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Discrimination and Civil Partnerships: Taking Legal out of Legal Recognition

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1. Introduction

In November 2013, the European Court of Human Rights (hereinafter 'ECtHR' or 'Court') issued its first judgment on same-sex civil partnerships. In Vallianatos v Greece,[1] the Grand Chamber held that exclusion of same-sex couples from the domestic civil partnership scheme violated prohibition of discrimination on grounds of sexual orientation in the enjoyment of their right to personal and family life. Perhaps unsurprisingly the judgment spawned widespread disapproval in Greece. Days after its release, a leading bishop warned Greek MPs that whoever votes for legal recognition of same-sex partnerships will be excommunicated.[2] This cautionary statement typifies the quintessential attitude of the Greek-Orthodox Church towards homosexuality, which has been described as 'an insult to God and man; the most disgusting and unclean sin.'[3] Notwithstanding that religion should not be reasonably expected to guide the legislature of a liberal secular state, conservative MPs soon started to lobby against the amendment of the law.[4]

But what does the judgment mean for the rest of the contracting parties to the ECHR? Strong international commitment to the prohibition of discrimination on grounds of sexual orientation has arguably been well-established.[5] However, should the principle of equal treatment be read to include a state duty to official legal recognition of same-sex couples? If yes, what are the normative grounds of such a duty and – crucially – its boundaries? For

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[1] Vallianatos and Others v Greece, Application Nos 29381/09 and 32684/09, Merits, 7 November 2013.

[2] The bishop argued that the MPs 'risk incurring the wrath of God'. See eg Smith, 'Bishop threatens to excommunicate Greek MPs who vote for gay unions' The Guardian, 4 December 2013, available at http://www.theguardian.com/world/2013/dec/04/greek-bishop-threatens-excommunicate-gay-unions [last accessed 3 February 2014].

[3] Ibid.

[4] The opposition radical left party (SYRIZA), the moderate socialists (PASOK) and the social democrats (DIMAR) have stated that they will push forward the amendment of the law on civil unions but, given the current formulation of the Greek Parliament, they are going to need broader political support to succeed.

[5] See UN Human Rights Council Res 17/19, Human Rights, sexual orientation and gender identity, 14 July 2011, A/HRC/RES/17/19. On 26 July 2013, Navi Pillay, UN High Commissioner for Human Rights, launched a year-long public information campaign designed to raise awareness of homophobic and transphobic violence and discrimination, materials available at: https://www.unfe.org/. See also Parliamentary Assembly of the Council of Europe Res 1728, Discrimination on the basis of sexual orientation and gender identity, 29 April 2010.

instance, does it entail equal marital rights? Or, rather, could any form of official recognition for same-sex couples satisfy equal treatment? Those are some of the questions that this article shall attempt to answer in light of the Vallianatos case. It is argued that whereas the scope of the state duty of equal treatment remains sensitive to European consensus, exclusion of stable same-sex relationships from all forms of official legal recognition in cases where states already offer such recognition to comparable different-sex couples would now be incompatible with the Convention.[6]

The case is important for an additional reason. It incorporates a crucial principle into the equality jurisprudence of the Strasbourg court. That is, equal distribution of resources might no longer be sufficient to satisfy the right to equal respect for everyone's life choices where there is no form of official recognition of same-sex relationships. Vallianatos is thus symptomatic, it is argued, of a gradual interpretive transition from a formal towards a more substantive, asymmetrical conception of equality. On that account, the Court's argument that official recognition bears intrinsic value for same-sex couples regardless of its legal effects suggests that recognition should be understood as a state duty which is broader than strictly legal recognition through de facto partnerships or contracts (already an option under Greek law). This marks a non-distributional principle of social justice best understood as equal social inclusion of all groups. The judgment is therefore particularly important even for jurisdictions (such as the UK) that already provide official recognition to same-sex relationships.

2. The Facts and Arguments before the Court

In Vallianatos v Greece, the ECtHR considered a number of complaints by same-sex couples in stable long-term relationships, which were grouped under two (very similar) applications. The applications targeted Law no. 3719/2008 that introduced an alternative official form of partnership to marriage, known as 'civil unions'.[7] Under Section 1 of the law, only two adults of different sex may register a civil union. The official rationale of the law was to establish a legal framework for an additional and more flexible type of partnership compared to marriage. Although, initially, the new legal framework was planned to cover both different-sex and same-sex unions, eventually the government yielded to vehement objections from the conservative parts of the Greek society – fomented by the state Church

[6] Exclusion would also be of questionable compatibility with international human rights norms. As noted in the 2011 Report of the United Nations High Commissioner for Human Rights: 'lack of official recognition of same-sex relationships…can result in same-sex partners being discriminated against by private actors, including health-care providers and insurance companies'. See UN Human Rights Council, Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, Report of the United Nations High Commissioner for Human Rights, 17 November 2011, A/HRC/19/41 at paras 68 and 69. See also UN Office of the High Commissioner for Human Rights, Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law (New York and Geneva: United Nations 2012), available at http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf [last accessed 3 February 2014].

