A victory for Italian same-sex couples, a victory for European homosexuals? A commentary on Oliari v Italy

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TRADUZIONE ITALIANA DEI PARAGRAFI 159-188

Corte di cassazione, 22 gennaio 2015, n.1126: risarcimento del danno per condotta omofoba della P. A.

Cassazione, sentenza 20 luglio 2015, n. 15138: si alla rettifica del sesso senza intervento chirurgico

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Affermazione di Giuseppe Zago *

Last 21 July, the European Court of Human Rights (ECHR) in Oliari and others v. Italy had once again the opportunity to analyze the status of same-sex couples wishing to marry or enter into a legally recognized partnership. This resulted in a groundbreaking
A victory for Italian same-sex couples, a victory for European homosexuals? A commentary on Oliari v Italy

The decision plunges into the current legal situation of Italy, but also contributes to the progressive interpretation of the Convention principles in relation to the right of same-sex individuals to enter stable intimate relationships, especially building on the outcomes of the previous cases Shalk and Kopf v. Austria and Vallianatos and others v. Greece.

The dispute at stake originated from two applications submitted by six Italian nationals in 2011. The applicants asserted that the absence of any legal provision allowing them to marry or access any form of civil union integrates a form of discrimination on the ground of sexual orientation, in violation of articles 8, 12 (right to marry) and 14 (non-discrimination principle) ECHR.\[2\]

The reasoning of the Court focused on the Article 8 ECHR and specifically on the meaning that the notion of “respect” entails in the present case. In doing so, the Chamber first addressed the specific arguments supporting Italian government legal position, through an accurate scrutiny of the objections raised and a scrupulous examination of the role of the judiciary within the national institutional framework; subsequently, it came to consider whether the needs of the individual applicants should prevail on the interests of the community as a whole, and evaluated the extent of the margin of appreciation enjoyed by Italian government in this controversy.

Therefore, as it will be discussed in the next paragraphs, Oliari and others is an interesting judgment on several levels: chiefly, it can be read as a reflection on the (lack of) balance of forces among Italian institutions and the impact thereof on the state of legal and social uncertainty affecting Italian homosexual citizens; more so, it can be examined in light of the ECHR case-law to evaluate what consequences, if any, such decision will have on the interpretation of European fundamental rights in light of other member States’ obligations; finally, some parts of the decision may induce a consideration on the impact of judicial dialogue in international courts assessments.

Oliari and others distinguishes itself as a useful source of review on the current legal framework in Italy as regards the recognition of homosexual relationships. Both the applicants and the government referred to the main decisions delivered in the most recent years by domestic higher courts on this issue, i.e. the Constitutional Court (which, among other attributions, passes judgments on the constitutionality of statutory provisions upon request of an ordinary judge, but cannot be seized directly by private individuals) and the Court of Cassation (a court of last resort judging on the application of the law).

The former issued the judgment no. 138/2010[3] on the legality of same-sex marriage. In that occasion, the judges admitted that same-sex unions were they a stable cohabitation of two persons of the same sex, must be considered a form of community to be protected under article 2 of Italian Constitution, which recognizes and guarantees the fundamental rights of the person as an individual, as well as in the social groups where he/she expresses his/her personality.\[4\] This acknowledgment may be obtained through judicial recognition of relevant rights and duties; nevertheless, it is upon the legislator to introduce a form of legal partnership to be accessible to homosexual couples, and not to the judiciary.\[5\] More importantly, the Court firmly stated that such recognition should be achieved in other ways than marriage, since its definition as included in the Constitution must be interpreted in the traditional sense, as the union between a man and a woman.\[6\] Indeed, according to the higher court this deduction complies with the equality principle, seen that homosexual unions cannot be considered as equivalent to marriage.\[7\]

The same conclusion has been reiterated by the Court of Cassation in its judgments n. 4184/2012 and 2400/2015.\[8\] However, in all these circumstances Italian higher courts were not called for the legislative power to fill the existing legal vacuum by adopting a new law. Lastly, the Constitutional Court, in judgment n. 170/2014, concerning a case of “forced divorce” after gender reassignment of one of the spouses, vehemently urged the legislator to put an end to the legal vacuum affecting the regulation of same-sex relationships, by providing an alternative to marriage.\[9\]

As for the legislative and administrative measures currently available to same-sex couples, particularly the Government recalled that about 155 municipalities have introduced local registers of civil unions between unmarried persons of either sexes, and that couples may conclude so called “cohabitation agreements” allowing them to regulate certain aspects, mainly of financial nature, of their life together.\[10\] The respondent seemed to suggest that these instruments represent an appropriate and timely response to the needs of same-sex partners.

