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Same-Sex Partnership, International Protection

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Same-Sex Partnership, International Protection

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A. Introduction

- 1 Many people want to live their life in intimate partnership with another person. And many do. These two facts have been recognized and protected in law for many centuries. Hence the existence—in domestic law—of family law, and of numerous related provisions in other areas of public and private law. → *International law*, too, and especially international law on the protection of → *human rights*, recognizes and protects the desire for, and existence of intimate partnership. It does so mainly through guaranteeing rights to marriage, to family and to private life, and through prohibitions of discrimination (see also → *Equality of Individuals*; → *Family, Right to, International Protection*; → *Privacy, Right to, International Protection*).
- 2 Intimate partnership can mean different things to different people at different times. For many people it would (ideally) involve loving each other, caring for each other, living together in the same house, having sexual contact with each other, raising children together, staying together for life, and having some things in joint possession. However, none of these characteristics seems to be a universal *conditio sine qua non* for marriage or for other forms of intimate partnership. Therefore the notion of partnership is used here in the wide sense of a relationship between two people which is intimate in at least some of the characteristics mentioned.
- 3 For most women and for most men, their desire and practice to live in an intimate partnership is gendered: they prefer to do so with a woman or they prefer to do so with a man. Accordingly, existing intimate partnerships can be classified as being either between partners of different sexes or between partners of the same sex. Although international human rights instruments do not contain wordings that refer explicitly to heterosexual partnership, their provisions on the rights to marriage, to family and to privacy have traditionally often been interpreted as only covering different-sex partners (see also → *Interpretation in International Law*). Thus same-sex partnership has often been excluded from the protection of these rights.

B. State Practice

- 4 A similar strong tendency only to contemplate and regulate different-sex partnerships has long been characteristic of virtually all domestic legal systems. However, in recent decades, a growing number of national and sub-national jurisdictions have started to give (some) legal recognition to same-sex partnerships (see also → *Gay Rights*). In many jurisdictions this has started with legislation and/or case law recognizing the informal or de facto cohabitation of same-sex couples for some specific purposes; the earliest examples of this go back to the 1970s. Since 1989 a slightly smaller number of jurisdictions have introduced some form of registered partnership—also called civil partnership, civil union, civil pact, etc. The structure, procedure, status and legal consequences attached to these new legal forms tend to be more or less similar to those of marriage, although in some jurisdictions there is still a big difference between the legal

content of marriage and the legal content of registered partnership. Finally, since 2001 the legislatures and/or courts of a growing number of jurisdictions have opted to open up the existing institution of civil marriage to same-sex couples.

- 5 As of May 2008 the situation seems to be as follows: marriage has been opened up to same-sex couples in Belgium, Canada, Netherlands, Spain, South Africa, and in parts of the United States of America ('US'), with legislation pending or expected in Norway and Sweden.
- 6 A form of registered partnership for same-sex couples and sometimes also for different-sex couples has been introduced under various names in Andorra, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greenland, Hungary (taking effect January 2009), Iceland, Luxembourg, Netherlands, New Zealand, Norway, Slovenia, South Africa, Sweden, Switzerland, United Kingdom, Uruguay, and in parts of Argentina, Australia, Brazil, Canada, Mexico, Spain, and the US, with legislation pending or expected in Austria, Chile, Ireland and Liechtenstein.
- 7 Informal cohabitation of same-sex partners has been recognized—at least for some legal purposes—in most of the jurisdictions mentioned above, and also in several others, including Austria, Brazil, Colombia, Croatia, Hungary, Israel, Portugal, and parts of Australia, Italy and the US.
- 8 So on the one hand a very large part of the western world now recognizes same-sex partnership to some degree, and there is a clear trend towards further recognition. On the other hand, such recognition is as yet (very) limited in some jurisdictions, while remaining (highly) controversial in many jurisdictions all over the world. This is illustrated by the recent enactment of provisions specifically banning same-sex marriage. Such provisions were even introduced into some constitutions, including those of Honduras (Art. 112 as amended in 2005, also prohibiting same-sex 'de facto' unions), of Latvia (Art. 110 as amended in 2006), of Uganda (Art. 31 (2) (a) as amended in 2005), and of several US states.
- 9 Against that two-sided background, the question arises what protection public international law offers to same-sex partnership in its three principal forms: civil marriage, informal cohabitation, and registered partnership. The question breaks down into a primary question on the implications of international human rights for national law (see paras 11–22 below; see also → *Human Rights, Domestic Implementation*), and a secondary question relating to the international recognition of nationally recognized forms of same-sex partnership (see paras 23–30 below).