[7] In the following analysis the terms 'civil unions' and 'civil partnerships' will be used interchangeably to suggest an officially recognised non-marital relationship securing identical legal rights and duties to those arising from marriage.

officially proclaiming civil unions as 'prostitution'[8] – and ultimately reserved civil unions only for different-sex couples given that the 'demands and requirements of the Greek society [did] not justify going beyond this point.'[9] That choice was made in defiance of the National Human Rights Commission and the Scientific Council of the Greek Parliament whose reports emphasised the non-static nature of family life and underscored that lack of an objective and reasonable justification for a difference in treatment will constitute unlawful discrimination on grounds of sexual orientation.[10]

Before the Grand Chamber, the Greek government employed two main sets of arguments to justify exclusion of same-sex couples from the scope of civil union registration. First, they claimed that the provisions and goals of the civil union legislation were not relevant to same-sex couples. According to the relevance argument (as it shall be called hereafter) the introduction of civil unions as an alternative route for legal recognition of different sex partnerships was aimed at bolstering the institutions of marriage and family in the traditional sense, and regulating the existing social phenomenon of unmarried different-sex couples with children.[11] In that sense, the aims of the law were irrelevant given the different situation[12] and the distinct biological capabilities for reproduction of same-sex couples.[13] Second, the government employed the redundancy argument: even if the civil union scheme was relevant to the social needs of same-sex couples, ordinary legislation already grants same-sex couples equivalent rights and obligations to those arising from civil unions and thus any further recognition would be redundant. More specifically, property rights, social-security matters, and maintenance and insurance issues could either be secured through private law on de facto partnerships or through contractual agreements. Therefore, including same-sex couples within the scope of the Law no. 3719/2008 would add nothing to their existing rights and duties.

In response to the relevance and redundancy arguments of the Greek government, the applicants claimed that their exclusion from the legal right to form civil unions lacked an objective and reasonable justification and thus constituted unlawful discrimination taken in conjunction with their right to family life.[14] More specifically, the legitimate aim of protecting the traditional heterosexual family could not, of itself, justify less favourable treatment of same-sex couples. Additionally, the purpose of civil unions was to regulate the rights and obligations of couples who do not wish to marry, irrespective of whether or not they had, could or wished to have children. In fact, their unjustifiable exclusion reinforces prejudice against homosexuality and reflected the state's overt disregard towards same-sex couples. They also argued that it fell short of an emerging European consensus towards legal recognition of same-sex couples.

[8] Vallianatos, supra n 1, at para 11.
[9] Ibid.
[10] Ibid. at para 23.
[11] Ibid. at para 62.
[12] Ibid. at para 63.
[13] Ibid. at para 67.
[14] Ibid. at para 60. With regard to whether or not their case falls within the scope of family life, the applicants referred to the ECtHR's judgment in Schalk and Kopf v Austria (2011) 53 EHRR 20, in which the Court acknowledged that stable relationships of cohabiting same-sex couples fall within the notion of family life.

3. Justifying Differential Treatment

It must be stressed at the outset that the Court was particularly careful when outlining the scope of the complaint. More specifically, the Court stated that the application did not concern whether or not the Greek state was under a positive duty to afford legal recognition to same-sex couples. Rather, the issue under examination was whether the Greek state was entitled to enact a civil union registration scheme that treated different-sex more favourably than same-sex couples; this was the focus of the Court's considerations.[15]

The Grand Chamber recalled that Article 14 ECHR prohibits discrimination in the enjoyment of the rights and freedoms secured under the Convention. However, not every case of differential treatment is discriminatory.[16] According to the Court's established jurisprudence, discrimination will arise only when there is no objective and reasonable justification for treating someone differently on certain grounds, or else, when the difference '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.'[17] The prohibition of discrimination also covers cases of indirect discrimination that arise whenever a facially neutral law treats certain persons or groups less favourably compared to others that do not share than characteristic.[18] That principle is significant because whereas a state might not have to afford particular social benefits to same-sex couples (eg because the Convention does not require more favourable treatment) conferring such benefits on different-sex couples will require (all things being equal) their extension to same-sex couples too, unless there is an objective and reasonable justification for the less favourable treatment.[19]

Whether or not individuals have been treated less favourably will be judged with reference to a comparable case. In Vallianatos the comparison had to be drawn against different-sex couples in similarly stable relationships.[20] The Grand Chamber emphasised that same-sex couples are equally capable of committing themselves to stable relationships.[21] Therefore, legal recognition and protection for their relationship should be considered just as important as it is for different-sex couples. Allowing civil union registration for different-sex couples only amounted to differential treatment based on the sexual orientation of the persons concerned. Hence, the Grand Chamber proceeded to examine the reasons justifying the difference in treatment, without clarifying though whether the tacit exclusion of same-sex couples from the civil union scheme constituted direct or indirect discrimination.[22]

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[15] Ibid. at para 75. 'More favourable' is taken to mean nothing more than inclusion into the scope of the registration scheme. Conversely, exclusion constitutes 'less favourable' treatment. It will become clearer in the later parts of the present analysis why excluding same-sex couples from civil unions constitutes less favourable treatment.

[16] Karner v Austria (2004) 38 EHRR 24, at para 37.

[17] Vallianatos, supra n 1, at para 76.

[18] Thlimmenos v Greece (2001) 31 EHRR 15, at para 44.

[19] Vallianatos v Greece at para 76. Also Abdulaziz, Cabales and Balkandali v the United Kingdom (1985) 7 EHRR 471, at para 82.

[20] Vallianatos, supra n 1, at para 78.

[21] Ibid.

[22] However, whether the exclusion of same-sex couples constitutes direct or indirect discrimination is not decisive here because – contrary to the UK Equality Act 2010 – objective and reasonable justification may justify even direct discrimination according to the ECtHR jurisprudence. See eg O'Connell, 'Cinderella comes to the ball: Article 14 and the right to non-discrimination in the ECHR', (2009) 29 Legal Studies 211. In the

In general, the contracting states of the Council of Europe enjoy a margin of appreciation with regard to whether the particular circumstances of a case justify a difference in treatment. Nevertheless, the scope of the margin of appreciation varies depending on the ground of discrimination.[23] More specifically, 'suspect' grounds of discrimination require 'particularly convincing and weighty' reasons to justify a difference in treatment.[24] According to well-established ECHR case-law sexual orientation is a suspect ground of discrimination.[25] States therefore enjoy narrow margin of appreciation in cases of differential treatment on grounds of sexual orientation. Practically what follows is that justifying less favourable treatment requires that the difference should not be just suitable, but that it should also be necessary to achieve the aim sought. The burden then falls on the government to convince the Court about the necessity of the differential treatment. In the instant case, the Greek government had to demonstrate why it was necessary to bar same-sex couples from entering civil unions in order to achieve the legitimate aim of protecting traditional families and children born outside marriage.[26]

