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## National Report: Greece

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# NATIONAL REPORT: GREECE

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## I. GENERAL REMARKS

The purpose of the present report is to provide insight in regards to the provisions of Greek law on same-sex marriage. As in many other jurisdictions, a more comprehensive work than a simple analysis on the (in)existence of same-sex marriage is required. Indeed, the statement that contemporary Greek family law excludes the possibility of same-sex marriage would not explain to what extent the law so stands today, why it came to be so, or what the future beholds. Similarly, since family law is affected by provisions from other legal fields on both the domestic and the international levels, it should be presented in conjunction to any such provisions. Finally, the application of law should be assessed in light of its construction by scholarly writing and the courts.

Based on the above, an introductory section provides information on the structure of the Greek State and the underpinnings of the domestic legal system (Part II); the main part of the report sets out an analysis on focal provisions of the Constitution and international conventions (Part III) and then illustrates how the difference of sex is perceived in the context of the Civil Code provisions on marriage on the one hand, and in the newly-established rules on the cohabitation pact on the other hand (Part IV); it then proceeds with a presentation of recent case law on same-sex marriage regulation (Part V). The report concludes with short remarks on what prospects lie ahead (Part VI).

In this report, use of terminology relating to couples, marriages, unions, etc. as of the ‘same-sex’ and/or the ‘opposite sex’—instead of the commonly applied pair of ‘homosexual’ and/or ‘heterosexual’ characterisations—is deliberate. If the law qualifies or disqualifies any such relations it is not on the basis of sexual orientation or preference, but rather on the basis that relations between people of the same sex, i.e. between two women or two men, may or may not be legally recognised. To state the

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obvious example, a man is allowed to marry a woman precisely because of the difference in sex and irrespective of his sexual orientation or preference.

## II. GREEK STATE & THE DOMESTIC LEGAL ORDER

### A. State Structure

Greece is a presidential parliamentary republic, with the current Constitution, enacted in 1975<sup>1</sup> (hereinafter: Const.) being the supreme law of the land.<sup>2</sup> As set out in article 26 Const., legislative, executive and judiciary powers are assigned to different state organs,<sup>3</sup> although certain links between the executive and legislative branches necessarily persist.

Parliament, a single chamber of 300 members elected by direct popular vote for a four-year term, is the principle organ discharging legislative functions. Introduced upon proposal by either Parliament itself or the Government, a bill is first debated before the competent parliamentary committee and then before the *plenum*. Having received the necessary number of positive votes and following its promulgation and publication in the Government Gazette, it becomes enacted law. Moreover, legislation is all too regularly produced by means of authority delegated by Parliament to organs of the executive. Thus, a plethora of statutory instruments originate directly from Government and take the form of decrees issued by the President of the Republic.<sup>4</sup>

The leader of the party winning the majority of seats in Parliament is

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1. Constitution of 1975, as amended in 1986, 2001 and 2008. For an overview see P.D. Dagtoglou, Constitutional and administrative law in K.D. Kerameus & P.J. Kozyris (eds), *Introduction to Greek law* (3<sup>rd</sup> rev. edn, Alphen aan den Rijn/Athens 2008) 23 et seq.; Ph.C. Spyropoulos & Th.P. Fortsakis, *Hellas in A. Alen* (ed.), *International encyclopedia of laws: Constitutional law* (last updated January 2009). For the purposes of the present report, the updated translation of the Constitution in English by X. Paparrigopoulos & St. Vassilouni, *The Constitution of Greece* (Athens 2008) was consulted; this translation, together with similar ones in French and German, is available online at the website of Parliament, [www.parliament.gr](http://www.parliament.gr) (10 March 2010).

2. Constitutional amendments may only be introduced by Parliament following a long and complicated procedure. All provisions are open to amendment, save those determining the form of government as a parliamentary republic, the one providing for the separation of state powers and those guaranteeing certain fundamental rights, i.e. respect and protection of the value of the human being (art. 2); equality (art. 4 paras 1, 4 and 7); free development of personality (art. 5 para. 1); personal freedom (art. 5 para. 3); and freedom of religious conscience (art. 13 para. 1).

3. Art. 26 Const.: "(1). Legislative powers shall be exercised by the Parliament and the President of the Republic. (2). Executive powers shall be exercised by the President of the Republic and the Government. (3). Judicial powers shall be exercised by the courts of law, the decisions of which shall be executed in the name of the Greek People."

4. The President of the Republic holds the—largely ceremonial—highest State office, and is elected by Parliament for a once-renewable, five-year term.

appointed Prime Minister, the powerful State figure who is the Head of Government. Ministries, the main division of central government, are responsible for carrying out the general policy of the administration. Government decentralisation is realised through regional authorities functioning under central government supervision. Following the constitutional amendment of 2001, a number of independent and regulatory authorities with consultative function and/or decision-making power have been introduced.

The judiciary is composed of courts and public prosecutors. Judicial organisation follows a system of triple court hierarchy, each exercising one of three different jurisdictions (civil, criminal and administrative: arts. 93 et seq. Const.).<sup>5</sup> With regards to the civil jurisdiction in particular, courts are further organised in justices of peace, one-member and three-member courts of first instance, courts of appeal and the Areios Pagos court. The latter is the supreme court of both the civil and criminal jurisdictions; its authority, however, extends only over extraordinary review of points of law. Similarly, the Council of State is the supreme court of the administrative jurisdiction.<sup>6</sup> The Constitution further provides for a third supreme court, the Court of Audit, which lies outside the hierarchy described above, and finally for the Supreme Special Court that has jurisdiction over specific instances of significant constitutional importance (art. 100 Const.).

### B. Legal System

Greece is a civil-law country, its system closely observing the Romano-Germanic legal tradition. As stated in article 1 of the Civil Code (hereinafter: CC),<sup>7</sup> legislation and custom are the sources of law, despite the fact that custom has very limited influence over contemporary Greek law.<sup>8</sup> “Legislation,” in the above sense, covers the totality of domestic legislation (i.e. the Constitution, laws, presidential decrees, other normative

5. For a thorough overview, see K.D. Kerameus, Judicial organisation and civil procedure in Kerameus & Kozyris, *supra* note 1, at 341 et seq.

6. The Council of State’s jurisdiction, *inter alia*, extends over the annulment upon petition of enforceable administrative acts for excess of power or violation of the law (art. 95 para. 1(a) Const.).

7. Available translations of the CC, in English and French respectively, by C. Taliadoros, *Greek Civil Code* (Athens 1982; two *Supplements*, 1983 and 2000) and P. Mamopoulos & M. Tsitsekis-Souridakis, *Code civil hellénique* (3<sup>rd</sup> edn, Hellenic Institute of International and Foreign Law, series no. 22, Athens/Komotini 2000).

8. Art. 1 CC: “Rules of law are contained in the laws and customs.” This provision should be read in conjunction with art. 2 para. 2 Legislative Decree of 07/10 May 1946, prohibiting the operation of custom *adversus legem*: “Custom cannot abolish law.” Indeed, custom has very limited influence on contemporary Greek law. On the sources of Greek law in general see A. Grammaticaki-Alexiou, Sources and materials in Kerameus & Kozyris, *supra* note 1, 15 et seq.

acts, etc.), the so-called ‘generally recognised’ rules of international law, as well as international conventions that have been formally introduced in the domestic legal order. It should be noted that the latter enjoy force superior to that of all other domestic provisions, as stipulated under article 28 para. 1 Const. providing that:

1. The generally recognised rules of international law, as well as international conventions as of the time they are ratified by statute and become operative according to their respective conditions, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law . . . .

