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La CEDU su obbligo positivo degli Stati di fornire riconoscimento e tutela alle coppie omosessuali

(CEDU, Grande Camera, sent. 17 gennaio 2023, ric. nn. 40792/10, 30538/14 e 43439/14)

La Corte Edu si pronuncia sul caso di tre coppie dello stesso sesso, che lamentavano l'impossibilità per loro in Russia di contrarre matrimonio o qualsiasi altra unione formale.
I Giudici di Strasburgo hanno preliminarmente ricordato la propria giurisprudenza conforme alla chiara tendenza in atto all'interno degli Stati Parte verso il riconoscimento legale e la protezione delle coppie omosessuali, consolidata dalla convergente posizione di numerosi organismi internazionali in tale direzione. Non avendo lo Stato convenuto informato la Corte stessa dell'intenzione di modificare il proprio diritto interno al fine di consentire alle coppie omosessuali di godere di un riconoscimento ufficiale e di un regime giuridico di protezione, si è ritenuto oltrepassato il margine di discrezionalità spettante agli Stati in materia e non rispettato l'obbligo positivo di garantire il diritto dei ricorrenti al rispetto della loro vita privata e familiare.
Di qui il riconoscimento dell'avvenuta violazione dell'art.8 Cedu.

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EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF XXXXX AND OTHERS v. RUSSIA

(Applications nos. 40792/10, 30538/14 and 43439/14)

JUDGMENT

STRASBOURG

17 January 2023

This judgment is final but it may be subject to editorial revision.

In the case of XXXXX and Others v. Russia,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Robert Spano,
Jon Fridrik Kjølbro,
Síofra O'Leary,
Georges Ravarani,
Marko Bošnjak,
Krzysztof Wojtyczek,
Iulia Antoanella Motoc,
Branko Lubarda,
Yonko Grozev,
Armen Harutyunyan,
Stéphanie Mourou-Vikström,
Pere Pastor Vilanova,
Alena Poláčková,
Tim Eicke,
Darian Pavli,
Frédéric Krenc,
Mikhail Lobov, *Judges*,
and Søren Prebensen, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 27 April 2022 and 12 October 2022,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in three applications against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by six Russian nationals whose names and personal details are listed in the appended table ("the applicants"), on 20 July 2010, 5 April 2014 and 17 May 2014.

2. The applicants were represented before the Court until 6 April 2022 by Mr E. Daci and Mr B. Cron, lawyers practising in Geneva. After that date Ms Fedotova (application no. 40792/10), Mr Chunusov and Mr Yevtushenko (application no. 30538/14) and Ms Shaykhraznova (application no. 43439/14) were represented by Ms O. Gnezdilova, a lawyer practising in Berlin.

3. The Russian Government ("the Government") were represented successively by Mr G. Matyushkin, Mr M. Galperin and Mr A. Fedorov, former Representatives of the Russian Federation at the European Court of Human Rights, and later before the Grand Chamber by their successor in that office, Mr M. Vinogradov.

4. The applicants alleged that they were unable to have their respective relationships recognised and protected by law, on account of the Russian authorities' refusal to allow them to marry and in the absence of any other form of legal recognition and protection of same-sex couples in Russia.

5. The applications were allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 2 May 2016 the Section President declared the complaints under Article 12 of the

Convention inadmissible under Rule 54 § 3. Notice of the complaints concerning Articles 8 and 14 of the Convention was given to the Government.

6. On 13 July 2021 a Chamber of the Third Section composed of Paul Lemmens, President, Georgios A. Serghides, Dmitry Dedov, María Elósegui, Anja Seibert-Fohr, Peeter Roosma and Andreas Zünd, judges, and Milan Blaško, Section Registrar, delivered a judgment ("the Chamber judgment") in which, unanimously, it joined the three applications, declared them admissible, held that there had been a violation of Article 8 of the Convention and found that there was no need to examine the merits of the complaints under Article 14 of the Convention taken in conjunction with Article 8. A joint separate opinion by Judges Lemmens and Zünd was annexed to the judgment.

7. In a letter of 12 October 2021, the Government requested that the case be referred to the Grand Chamber under Article 43 of the Convention. On 22 November 2021 the panel of the Grand Chamber granted that request.

8. The composition of the Grand Chamber was determined in accordance with the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24. A public hearing was scheduled for 27 April 2022.

9. The applicants and the Government each filed further written observations (Rule 59 § 1).

10. Ms Dunja Mijatović, the Council of Europe Commissioner for Human Rights ("the Commissioner"), exercised her right to intervene in the proceedings and submitted written comments (Article 36 § 3 of the Convention and Rule 44 § 2).

11. In addition, third-party comments on the merits were received from:

- LGB Alliance;

- ACCEPT Association jointly with the Youth LGBT Organisation Deystvie, the National LGBT Rights Organisation LGL, the "Love Does Not Exclude" Association, the Polish Society of Anti-Discrimination Law, Iniciativa Inakost, Insight Public Organisation and Sarajevo Open Centre;

- the Human Rights Centre of Ghent University;

- the Euroregional Center for Public Initiatives (ECPI), jointly with the Global Justice Institute (GJI);

- the AIRE Centre, jointly with the International Commission of Jurists (ICJ) and the Network of European LGBTIQ+[1] Families Associations (NELFA); and

- the Russian LGBT Network, jointly with Sphere Foundation.

The President had given leave to those third parties to intervene in the written procedure, under Article 36 § 2 of the Convention and Rule 44 § 2.

12. On 16 March 2022 the Committee of Ministers of the Council of Europe, in the context of a procedure launched under Article 8 of the Statute of the Council of Europe, adopted Resolution CM/Res(2022)2, by which the Russian Federation ceased to be a member of the Council of Europe as from 16 March 2022.

13. On 22 March 2022 the Court, sitting in plenary session in accordance with Rule 20 § 1, adopted the "Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights". It stated that the Russian Federation would cease to be a High Contracting Party to the Convention on 16 September 2022.

14. By a letter of 28 March 2022, the Government stated that "in the present circumstances the Russian Federation consider no need for oral hearing scheduled for 27 April 2022". The applicants were invited to state their position on the matter. In a letter of 1 April 2022, Mr Daci and Mr Cron stated that they had spoken to the applicants, who had expressed the view that it was necessary for the hearing to proceed.

15. On 4 April 2022 the President of the Court decided that the hearing of 27 April 2022 would proceed and asked the parties to provide a list of persons who would be attending. The Government did not respond to that request.

16. On 6 April 2022 Mr Daci and Mr Cron informed the Registrar that they were no longer representing the applicants, who would be represented at the hearing by a different lawyer.

17. In a letter of 8 April 2022, on the instructions of the President, the Registrar asked Mr Daci and Mr Cron to supply the current contact details of the applicants and their new lawyer, and reiterated that the parties were required to provide a list of the persons who would be representing them at the hearing.

18. As no reply was forthcoming, in a letter of 14 April 2022 the President of the Court, through the Registrar, gave the applicants a new deadline for submitting the list of persons who would be appearing at the hearing, adding that if no reply was received it would be presumed that the applicants would not be represented at the hearing. A copy of the letter, addressed to Mr Daci and Mr Cron, was also sent to the applicants' postal and email addresses as provided to the Court at the time the applications had been lodged.

19. On 15 April 2022 one of the applicants, Mr Chunusov, sent a letter to the Court stating that he had only been informed of the proceedings pending before the Grand Chamber via the Registrar's letter of 14 April 2022. He expressed his wish for a hearing to be held, but asked for it to be postponed to allow his new lawyer, Ms O. Gnezdilova, to prepare for it.

20. On 21 April 2022, observing that neither the Government nor the applicants had provided the names of the persons who would be appearing at the hearing on 27 April 2022, the President of the Court decided to cancel the hearing. The President also refused Mr Chunusov's request for the hearing to be postponed and decided that the Court would deliberate on the case on 27 April 2022.

21. In a letter dated 17 May 2022, the Registry of the Court took note of Mr Chunusov's wish to pursue the proceedings. Alongside this, in letters sent on the same day to the postal and email addresses supplied at the time of the applications, the other five applicants were asked to indicate whether they wished to pursue their applications.

22. In letters dated 30 May 2022 the applicants Ms Fedotova, Mr Yevtushenko and Ms Shaykhraznova informed the Court that, like Mr Chunusov, they wished to pursue their applications. They stated that they had authorised Ms Gnezdilova to represent them in the further proceedings. The applicants Ms Shipitko and Ms Yakovleva did not respond to the above-mentioned correspondence from the Court.

23. Deliberations were held on 27 April 2022 and 12 October 2022. The composition of the Grand Chamber was determined in accordance with Article 23 § 2 and Article 26 §§ 4 and 5 of the Convention and Rule 24.

THE FACTS

THE CIRCUMSTANCES OF THE CASE

A. The applicants' attempts to marry

24. The six applicants formed three same-sex couples. On various dates they gave notice of marriage (*заявление о вступление в брак*) to their local departments of the Register Office (*органы записи актов гражданского состояния*). Ms I. Fedotova and Ms I. Shipitko submitted their notice to the Tverskoy Department of the Register Office in Moscow on 12 May 2009, while the other applicants submitted their notices to the Fourth Department of the Register Office in St Petersburg on 28 June 2013.

25. The Tverskoy Department of the Register Office in Moscow examined the notice submitted by the first couple and rejected it on 12 May 2009. The Fourth Department of the Register Office in St Petersburg refused to examine the notices submitted by the other two couples and rejected both of them on 29 June 2013. The authorities relied on Article 1 of the Russian Family Code, which defines marriage as a "voluntary marital union between a man and a woman". Since the couples formed by the applicants were not made up of "a man and a woman", the authorities ruled that their notices of marriage could not be processed.

26. The applicants challenged those decisions in the domestic courts.

B. Court proceedings

1. Ms I. Fedotova and Ms I. Shipitko

27. Ms Fedotova and Ms Shipitko challenged the rejection of their notice of marriage in the Tverskoy District Court of Moscow.

28. They stated that the notice complied with the requirements of the Family Code and that the refusal to authorise their marriage violated their rights under the Constitution and Articles 8 and 12 of the Convention.

29. On 6 October 2009 the Tverskoy District Court dismissed their claim, holding that it did not satisfy the conditions set out in the Family Code in that the requirement of a "voluntary union between a man and a woman" was not met since the couple did not include a man. The court noted that neither international law nor the Constitution imposed an obligation on the authorities to promote or support same-sex unions. Lastly, the court pointed out that the form for a notice of marriage contained two fields, "he" and "she", and could therefore not be used by same-sex couples.

30. The applicants appealed, arguing that the Family Code did not ban marriage between two persons of the same sex. They pointed out that the list of impediments to marriage in Article 14 of the Family Code did not mention same-sex couples.

31. On 21 January 2010 the Moscow City Court upheld the judgment on appeal, endorsing the District Court's reasoning. In addition, it held that the absence of an explicit ban on same-sex marriage could not be construed as State-endorsed acceptance of that type of marriage.

2. Mr D. Chunusov and Mr Y. Yevtushenko

32. Mr Chunusov and Mr Yevtushenko challenged the rejection of their notice of marriage in the Gryazi Town Court (Lipetsk Region).

33. They argued that the Family Code did not restrict the right of same-sex couples to marry. They also argued that various international instruments, including the Convention, prohibited all forms of discrimination, including on the grounds of sexual orientation, and imposed an obligation on the Contracting States to protect private and family life. The applicants relied on, *inter alia*, Articles 8, 12 and 14 of the Convention.

34. On 2 August 2013 the Gryazi Town Court held that the refusal by the Register Office to examine the notice of marriage on its merits had been unlawful because under Russian law, such an examination was required for any notice of marriage. However, as far as the refusal to allow marriage between two persons of the same sex was concerned, the Town Court cited the Constitutional Court's decision in the case of Mr E. Murzin, in which that court had held that neither the Constitution nor legislation bestowed the right to marry on same-sex couples (see paragraph 44 below). The Town Court added that the concept of same-sex marriage ran counter to national and religious traditions, the understanding of a marriage "as a biological union between a man and a woman", the State's policy of protecting the family, motherhood and childhood, and the ban on promotion of homosexuality. It also stated that the Convention did not impose an obligation on Contracting States to allow same-sex marriages.

35. The applicants appealed against that judgment, arguing that Russian law did not define marriage as a union between two persons of different sexes, and that the Family Code did not prohibit same-sex marriage. They submitted that they had no other means of conferring a legal status on their relationship, since marriage was the only form of union that was recognised by law.

36. On 7 October 2013 the Lipetsk Regional Court dismissed the applicants' appeal. It stated that their arguments were no more than their personal opinion based on an incorrect interpretation of family law and national traditions.

37. On 12 March 2014 the Lipetsk Regional Court refused the applicants leave to lodge a cassation appeal.

3. Ms I. Shaykhraznova and Ms Y. Yakovleva

38. Ms Shaykhraznova and Ms Yakovleva challenged the rejection of their notice of marriage in the Gryazi Town Court (Lipetsk Region), raising essentially the same arguments as those submitted by Ms Fedotova and Ms Shipitko (see paragraph 28 above). The applicants relied on, *inter alia*, Articles 8, 12 and 14 of the Convention.

39. On 12 August 2013 the Town Court found against them. It held that, although it might have appeared that the applicants' notice of marriage had been rejected without being examined on the merits, that had not been the case. It added that the Register Office had duly examined the notice and had acted entirely lawfully in rejecting it. The court reiterated the arguments set out in the judgment of 2 August 2013 (see paragraph 34 above).

40. On 18 November 2013 and 11 March 2014 respectively the Lipetsk Regional Court dismissed an appeal and a subsequent cassation appeal by the applicants, holding that their

arguments were based on an incorrect interpretation of the provisions of family law and ran counter to established national traditions.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. The Russian Constitution

41. The relevant provisions of the Russian Constitution read as follows:

Article 15

"1. The Constitution of the Russian Federation has supreme juridical force and direct effect and is applicable throughout the territory of the Russian Federation. Laws and other legal acts adopted in the Russian Federation shall not contradict the Constitution of the Russian Federation.

...

4. The universally recognised standards of international law and the international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation sets out rules which are different from those laid down by the law, the rules of the international agreement shall apply."

Article 17

"1. The Russian Federation shall recognise and guarantee the rights and freedoms of individuals and citizens in conformity with the universally recognised principles and standards of international law, and under the present Constitution.

...

3. The exercise of individual and civic rights and freedoms may not violate the rights and freedoms of other people."

Article 19

"1. Everyone shall be equal before the law and courts of law.

2. The State shall guarantee equality of rights and freedoms regardless of sex, race, nationality, language, origin, social and official status, place of residence, religion, personal convictions, membership of public associations, or any other ground. Any restriction on the human rights of citizens on social, racial, national, linguistic or religious grounds shall be forbidden."

42. On 14 March 2020 Article 72 § 1 of the Constitution, setting out guidelines for the division of powers between the federal and the regional authorities, was amended by Federal Law no. 1-FKZ, which inserted a sentence in Article 72 § 1 specifying that the Russian Federation and the regions of the Russian Federation exercised joint jurisdiction in respect of the protection of "marriage in the form of a union between a man and a woman".

The same law also amended Article 114 of the Constitution, which lists the fields of responsibility of the government of the Russian Federation. Paragraph 1 (c) of Article 114 is now worded as follows:

"The Government of the Russian Federation:

...

(c) shall ensure the implementation in the Russian Federation of a uniform socially oriented State policy in the fields of culture, science, education, health, social security, support, strengthening and protection of the family, preservation of traditional family values, and protection of the environment;

..."

Before the 2020 legislative reform, the provision in question read as follows:

"The Government of the Russian Federation:

...

(c) shall ensure the implementation in the Russian Federation of a uniform State policy in the fields of culture, science, education, health, social security and ecology."

B. The Russian Family Code

43. The relevant provisions of the Russian Family Code read as follows:

Article 1. Fundamental principles of family legislation

"1. The family, motherhood, fatherhood and childhood shall be protected by the State ...

3. The regulation of family relationships shall be based on the principles of a voluntary marital union between a man and a woman, on the equality of spouses' rights in the family ...

4. It is prohibited to place any form of restriction on a person's rights to enter into marriage ... on the basis of social, racial, national, linguistic or religious affiliation ..."

Article 12. Conditions for marriage

"1. The mutual and voluntary consent of a man and a woman who have attained marriageable age is required for the registration of a marriage.

2. Marriage cannot be registered if any of the circumstances listed in Article 14 of the Code are present."

Article 14. Impediments to marriage

"Marriage is not allowed between:

- persons, if at least one of them is already married;
- close relatives ..., siblings, and half-siblings;
- adoptive parents and their adopted children;
- persons, if at least one of them has been deprived of legal capacity by a court owing to a mental disorder."

C. Case-law of the Russian Constitutional Court

44. On 16 November 2006 the Russian Constitutional Court declared inadmissible a complaint lodged by Mr E. Murzin, who had challenged the compatibility of Article 12 of the Family Code with the Constitution, in so far as its interpretation by the domestic authorities prevented him from marrying his same-sex partner. The relevant part of the Constitutional Court's decision (no. 496-O) reads as follows:

> "2. Having examined the documents submitted by Mr E. Murzin, the Constitutional Court does not find any grounds to proceed with the examination of the merits of his application.
>
> 2.1. ... [T]he Constitution of Russia and international legal rules are based on the principle that the main purpose of the family is to bear and bring up children.
>
> Taking that principle into consideration, as well as the national tradition of interpreting marriage as a biological union between a man and a woman, the Family Code provides that the regulation of family relationships is based on the principles of a voluntary marital union between a man and a woman, on prioritising the raising of children within the family and on caring for their well-being and development (Article 1). Accordingly, the federal legislature, acting within its powers, has stated that the mutual, voluntary consent of a man and a woman is one of the conditions for marriage. That [principle] cannot be considered a violation of the constitutional rights to which the applicant referred in his complaint.
>
> 2.2. By challenging Article 12 § 1 of the Family Code, the applicant asks the State to recognise his relationship with another man by ensuring their registration in the form of a union protected by the State.
>
> However, no obligation on the State to create conditions for advocating, supporting or recognising same-sex unions flows from either the Constitution or the international obligations of the Russian Federation. The lack of such recognition and registration [of same-sex unions] on its own has no effect on the level of recognition and guarantees for the applicant's individual and civil rights in the Russian Federation.
>
> The existence of a different approach in certain European States to the treatment of demographic and social issues does not prove that the applicant's constitutional rights have been infringed. This conclusion can be drawn because in accordance with Article 23 of the International Covenant on Civil and Political Rights, the right to marriage is recognised specifically for men and women. Moreover, Article 12 of the Convention explicitly provides for the possibility of founding a family in accordance with the national laws governing the exercise of that right.
>
> On the basis of all of the above ..., the Constitutional Court has decided ... not to proceed with the examination of Mr E. Murzin's complaint on the merits as it falls short of the requirements for admissibility set out in the Constitutional Court Act introduced by federal constitutional law ..."

45. On 23 September 2014 the Constitutional Court dismissed an application concerning the constitutionality of Article 6.21 of the Code of Administrative Offences, which introduced administrative liability for "promotion of non-traditional sexual relations among minors". In judgment 24-P, the Constitutional Court stated, *inter alia*:

"... In so far as one of the roles of the family is [to ensure] the birth and upbringing of children, an understanding of marriage as the union of a man and a woman underlies the legislative approach to resolving demographic and social issues in the area of family relations in the Russian Federation ..."

II. INTERNATIONAL LAW AND PRACTICE

A. United Nations

1. *Office of the United Nations High Commissioner for Human Rights*

46. On 29 May 2015 the Office of the United Nations High Commissioner for Human Rights published a report entitled "Discrimination and violence against individuals based on their sexual orientation and gender identity". It issued a number of recommendations to States aimed at combating violence and discrimination against LGBTI persons. These included:

"Providing legal recognition to same-sex couples and their children, ensuring that benefits traditionally accorded married partners – including those related to benefits, pensions, and taxation and inheritance – are accorded on a non-discriminatory basis."