Family protection is a weighty and legitimate reason capable of justifying differential treatment. Nevertheless, protection for families is an abstract policy goal compatible with various measures. On that account the Grand Chamber recalled that the Convention should be regarded as a 'living instrument' sensitive to present-day conditions.[27] In undertaking measures directed towards social regulation, states should be sensitive to contemporary social developments that have progressively endorsed the defensibility of various non-traditional options for leading one's family or private life.[28] Furthermore, protection of the interests of the child is a separate but similarly important reason that will justify a difference in treatment. But the primary purpose of the law in question was to establish an additional non-marital form of partnership, rather than to secure the rights of children born outside of a marriage.[29] At any rate, it is doubtful that the exclusion of same-sex couples from civil

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UK, exclusion of same-sex couples from civil partnerships would most probably constitute direct discrimination on grounds of sexual orientation and (as such) it would be unjustifiable. That assumption arises from the hypothetical application of the 'but for' test introduced by the House of Lords in James v Eastleigh Borough Council [1990] UKHL 6 for direct discrimination cases. In Vallianatos exclusion would constitute direct discrimination because 'but for' their sexual orientation, the applicants would be able to register a civil union and enjoy the benefits of official recognition. See Wintemute, 'Smug marrieds?' [2013] New Law Journal, available at http://www.newlawjournal.co.uk/nlj/content/smug-marrieds [last accessed 3 February 2014].

[23] See Gerards, 'The discrimination grounds of Article 14 of the European Convention on Human Rights' (2013) 13 Human Rights Law Review 99.

[24] Vallianatos, supra n 1, at para 77. Also Smith and Grady v United Kingdom (2000) 29 EHRR 493, at para 90; Karner, supra n 16, at paras 37 and 42; L. and V. v Austria (2003) 36 EHRR 55, at para 45; X and Others v Austria (2013) 57 EHRR 14, at para 99.

[25] de Schutter, The Prohibition of Discrimination under European Human Rights Law (European Commission 2011) at 62-66.

[26] Vallianatos, supra n 1, at para 85.

[27] It has been argued that the living instrument doctrine has enabled the Strasbourg court to creatively update the interpretation of the ECHR in various situations not envisaged by the drafters of the Convention in the 1940s. For a more detailed discussion of the various creative doctrines of interpretation adopted by the ECtHR see Mowbray, 'The creativity of the European Court of Human Rights' (2005) 5 Human Rights Law Review 57.

[28] Vallianatos, supra n 1, at para 84.

[29] The Grand Chamber seems to share the concerns of the National Human Rights Commission of Greece regarding the lack of correspondence between the legitimate goal of protection of children born outside marriage and the actual text and objectives of the legislation under scrutiny.

unions would be necessary to protect the interests of children born outside marriage, given that different-sex couples may register a civil union irrespective of whether they had or wished to have children.[30] Hence, the inability of same-sex couples to have biological children could not justify the differential treatment either.[31]

4. The Role of Consensus

In Vallianatos, the interpretation of the Convention as a living instrument protecting diverse forms of family life[32] was supported both by a strong European consensus regarding non-discrimination on grounds of sexual orientation, and by an 'emerging trend' regarding official forms of non-marital partnerships.[33] According to the Court, the trend regarding civil partnerships was sufficiently clear. More precisely, at the time of the judgment nine countries had legalised same-sex marriage,[34] while an additional 17 had enacted civil partnership schemes for same-sex couples.[35] From the 19 European countries that had introduced some form of registered partnership, Greece and Lithuania were alone in reserving civil unions only for different-sex couples.[36] Yet it was the lack of convincing and weighty reasons justifying the less favourable treatment of same-sex couples that led the Grand Chamber to find the Greek law in violation of the Convention. Exceptionality cannot in itself be a violation of the ECHR.[37]

The Court emphasised that various laws and recommendations of European institutions require equal treatment of unmarried same-sex partners to unmarried different-sex partners. More specifically, the Parliamentary Assembly of the Council of Europe ('PACE') has adopted a series of Recommendations and Resolutions on discrimination based on sexual orientation. In Recommendation 924, PACE drew attention to the need to eliminate discrimination, abandon oppressive practices and overcome prejudice against homosexuals.[38] In 2000, PACE adopted Recommendation 1474 which called for various measures against discrimination on sexual orientation, 'one of the most odious forms of discrimination.'[39] Measures also included legal recognition of same-sex partnerships[40] as well as other legal safeguards to ensure that homosexual partnership and families are treated on the same basis as heterosexual partnerships and families.[41] The same guarantees were called for in the 2010

[30] Vallianatos, supra n 1, at paras 88 and 89.
[31] Ibid. at para 89.
[32] Ibid. at para 84.
[33] Ibid. at para 91.
[34] Without counting the UK at the time of the judgment. Same-sex marriage will be allowed in the UK when the Marriage (Same Sex Couples) Act 2013 comes into force in 2014; see http://www.legislation.gov.uk/ukpga/2013/30/contents/enacted [last accessed 3 February 2014]. See Fairbairn, Commons Library Standard Note, SN03372, 11 November 2013, available at http://www.parliament.uk/business/publications/research/briefing-papers/SN03372/common-law-marriage-and-cohabitation [last accessed 3 February 2014].
[35] Vallianatos, supra n 1, at para 25.
[36] Ibid. at paras 26 and 91.
[37] Ibid. at para 92.
[38] Parliamentary Assembly of the Council of Europe Recommendation 924 (1981).
[39] Parliamentary Assembly of the Council of Europe Recommendation 1474 (2000).
[40] Ibid. at paras 9 and 11.
[41] Parliamentary Assembly of the Council of Europe, Recommendation 1470 (2000).

