso más reciente, *Hämäläinen*, en donde él constató que algunos Estados Parte habían reconocido el matrimonio para personas del mismo sexo pero que el artículo 12 no podía ser utilizado para construir una obligación a cargo de los Estados miembros de garantizar en sus derechos internos el acceso al instituto jurídico del matrimonio a parejas del mismo sexo. El Tribunal también sostuvo que más allá de la continuación de esa evolución (a la fecha del fallo, año 2015, 11 Estados del Consejo de Europa habían reconocido el instituto del matrimonio para personas del mismo sexo). La postura establecida en los fallos anteriores continuaba siendo pertinente, por lo que el Tribunal reafirmaba que el artículo 12 no establece ninguna obligación a los gobiernos de conceder la figura del matrimonio para personas del mismo sexo. A la par de ello, el Tribunal sostuvo, recordando lo decidido por él en *Schalk and Kopf*, que de la relación del artículo 14 con el artículo 8, siendo esta una norma más general en propósito y alcance, no se puede inferir ninguna obligación semejante para el Estado Parte, lo mismo se puede afirmar de la relación entre el artículo 14 y el 12 del Convenio. De lo cual se desprende que tanto la demanda fundada en el artículo 12 tomado individualmente, como aquella fundada en el artículo 14 en relación con el artículo 12, son manifiestamente infundadas y deben ser rechazadas de acuerdo al artículo 35 paras. 3 y 4 del Convenio.

## F. Decisión

En razón de todo lo expuesto el Tribunal Europeo de Derechos Humanos resolvió declarar las quejas de conformidad con el artículo 8 tomado individualmente y el artículo 14 en relación con el artículo 8 admisibles; consideró el resto de las pretensiones presentadas inadmisibles; afirmó que se había producido una violación del artículo 8 del Convenio; afirmó que no había necesidad de examinar la reclamación fundada en el artículo 14 en relación con el artículo 8 del Convenio; condenó al Estado al pago de las sumas explicitadas más arriba, desestimando las restantes reclamaciones pecuniarias.

## G. Votos disidentes

Tres de los siete jueces que formaron la Sala (9) (Cuarta Sección) del Tribunal Europeo de Derechos Humanos, los jueces Mahoney, Tsotsoria y Vehabovic, pronunciaron un voto en disidencia. Estos Jueces remarcan que votaron con la mayoría a favor de la existencia de una violación del artículo 8 del Convenio, pero en razón de un fundamento diferente. En la opinión de ellos no es necesario afirmar que dicho artículo le impone a Italia una obligación positiva de legislar sobre las uniones de personas del mismo sexo, sino que en sus opiniones lo más importante es que el Estado Italiano a través de su más alto tribunal, la Corte Constitucional, ha afirmado que la Constitución Italiana reviste a dos personas del mismo sexo que viven en una cohabitación estable del derecho fundamental a que esa relación sea reconocida jurídicamente, como así también sus derechos y obligaciones básicos. Es esta intervención voluntaria y activa por parte del Estado Italiano, a través de su Corte Constitucional, la que provoca la

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(9) Los Jueces fueron el Juez Päivi Hirvelä como Presidente de la Sala y los jueces Guido Raimondi, Ledi Bianku, Nona Tsotsoria, Paul Mahoney, Faris Vehabović y Yonko Grozev.

aplicación del artículo 8 en lo que al respecto de la vida privada y de familia se refiere, sin que preexista una obligación positiva contenida en el Convenio. En virtud de esto, la violación del artículo 8 del Convenio se produjo por el no seguimiento por parte del orden legal italiano de las exigencias de su Corte Constitucional de establecer un reconocimiento legal de tales uniones. En efecto, la Corte Constitucional italiana en su fallo nr. 138 del 15 de abril de 2010 causado por el recurso de inconstitucionalidad interpuesto por los Srs. Oliero y A., a la par que rechazó los argumentos de los recurrentes en base al artículo 29 de la Constitución, derecho a contraer matrimonio, afirmó que en base al artículo 2 de la Constitución dos personas del mismo sexo en una relación estable de cohabitación tienen un derecho fundamental a expresar libremente su personalidad como pareja, obteniendo, en el tiempo y por los medios y los límites que se establecen por la ley, el reconocimiento jurídico de los derechos y los deberes pertinentes. Con ellos, sostuvieron los tres Jueces en este voto en disidencia, la obligación del Estado italiano de regular viene dada por el artículo 2 de su propia Constitución y no se trata de una obligación positiva impuesta a éste por el Convenio Europeo de Derechos Humanos. Si bien la Corte Constitucional italiana tiene el poder de dictar la inconstitucionalidad del ordenamiento legal vigente, no tiene el poder de cubrir esa laguna del derecho, sino que es competencia del parlamento. Esta laguna no fue cubierta por el parlamento italiano denegando así el derecho fundamental de protección de su vida privada y familiar que poseen las personas del mismo sexo en una relación, de acuerdo al artículo 2 de la Constitución Italiana. Allí los jueces adujeron que si un Estado elige regular el ejercicio de una actividad que recae en la finalidad de algún derecho contenido en el Convenio, está obligado a hacerlo cumpliendo con los requisitos del artículo correspondiente del Convenio, En ese caso, sostuvieron los tres jueces, estamos frente a una cuestión de una correcta regulación y no frente a una obligación positiva a cargo del Estado. Es por ello que, de acuerdo a la opinión del voto en disidencia, las reclamaciones de los demandantes deberían haber sido analizadas en términos de una intervención defectuosa por parte del Estado en el ámbito de la vida privada y familiar y no en el marco del cumplimiento o no de una obligación positiva contenida en la Convención.

### **III. El caso *Chapin et Champertier c. France***

En este fallo, dictado en 2016, el Tribunal ha tenido la oportunidad de repetir su jurisprudencia sobre el tema que estamos analizando, sobre todo el verdadero sentido y alcance del artículo 12 del Convenio Europeo de Derechos Humanos.

#### **A. Los hechos**

En mayo de 2004 los demandantes realizaron una solicitud para contraer matrimonio en el registro civil de Beglès (Gironde). El 25 de mayo de ese año el oficial del registro civil publica el bando de matrimonio. Por actos de agentes fiscales, el Procurador de la República ante el tribunal de primera instancia de Burdeos comunica al oficial del registro civil su oposición a ese acto. A pesar de esta oposición, el alcalde de Beglès, oficiando de oficial del registro civil, realiza la ceremonia de matrimonio ente los dos demandantes el 5 de junio y los inscribe en los registros correspondientes. A causa de esto, el 22 de junio de ese año el Procurador de la República solicitó

la anulación del matrimonio ante el Tribunal Superior de Burdeos. Por sentencia del 27 de julio de 2004 el Tribunal Superior dictaminó la nulidad del matrimonio. El tribunal consideró que la diferencia de sexos era un requisito esencial en la legislación francesa para contraer matrimonio y que esto no estaba en contradicción con los artículos 8, 12 y 14 del Convenio Europeo de Derechos Humanos. Sostuvo también que si hubiere una evolución que llevara a una redefinición del concepto de matrimonio, esto debía ser debatido y requería una intervención legislativa. La Corte de Apelaciones de Burdeos confirmó este fallo por sentencia del 19 de abril de 2005. Ella hizo referencia a que la legislación francesa daba acceso a la unión civil tanto a parejas de distintos sexos como a aquellas del mismo sexo y que les brindaba muchas posibilidades de la vida en pareja, con o sin hijos, y que incluso les permitía la adopción. La Corte remarcó también que la diferenciación en el acceso al matrimonio se debía en la potencialidad que poseen las parejas de sexos opuestos a concebir hijos, por lo cual la situación no era análoga, lo cual justificaba la diferente legislación. La regulación de la unión civil a la que también podían acceder las parejas del mismo sexo, constituía un reconocimiento de su unión en las mismas condiciones que las parejas de sexos opuestos que no desean unirse en matrimonio. En razón de ello sostuvo la Corte que la distinción que resulta de esta especificidad puede justificarse objetivamente a causa de una finalidad legítima y mantiene una relación razonable de proporcionalidad entre los medios empleados y el objetivo perseguido. Un cambio en este aspecto sólo podría ser el fruto de un debate político y requería de la acción parlamentaria, no siendo la Corte la instancia indicada. Los demandantes elevaron recurso de casación fundamentando sus reclamos en los artículos 8, 12 y 14 y en jurisprudencia pertinente de la Corte de Casación. En sentencia del 13 de marzo de 2007, la Corte de Casación desestimó el recurso, señalando que “en el derecho francés, el matrimonio es la unión de un hombre y una mujer”. También sostuvo que este principio no contradice ninguna de las disposiciones de la Convención Europea de Derechos Humanos ni de la Carta de los Derechos Fundamentales de la Unión Europea.

## **B. La ley y la jurisprudencia nacional e internacional**

Aquí el Tribunal realiza un repaso de la normativa pertinente, artículos 75 y 144 del Código Civil francés, como así también jurisprudencia nacional que afirmaba la constitucionalidad de esa normativa y que reafirmaba que la diferencia entre la situación de las parejas del mismo sexo y las parejas compuestas por un hombre y una mujer puede justificar una diferencia de trato realizada por las normas del derecho de familia. El Tribunal mencionó cómo cambió la situación legislativa tras la aprobación de la ley N° 2013-404 del 17 de mayo de 2013 que introduce una modificación al artículo 143 del Código Civil abriendo la posibilidad del matrimonio a parejas del mismo sexo. El Tribunal también mencionó el régimen del pacto civil de solidaridad, abierto tanto a personas de distintos como del mismo sexo, y de las posibilidades que ellos otorgan a la pareja y de sus limitaciones. Se mencionó también allí la regulación jurídica del concubinato que realiza el Código Civil francés. En cuanto a la exposición de los textos pertinentes tanto del Consejo de Europa como de la Unión Europea, el Tribunal se remitió a lo manifestado en *Oliari y otros*.



### C. La violación alegada del artículo 12 en relación con el artículo 14 del Convenio

Antes de pasar al fondo del asunto el Tribunal cita textualmente las normas alegadas por los demandantes, esto es, los artículos 12 y 14 del Convenio y trata brevemente la cuestión de la admisibilidad de la demanda. Luego pasa a analizar las posiciones de las partes.

#### 1. Los argumentos de los demandantes

Los demandantes argumentaron que la ley francesa cometía una discriminación basada en la orientación sexual de ellos al no permitirle contraer matrimonio, lo que estaba garantizado por el artículo 12 del Convenio. Manifestaron que el régimen del pacto civil de solidaridad proveía una protección jurídica menor que el del matrimonio. Consideraron asimismo que esa discriminación no tiene ningún propósito legítimo a la vez que no es proporcional.

#### 2. Los argumentos del gobierno

Apoyándose en *Schalk and Kopf*, en donde el Tribunal dictaminó que el artículo 12 del Convenio no impone ninguna obligación al Estado de abrir la posibilidad del matrimonio para parejas de personas del mismo sexo, el gobierno sostuvo que no constituía ninguna discriminación el hecho que la ley francesa reservara el matrimonio a las parejas constituidas por un hombre y una mujer. Finalmente, destacó que la ley del 17 de mayo de 2013 posibilita contraer matrimonio también a las parejas de personas del mismo sexo.

#### 3. La valoración del Tribunal

El Tribunal recordó que en oportunidad del pronunciamiento en *Schalk and Kopf* -si bien la institución del matrimonio había sido profundamente alterada por los cambios sociales- no había un consenso en Europa sobre el matrimonio de personas del mismo sexo. El Tribunal confirmó que el artículo 12 era aplicable a los reclamos de los demandantes, pero que la aceptación o no del matrimonio entre personas del mismo sexo continuaba siendo competencia de las legislaciones internas de los Estados Parte del Convenio. El matrimonio tenía connotaciones sociales y culturales profundamente enraizadas y susceptibles de diferir notablemente de una sociedad a otra, por lo que el Tribunal no debía sustituir la apreciación de las autoridades nacionales, quienes estaban en mejor situación para evaluar las necesidades de la sociedad y responder en consecuencia. En virtud de todo esto, concluyó que el artículo 12 no imponía obligación al gobierno demandado de abrir el matrimonio a las parejas de personas del mismo sexo, citando su propia jurisprudencia en *Gas et Dubois* (10). Remarcó que es la misma jurisprudencia sostenida en *Hämäläinen* y *Oliari* y otros. En especial, recordó lo que expresó ya en *Hämäläinen*: que “el artículo 12 consagra el concepto tradicional del matrimonio, como la unión de un hombre y una mujer y que si bien era de notar que en un cierto número de Estados miembros se había abierto el matrimonio a las parejas del mismo sexo, este artículo no podría interpretarse como imponiendo una

(10) TEDH, *Gas et Dubois c. France*, para. 66.

tal obligación a los Estados contratantes” (11). El Tribunal recordó que en *Oliari y otros* él sostuvo que este resultado continuaba siendo válido, a pesar de la evolución que se había observado en los Estados en esta materia. También recordó que en *Schalk and Kopf* dictaminó que ni el artículo 12 ni el artículo 14 en relación con el artículo 8, podían interpretarse como imponiendo a los Estados Parte del Convenio una obligación de abrir el matrimonio a las parejas de personas del mismo sexo. Se llegó a la conclusión de que el mismo resultado era válido para el artículo 12 en relación con el artículo 14. A continuación expresó el Tribunal que no veía ninguna razón para llegar a una conclusión diferente en el presente caso, dado el poco tiempo transcurrido desde que las sentencias dictadas en los casos *Hämäläinen y Oliari y otros*. Por último, observó que la ley francesa del 17 de mayo de 2013 había abierto el matrimonio a parejas de personas del mismo sexo, por lo que los demandantes ahora estaban posibilitados de contraer matrimonio.

#### **D. La violación alegada del artículo 8 en relación con el artículo 14 del Convenio**

También aquí el Tribunal Europeo de Derechos Humanos tuvo la posibilidad de pronunciarse sobre este tema.

##### **1. Los argumentos de los demandantes**

Los demandantes reclamaron haber sido víctimas en el ejercicio de su derecho al respeto de su vida privada y familiar, a causa de una discriminación basada en la orientación sexual, lo que violaba el artículo 8 en relación con el artículo 14. Esta discriminación se daba en el hecho de que la posibilidad de matrimonio no estaba abierta a ellos. Aquí repitieron lo sostenido arriba con respecto al régimen del pacto civil de solidaridad.

##### **2. Los argumentos del gobierno**

El gobierno recordó que el Tribunal ya se había expedido en *Schalk and Kopf* en el sentido de que el artículo 8 en relación con el artículo 14 no podía ser interpretado en el sentido de imponer una obligación a los Estados Parte de reconocer el matrimonio de personas del mismo sexo en su derecho interno. Recordó también las posibilidades legales que ese tipo de parejas tenían dentro del derecho francés. También aquí mencionó la ley del 17 de mayo de 2013 que permite celebrar matrimonio a personas del mismo sexo.

##### **3. La valoración del Tribunal**

El tribunal recordó que de la valoración del artículo 8 en relación con el artículo 14 los Estados conservan su libertad de no abrir la institución del matrimonio a las parejas del mismo sexo y que gozan de un margen de apreciación para decidir la naturaleza exacta y el estatus de otras formas de reconocimiento legal de esas uniones (aquí citó su jurisprudencia en *Schalk and Kopf*, para. 108 y en *Gas et Dubois*, para. 66). Afirmó también que, si al momento de la demanda el matrimonio no estaba abierto a los de-

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(11) TEDH, *Cahpin et Champertier c. France*, para. 37.

mandantes en el derecho francés, ellos podían recurrir a un pacto civil de solidaridad, que confiere a los integrantes de la pareja de derechos y obligaciones en materia fiscal, patrimonial y social. En esto el presente se diferenciaba de otros casos anteriores, como en *Vallianatos*, en donde el pacto de convivencia de la ley griega estaba sólo abierto a parejas de sexo opuesto, o como en *Oliari y otros* en donde el derecho italiano no proveía de ningún reconocimiento legal para las uniones de personas del mismo sexo. En cuanto a las diferencias entre el régimen jurídico del pacto civil de solidaridad y el de matrimonio esgrimido por los demandantes, el Tribunal sostuvo que no se pronunciaba sobre los detalles de esas diferencias y que esas diferencias no son una señal de que los Estados Parte hayan traspasado su margen de apreciación en la regulación de medios legales alternativos al matrimonio. Al igual que realizara en el análisis de las otras normas, también aquí remarcó que luego de la ley del 17 de mayo de 2013 los demandantes son libres de contraer matrimonio.

### E. Decisión

En virtud de todo lo expuesto el Tribunal sentenció, en unanimidad, que no hubo violación del artículo 12 en conexión con el artículo 14, ni del artículo 8 en conexión con el artículo 14 del Convenio.

## IV. Conclusiones

Los dos fallos del Tribunal Europeo de Derechos Humanos muestran de forma clara la situación del tema de las uniones de personas del mismo sexo en el contexto de los derechos humanos en el viejo continente.

Por un lado, el Tribunal afirmó (con tres votos en disidencia en el caso *Oliari y otros*) que el artículo 8 del Convenio contiene una obligación positiva para el Estado parte de establecer algún tipo de regulación legal de las uniones de personas del mismo sexo. Esa regulación debe definir el estatus y los derechos y obligaciones de los individuos dentro de esa unión.

En cuanto al matrimonio, tema que acapara un mayor número de discusiones en los diversos Estados, el Tribunal fue claro en sostener, por unanimidad en los dos fallos aquí traídos, que el artículo 12 del Convenio no establece ninguna obligación para los Estados Parte de reconocer en sus derechos internos la figura del matrimonio para personas del mismo sexo. En los hechos, al momento del fallo *Chapin et Charpentier* (9 de junio de 2016) sólo 11 de los 47 Estados miembros del Consejo de Europa preveían el matrimonio para parejas del mismo sexo.

También con respecto al matrimonio como derecho fundamental reconocido en el Convenio, el Tribunal fue claro en *Chapin et Charpentier* en que el artículo 12 del Convenio consagra el concepto tradicional del matrimonio como la unión de un hombre y una mujer, tal como ya lo había afirmado en *Hämäläinen*.

Con ello, estos dos fallos de reciente data vienen a confirmar la jurisprudencia constante del Tribunal Europeo de Derechos Humanos sobre las obligaciones de los Estados con respecto a la regulación legal de las uniones de personas del mismo sexo.

**SENTENCIA:** ECHR *Applications nos. 18766/11 and 36030/11.*

**Tribunal:** Tribunal Europeo de Derechos Humanos Cuarta Sección (European Court of Human Rights (Fourth Section)).

**Fecha:** 21/07/2015 (Final 21/10/2015).

**Asunto:** OLIARI AND OTHERS v. ITALY (*Applications nos. 18766/11 and 36030/11*)

**Magistrados:** Päivi Hirvelä, *Presidente*, Guido Raimondi, Ledi Bianku, Nona Tsotsoria, Paul Mahoney, Faris Vehabović, Yonko Grozev, *jueces*.

*In the case of Oliari and Others v. Italy, the European Court of Human Rights (Fourth Section), sitting as a Chamber (...) having deliberated in private on 30 June 2015,*

*Delivers the following judgment, which was adopted on that date:*

## PROCEDURE

1. The case originated in two applications (nos. 18766/11 and 36030/11) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by six Italian nationals, Mr Enrico Oliari, Mr A., Mr Gian Mario Felicetti, Mr Riccardo Perelli Cippo, Mr Roberto Zaccheo and Mr Riccardo Zappa (“the applicants”), on 21 March and 10 June 2011 respectively.
2. The first two applicants were represented by Mr A. Schuster, a lawyer practising in Trent. The remaining applicants were represented by Ms M. D’Amico, Mr M. Clara and Mr C. Pitea, lawyers practising in Milan. The Italian Government (“the Government”) were represented by their Agent, Ms Ersiliagrazia Spatafora.
3. The applicants complained that the Italian legislation did not allow them to get married or enter into any other type of civil union and thus they were being discriminated against as a result of their sexual orientation. They cited Articles 8, 12 and 14 of the Convention.
4. On 3 December 2013 the Chamber to which the case was allocated decided that the complaints concerning Article 8 alone and in conjunction with Article 14 were to be communicated to the Government. It further decided that the applications should be joined.
5. On 7 January 2013 the Vice-President of the Section to which the case had been allocated decided to grant anonymity to one of the applicants under Rule 47 § 3 of the Rules of Court.
6. Written observations were also received from FIDH, AIRE Centre, ILGA-Europe, ECSOL, UFTDU and UDU jointly, Associazione Radicale Certi Diritti, and ECLJ (European Centre for Law and Justice), which had been given leave to intervene by the Vice-President of the Chamber (Article 36 § 2 of the Convention). Mr Pavel Parfentev on behalf of seven Russian NGOS (Family and Demography Foundation, For Family Rights, Moscow City Parents Committee, Saint-Petersburg City Parents Committee, Parents Committee of Volgograd City, the regional charity “Svetlitsa” Parents’ Culture Centre, and the “Peterburgskie mnogodetki” social organisation), and three Ukrainian NGOS (the Parental Committee of Ukraine, the Orthodox Parental Committee, and the Health Nation social organisation), had also been given leave to intervene by the Vice-President of the Chamber. However, no submissions have been received by the Court.
7. The Government objected to the observations submitted by FIDH, AIRE Centre, ILGA-Europe, ECSOL, UFTDU and UDU jointly, as they had reached the Court after the set

deadline, namely on 27 March 2014 instead of 26 March 2014. The Court notes that at the relevant time the Vice-President of the Chamber did not take a decision to reject the submissions presented, which were in fact sent to the parties for comment. The Court, having considered that the observations were anticipated by e-mail and received by the Court at 2.00 a.m. on 27 March 2014, and that the hard copy received by fax later that day contained an apology as well as an explanation for the delay, rejects the Government's objection.

8. The applicants in application no. 18766/11 requested that an oral hearing be held in the case. On 30 June 2015 the Court considered this request. It decided that having regard to the materials before it an oral hearing was not necessary.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

9. The details concerning the applicants may be found in the Annex.

#### *The background to the case*

##### *1. Mr. Oliari and Mr. A.*

10. In July 2008, these two applicants, who were in a committed stable relationship with each other, declared their intention to marry, and requested the Civil Status Office of the Trent Commune to issue the relevant marriage banns.

11. On 25 July 2008, their request was rejected.

12. The two applicants challenged the decision before the Trent Tribunal (in accordance with Article 98 of the Civil Code). They argued that Italian law did not explicitly prohibit marriage between persons of the same sex, and that, even if that were the case, such a position would be unconstitutional.

