

Are gay rights human rights?

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The title of my talk this evening is, "Are gay rights human rights?"

The title asks a question, which is broadly this: can the rights that gay people ask for in contemporary societies around the world be considered as rights that are universal and fundamental to all human beings?

In other words, do you think that denying two people of the same sex the opportunity to marry – as most countries do, including in one part of our own – is an infringement of their human rights?

Or do you think that criminalizing men and women for engaging in same-sex sexual acts – as is the case in around 73 to 77 countries of the world (depending on how you count them) – is an infringement of their human rights?

If your answer to these questions is "yes", then you probably think that gay rights should be recognized and addressed by human rights instruments and treaties such as the International Covenant on Civil and Political Rights,¹ or the European Convention on Human Rights.²

If your answer is "no", then you probably think that these human rights instruments and treaties have little to do with the rights that gay men and lesbians assert.

You might, for instance, agree with Robert Mugabe, President of Zimbabwe, who stated, in a speech to the United Nations in 2015, that in his country:

"we reject attempts to prescribe new rights that are contrary to our values, norms, traditions and beliefs. We are not gays."³

In the UK, and in many other Western democracies, there has been a profound shift in the last 10 years towards recognizing that the rights that gay people claim are synonymous with human rights.

A key driver of that shift in the UK was the policy-agenda of the Labour government elected in 1997. Prime Minister Tony Blair reflected on this issue at his party conference in 2004:

“...remember when to be in favour of gay rights was to be a loony leftie... Now the parties compete for the gay vote ... So many things that used to divide our country bitterly, now unite it in healthy consensus ... Who did it? The British people, by voting for change ... Labour is working.”⁴

Mr Blair was right: in the first decade of the new millennium, “gay rights” became accepted as “human rights” in Britain.

It became absolutely clear that the relationship between gay rights and human rights had become “mainstream” when Hillary Clinton, then Secretary of State under President Obama, said in 2011, “gay rights are human rights, and human rights are gay rights”.⁵

Many people here tonight will agree with Mrs Clinton’s view.

The problem is – and this won’t be news to you – there isn’t general agreement in the world that gay rights should be recognized as human rights.

In some parts of the world, there is a clear and consistent rejection of the claim that gay rights are human rights.

We can see that very easily by looking at some recent events:

In the Republic of Chechnya, which is a federal subject of Russia (so, a part of a European country), there have been recent credible claims, confirmed by the UK government,⁶ that gay men have, on mass, been detained by state officials, and some reports suggest that some men have been killed and many have been tortured.

I don’t imagine that in Chechnya, or in any part of the Russian Federation, that there would be widespread support for the view

that “gay rights are human rights, and human rights are gay rights”.

We might therefore ask: are human rights useful in addressing the often barbaric and brutal ways people are treated around the world because of their sexual orientation?

In the face of horrendous contemporary events – from gay men being thrown off buildings in ISIS-held Mosul,⁷ to gay women being raped in South Africa in an effort to change their sexual orientation⁸ – we might ask: is there much point in appealing to the legal concept of human rights?

Some people, including some gay people, say there isn’t much point in relying on human rights law, because human rights laws are largely ineffective in addressing the major problems people face.

Eric Posner, a distinguished professor of law at the University of Chicago, for example, argues:

“The truth is that human rights law has failed to accomplish its objectives. There is little evidence that human rights treaties, on the whole, have improved the wellbeing of people.”⁹

Professor Posner’s view will resonate with those who think that there would be little point in reading the Universal Declaration of Human Rights¹⁰ or the European Convention on Human Rights to Ramzan Kadyrov, Head of the Chechen Republic, in a bid to get him to stop police officers electrocuting gay men in detention camps.

However, I take a different view.

My view is that, regardless of whether human rights law seems to, at times, fail and falter, it *is* worth holding on to.

It is worth holding on to because, however imperfect human rights law might be, and however ineffective international human rights courts can be, human rights give us a language and a framework for aspiration and change.