PACE Resolution 1728[42] and in the Recommendation 2010 of the Committee of Minister.[43] Meanwhile, both the European Charter of Fundamental Rights[44] and Protocol 12 to the ECHR[45] prohibit any form of discrimination on grounds of sexual orientation.[46]

The living instrument interpretation of the Convention, doubly reinforced by a strong European commitment to the prohibition of sexual orientation discrimination and an 'emerging trend' regarding the recognition of civil partnerships, enabled the Grand Chamber to tacitly (albeit clearly) reject the idea that exclusion of same-sex couples from civil unions might be tolerated in cases where the domestic society, such as the Greek society in the present case, is not ready to endorse such a social development.[47] However, this assertion must be qualified in two ways.

First, currently the European consensus does not extend to same-sex marriage. The majority of the Court in Vallianatos was careful to refrain from finding positive state obligations with regard to the rights of same-sex couples. The fact that exclusion from civil unions left no other chances of official legal recognition for same-sex relationships played a pivotal role in the majority's judgment.[48] The case therefore remains compatible with Schalk and Kopf v Austria, where the majority of the ECtHR dismissed a complaint of discrimination on grounds of sexual orientation against the Austrian legislation that allowed same-sex civil partnerships but not same-sex marriage.[49] In Schalk and Kopf the ECtHR was skeptical about whether or not the formulation of the right to marriage under Article 12 ECHR – which refers to 'men and women of marriageable age' and not to everyone – should be taken as deliberately excluding same-sex couples. But notwithstanding the text of the Convention, it was predominantly the lack of a European consensus regarding same-sex marriage that led the Court to leave regulation of marriage to national law.[50] As Nils Muižnieks, the Council of Europe Commissioner for Human Rights, has recently noted, member states enjoy a 'pretty wide margin of manoeuvre' regarding same-sex marriage since there is no European consensus on the issue.[51]

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[42] Supra n 5.

[43] Committee of Ministers Recommendation CM/Rec(2010)5, 31 March 2010. There is little progress with domestic implementation of the Recommendation though. See the relevant research findings in International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), Summary report – Monitoring implementation of the CoE Recommendation (ILGA on behalf of the Dutch government, 2013), available at: http://www.ilga-europe.org/home/guide_europe/council_of_europe/lgbt_rights/recommendation_com_lgbt/ilga_europe_summary_report_monitoring_implementation_of_the_coe_recommendation [last accessed 3 February 2014].

[44] See Articles 7, 9 and 21, Charter of Fundamental Rights of the European Union (2010/C 83/02).

[45] Protocol 12 ECHR prohibits discrimination on various grounds across a range of contexts. It entered into force in 2005. As of 20 December 2013, 18 states (out of 47) have ratified it.

[46] Wintemute, 'Filling the Article 14 "Gap": Government ratification and judicial control of Protocol No.12 ECHR' (2004) 5 European Human Rights Law Review 484. See also Besson, 'Evolutions in non-discrimination law within the ECHR and the ESC systems: it takes two to tango in the Council of Europe' (2012) 60 American Journal of Comparative Law 147.

[47] Vallianatos, supra n 1, at para 84.

[48] Ibid. at para 81.

[49] Schalk and Kopf v Austria, supra n 14.

[50] Hodson, 'A Marriage by Any Other Name? Schalk and Kopf v Austria' (2011) 11 Human Rights Law Review 170.

[51] 'Croatia: Muižnieks warns against LGBT discrimination' Human Rights in Europe blog, 12 November 2013, available at: http://www.humanrightseurope.org/2013/11/croatia-muiznieks-warns-against-lgbt-discrimination/ [last accessed 3 February 2014].

Notably, comparing Vallianatos to Schalk and Kopf illustrates that the positive state obligation to confer some form of official legal recognition on same-sex relationships should be broadly understood as involving the availability of at least one form of official legal recognition for same-sex relationships. The fact that civil unions embodied the sole chance for official legal recognition of same-sex relationships under Greek law was crucial for the ECtHR. By the same token, there is nothing in Vallianatos to imply that European states whose domestic law provides some form of official recognition for same-sex relationships, but not same-sex marriage, would be in violation of the Convention.

Second, the European consensus does not extend to adoption.[52] In their separate concurring opinion,[53] Judges Casadevall, Ziemele, Jočienė and Sicilianos took care to distinguish Vallianatos from X v Austria,[54] a recent case about adoption within same-sex couples, in order to justify their different approach to the two cases.[55] They based that difference on the sharp division between Council of Europe states regarding adoption by same-sex couples. On the contrary, with regard to legislation on civil partnerships the evidence before the Court clearly demonstrated that whenever they choose to introduce a system of registered partnerships, the overwhelming majority of European states choose to include same-sex couples in its scope.[56] Of course the strategy of the Court to seek European consensus wherever possible cannot rule out the possibility that adoption (or same-sex marriage) might in the future fall within the protective scope of Convention.

Whether the strategy of finding a consensus should be considered strength or weakness of Strasbourg is a separate question that falls outside the scope of this article. It has been argued that patience whilst consensus builds at the national level is the price to pay for the binding nature of the Strasbourg judgments.[57] Political backlash might indeed occur were a small minority of countries to enforce its views on all 47 member states of the Council of Europe.[58] In that sense, the consensus strategy 'serves to anchor the court in legal, political and social reality on the ground.'[59] But whether this strategy should be in any way part of the

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[52] Johnson, 'Adoption, Homosexuality and the European Convention on Human Rights: Gas and Dubois v France' (2012) 75 Modern Law Review 1136. See also Gas and Dubois v France, Application no 25951/07, Merits, 15 March 2012 (available only in French) in which the ECtHR found no violation of the ECHR in a case where a partner in same-sex relationship failed to get permission to adopt her partner's child.

