THIRD PARTY OBSERVATIONS

submitted to

the European Court of Human Rights

in the cases of

***Orlandi & others v. Italy* (no. 26431/12…)**
and
Oliari & A. v. Italy and Felicetti & others v. Italy
(no. 36030/11 18766/11)

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Must every couple leading a family life, without discrimination based on its sexual composition, be able to obtain official recognition of their relationship from the moment when recognition is offered to certain couples through marriage? A positive response implies a double similarity: on the one hand between marriage and civil partnership, and on the other between male-female couples and homosexual couples.
A finding of discrimination would oblige the European States which do not allow gay marriage to offer an alternative status, similar to marriage, to same-sex couples such as civil union. If the Court establishes such a right for couples and such an obligation for States, the next step will be the elevating of the rights associated with this partnership to the level of those associated with marriage, notably in the area of procreation. Finally, these two statuses will be distinguishable less by rights than by obligations which will perhaps remain greater in marriage (notably regarding the absence of a right to divorce).

Before addressing the question of the existence of a Convention obligation to grant a legal status or to publicly recognise *de facto* couples (II), these observations will firstly briefly focus on the claim of a right to marriage (I).

I. Absence of a Convention right to marriage for same-sex couples (Article 12)

The absence of a Convention right to marriage for same-sex couples is clearly established and cannot reasonably be debated (A). Similarly, "marriage between persons of the same sex" is not part of European public policy. Italy cannot, therefore, be forced to give effect to marriages legally concluded abroad which are contrary to its public policy (B).

A. Non-applicability of the right to marry and found a family to same-sex couples

The applicants' situation does not fall within the scope of Article 12. The applicants are excluded from the scope of this Article as the Convention guarantee of the "right to marry and found a family" is reserved only to couples consisting of a man and a woman. Italy does not have to justify its decision not to deviate from the definition of marriage contained within the Convention itself and in other international instruments on the protection of human rights as the Convention explicitly provides that the exercise of this right is governed by national law.

Nevertheless, it should be remembered, as this is often lost from sight, that "*Article 12 refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 is mainly concerned to protect marriage as the basis of the family."*[1] The right to marry was not conceived as an autonomous and subjective right or as an individual freedom. The right to marry is almost incidental to that of founding a family: it is an instrument at its service. It appears thus in all the declarations of rights within which marriage and founding a family are one and the same right. Thus Article 16 of the Universal Declaration of Human Rights states that "*Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family."* Similarly, the European Convention on Human Rights guarantees for men and women "the right

[1] *Sheffield & Horsham v. United Kingdom*, 22985/93 and 23390/94, [GC] decision of 30 July 1998 § 66.

to marry and found a family" (and not the rights) and the International Covenant on Civil and Political Rights (1966) sets down in Article 23.2 that "*The right of men and women of marriageable age to marry and to found a family shall be recognised."*
This wording shows that marriage is "*an institution which forms a part of society*"[2] at the service of the family: marriage is an instrument which serves the end goal of the family. Thus, the conditions and impediments to marriage are not arbitrary but are the consequences of the ultimate aim of marriage. These conditions are, above all, natural: they concern marriageable age, that is the ability to procreate; the difference of sex of the spouses, which is also a condition of procreation; and consanguinity, which is a barrier to healthy procreation.

B. The absence of a Convention obligation to give effect to marriages legally conducted abroad and contrary to Italian public policy

Marriage between persons of the same sex is incompatible with the Italian legal order. Even the existence of such a marriage is impossible under Italian law. The application of foreign law, through the registration of marriages concluded abroad between persons of the same sex, is therefore inadmissible as the content of such a law is completely at variance with the fundamental concepts of the Italian legal order. A national judge can invoke international public policy as this "*implies an absence of legal community between the law which is normally relevant and the law of the jurisdiction.*"[3] It is therefore legitimate for an Italian judge to dismiss the normal rules of private international law, by invoking public policy in order to refuse the registration of such marriages.

