

Application No. 20081/19, BUHUCEANU & CIOBOTARU v. ROMANIA
(and 12 other applications), European Court of Human Rights, Fourth Section

WRITTEN COMMENTS OF
FIDH, ILGA-EUROPE, NELFA, AND ECSOL
Submitted on 15 September 2020

1. Prof. Robert Wintemute, School of Law, King's College London, respectfully submits these Written Comments on behalf of FIDH (*Fédération Internationale pour les Droits Humains*), ILGA-Europe (the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association), NELFA (Network of European LGBTIQ* Families Associations), and ECSOL (European Commission on Sexual Orientation Law). For their interest and expertise, see their application of 8 April 2020, granted on 25 May 2020 (Rule 44(3), Rules of Court).

Introduction: The Court's case law to date

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

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

4. In 2013, the Grand Chamber applied *Karner* to the exclusion of same-sex couples from second-parent adoption, in *X & Others v. Austria* (19 February 2013), and from new registration systems created as an alternative to marriage, in *Vallianatos & Others v. Greece* (7 November 2013). In doing so, the Grand Chamber agreed with the *Karner* Chamber's statements about “family life” (*X & Others*, para. 96; *Vallianatos*, para. 73), and about same-sex couples being in a “relevantly similar [or comparable] situation” (*X & Others*, para. 112; *Vallianatos*, paras. 78, 81). In *Vallianatos*, the Grand Chamber added (at para. 81) that “[s]ame-sex couples sharing their lives have the same needs in terms of mutual support and assistance as different-sex couples” and have an interest in “having their relationship officially recognised by the State”. The Grand Chamber stressed (at para. 84) that “the State, in its choice of means ... to protect the family and secure respect for family life as required by Article 8, must necessarily take into account developments in society and changes in the

perception of ... relationships, including the fact that there is not just one way or one choice when it comes to leading one's family or private life ...”.

5. In *Oliari & Others v. Italy* (21 July 2015) and *Taddeucci & McCall v. Italy* (30 June 2016), the Court extended its case law, beyond the *Karner* minimum requirement of equal treatment for all unmarried or unregistered couples, different-sex or same-sex (in Council of Europe member states that voluntarily grant rights to such couples, there being no Convention obligation to do so yet), to Convention obligations under Article 8 to respect family life by providing a “specific legal framework” for same-sex couples who are legally unable to marry (*Oliari & Others*), and under Article 14 combined with Article 8 to avoid discrimination, by treating same-sex couples differently when they are in a different situation compared with opposite-sex couples (because they are legally unable to marry) (*Taddeucci & McCall*).

6. In *Oliari & Others*, the Court reasoned as follows (emphasis added): “55. ... [T]o date twenty-four countries out of the forty-seven [Council of Europe] member States have already enacted legislation permitting same-sex couples to have their relationship recognised as a legal marriage or as a form of civil union or registered partnership. ... 167. ... [T]he applicants ..., who are unable to marry, have been unable to have access to a specific legal framework ... capable of providing them with the recognition of their status and guaranteeing to them certain rights relevant to a couple in a stable and committed relationship. ... 172. ... [T]he current available protection is not only lacking in content, in so far as it fails to provide for the core needs relevant to a couple in a stable committed relationship, but is also not sufficiently stable – it is dependent on ... the judicial (or sometimes administrative) attitude in the context of a country that is not bound by a system of judicial precedent [be it Italy, Romania, or Poland] ... 173. ... [T]here exists a conflict between the social reality of the applicants, ... and the law, which gives them no official recognition ... [A]n obligation to provide for the recognition and protection of same-sex unions, and thus to allow for the law to reflect the realities of the applicants’ situations, would not amount to any particular burden on the Italian State be it legislative, administrative or other. Moreover, such legislation would serve an important social need ... 174. ... [I]n the absence of marriage, same-sex couples like the applicants have a particular interest in obtaining the option of entering into a form of civil union or registered partnership, since this would be the most appropriate way in which they could have their relationship legally recognised and which would guarantee them the relevant protection – in the form of core rights relevant to a couple in a stable and committed relationship – without unnecessary hindrance. ... [S]uch civil partnerships have an intrinsic value for persons in the applicants’ position, irrespective of the legal effects, however narrow or extensive, that they would produce ... This recognition would further bring a sense of legitimacy to same-sex couples. 177. ... [T]he instant case is not concerned with certain specific “supplementary” (as opposed to core) rights ... which may be subject to fierce controversy in the light of their sensitive dimension [adoption or assisted reproduction?] ... [T]he instant case concerns solely the general need for legal recognition and the core protection of the applicants as same-sex couples. ... 185. ... [I]n the absence of a prevailing community interest ..., against which to balance the applicants’ momentous interests as identified above, ... the Court finds that the Italian Government have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions. ... 187. There has accordingly been a violation of Article 8 of the Convention.”

