

Sexual orientation and human rights

[Sociology](#), [Human Rights](#)



Introduction

As a law student with a particular interest in family life, there has always been a distinctive curiosity in our full rights as human beings. It is clear that the UK law has certainly made some positive progress over the years with such things as the 'Human Rights' and 'Equality', but just how far is Parliament willing to alter their legislations in order to satisfy their British citizens. To date there have been numerous changes, from women being able to vote and improved racial laws, to the main reason for this dissertation; same-sex couples being able to express their love for each other without committing an offence.

This dissertation is an attempt to address the issue of same-sex couples not having the right to marry. Marriage is perceived as a wonderful thing between man and woman, but in today's society things have changed immensely and Parliament has certainly recognised this. People are exploring their sexuality in many ways and now with same-sex couples having the right to live their lives more freely; more and more rights are sought after. With the Civil Partnership Act 2004 becoming part of the British legislation, it is apparent that the UK Parliament have taken advance steps to reach equality, allowing these civil partners the same rights as a married spouses.

Until 2005 same-sex couples were never able to take their relationship to a legally recognised degree, and although this act may be perceived as a good will gesture by some people, there are still some differences between

marriage and civil partnerships which some same-sex couples consider to be discriminatory.

Civil partnership is believed to be equivalent to 'civil' marriage, although there is still diversity between the two and for this reason, this dissertation is going to focus on the question from the views of those same-sex couples who want 'marriage' itself. By looking into the requests and protests covering this topic of same-sex marriage, there may be evident concerns for these people and their 'human rights'.

In order to achieve an answer to the selected question, this dissertation will need to be divided into individual chapters, which will focus on particular elements of the issue and with any luck come to a conclusion why 'same-sex couples can not marry', and maybe even uncover a solution as to what future changes could be made in order make this possible.

The first chapter will concentrate on the law relating to civil partners and married spouses, what differences they may have and the similarities involved. The second chapter will focus on the rights and responsibilities of civil partners, and the rights they now have which differ from those before the Civil Partnership Act 2004 came into legislation. Chapter three will cover what it is that same-sex couples want in regards to their relationships. It may show that civil partnership is not as satisfactory as thought to be and some same-sex couples may want more. Marriage has become a much desired practice within the gay community, so why has it been restricted Many people are both for and against same-sex marriage and this chapter will cover their views. The fourth and final chapter will analyse and compare

same-sex couple's rights in the UK with those in Spain. These findings may explain and expose what the future holds for same-sex couples in the UK and if the UK law will be satisfactory for those it involves.

All of the information gathered should aid in explaining why same-sex couples can not marry in the UK, for what reasons and what could be done to make a change. Without a doubt, the Human Rights Act and Equality Act is assumed to be the answer in finding a solution for this dissertation, but depending on what is found within this work, it may be more complicated than believed.

Chapter 1- Civil partnership vs. marriage

This first chapter is going to focus on the current UK law regarding marriage and civil partnership. This should aid in finding out if the Equality Act really does play a role in today's society for same-sex couples, or if the Civil Partnership Act is just a strategy used to help cover up the minute discrimination still going on today. Focusing on the differences and similarities will help explore civil partnership and help find out just how far Parliament has gone to achieve equality between homosexuals and heterosexuals.

Today, couples may wish to either cohabitate or form a legally recognised relationship. There are three forms of adult relationships that are recognised by the UK law: religious marriage, civil marriage and civil partnership.

Even though, it is clear civil marriage has more comparisons to a civil partnership, this dissertation will focus on marriage as a whole. By looking at

the reasons why people choose to get married or enter into civil partnerships, should assist in coming to the distinction between a marriage and civil partnership.

There are different definitions or concepts of ‘ marriage’ and depending on the individuals involved their definitions may vary as to what they believe it to be. For instance a husband’s understanding may be very different from those of his wife.

There were two legal definitions of marriage set, one by Lord Penzance:

‘... as understood in Christendom, may for the purpose be defined as the voluntary union for life of one man and woman to the exclusion of others’.[1]

The other, by Thorpe LJ:

‘ contract for which the parties elect but which is regulated by the state, both in its formation and its termination by divorce because it affects status upon which depend a variety of entitlements, benefits and obligations’.[2]

There is clearly a great time difference between the two quotes; this is evident from what was stated above. Lord Penzance’s (1866) definition makes it clear that marriage under the common law of England and Wales required individuals of the opposite sex and therefore, it is obvious that the idea of same-sex unions were not recognised or even considered at the time. Additionally, Christianity is not the only form of marriage which is acceptable today, and marriage no longer seems to last for eternity, with such things as adultery becoming common and parties choosing to exercise their rights

under divorce law. (If there is exclusivity, it is not always a union of equals. According to Blackstone, the woman's being and legal existence is suspended on marriage). [3]

Thorpe LJ had a more contemporary explanation of marriage. A contract between the two intentional parties (unless a sham), this is a very vague definition and could be argued it includes homosexuals as well as heterosexual couples. However, due to the state regulating the formation and termination of a marriage, it is apparent that the state would only allow the heterosexual couples to do so.

In addition, a quote was taken from *Ghaidan v Godin-Mendoza*, which specified marriage to be a union of man and women.[4] It stated that the spouse's partner had to be of the opposite sex and there need not be stability, faithfulness, sex, long-lasting and consent.

This could be seen to contradict with some, if not most of the Marriage Act 1949 regulations. If a marriage did not include those listed above, then the marriage is most likely to end in divorce or be classified as a sham. It seems to be focused more on who can marry, than the content of the relationship itself. This may suggest that two complete strangers could form a valid marriage.

Although these definitions exist, there appears to be three main reasons people wish to marry or become civil partners. These incentives are: legal reasons, religious beliefs and to prove their commitment to one another.

