Pace International Law Review

Volume 29 | Issue 1 Article 4

January 2017

Oliari and the European Court of Human Rights: Where the Court Failed

Vito John Marzano
Elisabeth Haub School of Law at Pace University, vmarzano@law.pace.edu

OLIARI AND THE EUROPEAN COURT OF HUMAN RIGHTS: WHERE THE COURT FAILED

Vito John Marzano*

ABSTRACT

The European Court of Human Rights revisited the issue of legal recognition for same-sex partnerships on July 21, 2015 when it decided *Oliari and Others v. Italy*. This Note explores the implications of that decision and what it may mean for same-sex couples within Italy and throughout the Council of Europe. Through a careful analysis of the decision, this Note concludes that *Oliari* provides slight yet important movement on the issue of a Contracting State's obligation to afford legal recognition for same-sex partnerships, but a practical implementation of the Court's holding likely will yield little additional movement in more conservative Contracting States, as the factors utilized to find a violation on the part of Italy remain highly unique to the Italian experience, rendering any perception of a victory as merely psychological in nature.

* Juris Doctorate, The Elisabeth Haub School of Law at Pace University *Certificate in International Law*; *Magna Cum Laude*

For conversations, comments, and support, I would like to thank Professor Darren Rosenblum, Professor Audrey Rogers, Professor Merril Sobie, and Professor Thomas M. McDonnell. For helping me become a better law student and person, I would like to express my gratitude to Professor Noa Ben-Asher and Professor Leslie Y. Garfield. For unparalleled support, special thanks and love to my husband, Carlos J. Marzano.

Table of Contents

INTRODUCTION

On July 21, 2016, the Fourth Section of the European Court of Human Rights ("ECtHR")[1] issued its decision in *Oliari and Others v. Italy*,[2] holding that while Italy had a positive obligation under the European Convention on Human Rights ("ECHR," the "Convention") to offer same-sex couples civil unions, or some type of partnership recognition, the Convention did not require Contracting States to recognize same-sex marriage.[3]

The decision held that it remains within a Contracting State's margin of appreciation to deny marriage to same-sex couples.[4] Importantly, however, the Fourth Section expanded the factors that may be considered for the ECtHR to place a positive obligation on a Contracting State to provide some legal partnership recognition.[5]

In Part I, this Note develops the Court's application and interpretation of the Convention in regards to LGBT rights.[6] Further, Part I analyzes *Schalk and Kopf v. Austria*[7] and

[1] The European Court of Human Rights is composed of five sections, that each include a President, Vice President, and judges. Further, the ECtHR divides itself up into judicial formations, which are: Single Judge, Committee, Chamber, and Grand Chamber. *International Justice Resource Center*, *European Court of Human Rights*, http://www.ijrcenter.org/european-court-of-human-rights/ (last visited Feb 1, 2017). When possible, this Note identifies the judicial formation that issued a particular decision.

[2] Oliari and Others v. Italy, App. Nos. 18766/11 & 36030/11, Eur. Ct. H.R., (July 21, 2015), http://hudoc.echr.coe.int/eng?i=001-156265.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] As this Note explains, an opposite-gender couple consisting of a male and a female, regardless if one of those partners is a trans-man or trans-woman, are entitled to State-recognized marriage provided that post-transition, the couple consists of two individuals of the opposite gender. Instances where a couple is made up of a transgender individual but the transgender individual is the same gender as the other spouse fall within the scope of same-sex partnerships. To avoid confusion, this Note uses "LGB" in lieu of "LGBT" when appropriate. This usage does not seek to undermine the position of transgender individuals in the LGBT community-at-large.

[7] Schalk and Kopf v. Austri*a*, 2010-IV Eur. Ct. H.R. 409.

Vallianatos and others v. Greece,[8] which established the foundation for *Oliari*.

Part II explores *Oliari and Others v. Italy*'s use of margin of appreciation, consensus analysis, and the living instrument document. In so doing, Part II seeks to pinpoint potential movement by the Court on the issue of same-sex partnerships. Part III addresses post-*Oliari* developments.

This Note draws the following conclusions: (1) the Court is likely not to find a right to marry for same-sex couples in the foreseeable future; (2) although the Court found that Italy had a positive obligation to provide same-sex couples with partnership benefits, the decision is extremely narrow and likely only applies to the Italian circumstance; and (3) the holding failed to identify what that State is actually required to offer same-sex couples in the event it must offer same-sex partnership recognition.

I. BACKGROUND

Within the Council of Europe, same-sex couples enjoy the right to marry in Belgium, Denmark, Finland, France, Iceland, Ireland, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom (England, Wales, and Scotland).[9] Same-sex couples may enter into civil partnerships (e.g., civil unions, domestic partnerships, unregistered partnership benefits, or any variation thereof) in Andorra, Austria, Croatia, Czech Republic, Estonia, Germany, Greece, Hungary, Liechtenstein, Malta, Northern Ireland, Slovenia, and Switzerland.[10] Outside of the Council of Europe, same-sex couples enjoy the right to marry, in whole or in part, in Argentina, Brazil, Canada, Colombia, Greenland, Mexico, New Zealand, South Africa, Uruguay, and the United States.[11]

---

[8] Vallianatos and others v. Greece, 2013-VI Eur. Ct. H. R. 125.

[9] *See* Michael Lipka, *Where Europe Stands on Gay Marriage and Civil Unions*, PEW RESEARCH CTR. (June 9, 2015), http://www.pewresearch.org /fact-tank/2015/06/09/where-europe-stands-on-gay-marriage-and-civil-unions/.

[10] *See id.*

[11] Amarendra Bhushan Dhiraj, *List of Countries Where Same-Sex Marriage Is Legal*, CEOWORLD MAGAZINE (Apr. 10, 2016), http://ceoworld.biz/ 2015/11/23/list-of-countries-where-same-sex-marriage-is-legal; *Colombia's highest court paves way for same-sex marriage*, TELEGRAPH (Apr. 8, 2016, 9:24

Finally, Chile and Ecuador provide same-sex couples with civil unions.[12]

a. Procedures and Functions of the European Court of Human Rights

The European Court of Human Rights employs some procedures that may seem alien to a U.S.-based audience. To better understand the decision in *Oliari*, one must possess a preliminary understanding of some of these doctrines.

First, it is important to consider that the European Court of Human Rights exists pursuant to Article 19 of the European Convention on Human Rights as an international tribunal for the purpose of interpreting the Convention.[13] While the Court may look to domestic courts for insight, it must confine its holdings to the limitations set forth in the Convention and within the scope of the Vienna Convention on the Law of Treaties.[14] Nevertheless, although the Convention speaks to the procedure for a private party to challenge a contracting State's

---

AM), http://www.telegraph.co.uk/news/2016/04/08/colombias-highest-court-paves-way-for-same-sex-marriage/.

[12] *Chile's same-sex couples celebrate civil unions: 'History changes today'*, GUARDIAN (Oct. 22, 2015, 1:46 PM), http://www.theguardian.com/world/2015/oct/22/chiles-same-sex-couples-celebrate-civil-unions; Michael K. Lavers, *Ecuadorian lawmakers approve civil unions bill*, WASHINGTON BLADE (Apr. 23, 2015, 2:05 PM), http://www.washingtonblade.com/2015/04/23/ecuadorian-lawmakers-approve-civil-unions-bill/.

[13] European Convention on Human Rights as amended by Protocols Nos. 11 and 14 art. 19, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter "ECHR"].

[14] European Court of Human Rights, *Bringing a Case to the European Court of Human Rights: A Practical Guide on Admissibility Criteria*, ¶ 382 (2014) ("Despite its distinctive nature, the Convention remains an international treaty which obeys the same rules as other inter-State treaties, in particular those laid down in the Vienna Convention on the Law of Treaties. The Court cannot therefore overstep the boundaries of the general powers which the Contracting States, of their sovereign will, have delegated to it.") [hereinafter "*Bringing a Case*"]. The source of authority plays a key role in the inherent difference between the ECtHR and national tribunals, such as the Supreme Court of the United States, which derives its authority from Article III of the U.S. Constitution. Nevertheless, while the ECtHR must adhere to a different set of standards when it interprets the Convention, certain doctrines have evolved that share analogous counterparts to the U.S. Supreme Court. When possible, this Note identifies those analogous doctrines or practices to U.S. counterparts.

action (or inaction), the Court has developed extensive jurisprudence in regards to the application of that procedure. As this Note demonstrates, the Court's application of that procedure can directly impact the interpretation of its holding.

Article 34 of the Convention permits an individual applicant to bring a claim against a Contracting State for alleged violations of the Convention, but Article 35 governs the initial procedural step, which requires the applicant to overcome the hurdle of admissibility.[15] However, to determine admissibility, the Court must conduct a *prima facie* examination of the merits, and, in so doing, will generally provide reasoning as to why it may find an application "manifestly ill-founded," and therefore, inadmissible.[16] As explored below, that evolution of the Court's reasoning on admissibility as it concerns the rights of lesbian, gay, bisexual, and transgender individuals ("LGBT") under the Convention furnishes one with insight on how the Court may rule on subsequent applications.

Once an application clears the procedural aspect of Article 35, the application must then undergo a thorough examination of the claims and determine whether the Contracting State did indeed violate, and the extent to which the State may continue to violate, an enumerated right of the

---

[15] ECHR, *supra* note 13, art. 34 ("The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.*"); Id.* art. 35 (requiring the Court to dismiss any application that failed to exhaust all domestic remedies, is incompatible with a provision, or that is manifestly ill-founded).

