Six international legal norms on the protection of same-sex partnership have emerged

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Six international legal norms on the protection of same-sex partnership have emerged

by Kees Waaldijk *

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When, in 2006, I wrote the first version of my article 'Same-Sex Partnership, International Protection' for the online *Max Planck Encyclopedia of Public International Law*, only some fifteen cases on the topic had been decided by international bodies. At the time, it felt as a daunting task to write that article for this prestigious, authoritative and massive *Encyclopedia* (the roots of which go back to the 1920s, while the printed edition of 2012 has more than 11,000 pages covering more than 1,600 topics). Even more so, because what was expected was a comprehensive and – as far as possible – impartial account, complemented by a personal assessment. At the same time, inclusion of this topic in the *Encyclopedia* felt as a welcome recognition for – and 'coming out' of – a new topic of international law.

Fifteen years later, international protection of same-sex partnership has become a well-established topic of international law – albeit a highly dynamic and controversial issue. By 2021 the number of decided international cases about same-sex partners has reached 50, while more and more international written law and soft law documents touch upon the topic. So after my minor 2013 update of the article, a much fuller revision and update was needed for 2021.

The beginning of my article (paragraphs 1-3) could remain unchanged:

> "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. (…)
>
> 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. (…)"

Meanwhile, my research has discovered that my bold claim about the non-existence, in international human rights documents, of any *explicit* reference to *heterosexual* partners, was even more true than I realized in 2006. If you look closely at the drafting history of article 16 of the Universal Declaration of Human Rights, there is nothing *heterosexual* about the words "men and women" as used in human rights provisions on the right to marry. In 1948 these words had been introduced as an amendment to the originally proposed "*Everyone* has the right to contract marriage". And the aim of this amendment had been to make clear that women must have the "same freedom" to marry as men. No doubt the drafters were thinking about *different-sex* marriages, but they did *not* include this exclusivity in the *text* of the fundamental right to marry. Instead the drafters underlined the equal rights of "men and women". The drafters were not thinking of same-sex partners. (For a detailed analysis of all this, see my 2021 book chapter 'The Right to Marry as a Right to Equality' or my 2018 podcast; details below.)

A lot, however, had to change in the rest of my *Encyclopedia* article, because in international law (as in more and more countries) there now is substantial recognition of same-sex partners.

After discussing all 50 rulings on the topic given by international judicial and quasi-judicial bodies, plus various decisions of other bodies of UN, EU and other international organizations (covering human rights law and international staff law, and touching on rules of free movement and private international law), I now conclude the 2021 version of my *Encyclopedia* article as follows:

> "International protection for same-sex partnership is a topic that has seen important developments recently (…). At least two 'global' norms have emerged:
>
> > **(1) a prohibition of discrimination between unmarried different-sex cohabitants and unmarried same-sex cohabitants**; and
> >
> > **(2) an obligation to recognize existing same-sex marriages from other jurisdictions (at least for some purposes)**.
>
> Two related 'global' norms seem to be emerging (…):
>
> > **(3) an obligation to respect existing marriages that are becoming 'same-sex' because one of the spouses is having a change of sex/gender**; and
> >
> > **(4) an obligation to recognize existing registered partnerships from other jurisdictions (at least for some purposes)**. (…)
>
> Authority for these four 'global' norms can be found in decisions of bodies of the UN, in decisions of European and Inter-American bodies, and also in the domestic law of countries in different parts of the world. (…) In two regions of the world (Europe and the Americas) two further norms are emerging. One of these regionally emerging norms is:
>
> > **(5) an obligation to give same-sex couples access to a legal framework for their relationship.**
>
> In the Americas this emerging obligation ultimately requires the opening up of marriage, while in Europe it still leaves it to the countries themselves to decide whether this legal framework will be marriage or only a form of registered partnership (…). The other regionally emerging norm is:
>
> > **(6) an obligation to give same-sex couples access to rights and benefits derived from marriage.**

> In the Americas this obligation seems to concern all rights that flow from marriage, while in Europe it so far seems limited to *core or essential rights*, such as the right to live in the same country as your partner (…). For these emerging regional norms there is not yet much authority in decisions of bodies of the UN, and even less from regional bodies outside Europe and the Americas. However, these norms do reflect developments in domestic law that have at least started on all continents. It seems likely that in both regions the international case law will crystalize further, and there seems scope for some convergence between the approaches of ECtHR and IACtHR. (…) (Also because) both courts have acknowledged both the controversial character and the dynamic nature of developments in the national and international protection of same-sex partnership. (…)"

For the full text of this quote, and for references to case law and previous paragraphs, see paragraphs 38-40 of my *Encyclopedia* article. And for an analysis (based on how the law has been developing in 21 European countries) of what rights for same-sex partners could be considered as "core or essential rights" in the sense of emerging norm 6, see my 2020 book chapter 'What First, What Later?', where I conclude (in paragraph 2.7):

> "a core minimum of rights would consist *at the very least* of (…)
> – legal protections at times of death (…);
> – legal protections for times of other great sadness (…);
> – the right to be able to live in the same country (…); and
> – the right to take at least *some* responsibility for each other's children (…)."

Perhaps this will emerge as a *seventh* international legal norm on the protection of same-sex partnership.

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