7. In *Taddeucci & McCall*, the Court reasoned as follows (emphasis added): “82. ... [I]t does not appear that the applicants, an unmarried homosexual couple, were treated differently from an unmarried heterosexual couple. ... 83. That said, the applicants’ situation cannot ... be regarded as analogous to that of an unmarried heterosexual couple. Unlike the latter, the applicants do not have the possibility of contracting marriage in Italy. ... [O]nly homosexual couples faced an insurmountable obstacle to obtaining a residence permit for family reasons. Nor could they obtain a form of legal recognition other than marriage, ... [such as] a registered partnership ... 85. ... [W]ith regard to eligibility for a residence permit for family reasons, the applicants – a homosexual couple – were treated in the same way as persons in a significantly different situation from theirs, namely, heterosexual partners who had decided not to regularise their situation. ... 93. [R]egarding ... - granting a residence permit for family reasons to a homosexual foreign partner – [protection of the traditional family] cannot amount to a “particularly convincing and weighty” reason capable of justifying ... discrimination on grounds of sexual orientation ... 94. Without any objective and reasonable justification the Italian State failed to treat heterosexual couples differently and take account of their ability to obtain legal recognition of their relationship ..., an option that was not available to the applicants (see *Thlimmenos v. Greece* (6 April 2000), ... [44]). ... 99. There has accordingly been a violation of Article 14 of the Convention taken in conjunction with Article 8.”

I. The Court should apply its reasoning in *Oliari & Others* and *Taddeucci & McCall* to every member state of the Council of Europe.

8. In *Oliari & Others*, the Court referred to two elements or factors that were present in Italy, but are not present in most of the Council of Europe member states that have yet to provide a “specific legal framework” for same-sex couples, including Romania and Poland (emphasis added): “180. The Court notes that in Italy the need to recognise and protect such relationships has been given a high profile by the highest judicial authorities, including the Constitutional Court and the Court of Cassation. ... [T]he Constitutional Court ... repeatedly called for a juridical recognition of the relevant rights and duties of homosexual unions ..., a measure which could only be put in place by Parliament. 181. The Court observes that such an expression reflects the sentiments of a majority of the Italian population, as shown through official surveys ... The statistics submitted indicate that there is amongst the Italian population a popular acceptance of homosexual couples, as well as popular support for their recognition and protection.”

9. FIDH, ILGA-Europe, NELFA, and ECSOL respectfully submit that these two elements or factors were not essential to the Court’s conclusion in *Oliari & Others*, and that their absence should be irrelevant when *Oliari & Others* is applied to other Council of Europe member states. If a clear European consensus supports finding a violation of the human rights protected by the Convention, the dissenting views of the highest judicial authorities or of the majority of the population should not preclude finding a violation. This was the case in *Dudgeon v. United Kingdom* (22 October 1981), *Norris v. Ireland* (26 October 1988), *Modinos v. Cyprus* (22 April 1993), *Bączkowski v. Poland* (3 May 2007), *Kozak v. Poland* (2 March 2010), *Alekseyev v. Russia* (21 October 2010), *Genderdoc-M v. Moldova* (12 June 2012), *Identoba & Others v. Georgia* (12 May 2015), *M.C. & A.C. v. Romania* (12 April 2016), *Kaos GL v. Turkey* (22 November 2016), *Bayev & Others v. Russia* (20 June

2017), *Zhdanov and Others v. Russia* (16 July 2019), and *Beizaras & Levickas v. Lithuania* (14 January 2020).

II. European consensus supporting an obligation to provide legal recognition to same-sex couples has strengthened since the *Oliari & Others* judgment in 2015.

10. As noted above (para. 6), when the Court adopted its judgment in *Oliari & Others*, on 30 June 2015, a “thin majority” of 24 of 47 or 51% of Council of Europe member states (para. 178 of the judgment) provided some form of legal recognition to same-sex couples. Since then, the number of Council of Europe member states providing legal recognition has increased by 25% from 24 to 30, or from 51% to 63.8%. There is now a clear consensus, in Council of Europe and other democratic societies, that a government may not limit particular rights or obligations to married couples, and then tell same-sex couples that it is legally impossible for them to qualify for these rights or obligations, because they are not permitted to marry. Of the 47 Council of Europe member states, 30 of 47 or 63.8% have passed some kind of legislation permitting same-sex couples to register their relationships, as a legal marriage or as a form of registered partnership, civil partnership, or civil union: Andorra, Austria, Belgium, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy,¹ Liechtenstein, Luxembourg, Malta, Monaco, Montenegro, the Netherlands, Norway, Portugal, San Marino, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom. Citations to this legislation can be found in the Appendix to these Written Comments.²

III. A growing number of national or international courts require at least an alternative to legal marriage, if not access to legal marriage for same-sex couples.

