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The UDHR& the Foundations of the Right to Marry

The institution of marriage has gone through much turbulence in the western world in the second half of the 20th century. Many new laws have been introduced and some old laws abandoned to adapt marriage to the changing circumstances of the day. The last major challenge to the 'old institution' has attacked marriage at its very foundations. Most countries of the western world have had to or will soon have to face challenges to their family laws requiring a redefinition of marriage to include couples of the same-sex or at least to institutionalize some sort of same-sex civil partnership. The process can also be illustrated by the changes that the legal articulation of the right to marry has undergone from Article 16 of the Universal Declaration of Human Rights to Article 9 of the Charter of Fundamental Rights of the European Union - one of the latest important human rights bill. The UDHR says: "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family." The European Union Charter states: "The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights." The latter formulation was intentionally written in such a way as to accommodate the right to marry of the person of the same sex. A lot has happened between the passing of these two documents.

What I want to explore today is one striking feature of the on-going process of redefining the right to marry. The striking feature is this: when one reads the judgments of the supreme courts that ventured to change the common law definition of marriage or listens to various public debates leading to such political changes, one gets the impression that this is a process of liberation, of extending rights to marginalized groups, of dispensing with age-long and irrational limitations of the subjects of the right to marry. However, a deeper rational reflection reveals that what is really happening is a radical shift in changing the moral foundation of the right to marry and thus the very meaning of this right for everyone. The traditional understanding of sexual relationships is being replaced by a new understanding. This is not a case of let's say extending a right to vote to prisoners while keeping the same right to vote for everyone else. This is a case of changing everyone's right to marry and thus a case of changing the very foundations of western societies. Yet, the most shocking aspect of this process is that it is done without discussing the real issues at stake. I will soon present a typical legal argument used in favour of same-sex marriage which is considered by many almost self-evidently true and conclusive. In reality, it is invalid and meaningless without several implicit moral assumptions. They, however, never get discussed. A responsible public debate leading to a reform would have to ask much deeper questions, the most fundamental of which is: what is good about sex? What makes human sexual act truly enriching

and valuable? Unless the answers to these questions form part of the moral culture of a given society, the right to marry will continue to be a battleground for various political interests.

This is an insight realized already by Jacques Maritain in his observations of the drafting of the Universal Declaration of Human Rights. He understood very well that the list of rights enumerated in the Declaration is just that – a solemn declaration, not 'a true Charter determining a common way of action'.[1] In order for this declaration to be implemented, there would have to be 'agreement on a scale of values', peoples would have to have in common 'the same philosophy of life'. Maritain was well aware that such agreement was lacking among the authors of the Declaration. They agreed about the list of rights but on a condition that no one asked them 'why'. However, without answering the 'why' question, no list of rights can be consistently implemented in real life. As Mary Ann Glendon remarked, the whole human rights project launched by the Universal Declaration of HRs 'will rest on shaky foundations unless and until philosophers and statespersons collaborate on the business that the framers left unfinished.'[2] The unfinished business is the business of laying the foundations for human rights. It seems to me that the purpose of the Doha declaration which we now celebrate and the purpose of the present colloquium is precisely that – contributing to laying the foundations for human rights, more specifically laying the foundations for rights relating to marriage and family.

My brief and incomplete argument will unfold in the following way: first, I will sketch a fairly universal legal argument in favour of redefining marriage and show that it is based on certain implicit moral assumptions about the goodness of sex. I will call these assumptions liberal and contrast them with liberationist and traditional positions on sex. These three positions present alternative and incompatible foundations for the right to marry. The legal debate about marriage reforms is empty and misconceived unless and until these foundational issues of the right to marry are discussed. When legal arguments decide who has the right to marry and whom, it is not law that rules but often hidden and unreflected private moral prejudices. To avoid this travesty of public deliberation, a society has to engage in public moral debate about the nature of sexual relationships. That is, at least those societies which face a serious challenge to the traditional understanding of marriage.

One of the most common legal arguments in favour of redefining the right to marry is relatively simple and fairly universal. One can find a version of it in the judgments of many supreme courts (whether in Massachussets, California, Canada or South Africa) as well as in political debates that have led to redefining traditional marriage or institutionalizing same-sex civil partnerships. The argument goes something like this:

Heterosexuals have a right to marry a person of their choice.

Homosexuals do not.

That is an obvious case of treating people differently.

The reason for this difference in treatment is the person's sexual orientation.

Sexual orientation is analogous to other prohibited grounds of discrimination such as race, sex, political or religious belief.

Therefore, denying homosexuals the right to marry is tantamount to unjust discrimination.

