Chapter 13
The Legal Situation of Same-Sex Couples in Greece and Cyprus

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Abstract This chapter explores in depth the question of the legal recognition of same-sex couples in Greece and Cyprus. The chapter begins by presenting and critically examining the (narrow reading of) existing law in both countries, and concludes that, according to the dominant view, same-sex couples are excluded from both civil marriage and civil unions. The picture is further complemented by an analysis of the most consequential judicial rulings, both already delivered and pending. As evidenced through the discussed case-law and reports of independent authorities, there is room for optimism in these two countries regarding the future developments in the legal protection of same-sex couples. Interestingly, any change in the law in both countries will bear the stamp of Strasbourg and Brussels.

13.1 Introduction

The legal situation of same-sex couples in Greece and in Cyprus[1] is discussed in parallel in this chapter because the two countries share very close ties and a number of common (ethnic and other) characteristics: the Greek language, the Greek

[1] Cyprus remains *de facto* divided since the Turkish invasion of 1974. The chapter will not discuss the situation in the Turkish-occupied northern part of Cyprus, which illegally proclaimed independence in 1983 as the 'Turkish Republic of Northern Cyprus' (TRNC) and is not recognized by any state other than Turkey. The Republic of Cyprus retains sovereignty but does not exercise effective control over that part (36.2 %) of the island, which has also been exempted from the application of the EU *acquis* when Cyprus joined the EU in 2004. UN-sponsored talks to reunite the island have been fruitless. There is not much to report on same-sex marriage in the TRNC,

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Orthodox religion espoused by the large majority of the population, popular culture, traditions etc. What is more, Greece and Cyprus have been quite reluctant to introduce same-sex marriage for similar reasons. Both are Member States of the European Union (Greece since 1981, the Republic of Cyprus since 2004) and parties to the European Convention on Human Rights (further referred to as ECHR) and all major instruments of international human rights law.[2]

Political and social developments in Greece are extensively covered in Cyprus on a daily basis and exert influence on developments in the island although there are many considerable differences in various aspects of public life. Thousands of Cypriots study or work and live in Greece and thousands of Greeks work and live in Cyprus. The Greek Orthodox Church is quite influential in both countries. Art. 3 (1) of the Greek Constitution states that "[t]he prevailing religion in Greece is that of the Eastern Orthodox Church of Christ". In Cyprus, Church reaction was the main reason why (male) homosexuality was only decriminalized as late as 1998, 5 years after the Strasbourg Court ruled in *Modinos v. Cyprus* that the relevant legislation was in violation of the right to private life[3] (there was no provision in the law addressing female homosexuality).

This background is reflected in public opinion polls, which portray a similar societal attitude towards homosexuality and same-sex marriage in both countries. Thus, in the 2006 Eurobarometer, which examined attitudes toward same-sex marriage in each EU Member State, the findings for Greece and Cyprus were almost identical. Forty-four percent of EU citizens thought that such marriages should be allowed throughout Europe; the figure was 15 % in Greece and 14 % in Cyprus (Netherlands scored the highest with 82 % and Romania the lowest with 11 %). With regard to adoption by same-sex couples, the level of acceptance decreased in all Member States (32 %) as well as in Greece (11 %) and Cyprus (10 %) (Netherlands again scored highest with 69 %, while Poland and Malta polled the lowest with 7 %).[4] The situation has certainly changed since 2006 for a variety of reasons but it is common ground that both Greece and Cyprus are among the conservative countries in Europe with regard to same-sex couples and the legal recognition of their rights. This is indeed reflected in the analysis that follows.

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since the criminal ban on (male) homosexuality (a legacy of the British colonial era) still holds at the time of writing and has actually been enforced in recent years, even though the authorities have reportedly promised to lift the ban.

[2] For an overview of the political structure and the legal framework for the protection of human rights in both countries see UN Doc. HRI/CORE/1/Add.121 of 7th October 2002 (Greece) and UN Doc. HRI/CORE/CYP/2011 of 2 September 2011 (Cyprus).

[3] N. 15050/89, judgment of 22nd April 1993.

[4] European Commission, 'Eurobarometer 66: Public Opinion in the European Union' (2006), pp. 43–46, http://ec.europa.eu/public_opinion/archives/eb/eb66/eb66_en.pdf.

13.2 Legal Framework

13.2.1 Greece

The Greek Constitution protects family and marriage as two distinct institutions. Art. 21(1) does not leave any room for any competing interpretations as its clear wording provides that

> [f]amily, being the cornerstone of the preservation and advancement of the Nation, as well as marriage, motherhood and childhood, shall be under the protection of the State.

Several variations of family life, regardless of their grounding in a marriage, civil union or free union, come within the scope of the provision. There is, however, sharper disagreement among Greek scholars on the correct interpretation of the term "marriage". On the one hand, the constitutional term "marriage" is taken to refer to the permanent and freely established partnership of two persons of the opposite sex that is recognized by law and based on the equality of spouses.[5] This reading of the term identifies the difference in sex as a constitutive element of the institution of marriage.

Taking this opinion a step further, the ordinary Legislator is prevented by the Constitution from extending marriage to same-sex couples as that would interfere with the constitutional meaning ascribed to this institution. The Legislator, too, is not under any positive obligation to provide for alternative institutions to marriage for same-sex couples. At the other end of this spectrum lies the claim that the core immutable elements of marriage are the (official) form of celebration and the enhanced treatment *vis-à-vis* free unions.[6] According to this opinion, the term marriage should be in agreement with other ever-evolving constitutional principles, like the principles of equality and non-discrimination. To this regard, Art. 4 of Constitution provides that: "1. [a]ll Greeks are equal before the law; 2. Greek men and women have equal rights and equal obligations". On these two constitutional provisions rests the prohibition of discrimination in account of sex. Excluding same-sex couples from the institution of marriage and, at once, not affording them any legal recognition would be at odds with the above principle.

Turning to ordinary legislation, the original provisions of the IV Book (Family Law Book) of the Greek Civil Code (further referred to as GCC) envisioned a family model which has been dismissed as conservative even by the standards of the post World War II era of its drafting (the Code entered into force in 1946).[7] Following the enactment of a new progressive Constitution in 1975 and pursuant to shift in the moral values and social attitudes of the Greek people, the IV Book of the

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[5] Dagtoglou (2005), para. 502.

[6] Papadopoulou (2008), pp. 418–422.

[7] Fessas (2011), p. 195.

GCC has undergone a series of amendments,[8] most recently by virtue of Law No. 3719/2008 which, amongst else, introduced into the domestic legal order the institution of the civil union.

Art. 1350–1360 GCC lay down the requisites of marriage, distinguishing between impediments and positive conditions. The difference of the sex of the spouses is not listed under either category of conditions. Notably, the chosen diction of Art. 1350, providing that "[t]he agreement of the future spouses is required for the celebration of marriage", does not shed light on the sex-difference condition as the Greek word for "future spouses" (= *μελλόνυμφοι*) is sex-neutral.

