



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

**CASE OF VALLIANATOS AND OTHERS v. GREECE**

*(Applications nos. 29381/09 and 32684/09)*

JUDGMENT

STRASBOURG

7 November 2013

*This judgment is final but it may be subject to editorial revision.*



**In the case of Vallianatos and Others v. Greece,**

The European Court of Human Rights (Grand Chamber), sitting as a Grand Chamber composed of:

Dean Spielmann, *President*,  
Josep Casadevall,  
Guido Raimondi,  
Ineta Ziemele,  
Mark Villiger,  
Isabelle Berro-Lefèvre,  
Peer Lorenzen,  
Danutė Jočienė,  
Mirjana Lazarova Trajkovska,  
Ledi Bianku,  
Angelika Nußberger,  
Julia Laffranque,  
Paulo Pinto de Albuquerque,  
Linos-Alexandre Sicilianos,  
Erik Møse,  
André Potocki,  
Aleš Pejchal, *judges*,

and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 16 January and 11 September 2013,

Delivers the following judgment, which was adopted on the last-mentioned date:

**PROCEDURE**

1. The case originated in two applications (nos. 29381/09 and 32684/09) against the Hellenic Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 6 and 25 May 2009 respectively. The first application (no. 29381/09) was lodged by two Greek nationals, Mr Grigoris Vallianatos and Mr Nikolaos Mylonas, born in 1956 and 1958 respectively, and the second (no. 32684/09) by six Greek nationals, C.S., E.D., K.T., M.P., A.H. and D.N., and by the association Synthessi – Information, Awareness-raising and Research, a legal entity based in Athens.

2. The applicants in application no. 29381/09 were represented by Greek Helsinki Monitor, a non-governmental organisation based in Glyka Nera (Athens). The applicants in application no. 32684/09 were represented by Mr N. Alivizatos and Mr E. Mallios, lawyers practising in Athens. The Greek Government ("the Government") were represented by their Deputy Agents, Ms A. Grigoriou and Ms G. Papadaki, Advisers at the State Legal

Council, and by Mr D. Kalogiros, Legal Assistant at the State Legal Council.

3. The applicants alleged in particular, relying on Article 8 taken in conjunction with Article 14, that the fact that the “civil unions” introduced by Law no. 3719/2008 were designed only for couples composed of different-sex adults had infringed their right to respect for their private and family life and amounted to unjustified discrimination between different-sex and same-sex couples, to the detriment of the latter.

4. The applications were allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). On 3 February 2011 that Section decided to give notice of the application to the Government. It also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1 of the Convention). Lastly, the acting President of the Chamber granted the request for anonymity made by the first six applicants in application no. 32684/09 (Rule 47 § 3).

5. On 11 September 2012 the Chamber, composed of Nina Vajić, Peer Lorenzen, Elisabeth Steiner, Mirjana Lazarova Trajkovska, Julia Laffranque, Linos-Alexandre Sicilianos and Erik Møse, judges, and Søren Nielsen, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment after being consulted (Article 30 of the Convention and Rule 72). The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

6. The applicants and the Government each filed written observations on the admissibility and merits of the applications (Rule 59 § 1). In addition, third-party comments were received from the Centre for Advice on Individual Rights in Europe (the AIRE Centre), the International Commission of Jurists (ICJ), the *Fédération internationale des Ligues des Droits de l’Homme* (FIDH) and the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 16 January 2013 (Rule 59 § 3).

There appeared before the Court:

(a) *for the respondent Government*

Ms A. GRIGORIOU, Adviser, State Legal Council,

Mr D. KALOGIRIS, Legal Assistant, State Legal Council,

Ms M. GERMANI, Legal Assistant, State Legal Council,

*Deputy Agents;*

(b) *for the applicants*

Ms C. MÉCARY, Lawyer,

Mr N. ALIVIZATOS, Lawyer,

Mr P. DIMITRAS,

Mr E. MALLIOS, Lawyer,

*Counsel,*

*Advisers.*

The Court heard addresses by Ms Germani, Ms Mécary and Mr Alivizatos.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

8. The applicants in application no. 29381/09 live together as a couple in Athens. In the case of application no. 32684/09, the first and second applicants and the third and fourth applicants have lived together for a long time as couples in Athens. The fifth and sixth applicants are in a relationship together but for professional and social reasons do not live together. As shown by their bank statements, the sixth applicant pays the fifth applicant's social-security contributions. The seventh applicant is a not-for-profit association the aims of which include providing psychological and moral support to gays and lesbians.

9. On 26 November 2008 Law no. 3719/2008, entitled "Reforms concerning the family, children and society", entered into force. It made provision for the first time in Greece for an official form of partnership other than marriage, known as "civil unions" (*σύμφωνο συμβίωσης*). Under section 1 of the Law, such unions can be entered into only by two adults of different sex.

10. According to the explanatory report on Law no. 3719/2008, the introduction of civil unions reflected a social reality, namely cohabitation outside marriage, and allowed the persons concerned to register their relationship within a more flexible legal framework than that provided by marriage. The report added that the number of children born in Greece to unmarried couples living in *de facto* partnerships had increased over time and by then represented around 5% of all children being born in the country. It further noted that the position of women left without any support after a long period of cohabitation, and the phenomenon of single-parent families generally, were major issues which called for a legislative response. However, the report pointed out that the status of religious marriage remained unparalleled and, alongside civil marriage, represented the best option for couples wishing to found a family with a maximum of legal, financial and social safeguards. The report also made reference to Article 8

of the Convention, which protected non-marital unions from the standpoint of the right to private and family life, and observed that a number of European countries afforded legal recognition to some form of registered partnership for different-sex or same-sex couples. Without elaborating further, it noted that civil unions were reserved for different-sex adults. It concluded that they represented a new form of partnership and not a kind of “flexible marriage”. The report considered that the institution of marriage would not be weakened by the new legislation, as it was governed by a different set of rules.

11. A lively debate preceded the implementation of Law no. 3719/2008. The Church of Greece spoke out officially against it. In a press release issued on 17 March 2008 by the Holy Synod, it described civil unions as “prostitution”. The Minister of Justice, meanwhile, addressed the competent parliamentary commission in the following terms:

“... We believe that we should not go any further. Same-sex couples should not be included. We are convinced that the demands and requirements of Greek society do not justify going beyond this point. In its law-making role, the ruling political party is accountable to the people of Greece. It has its own convictions and has debated this issue; I believe this is the way forward.”

12. The National Human Rights Commission, in its observations of 14 July 2008 on the bill, referred in particular to the concept of family life, the content of which was not static but evolved in line with social mores (see paragraphs 21-24 below).

13. On 4 November 2008 the Scientific Council (*Επιστημονικό Συμβούλιο*) of Parliament, a consultative body reporting to the Speaker of Parliament, prepared a report on the bill. It observed in particular, referring to the Court’s case-law, that the protection of sexual orientation came within the scope of Article 14 of the Convention and that the notion of the “family” was not confined solely to the relationships between individuals within the institution of marriage but, more generally, could encompass other ties outside marriage which amounted *de facto* to family life (page 2 of the report).

14. During the parliamentary debate on 11 November 2008 on the subject of civil unions the Minister of Justice merely stated that “society today [was] not yet ready to accept cohabitation between same-sex couples”. Several speakers stressed that Greece would be violating its international obligations and, in particular, Articles 8 and 14 of the Convention by excluding same-sex couples.

15. On 27 September 2010 the National Human Rights Commission wrote to the Minister of Justice reiterating its position as to the discriminatory nature of Law no. 3719/2008. In its letter, the Commission recommended drafting legislation extending the scope of civil unions to include same-sex couples.

## II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

### A. Domestic law and practice

#### 1. *Law no. 3719/2008*

16. The relevant sections of Law no. 3719/2008 read as follows:

#### **Section 1 Conclusion of a civil union**

“A contract between two different-sex adults governing their life as a couple (“civil union”) shall be entered into by means of a notarised instrument in the presence of the parties. The contract shall be valid from the date on which a copy of the notarised instrument is lodged with the civil registrar for the couple’s place of residence. It shall be recorded in a special civil register.”

#### **Section 2 Conditions**

- “1. Full legal capacity is required in order to enter into a civil union.
2. A civil union may not be entered into: (a) if either of the persons concerned is already married or party to a civil union, (b) between persons who are related by blood ... or by marriage ... and (c) between an adopter and adoptee.
3. Any violation of the provisions of this section shall render the civil union null and void.”

#### **Section 3 Nullity of the civil union**

“The parties and any person asserting a legitimate family or financial interest may invoke a ground of nullity of the civil union under the preceding section. The prosecutor may apply of his or her own motion for the civil union to be annulled if it breaches public order.”

#### **Section 4 Dissolution**

“1. The civil union shall be dissolved: (a) by an agreement between the parties in the form of a notarised instrument signed in their presence, (b) by means of a unilateral notarised declaration, after service on the other party by a process server and (c) by operation of law if the parties to the civil union marry or if one of the parties marries a third party.

2. The dissolution of the civil union shall take effect once the notarised instrument or the unilateral declaration has been deposited with the civil registrar at the place of registration of the civil union.”

### **Section 5** **Surname**

“The civil union shall not change the (family) name of the parties. Each party may, with the consent of the other party, use the other’s surname or add it to his or her own in social relations.”

### **Section 6** **Financial relations**

“The parties’ financial relations, particularly regarding any assets they acquire during the lifetime of the civil union (after-acquired assets), may be regulated by the civil union contract or by a subsequent notarised instrument. If no agreement exists on after-acquired assets, upon dissolution of the civil union each party shall have a claim in respect of any assets the other party has contributed. No such claim shall vest in the heirs of the claimant; it may not be assigned or transferred by succession but may be made against the heirs of the debtor. The claim shall expire two years after dissolution of the civil union.”

### **Section 7** **Maintenance obligation after dissolution**

“1. In the civil union contract or a subsequent notarised instrument, one of the parties or both parties mutually may undertake to pay maintenance only to cover the other in the event that, after dissolution of the union, the other party has insufficient income or assets to provide for his or her own upkeep. A party who, having regard to his or her other obligations, is unable to pay maintenance without compromising his or her own upkeep shall be exempt from the obligation to pay maintenance. The obligation shall not pass to the heirs of the debtor.

2. As regards the right to maintenance, the person entitled to maintenance by virtue of the civil union shall rank equally with the divorced spouse of the debtor.

3. After dissolution of the civil union, the party liable for payment of maintenance may not rely on that obligation in order to be exempted, in full or in part, from his or her obligation to contribute [to the maintenance of] his or her spouse or minor children or to pay maintenance for them.

4. Without prejudice to paragraphs 2 and 3, the contractual obligation referred to in paragraph 1 shall override the obligation to provide maintenance for persons other than the beneficiary [of the maintenance payments] if the latter, after dissolution of the union, has insufficient resources to provide for his or her own upkeep.”

### **Section 8** **Presumption of paternity**

“1. The putative father of any child born during the lifetime of the civil union or within three hundred days of its dissolution or annulment shall be the man with whom the mother entered into the union. That presumption may be rebutted only by an irreversible judicial decision. Articles 1466 et seq. of the Civil Code and Articles 614 et seq. of the Code of Civil Procedure shall be applicable by analogy.

2. The nullity or annulment of the civil union shall have no effect on the paternity of the children.”

**Section 9**  
**Children's surname**

“Any child born during the lifetime of the civil union or within three hundred days of its dissolution or annulment shall bear the surname chosen by its parents by means of a joint and irrevocable declaration contained in the civil union contract or in a subsequent notarised instrument drawn up before the birth of the first child. The surname chosen shall be given to all the children and must be the surname of one of the parents or a combination of their surnames. In no circumstances may it be made up of more than two surnames. If no declaration is made, the child shall be given a composite surname made up of the surnames of both parents. If the surname of one or both parents is a composite name, the child's surname shall be formed by the first of the two names.”

**Section 10**  
**Parental responsibility**

“1. Parental responsibility for a child born during the lifetime of the civil union or within three hundred days of its dissolution or annulment shall be held by both parents and exercised jointly. The provisions of the Civil Code concerning parental responsibility for children born within marriage shall be applicable by analogy.

2. If the civil union is dissolved for the reasons referred to in sections 2 and 4 of this Law, Article 1513 of the Civil Code shall apply by analogy for the purposes of parental responsibility.”

**Section 11**  
**Inheritance rights**

“1. After dissolution of the civil union as a result of death, the survivor shall be entitled to inherit on intestacy. If that survivor is in competition with heirs of the first class of persons entitled to inherit, he or she shall inherit one-sixth of the partner's estate. If in competition with heirs of any other classes, he or she shall inherit one-third, and if one of the partners dies intestate and without other heirs who may be entitled to inherit on intestacy, the survivor shall inherit the entire estate.