2. *Committee on Economic, Social and Cultural Rights*

47. In its Concluding Observations on the sixth periodic report of the Russian Federation, published on 16 October 2017, the Committee on Economic, Social and Cultural Rights stated the following:

"**Non-discrimination**

22. The Committee is concerned about the continuous absence of comprehensive antidiscrimination legislation, despite the information provided by the delegation on existing anti-discrimination provisions, including in the State party's Constitution and Criminal Code. The Committee is also concerned about the prevalence of societal stigma and discrimination, in particular on the grounds of disability, ethnicity, sexual orientation, gender identity or health status (art. 2).

23. The Committee recommends that the State party take steps to adopt comprehensive anti-discrimination legislation, encompassing all grounds of discrimination, including sexual orientation and gender identity, taking into account the Committee's general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights. It also recommends that the State party:

(a) Recognize that individuals in same-sex relationships are entitled to equal enjoyment of Covenant rights, including by extending to them benefits reserved to married couples, and repeal or amend all legislation, including Federal Law No. 135, that could result in discrimination, prosecution and punishment of people because of their sexual orientation or gender identity; ..."

B. Council of Europe

1. Committee of Ministers

Recommendation CM/Rec(2010)5

48. In Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, the Committee of Ministers recommended that member States:

"1. examine existing legislative and other measures, keep them under review, and collect and analyse relevant data, in order to monitor and redress any direct or indirect discrimination on grounds of sexual orientation or gender identity;

2. ensure that legislative and other measures are adopted and effectively implemented to combat discrimination on grounds of sexual orientation or gender identity, to ensure respect for the human rights of lesbian, gay, bisexual and transgender persons and to promote tolerance towards them;

...

IV. Right to respect for private and family life

...

23. Where national legislation confers rights and obligations on unmarried couples, member states should ensure that it applies in a non-discriminatory way to both same-sex and different-sex couples, including with respect to survivor's pension benefits and tenancy rights.

24. Where national legislation recognises registered same-sex partnerships, member states should seek to ensure that their legal status and their rights and obligations are equivalent to those of heterosexual couples in a comparable situation.

25. Where national legislation does not recognise nor confer rights or obligations on registered same-sex partnerships and unmarried couples, member states are invited to consider the possibility of providing, without discrimination of any kind, including against different sex couples, same-sex couples with legal or other means to address the practical problems related to the social reality in which they live."

The Russian Federation expressed its position on the Recommendation in an interpretative statement worded as follows:

"1. The Russian Federation considers that the provisions of the Recommendation of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity should be interpreted in the light of the international obligations of member states in the field of prohibition of discrimination, and should not create more favourable conditions for LGBT persons in comparison with other social groups.

2. Any reference to judgments of the European Court of Human Rights should be understood as applying to the particular circumstances of the relevant cases.

...

6. All provisions of Part IV 'Right to respect for private and family life' are interpreted by the Russian Federation on the basis of Article 12 of the European Convention on Human Rights, which provides that the exercise of the right to marry and to found a family is governed by national law, and on the unequivocal position of the European Court of Human Rights that the right to marry only refers to a union between a man and a woman, which cannot be construed

as inhibiting the rights of LGBT persons and consequently does not constitute discrimination and call for an increase of these rights.

...

8. The Russian Federation does not share the opinion that a single judgment of the European Court of Human Rights or decisions only in relation to one country must serve as a standard for all member states. It is indisputable that judgments of the Court are binding only for the states involved, according to Article 46 of the Convention. The Court itself has repeatedly declared that it is not bound by its own prior decisions, and that its decisions are only applicable to the specific circumstances of the respective cases. Moreover, LGBT issues have been approached with much controversy by the Court, with recent judgments upholding diametrically opposing views on the subject. With this in mind, the Russian Federation considers itself to be bound by the provisions of the European Convention on Human Rights and not by the decisions of the European Court of Human Rights in respect of other member states. ..."

49. On 16 September 2020 the Steering Committee for Human Rights (CDDH) published its latest "Report on the implementation of Recommendation CM/Rec(2010)5 of the Committee of Ministers", based on replies submitted by forty-two of the forty-seven member States to a questionnaire. It noted the following in particular:

"...

126. Following the trend in recent years in Europe and in line with the European Court of Human Rights case law, member States should ensure that a specific legal framework exists providing for appropriate recognition and protection of same sex unions.

...

137. On the basis of the replies from member States to the questionnaire, the CDDH invites the Committee of Ministers to take note of this report, encourage member States to continue their efforts to implement the provisions of the Recommendation, and continue to provide them with Council of Europe support, notably in the framework of the Steering Committee on Antidiscrimination, Diversity and Inclusion (CDADI)."

The Russian Federation made a statement reiterating that it dissociated itself from the content of the comments on Recommendation CM/Rec(2010)5 for the reasons expressed in the declaration appended to the CDDH's initial report (document CDDH(2009)019, Appendix IV) and did not participate in their adoption.

2. Parliamentary Assembly

50. In its Recommendation 1474 (2000), adopted on 26 September 2000, concerning the "situation of lesbians and gays in Council of Europe member states", the Parliamentary Assembly recommended that the Committee of Ministers call on the member States, among other things, to adopt legislation which makes provision for registered partnerships (paragraph 11.3 (i)).

51. On 10 October 2018 the Parliamentary Assembly adopted Resolution 2239 (2018) entitled "Private and family life: achieving equality regardless of sexual orientation", in which it called upon the member States of the Council of Europe to:

> "...
> 4.3. align their constitutional, legislative and regulatory provisions and policies with respect to same-sex partners with the case law of the European Court of Human Rights in this field, and accordingly:
> 4.3.1. ensure that same-sex partners have available to them a specific legal framework providing for the recognition and protection of their unions;
> 4.3.2. grant equal rights to same-sex couples and heterosexual couples as regards succession to a tenancy;
> 4.3.3. ensure that cohabiting same-sex partners, whatever the legal status of their partnership, qualify as dependants for the purposes of health insurance cover;
> 4.3.4. when dealing with applications for residence permits for the purposes of family reunification, ensure that, if same-sex couples are not able to marry, there is some other way for a foreign same-sex partner to qualify for a residence permit;
> ..."

52. On 25 January 2022 the Parliamentary Assembly adopted Resolution 2417 (2022), entitled "Combating rising hate against LGBTI people in Europe", the relevant parts of which read:

> "14. The Assembly emphasises that it is precisely when hostility is high or rising that effective criminal provisions and anti-discrimination legislation are most crucial. It calls on member States to strengthen their legislative framework wherever necessary to ensure that it protects the right of LGBTI people to live free from hatred and discrimination, and to apply it effectively in practice. In line with the above-mentioned standards, and without prejudice to the more specific or far-reaching obligations they may already entail, it calls on member States in particular to: ...
> 14.6. initiate, if this has not already been done, and bring to fruition in all cases, the legislative and policy-making processes necessary to complete other elements of the legal framework that are crucial to LGBTI equality, notably as regards legal gender recognition, the bodily integrity of intersex people, the protection of rainbow families, access to trans-specific healthcare and the exercise of civil rights such as the freedoms of expression, association and assembly."

3. European Commission against Racism and Intolerance (ECRI)

53. In its fifth report on the Russian Federation, adopted on 4 December 2018 and published on 5 March 2019, ECRI stated the following:

> "116. Concerning family law matters, the current legislation in the Russian Federation does not recognise any form of same-sex partnerships. ECRI considers that the absence of recognition of same-sex partnerships can lead to various forms of discrimination in the field of social rights. In this regard, it draws the attention of the authorities to Recommendation CM/Rec(2010)5 of

the Council of Europe's Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity.

117. ECRI recommends that the authorities provide a legal framework that affords same-sex couples, without discrimination of any kind, the possibility to have their relationship recognised and protected in order to address the practical problems related to the social reality in which they live."

54. On 1 March 2021 ECRI issued a "Factsheet on LGBTI issues" setting out its key standards on issues of sexual orientation, gender identity and sex characteristics. The relevant part reads as follows:

"6. The authorities should provide a legal framework that allows same-sex couples to have their relationship formally and legally recognised and protected, without discrimination of any kind, in order to address the practical problems related to the social reality in which they live. The authorities should examine whether there is an objective and reasonable justification for any differences in the regulation of married and same-sex couples and abolish any such unjustified differences."

55. On 5 October 2021 ECRI published its "Conclusions on the implementation of the recommendations in respect of the Russian Federation subject to interim follow-up". ECRI stated, among other things:

"In its report on the Russian Federation (fifth monitoring cycle), ECRI recommended that the Russian authorities abolish the legal ban on the provision of information about homosexuality to minors (legislation on the so-called 'promotion of non-traditional sexual relations among minors'), in line with the judgment of the European Court of Human Rights in the case *Bayev and Others v. Russia.*

ECRI appreciates the receipt of information from the Russian authorities regarding the implementation of this recommendation.

However, the authorities informed ECRI that they consider this recommendation to be 'absolutely irrelevant to the legislative system of the Russian Federation'. They also refer to Article 114 of the Constitution of the Russian Federation, which states that the Government of the Russian Federation is tasked with the 'support, strengthening and protection of the family, [and] preservation of traditional family values'. In the authorities' view, 'the notion of "traditional family values" obviously does not include the promotion of homosexuality among minors'.

Although ECRI has been informed by civil society groups that the number of convictions (payment of fines) under Article 6.21 of the Code of Administrative Offences in relation to the number of cases opened has continued to decrease in recent years (according to data from the Supreme Court: one out of 15 cases during the first six months of 2020; four out of 20 in 2019), the problem described in ECRI's last report on the Russian Federation, namely the ambiguity, potential broad reach and chilling effect of this legal provision, continues to be a problem.

Moreover, ECRI is especially concerned about the Russian authorities' view of this recommendation as 'irrelevant', given the fact that the recommendation is based on a judgment against Russia by the European Court of Human Rights.

ECRI considers that the recommendation has not been implemented."

4. Council of Europe Commissioner for Human Rights

56. On 21 February 2017 the Council of Europe Commissioner for Human Rights published a comment piece entitled "Access to registered same-sex partnerships: it's a question of equality". It included the following passages:

"Providing access to legal recognition to same-sex couples boils down to a simple concept: equality before the law. Civil marriage, civil unions, or registered partnerships represent benefits, rights and obligations that the state grants to a couple in a stable relationship. There is a growing consensus that a government may not discriminate against same-sex couples and exclude them from the protections attendant to a formally recognised different-sex union.

...

States should continue to work towards eliminating discrimination based on sexual orientation in the area of family rights. This requires several measures:

- The 20 member states of the Council of Europe that still do not provide any legal recognition to same-sex couples should enact legislation to create – at the very least – registered partnerships that ensure that privileges, obligations or benefits available to married or registered different-sex partners are equally available to same-sex partners.

- All states should ensure that legislation exists to provide registered same-sex couples with the same rights and benefits as married or registered different-sex couples, for example in the areas of social security, taxes, employment and pension benefits, freedom of movement, family reunification, parental rights and inheritance.

- States should promote respect for lesbian, gay and bisexual persons and combat discrimination based on sexual orientation through human rights education and awareness-raising campaigns.

Granting rights and benefits to same-sex couples does not take anything away from different-sex couples who already have access to them. These rights are not weaker or less valuable simply because more people receive them. The trend toward legal recognition of same-sex couples is responding to the daily reality and needs of relationships that have gone unrecognised for a very long time. Our societies are made up of a rich diversity of individuals, relationships and families. It's time we see this as an asset."

C. European Union

1. Charter of Fundamental Rights of the European Union

57. The relevant provisions of the Charter of Fundamental Rights of the European Union read as follows:

Article 7

"Everyone has the right to respect for his or her private and family life, home and communications."

Article 9

"The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights."

Article 21

"1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited."

58. The Explanations relating to the Charter of Fundamental Rights (2007/C 303/02) state the following with regard to Article 9:

"This Article is based on Article 12 of the ECHR, which reads as follows: 'Men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercising of this right.' The wording of the Article has been modernised to cover cases in which national legislation recognises arrangements other than marriage for founding a family. This Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. This right is thus similar to that afforded by the ECHR, but its scope may be wider when national legislation so provides."

2. Case-law of the CJEU

59. The Court of Justice of the European Union (CJEU) considers that a person's status, including such matters as the rules on marriage, falls within the sole competence of the member States and that European Union (EU) law does not detract from that competence. The member States are thus free to decide whether or not to allow marriage for persons of the same sex (see judgment of 24 November 2016 in *Parris*, C-443/15, EU:C:2016:897, paragraph 59). Nevertheless, in exercising that competence, member States must comply with the provisions on the freedom conferred on all EU citizens to move and reside in the territory of the member States (see, to that effect, judgment of 2 October 2003 in *Garcia Avello*, C-148/02, EU:C:2003:539, paragraph 25; judgment of 14 October 2008 in *Grunkin and Paul*, C-353/06, EU:C:2008:559, paragraph 16; and judgment of 2 June 2016 in *Bogendorff von Wolffersdorff*, C-438/14, EU:C:2016:401, paragraph 32).

60. In *Coman and Others* (judgment of 5 June 2018, C-673/16, EU:C:2018:385) the CJEU held that where an EU citizen had made use of his freedom of movement in order to travel to and reside in a member State other than that of which he was a national, and had pursued a family life there with a third-country national of the same sex to whom he was joined by marriage, Article 21 § 1 of the Treaty on the Functioning of the European Union precluded the competent authorities of the member State of which the EU citizen was a national from refusing to grant the third-country national a right of residence on the grounds that the law of that member State did not recognise marriage between persons of the same sex (see paragraph 51 of the judgment).

The CJEU based that finding on the following considerations in particular:

"45. ... the obligation for a Member State to recognise a marriage between persons of the same sex concluded in another Member State in accordance with the law of that state, for the sole purpose of granting a derived right of residence to a third-country national, does not undermine the institution of marriage in the first Member State, which is defined by national law and ... falls within the competence of the Member States. Such recognition does not require that Member State to provide, in its national law, for the institution of marriage between persons of the same sex. It is confined to the obligation to recognise such marriages, concluded in another Member State in accordance with the law of that state, for the sole purpose of enabling such persons to exercise the rights they enjoy under EU law.

46. Accordingly, an obligation to recognise such marriages for the sole purpose of granting a derived right of residence to a third-country national does not undermine the national identity or pose a threat to the public policy of the Member State concerned.

47. It should be added that a national measure that is liable to obstruct the exercise of freedom of movement for persons may be justified only where such a measure is consistent with the fundamental rights guaranteed by the Charter, it being the task of the Court to ensure that those rights are respected (see, by analogy, judgment of 13 September 2016, *Rendón Marín*, C-165/14, EU:C:2016:675, paragraph 66).

...

50. It is apparent from the case-law of the European Court of Human Rights that the relationship of a homosexual couple may fall within the notion of 'private life' and that of 'family life' in the same way as the relationship of a heterosexual couple in the same situation (ECtHR, 7 November 2013, *Vallianatos and Others v Greece*, CE:ECHR:2013:1107JUD002938109, § 73, and ECtHR, 14 December 2017, *Orlandi and Others v. Italy*, CE:ECHR:2017:1214JUD002643112, § 143)."

61. More recently, in *V.M.A.* (judgment of 14 December 2021, C-490/20, EU:C:2021:1008) the CJEU ruled on the interpretation of various provisions of EU law in the case of a child who was a minor and an EU citizen and whose birth certificate, issued by the host member State, designated two persons of the same sex as the child's parents. The CJEU held that the member State of which the child was a national was obliged to issue the child with an identity card or a passport, and to recognise, as was any other member State, the document from the host member State that permitted the child to exercise, with each of those two persons, the right to move and reside freely within the territory of the member States (see paragraph 69 and the operative provisions of the judgment).

3. European Parliament

62. On 14 September 2021 the European Parliament adopted a "Resolution on LGBTIQ rights in the EU" (2021/2679 (RSP)). The Resolution includes the following passages:

"The European Parliament ...

2. Expresses its deepest concern regarding the discrimination suffered by rainbow families and their children in the EU and the fact that they are deprived of their rights on grounds of sexual orientation or gender identity, or sex characteristics of the parents or partners; calls on the Commission and the Member States to overcome this discrimination and to remove the

obstacles they face when exercising the fundamental right to freedom of movement within the EU;

3. Underlines the need to work towards the full enjoyment of fundamental rights by LGBTIQ persons in all EU Member States and recalls that the EU institutions and the Member States therefore have a duty to uphold and protect them in accordance with the Treaties and the Charter, as well as with international law;

4. Insists that the EU needs to take a common approach to the recognition of same-sex marriages and partnerships; calls on the Member States specifically to introduce relevant legislation to ensure full respect for the right to private and family life without discrimination and free movement of all families, including measures to facilitate the recognition of the legal gender of transgender parents;

5. Recalls that EU law prevails over any type of national law, including over conflicting constitutional provisions, and that therefore, Member States cannot, invoke any constitutional ban on same-sex marriage or constitutional protection of 'morals' or 'public policy' in order to obstruct the fundamental right to free movement of persons within the EU in violation of the rights of rainbow families that move to their territory."

D. Inter-American Court of Human Rights

63. On a request by Costa Rica, the Inter-American Court of Human Rights issued an advisory opinion on 24 November 2017 (no. OC-24/17) on gender identity, equality and non-discrimination of same-sex couples.

In response to the fourth question raised by Costa Rica, as to whether the State should guarantee the protection of all patrimonial rights derived from a relationship between persons of the same sex, the court stated:

"Pursuant to the right to the protection of private and family life (Article 11(2)), as well as the right to protection of the family (Article 17), the American Convention protects the family ties that may derive from a relationship between persons of the same sex. The Court also finds that all the patrimonial rights derived from a protected family relationship between a same-sex couple must be protected, with no discrimination as regards to heterosexual couples, pursuant to the right to equality and non-discrimination (Articles 1(1) and 24). Notwithstanding the foregoing, the international obligation of States goes beyond mere patrimonial rights and includes all the internationally recognized human rights, as well as the rights and obligations recognized under the domestic law of each State that arise from the family ties of heterosexual couples." (paragraph 199 of the opinion)

Moreover, in response to the fifth question raised by Costa Rica, as to whether a legal institution regulating relationships between persons of the same was required in order to recognise the patrimonial rights deriving from that relationship, the court stated:

"States must ensure access to all the legal institutions that exist in their domestic laws to guarantee the protection of all the rights of families composed of same-sex couples, without discrimination in relation to families constituted by heterosexual couples. To this end, States

may need to amend existing institutions by taking administrative, judicial or legislative measures in order to extend such mechanisms to same-sex couples. States that encounter institutional difficulties to adapt the existing provisions, on a transitional basis, and while promoting such reforms in good faith, still have the obligation to ensure to same-sex couples, equality and parity of rights with respect to heterosexual couples without any discrimination." (paragraph 228 of the opinion)

64. The Inter-American Court concluded its opinion in the following terms:

"Under Articles 1(1), 2, 11(2), 17 and 24 of the [American] Convention [on Human Rights], States must ensure full access to all the mechanisms that exist in their domestic laws, including the right to marriage, to ensure the protection of the rights of families formed by same-sex couples, without discrimination in relation to those that are formed by heterosexual couples ..." (point 8 of the operative provisions)

III. COMPARATIVE-LAW MATERIAL

65. The Court carried out a comparative study of the forms of legal recognition of same-sex couples in the member States of the Council of Europe.

66. The study indicates that thirty member States currently offer same-sex couples an opportunity to have their relationship recognised by law. In particular, eighteen States (Austria, Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, the Netherlands, Norway, Portugal, Slovenia, Spain, Sweden, Switzerland and the United Kingdom) allow marriage between persons of the same sex, while twelve other States (Andorra, Croatia, Cyprus, the Czech Republic, Estonia, Greece, Hungary, Italy, Liechtenstein, Monaco, Montenegro and San Marino) allow alternative forms of partnership to marriage for same-sex couples. Among the eighteen States where marriage is allowed, eight (Austria, Belgium, France, Luxembourg, Malta, the Netherlands, Slovenia and the United Kingdom) also offer same-sex couples the opportunity to enter into other forms of partnership (for a description of various types of registered partnership existing in 2010, see *Schalk and Kopf v. Austria*, no. 30141/04, §§ 31-34, ECHR 2010).