The dominant view in Greek scholarship maintains that the not sex-specific word "future spouses" can only refer to a different-sex couple. This opinion rests on the teleological interpretation that the draftsman of the GCC could not have anything else in his mind at that time,[9] certainly not the pressing need for the protection of same-sex relationships, as well as on the systematic interpretation of the IV Book of the GCC. Until the decisions 114 and 115/2008 of the Rhodes three-member Court of first instance, no other domestic court had ever dealt with the interpretation of this term.

The non-compliance with the statutorily provided requisites can lead to a non-existent, void, or voidable marriage. According to the dominant view, the violation of the sex-difference condition results in an *ipso iure* non-existent marriage, which does not produce any legal effects.[10] Although no judicial ruling is required to ascertain the non-existence of a marriage, any one with a legal interest is entitled to seek a declaratory court judgment.

In a nutshell, the vast majority of Greek theoreticians would concur that the GCC, in its present form, does not leave any room for same-sex marriages. A minority view has argued that the amendments of the family law provisions of the Civil Code have done away with the difference in sex as a fundamental component of spousal relations, and therefore (and as there is no express prohibition) marriage is already available to same-sex couples.[11]

Despite the inertia of the Legislator to clarify the sex-difference condition in the institution of the civil marriage, there has been as of recently intense mobility with regard to alternative legal institutions of partnership. In specific, in 2004, following

[8] The Constitution of Greece has been amended three times since its enactment, in 1986, 2001 and, most recently, 2008. The IV Book received a major overhaul with Laws No. 1250/1982 and No. 1329/1983 which introduced much-needed amendments, amongst which were the possibility to celebrate one's marriage before the mayor (where only a religious ceremony was previously available); the equality of man and woman in their rights and duties as parents and spouses; the introduction of divorce by consent; the equal legal treatment of children born in and outside wedlock. Law No. 2447/1996 introduced further amendments in matters of adoption and legal guardianship, and Law No. 3089/2002 regulated in detail filiation in the context of medically assisted reproduction.

[9] Papachristou (2005), p. 37.

[10] *Ibidem*, p. 55.

[11] Vidalis (1996), pp. 73–74.

an invitation submitted from the Lesbian and Gay Community of Greece (O*ΛK*), the National Commission for Human Rights opined that rights ought to be extended to same-sex couples. In the same Opinion the Commission urged the Ministry of Justice to put together a working group with the mandate to explore the legal recognition of same-sex partnerships and lift discrimination against same-sex couples in the fields of succession, taxation, insurance, health, pensions, welfare and labour.[12] In 2006, the Ministry of Justice initiated a discussion on a cohabitation pact that would include same-sex couples. However, in 2008, the Minister of Justice introduced in the Parliament a bill on the cohabitation pact, which left same-sex couples outside of its scope. The introductory report to the bill neither made any reference to same-sex couples nor did it attempt to justify their exclusion from the scope of the proposed institution, but only summarily stated that "[t]he present bill exclusively refers to the free union of persons of the opposite sex".[13] In the Parliament, the Minister of Justice explained that the bill reflected "the social acceptance of certain principles and values" and that, given the lack of support from the society, "we should not proceed with the establishment of a pact for same-sex couples".[14]

The bill was passed on 17th November 2008. With regard to the cohabitation pact, Law No. 3719/2008 requires that the adult opposite-sex partners wishing to enter into a cohabitation pact sign the pertinent notarial deed before filing a copy thereof with the competent registry.[15] The pact confers a set of rights on the cohabitants. In specific, they are free to regulate the ownership of the property acquired during cohabitation; in the absence of an agreement to the contrary, the party who has contributed to the increase of the other party's property is entitled to seek recovery of that contribution.[16] A claim to maintenance can be agreed in the case of termination of the cohabitation, on the condition that the party seeking maintenance lacks the ability of self-support; however, this maintenance may not be claimed from the heirs of a deceased cohabitant.[17] Regarding children born in cohabitation, the same paternity presumption rule applies as to children born in wedlock. The nullity or annulment of the pact does not influence the parentage of the offspring.[18] Finally, the pact establishes rules of intestate succession, whereby the surviving party is entitled to one-sixth or one-third or the whole of the

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[12] National Commission for Human Rights, *Annual Report 2004* [in Greek], pp. 183–210, available at: http://www.nchr.gr/category.php?category_id=103.

[13] Introductory report to the bill on the amendments for the family, the child, society and other provisions (09 October 2008).

[14] Fessas (2011), note 77.

[15] Law 3719/2008, Art. 1. For a lengthy discussion of the new institution, see Papachristou et al. (2009).

[16] Law No. 3719/2008, Art. 6.

[17] *Ibidem*, Art. 7.

[18] *Ibidem*, Art. 8.

decedent's estate, depending on the surviving relatives.[19] Regrettably, same-sex couples have been excluded from the exercise of all the foregoing rights. The Grand Chamber of the Strasbourg Court is expected to decide, by the end of 2013, an application complaining that the law on the cohabitation of opposite-sex couples has breached the right of same-sex couples to respect for their private life and the principle of non-discrimination.[20]

Despite the increasing protection afforded to opposite-sex couples in free unions, same-sex couples in alike living arrangements find themselves, once again, beyond the scope of protection. For instance, in awarding monetary compensation to the surviving party of a free union for the emotional pain suffered from the wrongful death of the other party, the Court of Cassation described free union in limiting terms as "the cohabitation outside marriage between a man and a woman".[21] In similar vein, the protection afforded through the rules on domestic violence are inapplicable insofar the relevant Law 3500/2006, in Art. 1, employs gendered terms when delimiting the subjective scope of application which extends to "the man's [female] permanent partner or the woman's [male] permanent partner ... on the condition they cohabit" [= *μόνιμη σντροφος του άντρα, μόνιμος σντροφος της γυναίκας*].

The above *tour d'horizon* shows beyond doubt that same-sex couples are not meaningfully recognized in the eyes of the Greek Legislator, while at once suffering monetary and non-material damages from this comprehensive discrimination.

13.2.2 Cyprus

Cyprus is generally considered as having a comprehensive legal framework for safeguarding equality and combating discrimination.[22] The 1960 Constitution is largely modeled on the ECHR and in some instances it even expands upon the rights and liberties enshrined in the Convention. Fundamental rights and freedoms are generally safeguarded to all persons without differentiating between citizens and non-citizens. Art. 28 of the Constitution on equality and non-discrimination does not specifically mention sexual orientation but this should be deemed to fall within the open-ended wording ("or on any other grounds") of the provision. Sexual orientation is explicitly included among the prohibited grounds of direct or indirect discrimination in Art. 6 of Law No. 42(I)/2004, which implemented the EU Racial

[19] *Ibidem*, Art. 11.

[20] *Vallianatos and Mylonas v. Greece* and *C.S. and Others v. Greece*, n. 29381/09 and 32684/09 (pending before the Grand Chamber); see Statement of Facts published by the Court on 8th February 2011.

[21] Court of Cassation, judgment 434/2005, *EllDni* 2005, p. 1060.