[53] Concurring opinion of Judges Casadevall, Ziemele, Jočienė and Sicilianos, Vallianatos v Greece, supra n 1. Judge Pinto de Albuquerque dissented from the majority's judgment as he found the complaint inadmissible for non-exhaustion of domestic remedies.

[54] X and Others v Austria, supra n 24.

[55] The four judges found a violation of Article 14 in conjunction with Article 8 in Vallianatos but no violation in X v Austria, despite that the provisions and grounds for discrimination were identical.

[56] Concurring opinion of Judges Casadevall et al., supra n 53, at para 3.

[57] Helfer, 'Consensus, coherence and the European Convention on Human Rights' (1993) 26 Cornell International Law Journal 133.

[58] Striking a balance between the morally right interpretation of the Convention and particular policy choices made by the elected Parliaments of the contracting states of the Council of Europe remains an especially contentious area. See Lady Hale, 'Beanstalk or living instrument, how tall can the ECHR grow?' (Barnard's Inn Reading lecture, June 2011), available at: http://www.supremecourt.gov.uk/docs/speech_110616.pdf [last accessed 16 December 2013]. Specifically on the implications of lack of European consensus regarding the interpretation of anti-discrimination norms see O'Cinneide, 'The uncertain foundations of contemporary anti-discrimination law' (2011) 11 International Journal of Discrimination and the Law 7.

[59] Wintermute, 'Consensus is the right approach for the European court of human rights' The Guardian, 12 August 2010, available at: http://www.theguardian.com/law/2010/aug/12/european-court-human-rights-consensus [last accessed 3 February 2014].

living instrument doctrine might require more than a political argument about the effective implementation of the ECHR. Thus, it has been noted that through the living instrument doctrine the Strasbourg court follows a particular moral reading of the Convention according to which the rights secured under the Convention are autonomous from 'the various moralistic views that dominated member states when the Convention was drafted and may still survive in some respondent states.'[60] If it is correct that the living instrument doctrine exhibits a non-originalist and non-textualist moral reading of the Convention,[61] then it is doubtful that consensus among domestic authorities should indeed play a pivotal role. Rather, it has been argued that judges have a duty to discover and give effect to the 'morally best understanding of human rights, irrespective of the contracting states' current consensus'.[62]

In any event, I shall now attempt to establish that whether or not the exclusion of same-sex relationships from all forms of official recognition is compatible with the Convention does not (morally or logically) depend on the existence of European consensus regarding the various forms of legal recognition for same-sex partnerships. Rather, it depends on the conception of equality that informs our understanding of anti-discrimination laws and policies.

4. Legal Rights of Unmarried Same-Sex Couples

The Grand Chamber in Vallianatos employed various arguments to highlight the importance of equal treatment for unmarried different-sex and same-sex couples. But what does the state duty to equal treatment entail? This section will demonstrate that the Court has offered contrasting answers to that question. The different answers match the application of conflicting interpretations of equality in various sets of cases.

First, there is a number of cases where the ECtHR seems to interpret equal treatment as consistent treatment. According to this 'consistency' conception of equality, everyone should be equal before the law and treated consistently, irrespective of sexuality or any other protected characteristic.[63] Thus, procedural fairness through neutral provisions is interpreted as securing equality before the law. The assumption is that neutrally formulated laws cannot be discriminatory since they treat everyone equally. Sexual orientation remains a suspect ground of discrimination, except that in those cases it is considered not relevant. For instance, in Mata Estevez v Spain the Court held that the legitimate aim of family protection could justify differences in eligibility for a survivor's pension. According to the court it fell within the state's margin of appreciation whether or not to allow differential treatment not only between married and unmarried couples, but also between de facto same-sex and different-sex partnerships.[64] In Manenc v France, the ECtHR held that limiting pension

[60] Letsas, 'Strasbourg's interpretive ethic: lessons for the international lawyer' (2010) 21 European Journal of International Law 509 at 527.
[61] Letsas, A Theory of Interpretation of the European Convention on Human Rights (Oxford: Oxford University Press, 2007).
[62] Ibid.
[63] S. Fredman, Discrimination Law (Oxford: Clarendon Press, 2011) at 8-14.
[64] Mata Estevez v Spain (Application no. 56501/00) 10 May 2001 (inadmissible).

benefits to married couples fell within a state's discretion.[65] The same-sex couple in question was under a civil partnership agreement. When one of them passed away his retirement funds were refused to his survivor because the couple was not married. Given that same-sex marriage was unlawful at the time,[66] the applicant complained that the requirement constituted direct discrimination on grounds of his sexual orientation. Nevertheless, the ECtHR found that the applicant's sexual orientation was not relevant, since any person in a civil partnership would have received the same (less favourable) treatment.

Yet in other cases the Court seems to move beyond mere consistency in favour of a results-oriented conception of equality. On that account the equality principle 'goes beyond a demand for consistent treatment of likes, and requires instead that the result be equal.'[67] By the same token, in such cases the ECtHR looks beyond procedural fairness towards unveiling potential less favourable forms of treatment, even if those arise from facially neutral laws apparently irrelevant to sexual orientation. In Karner v Austria, the ECtHR examined a complaint against Austria's narrow interpretation of the domestic Rent Act that prevented the surviving partner of a same-sex couple to succeed to a tenancy after the death of his partner.[68] The applicant contended that the aim of the tenancy protection provision was to protect the surviving cohabitants from homelessness and not to pursue any family policy that might otherwise justify differential treatment between same-sex and different-sex couples.[69] The ECtHR agreed focusing on exclusion as the result of a neutrally formulated law; it found a violation of Article 14 in conjunction with Article 8 ECHR. Similarly to Vallianatos, the majority in Karner held that family protection was an abstract legitimate goal able to be pursued through various measures, not all of which necessitate exclusion of same-sex couples from the tenancy protection scheme. The Court followed similar reasoning in Kozak v Poland, where a blanket exclusion of unmarried same-sex couples from provisions allowing succession to tenancy following death of one's partner was found in violation of Article 14 in conjunction with Article 8 ECHR.[70] Furthermore, in P.B. and J.S. v Austria, the ECtHR held that a refusal to extend sickness insurance cover to same-sex partners of insured persons was in violation of the prohibition of discrimination on grounds of sexual orientation.[71] A subsequent change in Austrian legislation, which reformulated the relevant provisions in a neutral way concerning the sexual orientation of the dependent persons, ended the violation.[72] In J.M. v United Kingdom, the Court held that the fact that prior to the entry into force of the Civil Partnership Act 2004 higher child support contributions were expected from non-resident parents living with same-sex partners compared to those of non-resident parents living with a different-sex partners constituted sexual orientation discrimination.[73] Furthermore, this approach is congenial with the latest interpretation