The right of men and women of a marriageable age to marry is preserved in Art 12 European Convention for the Protection of Human Rights.[5] However, same-sex couples do not have this privilege, as they cannot marry, but have been given an alternative of 'civil partnership'. The Civil Partnership Act 2004 (the CPA) became part of British law on 5 December 2005 and was said to have been designed to send a clear message, which enables same-sex couples to obtain respect and legal recognition of their relationship by forming a civil partnership.[6]

This was a new legal relationship exclusively for same-sex couples, which provides all the rights and responsibilities of a civil marriage, coupled with social recognition of the status of their relationship.[7] For those who are in same-sex relationships the 'Civil partnership' was sought to be the solution for gay couples to marry, although they cannot technically marry, and possesses the same benefits, as heterosexual couples.[8]

There are a few similarities within a marriage and a civil partnership. They both require legal formalities that need to be fulfilled in order to be valid. The ceremonies require the presence of each other and a minimum of two other persons, who will serve as witnesses and are able to sign the registration documents. [9] Along with this, neither of the couple can already be in a civil partnership or lawfully married,[10] and they cannot fall within prohibited degrees of the relationship, [11] (although, two people within prohibited degrees of relationship in marriage e. g. same-sex, could in fact be permitted to become civil partners).[12] They also have to be 16 years of age and older. [13]

Persons between the ages of 16 and 18 may marry under the same conditions; however this should be done with written consent from their parents or other lawful guardians.[14] Nevertheless, a marriage is not deemed void without consent of a person which has parental responsibility, as a child has a right to challenge their parents' refusal by going to the courts,[15] as a consequence the courts may override the parents' refusal. With this said, the question is, is parental consent essential This is purely based on the fact that 16- 18 year olds are allowed to consent to life saving medical treatment and have sex, these are very mature decisions to have to make at such an age, so needing permission to marry could be a little patronising.

The differences within the legal formalities are, marriages have to be formed by people of the opposite sex and civil partners are of the same sex.[16] A civil partnership or marriage could be void or voidable if none of those stated above were followed.

The law insists that the parties intending to form a civil partnership or marry have to publicise their civil partnership/marriage before it can be solemnised.[17] This could aid in reducing (sham marriages) human trafficking and illegal immigration. This is good for both parties involved and will improve UK marriage laws. Although to some this can be seen as an invasion of their privacy as they may not have the means to do so.

There are many differences concerning the ceremony itself. Firstly, civil partners can only have the signing a civil partnership document, which is restrained from any religious activity; whereas, married couples exchange

vows, rings and marriage banns,[18] and secondly there are four types of ceremonies which the legislation permits for marriages only:

- Civil ceremonies, [19]
- The Church of England,
- Jewish & Quaker weddings, [20]
- Marriages in a registered place of religious worship

It could be disputed that these ceremonies are not fair for those who have their own religion e. g. Muslims, this is because they have to proceed with a civil ceremony as well as their own ceremony in order for their marriage to be recognised in UK. Several different religions have been created. Accepting these religions to be used as a basis for legitimising a marriage in the UK would be impractical, but some religions such as Muslim weddings should be, Islam is one of the most recognised religions in the UK, but is still unable to have their marriage recognised under UK law; surely this could be seen as unjust.

However, when comparing marriage to civil partnership, it is clear that marriage has more benefits. The sites where same-sex couples could enter into a civil partnership were restricted. There were certain offices where the registration could take place; some examples being: hotels, restaurants, and prestigious buildings.[21] However, on 17 February 2011, the Government announced that it intended to launch a consultation on implementing section 202 of the Equality Act 2010; [22] this was considered as a move towards building equality between civil marriage and partnerships. With this

announcement came mixed reviews, which will be explained in more detail in chapter three.

In reality, heterosexual couples have the choice between civil marriage and religious marriage, so why deny gay couples a similar choice. The Civil Partnership Act 2004 prohibits civil partnership registrations taking place in religious premises. However, section 202 of the Equality Act 2010 removes this prohibition. This made it possible for civil partnerships to be registered on religious premises where religious organisations permit this. The section also states, for the avoidance of doubt, that religious organisations will not be obliged to host civil partnerships if they do not wish to do so.[23]

With this said; if same-sex couples were to consider having their ceremony take place on religious premises', but were refused permission to have their civil partnerships registered in the Church, could the couple choose to take legal action (breach of Equality Act)?[24] In recent times a same-sex couple have had their blessing rejected by a church in the UK, where the Rt Rev Thomas McMahon, said:

' We would not be hold civil partnership services in our churches because it goes against our teachings and what we believe marriage to be.' [25]

Nothing in the Civil Partnership Act 2004 obligates any religious organisation to host civil partnerships if they do not wish to, [26] and the Equality Act 2010 states that religious organisations will not be obliged to host civil partnerships if they do not wish to do so.[27]

There is an interesting clash between section 202 (4) Equality Act 2010 and section 29 of the Equality Act. Section 29 makes it illegal to discriminate on grounds of sexual orientation in relation to the provision of services.

However, with a marriage ceremony and civil partnership registration, there are different services, so if a church simply refused to offer the specific service of civil partnership registration, they could not be said to be discriminating in the provision of that service. A refusal could certainly have a discriminatory appearance, but this would be protected by the separate regimes provided by statutory law.

The Equality Act is unlikely to assist legal action against religious organisations which refuse to conduct civil partnership registrations on their premises, even if it did amount to a form of discrimination. Paragraph 2 of Schedule 23 of the Equality Act provides a sexual orientation discrimination exemption for churches, synagogues, mosques and other religious organisations that refuse to facilitate civil partnerships.

Although religious organisations are protected, it could be argued that the religious organisations should never have been put in this predicament in the first place. Most, if not all religions believe marriage is for man and woman, so this could be seen as an offense towards their religious beliefs.

Archbishop Peter Smith of Southwark has strongly criticised the Government's intention to consider definition of marriage to include same-sex couples. He argued that marriage

‘ did not belong to the state..... It is a fundamental human institution rooted in human nature itself. It is a lifelong commitment of a man and a woman to each other, publicly entered into, for their mutual well-being and for the procreation and upbringing of children. No authority – civil or religious – has the power to modify the fundamental nature of marriage.....’ A consenting minister is perfectly free to hold a religious ceremony either before or after a civil partnership. That is a matter of religious freedom, but it requires no legislation by the state.’[28]

This could be argued that the Government may have exceeded its boundaries.