[22] See the European Committee against Racism and Intolerance (ECRI) Report on Cyprus, CRI (2011)20, p. 7 (adopted on 23rd March 2011 and published on 30th May 2011). For a critical account see: Trimikliniotis and Demetriou (2008a).

Equality Directive 2000/43/EC. Significantly, the Cyprus Constitution was amended in 2006 to give supremacy to EU laws. Other legal instruments also provide protection against discrimination since Cyprus is a party to all major universal human rights instruments and has transposed all relevant EU directives. However, this legal framework co-exists with a post-colonial legacy of illiberal laws, some of which are still in force.[23]

Art. 22 of the Constitution guarantees the right to marry and to found a family for all persons of marriageable age but refers to ordinary legislation for detailed regulation. Section 3 of the Marriage Law 104(I)/2003 defines marriage explicitly as a union between a man and a woman.[24]

In terms of institutions, the Office of the Commissioner for Administration (Ombudsman) was appointed as the national equality body in 2004. Under Law No. 42(I)/2004, two separate authorities were set up within the Ombudsman's office: the 'Equality Authority' and the 'Anti-discrimination Body', together comprising the Cyprus Equality Body under the Ombudsman. The Ombudsman, in her capacity as 'Anti-discrimination Body',[25] investigates complaints of maladministration and discrimination from public bodies towards individuals. Under certain conditions specified in the law, the Ombudsman is vested with the power to issue Orders or impose fines; however, the Ombudsman does not have the power to refer the non-complying party to court. In practice, the Ombudsman has rarely, if at all, made use of the powers to issue orders and impose fines when acting as Authority against Racism and Discrimination. Resort was almost invariably made to recommending measures aimed at the cessation of the discriminatory behavior or practice.

13.3 Case-Law

13.3.1 Greece

13.3.1.1 The Meaning of 'Marriage' Under the Greek Civil Code

In the meantime, while the Parliament was debating a cohabitation pact that would exclude same-sex couples, the mayor of the Dodecanese island of Tilos officiated on 3rd July 2008 the first same-sex wedding ceremonies ever to have been performed on Greek soil,[26] between two gay men and two gay women. The

[23] Trimikliniotis and Demetriou (2008b), p. 17, note 54.

[24] For an overview of the Marriage Law see Emilianides (2011), pp. 219–221.

[25] Both the incumbent holder of the position (Ms Eliza Savvidou, serving since March 2010) and her predecessor (Ms Eliana Nicolaou, who served from 1999–2010) are women.

[26] A qualification could be entered here, if one is to subscribe to late historian John Boswell's thesis that a precedent to contemporary same-sex marriages is the rite of *adelphopoiesis* as

prospective officiation had been leaked to the national press, and the Court of Cassation Prosecutor instructed prosecutors to take immediate action against any mayor that would accept declarations for the celebration of marriage by persons of the same sex, on grounds of a committed act of misconduct.[27] Despite the threatened action, the mayor of Tilos proceeded to perform the two marriages, and the prosecutor at the Rhodes Court of first instance reacted by bringing two actions against each of the couples and the mayor, seeking before the competent court the judicial declaration of the marriages as non-existent.

Decisions 114 and 115/2008 of the Rhodes three-member Court of first instance (Court hereinafter) are the first judgments by a Greek court to address same-sex marriage domestically.[28] Before delving into the substance of the dispute, the Court addressed two preliminary objections raised by the defendants who argued that the action had been brought inadmissibly against the defendant mayor and that the prosecutor had no legal standing to sue. As these objections exceed the scope of the present survey, suffice it is to say that the Court pronounced the action inadmissible with regard to the mayor. The Court further found that the prosecutor both enjoyed discretionary power to seek the declaration of the marriage as non-existent,[29] in light of the increased interest of the State in family affairs, and could represent himself in the audience without counsel.

The substantive point of the dispute asked whether the ambiguous, sex-neutral term "future spouses" covered same-sex spouses, too (Art. 1350 GCC). Essentially, the Court was called on to decide whether same-sex marriage was allowed in the Greek legal order, given that the difference of sex was not amongst the positive conditions of marriage, as explicitly enumerated in the Greek Civil Code.

In the Court's opinion, the Civil Code cannot be readily relied on as the issue of same-sex marriage had not been anticipated by the draftsman back in the 1950s. It should be noted as an aside that the draftsman of the Draft Civil Code had actually considered same-sex marriages when suggesting that, in cases of fraud as to the sex of one of the spouses, the marriage between two persons of the same sex should be declared as non-existent.[30] Then, to no avail, the Court sought guidance in international human rights documents such as the ECHR (Art. 12) and the ICCPR) (Art. 23). However, both these documents neither prohibit nor require same-sex marriage, and they leave the determination of the marriage conditions to the

celebrated in Eastern Orthodoxy during the late Byzantine period. See Boswell (1994). For an eloquent critique of this thesis (aimed at a lay audience, and pointing out several fallacies in Boswell's argumentation), see Mendelsohn (2009), pp. 289–321.

[27] See Instruction 5/2008 by the Court of Cassation Prosecutor, *EfAD* 2008, pp. 1073–1074.

[28] Judgment 114/2008, *ChrID* 2009, p. 617; Judgment 115/2009, *EfAD* 2009, p. 690.

[29] According to Article 608 para. 2 of the Code of Civil Procedure: "[an] action [on the existence, non-existence or nullity of marriage] by the prosecutor or any other interested person is to be brought against both spouses and, if one of them is deceased, against his decedents; otherwise it is denied as inadmissible".

[30] Balis (1962), p. 42.

discretion of the parties.[31] Without finding any foothold on contemporary legal instruments, the Court unexpectedly turned to the definition of marriage provided by the Roman jurist Modestinus around 250 CE, according to which marriage is "the union of male and female and the sharing of life together, involving both divine and human law".[32] The Court explained why it resorted to this bygone point of reference by arguing that this is the departing point of analysis taken by most Greek scholars in family law. Undoubtedly, this is an outdated definition and the Court should have fleshed out in more detail how this definition bodes with, or why it should even be relevant, for the Greek legal order.

It is to a certain extent befuddling that the Court uncritically adopted a definition that actually refers to divine law, as if the 1982 amendment of the IV Book (of the GCC) had not once and for all removed the metaphysical or religious aspects from the institution of civil marriage. Then, the Court performed a leap in its reasoning and arrived all too hastily at the conclusion that, according to the standing Greek laws, the difference in the sex of the spouses-to-be is an implicit condition for the existence of the marriage. A violation of that condition renders the marriage non-existent.

To reinforce the soundness of its verdict, the Court mentioned that the ordinary Legislator, as recently as in 2008, decided purposely to confer the right of entry into civil unions only to opposite-sex couples:

> a fact that, regardless of the counterargument that one could raise, represents the expressed will of the internal legal order, which is taken to reflect the moral and social values and traditions of the Greek people.

