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Is Marriage a Form of Discrimination?

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Justice requires that equals be treated equally and unequals unequally. Discrimination is a distinction or the differential treatment based on such a distinction. Whether discrimination is justified depends on the answer to what Aristotle calls "the difficult question": equals and unequals in what? Unjust discrimination either fails to ask the right question or fails to act on the right answer.

In contemporary political discourse the term discrimination itself has come to signify injustice. While this reflects the truth that all human beings have equal dignity simply in virtue of belonging to the human species, it can obscure the fact that human dignity also requires recognition of the truth that, though equal, not everyone is the same.

To deny driving licenses to the blind does not assume that they do not deserve equal respect and consideration as persons, but that they are different from other persons in respects relevant to driving.

Some countries have introduced, and others are considering, the extension of the legal recognition and social benefits of marriage to persons in homosexual relationships, in order to "put an end to discrimination".

Are homosexual relationships equal to marital relationships?

The first and most ambitious argument from discrimination proposes that homosexual relationships are equal to marital relationships in those respects that justify the privileged treatment of marriage.

Exclusivity, dependence, duration and sexual nature are not the relevant aspects why marriage is privileged by the State. They are only the conditions of those aspects that make marriage unique: the vital function of procreation and the socializing functions of bridging the male-female divide and raising children.

When the State uniquely privileges marriage it takes the position that it is in the best interest of society for children to be born and raised in a community where they experience the cause of their biological and historical identity as a loving union preserved by each parent placing the needs of others over their own. By promoting marriage to be the exclusive union between one man and one woman, the State not only protects the rights of children but encourages the values of commitment, restraint and diversity that are needed to preserve community at large.

One objection to this is that not all marriages lead to children. Of course, the State cannot anticipate whether or not couples will have children, but it is clear that only one man and one woman together can be the biological parents of a child and can raise it with the complementarity of motherly and fatherly love. Marital acts are procreative in character,

even if non-behavioural conditions do not allow for conception.

The other objection is that marriages fail, to the detriment of children, spouses and families at large. But if individual marriages are in crisis, the correct inference cannot be that social policy should institutionalize this failure rather than counteract it. Through marital benefits the State promotes rather than rewards ideal conditions for procreation and socialization.

Are legal recognition and governmental support justifiable?

When the State uniquely privileges marriage, homosexual relationships are in no way singled out for "unequal treatment". There are any number of relationships that do not qualify for the benefits of marriage. The question then is why homosexual relationships should be treated as uniquely analogous to marriage.

The aspect that differentiates homosexual unions from other non-marital relationships of dependence and duration is their particular sexual nature, and it is not clear why this should single them out for governmental support. Preferential treatment of this sort would discriminate against all those in dependent relationships of a non-sexual nature: an unmarried woman who cares for her aging mother or two widowed sisters who share a household could not claim privileges and protection from the State .

In France the perception of this problem has led to a more liberal model of civil unions, open to any two citizens. Even this model discriminates against some, as it provides no justification why groups or singles should be financially and socially disadvantaged.

Crucially, in an open-to-all policy marriage loses the uniquely privileged position it deserves for practical and symbolical reasons. The extension of marriage privileges to non-marital unions inevitably diverts resources, dilutes meaning and diminishes status of marriage as traditionally understood. Rhetorical efforts to maintain some distance between marriage and homosexual unions cannot hide this fact.

A minimalist version of the argument for homosexual unions suggests that with "legal recognition" nothing more is at stake than the formal registration of a social phenomenon. In most cases, though, such "legal recognition" does in fact confer to homosexual relationships privileges previously reserved to marriage. This involves a re-evaluation of what contributes to the common good, how social benefits should be distributed and what the rights of children are.

But even if no benefits and privileges were involved, to single out the social phenomenon of homosexual relationships for formal registration is either arbitrary or it suggests an analogy to the only other legally recognized relationship, which is marriage.

In an attempt to justify this analogy, proponents resort to the category of "committed relationships" to describe both homosexual and marital relationships. This falsely suggests that commitment in relationships is worthy of privileges for its own sake, while in fact the privileges promote the vital and social functions of marriage, for which commitment is only the condition.

