

Applications Nos. 29381/09 & 32684/09,
Vallianatos & Mylonas v. Greece, C.S. & Others v. Greece
European Court of Human Rights, First Section

WRITTEN COMMENTS OF FIDH, ICJ, AIRE CENTRE & ILGA-EUROPE
Submitted on 20 June 2011

1. Prof. Robert Wintemute, School of Law, King's College London, respectfully submits these Written Comments on behalf of FIDH (*Fédération Internationale des ligues des Droits de l'Homme*), ICJ (International Commission of Jurists), AIRE Centre (Advice on Individual Rights in Europe), and ILGA-Europe (European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association). For their interest and expertise, see "Application for leave to submit written comments" (3 May 2011), granted 11 May 2011 (Rule 44(2), Rules of Court).

Introduction

2. Since 1989, national legislatures and courts in Council of Europe member states and other democratic societies have been accepting, at an ever faster rate, that lesbian women and gay men have the same human capacity as heterosexual women and men to fall in love with another person, establish a long-term emotional and sexual relationship, set up a joint home and, if they wish, raise children with their partner. These national institutions have understood that same-sex couples therefore have the same emotional and practical needs as different-sex couples to have their relationships recognised by the law, and that same-sex couples can justly claim access to the same rights and obligations as different-sex couples.

3. The first judgment of the European Court of Human Rights to reflect these legal and social developments was *Karner v. Austria* (24 July 2003). The Court held that unmarried same-sex couples must generally be granted the same rights and obligations as unmarried different-sex couples. The Court has applied the principle of *Karner* in *Kozak v. Poland* (2 March 2010), *P.B. & J.S. v. Austria* (22 July 2010), and *J.M. v. UK* (28 Sept. 2010). In *Karner* (para. 33), the Court did not find it necessary to decide whether a same-sex couple enjoys "family life" under Article 8. The Court took this step in *Schalk & Kopf v. Austria* (24 June 2010). The First Section concluded unanimously (there was no dissent on this point) that:

"94. ... the relationship of the applicants, 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."

The two applications against Greece raise the question whether, under *Karner*, as reinforced by *Schalk & Kopf*, a Council of Europe member state may pass a law creating a new registration system that provides an alternative to marriage for unmarried couples, but is restricted to unmarried different-sex couples and therefore excludes unmarried same-sex couples.

I. The principle of *Karner* is strongly supported by comparative case law

4. In *Karner*, the Court found a violation of Article 14 combined with Article 8 (respect for home), because a law on succession to a tenancy had been interpreted as including a surviving unmarried different-sex partner, but not a surviving unmarried same-sex partner. The Court reasoned as follows (emphasis added):

"37. ... Just like differences [in treatment] based on sex, differences [in treatment] based on sexual orientation require particularly serious reasons by way of justification ...

41. The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. In cases in which the margin of appreciation afforded to member States is narrow, as the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. **It must also be shown that it was necessary to exclude persons living in a homosexual relationship from the scope of application of Section 14 of the Rent Act in order to achieve that aim.** The Court cannot see that the Government has advanced any arguments that would allow of such a conclusion."

5. The Court's conclusion in *Karner*, that there is direct discrimination based on sexual orientation when a right granted to unmarried different-sex couples is denied to unmarried same-sex couples, is consistent with the conclusions of several national courts: the Constitutional Court of Hungary in 1995,¹ the Supreme Court of Canada in 1999,² the United Kingdom's House of Lords³ and the Supreme Court of Montana in 2004,⁴ and the Constitutional Court of Colombia in 2007.⁵ Most recently, on 5 May 2011, Brazil's highest court for constitutional matters, the *Supremo Tribunal Federal*, decided that, to avoid discrimination based on "sexual preference" that would violate the federal Constitution, the federal Civil Code must be interpreted so as to permit "*o reconhecimento da união entre pessoas do mesmo sexo como entidade familiar*". See <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=178931>. The decision appears to require that the widespread recognition in Brazilian law, of unmarried different-sex couples living in an "*união estável*" (stable union), must be extended to unmarried same-sex couples living in an "*união estável*".