C. Parenting Issues

- 10 A related, and often even more controversial issue, is that of parenting by lesbian or gay individuals or couples. On this issue, too, there has been a marked evolution. A growing number of jurisdictions now allow same-sex couples jointly to foster or adopt a child, allow women in lesbian relationships to have a child through medically assisted insemination, and/or provide for joint parental status and/or responsibilities if a child is born to a woman in a lesbian relationship. There is not much international case law on parenting by same-sex couples. In an early case in 1992 (*Kerkhoven and Hinke v the Netherlands*) the European Commission on Human Rights ('ECommHR') found that, as regards joint parental authority over a child born by means of artificial insemination, 'a homosexual couple cannot be equated to a man and a woman living together' (ibid penultimate para.). However, in two cases involving an individual who happened to be gay or lesbian, the → *European Court of Human Rights (ECtHR)* has ruled against sexual orientation discrimination in the field of parenting. First it found discrimination contrary to Art. 14 → *European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)* ('ECHR') in conjunction with Art. 8 ECHR, in a case where a divorce court had awarded parental responsibility to the mother, on the grounds that the father 'was a homosexual and was living with another man' (*Mouta v Portugal* paras 34–36). More recently, in a 2008 case involving an application for individual adoption, the ECtHR found it also unacceptable under these articles to base the rejection of the applicant on considerations regarding her sexual orientation (*EB v France* paras 93–98). It remains to be seen whether the ECtHR and other international human rights courts and bodies would give similar judgments in cases involving parenting not by a homosexual individual but by a same-sex couple.

D. International Standards for Domestic Law

1. Civil Marriage

- 11 In contrast to the growing international protection for same-sex cohabitation outlined below, there is little explicit authority for the proposition that international law requires countries to open up the institution of civil marriage to same-sex couples. The strongest authority can be found in the provisions, contained in most international human rights

instruments, that each fundamental right—including the right to marry—should be ensured to all individuals without distinction of any kind, such as sex or other status (see eg Arts 2 (1) and 26 → *International Covenant on Civil and Political Rights* [1966] ['ICCPR']).

- 12 The first, and so far only, case decided by an international human rights court or body on the question whether a same-sex couple can derive a right to marry from international human rights law, is that of *Joslin v New Zealand*. Because of the words 'men and women' in the wording of the right to marry in Art. 23 (2) ICCPR, the → *Human Rights Committee* ('HRC') of the → *United Nations* (UN) rejected the claim that the exclusion of same-sex couples from marriage violated that article. And because of the existence of that specific provision on the right to marry, the HRC found that there could not be a violation of other rights invoked by the claimants (Arts 16, 17, 23 (1) and 26 ICCPR). The HRC did not address the impact of the non-discrimination provisions of Arts 2 (1) and 26 ICCPR, which had also been invoked by the claimants. It should be noted that the right to marry as formulated in Art. 16 Convention on the Elimination of Discrimination against Women (see also → *Women, Rights of, International Protection*) or in Art. 9 → *Charter of Fundamental Rights of the European Union* (2000) ('EU Charter'), does not allow for the textual argument used by the HRC in its interpretation of Art. 23 ICCPR.
- 13 Soon, the ECtHR will have to decide the case of *Schalk and Kopf v Austria*, which is similar to *Joslin*. In several cases on transgender issues, however, the ECtHR has already considered that Art. 12 ECHR, which also uses the words 'men and women' in its wording of the right to marry, enshrines the traditional concept of marriage as being between a man and a woman (see eg *Parry v the United Kingdom*; see also → *Transsexuals and Transgenders, International Protection*). Furthermore, it should be noted that in Art. 12 ECHR the right to marry is qualified by the phrase 'according to the national laws governing the exercise of this right'.
- 14 Still open is the question whether, given the non-availability of marriage in most countries for same-sex couples, it is permissible to attach certain rights and benefits exclusively to marriage, thus excluding same-sex partners from these rights and benefits (see para. 20 below).