[65] Manenc v France (Application 66686/09) 21 September 2010 (inadmissible).
[66] Same-sex marriage became lawful in France in May 2013; see Loi n° 2013-404 du 17 Mai 2013 ouvrant le mariage aux couples de personnes de même sexe.
[67] Fredman, supra n 63, at 14.
[68] Karner v Austria, supra n 16.
[69] Ibid. at para 34.
[70] Kozak v Poland (2010) 51 EHRR 16.
[71] P.B. and J.S. v Austria (2012) 55 EHRR 31.
[72] Ibid. at paras 45 and 50.
[73] J.M. v United Kingdom (2011) 53 EHRR 6. For a more detailed discussion of the issues in J.M., see the analysis of the House of Lords' judgment in M v Secretary of State for Work and Pensions [2006] UKHL 11,

followed by the Court of Justice of the European Union ('CJEU'). In December 2013, the CJEU ruled that the Employment Equality Directive 2000/78/EC[74] requires that same-sex couples in registered partnerships should enjoy equal benefits to married couples at the workplace.[75] The CJEU was not satisfied by the argument that French legislation did not treat same-sex partnerships as equivalent to marriage. Rather, it held that according more benefits to married couples while not allowing same-sex marriage constituted direct sexual orientation discrimination in violation of the directive.[76]

The results-oriented approach to equality, which focuses on less favourable treatment even when this arises from neutral laws or policies treating everyone equally irrespective of sexual orientation, is consistent with the reasoning followed by British courts in two landmark cases on sexual orientation discrimination. In Ghaidan v Godin-Mendoza, a case about the survivorship rights of cohabiting same-sex couples, the House of Lords found that the social policy of security of tenure that underlies S. 1(2)(2) Rent Act 1977 could not justify the exclusion of same-sex couples from tenancy succession.[77] In Bull v Hall, decided just a few days after Vallianatos, the UK Supreme Court held that a hotel's refusal to provide double-bedroom accommodation to a same-sex couple in a civil partnership because its owners' conscience proscribed sexual intercourse outside traditional marriage constituted unlawful discrimination on grounds of sexual orientation of the customers.[78] The Supreme Court rejected the argument that the sexual orientation of the respondents was irrelevant since the appellants were inclined to treat all unmarried couples (regardless of their sexual orientation) in the same way. Rather, they unanimously agreed that the case was unlawful discrimination on grounds of sexual orientation, either direct (the majority) or indirect (Lord Neuberger and Lord Hughes).

But even if we agree that focusing on unequal results – at least in the form of less favourable treatment on grounds of sexual orientation – is strategically more suitable to achieve a fairer distribution of benefits compared to procedural fairness, it is still not clear why the Grand Chamber in Vallianatos dismissed the second, redundancy argument made by the Greek government. Recall that under Greek law same-sex couples may enjoy identical rights and duties to different-sex couples through torts and contract law. Registering their relationship under the civil union scheme would have added nothing further to their existing rights. The case should therefore be distinguished from Karner v Austria and Kozak v Poland

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which was the case that led to the application to Strasbourg, by Wintermute, 'Same-sex couples in Secretary of State for Work and Pensions v M: identical to Karner and Godin-Mendoza, yet no discrimination?' (2006) 6 European Human Rights Law Review 722.

[74] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303. For more details on the scope of the Directive see Waddington and Bell, 'More equal than others: distinguishing European Union Equality Directives' (2001) 38 Common Market Law Review 587.

[75] Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres [2013] EUECJ C-267/12.

[76] Ibid. at paras 45 and 47. On the legalisation of same-sex marriage in France see supra n 66.

[77] Ghaidan v Godin-Mendoza [2004] UKHL 30.

[78] Bull v Hall [2013] UKSC 73, at paras 25 and 26. Notably the Supreme Court disagreed on whether the refusal to accommodate in double bedroom constituted direct or indirect discrimination on grounds of sexual orientation. Nonetheless, the court was unanimous finding that even if the refusal constituted indirect discrimination, that would still be unjustifiable. For a more detailed analysis see Trispiotis, '"Altenative lifestyles" and unlawful discrimination: the limits of religious freedom in Bull v Hall' (2014) 1 European Human Rights Law Review 39.

where unmarried same-sex couples were refused benefits that the ordinary law would have accorded to unmarried different-sex couples. Vallianatos should also be distinguished from Manenc v France and Frédéric Hay v Crédit agricole because under the Greek law there would be no less favourable treatment for a same-sex couple under a contractual agreement compared to a different-sex couple under a civil union or marriage. So assuming that ordinary legislation could have granted the complainants identical legal protection to civil unions, including equal access to the various socio-economic resources, why did the Court rule that their exclusion from civil unions constitutes unlawful discrimination?

According to the Grand Chamber

> even if [the redundancy argument] is 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.[79]

This is the first time that the ECtHR has alluded to the intrinsic value of official recognition and this argument should be carefully examined. Could the principle of equal treatment require more than equal welfare rights for unmarried different-sex and same-sex couples?