European Community law equally supersedes any contrary provision of domestic law since primary and – to a significant extent – secondary community law also fall under the ambit of article 28 Const.<sup>9</sup>

Court judgments are not considered a source of law, however their contribution in the interpretation, if not formation, of legal rules is undisputable.<sup>10</sup> Additionally, although the principle of judicial precedent is not recognised, in practice lower courts tend to follow case law originating from higher courts. Thus, the influence exercised by court judgments on the formal sources of law is notable. In a similar manner, legal doctrine is not a source of law, yet its importance is generally recognised.<sup>11</sup>

The judicial system (*supra*, Part A *in fine*) does not provide for a constitutional court. Indeed, review of constitutionality is diffuse and inherent to all courts, in the general sense that a court is bound not to apply any law the content of which such court finds to be contrary to the Constitution.<sup>12</sup> However, courts may only decline application of a law found to be unconstitutional and cannot set it aside;<sup>13</sup> the power to annul<sup>14</sup> an act of Parliament for reasons of unconstitutionality is exclusively vested to the Supreme Special Court.<sup>15</sup>

9. See interpretative clause, art. 28 Const. *in fine*: “Article 28 constitutes the foundation for the participation of the Country in the European integration process.” On the primacy of Community law see V.A. Christianos, Application of Community law in Greece *in* Kerameus & Kozyrus, *supra* note 1, 65 et seq., 66-70.

10. P. Agalopoulou (-Y. Kotsovolou Masry), *Basic concepts of Greek civil law* (Athens/Komotini/Berne/Brussels 2005) 25-26.

11. *Ibid.*, 26; Grammaticaki-Alexiou, *supra* note 8, at 16.

12. Art. 93 para. 4 Const. See also J. Iliopoulos-Strangas & St.-I. G. Koutnatzis, Constitutional courts as ‘positive legislators’ (Greek national report, topic under s. IV.B. (Constitutional law), *XVIIIth International Congress of comparative law*) = *RHDI* 2010 (forthcoming).

13. Note, however, that the Council of State performs a review of constitutionality of draft presidential decrees, i.e. legislation produced by delegation by the administration (*supra* Part A; art. 95 para. 1(d) Const.).

14. Dagtoglou, *supra* note 1, at 31 *in fine*.

15. *Supra*, A; para. 1(e) Const. provides that the Supreme Special Court has jurisdiction over: “The settlement of controversies on whether the content of a statute enacted by Parliament is contrary to the Constitution, or on the interpretation of the

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## III. PERTINENT CONSTITUTIONAL PROVISIONS

*A. Marriage*

In the context of the current discussion on same-sex marriage, article 21 para. 1 Const. figures prominently. This focal provision, found under the Second Part of the Constitution regulating individual and social rights, has as follows:

1. Family, being the cornerstone of the preservation and advancement of the Nation, as well as marriage, motherhood and childhood, shall be under the protection of the State . . . .

It is clear from the above provision that the Constitution protects family and marriage as institutions distinct from each other; clearly, even though a family may originate in marriage, the latter is not considered as a necessary condition of the former.<sup>16</sup> Furthermore, ‘family’ in the constitutional sense includes the community of spouses and their children (either born in or outside wedlock), but also spouses with no children at all.<sup>17</sup> Additionally, to the extent that the above provision does not distinguish between different types of family,<sup>18</sup> a family originating in free union instead of marriage is also awarded constitutional protection.<sup>19</sup>

In regards to marriage in particular, lack of unanimity of scholarly writing on the extent of protection awarded to same-sex couples and on the legal definition of marriage is manifest at the constitutional level.

On the one hand, ‘marriage’ in the constitutional sense may be understood as encompassing certain essential elements recognised by Greek society and also the relevant fundamental principles of the Greek legal order,<sup>20</sup> and therefore refers to the permanent and freely-established partnership of two persons *of the opposite sex* that is legally recognised and based on the equality of spouses before the law.<sup>21</sup> Accordingly, the common legislator may neither abolish the institution of marriage nor

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provisions of such statute when conflicting judgments have been pronounced by the Council of State, Areios Pagos or the Court of Audit.”

16. See P.D. Dagtoglou, *Human rights*, vol. A (2<sup>nd</sup> rev. edn, Athens/Komotini 2005) 393 para. 502 [in Greek].

17. *Ibid.*; contra K. Chrissogonos, *Civil and social rights* (3<sup>rd</sup> rev. edn, Athens/Komotini 2006) 535 [in Greek], according to whom childless spouses fall under the constitutional protection of marriage, not family.

18. For a discussion on the types of family from the Greek civil-law perspective see P. Agallopoulou, Les différents types de famille contemporaines selon le droit hellénique, *RHDI* 2002, 22-41.

19. *Idem*, Free unions in M. Stathopoulos, K. Beys, Ph. Doris & I. Karakostas (eds), *Studies in honour of Apostolos G. Georgiadis* (Athens/Komotini 2006) 3, 7 [in Greek].

20. I. Deliyannis, *Family law*, vol. I (Thessaloniki 1983) 53 [in Greek].

21. Chrissogonos, *supra* note 17, at 536.

amend its essential elements; therefore, extending the scope of marriage to same-sex couples would be unconstitutional. However, these restrictions do not prevent the legislator from regulating other forms of unions not falling under the above definition of marriage, such as free unions or same-sex unions in particular;<sup>22</sup> yet the legislator is under no positive obligation to regulate such unions, since whenever the Constitution considers any regulation as imperative it so provides (i.e. in the case of marriage).<sup>23</sup>

On the other hand, marriage may be also understood as a concept detached from social perceptions and legal provisions,<sup>24</sup> one that is in constant evolution and in concordance with other constitutional provisions.<sup>25</sup> Therefore, the minimum essential elements of marriage are restricted to the form of celebration and its privileged regulation at law in comparison to free unions,<sup>26</sup> while the concept itself may be amended or further complemented in a manner extending its scope of application.<sup>27</sup> Thus, marriage should retain a neutral stance as to the criterion of sex<sup>28</sup> and be constructed as allowing same-sex marriage.

Based on the above, same-sex marriage may be understood as either prohibited or allowed, while forms of same-sex unions should be considered as permissible yet unrecognised and unregulated.

### *B. Equality & Non-Discrimination*

Other constitutional provisions complement the corpus of rules that affect the issue herein discussed. Thus the general rule on equality and the one on gender equality in particular are significant in the present context. To this regard, article 4 Const. provides: (1) All Greeks are equal before the law, and (2) Greek men and women have equal rights and equal obligations . . . .

The above provisions set out a positive rule according to which men and women<sup>29</sup> should be given equal opportunities, and a negative one prohibiting discrimination on the basis of sex. Thus, whenever a court

22. *Ibid.*; Dagtoglou, *supra* note 16, at 394 para. 502c.

23. Chrissogonos, *supra* note 17, at 173.

24. Such as the relevant provisions of the Civil Code; to this particular regard *see infra* Part IV.A.

25. *Infra* Part B and C.

26. L. Papadopoulou, Same-sex marriage?, *Δικαιώματα του Ανθρώπου* (=Dikeomata tou Anthrou – DtA) 2008, 405, 422 [in Greek].

27. *Ibid.*, 425.

28. *Ibid.*, 480, following an exhaustive analysis of pertinent constitutional, international and other national provisions.

29. The Constitution states that the rules on equality apply to Greek citizens alone; however, legislation is not precluded from extending their scope of application to aliens.

should find a legal rule or administrative act in breach of the above it should consider it unconstitutional.<sup>30</sup> Exceptions from the above prohibition were allowed to a certain extent up to the 2001 constitutional amendment, however as the Constitution stands today, there is no room for derogation, apart from cases of affirmative action.<sup>31</sup>

Moreover, problems relating to recognition of same-sex marriage are generally regarded as falling under the provisions of *gender* discrimination, since the latter includes not just discrimination against one sex as regards the other, but also cases of discrimination due to the sex of men and/or women discriminated against.<sup>32</sup> Denying marriage of same-sex couples, while also excluding any alternative recognition of same-sex unions, is thus difficult to reconcile with the above principle.<sup>33</sup>

### C. Other

The constitutional framework affecting the regulation of same-sex marriage is further complemented by provisions relating to the free development of one's personality,<sup>34</sup> respect and protection of the human being,<sup>35</sup> and the exercise of human rights.<sup>36</sup> By contrast, provisions regulating freedom of religion<sup>37</sup> and the relations between State and

30. Dagtoglou, *supra* note 16, vol. B, at 1240-1242, para. 1381.

31. Art. 116 para. 2 Const.: "Adoption of positive measures for promoting equality between men and women does not constitute discrimination on the grounds of sex. The State shall take action for the elimination of inequalities actually existing, in particular to the detriment of women." See also Chrissogonos, *supra* note 17, at 142.

