

The concepts of equality and non-discrimination in europe

[Sociology](#), [Social Issues](#)



Abstract

There has been much discussion as to whether the ECHR's attempts to recognise and protect the right not to be discriminated against on the ground of sexual orientation have been successful. This is because, although the UK has in recent years made positive changes towards the equality of same-sex couples, discrimination is still prevalent in many other countries. This study aims to identify the extent to which such discrimination still exists and consider how effective the ECHR has been in preserving these rights.

Introduction

It will be examined the extent to which the European Court of Human Rights (ECHR's) case law has recognised and protected the right not to be discriminated against on the ground of sexual orientation. This will be examined in respect of same-sex marriages and by considering whether same-sex couples are still being discriminated against or whether the ECHR has been successful in helping to protect the interests of such couples. Various case law of the ECHR will be examined and a review of the academic literature in this area will be conducted.

These will be acquired by accessing relevant text books, journal articles, online databases and governmental reports. Once all the applicable information has been gathered an appropriate conclusion will then be drawn demonstrating that the ECHR has made significant attempts to protect the rights of individuals when it comes to their sexual orientation. However, it

will be demonstrated that whilst this has proven successful in the UK, other countries are still reluctant to employ the ECHR's approach.

Literature Review

The Marriage (Same Sex Couples) Act 2013 came into force on the 13 March 2014 to legalise same sex marriages as this was previously prohibited under section 11 (c) of the Matrimonial Causes Act 1973. This prohibition led to much debate and controversy for a number of years as it was felt that same-sex couples were being discriminated against and that their right to equality, as provided for under Article 14 of the European Convention of Human Rights 1951 (ECHR), as incorporated by the Human Rights Act 1998, was being violated. This controversy occurred regardless of the fact that civil partnerships were introduced under the Civil Partnership Act 2004 since it was still being argued that same-sex couples entering into a civil partnership were not provided with the same rights and responsibilities as heterosexual couples under a civil marriage. Inequality therefore still existed as the status of marriage was not capable of being acquired by same-sex couples. This was considered highly detrimental and it was argued by Francoz-Terminal that; " if at one time homosexuality was considered as a choice that implied no procreation, nowadays legal systems have had to face a new factual reality." [1] This highlights the importance of equality and it seems as though there has never been more of a pressing need for the provisions contained in the ECHR to be implemented. Not all agree that same sex-couples should have been permitted to marry rather than merely enter into a civil partnership, yet because of the increasing recognition of same-sex couples

in many European countries it was evident that the permitting of gay marriages have been relevant when discussing reforms in England and Wales.”[2]

There was clearly a pressing need for reform in this area since the 2004 Act had proven ineffective in providing same-sex couples with equal rights to heterosexual couples when it came to marriage. Nevertheless, whilst it was argued by some that civil partnerships were simply marriages under a different name, this was not entirely true. This is because the equal rights and responsibilities that were given to heterosexual couples were not being given to same-sex couples. For example, same sex couples were not allowed to get married in a church or other religious on the basis that these types of places are prohibited from conducting civil partnership ceremonies under the law. This was considered highly unfair given that some ministers were willing to marry same-sex couples; however they were prevented doing so by law. Modern beliefs that all people should be treated equally were therefore not being ascertained and all of the traditional views of marriage were upheld. Not all agree with the new changes, however, as churches can still refuse to marry same sex-couples which leaves same-sex couples open to further discrimination.[3] Yet, it is believed that the law should not restrict a person’s choice and that churches ministers should still have the ability to choose whether or not they would like to marry same-sex couples. This provides a fairer system overall because although some churches will permit same-sex marriages whilst others will not, the fact that marriages can be conducted in churches in the first place is a major step forward.[4]