[16] *Id.* art. 35(3)(a); BRINGING A CASE, *supra* note 14, ¶375 ("It is true that the use of the term "manifestly" … may cause confusion … [I]t is clear from the settled and abundant case-law of the Convention institutions … that the expression is to be construed more broadly, in terms of the final outcome of the case. [A]ny application will be considered 'manifestly ill-founded' if a preliminary examination of its substance does not disclose any appearance of a violation of the rights guaranteed by the Convention."). Put another way, manifestly ill-founded may indicate a *prima facie* declaration that the case is inadmissible, the Court's broad method requires it to look beyond the four corners of the application to the ultimate outcome to determine its admissibility.

ECHR.[17] Hence, the Court measures a Contracting State's "margin of appreciation," or the spectrum upon which a State may interfere with an individual's right.[18] To aid in its determination, the ECtHR must undertake a consensus analysis, which requires the Court to identify a crystalized consensus among the Contracting States on the issue.[19] Further,

---

[17] *Bringing a Case*, *supra* note 14, ¶ 367 (To determine if a State has made a permissible interference into the rights enumerated in the Convention, the Court requires the State to affirmatively meet three criteria: "(1) Was the interference in accordance with a "law" that was sufficiently accessible and foreseeable; (2) If so, did it pursue at least one of the "legitimate aims" which are exhaustively enumerated; and (3) if that is the case, was the interference "necessary in a democratic society" in order to achieve that aim? In other words, was there a relationship of proportionality between the aim and the restriction in issue?").

[18] *See Id.* ¶ 335; *see also* PAUL JOHNSON, HOMOSEXUALITY AND THE EUROPEAN COURT OF HUMAN RIGHTS 69 (2013) (to determine the margin of appreciation, the Court examines the legality, legitimacy, and necessity of the restriction relative to the personal interest of the applicant) (hereinafter "HOMOSEXUALITY AND THE EUROPEAN COURT"); PHILIP LEACH, TAKE A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS § 5.11 (2011) (stating that the specific issue before the Court will influence the breadth of a State's margin of appreciation, and that in contentious controversies, a State enjoys a broad latitude to interfere with the personal interest) [hereinafter "TAKING A CASE"]; HOMOSEXUALITY AND THE EUROPEAN COURT, at 68 (identifying that this inherently presents one with no clear outline as to how wide or narrow a State's margin of appreciation is, as the Court, in many instances, provides little legal justification for its reasoning); *Id.* at 69-70 (stating that some argue that this indicates that the margin of appreciation provides insight into the moral compass of the Court). One can analogize the concept of margin of appreciation to the U.S. application of judicial review. For instance, strict scrutiny requires the government to have a compelling interest to regulate the behavior, that the law is narrowly tailored, and it is the least restrictive means to achieve that result. Bret Snider, *Challenging Laws: 3 Levels of Scrutiny Explained*, FINDLAW (Jan. 27. 2014, 9:05 AM), http://blogs.findlaw.com/law_and_life/2014/01/challenging-laws-3-levels-of-scrutiny-explained.html. While the means may differ between the U.S. Courts and the ECtHR, the goal is the same – to determine the extent to which the government may interfere in an individual's respective rights. I did not feel it necessary to reinvent the wheel in my exploration of the jurisprudence of the ECtHR as related to LGBT rights, hence I rely heavily on the thoroughly researched and readily available book by Paul Johnson, HOMOSEXUALITY AND THE EUROPEAN COURT OF HUMAN RIGHTS.

[19] HOMOSEXUALITY AND THE EUROPEAN COURT, *supra* note 18, at 77 (stating that the Court will look to legal development among contracting States, expert opinions, public opinion both within the individual States and across the Council of Europe). *But see id.* at 77–78 ("Consensus analysis is a

the Court adheres to the living instrument interpretation within the framework of contemporary circumstances, which means that the vicissitudes of an issue permit an updated interpretation of the Convention.[20] In instances where a Contracting State acts outside its margin of appreciation as identified by the ECtHR, a contracting State must modify the law to adhere to the Court's determination and cease offending that particular right. However, in some instances, the failure to affirmatively act to protect a right may constitute a violation of the ECHR, which will require the ECtHR to place a positive obligation on the Contracting State to act to prevent further interference.[21]

---

construct through which the Court legitimizes its moral interpretation and because of this, … its use is unpredictable and variable. The Court's case law on homosexuality shows a highly capricious and frequently contested use of statutory, expert, and public consensus analysis… [T]he use … varies to such an extent that it cannot be regarded as causally determinative of the margin in any straightforward way."). The Supreme Court of the United States has not specifically identified this doctrine, but has undertaken similar analyses. *See e.g.,* Bowers v. Hardwick, 478 U.S. 186, 190 (1986) (noting that twenty-four states had anti-sodomy laws and using that rationale as a factor in upholding the constitutionality of said laws); Lawrence v. Texas, 539 U.S. 558, 573 (2003) (acknowledging that the number of states that maintained anti-sodomy laws since *Bowers* had dwindled to thirteen, with only four enforcing them solely against homosexuals and finding those remaining laws unconstitutional); Loving v. Virginia, 388 U.S. 1, 6-7 (1967) (noting that Virginia was only one of sixteen states that still maintained miscegenation laws at the time of the suit) for instances where the Supreme Court of the United States utilized a consensus analysis. The ECtHR does not exist in a vacuum and will often look to the reasoning and holding of non-Convention tribunals to inform it of international movement on a particular issue.

[20] TAKING A CASE, *supra* note 18, at § 5.13 ("[T]he role of the Court is to interpret the Convention in the light of present day conditions and situations, rather than to try to assess what was intended by the original drafts of the Convention in the late 1940s."). This does not mean that the Court ignores its previous decisions; it only means that when the Court deems it appropriate, it will reinterpret previous standards.

[21] *See generally* LEACH, TAKING A CASE, *supra* note 18, at § 6.351 ("The state's primary obligation under Article 8 is negative, that is, not to interfere with those rights. However, in certain circumstances, the Article imposes positive obligations, that is, a duty to take appropriate steps to ensure protection of the rights in question. It is well established that positive obligations are inherent in the concept of the right to 'respect' for private life under Article 8 … [I]n order to determine whether or not a positive obligation

a. A General Background on the Movement of the Court

From its inception, the ECtHR received numerous individual applications that challenged laws that banned homosexual conduct, but declared virtually all of those complaints manifestly ill-founded (i.e., inadmissible).[22] This period shaped the manner in which the Court addressed cases that sought redress for state interference into the lives of gay men. Paul Johnson identified *W.B. v. Federal Republic of Germany*[23] as the first case concerning homosexuality to be confronted by the ECHR.[24] He pointed out that the Commission held that "the Convention permits a High Contracting Party to legislate homosexuality as a punishable offense."[25] Notably, while applicants brought their claim under Articles 2, 8, 14, 17, and 18 of the Convention,[26] the Commission focused its early decision on the right to private life found in Article 8,[27] thus indicating the proper avenue for future cases to be brought. Nevertheless, these early cases permitted the ECtHR to circumvent the issue by relying on the issue of admissibility.[28]

---

exists, the Court will assess the fair balance between the general interests of the community and the interests of the individual.").

[22] JOHNSON, HOMOSEXUALITY AND THE COURT, *supra* note 18, at 19–34 (collecting cases).

[23] W.B. v. Federal Republic of Germany, App. No. 104/55, 1955-57 Y.B. Eur. Conv. Hum. Rts. 228 (Eur. Comm'n H.R.).

[24] JOHNSON, HOMOSEXUALITY AND THE COURT, *supra* note 18, at 23.

[25] *Id.*, quoting W.B. v. Federal Republic of Germany, App. No. 104/55, 1955-57 Y.B. Eur. Conv. Hum. Rts. 228 (Eur. Comm'n H.R.).

[26] ECHR, *supra* note 13, art. 2 (Right to Life), art. 8 (Right to respect for private and family life); art. 14 (Prohibition of discrimination); art. 17 (Prohibition of abuse of rights); art. 18 (Limitation on use of restrictions on rights).

[27] HOMOSEXUALITY AND THE COURT, *supra* note 18, at 24 (recognizing that although the Commission upheld paragraph 175, by classifying the law as one that interferes with Article 8's private life clause, it laid the foundation for future applicants to concentrate their challenges on this provision).; *see also* W.B. v. Federal Republic of Germany, App. No 104/55, 1955-57 Y.B. Eur. Conv. Hum. Rts. 228 (Eur. Comm'n H.R.) (finding that West Germany's paragraph 175, which made sexual conduct between two men illegal, did not violate the Convention); *see also* JOHNSON, HOMOSEXUALITY AND THE COURT, *supra* note 18, at 97.

[28] JOHNSON, HOMOSEXUALITY AND THE COURT, *supra* note 18, at 37.

In 1977, the Commission first declared an application that challenged anti-LGB laws admissible in *X v. United Kingdom*.[29] Although this provided progress, the Commission's decision was obscure, which some have argued was likely due to the ECtHR's transition from *formative* to *judicial*.[30] Put another way, the ECtHR's concern with legitimacy ultimately indicated its willingness to set aside important progress on the rights of an unpopular minority as to not undermine its legitimacy with Contracting States; in that spirit, the ECtHR obfuscated this concern through the use of its consensus analysis doctrine.