67. In the Russian Federation and the remaining sixteen member States (Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Georgia, Latvia, Lithuania, the Republic of Moldova, North Macedonia, Poland, Romania, Serbia, Slovakia, Türkiye and Ukraine), same-sex couples currently have no opportunity to have their relationship recognised by law.

THE LAW

I. PRELIMINARY ISSUES

A. Whether the Court has jurisdiction to deal with the case

68. The Court observes that the respondent State ceased to be a member of the Council of Europe on 16 March 2022 (see paragraph 12 above) and that it also ceased to be a Party to the Convention on 16 September 2022 (see paragraph 13 above).

69. In those circumstances, the Court is called upon to determine whether it has jurisdiction to deal with the present applications, although its jurisdiction has not been disputed in the context of the present proceedings by the respondent State, which requested that the case be referred to the Grand Chamber. Since the scope of the Court's jurisdiction is determined by the Convention itself, in particular by Article 32, and not by the parties' submissions in a particular case, the mere absence of a plea cannot extend that jurisdiction (see *Blečić v. Croatia* [GC], no. 59532/00, § 67, ECHR 2006-III). The Court must satisfy itself that it has jurisdiction in any case brought before it, and is therefore obliged to examine the question of its jurisdiction at every stage of the proceedings, of its own motion where necessary (see *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, § 201, ECHR 2014 (extracts)).

70. Article 58 of the Convention provides:

"1. A High Contracting Party may denounce the ... Convention only after the expiry of five years from the date on which it became a party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.

2. Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under [the] Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.

3. Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to [the] Convention under the same conditions.

..."

71. It appears from the wording of Article 58, and more specifically the second and third paragraphs, that a State which ceases to be a Party to the Convention by virtue of the fact that it has ceased to be a member of the Council of Europe is not released from its obligations under the Convention in respect of any act performed by that State before the date on which it ceases to be a Party to the Convention.

72. This reading of Article 58 of the Convention was confirmed by the Court, sitting in plenary session (in accordance with Rule 20 § 1 of the Rules of Court), in its "Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights", adopted on 22 March 2022. The Court stated that it "remain[ed] competent to deal with applications directed against the Russian Federation in relation to acts or omissions capable of constituting a violation of the Convention provided that they occurred until 16 September 2022" (see paragraph 2 of the Resolution).

73. In the present case, the facts giving rise to the violations of the Convention alleged by the applicants took place before 16 September 2022. Since the applications were lodged with the Court in 2010 and 2014, the Court has jurisdiction to deal with them.

B. Continuation of the examination of the applications

74. In letters sent on 17 May 2022, the Registry of the Court took note of Mr Chunusov's wish to pursue the proceedings and asked the other five applicants to indicate whether they intended to pursue their applications, bearing in mind that they were no longer represented by Mr Daci and Mr Cron. The applicants Ms Fedotova, Ms Shaykhraznova and Mr Yevtushenko replied on 30 May 2022 that, like Mr Chunusov, they wished to pursue the proceedings, while Ms Shipitko and Ms Yakovleva did not respond (see paragraphs 19, 21 and 22 above).

75. Under Article 37 § 1 (a) of the Convention, "[t]he Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that ... the applicant does not intend to pursue his application".

76. In the present case, the Court takes note, firstly, of the explicit confirmation by the applicants Ms Fedotova (application no. 40792/10), Mr Chunusov and Mr Yevtushenko (application no. 30538/14) and Ms Shaykhraznova (application no. 43439/14) of their intention to pursue the proceedings. The Court has no reason to call into question the wishes of these four applicants to pursue their applications.

77. The Court further notes that, unlike their respective co-applicants, Ms Shipitko (application no. 40792/10) and Ms Yakovleva (application no. 43439/14) did not reply to the letter sent to them on 17 May 2022. It is not aware of any particular circumstances that prevented those two applicants from contacting it to confirm their continued interest in pursuing the proceedings. That being so, the Court considers that Ms Shipitko and Ms Yakovleva no longer intend to pursue their applications (see, *mutatis mutandis*, *Ana Pavel v. Romania* (just satisfaction – striking out), no. 4503/06, § 5, 29 May 2012).

78. As to whether the Court is called upon to continue the examination of the case in respect of these two applicants on the grounds that "respect for human rights as defined in the Convention and the Protocols thereto so requires" (Article 37 § 1 *in fine* of the Convention), it should be noted that the complaints lodged by Ms Shipitko and Ms Yakovleva are identical to those raised by the other applicants, on which the Court will express its opinion below. Accordingly, the Court sees no grounds relating to respect for human rights as defined in the Convention and the Protocols thereto which, in accordance with Article 37 § 1 *in fine*, would require it to continue the examination of the case in respect of those two applicants (see, *mutatis mutandis*, *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 58, ECHR 2012, and *Sharifi and Others v. Italy and Greece*, no. 16643/09, § 134, 21 October 2014).

79. In conclusion, the Court decides to strike applications nos. 40792/10 and 43439/14 out of its list of cases in so far as they concern Ms Shipitko and Ms Yakovleva and to continue the examination of the case in respect of the other applicants.

C. Scope of the case before the Grand Chamber

80. Before the Grand Chamber, the Government challenged the Chamber's decision to examine the case under Articles 8 and 14 of the Convention, arguing that the case mainly concerned the right to marry enshrined in Article 12 of the Convention (see paragraphs 109-112 below).

81. The Court observes that in their initial applications, the applicants alleged firstly that the refusal of the Russian authorities to allow them to marry had breached Article 12 of the

Convention. Secondly, they alleged a violation of Articles 8 and 14 of the Convention and complained that they were unable to secure any form of legal recognition for their relationships.

82. On 2 May 2016 the President of the Third Section decided to give notice of the applications to the Russian Government under Article 8 of the Convention taken alone and Article 14 of the Convention taken in conjunction with Article 8. As regards the remaining complaints, namely those under Article 12, the Section President, sitting as a single judge, declared them inadmissible as being manifestly ill-founded, in a final decision (Article 27 § 2 of the Convention and Rule 54 § 3 of the Rules of Court).

83. According to the Court's settled case-law, the "case" referred to the Grand Chamber necessarily embraces all aspects of the application previously examined by the Chamber in its judgment. The "case" referred to the Grand Chamber is the application as it has been declared admissible, together with the complaints which have not been declared inadmissible (see *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, §§ 171-72 and 177, 21 November 2019; *S.M. v. Croatia* [GC], no. 60561/14, § 216, 25 June 2020); *Big Brother Watch and Others v. the United Kingdom* [GC], nos. 58170/13 and 2 others, § 268, 25 May 2021; *Denis and Irvine v. Belgium* [GC], nos. 62819/17 and 63921/17, § 98, 1 June 2021; and *Savran v. Denmark* [GC], no. 57467/15, § 169, 7 December 2021). It follows that the Grand Chamber cannot examine complaints which have previously been declared inadmissible by a single judge (see *Albert and Others v. Hungary* [GC], no. 5294/14, §§ 104-05, 7 July 2020, and *X and Others v. Bulgaria* [GC], no. 22457/16, § 141, 2 February 2021).

84. The Court sees no reason to depart from that approach in the present case. Like the Chamber, the Grand Chamber will therefore focus its examination on the applicants' complaints under Article 8 of the Convention and under Article 14 in conjunction with Article 8. It will not determine whether, as the applicants contended in their applications, Article 12 of the Convention imposes an obligation on the respondent State to make marriage available to same-sex couples, since the Court has already answered this question in the negative in the present case by means of a final decision.

II. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

85. In their observations before the Grand Chamber, the Government raised two preliminary objections for the first time. They argued firstly that the applicants had lost their victim status and secondly that they had not exhausted domestic remedies.

A. Alleged lack of victim status of the applicants

86. The Government submitted that the applicants were no longer victims of the violations of which they had complained before the Court. They asserted for the first time before the Grand Chamber that the applicants in application no. 40792/10 had married in Toronto in 2009 but had since separated. In the Government's submission, Mr Chunusov, the applicant in application no. 30538/14, had married another Russian national in Denmark in 2014 and had then set up home with him in Germany. Lastly, the Government stated that the applicants in application no. 43439/14 had separated and that one of them, Ms Shaykhraznova, had moved to Germany. For those reasons, the Government contended that the applicants had lost their victim status and any

interest in the complaints raised in their applications. They further submitted that, in view of the circumstances, the applications could even be struck out under Article 37 § 1 (c) of the Convention, as their continued examination was no longer justified.

87. The Court observes that in accordance with Rule 55 of the Rules of Court, any plea of inadmissibility must, in so far as its character and the circumstances permit, be raised by the respondent Contracting Party in its written or oral observations on the admissibility of the application (see *N.C. v. Italy* [GC], no. 24952/94, § 44, ECHR 2002-X, and *Konstantin Markin v. Russia* [GC], no. 30078/06, § 95, ECHR 2012 (extracts)). Where an objection is raised out of time for the purposes of Rule 55, an estoppel arises and the objection must accordingly be dismissed, unless the Government were not in a position to comply with the time-limit set forth in Rule 55 (see *Stanev v. Bulgaria* [GC], no. 36760/06, § 196, ECHR 2012, and *Svinarenko and Slyadnev v. Russia* [GC], nos. 32541/08 and 43441/08, § 82, ECHR 2014 (extracts)).

88. In the present case the Court sees no need to examine whether the Government are estopped from making the above objection as to loss of victim status since it concerns a matter which goes to the Court's jurisdiction and which it is not prevented from examining of its own motion (see *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, § 70, 5 July 2016, and *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, § 93, 27 June 2017).

89. The Court is required in this instance to determine firstly whether there has been an acknowledgment by the national authorities, at least in substance, of the violation alleged by the applicants, and secondly whether the applicants were afforded appropriate and sufficient redress (see, among other authorities, *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI; *Scordino v. Italy* (no. 1) [GC], no. 36813/97, § 193; ECHR 2006-V; and *Konstantin Markin*, cited above, § 82). In the present case, the applicants submitted that the absence of any opportunity to have their relationships recognised and protected by law in Russia had infringed their right to respect for their private and family life and had amounted to discrimination against them on grounds of sexual orientation. However, it does not appear from the material submitted to the Court that the national authorities have acknowledged, explicitly or in substance, the violations alleged by the applicants or afforded redress in that regard. On the contrary, the Government submitted before the Court that the fact that no such recognition was possible was compatible with the Convention.

90. Besides that, the applicants' life choices following the refusal of the Russian authorities to accept their notice of marriage and thus to grant them the only possible form of legal recognition of their relationship under Russian law cannot have any bearing on their status as victims (see, *mutatis mutandis*, *Yevgeniy Dmitriyev v. Russia*, no. 17840/06, § 37, 1 December 2020). Indeed, it cannot be ruled out that these possible changes in the applicants' circumstances are precisely the result of their inability to secure legal recognition and protection for their relationship in Russia, a situation which was at the heart of their complaints to the Court.

91. Having regard to the foregoing, the Court cannot find that the applicants can no longer claim to be victims of the alleged violations of Article 8 of the Convention and of Article 14 in conjunction with Article 8. For the same reasons, the Court is unable to conclude that it is no longer justified to continue the examination of the case. The Government's first preliminary objection must therefore be dismissed.

B. Non-exhaustion of domestic remedies

92. The Government further objected that domestic remedies had not been exhausted, on two counts. Firstly, they contended that the applicants should have lodged a cassation appeal under the "two-tier" cassation procedure. They referred in that connection to *Abramyan and Others v. Russia* ((dec.), nos. 38951/13 and 59611/13, 12 May 2015), in which the Court had held that the new cassation procedure introduced in 2012 by Law no 353-FZ was now an effective remedy to be pursued for exhaustion purposes. Secondly, the applicants should have argued explicitly in the domestic courts that it was impossible for them to have their relationship recognised by law, instead of simply relying on their right to marry.

93. The Court observes that this objection was not raised prior to the proceedings before the Grand Chamber. In accordance with Rule 55 (see paragraph 87 above), the Government are therefore estopped from raising this objection, especially as they have not indicated any impediment that might have prevented them from raising it in their initial observations of 15 September 2016 on the admissibility and merits of the applications (see, *mutantis mutandis*, *Navalnyy v. Russia* [GC], nos. 29580/12 and 4 others, § 61, 15 November 2018, and *López Ribalda and Others v. Spain* [GC], nos. 1874/13 and 8567/13, § 83, 17 October 2019).

94. As a subsidiary consideration, the Court notes that, as far as the first limb of the objection is concerned, the remedy referred to by the Government, namely the "two-tier" cassation appeal introduced in 2012 by Law no. 353-FZ, has only been regarded as an effective remedy for exhaustion purposes since the *Abramyan and Others* decision (cited above, §§ 93-96) of 12 May 2015. The Court has held that applicants who lodged their application with it prior to the date of that decision were not required to exhaust the two-tier cassation procedure (see *Kocherov and Sergeyeva v. Russia*, no. 16899/13, §§ 66-68, 29 March 2016). Since the applications in the present case were lodged in 2010 and 2014, the first limb of the Government's objection cannot be upheld by the Court.

95. As regards the second limb of the objection, the Court notes that it appears, at least from the material submitted in applications nos. 30538/14 and 43439/14, that the applicants argued before the domestic courts that the refusal to recognise and protect their relationships by law amounted to a violation of their right to respect for their private and family life and to discriminatory treatment, relying in particular on Articles 8 and 14 of the Convention. In any event, the applicants cannot be criticised for not seeking any form of recognition other than marriage, given that no other form of recognition is available under Russian law.

96. Having regard to the foregoing, the Court also dismisses the Government's second preliminary objection, concerning the alleged failure to exhaust domestic remedies.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

97. The applicants complained that it was impossible for them to have their relationships as couples recognised and protected by law in Russia. In their view, this amounted to a violation of their right to respect for their private and family life as protected by Article 8 of the Convention, which provides:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

98. The Government contested that argument.

A. The Chamber judgment

99. In its judgment the Chamber first of all held that the facts of the present case fell within the scope of Article 8 of the Convention and of the applicants' "private life" and also "family life" (see the Chamber judgment, § 41). In the Chamber's view, given the nature of the applicants' complaint, the Court had to determine whether, at the time of its analysis, Russia was in breach of its positive obligation to ensure respect for the applicants' private and family life, in particular through the provision of a domestic legal framework allowing them to have their respective relationships recognised and protected (ibid., § 50).

100. After examining the applicants' situation, the Chamber observed that the fact that it was absolutely impossible for them to have their relationships recognised by law created a conflict between the social reality of the applicants, who lived in committed relationships based on mutual affection, and the law, which failed to protect the most regular of "needs" arising in the context of a same-sex couple (ibid., § 51).

101. Being unable to identify any prevailing community interest that could outweigh the applicants' individual interests, the Chamber found that the respondent State had failed to justify the lack of any opportunity for the applicants to have their respective relationships formally acknowledged. Accordingly, a fair balance between the competing interests had not been struck in the case at hand (ibid., § 55). The Chamber held that Russia had overstepped the margin of appreciation it enjoyed in choosing the most appropriate form of recognition of same-sex couples, since domestic law did not provide any legal framework capable of protecting such couples. It therefore concluded that there had been a violation of Article 8 of the Convention (ibid., § 56).

B. The parties' submissions before the Grand Chamber

1. The applicants

102. The applicants first of all challenged the Government's assertion that the facts of the case fell within the scope of Article 12 of the Convention. They submitted that that Article was irrelevant to the present case. Their allegations had been examined by the Chamber under Articles 8 and 14 of the Convention, and moreover, the conclusions reached in the Chamber judgment under Article 8 scarcely concerned Article 12, since the two Articles differed in scope and guaranteed different rights.

103. The applicants maintained that they had been in stable relationships as couples and that Article 8 was therefore applicable under the head of both "private life" and "family life", in accordance with the Court's case-law. They submitted that the Russian State had a positive obligation to put in place a legal alternative to marriage enabling them to exercise the rights safeguarded by Article 8. Such an alternative could take the form of a civil partnership, a civil union, a civil solidarity agreement or any other arrangement, provided that same-sex couples were in a similar position to that of married different-sex couples.

104. The applicants submitted that same-sex partners should be entitled to State welfare support and housing benefits for families. By being treated as members of the same family, same-sex partners would in addition be able to take important decisions in the event of the partner's sickness or hospitalisation and would be entitled to take care leave. Such recognition would also exempt them from having to testify against their partner if criminal proceedings were brought against him or her. Members of a same-sex couple should also be entitled to visit their partner in prison without restrictions, and be able to inherit from the partner on the latter's death. The applicants also referred to the right to family reunion, the availability of assisted reproduction and the rules on maintenance payments in the event of separation, all of which were rights granted only to different-sex couples and from which same-sex partners were excluded in Russia.

105. While acknowledging that States enjoyed a wide margin of appreciation in choosing what form the legal alternative to marriage should take, the applicants argued that that margin of appreciation could not be stretched so far as to render any form of legal recognition of same-sex couples meaningless.

106. The applicants submitted that the Russian State had failed to strike a fair balance between the interests at stake. In their view, the Government's argument that there was a prevailing community interest, essentially involving protection of the moral order shared by the majority of Russian citizens, did not justify the lack of a legislative framework allowing recognition of same-sex couples.

107. The applicants further contended that guaranteeing same-sex couples a form of recognition other than marriage did not run counter to the need to protect the traditional family or to respect the attitudes and feelings of the majority of Russians.

108. The applicants accordingly urged the Grand Chamber to confirm the Chamber's conclusions under Article 8 of the Convention.

2. The Government

109. The Government submitted that the Chamber had interpreted Article 8 of the Convention in a very extensive manner, conflicting with Article 12 of the Convention and Article 16 of the Universal Declaration of Human Rights, both of which provided that only persons of different sex had the right to marry and found a family. In the Government's submission, the Chamber should have based its examination on Article 12 of the Convention alone and refrained from interpreting Article 8 in such a way as to impose obligations not directly deriving from the Convention on States. The various provisions of the Convention had to be read and interpreted coherently and in accordance with the rules on interpretation of treaties as set forth in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

110. Relying on Article 62 of the Vienna Convention, the Government submitted that a fundamental change of circumstances which had occurred with regard to those existing at the time of the conclusion of a treaty, and which had not been foreseen by the parties, could not be invoked as a ground for terminating the way in which the treaty had been interpreted when it was signed. The Contracting Parties had signed the Convention on the understanding that only "a man and a woman" had the right to marry and to found a family, and imposing a different interpretation on them now would be in breach of Article 62 of the Vienna Convention.

111. The Government explained that, given that at the time of signing the Convention, the Contracting Parties had not intended to grant two persons of the same sex the right to marry, such a right, as matters stood, remained at the discretion of the individual State. A new agreement would have to be drawn up – for example, in the form of a new Protocol to the Convention – providing specifically for the right to same-sex marriage. Such an agreement could also include an obligation for the signatory States to make provision in their domestic legal system for other forms of recognition of same-sex relationships.

112. The Government submitted that the applicants had relied above all on their right to marry and that the case therefore fell within the scope of Article 12 of the Convention, which had not been breached in the present case in view of the Court's case-law concerning that Article. This was also confirmed by the Court's decision to declare the complaint under Article 12 inadmissible when notice of the applications had been given.

113. The Government asserted in addition that there was no pan-European consensus on the issue of legal recognition and protection of same-sex couples, since the Russian Federation and sixteen member States of the Council of Europe did not grant such couples any form of legal recognition.

114. As regards the right relied on by the applicants to have their respective relationships recognised by law in some form, the Government submitted that an analysis of other countries' domestic legislation guaranteeing that right to same-sex couples showed that such forms of recognition by law did not afford comparable legal protection to that conferred by marriage, and thus did not constitute an adequate alternative.