The Court’s analysis of the proposed solutions coming from the Italian government and courts is enlightening as it reveals a major impasse of the Italian democratic process. As a matter, the Court stressed the weaknesses weighing on both the legislator and the judiciary rationale, which ignore the state of public opinion and consequently affect the Italian citizens’ opportunity to enjoy their civil rights.

The Court primarily addressed the government argument that the applicants did not exhaust their domestic remedies, since they should have brought their claims before the ordinary courts, as also suggested by the Constitutional Court and the Court of
A victory for Italian same-sex couples, a victory for European homosexuals? A commentary on Oliari v Italy

The Chamber observes:
the Government have not shown, nor does the Court imagine, that the ordinary jurisdictions could have ignored the Constitutional Court's findings and delivered different conclusions accompanied by the relevant redress. Further, the Court observes that the Constitutional Court itself could not but invite the legislature to take action, and it has not been demonstrated that the ordinary courts could have acted more effectively in redressing the situations in the present cases.

And continues stating:
it is questionable whether such recognition, if at all possible, would have had any legal effect on the practical situation of the applicants in the absence of a legal framework.

The topic is reviewed in the merits, with the Chamber making an obvious observation to any legal professional or academic who dealt with the issue at stake. Indeed, the approach suggested by the higher courts to the applicants cannot but generate a state of uncertainty: not only this strategy proved to be effective for certain categories of rights more than others, but the government constantly objected to the applicants' claims, even in cases where the judge of first instance decided in favor of the plaintiff.

The Court concluded noticing that judicial discretion, in a context were the law guarantees protection in a very limited set of circumstances, cannot but hinder applicants' efforts to see their bound of affection recognized, especially in an "overburdened" judicial system like the Italian one.

As concerns the local registers of civil unions introduced in certain municipalities, the Chamber agrees with the applicants that they have a "merely symbolic value" and they do not confer "any official civil status": indeed, the legal condition of homosexual couples simply amounts to a de facto union.

Even the so-called "cohabitation agreements" cannot be considered an adequate form of protection for same-sex partners, nor be equated to a form of civil union or registered partnership, as these private deeds "fail to provide some basic needs" fundamental to the relationship, especially in terms of mutual rights and obligations, moral and material support, maintenance obligations and inheritance rights, not to mention the fact that they can be concluded by anyone, regardless of their status. Plus, the Court already pointed out in the Vallianatos decision that previous cohabitation cannot be imposed as a requirement for the recognition of the partnership, especially if thinking of the globalised, interconnected character of the world we are living in.

Ultimately, the legal instruments provided for Italian same-sex couples are incapable to ensure adequate recognition and protection at any level, either legislative, administrative or judicial, so dependent as they are on previous cohabitation or judicial discretion.

In a very insightful passage, the Court finds this state of affairs particularly striking if having regard to the discrepancy between the change in the population's opinion and the passiveness of the legislator. The ECtHR emphasizes the conflict between the social reality of the applicants, which already live their lives as homosexuals committed in a relationship, and the law, fundamentally sustaining their legitimate interest to obtain recognition and protection of their core rights as a couple living in a stable and committed relationship, without suffering obstacles of any sort.

Interestingly, the interplay between evolving trends in society and legal principles has been evoked several times by the Court in this decision, thus raising questions on the way the Chamber's legal analysis has been conducted in light of ECtHR previous jurisprudence on sexual orientation.

b. "The absence of a prevailing community interest against which to balance the applicants' momentous interests".

Oliari and others v. Italy surely represents a cutting-edge judgment in the ECtHR case-law on rights of sexual minorities. The investigated issue deal with Italy's failure to ensure a legal family framework for the applicants to enjoy their family life, hence exposing an existing legal vacuum in Italian legislation.

The ECtHR already established in Shalk and Kopf that homosexual couples are entitled to establish family life for the purposes of Article 8, and are "just as capable as different-sex couples of entering into stable, committed relationships," thus departing from its previous interpretations. Yet, in that instance the judges focused on the timing for the introduction of legislative measures recognizing same-sex relationships (due to the fact that Austria, after the submission of the application, actually enacted a law on registered partnership available to same-sex couples), and found no violation of the Convention, in view of the lack of consensus among European countries and their wider margin of appreciation in deciding when to introduce a non-marital legal format for homosexual couples.

