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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 ways 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. Thus same-sex partnership has often been excluded from the protection of these rights (see also Gay Rights).

B. State Practice

4 A similar strong tendency to contemplate and regulate only 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. 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 these lesbian and gay rights 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 March 2013 the situation in the countries of the world (apart from their dependent territories overseas) seems to be as follows. Marriage has been opened up to same-sex couples in Argentina, Belgium, Canada, Denmark, Iceland, Netherlands, Norway, Portugal, South Africa, Spain, Sweden, and in parts of Brazil, Mexico and the United States of America. The opening up of marriage is pending or expected in Colombia, Finland, France, Luxembourg, Nepal, New Zealand, Uruguay, and in parts of the United Kingdom.

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, Austria, Brazil, Czech Republic, Finland, France, Germany, Hungary, Ireland, Liechtenstein, Luxembourg, New Zealand, Slovenia,

Switzerland, United Kingdom, Uruguay, and in parts of Argentina, Australia, Canada, Mexico, Spain, the US, and Venezuela. Legislation is being discussed in several other countries, including Chile and Vietnam. In Denmark, Iceland, Norway, and Sweden the possibility of partnership registration was also introduced, but later abolished when marriage was opened up to same-sex couples.

7 Informal cohabitation of same-sex partners has been recognized—at least for some legal purposes—in most of the countries mentioned above, and also in several others, including Croatia, Ecuador, Israel, Italy, and Poland.

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 recent enactments specifically banning the recognition of same-sex marriages (such as the federal Defense of Marriage Act of 1996 in the US) and by (unsuccessful) proposals to criminalize inter alia same-sex marriage ceremonies such as the Same Sex Marriage (Prohibition) Bill presented to the parliament of Nigeria in 2007, and the Anti Homosexuality Bill introduced in 2009 by a member of parliament in Uganda. Provisions entrenching the heterosexual character of marriage have even been introduced into some national constitutions, including those of Bolivia (Art. 63 of the new constitution of 2009), the Democratic Republic of Congo (Art. 40 of the new constitution of 2006), Ecuador (Art. 67 of the new constitution of 2008), Honduras (Art. 112 as amended in 2005, also prohibiting same-sex *de facto* unions), Hungary (Art. L of the new constitution that took effect in 2012), Latvia (Art. 110 as amended in 2006), and Uganda (Art. 31 (2) (a) as amended in 2005), and also into the constitutions of several US states.

9 Against that two-sided background, the question arises: what protection does public international law offer to same-sex partnership in its three principal forms: civil marriage, informal cohabitation, and registered partnership? (see also the Yogyakarta Principles, especially principle 24). 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 some international case law on parenting by same-sex couples. In an early case in 1992 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' (*Kerkhoven v the Netherlands* para. 2). However, in 1999 the European Court of Human Rights (ECtHR) found sexual orientation 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* para. 34). In 2012 the Inter-American Court of Human Rights (IACtHR) ruled in a very similar case, concerning a ruling of the Supreme Court of Justice of Chile that—solely on the basis of sexual orientation—denied custody to a mother who after her divorce had entered into a relationship with a person of the same sex. This was found to be incompatible with several rights guaranteed in the American Convention on Human Rights (1969) ('ACHR') (*Atala v Chile*). In a 2008 case involving an application for individual adoption, the ECtHR found it also

unacceptable under Art. 14 ECHR to base the rejection of the applicant on considerations regarding her sexual orientation (*EB v France* paras 93–8). Also since 2008 the Revised European Convention on the Adoption of Children of 2008 now expressly contemplates the possibility of adoption by same-sex couples. According to Art. 7 (2) 'States are free to extend the scope of this Convention to same sex couples who are married … or who have entered into a registered partnership', or 'who are living together in a stable relationship'. In 2013 the ECtHR ruled that Austria had violated Art. 14 in conjunction with Art. 8 ECHR, because it excluded second-parent adoptions by same-sex partners while allowing such adoptions by different-sex unmarried partners (*X v Austria* para. 153). The ECtHR also ruled that with respect to second-parent adoption unmarried same-sex partners are not in a situation that is relevantly similar to that of a married different-sex couple, and that therefore in that respect, there was no discrimination (ibid para. 109).

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, eg Arts 2 (1) and 26 International Covenant on Civil and Political Rights (1966) ('ICCPR').

12 The first 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. 9Charter 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 In several cases on transgender issues, the ECtHR 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 United Kingdom*; see also Transsexuals and Transgenders, International Protection). In 2010 the ECtHR (having regard to Art. 9 EU Charter) discarded the textual argument that the use of the words 'men and women' in the wording of the right to marriage meant that this right 'must in all circumstances be limited to marriage between two persons of the opposite sex' (*Schalk v Austria* para. 61). However, noting that 'there is no European consensus regarding same-sex marriage' (ibid para. 58) and that Art. 9 EU Charter like Art. 12 ECHR makes reference to 'the national laws governing the exercise of these rights', the court concluded that 'as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law' (ibid para. 61), and therefore Art. 12 ECHR on the right to marry was not violated. The ECtHR also ruled that the Austrian ban on same-sex marriages did not violate Art. 14 ECHR on non-discrimination taken in conjunction with the right to respect for private and family life of Art. 8 ECHR, because the latter provision is of more general purpose and scope than Art. 12 ECHR (ibid para. 101). The court did not address the possible impact of the right

to non-discrimination of Art. 14 ECHR taken in conjunction with Art. 12 ECHR itself.

