Comments on the ECtHR decision of *VALLIANATOS & Others v. GREECE* *and on the progressive dilution of the notion of family life*

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Undertaking a direct control of the conventionality of a law reserving the conclusion of a "civil union" only to heterosexual couples, the Court concluded that there was a combined violation of Articles 14 and 8 of the Convention, which prohibit discrimination within the scope of private and family life. This is a decision that raises questions about the content of the idea of *family life*.

By a decision delivered on 7th November 2013 in the case of *Vallianatos & Others v. Greece* (applications no. 29381/09 and 32684/09), the Grand Chamber of the European Court of Human Rights judged to be discriminatory the fact that the ability to enter into a "civil union" was reserved to couples composed of a man and a woman to the exclusion of couples of the same sex. The Court, however, did not judge that the Convention would in itself oblige a State to offer the status of civil union to homosexual couples.

"Civil union" is a form of civil partnership established by law no. 3719/2008 relating to "*Reforms concerning the family, children and society*". This union establishes a presumption of paternity and resolves a number of questions relating to parental authority, the surnames of the contracting parties and their children, as well as the financial relations between partners. It also anticipates the case of the death of one of the contracting parties; the survivor has a right to a portion of the estate.

Without having previously brought the case before a national court, four same-sex couples brought this case directly before the ECtHR. They primarily complained of the fact that civil union was reserved to couples of the opposite sex and so infringed on their right to private and family life and brought about an unjustified discrimination on the basis of their sexual orientation in violation of Articles 14 and 8 combined of the Convention.

The applicants were represented and supported before the Court by several NGOs acting as third party interveners. The case was brought before the Grand Chamber following the relinquishment of jurisdiction by the First Section of the Court to whom the case had

been initially attributed, a sign that the Court wished to confer a particular authority to its decision.

This judgment, which is in line with the decision of *Schalk and Kopf v. Austria* (no. 30141/04, 24.06.2010), was delivered shortly after the Grand Chamber judgment of *X & Others. v. Austria* (no. 19010 /07, 19/02/2013), and with the Grand Chamber decision of *H. v. Finland* (no. 37359 /09) also pending. Within a few months, the Strasbourg Court will thus decide on a series of cases affirming the rights of LGBT people in the family sphere.

In the *Vallianatos* case, the fact that the Court found the Greek law discriminatory is not a surprise as the Court judges severely any difference in treatment due to sexual orientation. The fundamental interest of this case lies in the fact that it raises two questions. The first relates to the current trend of the Court to judge the conventionality of national laws at first and last instance (I). The second focuses on the loss of specific content of "family life" guaranteed by Article 8 (II).

I. The censure of a discriminatory law

A. On the admissibility – a control of the conventionality of a Greek law

The first question that was posed involved the determination of the existence of damage. Can the applicants claim to be victims? According to the Government, the applicants did not suffer "*direct and immediate adverse consequences as a result of their inability to enter into a civil union"* (§ 37) because, firstly, they were not affected by the provisions of the agreement relating to children, and secondly, they were free to create between themselves mutual commitments identical to those organised by the law. The Court rejected this argument, holding that the fact that the applicant couples were excluded from the scope of the law was in itself sufficient to establish damage and a legitimate personal interest in questioning the contested law, thus conferring on them the quality of indirect victims (§ 49). Hence, the exclusion of a category of person from the field of application of a law is sufficient to confer on them the status of a potential victim.

The status of victim having been established, the question arose as to whether the applicants were required to exhaust all domestic remedies, pursuant to Article 35 which assures the subsidiary nature of international supervision by the Court. In this case, the applicants did not consider it necessary to bring the case before the national courts on the grounds that these did not offer them an effective remedy. Case law acknowledges that the rule of exhaustion of all domestic remedies is not absolute and that only available and effective remedies must be used.

Having the burden of proving the quality of domestic remedies, the Government stated that the applicants could have indirectly challenged the constitutionality of law no. 3719/2008, in connection with an action for damages for a tort of negligence committed by the State due to non-compliance with Articles 8 and 14 of the Convention. Conversely, the Court held that, even assuming that the action would lead to a conviction of the State, it was not likely to impose on it a legal obligation to change the law in question, that which would be the only solution likely to remedy the applicants' complaints. However, it is necessary to note the very detailed dissenting opinion of the Portuguese judge who seems to demonstrate the quality of the domestic remedies.

