

ECHR Same-Sex Partnership Protection Issues and Implications for China

Xinyan Cai

School of Anhui University of Finance and Economics, Bengbu, 233030, China

Abstract

The European Court of Human Rights (ECHR) has gradually developed from the non-recognition of same-sex partnerships to requiring member states to recognize and actively obligation to protect same-sex partnerships. From the series of cases of protecting same-sex couples published by ECHR, it can be seen that the ECHR protection of same-sex couples presents the characteristics of taking the new European consensus as the premise, expanding the scope of protection through evolutionary interpretation, and protecting same-sex couples by applying the principle of discretion and proportionality at the same time. The ECHR protection of same-sex couples has the problem of simply equating "new consensus" with the minimum standard of human rights protection, the conflict between the application of evolutionary interpretation and the principle of state consent, and the unclear scope of national discretion. From the characteristics and problems faced by the ECHR protection of same-sex couples, the rationality of the relativity theory of human rights protection in China has been further confirmed. In addition, it provides inspiration for China to avoid judicial creation in the interpretation of treaty evolution, and to respect the discretion of sovereign states to the greatest extent within the scope of national discretion.

Keywords

European Court of Human Rights; Same-Sex Partnerships; Evolutionary Interpretation; National Discretion; Relativity of Human Rights.

1. The Introduction of Problems

The European Convention on Human Rights (later called "the Convention") also played a major role in the legalization of same-sex partnerships in Europe. The ECHR protection of same-sex partnerships has experienced a gradual process, from the initial inadmissibility to the rejection of acceptance, and now the establishment of European member States to actively protect same-sex partnerships. The ECHR stresses that the Convention is a living law that can be interpreted in accordance with the new European consensus, but the ECHR's actions have been questioned by some European member states, Russia has announced its withdrawal from the ECHR, and the UK is increasingly opposed to the ECHR. As of May 31, 2023, the most recent case concerning the protection of same-sex partnerships published on the ECHR website is *Fedotova and Others v. Russia*. In this case, six Russian applicants, namely three same-sex couples, filed marriage applications with local marriage registration offices on different dates. *Fedotova and Shipitko* filed marriage applications with the Moscow Marriage Registration Office on May 12, 2009. The other two couples filed their marriage applications with the St. Petersburg marriage registration office on June 28, 2013. The Moscow marriage registration office examined the application submitted by the first couple and served the first couple with a notice of refusal to register on May 12, 2009. The St. Petersburg Marriage Registration Authority refused to review the applications filed by the other two couples and served notices of refusal of registration on the other two couples on June 29, 2013. The refusal to register was based on Article 1 of the Russian Family Code, which defines marriage as "a voluntary marriage

union between a man and a woman". The applicants challenged these decisions in the domestic courts, but the domestic courts rejected their challenge. They went on to appeal to the ECHR that they could not be formally registered as a marriage and faced great difficulties in their daily lives as domestic law did not provide any protection for a partnership. The ECHR argues that since 30 member states passed legislation recognising same-sex partnerships, there has been a continuing trend in Europe and internationally for member states to recognise same-sex partnerships through same-sex marriage or other partnership institutions, and that Russia should therefore have little discretion in the legal recognition and protection of same-sex couples. And considers that none of the public interest reasons put forward by Russia outweigh the applicants' interest in their respective relationships being fully recognized and protected by law. Accordingly, Russia has exceeded its discretion and failed to fulfil its positive obligation to ensure that the applicants' right to respect their private and family life is respected. Russia has withdrawn from the European Commission of Human Rights and has declared that decisions of the European Court of Human Rights that enter into force after 15 March 2022 will not be enforceable. As a result, the case of *Fedotova and Others v. Russia* faces the dilemma of being unenforceable even if it wins. Analyzing the characteristics of the ECHR series of judgments on the treatment of same-sex couples, pointing out the characteristics and problems of the protection of same-sex couples in the ECHR, it is of enlightening significance to the affirmation of the concept of relativity of human rights in China, the interpretation of treaties and the protection of same-sex couples.