There are two claims hidden in the court's reasoning. First, as the Court reminds, the Greek Legislator, when very recently called upon to regulate same-sex partnerships, chose to explicitly exclude those couples from the newly minted institution of civil union. In this clearly stated normative preference of the Legislator, the Court reads an *a fortiori* exclusion from the traditional institution of civil marriage; if the Legislator has decided to shut same-sex couples out of the cohabitation pact, then the same should hold true about the more comprehensive institution of civil marriage. This line of reasoning is unpersuasive and it could easily be reconstructed as an argument in favour of sex-neutral civil marriage. In specific, according to the reverse form of the Court's argument, while the ordinary Legislator has chosen, for the time being, to place an explicit sex-difference condition for the access to the institution of civil-union, the Legislator never did the same with regard to civil marriage, not even during the 2008 amendment of the IV Book of the GCC.

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[31] Art. 12 ECHR reads: "[m]en 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", and Art. 23 ICCPR provides that "[t]he right of men and women of marriageable age to marry and to found a family shall be recognized". See the chapters by Pustorino on ECHR and Paladini on ICCPR in this volume.

[32] Translated from "nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio".

A contrario, from the ongoing silence of the ordinary Legislator on civil marriage, notwithstanding the arisen opportunities for amendment and clarification, one could infer that the Civil Code indeed does not prescribe the difference in the sex of the spouses as a condition of marriage.

Second, the Court seems to imply that the civil union institution, even if discriminatory, only reflects the mores and shared attitudes of the majority of Greek people. On this point, the European Court of Human Rights has unconditionally held that references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex.[33] This particular ruling bodes well with the gay-rights strategy to reframe the exclusion of same-sex couples from the institution of marriage as sex discrimination as, in this form, the grievance would potentially mandate a higher degree of judicial scrutiny (at least in jurisdictions with no protection against discrimination on grounds of sexual orientation but with laws against sex-discrimination).[34]

It should be reminded that the Greek judicial system is primarily one of incidental and diffuse review of the constitutionality of the laws. Regardless of one's agreement or disagreement with the conclusion reached on the substance of the case, it is regrettable that the Court failed to seriously review the constitutionality objections that the applicants (and many legal scholars) had raised.[35] The Court held that the constitutional principle of equality does not mandate the same legal treatment of same- and opposite-sex couples as, in its judgment, these are two dissimilar categories; therefore, different treatment is allowed. This is a very narrowly constructed understanding of equality. The Court also found that sexual freedom, namely a person's right to conduct their sexual life in whichever way they please, does not include a claim to have those freely chosen relationships protected.

An unexpectedly welcome part of the judgment, albeit mostly just sugar-coating the pill, is the concluding *obiter dictum* where the court emphasizes that the domestic legislation is constantly progressing, all the more through its interaction with EU and other Member States' laws (naming countries where cohabitation pacts are in place), to reflect the changing social attitudes and contemporary needs. On this note, the Court suggests that these ambiguities in the Greek legal order about the rights of same-sex couples ought to be resolved through legislative amendments.

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[33] *Konstantin Markin v. Russia*, n. 30078/06, judgment of 22nd March 2012, para. 127.

[34] Koppelman describes this strategy of emphasizing the sex discrimination defects of anti-gay laws not as the only meaningful path but as one arrow in the quiver. See Koppelman (1994); Koppelman (2002), pp. 53–70; Green (2011).

[35] Papadopoulou (2008), pp. 418–422.

13.3.1.2 The Exclusion of Same-Sex Couples from Civil Unions Before the Strasbourg Court

The question on the alleged unlawful discrimination against same-sex couples in Greece has recently moved beyond the national borders and a case is at the moment of writing pending before the Grand Chamber of the Strasbourg Court. In specific, on 6th May 2009, four same-sex couples, residents in Athens, relying on Art. 8 ECHR, taken alone and in conjunction with Art. 14, lodged a complaint before the European Court of Human Rights (further referred to as ECtHR) claiming that the Law No. 3719/2008, which limits civil unions exclusively to adults of the opposite sex, breaches their right to respect for their private life and the principle of non-discrimination.[36] On 11th September 2012, the Chamber relinquished jurisdiction in favour of the Grand Chamber,[37] and the hearings were held on 16th January 2013. This much-awaited decision is expected by the end of 2013.

Since the case is still pending at the time of writing, the section here will look closer at the arguments of the applicants and of the respondent government, as delivered at the oral hearings.

A first issue that was raised before the Grand Chamber concerned the admissibility of the application in view of the applicant's apparent failure to exhaust any domestic remedies.[38] The Government brought forward the fact that the four couples had not pursued any legal action in Greece. They had thus deprived the authorities of the possibility to deal internally with the complaint, before seeking recourse to an international tribunal like the ECtHR. The government proceeded to enumerate a series of national remedies that the applicant could have pursued to seek damages, and asked the Court to declare the case inadmissible in line with Art. 35(1) ECHR.[39]

In response, the applicants relied on the Court's well-established case-law that the rule of exhaustion of domestic remedies requires that domestic remedies be both available and effective; otherwise, the applicants are exempt from this obligation.[40] In light of the absence of a constitutional review remedy in the Greek legal order,

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[36] *Vallianatos and Mylonas v. Greece* and *C.S. and Others v. Greece*.

[37] Jurisdiction was relinquished in accordance to Art. 30 ECHR, which provides that "[w]here a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects".

[38] See also Statement of Facts cited earlier, Question 1 and Question 3.

[39] Art. 35, para. 1, on admissibility criteria "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken".

[40] See in particular *Burden and Burden v. UK*, n. 13378/05, judgment of 12th December 2006. For an up-to-date collection of the Court's case-law on the rule of exhaustion of domestic remedies see in particular Jacobs et al. (2010).

the applicants underlined that they could not seek an i*n abstracto* judicial review of the impugned legislation. In addition, the applicants argued that there is no available and effective domestic remedy to seek redress for non-pecuniary damages caused by a legislative piece or the absence thereof.

With regard to the merits of the grievances, the first point of contestation revolved around the rationale of the impugned law. In particular, the Greek government argued that same-sex couples had been lawfully excluded from the scope of the law, because the new institution of civil union aims at addressing the pressing social need of the parentage of children born by parents who do not wish to get married. According to the government, the said rationale of this new institution lies in sects. 8–10 of Law No. 3719/2008, which respectively regulate the presumption of paternity when a child is to be born, the surname, and the sharing of the guardianship. This societal need, the argument continued, could not possibly be of concern to same-sex couples for pragmatic, biological reasons, and therefore these citizens have been excluded from the scope of the law in light of this objective and reasonable justification. In their intervention, the applicants suggested that it was the first time the Greek government had identified this problem of parentage as the driver behind this new institution and that this argument should not be taken at face value. However, a more careful reading reveals that the Introductory Report to the Draft Bill of the impugned law does in fact include the argument raised by the government. Furthermore, the applicants also suggested that only 16 same-sex couples had signed the cohabitation pact; a too small figure which, in the applicants' view, indicated the non-existence of this societal need. The source of that figure is not clear from the oral hearings. According to the most recent official data, as published by the Ministry of Interior in March 2013 (3 months after the oral hearings), at least 775 different-sex couples have signed the cohabitation pact under Law No. 3719/2008.[41]

Notably, this "parentage justification" has been a recurring theme in the defence of anti-gay policies. For instance, following the decision of the Obama Administration to not defend in courts (as discriminatory) the Defense of Marriage Act, the House of Representatives Bipartisan Legal Advisory Group (BLAG) stepped in and, in similar vein to the Greek government's argument, submitted in its written observations to the case *United States v Windsor* that

> [t]he link between procreation and marriage itself reflects a unique social difficulty with opposite-sex couples that is not present with same-sex couples—namely, the undeniable and distinct tendency of opposite-sex relationships to produce unplanned and unintended pregnancies.[42]

[41] The Ministry of Interior disclosed this figure in March 2013. See: http://www.ekathimerini.com/4dcgi/_w_articles_wsite1_1_29/03/2013_490797.