14 Neither the HRC (in *Joslin v New Zealand*) nor the ECtHR (in *Schalk v Austria*) has dealt with 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). In 2010 in three similar cases (one on rent law in Poland, one on health insurance cover for partners of civil servants in Austria, and one on the calculation of child maintenance in the United Kingdom) the court repeated and confirmed the approach it had taken in the case of Karner (*Kozak v Poland* para. 99; *PB v Austria* para. 42; *JM v the United Kingdom* para. 56). In 2013 the ECtHR applied the same reasoning in a case regarding access to second-parent adoption (*X v Austria*, see para. 10 above). 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 Union ('ECJ'; European Union, Court of Justice and General Court) has also found that discrimination between same-sex and different-sex cohabitants amounts to sexual orientation discrimination, first in *Grant v South-West Trains Ltd* (1998), and more explicitly in the 2008 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 (*Römer v Freie und Hansestadt Hamburg* paras 59–60; 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). 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 (but see the Yogyakarta Principles, especially principles 9 (e), 13 (a), 17 (h) and 24). 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 v 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 (Consideration of Reports: Norway 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 United Kingdom* Sec. III B). Recently the ECtHR went a little further when it acknowledged the 'need' of same-sex couples 'for legal recognition and protection of their relationship' (*Schalk v Austria* para. 99). However, because Austria had recently introduced a form of registered partnership, it did not examine 'whether the lack of any means of legal recognition for same-sex couples would constitute a violation of Article 14 taken in conjunction with Article 8 if it still obtained' (ibid para. 103).

22 In the already mentioned *Maruko Case* 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 (see para. 20 above), if the legal situations of married and registered partners were less comparable. That question did not get decided either in the very similar ECJ case of *Römer v Freie und Hansestadt Hamburg*. In 2010 the ECtHR declared the application in a somewhat similar case inadmissible This case concerned France, where a survivor's pension is only available for a surviving spouse, not for a surviving partner in a *pacte civil de solidarité* ('PACS'). The ECtHR found, *inter alia*, that the situations of spouses in marriage and partners in PACS were not analogous, because of the many legal differences between the two institutions, and that therefore there was no discrimination (*Manenc v France*). The ECtHR did not indicate why there was *no indirect* discrimination in this case.

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 (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 EU 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 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' (at 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]).

26 Similarly, a Dutch citizen working for the Food and Agriculture Organization of the United Nations (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). In a similar case of a married Canadian employee of the International Atomic Energy Agency (IAEA) the tribunal in 2008 took the same approach, stressing that any restrictive definition should be contained in the Staff Regulations and Rules themselves, not in a mere information document (*JLH v International Atomic Energy Agency* paras 4–6).

2. Recognition of Registered Partnership

27 In 2004 the United Nations Administrative Tribunal (see also Administrative Boards, Commissions, and Tribunals in International Organizations) found that a French employee of the UN who had entered into a *pacte civil de solidarité* (*'PACS'*) 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*), and that the same is true for a French PACS, because 'in the absence of a contrary provision in the Staff Regulations and Rules, the principle of non-discrimination requires that for the purposes of dependency benefits the term "spouse" be interpreted as applicable to a relationship of mutual dependence under the relevant national law' (*EH v Food and Agriculture Organization* para. 19). 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 EU 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 *Maruko Case* of 2008, and was largely set aside when in 2004 the EU Staff Regulations were changed, so as to equate with marriage any 'non-marital partnerships' provided that certain conditions regarding stableness are fulfilled (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 (ICCS) 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. The second treaty to do so is the Revised European Convention on the Adoption of Children of 2008 (see para. 10 above). The ICCS Convention 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 the ordre public (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 family life of the persons involved (and for their property). In this context it is important that the ECtHR now considers that 'a cohabiting same-sex couple living in a stable de facto partnership' falls within the notion of 'family life' (*Schalk v Austria* para. 94, overturning *Estevez v Spain*). This implies *a fortiori* that registered or married partners of the same sex can rely on the right to respect for family life, given in Art. 8 ECHR. Also according to the IACtHR same-sex partners are covered by the term 'family' in Arts 11 and 17 ACHR (*Atala v Chile* paras 174–7).

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 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 seems to be scope for international bodies to 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 the provision of specific benefits, rather than on the granting of status, has been accepted already in several domestic courts. Although the ECtHR has implicitly ignored this argument in a few cases (see paras 10 and 22 above), it is submitted here that persuading international courts and human rights bodies to apply it to key aspects of family life, 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 family 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, it seems possible that some day an international court or human rights body will start to require that States should introduce some alternative to marriage. The ECtHR has already acknowledged that same-sex couples are 'in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship' (*Schalk v Austria* para. 99).

33 Any claims in this field deserve serious attention, because, as the ECtHR and IACtHR 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 *Atala v Chile* para. 162). And as regards the prohibition of discrimination based on sexual orientation, 'any restriction of a right would need to be based on rigorous and weighty reasons' (*Atala v Chile* para. 124; see also *EB v France* para. 91). It should be expected that—in the long run—some international court or human rights body 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; see also Transsexuals and Transgenders, International Protection).

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