32. Papadopoulou, *supra* note 26, at 459.

33. M. Stathopoulos & Chr. Stambelou, Introductory remarks to articles 1350-1371 in Ap. Georgiadis & M. Stathopoulos (eds), *Civil Code*, vol. VII: *Family law (articles 1346-1504)* (2<sup>nd</sup> edn, Athens 2007) 54 no. 4 [in Greek].

34. Art. 5 para. 1 Const.: "All persons shall have the right to develop freely their personality and participate in the social, economic and political life of the country, insofar as they do not infringe the rights of others or violate the Constitution and good usages."

35. Art. 2 para. 1 Const.: "Respect and protection of the value of the human being constitute the primary obligation of the State."

36. Art. 25 Const.: "(1). The rights of the human being as an individual and as a member of society and the principle of the welfare state rule of law are guaranteed by the State. All agents of the State shall be obliged to ensure the unhindered and effective exercise thereof. These rights also apply between individuals to which they are appropriate. Restrictions of any kind which, according to the Constitution, may be imposed upon these rights, should be provided either by the Constitution or by statute, should a reservation exist in the latter's favour, and should respect the principle of proportionality. (2). The recognition and protection of the fundamental and inalienable rights of man by the State aims at the achievement of social progress in freedom and justice. (3). The abusive exercise of rights is not permitted. (4). The State has the right to claim of all citizens to fulfil the duty of social and national solidarity."

37. Art. 13 paras 1, 4 Const.: "(1). Freedom of religious conscience is inviolable. The enjoyment of civil rights and liberties does not depend on the individual's religious beliefs. . . (4). No person shall be exempt from discharging his obligations to the State or may refuse to comply with the laws by reason of his religious convictions."



Church<sup>38</sup> are irrelevant to the issue under analysis, to the extent that the State retains its neutrality as regards religion.

Although not part of constitutional law, protection afforded by international conventions and Community law that is relevant to the issue under examination should also be briefly outlined.<sup>39</sup>

Greece is a Council of Europe member and has ratified the European Convention for the protection of human rights and fundamental freedoms (*hereinafter* ECHR)<sup>40</sup> and most of its Protocols<sup>41</sup>. Once remedies at the domestic level have been exhausted (and whenever an effective remedy is not available), the enabled ECHR system of control provides persons within the jurisdiction of states parties with a right to file individual applications alleging violations by States parties of human rights protected by the ECHR and its Protocols before the European Court of human rights (*hereinafter*: ECtHR). The parties to a case must abide with the judgments of the ECtHR and take all necessary measures of compliance.

Among the rights protected by the ECHR, the right to respect for private and family life (art. 8), the right to marry (art. 12) and the prohibition of discrimination (art. 14) are of interest in the context of same-sex marriage. ECtHR case law is characterised by a certain degree of reluctance in formally recognising same-sex unions. The right to marry and found a family, for instance, is expressly guaranteed as a right of men and women of marriageable age, ‘according to the national laws governing the exercise of this right.’ The wide margin of appreciation thus allowed to states parties leaves little room for any creative construction.<sup>42</sup> However, the provisions

38. Art. 3 para. 1 Const.: “The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ [ . . . ].”

39. The authoritative source of international and Community law is described *supra* Part II.B.

40. Initially by Law 2329/1953 and once again, following restoration of the Republic in the mid-70s, by Law Decree 53/1974.

41. Namely the (First) Additional Protocol and Protocols 2, 3, 5-8, 11, 13 and 14; Protocols 10 and 12 have been signed but not yet ratified.

42. To this regard, see ECtHR, *case of Rees v. the United Kingdom* (application no. 9532/81), judgment of 17 October 1986, paras 49, 50: “In the Court’s opinion, the right to marry guaranteed by Article 12 refers to traditional marriage between persons of the 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. . . . The limitations [introduced by the national laws of the Contracting States] must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired. However, the legal impediment in the United Kingdom on the marriage of persons who are not of the opposite biological sex cannot be said to have an effect of this kind.” The ‘traditional concept of marriage’ was further emphasised in subsequent judgments: *case of Cossey v. the United Kingdom* (application no. 10843/84), judgment of 27 September 1990, paras 43 et seq.; *case of Sheffield and Horsham v. the United Kingdom* (application nos 22985/93, 23390/94), judgment of 30 July 1998, paras 66 et seq. A significant change occurred with the turn of the century through the abandonment of the biological sex criterion and the required ability to conceive a child: *case of I. v. the United Kingdom* (application no. 25680/94),

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on respect of private and family life and non-discrimination, especially when the principle of proportionality is applied,<sup>43</sup> are providing some indications of changing concepts.<sup>44</sup>

Greece has also ratified the International Covenant on civil and political rights (hereinafter: ICCPR)<sup>45</sup> that provides for the inviolability of privacy and family (art. 17), protection of family and the right to marriage of men and women (art. 23), equality (art. 26) and non-discrimination (art. 2 para. 1).

As a member of the European Union, Greece has ratified the Treaty of Lisbon amending the Treaty on the European Union and the Treaty establishing the European Community<sup>46</sup> which declares the legally binding force of the ECHR-influenced Charter of fundamental rights of the European Union not only upon the Union and its institutions, but also upon Member States as regards the implementation of European Union law.

#### IV. THE LAW ON SAME-SEX MARRIAGE & PARTNERSHIP

##### *A. Marriage & the Difference of Sex Under the Civil Code*

###### *1. General Considerations*

In the absence of a specific legal statute unequivocally allowing or prohibiting the conclusion of same-sex marriage, one necessarily turns to the Fourth Book of the Civil Code regulating family law (arts. 1346-1694) to search for the appropriate solution.

The original Civil Code provisions on family law purported to a nuclear and patriarchal model and were considered conservative even when the Code first came into force after the end of World War II.<sup>47</sup> Following the enactment of the current Constitution, it became clear that their reconsideration would be inevitable, since a substantial part thereof were incompatible with fundamental constitutional provisions, such as the newly-introduced principle of gender equality (art. 4 para. 2 Const.; *supra*

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judgment of 11 July 2002, paras 78 et seq.; all judgments published at [echr.coe.int/en/hudoc](http://echr.coe.int/en/hudoc) (10 March 2010).

43. ECtHR, *case of Karner v. Austria* (application no. 40016/98), judgment of 24 July 2003, paras 37, 40 et seq. The case involved a same-sex couple and the right to tenancy in the event of death. *See*, to the same regard, *case of Kozak v. Poland* (application no. 13102/02), judgment of 2 March 2010, paras 91-92, 97 et seq.; both judgments published at [echr.coe.int/en/hudoc](http://echr.coe.int/en/hudoc) (10 March 2010).

44. On current prospects *see infra* Part VI.

45. Law 2462/1997.

46. Law 3671/2008.

47. A. Grammaticaki-Alexiou, Family law *in* Kerameus & Kozyris, *supra* note 1, 180.

Part III.B).