2. Informal Cohabitation

(a) Where Different-Sex Cohabitation is Already Recognized

- 15 There is strong and growing authority for the proposition that international law prohibits sexual orientation discrimination and that discrimination between unmarried different-sex cohabitants and unmarried same-sex cohabitants is covered by that prohibition.
- 16 In 2003 the ECtHR came to that conclusion in the case of a surviving partner of a deceased tenant who wanted to succeed to the lease of the flat in which they had been living together (*Karner v Austria*). It ruled that the exclusion of same-sex partners from the category of unmarried life companions entitled to such a succession, was a violation of Art. 14 ECHR in conjunction with Art. 8 ECHR. It found that it had not been shown that the exclusion of persons living in a homosexual relationship was 'necessary' for achieving the aim—in itself legitimate—of protecting the family in the traditional sense (ibid para. 41). Thus the ECtHR has departed from its earlier admissibility decision in the case of *Estevez v Spain* (about a survivor's pension) and from a series of decisions of the former ECommHR.
- 17 In two cases (*Young v Australia* and *X v Colombia*) the HRC came to the same conclusion as the ECtHR. Both cases involved the refusal of a survivor's pension to a same-sex partner, although the applicable domestic rules did provide for such a pension to be paid out to a surviving unmarried different-sex cohabitant. The HRC concluded that there had been sexual orientation discrimination in violation of Art. 26 ICCPR. It considered in both cases that the State Party concerned had not put forward arguments justifying the distinction as reasonable and objective.
- 18 In a case about the right of prisoners to receive intimate visits from their life partners, the → *Inter-American Commission on Human Rights* (IACommHR) has indicated that the exclusion of unmarried same-sex partners could involve a violation of the → *American Convention on Human Rights* (1969) ('ACHR'), especially of Art. 11 (2) ACHR on private life (*Álvarez Giraldo v Colombia*; after that admissibility decision, the merits of the case were never decided).
- 19 The Court of Justice of the European Communities (→ *European Communities, Court of Justice* [ECJ] and *Court of First Instance* [CFI]) has also found that discrimination between same-sex and different-sex cohabitants amounts to sexual orientation discrimination (in *Grant v South-West Trains Ltd*, and more explicitly in the recent case of *Maruko v Versorgungsanstalt der deutschen Bühnen* ['Maruko Case']), and that sexual orientation discrimination—

in the implementation of community and union law—runs counter to a general principle of community law (*Mangold v Helm* on age discrimination; and also in *Maruko Case*; see also → *European Community and Union Law and Domestic [Municipal] Law*). The EU Charter explicitly stipulates that '[a]ny discrimination based on any ground such as ... sexual orientation shall be prohibited' (Art. 21 EU Charter). In the EU, Member States must prohibit sexual orientation discrimination by public and private employers (Council Directive 2000/78/EC Establishing a General Framework for Equal Treatment in Employment and Occupation ['Directive 2000/78/EC on Equal Treatment in Employment']). This prohibition extends to discrimination between unmarried different-sex and same-sex partners. Also as employers themselves, the EU institutions provide their staff with certain employment benefits for their cohabiting partners including same-sex partners. Several other international organizations, including the → *World Bank Group* and the → *International Monetary Fund (IMF)* have adopted a similar policy towards their own staff.

(b) Where Different-Sex Cohabitation is Not Recognized

- 20 Almost all jurisprudence on same-sex cohabitation listed above only applies to situations where domestic law already extends certain benefits of marriage to informally cohabiting different-sex partners. In these situations there is *direct* discrimination on grounds of sexual orientation, and in situations covered by international human rights law such direct discrimination is forbidden. There is less explicit authority for the proposition that international human rights law requires some recognition of same-sex cohabitation in situations where domestic law has not yet extended a certain benefit of marriage to cohabiting different-sex partners. The argument can be made that excluding all unmarried partners from such a benefit amounts to *indirect* sexual orientation discrimination, because the discriminatory effect is clearly disproportionate as it affects only a small number of different-sex couples but all same-sex couples. With regard to the latter category, the exclusion cannot be justified along the lines adopted by the HRC in the case of *Danning v the Netherlands*, because in that case the different-sex cohabitants involved had chosen not to enter into marriage, a choice which in most countries of the world is not open to same-sex cohabitants (see the individual opinion of members Lallah and Scheinin appended to the views of the HRC in *Joslin v New Zealand*). It is generally accepted in international human rights law that indirect discrimination also amounts to a violation of the right to non-discrimination (see eg the opinion of the HRC in *Althammer v Austria*; and the judgment of the ECtHR in *DH and others v the Czech Republic*). The ECtHR has specified that this right 'is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different' (*Thlimmenos v Greece* para. 44). Accordingly there seems scope for international human rights cases in which same-sex cohabitants claim that they should *not* be treated in the same way as different-sex cohabitants and that they should be awarded a certain benefit that is so far the exclusive privilege of married different-sex partners.