"*In principle, the content of public policy is freely determined by the State in which the effectiveness of the foreign norm is in question. It is the State, and it alone, which will determine the fundamental values which it is not ready to see challenged by a designated foreign law.*"[4] It is therefore not for one State to claim the imposition of its norms on another. This is so even if several States, having decided to change the definition and nature of marriage, have begun to promote their new conception by overturning the rules of private international law. It is the national law of the spouses which applies in principle to the marriage. However, several States have unilaterally decided to unite foreigners of the same sex, or one of their nationals with a foreigner, even if this was contrary to the national law of the foreigner. In this way they want to impose their ideas on other States. However, "*the rules of private international law are not tools to export internal political choices onto an international level.*"[5]

It is for each State to determine its public policy. However, there exist norms which form a European public policy and which are either imposed directly on States, or serve as targets in order to verify that, in their invocation of public policy, these States respect their international commitments. The Luxembourg Court has thus affirmed that "*while it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition of a judgment emanating from another Contracting State.*"[6] The principal instrument of European public policy is certainly the

[2] *Jolie v. Belgium*, no. 11418/85, decision of the Commission, 14 May 1986.
[3] Loussouarn, Bourel & Vareilles-Sommières, *Droit international privé,* Précis Dalloz 10e édition 2013 p. 363 (Précis Dalloz).
[4] Précis Dalloz p. 370. (unofficial translation)
[5] A. BOICHE, « Aspects de droit international privé », *AJ Famille*, 2013, p. 362, cited by Gaëtan Escudey, "Le mariage homosexuel et le « nouvel ordre public international » : un surprenant changement de paradigme ! A propos de l'arrêt de la Cour d'appel de Chambéry du 22 octobre 2013", Revue des droits et libertés fondamentaux http://rdlf.upmf-grenoble.fr/?p=4612. (text unavailable in English)
[6] CJEC, 11 May 2000, *Régie Nationale des Usines Renault SA v. Maxicar SpA,* Case C-38/98.

European Convention on Human Rights. However, it is evident that the text of Article 12 envisages marriage only as the union of a man and a woman, as the Court highlighted in the decision of *Schalk & Kopf v. Austria*. Even if the Convention does not prevent States who wish to change the definition of marriage from doing so, the Court reiterated firmly in the decision of *Schalk & Kopf* "*that the Convention is to be read as a whole and its Articles should therefore be construed in harmony with one another. Having regard to the conclusion reached above, namely that Article 12 does not impose an obligation on Contracting States to grant same-sex couples access to marriage, Article 14 taken in conjunction with Article 8, a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation either*" (§ 101).

As no right to marriage between persons of the same sex exists within the Convention, it is clear that marriage between persons of the same sex is not part of European public policy. Therefore, there is nothing to prevent an Italian judge from invoking public policy in order to refuse to register marriages that are incompatible with the Italian legal order.

To oblige a State to recognise a marriage conducted abroad contrary to its public policy would be to force them to recognise these marriages within their legal order. Its nationals merely have to cross the border to marry and thus present the authorities with a *fait accompli*. The brevity of the stays abroad of certain applicants seems to indicate that they acted in this way, in a form of "marital tourism". To oblige a State to give effect to these marriages would be contrary to the letter and spirit of the Convention, as well as the case-law of the Court. If the Court adopted such a position, it would exceed its jurisdiction and seriously weaken its authority.

Public policy demonstrates the fundamental values of a country, those which create its civilisation. Marriage between a man and a woman is a part of these values in the majority of European countries. Although marriage is governed by the national law of the spouses, Italy generally agrees to recognise the unions of its nationals conducted abroad. Yet it is necessary that these unions are not fundamentally incompatible with the Italian legal order. Thus, an Italian who would go to a country which accepts polygamy in order to marry several women could not have these marriages registered, no more than a brother and a sister who would get married abroad, supposing that a country allowed incestuous marriages. Marriage with a child, or between two children, where it is legal abroad would not be recognised either. Public policy would be invoked in order to dismiss the foreign law as such marriages would be incompatible with the Italian legal order. It is the same for marriage between persons of the same sex.