2. The survivor shall be entitled to a legally reserved portion of the estate equal to half the share that would be due to him or her on intestacy. ...

3. Articles 1823 et seq., 1839 et seq. and 1860 of the Civil Code shall apply by analogy.”

**Section 13**  
**Scope**

“This Law shall apply to all civil unions entered into in Greece or before a Greek consular authority. In all other cases the law designated by the rules of international private law shall apply.”

*2. Civil Code*

17. The relevant Articles of the Civil Code provide as follows:

**Article 57**

“Any person whose personal rights are unlawfully infringed shall be entitled to bring proceedings to enforce cessation of the infringement and restraint of any future infringement ...

In addition, the right to claim damages on the basis of the provisions concerning unlawful acts shall not be excluded.”

**Article 59**

“In cases covered by the preceding two Articles, the court, in a judgment delivered at the request of the person whose rights have been infringed and taking account of the nature of the infringement, may also order the person at fault to afford redress for the non-pecuniary damage caused. This shall consist in payment of a sum of money as well as a public announcement and any other measure that is appropriate in the circumstances.”

**Article 914**

“Any person who, in breach of the law, causes damage to another by his or her fault shall be obliged to afford redress.”

**Article 932**

“Irrespective of any compensation due in respect of the pecuniary damage caused by an unlawful act, the court may award a reasonable amount, based on its own assessment, in respect of non-pecuniary damage. Beneficiaries under this rule shall include those whose health has been impaired, whose honour has been infringed, who have been subjected to indecent assault or who have been deprived of their liberty. In the event of loss of life, the compensation may be paid to the victim’s family in the form of damages for pain and suffering.”

**Article 1444**

“... ”

Entitlement to maintenance payments shall cease if the beneficiary remarries or is in a stable relationship or a *de facto* partnership with another person ...”

**3. Introductory Law to the Civil Code**

18. Sections 104 and 105 of the Introductory Law to the Civil Code provide as follows:

**Section 104**

“The State shall be liable, in accordance with the provisions of the Civil Code concerning legal persons, for acts or omissions of its organs regarding private-law relations or State assets.”

**Section 105**

“The State shall be under a duty to make good any damage caused by the unlawful acts or omissions of its organs in the exercise of public authority, except where the unlawful act or omission is in breach of an existing provision but is intended to serve

the public interest. The person responsible and the State shall be jointly and severally liable, without prejudice to the special provisions on ministerial responsibility.”

19. These provisions establish the concept of a special prejudicial act in public law, creating State liability in tort. Such liability arises out of unlawful acts or omissions, which may be not only legal acts but also physical acts by the administrative authorities, including acts which are not in principle enforceable through the courts. The admissibility of an action for damages is subject to one condition: the unlawfulness of the act or omission in question.

20. Judgments nos. 1141/1999, 909-910/2007, 1011/2008, 3088/2009, 169/2010 and 2546/2010 of the Supreme Administrative Court are examples of judicial rulings concerning the State’s liability in tort in the event of unconstitutionality of a law. In particular, in judgment no. 1141/1999 concerning legislation revoking the right granted to parents of large families to operate public service vehicles, the Supreme Administrative Court dismissed the claim for damages on the grounds that the law applied was not unconstitutional. In judgments nos. 909-910/2007 and 169/2010, the same court recognised that the State had civil liability on account of the erection of advertising hoardings along the public highway in breach of the Vienna Convention on Road Signs and Signals. In judgment no. 1011/2008, concerning a claim for compensation on account of legislation limiting a property owner’s right to build on his property, the Supreme Administrative Court dismissed the application, finding that the State’s civil liability could not be engaged if a provision enacted in breach of a higher-ranking legal rule was intended to serve the public interest. In judgment no. 3088/2009, it recognised the State’s obligation to compensate the persons concerned for the legislature’s omission to enact provisions recognising the professional qualifications of a particular category of graduates of the higher technical institutes. Lastly, in judgment no. 2546/2010, the Supreme Administrative Court held that the State was civilly liable because it had awarded compensation to five farmers expressly named in a Law following storm damage that destroyed their crops, while omitting to compensate a sixth farmer who had incurred loss in the same conditions.

#### *4. Report of the National Human Rights Commission*

21. This Commission was established in 1998 and placed under the authority of the Prime Minister. One of its objectives is to prepare and publish reports on human rights protection, either on its own initiative or at the request of the Government, Parliament or non-governmental organisations.

22. On 14 July 2008 the Commission unanimously adopted a report setting forth proposals regarding the bill entitled “Reforms concerning the family, children and society”. The Commission stated that it could not understand why the bill bore this title given that it authorised a new form of

non-marital partnership. It added that the bill amended the family-law provisions of the Civil Code in a fragmentary, hasty and inadequately reasoned manner, without prior public consultation of the social, academic and professional stakeholders.

23. In its report the Commission also observed that certain passages in the explanatory report on the bill implied that the authors saw civil unions as a legal institution ranking below that of marriage. It added that, despite referring explicitly to the fact that other European countries had introduced civil unions for same-sex couples, the explanatory report offered no justification for excluding same-sex couples from the scope of the bill.

24. With particular reference to the last point, the Commission noted that it had been calling on the competent authorities since 2004 to grant legal recognition to civil partnerships between same-sex couples. In its proposals, the Commission based its arguments on the evolution of international law on the subject, referring in particular to the Court's case-law on Articles 8 and 14 of the Convention. It considered that the Greek State had missed a unique opportunity to remedy the discrimination against same-sex couples with regard to the possibility of entering into legally recognised civil partnerships. It stressed that the legislation made reference to *de facto* partnerships as an alternative to marriage for different-sex couples, and considered that the introduction of civil unions was more suited to the needs of same-sex couples than different-sex couples.

## **B. Comparative, European and international law**

### *1. Comparative law material*

25. The comparative law material available to the Court on the introduction of official forms of non-marital partnership within the legal systems of Council of Europe member States shows that nine countries (Belgium, Denmark, France, Iceland, the Netherlands, Norway, Portugal, Spain and Sweden) recognise same-sex marriage. In addition, seventeen member States (Andorra, Austria, Belgium, the Czech Republic, Finland, France, Germany, Hungary, Iceland, Ireland, Liechtenstein, Luxembourg, the Netherlands, Slovenia, Spain, Switzerland and the United Kingdom) authorise some form of civil partnership for same-sex couples. Denmark, Norway and Sweden recognise the right to same-sex marriage without at the same time providing for the possibility of entering into a civil partnership.

26. Lastly, Lithuania and Greece are the only Council of Europe countries which provide for a form of registered partnership designed solely for different-sex couples, as an alternative to marriage (which is available only to different-sex couples).

## 2. *Relevant Council of Europe materials*

27. In its Recommendation 924 (1981) on discrimination against homosexuals, the Parliamentary Assembly of the Council of Europe (PACE) criticised the various forms of discrimination against homosexuals in certain member States of the Council of Europe. In Recommendation 1474 (2000) on the situation of lesbians and gays in Council of Europe member states, it called on member States, among other things, to enact legislation making provision for registered partnerships. Furthermore, in Recommendation 1470 (2000) on the more specific subject of the situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe, it recommended to the Committee of Ministers that it urge member States, *inter alia*, “to review their policies in the field of social rights and protection of migrants in order to ensure that homosexual partnership and families are treated on the same basis as heterosexual partnerships and families ...”.

28. Resolution 1728 (2010) of the Parliamentary Assembly of the Council of Europe, adopted on 29 April 2010 and entitled “Discrimination on the basis of sexual orientation and gender identity”, calls on member States to “ensure legal recognition of same-sex partnerships when national legislation envisages such recognition, as already recommended by the Assembly in 2000”, by providing, *inter alia*, for:

“16.9.1. the same pecuniary rights and obligations as those pertaining to different-sex couples;

16.9.2. ‘next of kin’ status;

16.9.3. measures to ensure that, where one partner in a same-sex relationship is foreign, this partner is accorded the same residence rights as would apply if she or he were in a heterosexual relationship;

16.9.4. recognition of provisions with similar effects adopted by other member states;”

29. In Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, the Committee of Ministers recommended that member States:

“1. examine existing legislative and other measures, keep them under review, and collect and analyse relevant data, in order to monitor and redress any direct or indirect discrimination on grounds of sexual orientation or gender identity;

2. ensure that legislative and other measures are adopted and effectively implemented to combat discrimination on grounds of sexual orientation or gender identity, to ensure respect for the human rights of lesbian, gay, bisexual and transgender persons and to promote tolerance towards them;

...”

30. The Recommendation also observed as follows:

“23. Where national legislation confers rights and obligations on unmarried couples, member states should ensure that it applies in a non-discriminatory way to both same-sex and different-sex couples, including with respect to survivor’s pension benefits and tenancy rights.

24. Where national legislation recognises registered same-sex partnerships, member states should seek to ensure that their legal status and their rights and obligations are equivalent to those of heterosexual couples in a comparable situation.

25. Where national legislation does not recognise nor confer rights or obligations on registered same-sex partnerships and unmarried couples, member states are invited to consider the possibility of providing, without discrimination of any kind, including against different sex couples, same-sex couples with legal or other means to address the practical problems related to the social reality in which they live.”

### *3. European Union law*

31. Articles 7, 9 and 21 of the Charter of Fundamental Rights of the European Union, which was signed on 7 December 2000 and entered into force on 1 December 2009, read as follows:

#### **Article 7**

“Everyone has the right to respect for his or her private and family life, home and communications.”

#### **Article 9**

“The right to marry and to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.”

#### **Article 21**

“1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.”

32. The Commentary of the Charter of Fundamental Rights of the European Union, prepared in 2006 by the EU Network of Independent Experts on Fundamental Rights, states as follows with regard to Article 9 of the Charter:

“Modern trends and developments in the domestic laws in a number of countries toward greater openness and acceptance of same-sex couples notwithstanding, a few states still have public policies and/or regulations that explicitly forbid the notion that same-sex couples have the right to marry. At present there is very limited legal recognition of same-sex relationships in the sense that marriage is not available to same-sex couples. The domestic laws of the majority of states presuppose, in other words, that the intending spouses are of different sexes. Nevertheless, in a few

countries, e.g., in the Netherlands and in Belgium, marriage between people of the same sex is legally recognized. Others, like the Nordic countries, have endorsed a registered partnership legislation, which implies, among other things, that most provisions concerning marriage, i.e. its legal consequences such as property distribution, rights of inheritance, etc., are also applicable to these unions. At the same time it is important to point out that the name ‘registered partnership’ has intentionally been chosen not to confuse it with marriage and it has been established as an alternative method of recognizing personal relationships. This new institution is, consequently, as a rule only accessible to couples who cannot marry, and the same-sex partnership does not have the same status and the same benefits as marriage.

...

In order to take into account the diversity of domestic regulations on marriage, Article 9 of the Charter refers to domestic legislation. As it appears from its formulation, the provision is broader in its scope than the corresponding articles in other international instruments. Since there is no explicit reference to ‘men and women’ as the case is in other human rights instruments, it may be argued that there is no obstacle to recognize same-sex relationships in the context of marriage. There is, however, no explicit requirement that domestic laws should facilitate such marriages. International courts and committees have so far hesitated to extend the application of the right to marry to same-sex couples. ...”

33. A number of Directives are also of interest in the present case. European Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification lays down the conditions for the exercise of the right to family reunification by third country nationals residing lawfully on the territory of a Member State.

Article 4 of the Directive, which comes under the heading “Family members”, provides as follows:

“(3) The Member States may, by law or regulation, authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, of the unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership in accordance with Article 5(2), ...”

In addition, Article 5 of the same Directive reads as follows:

“1. Member States shall determine whether, in order to exercise the right to family reunification, an application for entry and residence shall be submitted to the competent authorities of the Member State concerned either by the sponsor or by the family member or members.

2. The application shall be accompanied by documentary evidence of the family relationship and of compliance with the conditions laid down in Articles 4 and 6 and, where applicable, Articles 7 and 8, as well as certified copies of family member(s)’ travel documents.

If appropriate, in order to obtain evidence that a family relationship exists, Member States may carry out interviews with the sponsor and his/her family members and conduct other investigations that are found to be necessary.

When examining an application concerning the unmarried partner of the sponsor, Member States shall consider, as evidence of the family relationship, factors such as a

common child, previous cohabitation, registration of the partnership and any other reliable means of proof.

...”

34. Directive 2004/38/EC of the European Parliament and Council of 29 April 2004 concerns the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

Article 2 contains the following definition:

“(2) ‘Family member’ means:

(a) the spouse

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage in accordance with the conditions laid down in the relevant legislation of the host Member State.