This point deserves to be underlined because it reflects a growing tendency by the Court to exercise direct control over the conventionality of national laws, particularly on social issues. This case can be compared to the cases of *Costa and Pavan v. Italy* (no. 54270/10, 28.08.2012) and *A. B. and C. v. Ireland* (No. 25579 /05, 16.12.2010) in which the Court censured Italian law on assisted reproduction and Irish law on abortion. Just as in the judgment of *Vallianatos* (§ 84), the Court not only noted the violation, but also indicated in detail that which, according to the Court, should constitute national legislation, thus assuming the role of "positive legislator" according to the expression of the Portuguese judge in his dissenting opinion. Soon, the Grand Chamber will also decide on the conventionality of law no. 2010-1192 of 11.10.2010 prohibiting the concealment of the face in public spaces, having been called upon directly by an applicant (*SAS v. France*, No. 43835/11).

It should also be noted that these cases (at least *Costa and Pavan*, *A. B and C*. and *Vallianatos*) have in common the fact that they have been conceived to a great extent by NGOs in the scope of "*strategic litigations*". This trend is likely to favour the establishment of an American style system of "*pick and choose*", evidenced by the refusal by the Court to rule on the case *League of Muslims in Switzerland & Others. v. Switzerland* (no. 66274/09, 28.06.2011) involving the conventionality of the constitutional ban on minarets, even though the applicants were obviously deprived of effective internal remedies.

B. On the subject-matter: the confirmation of the principle of equality between homosexual and heterosexual couples

It is by invoking the autonomous nature of the principle of non-discrimination guaranteed by Article 14 of the Convention, combined with Article 8, that the applicants have taken a case to the Court. Therefore, the Court was not called to judge whether the Convention obliges Greece to give a status to homosexual couples under respect for private and family life, but only whether the fact of reserving this option to male-female couples is, in itself, an unjustified discrimination.

According to the case law of the Court, for a question to be raised as regards Article 14, there must be a difference in treatment between persons or groups which are placed in comparable situations. Such a difference is discriminatory if it is not based on an objective justification; that is if it does not pursue a legitimate goal or if there is no reasonable relationship of proportionality between the methods employed and the end goal. The Court states, with particular reference to the case *X and Others* § 99, that "*differences motivated solely by considerations of sexual orientation are unacceptable under the Convention*" (§ 77). Differences in treatment must be justified by considerations which are not related directly to sexual orientation, but by "*particularly convincing and weighty reasons*" (*X and Others*, § 99), knowing that the margin of appreciation of States is narrow in this area *(Karner v. Austria* no. 40016/98 of 24.07.2003, § 41).

According to the Greek Government, the situation of the applicant couples is not comparable to that of the persons affected by the law at issue, and consequently there is no discrimination. Indeed, they argue that the legislative intent was to protect children born out of wedlock, by offering them and their parents a protective legal framework as an alternative to the institution of marriage. This is why the "civil union" was reserved for couples living a shared life, with children or with the possibility of having them. This

is not the case for the four applicant couples, which explains why they are not included within the scope of the law.

Also on this point, the Court followed the applicants' arguments, noting that a same-sex couple, even without children, can lead a *family life* for the purposes of Article 8. Accordingly, the Court considers that the applicants maintain a relationship which in this case falls under the notion of "private life" as well as that of "family life" in the same way as that of a difference-sex couple in the same position (§ 73). The *Vallianatos* judgment adds to previous case law, with the new precision that it is not necessary for a couple to cohabit in order to lead a family life (§ 49).

In considering that the applicants are in a similar situation to that of heterosexual couples, the court appreciated the two main arguments raised by the Government, namely that same-sex couples can, within the scope of their private life, through a contract and testament undertake the same commitments between adults as those included in Civil Union, and that Civil Union seeks to protect families. The Court dismissed these arguments one after another, as was called for by the applicants and intervening third parties. Against the first argument, the Court put forward the idea that the ability of the applicants to act by contract does not allow them to benefit from "*having their relationship officially recognised by the State*" because the possibility of a civil union provides them with *"the only opportunity available to them under Greek law of formalising their relationship by conferring on it a legal status recognised by the State*" (§ 81).

Against the second argument the Court judged 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"* (§ 87), and not at the legal protection of children born outside of marriage and of their parents

The Court stated in passing, in an *obiter dictum* intended for national legislators, that even when the State intends to "*protect the family in the traditional sense*," as in this case, it must choose measures "*tak[ing] 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*" (§ 84). The Court did not specify whether it is referring to the evolution of Greek society or to its own perception of social issues and the evolution of European society.