115. The Government further contended that extending marriage to same-sex couples would be contrary to the Russian Constitution and public policy. In their submission, introducing a new form of legal union similar to marriage in the domestic system would be unreasonable from a legal perspective. The creation of a new form of legal union would require a revision of the Russian Family Code. In that connection the Government relied on the Constitutional Court's decision no. 24-P of 23 September 2014, according to which, as provided in Article 38 of the Constitution, family, motherhood and childhood, in their traditional understanding, constituted fundamental values in the Russian domestic system and required special protection and preservation.

116. The Government submitted that the family in its traditional form was a fundamental value of Russian society, intrinsically linked to the aim of preserving and developing the human race. The importance of protecting the traditional family had been reaffirmed in the new 2020 Constitution, particularly in Article 114 § 1 (c), which included it among the fundamental values of the State, and Article 72 § 1, which specified that protection of the traditional family was now a matter under the joint jurisdiction of the federal State and the regional entities. The Government pointed out in that

connection that the Constitutional Court had confirmed that those provisions were compatible with the Russian constitutional order. The aim of protecting traditional family values, moreover, was not incompatible with the Convention since the Court's case-law had confirmed the importance of preserving traditions and cultural diversity. In addition, the Court had always allowed States to choose the appropriate timing and means for the introduction of reforms to protect sexual minorities, the national authorities being best placed to assess developments in society.

117. The Government argued in addition that the applicants, like all Russian citizens, enjoyed all the rights provided in the Civil Code, without facing any exclusion or obstacles deriving from their civil status. In Russia, everyone had the right to make a will and choose his or her beneficiaries freely. Moreover, everyone was free under Russian law to enter into mortgage agreements without any restrictions based on civil status or sexual orientation. Those rights, recognised in domestic law, could be relied on without any restrictions in dealings with the relevant institutions, including by unmarried people. Concerning access to housing programmes, the Government submitted that these were aimed at promoting the demographic growth of the nation, meaning that traditional families who did not meet the statutory criteria were also excluded from them. In addition, financial support programmes were available for persons in need, without a requirement to be married. That being so, access to housing, financial and any other social protection schemes was not regulated on the basis of civil status or limited to married couples. Lastly, the Government explained that while nobody was prevented from visiting hospital patients in Russia, the fact of being married did not guarantee the right to visit a partner suffering from an infectious disease.

118. The Government further submitted that the time was not right for Russian society to accept the legal recognition of same-sex couples. This was demonstrated by the results of various surveys carried out in 2021 by different research centres, including the independent Levada Analytical Centre, showing that 69% of Russian citizens were intolerant towards homosexual people and opposed not only to marriage but also to any form of recognition of same-sex couples. Moreover, according to statistical data published by the Levada Centre, 59% of Russians believed that homosexual people should not enjoy the same rights as heterosexual people. The Government called on the Court to adopt the same approach to this issue as it had in *Oliari and Others v. Italy* (nos. 18766/11 and 36030/11, 21 July 2015) and to have regard in its examination of the case to the attitudes in Russian society towards same-sex couples.

3. Submissions of third-party interveners

(a) Council of Europe Commissioner for Human Rights

119. The Commissioner referred to the document published by her predecessor in 2017 (see paragraph 56 above) and submitted that legal recognition of same-sex couples was of the utmost importance if those concerned were to be able to enjoy the right to respect for their private and family life effectively and without discrimination.

120. The Commissioner stated that in the absence of legal recognition, same-sex partners faced serious obstacles in their daily lives. In that connection she mentioned that it would be impossible

for same-sex partners to claim family allowances, health insurance or favourable tax arrangements. They would not be entitled to take care leave for the partner or the partner's child in the event of sickness, or to enjoy inheritance rights on the partner's death. In addition, members of a same-sex couple often encountered difficulties in living together, and the partner was not treated as a "family member" for the purposes of family reunion. In the Commissioner's view, the COVID-19 pandemic had amplified such couples' vulnerability, since very often they were not recognised by law in Europe and beyond.

121. The Commissioner submitted that the introduction of a legal framework for recognition of same-sex couples corresponded to the positive obligations on States under Article 8 of the Convention. She referred in that connection to the judgment in *Oliari and Others* (cited above). Where marriage was not accessible to same-sex couples, the Contracting Parties should at least provide an alternative form of recognition. To be truly effective, legal recognition of same-sex couples should be governed by a clear legal framework, be easily accessible and expressly spell out the rights of those concerned. Such recognition should be comprehensive, in order to cover all aspects of life for a couple in a stable and committed relationship. In that connection, further guidance from the Court would be beneficial as to the rights that should be included in the legal recognition available to same-sex couples.

122. The Commissioner noted that the consensus observed by the Court in *Oliari and Others* had become stronger in the intervening period, since thirty member States now provided a form of legal recognition for same-sex couples.

123. The Commissioner further submitted that the national authorities' margin of appreciation was limited in this matter, since the difference in treatment complained of was based on sexual orientation. It was therefore difficult to envisage a situation in which a legitimate community interest could prevail over the interests of same-sex couples in having access to a form of legal recognition for their relationship, including in countries where there was strong opposition in society to same-sex marriage or partnerships. Protecting diverse types of families did not undermine or disadvantage traditional families. Indeed, ensuring that same-sex couples could effectively enjoy the rights inherent in family life did not interfere in any way with the rights of different-sex couples, who already had – and continued to have - access to those same rights. Furthermore, there had been important societal changes regarding the structures of families in the past fifty years, which in itself made it questionable to seek to protect one type of family above others.

124. As to the prevailing public opinion within a given country, the Commissioner submitted that a negative attitude in society towards LGBTI people could be the result of their stigmatisation by certain political forces. Opinion polls in countries where political leaders promoted homophobic policies showed that there was a decline in acceptance of sexual minorities.

125. The Commissioner noted that the absence of legal recognition for same-sex couples constituted discrimination against LGBTI people and that excluding same-sex couples from legal recognition contributed to perpetuating prejudices about same-sex relationships, while, conversely, access to such recognition had been shown to reduce intolerance towards LGBTI people.

126. The Commissioner argued, lastly, that States should provide for a single form of recognition of couples and should avoid having a specific legal framework for same-sex couples only.

(b) LGB Alliance

127. LGB Alliance submitted that there was a clear international consensus supporting an obligation for States to provide legal recognition to same-sex couples. It pointed out that the European Parliament and the Parliamentary Assembly of the Council of Europe had called for the recognition of same-sex couples. Moreover, a growing number of international courts required access to marriage for same-sex couples, a factor that pleaded at least in favour of an alternative form of recognition. The intervener referred in addition to decisions given by the domestic courts in Canada, South Africa, Brazil, Taiwan, the United States of America, Costa Rica and Ecuador.

128. LGB Alliance expressed the view that the Court should give guidance on the content of the "core rights" for stable couples that States should guarantee in order to discharge their positive obligations under the Convention.

(c) ACCEPT Association, Youth LGBT Organisation Deystvie, the National LGBT Rights Organisation LGL, the "Love Does Not Exclude" Association, the Polish Society of Anti-Discrimination Law, Iniciativa Inakost, Insight Public Organisation and Sarajevo Open Centre, acting jointly

129. These third-party interveners submitted that Article 8 of the Convention in conjunction with Article 14 imposed a positive obligation on the Contracting Parties to ensure the legal recognition and protection of same-sex couples. The scope of that obligation had been clearly defined by the Court in *Oliari and Others* (cited above).

130. The interveners contended that same-sex couples should have access to marriage in countries that, like Russia, made no provision in their domestic legal system for any other form of recognition of couples. The introduction of alternative forms of recognition specifically for homosexual people was liable to result in subsequent discrimination against them.

131. In the absence of legal recognition of their relationship, same-sex couples faced major difficulties in everyday life. Moreover, the lack of an appropriate legal framework contributed to reinforcing prejudices against LGBTI people. On the contrary, as was shown by social surveys, access to marriage for LGBTI people enhanced their acceptance by society.

(d) Russian LGBT Network and Sphere Foundation, acting jointly

132. These two Russian non-governmental organisations had carried out a study and produced a list of the legal obstacles facing same-sex couples in Russia. They submitted that, unlike married couples, members of same-sex couples were denied, among other things, entitlement to parental leave or leave for family reasons, application of the rules on maintenance in the event of separation or death and on assistance for a sick partner, tax relief, the opportunity to adopt a child, and the opportunity to refuse to testify against the partner where criminal proceedings had been instituted against him or her. Furthermore, in the event of expulsion, the Russian authorities did not consider a same-sex partner to be a family member.

133. The interveners noted that same-sex couples in Russia could obtain certain advantages granted to other couples by signing contracts or instituting judicial proceedings. Nevertheless,

recourse to such processes was costly and took a long time. Moreover, many Russian same-sex couples were forced to travel abroad, to countries where foreign nationals were allowed to marry, in order to have their relationship registered, but their marriages were not recognised in Russia. In the interveners' submission, there was no objective and reasonable justification for the difference in treatment between same-sex and different-sex couples. This gave rise to feelings of humiliation and frustration linked to discriminatory treatment based on sexual orientation.

(e) Human Rights Centre of Ghent University

134. This third-party intervener observed that the Court's case-law concerning the recognition of same-sex couples had evolved over time in accordance with a dynamic interpretation of the Convention, until the Court had concluded in *Oliari and Others* (cited above) that the Contracting Parties had a positive obligation, under Article 8 of the Convention, to provide a specific legal framework for the recognition and protection of same-sex couples. The Chamber judgment formed part of this evolutive interpretation reflecting present-day conditions.

135. In the intervener's submission, the Court should specify the core rights of same-sex couples that should be recognised in law by States, in order to ensure uniform protection across the European continent.

(f) AIRE Centre, jointly with the International Commission of Jurists (ICJ) and the Network of European LGBTIQ+ Families Associations (NELFA)

136. Referring to the Chamber judgment in the present case and the judgment in *Oliari and Others* (cited above), and maintaining that there was an "increasing consensus" in this area, these third-party interveners submitted that Article 8 of the Convention imposed a positive obligation on the Contracting Parties to put in place a legal framework capable of protecting the right of same-sex couples to respect for their private and family life. Such a framework should make it possible for those couples to have their relationship recognised by law and should also ensure protection of their most common and basic needs and contribute to eliminating the state of uncertainty in which they found themselves.

137. In these interveners' submission, the absence of any form of legal recognition of same-sex couples exceeded the margin of appreciation afforded to the Contracting Parties under Article 8 of the Convention. Within that margin, States only retained the discretion to choose the most appropriate form of legal recognition.

(g) The Euroregional Center for Public Initiatives (ECPI) and the Global Justice Institute (GJI)

138. These third-party interveners produced comments on the relationship between freedom of religion and protection of the rights of LGBTI people. They submitted firstly that the definition of family and marriage was not tied to particular religious conceptions, but instead reflected gradual changes in contemporary understandings of families and family structures. There was no single religious definition of family, especially in such a multicultural and multireligious country as Russia. In any event, it was not for faith bodies or cultural norms to establish the concept of family. It

was for the State to define the nature of the legal protection offered to different types of families and their members. The right to freedom of religion and the right to cultural identity could not and should not dictate the legal definition of family and family unions.

139. Next, the interveners outlined the situation of inequality and vulnerability facing LGBTI people in Russia. They referred to the enactment of the law banning "propaganda of non-traditional sexual relations", first at regional level in 2006 and then at federal level in 2013, and to violent attacks against LGBTI people that had been fuelled by nationalist and Orthodox groups. The Orthodox Church had vehemently opposed recognition of the right to family life for LGBTI people. The Patriarch of the Russian Orthodox Church had repeatedly stated that LGBTI people were dangerous for the entire Russian society and civilisation. Those conditions, together with the impunity enjoyed by the perpetrators of homophobic offences, had since 2015 led to heightened anti-LGBTI attitudes in Russian society.

C. The Court's assessment

1. Applicability of Article 8 of the Convention

140. The Court notes firstly that the Government did not dispute, either before the Chamber or before the Grand Chamber, that Article 8 was applicable to the facts of the case under both its "private life" and "family life" aspects. The Court sees no reason to depart from the parties' view on this issue, for the reasons set out below.

(a) Private life

141. The Court reiterates that the notion of "private life" within the meaning of Article 8 of the Convention is a broad concept which does not lend itself to exhaustive definition and encompasses the right to personal development (see *K.A. and A.D. v. Belgium*, nos. 42758/98 and 45558/99, § 83, 17 February 2005), whether in terms of personality (see *Bensaid v. the United Kingdom*, no. 44599/98, § 47, ECHR 2001-I, and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 90, ECHR 2002-VI) or of personal autonomy, which is an important principle underlying the interpretation of the Article 8 guarantees (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III).

142. Sexual orientation falls within the personal sphere protected by Article 8 of the Convention (see *Dudgeon v. the United Kingdom*, 22 October 1981, § 41, Series A no. 45; *E.B. v. France* [GC], no. 43546/02, § 43, 22 January 2008; and *Gas and Dubois v. France*, no. 25951/07, § 37, ECHR 2012).

143. In addition, the Court has found that it would be too restrictive to limit the notion of private life to the most intimate aspects of an individual's life (see, for example, *Niemietz v. Germany*, 16 December 1992, § 29, Series A no. 251-B). Article 8 thus guarantees a right to "private life" in the broad sense, including the right to lead a "private social life", that is, the possibility for the individual to develop his or her social identity. In that respect, the right in question enshrines the possibility of approaching others in order to establish and develop relationships with them (see *Bărbulescu v. Romania* [GC], no. 61496/08, § 70, 5 September 2017, and the case-law cited therein). Accordingly, a person's "private life" embraces multiple aspects of the person's

social identity (see *López Ribalda and Others*, cited above, § 87, and *Denisov v. Ukraine* [GC], no. 76639/11, § 95, 25 September 2018). The Court has found, for example, that a person's civil status, be it married, single, divorced or widowed, forms part of his or her personal and social identity protected under Article 8 (see *Dadouch v. Malta*, no. 38816/07, § 48, 20 July 2010).

144. In the present case, the Court accepts that the unavailability of a legal regime for recognition and protection of same-sex couples affects both the personal and the social identity of the applicants as homosexual people wishing to have their relationships as couples legitimised and protected by law. Article 8 therefore applies in the present case under its "private life" aspect.

(b) Family life

145. "Family life" within the meaning of Article 8 of the Convention is essentially a question of fact depending upon the existence of close personal ties (see *Marckx v. Belgium*, 13 June 1979, § 31, Series A no. 31, and *K. and T. v. Finland* [GC], no. 25702/94, § 150, ECHR 2001-VII). The notion of "family" in Article 8 concerns marriage-based relationships, but also other *de facto* "family ties", for example where the parties are living together outside marriage (see *Johnston and Others v. Ireland*, 18 December 1986, § 55, Series A no. 112; *Keegan v. Ireland*, 26 May 1994, § 44, Series A no. 290; and *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, § 140, 24 January 2017).

146. With regard to same-sex relationships, the Court held in *Schalk and Kopf v. Austria* that in view of the rapid evolution in a considerable number of member States regarding the legal recognition of same-sex couples, it was artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple could not enjoy "family life" for the purposes of Article 8. It therefore found that the relationship between the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, fell within the notion of "family life", just as the relationship of a different-sex couple in the same situation would (see *Schalk and Kopf*, cited above, § 94).

147. In *Vallianatos and Others v. Greece* the Court confirmed that principle and added that the fact of not cohabiting – for professional and social reasons – did not deprive the couples concerned of the stability bringing them within the scope of "family life" within the meaning of Article 8 (see *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 73, ECHR 2013 (extracts)). In that connection, the Court noted in *Oliari and Others v. Italy* that in the globalised world of today, various couples experienced periods during which they conducted their relationship at a distance, given that they resided in different countries for professional or other reasons. The fact of not living together therefore has no bearing in itself on the existence of a stable relationship or the need for it to be protected (see *Oliari and Others*, cited above, § 169).

148. The Court has subsequently confirmed on several occasions that Article 8 of the Convention was applicable under both its "private life" and "family life" aspects in cases concerning the alleged lack of legal recognition and/or protection for same-sex couples (see *Orlandi and Others v. Italy*, nos. 26431/12 and 3 others, § 143, 14 December 2017; *Pajić v. Croatia*, no. 68453/13, § 68, 23 February 2016; *Chapin and Charpentier v. France*, no. 40183/07, § 44, 9 June 2016; and *Taddeucci and McCall v. Italy*, no. 51362/09, § 58, 30 June 2016).

149. In the present case, it has not been disputed that at the time of their initial approaches to the Russian authorities, the applicants formed stable and committed relationships which they were seeking to have recognised and protected. The fact that the applicants' circumstances may have

changed after their applications were lodged with the Court because of the lack of opportunity to secure legal recognition for their relationships under domestic law is a matter of speculation on which the Court is unable to express a position. This lack of opportunity is, moreover, at the heart of the complaint now being considered by the Court.

150. Accordingly, in the absence of any objections from the Government as to the applicability of Article 8 in the present case, the Court considers that there are no reasons for reaching different conclusions from those already reached in the cases cited above concerning the alleged lack of legal recognition and protection for same-sex couples.

(c) Conclusion

151. The Court concludes that Article 8 of the Convention is applicable under both its "private life" and "family life" aspects.

2. Compliance with Article 8 of the Convention

(a) Whether there is a positive obligation to provide legal recognition and protection to same-sex couples

152. The Court reiterates that while the essential object of Article 8 is to protect individuals against arbitrary interference by public authorities, it may also impose on the State certain positive obligations to ensure effective respect for the rights protected by Article 8 (see *Odièvre v. France* [GC], no. 42326/98, § 40, ECHR 2003-III; *Hämäläinen v. Finland* [GC], no. 37359/09, § 62, ECHR 2014; and *Bărbulescu*, cited above, § 108).

153. The Court observes that the case before it raises the issue of whether Article 8 of the Convention gives rise to a positive obligation for States Parties to allow same-sex couples to enjoy legal recognition and protection of their relationship.

154. In the present case, the Court is not called upon to examine whether the fact that it was impossible for the applicants to get married in Russia breached the Convention. It reiterates in this connection that the applicants' complaint of a violation of Article 12 of the Convention has been rejected as being manifestly ill-founded in a final decision (see paragraphs 5 and 82 above).

155. The present case concerns the absence in Russian law of any possibility of legal recognition for same-sex couples, regardless of the form such recognition may take. Contrary to what the Government have suggested before the Grand Chamber, the Chamber judgment did not lay down an obligation for the respondent State to make marriage available to same-sex couples. Such an interpretation cannot be inferred from the Chamber judgment, or indeed from the Court's case-law as it currently stands (see paragraph 165 below).

(i) State of the Court's case-law

156. The Court's case-law concerning the protection to be afforded to homosexual people under Article 8 has continually evolved over time, becoming increasingly substantial. While the Court was initially called upon to examine interferences affecting the most intimate aspects of the private life of homosexual people (see *Dudgeon*, cited above; *Norris v. Ireland*, 26 October 1988, Series A no. 142; and *Modinos v. Cyprus*, 22 April 1993, Series A no. 259, concerning the

criminalisation of homosexual acts in private between consenting adults; see also *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, ECHR 1999-VI, and *Lustig-Prean and Beckett v. the United Kingdom*, nos. 31417/96 and 32377/96, 27 September 1999, concerning the discharge of homosexual people from the armed forces), it has gradually been required to deal with complaints relating to the absence or insufficiency of protection for same-sex couples (see, for example, *Karner v. Austria*, no. 40016/98, ECHR 2003-IX, and *Kozak v. Poland*, no. 13102/02, 2 March 2010, concerning the right of a homosexual person to succeed to the deceased partner's tenancy; *Gas and Dubois*, cited above, concerning access to simple adoption for a same-sex couple; and *Taddeucci and McCall*, cited above, and *Pajić*, cited above, concerning the eligibility of a same-sex partner for a residence permit on family grounds).

157. Thus, the Court has gradually had to deal with various cases relating to the lack of legal recognition and protection for same-sex couples.