2. The Characteristics of ECHR's Protection of Same-Sex Partnerships

2.1. The New Consensus of Member States as a Prerequisite for Protection

According to the "new consensus" theory, the European Court of Human Rights should take into account current opinions when applying the European Convention on Human Rights, which mainly include: (1) the principle requires the European Court of Human Rights to follow the law of European countries; (2) the principle requires the ECHR to take into account expert opinion; And (3) the principle requires the European Court of Human Rights to take into account the views of the European public [1]. In *Fedotova and Others v. Russia*, the ECHR held that more than 30 Member States have recognized same-sex partnerships through legislation, and further held that the recognition of same-sex partnerships by Member States through same-sex marriage or other partnership institutions is a forward trend, There is a consensus among member States on the recognition and protection of same-sex partnerships. A review of the ECHR's previous jurisprudence shows that the ECHR's protection of homosexuality extends from the protection of the private sphere to the protection of the public sphere, from the decriminalization of homosexuality to equal protection without distinction of sex to the affirmation that member States have an active obligation to recognize and protect same-sex partnerships. Between 1955 and 1977, a total of 20 countries signed and ratified the European Convention on Human Rights, of which 10 countries had a total ban on homosexual acts [2], and at that time Europe was influenced by Christian religious thought that homosexuality was a "shame" and that such a "wrongful act" should be punished. As a result, most complaints were rejected by the European Commission of Human Rights during this period on the grounds of "lack of apparent basis". In 1977, the ECHR accepted the first case of a homosexual person [3]. Following a complaint by a European citizen known only as "X", the ECHR finally decided to "examine the issues raised in this application, taking into account the development in recent years of public opinion and morality towards the idea of government restrictions on consensual sexual activity among adults." In the end, though, the ECHR rejected the petitioner's case on the grounds that the member states' actions met the principle of proportionality. However, there is no doubt that the decision of the European Commission of Human Rights was also made

because the social climate in most member States had changed at that time.[4] In 1981, *Dudgeon v. the United Kingdom*[5], the ECHR declared that the provisions of Irish law criminalising homosexual acts between adult males were in breach of Article 8 of the Convention and constituted a breach of the right to privacy. It should be noted that prior to this decision, the Sexual Offences Act 1967 had ceased to criminalize consensual sexual acts between adult men over 21, and the Northern Ireland Assembly had published a draft bill to do the same in 1978, although the law had not yet been changed. In 2015, in *Oliari*[6], the ECHR held that while the court had dismissed an applicant's claim under the Article 12 right to marry on the grounds of lack of consensus after confirming that same-sex marriage was recognised in only 11 of 47 member States, the situation was different when discussing same-sex partnerships. Taking into account the fact that 24 of the 47 member States legally recognise such unions, the Court finally decided to impose this positive obligation "to protect the right to family life" on member States.

