Revue générale de droit

Marriage, the Law, and Samesex Unions

Christopher B. Gray

Volume 30, numéro 4, 1999–2000

URI : https://id.erudit.org/iderudit/1027761ar
DOI : https://doi.org/10.7202/1027761ar

Aller au sommaire du numéro

Éditeur(s)

Éditions Wilson & Lafleur, inc.

ISSN

0035-3086 (imprimé)
2292-2512 (numérique)

Découvrir la revue

Citer cet article

Gray, C. B. (1999). Marriage, the Law, and Samesex Unions. *Revue générale de droit*, *30*(4), 583–605. https://doi.org/10.7202/1027761ar

Résumé de l'article

Ce texte adopte une position à l'encontre du projet actuel visant l'obtention du statut légal pour les mariages de conjoints de même sexe. L'approche normative préparatoire identifie le tort religieux et l'inacceptabilité morale des activités sexuelles et des relations entre conjoints de même sexe. Les normes juridiques sont par la suite surimposées afin de démontrer que, malgré le fait que de nos jours il ne soit pas approprié de criminaliser l'homosexualité, l'opinion publique tend à favoriser la prévention des mariages de conjoints de même sexe, ou du moins ne souhaite pas le promouvoir en lui octroyant un statut légal. Plus précisément, ce traitement n'est pas exclu comme violation des droits de la personne, ni du droit de liberté d'association, ni du droit de la protection contre la discrimination, ni du droit à l'égalité.

Marriage, the Law, and Samesex Unions

CHRISTOPHER B. GRAY
Professor, Philosophy Department at
Concordia University, Montréal

ABSTRACT

This study argues against the contemporary project of acquiring the legal status of marriage for samesex unions. The preparatory normative approach identifies the religious wrong and the moral unacceptability of samesex sexual activity and liaisons. Legal norms are then superimposed to argue that, while criminalizing homosexual conduct is not now appropriate, the balance of public benefit weighs in favour of preventing samesex marriage, at least by not promoting it as giving it legal status would do. Most pointedly, this treatment is not excluded as a violation of rights, neither a right to freedom of association, nor a right to protection from discrimination, nor a right to equality.

RÉSUMÉ

Ce texte adopte une position à l'encontre du projet actuel visant l'obtention du statut légal pour les mariages de conjoints de même sexe. L'approche normative préparatoire identifie le tort religieux et l'inacceptabilité morale des activités sexuelles et des relations entre conjoints de même sexe. Les normes juridiques sont par la suite surimposées afin de démontrer que, malgré le fait que de nos jours il ne soit pas approprié de criminaliser l'homosexualité, l'opinion publique tend à favoriser la prévention des mariages de conjoints de même sexe, ou du moins ne souhaite pas le promouvoir en lui octroyant un statut légal. Plus précisément, ce traitement n'est pas exclu comme violation des droits de la personne, ni du droit de liberté d'association, ni du droit de la protection contre la discrimination, ni du droit à l'égalité.

(1999/2000) 30 *R.G.D.* 583-605

TABLE OF CONTENTS

This study of the law of samesex marriage engages its legal philosophy.[1] The situation is anything but "philosophical", however, in the sense of peaceful and detached, accepting or resigned. Its situation is, instead, one of vigorous advocacy; and four-fifths of the words and ink in law journals since 1990 have advocated the legitimacy of samesex marriage. The following discussion is counteradvocacy, with no

1. "Samesex marriage" is legally an oxymoron, as S. Gampel noted in (1977) 26 *Reports of Family Law* 271, although its use continues here. P. Lucas, in his article "*Common Law Marriage*", (1990) 49 *Cambridge Law Journal* 117, concludes the same even for that term.

attempt to present both sides of the argument in a balanced manner.

The three-day conference in July 1999 at King's College in the University of London is only the most recent and visible campaign.[2] This conference was pitched at lawyers and judges, drew its four dozen speakers from prominent advocates of samesex marriage around the globe, and included sessions chaired by Justice Claire L'Heureux-Dubé. The organizers' reply to a complaint from 163 American law professors about the conference's one-sidedness was to caricature them as bigots, and unfit to join its discussion.[3] Lawyers organized in the Lambda Legal Defence and Education Fund carry on the conference's advocacy daily.[4]

That conference is only one academic arm of legal scholars' raft of publications advocating homosexual unions, and of their practical advocacy to legitimate homosexual marriage before legislatures, courts and regulatory bodies. A few advocates are content to decriminalize samesex unions; some others take satisfaction from obtaining marital benefits for homosexual unions. But these battles being mostly won, the strategy has evolved, or perhaps shown its original objective, toward achieving recognition for homosexual unions within the legal regime of marriage.

The advocates' strategies differ: from the good will of wanting not to lack the dignity of marriage from their lovelives, through the indifference of finding marriage too unimportant to warrant a principled exclusion, to the frank ill will of aiming to implode the evil empire of marriage from within. By undoing the most basic feature of marriage, its union of one woman and one man, its distinctiveness is obliterated, at last. What Common Law union could not do, what divorce and abortion on demand could not quite manage, and what evacuation of parental authority and interest never quite achieved,

---

2. The description is found on <http://www.kcl.ac.uk/kis/schools/law/research/cel>.

3. MARRIAGE LAW PROJECT, *To Reaffirm Marriage: A Statement on the Defense of Marriage from Law Professors Across the World*, Columbus School of Law, The Catholic University of America, Washington DC, <http://www.marriagelaw.cua.edu>.