158. For example, in *Schalk and Kopf* the applicants alleged that they had been discriminated against on the grounds that, as a same-sex couple, they were unable to marry or to have their relationship otherwise recognised by law. Examining the applicants' complaint solely under Article 14 in conjunction with Article 8 of the Convention, the Court began by affirming that the applicants were in a relevantly similar situation to a different-sex couple as regards their need for recognition and protection of their relationship (see *Schalk and Kopf*, cited above, § 99). Next, assessing the complaint concerning the lack of any means of legal recognition other than marriage, the Court observed that the Austrian Parliament had passed the Registered Partnership Act, which had come into force on 1 January 2010, after the applicants had lodged their application. In those circumstances, the question to be determined was not whether the lack of legal recognition for same-sex couples would have constituted a violation of Article 14 taken in conjunction with Article 8 if it had still obtained at the time of the Court's examination, but only whether the respondent State should have provided the applicants with an alternative means of recognition any earlier than it had done (ibid., § 103). In that regard, the Court found that by affording same-sex couples the opportunity from 2010 onwards to obtain a legal status equal or similar to marriage in many respects (ibid., § 109), Austria had not breached Article 14 of the Convention taken in conjunction with Article 8 (ibid., § 106).

159. The case of *Vallianatos and Others* involved a different issue. The applicants alleged that the "civil unions" introduced in Greece by Law no. 3719/2008 were designed only for different-sex couples. The Court observed that the civil partnerships provided for by that Law as an officially recognised alternative to marriage had an intrinsic value for the applicants irrespective of the legal effects, however narrow or extensive, that they would produce. It emphasised that same-sex couples sharing their lives had the same needs in terms of mutual support and assistance as different-sex couples. Consequently, same-sex couples would have a particular interest in entering into a civil union since it would afford them, unlike different-sex couples, the sole basis in Greek law on which to have their relationship legally recognised. Moreover, extending civil unions to same-sex couples would allow the latter to regulate issues concerning property, maintenance and inheritance not as private individuals entering into contracts under the ordinary law but as couples officially recognised by the State (see *Vallianatos and Others*, cited above, §§ 81 and 90). Since the Government had not offered convincing and weighty reasons capable of justifying the exclusion of same-sex

couples from civil unions (ibid., § 92), the Court found that there had been a violation of Article 14 of the Convention taken in conjunction with Article 8.

160. The Court notes that in *Schalk and Kopf* and *Vallianatos and Others* it did not give a ruling under Article 8 of the Convention taken alone. Moreover, in *Vallianatos and Others* the applicants' complaint did not relate to a failure by the Greek State to comply with any positive obligation it might have had to provide for a form of legal recognition of same-sex relationships (see *Vallianatos and Others*, cited above, § 75). It concerned the exclusion of same-sex couples from a legal regime which had been introduced by law in addition to marriage but which was only available to different-sex couples.

161. Subsequently, however, the Court examined complaints alleging a violation of Article 8 of the Convention in other cases relating directly to the unavailability of legal recognition and protection for same-sex couples.

162. Thus, in *Oliari and Others* the Court held that the respondent State was required to ensure respect for the private and family life of same-sex couples through the provision of a legal framework guaranteeing the recognition and protection of their relationship in domestic law (see *Oliari and Others*, cited above, § 164). It reiterated that same-sex couples were just as capable as different-sex couples of entering into stable and committed relationships, and had a comparable need for legal recognition and protection of their relationships (ibid., § 165). Next, turning to the case before it, the Court took note of the position adopted by the Italian Constitutional Court, which had called for legal recognition and protection of the specific rights and duties of same-sex couples (ibid., § 180), and it observed that that position reflected the sentiments of the majority of the Italian population (ibid., § 181). After considering the interests of the applicants, who were deprived of any means of protection for their relationship, and the public-interest grounds put forward by the respondent State, the Court concluded that in the absence of a prevailing community interest that could be weighed against the applicants' interests, Italy had overstepped its margin of appreciation and had failed to fulfil its positive obligation to ensure that the applicants had available a specific legal framework providing for the recognition and protection of their same-sex relationship (ibid., § 185).

163. The Court repeated the same observations in *Orlandi and Others*, stressing the need under Article 8 of the Convention to ensure legal recognition and protection for same-sex couples (see *Orlandi and Others*, cited above, §§ 192 and 210). In that case, the Court again found that Italy had failed to strike a fair balance between the competing interests at stake, on account of the absence of a specific legal framework providing for the recognition and protection of same-sex couples until 2016, when the legislation on civil unions between persons of the same sex had come into force (ibid., § 210).

164. It can therefore be seen from the case-law of the Court that Article 8 of the Convention has already been interpreted as requiring a State Party to ensure legal recognition and protection for same-sex couples by putting in place a "specific legal framework" (see *Oliari and Others*, § 185, and *Orlandi and Others*, § 210, both cited above).

165. However, Article 8 of the Convention has to date not been interpreted as imposing a positive obligation on the States Parties to make marriage available to same-sex couples. In *Hämäläinen* the Court explicitly stated that Article 8 could not be understood as

imposing such an obligation (see *Hämäläinen*, cited above, § 71). This interpretation of Article 8 coincides with the Court's interpretation of Article 12 of the Convention, since it has consistently held to date that Article 12 cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples (see *Schalk and Kopf*, § 63; *Hämäläinen*, § 96; *Oliari and Others*, § 191; and *Orlandi and Others*, § 192, all cited above). The Court has reached a similar conclusion under Article 14 of the Convention taken in conjunction with Article 8, finding that States remain free to restrict access to marriage to different-sex couples only (see *Schalk and Kopf*, §§ 101 and 108; *Gas and Dubois*, § 66; and *Chapin and Charpentier*, § 48, all cited above).

(ii) Degree of consensus to be found at national and international level

166. The Court's case-law cited above concerning Article 8 of the Convention, from which it follows that the States Parties have a positive obligation to provide legal recognition and protection to same-sex couples, is in line with the tangible and ongoing evolution of the States Parties' domestic legislation and of international law.

167. The Court reiterates that the Convention is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today (see, among other authorities, *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26; *Marckx*, cited above, § 41; and *Christine Goodwin*, cited above). Since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions in Contracting States and respond, for example, to any evolving convergence as to the standards to be achieved (see *Stafford v. the United Kingdom* [GC], no. 46295/99, § 68, ECHR 2002-IV; *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 104, 17 September 2009; and *Bayatyan v. Armenia* [GC], no. 23459/03, § 102, ECHR 2011). As is apparent from the case-law cited above, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement (see, to that effect, *Christine Goodwin*, cited above, § 74, where the Court held that in accordance with their positive obligations under Article 8, the States Parties were henceforth required to recognise the new gender identity of post-operative transgender persons, in particular by allowing them to amend their civil status; see also *Scoppola*, cited above, § 104, concerning the interpretation of Article 7 of the Convention, and *Bayatyan*, cited above, § 98, concerning Article 9 of the Convention).

168. A large number of judgments delivered by the Court illustrate this interpretative approach, which draws on developments in the laws of the member States of the Council of Europe in order to interpret the scope of the rights guaranteed by the Convention (see, for example, *Mazurek v. France*, no. 34406/97, § 52, ECHR 2000-II, where, after noting "a distinct tendency in favour of eradicating discrimination against adulterine children" within the Council of Europe member States, the Court held that "it [could] not ignore such a tendency in its – necessarily dynamic – interpretation of the relevant provisions of the Convention").

169. With regard more specifically to persons of the same sex and the protection to which they are entitled under Article 8 of the Convention, the Court stated more than forty years ago in *Dudgeon* (cited above, § 60), concerning legislation criminalising homosexual acts in private between consenting adult males, that "[a]s compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is

no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States (see, *mutatis mutandis*, [*Marckx*, cited above, § 41, and *Tyrer*, cited above, § 31])".

170. In other words, what may have been regarded as "permissible and normal" at the time when the Convention was drafted may subsequently prove to be incompatible with it (see *Marckx*, cited above, § 41).

171. As far as the present case is concerned, the Court has taken note, through its case-law, of an ongoing trend towards legal recognition and protection of same-sex couples in the States Parties.

172. For example, the Court observed in *Schalk and Kopf* in 2010: "[T]here is an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes" (see *Schalk and Kopf*, cited above, § 105). In that case, the Court found that the Austrian Registered Partnership Act, which had entered into force on 1 January 2010, reflected the evolution described above and was "part of the emerging European consensus" (ibid., § 106).

173. In 2013 the Court observed in *Vallianatos and Others* that "although there is no consensus among the legal systems of the Council of Europe member States, a trend is currently emerging with regard to the introduction of forms of legal recognition of same-sex relationships" (see *Vallianatos and Others*, cited above, § 91). At the time, nine member States provided for same-sex marriage, while seventeen member States authorised some form of civil partnership for same-sex couples. In total nineteen member States provided for a form of recognition (marriage and/or registered partnership) for same-sex couples (ibid., § 25).

174. In 2015 the Court observed in *Oliari and Others* that the trend towards legal recognition of same-sex couples had "continued to develop rapidly in Europe since the Court's judgment in *Schalk and Kopf*". A "thin majority" of Council of Europe member States (twenty-four out of forty-seven) had legislated at that time in favour of affording legal recognition to same-sex couples, whether through the institution of marriage or by introducing another form of union. The same rapid development could, moreover, be identified in several countries beyond the Council of Europe (see *Oliari and Others*, cited above, §§ 65, 135 and 178).

175. The trend already observed by the Court in the above-mentioned cases is clearly confirmed today. According to the data available to the Court, thirty States Parties currently provide for the possibility of legal recognition of same-sex couples. Eighteen States have made marriage available to persons of the same sex. Twelve other States have introduced alternative forms of recognition to marriage. Among the eighteen States which allow marriage for same-sex couples, eight also offer such couples the option of entering into other forms of union (see paragraphs 66 and 67 above). In those circumstances, it is permissible to speak at present of a clear ongoing trend within the States Parties towards legal recognition of same-sex couples

(through the institution of marriage or other forms of partnership), since a majority of thirty States Parties have legislated to that effect.

176. This clear ongoing trend within the States Parties is consolidated by the converging positions of a number of international bodies. The Court reiterates in this connection that the Convention cannot be interpreted in a vacuum (see *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 123, 8 November 2016). The Court takes into account elements of international law other than the Convention and the interpretation of such elements by competent bodies (see *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 85, ECHR 2008; *Bayatyan*, cited above, § 102; and *National Federation of Sportspersons' Associations and Unions (FNASS) and Others v. France*, nos. 48151/11 and 77769/13, § 181, 18 January 2018). It has regard to relevant international instruments and reports, in particular those of other Council of Europe bodies, in order to interpret the guarantees of the Convention and to establish whether there is a common European standard in the field concerned (see *Tănase v. Moldova* [GC], no. 7/08, § 176, ECHR 2010).

177. As far as the issue raised by the present case is concerned, several Council of Europe bodies have stressed the need to ensure legal recognition and protection for same-sex couples within the member States (see paragraphs 48-56 above). The Court also takes note of developments at international level (see, in particular, paragraphs 46 and 61 above). Lastly, it observes that the Inter-American Court of Human Rights, in its advisory opinion no. OC-24/17, expressed the view that the States Parties to the American Convention on Human Rights were required to ensure access to all the legal institutions existing in their domestic laws in order to guarantee the protection of the rights of families composed of same-sex couples, without discrimination in relation to families constituted by different-sex couples (see paragraph 64 above).

(iii) Conclusion

178. Having regard to its case-law (see paragraphs 156-164 above) as consolidated by a clear ongoing trend within the member States of the Council of Europe (see paragraph 175 above), the Court confirms that in accordance with their positive obligations under Article 8 of the Convention, the member States are required to provide a legal framework allowing same-sex couples to be granted adequate recognition and protection of their relationship.

179. This interpretation of Article 8 of the Convention is guided by the concern to ensure effective protection of the private and family life of homosexual people. It is also in keeping with the values of the "democratic society" promoted by the Convention, foremost among which are pluralism, tolerance and broadmindedness (see *Young, James and Webster v. the United Kingdom*, 13 August 1981, § 63, Series A no. 44; *Chassagnou and Others v. France* [GC], nos. 25088/94 and 2 others, § 112, ECHR 1999-III; and *S.A.S. v. France* [GC], no. 43835/11, § 128, ECHR 2014). The Court reiterates in this connection that any interpretation of the rights and freedoms guaranteed has to be consistent with the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a "democratic society" (see *Soering v. the United Kingdom*, 7 July 1989, Series A no. 161; *Svinarenko and Slyadnev*, cited above; and *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, 24 January 2017).

180. As far as the issue raised by the present case is concerned, allowing same-sex couples to be granted legal recognition and protection undeniably serves these ideals and values in that

recognition and protection of that kind confers legitimacy on such couples and promotes their inclusion in society, regardless of sexual orientation. The Court emphasises that a democratic society within the meaning of the Convention rejects any stigmatisation based on sexual orientation (see *Bayev and Others v. Russia*, nos. 67667/09 and 2 others, § 83, 20 June 2017). It is built on the equal dignity of individuals and is sustained by diversity, which it perceives not as a threat but as a source of enrichment (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 145, ECHR 2005-VII).

181. The Court observes that many authorities and bodies view the recognition and protection of same-sex couples as a tool to combat prejudice and discrimination against homosexual people (see paragraphs 46, 48 and 125 above).

182. The Court must now determine the margin of appreciation available to the States Parties in implementing the above-mentioned positive obligation.

(b) Scope of the national authorities' margin of appreciation

183. In implementing their positive obligations to ensure the observance of Article 8 of the Convention, the States Parties enjoy a margin of appreciation, the scope of which varies according to different factors. The Court refers in this connection to the principles established in its case-law (see *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-I; *Dubská and Krejzová v. the Czech Republic* [GC], nos. 28859/11 and 28473/12, § 178, 15 November 2016; *Paradiso and Campanelli*, cited above, § 182; *S.H. and Others v. Austria* [GC], no. 57813/00, § 94, ECHR 2011; *Hämäläinen*, cited above, § 67; and *Vavřička and Others v. the Czech Republic* [GC], nos. 47621/13 and 5 others, § 273, 8 April 2021). Where an essential or particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted (see, for example, *Dudgeon*, cited above, § 60; *Christine Goodwin*, cited above, § 90; and *Mennesson v. France*, no. 65192/11, § 80, ECHR 2014 (extracts)). Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, the margin will be wider, particularly where the case raises sensitive moral or ethical issues (see, for example, *S.H. and Others v. Austria*, § 97; *Paradiso and Campanelli*, §§ 194-95; and *Dubská and Krejzová*, §§ 182-84, all cited above).

184. As regards the first point, the Court has already held that essential or particularly important facets of an individual's identity were at stake in cases concerning the legal parent-child relationship (see *Dickson v. the United Kingdom* [GC], no. 44362/04, § 78, ECHR 2007-V, and *Mennesson*, cited above, § 80), access to information about one's origins and the identity of one's parents (see *Odièvre*, cited above, § 29), ethnic identity (see *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, § 58, ECHR 2012) or gender identity (see *A.P., Garçon and Nicot v. France*, nos. 79885/12 and 2 others, § 123, 6 April 2017).

185. As far as the issue raised by the present case is concerned, the Court considers that a claim by same-sex partners for legal recognition and protection of their relationship touches on particularly important facets of their personal and social identity.

186. Furthermore, as to the existence of a consensus, the Court has already noted a clear ongoing trend at European level towards legal recognition and protection of same-sex couples within the member States of the Council of Europe (see paragraph 175 above).

187. Accordingly, given that particularly important facets of the personal and social identity of persons of the same sex are at stake (see paragraph 185 above) and that, in addition, a clear ongoing trend has been observed within the Council of Europe member States (see paragraph 175 above), the Court considers that the States Parties' margin of appreciation is significantly reduced when it comes to affording same-sex couples the possibility of legal recognition and protection.

188. Nevertheless, as is already apparent from the Court's case-law (see *Schalk and Kopf*, § 108; *Gas and Dubois* § 66; *Oliari and Others*, § 177; and *Chapin and Charpentier*, § 48, all cited above), the States Parties have a more extensive margin of appreciation in determining the exact nature of the legal regime to be made available to same-sex couples, which does not necessarily have to take the form of marriage (see paragraph 165 above). Indeed, States have the "choice of the means" to be used in discharging their positive obligations inherent in Article 8 of the Convention (see *Marckx*, cited above, § 53). The discretion afforded to States in this respect relates both to the form of recognition and to the content of the protection to be granted to same-sex couples.

189. The Court observes in this connection that while a clear ongoing trend is emerging towards legal recognition and protection for same-sex couples, no similar consensus can be found as to the form of such recognition and the content of such protection. Thus, in accordance with the principle of subsidiarity underpinning the Convention, it is above all for the Contracting States to decide on the measures necessary to secure the Convention rights to everyone within their "jurisdiction", and it is not for the Court itself to determine the legal regime to be accorded to same-sex couples (see *Christine Goodwin*, § 85, and *Marckx*, § 58, both cited above).

190. However, since the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see *Airey v. Ireland*, 9 October 1979, § 24, Series A no. 32, and *M.A. v. Denmark* [GC], no. 6697/18, § 162, 9 July 2021), it is important that the protection afforded by States Parties to same-sex couples should be adequate (see paragraph 178 above). In this connection, the Court has already had occasion to refer in certain judgments to aspects, in particular material (maintenance, taxation or inheritance) or moral (rights and duties in terms of mutual assistance), that are integral to life as a couple and would benefit from being regulated within a legal framework available to same-sex couples (see *Vallianatos and Others*, § 81, and *Oliari and Others*, § 169, both cited above).

(c) Whether the respondent State has satisfied its positive obligation

191. In the light of the foregoing, it is now the Court's task to ascertain whether the respondent State has satisfied its positive obligation to secure recognition and protection for the applicants (see paragraph 178 above). To that end, it must examine whether, having regard to the margin of appreciation afforded to it, the respondent State struck a fair balance between the prevailing interests it relied on and the interests claimed by the applicants (see *Hämäläinen*, cited above, § 65; see also *Oliari and Others*, § 175, and *Orlandi and Others*, § 198, both cited above).

192. The Court will proceed on the basis of the situation existing at the time of the applicants' initial approaches to the Russian authorities to have their respective relationships recognised by law,

and will examine whether any changes in the situation they complained of have occurred since their applications were lodged with the Court, bearing in mind that the Court's jurisdiction in respect of Russia does not extend to facts that took place from 16 September 2022 onwards (see paragraph 72 above).

193. In this connection, it is not disputed that at the time when the applicants applied to the domestic authorities for legal recognition, Russian law did not provide for that possibility (contrast *Chapin and Charpentier*, cited above, §§ 49-51, where the applicants, while being unable to get married, had the opportunity to enter into a civil partnership agreement at the material time). Nor is it disputed that Russian law has not changed at all since the present applications were lodged (contrast *Schalk and Kopf*, cited above, §§ 102-06, where the applicants had had no opportunity, at the time of their application to the Court in 2004, to have their relationship recognised under Austrian law, but they had subsequently been afforded the option of entering into a registered partnership following a legislative amendment that had come into force on 1 January 2010).

194. The Court notes that the respondent State did not inform it of any intention to amend its domestic law in order to allow same-sex couples to enjoy official recognition and a legal regime offering protection. On the contrary, the Government submitted that the fact that it was impossible for same-sex couples to be granted legal recognition and protection was compatible with Article 8 of the Convention and was justified in order to safeguard what they claimed to be prevailing interests. The Court observes, moreover, that the protection of the traditional family based on the union between a man and a woman was recently consolidated by the 2020 reform of the Constitution (see paragraph 42 above).

195. The situation in the respondent State therefore differs markedly from the situation in a substantial number of States Parties which have sought to amend their domestic law with a view to ensuring effective protection of the private and family life of same-sex partners (see, for example, *Schalk and Kopf*, *Orlandi and Others* and *Chapin and Charpentier*, all cited above, and the comparative-law material outlined in paragraphs 66 and 67 above).