2.2. Expand the Meaning of "Family" Through Evolutionary Interpretation

Tyrer v. United Kingdom[7] was the first case in which the European Court of Human Rights used evolutionary interpretation to interpret the provisions of the Convention. Without considering the legality and application of caning in a Member State, the ECHR simply stated: "The Court must emphasize that the Convention is a living law..... It must be interpreted in the light of the present situation. The Court cannot in this case be influenced by new developments and commonly accepted standards in criminal policy in the Member States of the European Parliament." As a result, the European Court of Human Rights ruled that caning was in breach of Article 3 of the Convention. In *Loizidou v. Turkey*[8], the European Court of Human Rights noted that "the Convention is a living law and therefore must be interpreted in the light of present circumstances, which is deeply embedded in the case law of this Court. This shows that these provisions cannot be interpreted solely in the light of the intent of the signatories at the time of their creation more than 40 years ago... Moreover, the object and purpose of the Convention, as a legal instrument protecting individuals, requires that its provisions be interpreted in such a way as to make such protection practical and effective[9]. In *Schalk* (2010), the court stated that "same-sex couples, like heterosexual couples, are capable of forming stable and committed relationships, and therefore their relationship should fall within the scope of Article 8 of the European Convention on Human Rights, 'family life'. In *Kozak v. Poland*, the ECHR expressed the same view, The ECHR held that the ECHR should be interpreted in the light of current social conditions, given that the Convention is a "living document". As social relations and the status of citizens change, citizens of Member States should not have only one choice when it comes to private and family life[10]. In the *Vallianatos* case in 2013, the Court continued to reaffirm this principle, And ordered Greece to open its non- marital partnerships designed for heterosexual couples, which differ in terms of rights and obligations from substitute marriages, to same-sex couples by granting them a legal status recognized by the State, so that the "same capacity for the continuity of the relationship" and the need for equal legal protection for same-sex couples are finally recognized. In *Fedotova and Others v. Russia*, the ECHR held that the "family" is an evolving concept and that there is now a new consensus among European member States to protect the family of same-sex couples, and therefore Russia's conduct violates Article 8 of the European Convention on Human Rights. It is worth mentioning that the situation of gay rights in Russia is worrying, in Russia, the government and the majority of the population are homophobic, homogenous phenomenon. In 2013, Russia enacted a gay propaganda law banning propaganda of "non-traditional sexual relations" to minors. It was designed to punish gay people and their supporters [11], also to limit Russian minors' access to scientific information about sexual orientation or gender identity so that the only thing they understood about gay people was "deviations or diseases that require treatment"[12]. Patriarch Kirill, the head of the Russian Orthodox Federation, emphasizes family values and moral

education in sexual relationships, describing Western recognition of same-sex unions as "a harbinger of impending doom," describing homosexuality as a "very dangerous apocalyptic symptom" and stressing that "we must do everything in our power to ensure by law that sin will never be sanctioned in Russia." [13] In a 2018 poll, two-thirds of Russians believe there is a global homosexual conspiracy to subvert "traditional" Russian values.

2.3. Apply the Principle of Both Marginal Discretion and Proportionality

The European Court of Human Rights pointed out that "the theory of marginal discretion is always an important tool to determine the relationship between the institutions of member states and the Court of Human rights" [14]. Arai held that the court of Human Rights applies the principle of marginal measurement when looking for and confirming facts, interpreting the basic rights of the Convention, evaluating the legislation of member states, weighing individual rights and public interests, and weighing conflicting rights and freedoms. [15] For regulating the application of marginal discretion, Ma honey, then deputy director of the registration department of the Human Rights Court, pointed out that marginal discretion should take into account: If member states form a consensus on the rights of the Convention, it will narrow the space for discretion given by the human Rights Court to member States; The nature of the rights; The nature of the obligations imposed on member states; The legal purpose pursued by member States in restricting rights; The nature of the regulated conduct; The background environment of the case; And the wording of the articles of the Convention. However, the ECHR does not actually form specific rules for the application of the principle of marginal discretion. It mainly uses the principle of marginal discretion as a tool to explain and then form judgments. [16] It is the ECHR's usual practice to link the principle of proportionality to the scope of Member States' marginal discretion. As the ECHR stated in its judgement in the Soering case: "The essence of the Convention as a whole is to find a reasonable balance between the general interest of the Community and the fundamental rights of the individual". In addition to the ECHR judgment, judges and scholars have also made relevant comments on the relationship between the principle of proportionality and the theory of marginal discretion. Judge Mastcher has argued that proportionality is "correct and strict" marginal discretion. Mr Spearman, president of the Court of Human Rights, regarded proportionality as the "most important and even decisive" influence on marginal discretion. Arai even called the principle of proportionality "the other side of marginal discretion". It can be seen that the application of the marginal discretion principle and the proportionality principle influences each other. Generally speaking, the wider the scope of discretion of member states, the more likely ECHR judges that member states restrict citizens' rights in accordance with the proportionality principle. In the Handyside case judgment, the European Court of Human Rights formally wrote "marginal discretion" into the judgment for the first time, and opened the era of relying on the theory of marginal discretion for judgment [17].

