

Application No. 18766/11, OLIARI and OTHERS v. ITALY
Application No. 26431/12, ORLANDI and OTHERS v. ITALY
European Court of Human Rights, Second Section

WRITTEN COMMENTS OF
FIDH, AIRE CENTRE, ILGA-EUROPE, ECSOL, UFTDU, AND LIDU
Submitted on 27 March 2014

1. Prof. Robert Wintemute, School of Law, King's College London, respectfully submits these Written Comments on behalf of FIDH (*Fédération Internationale des ligues des Droits 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*). For their interest and expertise, see "Application for leave to submit written comments" (25 Feb. 2014), granted on 6 March 2014 under Rule 44(3) of the Rules of Court.

Introduction

2. Since 1989, national legislatures and courts in Council of Europe (CoE) member states and other democratic societies have been accepting, at an ever faster rate, that lesbian women and gay men have the same human capacity as heterosexual women and men to fall in love with another person, establish a long-term emotional and sexual relationship, set up a joint home and, if they wish, raise children with their partner. These national institutions have understood that same-sex couples therefore have the same emotional and practical needs as different-sex couples to have their relationships recognised by the law, and that same-sex couples can justly claim access to the same rights and obligations as different-sex couples.

3. The first judgment of the European Court of Human Rights (ECtHR) to reflect these legal and social developments was *Karner v. Austria* (24 July 2003), which requires governments to provide "particularly serious reasons" to justify a refusal to grant unmarried same-sex couples the same rights and benefits as unmarried different-sex couples. In *Schalk & Kopf v. Austria* (24 June 2010), the ECtHR built on *Karner* by ruling that "the relationship of ... a cohabiting same-sex couple living in a stable *de facto* partnership[] falls within the notion of 'family life', just as the relationship of [an unmarried] different-sex couple in the same situation would" (para. 94), and that "same-sex couples are just as capable as different-sex couples of entering into stable committed relationships. Consequently, they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship" (para. 99).

4. The Grand Chamber has recently applied *Karner* to the exclusion of same-sex couples from second-parent adoption, in *X & Others v. Austria* (19 Feb. 2013), and from new registration systems created as an alternative to marriage, in *Vallianatos & Others v. Greece* (7 Nov. 2013). In doing so, the Grand Chamber agreed with the *Karner* Chamber's statements about "family life" (*X & Others*, para. 96; *Vallianatos*, para. 73) and "relevantly similar [or comparable] situation" (*X & Others*, para. 112; *Vallianatos*, paras. 78, 81). In *Vallianatos*, the Grand Chamber

added (at para. 81) that “[s]ame-sex couples sharing their lives have the same needs in terms of mutual support and assistance as different-sex couples”, and have an interest in “having their relationship officially recognised by the State”. The Grand Chamber stressed (at para. 84) that “the State, in its choice of means ... to protect the family and secure respect for family life as required by Article 8, must necessarily take into account developments in society and changes in the perception of ... relationships, including the fact that there is not just one way or one choice when it comes to leading one’s family or private life ...”.

5. The ECtHR has sent a common question to the parties to the six applications by same-sex couples against Italy, joined as *Oliari and Others* and *Orlandi and Others* (emphasis added): “Have the applicants suffered discrimination in the enjoyment of their Convention rights on the ground of their sexual orientation, contrary to Article 14 of the Convention read in conjunction with Article 8 of the Convention, in respect of their inability to enter into any other type of civil union recognising their relationship in Italy?” This question was left open by the majority of four judges in *Schalk & Kopf v. Austria* (judgment of 24 June 2010): “103. ... Given that ... it is open to the applicants to enter into a registered partnership [under a law in force from 1 Jan. 2010], the Court is not called upon to examine whether the lack of any means of legal recognition for same-sex couples would constitute a violation of Article 14 taken in conjunction with Article 8 if it still obtained today.”

6. The three dissenting judges in *Schalk & Kopf* concluded that the absence of a registered partnership law prior to 1 Jan. 2010 was discrimination violating the Convention: “4. The lack of any legal framework before the entry into force of the Registered Partnership Act ... raises a serious problem. In this respect we note a contradiction in the Court's reasoning. Having decided in paragraph 94 that “*the relationship of the applicants falls within the notion of 'family life'*”, the Court should have drawn inferences from this finding. However, by deciding that there has been no violation, the Court at the same time endorses the legal vacuum at stake, without imposing on the respondent State any positive obligation to provide a satisfactory framework, offering the applicants, at least to a certain extent, the protection any family should enjoy. ... 9. Today it is widely recognised and also accepted by society that same-sex couples enter into stable relationships. Any absence of a legal framework offering them, at least to a certain extent, the same rights or benefits attached to marriage (see paragraph 4 of this dissent) would need robust justification, especially taking into account the growing trend in Europe to offer some means of qualifying for such rights or benefits. 10. Consequently, in our view, there has been a violation of Article 14 in conjunction with Article 8 of the Convention.”