5. Taking Legal Out: The Intrinsic Value of Recognition

The Grand Chamber answered that question in the affirmative.[80] Entering into a civil union encompasses the only opportunity under Greek law to formalise a stable same-sex relationship by conferring on it a legal status recognised by the state.[81] According to the Court, extending civil unions to same-sex couples would allow them 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.' [82] Hence, it follows that official recognition is broader than legal recognition through de facto partnerships or contracts, (which was already an option under domestic law). It requires recognition that same-sex relationships are of an equal moral worth to different-sex relationships.[83]

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[79] Vallianatos, supra n 1, at para 81.

[80] The title of this paper has been inspired by Tasioulas, 'Taking rights out of human rights' (2010) 120 Ethics 647.

[81] Vallianatos, supra n 1, at para 81.

[82] Ibid.

[83] That understanding of recognition is congenial to recognition respect, one of the two kinds of respect that Stephen Darwall has proposed. Contrary to appraisal respect, recognition respect requires considering in one's deliberations certain features of the object of respect. For instance, when we say that we owe respect to all humans, we mean that certain elementary principles stemming from humanity, such as human dignity, should always be considered when deciding. See Darwall, 'Two kinds of respect' (1977) 88 Ethics 36. See also Trispiotis, 'The duty to respect religious beliefs: insights from European human rights law' (2013) 19 Columbia Journal of European Law 499.

The idea of intrinsic value suggests that something has value 'independent of what people happen to enjoy or want or need or what is good for them.'[84] But how should the intrinsic value of official recognition for same-sex relationships be understood? Perhaps a good starting point is that everyone should be able to pursue the choices that are most valuable for her life. However, in a pluralistic society the idea of a good life is widely contested. For some people a good life requires traditional marriage and family. For others it would be inconceivable without adventure travel and extreme sports. What liberal egalitarianism claims is that, so far as possible, political decisions must be independent of any particular conception of the good life, or of what gives value to it. Rather, state policies should treat everyone's fate as equally important and respect their individual responsibilities for their own lives.[85] State policies that impose a normative vision of how one should live are thus illegitimate.[86] By the same token, discriminatory laws constitute egregious forms of state interference with the individuals' ability to make important life choices for themselves.

However, full appreciation of the force of the intrinsic value argument cannot be had without examining it the other way round: that is, how does lack of official recognition impair freedom to make the life choices one deems valuable? For despite the argumentative force of the principle of equality, there is another kind of wrong perpetrated in cases of no official recognition, which may not be fully captured by focusing on unequal treatment.[87] But first we have to be clear about what we mean by lack of official recognition. We might have to revisit for that reason an argument pushed forward by the complainants in Vallianatos. That is, exclusion from civil unions is wrongful because it casts 'a negative moral judgment on homosexuality as it reflected an unjustifiable reserve towards same-sex couples.'[88] They claimed that through the civil union scheme the legislature showed 'clear disregard' for their relationships.[89] Lack of legal recognition constitutes therefore a type of official condemnation of a non-traditional way to lead one's family and personal life.

A careful reading of the Court's judgment in Vallianatos requires the following qualification to that interpretation. Lack of any form of official recognition might indeed be an expression of authoritative condemnation in a way that should be distinguished from private expressions of criticism or hostility towards same-sex couples. This is because the latter do not carry the authoritative voice of society.[90] The interpretation of the unavailability of any form of official recognition as authoritative condemnation could be expounded along the lines of Raz's argument regarding the importance of social validation of different ways of

[84] Dworkin, *Life's Dominion* (New York: Knopf, 1993) at 71.
[85] Dworkin, Justice for Hedgehogs (Cambridge, MA: Harvard University Press, 2011) at 330.
[86] Ibid. at 327-39. Grounding equality law on dignity has the potential of moving from equal treatment to appropriate treatment. For jurisdictions, such as Canada, that treat cases of discrimination based on dignity see Moon, 'From equal treatment to appropriate treatment: what lessons can Canadian equality law on dignity and on reasonable accommodation teach the United Kingdom?' (2006) 6 European Human Rights Law Review 695.
[87] Raz, The Morality of Freedom (Oxford: Oxford University Press, 1986) at 229.
[88] Vallianatos, supra n 1, at para 60.
[89] Ibid.
[90] Official recognition of same-sex relationship does not intend to censor private hostility and condemnation. Criticism against rival ways of life is part of any way of life. For the distinction between rival and incompatible ways of life see Raz, 'Free expression and personal identification' (1991) 11 Oxford Journal of Legal Studies 303 at 321.

life through their public expression.[91] Social validation of diverse ways of leading one's life through their public portrayal is intertwined with the capability of social identification. Social identification is fundamental for individual well-being, given that everyone should have the chance to feel like a full member of her community. Validation, therefore, can make people feel confident that there are others sharing their attitudes, tastes, or problems. Freedom to socially integrate through each one's selected way of life is important both for our well-being and for securing the genuine availability of several attractive (and selectable) ways of life.[92]

Authoritative condemnation through state refusal of any official legal recognition not only blocks validation of same-sex relationships, but also carries a strong social symbolism that impedes the ability of a particular way of life to gain public recognition and acceptability.[93] I think that this is the reason the Grand Chamber held that official recognition has intrinsic value for same-sex couples. And that is why complete absence of legal recognition, interpreted as official condemnation of a particular way of life, would be equally wrongful even if it affected a random group of people not distinguishable by their sexuality or any other protected characteristic. The wrong perpetrated in this case cannot therefore be fully captured by focusing on prohibition of discrimination on grounds of sexual orientation; for it is mainly a wrong against individual autonomy.