13. By a decision of 24 February 2009, the Trent Tribunal rejected their claim. It noted that the Constitution did not establish the requirements to contract marriage, but the Civil Code did and it precisely provided that one such requirement was that spouses be of the opposite sex. Thus, a marriage between persons of the same sex lacked one of the most essential requirements to render it a valid legal act, namely a difference in sex between the parties. In any event, there was no fundamental right to marry, neither could the limited law provisions constitute discrimination, since the limitations suffered by the applicants were the same as those applied to everyone. Furthermore, it noted that European Union ("EU") law left such rights to be regulated within the national order.

14. The applicants appealed to the Trent Court of Appeal. While the court reiterated the unanimous interpretation given to Italian law in the field, namely to the effect that ordinary law, particularly the Civil Code, did not allow marriage between people of the same sex, it considered it relevant to make a referral to the Constitutional Court in connection with the claims of unconstitutionality of the law in force.

15. The Italian Constitutional Court in judgment no. 138 of 15 April 2010 declared inadmissible the applicants' constitutional challenge to Articles 93, 96, 98, 107, 108, 143, 143 *bis* and 231 of the Italian Civil Code, as it was directed to the obtainment of additional norms not provided for by the Constitution (*diretta ad ottenere una pronunzia additiva non costituzionalmente obbligatoria*).



16. The Constitutional Court considered Article 2 of the Italian Constitution, which provided that the Republic recognises and guarantees the inviolable rights of the person, as an individual and in social groups where personality is expressed, as well as the duties of political, economic and social solidarity against which there was no derogation. It noted that by social group one had to understand any form of community, simple or complex, intended to enable and encourage the free development of any individual by means of relationships. Such a notion included homosexual unions, understood as a stable cohabitation of two people of the same sex, who have a fundamental right to freely express their personality in a couple, obtaining –in time and by the means and limits to be set by law– juridical recognition of the relevant rights and duties. However, this recognition, which necessarily requires general legal regulation aimed at setting out the rights and duties of the partners in a couple, could be achieved in other ways apart from the institution of marriage between homosexuals. As shown by the different systems in Europe, the question of the type of recognition was left to regulation by Parliament, in the exercise of its full discretion. Nevertheless, the Constitutional Court clarified that without prejudice to Parliament’s discretion, it could however intervene according to the principle of equality in specific situations related to a homosexual couple’s fundamental rights, where the same treatment of married couples and homosexual couples was called for. The court would in such cases assess the reasonableness of the measures.

17. It went on to consider that it was true that the concepts of family and marriage could not be considered “crystallised” in reference to the moment when the Constitution came into effect, given that constitutional principles must be interpreted bearing in mind changes in the legal order and the evolution of society and its customs. Nevertheless, such an interpretation could not be extended to the point where it affected the very essence of legal norms, modifying them in such a way as to include phenomena and problems which had not been considered in any way when it was enacted. In fact it appeared from the preparatory work to the Constitution that the question of homosexual unions had not been debated by the assembly, despite the fact that homosexuality was not unknown. In drafting Article 29 of the Constitution, the assembly had discussed an institution with a precise form and an articulate discipline provided for by the Civil Code. Thus, in the absence of any such reference, it was inevitable to conclude that what had been considered was the notion of marriage as defined in the Civil Code, which came into effect in 1942 and which at the time, and still today, established that spouses had to be of the opposite sex. Therefore, the meaning of this constitutional precept could not be altered by a creative interpretation. In consequence, the constitutional norm did not extend to homosexual unions, and was intended to refer to marriage in its traditional sense.

18. Lastly, the court considered that, in respect of Article 3 of the Constitution regarding the principle of equality, the relevant legislation did not create unreasonable discrimination, given that homosexual unions could not be considered equivalent to marriage. Even Article 12 of the European Convention on Human Rights and Article 9 of the Charter of Fundamental Rights did not require full equality between homosexual unions and marriages between a man and a woman, as this was a matter of Parliamentary discretion to be regulated by national law, as evidenced by the different approaches existing in Europe.

19. In consequence of the above judgment, by a decision (*ordinanza*) lodged in the relevant registry on 21 September 2010 the Court of Appeal rejected the applicants’ claims in full.

## 2. *Mr. Felicetti and Mr. Zappa*

20. In 2003 these two applicants met and entered into a relationship with each other. In 2004 Mr Felicetti decided to undertake further studies (and thus, stopped earning any income), a possibility open to him thanks to the financial support of Mr. Zappa.

21. On 1 July 2005 the couple moved in together. In 2005 and 2007 the applicants wrote to the President of the Republic highlighting difficulties encountered by same-sex couples and soliciting the enactment of legislation in favour of civil unions.

22. In 2008 the applicants' physical cohabitation was registered in the authorities' records. In 2009 they designated each other as guardians in the event of incapacitation (*amministratori di sostegno*).

23. On 19 February 2011 they requested their marriage banns to be issued. On 9 April 2011 their request was rejected on the basis of the law and jurisprudence pertaining to the subject matter (see Relevant domestic law below).

24. The two applicants did not pursue the remedy provided for under Article 98 of the Civil Code, in so far as it could not be considered effective following the Constitutional Court pronouncement mentioned above.

### 3. *Mr. Perelli Cippo and Mr. Zacheo*

25. In 2002, these two applicants met and entered into a relationship with each other. In the same year, they started cohabiting and since then they have been in a committed relationship.

26. In 2006 they opened a joint bank account.

27. In 2007, the applicants' physical cohabitation was registered in the authorities' records.

28. On 3 November 2009 they requested that their marriage banns be issued. The person in charge at the office did not request them to fill in the relevant application, simply attaching their request to a number of analogous requests made by other couples.

29. On 5 November 2009 their request was rejected on the basis of the law and jurisprudence pertaining to the subject matter (see Relevant domestic law below).

30. Mr. Perelli Cippo and Mr. Zacheo challenged the decision before the Milan Tribunal.

31. By a decision (*decreto*) of 9 June 2010 lodged in the relevant registry on 1 July 2010 the Milan Tribunal rejected their claim, considering that it was legitimate for the Civil Status Office to refuse a request to have marriage banns issued for the purposes of a marriage between persons of the same sex, in line with the finding of the Constitutional Court judgment no. 138 of 15 April 2010.

32. The applicants did not lodge a further challenge (*reclamo*) under Article 739 of the Code of Civil Procedure, in so far as it could not be considered effective following the Constitutional Court pronouncement.

## II. RELEVANT DOMESTIC LAW AND INTERNATIONAL LAW AND PRACTICE

### A. *Relevant domestic law and practice*

#### 1. *The Italian Constitution*

33. Articles 2, 3 and 29 of the Italian Constitution read as follows:

#### **Article 2**

“The Republic recognises and guarantees inviolable human rights, both as an individual and in social groups where personality is developed, and requires the fulfilment of obligations of political, economic, social solidarity, against which there is no derogation”.

### Article 3

“All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country.”

### Article 29

“The Republic recognises the rights of the family as a natural society founded on marriage. Marriage is based on the moral and legal equality of the spouses within the limits laid down by law to guarantee the unity of the family.”

## 2. Marriage

34. Under Italian domestic law, same-sex couples are not allowed to contract marriage, as affirmed in the Constitutional Court judgment no. 138 (mentioned above).

35. The same has been affirmed by the Italian Court of Cassation in its judgment no. 4184 of 15 March 2012 concerning two Italian citizens of the same sex who got married in the Netherlands and who had challenged the refusal of Italian authorities to register their marriage in the civil status record on the ground of the “*non-configurability as a marriage*”. The Court of Cassation concluded that the claimants had no right to register their marriage, not because it did not exist or was invalid, but because of its inability to produce any legal effect in the Italian order. It further held that persons of the same sex living together in a stable relationship had the right to respect for their private and family life under Article 8 of the European Convention; therefore, in the exercise of the right to freely live their inviolable status as a couple they may bring an action before a court to claim, in specific situations related to their fundamental rights, the same treatment as that afforded by law to married couples.

36. Furthermore, the Constitutional Court in its judgment no. 170/2014 concerning “forced divorce” following gender reassignment of one of the spouses, found that it was for the legislator to ensure that an alternative to marriage was provided, allowing such a couple to avoid the transformation in their situation, from one of maximum legal protection to an absolutely uncertain one. The Constitutional Court went on to state that the legislator had to act promptly to resolve the legal vacuum causing a lack of protection for the couple.

## 3. Other relevant case-law in the context of same-sex couples

37. In a case before the Tribunal of Reggio Emilia, the claimants (a same-sex couple) had not requested the tribunal to recognise their marriage entered into in Spain, but to recognise their right to family life in Italy, on the basis that they were related. The Tribunal of Reggio Emilia, by means of an ordinance of 13 February 2012, in the light of the EU directives and their transposition into Italian law, as well as the EU Charter of Fundamental Rights, considered that such a marriage was valid for the purposes of obtaining a residence permit in Italy.

38. In the judgment of the Tribunal of Grosseto of 3 April 2014, delivered by a court of first instance, it was held that the refusal to register a foreign marriage was unlawful. The court thus ordered the competent public authority to proceed with registration of the marriage. While the order was being executed, the case was appealed against by the State. By a judgment of 19 September 2014 the Court of Appeal of Florence, having detected a procedural error, quashed the first-instance decision and remitted the case to the tribunal of Grosseto.

#### 4. *Cohabitation agreements*

39. Cohabitation agreements are not specifically provided for in Italian law.

40. Protection of cohabiting couples *more uxorio* has always been derived from Article 2 of the Italian Constitution, as interpreted in various court judgments over the years (post 1988). In more recent years (2012 onwards) domestic judgments have also considered cohabiting same-sex couples as deserving such protection.

41. In order to fill the lacuna in the written law, with effect from 2 December 2013 it has been possible to enter into “cohabitation agreements,” namely a private deed, which does not have a specified form provided by law, and which may be entered into by cohabiting persons, be they in a parental relationship, partners, friends, simple flatmates or carers, but not by married couples. Such contracts mainly regulate the financial aspects of living together, cessation of the cohabitation, and assistance in the event of illness or incapacity.

#### 5. *Civil unions*

42. Italian domestic law does not provide for any alternative union to marriage, either for homosexual couples or for heterosexual ones. The former have thus no means of recognition.

43. In a report of 2013 prepared by Professor E. Gallo (then President of the Constitutional Court) addressed to the highest Italian constitutional authorities, the latter stated:

“Dialogue is sometimes more difficult with the [Constitutional] Court’s natural interlocutor. This is particularly so in cases where it solicits the legislature to modify a legal norm which it considered to be in contrast with the Constitution. Such requests are not to be underestimated. They constitute, in fact, the only means available to the [Constitutional] Court to oblige the legislative organs to eliminate any situation which is not compatible with the Constitution, and which, albeit identified by the [Constitutional] Court, does not lead to a pronouncement of anti-constitutionality. ... A request of this type which remained unheeded was that made in judgment no. 138/10, which, while finding the fact that a marriage could only be contracted by persons of a different sex to be constitutional compliant, also affirmed that same-sex couples had a fundamental right to obtain legal recognition, with the relevant rights and duties, of their union. It left it to Parliament to provide for such regulation, by the means and within the limits deemed appropriate”.

44. Nevertheless, some cities have established registers of “*civil unions*” between unmarried persons of the same sex or of different sexes: among others are the cities of Empoli, Pisa, Milan, Florence and Naples. However, the registration of “*civil unions*” of unmarried couples in such registers has a merely symbolic value.

#### 6. *Subsequent domestic case-law*

45. Similarly, the Italian Constitutional Court, in its judgments nos. 276/2010 of 7 July 2010 lodged in the registry on 22 July 2010, and 4/2011 of 16 December 2010 lodged in the registry on 5 January 2011, declared manifestly ill-founded claims that the above-mentioned articles of the Civil Code (in so far as they did not allow marriage between persons of the same sex) were not in conformity with Article 2 of the Constitution. The Constitutional Court reiterated that juridical recognition of homosexual unions did not require a union equal to marriage, as shown by the different approaches undertaken in different countries, and that under Article 2 of the Constitution it was for the Parliament, in the exercise of its discretion, to regulate and supply guarantees and recognition to such unions.

More recently, in a case concerning the refusal to issue marriage banns to a same-sex couple who had so requested, the Court of Cassation, in its judgment no. 2400/15 of 9 February 2015, rejected

the claimants' request. Having considered recent domestic and international case-law, it concluded that –while same-sex couples had to be protected under Article 2 of the Italian Constitution and that it was for the legislature to take action to ensure recognition of the union between such couples– the absence of same-sex marriage was not incompatible with the applicable domestic and international system of human rights. Accordingly, the lack of same-sex marriage could not amount to discriminatory treatment: the problem in the current legal system revolved around the fact that there was no other available union, apart from marriage, be it for heterosexual or homosexual couples. However, it noted that the court could not establish through jurisprudence matters which went beyond its competence.

### 7. *Recent and current legislation*

46. The House of Deputies has recently examined Bill no. 242 named “Amendments to the Civil Code and other provisions on equality in access to marriage and filiation by same-sex couples” and Bill no. 15 “Norms against discrimination in matrimony”. The Senate in 2014 examined Bill no. 14 on civil unions and Bill no. 197 concerning amendments to the Civil Code in relation to cohabitation, as well as Bill no. 239 on the introduction into the Civil Code of an agreement on cohabitation and solidarity.

47. A unified bill concerning all the relevant legal proposals was presented to the Senate in 2015 and was adopted by the Senate on 26 March 2015 as a basic text to enable further discussions by the Justice Commission. Amendments were to be submitted by May 2015, and a text presented to the two Chambers constituting Parliament by summer 2015. On 10 June 2015 the Lower House adopted a motion to favour the approval of a law on civil unions, taking particular account of the situation of persons of the same sex.

### 8. *Remedies in the domestic system*

48. A decision of the Civil Status Office may be challenged (within thirty days) before the ordinary tribunal, in accordance with Article 98 of the Civil Code.

49. A decree of the ordinary tribunal may in turn be challenged before the Court of Appeal (within ten days) by virtue of Article 739 of the Code of Civil Procedure.

50. According to its paragraph (3) no further appeal lay against the decision of the Court of Appeal. However, according to Article 111 (7) of the Constitution as interpreted by consolidated case-law, as well as Article 360 (4) of the Code of Civil Procedure (as modified by legislative decree no. 40/06) if the appeal decree affects subjective rights, is of a decisive nature, and constitutes a determination of a potentially irreversible matter (thus having the value of a judgment), the appeal decision may be challenged before the Court of Cassation within sixty days, in the circumstances and form established by Article 360 of the Code of Civil Procedure. According to Article 742 of the Code of Civil Procedure a decree which does not fall under the above-mentioned definition remains revocable and modifiable, at any future date subject to a change in the factual circumstances or underlying law (*presupposti di diritto*).

51. According to Articles 325 to 327 of the Code of Civil Procedure, an appeal to the Court of Cassation must be lodged within sixty days of the date on which the appeal decision is served on the party. In any event, in the absence of notification such an appeal may not be lodged later than six months from the date it was lodged in the registry (*pubblicazione*).

52. According to Article 324 of the Code of Civil Procedure, a decision becomes final, *inter alia*, when it is no longer subject to an appeal, to the Court of Appeal or Cassation, unless otherwise provided for by law.



## **B. Comparative and European law and practice**

### *1. Comparative-law material*

53. The comparative-law material available to the Court on the introduction of official forms of non-marital partnership within the legal systems of Council of Europe (CoE) member States shows that eleven countries (Belgium, Denmark, France, Iceland, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom) recognise same-sex marriage (12).

54. Eighteen member States (Andorra, Austria, Belgium, Croatia, the Czech Republic, Finland, France, Germany, Hungary, Ireland, Liechtenstein, Luxembourg, Malta, the Netherlands, Slovenia, Spain, Switzerland and the United Kingdom) authorise some form of civil partnership for same-sex couples. In certain cases, such union may confer the full set of rights and duties applicable to the institute of marriage, and thus, is equal to marriage in everything but name, as for example in Malta. In addition, on 9 October 2014 Estonia also legally recognised same-sex unions by enacting the Registered Partnership Act, which will enter into force on 1 January 2016. Portugal does not have an official form of civil union. Nevertheless, the law recognises *de facto* civil unions (13), which have automatic effect and do not require the couple to take any formal steps for recognition. Denmark, Norway, Sweden and Iceland used to provide for registered partnership in the case of same-sex unions, but was abolished in favour of same-sex marriage.

55. It follows that to date twenty-four countries out of the forty-seven CoE member States have already enacted legislation permitting same-sex couples to have their relationship recognised as a legal marriage or as a form of civil union or registered partnership.

### *2. Relevant Council of Europe materials*

56. In its Recommendation 924 (1981) on discrimination against homosexuals, the Parliamentary Assembly of the Council of Europe (PACE) criticised the various forms of discrimination against homosexuals in certain member States of the Council of Europe.

57. In Recommendation 1474 (2000) on the situation of lesbians and gays in Council of Europe member States, the PACE recommended that the Committee of Ministers call upon member States, among other things, “to adopt legislation making provision for registered partnerships”. Furthermore, in Recommendation 1470 (2000) on the more specific subject of the situation of gays and lesbians and their partners in respect of asylum and immigration in the member States of the Council of Europe, it recommended to the Committee of Ministers that it urge member States, *inter alia*, “to review their policies in the field of social rights and protection of migrants in order to ensure that homosexual partnerships and families are treated on the same basis as heterosexual partnerships and families ...”.

58. PACE Resolution 1547 (2007) of 18 April 2007 entitled “State of human rights and democracy in Europe” called upon all member States of the CoE, and in particular their respective parliamentary bodies, to address all the issues raised in the reports and opinions underlying this resolution and in particular, to, *inter alia*, combat effectively all forms of discrimination

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(12) On 22 May 2015 Ireland voted in favour of same-sex marriage in a referendum. In Finland, a bill legalising same-sex marriage was approved by Parliament on 12 December 2014 and signed by the President on 20 February 2015. The Marriage Act will not take effect until 1 March 2017.

(13) Article 1 § 2 of law no. 7/2001, as amended by law no. 23/2010 of 30 August 2010 – “A free union is the juridical situation between two persons, who irrespective of their sex, have been living in conditions analogous to those of married couples for more than two years”.

based on gender or sexual orientation, introduce anti-discrimination legislation, partnership rights and awareness-raising programmes where these are not already in place” (point 34.14.).

59. Resolution 1728 (2010) of the Parliamentary Assembly of the Council of Europe, adopted on 29 April 2010 and entitled “Discrimination on the basis of sexual orientation and gender identity”, calls on member States to “ensure legal recognition of same-sex partnerships when national legislation envisages such recognition, as already recommended by the Assembly in 2000”, by providing, *inter alia*, for:

- “16.9.1. the same pecuniary rights and obligations as those pertaining to different-sex couples;
- “16.9.2. ‘next of kin’ status;
- “16.9.3. measures to ensure that, where one partner in a same-sex relationship is foreign, this partner is accorded the same residence rights as would apply if she or he were in a heterosexual relationship;
- “16.9.4. recognition of provisions with similar effects adopted by other member states”.

60. In Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, the Committee of Ministers recommended that member States:

- “1. Examine existing legislative and other measures, keep them under review, and collect and analyse relevant data, in order to monitor and redress any direct or indirect discrimination on grounds of sexual orientation or gender identity;
- 3. Ensure that legislative and other measures are adopted and effectively implemented to combat discrimination on grounds of sexual orientation or gender identity, to ensure respect for the human rights of lesbian, gay, bisexual and transgender persons and to promote tolerance towards them ...”.

61. The Recommendation also observed as follows:

- “23. Where national legislation confers rights and obligations on unmarried couples, member states should ensure that it applies in a non-discriminatory way to both same-sex and different-sex couples, including with respect to survivor’s pension benefits and tenancy rights.
- 24. Where national legislation recognises 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.
- 25. Where national legislation does not recognise nor confer rights or obligations on registered same-sex partnerships and unmarried couples, member states are invited to consider the possibility of providing, without discrimination of any kind, including against different-sex couples, same-sex couples with legal or other means to address the practical problems related to the social reality in which they live”.

### 3. *European Union law*

62. Articles 7, 9 and 21 of the Charter of Fundamental Rights of the European Union, which was signed on 7 December 2000 and entered into force on 1 December 2009, read as follows:

#### **Article 7**

“Everyone has the right to respect for his or her private and family life, home and communications”.

#### **Article 9**

“The right to marry and to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights”.

### Article 21

“1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited”.

63. The Commentary of the Charter of Fundamental Rights of the European Union, prepared in 2006 by the EU Network of Independent Experts on Fundamental Rights, states as follows with regard to Article 9 of the Charter:

“Modern trends and developments in the domestic laws in a number of countries toward greater openness and acceptance of same-sex couples notwithstanding, a few states still have public policies and/or regulations that explicitly forbid the notion that same-sex couples have the right to marry. At present there is very limited legal recognition of same-sex relationships in the sense that marriage is not available to same-sex couples. The domestic laws of the majority of states presuppose, in other words, that the intending spouses are of different sexes. Nevertheless, in a few countries, e.g., in the Netherlands and in Belgium, marriage between people of the same sex is legally recognized. Others, like the Nordic countries, have endorsed a registered partnership legislation, which implies, among other things, that most provisions concerning marriage, i.e. its legal consequences such as property distribution, rights of inheritance, etc., are also applicable to these unions. At the same time it is important to point out that the name ‘registered partnership’ has intentionally been chosen not to confuse it with marriage and it has been established as an alternative method of recognizing personal relationships. This new institution is, consequently, as a rule only accessible to couples who cannot marry, and the same-sex partnership does not have the same status and the same benefits as marriage ...

In order to take into account the diversity of domestic regulations on marriage, Article 9 of the Charter refers to domestic legislation. As it appears from its formulation, the provision is broader in its scope than the corresponding articles in other international instruments. Since there is no explicit reference to ‘men and women’ as the case is in other human rights instruments, it may be argued that there is no obstacle to recognize same-sex relationships in the context of marriage. There is, however, no explicit requirement that domestic laws should facilitate such marriages. International courts and committees have so far hesitated to extend the application of the right to marry to same-sex couples ...”

64. A number of other Directives may also be of interest in the present case: they can be found in *Vallianatos and Others v. Greece* ([GC], nos. 29381/09 and 32684/09, §§ 33-34, ECHR 2013 (extracts)).

#### 4. *The United States*

65. On 26 June 2015, in the case of *Obergefell et al. v. Hodges, Director, Ohio Department of Health et al.*, the Supreme Court of the United States held that same-sex couples may exercise the fundamental right to marry in all States, and that there was no lawful basis for a State to refuse to recognise a lawful same-sex marriage performed in another State on the ground of its same-sex character.

The petitioners had claimed that the respondent state officials violated the Fourteenth Amendment by denying them the right to marry or to have marriages lawfully performed in another State given full recognition.