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b)

(d) the dependent direct relative in the ascending line and those of the spouse or partner as defined in point (b);”

## THE LAW

### I. JOINDER OF THE APPLICATIONS

35. The Court notes that the applicants in both applications complained of the exclusion of same-sex couples from the scope of Law no. 3719/2008. Accordingly, in view of the similarity between the applications in terms of the facts and the substantive issue they raise, it decides to join them and to examine them jointly in a single judgment.

### II. ALLEGED VIOLATION OF ARTICLE 14 TAKEN IN CONJUNCTION WITH ARTICLE 8 OF THE CONVENTION

36. The applicants alleged that the fact that the civil unions introduced by Law no. 3719/2008 were designed only for couples composed of different-sex adults infringed their right to respect for their private and family life and amounted to unjustified discrimination between different-sex and same-sex couples, to the detriment of the latter. They relied on Article 14 taken in conjunction with Article 8 of the Convention. Those provisions read as follows:

**Article 14**

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

**Article 8**

“1. Everyone has the right to respect for his private and family life [and] his home ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

**A. Admissibility***1. The parties' submissions***(a) The Government**

37. The Government argued firstly that the complaint was inadmissible *ratione personae*. With regard to the association Synthessi – Information, Awareness-raising and Research, they contended in particular that, as a legal entity, it could not be considered as a direct or indirect victim of the alleged violations. Moreover, the individual applicants could not be considered as victims of the alleged violation from the standpoint of Articles 14 and 8, as they did not suffer direct and immediate adverse consequences as a result of their inability to enter into a civil union. By way of example, the Government observed that the payment of maintenance following the dissolution of a civil union was optional under section 6 of Law no. 3719/2008. Furthermore, the applicants were in any case free to enter into a contract within each couple laying down obligations and reciprocal rights in that regard. As to partners' inheritance rights, the Government conceded that section 11 of the Law at issue provided for the surviving partner in a civil union to inherit on intestacy. However, the applicants, in view of their age (the oldest of them was still under sixty), could be regarded only as hypothetical victims of the alleged violation. In any case, they could at any time regulate inheritance issues or general issues concerning each partner's property status (including their financial relations) by means of a will or contract.

38. The Government further submitted that the applicants had not exhausted the domestic remedies available to them in the instant case. In general terms, they argued that the alleged impossibility for the applicants to challenge the impugned legislation in the domestic courts was not due to the absence of an effective remedy in Greek law but rather to the fact that they

had suffered no immediate and direct prejudice as a result of their exclusion from the legislation on civil unions. In sum, those applicants who were private individuals did not have victim status because the harm they claimed to have suffered with regard to the right to potential maintenance payments, inheritance arrangements and the regulation of financial issues within each couple was hypothetical and based on speculation.

39. The Government further contended that an action for damages in the administrative courts under section 105 of the Introductory Law to the Civil Code would have constituted an effective remedy in the instant case. Under that provision, the State was obliged to provide redress for damage caused by the acts or omissions of its organs in the exercise of public authority. The sole condition was that the act or omission had to be unlawful, that is to say, it had to infringe a rule of law establishing a specific individual right or interest. In the present case the applicants could have complained before the domestic courts under Articles 57, 914 and 932 of the Civil Code, read together with section 105 of the Introductory Law, of a breach of their personality rights and of their social marginalisation on account of their exclusion as same-sex couples from the scope of Law no. 3719/2008. In the Government's view, this remedy would have enabled the applicants to claim compensation for any damage caused by the impugned legislation and at the same time to challenge its constitutionality. They observed that, according to the case-law of the domestic courts, the latter could interpret the constitutional principle of equality broadly, extending a legislative provision favourable to a specific category of persons to cover another category in a similar situation. As authority, the Government cited two judgments of the Court of Cassation (nos. 60/2002 and 9/2004) concerning the salaries and allowances of different categories of employees, an issue that the court had examined from the standpoint of the equality principle.

40. The Government added that a review of constitutionality in Greece was diffuse and incidental and that all the domestic courts were empowered, in the context of the specific applications lodged before them, to examine issues of constitutionality and conformity with the Convention. They pointed out that, under Article 28 of the Constitution, the provisions of international treaties took precedence over domestic-law provisions once they had been ratified by the legislature, and that Legislative Decree no. 53/1974 had ratified the Convention in domestic law. They cited, among other authorities, certain judgments by the Supreme Administrative Court, the Court of Cassation and the Court of Audit in which those courts had conducted an incidental review of the conformity of various legislative provisions with the Greek Constitution and/or Articles 7, 11 and 12 of the Convention and Article 1 of Protocol No. 1. In this regard, the Government referred in particular to Supreme Administrative Court judgments nos. 867/1988, 33/2002, 2960/2010, 1664/2011 and 1501/2012, Court of Cassation judgment no. 982/2010 and Court of Audit judgment

no. 2028/2004. They also contended that the legislation in question could be amended if found by a judicial decision to be unconstitutional. The Government cited as an example the abolition, under Law no. 1848/1989, of Article 65 of Legislative Decree no. 1400/1973 in the wake of Supreme Administrative Court judgment no. 867/1988 concerning the formal conditions governing the exercise by Greek army officers of the right to marry.

41. On the basis of all these considerations the Government concluded that the applicants could have relied on Articles 14 and 8 of the Convention before the domestic courts in the context of an action for compensation based on section 105 of the Introductory Law to the Civil Code, and submitted on that occasion their complaint as to the discriminatory nature of the legislation at issue.

**(b) The applicants**

42. The applicants observed at the outset that they could in theory approach a notary to request that he or she draw up a civil union contract in accordance with the impugned Law. However, if the notary, against all expectations, were to agree to their request, he or she would be liable to disciplinary action for a breach of official duty. Accordingly, it was extremely unlikely that any notary would dare break the law in order to accede to the applicants' request. Furthermore, the applicants pointed out that notaries in Greece were members of a liberal profession. Consequently, any legal action before the administrative courts would have no prospect of success since notaries were not agents of the State. As to an action in the civil courts, that would have no greater chance of success, as a notary who refused to draw up a notarised instrument in respect of a same-sex couple would not incur any liability in tort as a result. Such a refusal would be neither unlawful nor intentional, as required by the domestic legislation in order for an individual to incur liability in tort.

43. Regarding the very specific issue of an action for damages based on section 105 of the Introductory Law to the Civil Code, the applicants disputed the Government's assertion that this was an effective remedy. Firstly, they asserted in general terms that the present cases affected their civil status and their position in Greek society. For that reason, any compensation that might be awarded by the domestic courts would in no way alleviate their feeling of exclusion and social marginalisation caused by Law no. 3719/2008. The applicants contended that only a finding by the Court of a violation of Articles 8 and 14 of the Convention would be capable of redressing the damage they had suffered in the instant case.

44. The applicants further maintained that the domestic courts were traditionally very reluctant to find that a claim for compensation could arise out of a legislative act or a failure to legislate in a given sphere. They submitted, firstly, that the case-law of the domestic courts cited by the

Government by no means accepted that the State was civilly liable whenever a law was held to be contrary to a higher-ranking legal rule. Whether in the context of the Constitution or an international convention, the administrative courts were still very hesitant about establishing a general principle limiting the legislature's margin of appreciation. Secondly, the applicants contended that the case-law cited by the Government was not relevant since it bore no relation to the present case. This was particularly so since the case-law of the domestic courts was much more restrictive than that of the Court with regard to the notion of "family". The applicants cited Court of Cassation judgment no. 1141/2007, which had explicitly excluded the deceased's partner from his "family".

45. Lastly, the applicants observed that, on account of the diffuse and incidental nature of a review of constitutionality, no procedural rules existed in domestic law providing for the amendment of a legislative provision deemed to be unconstitutional and thereby enabling notaries to draw up civil union contracts for same-sex couples as well. In other words, even in the hypothetical case that an action for damages under section 105 of the Introductory Law to the Civil Code were to succeed in the domestic courts, the administrative authorities would be under no obligation to amend the impugned legislation.

**(c) The third-party interveners**

46. The third-party interveners did not comment on the admissibility of the complaint.

*2. The Court's assessment*

**(a) Victim status**

47. The Court reiterates that, in order to rely on Article 34 of the Convention, an applicant must meet two conditions: he or she must fall into one of the categories of petitioners mentioned in Article 34 and must be able to make out a case that he or she is the victim of a violation of the Convention. According to the Court's established case-law, the concept of "victim" must be interpreted autonomously and irrespective of domestic concepts such as those concerning an interest or capacity to act (see *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, § 35, ECHR 2004-III). The word "victim", in the context of Article 34 of the Convention, denotes the person or persons directly or indirectly affected by the alleged violation (see *SARL du Parc d'Activités de Blotzheim v. France*, no. 72377/01, § 20, 11 July 2006). Hence, Article 34 concerns not just the direct victim or victims of the alleged violation, but also any indirect victims to whom the violation would cause harm or who would have a valid and personal interest in seeing it brought to an end (see, *mutatis mutandis*, *Defalque v. Belgium*,

no. 37330/02, § 46, 20 April 2006, and *Tourkiki Enosi Xanthis and Others v. Greece*, no. 26698/05, § 38, 27 March 2008).

48. As regards the association Synthessi–Information, Awareness-raising and Research, the Court observes that it is a not-for-profit association, the chief aim of which is to provide psychological and moral support to gays and lesbians. However, the complaints raised by the present case relate to the fact that section 1 of Law no. 3719/2008 does not afford individuals of the same sex the possibility of entering into a civil union. Consequently, in so far as the seventh applicant in application no. 32648/09 is a legal entity, it cannot be considered in the instant case as a direct or indirect “victim” within the meaning of Article 34 of the Convention (see, *mutatis mutandis*, *Fédération chrétienne des témoins de Jéhovah de France v. France* (dec.), no. 53430/99, ECHR 2001-XI).

49. As to the other applicants, the Court notes that they are individuals of full age, who, according to the information submitted to it, are in same-sex relationships and in some cases cohabit. To the extent that, as a result of section 1 of Law no. 3719/2008 which excludes same-sex couples from the scope of the Law, they cannot enter into a civil union and organise their relationship according to the legal arrangements laid down by that Law, the Court considers that they are directly concerned by the situation and have a legitimate personal interest in seeing it brought to an end. Accordingly, it concludes that the individuals in the present applications should be considered as “victims” of the alleged violation within the meaning of Article 34 of the Convention.

50. In view of the foregoing, the Court considers that the seventh applicant in application no. 32684/09 does not have the status of victim within the meaning of Article 34 of the Convention and that this complaint, in so far as it was raised by it, must be rejected in accordance with Article 35 § 4. The Court dismisses the Government’s objection alleging that the remaining applicants lack victim status.

**(b) Exhaustion of domestic remedies**

51. The Court reiterates that the rule concerning the exhaustion of domestic remedies set forth in Article 35 § 1 of the Convention is based on the assumption, reflected in Article 13 (with which it has a close affinity), that there is an effective domestic remedy available, in practice and in law, in respect of the alleged violation (see *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI, and *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, §§ 96-98, ECHR 2000-XI). It observes that the rule of exhaustion of domestic remedies requires applicants – using the legal remedies available in domestic law in so far as they are effective and adequate – to afford the Contracting States the possibility of putting right the violations alleged against them before bringing the matter before the

Court (see, among other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, § 37, ECHR 1999-1).

52. The only remedies which Article 35 § 1 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these conditions are satisfied (see, among other authorities, *McFarlane v. Ireland* [GC], no. 31333/06, § 107, 10 September 2010). The existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies (see *Akdivar and Others v. Turkey*, 16 September 1996, § 71, *Reports of Judgments and Decisions* 1996-IV). Lastly, an applicant who has availed himself of a remedy capable of redressing the situation giving rise to the alleged violation, directly and not merely indirectly, is not bound to have recourse to other remedies which would have been available to him but the effectiveness of which is questionable (see *Manoussakis and Others v. Greece*, 26 September 1996, § 33, *Reports* 1996-IV, and *Anakomba Yula v. Belgium*, no. 45413/07, § 22, 10 March 2009).

53. In the instant case the Court notes that the Government's chief argument regarding the exhaustion of domestic remedies consisted in maintaining that, by bringing an action for compensation under section 105 of the Introductory Law to the Civil Code, the applicants could have challenged the constitutionality of Law no. 3719/2008 on the basis of an interlocutory application. They contended that the applicants could thus have submitted to the domestic courts the issue of the compatibility of the legislation in question with Articles 8 and 14 of the Convention.

54. Firstly, the Court observes that the remedy referred to by the Government merely provides for the person concerned to obtain redress in respect of an act or omission by the State in the exercise of public authority. Accordingly, any review of the constitutionality of a law is carried out by the competent court as an incidental issue, with a view to determining whether the State must afford redress to the individual for an infringement of a rule of law establishing a specific individual right or interest. In the instant case, however, the applicants complain of a continuing violation of Articles 14 and 8 of the Convention on account of their inability, as same-sex couples, to enter into civil unions, whereas legislation exists affording that possibility to different-sex couples. Hence, a mere award of financial compensation would not appear capable of remedying their grievances.