3. The ECHR Protection of Same-Sex Partnerships Problems

3.1. The "New Consensus" is Simply Equated with the Minimum Standard of Human Rights Protection

The "emerging consensus" theory has been identified by the European Court of Human Rights and applied in many of its decisions, such as *Fedotova and Others v. Russia*. Based on the ECHR's use of the emerging consensus theory, we can conclude that the ECHR checks whether the majority of European countries protect a human right, and if so, the human right will be interpreted by the ECHR as being covered by the protection of the Convention, and the country violating the right will be found to be in breach of the Convention. The ECHR uses the "emerging consensus" to gradually improve human rights standards in Europe, and whenever a majority of member States protect a right, the ECHR defines this practice as a new minimum standard of

protection and requires all member States to give the same or more protection [18]. For example, in the Oliari case mentioned above, the ECHR took into account that 24 of the 47 member States legally recognized same-sex partnerships, and therefore included the protection of same-sex partnerships within the "protection of the right to family life", and placed the positive obligation to protect same-sex partnerships above member States. In the process of supervising the implementation of the obligations of member States under the Convention, the ECHR has the obligation to monitor the judicial decisions of member States not lower than the prevailing European human rights standards [19]. However, how many member states have reached a consensus on the issues in dispute is a new consensus. According to the judgment of the ECHR, as long as about half of the member states protect the rights of citizens, it can be considered that the European member states have reached a consensus on the protection of the right. This conclusion, reached by the ECHR on the basis of the position of the judges, is a breach of the principle of state consent, there is no corresponding legal basis, and there is no consent as reflected in subsequent agreements or in the practice of Member States. At the same time, the ECHR judges have an obligation to find the best way to protect human rights in a particular case, regardless of the current consensus of States parties. The existence of consensus analysis often subordinates minority opinion to majority opinion, leaving minorities vulnerable to majority rule. [20] In addition, from the perspective of the role of the ECHR, Article 1 of the Convention places the primary responsibility for the protection of rights on member States, and the ECHR, as a judicial body created by voluntary treaties of sovereign states, plays only a supplementary role. If the court takes an overly aggressive approach in a highly sensitive area, it will lose support and authority in more conservative countries [21].

3.2. Conflict between the Application of Evolutionary Interpretation and the Principle of State Consent

The "usual meaning" in article 31, paragraph 1, of the Vienna Convention on the Law of Treaties is not determined whether it is the usual meaning at the time of contracting or interpretation, and can therefore evolve over time; The "good faith" and "object and purpose" in article 31, paragraph 1, may have different requirements of good faith, purpose and purpose in different periods: Article 31, paragraph 3, requires that "subsequent agreement", "subsequent practice" or "relevant rules of international law" be taken into account when interpreting the context of the treaty, and the above-mentioned factors are evolutionary. In Article 32, "supplementary information of interpretation" such as "the preparation of the treaty and the circumstances of its conclusion" can still be used as evidence to allow the evolution of the interpretation of the treaty. Therefore, we can conclude that the Vienna Rules of Treaty interpretation acquiesce to the evolutionary interpretation of international treaties [22]. To carry out evolutionary interpretation of treaties, one is to carry out new interpretation according to the new circumstances; the other is to apply the original provisions to the new circumstances. There is no clear boundary between these two situations, but there is a certain overlap. A new interpretation of a treaty provision tends to expand its scope of application, and the expansion of its scope of application includes a new interpretation of the provision [23]. From the ECHR's adoption of a series of decisions protecting same-sex partnerships, we can see that the ECHR uses evolutionary interpretation to expand the meaning of "family", that is, from excluding same-sex partnerships from "family", to including same-sex partnerships in the meaning of "family", and then to requiring member States to fulfill positive obligations. To recognize and protect same-sex partnerships, and to a certain extent, the ECHR has a tendency to include same-sex unions in the scope of protection of "marriage", and further protect the human rights of citizens of member states. However, looking back at the subjective purpose of the member states to conclude the convention, and referring to the previous judgments of the ECHR and the articles of the European Convention on Human Rights, it can be seen that when the European