Nevertheless, the early seminal case for LGB individuals came in 1981, when the Grand Chamber decided *Dudgeon v. the United Kingdom*.[31] There, the Grand Chamber held that Northern Ireland's anti-sodomy law violated the right to privacy of homosexual men enumerated in Article 8 of the ECHR.[32] Importantly, *Dudgeon* provides two key takeaways for LGB activists: (1) an expansive reading of "private life" unblocks an avenue for LGBT individuals to seek redress from the ECtHR;[33] and (2) the Court views homosexuality as "a private manifestation of the human personality."[34]

In 1986, the Court decided *Rees v. United Kingdom*, where it held that the right to marry provision enumerated in Article 12 requires a biological consideration, and therefore could not be extended to instances where a spouse has

---

[29] X v. United Kingdom, App. No. 7215/75, Eur. Comm'n H.R. Dec. & Rep. Commission (1977).

[30] JOHNSON, HOMOSEXUALITY AND THE COURT, *supra* note 18, at 37 (reasoning that, although the ECtHR was obscure in its decision, it most likely acted due to its transition from a 'formative' court to a 'judicial' judicial).

[31] Dudgeon v. United Kingdom, 4 Eur. H.R. 149 (1981).

[32] *Id.* ¶ 63.

[33] *Id.*

[34] *Id.* ¶ 60. Gary Johnson argues the Court's established its ontological definition of homosexuality, and this approach continues to serve as the foundation of how the Court still views homosexuals. *See* JOHNSON, HOMOSEXUALITY AND THE COURT, *supra* note 18, at 50, ("Central to the Court's recognition that the criminalization of private, homosexual acts constitutes a violation of Article 8 was the idea that the applicant's 'personal circumstances' and his 'tendencies' predisposed him towards particular sexual acts. In this sense, acknowledging the congenital nature of the applicant's sexual orientation was foundation to accepting his status as a victim of criminal law.").

transitioned from one gender to the other, resulting in a male-female relationship.[35] The Court upheld this interpretation but provided insight into what it may look for in subsequent cases that would permit it to revisit the issue, as demonstrated in *Cossey v. the United Kingdom* in 1990.[36] Applying its consensus-analysis doctrine, it held that a consensus had yet to emerge among contracting States that altered the biological aspect of Article 12 and would allow the ECtHR to impose a new standard.[37]

Twelve years after *Cossey*, the Grand Chamber reversed and held that European and international trends moved sufficiently in the direction of recognizing legal status for transgender individuals to receive legal recognition of their proper gender, and thus required the removal of the biological aspect of gender within the meaning of Article 12.[38] Like *Dudgeon*, *Christine Goodwin v. United Kingdom* provided further insight into the factors necessary for subsequent progress. The Grand Chamber found that although Article 12 is the only article that identifies "men" and "women" by gender, it could not "still be assumed that these terms must refer to the determination of gender by purely biological criteria."[39] Looking at societal transitions, it held that "there have been major social changes in the institution of marriage … as well as dramatic changes brought about by the developments in medicine and science in the field of transsexuality."[40] To aid its decision, the Grand Chamber reasoned that the Council of Europe does not exist in a vacuum, permitting the Grand Chamber to look to

---

[35] Rees v. United Kingdom, 106 Eur. Ct. H.R. 4, ¶ 49 (1986) ("In the Court's opinion, the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex."); ECHR, *supra* note 2, art. 12 ("Right to marry – Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."). The use of the word "transsexual" reflects the terminology used in the decision.

[36] Cossey v. United Kingdom, 184 Eur. Ct. H.R. 5, ¶ 46 (1990) ("[T]he developments which have occurred ... cannot be said to evidence any general abandonment of the traditional concept of marriage.").

[37] *Id.*

[38] Christine Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 1.

[39] *Id.* ¶ 100.

[40] *Id.*

broader international movement on the topic.[41] This expansive consensus analysis provided the push required to apply the living instrument doctrine and, relying on the social, cultural, and legal context of that time, reinterpret Article 12 in the light of the then-contemporary understanding of gender.[42]

The Court has also progressed on the issue of family life. Article 8 of the Convention enumerates two important rights: the right to privacy and the right to family life.[43] The Court steadfastly refrained from an expansive interpretation of family life, which left only Article 8's private life as the avenue for applicants to challenge anti-LGB laws. The ECtHR first addressed family life as it relates directly to same-sex couples in 1983, when it deemed an application inadmissible because of the biological aspect of Article 12, and that no consensus had emerged among contracting States to alter this definition.[44] For example, in *Mata Estevez v. Spain*, the applicant shared a home, expenses, and his private life with his partner for a number of

---

[41] *Id.* ¶ 84.

[42] *See* JOHNSON, HOMOSEXUALITY AND THE COURT, *supra* note 18, at 84–85 (evaluating the *living document* approach the Court has taken regarding the ECHR when it first identified the "dynamic and evolutive" approach in Tyrer v. the United Kingdom, App. No. 5856/72, Eur. Ct. H.R. (1978)).

[43] ECHR, *supra* note 2, 13, § I, art. 8

[44] *See* X and Y v. United Kingdom, App. No. 9369/8, 32 Eur. Comm'n. H.R. Dec. & Rep. 220 (1983) (holding that although the child 'Z' was a British national, no tangible ill-effect is had on the child if X is not listed as its father on the birth certificate); *id.* ¶ 44 ("The Court observes that there is no common European standard with regard to granting parental rights to transsexuals. In addition, it has not been established before the Court that there exists any generally shared approach among the High Contracting Parties with regard to the manner in which the social relationship between a child conceived by the AID and the person who performs the role of father should be reflected in law. Indeed, according to the information available to the Court, although the technology of medically assisted procreation has been available in Europe for several decades, many of the issues to which it gives rise ... remain the subject of debate. For example, there is no consensus amongst the member States ... on the question whether the interests of a child conceived in such a way are best served by preserving the anonymity of the donor of the sperm or whether the child should have the right to know the donor's identity. Such the issues in the case, therefore, touch on areas where there is little common ground amongst member States ... and ... the law appears to be in a transitional stage, the respondent State must be afforded a wide margin of appreciation...").

years.[45] However, the Court refused to qualify their relationship as one of the drafters of the ECHR contemplated when they included family life in Article 8.[46] But it noted that Article 8 in conjunction with Article 14 may rise to the level of discrimination, indicating the Court's willingness to expand family life to include same-sex couples.[47] Nevertheless, the Court punted and held that marriage constitutes an essential precondition for eligibility for a survivor's pension; hence, the discrimination suffered had reasonable justification.[48]

Two years after *Mata Estevez*, the ECtHR reversed its holding and expanded family life to include same-sex couples. In *Karner v. Austria*, the application challenged an Austrian law that afforded the right of an unmarried partner to inherit the tenancy of an apartment but failed to encompass homosexuals; the First Section found this violated Article 8 in conjunction with Article 14 because Austria did not show the necessity of discriminating against same-sex partnerships.[49] The Fourth Section applied similar reasoning in *Kozak v. Poland*, when it held that Poland's exclusion of same-sex couples from a law that provided tenancy succession for *de facto* marital cohabitation was discriminatory.[50]

The issue of same-sex marriage presented itself once more to the ECtHR in *Schalk and Kopf v. Austria*.[51] There, the First Section identified the lack of developed consensus among

[45] Mata Estevez v. Spain, 2001-VI Eur. Ct. H.R. at 320–21.

[46] *Id.* at 321 (holding private life as understood by Article 8 does not guarantee access for the surviving partner of a same-sex couple to a deceased partner's pension regardless of the emotional and sexual relationship).

[47] *Id.* at 321; ECHR, *supra*, note 2, art. 14 ("Prohibition of discrimination – the enjoyment of the rights and freedoms set forth in this 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.").

[48] *See* Mata Estevez, 2001-VI Eur. Ct. H.R. at 314.

[49] Karner v. Austria, 2003-IX Eur. Ct. H. R. 199, ¶ 37 ("The Court reiterates that ... a difference in treatment is discriminatory if it has no objective and reasonable justification.").

[50] Kozak v. Poland, App. No. 13102/02, 2010 Eur. Ct. H. R., ¶¶ 92–99.

[51] Schalk and Kopf v. Austria, 2010-IV Eur. Ct. H.R. 409.

European States to expand marriage to same-sex couples.[52] Further, it noted the difference in terms: Article 12 genders the right with its use of "men and women," but the use of "everyone" found in Article 8 meant that gender was not a consideration for the rights enumerated in that article.[53] *Schalk* unshackled "family life" under Article 8 by removing the gendered constraints previously affixed, even though it inflexibly adhered to those same constraints in regards to the right to marriage under Article 12. Nevertheless, this expansive reading of Article 8 brought the issue to light with *Kozak*.

Thus, the ECtHR evolved substantially from *Dudgeon* in 1981 to *Schalk* in 2010. Nevertheless, even as the ECtHR continued to slowly move on the issue, same-sex couples began to see their rights vindicated as more countries began to provide legal partnership recognition either through alternative schemes such as civil unions or by ending state sponsored discrimination by expanding marriage.

a. *Schalk* and *Vallianatos* – What Did the ECtHR Say?

Schalk laid the foundation upon which the ECtHR built *Vallianatos* and *Oliari*. *Vallianatos* applied that criteria set forth in *Schalk* and produced a favorable decision for same-sex couples, and *Oliari* builds upon *Vallianatos* with its expansive application of "State movement."

As previously noted, *Schalk's* significance stems from the ECtHR's acknowledgment that Article 8's family life also applies to same-sex partnerships.[54] Prior to this decision, the ECtHR expressly refused to include same-sex partnerships and their families within the scope of this provision, only extending the

[52] *Id.* ¶ 58 ("[T]he institution of marriage has undergone major social change since the adoption of the Convention, the Court notes that there is no European consensus regarding same-sex marriage.").