In Vallianatos the Court added that when a new form of non-marital relationship is disciplined by the law, it must be accessible both to heterosexual and homosexual partners, since "same-sex couples sharing the same lives have the same needs in terms of mutual support and assistance as different-sex couples." It follows that civil unions

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Oliari moves forward on this line of reasoning by asserting that there is an obligation upon the States under Article 8 of the Convention to implement a legal framework regulating same-sex relationships,[26] also in light of the "movement towards legal recognition", and "the continuing international trend of legal recognition of same-sex couples which has continued to develop rapidly in Europe since the Court's judgment in Shalk and Kopf".[27]

Nonetheless, the methodology applied by the Court to reach this positive outcome is debatable. The Chamber decided to analyze a possible violation of article 8 alone, although most applicants claimed a violation of article 8 in conjunction with article 14. In so acting, the judges overlooked a scrutiny based on the investigation of the respect for the right to private and family life in light of the non-discrimination principle.[28] As observed by Johnson, this choice brings the Court approach back to prior 1999 as concerns adjudication of sexual orientation claims.[29]

In the author's view, by ignoring an evaluation of the case under article 14 ECHR, the Court reasoning results flattened to a reflection about the meaning of the term "respect" in the Italian context, and mainly translates into a scrutiny of the "coherence of administrative and legal practices in the domestic system,[30] along with the assessment of the competing interests of single individuals against the ones of the community as a whole,[31] especially in light of the incongruity between the social reality and the law.[32]

Once relying on these preconditions, the Chamber implicitly prefers not to examine whether under article 14 Italian government treated subjects in comparable situations differently, on the basis of their sexual orientation, and, in the affirmative, whether the State had no sufficiently convincing and weighty facultative reasons[33] to promote and protect heterosexual relationships to be reasonably justified by a legitimate aim. Ultimately, the Court missed to verify in detail whether the State satisfied the proportionality test in the means employed as compared to the aim sought to be realized.[34]

Contrarily, the judges ascertained the width of the respondent's margin of appreciation through the study of Italian domestic situation, focusing on the balance of powers between the judiciary and the legislator; depending on statistics documenting the acceptance of same-sex partnerships by the Italian population; and pointing out that the government did not provide sufficient motivated reasons to prove that the legal void concerning the legal recognition of same-sex unions corresponds to a prevailing community interest over the needs of the minority.[35]

Ultimately, the decision affirms that Italian government "has overstepped their margin of appreciation";[36] however, although the conclusion that "the absence of a legal framework allowing for recognition and protection of [applicants] relationship violates their rights under Article 8 of the Convention" may be interpreted as a general statement applicable to all States parties to the Convention, the Court's conclusion, heavily relying on the Italian government lack of compliance with both societal trends and the reprimands of the judiciary, appears unsatisfactory.

First, it leaves the question open if the same outcome can be reached in analogous cases against States where public opinion is not as positive towards homosexuality as Italy is reported to be, or where domestic courts are hesitant or silent in respect of urging the legislator to enact adequate laws for the recognition of same-sex relationships. As a matter, some members of the Chamber already attempted to circumscribe the effects of the decision to the Italian situation only in their concurring opinion.[37]

Furthermore, the Court claims that its investigation is confined to a general need for legal recognition and core protection of applicants' rights,[38] yet the extent of the effects such statutory partnerships would produce is not relevant to the case.[39] Hence, a doubt remains: what are the indispensable rights and obligations to be attached to a form of civil union other than marriage? Some guidance may come from previous jurisprudence of the Court, which stated that recognition of same-sex relationships does not depend on cohabitation of the members of the couple (Vallinatos v. Greece) and that the partner is entitled to succeed to tenancy after the death of a partner (Kärner v. Austria, Kozec v. Austria). Even the European Court of Justice can be of assistance, for example when it affirmed that a registered partner is in a situation comparable to that of married couples as concerns the right to receive survivor's pension (Tadao Asada v. Versorgungsanstalt der deutschen Bühner, C-267/06).[40] Nonetheless, the essential elements that a non-marital legal format should guarantee are still substantially left to the appreciation of the States, so upholding an approach that may facilitate a non-homogeneous, possibly discriminatory scenario.