Modifications were thus initially made to the Code by way of two separate enactments (Laws 1250/1982 and 1329/1983), with the novel provisions reflecting social development at the domestic level and due consideration of the conceptual underpinnings of family-law systems in force across Europe<sup>48</sup> at that time. Amendments included, *inter alia*, the possibility of civil marriage celebration before the mayor;<sup>49</sup> man and woman being regarded equal and autonomous at law, both as spouses and parents; the introduction of no-fault divorce and divorce by consent; the equality of children born in and outside wedlock; etc. Further amendments were introduced to the Code by Law 2447/1996 in matters of adoption and judicial assistance and Law 3089/2002 on medically-assisted reproduction, affecting matters of kinship and filiation. Lastly, amendments on adoption and divorce were introduced by Law 3719/2008, by way of which the cohabitation pact was also instituted (discussed *infra* Part B). Overall, the family law system provides for rules of mandatory character, i.e. parties may not derogate therefrom by private agreement.<sup>50</sup> Such mandatory character is dominant, despite the fact that the above amendments have strengthened private autonomy.<sup>51</sup>

## 2. Difference of Sex as a Positive Condition of Marriage

The requisites of marriage are enumerated in articles 1350-1360 CC, on the basis of a distinction between impediments and positive conditions. Valid conclusion of marriage requires non-fulfilment of conditions under the first category, i.e. the existence of another marriage in force (art. 1354 CC), consanguinity (art. 1356 CC), collateral kinship (art. 1357 CC) and adoption (art. 1360 CC). Positive conditions, i.e. those that must be fulfilled for a valid conclusion of marriage, include lawful age (art. 1350 para. 2 CC) and capacity (arts. 1351, 1352 CC). The difference of sex is not explicitly listed in any of the pertinent Civil Code provisions. In fact, article 1350 only goes so far as to state that: “The agreement of the future spouses is required for the celebration of marriage . . . .”<sup>52</sup>

48. P. Agalopoulou, Modifications du droit de la famille hellénique dues aux changements socio-familiaux, *RHDI* 1997, 579.

49. Prior to being amended, the Code only allowed for religious celebration. The current system provides spouses with a selection between religious and civil ceremony (or have both), thus allowing for one of the few religious influences to persist to this day: E. Kounougeri-Manoledaki, *Family law*, vol. I (4<sup>th</sup> edn, Athens/Thessaloniki 2008) 8 [in Greek].

50. See art. 3 CC: “Private will may not set aside the application of rules of public policy”.

51. Stathopoulos & Stambelou, *supra* note 33, 12 no. 42; Kounougeri-Manoledaki, *supra* note 49, 3-5.

52. The Greek word for ‘future spouses’ (=μελλοντες); literal translation: persons

Despite the lack of any express qualification of future spouses on the basis of difference or identity of sex as a condition to marriage, doctrine has long maintained that same-sex marriage is excluded by law. The main argument in support of this construction relates to the perception of marriage being available only to future spouses of the opposite sex, as such, perception results from the overall system of Greek family law;<sup>53</sup> accordingly, the prohibition was not expressly stated since it was a self-evident and obvious condition<sup>54</sup> that persists to this day.

The absence of legal definitions in positive law—a common occurrence in civil-law jurisdictions, to which the concept of marriage is no exception—is also referred to as a reason behind the lack of express prohibition. Thus “marriage” is systematically approached—in rather ambiguous terms—according to a mutually-accepted notion that emanates from its social perception as early as antiquity and up to contemporary times. Scholars frequently cite a definition proposed by the Roman jurisconsult Modestinus<sup>55</sup> as the starting-point of any approach, although there is ample unanimity that this definition is largely out-dated since it emphasises the moral elements of marriage and does not reflect the quality of marriage as a legal institution.<sup>56</sup> In any case, the dominant doctrinal position currently maintains that, by definition, marriage may be concluded only between persons of the opposite sex.<sup>57</sup> The above situation, complemented by the fact that, until quite recently (*infra* Part V) courts did not elaborate on the subject, lead to the fair assumption that the law stood firm on prohibiting same-sex marriage.<sup>58</sup>

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to be married) is non-gender specific.

53. Deliyannis, *supra* note 20, at 54 para. 33; I. Androulidakis-Dimitriadis, Hellas in W. Pinets (ed.), *International encyclopedia of laws: family and succession law* (The Hague/London/New York; last updated November 2003) 62 no. 73; Kounougeri-Manoledaki, *supra* note 49, 61; Grammaticaki-Alexiou, *supra* note 47, 181; Stathopoulos & Stambelou, *supra* note 33, at 54 no. 3 *in fine*.

54. G.A. Balis, *Family law* (2<sup>nd</sup> edn, Athens 1961) 22 para. 12 [in Greek]; Th.K. Papachristou, *Manual of family law* (3<sup>rd</sup> edn, Athens/Komotini 2005) 37 [in Greek]; E. Vassilakakis, Aspects de droit international privé de couples homosexuels, *RHDI* 2006 145, 146.

55. As such definition made its way to the modern era through the *Basilica* of Leo the Wise, providing that “*nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humanis iuris communicatio*”: 28, 4, 1.

56. G. Koumantos, *Family law*, vol. I (Athens 1988) 38 [in Greek]; Stathopoulos & Stambelou, *supra* note 33, 53 note 1; *see also* I.S. Spyridakis, *Family law* (Athens/Komotini 2006) 83 [in Greek], noting that despite the lack of legal accuracy, this definition is still widely used.

57. Kounougeri-Manoledaki, *supra* note 49, note 2; P. Filios, *Family law* (2<sup>nd</sup> rev. edn, Athens/Komotini 2007) 63 para. 12 [in Greek].

58. A notable exception to the above is T. Vidalis, *The constitutional aspect of power in marriage and family. Civil liberties and institutional changes* (Athens/Komotini 1996) 73, 74 [in Greek] according to whom the legislator, by amending the family law rules of the Civil Code, abolished the difference in sex as a

### 3. *The Inexistence of Same-Sex Marriage*

Violation of provisions on requisites (*supra* Part 2) may lead to a marriage that is void, voidable or inexistent<sup>59</sup>, depending on the particular violation. Thus, a marriage concluded in violation of articles 1350-1352, 1354, 1356-1357 and 1360 CC is void (i.e. null; art. 1372 para. 1 CC).<sup>60</sup> Moreover, a marriage celebrated by error as to the identity of the spouse or threat suffers from a vice of consent and is voidable (arts. 1374 and 1376 CC respectively).<sup>61</sup> In both cases, nullity is pronounced by court judgment; once the judgment becomes irrevocable (i.e. no longer open to review by any method of appeal) the effects of marriage are set aside *ex tunc* (art. 1381 CC).<sup>62</sup>

Non-compliance with the provisions on form (celebration by either religious or civil ceremony; art. 1367 CC) entails the most severe consequence: such marriage is *ipso jure* inexistent and produces no legal effect whatsoever<sup>63</sup> (*matrimonium non existens*; art. 1372 para. 2 CC). The substantial difference between an inexistent marriage on the one hand and a void or voidable one on the other hand is that a court judgment is not required to pronounce a marriage inexistent, as opposed to the other two instances. In practice, an action for a declaratory judgment on the inexistence of marriage<sup>64</sup> may be sought by anyone having legal interest.

Since no express prohibition of same-sex marriage is provided in the law, it goes without saying that there is no corresponding regulation on the violation of the relevant rule. Doctrine addresses this case as one falling under the last of the above categories and therefore a marriage concluded between persons of the same sex is considered inexistent.<sup>65</sup> It has been noted that in contrast to cases involving violations of the celebratory form,

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structural element of spousal relations and therefore marriage is available to same-sex couples.

59. On these distinctions in Greek civil law generally see S.C. Symeonides, *The general principles of civil law in Kerameus & Kozyris*, *supra* note 1, at 79, 94.

60. However the law provides for instances where such nullity may be remedied (arts. 1373 para. 2 and 1373 CC).

61. In both instances voidability is excluded where the spouse subsequently recognised the marriage.

62. Certain exceptions from this retroactive effect are provided for, such as the preservation of the status of any children born in wedlock (art. 1382 CC).

63. Ap. Georgiadis, Article 1372 in Georgiadis & Stathopoulos, *supra* note 33, at 127 no. 30 [in Greek].

64. A declaratory judgment is also sought in cases of void marriage; by contrast, cases of marriage voidability require an action for judicial determination of a legal relationship. On the types of actions in Greek civil procedural law see Kerameus, *supra* note 5, 350-351.