7. In the *Oliari* and *Orlandi* cases, the ECtHR is “called upon to examine whether the lack of any means of legal recognition for same-sex couples ... constitute[s] a violation of Article 14 taken in conjunction with Article 8” because, unlike in Austria, Italian law in 2014 still provides no such means.

I. Assuming that the Convention does not yet require equal access to legal marriage for same-sex couples, it is (at least) indirect discrimination based on sexual orientation (contrary to Art. 14 combined with Art. 8, “family life”) to limit particular rights or benefits to married different-sex couples, but provide no means for same-sex couples to qualify.

8. In *Thlimmenos v. Greece* (6 April 2000), the ECtHR recognised that: “44. [t]he [Art. 14] right not to be discriminated against in the enjoyment of Convention

rights ... is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different. ... 48. ... [Greece] violated the applicant's right not to be discriminated against in the enjoyment of his right under Art. 9 ... by failing to introduce appropriate exceptions [eg, for persons convicted because of their religious beliefs] to the rule barring persons convicted of a felony from the profession of chartered accountants." This reasoning applies to a same-sex couple who seek a right or benefit attached to marriage but are legally unable to marry. Failure to treat them differently because of their legal inability to marry, by providing them with alternative means of qualifying for the right or benefit, requires an objective and reasonable justification.

9. The ECtHR has recognised the concept of indirect discrimination, implicitly in *Thlimmenos* and explicitly in *D.H. v. Czech Republic* (13 Nov. 2007, para. 184): "a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group ... such a situation may amount to 'indirect discrimination', which does not necessarily require a discriminatory intent." 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." 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 means, for example, that a public-sector employer or pension scheme could maintain a marriage requirement for different-sex couples¹ (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 (eg, a civil union or registered partnership certificate, a sworn statement, or other evidence of a committed relationship).

10. In *Christine Goodwin v. United Kingdom* (11 July 2002), the Grand Chamber required CoE member states to legally recognise gender reassignment, but left the details of recognition to each member state. 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. The ECtHR's approach in *Goodwin* (para. 85; see also 91, 93, 103) applies *mutatis mutandis*: "The Court ... attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems [of same-sex couples], than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of [same-sex couples] but of legal recognition of [their relationships]."

11. A member state would find at least 5 options within its margin of appreciation: (1) it could grant same-sex couples, who could prove the existence of their relationship for a reasonable period, a permanent exemption from the marriage requirement;² (2) it could grant the same exemption to unmarried different-sex

¹ See *Irizarry v. Board of Education of City of Chicago*, 251 F.3d 604 (7th Cir. 2001).

² 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 UK legislation was amended. If she had died on 8 Jan. 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 UK had yet to implement *Goodwin*). Cf. *Maruko*, Case C-267/06 (1 April 2008) (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").

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 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, eg, relating to parental rights.

12. 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 2008.³ 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".

13. On 15 July 2010, in Case C-147/08, *Römer v. Freie und Hansestadt Hamburg*, Advocate General Jääskinen of the Court of Justice of the European Union delivered his Opinion (emphasis added): "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." The potential discrimination noted by the Advocate General falls outside the scope of EU law, but falls squarely within the scope of the Convention, which applies to all legislation of CoE member states, including in the area of family law.

II. Excluding same-sex couples from particular rights or benefits attached to legal marriage generally cannot be justified.

14. The ECtHR has made it clear that differences in treatment based on sexual orientation are analogous to differences in treatment based on race (*Smith & Grady v. UK*, 1999, para. 97), religion (*Mouta v. Portugal*, 1999, para. 36), and sex (*L. & V. v. Austria*, 2003, para. 45), and can only be justified by "particularly serious reasons". The ECtHR explained in *Karner* how this affects the proportionality test (emphasis added): "41. In cases in which the margin of appreciation ... is narrow, as ... where there is a difference in treatment based on ... sexual orientation, the principle of proportionality does not merely require that the measure chosen is ... suited for

³ "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>.

realising the aim sought. **It must also be shown that it was necessary in order to achieve that aim to exclude ... persons living in a homosexual relationship ...**"

The ECtHR found no evidence of necessity where there was a difference of treatment between unmarried different-sex couples and unmarried same-sex couples.