6. The Court's conclusion in *Karner* is also supported by two decisions of the United Nations Human Rights Committee, in *Edward Young v. Australia* (Communication No. 941/2000) (6 August 2003), and *X v. Colombia* (Communication No. 1361/2005) (14 May 2007).

¹ (13 March 1995), 14/1995 (III.13.) AB *határozat*; see László Sólyom & Georg Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (Ann Arbor, Univ. of Michigan Press, 2000), at 316-21 (English).

² *M. v. H.*, [1999] 2 S.C.R. 3, <http://scc.lexum.org/en/1999/1999scr2-3/1999scr2-3.pdf>.

³ *Ghaidan*, <http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd040621/gha-1.htm>.

⁴ *Snetsinger v. Mont. Univ. System*, 104 P.3d 445, <http://www.aclu.org/FilesPDFs/snetsinger-mt.pdf>.

⁵ Constitutional Court of Colombia, *Sentencias* (Judgments), <http://www.corteconstitucional.gov.co> (*Relatoria, Providencias*): C-075/07, 7 February 2007. See also C-811/07, 3 October 2007; T-856/07, 12 October 2007; C-336/08, 16 April 2008; C-029/09, 28 January 2009.

II. Council of Europe member states and other democratic societies have always respected the principle of *Karner* when creating new registration systems

7. Since the Danish registered partnership law of 1989, every law creating an alternative registration system for unmarried couples, in the Council of Europe member states, or in other democratic societies (such as Canada, the United States, South Africa, Australia and New Zealand), has been either: (1) limited to unmarried same-sex couples, because unmarried different-sex couples are legally able to marry (the Danish model); or (2) open to all unmarried couples, different-sex and same-sex, regardless of sexual orientation (the French model). Prior to the 2008 law in Greece, there was (to the knowledge of the Third-Party Interveners) no precedent anywhere in the world for a new registration system that provides an alternative to marriage for unmarried couples, but is restricted to unmarried different-sex couples and therefore excludes unmarried same-sex couples. The consensus among Council of Europe member states and other democratic societies is clearly that, if a legislature decides voluntarily to create a new registration system, it must be open (at least) to unmarried same-sex couples, because they are legally unable to marry (unlike unmarried different-sex couples in most countries).

8. The following Appendix lists the legislation of 22 Council of Europe member states that allow same-sex couples to register their relationships (in 21 cases), or provide limited recognition of cohabiting same-sex couples (in Croatia). It also lists similar legislation in other democratic societies.

APPENDIX – NATIONAL (FEDERAL, REGIONAL, LOCAL) LEGISLATION RECOGNISING SAME-SEX COUPLES⁶

Council of Europe Member States

Andorra - *Llei 4/2005, del 21 de febrer, qualificada de les unions estables de parella*, (23 March 2005) 17 *Butlletí Oficial del Principat d'Andorra* no. 25, p. 1022 ("unions estables de parella"; "stable unions of couples")

Austria - Registered Partnership Act (*Eingetragene Partnerschaft-Gesetz*), Federal Law Gazette (*Bundesgesetzblatt*) vol. I, no. 135/2009

Belgium - *Loi du 23 novembre 1998 instaurant la cohabitation légale*, *Moniteur belge*, 12 Jan. 1999, p. 786 ("cohabitants légaux"; "statutory cohabitants"); *Loi du 13 février 2003 ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil*, *Moniteur belge*, 28 Feb. 2003, Edition 3, p. 9880, in force on 1 June 2003

Croatia - Law on Same-Sex Civil Unions (*Zakon o istospolnim zajednicama*), passed by Parliament on 14 July 2003, signed by President on 16 July 2003 ("partneri" or "partnerice"; "partners")

Czech Republic - *Zákon ze dne 26. ledna 2006 o registrovaném partnerství a o změně některých souvisejících zákonů* (Act no. 115/2006 Coll. on Registered Partnership and on the Change of Certain Related Acts)