Finally, it is only *"in addition"* that the Court referred to comparative European law, noting a trend in favour of the legal recognition of relationships between persons of the same sex in a context still marked by an absence of consensus (§ 91).

It follows therefore that it is without legitimate reason that Greece excluded same-sex couples from the scope of application of the law and it violated Article 14 combined with Article 8 of the Convention.

II. A decision that reflects the evolution of the concept of *family life*

There is no doubt that this case involves the opposition of two different conceptions of family and society. The Greek Government has a traditional view of the relationship between the family unit and society. On the other hand, the Court has adopted a new conception of this relationship which focuses primarily on subjective rights and the

individual. This difference in approach is reflected in the refusal of the Court to believe that Greece acted firstly to protect children and not to grant *official recognition* to adults with stable emotional relationship who do not want to get married. Finally, the damage caused by the discrimination is the denial of "*official recognition*" of the relationship of the applicants, which, besides the legal elements, possesses a social and symbolic value, which cannot be obtained through a contract, which is in the sphere of private life.

A. LGBT rights: of privacy in family life

The debate as to the purpose of the contentious law is symptomatic of one on the social recognition of couples and families, and the relationship between "private life" and "family life" the respect for which is guaranteed under the same provision.

The Convention protects "*private and family life*" in the same provision (Article 8), as well as the home and correspondence, but the Court has progressively distinguished the protection of private life from that of family life. *Private life* is a broad concept that does not lend itself to an exhaustive definition. Essentially the goal of its protection is to protect the individual against arbitrary interference by public authorities and it may in addition create positive obligations inherent in an effective "*respect*" for private life (*Olsson v. Sweden*, No. 10465/83, 24.03.1988). *Protection of family life* focuses mainly on the relationships between children and their parents. According to the traditional case law of the Court, the right to respect for family life "*presupposes the existence of a family"* (*Marckx v. Belgium*, no. 6833/74, 13.06.1979, § 31) or of a potential relationship that could be developed, for example, between a natural father and a child born out of wedlock (*Nylund v. Finland*, No. 27110/95). In its traditional case law, the Court considered that in the absence of marriage it is the existence of a child which was constitutive of family life (*Johnston v. Ireland,* No. 9697/82, 18.12.1986). Unmarried couples without children could not claim the benefits of the protection afforded to families (*Elsholz v. Germany* [GC], no. 25735/94, 13.07.2000).

As was solemnly stated in various international instruments, the family is recognised and protected as a "*fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children"* (Preamble to the Convention on the Rights of the Child). The protection does not target the couple but the family which "*is entitled to protection by society and the State*" (Article 16§3 of the Universal Declaration of Human Rights and 23§1 of the International Covenant on Civil and Political Rights) "*while it is responsible for the care and education of dependent children*" (Article 10§1 of the International Covenant on Economic, Social and Cultural Rights). The recognition given by society to the couple stems from its contribution to the common good through the founding of a family and not from feelings, which are part of private life. The Court has long upheld this natural understanding of the relationship between family and society. However, the evolution of morality has lead to the reconstruction of this relationship. The history of the case law on "LGBT rights" is in part the story of the passage from protection under private life to protection under family life.

After having accepted the criminalisation of homosexual relations (*inter multis* dec Com.EDH No. 104/55 of 17.12.1955, No. 7215/75 of 07.07.1977), the Court considered that these relationships ultimately should be ignored by law and related to the protection afforded to private life. It has thus censured the interference of the State, consisting in particular of the criminalisation of homosexual relations between adults

(*Dudgeon v. UK*, No. 7525/76, 22.10.1981). It is only by combining it with the principle of non-discrimination, in comparison with heterosexual persons or couples that the invocation of the protection of private life helps promote gay rights. It was thus used, for example, in the allocation of parental authority (*da Silva Muta v. Portugal* No. 33290/96, 21.12.1999) or in the authorisation to adopt children (*Fretté v. France,* No. 36515/97, 26.02.2002). In the case of *Kerkhoven and Hinke v. Netherlands* (no. 15666/89, 19.05.1992), the Commission refused to equate a stable relationship between two women and a child born to one of them to family life, granting this relationship only the protection of private life. In the case of *Schalk and Kopf* however, the Court changed its position, stating that homosexual relationships exceeded the scope of private life and warranted public recognition, no longer in the punitive aspect, but as a legitimate family lifestyle. Having regard to the legislative developments in Europe, the Court held in effect that the relationship of a "*cohabiting same-sex couple living in a stable de facto partnership" "falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would* (§ 94)" and not only in the field of private life.