Convention on Human Rights was concluded, the member States did not include same-sex partnerships in the connotation of Article 8 "family life". Therefore, some scholars have proposed that ECHR's evolutionary interpretation broadens the connotation of relevant rights in the European Convention on Human Rights, thereby creating new obligations for member States. These acts have no legal basis under the framework of the European Convention on Human Rights, nor have the common consent of member states reflected in subsequent agreements or practices, and are suspected of judicial creation. And is detrimental to the stability of the law [24].

3.3. The Scope of the State's Discretion is Unclear

The scope and extent of individual rights protection is determined by local culture and tradition, and cross-border legal or moral standards cannot determine which human rights protection practices are reasonable or unreasonable [25]. If a case involves a member State's moral, religious, cultural and other sensitive areas, this area should fall within the scope of national discretion, and the court should respect the decision of the member State. In *Fedotova and Others v. Russia*, ECHR held that at present, a new consensus has been formed in Europe, so the scope of Russia's discretion is small, and later, through the application of the principle of proportionality, it held that Russia's refusal to perform positive obligations on the grounds of public interest is not justified. However, as far as Russia's current legislation is concerned, its Family Act and Constitution both restrict marriage to the union between a man and a woman, and the public opinion in Russia is unable to legalize same-sex partnership for the time being. Again from the subjective attitude towards Article 8 of the European Convention on Human Rights when Russia signed the European Convention on Human Rights and the subjective purpose and domestic legislative dynamics and other practical considerations, the Russian government has no subjective purpose to include same-sex partnerships within the framework of legal protection. Because the legalization of same-sex partnerships involves economic, political, cultural and other factors in member states, and human rights protection is also a gradual process, it is not appropriate to throw the issue outside the scope of national discretion or identify it as a small national discretion on the grounds of a new consensus, and apply the principle of proportionality to identify a violation of the provisions of the European Convention on Human Rights.

4. Enlightenment to China

4.1. The Relativity of Human Rights is Reasonable

The natural property of a sovereign state is to accede to or conclude an international treaty of its own free will [26]. It is undeniable that the main body of international legislation is still international organizations and sovereign states, and international judicial organizations to a large extent determine the outcome of the interpretation of international rules and the adjudication of disputes in international law. It is a legal necessity for the principles and rules of international law to be correctly applied, interpreted and demonstrated in the international judicial process, but more often, the international dispute settlement mechanism will influence and suppress the will of sovereign states when exercising its functions and powers [27]. If a dispute is submitted to a neutral third party for adjudication, the dispute will inevitably imprint the ideology of the third party in the process and result of dispute settlement, and the sovereign factor of the state is usually ignored in the case [28]. In *Fedotova and Others v. Russia* case, the ECHR confirmed the current minimum standard for the protection of same-sex partnerships through the "New European Consensus", and determined that Russia violated the standard, ignored the specific national conditions in the current stage of social development of Russia, and broke the principle of state consent. Ignoring the independence of Russia's national sovereignty. The new consensus can not be regarded as the minimum standard of human rights

protection, but should be based on the subsequent agreements or practices of each member state, specifically judge what limits of rights protection it should provide to its citizens, and influence other member states through the judgment of the European Court of Human Rights, so that member States can take the initiative to amend their own laws or confirm the scope of human rights protection through new protocols. Second, even if a new consensus is reached by member States, a substantive review should be conducted during the trial of a case to see whether the consensus violates the object and purpose of the Convention. Because "consensus" is a neutral word, the ECHR should not apply it if it undermines or restricts the human rights of citizens.