11. Although many of the courts mentioned below found direct discrimination based on sexual orientation, and required equal access to legal marriage for same-sex couples, their reasoning supports *a fortiori* a finding (at least) of an obligation to provide a “specific legal framework” for same-sex couples, or an obligation to treat same-sex couples differently from opposite-sex couples who are able to marry.

12. The first court to require equal access for same-sex couples to the rights and obligations of legal marriage, while leaving it to the legislature to decide whether this access would be through legal marriage or an alternative registration system, was the **Vermont Supreme Court** in *Baker v. State*, 744 A.2d 864 (1999): “We hold only that plaintiffs are entitled under ... the Vermont Constitution to obtain the same benefits and protections afforded ... to married opposite-sex couples. We do not purport to infringe upon the prerogatives of the Legislature ..., other than to note ... [the existence of] ‘registered partnership’ acts, which ... establish an alternative legal status to marriage for same-sex couples, ... and extend all or most of the same rights and obligations ...” A law on same-sex civil unions was passed in 2000.

13. The **British Columbia Court of Appeal** went further in *EGALE Canada* (1 May 2003), 225 D.L.R. (4th) 472, holding that the exclusion of same-sex couples from legal marriage is discrimination violating the Canadian Charter of Rights and Freedoms. The B.C. Court could not see: “127. ... how according same-sex couples

¹ “LEGGE 20 maggio 2016, n. 76. Regolamentazione delle unioni civili tra persone dello stesso sesso ...”, <https://www.gazzettaufficiale.it/eli/gu/2016/05/21/118/sg/pdf>.

² See also R. Wintemute, “European Law Against Discrimination on Grounds of Sexual Orientation” in K. Boele-Woelki & A. Fuchs (eds.), *Same-Sex Relationships and Beyond* (Intersentia, 2017), 179-203.

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

14. The **Ontario Court of Appeal** agreed in *Halpern* (10 June 2003), 65 O.R. (3d) 161: "107. ... [S]ame-sex couples are excluded from ... the benefits that are available only to married persons ... Exclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships ... [and] offends the dignity of persons in same-sex relationships." The Ontario Court ordered the issuance of marriage licenses to same-sex couples that day. The B.C. Court followed on 8 July 2003 (228 D.L.R. (4th) 416). A federal law (approved by the Supreme Court of Canada)³ extended these appellate decisions to all 10 provinces and 3 territories from 20 July 2005.⁴

15. On 18 November 2003, the **Massachusetts Supreme Judicial Court** reached the same conclusion as the Canadian courts in *Goodridge*, 798 N.E.2d 941: "The question before us is whether, consistent with the Massachusetts Constitution, the [State] may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex ... We conclude that it may not."

16. On 30 November 2004, **South Africa's Supreme Court of Appeal** agreed with the Canadian and Massachusetts courts, and restated the common-law definition of marriage as: "the union between two persons to the exclusion of all others for life."⁵ On 1 December 2005, **South Africa's Constitutional Court** concluded that the remaining statutory obstacle to marriage for same-sex couples was discriminatory: "71. ... The exclusion of same-sex couples from ... marriage ... represents a harsh if oblique statement by the law that same-sex couples are outsiders ... that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples ... that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples ..."⁶ South Africa's Parliament responded by enacting the Civil Union Act (No. 17 of 2006, in force on 30 November 2006), allowing any couple, different-sex or same-sex, to contract a "civil union" and choose whether it should be known as a "marriage" or a "civil partnership".

17. On 25 October 2006, in *Lewis v. Harris*, 908 A.2d 196 (2006), the **New Jersey Supreme Court** adopted the same approach as the Vermont Supreme Court: "Although we cannot find that a fundamental right to same-sex marriage exists in this State, the unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our State Constitution. With this State's legislative and judicial commitment to eradicating sexual orientation discrimination as our backdrop, we now hold that denying rights and benefits to committed same-sex couples ... given to their heterosexual counterparts violates the equal protection guarantee ... [T]he Legislature must either amend the marriage statutes to include same-sex couples or create a parallel statutory structure, which will provide for, on equal terms, the rights and benefits enjoyed and burdens and obligations borne by married couples. ... The name to be given to the statutory scheme ..., whether marriage or some other term, is a matter left to the democratic process." A law on same-sex civil unions was passed in 2006.