4. Lambda Legal Defense and Education Fund (LLDEF), founded 1973, head office Wall Street in New York NY, president Kevin Cathcar, 32 staffers, 22,000 members, $2M budget, <http://www.lambdalegal.org>.

homosexual marriage will. Marriage — patriarchal, illiberal, and privileged — will be destroyed, and its remnant increasingly penalized.

Even the goodwill position has, however, moved beyond the point of seeking a legal regime for homosexual unions which parallels the marital regimes. That goal increasingly is thought to deny that homosexual unions have the dignity to share the common regimes; and, as a result, the more recent objective is to include the samesex regimes within marriage.

Legal evaluation of these sorties is the primary objective here; but on the way to doing that, their religious and moral evaluation is not irrelevant.

I. Religious Response

In Canada the relevance of religious norms is greater than in jurisdictions such as the United States. Consideration of religious norms is not only not excluded by our Constitution, but is in fact mandated by arrangements in 1867 for particular religions, and by provisions and preambles in 1960 and 1982.[5] Again, religious groups' interests are as fully mandated as those of national, ethnic and racial groups by our multicultural protections and promotions. As well, given this room to introduce religious concerns, they show their importance in the character building that any polity relies upon for its participation and loyalty.

Both theistic and cosmic religious doctrines include a metaphysics which takes human nature as god-given or cosmos-given, offer an epistemology whereby we grasp that nature, and supply an ethics of divine norms which preserve and perfect that nature. Among "peoples of the book", namely the revealed religion of Jews, Christians and Moslems, that nature is fallen, however, and so not every one of its activities does preserve and perfect it. Among cosmic disciplines of Buddhists, although not of Hindus, a little room is left for homosexual exercises. To focus on biblical religions, Moslem and Christian rejection of homosexual relations is thoroughgoing,

5. *Constitution Act*, 1982, R.S.C., 1985, s. 93, in *Canada Act*, 1982, ch. 11 (U.K.); *Canadian Charter of Rights and Freedoms, Constitution Act*, App. II, n° 44, Sch. 3, ss. 2(a); s. 29; *Canadian Bill of Rights*, S.C., 1960, ch. 44, ss. 1(c) and preamble.

excepting Universalists and a few Quakers in the northeast U.S. 80 % of Jewish sects worldwide reject samesex unions. In summary, 98.9 % of the persons represented by North American religions reject samesex unions, and less than one-tenth percent worldwide tolerate them.[6]

Everywhere, sexuality is the core value, sexuality's normative exercise is of women with men, procreation and family are valued, and the religion's standing for samesex intercourse is distantly marginal, in the few cases where it is not thoroughly proscribed. In a country and world where, wishful thinking and journalism to the contrary, the vast majority is still affiliated to these five major religions, this wholesale rejection of samesex unions is of no small significance for legal policy. Religious policy, of course, remains the same: to conduct worship which helps adherents of all orientations to belong together in belief and continually to rethink their lives.

II. Moral Response

To properly appreciate homosexual marriage, the moral experience and the reflection upon it by both secular and religious persons is a normative source much closer to the law. While the social imitation and the psychological dependency of human life are as present in moralities as in religions, the norms of morality are no more reducible to conditioning, no more than to biological predisposition, than are religious norms. Denial of autonomy to moral concern remains an unsustainable conclusion.

To explain and justify the moral norms drawn from moral experience, however, is another matter. There is not much to say on moral egoism, or on social morality, since these moral theories give insufficient credit to moral experience. Egoism reduces the insistence of others' well-being to a reflex of prudence about one's own profit. And social morality deflates human well-being into a narrowly localized and temporalized phenomenon. Moral experience, however, involves relations with others, and looks at what belongs to our humanity in its full scope, in order to generate its norms.

6. The full report is found on the website in note 3.

Looking to our humanity for moral norms, in turn, is convoluted. Even if our humanity can be thought of as human nature, the sense of "nature" is disputed. Some consider it the intelligible reality of humans in relation, others the set of values or principles that overlay our conduct, still others merely the necessity that can be perceived in the behavioural regularities peculiar to this species.[7] These share a core of moral norms, even though Kantian values are hard to bring into awareness, and scientistic data are hard to reconcile with either freedom or with the possibility of perversity.

Pursuing this natural morality should not be confused with natural law doctrine;[8] that will be added later. Even less should natural morality be confused with religious doctrine. Religious thinkers long have taken trust in a fallen nature to be more idolatrous than orthodox. Only a few managed to identify a remnant of created nature, or a preview of redeemed nature, in order to launch the claim that "grace builds upon nature" which natural morality has used.[9] The rest agreed with the Marquis de Sade that the morality of nature is cruelty and faithlessness, that "nature is a whore". Natural law morality is hardly a religious reflex, nor to be rejected along with religion.