3. Registered Partnership

- 21 It is too soon to say that—in the absence of the opening up of marriage—international law requires the introduction of a form of registered partnership. However, when in 1993 Norway was the second country to introduce registered partnership, the HRC welcomed this, suggesting that the legislation did indeed relate to the right to equality and non-discrimination (Concluding Observations on Norway [4 November 1993] para. 7). And in a case unsuccessfully challenging the rule that a transgender person can only be recognized in his or her new gender if he or she is not married, the ECtHR attached 'some relevance' to the fact that after the imposed divorce and the desired gender recognition the couple could enter a civil partnership and thus regain many of the protections and benefits of their previous married status (*Parry v the United Kingdom* Sec. III B).
- 22 In the already mentioned *Maruko Case* (see para. 19 above) the ECJ had to consider the question whether it is sexual orientation discrimination when a survivor's pension is only available for married different-sex partners and not for registered same-sex partners. The ECJ found that this does indeed amount to *direct* sexual orientation discrimination—contrary to Directive 2000/78/EC on Equal Treatment in Employment—if, under national law, registered partnership places persons of the same sex in a situation comparable to that of spouses. It did not address the question whether there would be *indirect* sexual orientation discrimination if the legal situations of married and registered partners were less comparable.

E. International Recognition of Domestic Law

- 23 To a large degree questions relating to the recognition of foreign same-sex partnerships and of their consequences are left to national rules on conflicts of law. However, there is also some international law emerging in this complicated field.

1. Recognition of Same-Sex Marriage

- 24 There are many international treaties on → *private international law*, eg the Hague Convention on Celebration and Recognition of the Validity of Marriages, that make reference to marriage. Most of them do not explicitly restrict the notion of marriage to different-sex marriages, so possibly they should be interpreted as being also applicable to same-sex marriages. For the time being, however, their concept of marriage will often be interpreted in the traditional heterosexual sense. This may be different for some recent EU legislation using the words 'marriage', 'spouse', etc. That these should be interpreted as encompassing same-sex marriage can in particular be argued for directives in which the → *preamble* states that it should be implemented without discrimination on grounds of sexual orientation. That is for example the case in Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the Right of Citizens of the Unions and their Family Members to Move and Reside Freely within the Territory of the Member States ('Directive 2004/38/EC on the Right to Move' para. 31). More concretely, in a letter of 15 May 2001, the Director-General for Personnel and Administration of the European Commission has indicated that the EC staff regulations should be applied equally to same-sex and different-sex marriages.
- 25 Since 2004 the UN has been recognizing (most) same-sex marriages of its own staff. To that effect a UN Secretary-General's (→ *United Nations, Secretary-General*) Bulletin of 24 September 2004 on Personal Status for Purposes of United Nations Entitlements specifies that 'determining the personal status of staff members for the purpose of entitlements under the Staff Regulations and Rules has been done, and will continue to be done, by reference to the law of nationality of the staff member concerned' (para. 1). Other international organizations which recognize the same-sex spouses of their own staff include the European Patent Office (see also → *European Patent System*), which has been recognizing same-sex marriages since 2004 (see *TK v European Patent Office* and *MES v European Patent Office* Judgments of the Administrative Tribunal of the → *International Labour Organization [ILO]* ['ILO Administrative Tribunal']; see also → *Judgments of the Administrative Tribunal of the International Labour Organization [Advisory Opinion]*).
- 26 Similarly, a Dutch citizen working for the → *Food and Agriculture Organization (FAO)* who wanted to have his same-sex marriage recognized by his employer for the purposes of dependency benefits, won his case at the ILO Administrative Tribunal in 2007 (*EJP v Food and Agriculture Organization*). The tribunal reached its decision recalling its case law that as 'a general rule, and in the absence of a definition of the term, the status of spouse will flow from a marriage publicly performed and certified by an official of the State where the ceremony has taken place' (ibid para. 6).