If religious organisations refuse to carry out a civil partnership, could this facilitate the diversity between the marriage and civil partnership Civil partnerships are alleged to be marriage in all but name under UK Law;[29] which is explained in *Wilkinson v Kitzinger* (2006).[30] The claimants argued:

‘...simply not acceptable to be asked to pretend that this marriage is a civil partnership. While marriage remains open to heterosexual couples only, offering the ‘ consolation prize’ of a civil partnership to lesbians and gay men is offensive and demeaning.... access to this institution is an equal rights issue.... the argument of ‘ separate but different’ is unacceptable..... marriage and civil partnership is clearly not equal...’[31]

This quote shows that civil partnership is not enough and same-sex couples want everything heterosexual couples are entitled to, including the title. The claimant see civil partnership as a consolation prize, and describes it as

offensive, surely this confirms that civil partnership is not enough for some couples and cannot be considered equal if they cannot have the title 'marriage', let alone a religious activities.

Any marriage which is celebrated in UK must be registered in accordance with s 53 Marriage Act 1949. This registration is proof that the ceremony did take place. However, failure to do so will hold the marriage as void. If they have undergone a ceremony they would need to show beyond reasonable doubt the marriage was invalid. This is the only way to presume if there is a marriage or not.

There are possibilities of a presumption of marriage. In *A-M v A-M*, it was presumed that they married overseas, and was held as a non-marriage.[32] However, *Martin v Myers* presumed marriage was rebutted.[33]

The Matrimonial Causes Act 1973, s 11-13 sets out the grounds in which a marriage is voidable. In addition, a marriage can come to an end.[34] Where a marriage is annulled, the law recognises that there has been a flaw in the establishment of the marriage, rendering it unsuccessful. A divorce is when the creation of the marriage is considered proper but subsequent events signifying that the marriage should be brought to an end.

A Civil Partnership can end in either annulment, a death of a party, or on an order of dissolution. Dissolution is the termination of a civil partnership; this is divorce for civil partners. This is done in the same manner as divorce for civil marriage.

Dissolution is the equivalent of divorce. The process for dissolution of civil partnership is the same as for divorce. The only exception is adultery, which is a specific legal term relating to heterosexual sex and cannot be used as grounds for dissolving a civil partnership. If your partner is unfaithful the grounds for dissolution would instead be unreasonable behaviour.

The question which needs to be raised here is, why? If same-sex couples have been given the right to form a legally recognised marriage and are now allowed to form their civil partnerships on religious premises, which was once only for married spouses, Parliament must be able to amend the legislation to enable civil partners to get divorced. The fact that dissolution is only for civil partners segregates them from married spouses, adultery formed by same-sex couples should be adultery and not be classed as unreasonable behaviour.

It is apparent that people choose to form a marriage or civil partnership for many different reasons, although there are three which stand out the most. The formation of legal relationships seems to vary with both similarities and differences between them, not forgetting when these relations sadly come to an end. It seemed almost absurd that a civil partnership ends in dissolution because of the word 'adultery', with a slight amendment both civil partners and married couples can end in divorce.

There are surprisingly only a few differences between civil partners and married spouses, but why is this, considering the reason for civil partnership being passed. Stephen Cretney explained,

‘ the care taken by Parliament to ensure that marriage and civil partnerships were treated in the same way is revealed by the fact that the CPA 2004 amends legislation as diverse as the Explosive Substance Act 1883 and the Law of property Act 1925’.[35]

Parliament has unquestionably given same-sex couples more rights than they previously had, however if this were true, why are there are still alterations to be considered:

At present, civil partnership can only be a civil and not religious procedure, and even though the law says it can now take place on religious premises, it is down to the religious organisations discretion. Furthermore, opposite-sex couples can, in relevant circumstances, choose to have either a religious or a civil marriage ceremony.

A civil partnership is formed when the second partner signs the relevant document, whereas a civil marriage is formed when the couple exchange spoken words and then the register is signed.

Adultery is not a ground for dissolution of a civil partnership (as it is for divorce), nor is consummation a measure for validity (as it is in marriage).

This could be due to the fact that the Civil Partnership Act 2004 carefully avoids basing civil partnership on a sexual relationship. Baroness Scotland said,

‘ There is no provision for non-consummation in the Civil Partnership Bill. We do not look at the nature of the sexual relationship; it is totally different in nature.’[36]

This may signify that there was and still is a reluctance to accept homosexual relationships at full value. Non-consummation cannot invalidate a civil partnership and adultery is not a ground for dissolution, this is because the law regards the marital relationship as essentially a sexual one, unlike civil partnerships. The possibility of a non-sexual civil partnership could question the legality on forming a civil partnership with blood relatives. [37]

Weighing up the law on marriage and civil partnership shows that there are differences which prove civil partnerships have not achieved the same privileges as a marriage. Looking at the listed rights and responsibilities of a civil partnership should help to continue in the search for an answer.

Chapter 2- Respective rights and responsibilities

This chapter will explore the rights which same-sex couple's gain from entering a civil partnership and compare them to their rights before the Civil Partnership Act 2004 became part of the UK legislation. In addition, the distinctions found within the first chapter will aid in the investigation to whether these changes and differences could be considered right or wrong towards homosexual couples.

In *Secretary of State for Work and Pensions v M*, [38] it was noted that civil partnerships have 'virtually identical legal consequences to marriage'. Lord Filkin, the Minister of Constitutional Affairs said that marriage was:

'A template for the rights and responsibilities that go with the civil partnership.' [39]

If this is the case, assessing their rights and responsibilities should show similar results.

The Civil Partnership Act has theoretically given civil partners important legal rights and responsibilities of a civil marriage. Section 254 and Schedule 24 CPA 2004 places civil partners in the same positions as spouses. There are differences in the language used, however no real difference in the rights made available.