A. SEXUAL MORALITY

So far as samesex activity is concerned, sexual acts are properly viewed within sexual relations, and these within the personal relations between people. Sexual acts are distinctively human as penile-vaginal not because men have penises and women have vaginas, and the two can fit each other; for

7. The discusssion in Common Truths; New Perspectives on Natural Law by A. MACINTYRE, in his *Theories of Natural Law in the Culture of Advanced Modernity*, ISI Books, Wilmington DE, 2000, pp. 91-115, characterises the work of Lloyd Weinreb (pp. 101-2), John Finnis (105-7) and H.L.A. Hart (95-99), respectively, in ways which approximate this taxonomy of three types.

8. The distinction is drawn rigidly by J. DABIN, *Is There a Juridical Natural Law?*, from Legal Philosophies of Lask, Radbruch and Dabin, Cambridge MA, Harvard University Press, 1950, pp. 422-31, translation by Kurt Wilk, *Théorie générale du droit* (1944); and with greater flex by J.C. MURRAY, *We Hold These Truths*, New York, Sheed and Ward, 1960, pp. 327-36.

9. *Summa theologiae*, I.1.8.ad 2, is one of Thomas Aquinas' many invocations of this principle.

this event often breaks down at some point or another. The organs are not apt, or don't fit, or fit too well too many other things. Nor is that distinctively human; too many other species are similarly equipped (though poorly for face to face copulation), and exercise too many imaginative alternatives with their equipment for us to stake human sex upon that.

Human sex acts, instead, are "projected upon the plane of time", as Maitland once said of Common Law estates.[10] Sex acts share the liberation from total immersion in the performance that all human acts do. While immersed momentarily we may be, we cannot maintain such unselfconsciousness fore and aft. What for, all this dancing around sex acts and ecstasy within them? Whither are they going? Whence have they come? We are, in sum, asking their purpose; and we cannot help asking that, being humans, who *must* peer into the absence of past and the nothing of future because we *can* do that.

Querying sexual purposes can only amount to locating them within human purposes. Looking around them, everybody finds that sex acts lie in a watershed of great anxiety, great risk, and great danger, as great as the peace, the safety, and the growth which they can achieve. Jealousies and quarrels, harm to personal futures and loss of human lives center around sex acts as much as around property and ideology. Sex acts cry out for a normative context to protect them and to protect from them.

The norms are provided by the unique feature of sex acts that they alone are procreative. Sexual ecstasy can be replaced by chocolate, or by soccer, lapdancing by a laptop. But sexual generation can be replaced only by an ersatz which displaces our dual genomes to achieve the result. Cloned results may follow a single genome process; and dually gendered genomes can humanize by other procreative processes. Our sex does other things than procreate, and our procreation can be done by other means than sex. But the sexual way to procreation is what uniquely makes possible all

10. Sir F. POLLOCK, F.W. MAITLAND, *History of English Law Before the Time of Edward I*, 2nd ed., vol. II, London, Cambridge University Press, 1898, p. 10.

its other achievements, as the other procreations are uniquely dependent on materials of the sex acts.

That is what makes it a sex act. Other acts may employ sexual organs; other acts or organs as well may achieve something like sexual satisfactions. But they are not sex acts, if that kind of act is not capable of achieving procreation. The sex act may not be an upright sex act if it fails to achieve some other features of sex acts — their kindness, their support, their insight; but the act fails to be a sex act at all if it is not the kind of act which can achieve procreation. And this without the intervention of participants' intentions at all.[11]

Note the emphasis upon the *kind* of act, not upon its instances. For some people at all times (in sterility), for all people at some times (in seniority), and for some people at some times (in menses), it may be possible to copulate but not conceive. But the type if not the token of the act is capable of conceiving; or, less platonistically, the type of act alone is meaningfully related to conception, is a sex act.

B. SAMESEX MORALITY

Other kinds of acts, which relate to sex organs but not to sexual purpose, are called sex acts, but lack their character. Sodomies, for example, in the narrow current sense of penile-anal intercourse, or in its expanded legal sense of *coitus per os et per anum*, or in the yet more ancient meaning that stretches out to bestiality and to masturbation : these are not sex acts, but are imitations playing on some feature of sex acts. But their mendacity keeps them from being innocent "play". To the extent that these are substituted for sex acts properly so called, or for their satisfaction, these are not innocent but are perversions of sex.

That conclusion, if left by itself, is far too narrow an appreciation of people's sexuality. Sexuality is more than sex acts; sexuality permeates the whole of life, from bodybuild

11. For one development of this argument, see conference contributions by R.P. GEORGE and G.V. BRADLEY, "Marriage and the Liberal Imagination", (1995) 84 *Georgetown Law Journal*, p. 301, and S. MACEDO, "Reply to Critics", *id.*, p. 329.

and hormonal difference to expressive literacy and mystical transport. In particular, sexuality marks the social relating of men and women, and becomes their lifestyle. The disfavor toward sodomy among men, and among women, has no direct bearing on the lifestyle of some women preferring the company and attractions of women to that of men, nor of men *mutatis mutandis*, and living with them a life filled with fluent expressions of affection and love.