Moving beyond a narrow conception of equality focusing on fair access to social benefits echoes also the argument that justice should not only refer to distribution, but also to the 'institutional conditions necessary for the development and exercise of individual capacities and collective communication and cooperation.'[94] As Young has noted, social injustice often takes the form of oppression through systemic (or 'structural') constraints that are not necessarily forced intentionally upon certain social groups, but are embedded in 'assumptions underlying institutional rules and the collective consequences of following those rules.'[95] On that account, difference as a reason to refuse legal recognition to same-sex couples reinforces the position of the dominant social groups and reconstructs difference as deviance and inferiority.[96] The relationship between distributive inequalities and status-based inequalities (i.e. gender, age, ethnic origin, sexual orientation among others) is reciprocal.[97] For, as Fraser has argued, various economic injustices do not arise from the economic structure, but emanate from a status order which has institutionalised prejudice against

[91] Ibid.
[92] Ibid. at 312.
[93] Ibid. at 318.
[94] Young, Justice and the Politics of Difference (Oxford: Princeton University Press, 1990) at 39.
[95] Ibid. at 41. Social groups are not identified here following the aggregate model (i.e. numerically) but as forms of social relations intertwined with the common identities of their members. See Young, 'Together in difference: transforming the logic of group political conflict' in Kymlicka (ed), The Rights of Minority Cultures (Oxford: Oxford University Press, 1995) 155, at 160-163.
[96] Along the lines of what Young has described as oppression through the face of 'cultural imperialism'; see Young, supra n 94, at 58-61.
[97] Sen, Inequality Reexamined (Cambridge, MA: Harvard University Press, 1992) 55 and 117-128. For a discussion of disadvantage with reference to the UK legal framework see Fredman, 'Positive duties and socio-economic disadvantage: bringing disadvantage onto the equality agenda' (2010) 3 European Human Rights Law Review 290.

certain social groups.[98] Thus, in order to ensure that a 'class of devalued persons suffering economic liabilities as a byproduct' is not produced, phobias and prejudice must be overcome.[99] In other words, the remedy is changing the relations of recognition. Changing the relations of recognition may then cause the maldistribution to disappear.

6. Conclusion

As the UK Equality and Human Rights Commission has recently argued, stigma and stereotyping are interwoven with unfair treatment and discrimination.[100] Arguably, a number of recent judgments hint at the importance of protecting sexual orientation as status, and not necessarily via access to benefits or other forms of resource-distribution. For instance, in recent asylum cases, both the CJEU[101] and the UK Supreme Court[102] have held that even if asylum seekers could avoid the risk of persecution in their countries of origin by restraining the expression of their sexual orientation, the competent authorities should not take that possibility into account. On the right to private life, the Supreme Court held in Bull v Hall that denying to homosexuals the possibility of fulfilling themselves through relationships with others is 'an affront to their dignity.'[103]

Vallianatos v Greece adds an important proposition to those cases, and to the interpretation of European non-discrimination law in general. That is, redressing inequalities through conferring equivalent benefits might not be good enough anymore to satisfy the principle of equal respect for everyone's private life – at least in cases of total absence of official legal recognition for same-sex relationships. Although the Grand Chamber refrained from expressly finding positive state obligations, rejection of the possibility of identical social benefits to same-sex couples through contracts, coupled with the 'intrinsic value' of

[98] Fraser, 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' (The Tanner Lectures on Human Values, Stanford University, 30 April – 2 May 1996) at 14.
[99] Ibid.
[100] Equality and Human Rights Commission, Identity, Expression and Self-respect, Briefing paper no. 9, Summer 2013, at 32-4. Perhaps it is noteworthy that the anti-stereotyping approach in the interpretation of anti-discrimination laws has strong ties with the US equality jurisprudence; see Suk, 'From antidiscrimination to equality: stereotypes and the life cycle in the United States and Europe' (2012) 50 American Journal of Comparative Law 75.
[101] Minister voor Immigratie en Asiel v X, Y, and Z v Minister voor Immigratie en Asiel, joined cases C-199/12, C-200/12 and C-201/12 (request for a preliminary ruling under Article 267 TFEU concerning interpretation of Article 9(1) of Council Directive 2004/83/EC of 29 April 2004 read in conjunction with Article 9(2)(c) and Article 10(1)(d) thereof). The applicants were nationals of Sierra Leone, Uganda and Senegal and they applied for refugee status in the Netherlands arguing that they have well-founded fear of persecution in their countries of origin due to their sexual orientation. Homosexuality is criminalised in all three countries with punishment ranging from hefty fines to life imprisonment; see para 26. See also Council Directive 2004/83/EC, on minimum standards for the qualification and status of third-country nationals or Stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, 29 April 2004, [2004] OJ L 304.
[102] HJ (Iran) v Secretary of State for the Home Department [2010] UKSC 31. Lord Rodger of Earlsferry held that asylum-seekers should qualify as refugees where their deportation would be to countries where they would be prosecuted – or else required to conceal – their sexual orientation. In another recent case, the Supreme Court affirmed that the right to live openly according to one's beliefs covered freedom to hold and express different kinds of beliefs, including political opinions, see RT (Zimbabwe) v Secretary of State for the Home Department [2012] UKSC 38.
[103] Bull v Hall, supra n 78, at para 53.

official recognition, suggest that domestic systems of registered partnerships should from now on include same-sex relationships in their scope. This is arguably the closest Strasbourg has ever come to recognising that the Convention requires the introduction of same-sex civil partnerships under the right to equal respect for everyone's family life. In any event, the 'living instrument' and 'emerging trend' arguments mean that that would not occur before a sufficient consensus at the domestic level in European states has been diagnosed. Given the evidence before the Court, that might not be in the too distant future. In the meantime, the idea that official recognition of same-sex couples bears intrinsic value as a non-distributional form of social validation of a valuable life choice is an important addition to European human rights law jurisprudence. It infuses an extra dimension in the results-oriented conception of equality while signifying further departure from equality interpreted as consistency. Enriching redistribution with recognition is a promising idea whose application with regard to other disadvantaged social groups remains to be tested in the future.