[53] *Id.* ¶ 60 (Comparing Article 12 with Article 8 does not mean that same-sex couples should be denied "family life" due to biological sex, but the difference in wording between "men and women" and "everyone" is notable to withhold an expansive reading of Article 12 to include same-sex couples).

[54] *Id.*

right to private life found in Article 8 to same-sex couples.[55] By expanding family life, the ECtHR fundamentally shifted the conversation.

At the time that the First Section decided *Schalk*, only six of the forty-seven Contracting States of the Council of Europe recognized same-sex marriages and only thirteen extended some form of partnership reorganization (e.g., civil unions).[56] The applicants, two cohabitating Austrian nationals in a same-sex relationship, claimed that Austria discriminated against them when they were denied the right to marry or to have a relationship otherwise recognized by law.[57] The applicants brought their claims under Article 12 and Article 14 taken in conjunction with Article 8.[58] On the issue of admissibility, Austria failed to provide a strong argument against the complaint as it related to Article 12 of the Convention, which the First Section determined was satisfied due to the complex nature and the issue of law and fact it raised.[59] For the alleged violation of Article 14 taken in conjunction with Article 8, the First Section affirmed admissibility but determined that the applicants failed to achieve *victim status*.[60] The reasoning

[55] *See* Mata Estevez, 2001-VI Eur. Ct. H.R. at 321.

[56] Schalk, 2010-IV Eur. Ct. H.R. ¶¶ 27–28.

[57] *Id.* ¶¶ 1–3.

[58] *Id.* ¶¶ 40, 65.

[59] *Id.* ¶¶ 40–41 ("The Court observes that the Government raised the question whether the applicants' complaint fell within the scope of Article 12, given that they were two men claiming the right to marry. The Government did not argue, however that the complaint was inadmissible as being incompatible *ratione materiae*. The Court agrees that the issue is sufficiently complex not to be susceptible of being resolved at the admissibility stage. The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and of law under the Convention, the determination of which requires an examination of the merits. The Court concludes, therefore, that this this complaint is not manifestly ill-founded… No other grounds for declaring it inadmissible has been established.").

[60] *Id.* ¶¶ 73–74 ("The Court reiterates that an applicant's status as a victim may depend on compensation being awarded at the domestic level on the basis of the facts about which he or she complains before the Court and on whether the domestic authorities have acknowledged, either expressly or in substance, the breach of the Convention. … [T]he Court does not have to examine whether the first condition has been fulfilled, as the second condition has not been met. The government had made it clear that the Registered Partnership Act was introduced a matter of policy choice and not in order to

applied by the First Section portends its ultimate holding: Austria did not violate the Convention by failing to extend partnership recognition to same-sex couples.[61]

The First Section began its assessment on the alleged Article 12 complaint by acknowledging its previous movement away from the concept of traditional marriage. It cited *Goodwin* as an example of its willingness to interpret Article 12 in light of the circumstances that existed at the time of the case.[62] Recall that in *Goodwin*, the Grand Chamber acknowledged a crystalized consensus among the Contracting States that an individual who undergoes sexual-reassignment surgery can marry a member of the opposite sex.[63] In doing so, the Grand Chamber removed the biological aspect of sex from the concept of marriage as contemplated by Article 12; this did not mean that biological sex was irrelevant, but only that an individual who undergoes sex reassignment surgery can participate in marriage with a member of the now opposite sex.[64] It further acknowledged, however, that this did not extend marriage to couples in pre-existing marriages when one partner seeks to transition to the other sex, which afforded the State the ability to force that couple to divorce prior to acknowledging a change in sex.[65]

The petitioners in *Schalk* argued that, although Article 12 contains the words "men and women," one could read that as

---

fulfil an obligation under the Convention."). This note avoided a discussion on *victim status* as understood by the ECtHR as it did not afford any substantive value to this analysis. It was included in the analysis of *Schalk* only because of its relation to the final decision.

[61] Schalk, 2010-IV Eur. Ct. H.R. ¶ 110.

[62] *Id.* ¶ 51.

[63] *Id.*

[64] *Id.* ¶ 52 ("[The Court] considered that the terms used by Article 12 which referred to the right of a man and woman no longer had to be understood as determining gender by purely biological criteria."). This concept is not unique to Europe; prior to *Obergefell*, some U.S. states recognized that transgender individuals could marry a member of the opposite gender if they had met necessary legal requirements.

[65] *Id.* ¶ 53 ("The Court concluded that it fell within the State's margin of appreciation as to how to regulate the effects of the change of gender on pre-existing marriages.") (citing Parry v. the United Kingdom, 2006-XV Eur. Ct. H.R. 271; R. and F. v. the United Kingdom, no. 35748/05, 28 November 2006).

meaning "two men" or "two women."[66] The First Section dismissed this argument by stating that the specific language of Article 12, as compared to other Articles, indicates that the framers intended to restrict marriage to members of the opposite sex.[67] In refusing to accept the applicants' argument, the First Section ultimately held that even though the applicants did not utilize an entirely textualist argument, even relying on the ECtHR's living instrument doctrine, the light of present day circumstances had yet to mean that Article 12 obligates Contracting States to extend marriage to same-sex couples.[68]

The First Section next addressed the alleged violation of Article 14 taken in conjunction with Article 8 of the Convention. To start the analysis, it acknowledged that established case law recognized that family life under Article 8 does not require a marriage.[69] The ECtHR affords States a wide margin of appreciation to define family life because of the lack of common ground between the Contracting States. Due to the rapidly changing landscape within the Council of Europe, it held that, in light of present-day circumstances, a consensus had emerged that family life encompasses same-sex couples in *de facto* partnerships.[70]

The applicants argued that one may derive a right to marriage from taking Article 14 in conjunction with Article 8, which they supported by reasoning that one must read the Convention as a whole and the Articles construed in harmony with one another.[71] Further, the applicants predicated this argument on the notion that the failure to extend marriage rights to same-sex couples treated same-sex couples different than opposite-sex couples, thus violating Article 12 in conjunction with Article 8.[72] This argument, however, failed to consider the wide margin of appreciation afforded to Contracting

---

[66] Schalk, 2010-IV Eur. Ct. H.R. ¶¶ 54–55.

[67] *Id.* ¶¶ 54–55, 60 (holding that because other articles use "everyone" while Article 12 uses "men and women," the wording implies a deliberate intent).

[68] *Id.* ¶ 58.

[69] *Id.* ¶ 91.

[70] *Id.* ¶¶ 91, 94.

[71] Schalk, 2010-IV Eur. Ct. H.R. ¶ 101.

[72] *Id.* ¶ 96.

States in this circumstance.[73] The First Section viewed this argument as inherently flawed, stating that if its previous holding that Article 12 does not guarantee the right to marry to same-sex couples, then Article 14 in conjunction with Article 8, a broader provision, cannot be interpreted to create an obligation either.[74]

Further, the First Section determined that a lack of consensus still had yet to emerge, as a majority of Contracting States had yet to move on the issue of same-sex partnership recognition, but it did identify an emerging consensus.[75] Therefore, the First Section found no obligation for Austria to provide same-sex couples with access to marriage.[76] Finally, the First Section concluded that the Contracting States remain free to restrict access to marriage and to determine the extent to which an alternative scheme confers rights similar to marriage to same-sex couples.[77]

Schalk may not have extended the right to marriage to same-sex couples or created a positive obligation on Contracting States to provide an alternative scheme for partnership recognition, but it did offer three redeeming aspects: (1) Article 12 is no longer exclusive to opposite-sex couples in all circumstances; (2) it extended the right to family life to same-sex couples; and (3) it acknowledged an emerging consensus among the Contracting States in regards to legal partnership recognition for same-sex couples.[78]

---

[73] *Id.* ¶¶ 96–98 (Acknowledging a narrow margin of appreciation for state regulation on sex and sexual orientation but a broad margin of appreciation general measurers of economic and social strategy).

[74] *Id.*

[75] *Id.* ¶ 105 ("Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. This area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes.") (citations omitted).

[76] *Id.* ¶ 106 ("The Austrian Registered Partnership Act, which came into force on 1 January 2010, reflects the evolution described above and is thus part of the emerging European consensus. Though not in the vanguard, the Austrian legislator cannot be reproached for not having introduced the Registered Partnership Act earlier.").

[77] *Id*. ¶¶ 108–09.

[78] Loveday Hodson, *A Marriage by Any Other Name?*, 11 HUM. RIGHTS L. REV. 170, 176 (2011) ("[T]he Court acknowledged an emerging European

Three years after the decision in *Schalk*, the Grand Chamber of the European Court of Human Rights issued its decision in *Vallianatos and Others v. Greece*.[79] Where *Schalk* first extended family life to same-sex couples and began to further erode the biological aspect previously incorporated into marriage, *Vallianatos* identified circumstances where a positive obligation to provide legal recognition to same-sex couples will manifest.

On November 26, 2008, the "Reforms concerning the family, children and society," which created an alternative scheme to marriage restricted only to opposite-sex couples, went into effect in Greece.[80] An explanatory report justified this law by recognizing the social reality of modern Greece–many couples wished to have more flexibility in regards to their state-recognized unions.[81] Although some pushed for the inclusion of same-sex couples, the legislature felt that Greek society was "not yet ready to accept cohabitation between same-sex couples."[82]

The Grand Chamber granted admissibility for two reasons: (1) although two of the applicants did not meet the criteria, the remaining applicants satisfied the criteria for victim status as described in Article 34; and (2) the Government failed to show how the applicants could receive sufficient remedy in domestic courts or that the applicants failed to exhaust domestic remedies.[83]

On the merits of the case, the Greek government argued, *inter alia*, that the point of the law was to protect children born to different sex couples who were already living in *de facto* partnerships, but that the civil unions were to provide an alternative partnership scheme to heterosexual couples who wish to have more flexibility relative to marriage.[84] The government further relied on the claim that the law was justified under the existing social phenomenon of opposite-sex couples

consensus towards recognition and indicated that its case law would be responsive to it.").