But it has an indirect bearing. The inclination for the intimate sharing between a woman and a man to develop from friendship to coitus demands wariness to anticipate and avoid situations where that becomes more likely. No differently, men with sexual attraction toward each other have the moral obligation, as do women with women, to take the steps that are needed lest their friendship deteriorate into morally objectionable sodomite unions. This is a matter of moral character, which lays a secondary immorality upon what its own adherents call "queer" lifestyle, and not only upon their sodomy.

The lifestyle which facilitates sodomy is morally wrong as a temptation not only in view of one's obligations toward oneself, but also *vis-à-vis* other persons. Manifesting samesex lifestyle is meant to give comfort not only to present participants, but also to prospective adherents. It facilitates and educates the induction of new persons into the brotherhood, some who knew they were yearning for it and others who would have never suspected its possibilities for themselves. As any institution, the queer lifestyle crystalizes the imaginable into the real, and encourages an expanding world of sodomy. In our species of polymorphous perversity, where anyone's marvelous adaptiveness can as readily be educated to take pleasure in penises as in Plato, in anuses as in Anatole France, we have tertiary moral obligations not to scandalize more vulnerable brothers.

C. SAMESEX MARRIAGE

While acts of sodomy are morally condemned, this need not spill over immediately into condemnation of samesex lifestyle. But turning samesex friendship into samesex marriage is a different matter.

The conclusions about the morality of homosexual conduct and lifestyle apply easily to samesex marriage. This marriage is not friendship alone, but instead is built around putatively sexual conduct. It is that little alike with othersex marriage. If not to legitimate sexual intercourse, there is no need for any marriage. That homosexual marriage stabilizes expectations and so reduces promiscuity while training in faithfulness is no more relevant morally than that criminal conspiracy also reduces the number of individual criminal entrepreneurs. That a homosexual relation can and often does center around a commitment of profound love is also morally irrelevant to its uprightness, for that does not expunge the stigma of its moral wrongfulness, on any of its three levels.

Morally legitimating stable samesex relations into a marriage cannot help but increase the morally ill effects, and affect the unions which already have marital status. Marital unions are built around othersex relations, the yearning of a woman and a man for penile-vaginal intercourse, along with their other romantic ways to act creatively together. In homosexual union the othersex accomodation is displaced, and left to whatever less driving motivations it can muster. The respect of men and women for each other centered around their sexual differences dissipates into general human respect. Since those differences remain regardless, the primary motivator toward overcoming the difficulties caused by difference is eliminated. Better a moral impure relation than an immoral pure one.

If adult sociality is badly affected by samesex unions, so much more are undeveloped persons left unprotected before them. The children in any adult union are being educated, often intentionally but often not, into what it means to be a developed human person. They do not know how to be adult; more lastingly and in deeper detail than schools and peers teach them, do their significant adult others. The actual result is often awry from the intended one, but what cannot help but be done in parenting is to open or close global possibilities of living, by facilitating or blocking them. One way to educate for a life of immoral acts is to legitimate it institutionally, as creating a samesex marriage does. But the discourse on samesex unions has not even begun to address the

needs and the deprivations of children brought into those unions.

III. LEGAL RESPONSE

To all of which the response, if not outrage at the bigotry imputed to these remarks, may well be: so what? There are all sorts of acknowledged immoralities which are untouched legally because they fall outside the law's domain of concern. Actions may be tolerated despite their immorality, just as actions may be outlawed despite their moral innocence. Morality is not finally determinative of law. Even if homosexual conduct is immoral, even if samesex unions are morally wrongful, that has little to do with how the actions and the unions are treated at law.

This is partly true and partly untrue. Here is where the shift from natural morality to natural law occurs. To make the shift requires specifying the moral status of law. At the very least, law is not exempt from moral evaluation, because no facet of human living has that immunity. In addition, the law may have moral boundaries upon its creativity, certainly those boundaries which the moralizing dimensions of our charters and their preambles in our legal system set out. Finally, the purpose of law as a social institution can determine whether some pretenders to legal status, as statute or dictum are by reason of their official history, do in fact continue to carry the moral obligation to respond to them as legally binding, in effect whether they are law.

A. CRIMINALIZABILITY

The prominent classical naturalist way in which this is fleshed out is to identify law as authoritative and reasonable public dicta. While one way to amplify their being reasonable is as embodying requirements of morality, the dicta's maintenance of public good can outweigh their moral deficiency, and continue to hold moral force. Another version of this is to acknowledge that all law is directed toward achieving moral good, but not all moral good, instead only that which is linked to public good.

The chief classical liberal way to translate these theses is from the other end, by first identifying public good with the elimination of harms to citizens, and then limiting legal norms to this task. Harms are taken to be psychophysical deficits directly caused by an action to an identifiable person (like car theft). This rapidly collapses into actions which are *likely* to cause harm (like leaving car doors unlocked), then into acts which harm the body politic (like perjury about thieving or leaving an unlocked car). By now the way is cleared for legally controlling what were initially harmless acts (suicide, substance abuse, sexual improprieties), and offensive acts (disrespecting the dead, public display).