Civil partners have the same rights and responsibilities as a married spouse in many areas including: tax, social security, parental responsibility for their partner's child, rights for immigration and nationality purposes, the right to receive bereavement benefit if their partner dies, and domestic violence protection:

Like traditional marriage, those that are involved in a civil partnership are exempt from being required to testify in court against one another.

These rights and responsibilities have been given to same-sex couples as a way to maintain equality, additionally; it has been reluctant to launch same-sex marriage because of the religious views of holy matrimony.

With this said, there is a definite improvement towards making it better towards civil partners. Prior the Civil Partnership Act, homosexual couples had no rights in the UK at all, and their relationship was once deemed offensive. The English law identified anal intercourse and bestiality as offences punishable by hanging as a result of the Buggery Act 1533.[40] It seems rather callous to compare the two.

However, many changes and enforcements have been made in order to actually enable the rights and responsibility of civil partnerships to match those of a married couple. Section 61 of the Offences against the Person Act 1861 removed the death penalty for homosexuality. Nevertheless, only male homosexual acts still remained illegal and were punishable by imprisonment and section 11 of the Criminal Law Amendment Act 1885 extended the laws regarding homosexuality to include any kind of sexual activity between males. [41] The decriminalisation of homosexual acts was established in 1967.[42]

In spite of not having any rights, the Adoption and Children Act 2002 allowed same-sex couples to adopt children before the Civil Partnership Act 2004 was passed; formally a joint application for an adoption order could only be made by a married couple. Nevertheless, in 2002 it was clear that adoption applications could be made by an unmarried couple. This is defined as two people (no matter the sex) living together as partners in a long-term family relationship.[43] Now, with consent from the Civil Partnership Act, civil partners may choose to legally adopt their partner's child.

Although this is now possible, same sex couples formally recognised relationships with their partners child was not recognised in law or socially to the same degree as a married spouse before 2004.[44]

These rights have helped civil partners to a great degree. Their sexual orientation is no longer such a concern. Until now, there were several cases which had to determine whether having gay or lesbian relationships would affect the residence of the child. In *Re G*, Lord Thorpe had said that judicial

attitudes towards homosexuality were very different today than it was twenty years ago.[45]

Author J Herring states: [46]

‘ Lord Thorpe indicated that there should be no difference between a case involving a women who had received assisted reproductive treatment with a partner who was male from where she was female’.[47]

This indicates that today’s judicial system is up to date with society and the changes that have occurred over the years. It argues why there should be a problem with same-sex couples wanting to receive reproductive treatment. For those with religious views, same-sex couples cannot reproduce and this could be seen as an act against nature. The Human Rights Act states ‘ the right to privacy and respect for family life’.[48] Therefore, if same-sex couples were prohibited from accepting such treatment it would be a breach of their human rights

Prior to the civil partnership coming into force, homosexual couples who lived together had the same legal rights as any heterosexual couples which had chosen to cohabit, (which amounted to nothing in actual fact).[49] When a relationship had broken down or a partner had died, they had no right to automatically claim a share of the home they lived in together if the deeds did not specify the partners’ name. [50]

Civil partners were not given automatic parental rights over children. This meant they did not have a say on medical treatment or schools. The next-of-kin rights were not acknowledged at the time and no matter how long they

had lived together financial support could not be claimed. Inheritance tax would also have to be paid by the partner on any home that was jointly owned.

However, some discriminatory legislations have been repealed, such as section 28 of the Local Government Act,[51] which made the promotion of homosexuality illegal (S28a), and the 2008 Human Fertilisation and Embryology Act now recognises same-sex couples as legal parents of children conceived through the use of donated sperm, eggs or embryos.[52]

There is evident progress being made in this area, but still does not make up for civil partners being denied the right to call themselves ‘ married’ as well as divorce . As they are now able to enter into civil partnerships on religious premises by law, which was one of the main issues and debates to begin with, this should have some sort of impact on changing things

Until now, this dissertation has generally focused on why same-sex couples cannot marry and how discriminatory the UK legislation is being. However, a question of why civil partnerships exist at all, maybe an interesting thought. A civil partnership was not just intended to propose inferiority, but rather difference. Homosexual couples should have the confidence in themselves and their relationships to develop their own institutions and traditions, which will ultimately grow to become as respected and established and heterosexual’s relationship. Why should same-sex couples fight for their rights to have a legally recognised relationship, only to be given marriageSame-sex couples should be proud to have their own identity and traditions, as it is something they have had to fight for over many years.

In many ways, Civil Partnerships are already ‘ marriage’, in that they give many of the same rights, but aren’t allowed to be the equivalent of marriage since that’s reserved for straights. If anything, allowing heterosexual couples to form civil partnerships and homosexual couples to marry could either (1) strengthen both, since they would each have an equal validity, allowing either to choose based on what was important to them or, (2) make the significance of marriage become minimal. Heterosexual couples choose to join in civil partnerships to avoid marriage and divorce costs.

Marriage and civil partnerships represent the exact same commitments, but with different names. By attempting to strip heterosexual institutions of their identity and tradition, (by granting homosexual couples access to them), could imply same-sex couples imitate anything heterosexuals do. This will raise the problems chapter three is going to discuss.

In the next chapter, issues involving discrimination and what same-sex couples want in regards to their relationships, will be brought up and discussed. This will include the opinions of those in a same-sex relationship, feminists and those with religious beliefs. Do they agree with the idea of ‘ gay marriage’?

Chapter 3- What do same-sex couples want Civil partnership or marriage

This third chapter will attempt understand what same-sex couples want in regards to their relationships. It may show that same-sex couples want more than civil partnership and marriage could be the answer, so why has it been restricted?

Many people with strong religious beliefs have different views and opinions on whether or not civil partnerships are right or wrong, are entitled to the ‘ marriage’ status, or should be allowed to take place on religious premises. Some feminist believe marriage should be removed all together, while others, such as Sir Elton John feel as though civil partners should appreciate what they are currently entitled to.

Do same-sex couple’s feelings really count?

Although civil partnerships bestow many of the same rights and responsibilities as marriage, there have been calls for same-sex marriage to be permitted. The law does not allow this at present, and in this 2006 case below, the Family Division ruled that this does not constitute a breach of human rights legislation.