These matters do not pose a difficulty in terms of Article 12. They pose more of a problem in terms of Articles 8 and 14 regarding the invocation of a right to official recognition of relationships between homosexual persons.

II. The absence of a Convention obligation to grant a legal status or to publicly recognise *de facto* couples

In the recent decision of *Vallianatos*, the Court recognised the interest of same-sex couples to have "*their relationship officially recognised by the State*" (§ 81). In considering this, the Court found that "*same-sex couples are just as capable as different-sex couples of entering into stable committed relationship*" (§ 81). Consequently, the interest of these couples is "*to have their relationship legally recognised*" (§90). This is a component of their private and family life which is guaranteed by Article 8 of the Convention.
In the *Vallianatos* decision, the Court did not rule that a State has a positive obligation under Article 8 to offer official recognition to homosexual couples (§ 74). However, it does have a

particular obligation regarding the principle of non-discrimination (Art. 14), from the moment when it offers such a recognition, other than marriage, to different sex couples.

If the Court upholds its *Vallianatos* case-law it cannot condemn Italy.

The Court is presented with two options if it wishes to condemn Italy:

- Either it considers that Article 8 contains in itself an autonomous Convention right to official recognition of persons leading a family life (A);
- Or it rejects or does not rule on the existence of such an autonomous Convention right, but nevertheless considers that Article 14 combined with Article 8 is applicable (B).

This second option, which seems less far removed from the *Vallianatos* decision, is subject to two conditions:

1. That the Court maintains its view that it is the stability of the emotional relationship which, in the eyes of the State, must be the criterion that constitutes the existence of a couple and family life;
2. That the Court considers that marriage and civil partnership are equivalent or similar.

A. The absence of a positive obligation to publicly recognise unmarried couples

Article 8 protects existing family life but does not require the State to offer an institutional legal framework other than marriage to those leading a family life. The *protection of family life* focuses primarily on the relationship between children and their parents. The right to respect for family life "*presupposes the existence of a family*"[7] or, at the very least, the existence of a relationship which has the potential to develop, for example, between a natural father and a child born out of wedlock.[8] Until the decision of *Schalk & Kopf v. Austria*[9], the Court considered that in the absence of marriage, it was the existence of a child that would be constitutive of family life.[10] An unmarried couple without a child could therefore not claim to benefit from the protection afforded to families.[11]

This case-law conformed to international law and the spirit of the Convention. Indeed, marriage is a legal framework conducive to founding a family. As indicated by the wording of Article 12, marriage and the family are inter-related because the right to found a family is part of the right to marry and is not a separate right.

As was solemnly stated in various international instruments, the family is recognised and protected "*as the 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 is not aimed at the couple but at the family which "*is entitled to protection by society and the State*"[12] "*while it is responsible for the care and education of dependent children.*"[13] The recognition granted by society to the couple in fact results from its contribution to the common good by the foundation of a family. It is not as a result of the existence of feelings between the persons constituting the couple, these normally being a matter of private life. Thus, for example, the tax system for married couples is a return for their investment, including their financial contribution, to the future of society.

[7] *Marckx v. Belgium*, no. 6833/74, 13.06.1979, §31.
[8] *Nylund v. Finland*, no. 27110/95.
[9] *Schalk & Kopf v. Austria,* no. 30141/04, 24.06.2010.
[10] *Johnston v. Ireland*, no. 9697/82, 18.12.1986.
[11] *Elsholz v. Germany* [GC], no. 25735/94, 13.07.2000.
[12] Articles 16§3 of the Universal Declaration of Human Rights and 23§1 of the International Covenant on Civil and Political Rights.
[13] Article 10§1 of the International Covenant on Economic, Social and Cultural Rights.