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

⁴ See R. Wintemute, "Sexual Orientation and the Charter", (2004) 49 *McGill Law Journal* 1143; Civil Marriage Act, Statutes of Canada 2005, chapter 33.

⁵ *Fourie v. Minister of Home Affairs* (30 Nov. 2004), Case No. 232/2003.

⁶ *Minister of Home Affairs v. Fourie; Lesbian & Gay Equality Project* (Cases CCT60/04, CCT10/05).

18. On 15 May 2008, the **California Supreme Court** decided *In re Marriage Cases*, 183 P.3d 384 (2008). Almost 60 years after it struck down a law banning "the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race", in *Perez v. Sharp*, 32 Cal. 2d 711 (1948), the California Court found that legislation excluding same-sex couples from legal marriage breached (prima facie): (a) their fundamental right to marry, an aspect of the right of privacy; and (b) their right to equal protection based on sexual orientation, a "suspect classification". The Court subjected the legislation to "strict scrutiny" and found that it was not "necessary" to further a "compelling constitutional interest", even though same-sex couples could acquire nearly all of the rights and obligations attached to marriage by California law through a "domestic partnership".⁷

19. On 10 October 2008, the **Connecticut Supreme Court** agreed with the California Court in *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (2008). As in California, same-sex couples in Connecticut had access to all or nearly all the rights and obligations attached by state law to marriage through a "civil union". Yet the Court held: "In view of the exalted status of marriage in our society, it is hardly surprising that civil unions are perceived to be inferior ..."

20. On 3 April 2009, in *Varnum v. Brien*, 763 N.W.2d 862 (2009) the **Iowa Supreme Court** agreed with the decisions in Massachusetts, California, and Connecticut: "[C]ivil marriage with a person of the opposite sex is as unappealing to a gay or lesbian person as civil marriage with a person of the same sex is to a heterosexual. Thus, the right of a gay or lesbian person ... to enter into a civil marriage only with a person of the opposite sex is no right at all. ... State government can have no religious views, either directly or indirectly, expressed through its legislation. ... This ... is the essence of the separation of church and state. ... [C]ivil marriage must be judged under our constitutional standards of equal protection and not under religious doctrines or the religious views of individuals ... [O]ur constitutional principles ... require that the state recognize both opposite-sex and same-sex civil marriage."

21. On 5 May 2011, **Brazil's Supremo Tribunal Federal** (STF) interpreted Brazil's Constitution as requiring that existing legal recognition of "stable unions" (cohabitation outside marriage) include same-sex couples.⁸ On 25 October 2011, **Brazil's Superior Tribunal de Justiça** (STJ) ruled in *Recurso Especial* no. 1.183.378/RS that, in the absence of an express prohibition (as opposed to authorisation) of same-sex marriage in Brazilian law, two women could convert their "stable union" into a marriage under Article 1726 of the Civil Code ("A stable union can be converted into a marriage at the request of the partners before a judge and following registration in the Civil Registry"). On 14 May 2013, relying on the decisions of the STF and the STJ, the *Conselho Nacional de Justiça* (CNJ, which regulates the judiciary but is not itself a court, *Resolução* No. 175) ordered all public officials authorised to marry couples, or to convert "stable unions" into marriages, to do so for same-sex couples.

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

⁷ The California Court's decision allowed same-sex couples to marry in California from 16 June 2008 until 4 November 2008, when 52% of voters in a referendum supported an amendment to the California Constitution (Proposition 8): Art. I, Sec. 7.5: "Only marriage between a man and a woman is valid or recognized in California." The California Court's decision was reinstated, and Proposition 8 struck down, by the procedural effect of *Hollingsworth v. Perry*, 570 U.S. 693 (26 June 2013).

⁸ See <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=178931>.

New Mexico marriage laws is to bring stability and order to the legal relationship of committed couples by defining their rights and responsibilities as to one another, their children if they choose to raise children together, and their property. ... [B]arring individuals from marrying and depriving them of the rights, protections, and responsibilities of civil marriage solely because of their sexual orientation violates the Equal Protection Clause ... of the New Mexico Constitution. ... [T]he State of New Mexico is constitutionally required to allow same-gender couples to marry and must extend to them the rights ... and responsibilities that derive from civil marriage ...”