The Supreme Court held that that the challenged laws burdened the liberty of same-sex couples, and abridged central precepts of equality. It considered that the marriage laws enforced

by the respondents were unequal as same-sex couples were denied all the benefits afforded to opposite-sex couples and were barred from exercising a fundamental right. This denial to same-sex couples of the right to marry worked a grave and continuing harm and the imposition of this disability on gays and lesbians served to disrespect and subordinate them. Indeed, the Equal Protection Clause, like the Due Process Clause, prohibited this unjustified infringement of the fundamental right to marry. These considerations led to the conclusion that the right to marry was a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Supreme Court thus held that same-sex couples may exercise the fundamental right to marry.

Having noted that substantial attention had been devoted to the question by various actors in society, and that according to their constitutional system individuals need not await legislative action before asserting a fundamental right, it considered that were the Supreme Court to stay its hand and allow slower, case-by-case determination of the required availability of specific public benefits to same sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage.

Lastly, noting that many States already allowed same-sex marriage –and hundreds of thousands of these marriages had already occurred– it opined that the disruption caused by the recognition bans was significant and ever-growing. Thus, the Supreme Court also found that there was no lawful basis for a State to refuse to recognise a lawful same-sex marriage performed in another State.

## **THE LAW**

### **I. PRELIMINARY OBJECTIONS**

#### ***A. Rule 47***

66. The Government cited Article 47 of the Rules of Court. They highlighted that according to the recent revision of Article 47 of the Rules issued by the Plenary Court, the rules on what an application must contain must be applied in a stricter way. Thus, failure to comply with the requirements set out in paragraphs 1 and 2 of this rule may result in the application not being examined by the Court.

67. The applicants in application no. 18766/11 submitted that on the basis of the principle of *tempus regit actum*, the new Rule 47 adopted in 2013 could not apply to an application lodged in 2011.

68. The Court notes that, quite apart from the failure of the Government to indicate in what way the applicants failed to fulfil the requirements of Rule 47, it is only from 1 January 2014 that the amended Rule 47 applied stricter conditions for the introduction of an application with the Court. In the present case, the Court notes that all the applicants lodged their applications in 2011, and there is no reason to consider that they have not fulfilled the requirements of Rule 47 as applicable at the time.

69. It follows that any Government objection in this respect must be dismissed.

#### ***B. Victim status***

70. Although not explicitly raised as an objection to the applications' admissibility, the Government submitted that the applicants had not indicated in what way they had suffered any

actual damage, and the reference to the injury of the applicants was only abstract (inheritance rights, assistance to the partner, sub-entry into economic relationships acts). They pointed out that the Court could only judge upon specific circumstances of a case and not make evaluations going beyond the scope of the applications.

71. The Court considers it appropriate to deal with the argument at this stage. It notes that the applicants are individuals past the age of majority, who, according to the information submitted, are in same-sex relationships and in some cases are cohabiting. To the extent that the Italian Constitution as interpreted by the domestic courts excludes same-sex couples from the scope of marriage law, and that because of the absence of any legal framework to that effect the applicants cannot enter into a civil union and organise their relationship accordingly, the Court considers that they are directly concerned by the situation and have a legitimate personal interest in seeing it brought to an end (see, *mutatis mutandis*, *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 49, ECHR 2013 (extracts), and by implication, *Schalk and Kopf v. Austria*, no. 30141/04, ECHR 2010).

72. Accordingly, the Court concludes that the individuals in the present applications should be considered “victims” of the alleged violations within the meaning of Article 34 of the Convention.

### ***C. Exhaustion of domestic remedies***

#### *1. The Government*

73. The Government submitted that the applicants had failed to exhaust domestic remedies. They noted that in cases such as the present one it is possible to appeal against refusal to publish wedding banns before the relevant tribunal. The first-instance decision could then be challenged before the Court of Appeal and the Court of Cassation. However, Mr Oliari and Mr A. had failed to lodge a further appeal to the Court of Cassation, Mr Felicetti and Mr Zappa had not made any challenge to the administrative refusal to publish their banns, and Mr Perelli Cippo and Mr Zaccheo had failed to appeal against the first-instance judgment handed down in their case.

74. The Government referred to the principle of subsidiarity, and considered that the domestic courts could have given the applicants adequate redress for the damage suffered and offered them the legal and judicial means to obtain a statement at least recognising their union as a social formation like a life partnership as traditionally understood [*sic*]. In support of this the Government made reference to the Court of Cassation judgment no. 4184 delivered in 2012 concerning the registration of same-sex marriage contracted abroad, which according to their translation reads as follows:

“[T]he case law of this Court (of Cassation) –according to which the difference in sex of the engaged couple is, together with the manifestation of the will expressed by the same in the presence of the civil state officer celebrant, indispensable minimum requirement for the ‘existence of civil marriage’ as legally relevant act– is no more suitable to the current legal reality, having been radically overcome the idea that the difference in sex couples preparing for marriage is a prerequisite, as to say ‘natural’ of the same ‘existence’ of marriage. For all the above reasons, the non-transcription of homosexual unions depends – not from their ‘non-existence’, nor by their ‘invalidity’ but – by their inability to produce, as marriage records precisely, legal effects in the Italian system.”

In that light, the Government considered that if the applicants had brought their case before the domestic judges they would at least have had a legal recognition of their union. However, they had deliberately chosen not to do so.



75. Furthermore, they noted that the claims lodged before the domestic courts solely concerned their inability to obtain same-sex marriage and not the inability to obtain an alternative form of recognition for such couples.

## 2. *The applicants*

76. The applicants submitted that while the Constitutional Court in its judgment of no. 138/10 had found that Article 2 of the Constitution required legal protection of same-sex unions, it had no other option but to declare the complaint inadmissible, given the legislature's competence in the matter. A similar situation obtained in judgment no. 170/14 (see paragraph 36 above). Furthermore, the applicants submitted that the Government had not proved, by means of examples, that the domestic courts could provide any legal recognition of their unions. Indeed, given that the flaw related to the law (or lack thereof), ordinary domestic courts were prevented from taking any remedial action: even the court with competence to review the laws was unable to do this. Within the domestic system the appropriate remedy would have been a challenge before the Constitutional Court, which the Court had already stated was not a remedy to be used, it not being directly accessible to individuals (see *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 70, 17 September 2009). Moreover, in the present case such a challenge would not have been successful, given the precedent which lay in judgment no. 138/10, subsequently confirmed by other decisions.

## 3. *The Court's assessment*

77. The Court reiterates that Article 35 § 1 of the Convention requires that complaints intended to be made subsequently at Strasbourg should have been made to the appropriate domestic body, at least in substance (see *Akdivar and Others v. Turkey*, 16 September 1996, § 66, *Reports* 1996-IV, and *Gäfgen v. Germany* [GC], no. 22978/05 §§ 144 and 146, ECHR 2010). The purpose of the exhaustion rule is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it (see, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V). That rule is based on the assumption, reflected in Article 13 of the Convention, with which it has close affinity, that there is an effective remedy available in respect of the alleged breach in the domestic system (*ibid.*). To be effective, a remedy must be capable of remedying directly the impugned state of affairs, and must offer reasonable prospects of success (see *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006-II).

78. The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be "effective" in practice as well as in law (see, for example, *Ishan v. Turkey* [GC], no. 22277/93, § 97, ECHR 2000-VII). It is for the Court to determine whether the means available to an applicant for raising a complaint are "effective" in the sense either of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that had already occurred (see *Kudła v. Poland* [GC], no. 30210/96, §§ 157-158, ECHR 2000-XI). Whether the redress given is effective will depend, among other things, on the nature of the right alleged to have been breached, the reasons given for the decision and the persistence of the unfavourable consequences for the person concerned after that decision (see, for example, *Freimanis and Līdums v. Latvia*, nos. 73443/01 and 74860/01, § 68, 9 February 2006). In certain cases a violation cannot be made good through the mere payment of compensation (see, for example, *Petkov and Others v. Bulgaria*, nos. 77568/01, 178/02 and 505/02, § 80, 11 June 2009 in connection with Article 3 of Protocol No. 1) and the inability to render a binding decision granting redress may also raise issues (see *Silver and Others v. the United Kingdom*, 25 March 1983, § 115, Series A no. 61; *Leander*

*v. Sweden*, 26 March 1987, § 82, Series A no. 116; and *Segerstedt-Wiberg and Others v. Sweden*, no. 62332/00, § 118, ECHR 2006-VII).

79. The only remedies which Article 35 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see *Akdivar and Others*, cited above, § 66, and *Vučković and Others v. Serbia* [GC], no. 17153/11, § 71, 25 March 2014).

80. In addition, according to the “generally recognised principles of international law”, there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal (see *Selmouni*, cited above, § 75). However, the Court points out that the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies (see *Vučković and Others*, cited above, § 74, and *Brusco v. Italy* (dec.), no. 69789/01, ECHR 2001-IX). The issue of whether domestic remedies have been exhausted shall normally be determined by reference to the date when the application was lodged with the Court. This rule is however subject to exceptions which might be justified by the specific circumstances of each case (see, for example, *Baumann v. France*, no. 33592/96, § 47, 22 May 2001; *Nogolica v. Croatia* (dec.), no. 77784/01, ECHR 2002-VIII; and *Mariën v. Belgium* (dec.), no. 46046/99, 24 June 2004).

81. As regards the Government’s main argument that none of the applicants availed themselves of the full range of remedies available (up to the Court of Cassation), the Court observes that at the time when all the applicants introduced their applications before the Court (March and June 2011) the Constitutional Court had already given judgment on the merits of the first two applicants’ claim (15 April 2010), as a result of which the Court of Appeal dismissed their claims on 21 September 2010. The Constitutional Court subsequently reiterated those findings in two further judgments (lodged in the relevant registry on 22 July 2010 and 5 January 2011, see paragraph 45 above) also delivered before the applicants introduced their applications with the Court. Thus, at the time when the applicants wished to complain about the alleged violations there was consolidated jurisprudence of the highest court of the land indicating that their claims had no prospect of success.

82. The Government have not shown, nor does the Court imagine, that the ordinary jurisdictions could have ignored the Constitutional Court’s findings and delivered different conclusions accompanied by the relevant redress. Further, the Court observes that the Constitutional Court itself could not but invite the legislature to take action, and it has not been demonstrated that the ordinary courts could have acted more effectively in redressing the situations in the present cases. In this connection, and in the light of the Government’s argument that they could have obtained a statement at least on the recognition of their union based on the Court of Cassation judgment no. 4184/12, the Court notes as follows: firstly, the Government failed to give even one example of such a formal recognition by the domestic courts; secondly, it is questionable whether such recognition, if at all possible, would have had any legal effect on the practical situation of the applicants in the absence of a legal framework – indeed the Government have not explained what this *ad hoc* statement of recognition would entail; and thirdly, judgment no. 4184, referred to by the Government (which only makes certain references *en passant*), was delivered after the applicants had introduced their application with the Court.

83. Bearing in mind the above, the Court considers that there is no evidence enabling it to hold that on the date when the applications were lodged with the Court the remedies available in the Italian domestic system would have had any prospects of success. It follows that the applicants cannot be blamed for not having pursued an ineffective remedy, either at all or until

the end of the judicial process. Thus, the Court accepts that there were special circumstances which absolved the applicants from their normal obligation to exhaust domestic remedies (see *Vilnes and Others v. Norway*, nos. 52806/09 and 22703/10, § 178, 5 December 2013).

84. Without prejudice to the above, in reply to the Government's last argument the Court observes that the domestic proceedings (undertaken by four of the applicants in the present case) related to the authorities' refusal to permit the applicants to marry. As the opportunity to enter into a registered partnership did not exist in Italy, it is difficult to see how the applicants could have raised the question of legal recognition of their partnership except by seeking to marry, especially given that they had no direct access to the Constitutional Court. Consequently, their domestic complaint focused on their lack of access to marriage. Indeed, the Court considers that the issue of alternative legal recognition is so closely connected to the issue of lack of access to marriage that it has to be considered as inherent in the present application (see *Schalk and Kopf*, cited above, § 76). Thus, the Court accepts that such a complaint, at least in substance, included the lack of any other means to have their relationship recognised by law (*ibid.*, § 75). It follows that the domestic courts, particularly the Constitutional Court hearing the case concerning the first two applicants, was in a position to deal with the issue and, indeed, addressed it briefly, albeit only to conclude that it was for the legislature to take action on the matter. In these circumstances, the Court is satisfied that national jurisdictions were given the opportunity to redress the alleged violations being complained of in Strasbourg, as also characterised by the Court (see, *mutatis mutandis*, *Gatt v. Malta*, no. 28221/08, § 24, ECHR 2010).

85. It follows that in these circumstances the Government's objection must be dismissed.

## **D. Six months**

### *1. The Government*

86. The Government submitted that the complete application no. 18766/11 of 4 August 2011 was received by the Court on 9 August 2011, one year after the judgment of the Court of Appeal of Trent dated 23 September 2010, and that the complete application no. 36030/11 of 10 June 2011 was received by the Court on 17 June 2011, one year after the judgment of the Milan Tribunal of 9 June 2010, lodged in the relevant registry on 1 July 2010 in respect of Mr Perelli Cippo and Mr Zaccheo and in the absence of any judgment in respect of Mr Felicetti and Mr Zappa. Any material submitted to the Court before those dates had not contained all the characteristics of the application.

### *2. The applicants*

87. The applicants in application no. 18766/11 submitted that under Italian law the decision of the Trent Court of Appeal served on the applicants on 23 September 2010 became final after six months. It followed that the application introduced on 21 March 2011 complied with the six-month rule provided in the Convention.

88. The applicants in application no. 36030/11 considered that the alleged violations had a continuous character, as long as same-sex unions were not recognised under Italian law.

### *3. The Court's assessment*

#### **(a) Dates of introduction of the applications**

89. The Court reiterates that the six-month period is interrupted on the date of introduction of an application. In accordance with its established practice and Rule 47 § 5 of the Rules of

Court, as in force at the relevant time, it normally considered the date of the introduction of an application to be the date of the first communication indicating an intention to lodge an application and giving some indication of the nature of the application. Such first communication, which at the time could take the form of a letter sent by fax, would in principle interrupt the running of the six-month period (see *Yartsev v. Russia* (dec.) no. 1376/11, § 21, 26 March 2013; *Abdulrahman v. the Netherlands* (dec.), no. 66994/12, 5 February 2013; and *Biblical Centre of the Chuvash Republic v. Russia*, no. 33203/08, § 45, 12 June 2014).

90. In the instant case, concerning application no. 18766/11, the first communication indicating the wish to lodge a case with the Court as well as the object of the application (in the instant case in the form of an incomplete application), was deposited by hand at the Court Registry on 21 March 2011: a completed application followed in accordance with the instructions of the Registry. There is thus no doubt that the date of introduction in respect of application no. 18766/11 was 21 March 2011. Similarly, concerning application no. 36030/11 a complete application was received by the Court by fax on 10 June 2011, it was followed by the original received by the Court on 17 June 2011. There is therefore also no doubt that the introduction date in respect of application no. 36030/11 must be considered to be 10 June 2011. It follows that in these circumstances the date of “receipt” by the Court of the original or the completed application forms is irrelevant for determining the date of introduction; the Government’s argument to that effect is therefore misconceived.

91. It remains to be determined whether the applications introduced on those days complied with the six-month rule.

## **(b) Compliance with the six-month time-limit**

### *(i) General principles*

92. As a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Where it is clear from the outset, however, that no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of knowledge of that act or its effect on or prejudice to the applicant (see *Mocanu and Others v. Romania* [GC], nos. 10865/09, 45886/07 and 32431/08, § 259, ECHR 2014 (extracts)). Where an applicant avails himself of an apparently existing remedy and only subsequently becomes aware of circumstances which render the remedy ineffective, it may be appropriate for the purposes of Article 35 § 1 to take the start of the six-month period as the date when the applicant first became or ought to have become aware of those circumstances (ibid., § 260; see also *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 136, ECHR 2012, and *Paul and Audrey Edwards v. the United Kingdom* (dec.), no. 46477/99, 4 June 2001).

93. In cases where there is a continuing situation, the period starts to run afresh each day, and it is in general only when that situation ends that the six-month period actually starts to run (see *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 159, ECHR-2009).

94. The concept of a “continuing situation” refers to a state of affairs which operates by continuous activities by or on the part of the State which render the applicants victims (see *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, § 75, 10 January 2012; see also, conversely, *McDaid and Others v. the United Kingdom*, no. 25681/94, Commission decision of 9 April 1996, Decisions and Reports (DR) 85-A, p. 134, and *Posti and Rahko v. Finland*, no. 27824/95, § 39, ECHR 2002-VII). The Court has however also established that omissions on the part of the autho-

rities may also constitute “continuous activities by or on the part of the State” (see, for example, *Vasilescu v. Romania*, 22 May 1998, § 49, *Reports of Judgments and Decisions* 1998-III concerning a judgment preventing the applicant from regaining possession of her property; *Sabin Popescu v. Romania*, no. 48102/99, § 51, 2 March 2004 concerning a parent’s inability to regain parental rights; *Iordache v. Romania*, no. 6817/02, § 66, 14 October 2008; and *Hadzhigeorgievi v. Bulgaria*, no. 41064/05, §§ 56-57, 16 July 2013, both concerning non-enforcement of judgments, as well as, by implication, *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 104, ECHR 2012, concerning the inability to broadcast television programmes).

95. In its case-law the Court has considered that there were “continuing situations” bringing the case within its competence with regard to Article 35 § 1, where a legal provision gave rise to a permanent state of affairs, in the form of a permanent limitation on an individual Convention-protected right, such as the right to vote or to stand for election (see *Paksas v. Lithuania* [GC], no. 34932/04, § 83, 6 January 2011, and *Anchugov and Gladkov v. Russia*, nos. 11157/04 and 15162/05, § 77, 4 July 2013) or the right of access to court (see *Nataliya Mikhaylenko v. Ukraine*, no. 49069/11, § 25, 30 May 2013), or in the form of a legislative provision which intrudes continuously on an individual’s private life (see *Dudgeon v. the United Kingdom*, 22 October 1981, § 41, Series A no. 45, and *Daróczy v. Hungary*, no. 44378/05, § 19, 1 July 2008).

(ii) *Application to the present case*

96. Turning to the particular features of the present case, the Court notes that in so far as the rights under Articles 8, 12 and 14 concerning the inability to marry or enter into a civil union are at issue the applicants’ complaints do not concern an act occurring at a given point in time or even the enduring effects of such an act, but rather concern provisions (or in this case the lack thereof) giving rise to a continuing state of affairs, namely a lack of recognition of their union, with all its practical consequences on a daily basis, against which no effective domestic remedy was in fact available. The Convention organs have previously held that when they receive an application concerning a legal provision which gives rise to a permanent state of affairs for which there is no domestic remedy, the question of the six-month period arises only after this state of affairs has ceased to exist: “... in the circumstances, it is exactly as though the alleged violation was being repeated daily, thus preventing the running of the six-month period” (see *De Becker v. Belgium*, (dec.) 9 June 1958, no. 214/56, Yearbook 2, and *Paksas*, cited above, § 83).

97. In the instant case, in the absence of an effective domestic remedy given the state of domestic case-law, and the fact that the state of affairs complained of has clearly not ceased, the situation must be considered as a continuing one (see, for example, *Anchugov and Gladkov v. Russia*, nos. 11157/04 and 15162/05, § 77, 4 July 2013, albeit a different line had been taken previously in British cases concerning similar circumstances, see *Toner v. The United Kingdom* (dec.), § 29, no. 8195/08, 15 February 2011, and *Mclean and Cole v. The United Kingdom* (dec.), § 25, 11 June 2013). It cannot therefore be maintained that the applications are out of time.

98. Accordingly, the Government’s objection is dismissed.

### III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION AND ARTICLE 14 IN CONJUNCTION WITH ARTICLE 8

99. The applicants in application no. 18766/11 complained that they had no means of legally safeguarding their relationship, in that it was impossible to enter into any type of civil union in Italy. They invoked Article 8 alone. The applicants in application nos. 18766/11 and 36030/11 complained that they were being discriminated against in breach of Article 14 in conjunction with Article 8. Those provisions read as follows:



### 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 well-being 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”.

### 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, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

100. The Court reiterates that it is the master of the characterisation to be given in law to the facts of the case (see, for example, *Gatt*, cited above, § 19). In the present case the Court considers that the complaints raised by the applicants in application no. 36030/11, also fall to be examined under Article 8 alone.

#### A. Admissibility

##### 1. Applicability

101. The Government, referring to *Schalk and Kopf* (§§ 93-95), did not dispute the applicability of Article 14 in conjunction with Article 8.

102. As the Court has consistently held, Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence, since it has effect solely in relation to “the enjoyment of the rights and freedoms” safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, for instance, *E.B. v. France* [GC], no. 43546/02, § 47, 22 January 2008; *Karner v. Austria*, no. 40016/98, § 32, ECHR 2003-IX; and *Petrovic v. Austria*, 27 March 1998, § 22, Reports 1998-II).

103. It is undisputed that the relationship of a same-sex couple, such as those of the applicants, falls within the notion of “private life” within the meaning of Article 8. Similarly, the Court has already held that the relationship of a cohabiting same-sex couple living in a stable *de facto* partnership falls within the notion of “family life” (see *Schalk and Kopf*, cited above, § 94). It follows that the facts of the present applications fall within the notion of “private life” as well as “family life” within the meaning of Article 8. Consequently, both Article 8 alone and Article 14 taken in conjunction with Article 8 of the Convention apply.

##### 2. Conclusion

104. The Court notes that the complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

#### B. Merits

##### 1. The parties’ submissions

##### (a) The applicants in application no. 18766/11

105. The applicants referred to the evolution which had taken place, as a result of which many countries had legislated in favour of some type of institution for same-sex couples, the

most recent additions being Gibraltar and Malta, whose legislation enacted in 2014 gave same-sex couples *grosso modo* the same rights and duties applicable to married couples; registered partnership for same-sex couples had also been instituted in Croatia. They considered that there was no reason why those unions should not be provided for in Italy. They noted in particular that the Italian Constitutional Court itself had considered that the state had an obligation to introduce in its legal system some form of civil union for same-sex couples. They referred to the Court's jurisprudence concerning the positive obligations inherent in an effective respect for private and family life, and reiterated that according to the Court, where a particular facet of an individual's existence or identity was at stake, or where the activities at stake involved a most intimate aspect of private life, the margin allowed to a State was correspondingly narrow (*Söderman v. Sweden* [GC], no. 5786/08, § 79, ECHR 2013).