In *Wilkinson v Kitzinger*, Sir Mark Potter said:

‘ Parliament has taken steps by enacting the Civil Partnership Act to accord to same-sex relationships effectively all the rights, responsibilities, benefits and advantages of civil marriage save the name’; and the concept of civil partnership was described as a ‘ parallel and equalizing institution designed to redress a perceived inequality of treatment of long-term monogamous same-sex relationships, while at the same time, demonstrating support for the long established institution of marriage’.[53]

It was held that there was no breach of Art 12 because it specifically states men and women are to marry. Even if it could be otherwise interpreted, this

was an area where national law could determine who could marry who, and there could be justification for discrimination.[54]

This was also said more recently, in June 2010, in a case brought by two Austrians, the European Court of Human Rights ruled that there was no obligation under Article 12 for states to recognise same-sex marriage.[55] This illustrates that there is still no change and the Human Rights Act may not be as effective as believed to be.

When civil partnerships were introduced, the Labour Government's stated view was that it was not necessary to extend eligibility to heterosexual couples because they already had the option to marry and the legal consequences of the two institutions are very similar.

The Civil Partnership Act 2004 prohibits opposite-sex couples from entering into a civil partnership. In 2009, this prohibition was challenged by Tom Freeman and Katherine Doyle, who attempted to register as civil partners at their local registry office. On being turned away, the couple were reported to have said that they would consider challenging the legislation in the European Court of Human Rights (ECHR) claiming breaches of Articles 8, 12 and 14.[56]

According to Robert Wintemute, Professor of Human Rights law, Kings College London,

‘ By excluding same-sex couples from civil marriage, and different-sex couples from civil partnership, the UK Government is discriminating on the ground of sexual orientation, contrary to the Human Rights Act..... The twin

bans violate Article 14 (protection against discrimination), Article 12 (the right to marry) and Article 8 (the right to privacy and respect for family life) The rights attached to civil marriage and civil partnership are identical, especially with regard to adoption of children, donor insemination, and surrogacy. There is no longer any justification for excluding same-sex couples from civil marriage and different-sex couples from civil partnership. It's like having separate drinking fountains or beaches for different racial groups, even though the water is the same. The only function of the twin bans is to mark lesbian and gay people as inferior to heterosexual people. [57]

Professor Wintemute has a respectable argument here. He explains that UK Parliament has given same-sex couples virtually identical rights as opposite sex couples, but still feels the need to keep them separate. This can be seen as discrimination against their sexual orientation and is not acceptable.

Human rights campaigner Peter Tatchell, who has the same opinion that the ban on heterosexual civil partnerships, is heterophobic, discriminatory and offensive said,

‘ I want to see it ended so that straight couples like Tom and Katherine can have the option of a civil partnership’.[58]

This quote shows a very bias opinion on Peter's behalf. He campaigns for human rights; however seems to only show concern for the heterosexual couple's rights. If it were possible for heterosexual couples to form a civil

partnership, it should surely open up the opportunity for same-sex couples to marry. (Judicial review should be taken into consideration).

Despite the fact same-sex couples now live a free and public life, and the liberal ideology is that we need to just ‘get over it’; many same-sex couples continue to experience a high degree of exclusion and segregation in many areas of society.[59]

Some same-sex couples see marriage as the only option to break this segregation, however Sir Elton John, who entered into a civil partnership in 2005, believes that the homosexuals have put themselves into this predicament. He said,

‘I don’t want to be married... David and I are not married. Let’s get that right. We have a civil partnership. What is wrong with Proposition 8 is that they went for marriage. Marriage is going to put a lot of people off. It’s the word marriage.’

The 61 year old believes that same-sex couples should be happy with a civil partnership as it gives them the same legal rights and protection as heterosexual couples. He added, ‘I’m very happy with a civil partnership...if gay people want to get married, or get together, they should have a civil partnership.’ [60] Proposition 8 (or the California Marriage Protection Act) gave same-sex couples the right to marry in California,[61] Sir Elton John believes this was not necessary and could, in his own words, ‘put people off’.

Nevertheless, this is not the case. There are two separate but connected arguments, based on perceived rights under the Human Right Act 1998, that same-sex couples should be able to marry and opposite sex couples should be able to enter in to a civil partnership. Could this be considered illogical as both the significance of marriage and civil partnership could be jeopardised.

There are many people in today's society, who are for and against such things as, same-sex couples wanting civil marriages and different-sex couples wanting civil partnerships, but before now many people had proposed arguments against heterosexual marriage for varied reasons. In an article labeled ' Scenes from the Family', a feminist's point of view suggested that a woman's identity disappeared once in a marriage and that marriage is bad for women.[62]

There are some feminists who seek the end of formal marriage. Individuals such as Sheila Cronan claim that,

' Freedom for women cannot be won without the abolition of marriage.'[63]

Feminists also stressed that women needed to take control of their sexual and reproductive lives in order to avoid being merely ' sex objects', or as dutiful wives and mothers.[64]It could be taken into consideration that the feminist may have a very passe perception of what marriage involves. Women now have rights to stop them from being treated how they once were.[65]

The right to marry or not, has historically been more of a man's right than a woman's. Although, there are men who think that marriage is unfavorable to

men, particularly the financial consequences of divorce. Men who want gender equality claim that there is a continuing societal bias favoring women as custodial parents in divorce laws, and is unjust to men when the marriage fails.[66] The majority of unsuccessful marriages end with the mother having full custody of the children, although many men are now stepping to the plate.

Various feminists also had three arguments against gay marriage which tended to fall into three broad categories:[67]

The first argument is traditionally closest to faith. For those who have a strong belief in their religion, it is expected that they will be against homosexuality. Religion plays a big role in the United Kingdom, and it is precisely because this, it is scarcely used by opponents of same-sex marriage in public debates.