Is this argument true? Should we change our marriage laws as a consequence? This argument works if and only if it is true that committed sexual relationships of two men/women are of equal value to committed sexual relationships of a man and a woman. If they are of an equal value,

1 J Maritain, 'Introduction' in UNESCO (ed) Human Rights: Comments and Interpretations (Wingate, New York 1949)16.

2 MA Glendon, 'Foundations of Human Rights: The Unfinished Business' (1999) 44 American Journal of Jurisprudence 1.

denying one the right to marry is treating like things unlike. However, if there is fundamental difference in these relationships, then there cannot be any talk of an unjust discrimination. All societies admit that there are limits to who one can marry. Siblings cannot marry, neither can groups. Is this unjust discrimination? No, because sexual relationship between siblings would be immoral and self-destructive. As such it does not have any value and is therefore fundamentally different from a committed sexual relationship between a man and a woman.

So we can see that the well-sounding and potentially sophisticated legal argument is fairly empty and useless. It cannot solve the issue that is really at stake. The issue is the value of different sexual relationships. And that is an issue of moral philosophy. Following arguments of Patrick Lee and Robert George, I will briefly outline three competing solutions to our problem: liberationist, liberal and traditional. These are three relatively common answers to the question 'under what conditions is a sexual act morally right'[3] or in other words 'what gives value to a sexual relationship?'

The 'liberationist' position holds that what makes sex morally right is pleasure. As long as the couple does not violate other moral norms, the fact that they are causing pleasure to each other is sufficient for the act to be morally right. Many academics surely hold this view but it is fairly irrelevant in legal debates. If this position was adopted by marriage law, there could hardly be a reason for excluding groups or family members from marrying because all such relationships would be of an equal value. There does not seem to be a relevant voice publicly arguing for such radical reform. The second position, so-called 'liberal' position, holds 'that sexual acts between people are morally right as long as they in some way express genuine love or affection.'[4] This seems a very attractive position. On one hand, it admits that not all sexual expression is good – casual sex with a prostitute is not because it doesn't express love. On the other hand, it considers equally valuable any committed sexual relationships of two adults. The third - 'traditional' – position holds that sexual acts are morally right only within a reproductive-type life-long union that can only be formed by a man and a woman. In other words, sex is a unique form of expressing love that is suitable only within such relationship that is, at least in principle, oriented towards begetting and rearing of children.[5] So here we have three different views on sex – sex is good when it causes pleasure, sex is good when it is an expression of love or sex is good when it actualizes a reproductive-type union between a man and a woman. These are competing and in many ways incompatible views of sex. The traditional position has arguably been the foundation of western marriage laws for centuries. It has arguably been the position of most of the drafters of the Universal Declaration of Human Rights. However, it has been corroded for many decades now and the same-sex marriage challenge is another serious threat.

Which of these positions is implied by the legal argument I've sketched? It is obvious that it is the liberal position. The common legal argument in favour of same-sex marriage assumes that a committed opposite-sex and same-sex relationships are of equal value. But what does a sexual relationship between two men have in common with a sexual relationship between a man and a woman? If we look at it from the perspective of the traditional position, these are radically different relationships – reproductive-type sexual acts of married opposite sex couples unite them in a two-in-one-flesh bodily and thus personal union; intrinsically sterile sexual acts of same-sex couples cannot achieve more than give pleasure and an illusion of unity. The traditional position

3 R George and P Lee, 'What Sex Can Be: Self-Alienation, Illusion or One-Flesh Union' (1997) 42 American Journal of Jurisprudence 135, 136.

4 ibid.

5 J Finnis, 'The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations' (1997) 97 American Journal of Jurisprudence 97, 131.

sees a rational and essential distinction between such relationships. However, if we accepted the liberal position we could conclude that both kinds of relationships are morally equal because they can both be based on 'love'.

Here we have arrived at the moral position that is driving most of today's legal reforms of marriage laws in many western countries. It is this particular view of the goodness of sex that is replacing the traditional understanding of sexual relationships. Without this implicit moral position, the legal argument that often wins the day makes no sense.

I happen to think that the liberal position is not only rationally indefensible but also unstable: it will eventually slide down to the liberationist position. Unfortunately, I can't make that argument today. My only intention was to show that there are deep moral questions lurking behind seemingly straightforward legal arguments. These questions can have different answers. Whichever answer is accepted, however, it will have wide-reaching consequences for everyone. The right to marry based on liberal foundation will be different than the right to marry based on traditional foundation. Granting the right to marry to same-sex couples is not a simple question of extending the subjects of the right, it is a momentous question of choosing the foundations for an institution which, as Richard Wilkins argues, 'has been essential to individual development, social progress, and communal prosperity' throughout the ages.[6] Such momentous decisions should not be made, if at all, in the ivory towers of lawyers and politicians. They require long and quiet contemplation, sincere and open debate seeking truth for the benefit of all. Legal language is too poor an instrument for such deliberation. We need a much richer and deeper debate. It is encouraging to see that there are still places and people who are interested in such debates. Let me conclude by thanking the Quatar Foundation for the invitation to offer my modest reflections and more importantly for creating space and time where statesmen and philosophers can cooperate in the business left unfinished by the drafters of the UDHR.

6 R Wilkins, 'The Meaning of Marriage' http://globalfamis.org.qa/.