The existence, recognised by the Court (and even also by the national authorities) of a "family life" entails an obligation for the State to respect this family life within the limits flowing from Article 8§2. These limits justify the refusal of a State to grant public recognition to certain forms of "family life", such as those led within polygamous or incestuous families. Until the decision of *Schalk & Kopf* a homosexual relationship came under Article 8 from the point of view of private life and not family life as a homosexual couple could not naturally found a family.
This being so, it is unreasonable to interpret the notion of "respect" as going so far as to oblige a society to change its foundations, its fundamental unit being the family. Article 8 does not include the right to have a stable relationship recognised by the State. It is not "*possible to derive from Article 8 an obligation … to establish for unmarried couples a status analogous to that of married couples.* [14] In countries which do not allow same-sex couples to marry, the Convention does not give these couples the right to gain access to a legal status. Only the national legislature can decide to do this. Recommendation CM/Rec (2010) 5 of the Committee of Ministers *on measures to combat discrimination on grounds of sexual orientation or gender identity* does not recommend such a solution. It is therefore impossible to say that the High Contracting Parties have expressed their consent to this obligation by the adoption of this recommendation. On the contrary, during the work of the Committee of Experts, who were the authors of the draft recommendation, the States deliberately refused to recommend the adoption of a legal status for non-married couples. The recommendation settled for this invitation: "*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.*"

Interpreting a Convention does not follow the prevailing wind

The mission of the Court is "*To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto*" (Article 19). It is an international court that ensures the respect of a treaty. Even if it is appropriate to interpret the Convention in light of current circumstances, these circumstances only provide guidance and cannot be substituted in place of the Convention as the principal point of reference. Otherwise, the mission of the Court would be transformed, particularly regarding social issues, into an instrument of the ideological updating of national legislation. This path would lead far beyond its jurisdiction.
In *Vallianatos*, the Court confirmed that when a European State legislates as regards the family, regarding "*its choice of means …* [it] *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*" (*Vallianatos* § 84). The Court thus makes sure that European States adapt their legislation in line with the evolution of morals, as this is perceived by the majority of judges. Does this respect the sovereignty of States? Furthermore, is it wise? To interpret the Convention in accordance with the rights of the Convention is a form of security for the Court itself. The mission of the ECtHR is in large part to verify that the superior national courts respect the Convention as they are often influenced by political factors. But if the Court itself comes to behave as a mere Constitutional Court, the guarantees of the Convention shall be no more certain than those contained within national Constitutions. The protection of human rights in Europe will depend less on the text of the Convention and its Protocols than on the contingent composition of the Court. Can we really believe that this would be progress? The immediate progress of a cause should not be realised at the expense of the instruments that protect human rights. Decisions such

[14] *Johnston & others v. Ireland*, 18 December 1986, § 68.

as *X & others v. Austria* or *Gross v. Switzerland* (on assisted suicide) which were adopted by ten votes to seven and four votes to three respectively, on highly controversial subjects with disputed interpretations certainly please a portion of Western public opinion but weakens the system of protection of human rights in Europe.

Furthermore, this approach lacks coherence, and the Court can be accused of lacking sincerity. Indeed, if the legislature must take into account the evolution of society, the European legislators must also take into account the requests of the legalisation of polygamy and marriage for minor girls. In Turkey, but also in Switzerland, Belgium and in the United Kingdom, there are many more practicing Muslims than same-sex couples and this trend will increase. On what grounds is consenting homosexuality more acceptable than consenting polygamy? The Court has already recognised that a polygamous family leads family life (*Serife Yigit v. Turkey*, no. 3976/05, 2.11.2010, §90). Why refuse to some that which is given to others, since all reference to a conjugal family as a social norm has been rejected.

More generally, the prudent thing is surely not to force States at the cost of an extensive and *ultra vires* interpretation of the Convention. Just as the Court should not replace national authorities when it considers a case, it should not, furthermore, replace the High Contracting Parties. One must keep in mind that it is open to the High Contracting Parties to draft an additional protocol to the Convention relating to sexual orientation in the spirit of Recommendation CM/Rec (2010) 5. The abolition of the death penalty in Europe was carried out by means of the Convention.