(i) The applicants' individual interests

196. The applicants complained that it was impossible for them to have their respective relationships recognised by law in Russia. They further alleged that because of the legal vacuum in which they found themselves as couples, they were deprived of any legal protection and faced substantial difficulties in their daily lives. They referred to their ineligibility, as same-sex couples, for housing and financial support schemes for families, and to the fact that they would be unable to inherit from a deceased partner or to be awarded maintenance in the event of separation or death. They also submitted that by not being treated as couples in their own right, they were prevented from taking care leave in the event of the partner's sickness and excluded from taking important decisions concerning hospital treatment. They also alleged that there was no exemption from having to testify against a same-sex partner if criminal proceedings were brought against him or her, and that visits to the partner in prison would likewise not be freely granted (see paragraph 104 above).

197. The Government did not submit any observations as to the unavailability of maintenance or other means of assistance in the event of separation from a same-sex partner or the latter's death. However, they argued that the applicants, like any other citizens, enjoyed the property and inheritance rights provided for by Russian law and could enter into mortgage agreements. The Government contended that Russian law afforded adequate protection for the applicants' rights and did not restrict their access to the competent authorities in any way (see paragraph 117 above).

198. The Russian non-governmental organisations Russian LGBT Network and Sphere, intervening as third parties before the Grand Chamber, described the situation for same-sex couples in Russia differently and complained of the difficulties encountered by same-sex partners in their daily lives in obtaining such entitlements as parental leave or leave for family reasons, tax relief or maintenance in the event of separation from the partner or the latter's death (see paragraph 132 above) – in other words, the most regular of needs for a couple in a stable relationship.

199. ECRI has confirmed the difficulties encountered on a daily basis by same-sex couples in the absence of an appropriate legal framework in Russia (see paragraph 53 above). It has urged the respondent State "to provide a legal framework that affords same-sex couples, without discrimination of any kind, the possibility to have their relationship recognised and protected in order to address the practical problems related to the social reality in which they live" (ibid.).

200. The Court accepts that gaining official recognition for their relationship has an intrinsic value for the applicants. Such recognition forms part of the development of both their personal and their social identity as guaranteed by Article 8 of the Convention (see paragraph 144 above).

201. The Court has already held that partnerships constituting an officially recognised alternative to marriage have an intrinsic value for same-sex couples irrespective of the legal effects, however narrow or extensive, that they produce (see *Vallianatos and Others*, cited above, § 81). Accordingly, official recognition of same-sex couples confers an existence and a legitimacy on them *vis-à-vis* the outside world (see *Oliari and Others*, cited above, § 174).

202. Beyond the essential need for official recognition, same-sex couples, like different-sex couples, have "basic needs" for protection (ibid., § 169). Indeed, the recognition and the protection of a couple are inextricably linked. The Court has held on a number of occasions that same-sex couples are in a relevantly similar situation to different-sex couples as regards their need for formal acknowledgment and protection of their relationship (see, in particular, *Schalk and Kopf*, § 99; *Vallianatos and Others*, §§ 78 and 81; and *Oliari and Others*, § 165, all cited above).

203. In the present case, the Court can only conclude that in the absence of official recognition, same-sex couples are nothing more than *de facto* unions under Russian law. The partners are unable to regulate fundamental aspects of life as a couple such as those concerning property, maintenance and inheritance except as private individuals entering into contracts under the ordinary law, rather than as an officially recognised couple (see, *mutatis mutandis*, *Vallianatos and Others*, cited above, § 81). Nor are they able to rely on the existence of their relationship in dealings with the judicial or administrative authorities. Indeed, the fact that same-sex partners are required to apply to the domestic courts for protection of their basic needs as a couple constitutes in itself a hindrance to respect for their private and family life (see *Oliari and Others*, cited above, § 171).

204. In the light of the foregoing, the Russian legal framework, as applied to the applicants, cannot be said to provide for the core needs of recognition and protection of same-sex couples in a stable and committed relationship (see, *mutatis mutandis*, *Oliari and Others*, cited above, § 172).

(ii) Public-interest grounds put forward by the respondent State

205. The Court must now examine the reasons put forward by the respondent State to justify the lack of any legal recognition and protection for same-sex couples. The Government relied on traditional family values, the feelings of the majority of the Russian population and the protection of minors from promotion of homosexuality. These grounds will be examined in turn.

(*α*) Protection of the traditional family

206. The Government argued, firstly, that it was necessary to preserve the traditional institutions of marriage and the family, these being fundamental values of Russian society that were protected by the Constitution (see paragraphs 115 and 116 above). They submitted that the aim of protecting traditional family values was not intrinsically objectionable given that the Court's case-law had confirmed the importance of preserving traditions and cultural diversity (ibid.).

207. The Court reiterates that support and encouragement of the traditional family is in itself legitimate or even praiseworthy (see *Marckx*, cited above, § 40). It has held that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment on grounds of sexual orientation (see *Karner*, § 40; *Kozak*, § 99; and *Vallianatos and Others*, § 83, all cited above).

208. However, 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 (see *Karner*, § 41; *Kozak*, § 98; and *Vallianatos and Others*, § 139, all cited above). Moreover, the concept of family is necessarily evolutive (see *Mazurek*, cited above, § 52), as is shown by the changes it has undergone since the Convention was adopted.

209. Given that the Convention is a living instrument which must be interpreted in the light of present-day conditions, the State, in its choice of means designed to protect the family and secure respect for family life as required by Article 8, must necessarily take into account developments in society and changes in the perception of social and civil-status issues and relationships, including the fact that there is not just one way or one choice when it comes to leading one's family or private life (see *Vallianatos and Others*, cited above, § 84, with further references).

210. Thus, in *Marckx*, concerning the distinction between "legitimate" and "illegitimate" families in Belgian law, the Court held that "support and encouragement of the traditional family is in itself legitimate or even praiseworthy", but added that "in the achievement of this end recourse must not be had to measures whose object or result is, as in the present case, to prejudice the 'illegitimate' family; the members of the 'illegitimate' family enjoy the guarantees of Article 8 on an equal footing with the members of the traditional family" (see *Marckx*, cited above, § 40).

211. With regard more specifically to same-sex couples, the Court has held under Article 14 of the Convention in conjunction with Article 8 that excluding a person in a same-sex relationship

from succession to a tenancy in the event of the partner's death could not be justified by the need to protect the traditional family (see *Karner*, § 41, and *Kozak*, § 99, both cited above). The Court reached a similar conclusion concerning the refusal to grant a same-sex partner a residence permit on family grounds in *Taddeucci and McCall* (cited above, § 98). In *X and Others v. Austria* the Court likewise found that it had not been shown that excluding second-parent adoption in a same-sex couple in Austria, while allowing that possibility in a different-sex couple, could be justified by the protection of the family in the traditional sense (see *X and Others v. Austria* [GC], no. 19010/07, § 151, ECHR 2013).

212. In the present case, there is no basis for considering that affording legal recognition and protection to same-sex couples in a stable and committed relationship could in itself harm families constituted in the traditional way or compromise their future or integrity (see, *mutatis mutandis*, *Bayev and Others*, cited above, § 67). Indeed, the recognition of same-sex couples does not in any way prevent different-sex couples from marrying or founding a family corresponding to their conception of that term. More broadly, securing rights to same-sex couples does not in itself entail weakening the rights secured to other people or other couples. The Government have been unable to prove the contrary.

213. Having regard to the foregoing, the Court considers that the protection of the traditional family cannot justify the absence of any form of legal recognition and protection for same-sex couples in the present case.

(β) Feelings of the majority of the Russian population

214. The Government submitted that the Court's assessment should follow the same approach adopted in *Oliari and Others* and have regard to the attitude of the Russian population, namely widespread opposition to same-sex relationships (see paragraph 118 above).

215. The Court notes firstly that in *Oliari and Others* it did indeed have regard to the sentiments of the Italian population, the majority of whom were in favour of the recognition of same-sex couples (see *Oliari and Others*, cited above, § 181). However, that factor cannot be said to have carried decisive weight in the Court's reasoning. The Court found a violation of Article 8 of the Convention in that case after taking into consideration the conclusions of the highest domestic courts, which had remained unheeded in terms of legislative action, and noting, more broadly, that there was no prevailing community interest that could outweigh the applicants' individual interests (ibid., § 185).

216. Moreover, the Court has repeatedly held that although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position (see, *mutatis mutandis*, *Young, James and Webster*, cited above, § 63; *Chassagnou and Others*, cited above, § 112; *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 90, ECHR 2004-I; and *İzzettin Doğan and Others v. Turkey* [GC], no. 62649/10, § 109, 26 April 2016).

217. It is important to note that the Court has consistently declined to endorse policies and decisions which embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority (see *Bayev and Others*, cited above, § 68; *Smith and Grady*, cited above, § 97; *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, §§ 34-36, ECHR 1999-IX; and *L. and V. v. Austria*,

nos. 39392/98 and 39829/98, § 52, ECHR 2003-I). It has also held, under Article 14 of the Convention, that traditions, stereotypes and prevailing social attitudes in a particular country cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment based on sexual orientation (see *Khamtokhu and Aksenchik*, cited above, § 78).

218. Thus, the Court has already rejected the Government's argument that the majority of Russians disapprove of homosexuality, in the context of cases concerning freedom of expression, assembly or association for sexual minorities. Like the Chamber (see paragraph 52 of the Chamber judgment), the Grand Chamber considers that it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were this so, a minority group's rights to freedom of religion, expression and assembly would become merely theoretical rather than practical and effective as required by the Convention (see *Barankevich v. Russia*, no. 10519/03, § 31, 26 July 2007; *Bayev and Others*, cited above, § 70; *Alekseyev v. Russia*, nos. 4916/07 and 2 others, § 81, 21 October 2010; see also, beyond the respondent State, *Sekmadienis Ltd. v. Lithuania*, no. 69317/14, § 82, 30 January 2018, and *Beizaras and Levickas v. Lithuania*, no. 41288/15, § 123, 14 January 2020).

219. The Court finds that these considerations are entirely relevant in the present case, meaning that the allegedly negative, or even hostile, attitude on the part of the heterosexual majority in Russia cannot be set against the applicants' interest in having their respective relationships adequately recognised and protected by law.

(γ) Protection of minors from promotion of homosexuality

220. In their observations before the Chamber, the Government submitted that official recognition of same-sex couples was contrary to the crucial principle of protecting minors from the promotion of homosexuality. They argued that it could harm the health and morals of minors and instil in them "a distorted image of the social equivalence of traditional and non-traditional marital relations". This argument was based on the laws on protecting minors from "homosexual propaganda" (see paragraphs 34 and 53 of the Chamber judgment).

221. The Government did not explicitly reiterate those arguments before the Grand Chamber.

222. In any event, the Court has already had the opportunity to rule on the legislative ban on promotion of homosexuality or non-traditional sexual relations among minors in *Bayev and Others*. In that judgment, the Court held that "the legislative provisions in question embodied a predisposed bias on the part of the heterosexual majority against the homosexual minority" (see *Bayev and Others*, cited above, §§ 68-69 and 91). It concluded that "by adopting such laws the authorities reinforce stigma and prejudice and encourage homophobia, which is incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society" (ibid., § 83).

223. The Court sees no reason to depart from that conclusion in the present case.

(d) Conclusion

224. On the basis of its assessment, the Court finds that none of the public-interest grounds put forward by the Government prevails over the applicants' interest in having their respective

relationships adequately recognised and protected by law. The Court concludes that the respondent State has overstepped its margin of appreciation and has failed to comply with its positive obligation to secure the applicants' right to respect for their private and family life.

225. There has therefore been a violation of Article 8 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

226. The applicants alleged that the fact that they were unable to secure legal recognition of their relationships by means of an alternative to marriage amounted to discrimination on grounds of sexual orientation. They relied on Article 14 of the Convention taken in conjunction with Article 8.

A. The Chamber judgment

227. Having regard to its finding of a violation of Article 8, the Chamber considered that it was not necessary to examine whether, in the present case, there had also been a violation of Article 14 of the Convention in conjunction with Article 8.

B. The parties' submissions

228. The applicants argued that since they had no access to marriage, the fact that they were unable to have their relationships recognised and protected by law in a similar way to married couples left them exposed to discrimination on grounds of sexual orientation, in breach of Article 14 of the Convention taken in conjunction with Article 8. That difference in treatment did not pursue any legitimate aim.

229. The Government submitted that it was wrong for the applicants to complain of discrimination on the grounds of their sexual orientation since they enjoyed the same rights as unmarried different-sex couples, marriage being the only possible form of legal recognition of a couple in Russian law.

C. The Court's assessment

230. Having regard to the conclusions it has reached under Article 8, the Grand Chamber considers, as the Chamber did, that it is not necessary to examine separately whether there has been a violation of Article 14 of the Convention taken in conjunction with Article 8 (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014; see also *Oliari and Others*, § 188, and *Orlandi and Others*, § 212, both cited above).

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

231. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

232. Before the Chamber, the applicants claimed 50,000 euros in respect of non-pecuniary damage.

233. The Government contested that claim.

234. The Court reiterates that its practice in cases referred under Article 43 of the Convention has generally been that the just satisfaction claim remains the same as that originally submitted before the Chamber, an applicant only being allowed at this stage to submit claims for costs and expenses incurred in relation to the proceedings before the Grand Chamber (see *Nagmetov v. Russia* [GC], no. 35589/08, § 63, 30 March 2017, and *Abdi Ibrahim v. Norway* [GC], no. 15379/16, § 168, 10 December 2021).

235. Having regard to the circumstances of the case, the Court considers that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage that may have been sustained by the applicants.

B. Costs and expenses

236. The applicants did not submit any claims in respect of costs and expenses in the proceedings before the Grand Chamber.

237. Accordingly, having regard to Rule 60 of the Rules of Court, the Court makes no award under this head.

FOR THESE REASONS, THE COURT

1. *Holds*, unanimously, that it has jurisdiction to deal with the applicants' complaints in so far as they relate to facts that took place before 16 September 2022;
2. *Decides*, by sixteen votes to one, to strike applications nos. 40792/10 and 43439/14 out of its list of cases in so far as they concern Ms Shipitko and Ms Yakovleva, and to continue the examination of the case in respect of the other applicants;
3. *Dismisses*, by sixteen votes to one, the Government's preliminary objections;
4. *Holds*, by fourteen votes to three, that there has been a violation of Article 8 of the Convention;
5. *Holds*, by thirteen votes to four, that there is no need to examine separately the complaint under Article 14 of the Convention taken in conjunction with Article 8;
6. *Holds*, by fifteen votes to two, that the finding of a violation of the Convention constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants;
7. *Dismisses*, by sixteen votes to one, the remainder of the applicants' claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 17 January 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

{signature_p_2}

Søren Prebensen
Deputy to the Registrar

Robert Spano
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) partly dissenting opinion of Judge Pavli, joined by Judge Motoc;
(b) dissenting opinions of Judges Wojtyczek, Poláčková and Lobov.

R.S.
S.C.P.

PARTLY DISSENTING OPINION OF JUDGE PAVLI, JOINED BY JUDGE MOTOC

1. I have voted with the majority in finding, without reservation, a violation of Article 8 of the Convention in this case. In the words of Justice Anthony Kennedy, "[t]he nature of injustice is that we may not always see it in our own times."[2] With today's judgment the Court has lifted a veil of invisibility for sexual minorities throughout Europe.

2. I regret, however, that I am unable to concur with the majority in holding that there is no need to examine separately the applicants' complaint under Article 14 of the Convention, taken in conjunction with Article 8. That complaint rests on the argument that their inability to secure legal recognition of their relationships by means of an alternative to marriage amounted to discrimination on grounds of sexual orientation (see paragraph 226 of the judgment). The majority's conclusion, based on the "*Câmpeanu* formula" (see paragraph 230 of the judgment), implies that the claim based on inequality of treatment does not constitute "a fundamental aspect of the case" (see *Dudgeon v. the United Kingdom*, 22 October 1981, § 67, Series A no. 45; *Chassagnou and Others v. France* [GC], nos. 25088/94 and 2 others, § 89, ECHR 1999-III; *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 53, ECHR 2005-XII; and *A.K. and L. v. Croatia*, no. 37956/11, § 92, 8 January 2013). I respectfully disagree.

3. The summary disposal of the Article 14 claim stands at odds with much of the Grand Chamber's analysis under Article 8 of the Convention, which, like a large part of our previous case-law on the relevant questions, is replete with arguments grounded, in one form or another, on equality considerations (see in particular paragraphs 146, 158, 159, 162, 177, 180, 181, 211 and 217 of the judgment). The Court's now settled approach rests on the fundamental understanding that same-sex couples are "in a relevantly similar situation to a different-sex couple as regards their need for recognition and protection of their relationship". In other words, they are not less *worthy* of the protection of the law, especially when it comes to "particularly important facets of their personal

and social identity" (see paragraph 185 of the judgment). Today's judgment by the Court's highest judicial formation marks an important milestone in the gradual but steady shift from the mere "increased tolerance of homosexual behaviour" of some forty years ago (see *Dudgeon*, cited above, § 60) to full respect for their equal dignity (see, among other references, paragraph 180 of the present judgment).

4. Furthermore, it is not in dispute that the applicants' sexual orientation was *the sole basis* for denying them any form of legal recognition or protection of their bond as couples in committed relationships. The grounds invoked by the respondent Government in support of the national legal regime leave no doubts in this regard. It is also clear that the applicants were treated differently from opposite-sex couples (that is, made up of two individuals who happen to be of a different sexual orientation from the present applicants), who enjoy access under Russian law to the legal protections, privileges and responsibilities of the traditional legal institution of marriage. The Grand Chamber has rejected all three lines of justification put forward by the Russian Government – based, namely, on protection of the traditional family, respect for the views and feelings of the majority population, and protection of minors – by relying on arguments grounded on the doctrines of non-discrimination, democratic pluralism and the counter-majoritarian aspect of fundamental rights. Majorities may be entitled to their views as to what constitutes a good marriage, but they cannot impose those views on sexual minorities in ways that lead to their legal exclusion and denial of their most basic privacy and family rights. In the light of the above considerations, I can only conclude that the equal-treatment claim is, in fact, a "fundamental aspect" of this case.

5. In fairness, the judgment does include important equal-treatment considerations: for example, that the legal recognition of same-sex relationships "confers legitimacy on [same-sex] couples and promotes their inclusion in society, regardless of sexual orientation" and that it helps counter their stigmatisation (see paragraph 180 of the judgment). Such recognition has "intrinsic value" for members of sexual minorities, which goes beyond the practical or legalistic benefits (see paragraphs 200-01 of the judgment). The same could have been said, however, had the Grand Chamber agreed to address the applicants' discrimination claim separately. As I have recently argued in a similar context, laws have a moral dimension and they help shape a society's moral views.[3] They tell their beneficiaries that they are not invisible, that they are seen and valued as equal members of that society, irrespective of their differences. Conversely, national legal regimes that discriminate on impermissible grounds do the contrary: they tend to reinforce prejudice and social segregation, causing harm that goes above and beyond the violation of particular individuals' Article 8 rights. There is, therefore, great inherent value in a Court judgment that confirms the "equal enjoyment of rights" imperative.

6. There is a final and additional reason why a proper consideration of the merits of the discrimination claim would have also been of value to the present and future analyses under Article 8 of the Convention – namely, the question of the State's margin of appreciation in this context. Today's judgment has clarified that such a margin is "significantly reduced" when it comes to affording same-sex couples some form of legal recognition and protection, but that the scope of State appreciation is "more extensive" in determining the exact nature of the relevant legal regime, in terms of both the form of recognition and the "content of the protection" to be

granted (see paragraphs 187-88 of the judgment). Future legal battles on the rights of same-sex couples will play out in the space between the "significantly reduced" and the "more extensive" benchmarks of the States' margin of appreciation.