65. Deliyannis, *supra* note 20, 177 para. 102; Kounougeri-Manoledaki, *supra* note 49, 61, 112; Georgiadis, *supra* note 63, 121 no. 13; Papachristou, *supra* note 54, at 55; Filios, *supra* note 57, at 84 para. 20.

same-sex marriages manifest themselves as externally valid<sup>66</sup> and therefore it would seem more appropriate to address them in the context of void marriages. However, the exhaustive enumeration of violations entailing nullity of marriage under article 1372 para. 1 CC does not support such construction, the only alternative necessarily being the treatment of same-sex marriages as inexistent.<sup>67</sup>

*B. Law 3719/2008 on the Cohabitation Pact*

*1. Background*

The radical modification of family relations in Greece during the past two decades, combined with a veritable expansion of the notion of family, necessitated the legal acknowledgment of actual situations that could no longer remain unregulated.<sup>68</sup> It was thus reasonable to expect that the legislator would sooner or later proceed with the enactment of concrete rules on cohabitation.

Additionally, given the well-rooted denial of same-sex marriage at law, the eventual regulation of cohabitation outside marriage would provide a suitable opportunity for a discussion between State, legislator and society at large on an alternative method of same-sex couple recognition. To this regard, the intention of the Ministry of Justice to proceed, in 2006, with the introduction of a bill providing for a cohabitation pact was welcomed with considerable interest. Even prior to this initiative, the National Commission for Human Rights (*hereinafter* NCHR)<sup>69</sup> had called the Minister of Justice to establish a working group with a mandate to explore the legal recognition of the actual cohabitation status between persons of the same sex, in order to alleviate any discrimination in the fields of succession, taxes, labour, health, pensions and insurance, in light of international practice and the existing domestic legal framework.<sup>70</sup>

66. Koumantos, *supra* note 56, at 88.

67. *Ibid.*

68. See Agallopoulou, *supra* note 18, describing the existence of natural families founded on free unions, single-parent families, families established by way of adoption or medically-assisted reproduction, etc.

69. Established by Law 2667/1998, the NCHR is a consultative organ to the State in matters of human rights and is directly accountable to the Prime Minister.

70. NCHR, Document no. 8, *Annual report 2004*, 198, [www.nchr.gr](http://www.nchr.gr) (10 February 2010; in Greek). Scholarly voices were also raised in support of a pact that would be open to couples irrespective of sex, in view of pertinent constitutional and international rules: K. Papadimitriou, Cohabitation pact—a demand of our times, [manesis.blogspot.com](http://manesis.blogspot.com); A. Kotzambasi, 'Free union pact' and same-sex marriage—a first approach, *ibid.* (10 February 2010; both in Greek).

## 2. *Bill Debated, Law Enacted: A Pact for Opposite-Sex Couples*

Expectations were, however, denied in late March 2008 when a bill on the so-called “free union pact” was introduced to Parliament, providing that the pact would not be available to same-sex couples. In the cautious words of the Minister of Justice, the issues of same-sex cohabitation and legal regulation thereof were multi-faceted, requiring synthetic examination at the inter-ministerial level; in any case, the Minister stated he had no intention to operate against any social group on a discriminatory basis and accepted the NCHR proposal for the establishment of a working group on the subject.<sup>71</sup>

The bill was not debated until the fall of 2008, at which point a series of additional provisions—unrelated to the proposed “free union pact”—also found their way before the competent parliamentary committees. The bill was now eloquently entitled “amendments for the family, the child, society and other provisions” and was debated in a series of three joint meetings of the Standing Parliamentary Committee on public administration and the Special Standing Parliamentary Committee on equality, youth and human rights.

The introductory report to the bill<sup>72</sup> set out the reasons justifying the introduction of the “free union pact”<sup>73</sup> and included, *inter alia*, references to a rise in frequency of cohabitating persons of the opposite sex without marriage in contemporary societies; the social recognition of cohabitation outside marriage as an alternative and “milder” form of community of living; that the percentage of women aged 18-24 choosing to cohabit outside marriage has tripled in the last thirty years; that about five percent of children born in Greece originates from free unions and 120,000 children have been born outside wedlock; that unprotected women—following years of free-union life—and single-parent families are faced with serious problems; that despite the above, the value of religious

71. Press Office of the Ministry of Justice, Press release of 28 March 2008, reproduced in NCHR, *Annual report 2007*, 250-251, www.nchr.gr (10 February 2010; in Greek). To the best of our knowledge, the establishment of such working group has yet to be confirmed.

72. *Introductory report to the bill on the amendments for the family, the child, society and other provisions* (dated 09 October 2008), chapter one: *Free union pact*, part I: *Introduction – general considerations*, 1, www.parliament.gr (10 February 2010; in Greek).

73. This term was subsequently abandoned for the simpler ‘cohabitation pact’; *Transcript of the parliamentary debate (Committees)*, 16 October 2008 (3<sup>rd</sup> session), 2, 7, 29 [in Greek; on file with the author]. Despite the change, it should be noted that use of the word ‘free’ meant to emphasise the added importance of private autonomy to the conclusion, regulation and termination of the pact. To this regard see Th. Papachristou, *The free union pact, Εφαρμογές Αστικού Δικαίου* (=Efarmoges Astikou Dikaiou – EfAD) 2008, 393 (commenting on the original draft prepared by the special drafting committee, of which the author was a member) [in Greek].

marriage is great and incomparable and that, together with civil marriage they constitute the optimum choice for couples wishing to establish a family with full legal, financial and social guarantees and protections.

Irrespective of the fact that one or two of the abovementioned reasons that purport to the justification of the pact could be equally regarded as defeating its intended purpose, the absence of any reason justifying the exclusion of cohabitating same-sex couples from the pact is surprising. Indeed, the introductory report only went so far as to state that:

The present bill exclusively refers to the free union of persons of the opposite sex. The scope of its provisions is to set a legal framework and regulate in a systematic manner this form of cohabitation by expressly setting out the rights, obligations and commitments of cohabitating persons . . . .<sup>74</sup>

The arguments forwarded by the rapporteur for the Majority<sup>75</sup> shed no light to this regard, while the rapporteur for the Minority only incidentally commented on the point.<sup>76</sup> It should be noted that the Minister of Justice defended the exclusion by arguing that the demands and needs of Greek society so dictated; and that the question of extending the pact to same-sex couples would be left open for possible future reconsideration.<sup>77</sup> By contrast, non-Member speakers who were invited to present their views emphasised that such exclusion was the result of a chance to influence the law in the positive direction that went amiss<sup>78</sup> and voiced concerns of gender discrimination.<sup>79</sup>

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74. *Introductory Report, supra* note 72.

75. *Transcript of the parliamentary debate (Committees)*, 15 October 2008 (1st session), 6-9 [in Greek; on file with the author].

76. *Ibid.*, 14 *in fine*; *Transcript of the parliamentary debate*, 3<sup>rd</sup> session, *supra* note 73, 7. The lack of legal grounds justifying the discrimination was, however, highlighted by other Members of Parliament: *Transcript of the parliamentary debate*, 1st session, *supra* note, at 19-22, 30-32, 39; *Transcript of the parliamentary debate*, 3<sup>rd</sup> session, *supra* note 73, at 11, 12, 14. In support of the exclusion, it has been argued that same-sex cohabitating couples cannot be brought under the pact, since the latter is modelled on the basis of a family comprised of parents and children: *see* K.D. Pantelidou, Critical comments on the bill on the 'free union pact', *EfAD* 2008, 386, 388 [in Greek], who further argues that the pact would operate as an experimental phase for the formal recognition of same-sex unions which would have negative repercussions in the structure and morals of Greek society: *ibid.*; as to the 'negativity' of such consequences, *contra* Papachristou, *supra* note 73, at 394.