15. The necessity test should also be applied to the prima facie indirect discrimination created by an apparently neutral marriage requirement. Such a requirement fails to treat same-sex couples who are legally unable to marry differently from different-sex couples who are legally able to marry but have neglected to do so, or chosen not to do so (because of the decision of one or both partners). The ECtHR's reasoning in *Vallianatos* applies *mutatis mutandis*: "85. ... the burden of proof ... is on the respondent Government. It is therefore for the [Italian] Government to show ... that it was necessary, in pursuit of the legitimate aims which they invoked, to [refuse to adopt legislation allowing] same-sex couples [to] enter[] into ... civil unions ..."

III. Consensus in European and other democratic societies supports a positive obligation to provide some means of legal recognition to same-sex couples.

16. There is an emerging consensus, in European and other democratic societies (see Appendix), that a government may not limit a particular right, benefit or obligation to married couples, and then tell same-sex couples that it is legally impossible for them to qualify for it, because they are not permitted to marry. Of the 47 CoE member states, 21 or 44.7% have already passed some kind of legislation permitting same-sex couples to register their relationships, as a legal marriage or as a form of civil union or registered partnership: Andorra, Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Iceland, Ireland, Liechtenstein, Luxembourg, the Netherlands, Norway, Portugal, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom. While the *Oliari/Orlandi* cases are pending, this total could rise to 26 or 55.3% of member states, if proposed legislation is adopted in Croatia, Cyprus, Estonia and Malta, and if the Greek Government complies with *Vallianatos* by extending the civil union law to same-sex couples.⁴

17. Indeed, Italy's *Corte Costituzionale* (*Sentenza* 183/2010 of 14 April 2010) has called for legislation with regard to same-sex couples: "8. ... *spetta al Parlamento, nell'esercizio della sua piena discrezionalità, individuare le forme di garanzia e di riconoscimento per le unioni suddette [stabile convivenza tra due persone dello stesso sesso], restando riservata alla Corte costituzionale la possibilità d'intervenire a tutela di specifiche situazioni ... Può accadere ... che, in relazione ad ipotesi particolari, sia riscontrabile la necessità di un trattamento omogeneo tra la condizione della coppia coniugata e quella della coppia omosessuale ...*" To date, Italy's Parliament has refused to legislate.

18. Outside of Europe, legislation has been adopted in Argentina, Australia (alternative registration systems in 5 of 8 states and territories, in addition to recognition of cohabiting same-sex couples at the federal level and in all 8 states and territories), Canada (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), Mexico (at least 2 states and the Federal District), New Zealand, South Africa and

⁴ See, eg, Croatia ("the Croatian Government, on 13 December 2013, proposed a new draft Law on Registered Civil Partnership to Parliament", CoE, Committee of Ministers, Reply to Written Question, Doc. 13450, 24 March 2014); Malta, Civil Unions Bill (No. 20), <http://www.parlament.mt/billdetails?bid=444&l=1&legcat=13>.

Uruguay. In the United States, 21 of 50 states (42%) and the District of Columbia have 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.

IV. Judicial reasoning in a growing number of decisions requires at least an alternative to legal marriage, if not access to legal marriage for same-sex couples.

19. 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 supports *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.

20. 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.

21. 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 is discrimination violating the Canadian Charter. The B.C. Court 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. ... "

22. The **Ontario Court of Appeal** agreed 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 licenses to same-sex couples that day. The B.C. Court followed on 8 July 2003 (228 D.L.R. (4th) 416). A federal law (approved by the Supreme Ct of Canada)⁵ extended these appellate decisions to all 10 provinces and 3 territories from 20 July 2005.⁶

23. On 18 Nov. 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."

24. On 30 Nov. 2004, **South Africa's Supreme Court of Appeal** agreed with the Canadian and Massachusetts courts, and restated the common-law definition of

⁵ *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698.

⁶ See R. Wintemute, "Sexual Orientation and the Charter", (2004) 49 *McGill Law Journal* 1143; Civil Marriage Act, Statutes of Canada 2005, chapter 33.

marriage as: "the union between two persons to the exclusion of all others for life."⁷ On 1 Dec. 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 ..."⁸ South Africa's Parliament responded by enacting the Civil Union Act (No. 17 of 2006, in force on 30 Nov. 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".

25. On 25 Oct. 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 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.

26. On 15 May 2008, the **California Supreme Court** decided *In re Marriage Cases*, 183 P.3d 384 (2008). Almost 60 years after it struck down a law banning "the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race", in *Perez v. Sharp*, 32 Cal. 2d 711 (1948), the California Court 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". The Court 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".⁹

27. On 10 Oct. 2008, the **Connecticut Supreme Court** agreed with the Calif. Court in *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (2008). As in Calif., same-sex couples in Connecticut had access to all or nearly all the rights and

⁷ *Fourie v. Minister of Home Affairs* (30 Nov. 2004), Case No. 232/2003.