55. Secondly, with regard to the nature of the remedy invoked by the Government, the Court notes that, even if a claim for damages based on section 105 of the Introductory Law to the Civil Code were to be allowed by

the domestic courts, the State would be under no statutory obligation to amend the legislation in question.

56. Lastly, the Court observes additionally that, as shown by the judgments cited by the Government in the context of an action for compensation based on section 105 of the Introductory Law to the Civil Code, the domestic courts apply section 105 of the Introductory Law restrictively as regards the State's liability in tort in cases where a law is found to be unconstitutional. In particular, the Court notes that none of the judgments of the highest courts in Greece cited by the Government concerned an issue comparable to that raised in the instant case, that is to say, the unconstitutionality of a statute on account of its discriminatory nature with regard to the right to private or family life. This is particularly true since none of the judgments in question examined the issue of compensation for the claimants on account of the incompatibility of a law with Articles 8 and 14 of the Convention.

57. In sum, the Court considers that the Government have not produced any examples of past court rulings capable of demonstrating convincingly that the lodging by the applicants of the action provided for by section 105 of the Introductory Law to the Civil Code could have remedied their complaints under Articles 8 and 14 of the Convention. A State pleading non-exhaustion of domestic remedies must, however, demonstrate the existence of effective and sufficient domestic remedies (see *Soto Sanchez v. Spain*, no. 66990/01, § 34, 25 November 2003; *L. v. Lithuania*, no. 27527/03, §§ 35-36, ECHR 2007-IV; and *Sampanis and Others v. Greece*, no. 32526/05, § 58, 5 June 2008).

58. In view of the foregoing the Court considers that, regard being had to the nature of the action for compensation based on section 105 of the Introductory Law to the Civil Code and its application by the courts, it cannot be said to constitute a remedy to be exhausted under Article 35 § 1 of the Convention. Accordingly, the Court dismisses the Government's objection of non-exhaustion of domestic remedies.

#### (c) Conclusion

59. The Court considers that this complaint must be rejected in accordance with Article 35 § 4 of the Convention in respect of the seventh applicant in application no. 32684/09, as the applicant does not have the status of a "victim" within the meaning of Article 34 of the Convention. Furthermore, the Government's objection of non-exhaustion of domestic remedies is dismissed. Lastly, the Court notes that, as regards the eight applicants who have the status of "victims" for the purposes of Article 34 of the Convention, this complaint is not inadmissible on any other grounds; it therefore declares it admissible.

## **B. Merits**

### *1. The parties' submissions*

#### **(a) The applicants**

60. The applicants referred to the judgment in *Schalk and Kopf v. Austria* (no. 30141/04, ECHR 2010), in which the Court had acknowledged that the relationship of a cohabiting same-sex couple living in a stable *de facto* partnership fell within the notion of “family life”. They contended that, although European countries’ legislation on the issue was not entirely uniform, there was nevertheless a trend towards legal recognition of same-sex couples. The applicants observed that, to their knowledge, Greece was to date the only European country to have introduced a legal alternative to marriage that was confined to different-sex couples. In other words, Greece was the only country to have enacted legislation governing a form of civil partnership while under the same legislation excluding same-sex couples from its scope. Greece was thus clearly and radically out of step with the norm among European countries in that regard. The applicants argued that the wish to preserve the ties of the traditional heterosexual family could not constitute substantive grounds such as to justify treating same-sex couples differently. Instead of taking positive steps to overcome prejudice against gays and lesbians in Greek society, the respondent State had reinforced that prejudice by enacting Law no. 3719/2008 without including same-sex couples. In the applicants’ view, the Law in question cast a negative moral judgment on homosexuality as it reflected an unjustifiable reserve, not to say hostility, towards same-sex couples. Having decided to move away from marriage as the sole formal basis of family life, the legislature had shown a clear disregard for same-sex couples by excluding them from the scope of Law no. 3719/2008.

61. Lastly, the applicants could not subscribe to the Government’s argument that the legislature’s aim had been to protect children born to different-sex couples living in *de facto* partnerships. In the applicants’ view, it was clear that the legislation in question was designed to regulate the situation of couples who did not wish to marry, irrespective of whether or not they had or wished to have children. Hence, they considered that their exclusion from the scope of the legislation lacked any objective and reasonable justification and was therefore discriminatory.

#### **(b) The Government**

62. The Government observed that, with regard to the legitimate aims pursued by Law no. 3719/2008, the legislation on civil unions should be viewed as a set of provisions allowing parents to raise their biological children in such a way that the father had an equitable share of parental responsibility without the couple being obliged to marry. Civil unions

therefore meant that, when the woman became pregnant, the couple no longer had to marry out of fear that they would not otherwise have the legal relationship they desired with their child since he or she would be regarded as being born out of wedlock. Hence, by introducing civil unions the Greek legislature had shown itself to be both traditional and modern in its thinking. By enacting Law no. 3719/2008, the legislature had sought to strengthen the institutions of marriage and the family in the traditional sense, since the decision to marry would henceforth be taken irrespective of the prospect of having a child and thus purely on the basis of a mutual commitment entered into by two individuals of different sex, free of outside constraints.

63. The Government further submitted that Law no. 3719/2008 was aimed at regulating an existing social phenomenon, that of unmarried different-sex couples who had children. Greek law differed in that respect from the legislation in other European countries providing for civil unions. The Greek legislature had stated expressly in the explanatory report on the Law that it was not seeking to regulate all forms of *de facto* partnership but rather to protect children born to different-sex couples in such partnerships, as well as the parents themselves if they did not wish to marry. In the Government's view, the whole structure of the Law and the content of its provisions were designed to reflect this. Consequently, the introduction of civil unions for same-sex couples would require a separate set of rules governing a situation which was analogous to, but not the same as, the situation of different-sex couples.

64. The Government stated that, prior to the enactment of Law no. 3719/2008, domestic law had afforded limited recognition to different-sex couples living together outside marriage. In particular, Article 1444 of the Civil Code made reference to "*de facto* partnership[s]". Under that provision, divorced persons who remarried or lived in a *de facto* partnership lost the right to maintenance payments. *De facto* partnerships were also mentioned in Articles 1456 and 1457 of the Civil Code concerning assisted reproduction. Article 1456 provided that, if an unmarried woman sought recourse to assisted reproduction techniques, the man with whom she lived in a *de facto* partnership had to give his consent before a notary. Article 1457 laid down the conditions in which "artificial insemination [was permitted] following the death of the woman's husband or the man with whom she live[d] in a *de facto* partnership".

65. The Government were of the view that, in examining the conformity of section 1 of Law no. 3719/2008 with Articles 8 and 14 of the Convention and, in particular, in assessing the proportionality of the interference in question, the Court should take into consideration the overall background to the case and all the provisions of the above-mentioned Law concerning civil unions. First of all, the Government urged the Court to make a distinction between the applicants who cohabited and those who did not. In the case of the former, their complaints should be examined from the standpoint of the

right to “family life”; in the case of the latter, the applicable concept was that of “private life”.

66. The Government then proceeded to analyse the rights and obligations arising out of civil unions and concluded that the applicants’ property and personal status had in no way been affected by their exclusion from the scope of the legislation on civil unions. With regard to property issues, the Government reiterated their arguments concerning the admissibility *ratione personae* of the complaint. They observed that civil unions did not produce any automatic and binding effects with regard to the partners’ property status. As to social-security matters, same-sex couples were in an identical position to different-sex couples who decided to enter into a union. As far as maintenance and inheritance issues were concerned, these could be regulated within a same-sex couple without a civil union, by means of a contractual agreement.

67. With regard to the applicants’ personal situation, the Government maintained that 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. The Government referred in particular to sections 9 and 10 of Law no. 3719/2008, which enabled the father of a child born outside marriage to establish paternity and be involved in the child’s upbringing without having to be married to the child’s mother. Hence, marriage and the recognition of paternity by the courts or by the father himself no longer constituted the sole means of establishing paternity. The Government stressed that the object of the provisions in question represented the “hard core” of the legislation on civil unions and, by definition, could apply only to different-sex couples. On the basis of that argument, the Government contended that the present case should not lead the Court to find a violation of Articles 14 and 8 of the Convention. In their view, same-sex couples were not in a similar or comparable situation to different-sex couples since they could not in any circumstances have biological children together.

68. The Government added that, as stated in Law no. 3719/2008, the legislation on civil unions differed from similar legislation enacted by other Council of Europe member States. While those laws produced effects with regard to the financial relations between the parties, only the Greek legislation established a presumption of paternity in respect of children born in the context of a civil union. The Government concluded from this that Law no. 3719/2008 focused on the personal ties between the partners rather than the property-related aspects of their relationship.

**(c) The third-party interveners**

69. The third-party interveners (the AIRE Centre, the ICJ, the FIDH and ILGA-Europe – see paragraph 6 above) referred to the Court’s case-law, and in particular its judgment in *Karner v. Austria* (no. 40016/98,

ECHR 2003-IX) and to the case-law of national constitutional courts including the Hungarian Constitutional Court, the Supreme Court of Canada, the United Kingdom's House of Lords and the Brazilian Constitutional Court. According to those courts, a strong justification was required when the ground for a distinction was sex or sexual orientation. The third-party interveners observed that a growing number of national courts, both in Europe and elsewhere, required that unmarried different-sex and same-sex couples be treated in the same way. A large number of Council of Europe member States had now enacted legislation recognising same-sex relationships. To their knowledge, the case of Greece was unique, as it was the only European country to have introduced civil unions while excluding same-sex couples from their scope of application. The relevant legislation of the Contracting States on registered civil partnerships for same-sex couples was founded on two models: (a) the "Danish model", based on the Danish legislation introduced in 1989, which confined the registration scheme to same-sex couples, since different-sex couples already had the option of marrying, and (b) the "French model", whereby the right to enter into a civil partnership was open to all unmarried couples irrespective of their sexual orientation.

## 2. *The Court's assessment*

### (a) **Applicability of Article 14 taken in conjunction with Article 8**

70. The Court has already dealt with a number of cases in which the applicants alleged discrimination on grounds of sexual orientation in the sphere of private and family life. Some were examined under Article 8 taken alone. These cases concerned the prohibition under criminal law of homosexual relations between adults (see *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45; *Norris v. Ireland*, 26 October 1988, Series A no. 142; and *Modinos v. Cyprus*, 22 April 1993, Series A no. 259) and the discharge of homosexuals from the armed forces (see *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, ECHR 1999-VI). Others were examined under Article 14 taken in conjunction with Article 8. These concerned differing ages of consent under criminal law for homosexual relations on the one hand and heterosexual relations on the other (see *L. and V. v. Austria*, nos. 39392/98 and 39829/98, ECHR 2003-I), the granting of parental responsibility (see *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, ECHR 1999-IX), authorisation to adopt a child (see *Fretté v. France*, no. 36515/97, ECHR 2002-I; *E.B. v. France* [GC], no. 43546/02, 22 January 2008; and *Gas and Dubois v. France*, no. 25951/07, ECHR 2012), the right to succeed to the deceased partner's tenancy (see *Karner*, cited above, and *Kozak v. Poland*, no. 13102/02, 2 March 2010), the right to social-security cover (see *P.B. and J.S. v. Austria*, no. 18984/02, 22 July 2010), access for same-sex

couples to marriage or another form of legal recognition (see *Schalk and Kopf*, cited above) and the exclusion of same-sex couples from second-parent adoption (see *X and Others v. Austria* [GC], no. 19010/07, 19 February 2013).

71. In the instant case the applicants formulated their complaint under Article 14 taken in conjunction with Article 8, and the Government did not dispute the applicability of those provisions. The Court finds it appropriate to follow this approach (see, to the same effect, *Schalk and Kopf*, cited above, § 88).

72. Furthermore, the Court has repeatedly held that Article 14 is not autonomous but has effect only in relation to other Convention rights. This provision complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to “the enjoyment of the rights and freedoms” safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, among other authorities, *Petrovic v. Austria*, 27 March 1998, § 22, *Reports* 1998-II; *E.B.*, cited above, § 47; *Schalk and Kopf*, cited above, § 89; and *X and Others*, cited above, § 94).

73. The Court notes, on the basis of the case file, that the applicants form stable same-sex couples. Furthermore, it is not disputed that their relationships fall within the notion of “private life” within the meaning of Article 8 of the Convention. The Court also points out that in its judgment in *Schalk and Kopf*, it considered that, in view of the rapid evolution in a considerable number of member States regarding the granting of legal recognition to same-sex couples, “it [would be] artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple [could not] enjoy ‘family life’ for the purposes of Article 8” (see *Schalk and Kopf*, cited above, § 94). Accordingly, the Court is of the view that the applicants’ relationships in the present case fall within the notion of “private life” and that of “family life”, just as would the relationships of different-sex couples in the same situation. It can see no basis for drawing the distinction requested by the Government (see paragraph 65 *in fine*) between those applicants who live together and those who – for professional and social reasons – do not (see paragraph 8 above), since in the instant case the fact of not cohabiting does not deprive the couples concerned of the stability which brings them within the scope of family life within the meaning of Article 8.