Finally, verified that the Court in Oliari ensured relevant progress in calling for the establishment of a legal framework for same-sex relationships, the same cannot be affirmed as for the right to marry in light of article 12 ECHR. The Chamber did not move forward from its conclusions in Shalk and Kopf and did not clarify whether the impossibility for homosexual partners to access marriage implies that the ECHR tolerates differences in treatment between marriage and registered partnerships / civil unions.[41]

As Johnson pointed out, the Court failed to make progress on the application of Article 12 if compared to previous cases like Shalk and Kopf or Hämäläinen v. Finland.[42] Vice-versa, it even went "backwards", considering that in the Oliari decision the Chamber declared the claim under article 12 inadmissible, whereas in Shalk and Kopf deemed it...
admissible, for then finding no violation.[43]

The Court did not provide any explanations to such approach, nor it contextualized the reason why it keeps registering the same lack of consensus on the issue of same-sex marriage, although in this respect the map of Europe and of this respect the map of the world is continuously evolving since 2010, when the Shalk and Kopf judgment was delivered.[44] Particularly, it would have been helpful if the Chamber elaborated on the wider margin of appreciation attributed to Italy as concerns application of article 12, especially taking into account that the judges did not justify why the same statistics showing that in Italy there is general acceptance of homosexual partnerships, cannot be valid for same-sex marriage.

Obviously, the Court is still far from applying the Convention as “a living instrument to be interpreted in light of present day conditions” in respect of marriage, differently from past rulings where consensus was hardly to be found among European States on similarly sensitive topics (like in Goodwin v. UK, to mention one[45]). On the contrary, the Court appears prone to adapting to societal approval and such attitude seems unlikely to change any time soon.

c. Interaction between courts

The reference made by the Chamber to the recent judgment of the US Supreme Court in Obergefell et al. v. Hodges, with which the right to marry for same-sex couples was extended to all States of the Federation, should not be disregarded.[46]

It is indeed not common for the ECtHR to explicitly cite other courts when exercising its adjudicatory power.[47] One cannot read a judge’s mind, but it looks as the Supreme Court decision had a certain influence on the members of the Chamber. In particular, Oliari is reminiscent of Supreme Court’s considerations when it deals with the role of the judiciary, particularly when it comes to judges’ authority to intervene when the legislator remains inactive, if a case-by-case determination shows to be inadequate to guarantee equal treatment to same-sex couples.[48] Also, the US Supreme Court, similarly to the Strasbourg judicial body, sustains that judicial activism is even more legitimate when the Court assessment is preceded by an intense societal discussion on the topic.

It is however curious to see the ECtHR mention Obergefell; with all due differences between the two legal systems, where the Supreme Court finally recognized the right to marry for same-sex couples in all United States on the basis of the Equality and Due Process clauses, the ECtHR still precludes the applicability of Article 12 ECHR to same-sex relationships.

Truly, there is no real meditation on the discrimination homosexual couples, excluded by the institution of marriage, may or may not have not suffered due to their sexual orientation. Accordingly, the Strasbourg Court, in spite of promoting a general obligation upon the States to foresee a legal framework acknowledging same-sex unions, did not elaborate an articulate opinion on whether the lack of any legal recognition of same-sex partnerships represents a form of unjustifiable discrimination.

Perhaps exactly the common elements of the two decisions unveil the criticalities of the Strasbourg judgment. The US Supreme Court attached to the Due Process clause the right of any person to private life, liberty and property, where the identification of such individual’s rights varies through time, thanks to the new ideals and values. Accordingly, the other side, marriage as a bond that grants two people to find a life partner, a family, a “familiare” the person[49] to which the Supreme Court decision had a certain influence on the members of the Chamber. In particular, Oliari is reminiscent of Supreme Court’s considerations when it deals with the role of the judiciary, particularly when it comes to judges’ authority to intervene when the legislator remains inactive, if a case-by-case determination shows to be inadequate to guarantee equal treatment to same-sex couples.[48] Also, the US Supreme Court, similarly to the Strasbourg judicial body, sustains that judicial activism is even more legitimate when the Court assessment is preceded by an intense societal discussion on the topic.

However, this newly emerged link between the Due Process clause and the Equality clause in Obergefell is not really grounded on a detailed legal reasoning, but it rather relies on changing history, evolving traditions, different social constructions: in the ECHR language, an “emerging consensus” or a “trend towards recognition”, which triggers an analysis built upon the margin of appreciation doctrine. Yet, merely justifying the extension of the margin of appreciation based on societal attitudes or tendencies among the States, as the ECHR did, creates legal uncertainty, particularly when sexual minorities’ rights are at stake, since within the Council of Europe opinions on the issue diverge greatly.