106. The applicants noted that the Government had given no justification for the failure to legislate to this effect. On the contrary, they had tried to convince the Court that same-sex couples were already protected, despite the lack of a specific legal framework. This in itself was contradictory, because if the Government recognised the need to protect, then there was no other way of doing so than by providing a stable legal framework, such as marriage or a similar institution of registered partnership, or the like. Further, the applicants failed to understand the connection between the protection of family in its traditional sense and the legal recognition of a stable relationship of a same-sex couple.

107. The applicants considered that the recognition in law of one's family life and status was crucial for the existence and well-being of an individual and for his or her dignity. In the absence of marriage the State should, at least, give access to a recognised union by means of a solemn juridical institution, based on a public commitment and capable of offering them legal certainty. Currently they were denied such protection in law, and same-sex couples suffered a state of uncertainty, as shown by the domestic cases cited by the Government, which left people in the applicants' situation at the mercy of judicial discretion. The applicants noted that despite the fact that Italy had transposed EU directive 78/2000, the administration continued to deny certain benefits to same-sex couples, and did not consider them equal to heterosexual couples.

108. The applicants considered that the Government was misleading the Court by a wrong interpretation of the decision of the municipality of Milan concerning registration (see paragraph 130 below). The registration referred to did not provide for the issuance of a document certifying a "civil union" based on a bond of affection, but of a "union for record purposes (*unione anagrafica*)" based on a bond of affection. It solely concerned registration for the purposes of statistical records of the existing population, which was not to be confused with the notion of an individual's civil status. While noting that certain municipalities had embraced this system, very few couples had actually registered, since it had no effect on a person's civil status, and could only be produced as proof of cohabitation. Indeed it had no effects *vis-à-vis* third parties, nor did it deal with matters such as succession, parental matters, adoption, and the right to create a family business (*impresa familiare*). Similarly, the judgment of the tribunal of Grosseto concerning the registration of the marriage of a homosexual couple (see paragraph 38 above) had been a unique judgment and was, at the time of the submission of observations, pending appeal at the request of the Government. They further noted that the remarks made by the Court of Cassation in its judgment no. 4184/12, to the effect that a same-sex marriage contracted abroad was no longer contrary to the Italian public order, had been said in passing (*obiter dictum*), were not binding and the administration had not followed suit. Indeed the Court of Cassation had clearly decided the matter, in the sense that no such marriage was possible.

109. In connection with Article 14, the applicants reiterated that the State's margin of appreciation was narrow when the justification for evading such an obligation was based on the

sexual orientation of individuals (they referred to *X and Others v. Austria* [GC], no. 19010/07, ECHR 2013, and *X v. Turkey*, no. 24626/09, 9 October 2012), and very weighty reasons were necessary to justify a difference of treatment based on such grounds. They relied on the dissenting opinions in the judgment of *Schalk and Kopf*. They further considered that in the present case there was no point in arguing that it was not open for heterosexual couples to enter into some sort of registered union, given that heterosexual couples had the opportunity to marry, while homosexual couples had no protection of this kind whatsoever.

**(b) The applicants in application no. 36030/11**

110. The applicants submitted that in view of the positive trend registered in Europe, the Court should now impose on States a positive obligation to ensure that same sex-couples have access to an institution, of whatever name, which was more or less equivalent to marriage. This was particularly so given that in Italy the Constitutional Court had upheld the need for homosexual unions to be recognised in law with the relevant rights and duties; despite this the legislator had remained inert.

111. The applicants noted that the Government had failed to demonstrate how recognition of same-sex unions would adversely affect actual and existing “traditional families”. Neither had the Government explained that prevention of any adverse effects could not be attained through less restrictive means. The applicants also noted that a finding of a violation in the present case would only oblige Italy to take legislative measures in this regard, leaving to the State the space to address any legitimate aim by tailoring the relevant legislation. It followed that the margin of appreciation, which was particularly narrow in respect of a total denial of legal recognition to same-sex couples, was, conversely, existent in relation to the form and content of such recognition, which however was not the subject of this application. They further noted that the present case did not raise moral and ethical issues of acute sensitivity (such as the issue of abortion) nor did it involve a balance with the rights of others, in particular children (such as adoption by homosexuals): the present case simply related to the rights and duties of partners towards each other (irrespective of the recognition of rights such as parental rights, adoption or access to medically assisted procreation).

112. The applicants submitted that in *Schalk and Kopf* one of the Chambers of the Court had found no violation of Article 14 in conjunction with Article 8, by a tight majority (4-3), considering that States enjoyed a margin of appreciation as to the timing of such recognition, and that at the time there was not yet a majority of States providing for such recognition. The applicants noted that until June 2014 (date of observations) 22 of 47 States recognised some form of same-sex union. These included all the Council of Europe (CoE) founding States except Italy, as well as countries sharing, like Italy, a deep attachment to the Catholic religion (such as Ireland and Malta). In addition, Greece was also under an obligation to introduce such recognition following the judgment in *Vallianatos*. This meant that, at the time they submitted their observations, 49% of States had recognised same-sex unions. However, the applicants noted, with respect, that in *Schalk and Kopf* the Chamber had taken as a decisive factor “the majority of member States”, while in earlier case-law (namely *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 84, ECHR 2002-VI), notwithstanding the little common ground that existed between States, and the fact that a European common approach was still lacking, the Grand Chamber chose to give less importance to those criteria and to give more importance to the clear and uncontested evidence of a continuing international trend. Further, the applicants noted that in the present case it could not be said that there was a consensus on the practice followed by Italy.

113. The applicants contended that the Court could not be reduced to being an “accountant” of majoritarian domestic views. On the contrary, it had to be the guardian of the Convention

and its underlying values, which include the protection of minorities (they referred in this connection to *L. and V. v. Austria*, nos. 39392/98 and 39829/98, § 52, ECHR 2003-I, and *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 97, ECHR 1999-VI). The applicants noted that bias was still present throughout Europe, and could be stronger in certain countries where prejudice against homosexuals was rooted in traditional, if not archaic, convictions and where democratic ideals and practices had only established themselves in recent times. The applicants noted that empirical evidence (submitted to the Court) showed that lack of recognition of same-sex couples in a given state corresponded to a lower degree of social acceptance of homosexuality. It followed that by simply deferring normative choices to the national authorities, the Court would fail to take account of the fact that certain national choices were in fact based on prevailing discriminatory attitudes against homosexuals, rather than the outcome of a genuine democratic process guided by the consideration of what is strictly necessary in a democratic society.

114. In the applicants' view, even accepting a certain margin of appreciation it was not appropriate for the Italian Government to rely on it for the specific reason that the domestic courts had upheld the existence in domestic constitutional law of an obligation to recognise same-sex unions. The applicants contended that under the Court's jurisprudence once a State provided for a right in domestic law it was then obliged to provide effective and non-discriminatory protection of such a right (they referred to *A, B and C v. Ireland* [GC], no. 25579/05, § 249, ECHR 2010). The applicants noted that Constitutional Court judgment no. 138/10 had the effect of affirming the existence of a constitutional fundamental right for same-sex partners to obtain recognition of their union and, to this effect, of a constitutional duty upon the legislature to enact an appropriate general regulation on the recognition of same-sex unions, with consequent rights and duties for partners. The recognition by the domestic courts that the concept of family was not limited to the traditional notion based on marriage had gone even beyond judgment no. 138/10. Other judgments in the field of fundamental rights held that as a matter of domestic constitutional law the notion of traditional family played a minor role in justifying restrictions: examples pertained to medically assisted procreation (nos. 162/14 and 151/09); rules on the transmission of the family name to children (no. 61/06); a partner's right to succeed in a lease contract (no. 404/88); and a partner's right to refrain from giving testimony in judicial proceedings (no. 7/97).

115. The lack of recognition of their union affected and disadvantaged the applicants in many specific and concrete ways. The applicants noted that even if the law recognised some specific and limited rights for non-married (heterosexual or same-sex) couples, these were not dependent on status, but on a *de facto* situation of cohabitation *more uxorio*. In fact, in the domestic cases concerning reparation in the case of a partner's death, the Court of Cassation (judgment no. 23725/08) had held that for such purposes the existence of a stable relationship providing mutual, moral and material assistance would have to be proved, and that declarations made by the interested individuals (*affidavit*) or indications given to the administration for the purposes of statistics would not suffice. Thus, the applicants submitted that to exercise or claim their rights they could not rely on status resulting from an act of common will, but had to resort to proving the existence of a factual situation. In addition, only a limited number of rights had been recognised in respect of *de facto* partners, and in most cases they remained without legal protection. They submitted the following as a non-exhaustive list of examples of the latter (on the basis of legal provisions, and in certain cases confirmed by case-law): the law failed to regulate the respective rights and duties of partners (as also noted by the Constitutional Court) in spheres such as material and moral assistance between partners, the responsibilities in contributing to the needs of the family, or their choices concerning family life; there was a lack of inheritance rights in the case of intestate succession; *de facto* partners were not entitled to a reserved portion



(*legitim*) and a surviving partner did not enjoy a right *in rem* to live in the family home owned by the deceased partner (Constitutional Court judgment no. 310/89); there existed no right to a survivor's pension (Constitutional Court judgment no. 461/2000); *de facto* partners had limited rights concerning assistance to a hospitalised partner when the latter was not able to express his or her will; in principle a *de facto* partner had no right to access his or her companion's medical file (although the *Garante della Privacy* in its decision of 17 September 2009, found otherwise, in the event of proof of written consent); *de facto* partners did not have maintenance rights and duties; *de facto* partners were not entitled to special leave from work to assist a partner affected by a serious disability; *de facto* partners did not benefit from most taxation or social policies relating to family: for example, they could not benefit from tax deductions applicable to dependent spouses; and *de facto* partners had no access to adoption or to medically assisted procreation.

116. The applicants noted that while a certain limited degree of protection could have been obtained by means of private agreements, this was irrelevant, and the Court's Grand Chamber had already rejected such an argument in *Vallianatos* (§ 81). Furthermore, such arrangements were time-consuming and costly, as well as stressful, and again it was a burden only to be carried by the applicants and not by heterosexual couples, who could opt for marriage, or by couples who were not interested in having any legal recognition. The lack of legal recognition of the union, besides causing legal and practical problems, also prevented the applicants from having a ritualised public ceremony through which they could, under the protection of the law, solemnly undertake the relevant duties towards each other. They considered that such ceremonies brought social legitimacy and acceptance, and particularly in the case of homosexuals, they went to show that they also have the right to live freely and to live their relationships on an equal basis, both in private and in public. They noted that the absence of such recognition brought about in them a sense of belonging to an inferior class of persons, despite their needs in the sphere of love being the same.

117. The applicants submitted that the fact that 155 of the existing 8,000 municipalities had recently instituted what are known as "registers of civil unions" had not corrected the situation. Accepting their political and symbolic importance, the applicants submitted that such registers, available only on a small portion of the territory, were merely administrative acts which were unable to confer a status on the applicants or bestow any legal rights. Such initiatives only testified to the willingness of certain authorities to include unions outside marriage when taking measures concerning families, within their sphere of competence.

118. The applicants submitted that the alleged violation was a direct consequence of the vacuum in the legal system in force. The applicants' were in a relevantly similar situation to that of a different-sex couple as regards their need for legal recognition and protection of their relationship. They further claimed that they were also in a position which was significantly different from that of opposite-sex couples who, though eligible for marriage, did not wish to obtain legal recognition of their union. They noted that the only basis for the difference in treatment suffered by the applicants was their sexual orientation, and that the Government had failed to give weighty reasons justifying such treatment, which constituted direct discrimination. Neither was any justification submitted as to why they were subject to indirect discrimination, in that they were treated in the same way as persons who were in a significantly different situation (they referred to *Thlimmenos v. Greece* [GC], no. 34369/97, ECHR 2000-IV), namely that of heterosexual couples who were not willing to marry.

119. The Government, relying solely on their margin of appreciation, gave no reasons at all, let alone weighty ones, to justify such a situation. In the applicants' view this stance was already sufficient to find a violation of the cited provisions.



120. Nevertheless, even assuming that the difference in treatment may be considered to be aiming at “the protection of the family in the traditional sense”, given the Court’s evolving case-law they considered that it would be unacceptable to frame restrictions on the basis of sexual orientation as aimed at protecting public morals. This, in their view, would be in radical contrast with the demands of pluralism, tolerance and broadmindedness without which there was no democratic society (they referred to *Handyside the United Kingdom*, 7 December 1976, § 50, Series A no. 24). In connection with the notion of the traditional family the applicants referred to the Court’s findings in *Vallianatos* (cited above, § 84) and *Konstantin Markin* (cited above, § 127).

121. Lastly, they noted that in *Vallianatos* the Court stressed that “the principle of proportionality does not merely require the measure chosen to be suitable in principle for achievement of the aim sought. It must also be shown that it was necessary, in order to achieve that aim, to exclude certain categories of people – in this instance persons living in a homosexual relationship – from the scope of application of the provisions at issue ... the burden of proof in this regard is on the respondent Government.” Moreover, the need for any restriction was to be assessed in relation to the principles which normally prevail in a democratic society (they referred to *Konstantin Markin*, cited above).

### (c) The Government

122. The Government noted that the Court recognised the Convention right of same-sex couples to see their union legally acknowledged, but considered that the relevant provisions (Articles 8, 12 and 14) did not give rise to a legal obligation on the Contracting States, as the latter enjoyed a wider margin of appreciation in the adoption of legislative changes able to meet the changed “common sense” of the community. Indeed, in that light, in *Schalk and Kopf*, although lacking legislation on marriage or other forms of recognition of homosexual unions, the Austrian State was not held responsible for violations of the Convention. In the Government’s view, as in *Gas and Dubois v. France*, (no. 25951/07, ECHR 2012), the Court had acknowledged that the State had no obligation to provide for same-sex marriage, so it also had no obligation to provide for other same-sex unions.

123. Referring to the principles laid down by the Court, the Government observed that the social and cultural sensitivities of the issue of legal recognition of homosexual couples gave each Contracting State a wide margin of appreciation in the choice of the times and modes of a specific legal framework. They further relied on the provisions of Protocol No. 15. They noted that the same margin had been provided for in EU law, particularly Article 9 of the Bill of Rights. This matter had thus to be left to the individual State (in this case Italy), which was the only entity capable of having cognisance of the “common sense” of its own community, particularly concerning a delicate matter which affected the sensitivity of individuals and their cultural identities, and where time was necessarily required to achieve a gradual maturation of a common sense of national community on the recognition of this new form of family in the Convention sense.

124. In the Government’s view the Court had no power to impose such an obligation. Nor could such an obligation be dictated by other States which, in the meantime –most of them only recently (see for example, Malta, 2014)– had adopted a rule as a result of an internal process of social maturation. The Government noted that, at the time of the submission of their observations, less than half the European Contracting States had provided legal forms of protection for unmarried couples, including homosexuals, and many had done so only recently (for example, Austria in 2010, Ireland in 2011, and Finland in 2012), and in the other half it was not provided for at all. They further considered that the fact that at the end of a gradual evolution a State was in an isolated position with regard to an aspect of its legislation did not necessarily mean that that aspect was in conflict with the Convention (they referred to *Vallianatos*, § 92). The Government

thus considered that no positive obligation to legislate in the matter of homosexual couples descended from any article of the Convention. It was solely for the State to decide whether to prohibit or allow same-sex unions, and currently there was no trend to this effect (this process and result could also be seen in the United States of America, where each state was allowed to regulate the matter).

125. Turning to the situation pertaining to Italy, the Government referred to judgment no. 138/10 (see paragraph 16 above), in which the Constitutional Court had recognised the importance for same-sex couples of being able to see their union legally acknowledged, but had left it to Parliament to identify the timing, methods and limits of such a regulatory framework. Thus, contrary to the applicants' argument, there was no immediate obligation, and the Constitutional Court had not enshrined such a constitutional obligation. Reference to this finding had also been made in the recent Constitutional Court judgment no. 170/14 concerning "forced divorce" following gender reassignment. However, unlike in the present case, in the latter case the Constitutional Court had invited the legislator to act promptly because the individuals concerned had already established a marital relationship productive of effects and consequences which were suddenly brought to a halt. In the instant case, the Constitutional Court acknowledged the existence of a fundamental right, with a consequent need to ensure the legal protection of same-sex unions whenever unequal treatment arose. However, it had delegated to the ordinary national courts the role of controlling, on a case-by-case basis, whether in each specific case the rules provided for different gender unions were extendable to same-sex ones. If, in the courts' view, there was unequal treatment to the detriment of same-sex couples, they could refer the question to the Constitutional Court claiming the rule examined to be discriminatory and calling for corrective intervention by the judge.

126. The Government further submitted that the Italian State had been engaged in developing legal status for same-sex unions since 1986, by means of intense debate and a variety of bills on the recognition of civil unions (also between same-sex couples). The issue had always been considered timely and relevant, and recent bills to this effect, introduced by various political parties, were in the process of undergoing parliamentary scrutiny (see paragraphs 46-47 above). Thus, while noting the widespread social and legal ferment on the issue, the Government highlighted that the matter had continued to be debated in recent times. They referred particularly to the President of the Italian Council of Ministers, who had publicly claimed to have assigned top priority to the legal recognition of same-sex unions and to the imminent discussion and examination in the Senate of Bill no. 14 on civil unions for same-sex couples, which, in terms of obligations, specifically corresponded to the institution of marriage and the rights therein, including adoption, inheritance rights, the status of a couple's children, health care and penitentiary care, residence and working benefits. Thus, Italy was perfectly in line with the pace of maturation which would lead to a European consensus, and could not be blamed for not having yet legislated on the matter. This intense activity in the past thirty years showed an intention on the part of the State to find a solution which would meet with public approval, as well as corresponding to the needs of the protection of a part of the community. It also showed, however, that despite the attention paid to the issue by various political forces, it was difficult to reach a balance between the different sensitivities on such a delicate and deeply felt social issue. They noted that the delicate choices involved in social and legislative policy had to achieve the unanimous consent of different currents of thought and feeling, as well as religious sentiment, which were present in society. It followed that the Italian State could not be held responsible for the tortuous course towards recognition of same-sex unions.

127. The Government, however, contended that they had still, in many ways, demonstrated that they recognised homosexual unions as legally existing and relevant, and that they had offered

them specific and concrete forms of legal protection, through judicial and non-judicial means. Domestic jurisprudence had in most circumstances recognised same-sex unions as a reality, with legal and social importance. Indeed, the Italian supreme courts recognised that, in some specific circumstances, same-sex couples may have the same rights as heterosexual married couples: they referred to the Constitutional Court judgments nos. 138/10; 276/2010 and 4/2011 (all mentioned above) and particularly the Court of Cassation judgment no. 4184/12, as well as the Reggio Emilia ordinance of 13 February 2012 and the decision of the Tribunal of Grosseto (see paragraph 37 above): according to the Government, subsequent to the latter decision registration of such marriages became the common practice (an example was the decision of the Municipality of Milan of 7 May 2013).

128. The Government pointed out that the protection of same-sex couples was not limited to the recognition of the union and the family relationship itself. It was actually ensured with specific reference to concrete aspects of their common life. The Government referred to a number of judgments of the ordinary courts: the Rome Tribunal judgment no. 13445/82 of 20 November 1982 which, in a case concerning the lease of an apartment, considered cohabitation by a homosexual couple to be on an equal footing with that of a heterosexual couple; the Milan Tribunal ordinance of 13 February 2011, in which the surviving partner, who had had a long-standing relationship with the victim, was awarded non-pecuniary damages for the loss of the same-sex partner; the Milan Tribunal ordinance of 13 November 2009 [*sic*] admitting the application as a civil party of the homosexual partner of a victim for the purposes of compensation for the loss suffered; Judgment no. 7176/12 of the Milan Court of Appeal, Labour Section of 29 March 2012, lodged in the relevant registry on 31 August 2012, which granted to the same-sex partner the welfare benefits payable by the employer to the family living with the employee; Judgment of the Rome Court of Minors no. 299/14 of 30 June 2014 which granted “the right to adopt to a homosexual couple” [*sic*], *recte*: the right of a non-biological “mother” to adopt her lesbian partner’s child (conceived through medically assisted procreation, abroad, in pursuance of their wish for joint parenthood) given the best interests of the child.

129. The Government further stressed that same-sex couples wishing to give a legal framework to various aspects of their community life could enter into cohabitation agreements (*contratti di convivenza*). Such agreements enabled same-sex couples to regulate aspects related to; i) the manner of sharing common expenses, ii) the criteria for the allocation of ownership of assets acquired during the cohabitation; iii) the manner of use of the common residence (whether owned by one or both partners); iv) the procedure for the distribution of assets in the event of termination of cohabitation; v) provisions relating to rights in cases of physical or mental illness or incapacity; and vi) acts of testamentary disposition in favour of the cohabiting partner. Such agreements had recently been publicised by the National Council of Notaries, in the light of the growing phenomenon of *de facto* unions. The Government explained that in order to give cohabitation agreements the organic nature of a legal framework for *de facto* unions, whether between couples of the same or different sex, a proposal had been made for the Civil Code to be amended, which introduced a regulatory body dedicated to these situations (Civil Code Chapter XXVI, Article 1986 *bis et sequi*).

130. The Government further noted that since 1993 a growing number of municipalities (to date 155) had established a Register of Civil Unions, which allowed homosexual couples to register themselves to enable their recognition as families for the purposes of administrative, political, social and welfare policy of the city. This was in place in both small and larger towns, and was an unequivocal sign of a progressive and growing social consensus in favour of the recognition of such families. Concerning the content and effects of this form of protection, the Government referred by way of example to the regulations of the register of civil unions issued

by the city of Milan (resolution no. 30 of 26 July 2012) according to which the city was committed to protecting and supporting civil unions, in order to overcome situations of discrimination and to promote integration into the social, cultural and economic development of the territory. The thematic areas within which priority action was required were housing, health and social services, policies for youth, parents and seniors, sports and leisure, education, school and educational services, rights, participation, and transportation. The acts of the administration were to provide non-discriminatory access to these areas and to prevent conditions of social and economic disadvantage. Within the city of Milan, a person enrolled in the register was equivalent to “the next of kin of the person with whom he or she is registered” for the purposes of assistance. The City Council shall, at the request of interested parties, grant a certificate of civil union based on an affective bond of mutual, moral and material assistance.

131. The Government further submitted that since 2003 Italian legislation had been in place for equal treatment in employment and occupation under Directive 2000/78/EC. They noted that the protection of civil unions received more acceptance in certain branches of the State than in others. As an example, they referred to a decision of the *Garante della Privacy* (a collegial body made of four elected parliamentarians that deals with the protection of personal data) of 17 September 2009, which recognised a surviving partner’s right to request a copy of the deceased partner’s medical records, despite the heirs’ opposition.