74. In sum, the Court concludes that Article 14 of the Convention taken in conjunction with Article 8 is applicable in the present case.

**(b) Compliance with Article 14 taken in conjunction with Article 8***(i) Scope of the case*

75. The Court deems it important to delimit the scope of the present case. The applicants' complaint does not relate in the abstract to a general obligation on the Greek State to provide for a form of legal recognition in domestic law for same-sex relationships. In the instant case the applicants complain that Law no. 3719/2008 provides for civil unions for different-sex couples only, thereby automatically excluding same-sex couples from its scope. In other words, the applicants' complaint is not that the Greek State failed to comply with any positive obligation which might be imposed on it by the Convention, but that it introduced a distinction, by virtue of Law no. 3719/2008, which in their view discriminates against them. Accordingly, the issue to be determined in the instant case is whether the Greek State was entitled, from the standpoint of Articles 14 and 8 of the Convention, to enact a law introducing alongside the institution of marriage a new registered partnership scheme for unmarried couples that was limited to different-sex couples and thus excluded same-sex couples.

*(ii) Principles established by the Court's case-law*

76. According to the Court's settled case-law, in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in comparable situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see *Burden v. the United Kingdom* [GC], no. 13378/05, § 60, ECHR 2008; *Schalk and Kopf*, cited above, § 96; and *X and Others*, cited above, § 98). The notion of discrimination within the meaning of Article 14 also includes cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 82, Series A no. 94).

77. Sexual orientation is a concept covered by Article 14. The Court has repeatedly held that, just like differences based on sex, differences based on sexual orientation require "particularly convincing and weighty reasons" by way of justification (see, for example, *Smith and Grady*, § 90; *Karner*, §§ 37 and 42; *L. and V.*, § 45; and *X and Others*, § 99, all cited above). Where a difference in treatment is based on sex or sexual orientation the State's margin of appreciation is narrow (see *Karner*, § 41, and *Kozak*, § 92, both cited above). Differences based solely on considerations of sexual

orientation are unacceptable under the Convention (see *Salgueiro da Silva Mouta*, § 36; *E.B.*, §§ 93 and 96; and *X and Others*, § 99, all cited above).

(iii) *Application of these principles in the present case*

(a) Comparison of the applicants' situation with that of different-sex couples and existence of a difference in treatment

78. The first question to be addressed by the Court is whether the applicants' situation is comparable to that of different-sex couples wishing to enter into a civil union under Law no. 3719/2008. The Court reiterates that same-sex couples are just as capable as different-sex couples of entering into stable committed relationships (see *Schalk and Kopf*, cited above, § 99). It therefore considers that the applicants are in a comparable situation to different-sex couples as regards their need for legal recognition and protection of their relationship (see *Schalk and Kopf*, loc. cit.).

79. The Court further observes that section 1 of Law no. 3719/2008 expressly reserves the possibility of entering into a civil union to two individuals of different sex. Accordingly, by tacitly excluding same-sex couples from its scope, the Law in question introduces a difference in treatment based on the sexual orientation of the persons concerned.

(β) Legitimate aim and proportionality

80. The Court observes that the Government relied chiefly on two sets of arguments to justify the legislature's choice not to include same-sex couples in the scope of Law no. 3719/2008. Firstly, they contended that if the civil unions introduced by that Law were applied to the applicants, this would result for them in rights and obligations – in terms of their property status, the financial relations within each couple and their inheritance rights – for which they could already provide a legal framework under ordinary law, that is to say, on a contractual basis. Secondly, the Government argued that the legislation in question was designed to achieve several goals: protecting children born outside marriage, protecting single-parent families (as made clear in the explanatory report to the Law), responding to the wishes of parents to raise their children without being obliged to marry and, ultimately, strengthening the institutions of marriage and the family in the traditional sense.

81. As regards the first argument advanced by the Government, the Court is of the view that, even if it were to be considered valid, it does not take account of the fact that the civil partnerships provided for by Law no. 3719/2008 as an officially recognised alternative to marriage have an intrinsic value for the applicants irrespective of the legal effects, however narrow or extensive, that they would produce. As the Court has already observed, same-sex couples are just as capable as different-sex couples of entering into stable committed relationships. Same-sex couples sharing their

lives have the same needs in terms of mutual support and assistance as different-sex couples. Accordingly, the option of entering into a civil union would afford the former the only opportunity available to them under Greek law of formalising their relationship by conferring on it a legal status recognised by the State. The Court notes that extending civil unions to same-sex couples would allow the latter to regulate issues concerning property, maintenance and inheritance not as private individuals entering into contracts under the ordinary law but on the basis of the legal rules governing civil unions, thus having their relationship officially recognised by the State.

82. It is true that the Government's second main argument is that Law no. 3719/2008 is designed to strengthen the legal status of children born outside marriage and to make it easier for parents to raise their children without being obliged to marry. This aspect, it is argued, distinguishes different-sex couples from same-sex couples, since the latter cannot have biological children together.

83. The Court considers it legitimate from the standpoint of Article 8 of the Convention for the legislature to enact legislation to regulate the situation of children born outside marriage and also indirectly strengthen the institution of marriage within Greek society by promoting the notion, as explained by the Government, that the decision to marry would be taken purely on the basis of a mutual commitment entered into by two individuals, independently of outside constraints or of the prospect of having children (see paragraph 62 above). The Court accepts that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment (see *Karner*, § 40, and *Kozak*, § 98, both cited above). It goes without saying that the protection of the interests of the child is also a legitimate aim (see *X and Others*, cited above, § 138). It remains to be ascertained whether the principle of proportionality was respected in the present case.

84. The Court reiterates the principles established in its case-law. The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it (see *Karner*, § 41, and *Kozak*, § 98, both cited above). Also, given that the Convention is a living instrument, to be interpreted in present-day conditions (see, among other authorities, *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26, and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 75, ECHR 2002-VI), the State, in its choice of means designed 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 social and civil-status issues and 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 (see *X and Others*, cited above, § 139).

85. In cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require the measure chosen to be suitable in principle for achievement of the aim sought. It must also be shown that it was necessary, in order to achieve that aim, to exclude certain categories of people – in this instance persons living in a homosexual relationship – from the scope of application of the provisions at issue (see *Karner*, § 41, and *Kozak*, § 99, both cited above). According to the case-law cited above, the burden of proof in this regard is on the respondent Government. It is therefore for the Greek Government to show in the instant case that it was necessary, in pursuit of the legitimate aims which they invoked, to bar same-sex couples from entering into the civil unions provided for by Law no. 3719/2008 (see, to similar effect, *X and Others*, cited above, § 141).

86. The Court notes that the legislation in question does not merely provide for measures aimed at regulating the social realities and attaining the objectives referred to by the Government (see paragraph 80 above). It is designed first and foremost to afford legal recognition to a form of partnership other than marriage, referred to as “civil unions”. This emerges clearly from the content and structure of the Law. Section 1 defines a civil union as a “contract between two different-sex adults governing their life as a couple”. Furthermore, the subsequent sections are not confined to regulating the status of children born outside marriage, but deal with the living arrangements of couples who have entered into a civil union. Sections 6 and 7, for instance, refer to the financial relations between the parties and the maintenance obligations on dissolution of the union. Section 11, meanwhile, provides that when one partner dies the surviving partner is entitled to inherit (see paragraph 16 above).

87. The Court notes in that regard that in its report on the draft legislation the National Human Rights Commission observed that it was not made clear why exactly the bill had been given the title “Reforms concerning the family, children and society”, when it actually provided for a new legal form of non-marital partnership (see paragraph 22 above). In view of the foregoing the Court considers that, notwithstanding its title and the declared intentions of the legislature, Law no. 3719/2008 was primarily aimed at affording legal recognition to a new form of non-marital partnership.

88. In any event, even assuming that the legislature’s intention was to enhance the legal protection of children born outside marriage and indirectly to strengthen the institution of marriage, the fact remains that, by enacting Law no. 3719/2008, it introduced a form of civil partnership, known as civil unions, which excluded same-sex couples while allowing different-sex couples, whether or not they had children, to regulate numerous aspects of their relationship.

89. On this point the Court notes firstly that the Government's arguments focus on the situation of different-sex couples with children, without justifying the difference in treatment arising out of the legislation in question between same-sex and different-sex couples who are not parents. Secondly, the Court is not convinced by the Government's argument that the attainment through Law no. 3719/2008 of the goals to which they refer presupposes excluding same-sex couples from its scope. It would not have been impossible for the legislature to include some provisions dealing specifically with children born outside marriage, while at the same time extending to same-sex couples the general possibility of entering into a civil union. The Court points out in that connection that the explanatory report on the legislation at issue offers no insight into the legislature's decision to limit civil unions to different-sex couples (see paragraph 10 above). It further notes that the National Human Rights Commission considered the bill to be discriminatory since it did not apply to same-sex couples (see paragraphs 23-24 above) and that the Scientific Council of Parliament adopted a similar position (see paragraph 13 above).

90. Lastly, the Court observes that under Greek law, as the Government themselves pointed out (see paragraph 64 above), different-sex couples, unlike same-sex couples, could have their relationship legally recognised even before the enactment of Law no. 3719/2008, whether fully on the basis of the institution of marriage or in a more limited form under the provisions of the Civil Code dealing with *de facto* partnerships. Consequently, same-sex couples would have a particular interest in entering into a civil union since it would afford them, unlike different-sex couples, the sole basis in Greek law on which to have their relationship legally recognised.

91. In addition, the Court would point to the fact that, although there is no consensus among the legal systems of the Council of Europe member States, a trend is currently emerging with regard to the introduction of forms of legal recognition of same-sex relationships. Nine member States provide for same-sex marriage. In addition, seventeen member States authorise some form of civil partnership for same-sex couples. As to the specific issue raised by the present case (see paragraph 75 above), the Court considers that the trend emerging in the legal systems of the Council of Europe member States is clear: of the nineteen States which authorise some form of registered partnership other than marriage, Lithuania and Greece are the only ones to reserve it exclusively to different-sex couples (see paragraphs 25 and 26 above). In other words, with two exceptions, Council of Europe member States, when they opt to enact legislation introducing a new system of registered partnership as an alternative to marriage for unmarried couples, include same-sex couples in its scope. Moreover, this trend is reflected in the relevant Council of Europe materials. In that regard the Court refers particularly to Resolution 1728(2010) of the Parliamentary

Assembly of the Council of Europe and to Committee of Ministers Recommendation CM/Rec(2010)5 (see paragraphs 28-30 above).

92. The fact that, at the end of a gradual evolution, a country finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that that aspect conflicts with the Convention (see *F. v. Switzerland*, 18 December 1987, § 33, Series A no. 128). Nevertheless, in view of the foregoing, the Court considers that the Government have not offered convincing and weighty reasons capable of justifying the exclusion of same-sex couples from the scope of Law no. 3719/2008. Accordingly, it finds that there has been a violation of Article 14 taken in conjunction with Article 8 of the Convention in the present case.

### III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

93. The applicants alleged that no effective remedy was available in domestic law enabling them to assert before the domestic courts their complaints concerning the discriminatory nature of civil unions. They relied on Article 13 of the Convention, which provides:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

94. The Court reiterates that Article 13 does not go so far as to guarantee a remedy allowing a Contracting State’s laws as such to be challenged before a national authority on the ground of being contrary to the Convention (see, among other authorities, *Roche v. the United Kingdom* [GC], no. 32555/96, § 137, ECHR 2005-X, and *Paksas v. Lithuania* [GC], no. 34932/04, § 114, ECHR 2011). In the instant case, the applicants’ complaint under Article 13 is at odds with this principle. Consequently, this complaint is manifestly ill-founded and as such must be declared inadmissible in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

### IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

95. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

#### A. Damage

96. The applicants in application no. 29381/09 claimed 10,000 euros (EUR) jointly in respect of the non-pecuniary damage they had allegedly

sustained on account of the violation of Article 14 taken in conjunction with Article 8 of the Convention and the lack of an effective remedy in that regard. They also requested the Court to make specific recommendations to the Government with a view to amending Law no. 3719/2008 and extending the application of civil unions to same-sex couples.

97. The applicants in application no. 32684/09 claimed EUR 15,000 per couple in respect of non-pecuniary damage, making a total of EUR 45,000. They alleged that they had been subjected to unacceptable discrimination on account of their sexual preferences and that their exclusion from the scope of Law no. 3719/2008 had caused them considerable frustration.