7. I do not disagree with the above characterisation of the relevant margin of appreciation. However, I wish that the Court had gone a step further by outlining, at least in broad brushes, the *outer limits* of that margin when it comes to the nature of the legal protections that are owed to same-sex couples – beyond the rather barebones instruction that such protections ought to be "adequate" (see paragraph 190 of the judgment). The standards established by the Court in *Vallianatos and Others v. Greece* ([GC], nos. 29381/09 and 32684/09, ECHR 2013), a case decided primarily on the basis of Article 14 read in conjunction with Article 8, will be of particular importance in my view. First, the burden of proof will be on the respondent Governments to show why legal protections and benefits that are enjoyed by heterosexual couples can be legitimately denied to same-sex couples in otherwise comparable situations. Secondly, "the margin of appreciation afforded to States [being] narrow ... where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require the measure chosen to be suitable in principle for achievement of the aim sought. It must also be shown that it was necessary, in order to achieve that aim, to exclude certain categories of people – in this instance persons living in a homosexual relationship – from the scope of application of the provisions in issue" (ibid., § 85, with further references).[4]

8. In other words, the application of the "more extensive" margin of appreciation recognised in the present judgment cannot lead to outcomes that would run counter to the logic and principles of our Article 14 jurisprudence. This ought to be abundantly clear from the existing case-law, cited in paragraph 156 *in fine* of the judgment, regarding "the absence or insufficiency of protection for same-sex couples" in specific legal contexts, and reiterated later on to elucidate why the goal of protection of the "traditional family" has been deemed insufficient to justify unequal treatment for same-sex couples in a number of prior cases (see paragraph 211 of the judgment). The need to construe the various provisions of the Convention in harmony with each other is a fundamental principle of interpretation. Whether or not the Court chooses to employ the prism of Article 14 of the Convention in a particular case, the pull of its gravity can hardly be avoided in this context.

DISSENTING OPINION OF JUDGE WOJTYCZEK

"*Plus le gouvernement approche de la république, plus la manière de juger devient fixe.*" (Ch. de Secondat de Montesquieu, *De l'esprit des lois*, livre VI, chapitre III)

I respectfully disagree with the view that Article 8 has been violated in the instant case. The case raises fundamental issues concerning treaty interpretation, as well as the nature of the Court's mandate. My objections pertain mainly to the approach adopted by the majority in respect of these two issues.

1. The Court's mandate

1.1. The point of departure in the instant case is the precise determination of the Court's mandate. Article 19 of the Convention defines this mandate in the following terms: "To ensure the observance of the engagements **undertaken** by the High Contracting Parties in the Convention and the Protocols thereto" (emphasis added).

The Preamble to the Convention refers to "a common heritage of political traditions, ideals, freedom and the rule of law", thus inviting the European Court of Human Rights to interpret the rights enshrined in the Convention taking into account their long-established meaning in national legal orders and looking for what is common to the High Contracting Parties. The engagements **undertaken** by the High Contracting Parties concern the protection of clearly defined rights with well-established content and belonging to their common heritage. The High Contracting Parties have not undertaken to protect undetermined rights whose precise content could change in time and could be adapted without their clear consent.

Article 3 of Protocol No. 1 enshrines further the following guarantee:

"The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

Legislative power, that is, the power to enact primary legal rules, and especially legal rules concerning fundamental societal issues, should therefore be vested in an elected parliament. In other words, the Convention guarantees freedom from primary legal rules concerning fundamental societal issues where such rules emanate from any other body that has not been elected for the purpose of exercising norm-making power. Primary legal rules may be enacted in the form of statutes adopted by national parliaments or in the form of international treaties ratified with the consent of national parliaments. Norm-making power in respect of fundamental societal issues cannot be exercised by a judicial body, be it the European Court of Human Rights. Article 3 of Protocol No. 1 clearly guarantees that, in Europe, there will be no social transformation without representation. This provision was introduced as a reaction to the experience of political regimes which did not respect the principle under consideration.

Article 3 of Protocol No. 1 implements Article 21 § 3 of the Universal Declaration. This provision is worded as follows:

"The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

1.2. The Court's mandate has to be defined in the broader context of the existing procedure for amending the Convention. The High Contracting Parties are free to modify and adapt the Convention rules in force by way of new treaties. To date, they have concluded sixteen additional protocols, and at least six of them (Nos. 1, 4, 6, 7, 12 and 13) provide for the protection of new rights not protected initially by the Convention, whereas Protocol No. 15, which amends the Preamble, impacts to some extent upon the scope and protection of the existing rights.

Against this backdrop, the Court's mandate is limited to the application and interpretation of the existing treaty in observance of the applicable rules of treaty interpretation and does not encompass treaty adaptation or amendment. The latter power belongs to the High Contracting Parties on an exclusive basis. Granting additional rights by way of new protocols has the advantage that the instruments concerned may enter into force without waiting for acceptance by all the forty-six States Parties to the Convention. Such a method enables the States to decide whether and at which moment to join the protocols and better fits the ideal of effective political democracy referred to in the Preamble to the Convention. It avoids the controversies connected with the Court's existing approach based upon the reference, in the context of divisive issues, to clear trends, a method which ends up imposing new treaty obligations to which some of the States and societies concerned may fundamentally object.

2. *The question of dynamic interpretation*

2.1. The majority adopt a dynamic interpretation of the Convention and justify it in the following terms in paragraph 167 of the judgment:

> "The Court reiterates that the Convention is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today ... Since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions in Contracting States and respond, for example, to any evolving convergence as to the standards to be achieved ... As is apparent from the case-law cited above, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement ..."

Although this approach is well established in the Court's case-law, it is nonetheless difficult to agree with it. The Convention is undeniably a living instrument, and the Court has to apply it to new situations and give a more precise meaning to its provisions in these new contexts. With the development of the case-law, the legal obligations of the Convention should become more precise and specific. A living instrument is an instrument which acquires more precise and specific content, providing clearer guidance to its addressees. In this respect, the Convention does not differ significantly from the majority of other international treaties. The Court cannot avoid law-making decisions to the extent they provide a more specific meaning to the existing general and sometimes vague formulations of the Convention. However, as mentioned above, the mandate of the Court is limited and the potential law-making powers of the Court, if they exist, are secondary and derivative. The point of departure is always a legal text and its meaning as an intransgressible border. This mandate of the Court does not encompass primary norm-making: either for the purpose of adapting the rules in force to social or societal changes or for the purpose of filling the lacunae in rights protection or curing other shortcomings of the Convention. Such adaptation or improvement can take place only by way of new treaties.

Drawing a precise demarcation line between treaty interpretation and treaty modification is not possible. The categorisation of many judicial decisions as interpretative or treaty-making may be debatable. At the same time, there are numerous judicial decisions whose status cannot be disputed: some of them clearly belong to the category of treaty interpretation, some of them clearly belong to

the category of treaty-making. Granting new rights which were not initially granted in the Convention belongs to the category of treaty-making and requires the adoption of a new treaty. In any event, whatever the theoretical views about the demarcation between legal interpretation and law-making we prefer, a major paradigm change in Convention rights protection would always require the adoption of a new protocol to the Convention.

The idea of the Convention as a living instrument, as understood by the majority, is a legal technique which transfers a significant part of treaty-making power from the democratically elected authorities within the States to the European Court of Human Rights. It is a limitation upon democratic decision-making in the States Parties to this treaty. Such a limitation is usually justified as necessary by (i) the need to protect insular and vulnerable groups which do not have sufficient representation in parliaments to effectively protect their rights and interests, and (ii) the assumption that courts necessarily protect such rights and interests better than mechanisms of representative democracy do. I am not persuaded by these arguments, which are a modern adaptation of the ancient view that mixed regimes are preferable to democratic ones (compare, *inter alia*, Plato, *Laws*, book III). In particular, these arguments do not stand *de lege lata*. They overlook the clear and limited definition of the Court's mandate in the Convention. Convention rights are by definition counter-majoritarian claims but they become legally enforceable counter-majoritarian claims only once they have been enshrined in the Convention and only to the extent they have been enshrined in the Convention. To become part of the Convention system they need to get through the majoritarian decision-making procedures in all the States concerned.

When the nation disagrees with a ruling of a constitutional court, the constituent power (*pouvoir constituant*) can react and change the Constitution. This fact is an important element in the mechanics of the separation of powers and ensures the equilibrium of the whole constitutional construction. If the majority of the High Contracting Parties disagree with a judgment of the Court, an amendment to the Convention would require the consent of all of them, which makes an "overruling" by way of an amendment to the treaty improbable. The partial interception of treaty-making power by the Court is therefore more effective and significant than the interception of constitution-making power by the domestic constitutional courts. This element is an additional reason for a strict interpretation of the scope of the Court's mandate, and in any event an interpretation that is much stricter than in the case of national constitutional courts.

2.2. The approach adopted by the Court and explained in paragraph 167 of the judgment triggers several further fundamental objections. Since the Convention is first and foremost a system for the protection of human rights, it was designed in 1950 to protect values against the prevailing wisdom (to paraphrase Justice Scalia). The approach adopted by the majority relativises the content and scope of fundamental human rights and makes them depend upon prevailing ideas. A Convention which constantly adapts to the prevailing wisdom cannot guarantee rights which are genuinely practical and effective. Moreover, a failure by the Court to maintain a dynamic and evolutive approach would not be a bar to reform or improvement but would only incite the States to introduce the necessary reforms and improvements more frequently by way of new treaties (additional protocols), ratified through democratic

constitutional procedures, with the participation of the national legislatures elected in accordance with Article 3 of Protocol No 1.

2.3. The majority refer several times to "a clear ongoing trend" (see paragraphs 171, 175, 176, 178, 186, 187 and 189 of the judgment). Resorting to this argument usually suggests that the interpretation adopted is not supported by other strong arguments relying on the interpretative rules accepted in international law that are applicable to international treaties. Moreover, it is an implicit recognition that there is no consensus among the High Contracting Parties on the relevant standards. It does not appear either that there is *any evolving convergence as to the standards to be achieved.*

One may add that there is even less consensus within the States concerning the anthropological and moral issues underlying the instant case. The Representative of Lithuania, during the drafting of Recommendation CM/Rec(2010)5 of the Committee of Ministers to member States on measures to combat discrimination on grounds of sexual orientation or gender identity, stated that "[t]he recommendations, which are self-explanatory and taken for granted in some countries, can elicit conflicting responses from the broad public and even resistance in others" (Ministers' Deputies, Records, CM/Del/Act(2010)1081, 1081st meeting, 31 March 2010, https://rm.coe.int/09000016805cf1bc). The Council of Europe in 2019 confirmed the validity of this observation by noting that "a climate of opposition to LGBT human rights has simultaneously gained ground in certain European countries" (see the CDDH Report on the implementation of Recommendation CM/Rec(2010)5 of the Committee of Ministers to member States on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted by the CDDH at its 92nd meeting (26-29 November 2019), paragraph 12). Europeans are also very divided on fundamental anthropological and moral ideas constituting the foundation of human rights, and the divergence in this domain has tended to grow in the last few decades. In particular, there is no agreement on the question of who man is, and what his identity, his nature and his final destiny are. According to the Court's case-law, this pluralism has to be accepted as a hallmark of democratic societies and the existing diversity of views among both Europeans and European States should be perceived not as a threat but as a source of enrichment. The disagreement on fundamentals is another argument against departing from what has been agreed, that is from the text of the treaty and its original understanding.

3. *A major change of the rights protection paradigm*

3.1. The Convention was signed in order "to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration" (see the Preamble). This instrument has to be interpreted in the light of the Universal Declaration of Human Rights. Under Article 16 of the Declaration, the family is founded by way of a marriage concluded by a man and a woman. The family founded in this way is considered to be "the natural and fundamental group unit of society and is entitled to protection by society and the State". The Declaration does not provide for any other legal form of founding a family (on these questions, see the dissenting opinion of Judges Pejchal and Wojtyczek, appended to the judgment in *Orlandi and Others v. Italy*, nos. 26431/12 and 3 others, 14 December 2017).

Similarly, under Article 12 of the Convention, men and women of marriageable age have the right to marry and to found a family. According to the Convention provisions, the family is founded by

way of a marriage concluded by a man and a woman, and this treaty does not provide for any other type of legally recognised interpersonal union (see the above-mentioned dissenting opinion of Judges Pejchal and Wojtyczek).

3.2. In this context, imposing on States the positive obligation to legally recognise in some form and protect same-sex couples is a fundamental change of the rights protection paradigm under the Convention in the field of family law. It could not have been foreseen by the respondent State at the date of the ratification of the Convention (5 May 1998). Had the respondent State foreseen this major change of the content of its undertakings, its decision concerning the ratification of the Convention might have been different. By adopting the solution proposed by the majority, the Court risks acting *ultra vires* (compare the partly dissenting opinion of Judge Fura-Sandström appended to the judgment in *L. v. Lithuania*, no. 27527/03, ECHR 2007-IV).

3.3. The main argument of the majority in favour of finding a violation is worded as follows in paragraph 218 of the judgment: "it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority". This argument is a truism which cannot be contested as such but raises at least two objections. Firstly, it misses the point in the case. The question at stake is not about the exercise of Convention rights but about adding new rights to the Convention, and more precisely about the procedure to be followed for granting rights that were not initially granted in the Convention. In my view, it would be incompatible with the underlying values of the Convention if rights not initially granted by the Convention could be inserted in it without being accepted by the majority – at the national level in all the States concerned – in the treaty-making procedure, as defined in the domestic constitutional law of the High Contracting Parties.

Secondly, as mentioned above, the majority rely further on "a clear ongoing trend" and highlight that a majority of thirty States Parties have legislated to recognise same-sex couples (see paragraph 175 of the judgment). If one assumes that the case is indeed about the exercise of rights granted in the Convention, then the question arises whether it is compatible with the underlying values of the Convention for the exercise of Convention rights by a minority group to be made conditional on its being accepted in domestic legislation by the majority of States.

3.4. The approach adopted by the Court entails another difficulty. The Court may only find a violation of the Convention as interpreted dynamically if it has been shown that the conditions for adopting such a new interpretation were fulfilled at the time when the alleged violation of the Convention took place. The determination of the time from when the new interpretation of the Convention took effect is of crucial importance in distinguishing well-founded applications concerning facts which occurred under the new standards from manifestly ill-founded applications concerning similar actions and omissions of State authorities but which occurred previously, under the old standards.

The judgment correctly states that the Court's jurisdiction in respect of Russia does not extend to facts that took place from 16 September 2022 onwards but leaves open the questions at which date the new interpretation of the Convention established by the Court starts to apply, when the violation of the Convention started to occur and whether it lasted until 16 September 2022 for all the applicants.

I note in this context that the majority refer – correctly – to the judgment in *Schalk and Kopf v. Austria* (no. 30141/04, ECHR 2010), in the following terms:

> "In that regard, the Court found that by affording same-sex couples the opportunity from 2010 onwards to obtain a legal status equal or similar to marriage in many respects (ibid., § 109), Austria had not breached Article 14 of the Convention taken in conjunction with Article 8 (ibid., § 106)."

Indeed, as stated in Schalk and Kopf (ibid., § 106):

> "The Austrian Registered Partnership Act, which came into force on 1 January 2010, reflects the evolution described above and is thus part of the emerging European consensus. Though not in the vanguard, the Austrian legislator cannot be reproached for not having introduced the Registered Partnership Act any earlier (see, *mutatis mutandis*, *Petrovic*, cited above, § 41)."

It should be noted that the facts presented in application no. 40792/10 date back to 21 January 2010 (see paragraphs 24-31 of the judgment). In the light of *Schalk and Kopf* (cited above), the Russian authorities cannot be reproached for not having legally recognised a same-sex union at the material time. The facts presented in applications nos. 30538/14 and 43439/14 took place in 2013 and 2014 (see paragraphs 24-26 and 32-40 of the judgment) and, moreover, at least two of the four applicants concerned subsequently moved outside the jurisdiction of the respondent State (see paragraph 86). Most of the international materials quoted in the judgment (with the exception of the documents quoted in paragraphs 50, 57, 58 and 59) were adopted after 2014. In paragraph 175, the Court nonetheless relies on these subsequent developments. It is impossible to reproach the Russian authorities for not having anticipated these events. The majority, while focusing on the current situation, do not provide any arguments showing that a violation of the Convention had already occurred in 2013 or 2014 and not only in 2022.

3.5. The majority, while advocating a major change of the rights protection paradigm, are not fully consistent.

In the above-mentioned dissenting opinion appended to the judgment in *Orlandi and Others* (cited above, point 3), I expressed, together with Judge Pejchal, the following view (in the context of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights):

> "It follows that the two above-mentioned instruments differentiate the legal status of heterosexual and homosexual couples. There is no doubt that between heterosexual and homosexual couples there are certain similarities and certain differences. However, from the axiological perspective of the two international instruments, the differences prevail over the similarities. It follows that their situations are not comparable for the purpose of assessing the permissibility of legal differentiations in the field of family law."

I note in this context the following contradiction in the reasoning of the present judgment. In paragraph 202 *in fine* the majority state:

> "The Court has held on a number of occasions that same-sex couples are in a relevantly similar situation to different-sex couples as regards their need for formal acknowledgment and

protection of their relationship (see, in particular, *Schalk and Kopf*, § 99; *Vallianatos and Others*, §§ 78 and 81; and *Oliari and Others*, § 165, all cited above)."

The logical conclusion would be that the law should make all existing forms of legal recognition available to both different-sex and same-sex couples. Nonetheless, at the same time, the majority state the following in paragraph 165:

"However, Article 8 of the Convention has to date not been interpreted as imposing a positive obligation on the States Parties to make marriage available to same-sex couples. In *Hämäläinen* the Court explicitly stated that Article 8 could not be understood as imposing such an obligation (see *Hämäläinen*, cited above, § 71). This interpretation of Article 8 coincides with the Court's interpretation of Article 12 of the Convention, since it has consistently held to date that Article 12 cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples (see *Schalk and Kopf*, § 63; *Hämäläinen*, § 96; *Oliari and Others*, § 191; and *Orlandi and Others*, § 192, all cited above). The Court has reached a similar conclusion under Article 14 of the Convention taken in conjunction with Article 8, finding that States remain free to restrict access to marriage to different-sex couples only (see *Schalk and Kopf*, §§ 101 and 108; *Gas and Dubois*, § 66; and *Chapin and Charpentier*, § 48, all cited above)."

This paragraph entails the conclusion that the majority consider that the situation of same-sex couples is different from the situation of different-sex couples as regards their need for formal acknowledgment and protection of their relationship.

4. The effects of the judgment

4.1. The Court's judgment may produce *erga omnes* effects if the Court infers from the Convention some general principles pertaining to the protection of Convention rights and values. These principles may acquire *erga omnes* effects only if the Court has carefully weighed all relevant private and public interests and values throughout Europe. In particular, in order to establish principles applicable to all the States in the system it is necessary to identify and articulate all public interests and values relevant for all these States. The procedure should therefore enable the identification and articulation of all these interests and values.

4.2. The instant case has been decided in a specific international context. On 16 March 2022 the Russian Federation was expelled from the Council of Europe. On 16 September 2022 the Russian Federation ceased to be a party to the Convention. As of 16 September 2022, the respondent State, while remaining responsible for the possible violations of Convention rights which might have occurred before that date, no longer has any substantive obligations concerning the further observance of the rights enshrined in the Convention. The obligation to undertake steps which would prevent similar violations in the future (see *Ilgar Mammadov v. Azerbaijan* (infringement proceedings) [GC], no. 15172/13, § 162, 29 May 2019) becomes irrelevant, as the fact of ceasing to be a party to the Convention automatically guarantees not only the cessation of an ongoing violation but also the non-repetition of similar violations in the future.

The case therefore has no practical consequences for the further development of the domestic legal system of the respondent State but at the same time the underlying general questions are of

high importance for the forty-six States which remain in the Convention system, and especially for the States which do not provide for the legal recognition of same-sex unions.

I note in this context that the respondent Government did not respond to the request to provide the list of persons who would attend the oral hearing (see paragraphs 14 and 15 of the judgment). It appears that, after 16 March 2022, they lost any interest in pleading the case and in developing the Convention system. The public interests and values at stake which might have been relevant for other States have been neither identified nor articulated in the proceedings before the Court.

Under the current international circumstances, it is impossible to attribute any value of precedent to this and any other judgments delivered after 16 September 2022 in cases brought against Russia, and such judgments cannot produce *erga omnes* effects.