132. In their observations in reply, the Government denied categorically that the aim of the contested measure, or rather the absence of such a measure, was to protect the traditional family or the morals of society (as had been claimed by the applicants).

133. In particular, in connection with Article 14, the Government distinguished the present case from that of *Vallianatos*. They noted that it was not possible yet to state that there existed a European common view on the matter and most states were, in fact, still deprived of this kind of regulatory framework. They further relied on the Court’s findings in *Shalk and Kopf*. The Government submitted that while the Italian State had engaged in the development of a number of bills concerning *de facto* couples, they had not given rise to unequal treatment or discrimination.

Similarly, given the concrete recognition and legal judicial, legislative, and administrative protection awarded to same-sex couples (as described above), the conduct of the Italian State could not be considered discriminatory. Furthermore, the applicants had not given specific details of the suffering they alleged, and any abstract or generic damage could not be considered discriminatory. Had it been so, it could also be considered discriminatory against heterosexual unmarried couples, as no difference of treatment existed between the two mentioned types of couples.

#### (d) Third-party interveners

- (i) *Prof. Robert Wintemute, on behalf of the non-governmental organisations FIDH (Fédération Internationale des ligues de Droit de l’Homme), AIRE Centre (Advice on Individual Rights in Europe), ILGA-Europe (European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association), ECSOL (European Commission on Sexual Orientation Law), UFTDU (Unione forense per la tutela dei diritti umani) and LIDU (Lega Italiana dei Diritti dell’Uomo).*

##### (a) positive obligation to provide some means of recognition

134. Those intervening submitted that there existed an emerging consensus, in European and other democratic societies, that a government may not limit a particular right, benefit or obligation to married couples, to the exclusion of same-sex couples who were legally prevented



from getting married. They referred to the situation in March 2014, where at the time 44.7% of CoE member States had legislated in favour of same-sex relationships (see above for the current situation) and where Greece was yet to amend its legislation following the judgment in *Vallianatos*, as well as the Italian Constitutional Court's invitation to the legislature to legislate accordingly. They noted that up until March 2014, outside Europe legislation had been adopted in Argentina, Australia (14), Canada (15), Mexico (16), New Zealand, South Africa and Uruguay. In the United States, 21 of 50 states (42%) and the District of Columbia had granted legal recognition to same-sex couples, through access to marriage, civil union or domestic partnership, as the result of legislation or a judicial decision. The interveners opined that there was a growing consensus in European and other democratic societies that same-sex couples must be provided with some means of qualifying for particular rights, benefits and obligations attached to legal marriage, and as noted in *Smith and Grady v. the United Kingdom* (nos. 33985/96 and 33986/96, § 104, ECHR 1999-VI), even if relatively recent, the Court cannot overlook the widespread and consistently developing views and associated legal changes to the domestic laws of Contracting States on this issue. The Court had therefore to take account of this evolution and any further development until the date of its judgment. They considered that the Court's approach in *Goodwin* (§ 85; see also §§ 91, 93, 103) to give more weight to "a continuing international trend" applied, *mutatis mutandis*, in the present case.

135. They submitted that judicial reasoning in a growing number of decisions required at least an alternative to legal marriage, if not access to legal marriage for same-sex couples. They noted that although many of the courts (mentioned below) found direct discrimination based on sexual orientation, and required equal access to legal marriage for same-sex couples, their reasoning supported *a fortiori* (at least) a finding of indirect discrimination based on sexual orientation, and (at least) a requirement that governments provide alternative means of legal recognition to same-sex couples. They noted the following: The first court to require equal access for same-sex couples to the rights, benefits and obligations of legal marriage, while leaving it to the legislature to decide whether this access would be through legal marriage or an alternative registration system, was the Vermont Supreme Court in *Baker v. State*, 744 A.2d 864 (1999):

"We hold only that plaintiffs are entitled under ... the Vermont Constitution to obtain the same benefits and protections afforded ... to married opposite-sex couples. We do not purport to infringe upon the prerogatives of the Legislature ... other than to note ... [the existence of] 'registered partnership' acts, which ... establish an alternative legal status to marriage for same-sex couples, ... create a parallel ... registration scheme, and extend all or most of the same rights and obligations ... [T]he current statutory scheme shall remain in effect for a reasonable period of time to enable the Legislature to ... enact implementing legislation in an orderly and expeditious fashion."

A law on same-sex civil unions was passed in 2000.

The British Columbia Court of Appeal went further in *EGALE Canada* (1 May 2003), 225 D.L.R. (4th) 472, holding that the exclusion of same-sex couples from legal marriage amounted to discrimination violating the Canadian Charter. It could not see (§ 127):

"... how according same-sex couples the benefits flowing to opposite-sex couples in any way inhibits, dissuades or impedes the formation of heterosexual unions ..."

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(14) Alternative registration systems in 5 of 8 states and territories, in addition to recognition of cohabiting same-sex couples at the federal level in all 8 states and territories.

(15) Federal legislation on capacity to marry applying to all 13 provinces and territories, in addition to recognition of cohabiting same-sex couples at the federal level and in all 13 provinces and territories, and civil unions in Québec.

(16) At least 2 states and the Federal District.



The Ontario Court of Appeal agreed with the above in *Halpern* (10 June 2003), 65 O.R. (3d) 161 (§ 107):

“... [S]ame-sex couples are excluded from ... the benefits that are available only to married persons ... Exclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships ... [and] offends the dignity of persons in same-sex relationships”.

The Ontario Court ordered the issuance of marriage licences to same-sex couples that day.

The British Columbia Court followed on 8 July 2003 (228 D.L.R. (4th) 416). A federal law (approved by the Supreme Court of Canada) (17) extended these appellate decisions to all ten provinces and three territories from 20 July 2005 (18).

On 18 November 2003 the Massachusetts Supreme Judicial Court reached the same conclusion as the Canadian courts in *Goodridge*, 798 N.E.2d 941:

“The question before us is whether, consistent with the Massachusetts Constitution, the [State] may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex ... We conclude that it may not”.

On 30 November 2004, South Africa’s Supreme Court of Appeal agreed with the Canadian and Massachusetts courts, and restated the common-law definition of marriage as: “the union between two persons to the exclusion of all others for life” (19). On 1 December 2005, South Africa’s Constitutional Court concluded that the remaining statutory obstacle to marriage for same-sex couples was discriminatory (§ 71):

“... The exclusion of same-sex couples from ... marriage ... represents a harsh if oblique statement by the law that same-sex couples are outsiders ... that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples ... that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples ...” (20).

South Africa’s Parliament responded by enacting the Civil Union Act (No. 17 of 2006, in force on 30 November 2006), allowing any couple, different-sex or same-sex, to contract a “civil union” and choose whether it should be known as a ‘marriage’ or a ‘civil partnership’.

On 25 October 2006, in *Lewis v. Harris*, 908 A.2d 196 (2006), the New Jersey Supreme Court adopted the same approach as the Vermont Supreme Court:

“Although we cannot find that a fundamental right to same-sex marriage exists in this State [cf. *Schalk & Kopf*], the unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our State Constitution. With this State’s legislative and judicial commitment to eradicating sexual orientation discrimination as our backdrop, we now hold that denying rights and benefits to committed same-sex couples ... given to their heterosexual counterparts violates the equal protection guarantee ... [T]he Legislature must either amend the marriage statutes to include same-sex couples or create a parallel statutory structure, which will

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(17) *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698.

(18) See R. Wintemute, “Sexual Orientation and the Charter”, (2004) 49 *McGill Law Journal* 1143; Civil Marriage Act, Statutes of Canada 2005, chapter 33.

(19) *Fourie v. Minister of Home Affairs* (30 Nov. 2004), Case No. 232/2003.

(20) *Minister of Home Affairs v. Fourie; Lesbian & Gay Equality Project* (Cases CCT60/04, CCT10/05).

provide for, on equal terms, the rights and benefits enjoyed and burdens and obligations borne by married couples. ... The name to be given to the statutory scheme ..., whether marriage or some other term, is a matter left to the democratic process”.

A law on same-sex civil unions was passed in 2006.

On 15 May 2008 the California Supreme Court decided *In re Marriage Cases*, 183 P.3d 384 (2008). It found that legislation excluding same-sex couples from legal marriage breached (*prima facie*): (a) their fundamental right to marry, an aspect of the right of privacy; and (b) their right to equal protection based on sexual orientation, a ‘suspect classification’. It subjected the legislation to ‘strict scrutiny’ and found that it was not ‘necessary’ to further a ‘compelling constitutional interest’, even though same-sex couples could acquire nearly all the rights and obligations attached to marriage by California law through a “domestic partnership” (21).

On 10 October 2008 the Connecticut Supreme Court agreed with the California Court in *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (2008).

On 3 April 2009 in *Varnum v. Brien*, 763 N.W.2d 862 (2009), the Iowa Supreme Court agreed with the decisions in Massachusetts, California and Connecticut:

“[C]ivil marriage with a person of the opposite sex is as unappealing to a gay or lesbian person as civil marriage with a person of the same sex is to a heterosexual. Thus, the right of a gay or lesbian person ... to enter into a civil marriage only with a person of the opposite sex is no right at all. ... State government can have no religious views, either directly or indirectly, expressed through its legislation. ... This ... is the essence of the separation of church and state. ... [C]ivil marriage must be judged under our constitutional standards of equal protection and not under religious doctrines or the religious views of individuals ... [O]ur constitutional principles ... require that the state recognize both opposite-sex and same-sex civil marriage”.

On 5 May 2011 Brazil’s *Supremo Tribunal Federal* (STF) interpreted Brazil’s Constitution as requiring that existing legal recognition of ‘stable unions’ (cohabitation outside marriage) include same-sex couples (22). On 25 October 2011 Brazil’s *Superior Tribunal de Justiça* (STJ) ruled in *Recurso Especial* no. 1.183.378/RS that, in the absence of an express prohibition (as opposed to authorisation) of same-sex marriage in Brazilian law, two women could convert their ‘stable union’ into a marriage under Article 1726 of the Civil Code (“A stable union can be converted into a marriage at the request of the partners before a judge and following registration in the Civil Registry”).

On 14 May 2013, relying on the decisions of the STF and the STJ, the *Conselho Nacional de Justiça* (CNJ), which regulates the judiciary but is not itself a court, *Resolução* No. 175 ordered all public officials authorised to marry couples, or to convert ‘stable unions’ into marriages, to do so for same-sex couples. A constitutional challenge to the resolution of the CNJ by the *Partido*

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(21) The Californian Court’s decision allowed same-sex couples to marry in California from 16 June 2008 until 4 November 2008, when 52% of voters in a referendum supported an amendment to the Californian Constitution (Proposition 8). Proposition 8 converted the rule denying access to legal marriage to same-sex couples from a sub-constitutional rule (adopted after the 2000 referendum on Proposition 22 and struck down by the Court in 2008) to a constitutional rule that could only be repealed after a second referendum: Article I, Section 7.5: “Only marriage between a man and a woman is valid or recognized in California.” The Court upheld Proposition 8 in *Strauss v. Horton* (26 May 2009), but maintained the validity of the legal marriages of same-sex couples who married before 4 November 2008. The Court’s decision was reinstated, and Proposition 8 struck down, by the procedural effect of *Hollingsworth v. Perry*, 133 S.Ct. 2652 (26 June 2013).

(22) See (last accessed June 2015).

*Social Cristão* has been pending in the STF since 7 June 2013: *Ação Direta de Inconstitucionalidade* (ADI) 4966. It seems likely that the STF will endorse the reasoning of the STJ and the CNJ.

On 26 July 2011 Colombia's Constitutional Court "exhorted" Colombia's Congress to legislate to provide same-sex couples with the same rights as married different-sex couples. Congress refused to do so, triggering the Court's default remedy from 20 June 2013: same-sex couples have the right to appear before a notary or judge to "formalise and solemnise their contractual link" (23).

On 5 December 2012 Mexico's Supreme Court decided that three same-sex couples in the state of Oaxaca had the right under the federal constitution to marry (24).

On 19 December 2013 in *Griego v. Oliver*, 316 P.3d 865 (2013), the New Mexico Supreme Court became the fifth state supreme court to require equal access to marriage for same-sex couples:

"We conclude that the purpose of New Mexico marriage laws is to bring stability and order to the legal relationship of committed couples by defining their rights and responsibilities as to one another, their children if they choose to raise children together, and their property. Prohibiting same-gender marriages is not substantially related to the governmental interests advanced ... or to the purposes we have identified. Therefore, barring individuals from marrying and depriving them of the rights, protections, and responsibilities of civil marriage solely because of their sexual orientation violates the Equal Protection Clause ... of the New Mexico Constitution. ... [T]he State of New Mexico is constitutionally required to allow same-gender couples to marry and must extend to them the rights, protections, and responsibilities that derive from civil marriage under New Mexico law".

136. As regards national supreme courts in Europe, although no court has yet interpreted its national constitution as prohibiting the exclusion of same-sex couples from legal marriage, or requiring alternative means of legal recognition, on 9 July 2009 two of the five judges of Portugal's *Tribunal Constitucional* dissented from the majority's decision to uphold the exclusion (25). On 2 July 2009, Slovenia's Constitutional Court held in *Blažič & Kern v. Slovenia* (U-I-425/06-10) that same-sex registered partners must be granted the same inheritance rights as different-sex spouses. On 7 July 2009, Germany's Federal Constitutional Court held (1 BvR 1164/07) that same-sex registered partners and different-sex spouses must be granted the same survivor's pensions. And, since 22 September 2011, Austria's Constitutional Court has issued five decisions finding that (same-sex) registered partners must have the same rights as (different-sex) married couples (26).

137. Those intervening further noted that the Parliamentary Assembly of the CoE (PACE) has recommended: (a) that member States "review their policies in the field of social rights and protection of migrants ... to ensure that homosexual partnership[s] and families are treated on the same basis as heterosexual partnerships and families" (Recommendation 1470 (2000)); and (b) that they "adopt legislation which makes provision for registered [same-sex] partnerships" (27). The EU's European Parliament first called for equal treatment of different-sex and

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(23) Sentencia C-577/11, <http://www.corteconstitucional.gov.co/relatoria/2011/C-577-11.htm> (last accessed June 2015), pp. 193-194.

(24) Amparos en Revisión 457/2012, 567/2012, 581/2012, Primera Sala de la Suprema Corte de Justicia.

(25) See Acórdão 359/09 (9 July 2009), <http://w3.tribunalconstitucional.pt/acordaos/acordaos09/301-400/35909.htm> (last accessed June 2015) (Declaração de Voto: Judges Gil Galvão and Maria João Antunes).

(26) See <http://www.sexualorientationlaw.eu/documents/austria.htm>. (no longer accessible).

(27) Recommendation 1474 (2000), para. 11(iii)(i). See also Resolution 1547 (2007), para. 34.14.

same-sex couples in a 1994 resolution seeking to end “the barring of [same-sex] couples from marriage or from an equivalent legal framework” (28).

138. In 2004, the EU’s Council amended the Staff Regulations to provide for benefits for the non-marital partners of EU officials:

“non-marital partnership shall be treated as marriage provided that ... the couple produces a legal document recognised as such by a member State ... acknowledging their status as non-marital partners, ... [and] ... has no access to legal marriage in a member State” (29).

139. Finally, in 2008, the CoE’s Committee of Ministers agreed that:

“A staff member who is registered as a stable non-marital partner shall not be discriminated against, with regard to pensions, leave and allowances under the Staff Regulations ..., vis-à-vis a married staff member provided that ...: (i.) the couple produces a legal document recognised as such by a member state ... acknowledging their status as non-marital partners; ... (v.) the couple has no access to legal marriage in a member state” (30).

(β) *Discrimination*

140. Those intervening considered that, even assuming that the Convention did not yet require equal access to legal marriage for same-sex couples, it was (at least) indirect discrimination based on sexual orientation to limit particular rights or benefits to married different-sex couples, but provide no means for same-sex couples to qualify. Referring to *Thlimmenos v. Greece* and *D.H. and Others v. the Czech Republic* ([GC], no. 57325/00, ECHR 2007-IV), they considered that failure to treat same-sex couples differently because of their legal inability to marry, by providing them with alternative means of qualifying for the right or benefit, required an objective and reasonable justification. They noted that indirect discrimination, as defined in Council Directive 2000/78/EC, Art. 2(2)(b), occurs when “an apparently neutral ... criterion ... would put persons having a ... particular sexual orientation at a particular disadvantage compared with other persons unless [it] is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.” In their view, to avoid indirect discrimination against same-sex couples, governments must grant them an exemption from a requirement that they be legally married to qualify for particular rights or benefits. This meant, for example, that a public-sector employer or pension scheme could maintain a marriage requirement for different-sex couples (31) (just as the rule on felony convictions could be maintained in *Thlimmenos*), but must exempt same-sex couples and find some alternative means for them to qualify (example, a civil union or registered partnership certificate, a sworn statement, or other evidence of a committed relationship).

141. In *Christine Goodwin* (cited above), the Grand Chamber required CoE member States to legally recognise gender reassignment, but left the details of recognition to each member State. Similarly, an obligation to exempt same-sex couples from a marriage requirement, to avoid indirect discrimination, would leave to member States the choice of the method used to do so. A member State would find at least five options within its margin of appreciation: (1) it

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(28) “Resolution on equal rights for homosexuals ... in the EC” (8 Feb. 1994), OJ C61/40 at 42, para. 14.

(29) Staff Regulations of [EC] officials ..., Article 1d(1); Annex VII, Article 1(2)(c); Annex VIII, Article. 17, as amended by Council Regulation 723/2004/EC (22 March 2004), OJ L124/1. Cf. Decision No. 2005/684/EC of the European Parliament, Art. 17(9), (28 Sept. 2005), OJ L262/6 (“[p]artners from relationships recognised in the Member States shall be treated as equivalent to spouses”).

(30) Resolution CM/Res(2008)22, 19 Nov. 2008.

(31) See *Irizarry v. Board of Education of City of Chicago*, 251 F.3d 604 (7th Cir. 2001).

could grant same-sex couples who could prove the existence of their relationship for a reasonable period a permanent exemption from the marriage requirement (32); (2) it could grant the same exemption to unmarried different-sex couples; (3) it could grant a temporary exemption to same-sex couples until it had created an alternative registration system, with a name other than marriage, allowing same-sex couples to qualify; (4) it could grant access to the same system to different-sex couples; or (5) if it did not wish to grant the right or benefit to unmarried couples, or to create an alternative registration system, it could grant a temporary exemption to same-sex couples until it had had time to pass a law granting them equal access to legal marriage. It could also decide (subject to subsequent ECtHR supervision) whether any exceptions could be justified, for example relating to parental rights.

142. The principle that marriage requirements discriminate indirectly against same-sex couples was concisely stated by the legal report on homophobia published by the European Union's Agency for Fundamental Rights in June 2008.<sup>1</sup> The report concluded (at pp. 58-59, emphasis added) that "any measures denying to same-sex couples benefits ... available to opposite-sex married couples, where marriage is not open to same-sex couples, should be treated presumptively as a form of indirect discrimination on grounds of sexual orientation", and that "international human rights law complements EU law, by requiring that same-sex couples either have access to an institution such as ... registered partnership[,] that would provide them with the same advantages ... [as] marriage, or ... that their *de facto* durable relationships extend[ ] such advantages to them". According to Advocate General Jääskinen of the Court of Justice of the European Union, in his opinion of 15 July 2010, in Case C-147/08, *Römer v. Freie und Hansestadt Hamburg*:

"(§ 76) It is the [EU] Member States that must decide whether or not their national legal order allows any form of legal union available to homosexual couples, or whether or not the institution of marriage is only for couples of the opposite sex. In my view, a situation in which a Member State does not allow any form of legally recognised union available to persons of the same sex may be regarded as practising discrimination on the basis of sexual orientation, because it is possible to derive from the principle of equality, together with the duty to respect the human dignity of homosexuals, an obligation to recognise their right to conduct a stable relationship within a legally recognised commitment. However, in my view, this issue, which concerns legislation on marital status, lies outside the sphere of activity of [EU] law".

Those intervening contended that the potential discrimination noted by the Advocate General fell outside the scope of EU law, but fell squarely within the scope of the Convention, which applies to all legislation of CoE member States, including in the area of family law.

(Council Directive 2000/78/EC requires equal survivor's pensions for same-sex registered partners if national law places them "in a situation comparable to that of [different-sex] spouses").

1. "Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part 1 – Legal Analysis"; <http://fra.europa.eu/en/publication/2010/homophobia-and-discrimination-grounds-sexual-orientation-eu-member-states-part-i>. (last accessed June 2015).

143. Those intervening noted that according to the Court's case-law differences in treatment based on sexual orientation were analogous to difference in treatment based on race, religion

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(32) The Court of Justice of the European Union effectively granted such an exemption in *K.B.*, Case C-117/01 (7 Jan. 2004), which implicitly entitled Ms. K.B. and Mr. R. (her transsexual male partner) to an exemption from the marriage requirement until U.K. legislation was amended. If she had died on 8 January 2004 (the day after the judgment), he would have been entitled to a survivor's pension even though he was not married to her (the U.K. had yet to implement *Goodwin*). Cf. *Maruko*, Case C-267/06 (1 April 2008).



and sex, and could only be justified by particularly serious reasons. This was relevant for the purposes of the proportionality test in which “It must also be shown that it was necessary in order to achieve that aim to exclude ... persons living in a homosexual relationship ...” (see *Karner v. Austria*, no. 40016/98, § 41, ECHR 2003-IX) The Court found no evidence of necessity where there was a difference of treatment between unmarried different-sex couples and unmarried same-sex couples. Those intervening considered that the necessity test should also be applied to the prima facie indirect discrimination created by an apparently neutral marriage requirement. Such a requirement failed to treat same-sex couples, who are legally unable to marry, differently from different-sex couples who *were* legally able to marry but had neglected to do so, or had chosen not to do so (because of a decision by one or both partners). The Court’s reasoning in *Vallianatos* (cited above, § 85) concerning the burden of proof being on the Government, also applied *mutatis mutandis* to the present case.

(ii) *Associazione Radicale Certi Diritti (ARCD)*

144. The ARCD submitted that a survey carried out (amongst Italians aged between 18 and 74) in 2011 by the ISTAT (33) (Italian institute for statistics) found as follows: 61.3% thought that homosexuals were discriminated against or severely discriminated against; 74.8% thought that homosexuality was not a threat to the family; 65.8% declared themselves in agreement with the content of the phrase “It is possible to love a person of a different sex or the same sex, love is what is important”; 62.8% of those responding to the survey agreed with the phrase “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”; 40.3% of the one million homosexuals or bisexuals living in central Italy declared themselves to have been discriminated against; the 40.3% increases to 53.7% if discrimination clearly based on homosexual or bisexual orientation is added in relation to the search for apartments (10.2%), their relations with neighbours (14.3%), their needs in the medical sector (10.2%) or in relations in with others in public places, offices or on public transport (12.4%).