[79] Vallianatos and Others v. Greece, 2013-VI Eur. Ct. H.R. 125.

[80] *Id.* ¶ 9.

[81] *Id.* ¶ 10.

[82] *Id.* ¶¶ 13–14.

[83] Vallianatos, 2013-VI Eur. Ct. H.R ¶¶ 47–59.

[84] *Id.* ¶ 61.

raising children out of wedlock and their interest in protecting the legal rights of their families.[85] That is, the legislature did not intend to regulate all non-married, opposite-sex couples who were already offered some *de facto* rights for their unrecognized partnerships, but wanted to offer more protection for those non-married, opposite-sex couples with children.[86] The applicants countered that the law was out-of-step with other European countries that had introduced civil unions, and that the clear intent of the law was to regulate non-married couples who did not wish to marry, whether they had, or intended to have, children.[87]

Previously, the ECtHR refused to include Article 14 of the Convention, which contemplates issues related to different treatment of individuals, in an analysis concerning same-sex families. However, *Schalk*'s expansive view of family life enabled the Grand Chamber to apply Article 14 to same-sex couples and narrow the margin of appreciation previously enjoyed by the Contracting States when it takes Article 8 in conjunction with Article 14.[88] One should recall that this is not out-of-step with *Schalk*, as the First Section in *Schalk* acknowledged the interest a same-sex couple has in civil unions, but afforded the State a greater margin of appreciation on regulating marriage as permitted under Article 12 of the Convention. On this point, the Grand Chamber found that the raison d'être of Greece's action was to create an alternative scheme for the purpose of governing the contract between two opposite-sex couples for the purpose of living as a couple.[89] The government did not confine the law only to child-rearing, but included regulation on financial relations,

[85] *Id.* ¶ 63.

[86] *Id.* ¶ 64.

[87] *Id.* ¶¶ 60–61.

[88] *Id.* ¶¶ 76–77 ("The notion of discrimination within the meaning of Article 14 also includes cases where a person or group is treated, without proper justification, less favourably than another, even though the more favorable treatment is not called for by the Convention . . . Sexual orientation is a concept covered by Article 14. The Court has repeatedly held that, just like differences based on sex, differences based on sexual orientation require 'particularly convincing and weighty reasons' by way of justification . . . Differences based on sexual orientation are unacceptable under the Convention.") (internal quotations and citations omitted).

[89] Vallianatos, 2013-VI Eur. Ct. H.R. ¶ 61.

maintenance obligations, the right to inherit, and dissolution of the union.[90] For those reasons, the Grand Chamber did not accept the government's argument that it undertook this action due to the interest in children born or raised by an unwed couple.[91]

Nevertheless, the Grand Chamber held that in this context, when the Contracting State has a narrow margin of appreciation, the principle of proportionality requires that the State only act out of necessity to exclude individuals (or groups) from achieving its aim, firmly placing the burden of proof on the government to show why exclusion is necessary.[92] Applying the principle of proportionality to the issue at hand, the Grand Chamber once again acknowledged an emerging consensus among States for legal recognition of same-sex relationships.[93] However, the consensus that the Grand Chamber did identify was based on the fact that of all the Contracting States that introduced legal and alternative partnership schemes for unwed couples, they all included same-sex couples, with Greece and Lithuania serving as the exceptions.[94] Hence, the consensus is not that one must provide same-sex couples with legal partnership recognition, but if a Contracting State chose to introduce a scheme for unwed couples, it *must* include same-sex couples.

The Grand Chamber further noted that Resolution 1728 (2010) of the Parliamentary Assembly of the Council of Europe, which called on Contracting States to ensure legal recognition of same-sex couples and specifically identifying alternative schemes for unmarried couples, supported the notion that States should include same-sex couples within any alternative

---

[90] *Id.*

[91] *Id.* ¶ 89 ("[T]he Court notes firstly that the Government's arguments focus on the situation of different-sex couples with children, without justifying the difference in treatment arising out of the legislation in question between same-sex and different-sex couples who are not parents. Secondly, the Court is not convinced by the Government's argument that the attainment through [the] law . . . of the goals to which they refer presupposes excluding same-sex couples from its scope.").

[92] *Id.* ¶ 85.

[93] *Id.* ¶ 91.

[94] *Id.*

partnership schemes.[95] Put another way, the Grand Chamber identified an emerged consensus that if a State acts to create an alternative scheme that extends to unwed couples the rights otherwise reserved for married couples, the Convention places a positive obligation on the State to include same-sex couples in that scheme. For a State to not include same-sex couples, they must have convincing and weighty reasons to justify that exclusion.[96] Therefore, Greece violated Article 8 taken in conjunction with Article 14 of the Convention by excluding same-sex couples from its civil union law.[97]

Vallianatos builds on the foundation of *Schalk* in a significant way- *Schalk* extended family life to include same-sex couples but stopped short of placing a positive obligation on Austria to act earlier than it did to extend some legal recognition to those couples; *Vallianatos*, for the first time, identified a positive obligation for a State to extend legal recognition to same-sex couples, but it does so only if the State chooses to act on the issue of legal recognition for unmarried couples. The Grand Chamber failed to identify a consensus for providing legal recognition, but held that, if a State chooses to create an alternative partnership recognition, even if just for opposite-sex couples, it must do so inclusive of same-sex couples.[98] The question now posed focuses on whether *Oliari* alters this understanding.

II. *OLIARI* AND *OTHERS V. ITALY*

The Fourth Section of the European Court of Human Rights in *Oliari and Others v. Italy* held that Italy's failure to extend any legal recognition to same-sex couples violated Article 8 of the Convention.[99] The holding signals a natural progression

[95] *See* Vallianatos, 2013-VI Eur. Ct. H.R. ¶¶ 61, 28–30; *see also id.* ¶ 91 ("[T]his trend is reflected in the relevant Council of Europe materials . . . [T]he Court refers particularly to Resolution 1728(2010) of the Parliamentary Assembly of the Council of Europe and to Committee of Ministers Recommendation CM/Rec(2010)5.") (citations omitted).

[96] *See* Vallianatos, 2013-VI Eur. Ct. H.R ¶ 92.

[97] *Id.* ¶¶ 34–35.

[98] This note withheld an analysis of the concurring and dissenting opinions as they addressed other issues presented.

[99] Oliari, 2015 Eur. Ct. H.R.¶ 205.

of ECtHR jurisprudence respective to the rights for homosexuals under the ECHR. Nevertheless, *Oliari* fails to address many of the issues facing same-sex families and is narrowly-tailored in such a way that it remains seemingly only applicable to the circumstances found in Italy.

a. The Relevant Articles of the European Convention on Human Rights and Admissibility

The applicants in *Oliari* claimed that the failure on the part of the Italian Government ("Italy;" "the Government") to legally recognize same-sex couples violated Article 8 alone, Article 14 in conjunction with Article 8, and Article 12 alone, and Article 14 in conjunction with Article 12.[100]

As a threshold matter, the Fourth Section recognized the undisputed fact that Article 8's "private life" contemplates LGB individuals; reiterated that Article 8's "family life" encompasses same-sex couples in *de facto* partnerships; and concluded that the facts of the case-at-bar meet the admissibility requirements of Article 8.[101] Further, as Article 14 serves as a complementary provision to the other substantive provisions, and as Italy did not contest applicability, because Article 8 applies on its own, Article 14 with Article 8 also meets the admissibility requirements.[102]

In regards to Article 12, the Applicants argued that because more countries have legislated in favor of same-sex marriage post-*Schalk*, and because the ECtHR interprets the Convention as a living document, the facts of this case warrant a reevaluation of the subject matter in light of the present day.[103] While the Fourth Section did determine that Article 12 no longer applies exclusively to heterosexual couples, *Schalk* failed to expand Article 12 to include same-sex couples, stating that

[100] *Id.* ¶¶ 99, 188–190.

[101] *Id.* ¶ 106. Recall that the Court first expanded private life to apply to homosexuals in *Dudgeon v. United Kingdom* and recognized family life to include *de facto* same-sex couples in *Schalk and Kopf v. Austria*.

[102] Oliari, 2015 Eur. Ct. H.R ¶¶ 102–04.

[103] *Id.* ¶ 189.

although it recognizes an emerging European consensus towards legal recognition of same-sex couples, it cannot find a crystalized consensus among the Contracting States that would place a positive obligation to extend marriage to same-sex couples, and that States maintain a broad margin of appreciation when it comes to regulating marriage; thus, the exclusion of same-sex couples does not offend the Convention.[104] As a consensus had yet to emerge, the Article 12 claim was manifestly ill-founded and, therefore, was inadmissible.[105]

b. The Italian Constitution and Same-Sex Partnership Recognition

Prior to taking the case to the ECtHR, the applicants sought redress within the domestic court system. The Constitutional Court of Italy on April 15, 2010 held that denying same-sex couples access to legal recognition and benefits similar to marriage violates Article 2 of the Italian Constitution, and identified a legal lacuna due to the failure to formally recognize any form of same-sex partnerships.[106] Nevertheless, the Italian Court was powerless to rectify the issue as, by nature of the Italian system, it cannot act on its own and it cannot force the legislature to act.[107]

The Fourth Section noted that the Italian parliament had debated the subject matter since 1986.[108] In fact, the Government referenced this debate as a predicate to its argument that Italy acted within its margin of appreciation by

---

[104] Schalk and Kopf v. Austria, 2010-IV Eur. Ct. H.R. 409, ¶¶ 105, 108 (finding a lack of consensus among contracting stats that would place a positive obligation under either Article 12 or Article 8 to extend marriage rights to same-sex couples, or to require some form of partnership benefits).