The debate as to whether same-sex marriages should be permitted has been going on for some time, and the courts have attempted to protect an individual's right not to be discriminated against on grounds of sexual orientation on marriage. In *The Attorney General for Ontario v M and H* [5] it was held by the court that; " provincial governments are to take legislative action to ensure that individuals in same-sex relationships are afforded equal treatment with others in marriage-like relationships." Regardless of these views, it wasn't until the ECHR began to recognise such rights that Parliament decided to take action. In *Schalk v. Kopf v. Austria* [6] it was made clear by the ECHR that; " a failure by a state to allow same-sex couples to marry amounted to a violation of the article 12 right to marry." This decision highlighted the need to make amendments to section 11 (c) of the 1973 Act so that same-sex couples were not being discriminated against on the basis of their sexual orientation when it came to marriage. It was quite surprising when the 2013 Act was implemented given the widespread concerns that existed and as put by Norrie; " the trouble with gay and lesbian people is that they are never satisfied. Give them a crumb and they want a slice of bread. Give them a slice of bread and they want a full meal." [7]

Nevertheless, although changes were made under the 2004 Act to provide same sex couples with equal rights to heterosexual couples, the ECHR did not believe that this went far enough and still found that discrimination subsisted.

It could be said that civil ceremonies were the same as marriages, yet because the nature of the ceremonies were different as well as the rights

that were provided to married couples, it was clear that further changes were needed if complete equality was to be attained. It was argued by Eireann that the 2004 Act was akin to marriage in that it allowed same-sex couples to “ formally declare their allegiance to each other, register their partnership and commit themselves to a range of duties and responsibilities.”[8] On the other hand, because equality of choice and opportunity was removed from same-sex couples, their rights under the ECHR were not being fully recognised[9], which is why drastic changes to the law were implemented in 2013. Whether all 47 countries will follow the ECHR’s decision in Schalkis is questionable[10], given the political backlash that some countries will be subjected to. Although the ECHR is of the view that same-sex marriages should be permitted, they are also aware of the fact that not everyone agrees with this position. As a result, they made it clear in their judgment that the choice to marry same-sex couples should still remain with the minister conducting the ceremony and that the rights of ministers should also be upheld.[11] Therefore, whilst it is important that the rights to equality are being maintained when it comes to the marriage of same-sex couples, it is also important that the rights of ministers not to be discriminated against if they choose not to marry such couples are also preserved.

The ECHR has made great attempts to recognise and protect the rights of individuals not to be discriminated against on grounds of sexual orientation over the years, which is enunciated in various case law decisions. An example of this can be seen in the Niemietz v Germany[12] case where it was

made clear that the right to a private life under Article 8 of the ECHR included the right to establish relationships with other human beings regardless as to whether they were of the same sex or not. Therefore, the fact that there were laws against same-sex marriages demonstrated that the right to a private life under this Article was also being violated. This was also identified in *Bensaid v United Kingdom*[13] where the court held that “gender identification, name and sexual orientation and sexual life” were all capable of protection under Article 8. Arguably, the ECHR has been a pioneer for same-sex relationships for some time and has clearly made significant attempts to eradicate discrimination on the basis of sexual orientation. In *Mata Estevez v Spain*[14] the Court held that same-sex relationships could be protected by the right to respect for private life, although it was held that homosexual relationships could not be protected by the right to a family life. However, this has since been resolved in the *Schalk* case above. The *Schalk* case is a major development within this area of the law, yet because many states have not yet legalised the marriage of same-sex couples it is manifest that the development of this area does remain ongoing.

It remains to be seen what changes, if any will be made by other Member States because although this was a positive decision inferences were not drawn by the Court. This leads to confusion as to whether puzzling all States should follow suit and as has been noted; “the door may have been unlocked but remains closed (or half open) for now?”[15] Consequently, even though same sex marriages are now being permitted in the UK,

inequality will still exist by the ability for ministers to refuse to marry same-sex couples. Whether this will ever be changed is doubtful since all individuals still have the right to freedom of belief and religion under Article 9 of the ECHR. Hence, there will still be many churches that will refuse to allow such marriages to take place, yet nothing can be done to stop this as this too will result in a violation of human rights. At present an attempt to strike a balance between these competing interests has been made and it is unlikely that discrimination on the grounds of sexual orientation with regards to marriage will ever be fully eradicated. Still, the rights same-sex couples have to marry has increased substantially over the years, though there will continue to be different views in relation to the acceptance of such marriages by society. Every person has a right to have an opinion and by forcing ministers to conduct same-sex marriages would seriously contravene. In addition to the UK, Belgium, the Netherlands and Canada, also allow same-sex marriages to be conducted, which demonstrates the movement that is being made towards achieving greater equality across the globe.