Human rights law gives us a moral framework – a moral compass – that can guide us towards realizing the most fundamental rights and freedoms that we all, regardless of the differences between us, aspire to.

The Universal Declaration of Human Rights, for instance, which was proclaimed by the United Nations in 1948, is founded on the recognition of the “inherent dignity and of the equal and inalienable rights of all members of the human family”.¹¹ It states that we human beings are all “born free and equal in dignity and rights” and, being “endowed with reason and conscience”, we “should act towards one another in a spirit of brotherhood”.¹²

The essence of that principle, I would argue, has been the basis for the development of equality on the grounds of sexual orientation in our own country.

It has been the gradual acceptance that gay people should be treated with “dignity” that has progressively diminished the most awful forms of discriminatory treatment of gay people in the UK.

Although that discrimination has not yet entirely ended and there is some way to go, I believe that the reason that we have come so far is because of the existence and acceptance of human rights law in our country.

Our history shows that human rights *are* useful, *do* help change things, and *do* protect people from tangible harm.

Let me talk for a few moments about some of the ways in which human rights have been vital for developing sexual orientation equality in the UK.

In 1957, when all sexual acts between men were criminalized in the UK, the “Wolfenden Report” recommended that “homosexual behaviour between consenting adults in private should no longer be a criminal offence”.¹³ It did so on the basis of recognizing “the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality”.¹⁴

Although the Wolfenden Report made no explicit use of human rights law, it cannot be ignored that the recommendations it made

were formulated at a time when the UK had pioneered the introduction of the European Convention on Human Rights, which guarantees to all people in the UK (and other European countries) the right to respect for private life.¹⁵

That idea – that the sexual choices of individuals should be respected as part of their private lives – led to the partial decriminalization of sexual acts in England and Wales in 1967 between men aged 21 or over.¹⁶

That revolutionary legal change – brought about by the Sexual Offences Act 1967 – significantly diminished the state-sponsored persecution of gay men in England and Wales that had gone on for centuries.

That persecution, detailed in written records going back over seven centuries to around 1290, took the form of putting people to death for engaging in male same-sex sexual acts.¹⁷

In England and Wales, people could be executed for engaging in what ecclesiastical law called sodomy and, from 1533, state law called buggery.¹⁸

The last two people to be executed for engaging in consensual, adult same-sex sexual acts in England were two men that were hung by the neck in 1835.¹⁹

The offence of buggery – combined with the offence of gross indecency, introduced in 1885²⁰ – provided a comprehensive framework for regulating all sexual acts between men.

It was a comprehensive framework that remained in place in other parts of the UK, following the Sexual Offences Act 1967 in England and Wales.

And it was a comprehensive framework that, in 1976, a man called Jeffrey Dudgeon decided to challenge in Northern Ireland using the instrument of human rights.

Back then, in 1976, Mr Dudgeon's claim that the criminalization of gay men for having sex amounted to a violation of human rights

did not have mainstream support in Northern Ireland or in the Labour government of the day.

Mr Dudgeon took his claim to the European Court of Human Rights in Strasbourg and, in 1981, the Court upheld it.²¹

As a result, the UK government was, in 1982, forced to partially decriminalize consensual sexual acts between men in Northern Ireland.²²

Following that major development in the human rights of gay people came the next great battles...

The battle to gain equality in the "age of consent" for gay men, which was won by 17-year-old Euan Sutherland who successfully argued that maintaining a higher age of consent for sexual acts between men amounted to discrimination in violation of the European Convention on Human Rights.²³ That success led the UK government to equalize the age of consent by Act of Parliament in 2000.²⁴

There was the battle to end the "ban" on gay men and lesbians serving in the armed forces. This ban, which meant that, up until 1994, a gay person in the armed forces could be imprisoned for having a same-sex relationship, and after 1994 could be sacked, resulted in the ruin of the careers of thousands of service people.