[105] Oliari, 2015 Eur. Ct. H.R ¶ 192 (at the time of *Oliari*, only eleven states had same-sex marriage); *id.* ¶ 194. ("It follows that both the complaint[s] … are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.").

[106] *Id.* ¶¶ 2–3.

[107] *Id.* Similarly, the ECtHR cannot force a State to act; it can merely find when the State's action (or inaction) offends a Convention provision and issue a fine against that State.

[108] Oliari, 2015 Eur. Ct. H.R. ¶ 126.

continuing to debate the subject matter.[109] Nevertheless, the Government argued that because a consensus had yet to emerge, the ECtHR cannot find that it violated Article 8 for failing to move on the issue.[110] The Fourth Section rejected this argument, stating that while domestic governments are usually better placed to assess the interest of the community, the fact that the Constitutional Court of Italy identified an unconstitutional legal lacuna that the legislature must remedy and that this issue had been considered by the Italian parliament previously, the continued failure of the legislature to move on the subject sufficiently demonstrates that Italy violated its margin of appreciation within Article 8.[111] The Fourth Section further observed that providing civil unions was "an expression [that] reflects the sentiments of a majority of the Italian population, as shown through official surveys."[112]

The Fourth Section further utilized Italy's long delayed action to indicate that it had a positive obligation to act,[113] which implicates *Vallianatos* as an indirect analogy. That is to say, in *Vallianatos*, the Greek Government passed an alternative scheme to marriage, and the Grand Chamber held that because of the strong interest of same-sex couples in legal protections, any alternative partnership scheme cannot exclude same-sex couples,[114] but in *Oliari*, the fact that Italy had debated this issue for decades, and the fact that the Constitutional Court has identified that the legal lacuna is unconstitutional, a positive obligation can be identified that required Italy to provide partnership recognition to same-sex couples.[115] In that regard,

---

[109] *Id.*

[110] *Id.*

[111] *Id.* ¶¶ 179–80.

[112] *Id.* ¶ 181 ("The statistics submitted indicate that there is amongst the Italian population a popular acceptance of homosexual couples, as well as public support for their recognition and protection.").

[113] *See id.* ¶ 166.

[114] Vallianatos, 2013-VI Eur. Ct. H.R. ¶¶ 47–59.

[115] The ECtHR also identified a decision from the Italian Court of Cessasion from 2012, where the Court of Cessasion concluded that foreign marriages could not be recognized because that recognition would have no legal ramification in Italy, but persons living in a stable relationship were entitled to private and family life protections under Article 8 of the Convention; thus, the failure on the part of Italy to offer some type of analogous partnership

the analysis suggests that the Fourth Section did not suddenly recognize a new positive obligation, but that it merely expands the positive obligation previously identified that manifests when the State begins to act. Ultimately, the Fourth Section considered: (1) the Italian parliament had debated this issue since 1986;[116] (2) in 2010 the Constitutional Court identified a legal lacuna in denying same-sex couples the right to marry;[117] (3) in 2012 the Court of Cessation found that Italy's failure to offer any legal recognition analogous to marriage likely violates the ECHR;[118] and (4) the Italian public favored granting same-sex couples the right to legal recognition.[119] The Fourth Section used these factors to find that the Parliament was not acting as the best arbiter for the desires of the Italian people, and that in this instance, the court rulings coupled with opinion polls clearly indicated a preference for granting same-sex couples legal recognition, thus narrowing Italy's margin of appreciation.[120]

a. The Emerging Trend among Contracting States

The ECtHR has taken small steps towards recognizing a positive obligation under Article 8 requiring legal recognition of same-sex couples. As previously discussed, *Schalk* expanded the purview of Article 12 regarding gender, but fell short of finding a positive obligation for the recognition of same-sex marriage.[121] By the time *Schalk* reached the First Section, Austria passed the Registered Partnership Act, creating a legal scheme for same-sex couples to receive similar rights to heterosexual couples. This meant that the First Section declined to address whether

scheme contravened the Convention. Oliari, 2015 Eur. Ct. H.R. ¶ 35. *See also* Sabrina Ragone & Valentina Volpe, *An Emerging Right to "Gay" Family Life? The case of Oliari v. Italy in a Comparative Perspective*, 17 German L.J. 451, 455–56 (2016) (providing an analysis of the decisions from the Italian Constitutional Court and Court of Cessation and their impact on the decision of the European Court of Human Rights).

[116] Oliari, 2015 Eur. Ct. H.R. ¶ 126.

[117] *Id.* ¶¶ 40–41.

[118] *Id.* ¶ 35.

[119] *Id.* ¶ 190.

[120] *See id.* ¶ 59.

[121] *See* Schalk, 2010-IV Eur. Ct. H.R. 409.

Article 8 places a positive obligation on Contracting States to extend legal recognition to same-sex couples. The First Section, however, held that Austria's movement on the issue lent itself to an emerging consensus for partnership recognition. Hence, Austria acted within its margin of appreciation, even if a little late to the game.[122]

In *Vallianatos v. Greece*, the Grand Chamber recognized a positive obligation under Article 8 to provide legal recognition to same-sex couples; it did so under the premise that if the Contracting State acts to create an alternative partnership scheme relative to marriage, it cannot do so while excluding same-sex couples.[123] Greece violated Article 14 in conjunction with Article 8 because the process of recognizing *de facto* cohabitation, and affording those unregistered partnerships rights usually reserved for marriage, must not discriminate due to sexual orientation.[124] Put another way, under *Schalk*, a Contracting State does not have a positive obligation to extend marriage to same-sex couples, but under *Vallianatos*, if they choose to create an alternative scheme of partnership recognition for non-married couples, they cannot exclude same-sex couples from the scheme. The logic behind the ECtHR's holding focuses primarily on which *emerging consensus* applies. That is to say, many other Contracting States previously introduced some form of alternative to marriage, but in all cases except for Greece and Lithuania, those alternatives included same-sex partners. Thus, the act of establishing an alternative scheme to marriage became the consensus the ECtHR identified, and that action created a positive obligation to include same-sex couples.[125]

---

[122] *Id.* ¶ 105; *see also id.* ¶ 106 ("Though not in the vanguard, the Austrian legislation cannot be reproached for not having introduced the Registered Partnership Act any earlier.").

[123] *See* Vallianatos, 2013-VI Eur. Ct. H.R.

[124] *See Id.* ¶ 89.

[125] *Id.* ¶ 91 ("[T]he Court would point to the fact that, although there is no consensus among the legal systems of ... member States, a trend is currently emerging with regard to the introduction of forms of legal recognition of same-sex relationships. Nine member States provide same-sex marriage. In addition, seventeen member States authorise some form of civil partnership for same-sex couples. As to the specific issue raised by the present case, the Court considers that the trend emerging in the legal systems of the ... member States

One must consider the distinction between *Vallianatos* and *Oliari*. Following the logic in *Vallianatos*, a positive obligation manifests when the Contracting State chooses to act. In a sense, this creates a *negative obligation* to simply not act if a Contracting State wishes to remain within the margin of appreciation for not extending any legal recognition to same-sex couples. In *Oliari*, however, the applicants claim that by not establishing civil unions (or marriage), the Contracting State violated the Convention. Considering the short time between *Vallianatos* and *Oliari*, the number of States recognizing some form of partnership recognition remained relatively stable.[126] *Oliari* did not move the issue substantially, but expanded the type of state action that constitutes movement: in *Vallianatos*, the action of the Greek government and the resulting alternative partnership scheme created the positive obligation; in *Oliari*, the action by the Italian government, in debating partnership recognition for three decades, the unconstitutional lacuna identified by the Italian Constitutional Court, and the Parliament's failure to act, created the positive obligation. Hence, *Oliari* broadens the consensus by including movement by the government, not that it necessarily requires an actual alternative scheme to have been implemented. Further, it indicates what "movement" may mean.

The Fourth Section emphasized developments outside of the Council of Europe. For instance, the decision acknowledged that the Supreme Court of the United States recognized a constitutional right to marriage for same-sex couples in

---

is clear: of the nineteen States which authorize some form of registered partnership other than marriage, Lithuania and Greece are the only ones to reserve it exclusively to different-sex couples. In other words, with two exceptions ... when they opt to enact legislation introducing a new system of registered partnership as an alternative to marriage for unmarried couples, include same-sex couples in its scope."). *But see* Clair Poppelwell-Scevak, *The Euroepan Court of Human Rights and Same-Sex Marriage. The Consensus Approach* 41–45 (Ohio Law School, PluriCourts Research Paper No. 16–10, 2016) (arguing there continues to be confusion among scholars on what an *emerging consensus* is, and using *trend* in place of *emerging consensus* more aptly describes the process of the Court as it relates to LGBTQI rights), http://dx.doi.org/10.2139/ssrn.2832756.

[126] *See* Vallianatos, 2013-VI Eur. Ct. H.R. ¶ 9; *see also* Oliari, 2015 Eur. Ct. H.R. ¶ 205.