Comparative Law

Until recently, it was not necessary to specify that the right to marriage exclusively benefits couples comprised of a man and a woman. It is nevertheless explicitly stated in the European Convention on Human Rights, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights of 1966. A large number of international treaties also concern the relations of men and women as spouses such as the Convention on the Nationality of married women of 1957.

The United Nations Human Right Committee has held that the right to marry and to found a family guaranteed by Article 23 § 2 of the ICCPR must be understood as being deliberately and exclusively reserved for men and women, because it is "*the only substantive provision in the Covenant which defines a right by using the term "men and women", rather than "every human being", "everyone" and "all persons*"[15] Furthermore, this Article "*has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.*"[16]

With regard to the Charter of Fundamental Rights, although it guarantees the right to marry "in accordance with national laws" (Article 9), without reference to the sex of the spouses, the Luxembourg Court has retained the definition of marriage by recalling that "*It is not in question that, according to the definition generally accepted by the Member States, the term 'marriage means a union between two persons of the opposite sex.*"[17]

To date in the Council of Europe 17 Member States (Andorra, Austria, Belgium, Czech Republic, Germany, Finland, France, Hungary, Iceland, Ireland, Liechtenstein, Luxembourg, the Netherlands, Slovenia, Spain, Switzerland and the UK) allow forms of civil partnerships for same-sex couples. Nine states, amongst which four have not established civil partnership, recognise marriage between persons of the same sex (Belgium, Denmark, France, Iceland, the

[15] *Ms. Juliet Joslin et al. v. New Zealand*, Communication No. 902/1999, U.N. Doc. A/57/40 at 214 (2002).
[16] *Ms. Juliet Joslin et al. v. New Zealand*, Communication No. 902/1999, U.N. Doc. A/57/40 at 214 (2002). §8.2
[17] *D and Kingdom of Sweden v Council of the European Union*, 31 May 2001, pt 34, Aff. C-122/99 et C-125/99, Rec. I, p. 4342 (Rev. trim. dr. h. 2002, p. 663, obs. C. Maubernard)

Netherlands, Norway, Portugal, Spain and Sweden). Therefore 21 out of 47 Member States, which is less than half, provide the possibility for same-sex couples to marry and/or enter into a civil partnership. Moreover, in several European States, the definition of marriage as a union between a man and a woman figures explicitly in their Constitution. It is so, for example, in Bulgaria, Croatia, Lithuania, Hungary, Moldova, and Poland. In most other States, Constitutions also protect marriage and the family, but the authors of the Constitution did not then consider it necessary to specify that marriage is a union between a man and a woman. Due to current circumstances, Hungary and Croatia have given Constitutional status to the definition of marriage, while Slovakia and Romania are currently preparing to do the same. In March 2012, a referendum in favour to the recognition of unions between homosexuals was rejected by the majority of voters in Slovenia. The same happened in Northern Ireland.

Italian law makes it possible to respond to certain needs of mutual support and assistance of same-sex couples

Assuming that the majority of judges consider that Article 8 now implies an obligation for the State to facilitate the organisation of the common life of *de facto* couples, who cannot or do not want to marry, the question then arises of the extent of this obligation. In other words, what is the extent of this obligation? What is the nature of this *official recognition* other than marriage? Two measures are possible: either the extent of this obligation is measured against the specific needs of couples and the interests of society, the legislature retaining a margin of appreciation (as shown in Recommendation CM 2010) or this obligation is measured in relation to marriage and then ultimately there is confusion.