During the 1990s, several of those who had been sacked from the services simply because of being gay sought to change the policy of the Ministry of Defence by using human rights law. They were eventually successful in the European Court of Human Rights in 1999,²⁵ and in 2000 the ban on gay men and lesbians serving in the armed forces was lifted.²⁶

There were the battles to stop people being discriminated against in employment. Until 2003, if you were gay and applied for a job to work in this pub, the person who owned or ran it could have legally refused to employ you solely on the grounds of your sexual orientation.²⁷

Or, until 2007, if you were a customer in this pub, the person behind the bar could have legally refused to serve you solely on the basis of your sexual orientation.²⁸

These forms of discrimination were ended, I would argue, largely because of an acceptance of the argument that to differentiate between people on the grounds of sexual orientation violates the principle of equal dignity at the heart of human rights.

It's that same principle that underpinned the argument that the relationships of same-sex couples should be recognized in law, and which led to the introduction of civil partnerships in 2004²⁹ and same-sex marriage in 2013.³⁰

The introduction of same-sex marriage was, for many people, the moment that gay rights became truly synonymous with human rights in the UK – the moment that our society acknowledged the shared human dignity between people, regardless of their sexual orientation.

For me personally, an equally significant moment is a less well-known and more recent legislative event that happened on the last day of January this year, when Her Majesty the Queen gave her Royal Assent to the Policing and Crime Act 2017.

That Act did the most astonishing thing: it granted posthumous pardons to every person in England, Wales and Northern Ireland who, as a result of engaging in a consensual sexual act, had been convicted of an offence of buggery or gross indecency between 1533 and 2008.³¹

I had the great privilege of working closely with two peers in the House of Lords on various aspects of this legislation, and I was in the gallery of the Lords in late December 2016 when many of the relevant provisions were adopted by the government.

To sit in the very place where, 483 years earlier, the government of Henry VIII had passed the first statute criminalizing buggery, and to hear that all those who had suffered under these cruel laws were to be posthumously pardoned, was moving beyond words.

And the legislators themselves were profoundly moved.

Lord Lexden spoke most movingly about “[t]he need for equality throughout the United Kingdom on this issue of human rights...” and noted that the legislation will:

“have the effect of making available ... pardons to those who were cautioned or convicted under cruel and discriminatory laws, now repealed, that bore so heavily and so unfairly for so long on homosexual and bisexual men. They will make reparation, to the extent that it is possible and practicable, to those still living and remove a terrible stain from the reputations of those who are no longer alive, for the comfort of their families.”³²

Lord Cashman, who also spoke in the most moving way, stated:

“I remind myself that what we achieve now is not achieved by us but was made possible by a thousand generations of LGBT people and our heterosexual allies who stood up and fought for equality, often giving up their livelihoods, their freedom and, in some instances, their lives. Moments like these make me feel truly humbled as I recognise their sacrifices over hundreds of years.”³³

And so ended nearly five centuries of the state-sponsored persecution of gay people. The state, by a mechanism itself centuries old – the pardon – said sorry.

It’s my unshakeable belief that what we have achieved in this country has been underpinned by the concept of human rights and the legal instruments that enshrine it.

When I think of those around the world who are imprisoned, brutalized and ill-treated because of their sexual orientation, it is the concept of human rights that gives me hope for the future.

Human rights treaties and laws are, as my colleague Dr Silvia Falcetta reminded me the other day, not just pieces of paper. Rather, they are our guide, our route map, to a better world based on a shared understanding of what a human being is and how each human being ought to be treated.

So, I do hope people in Chechnya will keep reminding their Head of the Republic of his commitments under international human

rights law, just as I hope people in this country will always remind politicians of their duties under international human rights law.

Those duties are founded on that most precious principle that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".³⁴

If we hold on to that, if we hold on to the concept of human rights, we will, I believe, keep making progress.