The thrust of both Mill's liberal and Aquinas' natural law has to do with criminalization, namely what are the justifications and the limits of law for making some conduct criminal.[12] This question is not the central issue in the present context. There are jurisdictions which still criminalize sodomy, but ours has not been one for thirty years. Only gross public indecency, homo or heterosexual, remains penalized.[13] In the instance of sodomy it is largely the abuses of enforcement which induced its decriminalization, such as the grave intrusions upon privacy during discovery and the serious potential for exploitating its participants with a claim to publicize that information. Such serious public harms from abuse of rights outweighs even important public benefits from criminalizing sodomy.

B. PREVENTION OR PROMOTION

It may be wrong to punish samesex unions. But it is right to refuse to privilege them. Decriminalization does not terminate the legal relevance of homosexual conduct. The question becomes whether it is justifiable to refrain from privileging conduct which it is not justifiable to criminalize. The harms of criminalization are not a problem, when the issue is whether to give public favor to institutionalizing

12. J.S. MILL, *On Liberty* (1859), whose dialectic as presented here is developed by T.C. GREY in *The Legal Enforcement of Morality*, New York, Random House, 1980, ch. 1; THOMAS AQUINAS, *Summa theologiae*, I-II.96.2.c.

13. *Criminal Code*, R.S.C. 1985, ch. C-46, s. 173.

samesex relations. No intrusion nor exploitation is at issue here, because in the course of seeking recognition the aspirants to this status themselves publicize their own relations, and ask for public approval.

The starting point is to recognize that marriage is not created by law, but is recognized by law in order to attribute to it a set of legal consequences. There is wide variance across eras and regions as to how much of marriage is recognized and what is attributed to it, as well as variance in what the factual state of affairs is which receives these. There seems little doubt, however, that in the regions of western jurisdiction during historical times the candidates for recognition have not included men with men or women with women.

A similar conclusion arises from considering the capacity of legislation *vis-à-vis* matters of fact. There is no question that law can and does use legal fictions to accomplish desirable public purposes, and makes them true at law. A karakul lamb is deemed not to be an animal for butchering purposes, an unborn child is deemed to be a person for loss of limb but not for loss of life, a felon was defined as murderer along with an accomplice who slew until recently in Canada.[14] The fiction that a union between two men or two women is a marriage also lies within the law's creativity.

The relevant question, instead, is whether such a public benefit is achieved by such fictions that it is worth the pretense, and being flayed by Bentham's disgust over its duplicity. The public benefit from creating the fiction of homosexual marriage is taken to be the regularizing of sexual unions in order to protect property holdings and vulnerable persons. In the course of doing this, homosexual promiscuity is reduced, and the discomfort over unmarried adults adrift in society is curtailed. Evidence that the putative institution will do this is, of course, conjectural and made up only of negative instances until the institution has been established and observed longitudinally.

---

14. *Abattoir Commission Act*, Statutes of the Republic of South Africa, 1961; *Criminal Code* (Canada), comparing ss. 223 (1) and (2) to ss. 287 (4; not in force since 1989); *R.* v. *Vaillancourt*, [1987] 2 S.C.R. 636 (Canada).

Facing this uncertain benefit are a set of more likely detriments. Here the moral considerations feed back in. Disrespect toward the most inexpugible differences in society is promoted by segregating and ghettoizing the sexes into their own marriages. As well, the homosexual union is still widely considered to be a moral travesty, even if not always for morally defensible reasons; it is not held up as one of the ideal states to be inculcated among undeveloped persons. Finally, even if moral beliefs lie beyond legal rejection, what is still the dominant moral practice and one prominent stabilizing force until now is altered beyond recognition. While the damages from taking this step remain as postulatory as their opposites, the public risk of creating this fiction is too great to undertake for such meager public benefits.

C. RIGHTS

The most vocal version of the campaign to legitimate samesex marriage is launched neither to eliminate the criminality of sodomite conduct, nor to demonstrate its balance of public benefit to be greater, but in order to claim an entitlement to this civil status because of equality rights and the protection from discrimination. The previous part of this study clears the ground to raise and focus on this prominent issue. The earlier considerations, however, recur both once the non-discriminatory character of othersex marriage has been shown, and as the justification for excluding samesex marriage.

1. Association

There is, generally, no discrimination involved in the bisexual definition of marriage. On the contrary, the provision protects citizens from unwanted impositions. Citizens are entitled to live with whomever agrees to live with them, short of exceptions by law or regulation (*e.g.*, convicts, quarantines). The only obligations resulting from co-residency are those which co-residents take on by mutual consent. These voluntary obligations may or may not include ones analogous to marital obligations (*e.g.*, continued cohabitation, mutual

support). Requiring these obligations to be borne by co-residents for no other reason than their consent merely to live together is an intrusion of legislation upon civil rights of association, without sufficient cause. Such an intrusion, however, is just what replacing "man and woman" by "two persons" or the equivalent constitutes, by broadening co-residents' obligations without their consent, in the way that Common Law partners' obligations have already been expanded. These liaisons equivalent-to-marriage are currently imposed regardless of partners' intent. Québec has tried but failed to avoid creating Common Law marriage by only extending marital benefits and burdens but not the marital regime to such liaisons.[15]