⁸ *Minister of Home Affairs v. Fourie; Lesbian & Gay Equality Project* (Cases CCT60/04, CCT10/05).

⁹ The Calif. Court's decision allowed same-sex couples to marry in Calif. from 16 June 2008 until 4 Nov. 2008, when 52% of voters in a referendum supported an amendment to the Calif. Constitution (Proposition 8). Prop. 8 converted the rule denying access to legal marriage to same-sex couples from a sub-constitutional rule (adopted after the 2000 referendum on Prop. 22 and struck down by the Court in 2008) to a constitutional rule that could only be repealed after a second referendum: Art. I, Sec. 7.5: "Only marriage between a man and a woman is valid or recognized in California." The Court upheld Prop. 8 in *Strauss v. Horton* (26 May 2009), but maintained the validity of the legal marriages of same-sex couples who married before 4 Nov. 2008. The Court's decision was reinstated, and Prop. 8 struck down, by the procedural effect of *Hollingsworth v. Perry*, 133 S.Ct. 2652 (26 June 2013).

obligations attached by state law to marriage through a "civil union". Yet the Court held: "In view of the exalted status of marriage in our society, it is hardly surprising that civil unions are perceived to be inferior ..."

28. 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."

29. 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.¹⁰ On 25 Oct. 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 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.

30. On 26 July 2011, the **Colombia's Constitutional Court** "exhorted" Colombia's Congress to legislate so as to provide same-sex couples 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 "formalize and solemnize their contractual link".¹¹

31. On 5 December 2012, **Mexico's Supreme Court** decided that three same-sex couples in the state of Oaxaca had a right under the federal constitution to marry.¹² The decision benefits these same-sex couples, but does not create *jurisprudencia* (a precedent binding on all courts and public officials across the country). It would appear that the Court must adopt the same interpretation in at least five cases to create *jurisprudencia*. Yet it would be surprising if the Supreme Court were to retreat in future decisions from its conclusion that the Oaxaca Civil Code's definition of marriage as a "contract celebrated between only one man and only one woman" is contrary to the federal constitution, because "it contains a distinction that excludes without justification same-sex couples from access to marriage".

¹⁰ See <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=178931>.

¹¹ *Sentencia* C-577/11, <http://www.corteconstitucional.gov.co/relatoria/2011/C-577-11.htm>, pp. 193-194.

¹² *Amparos en Revisión* 457/2012, 567/2012, 581/2012, *Primera Sala de la Suprema Corte de Justicia*.

32. On 19 December 2013, in *Griego v. Oliver*, 316 P.3d 865 (2013), the **New Mexico Supreme Court** became the 5th 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.”

33. As for 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, 2 of 5 judges of **Portugal’s Tribunal Constitucional** dissented from the majority's decision to uphold the exclusion.¹³ On 2 July 2009, **Slovenia’s Constitutional Court** held in *Blažic & 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.¹⁴

V. Council of Europe and European Union institutions also support a positive obligation to provide some means of legal recognition to same-sex couples.

34. 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", Recommend. 1470 (2000); and (b) that they "adopt legislation which makes provision for registered [same-sex] partnerships".¹⁵ The EU's European Parliament first called for equal treatment of different-sex and same-sex couples in a 1994 resolution seeking to end "the barring of [same-sex] couples from marriage or from an equivalent legal framework".¹⁶

35. 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".¹⁷

¹³ See *Acórdão* 359/09 (9 July 2009), <http://w3.tribunalconstitucional.pt/acordaos/acordaos09/301-400/35909.htm> (*Declaração de Voto*: Judges Gil Galvão and Maria João Antunes).

¹⁴ See <http://www.sexualorientationlaw.eu/documents/austria.htm>.

¹⁵ Recommend. 1474 (2000), para. 11(iii)(i). See also Resolution 1547 (2007), para. 34.14.

¹⁶ "Resolution on equal rights for homosexuals ... in the EC" (8 Feb. 1994), OJ C61/40 at 42, para. 14.

¹⁷ Staff Regulations of [EC] officials ..., Article 1d(1); Annex VII, Article 1(2)(c); Annex VIII, Art. 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").