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- ¹ International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.
- ² Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 005.
- ³ <http://www.unmultimedia.org/tv/unifeed/asset/1449/1449080/>
- ⁴ <https://www.theguardian.com/politics/2004/sep/28/labourconference.labour6>
- ⁵ Hillary R. Clinton, "Remarks in Recognition of International Human Rights Day", Geneva, 6 December 2011.
- ⁶ <https://www.gov.uk/government/news/minister-condemns-persecution-of-lgbt-community-in-chechnya>
- ⁷ <http://www.independent.co.uk/news/world/middle-east/isis-executes-three-gay-men-by-dangling-them-from-top-of-100ft-building-and-letting-go-10294966.html>
- ⁸ <http://www.telegraph.co.uk/women/womens-life/11608361/Corrective-rape-The-homophobic-fallout-of-post-apartheid-South-Africa.html>
- ⁹ <https://www.theguardian.com/news/2014/dec/04/sp-case-against-human-rights>
- ¹⁰ Universal Declaration of Human Rights, United Nations General Assembly resolution 217 A (III), December 10, 1948, A/810, p. 71.
- ¹¹ *Ibid.*, preamble.
- ¹² *Ibid.*, art. 1.
- ¹³ Home Office, *Report of the Committee on Homosexual Offences and Prostitution*, Cmnd 247, 1957, para. 62.
- ¹⁴ *Ibid.*, para. 61.
- ¹⁵ *Op. cit.*, n. 2, art. 8.
- ¹⁶ Sexual Offences Act 1967.
- ¹⁷ *Fleta* (circa 1290) states: "Contraheutes vero cum Judæis vel Judæabus pecorantes & Sodomitæ in terra vivi confodiantur, dum tamen man' oper' capti per testimonium legale vel publice convicti". *Fleta, seu Commentarius Juris Anglicani*, London: H. Twyford, T. Bassett, J. Place, & S. Keble, 1685, p. 54. Bailey translates this as: "Those who have dealings with Jews and Jewesses, those who commit bestiality, and sodomists, are to be buried alive, after legal proof that they were taken in the act, and public conviction." D.S. Bailey, *Homosexuality and the Western Christian Tradition*, London: Longmans, 1955, p. 145. For a discussion see: P. Johnson and R. M. Vanderbeck, *Law, Religion and Homosexuality*, Abingdon: Routledge, 2014.
- ¹⁸ An Acte for the punysshement of the vice of Buggerie (1533) 25 Hen. 8 c. 6.
- ¹⁹ Old Bailey Proceedings Online, September 1835, trial of John Smith, James Pratt and William Bonill, <https://www.oldbaileyonline.org/browse.jsp?name=18350921>
- ²⁰ Criminal Law Amendment Act 1885, s. 11.
- ²¹ *Dudgeon v the United Kingdom* (1981) Series A no 45.
- ²² Homosexual Offences (Northern Ireland) Order 1982.
- ²³ *Sutherland v the United Kingdom* App. No. 25186/94 (Commission report, 1 July 1997).
- ²⁴ Sexual Offences (Amendment) Act 2000.
- ²⁵ *Lustig-Prean and Beckett v the United Kingdom* App. Nos. 31417/96 and 32377/96 (ECtHR, 27 September 1999); *Smith and Grady v the United Kingdom* ECHR 1999-VI.
- ²⁶ Geoffrey Hoon MP, HC Debate 12 January 2000, vol. 342, col. 288.
- ²⁷ Employment Equality (Sexual Orientation) Regulations 2003.
- ²⁸ Equality Act (Sexual Orientation) Regulations 2007.
- ²⁹ Civil Partnership Act 2004.
- ³⁰ Marriage (Same Sex Couples) Act 2013.
- ³¹ http://www.huffingtonpost.co.uk/paul-johnson-1/turing-law_b_14548270.html
- ³² HL Debate 12 December 2016, vol. 777, col. 1016.
- ³³ *Ibid.*, col. 1018.
- ³⁴ *Op. cit.*, n. 10, preamble.