4.2. The Evolution of Treaties Should be Interpreted in Such a Way as to Avoid Judicial Manipulation

Most of the provisions of the European Convention on Human Rights are ambiguous. In order to adapt to social development and realize the purpose and purpose of the European Convention on Human Rights, the provisions of the European Convention on Human Rights are not in a state of "vacuity". It is undeniable that the ECHR interprets the provisions with the method of evolutionary interpretation. However, in the evolutionary interpretation, we should strictly distinguish between evolutionary interpretation and judicial law-making behavior, so as not to fall into the misunderstanding of judicial law-making. The "judges" of the international judicial or quasi-judicial bodies should not carry out law-making activities, resulting in the erosion of the legislative process of international law. The legal norms created by international legislation are the most important source of international law. Judges should apply them in accordance with the rules of international law, rather than conniving at their law-making activities. Judge-making mainly includes decisions that deviate from the original intent of legislation due to the judge's personal preference, to achieve certain relief purposes, or to deviate from the intention of the legislator and ratifier. Judicial initiative is often random and accidental. In most cases, the international dispute settlement mechanism only demonstrates or interprets the provisions involved in the case. Compared with the consistency and professionalism of the legislative process, the interpretation of laws by judges can only achieve partial coherence, cannot actually develop international law, and will further undermine the overall coherence of the legal system[29]. Therefore, the application conditions of evolutionary interpretation should be clearly defined, including the application premise, application basis, application scope and restriction conditions, so as to avoid judicial creation of law.

4.3. The Premise of Treaty Interpretation: Clarify the Scope of National Discretion

Before applying the principle of proportionality, ECHR should first judge whether it is within the scope of member states' discretion. If it is within the scope of morality, culture, etc., it usually falls within the scope of member states' discretion. Based on the principle of state consent and state sovereignty, ECHR can declare that member states have not violated the Convention, giving member states maximum discretion, and balancing the relationship between sovereignty and human rights. If the case falls outside the scope of the discretion of member states, the principle of proportionality should be actively applied to judge whether the behavior of member States meets the requirements of the principle of proportionality. At the same time, in applying the principle of proportionality, it should be recognized that the protection of rights sometimes needs to be subject to factors such as the public interest and the protection of other people's interests, and the court's ruling is often the result of weighing and even compromise. When the court applies the principle of proportionality to determine whether the restriction of human rights is reasonable, the court's cognition of various factors is closely related to the specific country and factual situation, and the judgment of the facts of a case and the balance of relevant factors will vary from member states and specific

circumstances. In particular, the history, culture and legal provisions of different countries have a direct impact on their perceptions of the necessity and rationality of restricting human rights. When determining proportionality, the ECHR must take into account such cognitive differences to protect citizens' rights and freedoms to the greatest extent [30]. However, neither the principle of discretion nor the principle of proportionality can override the principle of state consent. Therefore, in the process of treaty interpretation, the first judgment should be made as to whether the matter to be interpreted is within the scope of national discretion. If the matter falls within the scope of national discretion, the sovereign state's discretion should be respected to the greatest extent.

5. Conclusion

From the perspective of the characteristics and existing problems of ECHR's protection of same-sex partnerships, ECHR should not only consider the purposes of the European Convention on Human Rights and the new European consensus when protecting same-sex partnerships, but also consider the factors of national sovereignty involved in cases from the perspective of national consent. Within the scope of national discretion, the will of the state should be fully respected. To give the country the maximum degree of discretion. This is consistent with China's consistent view that human rights are relative. At the same time, the problems existing in the ECHR's treaty interpretation also provide implications for China's treaty interpretation and legal strategy in the application of disputes.

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