145. Those intervening submitted that to date a same-sex partner was “recognised” in written legislation only in limited cases, namely:

Article 14 *quarter* and Article 18 of the prison regulations, through which cohabitees have the right to visit the person incarcerated;

Law no. 91/99 concerning organ donation, where the partner *more uxorio* must be informed of the nature and circumstances surrounding the removal of the organ. They also have the right to object to such a procedure;

Article 199 (3) (a) of the Code of Criminal Procedure concerning the right not to testify against a partner;

Article 681 of the Code of Criminal Procedure regarding presidential pardon which may be signed by a cohabitee;

Circular no. 8996 issued by the Italian Minister for the Interior of 26 October 2012, which had as its object same-sex unions and residence permits in connection with legislative decree no. 30/2007;

The inclusion in the medical insurance scheme of the partners of homosexual parliamentarians.

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(33) Published on 17 May 2012.

146. In this connection domestic judges made various pronouncements, namely:

Judgment no. 404/88 of the Constitutional Court, which found that it was unconstitutional to evict a cohabiting surviving partner from a leased property. By means of the judgment of the Court of Cassation no. 5544/94 this right was extended to same-sex couples living *more uxorio*; (see also judgment of the Court of Cassation no. 33305/02 regarding rights to sue as a civil party for civil damage); Ordinance no. 25661/10 of the Court of Cassation of 17 December 2010, which found that the right of entry [to Italian territory] and stay for the purposes of family reunification with an Italian citizen is solely regulated by EU directives.

Judgment no. 1328/11 of the Court of Cassation, which held that the notion of “spouse” must be understood according to the judicial regime where the marriage was celebrated. Thus, a foreigner who marries an EU national in Spain must be considered related for the purposes of their stay in Italy; Judgment no. 9965/11 of the Milan Tribunal (at first instance) of 13 June 2011 which recognised the right of a homosexual partner to compensation following the loss suffered pursuant to the death of the partner in a traffic accident.

Judgment no. 7176/12 of the Milan Court of Appeal, Labour Section, (mentioned above) which confirmed that a same-sex partner had the right to be covered under the employed partner’s medical insurance.

147. The ARCD further referred to the importance of the findings in judgments nos. 138/10 and 4184/12 (for both, see Relevant domestic law above) as well as those in the Tribunal of Reggio Emilia’s ordinance of 13 February 2012. These decisions went to prove that Italian jurisprudence had assimilated the relevant notions, and the meticulous reasoning of the decisions (particularly that of the Court of Cassation, no. 4184/12) left no room for future U-turns on the matter.

148. In conclusion, the ARCD noted that given that the Court had established that same-sex couples had the same protection under Article 8 as different-sex couples did, the recognition of their right to some kind of a union was desirable to ensure such protection.

(iii) *European Centre for Law and Justice (ECLJ)*

149. The ECLJ feared that if the Court established that same-sex couples had a right to recognition in the form of a civil union, the next issue would be what rights to attach to such a union, in particular in connection with procreation. They noted that in *Vallianatos* the Court had not established such an obligation, but had solely considered that to provide for such unions for heterosexual couples but not for same-sex couples gave rise to discrimination. It followed that the Court could not find a violation in the present case.

150. In their view, Article 8 did not oblige States to provide a legal framework beyond that of marriage to safeguard family life. They considered that family life essentially concerned the relations between children and their parents. They noted that before the judgment in *Schalk and Kopf* the Court used to consider that in the absence of marriage it was only the existence of a child which brought into play the concept of family (they referred to *Johnston and Others v. Ireland*, 18 December 1986, Series A no. 112, and *Elsholz v. Germany* [GC], no. 25735/94, ECHR 2000-VIII). This was in line with international instruments and the Convention. They considered that any recognition given to a couple by society depended on the couple’s contribution to the common good through founding a family, and definitely not on the basis that the couple had feelings for each other, that being a matter concerning private life only.

151. The Centre, intervening, noted that Article 8 § 2 set limits on the protection of family life by the State. Such limits justified the refusal of the State to recognise certain families, such as polygamous or incestuous ones. In their view, Article 8 did not provide an obligation to give

non-married couples a status equivalent to married ones. This was a matter to be regulated by the States and not the Convention. Neither could the States' consent be assumed through the adoption of the CoE's Committee of Ministers recommendation (2010)<sup>5</sup>. According to the ECLJ, during the preparatory work of the commission of experts and rapporteurs on the mentioned text the States refused to recommend the adoption of a legal framework for non-married couples, finally settling for a text which reads as follows:

“25. Where national legislation does not recognise nor confer rights or obligations on registered same-sex partnerships and unmarried couples, member states are invited to consider the possibility of providing, without discrimination of any kind, including against different sex couples, same-sex couples with legal or other means to address the practical problems related to the social reality in which they live”.

152. ECLJ considered that although the Court had to interpret the Convention as a living instrument, it could not substitute it, as it remained the principal reference. Otherwise, the Court would transform itself into an instrument of ideological actualisation on the basis of national legislations, in matters related to society – a role which surely did not fall within its competence. The intervener questioned whether it was prudent and respectful of the subsidiarity principle for the Court to supervise whether states were updating legislation according to evolving customs and morals (*moeurs*), as interpreted by a majority of judges. This would make the protection of human rights dependant less on the Convention and its protocols and more on the Court's composition (as evidenced by the slight (10-7) majority in *X and Others v. Austria* [GC], no. 19010/07, ECHR 2013). They considered therefore that the Court should not usurp the role of States, especially given that the latter were free to add an additional protocol to the Convention had they wished to regulate sexual orientation (as was done to abolish the death penalty).

153. The ECLJ questioned why homosexuality was more acceptable than polygamy. They considered that if the legislator had to take account of an evolving society, then it had also to legislate in favour of polygamy and child marriage, even more so given that in many countries (such as Turkey, Switzerland, Belgium and the United Kingdom), there were more practising Muslims than same-sex couples.

154. They further referred to the comparative situations of States (discussed above), and added that referendums in favour of civil unions had been rejected by the majority of voters in Slovenia and Northern Ireland.

155. They considered that if the Court had to consider that an obligation to facilitate the common life of same-sex couples arose from Article 8 of the Convention, then such an obligation would need to relate solely to the specific needs of such couples and of society, allowing the State a margin of appreciation, and in their view the Italian State had fulfilled that duty of protection through judicial or contractual acts (as mainly explained by the Government). Further, they considered that protecting the family in its traditional sense constituted a legitimate aim justifying a difference in treatment (they referred to *X and Others*, cited above). They considered that since no obligation arose from the Convention, nor was there a right guaranteed by the State which fell within the ambit of the Convention, there was no room for a margin of appreciation.

156. As regards discrimination, the ECLJ considered that same-sex couples and different-sex couples were not in identical or similar situations, since the former could not procreate naturally. The difference was not one of sexual orientation but of sexual identity, based on objective biological causes, thus there was no room for justifying a difference in treatment. They considered that the States had an interest in protecting children, their birth and their well-being, as they were the common good of parents and society.

If children stopped being at the heart of the family, then it would only be the concept of interpersonal relations which would subsist – an entirely individualistic notion.

157. They disapproved of the Court’s findings in *Schalk and Kopf* (§ 94), claiming that they were findings of a political not a juridical nature, which excluded children from being the essence of family life. Even worse, in *Vallianatos* (§ 49), the Grand Chamber considered that not even cohabitation was necessary to constitute family life. They also wondered whether stability of a relationship was a pertinent criterion (*ibid.*, § 73). In this light they questioned what constituted family life, given that it no longer required a public commitment, or the presence of children, or cohabitation. It thus appeared that the existence of feelings was enough to establish family life. However, in their view, feelings could play a part in private life only, but not in family life. It followed that there was no objective definition of family life. This loss of definition was further reaffirmed in *Burden v. the United Kingdom* ([GC], no. 13378/05, ECHR 2008), and *Stübing v. Germany* (no. 43547/08, 12 April 2012).

158. The ECLJ submitted that the refusal to consider on an equal footing a marital family and a stable homosexual relationship was justified on the basis of the consequences connected to procreation and filiation, as well as the relationship between society and the State. In their view, to consider them as comparable would mean that all the rights applicable to married couples would also apply to them, including those related to parental issues, given that it would be illusory to allow them to marry but not to found a family. It would therefore mean accepting medically assisted procreation for female couples and surrogacy for male couples, with the consequences this would have for the children so conceived. As regards the relation with the State, they noted that a State wanting to define “family” would be a totalitarian state. Indeed, in their view, the drafters of the Convention wanted to safeguard the family from the actions of the State, and not allow the State to define the concept of family, according to the majority’s view of it – which was based on a view that it was the individual and not the family who was at the core of society.

## 2. *The Court’s assessment*

### (a) **Article 8**

#### (i) *General principles*

159. While the essential object of Article 8 is to protect individuals against arbitrary interference by public authorities, it may also impose on a State certain positive obligations to ensure effective respect for the rights protected by Article 8 (see, among other authorities, *X and Y v. the Netherlands*, 26 March 1985, § 23, Series A no. 91; *Maumousseau and Washington v. France*, no. 39388/05, § 83, 6 December 2007; *Söderman v. Sweden* [GC], no. 5786/08, § 78, ECHR 2013; and *Hämäläinen v. Finland* [GC], no. 37359/09, § 62, ECHR 2014). These 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 (see, *inter alia*, *S.H. and Others v. Austria* [GC], no. 57813/00, § 87, ECHR 2011, and *Söderman*, cited above, § 78).

160. The principles applicable to assessing a State’s positive and negative obligations under the Convention are similar. Regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, the aims in the second paragraph of Article 8 being of a certain relevance (see *Gaskin v. the United Kingdom*, 7 July 1989, § 42, Series A no. 160, and *Roche v. the United Kingdom* [GC], no. 32555/96, § 157, ECHR 2005-X).

161. The notion of “respect” is not clear-cut, especially as far as positive obligations are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion’s requirements will vary considerably from case to case (see

*Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 72, ECHR 2002-VI). Nonetheless, certain factors have been considered relevant for the assessment of the content of those positive obligations on States (see *Hämäläinen*, cited above, § 66). Of relevance to the present case is 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 (see, *mutatis mutandis*, *Christine Goodwin*, cited above, §§ 77-78; *I. v. the United Kingdom* [GC], no. 25680/94, § 58, 11 July 2002, and *Hämäläinen*, cited above, § 66). Other factors relate to the impact of the alleged positive obligation at stake on the State concerned. The question here is whether the alleged obligation is narrow and precise or broad and indeterminate (see *Botta v. Italy*, 24 February 1998, § 35, *Reports* 1998-I) or about the extent of any burden the obligation would impose on the State (see *Christine Goodwin*, cited above, §§ 86-88).

162. In implementing their positive obligation under Article 8 the States enjoy a certain margin of appreciation. A number of factors must be taken into account when determining the breadth of that margin. In the context of “private life” the Court has considered that where a particularly important facet of an individual’s existence or identity is at stake the margin allowed to the State will be restricted (see, for example, *X and Y*, cited above, §§ 24 and 27; *Christine Goodwin*, cited above, § 90; see also *Pretty v. the United Kingdom*, no. 2346/02, § 71, ECHR 2002-III). Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider (see *X, Y and Z v. the United Kingdom*, 22 April 1997, § 44, *Reports* 1997-II; *Fretté v. France*, no. 36515/97, § 41, ECHR 2002-I; and *Christine Goodwin*, cited above, § 85). There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests or Convention rights (see *Fretté*, cited above, § 42; *Odièvre v. France* [GC], no. 42326/98, §§ 44-49, ECHR 2003-III; *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-I; *Dickson v. the United Kingdom* [GC], no. 44362/04, § 78, ECHR 2007-V; and *S.H. and Others*, cited above, § 94).

(ii) *Recent relevant case-law and the scope of the present case*

163. The Court has already been faced with complaints concerning the lack of recognition of same-sex unions. However, in the most recent case of *Schalk and Kopf v. Austria*, when the Court delivered judgment the applicants had already obtained the opportunity to enter into a registered partnership. Thus, the Court had solely to determine whether the respondent State should have had provided the applicants with an alternative means of legal recognition of their partnership any earlier than it did (that is, before 1 January 2010). Having noted the rapidly developing European consensus which had emerged in the previous decade, but that there was not yet a majority of States providing for legal recognition of same-sex couples (at the time nineteen states), the Court considered the area in question to be one of evolving rights with no established consensus, where States enjoyed a margin of appreciation in the timing of the introduction of legislative changes (§ 105). Thus, the Court concluded that, though not in the vanguard, the Austrian legislator could not be reproached for not having introduced the Registered Partnership Act any earlier than 2010 (see *ibid.*, § 106). In that case the Court also found that Article 14 taken in conjunction with Article 8 did not impose an obligation on Contracting States to grant same-sex couples access to marriage (*ibid.*, § 101).

164. In the present case the applicants still today have no opportunity to enter into a civil union or registered partnership (in the absence of marriage) in Italy. It is thus for the Court to determine whether Italy, at the date of the analysis of the Court, namely in 2015, failed to



comply with a positive obligation to ensure respect for the applicants' private and family life, in particular through the provision of a legal framework allowing them to have their relationship recognised and protected under domestic law.

(iii) *Application of the general principles to the present case*

165. The Court reiterates that it has already held that same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships, and that they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship (see *Schalk and Kopf*, § 99, and *Vallianatos*, §§ 78 and 81, both cited above). It follows that the Court has already acknowledged that same-sex couples are in need of legal recognition and protection of their relationship.

166. That same need, as well as the will to provide for it, has been expressed by the Parliamentary Assembly of the Council of Europe, which recommended that the Committee of Ministers call upon member States, among other things, "to adopt legislation making provision for registered partnerships" as long as fifteen years ago, and more recently by the Committee of Ministers (in its Recommendation CM/Rec(2010)5) which invited member States, where national legislation did not recognise nor confer rights or obligations on registered same-sex partnerships, 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 (see paragraphs 57 and 59 above).

167. The Court notes that the applicants in the present case, who are unable to marry, have been unable to have access to a specific legal framework (such as that for civil unions or registered partnerships) capable of providing them with the recognition of their status and guaranteeing to them certain rights relevant to a couple in a stable and committed relationship.

168. The Court takes note of the applicants' situation within the Italian domestic system. As regards registration of the applicants' same-sex unions with the "local registers for civil unions", the Court notes that where this is possible (that is in less than 2% of existing municipalities) this action has merely symbolic value and is relevant for statistical purposes; it does not confer on the applicants any official civil status, and it by no means confers any rights on same-sex couples. It is even devoid of any probative value (of a stable union) before the domestic courts (see paragraph 115 above).

169. The applicants' current status in the domestic legal context can only be considered a "*de facto*" union, which may be regulated by certain private contractual agreements of limited scope. As regards the mentioned cohabitation agreements, the Court notes that while providing for some domestic arrangements in relation to cohabitation (see paragraphs 41 and 129 above) such private agreements fail to provide for some basic needs which are fundamental to the regulation of a relationship between a couple in a stable and committed relationship, such as, *inter alia*, the mutual rights and obligations they have towards each other, including moral and material support, maintenance obligations and inheritance rights (compare *Vallianatos*, § 81 *in fine*, and *Schalk and Kopf*, § 109, both cited above). The fact that the aim of such contracts is not that of the recognition and protection of the couple is evident from the fact that they are open to anyone cohabiting, irrespective of whether they are a couple in a committed stable relationship (see paragraph 41 above). Furthermore, such a contract requires the persons to be cohabiting; however, the Court has already accepted that the existence of a stable union is independent of cohabitation (see *Vallianatos*, §§ 49 and 73). Indeed, in the globalised world of today various couples, married or in a registered partnership, experience periods during which they conduct their relationship at long distance, needing to maintain residence in different countries, for professional or other reasons. The Court considers that that fact in itself has no bearing on the

existence of a stable committed relationship and the need for it to be protected. It follows that, quite apart from the fact that cohabitation agreements were not even available to the applicants before December 2013, such agreements cannot be considered as giving recognition and the requisite protection to the applicants' unions.

170. Further, it has not been proved that the domestic courts could issue a statement of formal recognition, nor has the Government explained what would have been the implications of such a statement (see paragraph 82 above). While the national courts have repeatedly upheld the need to ensure protection for same sex-unions and to avoid discriminatory treatment, currently, in order to receive such protection the applicants, as with others in their position, must raise a number of recurring issues with the domestic courts and possibly even the Constitutional Court (see paragraph 16 above), to which the applicants have no direct access (see *Scoppola v. Italy* (no. 2) [GC], no. 10249/03, § 70, 17 September 2009). From the case-law brought to the Court's attention, it transpires that while recognition of certain rights has been rigorously upheld, other matters in connection with same-sex unions remain uncertain, given that, as reiterated by the Government, the courts make findings on a case-by-case basis. The Government also admitted that protection of same-sex unions received more acceptance in certain branches than in others (see paragraph 131 above). In this connection it is also noted that the Government persistently exercise their right to object to such claims (see, for example, the appeal against the decision of the Tribunal of Grosseto) and thus they show little support for the findings on which they are hereby relying.

171. As indicated by the ARCD the law provides explicitly for the recognition of a same-sex partner in very limited circumstances (see paragraph 146 above). It follows that even the most regular of "needs" arising in the context of a same-sex couple must be determined judicially, in the uncertain circumstances mentioned above. In the Court's view, the necessity to refer repeatedly to the domestic courts to call for equal treatment in respect of each one of the plurality of aspects which concern the rights and duties between a couple, especially in an overburdened justice system such as the one in Italy, already amounts to a not-insignificant hindrance to the applicants' efforts to obtain respect for their private and family life. This is further aggravated by a state of uncertainty.

172. It follows from the above that the current available protection is not only lacking in content, in so far as it fails to provide for the core needs relevant to a couple in a stable committed relationship, but is also not sufficiently stable – it is dependent on cohabitation, as well as the judicial (or sometimes administrative) attitude in the context of a country that is not bound by a system of judicial precedent (see *Torri and Others v. Italy*, (dec.), nos. 11838/07 and 12302/07, § 42, 24 January 2012). In this connection the Court reiterates that coherence of administrative and legal practices within the domestic system must be regarded as an important factor in the assessment carried out under Article 8 (see paragraph 161 above).

173. In connection with the general principles mentioned in paragraph 161 above, the Court observes that, it also follows from the above examination of the domestic context that there exists a conflict between the social reality of the applicants, who for the most part live their relationship openly in Italy, and the law, which gives them no official recognition on the territory. In the Court's view an obligation to provide for the recognition and protection of same-sex unions, and thus to allow for the law to reflect the realities of the applicants' situations, would not amount to any particular burden on the Italian State be it legislative, administrative or other. Moreover, such legislation would serve an important social need – as observed by the ARCD, official national statistics show that there are around one million homosexuals (or bisexuals), in central Italy alone.

174. In view of the above considerations, the Court considers that in the absence of marriage, same-sex couples like the applicants have a particular interest in obtaining the option of entering into a form of civil union or registered partnership, since this would be the most appropriate way in which they could have their relationship legally recognised and which would guarantee them the relevant protection – in the form of core rights relevant to a couple in a stable and committed relationship – without unnecessary hindrance. Further, the Court has already held that 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 (see *Vallianatos*, cited above, § 81). This recognition would further bring a sense of legitimacy to same-sex couples.

175. The Court reiterates that in assessing a State’s positive obligations regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole. Having identified above the individuals’ interests at play, the Court must proceed to weigh them against the community interests.

176. Nevertheless, in this connection the Court notes that the Italian Government have failed to explicitly highlight what, in their view, corresponded to the interests of the community as a whole. They however considered that “time was necessarily required to achieve a gradual maturation of a common view of the national community on the recognition of this new form of family”. They also referred to “the different sensitivities on such a delicate and deeply felt social issue” and the search for a “unanimous consent of different currents of thought and feeling, even of religious inspiration, present in society”. At the same time, they categorically denied that the absence of a specific legal framework providing for the recognition and protection of same-sex unions attempted to protect the traditional concept of family, or the morals of society. The Government instead relied on their margin of appreciation in the choice of times and the modes of a specific legal framework, considering that they were better placed to assess the feelings of their community.

177. As regards the breadth of the margin of appreciation, the Court notes that this is dependent on various factors. While the Court can accept that the subject matter of the present case may be linked to sensitive moral or ethical issues which allow for a wider margin of appreciation in the absence of consensus among member States, it notes that the instant case is not concerned with certain specific “supplementary” (as opposed to core) rights which may or may not arise from such a union and which may be subject to fierce controversy in the light of their sensitive dimension. In this connection the Court has already held that States enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition and the rights and obligations conferred by such a union or registered partnership (see *Schalk and Kopf*, cited above, §§ 108-09). Indeed, the instant case concerns solely the general need for legal recognition and the core protection of the applicants as same-sex couples. The Court considers the latter to be facets of an individual’s existence and identity to which the relevant margin should apply.

178. In addition to the above, of relevance to the Court’s consideration is also the movement towards legal recognition of same-sex couples which has continued to develop rapidly in Europe since the Court’s judgment in *Schalk and Kopf*. To date a thin majority of CoE States (twenty-four out of forty-seven, see paragraph 55 above) have already legislated in favour of such recognition and the relevant protection. The same rapid development can be identified globally, with particular reference to countries in the Americas and Australasia (see paragraphs 65 and 135 above). The information available thus goes to show the continuing international movement towards legal recognition, to which the Court cannot but attach some importance (see, *mutatis mutandis*, *Christine Goodwin*, § 85, and *Vallianatos*, § 91, both cited above).

179. Turning back to the situation in Italy, the Court observes that while the Government is usually better placed to assess community interests, in the present case the Italian legislature seems not to have attached particular importance to the indications set out by the national community, including the general Italian population and the highest judicial authorities in Italy.

180. The Court notes that in Italy the need to recognise and protect such relationships has been given a high profile by the highest judicial authorities, including the Constitutional Court and the Court of Cassation. Reference is made particularly to the judgment of the Constitutional Court no. 138/10 in the first two applicants' case, the findings of which were reiterated in a series of subsequent judgments in the following years (see some examples at paragraph 45 above). In such cases, the Constitutional Court, notably and repeatedly called for a juridical recognition of the relevant rights and duties of homosexual unions (see, *inter alia*, paragraph 16 above), a measure which could only be put in place by Parliament.

181. The Court observes that such an expression reflects the sentiments of a majority of the Italian population, as shown through official surveys (see paragraph 144 above). The statistics submitted indicate that there is amongst the Italian population a popular acceptance of homosexual couples, as well as popular support for their recognition and protection.