36. 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."¹⁸

VI. Foreign marriages of same-sex couples could be recognised as civil unions.

37. If Articles 14 and 8 of the Convention can be interpreted in the *Oliari* cases as requiring access for same-sex couples to a civil union or other alternative to legal marriage, they can also be interpreted in the *Orlandi* cases as requiring that the foreign marriages of same-sex couples be recognised as equivalent to the civil union or other alternative to legal marriage that must be provided to same-sex couples. A model can be found in s. 215 of the United Kingdom's Civil Partnership Act 2004, prior to its amendment by the Marriage (Same Sex Couples) Act 2013: "(1) Two people [of the same sex] are to be treated as having formed a civil partnership as a result of having registered an overseas relationship [which includes a marriage in any country in which same-sex couples may marry] if, under the relevant law, they (a) had capacity to enter into the relationship, and (b) met all requirements necessary to ensure the formal validity of the relationship."

38. Finally, the EU's European Parliament adopted, on 4 February 2014, a resolution on a roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity calling on the European Commission to "make proposals for the mutual recognition of the effects of all civil status documents across the EU, in order to reduce discriminatory legal and administrative barriers for citizens and their families who exercise their right to free movement",¹⁹ which includes marriages registered in other EU member states.

Conclusion

38. There is 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. As the ECtHR noted in *Smith & Grady v. UK* (27 Sept. 1999): "104. ... 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".²⁰

¹⁸ Resolution CM/Res(2008)22, 19 Nov. 2008.

¹⁹ Eur. Parl. resolution of 4 Feb. 2014 on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity, Resolution no. A7-0009/2014, para. 4(H)(ii).

²⁰ The *Oliari* and *Orlandi* cases concern a continuing situation: the exclusion of same-sex couples from legal marriage in Italy, and the absence of alternative means of legal recognition. The ECtHR should therefore consider the level of European consensus at the date of its judgment on the merits. In *M.W. v. UK* (No. 11313/02) (inadmissible, 23 June 2009), the ECtHR concluded that "the applicant [could not] claim ... that, at the material time, he was in an analogous situation to a bereaved spouse". The material time was the date of his male partner's death (10 April 2001). In *Courten v. UK* (No. 4479/06) (inadmissible, 4 Nov. 2008), the material time was also the date of the same-sex partner's death (1 Jan. 2005). In both cases, the partner died before the couple could register their relationship under the UK's Civil Partnership Act 2004 (in force on 5 Dec. 2005). The Act eliminated the discrimination challenged in *M.W.* (bereavement payment) and *Courten* (inheritance tax exemption) These cases therefore concerned the fact that the Act could not be invoked retroactively by a surviving same-sex partner, who could not marry, to obtain benefits granted to surviving different-sex spouses.

**APPENDIX – NATIONAL (FEDERAL, REGIONAL, LOCAL) LEGISLATION
RECOGNISING SAME-SEX COUPLES²¹**

Council of Europe Member States

Andorra - *Llei 4/2005, del 21 de febrer, qualificada de les unions estables de parella*, (23 March 2005) 17 *Butlletí Oficial del Principat d'Andorra* no. 25, p. 1022 ("unions estables de parella"; "stable unions of couples")

Austria - Registered Partnership Act (*Eingetragene Partnerschaft-Gesetz*), Federal Law Gazette (*Bundesgesetzblatt*) vol. I, no. 135/2009

Belgium - *Loi du 23 novembre 1998 instaurant la cohabitation légale*, *Moniteur belge*, 12 Jan. 1999, p. 786 ("cohabitants légaux"; "statutory cohabitants"); *Loi du 13 février 2003 ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil*, *Moniteur belge*, 28 Feb. 2003, Edition 3, p. 9880, in force on 1 June 2003

Czech Republic - *Zákon ze dne 26. ledna 2006 o registrovaném partnerství a o změně některých souvisejících zákonů* (Act no. 115/2006 Coll. on Registered Partnership and on the Change of Certain Related Acts)

Denmark - Law on Registered Partnership (*Lov om registreret partnerskab*), 7 June 1989, nr. 372 ("registrerede partnere"; "registered partners"); replaced by *Lov om ændring af lov om ægteskabs indgåelse og opløsning, lov om ægteskabets retsvirkninger og retsplejeloven og om ophævelse af lov om registreret partnerskab*, Law nr. 532 of 12 June 2012 (in force 15 June 2012; "spouses")

Finland - Law 9.11.2001/950, Act on Registered Partnerships (*Laki rekisteröidystä parisuhteista*) ("*parisuhteen osapuolet*"; "registered partners")

France - *Loi no. 99-944 du 15 novembre 1999 relative au pacte civil de solidarité*, ("*partenaires*"; "partners"); *Loi no. 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe* ("époux"; "spouses")

²¹ An earlier version appeared in R. Wintemute (ed.) & M. Andenæs (hon. co-ed.), *Legal Recognition of Same-Sex Partnerships* (Oxford, Hart Publishing, 2001).