77. *Transcript of the parliamentary debate*, 1st session, *supra* note 75, at 29. The Minister subsequently added that the bill reflected the sense of justice, i.e. 'the social acceptance of certain principles and values' and that feedback from society indicated that "we should not proceed with the establishment of a pact for same-sex couples": *Transcript of the parliamentary debate*, 3<sup>rd</sup> session, *supra* note 73, at 18, 19.

78. Comments by A. Yiotopoulos-Marangopoulos, president of the governing board of the Marangopoulos Foundation for human rights, *Transcript of the parliamentary debate (Committees)*, 16 October 2008 (2<sup>nd</sup> session), 3-5 [in Greek; on file with the author].

79. Comments by S. Spiliotopoulou, NCHR member, *ibid.*, 12; to this regard, *see*



The bill was further debated—along the same lines—before the *plenum*, and was passed on 17 November 2008. In so far as the cohabitation pact is concerned, Law 3719/2008, as enacted,<sup>80</sup> requires adult opposite-sex couples wishing to enter into a cohabitation pact to sign a relevant notarial deed which is then filed with the competent registry. Following the same formalities, the pact is terminated by unilateral declaration or mutual agreement and also by subsequent marriage and by death. Cohabitants are free to regulate ownership of property acquired during cohabitation; in the absence of an agreement to the contrary, the party who has contributed to the increase of the other party's property may raise a claim for contribution. Following termination, maintenance is possible had the parties so agreed, provided that the party seeking maintenance lacks the ability of self-support; however, maintenance may not be claimed by heirs of the other party where the pact is dissolved by death. In regards to children born in cohabitation, there is assimilation to children born in wedlock, with both parents exercising parental care. It should be noted that cohabitants are not allowed to jointly adopt. Finally, rules of intestate succession are introduced, whereby the surviving party is entitled to one-sixth or one-third of the decedent's estate (depending on whether there is surviving issue or close relatives respectively); similarly, the legitimate portion in case of forced heirship is equal to one-half of the intestate portion.

### 3. A Pact to the Detriment of Same-Sex Couples?

The cohabitation pact is a formal part of domestic family law provisions.<sup>81</sup> As regards in particular the introduction of the cohabitation pact solely to opposite-sex couples,<sup>82</sup> doctrinal reaction ranged from cool reception to serious objection.<sup>83</sup> Thus, on the one hand, the express

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NCHR, Comments on the bill on 'amendments for the family, the child and society', *Annual report 2008*, 58-60, [www.nchr.gr](http://www.nchr.gr) (10 February 2010; in Greek); see also comments by M. Lamtzipis, member of the board of the Committee of Hellenic Bar Associations, *Transcript of the parliamentary debate*, 2<sup>nd</sup> session, *supra* note, 13.

80. For brief overviews see P. Agallopoulou, Greek law on cohabitation, *IFL* 2009, 85-86; H. Constandinidou & K. Stavropoulos, Cohabitation in Greece, *ibid.*, 190-191.

81. Discussion on the cohabitation pact lies beyond the scope of the present report. To date, the following monographs offer insightful comments and initial interpretation: A. Kotzambasi (ed.), *Cohabitation pact and family law amendments* (Athens/Thessaloniki 2009) [in Greek]; Th. Papachristou, N. Koumoutzis & Chr. Tsouca, *Cohabitation pact* (Athens 2009) [in Greek]; I. Spyridakis, *The cohabitation pact according to Law 3719/2008* (Athens/Komotini 2009) [in Greek]. See also A.G. Koutsouradis, Law 3719/2008: audietur et altera pars et cetera!, *EfAD* 2009, 56 et seq. [in Greek]; K. Christodoulou, Cohabitation pact. Issues of substantive and procedural law, *Dike* 2009, 346 et seq. [in Greek].

82. The pertinent provision states: "The agreement between two adult persons of the opposite sex whereby their cohabitation is organised (cohabitation pact) is concluded in person by notarial deed . . .": art. 1 Law 3719/2008.

83. In the words of Th. Papachristou in Papachristou, Koumoutzis & Tsouca, *supra* note 81, at 4 no. 2, the Law has been criticised as suffering from a homophobe

reference to the difference in sex may be regarded as a positive condition for the conclusion of the pact<sup>84</sup> and, therefore, the relevant analysis in the field of marriage<sup>85</sup> is applied *mutatis mutandis*. On the other hand, however, the exclusion of same-sex couples may also be regarded as unconstitutional, since it disregards social reality and conflicts with the provisions on gender equality (art. 4 para. 2 Const.; *supra* Part III.B)<sup>86</sup> or, alternatively, the free development of one's personality (art. 5 para. 1 Const.; *supra* Part III.C)<sup>87</sup> that is hindered by the exclusion from participation in the social life of the country. Courts have yet to pronounce judgments on this subject, a fact explained by the relatively short period of time that has lapsed since the enactment of Law 3719/2008. It is nevertheless probable that, in light of the problematic exclusion of same-sex couples from the cohabitation pact, the relevant provision of the Law may not hold well against constitutional review.

A minor development originated, quite surprisingly, in the legislature itself shortly after: a group of Members of Parliament belonging to the then Minority proposed a bill entitled 'Cohabitation pact' with the aim to amend Law 3719/2008 in a number of issues pertaining to the application of equality before the law and the alleviation of discrimination on the basis of sex.<sup>88</sup> To this regard, it was proposed that article 1 of the Law be modified so as to allow conclusion of the pact by persons irrespective of sex.<sup>89</sup> Ironically, the date set for the debate coincided with the last working day of Parliament prior to its dissolution and the start of the September 2009

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syndrome.

84. E. Kounougeri-Manoledaki, *Family Law – Supplement to the 4<sup>th</sup> edn* (Athens/Thessaloniki 2009) 12 [in Greek]; Th. Papachristos, Critical comments on Law 3719/2008, *EfAD* 2008, 1018 et seq. (stating that the drafting committee was given an explicit mandate to proceed with the institutional recognition of cohabitation outside marriage of persons of different sex; this *political* choice, according to the author, is justified by the dissimilarity of the two cases, which in turn excuses the adopted qualified solution) [in Greek].

85. *Supra*, Part A.2-3. See, however E. Kounougeri-Manoledaki, The new Law 3719/2008: a first assessment, *EfAD* 2008, 1016 et seq., 1018 *in fine* (commenting that Greece's chance to prove its respect for sexual diversity and regulate same-sex unions is postponed for the – near or distant – future) [in Greek].

86. Chr. Stambelou, Cohabitation pact and equality, *Χρονικά Ιδιωτικού Δικαίου* (=Chronika Idiotikou Dikaïou – ChrID) 2009, 189 et seq., 192 [in Greek]; G.S.P. Katroungalos, 3+1 views on 'same-sex marriage,' no. 3, manesis.blogspot.com (10 February 2010; in Greek).

87. *Ibid.*; A. Varka Adami, Cohabitation pact – a contractual form of family, *Ελληνική Δικαιοσύνη* (=Elliniki Dikeossini – EllDni) 2009, 401 et seq., 402, 407 [in Greek].

88. *Introductory report and proposed bill on the cohabitation pact*, 4 November 2008, <www.parliament.gr>, 1, A [10 February 2010; in Greek].

89. "The cohabitation pact regulates the permanent union of adult persons of the same or different sex for the purpose of mutual support and solidarity and the creation of a community in life": article 1 of the proposed bill, *ibid.*, 3.

election period which in turn led to a reversal of parliamentary majority and a change of Government;<sup>90</sup> in any case, the proposed bill would not have been enacted as law.<sup>91</sup> Nevertheless, this proposal is significant to the extent that only months after the introduction of the cohabitation pact, the legislature was required to re-evaluate, even summarily, its views on the subject. In the same context it is worth noting that the political party from which the proposed bill originated currently holds a comfortable majority in Parliament and, as the Greek expression goes, “rules the land”; moreover, a significant number of those Members of Parliament who signed the proposed bill currently serve in senior ministerial and vice-ministerial offices in Government and in the parliamentary Presidium. Yet it is unclear whether, under the present circumstances, government policy would ever embrace the proposed solution. In any case, there is no formal discussion on future regulation of same-sex unions in the above context.