Denmark - Law on Registered Partnership (*Lov om registreret partnerskab*), 7 June 1989, nr. 372 ("registrerede partnere"; "registered partners")

Finland - Law 9.11.2001/950, Act on Registered Partnerships (*Laki rekisteröidystä parisuhteista*) ("parisuhteiden osapuolet"; "registered partners")

France - *Loi no. 99-944 du 15 novembre 1999 relative au pacte civil de solidarité*, ("partenaires"; "partners"); also inserting a new Art. 515-8 into the *Code civil*: "Le concubinage est une union de fait, caractérisée par une vie commune présentant un caractère de stabilité et de continuité, entre deux personnes, de sexe différent ou de même sexe, qui vivent en couple."

Germany

Federal Level - Law of 16 Feb. 2001 on Ending Discrimination Against Same-Sex Communities: Life Partnerships (*Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften*), [2001] 9 *Bundesgesetzblatt* 266 ("Lebenspartner"; "life partners")

⁶ An earlier version appeared in R. Wintemute (ed.) & M. Andenæs (hon. co-ed.), *Legal Recognition of Same-Sex Partnerships* (Oxford, Hart Publishing, 2001).

- Hungary** – Civil Code, Art. 685/A, as amended by Act No. 42 of 1996 ("Partners – if not stipulated otherwise by law – are two people living in an emotional and economic community in the same household without being married."); Act on Registered Partnership, Law 29 of 2009 (incorporated into new Civil Code adopted on 21 Sept. 2009)
- Iceland** – Law on Confirmed Cohabitation (*Lög um staðfesta samvist*), 12 June 1996, nr. 87 ("parties to a confirmed cohabitation"); *Lög um breytingar á hjúskaparlögum og fleiri lögum og um brottfall laga um staðfesta samvist (ein hjúskaparlög)*, **22 June 2010, nr. 65 ("spouses")**, <http://www.althingi.is/altext/138/s/1302.html>
- Ireland** - Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, No. 24 of 2010 ("civil partners")
- Liechtenstein** - Law on the Registered Partnership of Same-Sex Couples (*Gesetzes über die eingetragene Partnerschaft gleichgeschlechtlicher Paare*) (approved by legislature on 17 March 2011; approved by 68% of voters in a referendum on 17 and 19 June 2011)
- Luxembourg** - *Loi du 9 juillet 2004 relative aux effets légaux de certains partenariats*, *Mémorial A*, nr. 143, 6 August 2004 ("partenaires"; "partners")
- Netherlands** - Act of 21 June 1979 amending the Civil Code [Art. 7A:1623h] with respect to rent law, *Staatsblad* 1979, nr. 330 ("*duurzame gemeenschappelijke huishouding*"; "lasting joint household"); Act of 5 July 1997 amending Book 1 of the Civil Code and the Code of Civil Procedure, concerning the introduction therein of provisions relating to registered partnership (*geregistreerd partnerschap*), *Staatsblad* 1997, nr. 324 ("*geregistreerde partners*"; "registered partners"); Act of 21 December 2000 amending Book 1 of the Civil Code, concerning the opening up of marriage for persons of the same sex (Act on the Opening Up of Marriage), *Staatsblad* 2001, nr. 9 ("*echtgenoten*"; "spouses")
- Norway** – Law on Registered Partnership (*Lov om registrert partnerskap*), 30 April 1993, nr. 40 ("*registrerte partnere*"; "registered partners"); Marriage Act (*Lov 4 juli 1991 nr. 47 om ekteskap*), as amended by Act of 27 June 2008 No. 53, (in force 1 January 2009, Decree of 27 June 2008 No. 745) ("spouses")
- Portugal** – *Lei No. 7/2001 de 11 de Maio, Adopta medidas de protecção das uniões de facto*, [2001] 109 (I-A) *Diário da República* 2797 ("*uniões de facto*"; "de facto unions"); *Lei no. 9/2010 de 31 de Maio, Permite o casamento [marriage] civil entre pessoas do mesmo sexo* ("spouses")
- Slovenia** - *Zakon o registraciji istospolne partnerske skupnosti (ZRIPS) Ur.l. RS, št. 65/2005* (Registered Partnership Law)