Germany

Federal Level - Law of 16 Feb. 2001 on Ending Discrimination Against Same-Sex Communities: Life Partnerships (*Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften*), [2001] 9 *Bundesgesetzblatt* 266 ("Lebenspartner"; "life partners")

Hungary – Act on Registered Partnership, Law 29 of 2009 (“registered partners”)

Iceland – Law on Confirmed Cohabitation (*Lög um staðfesta samvist*), 12 June 1996, nr. 87 ("parties to a confirmed cohabitation"); replaced by *Lög um breytingar á hjúskaparlögum og fleiri lögum og um brottfall laga um staðfesta samvist (ein hjúskaparlög)*, **22 June 2010, nr. 65 ("spouses")**

Ireland - Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, No. 24 of 2010 ("civil partners")

Liechtenstein - Law on the Registered Partnership of Same-Sex Couples (*Gesetzes über die eingetragene Partnerschaft gleichgeschlechtlicher Paare*) (approved by legislature on 17 March 2011; approved by 68% of voters in a referendum on 17 and 19 June 2011)

Luxembourg - *Loi du 9 juillet 2004 relative aux effets légaux de certains partenariats*, *Mémorial A*, nr. 143, 6 August 2004 ("partenaires"; "partners")

Netherlands - Act of 5 July 1997 amending Book 1 of the Civil Code and the Code of Civil Procedure, concerning the introduction therein of provisions relating to registered partnership (*geregistreerd partnerschap*), *Staatsblad* 1997, nr. 324 ("geregistreerde partners"; "registered partners"); Act of 21 December 2000 amending Book 1 of the Civil Code, concerning the opening up of marriage for persons of the same sex (Act on the Opening Up of Marriage), *Staatsblad* 2001, nr. 9 ("echtgenoten"; "spouses")

Norway – Law on Registered Partnership (*Lov om registrert partnerskap*), 30 April 1993, nr. 40 ("registrerte partnere"; "registered partners"); replaced by Marriage Act (*Lov 4 juli 1991 nr. 47 om ekteskap*), as amended by Act of 27 June 2008 No. 53 ("spouses")

Portugal – *Lei no. 9/2010 de 31 de Maio, Permite o casamento [marriage] civil entre pessoas do mesmo sexo* ("spouses")

Slovenia - *Zakon o registraciji istospolne partnerske skupnosti (ZRIPS) Ur.l. RS, št. 65/2005* (Registered Partnership Law) (“registered partners”)

Spain

Spanish State – *Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio* (Law 13/2005, of 1 July, providing for the amendment of the Civil Code with regard to the right to contract marriage), *Boletín Oficial del Estado* no. 157, 2 July 2005, pp. 23632-23634

Autonomous Communities (*Comunidades Autónomas*):

- Andalucía - *Ley de parejas de hecho*, (5 Dec. 2002) 422 *Boletín Oficial del Parlamento de Andalucía* 23987 ("parejas de hecho"; "de facto couples")
- Aragón - *Ley relativa a parejas estables no casadas*, (26 March 1999) 255 *Boletín Oficial de las Cortes de Aragón* ("parejas estables no casadas"; "unmarried stable couples")
- Asturias - *Ley 4/2002, de 23 de mayo, de Parejas Estables* ("parejas estables"; "stable couples")
- Balearic Islands - *Llei 18/2001 de 19 de diciembre, de parelles estables* ("parelles estables"; "stable couples")
- Basque Country - *Ley 2/2003, de 7 de mayo, reguladora de las parejas de hecho*, (9 May 2002) 92 *Boletín Oficial del Parlamento Vasco* 9760 ("parejas de hecho"; "de facto couples")
- Canary Islands - *Ley 5/2003, de 6 de marzo, para la regulación de las parejas de hecho*, (13 March 2003, V *Legislatura*) 150 *Boletín Oficial del Parlamento de Canarias* 2 ("parejas de hecho"; "de facto couples")
- Cantabria - *Ley 1/2005, de 16 de mayo, de parejas de hecho*, (24 May 2005) 98 *Boletín Oficial de Cantabria* ("parejas de hecho"; "de facto couples")
- Catalonia - *Llei 10/1998, de 15 de juliol, d'unions estables de parella*, (10 July 1998) 309 *Butlletí Oficial del Parlament de Catalunya* (BOPC) 24738 ("unions estables de parella"; "stable unions of couples")
- Extremadura - *Ley de Parejas de Hecho*, (26 March 2003) 377 *Boletín Oficial de la Asamblea de Extremadura* 13 ("parejas de hecho"; "de facto couples")
- Madrid - *Ley de Uniones de Hecho de la Comunidad de Madrid*, (28 Dec. 2001) 134 *Boletín Oficial de la Asamblea de Madrid* (V *Legislatura*) 160003 ("uniones de hecho"; de facto unions)
- Navarra - *Ley Foral 6/2000, de 3 de julio, para la igualdad jurídica de las parejas estables*, [7 July 2000] 82 *Boletín Oficial de Navarra* ("parejas estables"; "stable couples")
- Valencia - *Ley por la que se regulan las uniones de hecho*, (9 April 2001) 93 *Boletín Oficial de las Cortes Valencianas* 12404 ("uniones de hecho"; "de facto unions")