The Common Law marital regime elsewhere consists in the provision of some although not all of the rights and obligations of the marital regime, whether or not it is considered as a marriage by the law; certainly it is not so considered by the participants, or they would have married. This sort of arrangement is not considered discriminatory, however. This non-marital heterosexual arrangement is non-consensual,

---

15. The substantive side of the evidentiary merger in C.C.Q., S.Q. 1991, ch. 64, s. 379, is found in statutes. *An Act respecting the Québec pension plan*, L.R.Q., c. R-9, ss. 91(b) as amended in L.Q. 1993, c.15, s. 16; *The Supplemental Pension Plans Act*, L.R.Q., c. R-15.1, ss. 85(2); *Automobile Insurance Act*, L.R.Q., c. A-25, ss. 2(3), as modified in L.Q. 1993, c. 56, s. 1; *An Act respecting industrial accidents and occupational diseases*, L.R.Q., c. A-3.001, s. 2; *An Act respecting income security*, L.R.Q., c. S-3.1.1, ss. 2(2); *An Act respecting financial assistance for students*, L.R.Q., c. a-13.3, s. 2; *An Act respecting the indemnification of the victims of crime*, L.R.Q., c. I-6; and *An Act to promote civism*, L.R.Q., c. C-20 provide social benefits to factual partners on a basis similar to spouses. The *Legal Aid Act*, L.R.Q., c. A-14 lumps together both partners' income in the way spouses' incomes are. For the *Taxation Act*, L.R.Q., c. I-3, s. 2.2.1, partners can be considered as spouses, as for the Canadian *Income Tax Act*, R.S.C. 1985, c. 1 (5th Suppl.), s. 252(4). While finding as many sections of the codes which resist this assimilation (art. 410, 500, 512, 585, 596, 666, 2906 C.C.Q.) as finding those which accommodate it (art. 604 C.C.Q. and art. 20, 46(5), 587.1, 587.2, 825 C.C.P.), Verdon places more likelihood of success at litigating samesex treatment as spouses in an innominate tacit contract, after *Peter* v. *Beblow*, [1993] S.C.R. 980 and *Beaudoin-Daigneault* v. *Richard*, [1984] 1 S.C.R. 2, than in the suit for undeclared partnership or in enrichment without cause which Hendy and Stonebanks favour. See J. VERDON, *L'union de fait — de quel droit, au fait?, Développements récents en droit familial*, Cowansville, Les Éditions Yvon Blais Inc., 1998, pp. 59-112; and D.M. HENDY, C.N. STONEBANKS, *Strangers at Law? The Treatment of Conjoints de fait in the Civil Law of Quebec and the Development of Unjust Enrichment*, The Definitive Seminar on Family Law, Montréal, McGill University, 1995, pp. 1-47. Many of these tactics have been bypassed by the developments in notes 17 and 19 under the Charters.

unlike the exclusion of samesex couples from the marital regime, for the former is imposed by law upon persons who meet its requirements, even if they dissent.

The current regime, far from infringing rights, protects the right of association. The marital institution is one mode of association, which persons have a right to exercise, given their prerequisites. It is the form of association which has as its defining character the gender-difference of its participants. If that association is no longer available but is replaced by a different one wherein sexual difference has become irrelevant, this is not the same institutional association. The right to associate by means of it is not the same right. That right has, instead, been obliterated. A provision of law which obliterates a right by making its exercise unavailable cannot be justified as a limitation upon the right. That provision cannot be justified, because it is an extinction of the right. While usually it is the limitation of a right which is to be outlawed because it prohibits the exercise, in the present case what prohibits the exercise is the extension of the right.

Definition of marriage only in its multi-millenial form of a man-woman union not only avoids infringing equal freedom of association, but contributes to expanding it. The association which aspires to be included in this definition, namely samesex union, is of recent origin insofar as its publicity, advocacy and structure is concerned. It is a form of association in rapid development, often negative towards the long since crystallized form of marriage, despite recent alterations in the legal form of marriage, too. To fix the form of samesex relationship into that of marriage is to halt its evolution. It is to impose upon the participants a set of duties which, perhaps appropriate to a man-woman relationship, will be contrary to homosexual association. Maintaining this requirement of capacity for marriage keeps from imposing foreign norms upon homosexuals' self-determination and freedom of association. The current provision keeps from forcing all relationships into the one mold of marriage, nor forcing all worthy participants to think of themselves as "spouses". Instead by its exclusion the present practice leaves autonomy to other relations, *e.g.* to friendship, to co-residency, to love. While exclusion from marriage may ben-

efit only those homosexuals who do not desire it, while depriving those who do, this is better than eliminating the exclusion. Eliminating it would co-opt into this association not only those who do want it but also those who do not, which is the greater public intrusion upon their private rights.