23. As the Court noted in *Oliari & Others*, on 26 June 2015 in *Obergefell v. Hodges*, 576 U.S. 644 (2015), the **United States Supreme Court** interpreted the United States Constitution as requiring equal access to legal marriage for same-sex couples in all fifty states, thereby striking down constitutional amendments or legislation that had excluded them in thirty-four states.⁹

24. In its *Sentencia C-577/11* (26 July 2011), Colombia’s Constitutional Court gave the Congress (legislature) of Colombia until 20 June 2013 to pass a law dealing with the rights of same-sex couples. The Congress took no action, which led to further litigation. On 28 April 2016, in its *Sentencia SU-214/16*, **Colombia’s Constitutional Court** concluded that Colombia’s Constitution requires equal access to marriage for same-sex couples (p. 176, 10, *Séptimo fundamento*; p. 181, *Noveno*), and validated all same-sex marriages since 20 June 2013.¹⁰

25. On 24 May 2017, **Taiwan’s Constitutional Court** became the first in Asia to order the legislature to open up legal marriage to same-sex couples: “... [T]o determine the constitutionality of different treatment based on sexual orientation, a heightened standard shall be applied. Such different treatment must be aimed at furthering an important public interest by means that are substantially related to that interest ... Disallowing the marriage of two persons of the same sex because of their inability to reproduce is a different treatment having no apparent rational basis. ... Disallowing the marriage of two persons of the same sex for the sake of safeguarding basic ethical orders is a different treatment also having no apparent rational basis. Such different treatment is incompatible with the spirit and meaning of the right to equality as protected by Article 7 of [Taiwan’s] Constitution. ... This Court thus orders that the authorities ... shall amend or enact the laws as appropriate in accordance with ... this Interpretation within two years ... It is within the discretion of the authorities ... to determine the formality ... for achieving the equal protection of the freedom of marriage for two persons of the same sex to create a permanent union of intimate and exclusive nature for the purpose of living a common life.”¹¹ Rather than amend the Civil Code, Taiwan’s legislature approved a separate law on 17 May 2019 that allowed same-sex couples to marry from 24 May 2019.¹²

26. On 24 November 2017, the **Inter-American Court of Human Rights** adopted *Advisory Opinion OC-24/17, requested by Costa Rica*:¹³ “217. ... States can adopt diverse types of ... measures to ensure the rights of same-sex couples. ... 218. ... [I]f a State should decide that it is not necessary to create new legal institutions ... and ... chooses to extend those that exist ... [t]he Court considers that this would be the most simple and effective way to ensure the rights derived from the relationship

⁹ See R. Wintemute, “Same-Sex Marriage in National and International Courts: ‘Apply Principle Now’ or ‘Wait for Consensus’?”, [2020] *Public Law* 134.

¹⁰ See <https://www.corteconstitucional.gov.co/relatoria/2016/su214-16.htm>.

¹¹ Interpretation No. 748 (24 May 2017), <https://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=748>.

¹² See <https://www.loc.gov/law/foreign-news/article/taiwan-same-sex-marriage-law-enters-into-effect/>.

¹³ Published on 9 January 2018, https://www.corteidh.or.cr/docs/opiniones/seriea_24_eng.pdf.

between same-sex couples. 219. ... [T]he Court reiterates its consistent jurisprudence that the presumed lack of consensus within some countries regarding full respect for the rights of sexual minorities cannot be considered a valid argument to deny or restrict their human rights or to reproduce and perpetuate the historical and structural discrimination that such minorities have suffered ... 220. The establishment of a differentiated treatment between heterosexual couples and couples of the same sex regarding the way in which they can form a family ... does not pass the strict test of equality ... because, in the Court's opinion, there is no purpose acceptable under the Convention for which this distinction could be considered necessary or proportionate. ... 224. Moreover, in the Court's opinion, there would be no sense in creating an institution that produces the same effects and gives rise to the same rights as marriage, but that is not called marriage except to draw attention to same-sex couples by the use of a label that indicates a stigmatizing difference or that, at the very least, belittles them. ... Consequently, the Court deems inadmissible the existence of two types of formal unions ..., because this would create a distinction based on an individual's sexual orientation that would be discriminatory and, therefore, incompatible with the American Convention. 226. Notwithstanding the foregoing, this Court cannot ignore the possibility that some States must overcome institutional difficulties to adapt their domestic law and extend the right of access to the institution of marriage to same-sex couples, especially when there are rigorous procedures for legislative reform, which may demand a process that is politically complex and requires time. ... 227. ... States that do not yet ensure the right of access to marriage to same-sex couples are obliged not to violate the provisions that prohibit discriminating against them and must, consequently, ensure them the same rights derived from marriage in the understanding that this is a transitional situation."