Sweden – Law on Registered Partnership (*Lag om registrerat partnerskap*), 23 June 1994, SFS 1994:1117 ("registrerade partner"; "registered partners"); replaced by SFS 1987:230 as amended by SFS 2009:253 ("spouses")

Switzerland

Federal Level - *Bundesgesetz vom 18. Juni 2004 über die eingetragene Partnerschaft gleichgeschlechtlicher Paare (Partnerschaftsgesetz)*, *Bundesblatt*, 2004, No. 25 (29 June 2004), p. 3137; *Loi fédérale du 18 juin 2004 sur le partenariat enregistré entre personnes du même sexe (Loi sur le partenariat)*, *Feuille fédérale*, 2004, No. 25 (29 June 2004), p. 2935 ("Partner/Partnerinnen"; "partenaires"; "partners") (approved by 58% of voters in a referendum on 5 June 2005; entered into force on 1 January 2007)

United Kingdom - Civil Partnership Act 2004 ("civil partners"); Marriage (Same Sex Couples) Act 2013 (applies to England and Wales) ("spouses"); Marriage and Civil Partnership (Scotland) Act 2014 ("spouses")

Other Democratic Societies

Argentina

Federal Level - Civil Code, as amended by *Ley 26.618*, promulgated on 21 July 2010, published in *Boletín Oficial de la República Argentina* on 22 July 2010, No. 31.949 ("spouses")

Buenos Aires (Autonomous City) - *Ley No. 1.004, Reconócense las Uniones Civiles*, 12 December 2002 ("members of the civil union")

Australia

Federal Level - Same-Sex Relationships (Equal Treatment In Commonwealth Laws - General Law Reform) Act 2008 (No. 144 of 2008); Family Law Amendment (De Facto Financial Matters And Other Measures) Act 2008 (No. 115 of 2008); Same-Sex Relationships (Equal Treatment In Commonwealth Laws-- Superannuation) Act 2008 (No. 134 of 2008)

States and Territories:

Australian Capital Territory – Civil Partnerships Act 2008 ("civil partners"), replaced by Civil Unions Act 2012 ("civil union partners")

New South Wales - Relationships Register Act 2010 (Act. No. 19 of 2010) ("persons in a registered relationship")

Northern Territory - Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003, Act. No. 1 of 2004 ("de facto partners")

Queensland – Relationships Act 2011 ("parties to a registered relationship")

South Australia - Statutes Amendment (Domestic Partners) Act 2006 ("domestic partners")

Tasmania - Relationships Act 2003, Relationships (Consequential Amendments) Act 2003 ("partners" include two persons in a "significant relationship", ie, "who have a relationship as a couple"; they may register a "deed of relationship")

Victoria – Relationships Act 2008 ("persons in a registered relationship")

Western Australia - Acts Amendment (Lesbian and Gay Law Reform) Act 2002 ("de facto partners")

Canada

Federal Level - Modernization of Benefits and Obligations Act, Statutes (S.) of Canada 2000, chapter (c.) 12 ("common-law partners", "*conjoints de fait*"); Civil Marriage Act, Statutes of Canada 2005, c. 33 ("spouses", "*époux*")

Provinces and Territories:

- Alberta - Adult Interdependent Relationships Act, S.A. 2002, c. A-4.5 ("adult interdependent partners")
- British Columbia - Definition of Spouse Amendment Acts, S.B.C. 1999, c. 29, S.B.C. 2000, c. 24 ("spouses")
- Manitoba - Charter Compliance Act, S.M. 2002, c. 24 and Common-Law Partners' Property and Related Statutes Amendment Act, S.M. 2002, c. 48 (registered and unregistered "common-law partners")
- New Brunswick - eg, Family Services Act, N.B. Acts, c. F-2.2, section (s.) 112(3), as amended in 2000 (spousal support obligations of unmarried persons living in a family relationship)
- Newfoundland - Same Sex Amendment Act, S.N. 2001, c. 22 ("cohabiting partners")
- Northwest Territories - Family Law Act, S.N.W.T. 1997, c. 18, s. 1(1), as amended by S.N.W.T. 2002, c. 6 ("spouses")
- Nova Scotia - Law Reform (2000) Act, S.N.S. 2000, c. 29 (unregistered "common-law partners", registered "domestic partners")
- Nunavut - eg, An Act to amend the Labour Standards Act, S. Nunavut 2003, c. 18 ("common-law partners")
- Ontario - Amendments Because of the Supreme Court of Canada Decision in *M. v. H.* Act, S.O. 1999, c. 6 ("same-sex partners"); An Act to amend various statutes in respect of spousal relationships, S.O. 2005, c. 5 ("spouses")
- Prince Edward Island - Family Law Act, R.S.P.E.I. 1988, c. F-2.1, s. 29(1), as amended by S.P.E.I. 2002, c. 7 ("common-law partners")
- Québec - An Act to amend various legislative provisions concerning de facto spouses, S.Q. 1999, c. 14, 1st session, 36th legislature, Bill 32 ("*conjoints de fait*", "de facto spouses"); An Act instituting civil unions and establishing new rules of filiation, S.Q. 2002, c. 6, 2nd session, 36th legislature, Bill 84 ("*conjoints en union civile*" or "*conjoints unis civilement*" or "civil union spouses"; capacity to become "*conjoints mariés*" or "*époux*" or "married spouses" is governed by the 2005 federal law)
- Saskatchewan - Miscellaneous Statutes (Domestic Relations) Amendment Acts, 2001, S.S. 2001, cc. 50-51 ("common-law partners", or persons "cohabiting as spouses" or "cohabiting in a spousal relationship")
- Yukon Territory – eg, Family Property and Support Act, R.S.Y. 1986 (Vol. 2), c. 63, ss. 1, 30, 31, as amended by S.Y. 1998, c. 8, s. 10 ("spouses")

Mexico

Federal District (Mexico City) - *Decreto de Ley de Sociedad de Convivencia para el Distrito Federal*, *Gaceta Oficial*, 16 November 2006 ("convivientes"; "cohabitants"); *Código Civil para el Distrito Federal*, Article 146 ("spouses")

(as amended by a law approved by the *Asamblea Legislativa* on 21 Dec. 2009 and published on 29 Dec. 2009)

Coahuila - *Decreto* No. 209, 11 Jan. 2007, adding the *Pacto Civil de Solidaridad* to the Civil Code ("*compañeros civiles*"; "civil companions")

New Zealand - Civil Union Act 2004, Relationships (Statutory References) Act 2004 ("parties to a civil union"); Marriage (Definition of Marriage) Amendment Act 2013 ("spouses")

South Africa - Civil Union Act, No. 17 of 2006 (same-sex or different-sex "civil union partners", who include "spouses in a marriage" and "partners in a civil partnership")

United States (http://www.thetaskforce.org/downloads/reports/issue_maps/rel_recog_1_6_14_color.pdf; specific citations can be provided)

- Calif. - "domestic partners" - 1999, 2001, 2003; "spouses" - 16 June-3 Nov. 2008, and since 28 June 2013
- Colorado - "parties to a civil union" - 2013
- Connecticut - "parties to a civil union" – 2005; "spouses" - 2008
- Delaware - "parties to a civil union" – 2011; "spouses" - 2013
- District of Columbia - "domestic partners" - 1992; "spouses" - 2010
- Hawaii - "reciprocal beneficiaries"- 1997; "partners in a civil union" – 2011; "spouses" - 2013
- Illinois - "parties to a civil union" – 2011; "spouses" - 2014
- Iowa - "spouses" - 2009
- Maine - "domestic partners" – 2004; "spouses" – 2012
- Maryland – "spouses" - 2012
- Massachusetts - "spouses" – 2004
- Minnesota – "spouses" - 2013
- Nevada - "domestic partners" - 2009
- New Hampshire - "spouses in a civil union" – 2007; "spouses" - 2010
- New Jersey - "civil union partners" – 2006; "spouses" – 2013
- New Mexico – "spouses" - 2013
- New York – "spouses" - 2011
- Oregon - "domestic partners" – 2008
- Rhode Island – "spouses" – 2013
- Vermont - "parties to a civil union" – 2000; "spouses" - 2009
- Washington - "domestic partners" - 2007, 2009; "spouses" - 2012
- Wisconsin - "domestic partners" - 2009

Uruguay - *Ley No. 18.246 de Unión Concubinaria*, published in *Diario Oficial*, 10 Jan. 2008, No. 27402 (same-sex or different-sex "*concubinos*"); *Ley No. 19.075 de Matrimonio Igualitario*, published in *Diario Oficial*, 9 May 2013, No. 28710 (same-sex or different-sex "*cónyuges*" or "spouses")