[42] See the Bipartisan Legal Advisory Group of the U.S. House of Representatives Brief on the merits for Respondent in the case United States v. Windsor (pending before the Supreme Court of the US), p. 44.

This position of the Greek government appears disingenuous on at least two grounds. First, the claim to an "objective justification" does not really hold much water as different-sex couples who are for their own reasons disinclined or biologically unable to procreate are still entitled to sign a cohabitation pact and enter into a civil union. Had the new institution aimed only at the regulation of the parentage of children born out of wedlock, it would then only be available to those couples with children—or at least to those capable of producing a positive fertility test. The government's line of reasoning is even less convincing in light of a 2013 Eurostat report stating that Greece has the lowest share of children born outside marriage, at a rate of 7 %, a far cry from the EU-27 average of 40 %.[43] Arguably, the Greek government invokes a barely existing social reality as the thin justification of the present law without explaining why the rights of same-sex couples do not constitute a similarly pressing social need. More importantly, there are already rules in place to address the parentage of children born out of wedlock, as well as legal means that are available to unmarried opposite-sex parents who wish to safeguard the interests of the child.

To return to the merits of the case, a second line of argumentation before the Grand Chamber considered whether alternative legal tools were available to same-sex couples for the management of their financial affairs. According to the Greek government, same-sex couples could rely on contractual freedom mechanisms in order to manage their estate as if they were married. Therefore, according to the government, same-sex couples do not suffer any damages as a result of their exclusion from the institution of cohabitation. As demonstrated immediately below, this assertion could not be further from the truth.

The applicants first claimed that same-sex couples are excluded symbolically from the scope of the impugned law; per the wording of the representing counsellor, same-sex partners "are in a legal no man's land on grounds of their sexual orientation only; they have lost the symbolic right to be seen as a fully fledged citizen, they are second-class citizens". This idea turns on the potential of legislation to shift socially backward attitudes.

More to the point, the applicants persuasively counter-argued that same-sex couples are not afforded the same legal protection as granted to their heterosexual counterparts, including in financial affairs. For instance, same-sex partners are not legally empowered to present themselves as a couple in the eyes of the administration and have to face insurmountable obstacles regarding the management of their shared estate. The applicants reinforced their latter point by explaining the state of affairs in the hypothetical scenario of the passing of one partner of a same-sex couple. They correctly identified that Greek law requires that, notwithstanding a valid will, a significant portion of one's estate be reserved for the surviving

[43] Eurostat, *Report on demography*, 49-2013, 26th March 2013, available at: http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-26032013-AP/EN/3-26032013-AP-EN.PDF. According to the same report, the second lowest share belongs to Cyprus at 17 % while the highest to Estonia at 60 %.

relatives, to the detriment of the decedent. By contrast, the inheritance rights of the different-sex partners of a civil union are explicitly regulated and protected under sect. 11 of Law No. 3719/2008. Furthermore, Greek courts have denied inheritance rights to beneficiaries who, according to the language used by the Greek Courts, might have abused the sexual weaknesses of the deceased or which would reflect situations contrary to accepted standards of behaviour.[44] Naturally, such judicial precedents, all the more when handed down by superior courts, foster a climate of uncertainty regarding the finances of a same-sex couple. The applicants did not refer in detail to other discriminatory practices; by way of illustration, they did not elaborate financial losses suffered by same-sex couples due to their ineligibility to receive social welfare benefits and tax cuts. Naturally, contractual freedom could not help same-sex couples obtain those tax cuts that are readily available to opposite-sex couples.

It should be noted that the discrimination under scrutiny is unique in kind inasmuch Greece is the only Member State of the Council of Europe that has established a civil union institution that is open only to opposite-sex couples. In maintaining two institutions with corresponding rights for opposite-sex couples and no institution for same-sex couples, Greece has taken a regulatory approach without any precedent among the Member States of the Council of Europe, which will hopefully find no imitators. The Greek government has attempted to defend in Court a policy decision that essentially transforms the single exclusion of same-sex couples from marriage into a double exclusion from both marriage and civil union.

It should also be reminded that the Court has been increasingly vigorous when dealing with questions of discriminatory practices on account of sexual orientation. In its most recent judgment in *Vejdeland and others v. Sweden,* it underlined that 'discrimination based on sexual orientation is as serious as discrimination based on "race, origin or colour"'.[45] In this vein, the counsellor for the applicants incisively pointed out that

> limiting a new legal institution to different-sex couples only is just as unacceptable in Europe as limiting it to white couples only or Christian couples only.

As per the adage, "definitions belong to the definer, not the defined". The Greek Legislator would only need to delete the words "of different sex" in sect. 1 to change the definition of the rights-holder, while leaving the rest of the text intact.[46]

[44] Court of Cassation 981/2006. In this recent judgment the Court of Cassation uses unacceptable and, in my view, nearly hateful language when referring to the decedent's homosexuality, which the Court perceives as a "disorder that aggravated to the point of pathology", and when presenting gratuitous details of his personal life, such as the fact that the decedent "had displayed, since his childhood, tendencies of passive homosexuality [sic] and engaged in casual erotic same-sex relationships".

[45] Case of *Vejdeland and others v. Sweden*, n. 1813/07, judgment of 9th February 2012, para. 55; see also *Smith and Grady v. the United Kingdom*, n. 33985/96 and 33986/96, judgment o 27th September 1999, para. 97, cited by the Court in the same judgment.

[46] In December 2010, the Committee, established by the Minister of Justice, for the preparation of an Introductory Report to the Draft Bill for the amendment of Family Law rules recommended the

Sections 8–10 would require no amendment, as the already chosen diction, referring to a mother and a man, does not leave room for misunderstandings. The ease of this amendment, that would scrub the discrimination tarnish from the new institution, highlights the disproportionality of the exclusion of same-sex couples from the protective scope of this new instrument.

In the profoundly queer film Victor/Victoria, there is a soft-shoe number called "You and Me", where a gay male couple, performed by Julie Andrews and Robert Preston, sings "we don't care that tomorrow comes with no guarantee, we've each other for company". However moving and sentimental this lyric in its depiction of dignified suffering, however vigorously it resonates with the experiences of numerous same-sex couples in Greece, it is high time that these citizens also obtained the rights and guarantees that their different-sex counterparts rightfully enjoy.