Spain

Spanish State – see, e.g., Law on Urban Leasing (*Ley de Arrendamientos Urbanos*) of 24 Nov. 1994, Arts. 12, 16, 24, *disposición transitoria segunda* B(7): housing rights granted to a person cohabiting "in a permanent way in an emotional relationship analogous to that of spouses, without regard to its sexual orientation [*con independencia de su orientación sexual*]"; *Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio* (Law 13/2005, of 1 July, providing for the amendment of the Civil Code with regard to the right to contract marriage), *Boletín Oficial del Estado* no. 157, 2 July 2005, pp. 23632-23634 (in force 3 July 2005)

Autonomous Communities (*Comunidades Autónomas*):

- Andalucía - *Ley de parejas de hecho*, (5 Dec. 2002) 422 *Boletín Oficial del Parlamento de Andalucía* 23987 ("parejas de hecho"; "de facto couples")
- Aragón - *Ley relativa a parejas estables no casadas*, (26 March 1999) 255 *Boletín Oficial de las Cortes de Aragón* ("parejas estables no casadas"; "unmarried stable couples")
- Asturias - *Ley 4/2002, de 23 de mayo, de Parejas Estables* ("parejas estables"; "stable couples")
- Balearic Islands - *Llei 18/2001 de 19 de diciembre, de parelles estables* ("parelles estables"; "stable couples")
- Basque Country - *Ley 2/2003, de 7 de mayo, reguladora de las parejas de hecho*, (9 May 2002) 92 *Boletín Oficial del Parlamento Vasco* 9760 ("parejas de hecho"; "de facto couples")
- Canary Islands - *Ley 5/2003, de 6 de marzo, para la regulación de las parejas de hecho*, (13 March 2003, V Legislatura) 150 *Boletín Oficial del Parlamento de Canarias* 2 ("parejas de hecho"; "de facto couples")
- Cantabria - *Ley 1/2005, de 16 de mayo, de parejas de hecho*, (24 May 2005) 98 *Boletín Oficial de Cantabria* ("parejas de hecho"; "de facto couples")
- Catalonia - *Llei 10/1998, de 15 de juliol, d'unions estables de parella*, (10 July 1998) 309 *Butlletí Oficial del Parlament de Catalunya* (BOPC) 24738 ("unions estables de parella"; "stable unions of couples")
- Extremadura - *Ley de Parejas de Hecho*, (26 March 2003) 377 *Boletín Oficial de la Asamblea de Extremadura* 13 ("parejas de hecho"; "de facto couples")
- Madrid - *Ley de Uniones de Hecho de la Comunidad de Madrid*, (28 Dec. 2001) 134 *Boletín Oficial de la Asamblea de Madrid* (V Legislatura) 160003 ("uniones de hecho"; de facto unions)
- Navarra - *Ley Foral 6/2000, de 3 de julio, para la igualdad jurídica de las parejas estables*, [7 July 2000] 82 *Boletín Oficial de Navarra* ("parejas estables"; "stable couples")
- Valencia - *Ley por la que se regulan las uniones de hecho*, (9 April 2001) 93 *Boletín Oficial de las Cortes Valencianas* 12404 ("uniones de hecho"; "de facto unions")

Sweden – Homosexual Cohabitees Act (*Lag om homosexuella sambor*), SFS 1987:813 (replaced by SFS 2003:376); Law on Registered Partnership (*Lag om registrerat partnerskap*), 23 June 1994, SFS 1994:1117 ("registrerade partner"; "registered partners"); SFS 1987:230 as amended by SFS 2009:253 ("spouses")