If it is measured against the specific needs of couples and the interests of society, it is appropriate not to seek if there is an "institution" of the civil partnership type, but if the domestic law and practice provide solutions to the needs *de facto* couples, including same sex couples. Italian law provides such solutions on a legal and contractual basis:

By virtue of contractual freedom, *de facto* couples can give a legal character to their life in common by entering into a civil contract commonly called a pact or a cohabitation contract. Thus, they can establish communal rules for the shared household, shared expenses (nothing prevents a *de facto* couple from opening a joint account, for example), the cessation of cohabitation (and even to anticipate the payment of a compensation to one of the partners), the right of residence of one of the partners in the building that was previously the common home, the opportunity to acquire co-ownership of the building. Finally, on the initiative of the LGBT movement, the registers of civil unions between same-sex couples have been created since 1993 in some Italian cities (Empoli in 1993, Pisa in 1996, Cagliari, Milan, Florence, Turin and Naples in 2012 and Palermo in 2013). These registers aim to provide a symbolic and social dimension to the signing of contracts of common life. Also by virtue of contractual freedom, the partners can inherit by means of a will. The Courts have also provided rights for unmarried partners. By Decision No. 404/1988, the Italian Constitutional Court established that in the case of the death of the holder of a lease, the life partner has the right to succeed his partner. Law No. 6/2004 provides for the possibility for a partner to appoint other partner as a proxy, in the event of future incapacity. The right of the partner to receive information on the state of health of the deceased partner, despite opposition from the family of the latter, was recognised by the decision of 17 September 2009 of the *Guarantor of privacy*. By Decisions 8976/2005 and 12278/2011, the Court of Cassation decided that if one partner suffers injury or dies because of a wrongful act of a third party, the other partner may claim compensation for the damage caused by the wrongful act.

Finally, the law also provides rights for unmarried partners. The first legal provision dates back to 1918 and allows the partner to get a war pension.[18] Partners also have a right to mutual visits when one is in prison. The inmate can also leave prison to visit his sick partner. Finally, the Civil

[18] Decree no. 1726 of 27 October 1918

Code allows the judge to order the removal of a violent partner from the home of the *de facto* couple.

Such a requirement for recognition, supposing that it exists, does not mean that the State must establish a status for common life alternative to marriage, but that the State gives "*legal or other means to address the practical problems related to the social reality in which* [unmarried couples] *live*," according to the terms of Recommendation CM 2010 . The State may choose to maintain the monopoly of marriage as a status and institution of common life recognised publicly and endowed with specific rights and obligations, as well as a strong social and symbolic dimension. As the Court noted in *X and others v. Austria*, it "*has accepted that the protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment*" (§ 138). The rights and obligations specific to marriage may justify differences in treatment, in particular in terms of social benefits (including *Estevez v. Spain*, No. 56501 /00, Dec. 10 May 2001).

The margin of appreciation

The margin of appreciation only applies in the context of a convention obligation, or conditionally, in the context of a right only granted in domestic law that falls within the scope of the Convention. In this case, it would be appropriate to apply the doctrine of the margin of appreciation either if there was a convention obligation to grant legal status to unmarried couples which is not the case, or if Italy had voluntarily chosen to grant such a status, which is not the case either. In the latter case, the margin of appreciation would have applied in the context of the assessment of the legal framework in relation to convention requirements.

It should be noted that in this case, in the absence of an obligation, the margin of appreciation does not apply.

B. Absence of discrimination

Two conditions are necessary in order to be able to reasonably consider that the applicants' situation is similar to that of heterosexual married couples:

- Confusing sexual *orientation* and sexual *identity*;
- Considering that family life is established by feelings

Confusion between sexual orientation and sexual identity

A couple composed of two persons of the same sex and a couple composed of a man and a woman are neither identical, nor similar. They are not in the same situation either from a private, or public point of view, because their relationship is not naturally procreative.