2. Nondiscrimination

Nor is there any infringement through discrimination created by the definition of marriage. The substance of inappropriate discrimination consists in treating like persons in an unlike way and unlike persons in a like way, not in treating like alike and unlike unlike.[16] The existing definition of marriage makes available the institution of marriage to persons who are alike by being opposite in gender. Our marital regimes make available the remaining range of other consensual relationships to persons who, while alike by being the same in gender, are unlike the persons considered in the first way. The gender unlikeness of married persons is a relevant difference, the definitional distinction which defines the institution. That relevance ensures that the difference in gender remains non-discriminatory.

a) Codal Features

Defining the persons capable of marriage is done uniquely in a civilian Code, whose purpose is to establish the institutions of the particular society. This Code is as integral to the Constitution of the province as its Charter of Rights, and its Charter of the French language. While this does not immunise its provisions against evaluation according to the provincial or federal Charters, this legislative stature does lift its provisions from being part of some narrower legislative scheme or "minicode" inconsistent with the whole, and relieves its provisions from being evaluated according to some

16. A similar argument is made by J.-L. AUBERT in his note to *Cass. Civ. 17 déc. 1997,* Dalloz, *Recueil de jurisprudence*, 1998, p. 114, n^{os} 6, 7, 9.

narrower purpose which they might have impeded.[17] Charter rights are as fundamental as civil status, but no more so, such as to delegitimate the codally defined marital status.

The defining feature of marriage is a definition of an institutional reality, and not of a precondition for a claim upon welfare relief, taxation exemptions, contractual standing or delictual obligation. The marriage's systemic effect of changing one's position in view of such other statutory dispositions, then, cannot be characterised as prohibited discrimination.

b) Definitional Features

The samesex exclusion from marriage is no more discriminatory than the other definitional features of marriage. These distinguish groups of people at least as foundationally in terms of their capacity for marriage as does gender. Capacities of age, relationship, and previous marriage distinguish some groups from others by reason of their incapacity for marriage. The incidents of "respect, fidelity, succour and assistance", cohabitation and other duties also distinguish some groups in terms of their capacity for the formation of marriage, in a manner which is also definitional since these are non-derogible provisions. Brothers and sisters cannot marry each other. Neither gender is free to marry with legal regimes that provide for multiple partners, bestial ones, with a "sunset" expiry, or agreeing to exclude an obligation to provide for each other's needs.[18] And these incapacities involve as much if not more historical disadvantage for the group members as does gender, having led to such stigmatizing perjoratives as "playboy", "incestuous", (statutory) "rapist", "swinger" or "skip". Samesex orientation is even less manifest, is of disputed voluntariness, and is grouped by historical perception no less than age or family relationship. Despite this, these other provisions are not considered open to challenge by reason of being prohibited discriminations.

17. *Egan* v. *Canada (Attorney General)*, [1995] 2 S.C.R. 513.

18. On marriage in C.C.Q., see articles 373 for the capacities, 392 for the incidents, and 391 for their non-derogibility.

c) Beneficial Entitlement

Definition of marriage between a man and a woman does not, or need not, exclude couples from the alleged benefits of marriage. The law provides that the institution identified as marriage, when it is entered, entails a set of entitlements and obligations. The provision that marriage is between a man and a woman makes available the possibility of a samesex arrangement whose contractual regime can be defined to include all, some or none of these entitlements. Limitation to this far more libertarian arrangement cannot be considered as discriminatory.

The dictum of Cory, J., in *M.* v *H.* that "[a] contractual regime cannot be considered as an adequate alternative to a statutory regime" is true only where the statutory regime enforces benefits which would be contractually unavailable, for example if the parties have unequal bargaining power.[19] When parties determine themselves to contracts analogous to marriage, however, they do this with fully equal power. Nor is the marital regime itself the benefit of which samesex parties are deprived in a way that infringes their equality. Marriage is a distinctive benefit only to the extent it remains distinctive.

A contractual regime cannot currently bring all the valuable benefits of the statutory regime, such as tax, inheritance and welfare benefits, nor prenuptial gifting. These are or can be provided by statute, however, so any deprivation does not constitute discrimination under the definition of marriage, but under other statutes which fail to provide those benefits. In turn, then, the remedies if any for such deprivation relate to other statutes, and not to the identity of marriage.

d) Beneficial Deprivation

Marriage between only a woman and a man is not discriminatory because it deprives no one of the benefit of its status. Infringement of equality always requires the loss of some benefit, however. The benefit to which samesex partners aspire is marriage, the detriment they allege is the

19. *M.* v. *H.*, [1999] 2 S.C.R. 3.

exclusion from marriage, and the alleged discrimination is the loss of self-worth and human dignity which this exclusion brings. In order for exclusion from marriage to be a detriment, however, as needed for discrimination, inclusion in marriage must be a benefit. While some consider it to be such, much literature points out how contemporary marriage is itself the factor which undermines self-worth and human dignity. Its patriarchy, rigid roles, loss of public and professional development, economic losses, abusive internal relations, and infantilisation of both adults and children is alleged particularly in research sponsored by samesex interest groups.[20] In samesex appreciation itself, inclusion into this status is no benefit. Exclusion from it, then, can be no detriment, nor a discrimination. Nor is there is a way out by saying it is up to the persons choosing it to determine whether it is a benefit or not. The legal status of marriage as benefit whose deprivation gives rise to a claim of discrimination cannot have as subjective a base as this preference.