Obergefell v. Hodges.[127] But the Fourth Section implied that the Supreme Court reached this decision by undertaking a consensus analysis because it only found that same-sex marriage was a right after most States permitted it.[128] Under this logic, had a majority of states not expanded marriage rights to same-sex couples, the Supreme Court may have found differently.[129] This implication seeks to legitimatize the ECtHR's reluctance on the issue.

a. *The Concurring Opinion*

Three judges concurred that Italy did violate Article 8 of the Convention, but did not find that the Convention imposed a positive obligation on States to act.[130] They reasoned that by acting voluntarily, Italy chose to intervene in the personal relations of homosexuals, as understood by Article 8, and that action triggered a positive obligation.[131] The violation finds its root in the defective nature of the Italian system, in that the Constitutional Court has the power to interpret the Italian Constitution but does not have the power to enforce its holding.[132]

The Concurrence noted that the Majority's opinion applied a narrow application of the doctrines in circumstances

---

[127] Oliari, 2015 Eur. Ct. H.R. ¶ 65, citing Obergefell v. Hodges, 135 S.Ct. 2584 (2015) (recognizing a fundamental right under the due process clause of the Fourteenth Amendment for same-sex couples to marry).

[128] 2015 Eur. Ct. H.R. ¶ 65 ("[N]oting that many States already allowed same-sex marriage ... [the Supreme Court] opined that the disruption caused by the recognition bans was significant and ever-growing.").

[129] In that sense, had the U.S. Supreme Court confronted the issue earlier, it would have not reached the conclusion that it did, *or* U.S. states would maintain a broader margin of appreciation in regards to their respective marriage laws. This supports the notion that the ECtHR's concern for legitimacy impacts its willingness to move on an issue; the consensus analysis doctrine inhibits the ability of the ECtHR to evolve. However, one should not disregard the tremendous steps made by the ECtHR to protect minority rights. When the ECtHR decided *Dudgeon v. United Kingdom*, it did so in the vanguard. Associate Justice Anthony Kennedy would cite *Dudegon* in 2003 in *Lawrence v. Texas*, which overturned anti-sodomy laws in the United States.

[130] Oliari 2015 Eur. Ct. H.R. ¶ 1 (Mahoney, concurring).

[131] *Id.*

[132] *Id.*

unique to Italy.[133] It reasoned that the Majority is "careful to limit their finding … to Italy and to ground their conclusion on a combination of factors not necessarily found in other Contracting States … [W]e are not sure that such a limitation of a positive obligation under the Convention to local conditions is conceptually possible."[134] Thus, the positive obligation only applies to Italy. However, whether it is feasible to so narrowly limit the positive obligation to one State remains undetermined.[135] Furthermore, the Concurrence spoke to the misapplication in the Majority's use of positive obligation.[136] That is, the Majority suggested a positive obligation on all Contracting States, but that should not apply to all Contracting States; rather, the defect here cannot be found in the terms of a failure to fulfill a positive obligation, but in defective State intervention in the sphere of private and family life.[137]

c. *What does Oliari Accomplish?*

Oliari may not accomplish anything in the immediate future. The decision does identify some key issues that proponents of same-sex marriage, or civil unions, must address prior to any further movement within the scope of the Council of Europe. But the holding remains firmly narrow and still in line with *Vallianatos* and *Schalk*.

---

[133] *Id.* ¶ 9 (Mahoney, concurring).

[134] *Id.* ¶ 10 ("Our colleagues are careful to limit their finding ... to Italy and to ground their conclusion on a combination of factors not necessarily found in other Contracting States. [W]e are not sure that such a limitation of a positive obligation under the Convention to local conditions is conceptually possible.") (concurring opinion).

[135] *Id.* (concurring opinion).

[136] *Id.* (concurring opinion).

[137] *Id.* ¶ 10. The note offers that one can interpret the differences as highly nuanced, and they seem prima facie identical. The Majority finds a *positive obligation* when the Government moves on the issue, with *Oliari* expanding what qualifies as movement. The Concurrence places the issue on Italy's interference with *private* and *family life.* In essence, 'movement' and 'interference' are the same thing. The disagreement, however, is whether it was appropriate to use this instance to expand what 'movement' means. I offer that I am partial to the argument put forward by the Concurrence, on the ground that it implies progress on the issue when none really exists.

The Fourth Section based its position on the fact that the Government failed to present an argument that it has a prevailing community interest in restricting access of partnership recognition to same-sex couples.[138] The Fourth Section acknowledged that Contracting States maintain a wide margin of appreciation within the context of private life when a consensus among Contracting States within the Council of Europe has yet to crystalize.[139] The flexible margin of appreciation enjoyed by Contracting States depends entirely on the positive obligation found under Article 8; that is, when determining if such an obligation exists, the ECtHR will utilize the fair balancing test, weighing the general interest against the interest of the individual.[140] The Fourth Section identified the individual interest argued by the applicants, that there is a particular interest in obtaining civil unions, as this is an appropriate alternative to marriage and functions as a way to grant legal protections enjoyed by heterosexual couples.[141] The Fourth Section noted that the Italian Government did not present an explicit interest of the community as a whole to justify its failure to extend partnership benefits to same-sex couples.[142]

The Court identified that social and ethical sensitivities create a broad margin of appreciation, but noted that the instant case lacks such sensitivity.[143] The case addresses the need for individuals to have access to legal protections and the core protections that applicants desire as same-sex couples.[144] Thus, while social and ethical sensitivities may exist, and may remain

---

[138] *Id.* ¶ 181.

[139] *Id.* ¶ 162. I emphasize the usage of the Council of Europe. This indicates that the movement must be virtually entirely internal, as unless some seismic shift occurs externally that places the Council of Europe in a vacuum, the member States must move the Court.

[140] *See* JOHNSON, HOMOSEXUALITY AND THE COURT, *supra* note 7, at 96 (quoting Van Kück v. Germany, 2003-VII Eur. Ct. H.R. § 70-71); *see also* Oliari, 2015 Eur. Ct. H.R. ¶ 162 ("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.").

[141] *Oliari*, 2015 Eur. Ct. H.R. ¶ 174.

[142] *Id.* ¶ 176.

[143] *Id.* ¶ 111.

[144] *Id.* ¶ 177.

a concern for the State, those sensitivities do not overcome the individual interest in seeking legal protections.[145]

Ultimately, the logical interpretation follows along with *Vallianatos*, in that the Italian parliament began to act on the subject in 1986 and its courts acted as recently as 2010, but legal recognition for same-sex couples remained in a state of limbo, as in Greece where the Government acted to extend rights to heterosexual couples in *de facto* unions while actively excluding same-sex couples.[146] In both of the instances, the fact that the State committed an action created the positive obligation. In *Schalk*, the First Section did not address the issue of civil unions because the legislature acted prior to the any action by the Court, thus rending any action moot.[147] In this sense, *Oliari* only maintains the status quo and does not expand the rights of same-sex couples. However, one can distinguish *Oliari* from *Vallianatos* in a clear fashion: where in *Vallianatos* it was Greece's choice to discriminate against same-sex couples in its alternative partnership scheme, in *Oliari*, it was the failure of the parliament to act within the desire of the Italian population after a legal lacuna had been identified, thereby temporarily removing the Parliament from its responsibility as an arbiter. In that sense, *Oliari* may provide a framework for when the ECtHR will not pay deference to a choice by the Contracting State's legislature to withhold legal benefits from same-sex couples.

e. *Reactions to Oliari*

Oliari has received mixed reactions.[148] One report noted the shortcomings of the decision, acknowledging that the ECtHR suggested the predicate factor for such an obligation remains on

---

[145] *Id.* ¶ 123.

[146] *See generally* Vallianatos, 2013-VI Eur. Ct. H.R. 125.

[147] *See generally* Schalk and Kopf v. Austria, 2010-IV Eur. Ct. H.R. 409.

[148] Giuseppe Zago, *A Victory for Italian Same-Sex Couples, A Victory for European Homosexuals? A Commentary on Oliari v Italy* 6, (Leiden Law School, Article 29, 2015). https://ssrn.com/abstract=2689060 ("[T]he Chamber did not make explicit whether the obligation to introduce a legal framework for homosexual couples has to be referred merely to the specific Italian situation, or if the Court intended to assert a more general principle, as it seems from the reading of some passages in the judgment.").

the general acceptance of Italian society.[149] Paul Johnson viewed *Oliari* as a groundbreaking judgment, recognizing that while the facts are unique to Italy, the establishment of a positive obligation for legal recognition where no other action had been taken by the Contracting State is a momentous step forward.[150] However, one reaction questioned whether the ECtHR will recognize that other Contracting States have a positive obligation to provide same-sex partnership recognition, and if such an obligation were found, would the more conservative Contracting States of the Council of Europe adhere to the Court's decision?[151]

Ultimately, the ramifications of *Oliari* remain unresolved. The ECtHR has not clearly determined whether Article 8 creates a positive obligation for recognition of same-sex

---

[149] Peter Laverack, *Olari v. Italy: a missed opportunity for equality in Strasbourg*, LSE HUMAN RIGHTS (July 31, 2015), http://blogs.lse.ac.uk /humanrights/2015/07/31/oliari-v-italy-a-missed-opportunity-for-equality-in-strasbourg/ ("More concerning still, the decision to grant civil partnership, as opposed to nothing at all, was premised on the general acceptance of the same-sex relationships within Italian society. Those who wish to keep LGBT people in the shadows will no doubt seize upon this. The Starsbourg Court is simply wrong to link rights with acceptance.").