Still, when the ECHR will be ready to seriously engage in the analysis of the right to marry for same-sex partners under the ECHR, the reference madein Oliari to Obergefell may constitute a useful precedent to employ US jurisprudence for demonstrating that the exclusion of homosexual partners from marriage represent a form of unnecessary, disproportionate discrimination also under the ECHR.

d. Conclusion

Oliari and Others v. Italy is certainly an important case in the ECHR jurisprudence related to sexual orientation, building up on previous judgments like Shalk and Kopf and Vallianatos. The Court, after having underlined “the importance of granting legal recognition to de facto family life” (X v. Austria); having included same-sex unions as stable committed relationships in the notion of family life (Shalk and Kopf v. Austria); and clarified that whether a State enacts through legislation a form of registered partnership, such format must be accessible to all couples regardless to their sexual orientation (Vallianatos and others v. Greece); it now establishes the positive obligation of the State to ensure recognition of a legal framework for same-sex couples in absence of marriage, in light of article 8 of the Convention.

Despite the constant progressive interpretation enshrined in the Ober of the Court,[51] it is still in the margin of appreciation of the States to regulate the specific content of

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A victory for Italian same-sex couples, a victory for European homosexuals? A commentary on Oliari v Italy

Much legal formats, which remains indeed unclear. Generally, it can anyway be argued from the Oliari decision that a legal framework accessible to same-sex couples must guarantee something more than a mere private deed similar to Italian cohabitation agreements, not only because living together cannot be a precondition to registration (as the Court made clear in the Vallianatos judgment), but also since the Court attaches to the union a core of rights and needs that go beyond the economic aspects of the relationship.[52]

As for the right to marry, the road towards the opening of the institution to same-sex couples appears long and rough. The Court showed to be overly cautious, perhaps also in light of the fierce opposition of some States parties to the Council of Europe, when it comes to sexual minorities' rights. Anyway, it is interesting to notice that Strasbourg judges are sensible to new developments at the global level, like the reference to the Obergefell judgment rendered by the US Supreme Court demonstrates; this inter-institutional dialogue contributes to the consolidation of an international trend towards recognition of same-sex relationships.

Ultimately, as stressed also in the concurring opinion,[53] the 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 of the judgment. Even if the latter option appears more plausible, the lack of a detailed analysis on the violation of article 8 in conjunction with article 14 ECHR, which could have highlighted the existence of an unreasonable differential treatment based on sexual orientation, may allow other States to apply a wider margin of appreciation in future cases, particularly whether there is no large social support of the instances of the LGBT community by domestic population.

Nonetheless, the decision is definitely clear as for the legal situation in Italy, and national institutions should be concerned on the outcome of this judgment. Indeed, the Court underlined how the inactivity of the legislative power endangers the authority of the judiciary and fails to address the interests of the general community. In sum, the attitude of the legislator in relation to the right of same-sex couples not only undermined their fundamental rights, but the whole democratic process.

Such criticisms will hopefully expedite the approval of the draft bill on civil unions currently under discussion in Parliament, but should also sound as a warning on the general impasse of the Italian legislator when it comes to recognition and protection of civil rights.

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2. Id., para. 3.
4. Id., par. 8 de jure.
5. Id.
6. Id., par. 9 de jure.
7. Id.
10. See Oliari, supra note 1, paras. 129 – 130.
11. See Oliari, supra note 1, paras. 73-75.
12. Id., para. 82.
13. Id.

14. For instance, Grosseto ordinary court recognized twice a same-sex marriage contracted abroad by the applicants, but both decisions were then reversed on appeal: see Tribunale di Grosseto, order 9 April 2014 and decree 17 February 2015; Corte d'Appello di Firenze, sentence 19 September 2014 and sentence 1 July 2015. Here follow a series of decisions (but many others could be reported) that exemplify the state of fragmentation and uncertainty emerged after the higher courts judgments on recognition of same-sex unions: ordinary courts in Reggio Emilia and Napoli deemed valid same-sex marriages contracted in foreign European States by the applicants (though Napoli Court of Appeal considered as an exceptional condition to grant recognition to the same-sex union the fact that both applicants were French citizens residing in Italy), whereas the Tribunal of Milan rejected similar claims more than once. See Tribunale di Reggio Emilia, I sez. Civ., decree 13 February 2012; Corte d'Appello di Napoli, sentence 13 March 2015; Tribunale Milano, sez. IX civ., decree 2 July 2014 and 17 July 2014.
15. See Oliari, supra note 1, para. 171.
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Corte federale conferma la legittimità del matrimonio same sex in Virginia: è la prima volta in uno Stato del sud. Come sessant'anni fa con il divieto di matrimonio fra bianchi e neri (caso Loving v Virginia), la questione passerà ora alla Corte Suprema degli U.S.A.
Virginia same-sex marriage ban ruled unconstitutional by U.S. court
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