Until the *Vallianatos* decision, the stable cohabitation of the couple was enough to establish family life. With this judgment, cohabitation is no longer necessary since "*individuals of full age, who, (…) are in same-sex relationships and in some cases cohabit*" also lead a family life (§ 49). It is true that the Court has never considered cohabitation necessary, but only if the spouses were married or divorced, or if there was a child, because it is marriage or the child which establishes family life.

This development was initiated by *Goodwin v. United Kingdom* (no. 28957/95, 11.07.2002) in which the Court held that the right to marry exists independently, irrespective of the family. The Court has thus abandoned the idea according to which marriage is the form and the family is the substance, of a unique "*right to marry and to found a family*." Marriage has become a substantial asset and a right in itself, by its social and symbolic dimension, regardless of its first concrete purpose as considered by the law.

Having established the principle of equivalence under the protection of family life between a same-sex couple without children and a biological family, the Court draws the consequences of this: in *Schalk and Kopf* and *Vallianatos* concerning the legal recognition and protection of the relationship, in the case of *X and others* in relation to the ability to raise a child. The *Vallianatos* case is an application of this egalitarian logic which considers the biological differences between a same-sex couple and a biological family as a difference of sexual orientation unable to justify, in itself, a difference of treatment (*X and other* §146).

B. A *family life* without objective content

Finally, at this stage of the evolution of the case law, what is the content of *family life* under Article 8? Do we know yet? Family life requires neither public engagement, nor the presence of a child, nor even cohabitation in order to exist. As for feelings, the law has always ignored them. They fall under the scope of private, not family, life just like consensual sexual relations between adults (except in special cases). As for the stability

of the relationship (*Vallianatos*, § 73), it is a relatively strong criterion. Two related cases reinforce this analysis.

In the case of *Burden v. United Kingdom* (no. 13378 /05, 29.04.2008), the situation of two unmarried sisters who had always lived together was compared to that of other same-sex couples, the former not being allowed to enter into a civil partnership and benefit from the exemptions in the area of inheritance law attached thereto. Without having determined whether the sisters led a family life the majority of the Court held the situations to be non-comparable because partnership is forbidden for "*persons who have close family relations*" (§ 62). The Court added: "*Rather than the length or the supportive nature of the relationship, what is determinative is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature"* (§ 65). Yet the sisters complained of precisely the same thing as in the *Vallianatos* case: not having access to partnership for an unjustified reason, and the Court did not say what in the facts justified this difference. We can retain from this case that "*the length or the supportive nature of the relationship*" is not determinative.

While in the *Burden* case the Court did not mention sexuality, the Court did so in the case of *Stübing v. Germany* (no. 43547/08, 12.04.2012) in refusing to recognise that a brother and sister living with their four children, could claim the protection granted to family life, on the grounds of the European consensus condemning incestuous relations (§ 61).

Finally, since we have renounced marriage or the presence of a child as a criterion of family life, it seems to be difficult to establish other objective, and therefore non-arbitrary, criteria. Several dissenting judges have substantially criticised the *Burden* decision as being arbitrary because it is purely positivist. But who decides the existence of a family life if the facts are not decisive? Is it the judge, the law or the people involved in the relationship? If the decision belongs to the judge and the law, it will therefore be contingent and relative to cultural developments.

In addition, any person claiming to lead a family life could assess as arbitrary their inability to enter into a civil partnership. Thus, the Greek law does not allow more than two people to contract even thought the Court has recognised that a polygamous family leads a family life (*Serife Yigit v. Turkey*, No. 3976/05, 2.11.2010, § 90). Similarly, several European countries reserve civil partnership to same-sex couples (*Vallianatos,* § 69), thus creating a new type of discrimination. This process of social reorganisation is clearly not finished.

Finally, Article 12 of the Convention which reserves to a man and a woman "*the right to marry and to found a family*" must appear increasingly outdated to the Court, as a naturalistic stain in the middle of Convention which has become subjectivist, as a discrimination inherited from the late 1940s.