13.3.2 Cyprus

13.3.2.1 Reports of the Ombudsman: Discrimination Against Same-Sex Couples

The first complaint was filed in July 2007 and concerned the rejection by the Civil Registry and Migration Department (CRMD) of a request by Mr. N.V., a national of India, to be granted a residence permit as a family member of Mr. B.J.G., an EU (UK) citizen who was permanent resident of Cyprus.[47] N.V and B.J.G. had entered into a civil partnership in the UK in June 2006. N.V.'s request to the CRMD relied on Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.[48] The request was rejected on the ground that the law of Cyprus did not recognize same-sex marriage.

Art. 2(2)b of the Directive treats any

> partner with whom the Union citizen has contracted a registered partnership on the basis of the legislation of a Member State" as a family member "if the legislation of the host Member State treats registered partnerships as equivalent to marriage.

When incorporating the Directive in the legal order of Cyprus by Law No. 7(1)/2007, the Parliament did not include either opposite-sex or same-sex partners, that is, relationships falling short of traditional marriages, in the category of 'family members'. Art. 3(2)b of the Directive states that the host Member State shall, in accordance with its national legislation, facilitate entry and residence of "the

same solution to the Minister (p. 25 of the Report; available [in Greek] at: http://www.isotita.gr/var/uploads/POLICIES/NOMOPARASKEBASTIKES%20EPITROPES/EISIGITIKI-EKTHESI-OIKOGENEIAKO.pdf).

[47] Complaint No. 68/2007.

[48] On same-sex couples under EU law see the chapter by Rijpma and Koffeman in this volume.

partner with whom the Union citizen has a durable relationship, duly attested" by undertaking an extensive examination of the personal circumstances and by justifying any denial of entry or residence to these people.

In a report of 23rd April 2008, the Ombudsman reviewed the European legal framework on same-sex marriage and made extensive analysis of the Strasbourg Court's case-law on the evolving notion and meaning of 'family' and 'marriage' and on same-sex couples; she also made particular reference to Recommendation No. 1470 (2000) of the Parliamentary Assembly of the Council of Europe (PACE).[49] Although the Ombudsman admitted that the CRMD's position was not in direct conflict with the Directive and the national implementing legislation, since the matter was left at the discretion of national authorities, she opined that the Directive set the minimum level of protection and that the exercise of national discretion should not conflict with the principles, values and rights recognized and protected by the broader international and domestic legal framework. This line of analysis led the Ombudsman to conclude that the exclusion of same-sex spouses or partners from the notion of 'family members' was problematic in terms of fully respecting the Community principle of free movement of persons; it also discriminated against homosexual partners of EU citizens and against same-sex couples on the basis of sexual orientation in a way that could not be justified in objective and reasonable terms. In addition, according to the Ombudsman, the adverse implications of such discrimination on the private and family life of same-sex couples did not seem to accord with the principle of proportionality. She expressed the view that the introduction of same-sex partnerships in the legal order of Cyprus should become a matter for public debate and study in the light of international and European practice and expressed her intention to issue a Recommendation to the competent authorities to that effect. She also forwarded her Report to the Director of the CRMD, the Minister of Interior and the Attorney-General of the Republic.

The Ombudsman's report was followed by a complaint filed in July 2008 by Mr. S.S., a Cypriot citizen, on behalf of his Canadian spouse, Mr. T.C.[50] The couple had got married in Ontario, Canada in July 2006 and moved permanently to Cyprus in July 2007. T.C. requested a residence permit as a 'family member' of S.S. in accordance with Directive 2004/38/EC. His request was rejected by the CRMD on the ground that he was not considered a family member of a Cypriot citizen because their marriage was not recognized by Cypriot legislation. Both S.S. and T.C. filed an application before the Supreme Court, which is examined in Sect. 13.3.2.3.

T.C. was granted a temporary residence permit as a visitor for 1 year. On 21st October 2008, S.S. filed a fresh complaint on behalf of T.C. concerning the latter's

[49] "Situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe", adopted on 30th June 2000.

[50] Complaint No. 159/2008. It is noteworthy that the facts and legal issues raised in the complaint were virtually identical to the case of *Tadeucci and McCall v. Italy*, which was pending before the ECtHR at the time of writing.

visitor's permit.[51] As a visitor, T.C. did not have the right to work or open his own bank account (he could only have a special bank account for visitors), which was a source of numerous problems in his daily life.

The Ombudsman's report of 10th December 2008 referred to the EC rules on discrimination against homosexuals, including the Proposal for a Directive of 2nd July 2008 on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (which has however remained a Proposal at the time of writing).[52] She also referred to the comparative legal analysis of homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity published by the EU Fundamental Rights Agency in June 2008, and emphasized that 18 out of the 27 EU Member States had introduced measures that went beyond the minimum standard required under EU legislation on combating discrimination on the ground of sexual orientation in labor, access to goods and services, housing and social benefits. She finally referred to the conclusions of the study that the rights and privileges accorded to married couples, including those rights relating to freedom of movement and family reunification, should be extended to same-sex couples.

In her own conclusions, the Ombudsman felt the need to clarify that regulation of same-sex marriage in Cyprus fell within the exclusive competence of the legislature. That said, she held the view that the complainant did not receive equal treatment because his right to work was directly linked with the non-recognition of same-sex marriage under Cyprus law. She added that the Cypriot legal order, as part of the EU legal order, should grant full protection to homosexuals; a blanket exclusion of same-sex partners from the rights granted to different-sex spouses of EU citizens as 'family members' was an unjustified discrimination on the ground of sexual orientation and a clear discrimination against same-sex couples. Consequently, the Ombudsman held that the denial of Mr. T.C.'s right to work was an unjustified adverse treatment that was directly linked to his sexual orientation and recommended that the CMRD reexamine his request with a view to granting him the right to work.

Similar arguments and conclusions were reiterated in a third report dated 3rd August 2009, which was triggered by two fresh complaints and by the negative reaction of the CMRD to the Ombudsman's previous reports. In particular, the CMRD insisted that their interpretation of the Directive was correct and that they had acted within the law; hence, the Ombudsman should have refrained from addressing any recommendation to the Department to act in a different way. The CMRD also invoked a Legal Opinion issued by the Law Office of the Republic of Cyprus in July 2008, which had similarly concluded that the Republic had no legal obligation but mere discretion to receive the (non-EU nationals) same-sex partners of persons legally residing in Cyprus.

[51] Complaint No. 213/2008.

[52] COM(2008) 426.