2. Recognition of Registered Partnership

- 27 In 2004 the United Nations Administrative Tribunal (see also → *United Nations Administrative Tribunal, Applications for Review [Advisory Opinions]*) found that a French employee of the UN who had entered into a *pacte civil de solidarité* should be considered as 'married' (*Adrian v Secretary-General of the United Nations*). Similarly, the ILO Administrative Tribunal ruled that for the purposes of the ILO Staff Regulations a Danish or German registered partnership was equivalent to marriage (*AHRC-J v International Labour Organization* and *DB v International Labour Organization*). In earlier cases both tribunals had still rejected similar claims, as had the ECJ, when in 2001 it considered that it could not interpret the staff regulations in such a way that 'legal situations distinct from marriage' (ie registered partnerships) are treated in the same way as marriage (*D and Sweden v Council of the European Union* para. 37). That judgment of the ECJ may have to be reconsidered in light of the recent *Maruko Case* (see paras 19 and 22 above), and was largely set aside when in 2004 the staff regulations of EC officials were changed, so as to equate with married officials any 'official who is registered as a stable non-marital partner' (Art. 1d Staff Regulations of Officials and Conditions of Employment of Other Servants of the European Communities as amended by Council Regulation 723/2004).
- 28 A more limited recognition of registered partners found its way into Directive 2004/38/EC on the Right to Move. Here a registered partner is only considered to be a family member 'if the legislation of the host Member State treats registered partnerships as equivalent to marriage' (Art. 2 (2) (b) Directive 2004/38/EC on the Right to Move). If that is not the case, the country shall only have a duty to 'facilitate' entry and residence for the 'partner with whom the Union citizen has a durable relationship, duly attested' (Art. 3 (2) (b) Directive 2004/38/EC on the Right to Move).
- 29 In 2007 the International Commission on Civil Status adopted Convention No 32 on the Recognition of Registered Partnerships ('ICCS Convention No 32'). It is the first treaty in which registered partnership—or indeed same-sex partnership—is explicitly mentioned. It will require the Contracting States to recognize the validity of partnerships registered in any other State—subject to several exceptions, such as manifest incompatibility with public policy. The convention will not require the recognition of all the legal effects of a registered partnership, but only the recognition of the surname of the partners, and the recognition of registered partnership as an impediment for contracting a marriage.

The possible recognition of other legal consequences is left to the operation of (national) rules of private international law.

- 30 Irrespective of ICCS Convention No 32, national rules of private international law need to be applied in accordance with international human rights law. The argument can be made that the denial of recognition for certain legal consequences of a foreign registered partnership will quite easily result in a violation of the right to non-discriminatory respect for the private and family life of the persons involved (and for their property).

F. Assessment

- 31 International protection for same-sex partnership is a topic that has seen important developments recently, reflecting more extensive national developments in a growing number of countries. These national and international developments are likely to continue and to reinforce each other. As has been explained above, the current state of international law seems to be quite clear on two points: discrimination between unmarried different-sex cohabitants and unmarried same-sex cohabitants is prohibited, and exclusion of same-sex couples from marriage is (probably) still permissible. In between those two points the field is less clear. There is growing support for the proposition that a registered partnership or same-sex marriage validly contracted in one country should be recognized by international organizations and—for certain purposes—also by other countries. And there are reasons to expect that international bodies will apply the prohibition of indirect discrimination to situations where same-sex partners are being excluded from certain legal benefits, because these are only available to married partners. This indirect discrimination argument, which focuses on providing specific benefits, rather than on obtaining status, has been accepted already in several domestic courts. It is submitted here that—in the short run—persuading international human rights courts and bodies to apply it will probably be the most effective way of increasing the international protection of same-sex partnership.
- 32 Several countries have, in response to claims that marriage should be opened up to same-sex couples, introduced a form of registered partnership. As was indicated above, the new institution of registered partnership is already getting some international recognition. It could be argued that non-discriminatory respect for private life not only demands that same-sex partners shall be awarded (all or certain) spousal benefits, but also requires that the law provides procedures and a status to ensure the legal certainty of all persons concerned. Marriage, and the procedures for getting into it and out of it, provides such a status and the consequential legal certainty. Registered partnership, which can be characterized as a semi-marriage or quasi-marriage, does the same. Assuming that international human rights law will not soon require all countries in the world to open up marriage to same-sex couples, and assuming that many legislatures will be reluctant to attach all rights and obligations of marriage to non-registered cohabitation, it seems possible that some day international human rights courts and bodies will start to require that countries should introduce some alternative to marriage.
- 33 Any claims in this field deserve serious attention, because, as the ECtHR has consistently put it, the right to respect for private life encompasses ‘the right to establish and develop relationships with other human beings’ (see eg *EB v France* para. 43). And also because ‘[w]here sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment [regarding private and family life]’ (ibid para. 91). It should be expected that—in the long run—some human rights courts and bodies will start to apply these two principles also to claims that marriage should not be the exclusive privilege of different-sex couples, and to follow lines of argument that have been applied in several cases confirming the right of transsexuals to marry (see eg *Goodwin v the United Kingdom* paras 98–101).

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