### C. Other Domestic Provisions

Greek family law does not provide for further regulation of relations between same-sex couples. Although in recent times free unions attract an increased interest by both the legislator<sup>92</sup> and the courts,<sup>93</sup> the absence of positive regulation and recognition of any form of same-sex unions (*supra* Part III.A *in fine*) remains to this day a reality. Specific manifestations of such absence include, for instance, the position according to which same-sex couples cannot benefit from what little regulation the law provides to couples in free union<sup>94</sup> and the fact that provisions on domestic violence are

90. *Transcript of the parliamentary debate (2009 summer Session)*, 12<sup>th</sup> period of the Presidential Parliamentary Republic, 36<sup>th</sup> hearing, 3 September 2009, [www.parliament.gr](http://www.parliament.gr), 2651 et seq. (10 February 2010; in Greek).

91. According to article 73 para. 3 Const., “No law proposal or amendment or addition which originated in Parliament shall be introduced for debate if it results in an expenditure or a reduction of revenues or assets for the State or local government agencies or other public law legal persons, for the purpose of paying a salary or pension or otherwise benefiting a person.” In practice, proposed bills falling under the above provision are debated, since it is considered that Parliament should nevertheless express its opinion, albeit without a vote.

92. E.g. art. 1444 para. 2 CC providing for peremption of the right to maintenance if the beneficiary lives in free union to another; art. 1456 para. 2 CC requiring consent of both the woman and man living in free union for the purposes of medically-assisted reproduction; art. 1457 CC on posthumous fertilisation in cases of free union; and various provisions of Law 3305/2005 on the application of medically-assisted reproduction.

93. See, indicatively, judgments cited by Agalopoulou, *supra* note 18, and Androulidakis-Dimitriadis, *supra* note 53.

94. It is for this reason that scholarly writing on free unions usually states that analysis on the status of free unions excludes cases of same-sex couples: see Agalopoulou, *supra* note 19; *idem*, Personal relations between cohabitants and cohabitants and third parties following Law 3719/2008, *EfAD* 2009, 6 et seq., 7 [in Greek]. Presently, courts seem not to accept that same-sex couples fall within the ambit of free unions; see Areios Pagos, judgment 434/2005, *EllDni* 2005, 1060, 1061: “For

inapplicable to their regard,<sup>95</sup> while general ones include, e.g., the overall prohibition of adoption by non-married couples.<sup>96</sup> However, and even though lying outside the scope of family law rules, Law 3304/2005 on equal treatment in employment and education<sup>97</sup> may be of indirect relevance. Finally, the possibility of contractual regulation of same-sex couple relationships by the partners themselves by resort to the freedom of contract (art. 361 CC) and the general rules (arts. 3, 174, 178, 281, 362 CC etc.) is, just as in the case of couples in free union,<sup>98</sup> a theoretical possibility in view of Greek reality.

## V. JUDICIAL CONSTRUCTION OF THE LAW: THE TELOS CASES

### A. Background

At about the same time when the bill on the cohabitation pact was being introduced to Parliament, two same-sex couples wishing to marry applied for marriage licences in Telos, a small island of the Dodecanese complex in the South-eastern Aegean Sea. Due to the increased media attention surrounding the introduction of the cohabitation pact, news of the expected marriages soon made headlines.<sup>99</sup> The Areios Pagos prosecutor<sup>100</sup> reacted by instructing prosecutors to take appropriate action in any such event.<sup>101</sup> In

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the first time since the revision of family law rules by Law 1329/1983, ‘free union’, i.e. the cohabitation outside marriage *between a man and a woman* is referred in article 1444 para. 2 CC . . .” (emphasis added).

95. See art. 1(c) Law 3500/2006 on domestic violence, providing that “the present Law also applies to the man’s permanent partner or the woman’s permanent partner . . . provided they cohabit . . .” The Greek terms chosen by the Law for the man’s “permanent partner” are of the female gender (*μόνιμη σύντροφος του άνδρα*) and for the woman’s “permanent partner” of the male gender (*μόνιμος σύντροφος της γυναίκας*).

96. Article 1545 CC prohibits adoption by more than one individual, save cases where those adopting are spouses. Given their present exclusion from marriage, it is evident that adoption by same-sex couples is not allowed. Provided, however, that the Code does not distinguish among cases of adoptions by single individuals, it is clear that the sexual orientation or preference of any such single individual is irrelevant.

97. Incorporating Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180/22-26, 2000 and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303/16-22, 2000.

98. Koutsouradis, *supra* note 81, at 67.

99. See indicatively, Double premiere for gay marriages, *Ta Néa* (=Ta Nea), 29.05.2008, digital.tanea.gr; Reaction to gay marriages, *To Βήμα* (=To Vima), 30.05.2008, www.tovima.gr (10 February 2010; both in Greek).

100. Prosecutor hierarchy corresponds to the three-tiered system of judicial organisation (described *supra* Part II.A) on the basis of internal subordination.

101. See Instruction 5/2008 by the Areios Pagos prosecutor, *EfAD* 2008, 1073-1074 [in Greek], stating *inter alia* that “marriage is conceived as the legal union and cohabitation of a couple, i.e. the creation of a family between a man and a woman. Homosexual marriage, in a manner protected by the Constitution and celebrated under

June 2008, the mayor of Telos celebrated the two marriages and executed the marriage declaration and vital records documents, as prescribed by law for (civil) marriage. The prosecutor at the Rhodes Court of first instance reacted by bringing two actions before the competent Rhodes Court against each of both couples and the mayor, seeking declaratory judgments on the grounds that the marriages were nonexistent.

### *B. Judgment & Reasoning*

Judgments 114 and 115/2008 of the Rhodes three-member Court of first instance<sup>102</sup> (*hereinafter* collectively referred to as: the judgment) are the first court opinions to address the issue of same-sex marriage domestically. Prior to examining the main dispute, the Court addressed two preliminary objections raised by defendants, i.e. (a) whether the action was admissibly brought against the defendant mayor and (b) whether the claimant prosecutor had standing to sue. This pair of procedural issues, although not insignificant, will not be analysed in detail. Suffice it to say that the Court declared the action inadmissible with regards to the mayor<sup>103</sup> and found that such declaratory action by the prosecutor was necessitated by the protection of morality and the increased interest of the State in family affairs and, therefore, the prosecutor enjoyed, by law, the discretionary power to bring the action (thus having the required standing to sue) and the capacity to represent himself without counsel.

The point in dispute was then determined as one relating to whether the use of the ambiguous term “future spouses”<sup>104</sup> in the Civil Code encompasses persons of the same sex or not. The Court’s initial approach consisted in exploring the *ratio legis* and the legislator’s intent without restriction to purely domestic rules. Thus, reference was made to article 12 ECHR and article 23 ICCPR,<sup>105</sup> with the court observing that the above

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the provisions of article 1367 CC, is inconceivable. . . . The difference of sex is the fundamental and obvious requisite for valid marriage conclusion. Marriage between persons of the same sex is inexistent. . . . In the event that mayors were to accept declarations by persons of the same sex (homosexuals) for the celebration of marriage, you should take legal action, at least in view of commission of the crime of misconduct . . . .” Similar language was used in Order 2223/2008 addressed to the prosecutor of the Rhodes Court of first instance, *ibid.*, 1074 (issued prior to the abovementioned Instruction) [in Greek], where legal argumentation in support of same is supplemented by reference to the definition of marriage given in a popular dictionary of Modern Greek.

102. Judgment 114/2008, *ChrID* 2009, 617 et seq., with comments by Th. Papachristou & Th. Papazisi [in Greek]; judgment 115/2009, *EfAD* 2009, 690 et seq.