What distinguishes them is not a difference of sexual *orientation*, but of sexual *identity*. It is a denial of reality and a fallacy to consider that the difference between a male-female couple and a same-sex couple is merely a difference of *sexual orientation*. It is to apply an abstract egalitarian logic that reduces the (objective) biological differences between a same-sex couple and a male-female couple to a simple (subjective) difference of sexual orientation which is unable to justify, in itself, a difference of treatment. Therefore, the reality of *sexual identity* is absorbed into the subjectivity of the concept of *sexual orientation*. It then becomes impossible to justify a difference in treatment based on sexual identity because objective, biological grounds for differences in treatment are wrongly presented as subjective grounds linked to a viewpoint on homosexuality. The principle of non-discrimination based on sexual *orientation* outweighs the prohibition to distinguish according to the sexual *identity* of the members of the couple. But in terms of family and filiation it is the sexual identity that matters, not the orientation.

It is true that the State should not be interested in the *sexual orientation* of individuals. In terms of family life, the State's interest focuses above all else on children. Their birth and well-being

are determined by the particular protective framework offered by the family and marriage. Children are the common good of the parents and society. It is true that if the Court, and in its wake the public authorities, refuse to put children at the heart of both the family and the protection granted by the State, then it is a different concept- no longer of family - but of interpersonal relationships that are substituted for it: a voluntarist and individualistic design. This conception is full of good intentions; it believes that what matters, and should be recognised by society, is above all else the feelings of individuals. However, feelings are nothing more than a mode of expression of individual will.

Family life is not a matter of feelings or stability

In the case of *Schalk and Kopf v. Austria* the Court ruled that homosexual relationships exceed the scope of private life and warrant public recognition as a legitimate family lifestyle. Given the legislative developments in Europe, the Court held 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). Such an assertion is political in nature and not legal. It does not flow from the Convention but from changing attitudes at a given moment in the history of the Court.

Since the decision of *Schalk and Kopf*, the stable cohabitation of a couple is enough to constitute family life, marriage and the presence of children no longer being necessary. With the *Vallianatos* case, cohabitation is no longer even necessary for the existence of family life as according to the Court, "*individuals of full age, who … are in same-sex relationships and in some cases cohabit*" also lead a family life (§ 49).

What then is the content of family life under Article 8? Do we still know, as now family life requires neither public engagement, nor the presence of a child, nor even cohabitation to exist. Is it the existence of feelings that characterises family life under Article 8 of the Convention? But the law has always ignored feelings, considering them to fall within the scope of private, and not family life, like sexual relations between consenting adults (except in special cases). Is it then the stability of the relationship (*Vallianatos*, § 73)? But this is a relatively strong criterion (which has not been applied in the cases of *Burden* and *Strübing*). The cases of *Burden v. UK*[19] and *Stübing v. Germany*[20] reinforce the loss of an objective definition of family and family life. Family which was for the drafters of the Convention a biological and institutional reality outside of the law, is now a flexible *notion* which can be extended to incoherence and arbitrarily defined by judges and legislators.[21] Finally, from the moment when we have renounced marriage or the presence of children as the criteria of family life, it is very difficult to establish other criteria which are objective and therefore not arbitrary. Several dissenting judges criticised the substance of the *Burden* decision as being arbitrary because it is purely positivist. What decides the existence of family life if the facts are not relevant? 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 be contingent on, and relative to, cultural evolution. Any person claiming to lead a family life can decide that his inability to enter into a civil union is arbitrary.

The Court, because it rejected the definition of family, is now in the awkward position of having to say in each case what is or is not a family, and whether that family lifestyle deserves the protection and recognition of society. According to which criteria?

The case law of the Court would be taken over romanticism if it continued to make "feelings" and "stability" the true test of family life. Family life is not a matter of feelings or stability. A broken and torn family remains a family as long as there are blood ties. It is not affection, nor stability nor the educational capacity of adults which create family life. It is only desirable that these qualities are present in families, just like in orphanages and educational institutions. Family

[19] *Burden v. United Kingdom*, no. 13378/05, 29.04.2008.

[20] *Stübing v. Germany*, no. 43547/08, 12.04.2012.