The second argument involves children and this tends to only show up at the most heated political moments, often with devastating effect. The Proposition 8 campaign in California, opponents of gay marriage repeatedly brought up innocent children in their advertising campaign. Also, same-sex parents and gender roles, cause fear, that children of same-sex parents are worse off, and children of same-sex parents are more likely to become homosexuals. Is this so wrong? The fact that people worry about the younger society becoming gay demonstrates discrimination.

The third argument is that homosexual marriage threatens heterosexual marriage. This argument follows from the idea that marriage is a singular

societal institution that is instrumental in keeping heterosexual couples together. If the definition of the institution changed, then heterosexual couples would be less likely to think marriage is important, and therefore less likely to stay together for the sake of their children. This argument could be argued against. Not all heterosexual couples marry, particularly because they do not agree with the rules integrated in marriage, and for those who feel this way should have options. It is not the issue of whether people consider marriage important or not, that will affect their relationship, if a couple breaks down the marriage will come to an end. Now a day's married couples do not stay together for the sake of their children, there are many procedures that take place to help with this situation, such as joint custody.

As stated before, one of the core reasons why people oppose same sex marriages is because they believe that it is in opposition to their religious beliefs. [68]

This topic is awkward as sex is a very intimate and a personal area for people. There are religious people who argue that the Bible is against homosexuals and Rabbi Yitzhak Schochet, from Mill Hill Synagogue in north London and a columnist for the Jewish News, told the BBC:

‘ Same sex marriages have no place in any house of religious worship’. [69]

Religious organisations have a right to refuse same-sex marriages taking place on their premises. Is this not discrimination?

In the past there have been many attempts by the gay community trying to engage in marriage, but unfortunately none were successful. This led to

eight couples (four heterosexual and four homosexual) filing applications for civil partnerships and marriage respectively, which were all rejected. For this reason activists from the Equal Love campaign are challenging the UK law, arguing that the prevention of equal treatment is contrary to the Human Rights Act. [70]

Campaigners have launched a legal challenge at the European court of human rights in an attempt to change ‘ unjust and discriminatory’ legislation that prevents gay couples from getting married and straight couples from entering civil partnerships. Gay rights activist Peter Tatchell said,

‘ A similar ban on black marriages would provoke an outcry. So why should the ban on gay marriages be tolerated?...The bans on same-sex civil marriages and opposite-sex civil partnerships are a form of sexual apartheid – one law for gay couples and another law for heterosexual partners. Two wrongs don’t make a right’.[71]

Comparing black marriage and same-sex marriage may be perceived as a bit of an exaggeration. However, both black and Homosexuals have had to endure immense struggles and torment to get where they are now and somehow makes a very admirable argument comparing the two.

One of the essential questions underlying the debate over gay marriage is: ‘ what is the point for gay marriage. Aside from certain property and legal issues which could in theory, be solved by other laws, what point are homosexuals trying to make in attempting to get marriedWhy is it so

important to be able to hold up a marriage certificate and say ‘ we’re married’ instead of simply saying ‘ we’re a couple’ without a certificate?’[72]

Chris Burgwald, asked this question:

‘ Gay marriage advocates argue that this is an equal rights issue. But what is it that a married hetero couple can “ do” that an unmarried gay couple cannot “ do” Under current law, gays can commit themselves to one another... they can live together... what can’t they do that married people can doNothing, as far as I can tell’.[73]

This is a very good point, same-sex couples cannot marry ‘ technically’, nevertheless they can do have virtually identical rights as marriage. Chris seems to think this should be good enough, as they had no rights at all. The Civil Partnership Act has enhanced their lives drastically. Civil partnership should be recognised for what it is and same-sex couples, who want to marry, may want to consider the advantages of civil partnership and treat it as their own institution, one to be proud of.

The challenge by the eight couples is being lodged with the European Court of Human Rights in Strasbourg because courts in the UK do not have the power under the Human Rights Act to order the UK Government to change the law. If the application is successful, the British Government will be required to amend the law to open up civil partnerships to heterosexual couples, and to allow homosexual partners to have civil marriages, Mr. Tatchell said.

‘ We are very confident that eventually the European Court of Human Rights will overturn both the ban on gay civil marriages and heterosexual civil partnerships... ‘ These bans are a form of discrimination and discrimination is contrary to the principles of the European Convention’.[74]

If this were possible, then it may have positive effects on the lives of those same-sex couples wanting marriage and heterosexual couples wanting civil partnerships. However, for those couples who want things to remain as they are, they may see their traditions and institutions lose its value. People could also take advantage of this right, as heterosexual lovers in France are increasingly taking part in ‘ gay’ civil partnership ceremonies so as to avoid the future possibility of expensive divorces. [75]

While it is apparent that previously, the idea of homosexual relationships let alone civil partnerships was seen as indecent behaviour. The laws have changed and a number of people in today’s society have come to terms with these changes, while several still have negative feelings.

Legislation was not imposed to force people who think homosexuality is immoral and wrong to change their views, however it does require them to be more tolerant and treat people alike. [76] The Civil Partnership Act was imposed to allow same sex couples to commit to each other in several ways that married couples can, but yet some same-sex couples are still not satisfied and say it isn’t enough.

The deputy leader of the Liberal Democrats said that gay couples are likely to gain full rights to marriage under the current Parliament. This would

represent a revolution for gay rights, but there is still a long way to go before same-sex couples may be able to achieve full rights to marry as they are debatably entitled too, under human rights law.

Simon Hughes MP has said that Liberal Democrat MPs would be consulted on the rights of gay couples. He said

‘ I don’t know the answer because we haven’t had the discussion... I see absolutely no reason why we shouldn’t all be able to support what Nick Clegg said, which is that it would be appropriate in Britain in 2010-11 for there to be the ability to have civil marriage for straight people and gay people equally’.[77]

As well as the Government announcing its intentions to launch a consultation, on the implementation of section 202 of the Equality Act 2010. The Government further announced that it would consult on a move towards equal civil marriage and partnerships. The question is, why has it taken so long or is it really in the best interest of same-sex couples.