27. Relying on *Advisory Opinion OC-24/17*, **Costa Rica's Constitutional Court** interpreted the national constitution as requiring equal access to legal marriage for same-sex couples on 8 August 2018.¹⁴ **Ecuador's Constitutional Court** did the same on 12 June 2019.¹⁵

28. Finally, on 4 December 2017, **Austria's Constitutional Court** became the first in Europe to order that legal marriage be opened up to same-sex couples, and that registered partnership be opened up to different-sex couples.¹⁶

IV. Council of Europe and European Union institutions have called for legal recognition for same-sex couples since 1994.

29. The EU's European Parliament first called for equal treatment of different-sex and same-sex couples in a 1994 resolution seeking to end "the barring of [same-sex] couples from marriage or from an equivalent legal framework".¹⁷ In 2000, the

¹⁴ Resolution No. 12782–2018 (8 August 2018), <https://nexuspj.poder-judicial.go.cr/document/sen-1-0007-875801>.

¹⁵ 12 June 2019, *Sentencia* 10-18-CN, <http://portal.corteconstitucional.gob.ec:8494/FichaRelatoria.aspx?numdocumento=10-18-CN/19>, *Sentencia* 11-18-CN, <http://portal.corteconstitucional.gob.ec:8494/FichaRelatoria.aspx?numdocumento=11-18-CN/19>.

¹⁶ See https://www.vfgh.gv.at/medien/Ehe_fuer_gleichgeschlechtliche_Paare.en.php (press release in English); https://www.vfgh.gv.at/downloads/VfGH_Entscheidung_G_258-2017_ua_Ehe_gleichgeschlechtl_Paare.pdf (judgment in German); https://www.rklambda.at/images/EF_VfGH_Entscheidung_G_258-2017_ua_Ehe_gleichgeschlechtl_Paare-korr.pdf (unofficial English translation).

¹⁷ "Resolution on equal rights for homosexuals ... in the EC" (8 Feb. 1994), OJ C61/40 at 42, para. 14.

Parliamentary Assembly of the Council of Europe (PACE) recommended in Recommendation 1474 that member states "adopt legislation which makes provision for registered [same-sex] partnerships".¹⁸

30. On 10 October 2018, the PACE added detail to Recommendation 1474 by adopting Resolution 2239, "Private and family life: achieving equality regardless of sexual orientation",¹⁹ which calls on member states to (emphasis added):

"4.3. align their constitutional, legislative and regulatory provisions and policies with respect to same-sex partners with the case law of the European Court of Human Rights in this field, and accordingly:

4.3.1. ensure that same-sex partners have available to them a specific legal framework providing for the recognition and protection of their unions;

4.3.2. grant equal rights to same-sex couples and heterosexual couples as regards succession to a tenancy;

4.3.3. ensure that cohabiting same-sex partners ... qualify as dependants for the purposes of health insurance cover;

4.3.4. when dealing with applications for residence permits for the purposes of family reunification, ensure that, if same-sex couples are not able to marry, there is some other way for a foreign same-sex partner to qualify for a residence permit;

4.4. ensure that other basic needs which are fundamental to the regulation of a relationship between a couple in a stable and committed relationship are provided for without discrimination on the grounds of sexual orientation, and accordingly:

4.4.1. as regards migration, extend residence rights to same-sex partners on an equal footing with heterosexual partners and give equal recognition to same-sex partnerships in the context of applications for citizenship;

4.4.2. ... recognise same-sex partners as next of kin for medical purposes and extend to them entitlements to special leave for the purpose of caring for a sick partner or for the sick parent of a partner ...;

4.4.3. as regards property, treat as joint property the possessions acquired by a same-sex couple during their relationship ...;

4.4.4. ... ensure ... statutory protection against domestic violence and guarantee the right to refuse to testify against one's partner in criminal procedures ...;

4.4.5. ... ensure the applicability to same-sex couples of rules on alimony ...;

4.4.6. ... extend access to survivor's pensions to same-sex couples as well as entitlements to compensation for the wrongful death of one's partner and entitlements to inherit when one's partner dies intestate, and grant exemption from inheritance tax to same-sex couples ..."