98. The Government contended that the amounts claimed by the applicants were excessive and that the applicants had not proved that they had suffered personal and direct interference with their private and family life. They submitted that the finding of a violation would constitute in itself sufficient just satisfaction.

99. Unlike the Government, the Court considers that the finding of a violation of Article 14 taken in conjunction with Article 8 of the Convention does not constitute sufficient redress for the non-pecuniary damage sustained by the applicants. Ruling on an equitable basis, in accordance with Article 41 of the Convention, the Court awards to each of the applicants, with the exception of the seventh applicant in application no. 32684/09, the sum of EUR 5,000, plus any tax that may be chargeable, in respect of non-pecuniary damage. The Court dismisses the remainder of the applicants' claims for just satisfaction.

## **B. Costs and expenses**

100. The applicants in application no. 29381/09 claimed jointly a sum of EUR 7,490.97 in respect of the costs and expenses incurred before the Court. In particular, they estimated the time spent on the case by their representatives from Greek Helsinki Monitor at twenty hours' work, at an hourly rate of EUR 100. They produced in that connection a document setting out details of the time their representatives had spent on preparing their observations before the Court. They also claimed EUR 4,485 in respect of their representation before the Grand Chamber by Ms Mécary, and submitted a bill of costs in support of their claim. Lastly, they claimed EUR 1,005.97 for the travel expenses incurred by their representatives in connection with the Grand Chamber hearing. The applicants explained that, under the terms of an agreement with their representatives, they would be required to pay the latter the full amount awarded by the Grand Chamber in respect of costs and expenses if the Court found a violation of the Convention. They therefore requested that any compensation awarded under that head be paid directly into their representatives' bank accounts.

101. The applicants in application no. 32684/09 claimed jointly the sum of EUR 8,000 in respect of the proceedings before the Court, and submitted invoices and bills of costs in support of their claim.

102. The Government replied that the Court could make awards to the applicants in respect of costs and expenses only to the extent that the claims were sufficiently substantiated.

103. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only if it is established that they were actually incurred, were necessarily incurred and were reasonable as to quantum (see *Creangă v. Romania* [GC], no. 29226/03, § 130, 23 February 2012). Regard being had to the documents in its possession and the above-mentioned criteria, the Court considers that the applicants in application no. 29381/09 should be awarded the sum of EUR 5,000 jointly, plus any tax that may be chargeable to them, to be paid directly into their representatives' bank accounts (see, to similar effect, *Carabulea v. Romania*, no. 45661/99, § 180, 13 July 2010). As regards the applicants in application no. 32684/09, the Court considers that they should be awarded the sum of EUR 6,000 jointly in respect of costs and expenses, plus any tax that may be chargeable to them.

### C. Default interest

104. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## FOR THESE REASONS, THE COURT

1. *Decides*, unanimously, to join the applications;
2. *Declares*, by a majority, the applications admissible as regards the complaint under Article 14 taken in conjunction with Article 8 of the Convention in respect of the applicants G. Vallianatos and N. Mylonas and the applicants C.S., E.D., K.T., M.P., A.H. and D.N., and, unanimously, the remainder of the applications inadmissible;
3. *Holds*, by sixteen votes to one, that there has been a violation of Article 14 taken in conjunction with Article 8 of the Convention;
4. *Holds*, by sixteen votes to one,
  - (a) that the respondent State is to pay the applicants, within three months, the following amounts:

- (i) EUR 5,000 (five thousand euros) to each applicant, with the exception of the seventh applicant in application no. 32684/09, plus any tax that may be chargeable, in respect of non-pecuniary damage;
  - (ii) EUR 5,000 (five thousand euros) jointly to the applicants in application no. 29381/09, plus any tax that may be chargeable to them, in respect of costs and expenses, to be paid directly into their representatives' bank accounts;
  - (iii) EUR 6,000 (six thousand euros) jointly to the applicants in application no. 32684/09, with the exception of the seventh applicant, plus any tax that may be chargeable to them, in respect of costs and expenses;
- (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses*, unanimously, the remainder of the applicants' claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 7 November 2013

Michael O'Boyle  
Deputy Registrar

Dean Spielmann  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) joint concurring opinion of judges Casadevall, Ziemele, Jočienė and Sicilianos;
- (b) partly concurring, partly dissenting opinion of judge Pinto de Albuquerque.

D.S.  
M.O'B.

JOINT CONCURRING OPINION OF JUDGES  
CASADEVALL, ZIEMELE, JOČIENĖ AND SICILIANOS

(Translation)

1. We voted for the finding of a violation of Article 14 taken in conjunction with Article 8 of the Convention in the present case. Given that the provisions in question and the grounds for discrimination – sexual orientation – are the same in this case and in the case of *X and Others v. Austria* (Grand Chamber judgment of 19 February 2013), one might wonder at first sight whether our respective positions in the two cases are consistent. We would recall that in *X and Others v. Austria* we voted against the finding of a violation of Article 14 taken in conjunction with Article 8 of the Convention, and that we expressed the reasons for our disagreement in a joint dissenting opinion together with three of our colleagues (see *X and Others v. Austria*, cited above, joint partly dissenting opinion of Judges Casadevall, Ziemele, Kovler, Jočienė, Šikuta, De Gaetano and Sicilianos). However, we are convinced that, despite the aforementioned similarities, the two cases are clearly distinguishable from each other, which explains our vote in each case.

2. Besides the specific features of *X and Others v. Austria* – explored extensively in the above-mentioned partly dissenting opinion (§§ 2-11) – the background to the case, as we know, was the issue of adoption within same-sex couples. More particularly, the case in question concerned the possibility for the first applicant to adopt her partner’s child. In addition to the same-sex partners themselves, any such adoption would necessarily, and indeed radically, affect the situation of the child to be adopted and that of the other biological parent, raising delicate issues with regard to the best interests of the child and the other parent’s Convention rights. No such considerations apply in the present case. The applicants in this case are same-sex adult couples who simply wish to formalise their own relationships. No third party is affected in any way. It should also be noted that the Greek legislation on civil unions makes no provision for adoption by the different-sex couples to whom it applies (see the text of Law no. 3719/2008, cited in paragraph 16 of the judgment). In other words, the possible extension of the scope of the legislation to include same-sex couples would not raise issues comparable to those in *X and Others v. Austria*.

3. This first significant difference is very closely linked to another parameter to be taken into consideration. As we stressed in our partly dissenting opinion in *X and Others* (cited above), the States Parties to the Convention, including those which allow second-parent adoption for unmarried couples, “are sharply divided and ... there is therefore no consensus” on the issue raised in that case (*loc. cit.*, § 14). Indeed, there is

considerable diversity in the approaches taken by national legislation to the adoption issue. In the present case, by contrast, a very clear trend exists towards making registered partnerships available to same-sex couples. This trend is underlined in paragraph 91 of the judgment which concludes that, with two exceptions, Council of Europe member States, when they opt to enact legislation introducing a system of registered partnerships as an alternative to marriage, “include same-sex couples in its scope”.

4. Furthermore, the complexity of the issues raised in *X and Others v. Austria* is reflected, in our view, in Article 7 § 2 of the European Convention on the Adoption of Children (revised in 2008), which entered into force on 1 September 2011. That provision reads as follows: “States are free to extend the scope of this Convention to same-sex couples who are married to each other or who have entered into a registered partnership together. They are also free to extend the scope of this Convention to different-sex couples and same-sex couples who are living together in a stable relationship.” In other words, regard being had to the aforementioned differences of approach, a recent Council of Europe treaty instrument affords States complete freedom when it comes to regulating the adoption of children in the various scenarios considered above, including the scenario in issue in *X and Others v. Austria*.

5. This “*laissez-faire*” attitude contrasts with the relevant Council of Europe instruments referred to in paragraphs 27 to 30 of the present judgment. These lend clear support to the finding of a violation of Article 14 taken in conjunction with Article 8 of the Convention in the instant case. This is particularly true as regards Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted by the Committee of Ministers on 31 March 2010, and Resolution 1728 (2010), adopted by the Parliamentary Assembly on 29 April 2010 and entitled “Discrimination on the basis of sexual orientation and gender identity”. To put it another way: the finding of a violation in the present judgment is “in tune” with all the relevant Council of Europe instruments, including and especially the most recent. Similar observations apply, *mutatis mutandis*, with regard to European Union law, the relevant provisions of which are set forth in paragraphs 31 to 34 of the judgment.

## PARTLY CONCURRING, PARTLY DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE

The particular interest of the *Vallianatos and Others* case is that the Grand Chamber performs an abstract review of the “conventionality” of a Greek law, while acting as a court of first instance<sup>1</sup>. The Grand Chamber not only reviews the Convention compliance of a law which has not been applied to the applicants, but furthermore does it without the benefit of prior scrutiny of that same legislation by the national courts. In other words, the Grand Chamber invests itself with the power to examine *in abstracto* the Convention compliance of laws without any prior national judicial review.

I concur with the majority in finding the application lodged by the association Synthessi – Information, Awareness-raising and Research, a legal entity based in Athens, inadmissible for lack of victim status. I also concur in finding the other applicants’ complaint under Article 13 inadmissible as being manifestly ill-founded. But I dissent with regard to the complaint of a violation of Article 14 taken in conjunction with Article 8 of the European Convention on Human Rights (“the Convention”), which I find inadmissible for non-exhaustion of domestic remedies. Although the individual applicants had an arguable claim, they did not even try to lodge their claim before the national courts, as they could have done. No opportunity was given to the national authorities to address the applicants’ complaint at the national level. Ultimately, the core of the principle of subsidiarity was infringed.

### **Potential victim and abstract review of the Convention compliance of laws**

The European mechanism of human rights protection does not, in principle, permit abstract review of the Convention compliance of national laws<sup>2</sup> and still less an *actio popularis* against legislation<sup>3</sup>. Hence, an

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<sup>1</sup> The abstract review of “conventionality” is the review of the compatibility of a national law with the Convention independently of a specific case where this law has been applied (for the use of the word “conventionality”, see *Michaud v. France*, no. 12323/11, § 73, ECHR 2012; for the French term “conventionalité”, see *Vassis and Others v. France*, no. 62736/09, § 36, 27 June 2013; *Kanagaratnam and Others v. Belgium*, no 15297/09, § 75, 13 December 2011; *Duda v. France* (dec.), no. 37387/05, 17 March 2009; and *Kart v. Turkey*, no 8917/05, § 83, 8 July 2008).

<sup>2</sup> This is true only for individual applications (see, for example, *de Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 22, Series A no. 12; *Findlay v. the United Kingdom*, 25 February 1997, § 67, *Reports of Judgments and Decisions* 1997-I; and *Von Hannover v. Germany* (no. 2) [GC], nos. 40660/08 and 60641/08, § 116, ECHR 2012). In inter-State cases, a State may challenge a legal provision *in abstracto*, since Article 33 of the Convention allows a State Party to refer to “any alleged breach” of the provisions of the

applicant to the European Court of Human Rights (“the Court”) must be able to claim to be, have been or become in the future a victim of a State act, even where he or she was not, is not and will not be personally targeted by that act<sup>4</sup>. Nonetheless, an individual may contend that a law violates his or her rights in the absence of any specific measure of implementation in his or her respect, if there is a real risk that he or she will be personally affected by the said law. The Court has established the categories of people at risk: those who have to modify their conduct, under pain of criminal prosecution<sup>5</sup>, and those who are members of a class of people who risk being directly affected by the legislation, be it ordinary<sup>6</sup> or constitutional legislation<sup>7</sup>. These two categories of people, which may be as broad as to include, for example, “all users or potential users of the postal and telecommunication services”<sup>8</sup>, “illegitimate children”<sup>9</sup>, “women of child-bearing age”<sup>10</sup> or persons of Roma and Jewish origin<sup>11</sup>, are known as potential victims<sup>12</sup>.

In the case at hand the individual applicants argue that they belong to a group of people based on an identifiable characteristic (unmarried same-sex couples) which does not benefit from the legal protection afforded by a specific law to another group of people in a similar factual situation (unmarried different-sex couples). Their claim is not unlike that of the

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Convention by another State Party (see *Ireland v. the United Kingdom*, 18 January 1978, § 240, Series A no. 25, and *Cyprus v. Turkey* [GC], no. 25781/94, § 358, ECHR 2001-IV).

<sup>3</sup> An *actio popularis* is an action brought by a member of the public who is acting solely in the interest of public order and does not claim to have been, to be or to become in the future a victim of the impugned law or other State act (see among other authorities, *Tănase v. Moldova* [GC], no. 7/08, § 104, ECHR 2010, and *X and Others v. Austria* [GC], no. 19010/07, § 126, ECHR 2013).