This is believed highly desirable and as noted by the court in *Fourie and Another v Minister of Home Affairs and Others*; [16] “the limitation of marriage to opposite sex couples was unconstitutional.” Same-sex marriages should therefore be recognised in all countries as societal views are continuously changing and same-sex couples are starting to become the “norm.” It is questionable whether this will be implemented by all and as stressed by Herring; “the tensions between the traditional family ideal of what a family should be like and the realities of family life today indicate that

family law is quite different from family law 30 years ago and where family law will be in 30 years time is hard to predict.”[17] Now that same-sex couples are able to marry under the 2013 Act, such couples are now able to claim a family status. This is necessary given that there is “ no institution of a de facto family” as pointed out in *McD v L & Another*. [18] It is thus in the best interests of a child to be served in a marriage-based family and because same-sex couples can adopt, it is necessary for them to be able to marry also; *N and Another v Health Service Executive & Ors* [19] Nevertheless, because same-sex marriages are not permitted in all countries, such as France, it cannot be said that the ECHR’s approaches have been completely successful. It was recognised by *Francoz-Terminal* that the emergence of same-sex families has been challenging for French Law, yet it has been said that the courts do actually seem prepared to meet these challenges.” [20]

Attitudes towards same-sex marriages have changed considerably over the years and are likely to continue to do so until such marriages are considered a normal part of society. As a result, “ the married family can no longer be assumed to be the near-universal institution of civil society it once was.” [21] Because of the changes that continue to be made within society, it is vital that the law is able to keep abreast with such changes which can be achieved by making sure individuals are not discriminated against on the basis of their sexual orientation. Conversely, it has been said that marriage is being undermined as a result of this, [22] yet the courts should not be able to interfere in one’s beliefs as shown in *Burden and Burden v UK*. [23] The right to marry is enshrined in human rights law and is thereby considered a “

fundamental part of the freedom of the individual to form personal relationships according to his or her own inclination.”[24] Resultantly, individuals should have the right to marry whoever they wish regardless as to whether they are of the same-sex or not, though it remains to be seen whether other European countries will adopt the same approach as the UK in protecting such rights.

Conclusion

Overall, it is evident that the ECHR has recognised the rights of same-sex couples for a number of years and has made great attempts to recognise and protect the right not to be discriminated against on grounds of sexual orientation. Nevertheless, it is only recently that the UK has implemented changes to reflect the stance taken by the ECHR by enacting the Marriage (Same Sex Couples) Act 2013. This Act makes it permissible for same sex couples to marry in religious settings. Although the Civil Partnership Act 2004 was said to provide similar rights, these were not considered enough and same-sex couples were still being subject to much discrimination. Since the 2013 Act was implemented, greater equality is now capable of being attained in the UK. The ECHR in *Schalkis* considered a major breakthrough in this area as this decision is what sparked the introduction of the new law. Nevertheless, because not all countries have followed the same approach as the UK, the ECHR still has some way to go in attaining equality for all. This is likely to prove difficult given the divergence of opinions that exist in this area, yet because the marriage of same-sex couples is becoming the ‘norm’, it is likely that other European countries will follow suit. The fact that

ministers are able to choose whether or not to conduct same-sex marriages also ensures that their rights are also being protected. This maintains a balance between the rights of individuals not to be discriminated against on grounds of sexual orientation with the rights of belief and opinion.

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