3. Equality

a) Orientation

If there were any purported discrimination, it could not be a discrimination based on sexual orientation. No mention of sodomite acts nor of sexual preference is to be found in the definition of marriage. Instead, only a reference to gender is stated. Nor does a sodomite nor a homophile dimension show up in its interpretation and application, giving a basis to allege differential effect. If that were the case, two contrary to fact applications would prevail. On one hand, the performance of sodomitic acts with each other would prohibit heterosexual persons, also, who engage in such acts from marrying each other. On the other, a person engaging only in heterosexual preferences and acts would not be excluded from marrying someone of the same gender. Nor would a person

20. See examples in Andrew SULLIVAN (ed.) *Same-Sex Marriage : Pro and Con*, New York, Random House, 1997, especially ch. 4 and 9; and in R.M. BAIRD and S.E. ROSENBAUM (eds.), *Same-Sex Marriage : The Moral and Legal Debate*, Amherst, NY, Prometheus Books, 1997.

with homosexual preferences who lives celibately. But they, too, are excluded from any liaison purporting to be samesex marriage. There is no differential impact on samesex applicants for marriage.

To defeat this defense, one could try and assert that, while the definition of marriage does not exclude a person of either gender, it does exclude two applicants of the same gender; and so this must involve the sexual orientation of the applicants, their sexual orientation toward each other's gender. But, by analogy, a marriage application by two persons, only one of whom remains already married, is rejected for both parties. This does not imply that both are rejected for attempting bigamy.

b) Gender

If there were discrimination, it would be based on gender, not on orientation. Neither is there a discrimination by gender, however, but only a distinction. The feature which makes an exclusion discriminatory is that the benefit from which the person is excluded is first defined in a way available to all, but then the access to it is blocked by an unreasonably prejudicial distinction. The impugned law, however, does not deal with access to an institution which was already available. The same provision that defines the benefit also sets the access, which has never been available for all comers in its conception prior to being restricted to only some by its application. The situation that is required in order for discriminatory exclusion by gender to occur does not occur in this provision.

Far from being an instance of discrimination by gender, marriage as currently defined in law protects each gender from discrimination against it. Marriage is concerned with sexual conduct. While marriage is not required in order for sexual conduct to occur, marriage without sexual relations between partners is commonly thought bizarre, unhealthful, cruel and ground for annulment in some traditions. Similarly, sexuality is concerned with gender. Samesex sexual relationships are ones that engage those features of the person which identify the person as gendered in one way rather than

another. That marriage is sexual, and sex is gendered, means that it is part of the defining feature of gender for parties to have access to an association limited to sexual relations with the other gender. Exclusivity is a defining feature of gender — "this gender is not the other"; so any institution built around sexual gender must be likewise exclusive. For this association not to be available is a detriment, and a discrimination against not just one gender but against each gender. The law, by ensuring an association defined as it is, ensures that marriage cannot be discriminatory by reason of gender.

Far from enforcing discrimination by reason of gender, the definition of marriage between a woman and a man makes persons of each gender capable of a favored public union with persons of the other gender. Equal status is given to each gender in this respect; neither gender is given a preference or a detriment. Genders are treated equally, and without discrimination. This is not equal discrimination or equal deprivation, for what is equalised is the opportunity to marry, rather than the prohibition against marrying.

c) Status

If it is discrimination neither by orientation nor by gender, the definition of this capacity for marriage does not discriminate with regard to civil status, either; for all continue to have equal access to the married status. All are provided "a fundamental personal choice with regard to public recognition" (*Egan*).[21] Both heterosexuals and homosexuals can marry, and can marry each other or the other : lesbian female to gay male, as much as either to an oppositely gendered heterosexual partner. No more in this civil status than in others does its openness unrestrictedly imply that it is open unconditionally. Thus to marriage as to the other civil statuses there are limiting conditions : to birth, since some are aborted; to name, since some are refused their chosen names; to death, since some are kept alive in extremity. Access to the civil status of marriage is equally open to all, with conditions that are not otherwise discriminatory.

21. For *Egan*, *supra*, note 17.

Discrimination and the protection from it has to do with individuals; individuals are discriminated or protected, and not groups. Thus the complaint in *Egan*, that restriction of marriage to opposite sexes is a "denial of the same degree of dignity to relationships", is not relevant to the claim of discrimination. If any right to dignity is violated, that would be a right of individual persons.[22] But that is not the case, since there is no discrimination by orientation, gender or civil status, nor discrimination as to any benefit at all. Once that is achieved, the relationship as well as the individual is given its autonomy and its dignity.

CONCLUSION

This study has shown that pretenders to samesex "marriage" have a project that, if unwise to criminalize, is contrary to legal, moral and religious norms, whose promotion is legally wrongful, and whose prevention is not legally proscribed. The conclusion of this study is to find that support for marriage as the permanent and exclusive union of one man and one woman is not legally impermissible, and is justifiable at law. This is the humane assurance that is needed in order to fuel and commit to the hard technical work at law in support of the value of marriage.

Christopher B. Gray
Philosophy Department
Concordia University
1455 ouest, boul. de Maisonneuve
MONTRÉAL (Québec) H3G 1M8

22. *Ibid.*