In the third report, the Ombudsman remained firm in her reading of the Directive within the broader legal framework, as articulated in her previous reports. In addition, she referred to the European Parliament Resolution of 2nd April 2009 on the application of Directive 2004/38/EC,[53] which, *inter alia*,

> call[ed] on member states to fully implement the rights granted under [the Directive] not only to different sex spouses, but also to the registered partner, member of the household and the partner, including same-sex couples recognized by a Member State, irrespective of nationality and without prejudice to their non-recognition in civil law by another Member State, on the basis of the principles of mutual recognition, equality, non-discrimination, dignity, and private and family life

and

> call[ed] on member states to bear in mind that the Directive imposes an obligation to recognize freedom of movement to all Union citizens (including same-sex partners) without imposing the recognition of same-sex marriages.[54]

In line with this Resolution, the Ombudsman reiterated that the CMRD's restrictive interpretation of all relevant provisions was to the detriment of EU citizens who had registered partnerships—especially same-sex ones—in their country of origin. Such restrictive interpretation would make it virtually impossible for this category of EU citizens to exercise their freedom of movement and establishment. She concluded that the blanket exclusion of same-sex partners of EU citizens from the rights deriving from the EU *acquis* on the mere ground that same-sex marriage was not recognized in Cyprus amounted to an unjustified discrimination and was incompatible with the spirit of the Directive and basic principles of EU Law; at the very least, there should have been some examination of the individual circumstances surrounding each case.

13.3.2.2 Reports of the Ombudsman: Recommending the Introduction of Civil Partnership for Both Opposite-Sex and Same-Sex Couples

The first three reports aimed at urging the State to adopt measures towards equal treatment of same-sex couples and full respect of their right to private life, but fell short of linking such measures to recognition of same-sex marriage or partnership in the legal order of Cyprus. The Ombudsman was indeed cautious to keep the two issues apart. However, in a fourth report dated 31st March 2010 she moved a step further towards recommending that Parliament introduce civil or registered partnerships for both opposite-sex and same-sex couples. The report was triggered by two complaints concerning the legislative gap on the civil marriage or registered

[53] P6_TA(2009)0203.

[54] Art. 2.

partnership of same-sex couples.[55] One of the complainants had received a clear reply by the Ministry of Interior informing him that the Cypriot law only provided for marriage between persons of different sex; since same-sex marriage was not recognized, any such marriage celebrated abroad had no legal basis in Cyprus.

The Ombudsman identified a gap in the law of Cyprus since cohabitation outside of marriage of either different-sex or same-sex couples, even if long and stable, did not give rise to any rights for the partners and was not subject to any regulation whatsoever. She stressed that new types of living together and cohabitation between such couples were a reality that required revisiting the traditional concept of marriage and the introduction of legal rules that would fill in the gap. The Ombudsman was cognizant that societal consensus would be broader for the legal recognition of different-sex partnerships outside of marriage than for same-sex ones, but she was also mindful of everyone's right not to be subjected to discrimination on the ground of sexual orientation. In her view, the continuing legal non-recognition of the social reality of same-sex partnerships reinforced negative stereotypes and prejudices against homosexuals and deprived them of the possibility to claim their rights. On the other hand, legal recognition would be a realistic response to an existing social need and essential for the realization of equal treatment. It would also bring Cyprus fully in line with the fundamental EU principle of free movement of persons.

The Ombudsman also underlined that legal regulation of civil unions would not undermine traditional marriage, which would continue to be the prevalent basis for establishing a family. In any case, the legitimate aim of protecting traditional marriage and family should not be achieved by ignoring or refusing to regulate existent (same-sex) partnerships. The State should secure the same respect and protection to all citizens irrespective of their sexual orientation. It thus fell on Parliament to introduce relevant legislation. In doing so, Parliament could be guided by the legislative provisions of other European countries as well as by the obligations of states under European and international law to eliminate any form of discrimination.

These views were reiterated in a Position Paper issued on 22nd December 2011 in the Ombudsman's capacity as Equality Authority. The Ombudsman stressed once again that there was a legal gap in regulating cohabitation outside marriage of both different-sex and same-sex couples, and that Cyprus was one of the few EU Member States that had not introduced civil partnerships. She also noted that there was no constitutional obstacle for doing so since this was an issue to be regulated by the legislature. Finally, she pointed out that legal recognition of civil partnerships would have a positive impact on public attitudes towards same-sex couples and would contribute to eliminating negative stereotypes against them, as experience in other countries has shown.

The publicity given to this series of reports in the local press and media, as well as the growing number of other initiatives and public debates in mass and social

[55] No. 142/2009 of 15th December 2009 and No. 16/2010 of 29th January 2010.

media have raised some public awareness in an issue that was considered taboo until less than a decade ago. Such initiatives and the on-going integration of Cyprus in the EU seem quite likely to counterweight—to some extent at least—deeply embedded negative public attitudes and stereotypes, including sporadic homophobic statements by prominent figures of public life. This improved climate has made it easier for a small group of parliamentarians stemming from various political parties to initiate informal discussions within Parliament with a view to introducing civil partnerships, including for same-sex couples. It is noteworthy, however, that neither the Ombudsman nor any other public figure has suggested the extension of marriage to same-sex couples; they have invariably called for introducing civil partnership/union for both opposite-sex and same-sex couples and keeping marriage for opposite-sex couples. Indeed, any other proposal would be extremely unlikely to find wider public support.

13.3.2.3 The Supreme Court Decision in *Correia and Or v. Republic*

This case was a follow-up to Complaint No. 159/2008 examined by the Ombudsman and mentioned in Sect. 13.3.2.1. The petitioners, the Cypriot Savvas Savva and his Canadian spouse Thadd Correia, claimed that the CMRD letter/reply of 25th July 2008 (stating that Mr Correia was not considered a family member of a Cypriot citizen because his marriage with Mr Savva in Canada was not recognized by Cypriot legislation) was null and void, illegal and without legal effect, for being contrary to the EU Law, the ECHR as well as Art. 15 (right to private life), 22 (right to marry) and 28 (right to equal treatment) of the Cyprus Constitution. The petition was rejected on procedural grounds,[56] mainly because under Cypriot administrative case-law the impugned act—the CMRD letter of 25th July 2008—was held to be of an informative nature and not an enforceable act of administration. Nonetheless, the Court went on to discuss the merits of the petitioners' claim (albeit not as fully as it would have done had the petition not been dismissed).

The Court rejected the arguments of the petitioners and held as follows: (a) Directive 2004/38/EC and national implementing legislation did not apply to EU nationals who wished to reside in an EU Member State of which they were a national, such as Mr Savva who wished to reside in his native Cyprus; (b) facilitation of entry and residence could take many forms but did not amount to recognition of marriage celebrated abroad; (c) there was no question of violating Art. 22 and 28 of the Constitution since the law in Cyprus did not provide for same-sex marriage but only for marriage between persons of different-sex; (d) the Strasbourg case-law has not advanced to the point of ruling that non-recognition of same-sex marriage was in violation of the right to private and family life; on the contrary, it has acknowledged that the right to marry and regulation of same-sex marriage fell within the discretion of the ECHR States parties, which could decide

[56] Judgment of 22nd July 2010, Case No. 1582/2008.

on the meaning of marriage in accordance with their own legislation and social views; the fact that some States decided to extent the right to marry to persons of same-sex reflected their own views on the role of marriage in their societies and did not give rise to any legal principle or interpretation of the Convention that could affect the traditional concept of marriage; (e) the Strasbourg case-law on the right of transsexuals to marry could point to an extension of that right to persons of same-sex in the future; (f) the Strasbourg jurisprudence on the right of same-sex couples to private life did not help the petitioners in the instant case; the protection of traditional family was a valid ground for justifying distinctions in treatment.[57]

This was a narrow reading of the same legal provisions that were construed more liberally by the Ombudsman. Admittedly, the Ombudsman had more leeway to make extensive use of non-binding instruments such as the relevant PACE recommendations and resolutions of the European Parliament. This was among the factors that led to different legal determinations and conclusions than the Supreme Court.