<sup>4</sup> In this latter case the applicant must also be able to claim that he or she belongs to a group of persons to which the State act is addressed (*Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, § 50, ECHR 2012). The bond to the group covered by the State act must exist at the material time and at the time of the lodging of the complaint before the Court.

<sup>5</sup> *Dudgeon v. the United Kingdom*, 22 October 1981, § 41, Series A no. 45; *Norris v. Ireland*, 26 October 1988, § 32, Series A no. 142; and *S.L. v. Austria*, no. 45330/99, ECHR 2003-I (extracts).

<sup>6</sup> *Marckx v. Belgium*, 13 June 1979, § 27, Series A no. 31; *Johnston and Others v. Ireland*, 18 December 1986, § 42, Series A no. 112; and *Burden v. the United Kingdom* [GC], no. 13378/05, §§ 33-34, ECHR 2008.

<sup>7</sup> *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, §§ 28-29, ECHR 2009.

<sup>8</sup> *Klass and Others v. Germany*, 6 September 1978, §§ 34-37, Series A no. 28.

<sup>9</sup> *Marckx*, cited above, §§ 44-48.

<sup>10</sup> *Open Door and Dublin Well Woman v. Ireland*, 29 October 1992, § 44, Series A no. 246-A.

<sup>11</sup> *Sejdić and Finci*, cited above, § 45.

<sup>12</sup> There is a third group of potential victims: those who have not yet been victims of a Convention breach, but will be if the impugned State act is performed (for instance, an expulsion order). Potential victims should not be confused with indirect victims, a term which refers to persons who have suffered indirect negative consequences of a State act or omission, like the wife and children of a man unlawfully killed by State officials.

applicant Alexandra in the seminal case of *Marckx v. Belgium*, in so far as she argued that she belonged to a group of persons based on an identifiable characteristic (children born out of wedlock) which did not benefit from the legal protection afforded by the Belgian Civil Code to another group of persons (children born within wedlock)<sup>13</sup>. The admissibility principle established in *Marckx* is also valid for the present case. In other words, when a law or regulation confers a Convention right solely on one group of people based on an identifiable characteristic of that group, by implication depriving another group of people in the same or similar situation of the enjoyment of the said right without any objective justification, the Convention compliance of that law or regulation may be reviewed *in abstracto* by the Court on the basis of a complaint lodged by any member of the deprived group of people<sup>14</sup>. The same conclusion is valid for a law or regulation which explicitly prohibits or restricts the enjoyment of a Convention right by a group of people based on an identifiable characteristic of that group, treating it differently from another group of people in the same or similar situation without any objective justification (direct discrimination)<sup>15</sup>, and for a law or regulation which treats identically groups of people in different situations, without any objective justification (indirect discrimination)<sup>16</sup>. In both cases, members of the group of people deprived of the full enjoyment of the Convention right may challenge that law or regulation before the Court independently of any implementing act. *A fortiori*, any discriminatory law or regulation which targets identified or clearly identifiable persons may also be challenged by those persons before

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<sup>13</sup> *Marckx*, cited above, § 27.

<sup>14</sup> *Marckx*, cited above, § 27, and, more recently, *Sejdić and Finci*, cited above, §§ 28 and 29.

<sup>15</sup> *S.L. v. Austria* (dec.), no. 45330/99, 22 November 2001, and the case-law referred to therein.

<sup>16</sup> *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 184, ECHR 2007-IV. Conversely, a law or regulation which provides for affirmative measures when these measures are essential to put an end to or attenuate *de facto* discrimination in the enjoyment of a Convention right by a disadvantaged group of people based on an identifiable characteristic may also be submitted *in abstracto* to the Court's scrutiny (*Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, §§ 61 and 66, ECHR 2006-VI, and *Wintersberger v. Austria* (dec.), no. 57448/00, 27 May 2003). Since the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States fail to treat differently persons whose situations are significantly different, a law or regulation which does not provide for affirmative measures when they are warranted by a situation of factual inequality of a group of people based on an identifiable characteristic may also be challenged before the Court, regardless of any previous implementing act. The reverse situation of a law or regulation which brings about equality through "levelling down" the enjoyment of a Convention right by an advantaged group of people with an identifiable characteristic in comparison with another disadvantaged group of people also comes within the scope of the Court's review *in abstracto* (*Runkee and White v. the United Kingdom*, nos. 42949/98 and 53134/99, §§ 40-43, 10 May 2007).

the Court, regardless of any implementing act (*intuitu personae* discrimination). Finally, all the aforementioned conclusions apply similarly to rights which, although not specifically provided for by the Convention, fall within the scope of a Convention right, even if there has been no violation of the substantive right itself.

That being so, all the applicants but one could claim to be potential victims in the sense already referred to. By contrast, the complaint of the association Synthessi – Information, Awareness-raising and Research is not based on any risk of personal damage to the applicant, which cannot therefore be seen as a potential victim.

### **Non-exhaustion of national remedies against discriminatory laws**

Being more than just a multilateral agreement on reciprocal obligations of States Parties, the Convention creates obligations for States Parties towards all individuals within their jurisdiction, with a view to the practical implementation of the protected rights and freedoms in the domestic legal order of the States Parties<sup>17</sup>. Therefore, the States Parties to the Convention are legally obliged not to hinder in any way the effective exercise of the right of individual application and to make such modifications to their domestic legal systems as may be necessary to ensure the full implementation of the obligations incumbent on them<sup>18</sup>. Seen from another

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<sup>17</sup> The International Court of Justice explicitly excluded the notion of reciprocal obligations with regard to human rights treaties (*Reservations to the Convention on Genocide, Advisory Opinion: ICJ Reports 1951*, p. 23, followed by *Barcelona Traction, Light and Power Company, Limited, Judgment, ICJ Reports 1964*, p. 32, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, ICJ Reports 1996*, p. 20), after the Permanent Court of International Justice had conceded that “the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts” (*Jurisdiction of the Courts of Danzig, Advisory Opinion*, 1928, PCIJ, Series B, No. 15 (3 March 1928), p. 17). The Inter-American Court of Human Rights (Advisory Opinion No. OC-2/82, 24 September 1982, on the effect of reservations to the Inter-American Convention on Human Rights, paragraph 29) and the Human Rights Committee (General Comment no. 24, 2 November 1994, on reservations to the ICCPR, paragraph 17) have expressed the same opinion. Very early on, the former Commission, in its decision of 11 January 1961 in the case of *Austria v. Italy* (no. 788/60), expressed the same principle when it affirmed the “objective character” of the Convention (“... the obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves”). The Court adhered to this doctrine in *Ireland v. the United Kingdom*, cited above, § 239).

<sup>18</sup> This general principle of international law, which was considered as “self-evident” in *Exchange of Greek and Turkish Populations, Advisory Opinion*, 1925, PCIJ, Series B, No. 10 (21 February 1925), p. 20, has been described by the Court in *Maestri v. Italy*

perspective, these are the consequences of the principle of good faith in fulfilling treaty obligations, provided for in Articles 26 and 31 of the Vienna Convention on the Law of Treaties.

While Article 13 of the Convention does not impose, in principle, the existence of a remedy by which to have the Convention compliance of laws reviewed by the national courts<sup>19</sup>, when the alleged violation of a Convention right rests on a discriminatory law or regulation directly affecting the applicant or the group of people to which the applicant belongs, an effective remedy must be provided within the national legal system allowing such a law or regulation to be challenged<sup>20</sup>. Otherwise, no legal protection of the Convention right would be afforded by the Contracting Party to the persons under its jurisdiction, and direct access to the Court would be the sole legal avenue available. This is not the case in Greece.

Greece has a system of diffuse, concrete, successive and incidental review of the constitutionality and Convention compliance of laws<sup>21</sup>, and this system is effective. In fact, the Greek courts have declared various provisions of ordinary laws unconstitutional or in breach of the Convention<sup>22</sup>. In its judgment no. 3/2012, the Greek Court of Cassation

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([GC], no. 39748/98, § 47, ECHR 2004-I) in these terms: "... it follows from the Convention, and from Article 1 in particular, that in ratifying the Convention the Contracting States undertake to ensure that their domestic legislation is compatible with it. Consequently, it is for the respondent State to remove any obstacles in its domestic legal system that might prevent the applicant's situation from being adequately redressed".

<sup>19</sup> *James and Others v. the United Kingdom*, 21 February 1986, § 85, Series A no. 98; *Roche v. the United Kingdom* [GC], no. 32555/96, § 137, ECHR 2005-X; and *Paksas v. Lithuania* [GC], no. 34932/04, § 114, ECHR 2011 (extracts).

<sup>20</sup> Most, if not all, Convention rights are also acknowledged by the Constitutions of the Contracting Parties. Thus, a constitutional appeal lodged against a law violating a Convention right suffices under Article 13 of the Convention, regardless of the concrete or abstract, concentrated or diffuse, principal (preventive or successive) or incidental nature of the constitutional review mechanism.

<sup>21</sup> See Spiliotopoulos, *Judicial Remedy of Legislative Acts in Greece*, in *Temple Law Quarterly*, 1983, pp. 463-502; Manitakis, *Fondement et Légitimité du contrôle juridictionnel des lois en Grèce*, in RIDC, 1988, pp. 39-55; Skouris, *Constitutional disputes and judicial review in Greece*, in Landfried (ed.), *Constitutional Review and Legislation: An International Comparison*, 1988, pp. 177-200; Dagtoglou, *Judicial Review of Constitutionality of Laws*, in *European Review of Public Law*, 1989, pp. 309-327; Spyropoulos and Fortsakis, *Constitutional Law in Greece*, 2009, Koutnatzis, *Grundlagen und Grundzüge staatlichen Verfassungsrechts: Griechenland*, in Bogdandy et al. (eds.), *Handbuch Ius Publicum Europeum*, 2007, pp. 151-215; and Iliopoulos-Strangas and Koutnatzis, *Greece, Constitutional courts as positive legislators*, in Brewer-Carias, *Constitutional Courts as positive legislators, A comparative law study*, 2011, pp. 539-574.

<sup>22</sup> See Greek Supreme Administrative Court judgment no. 867/1988, finding that Article 65 of Legislative Decree 1400/1973 did not conform to Article 12 of the Convention; Supreme Administrative Court judgment no. 1664/2011, finding section 4(3) of Law 383/1976 in breach of Article 5 of the Constitution; Supreme Administrative Court judgment no. 3103/1997, finding section 25(1)(2) of Law no. 1975/1991 incompatible with the Geneva

(Plenary) even held that it flowed from Article 12 § 1 of the Constitution and Article 11 of the European Convention on Human Rights that individuals serving in the armed forces had the right to freedom of association and that the Court of Appeal's finding that the provisions of section 30 of Law 1264/1982 and section 1 of Law 2265/1994 did not apply by analogy in the case of military personnel was erroneous since it gave rise to a violation of the provisions of the Constitution and of the European Convention on Human Rights. The Court of Cassation further found that "absent any specific legislation, the general provisions of Articles 78 et seq. of the Civil Code are applicable". The fact that no statutory provision had been made for the right of military personnel to establish associations did not hinder the Court of Cassation from holding that the right in question was guaranteed by the Constitution and by the Convention, that the exercise thereof was not dependent upon the promulgation of an ordinary law that would regulate that right and that, in the absence of specific legislation, the general provisions of the Civil Code should apply.

The applicants in the present case did not give the national courts the opportunity to apply the same reasoning to their claim. Where constitutional protection for fundamental rights is provided, it is incumbent on the allegedly aggrieved party to test the extent of that protection and allow the domestic courts to develop those rights by way of interpretation<sup>23</sup>. It cannot be assumed by the Court, as it was by the applicants, that the national courts would not give full effect to the provisions of their own country's Constitution.

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Convention of 28 July 1951; Supreme Administrative Court judgment no. 1501/2012, finding Law no. 2120/1993 in breach of Articles 4 § 5 and 17 § 1 of the Constitution and of Article 1 of Protocol 1; Supreme Administrative Court judgment no. 2960/2010, finding that section 16 of Law 2227/1994 did not conform to Article 7 § 1 of the Convention; Court of Cassation judgment no. 982/2010, finding section 13(4) of Law 2882/2001 in breach of Article 1 of Protocol 1; Court of Cassation judgment no. 33/2002, finding section 5(3) of Law 2246/1994 contrary to Article 5 § 1 of the Constitution; Thessaloniki Court of First Instance judgments nos. 5251/2004 and 16520/2004, both ruling that section 107 of the Introductory Law to the Civil Code did not conform to Articles 11 and 14 of the Convention; Athens Administrative Court of Appeal judgment no. 954/1999, finding section 31 of Law 2470/1997 in breach of Article 1 of Protocol 1; Athens Administrative Court of Appeal judgment no. 748/2011, finding Article 64 of Legislative Decree 1400/1973 contrary to the European Social Charter and the ban on forced labour; Athens District Court judgment no. 2377/2007, finding section 30(2) of Law 2789/2000 incompatible with Articles 2 and 17 of the Constitution and Article 1 of Protocol 1; Athens Administrative Court of First Instance judgment no. 2250/2008, finding section 60 of Law 2084/1992 in breach of Article 1 of Protocol 1; and Supreme Administrative Court judgment no. 2028/2004, finding section 7(1) of Law 2703/1999 in breach of Article 1 of Protocol 1.