103. By applying article 608 para. 2 of the Code of Civil Procedure, providing that “An action [on the existence, inexistence or nullity of marriage] by the prosecutor or any other interested person is brought against both spouses and, if one of them is deceased, against his decedents; otherwise it is denied as inadmissible.”

104. *Supra* Part IV.A.2 and note 52.

105. *Supra* Part III.C.

instruments provided no solution to a possible marriage of same-sex persons. The court then proceeded to an elaboration of the prevalent doctrinal construction on marriage<sup>106</sup> and reached the interim conclusion that the law leaves no discretion for the celebration of marriage between same-sex couples, since the difference of sex is regarded, in near absolute terms, as a condition of its substantive existence. In order to reinforce this conclusion, the Court referred to the newly enacted rules on the cohabitation pact and considered that the express provision on the difference of sex under Law 3719/2008 is a manifestation of intention by the domestic legal order that reflects the moral and social values and traditions of the Greek people.

The Court's further approach to the point in dispute was made on the basis of constitutional provisions. On the one hand, the Court referred to the general principle of equality (art. 4 para. 1 Const.; without making reference to gender equality—art. 4 para. 2 Const.)<sup>107</sup> and regarded its interim conclusion as consistent thereto, by holding that the differentiated treatment of same-sex couples is excused due to (unspecified) social, financial, professional, or other existing circumstances. On the other hand, the Court also subjected its interim conclusion to the complementary rule on free development of one's personality (art. 5 para. 1 Const.)<sup>108</sup> and found that the right to sexual freedom does not extend to a positive claim on having any relationship legally acknowledged. In light of the above, the Court declared that the marriage concluded between the defendants was inexistent and accordingly held in claimant's favour.

It should be noted that, in stark contrast to the formalised contents of Greek court judgments, the present one contained a surprising *obiter dictum*. By noting that domestic legislation is progressing and developing and that it is moreover influenced by other jurisdictions within the European Union, it suggested that the point in dispute would be settled in certainty through the introduction of the appropriate solution by law and specifically through the amendment of the cohabitation pact rules.

## VI. AFTERMATH & PROSPECTS

The institution of proceedings in the Telos cases, and more so the judgment itself, generated scholarly reaction<sup>109</sup> that is still unfolding.<sup>110</sup> The

106. *Supra* Part IV.A.1,2.

107. *Supra* Part III.B.

108. *Supra* Part III.C.

109. In certain cases such reaction is fierce, yet not altogether accurate. For instance, reference has been made to a mid-1990s Resolution of the European Parliament on equal rights of homosexuals and lesbians in the EC (A3-0028/94, OJ L 61/40-43, 1994) as proof of the Community legislator's expressed intention to support same-sex marriage: Papazisi, *supra* note 102, at 621, 623, 624. The said instrument, as correctly

Court's consideration of the difference in sex as an essential element of the substantive existence of marriage is regarded, to a considerable extent,<sup>111</sup> as the agreed solution,<sup>112</sup> even though the reasoning supporting it in the judgment has been criticised for not being well-founded.<sup>113</sup> It is unknown whether this judgment will be reviewed on appeal or even be the cause for an individual application against Greece before the European Court of Human Rights; it is equally unknown whether similar cases will soon find their way before the courts and, in such an event, whether any subsequent rulings will follow the same line of opinion, although it would be surprising if other courts were to depart from the generally accepted perceptions on marriage.

Overall, this may not have been a landmark or groundbreaking judgment. On the positive side, however, it did state where the law currently stands and it proved that same-sex marriage should not be regarded as the object of theoretical interest alone. Comparable situations exist in other European jurisdictions. Two notable recent examples originate in Austria and France, where same-sex couples wishing to marry were refused their request (Austria) or had their marriage annulled (France)

pointed out by the same author, is not legally binding. Additionally, the sole reference therein made in relation to same-sex marriage is not addressed to Member States, but to the Commission of the European Communities which is called on to present a draft Recommendation seeking to end "the barring of lesbians and homosexual couples from marriage or from an equivalent legal framework, and should guarantee the full rights and benefits of marriage, allowing the registration of partnerships" (no. 14). It is clear that contrary to what the author contends, no "indirect obligation to enforce this instrument by the domestic legislator" may be inferred from the above, since the Resolution requests a Community organ to prepare a draft Recommendation. Similarly, no such obligation can be inferred from more recent resolutions where the European Parliament directly addresses the issue of gender discrimination against same-sex couples, but only goes so far as to reiterate an invitation "to all Member States to propose legislation to overcome the discrimination experienced by same-sex couples": see European Parliament Resolution of 26 April 2007 on homophobia in Europe, P6\_TA(2007)0167 (adopted text), no. 8, available at [www.europarl.europa.eu](http://www.europarl.europa.eu) (10 March 2010).

110. Th. Papazisi, Same-sex marriage: valid, null or inexistent? (opinion), *ChrID* 2009, 851, 853 et seq. [in Greek]; V. Sotiropoulos, The right to marriage: the judicial pursuit of an inexistent prohibition, *Νομικό Βήμα* (=Nomiko Vima – NoV) 2009, 2002 et seq., 2005-2007 [in Greek]; T. Vidalis, Same-sex marriage, [manesis.blogspot.com](http://manesis.blogspot.com) (10 February 2010; in Greek); St. Mitas, The (sexual) "lives of others." Right to marriage and sexual freedom, *ibid.* [in Greek]; L. Papadopoulou, Same-sex marriage in light of gender equality, *ibid.* [in Greek].

111. *I.e.* since it embraces the dominant doctrinal approach.

112. A. Manitakis, Same-sex marriage is inexistent; the legislator is free to regulate it, *Ελευθεροτυπία* (=Eleftherotipia), 9 June 2008, [archive.enet.gr](http://archive.enet.gr) (10 February 2010; in Greek); K. Chrissogonos, "Civil marriage" ceremonies between persons of the same sex, [manesis.blogspot.com](http://manesis.blogspot.com) (10 February 2010; in Greek); F. Evangelidou-Tsikrika, Same-sex marriage: the 'Telos case' as an example of private law methodology, *EfAD* 2009, 1283 et seq. [in Greek]; Th. Papachristou, Same-sex marriage and the law, *Ελευθεροτυπία*, 5 June 2008, [archive.enet.gr](http://archive.enet.gr) (10 February 2010; in Greek); *idem*, *supra* note 102, 620-621; Katroungalos, *supra* note 86.

113. Papachristou, *supra* note 102.

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with similar judgments upheld all the way to the *Verfassungsgerichtshof* and the *Cour de Cassation* respectively. Both cases are currently pending before the European Court of Human Rights,<sup>114</sup> it is, however, unclear whether the Court will depart from its established case law in the near future.

By way of conclusion, it should be noted that out of six (soon to be seven) European countries currently recognising same-sex marriage, nearly all had acknowledged same-sex unions well before amending their marriage laws. In any case, recognition of same-sex marriage is provided in these countries by express statutory provision. Currently, Greek law embraces neither of the above alternatives. Given the fact that the exclusion of same-sex partners from the cohabitation pact is hard to reconcile with domestic and international rules on gender equality and non-discrimination, this is perhaps the opportune time for the legislature to reassess its hostility vis-à-vis same-sex partners by embarking on that age-old (and long-forgotten?) Greek family law practice, i.e. the responsible revision of rules by way of amendments that strike a fair and legitimate balance between tradition and change.

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114. ECtHR, *case of Schalk & Kopf v. Austria* (application no. 30141/04), Statement of facts and complaints, 16 February 2010, [echr.coe.int/en/hudoc](http://echr.coe.int/en/hudoc) (10 March 2010); the hearing on admissibility and merits was held on 25 February 2010; see Press release by the Registrar no. 154, 25 February 2010, *ibid.*; *affaire de St. Chapin & B. Charpentier c. la France* (requête 40183/07), Exposé des faits (undated), *ibid.*