The legal issues raised in this case were virtually identical to the ones in *Tadeucci and McCall v. Italy*,[58] which was brought before the Strasbourg Court and was pending at the moment of writing. The outcome of this case as well as the cases pending against Greece is expected to influence related developments in Cyprus.

13.4 In Lieu of Conclusion: Towards Introducing Same-Sex Civil Unions in Both Greece and Cyprus (?)

The above analysis of the legal situation of same-sex couples in Greece and Cyprus presents an interesting case study of how social changes and human rights improvements can be gradually brought about ‘from above’ when supranational actors empower local ones to overcome the unwillingness and reluctance of conservative constituencies and make necessary changes in law (and society). In many respects, the issue of same-sex marriage (or, rather, civil union in the case of Greece and Cyprus) is not much different than similar changes that have occurred in the past in these two countries and elsewhere (decriminalization of homosexuality, rights of transsexuals etc). The slow and gradual process followed is indeed a *déjà vu*. In Greece, legislative change is expected to come as the result of Strasbourg’s verdict in *Vallianatos and Mylonas v. Greece*. In Cyprus, the Ombudsman’s reports were triggered by complaints concerning the rights of non-Cypriot partners/spouses of Cypriot or EU nationals under EU law, as a result of the evolving integration of Cyprus in the EU. Following past experience, there is little doubt that such change

[57] Reference was made to *Mata Estevez v. Spain*, n. 56501/00, decision of 10th May 2001; *Kerhoven and Hinke v. Netherlands*, n. 15666/89, decision of 19th May 1992; *Kozak v. Poland*, n. 13102/02, judgment of 2nd March 2010.

[58] App. No. 51362/09.

will sooner or later eventually transpire in both Greece and Cyprus. By the time these lines are written, this is not the case yet. It will hopefully (and more likely than not) be the case by the time these lines are read. Thus, in lieu of conclusion, the remainder of this chapter will briefly present fresh developments unfolding by the time of writing.

The prospects of the legal recognition of same-sex couples in Greece look at the moment of writing more auspicious. On the one hand, the ECtHR is reviewing a complaint on the alleged violation of the right to private life of same-sex couples, and the decision is expected to be delivered by the end of 2013. On the other hand, responding to a parliamentary question, the Greek Minister of Justice announced in February 2013 that he was planning to formally restart dialogue on the extension of the cohabitation pact to same-sex couples.

Similarly, prospects look more positive in Cyprus. During their last meeting before the presidential elections of February 2013, the outgoing Council of Ministers endorsed a draft law for submission to Parliament, which would lead to the introduction of civil partnership in Cyprus for both opposite-sex and same-sex couples. Such a development was in line with public statements made by the new President. Initial reactions by the Ministry of Interior also seem to be positive. It could still be the case, however, that the process can be affected and delayed by contingent factors, such as the unfolding sovereign debt crisis.

If these evolving initiatives eventually succeed, this chapter will have shown that/how narrow readings of legislation can be defeated, and the principle of non-discrimination will have scored yet another victory in the long and enduring battle for equality for all.

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Post Scriptum

On 7 November 2013, the ECtHR handed down its much-awaited decision in *Vallianatos and Others v Greece*, and delivered the first major win for gay rights in Greece. In an exemplary ruling, the Grand Chamber of the Court held the Greek Government to be in violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 8 (respect for one's private and family life). The applicants had complained against the exclusion of same-sex couples from the scope of Law 3719/2008 on civil unions, which extended that right only to different-sex couples.

The Court reminded that, according to its case-law, same- and different-sex couples are in comparable situation in what regards their need for legal recognition and protection of their relationship (*Schalk and Kopf v. Austria*, no. 30141/04, ECHR 2010, para. 99). The Court reiterated that the protection of the family in its traditional sense as well as the interests of the child are both legitimate aims that could in principle justify a difference in the treatment of similar situations. However, the Court entered certain caveats; first, there is a broad range of measures capable of protecting the family in the traditional sense; second, given that the Convention is a living instrument which should be interpreted in present-day conditions, any State, regulating family affairs, ought to take into account societal developments, "*including the fact that there is not just one way or one choice when it comes to leading one's family or private life*" [emphasis added] (para. 84). As previously established in the Court's case-law, sexual orientation is protected under Article 14, and Parties enjoy a narrow margin of appreciation; thus, the different treatment of similar situations on grounds of sexual orientation requires "particularly convincing and weighty reasons" by way of justification.

The Court, then, proceeded to address the flimsy argument of the Greek Government that the raison d'être of the impugned Law is to strengthen the legal status of children born outside marriage. In the mind of the Greek government, the "biological difference between different-sex and same-sex couples, in so far as the latter could not have biological children together, justified limiting civil unions to different-sex couples" (para. 67). Going into the nitty-gritty details of the Law in question, and echoing the arguments put forward by the applicants at the stage of the oral hearings, the Court concluded that this Law was designed first and foremost

with the idea of providing a legal alternative to the traditional institution of marriage, and was not confined to the protection of children born outside of marriage. To this end, the Court adduced the fact that the Law allowed different-sex couples without children to enter into a civil union, without extending the same right to childless same-sex couples. Of equal importance was the fact that various sections of the Law regulate the living arrangements between the different-sex partners in a civil union, such as their financial relations and the maintenance obligations as well as the right to inherit, regardless of the existence or not of a child. The Court also held that the Government had failed to demonstrate how the interests of children born outside marriage would have been compromised, had same-sex couples been brought within the scope of the law.

In a separate concurring Opinion, three judges, amongst whom the Greek judge, drew a clear line between the clear-cut trend across the Parties in making civil unions available to same-sex couples and the thorny question of adoption by gay partners which, in their view, still remains controversial.

At the time of writing, there has been neither any coverage in the mainstream Greek press on the ramifications of the Court's ruling nor any official statement by the Government. It remains to be seen when and how and whether the present Greek (coalition) Government will remedy the existing incompatibility, as found by the Court, between the Law no. 3719/2008 and the prohibition of discrimination taken with the right to one's private and family life. It is regrettable that back then the Greek government opted, in full knowledge, to adopt a clearly discriminatory law instead of shouldering the political costs of extending rights to gay people; 5 years later, it is high time that the Greek legislature repaired, without any delay, the injustice done to an already discriminated segment of its population.