V. Guidance regarding the content of the "specific legal framework"

31. FIDH, ILGA-Europe, NELFA, and ECSOL respectfully suggest that the Court should provide guidance to national governments (and the Committee of Ministers) regarding the "core rights relevant to a couple in a stable and committed relationship", which the "specific legal framework" should include. A good starting point is the list in Resolution 2239 (2018) of the PACE (para. 30 above), which took into account the March 2018 report for the Danish Chairmanship of the Committee of Ministers of the Council of Europe by Prof. Kees Waaldijk, University of Leiden.²⁰

¹⁸ (26 Sept. 2000), para. 11(iii)(i). See also Resolution 1547 (2007), para. 34.14.

¹⁹ See <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=25166&lang=en>.

²⁰ "Extending rights, responsibilities and status to same-sex families: trends across Europe", <https://rm.coe.int/extending-rights-responsibilities-and-status-to-same-sex-families-tran/168078f261>.

32. The Court could find examples in its own case law, or the case law of the Court of Justice of the EU: *Karner and Kozak v. Poland* (2 March 2010) on succession to a tenancy; *P.B. & J.S. v. Austria* (22 July 2010) on accident and sickness insurance cover; *Pajić v. Croatia* (23 February 2016) and *Taddeucci & McCall* on residence permits; Case C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen* (CJEU, 1 April 2008) (pension for surviving different-sex spouse must also be provided to surviving same-sex registered partner "if registration places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor's benefit").

33. The Court could also find examples in its pending cases:

- *Formela & Others v. Poland*, Applications nos. 58828/12, 40795/17, 55306/18, 55321/18 (right to receive a gift tax free, right to file a joint tax return, social security benefit to care for a sick spouse, health insurance coverage for a spouse)
- *Grochulski v. Poland*, Application no. 131/15 (subscription to a family scheme of life insurance)
- *Handzlik-Rosul & Rosul v. Poland*, Application no. 45301/19 (non-recognition of same-sex marriage contracted in Denmark)
- *Meskes v. Poland*, Application no. 11560/19 (exemption from inheritance tax)
- *Starska v. Poland*, Application no. 18822/18 (right to change surname to partner's surname)
- *Szypula & Others v. Poland*, Applications nos. 78030/14 and 23669/16 (refusal to issue the marriage eligibility certificate that would enable the applicants to get married in Spain)

Conclusion

34. FIDH, ILGA-Europe, NELFA, and ECSOL respectfully submit that the Court should apply its reasoning in *Oliari & Others* and *Taddeucci & McCall* to every member state of the Council of Europe, and provide guidance to governments (and the Committee of Ministers) regarding the "core rights relevant to a couple in a stable and committed relationship", which the "specific legal framework" should include.

35. The need for this guidance was explained very well by Nils Muižnieks, the Council of Europe's former Commissioner for Human Rights: "**It's not just symbolic: the real problems faced by "rainbow" families** In my recent visits to San Marino, Slovakia and Latvia, I met with lesbian and gay activists who gave me vivid examples of the specific problems engendered by the absence of legal recognition of same-sex stable relationships. Same-sex couples may lack inheritance rights, even after a lifetime of sharing and acquiring property. Having no legal recognition as next-of-kin means that a person may not be entitled to a survivor's pension, to a living partner's health insurance or to continue living in the home of a deceased partner. If someone is hospitalised after a serious accident ..., the person's partner may be denied visitation rights or access to the medical file. ... If a same-sex couple chooses to separate, there is no framework to regulate maintenance rights and duties toward each other ... Stable same-sex couples also have no access to tax advantages provided by the state to other couples. Like marriage, a registered partnership brings rights and obligations to the relationship of committed couples. Same-sex couples in this situation have the same needs and problems as any other couple."²¹

²¹ See https://www.coe.int/en/web/commissioner/blog/-/asset_publisher/xZ32OPEoxOkq/content/access-to-registered-same-sex-partnerships-it-s-a-question-of-equality/pop_up?_101_INSTANCE_xZ32OPEoxOkq_languageId=en_GB (21 February 2017).

**APPENDIX:
LEGISLATION IN COUNCIL OF EUROPE MEMBER STATES
RECOGNISING SAME-SEX COUPLES**

Council of Europe Member States

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

Austria - Registered Partnership Act (*Eingetragene Partnerschaft-Gesetz*), Federal Law Gazette (*Bundesgesetzblatt*) vol. I, no. 135/2009; Constitutional Court (*Verfassungsgerichtshof*), *Erkenntnis* G 258-259/2017-9, 4 December 2017:

1. The phrase "of different sex" in section 44 of the General Civil Code, Collection of Laws 946/1811, and the phrases "of same-sex couples" in section 1, "of the same sex" in section 2 and section 5 (1) item 1 of the Federal Act on Registered Partnership, Federal Law Gazette I 135/2009 as amended by Federal Law Gazette I 25/2015, are repealed as unconstitutional.