Switzerland

Federal Level - *Bundesgesetz vom 18. Juni 2004 über die eingetragene Partnerschaft gleichgeschlechtlicher Paare (Partnerschaftsgesetz)*, *Bundesblatt*, 2004, No. 25 (29 June 2004), p. 3137; *Loi fédérale du 18 juin 2004 sur le partenariat enregistré entre personnes du même sexe (Loi sur le partenariat)*, *Feuille fédérale*, 2004, No. 25 (29 June 2004), p. 2935 ("Partner/Partnerinnen"; "partenaires"; "partners") (approved by 58% of voters in a referendum on 5 June 2005; entered into force on 1 January 2007)

United Kingdom - Civil Partnership Act 2004 ("civil partners")

Other Democratic Societies

Argentina

Federal Level - Civil Code, as amended by *Ley 26.618*, promulgated on 21 July 2010, published in *Boletín Oficial de la República Argentina* on 22 July 2010, No. 31.949 ("spouses")

Buenos Aires (Autonomous City) - *Ley No. 1.004, Reconócense las Uniones Civiles*, 12 December 2002 ("members of the civil union")

Australia

Federal Level - Same-Sex Relationships (Equal Treatment In Commonwealth Laws - General Law Reform) Act 2008 (No. 144 of 2008); Family Law Amendment (De Facto Financial Matters And Other Measures) Act 2008 (No. 115 of 2008); Same-Sex Relationships (Equal Treatment In Commonwealth Laws-- Superannuation) Act 2008 (No. 134 of 2008); Evidence Amendment Act 2008 (No. 135 of 2008)

States and Territories:

Australian Capital Territory – eg, Domestic Relationships Act 1994 ("parties to a domestic relationship"); Legislation (Gay, Lesbian and Transgender) Amendment Act 2003 ("domestic partners"); Civil Partnerships Act 2008 ("civil partners")

New South Wales - Property (Relationships) Legislation Amendment Act 1999; Miscellaneous Acts Amendment (Relationships) Act 2002 (eg, "de facto spouses", "de facto partners", "parties to a de facto relationship"); Relationships Register Act 2010 (Act. No. 19 of 2010)

Northern Territory - Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003, Act. No. 1 of 2004 ("de facto partners")
Queensland - eg, Property Law Amendment Act 1999 ("de facto spouses")
South Australia - Statutes Amendment (Domestic Partners) Act 2006 ("domestic partners")
Tasmania - Relationships Act 2003, Relationships (Consequential Amendments) Act 2003 ("partners" include two persons in a "significant relationship", ie, "who have a relationship as a couple"; they may register a "deed of relationship")
Victoria – Statute Law Amendment (Relationships) Act 2001 ("domestic partners"); Relationships Act 2008 ("persons in a registered relationship")
Western Australia - Acts Amendment (Lesbian and Gay Law Reform) Act 2002 ("de facto partners")

Canada

Federal Level - Modernization of Benefits and Obligations Act, Statutes (S.) of Canada 2000, chapter (c.) 12 ("common-law partners", "*conjoints de fait*"); Civil Marriage Act, Statutes of Canada 2005, c. 33 ("spouses", "*époux*")

Provinces and Territories:

Alberta - Adult Interdependent Relationships Act, S.A. 2002, c. A-4.5 ("adult interdependent partners")
British Columbia - Definition of Spouse Amendment Acts, S.B.C. 1999, c. 29, S.B.C. 2000, c. 24 ("spouses")
Manitoba - Charter Compliance Act, S.M. 2002, c. 24 and Common-Law Partners' Property and Related Statutes Amendment Act, S.M. 2002, c. 48 (registered and unregistered "common-law partners")
New Brunswick - eg, Family Services Act, N.B. Acts, c. F-2.2, section (s.) 112(3), as amended in 2000 (spousal support obligations of unmarried persons living in a family relationship)
Newfoundland - Same Sex Amendment Act, S.N. 2001, c. 22 ("cohabiting partners")
Northwest Territories - Family Law Act, S.N.W.T. 1997, c. 18, s. 1(1), as amended by S.N.W.T. 2002, c. 6 ("spouses")
Nova Scotia - Law Reform (2000) Act, S.N.S. 2000, c. 29 (unregistered "common-law partners", registered "domestic partners")
Nunavut - eg, An Act to amend the Labour Standards Act, S. Nunavut 2003, c. 18 ("common-law partners")
Ontario - Amendments Because of the Supreme Court of Canada Decision in *M. v. H.* Act, S.O. 1999, c. 6 ("same-sex partners"); An Act to amend various statutes in respect of spousal relationships, S.O. 2005, c. 5 ("spouses")
Prince Edward Island - Family Law Act, R.S.P.E.I. 1988, c. F-2.1, s. 29(1), as amended by S.P.E.I. 2002, c. 7 ("common-law partners")
Québec - An Act to amend various legislative provisions concerning de facto spouses, S.Q. 1999, c. 14, 1st session, 36th legislature, Bill 32 ("*conjoints de fait*", "de facto spouses"); An Act instituting civil unions and establishing new rules of filiation, S.Q. 2002, c. 6, 2nd session, 36th legislature, Bill 84 ("*conjoints en*

union civile" or "*conjointis unis civilement*" or "civil union spouses"; capacity to become "*conjointis mariés*" or "*époux*" or "married spouses" is governed by the 2005 federal law)

Saskatchewan - Miscellaneous Statutes (Domestic Relations) Amendment Acts, 2001, S.S. 2001, cc. 50-51 ("common-law partners", or persons "cohabiting as spouses" or "cohabiting in a spousal relationship")

Yukon Territory – eg, Family Property and Support Act, R.S.Y. 1986 (Vol. 2), c. 63, ss. 1, 30, 31, as amended by S.Y. 1998, c. 8, s. 10 ("spouses")

Mexico

Federal District (Mexico City) - *Decreto de Ley de Sociedad de Convivencia para el Distrito Federal*, *Gaceta Oficial*, 16 November 2006 ("convivientes"; "cohabitants"); *Código Civil para el Distrito Federal*, Article 146 ("spouses") (as amended by a law approved by the *Asamblea Legislativa* on 21 Dec. 2009 and published on 29 Dec. 2009)

Coahuila - *Decreto* No. 209, 11 Jan. 2007, adding the *Pacto Civil de Solidaridad* to the Civil Code ("*compañeros civiles*"; "civil companions")

New Zealand - Civil Union Act 2004, Relationships (Statutory References) Act 2004 ("parties to a civil union")

South Africa - Civil Union Act, No. 17 of 2006 (same-sex or different-sex "civil union partners", who include "spouses in a marriage" and "partners in a civil partnership")

United States (specific citations can be provided if the ECtHR would find them helpful)

- Calif. - "domestic partners" - 1999, 2001, 2003 ("spouses": 16 June-3 Nov. 2008)
- Colorado - "designated beneficiaries" - 2009
- Connecticut - "parties to a civil union" - 2005 ("spouses" from 2008)
- Delaware - "parties to a civil union" - 2011
- District of Columbia - "domestic partners" - 1992; "spouses" - 2010
- Hawaii - "reciprocal beneficiaries"- 1997; "partners in a civil union" - 2011
- Illinois - "parties to a civil union" - 2011
- Iowa - "spouses" - 2009
- Maine - "domestic partners" - 2004
- Massachusetts - "spouses" - 2004
- Nevada - "domestic partners" - 2009
- New Hampshire - "spouses in a civil union" - 2007 ("spouses" from 2010)
- New Jersey - "civil union partners" - 2006
- Oregon - "domestic partners" - 2007
- Vermont - "parties to a civil union" - 2000 ("spouses" from 2009)
- Washington - "domestic partners" - 2007, 2009
- Wisconsin - "domestic partners" - 2009

Uruguay - *Ley No. 18.246 de Unión Concubinaria*, published in *Diario Oficial*, 10 Jan. 2008, No. 27402 (same-sex or different-sex "*concubinos*")