[150] Paul Johnson, *Ground-breaking judgment of the European Court of Human Rights in Oliari and Others v Italy: same-sex couples in Italy must have access to civil unions/registered partnerships*, ECHR SEXUAL ORIENTATION BLOG, (July 21, 2015 4:15 PM), http://echrso.blogspot.com/2015/07/ground-breaking-judgment-of-european.html ("This is a ground-breaking judgment that advances the human rights and freedoms of same-sex couples in significant ways. It establishes that there is a positive obligation for Italy under Article 8 to provide same-sex couples with some form of legal recognition of their relationships. Although this positive obligation has been established in the context of the social and legal relations of Italy, it is clear that this may set an important precedent in respect of all other states.").

[151] Edward Delman, *An Ambiguous Victory for Gay Rights in Europe*, ATLANTIC, July 24, 2015, http://www.theatlantic.com/international/ archive/2015/07/gay-rights-italy-europe/399572/ ("The reality is that if the ECtHR were, in the future, to order Russia to recognize same-sex unions, it would have no surefire way of enforcing that judgment. The Committee of Ministers cannot apply sanctions or similar penalties to ensure compliance; it can only apply continuous diplomatic pressure on a given member ... But pressure can only go so far, and short of expelling a state from the court, there is little the ECtHR can do to require a nation to adopt measures that are anathema to it.").

couples. It has signaled to Contracting States its intention and possible desire to recognize a right to partnership recognition.

III. SUBSEQUENT DEVELOPMENTS AND POSSIBLE SIGNALS OF THE COURT

The ECtHR did not break new ground with its decision in *Oliari*, Rather, it merely expanded on its previous rulings in *Schalk* and *Vallianatos*. The impact of these cases on Greece and Italy may provide some insight as to the ECtHR's method. *Schalk's* importance focuses on the incorporation of same-sex individuals into family life under Article 8. That significant shift narrowed the margin of appreciation previously enjoyed by Contracting States. Further, the wording portends its willingness to find a positive obligation on States but failed to provide what the criteria of such an obligation are.

In the two subsequent cases, the ECtHR offered further insight. The Council of Europe finds itself in the same situation post-*Schalk* as it did pre-*Schalk* – no positive obligation exists to confer legal recognition to same-sex couples. However, the ECtHR provided some recourse to same-sex couples. It acknowledged that same-sex couples have an interest in securing legal rights and partnership recognition and that interest narrows the margin of appreciation to such an extent that a State must include same-sex couples in an alternative partnership scheme if it chooses to act.[152] A clear majority of the Contracting States Council of Europe have not created these schemes but of the States that have, by a margin of 17-2, same-sex couples were included.[153] That, along with other developments in the form of recommendations and resolutions, provided enough factors for the ECtHR to place a positive obligation on Contracting States who chose to create alternative partnership schemes to do so with certain conditions.

The ECtHR presents States with two options: (1) if they choose to provide legal recognition to non-married heterosexual

[152] Vallianatos, 2013-VI Eur. Ct. H.R ¶ 90 ("[S]ame-sex couples would have a particular interest in entering into a civil union since it would afford them, unlike different-sex couples, the sole basis in … law on which to have their relationship legally recognized").

[153] *Id.* ¶¶ 91–92.

couples, they must also do so for same-sex couples; or (2) not move at all on the issue and not run the risk of violating the Convention. However, the concept of movement has been expanded to include judicial intervention. The Fourth Section in *Oliari* did not find a *positive obligation* because the legislature failed to include same-sex couples, but because Italy's judiciary had identified an unconstitutional legal lacuna, the legislature debated the issue for years and failed to act, and a clear majority of Italian citizens favored such unions.[154] In that regard, the Fourth Section recognized that the Italian judiciary became the arbiter on the issue, and it was their movement that created the positive obligation.[155] The point is that there was movement on which the ECtHR could find a violation.

Greece finally addressed same-sex civil unions in 2015, when it enacted a human rights bill extending civil unions to same-sex couples.[156] Not included in that legislation were pension benefits, tax and health rights, and adoption rights.[157] Although fairly limited, this may not violate the Convention. The First Section held in *Schalk*, and has not subsequently addressed this issue, that Contracting States continue to enjoy a wide margin of appreciation on how these alternative partnerships take form and the rights they confer.[158] *Schalk* had different circumstances than *Oliari* and *Vallianatos*, in that the applicants in *Schalk* further claimed that the Austrian partnership scheme was insufficient and inferior to the rights enjoyed by heterosexual married couples.[159] This situation did not present itself in *Oliari* and *Vallianatos*.

---

[154] *Id.* ¶ 176.

[155] *Id.* ¶ 185.

[156] *Greece passes bill allowing civil partnerships for same-sex couples*, GUARDIAN (Dec. 22, 2015, 7:39 PM), http://www.theguardian.com/world/2015 /dec/ 23/greece-passes-bill-allowing-same-sex-civil-partnerships.

[157] *Id.*

[158] 2010-IV Eur. Ct. H.R., ¶ 109, ("On the whole, the Court does not see any indication that the respondent State [Austria] exceeded its margin of appreciation in tis choice of rights and obligations conferred by registered partnership.").

[159] *Id.* ¶ 23.

Italy fulfilled its obligation by passing civil unions for same-sex couples on May 11, 2016.[160] Although this provides needed legal protections for same-sex couples, many LGB claim that the legislation falls too short, in that it does not expand marriage to same-sex couples and is woefully deficient in the rights it confers (i.e., the right to adopt a partner's children).[161] While the original bill did provide broader protections, the pushback from conservative elements of Italian society, namely the Catholic Church, required the Government to pass a less ambitious bill.[162]

Ultimately, the ECtHR signaled its willingness to recognize a positive obligation for civil unions. It continues to wait for a consensus to emerge that would allow it to find a positive obligation to recognize same-sex unions. The probability of that within the foreseeable future remains highly unlikely. Many Contracting States of the European Union continue to express disapproval of LGB individuals and their rights, including same-sex marriage.[163] Likely, that number increases when one includes the Council of Europe. Thus, absent some other development, the ECtHR is highly unlikely to find a positive obligation to provide civil unions without any movement or to find a consensus has emerged to extend marriage to same-sex couples.

The ECtHR may seek to identify a consensus over the types of rights conferred to same-sex couples. For instance, if a majority of states were to include adoption, tax, or inheritance rights in their civil union statutes, the ECtHR may find that a

---

[160] Elisabetta Povoledo, *Italy Approves Same-Sex Civil Unions*, N.Y. TIMES (May 11, 2016), http://www.nytimes.com/2016/05/12/world/europe/italy-gay-same-sex-unions.html?_r=0.

[161] *Id.*

[162] Sylvia Poggioli, *A Holdout in Western Europe, Italy Prepares to Decide on Civil Unions*, NPR: PARALLELS (Jan. 28, 2016, 5:56 AM), http://www.npr.org/sections/parallels/2016/01/27/464582046/a-holdout-in-western-europe-italy-prepares-to-decide-on-civil-unions; Stephanie Kirchgaessner, *Italian senate passes watered-down bill recognizing same-sex civil unions*, THE GUARDIAN (Feb. 25, 2016, 2:48 PM), http://www.theguardian.com/society/2016/feb/25/italy-passes-watered-down-bill-recognising-same-sex-civil-unions.

[163] *Special Eurobarometer 437: Discrimination in the EU in 2015,* report, 437, (Oct. 2015), https://open-data.europa.eu/en/data/dataset/S2077_83_4_437_ENG.

State who does not extend these rights is in violation of the Convention. However, the current situation does not lend itself to any further substantial development on the issue.

IV. CONCLUSION

Oliari provides more definition to which movement the ECtHR may consider when confronted by an applicant seeking legal partnership rights for same-sex couples. The ECtHR expanded *Vallianatos* by including judicial action in conjunction with national sentiment to determine whether the failure of the Contracting State to provide partnership recognition violated the Convention. While the ECtHR usually defers to a State's legislature to represent the consensus of the population, such as in Italy, it will identify circumstances where legislature has failed in that role. Nevertheless, it also implicitly indicated that same-sex marriage advocates have a tremendous amount of work to do before it will expand the purview of Article 12. But it goes a step further, and makes it clear that even finding a broad positive obligation under Article 8 for civil unions still requires a lot of work. In that sense, the ECtHR demonstrated that, although it may want to find in favor of same-sex civil rights, concerns with implementation and legitimacy ultimately prevail. Put another way, the conservative elements of the Council of Europe bind the ECtHR. It will not act without certainty when it comes to rights of same-sex couples. *Oliari* is important, but for the wrong reasons.

From a pragmatic lens, *Oliari* functions as a step forward on the issue. But it does not go far enough. If the ECtHR felt it was necessary to limit its holding, it could have further clarified which rights partnership recognition must encompass. Here, same-sex couples remain unsure of the rights the State must provide, *if it chooses to act*. Instead, the ECtHR will require more action on the part of applicants to argue for each right as the issue arises. Finally, the ECtHR leaves same-sex couples in many Central and Eastern European states without any legal protections, and continues to countenance state-sponsored discrimination.

Ultimately, the ECtHR will likely do exactly what was discussed above, but in an *ad hoc* fashion. Instead of addressing

this aspect in one holding, it will likely require each individual right to come before the ECtHR, thus allowing it to limit its holding to more LGB-friendly States. In terms of a broad positive obligation under Article 12, the ECtHR is nowhere in the realm of imposing such a broad right on the Contracting States. It remains much too concerned with the homophobic elements of Eastern Europe.