This chapter has shown the reason for some same-sex couples wanting to marry and why one in particular objects to their decision; along with why same-sex marriage has not been approved until now and what people’s thoughts are on the topic. Clearly, even with the negative opinions same-sex couples are fighting for their rights and with heterosexuals wanting the same (civil partnerships) this could work to their advantage. Legal action is being taken at present, but will it be successful.

Chapter 4- Same-sex couples rights & possible changes within the law which could be made

This fourth and final chapter will look into why same-sex marriage is prohibited in the United Kingdom, whilst several other countries in Europe have removed the ban on same-sex marriage. In particular, this dissertation will compare the UK to one of the first European countries to do so and try and find out why the UK has failed to make this change.

In order to see if there could be an opportunity for same-sex couples to get married and straight couples to have civil partnerships in the United Kingdom, their rights as human beings would need to be taken into consideration. The European Convention on Human Rights is an international treaty to protect human rights and fundamental freedoms in Europe; [78] however same-sex couples are still trying to attain the right to marry in the UK. What rights do same-sex couples have under the Human Rights Act 1998 and could this make a difference to what they are entitled to?

The introduction of civil partnerships in the UK, under the Civil Partnership Act 2004, contributed to great equality for people of all sexualities in several areas of life. In addition to detailed legislation which now makes it unlawful to discriminate against people on account of sexual orientation,[79] the Human Rights Act has perhaps offered some sort of protection and guidance on an individual's human rights.

The UK Human Rights Act declares individuals are entitled to have the other Convention rights applied equally regardless of their sexual orientation. [80]

Article 8 of the Convention concerns the right to private and family life; along with the right to choose one's own sexual identity.[81] Article 14 of the Convention is the right to be free from discrimination.[82]

Sexual orientation equality has allowed same-sex couple's the freedom and protection they deserve. Countless developments in UK legislation and rights within Human Rights Articles concerning civil partnerships and family life have come a long way, transforming the everyday lives of homosexuals.

Protective legislation for lesbians and gay men did not always exist and all aspects of same-sex male sexual activities were criminalised and punishment by death.[83] There were many political debates considering the law on homosexuality. Adoption, for example was only designed for heterosexual couples before 2002. Homosexual's rights to parent or conceive children, and to adopt or foster, prior the Adoption and Children Act 2002 was considered harmful and was suggested that children could not develop normally within gay households.[84]

There have been exceptional levels of new legislation and supporting guidance in the UK, acknowledging and protecting the rights of same-sex couples and their families. This includes discrimination on the grounds of sexual orientation in three areas: sexual practices, employment and family life.

Marriage between two people of the same-sex has been a debate over many years, the UK law has tried to compromise and brought forward many great

opportunities for civil partners to live a more comfortable lifestyle, but seems to be vigilantly avoiding the word ‘ marriage’.

Why is the UK so determined not to allow gay marriages, when it has clearly been approved elsewhere?

It seems to be that some countries base their laws with the existing homosexuality laws used within other countries, many countries have identical, or at least, similar laws to others when it comes to gay marriage.

(LGBT) Lesbian and gay rights in a country permit its citizens to receive equal

treatment without considering their gender or sexual preferences. However this does not suggest gay marriage is always accepted.

In 2005, Spain, which has a very religious culture comparable to the United Kingdom, became the fourth country in the Europe to allow same-sex couples the same rights as married heterosexual couples. The Netherlands and Belgium legalised them in 2000 and 2003.

Spanish President, Jose Luis Rodriguez Zapatero’s claimed he would fight discrimination against homosexuals, the day he was confirmed as prime minister and shortly after winning the election Mr Zapatero ruling Socialist government proposed the bill. During the debate before today’s historic vote, Mr Zapatero acknowledged Spain was joining the growing numbers of countries legalising same-sex marriages. He said,

‘ We are not the first, but I am sure we will not be the last... After us will come many countries, driven, ladies and gentlemen, by two unstoppable forces: freedom and equality.’[85]

Mr Zapatero had a very honest and realistic opinion for his decision to legalise gay marriage, however the consequences are uncertain.

In this case, the Roman Catholic Church and conservative leaders opposed the bill, and took the unusual step of endorsing a rally in which hundreds of thousands, and marched through Madrid protesting against the legislation. The spokesman for the Spanish bishops’ conference, Antonio Martinez Camino, said that allowing gay marriage was like ‘ imposing a virus on society – something false that will have negative consequences for social life’. [86]

The Spanish parliament voted to legalise gay marriage despite the heavy opposition from the Roman Catholic church and allows married homosexual couples equal rights to inheritance, to adopt children and the same rights as married heterosexual couples when getting divorced.

Gay rights activist Beatriz Gimeno said,

‘ This victory in Spain will make many other countries start the battle for equality because it is possible... if Spain, a Catholic and southern Mediterranean country with a short history of policies in protecting social freedoms can do it, it is perfectly possible that any other European country can do it.’[87]

With evidence showing same-sex marriage is possible in such a religious country, the United Kingdom could employ this as a guideline to enable same-sex couples to marry in Britain. Spain managed to do this in spite of the objections from the Roman Catholic Church.

Same-sex couples, who want to marry, want to know why they cannot, and if they are entitled to such rights and responsibilities of a civil marriage what harm would there be in passing on the title ' marriage'. Spain was able to do so by adding a sentence to their existing law: ' be the parties of the same sex or of different sex'. Therefore, why is this so impractical for the UK law to adopt?

Homosexuality is no longer a restricted in the UK and there have been many divisions of the media which relate to same-sex couples. There are television programmes flaunting homosexuality, which have had fairly high ratings, such as ' Will & Grace', Glee' and ' Sugar Rush'.^[88] This could imply that same-sex relationships are candidly accepted in the country; but still this makes no difference to the UK law and their on-going debate over same-sex marriage.

Labour baroness Scotland made clear:

' The bill does not undermine or weaken the importance of marriage and we do not propose to open civil partnership to opposite-sex couples. Civil partnership is aimed at same-sex couples who cannot marry...we continue to support marriage and recognise that it is the surest foundation for opposite-sex couples raising children'.^[89]

From the very beginning, it seems to be apparent the UK Parliament had no intention of allowing same-sex couples anything more than a civil partnership and civil partnership was never going to be a relationship heterosexuals could consider forming. Indeed, the civil partnership law in the UK may have been passed solely to avoid the opening up of legal marriage to same-sex couples.