2. The repeal shall take effect as per the close of December 31, 2018.

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

Croatia - *Zakon o životnom partnerstvu osoba istog spola*, NN 92/14, 98/19, <https://www.zakon.hr/z/732/Zakon-o-%C5%BEivotnom-partnerstvu-osoba-istog-spola>

Cyprus - *ΝΟΜΟΣ ΠΟΥ ΠΡΟΝΟΕΙ ΓΙΑ ΤΗ ΣΥΝΑΨΗ ΠΟΛΙΤΙΚΗΣ ΣΥΜΒΙΩΣΗΣ*, N. 184(I)/2015 (9 December 2015), http://www.cylaw.org/nomoi/indexes/2015_1_184.html

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

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

Estonia – Registered Partnership Act (9 October 2014), <https://www.riigiteataja.ee/en/eli/527112014001/consolide>

Finland - Law 9.11.2001/950, Act on Registered Partnerships (*Laki rekisteröidystä parisuhteista*) ("*parisuhteen osapuolet*"; "registered partners"); *Laki avioliittolain muuttamisesta*, 156/2015, <https://www.finlex.fi/fi/laki/alkup/2015/20150156> (marriage)

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

Germany

Federal Level - Law of 16 Feb. 2001 on Ending Discrimination Against Same-Sex Communities: Life Partnerships (*Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften*), [2001] 9 *Bundesgesetzblatt* 266 ("*Lebenspartner*"; "life partners"); *Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts* (20 July 2017), https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&jumpTo=bgbl117s2787.pdf#_bgbl__%2F%2F%5B%40attr_id%3D%27bgbl117s2787.pdf%27%5D__1599502513922

Greece - ΝΟΜΟΣ ΥΠ' ΑΡΙΘΜ. 4443 (9 December 2016), https://0076.syzefxis.gov.gr/wp-content/uploads/2019/08/11aNomos_N4443-1.pdf

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

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

Ireland - Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, No. 24 of 2010 ("civil partners"); Marriage Act 2015, <https://www.oireachtas.ie/en/bills/bill/2015/78/>

Italy - *LEGGE 20 maggio 2016, n. 76. Regolamentazione delle unioni civili tra persone dello stesso sesso ...*, <https://www.gazzettaufficiale.it/eli/gu/2016/05/21/118/sg/pdf>.

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

Luxembourg - *Loi du 9 juillet 2004 relative aux effets légaux de certains partenariats*, *Mémorial A*, nr. 143, 6 August 2004 ("*partenaires*"; "partners"); *Loi du 4 juillet 2014*, <http://legilux.public.lu/eli/etat/leg/loi/2014/07/04/n1/jo> (marriage)

Malta - Marriage Act and other Laws (Amendment) Act, 2017,
<https://parlament.mt/media/90386/act-xxiii-marriage-act-and-other-laws-amendment-act.pdf>

Monaco - *Loi n° 1.481 du 17 décembre 2019 relative aux contrats civils de solidarité*,
<https://journalde Monaco.gouv.mc/Journaux/2019/Journal-8466/Loi-n-1.481-du-17-decembre-2019-relative-aux-contrats-civils-de-solidarite>

Montenegro – Same-Sex Life Partnership Act (7 July 2020), *Zakon o životnom partnerstvu lica istog pola*
<http://www.sluzbenilist.me/pregled-dokumenta/?id={1CA9749D-5713-441B-BC02-9A9BDA48F7DB}>

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

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

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

San Marino - *LEGGE 20 novembre 2018 n.147 - Regolamentazione delle unioni civili*, <https://www.consigliograndeegenerale.sm/on-line/home/lavori-consiliari/consultazione-archivi/scheda17160637.html>

Slovenia - *Zakon o partnerski zvezi* (Civil Union Act, ZPZ), Ur. l. RS, 33/16 (9 May 2016),
<https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/2016-01-1426?sop=2016-01-1426>

Spain

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

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

Switzerland

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

United Kingdom - Civil Partnership Act 2004 ("civil partners"); Marriage (Same Sex Couples) Act 2013 (applies to England and Wales) ("spouses"); Marriage and Civil Partnership (Scotland) Act 2014 ("spouses"); Marriage (Same-sex Couples) and Civil Partnership (Opposite-sex Couples) (Northern Ireland) Regulations 2019 ("spouses")