<sup>23</sup> *Vinčić and Others v. Serbia*, no. 44698/06 and others, § 51, 1 December 2009, and *A, B and C v. Ireland* [GC], no. 25579/05, § 142, ECHR 2010.

**The Convention obligation to extend favourable provisions to persons discriminated against**

In addition, Greek law makes provision for a special action based on harm attributable to the State or a public-law corporation<sup>24</sup>. Article 57 of the Civil Code provides that anyone who is subjected to personal harm is not only entitled to seek financial compensation but also, and more particularly, is entitled to “enforce cessation of the infringement and restraint of any future infringement”. According to national case-law, an obligation exists to pay compensation in the case of acts or omissions of the legislature where the legislation in force or the absence of legislation contravenes higher-ranking legal rules such as the provisions of the Constitution or of international conventions ratified by law, including the Convention<sup>25</sup>. Moreover, still according to national case-law, any violation of the principle of equality arising out of an omission on the part of the legislature to include in its regulations categories of individuals whose circumstances are identical to those for whom it has legislated gives rise to liability on the part of the State and public-law legal entities and to an obligation for them to pay compensation. More particularly, according to the case-law, “if the law introduces special regulations concerning a certain category of individuals, and another category of individuals in respect of whom the same reason for particular treatment exists is excluded from those regulations as a result of unwarranted unfavourable discrimination, the provision introducing that unfavourable treatment will be considered to be invalid as being unconstitutional. In such cases, in order to restore the constitutional principle of equality, the provision applicable to the category in whose favour the special regulations were instituted shall also be applied to the category of individuals having suffered discrimination. In that situation, the judicial authorities cannot be said to breach the principle of separation of powers enshrined by Articles 1, 26, 73 et seq. and 87 of the Constitution”<sup>26</sup>. Thus, when confronted with a discriminatory law, the Greek courts must exercise, in accordance with Articles 87 §§ 1 and 2, 93 § 4 and 120 § 2 of the Constitution, powers of review over the activities of the legislature and apply the principle of equality to the maximum extent possible and, on the

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<sup>24</sup> See section 105 of the Introductory Law to the Civil Code and Articles 57, 914 and 932 of the Civil Code.

<sup>25</sup> See Greek Supreme Administrative Court judgment no. 169/2010, and Athens Administrative Court of Appeal judgments nos. 743/2006, 3928/1992, 409/2007 and 6/2007.

<sup>26</sup> See, for the consistent and varied case-law on the extension of preferential treatment to groups of persons discriminated against, even when this has budgetary consequences, Greek Court of Cassation judgments nos. 1578/2008, 60/2002, 7/1995, 40/1990 and 3/1990; Supreme Administrative Court judgments nos. 3088/2007, 2180/2004 and 1467/1994; Athens Administrative Court of Appeal judgment no. 3717/1992; and Athens Administrative Court of First Instance judgment no. 10391/1990.

basis of that principle, apply the favourable regulation to the disadvantaged group of people<sup>27</sup>.

This legal avenue would have sufficed under the Convention. If the national courts were to restrict themselves to declaring the discriminatory provision to be unconstitutional or contrary to the Convention, without being able to extend the special favourable regulation to the individual who was the subject of the discrimination, the breach of the principle of equality would subsist and the judicial protection sought would be devoid of actual content. The Convention must be applied by the judiciary, regardless of the way in which the domestic legislative reform procedure evolves, since “[t]he freedom of choice allowed to a State as to the means of fulfilling its obligation under Article 53 cannot allow it to suspend the application of the Convention”<sup>28</sup>. In practice, national courts have to adopt the most Convention-friendly interpretation of the national law in order to comply with the international obligation to prevent a breach of the Convention<sup>29</sup>. In spite of this, the applicants did not even try to argue before the national courts that their case should be treated in accordance with the above-mentioned case-law.

### **The Convention obligation to review legislation incompatible with it**

Moreover, in cases in which harmonisation of the ordinary law at issue with the Constitution or the Convention required the intervention of the legislature, the necessary changes to the law have indeed been made in Greece. By way of example, after the pronouncement of judgment no. 867/1988 of the Greek Supreme Administrative Court, which held that the provisions of Article 65 of Legislative Decree 1400/1973 were incompatible with the provisions of Articles 2 § 1 and 4 § 1 of the Constitution and the provisions of Article 12 of the Convention, section 18(1) of Law 1848/1989 was enacted, abolishing the impugned provision. It is true that there is no explicit provision in Greek law which establishes the obligation to review legislation incompatible with the Constitution or the Convention. But in respect of legislation incompatible with the Convention, that obligation results from the Convention itself and its incorporation in the national legal order.

The obligation to prevent a violation of the Convention may warrant the adoption of general measures where there is no domestic legal framework compatible with the Convention<sup>30</sup> or the existing domestic legal framework

<sup>27</sup> See Greek Court of Cassation judgment no. 60/2002.

<sup>28</sup> *Vermeire v. Belgium*, 29 November 1991, § 26, Series A no. 214-C.

<sup>29</sup> See my separate opinion in *Fabris v. France* [GC], no. 16574/08, ECHR 2013 (extracts).

<sup>30</sup> *Malone v. the United Kingdom*, 2 August 1984, § 82, Series A no. 82; *X and Y v. the Netherlands*, 26 March 1985, § 27, Series A no. 91; see also, more recently, *Viașu v. Romania*, no. 75951/01, § 83, 9 December 2008; *Mandić and Jović v. Slovenia*,

or administrative practice is contrary to the Convention<sup>31</sup>. In some cases even the national Constitution may have to be amended, since the Convention “makes no distinction as to the type of rule or measure concerned and does not exclude any part of the member States’ ‘jurisdiction’ from scrutiny under the Convention”<sup>32</sup>. In fact, both the principle of the *effet utile* of the Convention and the principle of subsidiarity imply that any breaches of the Convention, including those perpetrated by the legislature, must be addressed at the national level as soon as they have been definitively established by the national courts. In the event of total inaction on the part of the legislature after a final judicial finding that a legal provision breached the Convention, a complaint based on the non-enforcement of a final court ruling can be raised under Article 6 of the Convention. Thus, Article 6 read in the light of the *effet utile* of the Convention and the principle of subsidiarity imposes on the States Parties an obligation to review any law or regulation when a final judicial finding of its non-compliance with the Convention has been reached at the national level. The applicants ignored this additional legal avenue<sup>33</sup>.

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nos. 5774/10 and 5985/10, § 128, 20 October 2011; and *Pulatlı v. Turkey*, no. 38665/07, § 39, 26 April 2011. The Court has also considered legislative developments subsequent to the alleged violations and criticised the insufficient nature of those developments (see, for example, *Odièvre v. France* [GC], no. 42326/98, §§ 15-17, ECHR 2003-III; *Brauer v. Germany*, no. 3545/04, § 24, 28 May 2009; and *Dumitru Popescu v. Romania (no. 2)*, no. 71525/01, §§ 82-84, 26 April 2007).

<sup>31</sup> *Dudgeon*, cited above, §§ 41 and 63; *Johnston and Others*, cited above, § 42; *Norris*, cited above, § 38; or *Manoussakis and Others v. Greece*, 26 September 1996, § 45, *Reports* 1996-IV. In some cases, the Court details with particular care the legislative measures to be taken (*M. and Others v. Bulgaria*, no. 41416/08, § 138, 26 July 2011). An administrative practice such as the practice of weekly routine strip-searches in a prison may also require general measures to be taken (see *Salah v. the Netherlands*, no. 8196/02, §§ 77-79, ECHR 2006-IX (extracts)). This is not an oddity of the European system of human rights protection. The Human Rights Committee has already recommended that legislation be amended in *Ballantyne, Davidson and McIntyre v. Canada*, communications nos. 359/1989 and 385/1989, 31 March 1993, paragraph 13, and in *Toonen v. Australia*, communication no. 488/1992, 31 March 1994, paragraph 10. In its General Comment no. 24, 2 November 1994, paragraph 17, the Committee rejected any exception to this obligation as contradictory to the Covenant’s purpose and object.

<sup>32</sup> *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, §§ 29-30, *Reports* 1998-I, and, even more explicitly, *Dumitru Popescu (no. 2)*, cited above, § 103. Not only the Court’s practice, but also the States Parties’ acceptance, confirm this understanding (see the constitutional amendments achieved following the judgment of 27 August 1991 in *Demicoli v. Malta*, Series A No. 210, and the subsequent Resolution DH (95) 211 of 11 September 1995; the judgment of 29 October 1992 in *Open Door and Dublin Well Woman v. Ireland*, Series A no. 246-A, and the subsequent Resolution DH (96) 368 of 26 June 1996; and the judgment of 23 October 1995 in *Palaoro v. Austria*, Series A no. 329-B, and the subsequent Resolution DH (96) 150 of 15 May 1996).

<sup>33</sup> The mere fact that doubts may exist in respect of the effectiveness of this remedy is not a valid reason for not pursuing it (*Akdivar and Others v. Turkey*, 16 September 1996, § 71, *Reports* 1996-IV).

Nonetheless, the Grand Chamber was prepared to embark on an examination of the Greek legislature's "primary" intentions above and beyond their "declared" ones (paragraph 87 of the judgment) and to criticise them, and did not refrain from dictating to the respondent State a legislative alternative (paragraph 89). After "pilot-judgment" procedures<sup>34</sup> and "Article 46 judgments" (or so-called "quasi-pilot judgments")<sup>35</sup>, the Grand Chamber has inaugurated a novel remedy in the present judgment, which posits a specific legislative solution to a social problem that has allegedly not been solved by the national legislator after the persons concerned have taken direct action before the Court. The Court is no longer a mere "negative legislator": it assumes the role of a supra-national "positive legislator" which intervenes directly in the face of a supposed legislative omission by a State Party.

### Conclusion

In view of all the foregoing, the applicants failed to use the remedies that would have enabled the Greek courts to examine their allegations of a violation of the Convention. Consequently, the Grand Chamber of the Court should not have addressed the merits of the case, which it did as a European Constitutional Court functioning as a "positive legislator" at the direct request of the persons concerned. Not even Hans Kelsen, the architect of the

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<sup>34</sup> See the ground-breaking case of *Broniowski v. Poland* ([GC], no. 31443/96, ECHR 2004-V), based on a "malfunctioning of Polish legislation and administrative practice". This procedure has been enshrined in Rule 61 of the Rules of Court. Recently, in *Ananyev and Others v. Russia* (nos. 42525/07 and 60800/08, 10 January 2012, §§ 191-240 and point 7 of the operative part), the Court raised the potential of this new procedure still further by ordering the presentation by the respondent State, within six months, of an action plan to implement a long list of preventive and compensatory measures stipulated by the Court.

<sup>35</sup> In "quasi-pilot judgments", the Court identifies systemic problems in the national legal system or practice which may be a source of repeated breaches of the Convention, but does not normally prescribe general measures in the operative part of the judgment. In some cases the Court has gone so far as to include these obligations in the operative part of the judgment, without any mention of the "pilot" nature of the judgment (see, for example, *Lukenda v. Slovenia*, no. 23032/02, § 98, ECHR 2005-X, and *Xenides-Zarestis v. Turkey*, no. 46347/99, § 40, 22 December 2005). In other cases, the obligation was included solely in the judgment's reasoning, without any reference in its operative part (see, for instance, *Hasan and Eylem Zengin v. Turkey*, no. 1448/04, § 84, 9 October 2007, and *Manole and Others v. Moldova*, no. 13936/02, § 117, ECHR 2009 (extracts)). The Court has also stipulated a deadline for the adoption of the necessary measures (see *Xenides-Arestis*, cited above, § 40, and *Burdov v. Russia* (no. 2), no. 33509/04, § 141, ECHR 2009), or affirmed their "urgency" (see *Ramadhi and Others v. Albania*, no. 38222/02, § 94, 13 November 2007). On one occasion, the Court even declared retrospectively as a "pilot" judgment a judgment which affected the admissibility of another application (see *İçyer v. Turkey* (dec.), no. 18888/02, § 67, ECHR 2006-I, referring to *Doğan and Others v. Turkey*, nos. 8803-8811/02, 8813/02 and 8815-8819/02, ECHR 2004-VI (extracts)).

concentrated constitutional judicial review system, would have dreamed that one day such a step would be taken in Europe.