However, the Conservatives have recently become the first of the three main political parties in Britain to set out an explicit commitment to consider allowing homosexual couples to marry. The party stated that, if were elected, it would ‘ consider the case’ for civil partnerships between same-sex couples to be ‘ called and classified as marriage’.

Their Contract for Equalities, stated:

‘ We support civil partnerships and will recognise civil partnerships in the tax system. Our plans to end the couple penalty in the tax credits system and to introduce a new system of flexible parental leave will apply to all couples, regardless of whether they are heterosexual or same sex couples... we will also consider the case for changing the law to allow civil partnerships to be called and classified as marriage.’[90]

How is this possible, can the Conservative party really make such promises to the gay and lesbian community, when Stonewall said that it expects to see cases being brought on practical discrimination issues, but the Human Rights Act will not give same-sex couples the right to marry since the Act cannot override British legislation, campaigners say that the cultural impact

on the courts' interpretation of current legislation, and the effect this will have on future law making, is extremely important for the gay rights cause. [91]

An option worth considering is to abolish marriage; all adult intimate relationships should be regulated under one single statute. The Matrimonial Causes Act 1973 could be repealed, instead of being amended to include same sex couples. As a consequence, there would, be no such thing as (legal) marriage. Marriage as a legal construct is a heterosexual and patriarchal institution and is therefore so fundamentally flawed it is beyond the possibility of successful reform or repair. This would have serious consequences on religious organisation, who will oppose to this idea as it shows a lack of respect for their religious beliefs.

The present system of having two distinct legal means of relationship recognition is parallel to sexual apartheid and is therefore unsustainable in the long term. Having a legal system which recognises only one form of legal partnership would end discrimination.[92]However, it would not be an easy transformation as many will object.

Nevertheless, the government has been very clear throughout the process that it has no plans to bring in same-sex marriage. Marriage is an institution for opposite-sex couples with its own historical traditions. Civil partnership provides a separate and distinct relationship, which is secular in nature and only open to same-sex couples.[93]

We have established that the UK have restricted civil partnership to same-sex partners, as well as the Government not yet proceeding to allow same-sex couples to marry. This is due to the 'separate but equal' institution of civil partnership and therefore, those who believe that civil partnership will soon become same-sex marriage may be mistaken.

However, the proposed consultation on equal civil marriage and partnerships in February 2011, announced the Government would be consulting on a move towards equal civil marriage and partnerships. The Ministers have identified a reason to move towards equal civil marriage and partnerships, and will be consulting further how legislation can develop, working with all those who have an interest in the area.

Minister for Equalities, Lynne Featherstone has noticed there is a real desire to address the differences between civil marriage and civil partnerships after speaking to the 'Lesbian, Gay, Bisexual and Transsexual people and campaign groups, they are the first British government to formally look at what steps in which can be taken to address this. However, is this just a broken promise, what makes their pledge worth taking into consideration?

The Government quoted the welcome given to this proposal by Michael Hutchinson, for Quakers in Britain, who said:

'Quakers warmly welcome the move to allow the celebration of civil partnerships on religious premises. We are also heartened by proposals to address calls for full equality of civil marriages and civil partnerships, as our religious experience leads us to seek a change in the law so that same sex

marriages can be celebrated, and reported to the state in the same way as heterosexual marriages.'

This is an intense proposal to bring forward, although this has not officially brought forward a promise of change, same-sex couples will be relying on them for a change. There are many people who need to be taken into consideration, and the consequences of their actions need to be taken into consideration: is this in the best interest of the country, do same-sex couples need to marry and how will this affect religious organisations.

The UK Government should focus on what it needs to do to please its British citizens, however no matter what decision they make not everyone will be in agreement. The issue of whether same-sex couples need to marry is a huge point to consider. The Government could consider allowing same-sex marriage, refusing same-sex marriage, or coming to a compromise, allowing same-sex couples to marry abroad and keeping their title in the UK. This last option may not be achievable as it could cause confusion and inconvenience. Religious organisations can allow civil partnerships to take place on religious premises and give a blessing, but at their own discretion. Many religious organisations have refused to participate in these blessings as it is against their beliefs, so asking them to proceed with a civil wedding for same-sex couples may not be practical. Even if the law was to change, there can be no marriage without the participation of religious organisations.

It is clear to see that same-sex marriage is possible, the decision in *Halpern v Canada (Attorney General)*, remains the most important, because it was the

first to reformulate the opposite-sex definition, and to order that same-sex couples be permitted to marry, with immediate effect.[94]

The UK law seems to ignore what other countries are doing in regards to same-sex marriage and sticking by their beliefs to what is right for their country. The initial aim of the Civil Partnership Act was to promote a stable and committed relationship between same sex couples, and that is what they believe they have done. This may in fact work for the UK, they have allowed same-sex couples to take their relationships further, along with the rights and responsibility of those who are married, considering some countries have not taken these steps as yet, is it not ok for the ' marriage' title to stay as it is?

Although, it may be seen as discriminatory towards same-sex couples to only be given the right to a civil partnership, it is arguable understandable that ' marriage' has been seen in a specific way for generations, in order to change the significance of the word would not be a simple task as there are many complications attached. If these procedures were to be easy and the UK Government wanted these changes, legislation would have been passed. There is no simple solution to this dilemma; no matter the outcome many will be offended.

Conclusion

To conclude, the UK government have been hesitant in allowing same-sex marriage. One of the reasons for this is it is convinced that legalising same-sex marriages will lead to a decline in the rate of heterosexual marriages,

although this is could be argued. If same-sex couples were approved to marry and heterosexuals could have civil partnerships, the heterosexual couples may to become civil partners as a way to avoid such things as divorce expenses. However if the Civil Partnership Act was abolished altogether then there would be no other option and marriage rates should continue to grow.

It is believed people do not choose to be heterosexuals or homosexuals; an