182. Indeed, in their observations before this Court, the same Italian Government have not denied the need for such protection, claiming that it was not limited to recognition (see paragraph 128 above), which moreover they admitted was growing in popularity amongst the Italian community (see paragraph 130 above).

183. Nevertheless, despite some attempts over three decades (see paragraphs 126 and 46-47 above) the Italian legislature has been unable to enact the relevant legislation.

184. In this connection the Court recalls that, although in a different context, it has previously held that "a deliberate attempt to prevent the implementation of a final and enforceable judgment and which is, in addition, tolerated, if not tacitly approved, by the executive and legislative branch of the State, cannot be explained in terms of any legitimate public interest or the interests of the community as a whole. On the contrary, it is capable of undermining the credibility and authority of the judiciary and of jeopardising its effectiveness, factors which are of the utmost importance from the point of view of the fundamental principles underlying the Convention (see *Broniowski v. Poland* [GC], no. 31443/96, § 175, ECHR 2004-V). While the Court is aware of the important legal and factual differences between *Broniowski* and the present case, it nevertheless considers that in the instant case, the legislature, be it willingly or for failure to have the necessary determination, left unheeded the repetitive calls by the highest courts in Italy. Indeed the President of the Constitutional Court himself in the annual report of the court regretted the lack of reaction on behalf of the legislator to the Constitutional Court's pronouncement in the case of the first two applicants (see paragraph 43 above). The Court considers that this repetitive failure of legislators to take account of Constitutional Court pronouncements or the recommendations therein relating to consistency with the Constitution over a significant period of time, potentially undermines the responsibilities of the judiciary and in the present case left the concerned individuals in a situation of legal uncertainty which has to be taken into account.

185. In conclusion, in the absence of a prevailing community interest being put forward by the Italian Government, against which to balance the applicants' momentous interests as identified above, and in the light of domestic courts' conclusions on the matter which remained unheeded, the Court finds that the Italian Government 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.



186. To find otherwise today, the Court would have to be unwilling to take note of the changing conditions in Italy and be reluctant to apply the Convention in a way which is practical and effective.

187. There has accordingly been a violation of Article 8 of the Convention.

**(b) Article 14 in conjunction with Article 8**

188. Having regard to its finding under Article 8 (see paragraph 187 above), the Court considers that it is not necessary to examine whether, in this case, there has also been a violation of Article 14 in conjunction with Article 8.

**IV. ALLEGED VIOLATION OF ARTICLE 12 ALONE AND ARTICLE 14 READ IN CONJUNCTION WITH ARTICLE 12 OF THE CONVENTION**

189. The applicants in application no. 18766/11 relied on Article 12 on its own, and argue that since the judgment in *Schalk and Kopf* (cited above), more countries have legislated in favour of gay marriage, and many more are in the process of discussing the issue. Therefore, given that the Convention is a living instrument, the Court should redetermine the question in the light of the position today.

190. All the applicants further complained that they had suffered discrimination as a result of the prohibition to marry applicable to them. Noting the Court's recent acceptance in *Schalk and Kopf* of the applicability of Article 12 (apart from Article 8) to such situations, the applicants argued that while it was true that the Court held that the provision did not oblige states to confer such a right on homosexual couples, it was nevertheless for the Court to examine whether the failure to provide for same-sex marriage was justified in view of all the relevant circumstances. They argued that in the present cases it was particularly relevant that no other option was open for the applicants to have their unions legally recognised. Moreover, such exclusion could no longer be held as legitimate, given the social reality (according to a 2010 study by Eurispes 61.4% of Italians were in favour of some sort of union, 20.4% of whom were in favour of it being in the form of a marriage). To persist on denying certain rights to same-sex couples only continued to marginalise and stigmatise a minority group in favour of a majority with discriminatory tendencies. Lastly, they submitted that even assuming it could be considered legitimate it was clearly not proportionate, given the narrow margin of appreciation afforded to States when applying different treatment on the basis of sexual orientation. The same margin had to be considered narrow also in view of the fact that most States had in fact regulated for some form of civil union (see *Schalk and Kopf*, cited above, § 105).

191. The Court notes that in *Schalk and Kopf* the Court 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. However, as matters stood (at the time only six out of forty-seven CoE member States allowed same-sex marriage), the question whether or not to allow same-sex marriage was left to regulation by the national law of the Contracting State. The Court felt 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. It followed that Article 12 of the Convention did not impose an obligation on the respondent Government to grant a same-sex couple like the applicants access to marriage (§§ 61-63). The same conclusion was reiterated in the more recent *Hämäläinen* (cited above, § 96), where the Court held that while 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.



192. The Court notes that despite the gradual evolution of States on the matter (today there are eleven CoE states that have recognised same-sex marriage) the findings reached in the cases mentioned above remain pertinent. In 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.

193. Similarly, in *Schalk and Kopf*, the Court held that Article 14 taken in conjunction with Article 8, a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation either. The Court considers that the same can be said of Article 14 in conjunction with Article 12.

194. It follows that both the complaint under Article 12 alone, and that under Article 14 in conjunction with Article 12 are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

## V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

195. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party”.

### A. *Damage*

196. The applicants in application no. 18766/11 claimed that they had suffered material damage, as a result of losses in leave days for family reasons as well as bonuses, and inability to enjoy a loan, losses which were however difficult to quantify. They further noted they had suffered non-pecuniary damage, without making a specific claim in that respect.

197. The applicants in application no. 36030/11 claimed non-pecuniary damage in a sum to be determined by the Court, though they considered that EUR 7,000 for each applicant may be considered equitable in line with the award made in *Vallianatos* (cited above). They also requested the Court to make specific recommendations to the Government with a view to legislating in favour of civil unions for same-sex couples.

198. The Government submitted that the applicants had not suffered any actual damage.

199. The Court notes that the pecuniary claim of the applicants in applications no. 18766/11 is both unquantified and unsubstantiated. On the other hand, the Court considers that all the applicants have suffered non-pecuniary damage, and awards the applicants EUR 5,000 each, plus any tax that may be chargeable to them, in this respect.

200. Lastly, in connection with the applicants' request, the Court notes that it has found that the absence of a legal framework allowing for recognition and protection of their relationship violates their rights under Article 8 of the Convention. In accordance with Article 46 of the Convention, it will be for the respondent State to implement, under the supervision of the Committee of Ministers, appropriate general and/or individual measures to fulfil its obligations to secure the right of the applicants and other persons in their position to respect for their private and family life (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII, *Christine Goodwin*, cited above, § 120, ECHR 2002-VI; and *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 134, ECHR 2008).

### ***B. Costs and expenses***

201. The applicants in application no. 18766/11 also claimed EUR 8,200 for costs and expenses incurred before the domestic courts and EUR 5,000 for those incurred before the Court.

202. The applicants in application no. 36030/11 claimed EUR 11,672.96 for costs and expenses incurred before this Court as calculated in accordance with Italian law and bearing in mind the complex issues dealt with in the case as well as the extensive observations, including those of the third parties.

203. The Government submitted that the applicants' claims for expenses were "groundless and lacking any support".

204. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings, as it has not been substantiated by means of any documents. The Court, having considered the two claims made by the different lawyers and the lack of detail in the claim concerning application no. 18766/11, further considers it reasonable to award the sum of EUR 4,000 jointly, plus any tax that may be chargeable to the applicants in respect of application no. 18766/11, and EUR 10,000, jointly, plus any tax that may be chargeable to the applicants, to be paid directly into their representatives' bank accounts, in respect of application no. 36030/11 for the proceedings before the Court.

### ***C. Default interest***

205. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## **FOR THESE REASONS, THE COURT, UNANIMOUSLY,**

1. *Declares* the complaints under Article 8 alone and Article 14 in conjunction with Article 8 admissible, and the remainder of the applications inadmissible;
2. *Holds* that there has been a violation of Article 8 of the Convention;
3. *Holds* that there is no need to examine the complaint under Article 14 in conjunction with Article 8 of the Convention;
4. *Holds*
  - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
    - (i) EUR 5,000 (five thousand euros) each, plus any tax that may be chargeable, in respect of non-pecuniary damage;
    - (ii) EUR 4,000 (four thousand euros), jointly, to the applicants in application no. 18766/11, plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
    - (iii) EUR 10,000 (ten thousand euros), jointly, to the applicants in application no. 36030/11, plus any tax that may be chargeable to the applicants, in respect of costs and expenses, to be paid directly into their representatives' bank accounts;

- (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicants' claim for just satisfaction. Done in English, and notified in writing on 21 July 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos  
Registrar

Päivi Hirvelä  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Mahoney joined by Judges Tsotsoria and Vehabović is annexed to this judgment. P.H. E.E.P.

## **VI. CONCURRING OPINION OF JUDGE MAHONEY JOINED BY JUDGES TSOTSORIA AND VEHAHOVIĆ**

1. We, the three judges subscribing to this concurring opinion, have voted with our four colleagues for a violation of Article 8 of the Convention in the present case, but on the basis of different, narrower reasoning. In short, we find no need to assert that today Article 8 imposes on Italy what our colleagues characterise as a positive obligation to provide same-sex couples such as the applicants with a specific legal framework providing for the recognition and protection of their same-sex unions (paragraph 185 *in fine* of the judgment). What is decisive for us in the present case may be briefly summarised as follows:
- the Italian State has chosen, through its highest courts, notably the Constitutional Court, to declare that two people of the same sex living in stable cohabitation are invested by the Italian Constitution with a fundamental right to obtain juridical recognition of the relevant rights and duties attaching to their union;
  - it is this voluntary, active intervention by the Italian State into the sphere of personal relations covered by Article 8 that attracts the application of the Convention's guarantee of the right to respect for private and family life, without there being any call to invoke the pre-existence of a positive Convention obligation;
  - the requirements flowing from Article 8 as regards any State regulation of the exercise of the right to respect for private and family life were not met in the circumstances of the present case because of the defective nature of the follow-up, within the Italian legal order, to the Constitutional Court's authoritative judicial declaration of a constitutional entitlement for persons in the position of the applicants to some form of adequate legal recognition of stable same-sex unions.

This reasoning is explained in further detail below.

2. In its judgment no. 138 of 15 April 2010 in relation to the constitutional challenges of the applicants Mr Oliari and Mr A, the Italian Constitutional Court, while rejecting the arguments under Article 29 of the Constitution (on the institution of marriage), ruled that, by virtue of Article 2 of the Constitution, two people of the same sex in stable cohabitation have a fundamental right to freely express their personality in a couple, obtaining –in time and by the means and the limits to be set by law– juridical recognition of the relevant rights and duties (these are the words in which the ruling is summarised

in paragraph 16 of the judgment; the text of Articles 2 and 29 of the Italian Constitution is set out in paragraph 33 of the judgment). This ruling represents an authoritative statement of the regulation, within the Italian legal order, of the applicants' right to respect for their private and family life as far as the legal status that should be given to their union as a same-sex couple is concerned. The "fundamental right" thereby recognised to obtain juridical recognition of the relevant rights and duties attaching to a same-sex union is one deriving, not from any positive obligation enshrined in the Convention, but from the wording of Article 2 of the Italian Constitution.

3. Under the constitutional arrangements in Italy, while the Constitutional Court may make a pronouncement of unconstitutionality in respect of existing legislation, it has no power to fill a legislative lacuna even though, as in its judgment no. 138/2010, it may have identified that lacuna as entailing a situation which is not compatible with the Constitution. Thus, in the case of Mr Oliari and Mr A in 2010, it was not for the Constitutional Court to proceed to the formulation of the appropriate legal provisions, but for the Italian Parliament (see paragraphs 36 and 45 of the present judgment for similar explanations of its powers given by the Constitutional Court in its subsequent rulings reiterating the general conclusion stated in judgment no. 138/10). As the present judgment (at paragraph 82) puts it, "the Constitutional Court ... could not but invite the legislature to take action" (see likewise paragraphs 84 and 180 *in fine* of the judgment). In this connection it is worth citing the report that the then President of the Constitutional Court addressed to the highest Italian constitutional authorities in 2013 (quoted at paragraph 43 of the judgment):

"Dialogue is sometimes more difficult with the [Constitutional] Court's natural interlocutor. This is particularly so in cases where it solicits the legislature to modify a legal norm which it considered to be in contrast with the Constitution. Such requests are not to be underestimated. They constitute, in fact, the only means available to the [Constitutional] Court to oblige the legislative organs to eliminate any situation which is not compatible with the Constitution, and which, albeit identified by the [Constitutional] Court, does not lead to a pronouncement of anti-constitutionality. ... A request of this type which remained unheeded was that made in judgment no. 138/10, which, while finding the fact that a marriage could only be contracted by persons of a different sex to be constitutional compliant, also affirmed that same-sex couples had a fundamental right to obtain legal recognition, with the relevant rights and duties, of their union. It left it to Parliament to provide for such regulation, by the means and within the limits deemed appropriate".

In sum, as explained by the then President of the Constitutional Court:

- the Constitutional Court had affirmed the fundamental right of same-sex couples under the Italian Constitution to obtain legal recognition of their union;
- however, the only means available to the Constitutional Court to "oblige" the legislative organs to eliminate the unconstitutional lacuna in Italian law denying same-sex couples this nationally guaranteed fundamental right was to "solicit", or address a "request" to, Parliament to take the necessary legislative action.

The applicants in application no. 36030/11 added their explanation that "Constitutional Court judgment no. 138/10 had the effect of affirming the existence of ... a constitutional duty upon the legislature to enact an appropriate general regulation on the recognition of same-sex unions, with consequent rights and duties for partners" (paragraph 114 of the judgment).

4. Yet, to date, five years have elapsed since the judgment of the Constitutional Court, with no appropriate legislation having been enacted by the Italian Parliament. The applicants are thus in the unsatisfactory position of being recognised by the Constitutional Court as enjoying under Italian constitutional law an inchoate "fundamental right" affecting

an important aspect of the legal status to be accorded to their private and family life, but this inchoate “fundamental right” has not received adequate concrete implementation from the competent arm of government, namely the legislature. The applicants, like other same-sex couples in their position, have been left in limbo, in a state of legal uncertainty as regards the legal recognition of their union to which they are entitled under the Italian Constitution.

5. On the basis of the foregoing facts, it is not necessary for the Court to decide whether Italy has a positive obligation under paragraph 1 of Article 8 of the Convention to accord appropriate legal recognition within its legal order to the union of same-sex couples. The declaration by the Constitutional Court that Article 2 of the Italian Constitution confers on two people of the same sex living in stable cohabitation a “fundamental right” under domestic constitutional law to obtain juridical recognition of their union constitutes an active intervention by the State into the sphere of private and family life covered by Article 8 of the Convention. Judgment no. 138/10 was not an isolated ruling: in the words of the present judgment (at paragraph 180), “in Italy the need to recognise and protect such relationships has been given a high profile by the highest judicial authorities, including the Constitutional Court and the Court of Cassation”, with the Constitutional Court repeatedly calling on Parliament to adopt the requisite legislation giving juridical recognition of the relevant rights and duties of homosexual unions. In our view, this voluntary action of the State in relation to the legal regulation of the applicants’ private and family life in itself and of itself attracts the application of Article 8 of the Convention in their cases and the accompanying obligation on the Italian State to comply with the requirements flowing from Article 8, notably those set out in its paragraph 2.
6. Undeniably, given what the respondent Government describe as the difficult exercise of reaching a balance between “different sensitivities on such a delicate and deeply felt social issue” (paragraph 126 of the judgment), the Italian State is to be recognised as having a certain margin of appreciation in regard both to the choice of the precise legal status to be accorded to same-sex unions and to the timing for the enactment of the relevant legislation (see paragraph 177 of the judgment, which makes a similar point).
7. On the other hand, whatever constitutional framework and distribution of powers between the arms of government a Contracting State may choose to adopt, there is an overall duty of trust and good faith owed by the State and its public authorities to the citizen in a democratic society governed by the rule of law (see, *mutatis mutandis*, *Broniowski v. Poland* [GC], no. 31443/96, §§173 and 175, ECHR 2004-V). In our view, despite the margin of appreciation available to the Italian State, this duty of trust was not respected in the present case as regards the follow-up to judgment no. 138/10 of the Constitutional Court in which an unconstitutional lacuna, involving the denial of a “fundamental right”, was identified as existing in the Italian legal order. There is, and has remained for five years, a discordance between the Constitutional Court’s declaration as to the entitlement of a given category of individuals under the Constitution and the action, or rather inaction, of the Italian legislature, as the competent arm of government, in implementing that entitlement. The beneficiaries of the declaration of the Constitutional Court as to the incompatibility with the Constitution of the lack of adequate legal recognition of same-sex unions have been denied the level of protection of their private and family life to which they are entitled under Article 2 of the Italian Constitution.
8. Furthermore, Italian law regarding the legal status to be accorded to same-sex unions has been left in a state of unregulated uncertainty over an excessive period of time. This enduring situation of legal uncertainty, relied on in the present judgment (for example, at paragraphs 170, 171 and 184 *in fine*), is such as to render the domestic regulation of the applicants’ same-sex union incompatible with the democratic concept of “law”



inherent in paragraph 2's requirement that any "interference" with the right to respect for private and family life be "in accordance with the law". This is especially so since, as the judgment points out (at paragraph 171), "the necessity to refer repeatedly to the domestic courts to call for equal treatment in respect of each one of the plurality of aspects which concern the rights and duties between a couple, especially in an overburdened justice system such as the one in Italy, already amounts to a not-insignificant hindrance to the applicants' efforts to obtain respect for their private and family life".

What is more, the judgment adds (at paragraph 170), the Government persistently exercise their right to object to such claims of equal treatment brought before the national courts on a case-by-case basis in various branches of the law by same-sex couples.

9. Like our colleagues, we note that "the Italian Government have failed to explicitly highlight what, in their view, corresponded to the interests of the community as a whole" in order to explain the omission of the Parliament to legislate so as to implement the fundamental constitutional right identified by the Constitutional Court (see paragraph 176 of the judgment). We likewise agree with our colleagues in rejecting the various arguments that the Government did adduce by way of justification of this continuing omission, notably the arguments as to registration of same-sex unions by some municipalities, private contractual agreements and the capacity of the domestic courts on the domestic law as it stands to afford adequate legal recognition and protection (see, in particular, paragraphs 81-82 and 168-172). As our colleagues point out, it is also significant that "there is amongst the Italian population a popular acceptance of homosexual couples, as well as popular support for their recognition and protection", such that the rulings of the highest judicial authorities in Italy, including the Constitutional Court and the Court of Cassation, reflect the sentiments of a majority of the community in Italy (paragraphs 180-181 of the judgment).
10. Where we part company with our colleagues is as regards the question where to situate the analysis of the facts of the case for the purposes of Article 8 of the Convention. 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. To begin with, we are not sure that such a limitation of a positive obligation under the Convention to local conditions is conceptually possible. Secondly, at some points our colleagues nonetheless appear to rely, at least partly, on general reasoning capable of being read as implying a free-standing positive obligation incumbent on all the Contracting States to provide a legal framework for same-sex unions (see, for example, paragraph 165 of the judgment). It might conceivably be reasoned that, on analogy with *A, B and C v. Ireland* [GC] (application no. 25579/05, ECHR 2010, §§253, 264 and 267), a "positive obligation" on the Italian State to enact adequate implementing legislation arises from Article 2 of the Italian Constitution as interpreted by the Constitutional Court. That may well be true as a matter of Italian constitutional law, as argued by the applicants in application no. 36030/11 (see paragraph 3 *in fine* above of the present concurring opinion). However, this is not what is normally meant by a positive obligation being imposed by a Convention Article. In particular, whenever a State chooses to regulate the exercise of an activity coming within the scope of a Convention right, it is obliged to do so in compliance with the express and inherent requirements of the Convention Article in question – for example, in a manner that does not involve excessive legal uncertainty for the Convention right-holder. In such circumstances, we are in the realm of right-regulation, not the realm of positive Convention obligations. This is why we have urged (at paragraph 5 above in the present concurring opinion) that

the applicants' grievance should be analysed in terms of defective State intervention in the sphere of private and family life, rather than in terms of failure to fulfil a positive Convention obligation.

11. In conclusion, for us, the unsatisfactory state of the relevant domestic law on the recognition of same-sex unions, displaying a prolonged failure to implement a nationally recognized fundamental constitutional right in an effective manner and giving rise to continuing uncertainty, renders the active intervention of the Italian State into the regulation of the applicants' right to respect for their private and family life incompatible with the requirements of Article 8 of the Convention.
12. The foregoing concurring opinion is not to be taken as expressing a view on whether, in the present-day conditions of 2015 in the light of evolving attitudes in democratic society in Europe, paragraph 1 of Article 8 should now be interpreted as embodying, for Italy or generally for all Contracting States, a positive obligation to accord appropriate legal recognition and protection to same-sex unions. Our point is that there is no necessity in the present case to have recourse to such a "new" interpretation, as in any event a finding in favour of the applicants is dictated on a narrower ground on the basis of existing jurisprudence and the existing classic analysis of the requirements accompanying active State intervention regulating the exercise of the right under Article 8 of the Convention to respect for private and family life.

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**SENTENCIA: TEDH** (Solicitud n°40183/07)

**Tribunal:** Tribunal Europeo de Derechos Humanos (European Court of Human Rights (Sección quinta))

**Fecha:** 09/06/2016

**Asunto:** CHAPIN ET CHARPENTIER C. FRANCIA (Solicitud n°40183/07)

**Magistrados:** Angelika Nußberger, *Presidente*, Khanlar Hajiyev, Erik Møse, André Potocki, Faris Vehabović, Siofra O'LearyMártaíņš Mits, *Jueces*.

Después de haber deliberado en privada de 10 de mayo de 2016; Dicta la siguiente sentencia, adoptada en esa fecha:

### PROCEDIMIENTO

1. En el origen del caso está la solicitud (no 40183/07) dirigida contra la República francesa y de la cual dos ciudadanos de este Estado, los señores Stéphane Chapin y Bertrand Charpentier ("los demandantes") recurrieron al Tribunal el 6 de septiembre 2007 en virtud del artículo 34° del Convenio Europeo para la protección de los Derechos Humanos y las Libertades Fundamentales ("el Convenio").

2. Los demandantes fueron representados por el Lic. C. Mécary, abogada en París. El gobierno francés ("el Gobierno") fue representado por su agente, Lic. E. Belliard, directora de asuntos jurídicos en la Secretaría de Asuntos Extranjeros, a quién le siguió M.F. Alabrune.

3. Los demandantes alegan en particular la violación del artículo combinado con los artículos 8° y 12° del Convenio en razón de la anulación de su matrimonio.

4. El 7 de abril 2009, la solicitud fue comunicada al Gobierno. Las partes presentaron observaciones sobre la admisibilidad y el fondo del caso.