5. Conclusion

In conclusion, I would like to note the following quote which summarises the problems which also arise in the instant case:

> "It is in no way remarkable, and in no way a vindication of textual evolutionism, that taking power from the people and placing it instead with a judicial aristocracy can produce some creditable results that democracy might not achieve. The same can be said of monarchy and totalitarianism. But once a nation has decided that democracy, with all its warts, is the best system of government, the crucial question becomes which theory of textual interpretation is compatible with democracy. Originalism unquestionably is. Nonoriginalism, by contrast, imposes on society statutory prescriptions that were never democratically adopted." (A. Scalia, B.A. Garner, *Reading Law: The Interpretation of Legal Texts*, St. Paul, Minn., 2012, p. 88)

Despite all the obvious differences between a national Constitution and an international treaty, as well as between constitutional interpretation and treaty interpretation, the gist of the problem remains the same. Once the Court has established that democracy is the only political model contemplated by the Convention and, accordingly, the only one compatible with it (see, for instance, *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 45, *Reports of Judgments and Decisions* 1998-I; *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98 and 3 others, § 86, ECHR 2003-II; and *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 89, ECHR 2004-I), the crucial question becomes which theory of Convention interpretation is compatible with democracy. The problem with the approach chosen in this respect by the majority is that it imposes upon the High Contracting Parties new international engagements that were never undertaken, let alone through democratic procedures. As a result, it erodes the rule of law.

DISSENTING OPINION OF JUDGE POLÁČKOVÁ

1. In the present case, I voted with the majority as regards the first point of the operative part of the judgment, namely the declaration that the Court has jurisdiction to deal with the applicants' complaints.

The applications in the present case were lodged with the Court in 2010 and 2014. The facts giving rise to the violations of the Convention alleged by the applicants took place before 16 September 2022. It is therefore obvious that, in accordance with Article 58 of the Convention – as was confirmed by the Court, sitting in plenary session, in its "Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights", adopted on 22 March 2022 (see paragraph 2 of the Resolution) – the Court has jurisdiction to deal with them.

2. However, to my regret and for the reasons explained below, I cannot subscribe to the view of my colleagues regarding a procedural issue, namely that the composition of the Grand Chamber deliberating on 12 October 2022 was determined in accordance with Article 23 § 2, Article 26 §§ 4 and 5 of the Convention and Rule 24 of the Rules of Court (see paragraph 23 of the judgment).

Article 23 § 2 of the Convention provides:

"The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration."

The relevant parts of Article 26 §§ 4 and 5 provide:

"4. There shall sit as an *ex officio* member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party concerned. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge.

5. ...When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of ... the judge who sat in respect of the High Contracting Party concerned."

The relevant parts of Rule 24 (Composition of the Grand Chamber) provide:

"1. The Grand Chamber shall be composed of seventeen judges and at least three substitute judges.

2. ...

(b) The judge elected in respect of the Contracting Party concerned ... shall sit as an *ex officio* member of the Grand Chamber in accordance with Article 26 §§ 4 and 5 of the Convention.

...

3. If any judges are prevented from sitting, they shall be replaced by the substitute judges ...

4. The judges and substitute judges designated in accordance with the above provisions shall continue to sit in the Grand Chamber for the consideration of the case until the proceedings have been completed. Even after the end of their terms of office, they shall continue to deal with the case if they have participated in the consideration of the merits. ..."

3. The respondent State in the present case ceased to be a member of the Council of Europe on 16 March 2022. It ceased to be a Party to the Convention on 16 September 2022.

4. In accordance with Article 20 of the Convention, the Court consists of a number of judges equal to that of the High Contracting Parties. The rule flowing from this Article is, in my opinion, of a fundamental character and goes hand in hand with the spirit of the Convention, such that the number of judges of the Court should never exceed the number of High Contracting Parties to the Convention.

This rule, in my opinion, also implies that once a State has ceased to be a High Contracting Party to the Convention, there is no mandate for the judge formerly elected on behalf of that State to continue to deal with cases which he or she has already under consideration.

5. Even though judges, after taking up office, sit on the Court in their individual capacity, as provided by Article 21 § 2 of the Convention, this, in my opinion, cannot be interpreted as a fundamental rule equal to that laid down in Article 20 of the Convention, in other words as meaning that on the basis of Article 21 § 2 of the Convention, if a State has ceased to be a High Contracting Party to the Convention, this does not have any impact on the number of judges of the Court.

6. To the extent that the majority's reasoning on this point may be understood as implying that Article 23 § 2 and Article 26 §§ 4 and 5 of the Convention and Rule 24 are applicable to the present situation *per analogiam*, in my opinion this is not possible, simply because the situation contemplated by these provisions substantially differs from the present one.

Whilst the situation envisaged by the provisions in question concerns the replacement of judges and presupposes that there is a High Contracting Party to the Convention which has a right to nominate candidates for election as judges, in the present case there are no longer any legal grounds for a judge elected in respect of the member State, which has ceased to be a High Contracting Party to the Convention, to continue his or her mandate after the date of cessation of that status.

7. Moreover, this is not the first time that the Court has been called upon to address the issue of its composition after a member State has ceased to be a High Contracting Party to the Convention.

8. By *note verbale* of 12 December 1969, the Government of Greece notified the Secretariat General of its decision to withdraw from the Council of Europe in accordance with Article 7 of the Statute of the Council. As appears from Resolution (70) 34 adopted by the Ministers' Deputies on 27 November 1970, "the notification of Greece's withdrawal shall take effect at the end of 1970".

This Resolution states, in paragraph 11, that "[a]fter 31 December 1970, there will no longer be any grounds for requesting nominations from the Greek Government for the election of judges to the European Court of Human Rights, Article 39 of the Convention for the Protection of Human Rights and Fundamental Freedoms reserving the presentation of such nominations to member States of the Council of Europe only".

9. In its judgment in *De Wilde, Ooms and Versyp v. Belgium* (18 June 1971, § 11, Series A no. 12), the Court, sitting in plenary session, held that "Judge G. Maridakis, who had attended the oral hearings, could not take part in the consideration of the present cases after 31st December 1970, as the withdrawal of Greece from the Council of Europe became effective from that date".

10. In Resolution CM/Res (2022)2 on cessation of the membership of the Russian Federation to the Council of Europe, adopted by the Committee of Ministers on 16 March 2022 at the 1428ter meeting of the Ministers' Deputies, the Committee of Ministers decided, in the context of the procedure launched under Article 8 of the Statute of the Council of Europe, that the Russian Federation ceased to be a member of the Council of Europe as from 16 March 2022.

Further to the above-mentioned Resolution, and in accordance with the Resolution on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights, adopted by the plenary Court on 22 March 2022, on 5 September 2022 the plenary Court took formal notice of the fact that since the Russian Federation would cease to be a High Contracting Party to the Convention on 16 September 2022, the office of judge at the Court with respect to the Russian Federation would also cease to exist.

11. Looking at both cases, the present one and the one from 1970, I cannot find any distinction as regards their procedural aspects. The only difference is that in 1970 the Greek judge was sitting in a composition as an "ordinary judge", whilst in the present case the Russian judge was the "national judge", who should be *ex officio* a member of the Grand Chamber composition in accordance with Article 26 § 4 of the Convention and Rule 24 § 2 (b).

In my opinion, this fact cannot be decisive for the different approach taken by the majority. The position of "national judge" presupposes the existence of a mandate of a judge as such, which in the present case ceased to exist after 16 September 2022.

12. In my view, the Court's judgment as regards the procedure is a regrettable deviation not only from the above-mentioned Greek precedent but also from its own case-law regarding Article 6 of the Convention, in particular the principles concerning a tribunal established by law (see, for example, *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, § 289, 1 December 2020).

13. In my opinion, the presence of the former Russian judge at the second deliberations on 12 October 2022 – that is, after 16 September 2022 – in the course of which the Grand Chamber held the final vote in the case, makes the composition of the Grand Chamber a "tribunal not established in accordance with the law", in this case with Article 20 of the Convention. This fact vitiated all the decisions taken by the composition of the Grand Chamber in the present case.

14. The second sentence of Rule 23 § 2 of the Rules of Court provides: "Abstention shall not be allowed in final votes on the admissibility and merits of cases." It is obvious that this provision does not allow to a judge to abstain in a final vote. For this reason, I voted against all remaining points of the operative part of the judgment.

DISSENTING OPINION OF JUDGE LOBOV

(Translation)

1. I voted against the finding of a violation of Article 8 of the Convention in the present case. The current state of the case-law and the clear lack of a European consensus on this issue do not, in my opinion, allow the Convention to be interpreted as imposing a general positive obligation to ensure legal recognition of same-sex couples.

1. Summary of the facts and the background

2. The facts giving rise to the application by Ms Fedotova and Ms Shipitko go back thirteen years. The applicants' notice of marriage and the authorities' refusal both date back to 2009. The

applicants' application challenging the refusal was lodged with the Court on 20 July 2010, four weeks after the delivery of the judgment in a similar case, *Schalk and Kopf v. Austria* (no. 30141/04, ECHR 2010). Endorsing the opinion of the three dissenting judges,[5] the applicants quite simply asked the Court to reverse the conclusions it had reached in *Schalk and Kopf*.[6]

3. However, that judgment became final on 22 November 2010, when the request for referral to the Grand Chamber was rejected. As a result, the application lodged by Ms Fedotova and Ms Shipitko, which was largely modelled on the one brought by Mr Schalk and Mr Kopf, should have been decided straight away by similar findings of no violation, or declared inadmissible. This would have been a matter of basic observance by the Court of legal logic and its own case-law.

4. Contrary to such logic, the case experienced a radically different fate. After languishing on the shelves for more than ten years, it was chosen as the leading case enabling a departure from precedent by the "new generation" of Strasbourg judges. Thus, in 2021 the applicants managed to persuade the Chamber to uphold their initial application from 2010, which was inadmissible at the time, with a unanimous finding of a violation.[7]

5. The method used by the Court looks at the outset highly debatable in my view, and all the more so as it prompts a reversal of the Court's previous position on what is a sensitive social issue in a significant number of countries. Moreover, both the unanimous Chamber and the majority of the Grand Chamber hastily presumed that there was "family life" between the respective applicants, even though there was no such indication in the case file and some of them manifestly lost interest, thus revealing a lack of commitment (see paragraph 151 of the judgment and compare with, *inter alia*, *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 73, ECHR 2013 (extracts), where the Court found that the acknowledgment of "family life", within the meaning of Article 8, was conditional on the stability of the relationship).

2. *Discrepancy between the dominant line of case-law and the majority's position*

6. The majority's position in favour of a positive obligation to recognise same-sex couples by law is in my view at odds with the predominant approach taken by the Court, which until now had found breaches in clearly defined situations affecting specific individual rights, such as the criminalisation of homosexual acts,[8] the refusal to employ homosexual persons in a specific profession,[9] the refusal of the right to succeed to a tenancy,[10] and many others.

7. The case of *Fedotova and Others*, however, like that of *Schalk and Kopf* (cited above), had a very different ambition. Both cases concerned the alleged general positive obligation for the State to recognise same-sex couples by law. Instead of claiming specific detriment they had allegedly sustained in civil, tax or social welfare matters or any other area, the applicants deliberately chose to claim only a non-existent right to marriage for same-sex couples, thus engaging in manifestly frivolous lawsuits at national level.

8. Admittedly, there had been two notable exceptions to the Court's targeted, nuanced approach based on specific violations, and these concerned first Greece and then Italy, which were found to have breached a general positive obligation to recognise same-sex couples (see *Vallianatos and Others*, cited above; *Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, 21 July 2015; and *Orlandi and Others v. Italy*, nos. 26431/12 and 3 others, 14 December 2017).

9. However, those cases concerned legal and factual situations that were completely different from the situation in the present case. The judgment in *Vallianatos and Others* cannot serve as a precedent in this case, since it involved discriminatory treatment in connection with a "civil union". There being no provision for civil unions or any similar institutions in Russia, no discrimination can exist on this ground.

10. *Oliari and Others* and *Orlandi and Others* were therefore the only previous judgments that had imposed a general positive obligation on a single State to ensure legal recognition for same-sex couples (see paragraph 164 of the judgment). However, both judgments were adopted by a Chamber in a very specific, if not exceptional context, which bore no relation to the situation in Russia or any of the other sixteen European States that still do not afford such recognition.

11. The findings of a violation in respect of Italy were explained, firstly, by the need to develop and harmonise the different regimes applicable to same-sex unions in that country (see *Oliari and Others*, cited above, §§ 168-71). Next, the Court drew heavily on a series of judgments of the highest Italian courts – the Constitutional Court and the Court of Cassation – both of which had stressed the need for legislation on same-sex unions (ibid., § 180). This factor carried so much weight in the Court's reasoning that three of the seven judges of the Chamber made it the central aspect justifying their concurring vote in favour of a violation, without, however, accepting that there was a general positive obligation.[11] Lastly, the Court also had regard to the sentiments of the majority of the Italian population, who, according to data acknowledged by the Government, accepted same-sex couples and supported their recognition (ibid., §§ 181-82).

12. That being so, it is impossible to imagine that the case of *Oliari and Others* and that of *Orlandi and Others*, which followed two years later despite the virulent opposition of two dissenting judges,[12] would have been decided by the Chamber in the same way in the absence of the above-mentioned contextual factors.

13. The imposition of this context-specific and disputed approach taken by a Chamber on seventeen European States not forming part of the "clear ongoing trend" is lacking both in legal basis and in intellectual rigour.

3. Importance of a European consensus and social realities

14. The lack of a European consensus on the legal recognition of same-sex couples is another major obstacle that the majority attempt to overcome by resorting to the more slippery concept of a "*clear ongoing trend*" in favour of such recognition. The risks which this substitution poses for the integrity of the Strasbourg case-law, which is largely based on the concept of consensus and was already in peril, are glaringly obvious. The deafening silence on the *A, B and C v. Ireland* judgment ([GC], no. 25579/05, ECHR 2010), in which the Grand Chamber accepted the societal constraints of a single State in justifying the ban on abortion despite the existence of an impeccable European consensus to the contrary is a further sign of a malaise.

15. It should in any event be emphasised that the majority of thirty States forming part of the "trend" in the present case did not even amount to two-thirds of the States Parties at the time the case was referred to the Grand Chamber, not to mention the fact that the seventeen "minority" States accounted for almost half of the population of the member States of the Council of Europe at the time. By supporting the right of sexual minorities to compulsory recognition of their

relationships, the Grand Chamber disregarded the sensitivities and societal constraints of this large minority of States that are not ready to join the "trend". The majority's defence of pluralism at domestic level sits ill, moreover, with the forceful imposition of a single approach at European level despite the extremely varying national circumstances.

16. It is significant in this regard that none of the international or regional texts extensively quoted in the judgment (see paragraphs 46-64) has to date imposed a general positive obligation to ensure legal recognition of same-sex couples. The only instrument negotiated by the governments of the Council of Europe cautiously limits itself, along with numerous reservations, to inviting States to "*consider the possibility*" of providing same-sex couples with "*legal or other means to address the practical problems related to the social reality in which they live*" (see paragraph 25 of Recommendation CM/Rec (2010)5 of the Committee of Ministers, cited in paragraph 48 of the judgment; emphasis added).

17. The present judgment is thus the first to force the pace as it imposes, notwithstanding the national context and the unequivocal position of the Constitutional Court, a requirement to recognise same-sex couples in law, leaving only a small degree of freedom as to the form such recognition should take (see paragraph 188 of the judgment). However, a measure of this magnitude in relation to issues which the Court itself regards as sensitive, touching as they do on ethics and morals,[13] is very much a matter for national lawmakers in view of their institutional prerogatives. The growing desire of an international court to promote trends it considers progressive does not entitle it to use judicial compulsion at will to brutally force social changes in the Contracting States. Indeed, the living instrument which the Convention aspires to be would have trouble surviving if the Court took it too far from its roots. Hence, the Court should avoid using the principle of evolutive interpretation (see paragraph 167 of the judgment) to infer new obligations for a Contracting State which it had not – and would still not have – accepted within the framework of the treaty itself (see, *mutatis mutandis*, *Johnston and Others v. Ireland*, Series A no. 112, § 57, 18 December 1986, and the unambiguous and reiterated position of the respondent State quoted in paragraphs 48-49 of the present judgment). The judgment thus provides an example of the excessive use of the principle of evolutive interpretation, which the majority have pushed beyond its proper limits, moving contrary to the law of treaties.

Conclusion

18. When they discussed the longer-term future of the Convention system, the forty-seven States Parties rightly concluded that "[t]he authority of the Court is vital for its effectiveness and for the viability of the Convention system as a whole" and that "[t]hese are contingent on the *quality, cogency and consistency of the Court's judgments, and the ensuing acceptance thereof by all actors of the Convention system, including governments, parliaments, domestic courts, applicants and the general public as a whole*"[14] (emphasis added).

19. It must be acknowledged that the present judgment is not inspired by such wisdom. As a result, it is bound to cause huge problems in terms of legitimacy and acceptance, and to undermine even further the authority of the Court and its case-law. Its harmful effects will especially resonate beyond the respondent State, as the latter is no longer a party to the Convention. In more general terms, it was inappropriate for the Court to raise the Convention standard to such an extent as to

require legal recognition of same-sex couples notwithstanding the significant objective social circumstances facing many States Parties in this area. Instead of seeking to achieve "a greater unity" on the basis of truly common and shared values in accordance with the Statute of the Council of Europe, the judgment is more likely to deepen the division and heighten the clash resulting from divergent societal visions in Europe.

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[1] The abbreviation LGBTIQ denotes Lesbian, Gay, Bisexual, Transgender, Intersex and Queer.
[2] *Obergefell v. Hodges*, 576 U.S. 644 (2015, majority opinion).
[3] See *D.B. and Others v. Switzerland* (nos. 58817/15 and 58252/15, 22 November 2022, not yet final), partly dissenting opinion of Judge Pavli.
[4] Admittedly, the difference in treatment under review in *Vallianatos and Others* involved the denial of access for same-sex couples to an entire legal regime of recognition and protection for opposite-sex couples. That notwithstanding, similar principles ought to apply to discrimination in the granting of specific benefits or protections, considering that legal distinctions on the basis of sexual orientation are generally suspect (see *Vejdeland and Others v. Sweden*, § 55, 9 February 2012; see also, for differentiated treatment based solely on sexual orientation, *E.B. v. France* [GC], §§ 93 and 96, 22 January 2008; *Salgueiro da Silva Mouta v. Portugal*, § 36, ECHR 1999-IX; and *X and Others v. Austria* [GC], § 99, ECHR 2013) and the overall margin of appreciation in this field remains narrow.
[5] Joint dissenting opinion of Judges Rozakis, Spielmann and Jebens in *Schalk and Kopf*, cited above.
[6] "[T]he applicants ask the Court to extend the above reasoning of the dissenting judges [to] the present case to find that the Russian Federation has violated the applicants' right to private and family life by excluding the applicants from any recognition of their same-sex family relationship."
[7] The Chamber joined the application to two other similarly worded applications lodged by two other couples in 2014 (*Chunosov and Yevtushenko v. Russia*, no. 30538/14, and *Shaykhraznova and Yakovleva v. Russia*, no. 43439/14).
[8] *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45; *Norris v. Ireland*, 26 October 1988, Series A no. 142; and *Modinos v. Cyprus*, 22 April 1993, Series A no. 259.
[9] *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, ECHR 1999-VI.
[10] *Karner v. Austria*, no. 40016/98, ECHR 2003-IX.
[11] Concurring opinion of Judge Mahoney joined by Judges Tsotsoria and Vehabović in *Oliari and Others* (cited above).
[12] Dissenting opinion of Judges Pejchal and Wojtyczek in *Orlandi and Others* (cited above).
[13] "[T]he Court can accept that the subject matter of the present case may be linked to sensitive moral or ethical issues which allow for a wider margin of appreciation in the absence of consensus among member States …" (see *Oliari and Others*, cited above, § 177).
[14] "The longer-term future of the system of the European Convention on Human Rights", report of the Steering Committee for Human Rights (CDDH), Council of Europe, 2016, pp. 103-04.