[21] Example of inconsistency which leads denial of biological reality: by guaranteeing the right to marry to transgender couples, but excluding same-sex couples, the Court introduced between couples of the same sex, a difference of treatment based on their sexual orientation and sexual identity...

is first and foremost created by conjugality, by the transmission of life, by the child. It is the birth of a child that really creates a family, even if that child is born of a brief relationship. Birth, and by extension adoption, create a family. It is by destiny, by virtue of its family purpose, that marriage constitutes a family. The wording of Article 12 and the suffering of infertile couples suffice to demonstrate this.

III. The social consequence of Civil Partnerships

The taste for equality is linked to empathy. Why refuse marriage or a similar status to people who ask for it insistently, even though this recognition could alleviate their discomfort and ease their daily life? Why maintain the "traditional family" as a model when it would bring suffering and "segregation". This model would also alienate, since it is linked to a biological conception of humanity. The grounds for opposing "gay marriage" are not to be sought in alleged homophobia, and neither is Article 12 of the Convention "homophobic". Other reasons related to the consequences of this radical change of the concept of family, justify the refusal to consider a conjugal family as equivalent to a stable homosexual relationship.

The consequences regarding reproduction and filiation

If the Court judges that the situation of a marriage between a man and a woman and that of two persons of the same sex who wish to marry is similar, then not only can it conclude that same-sex couples are discriminated against since sexual difference is reduced to a differing of sexual orientation, but beyond that, such a judgment will necessarily lead to the alignment of systems, especially in terms of parenthood, by applying the law and *X and others v. Austria*[22]. If the two situations are similar, all rights related to marriage must benefit, in principle, unmarried couples and differential treatment for reasons of the identity/sexual orientation of unmarried couples are also excluded.

In addition, the abandonment of sexual difference as the foundation of the family necessarily leads to the (fictional) abandonment of this difference as the basis for procreation. This means accepting medically assisted procreation for female couples and surrogacy for male couples. To separate the right to marry from that of founding a family is to render marriage theoretical and illusory as being able to start a family under the protection of society is the very essence of the right to marry. Can we say to two people: *you have the right to marry, or to officially unite, but not to start a family? Your right to marry is only formal?* However, children conceived by IVF or surrogacy for same-sex couples have been deliberately deprived of their father or mother. Thus a chain of consequences regarding reproduction and filiation that goes well beyond the social recognition of new forms of "family life" is created.

The relationship between society and the State

Furthermore, the relationship between the State and society is also involved in this issue. A State that claims to define that which is a family and what society should be is a totalitarian State. That is why the drafters of the Convention intended to protect families against the State, and not to entrust the State with the power to define family. According to the original thought of the drafters of the Convention and other great post-war works, the family humanly constitutes the society from which the State emanates, so it precedes the State which is at the service of society. According to the new conception, the family comes from the State. It is the State which, by its influence on society, redefines the family in accordance with the prevailing thought. This change in perspective demonstrates the modern rerouting of human rights theory: initially founded upon natural law humanism, it has today become a privileged instrument of the implementation of liberal individualism. Individualism which, by an ironic paradox, reinforces

[22] *X and Others v Austria*, no.19010/07, 19.02.2013

the State's hold over society in exchange for the promise of greater freedom for individuals.[23] The prevailing thought is derived from the individualist revolution, which believes that it is the individual, and no longer the family, who is the fundamental unit of an atomised society whose unity depends on the positive action of the State. In an individualistic and egalitarian "society", it is the State which establishes society and maintains cohesion. It is up to the State to cater for the demands of "official recognition", including for homosexual relationships, as if official recognition had the power to transform a homosexual relationship into a family in a society that remains, despite everything, a living, social body which predates the law. It is the generational and cultural vitality of families which ensures the existence of society, and not the will of the State.

It is this generational vitality and organic unity of society which are challenged by the breaking of the chain which links *sexual complementarity – procreation – family – society – State*.

[23] G. Puppinck, "The dilution of the family in human rights: Comments on Vallianatos and other ECHR cases on "family life", *EJIL Talk*, 25 mars 2014.