5. El 31 de agosto 2010, la sala decidió posponer su decisión sobre la celebración de una audiencia, para esperar la sentencia sobre el caso *Schalk y Kopf vs Austria* (no 30141/04, CEDH 2010).

6. El 8 de abril 2011, el presidente de la sala decidió, como lo permite el artículo 29º, fracción 3 del Convenio, que la sala se pronunciaría al mismo tiempo sobre la admisibilidad y sobre el fondo. Las partes presentaron observaciones complementarias.

7. El 24 de octubre 2012, el presidente decidió posponer el examen de la solicitud en la espera de la aprobación del proyecto de ley que permite el matrimonio entre personas de mismo sexo.

8. A raíz de la promulgación de la ley del 17 de mayo 2013 que “otorga derecho al matrimonio a las parejas de mismo sexo”, las partes presentaron nuevas observaciones complementarias.

9. También se recibieron observaciones comunes de parte de la FIDH (Federación internacional de las ligas de derechos humanos), de la CIJ (Comisión internacional de juristas) del AIRE Centre (Advice on Individual Rights in Europe) y de ILGA-Europe (European Region of the International Lesbian and Gay Association), representados por M.R. Wintermute, a quienes el presidente había autorizado a intervenir en el procedimiento escrito, como terceros (artículo 36º, fracción 2 del Convenio y 44º, fracción 3, inciso a) del reglamento).

## HECHOS

### I. LAS CIRCUNSTANCIAS DEL CASO

10. Los demandantes nacieron respectivamente en 1970 y 1973 y viven en Plassac (Gironde).

11. En mayo 2004, los demandantes presentaron un expediente ante los servicios del Registro Civil de la alcaldía de Bègles (Gironde). El 25 de mayo 2004, el oficial del Registro Civil de la alcaldía publica las amonestaciones.

12. Mediante notificaciones judiciales, expedidas respectivamente el 27 de mayo y el 3 de junio 2004, el Procurador de la República del Tribunal de Primera Instancia de Bordeaux le notificó su oposición al matrimonio al oficial del Registro Civil del municipio de Bègles, así como a los demandantes.

13. El 5 de junio 2004 el alcalde de Bègles, en su calidad de oficial del Registro Civil, celebró el matrimonio de los demandantes y lo inscribió en los registros del Registro Civil.

14. El 22 de junio 2004 el Procurador de la República citó en un día fijo a los demandantes ante el Tribunal de Primera Instancia de Bordeaux con el fin de declarar la nulidad del matrimonio.

15. Mediante sentencia del 27 de julio 2004, el Tribunal accedió a esta demanda. Declaró que según el derecho francés la diferencia de sexos era una condición del matrimonio, estimó que esta condición no constituía una infracción a los artículos 12º, 8º y 14º del Convenio, tal como el Tribunal los interpretó y concluyó que, si la evolución de las costumbres o el respeto de un principio de igualdad podía llevar a una redefinición del matrimonio, este asunto debía ser objeto de un debate y requería la intervención del legislador. Consecuentemente el Tribunal anuló el matrimonio de los demandantes y ordenó la inscripción de la sentencia al margen de sus actas de nacimiento y del acta de matrimonio.

16. Mediante sentencia del 19 de abril 2005, la Corte de Apelación de Bordeaux confirma el fallo. Constata en primer lugar, al igual que el Tribunal, que en el derecho francés la diferencia de sexo era una condición para la existencia del matrimonio. Al examinar luego esta condición respecto a los artículos 12º, 8º y 14º del Convenio, la Corte de Apelación observó primero que la legislación francesa permitía, específicamente mediante del concubinato y el Pacto Civil de Solidaridad,

abiertos a las personas de mismo sexo o de sexo diferente, “ múltiples posibilidades de vida de pareja, con o sin hijos, asegurándoles la Ley una protección igual para todos, con una jurisprudencia adaptada, derechos iguales para los hijos”, de modo que no descubría “ninguna discriminación en el derecho de fundar una pareja, de vivir en pareja, de mismo sexo o de sexo diferente, ni de fundar una familia libremente escogida, natural o legítima, con la posibilidad de adopción”.

17. La Corte de Apelación agregó lo siguiente: “La especificidad, y no la discriminación, provienen de que la Naturaleza no ha hecho potencialmente fecundos más que a las parejas de sexo diferente y que el legislador (...) quiso tomar en cuenta esta realidad biológica y “determinar sus formas”, al incluir a la pareja y su consecuencia previsible, los hijos comunes, en una institución específica llamada matrimonio, elección legislativa que se ha mantenido en el tiempo (...) Todas las parejas de sexo diferente, afectadas así por una eventualidad de filiación común, son tratadas por igual ya que tienen una libre elección y un libre acceso al matrimonio. Si bien es cierto que, a las parejas de mismo sexo, que la Naturaleza no creó potencialmente fecundos, no quedan afectados, en consecuencia, por esta institución. En esto su tratamiento jurídico es diferente, porque su situación no es análoga. Pero disponen por otro lado del derecho a que se les reconozca su unión en las mismas condiciones que todas las parejas de sexo diferente que no desean casarse, de modo que la distinción que resulta de esta especificidad está objetivamente fundada, justificada por un propósito legítimo y respeta una relación razonable de proporcionalidad entre los medios utilizados y el propósito que se tiene como objetivo”.

18. Finalmente, la Corte de Apelación examinó las consecuencias previsible -en especial sobre varias disposiciones del Código Civil- de la invalidación eventual del fallo que llevaría, sin preparación legislativa, a un “trastorno de los principios” que rigen las reglas de filiación y consideró, al igual que el Tribunal, que no le incumbía dirimir un problema de sociedad que no podía sino ser objeto de un debate político y de una intervención del legislador.

19. Los demandantes interpusieron un recurso en casación. En su reporte ampliatorio invocaron los artículos 8°, 12° y 14° del Convenio y se fundamentaron en la jurisprudencia pertinente de la Corte.

20. Mediante sentencia del 13 de marzo 2007, la Corte de Casación no admitió el recurso, observando en especial que “según la ley francesa, el matrimonio es la unión de un hombre y una mujer” y que este principio no quedaba contradicho por ninguna de las disposiciones del Convenio y de la Carta de los Derechos Fundamentales de la Unión Europea, de la cual recalco que carecía de obligatoriedad en Francia.

## II. EL DERECHO Y LA PRÁCTICA INTERNOS E INTERNACIONALES PERTINENTES

21. En la época de los hechos, el artículo 144° del Código Civil estaba redactado del modo siguiente: “El hombre antes de cumplir los diez y ocho años, y la mujer antes de los quince años cumplidos, no pueden contraer matrimonio”.

22. Por otro lado, el artículo 75° del mismo Código, relativo a la celebración del matrimonio, disponía en su última fracción, que el Oficial del Registro Civil debía recibir de cada una de las partes “la declaración de que quieren unirse como marido y mujer”.

23. El 16 de noviembre 2010, la Corte de Casación somete una cuestión prioritaria de constitucionalidad referida a estas disposiciones del Código Civil, y el Consejo Constitucional las declara de conformidad con la Constitución por decisión del 28 de enero 2011. Consideró en particular que el derecho de llevar una vida familiar normal, no implicaba el derecho de casarse para las parejas de mismo sexo, que al mantener el principio según el cual el matrimonio es la unión de un hombre y una mujer, el legislador consideró que la diferencia de situación entre las

parejas de mismo sexo y las parejas compuestas de un hombre y de una mujer podían justificar una diferencia de tratamiento en cuanto a las reglas del derecho familiar y que no le tocaba sustituir su apreciación por la del legislador.

24. Después de que se adoptó la Ley no 2013-404 del 17 de mayo 2013 que otorga el derecho al matrimonio a las parejas de mismo sexo, el nuevo artículo 143° del Código Civil dice así: “El matrimonio se contrae entre dos personas de sexo diferente o de mismo sexo”.

25. Según lo dispuesto en el artículo 515-1 del Código Civil, el Pacto Civil de Solidaridad (Pacs) establecido por la Ley del 15 de noviembre 1999 es “un contrato celebrado por dos personas mayores de edad, de sexo diferente o de mismo sexo, con el fin de organizar su vida en común”. El Pacs implica para los contratantes un cierto número de obligaciones, entre las cuales la de mantener una vida en común y procurarse ayuda material y una cooperación recíprocas. El Pacs también confiere a los contratantes algunos derechos en materia fiscal, patrimonial y social. Los contratantes forman así un solo hogar fiscal; por otro lado, se les asimila a los cónyuges casados en cuanto al ejercicio de ciertos derechos, especialmente para el seguro de enfermedad y maternidad y el seguro en caso de muerte. Algunos efectos propios del matrimonio siguen sin ser aplicables para los contratantes del Pacs, ya que la Ley no crea lazos de alianza o de vocación sucesoria entre contratantes. En particular, la disolución del Pacs escapa a los procedimientos judiciales de divorcio y puede intervenir en base a una simple declaración conjunta de los contratantes o por decisión unilateral de uno de ellos, notificada a su cocontratante (artículo 515-7 del Código Civil). Además, el Pacs no tiene incidencia alguna sobre las disposiciones del Código Civil relativas a la filiación adoptiva y a la autoridad parental (Gas y Dubois vs Francia, no 25951/07, fracción 24, CEDH 2012).

26. En cuanto al concubinato, queda definido por el artículo 515-8 del mismo Código como “una unión de hecho, caracterizada por una vida en común que presenta un carácter de estabilidad y de continuidad, entre dos personas, de sexo diferente o de mismo sexo, que viven en pareja”.

27. Una exposición del derecho comparado en la materia, así como textos pertinentes del Consejo de Europa y de la Unión Europea, se encuentra en la sentencia Oliari y otros vs Italia (nos 18766/11 y 36030/11, fracciones 53-64, 21 julio 2015).

## DERECHO

### I. SOBRE LA PRESUNTA VIOLACIÓN DEL ARTÍCULO 12° COMBINADO CON EL ARTÍCULO 14° DEL CONVENIO

28. Los demandantes consideran que el hecho de limitar el matrimonio a las personas de sexo diferente causa un perjuicio discriminatorio al derecho de casarse. Invocan los artículos 12° y 14° combinados del Convenio, que dicen lo siguiente: Artículo 12° « A partir de la edad núbil, el hombre y la mujer tienen derecho a casarse y a fundar una familia según las leyes nacionales que rigen el ejercicio de este derecho” Artículo 14° « El goce de los derechos y las libertades reconocidos en el (...) Convenio debe garantizarse, sin distinción alguna, en particular fundada en el sexo, la raza, el color, el idioma, la religión, las opiniones políticas o de cualquier otra índole, el origen nacional o social, la pertenencia a una minoría nacional, la posición económica, el nacimiento o cualquier otra situación”.

29. El Gobierno se opone a esta tesis.

#### A. Sobre la admisibilidad

30. En las observaciones iniciales, el Gobierno planteó la incompatibilidad *ratione materiae* de esta acusación con las disposiciones del Convenio.



31. El Tribunal recuerda que, en la sentencia *Schalk y Kopf vs Austria* (no 30141/04, fracción 61, CEDH 2010) admitió, refiriéndose en particular al artículo 9° de la Carta de los Derechos Fundamentales de la Unión Europea, que el artículo 12° se aplicaba a la queja de los demandantes (ver también *Hämäläinen vs Finlandia* [GC], no 37359/09, fracción 110, CEDH 2014 y *Oliari y otros*, antes citados, fracción §191). No ve ninguna razón por la cual pronunciarse de manera diferente en el presente caso.

32. Por consiguiente, la excepción del Gobierno debe ser rechazada. El Tribunal observa, además, que esta queja no está manifiestamente mal fundada, en el sentido del artículo 35, fracción 3 a) del Convenio y que no se enfrenta, por otro lado, a ningún otro motivo de inadmisibilidad. La declara pues admisible.

## **B. Sobre el fondo**

### *1. Argumentos de las partes y de los terceros*

#### a) Las partes

33. Los demandantes consideran haber sido objeto de una discriminación fundada en su orientación sexual que les negó el beneficio del derecho al matrimonio garantizado por el artículo 12°. Alegan que, si hubieran tenido una orientación heterosexual, hubieran podido tener acceso a tres regímenes de protección de la pareja (el concubinato, el Pacs y el matrimonio) y recalcan que la protección jurídica brindada por el Pacs es inferior a la del matrimonio. Consideran que esta discriminación no apunta a ningún fin legítimo (y que en particular la protección del equilibrio jurídico relativo a la familia y la filiación, citada por el Gobierno, no constituye un tal fin) y que no es proporcional.

34. Basándose en la sentencia *Schalk y Kopf* antes citada y en la afirmación que ahí hace el Tribunal de que “el artículo 12° no impone al gobierno demandado la obligación de otorgar derecho al matrimonio a una pareja homosexual como la de los demandantes”, el Gobierno deduce que los demandantes no pueden prevalerse de discriminación alguna en su contra por el hecho que la legislación francesa reserva el matrimonio a las parejas constituidas por un hombre y una mujer. En estas últimas observaciones, enfatiza que tras la entrada en vigor de la Ley del 17 de mayo 2013, los demandantes pueden de aquí en adelante celebrar un matrimonio conforme a las leyes de la República.

#### b) Los terceros

35. Las cuatro organizaciones coadyuvantes entregaron observaciones idénticas a aquellas presentadas en el caso *Schalk y Kopf* antes citado (fracciones 47-48).

### *2. Valoración del Tribunal*

36. En la sentencia *Schalk y Kopf* (fracciones 58-63), el Tribunal dijo que, si la institución del matrimonio había sido profundamente trastocada por la evolución de la sociedad desde que se adoptó el Convenio, no existía un consenso europeo sobre la cuestión del matrimonio homosexual. Estimó que el artículo 12° del Convenio se aplicaba a la queja de los demandantes, pero que la autorización o la prohibición del matrimonio homosexual se regía por las leyes nacionales de los Estados contratantes. Recordó que el matrimonio poseía connotaciones sociales y culturales profundamente enraizadas, susceptibles de variar notablemente de una sociedad a otra y recordó que no debía apurarse en sustituir su propia valoración a la de las autoridades nacionales, mejor ubicadas para valorar las necesidades de la sociedad y responder a ellas.

Por lo tanto, concluyó que el artículo 12° no imponía al gobierno demandado la obligación de otorgar el derecho al matrimonio a una pareja homosexual como la de los demandantes (ver también Gas y Dubois vs Francia, no 25951/07, fracción 66 CEDH 2012).

37. El Tribunal reiteró esta conclusión en las recientes sentencias *Hämäläinen y Oliari y otros*, antes citadas. En la sentencia *Hämäläinen* (fracción 96), recordó que el artículo 12° reconocía el concepto tradicional de matrimonio, a saber, la unión de un hombre y una mujer y que, si bien era cierto que cierto número de Estados miembros habían otorgado el derecho al matrimonio a los contrayentes de mismo sexo, este artículo no podía entenderse como que imponía la misma obligación a los Estados contratantes.

38. En la sentencia de Oliari y otros (fracciones 192-194), afirmó que estas conclusiones seguían siendo válidas a pesar de la evolución gradual de los Estados en la materia, once Estados miembros del Consejo de Europa autorizan a partir de ahora el matrimonio entre personas del mismo sexo. Recordó haber dicho en la sentencia de *Schalk and Kopf* que, no más que el artículo 12°, el artículo 14° combinado con el artículo 8°, cuyo objetivo y alcance son más generales, no podía interpretarse como que imponía a los Estados contratantes la obligación de otorgar el derecho al matrimonio a las parejas homosexuales. De ello dedujo que el mismo enfoque era válido para el artículo 12° combinado con el artículo 14° y desestimó esta queja como estando manifiestamente mal fundada (fracción 194).

39. El Tribunal no ve ninguna razón para llegar a una conclusión diferente en el presente caso, en vista del breve lapso de tiempo que pasó desde las sentencias que dictó en los casos *Hämäläinen y Oliari y otros*. Además, recalca que, desde la presentación de la solicitud, la ley del 17 de mayo 2013 otorgó el derecho al matrimonio a las parejas homosexuales (párrafo 24, arriba citado) y que los demandantes son ahora libres de casarse.

40. De esto sigue que no hubo, en este caso, violación del artículo 12° combinado con el artículo 14° del Convenio.

## **II. SOBRE LA SUPUESTA VIOLACIÓN DEL ARTÍCULO 8° COMBINADO CON EL ARTÍCULO 14° DEL CONVENIO**

41. Los demandantes consideran haber sido víctimas, en el ejercicio de su derecho al respeto de su vida privada y familiar, de una discriminación basada en su orientación sexual. Invocan el artículo 8° combinado con el artículo 14° del Convenio. El artículo 8° dice así: 1. “Toda persona tiene derecho al respeto de su vida privada y familiar, de su domicilio y de su correspondencia”. 2. “No podrá haber injerencia de la autoridad pública en el ejercicio de este derecho salvo cuando esta injerencia esté prevista por la ley y constituya una medida que, en una sociedad democrática, sea necesaria para la seguridad nacional, la seguridad pública, el bienestar económico del país, la defensa del orden y la prevención de las infracciones penales, la protección de la salud o de la moral, o la protección de los derechos y las libertades de terceros”.

42. El Gobierno impugna esta tesis.

### **A. Sobre la admisibilidad**

43. En sus observaciones iniciales, el Gobierno planteó la incompatibilidad *ratione materiae* de esta acusación con las disposiciones del Convenio.

44. En vista de la jurisprudencia en la materia, el Tribunal considera que quedó establecido que los hechos de la causa entran en el campo de aplicación de la noción de “vida privada” en el sentido del artículo 8° y que, por consiguiente, el artículo 14° combinado con el artículo 8° se aplica (*Schalk y Kopf* antes citado, fracción 95, *Vallianatos y otros vs. Grecia* [GC], nos 29381/09

y 32684/09, fracción 71, CEDH 2013 (extractos) y *Oliari y otros*, antes citado, fracción 103). Entonces ha lugar para desestimar la excepción planteada por el Gobierno. El Tribunal observa además que esta queja no está manifiestamente mal fundada, en el sentido del artículo 35, fracción 3 a) del Convenio y que no se enfrenta, por otro lado, a ningún otro motivo de inadmisibilidad. La declara pues admisible.

## **B. Sobre el fondo**

### *1. Argumentos de las partes y de los terceros*

#### a) Las partes

45. Los demandantes consideran ser objeto de una discriminación basada en su orientación sexual en la medida en que el matrimonio no les está permitido. Admiten tener acceso al Pacs, pero alegan que la protección jurídica que ofrece es ampliamente inferior a la que resulta del matrimonio. Enumeran las diferencias entre los dos regímenes, en particular en materia de derecho de residencia, de nacionalidad, de pensión de reversión (viudez, Ndt) o de régimen de bienes adquiridos durante la unión. Consideran que la diferencia de tratamiento que sufrieron no tiene ningún fin legítimo y no es proporcional.

46. El Gobierno cita la sentencia *Schalk y Kopf* (fracción 101), en la cual el Tribunal concluyó que el artículo 14° combinado con el artículo 8° no podía entenderse como que impone a los Estados contratantes la obligación de otorgar derecho al matrimonio a las parejas homosexuales. Por otra parte, hizo valer que la legislación francesa, lejos de perjudicar la vida privada de los demandantes, la favorece. En efecto, las parejas homosexuales pueden unirse en un Pacs, cuyo régimen jurídico permite garantizarles un reconocimiento como pareja y conlleva consecuencias muy similares o idénticas a las del matrimonio en diferentes ámbitos de su vida (fiscalidad, derecho de arrendamiento, donaciones, régimen patrimonial, derecho laboral). En sus últimas observaciones, el Gobierno precisa que después de la adopción de la Ley del 17 de mayo 2013, los demandantes pueden casarse.

#### b) Los terceros

47. Las cuatro organizaciones coadyuvantes entregaron observaciones idénticas a aquellas presentadas en el caso *Schalk y Kopf* antes citado (fracciones 84-86).

### *2. Evaluación del Tribunal*

48. El Tribunal recuerda que los Estados siguen siendo libres con respecto al artículo 14° combinado con el artículo 8° de no otorgar derecho al matrimonio más que a las parejas heterosexuales y que benefician de cierto margen de apreciación para decidir de la naturaleza exacta del estatus conferido por otros modos de reconocimiento jurídico (*Schalk y Kopf* antes citado, fracción 108 y *Gas y Dubois* antes citado, fracción 66).

49. Hace notar que, si en la época de los hechos el matrimonio no les estaba permitido a los demandantes por el derecho francés, podían sin embargo celebrar un Pacto Civil de Solidaridad, previsto por el artículo 515-1 del Código Civil, el cual confiere a los contratantes cierto número de derechos y obligaciones en materia fiscal, patrimonial y social (ver párrafo 25 más arriba).

50. En esto la situación se distingue de la de otros casos en los cuales el Tribunal concluyó en la violación de los artículos 8° y 14° combinados, a saber, el caso *Vallianatos* antes citado, donde el pacto de vida común no estaba autorizado por la Ley griega más que a las parejas de sexo opuesto y en el caso *Oliari y otros*, donde el derecho italiano no preveía ningún modo de reconocimiento jurídico de las parejas de mismo sexo.

51. En la medida en que los demandantes hacen valer las diferencias existentes entre el régimen del matrimonio y el del Pacto Civil de Solidaridad, el Tribunal reitera que no tiene que pronunciarse en este caso sobre cada una de las diferencias de manera detallada (*Schalk y Kopf* antes citado, fracción 109). En todo caso, como lo hizo notar en esta sentencia, estas diferencias corresponden en su conjunto a la tendencia observada en otros Estados miembros y no percibe ninguna señal que indique que el Estado demandado hubiera extralimitado su margen de evaluación en la elección que hizo de los derechos y obligaciones conferidos por el Pacto Civil de Solidaridad (ibídem). Además, como se recuerda más arriba (párrafo 39), la Ley del 17 de mayo 2013 otorgó el derecho al matrimonio a las parejas homosexuales y los demandantes son ahora libres de casarse.

52. Por consiguiente, el Tribunal considera que no hubo en este caso violación del artículo 8º combinado con el artículo 14º del Convenio.

### **SENTENCIA**

#### **POR ESTOS MOTIVOS, EL TRIBUNAL, POR UNANIMIDAD,**

1. Declara que la solicitud es admisible;
2. Dice que no hubo violación del artículo 12º combinado con el artículo 14º del Convenio;
3. Dice que no hubo violación del artículo 8º combinado con el artículo 14º del Convenio;

Hecho en francés y luego comunicado por escrito el 9 de junio 2016, en virtud del artículo 77, fracciones 2 y 3 del Reglamento del Tribunal.