Consequently, for the State to promote a homogenized vision of "committed relationships" amounts to the decision no longer to encourage ideal conditions for procreation and socialization.

Conferral of marital status to homosexual unions?

The second argument from discrimination takes a different approach. Now the contention is not that homosexual unions are equal to marriage in relevant aspects but that the disadvantages homosexual persons suffer in society ought to be compensated for by conferring marital status to homosexual unions.

Because only homosexual persons are disadvantaged in this particular way the question

whether the State should extend the privileges to other non-marital relationships does not arise. The burden of proof then no longer lies with homosexual unions and their contribution to society in comparison to marriage, but with individual homosexuals and the disadvantages they suffer.

Naturally, the argument will encounter less sympathy if these sufferings are in any way self-inflicted - hence, the importance of shifting responsibility away from those who share the homosexual identity to others who by their actions allegedly make it oppressive.

The argument from identity often assumes a unique advance in knowledge and understanding of human nature and elevates contemporary perceptions and practices to a normative status. Different perceptions, such as the traditional heterosexual model of marriage envisaged by Plato and Aristotle, are explained by their relation to an inferior understanding of the "facts" about homosexuality. Their objection to homosexuality, based on the notion that homosexual persons engage in unnatural and therefore immoral acts, now can be dismissed because we "know" that homosexuality is a "natural condition" and ought to be treated as an "identity".

But are these established facts?

While so far there is no empirical evidence that homosexuality is biologically predetermined and unchangeable, there seem to be biological factors that can contribute to the development of homosexual inclination, just as there are in the case of aggressiveness or athleticism. However, the claim of a biologically determined and clearly delineated homosexual identity is rendered problematic in theory by Foucault's sexual constructivism and in practice by the bisexual and paedophile fringes of the category.

Regardless of whether sexual orientation is chosen, biologically determined or psychologically enforced (as it seems to be the case with many victims of abuse), no account of the origins of homosexuality can establish that the inclination must constitute an identity.

Next to the identity claim, the argument for compensation has to rely on the perception that the disadvantages homosexual persons face are substantial.

In this regard there can be no doubt that the feeling of being ostracized or persecuted among many homosexual persons is real, even if the truth of the feeling is increasingly difficult to establish as a truth of fact. Homosexual persons enjoy the full protection of the law, and in many countries additional antidiscrimination laws are in place that single out sexual orientation for particular protection. They enjoy above average professional success and financial power (in the U.S. almost twice the average household income) and are present in high proportion in politics and among opinion-shaping elites.

This is not to say that they do not face very real problems, but so far it has been impossible to show that they are related to societal discrimination. The significantly higher rates of mental illness, substance abuse, domestic violence and suicide among homosexual persons seem to be independent not only of HIV status, but there is no reduction in these rates among those who live in a social milieu where homosexuality is widely accepted and legally recognized.

If social acceptance does not affect these problems, it is unclear how increased social status could remedy them.

Opposition to homosexual unions does not mean lack of respect

Thin evidence for societal discrimination weakens the compensation argument, as the discrimination for which marriage is supposed to compensate appears to consist mostly in the fact that homosexual persons cannot marry. Because this is true for any number of relationships, the question returns why homosexual persons should be singled out for preferential treatment.

Here emerges the perhaps most problematic aspect to the compensation argument. If it turns out that the discrimination to be compensated for consists not so much in acts that unjustly discriminate against homosexual persons but simply in the fact that homosexual behaviour is morally controversial, this raises questions of freedom of conscience.

Is the introduction of homosexual unions ultimately to symbolize that there is no right to freedom of conscience on the matter of homosexual acts and that conscientious objectors are to be marginalized in public life?

Already the appeal to conscience in any matter pertaining to homosexuality risks being dismissed as "homophobia". Understood as a pathological fear, this disqualifies the position of opponents as an entirely irrational stance.

Beyond that, it has also come to imply an indifferent or even hostile attitude. Because the condemnation of homosexual behaviour objects to acts, not to persons, the conclusion that any opposition to homosexual unions indicates lack of respect and care for people is a blatant non sequitur.

If the line of reasoning is that homosexuality is so central to the human person that it is impossible to morally disapprove of homosexual acts and not thereby discriminate against the person, then by the same token conscientious beliefs central to the human person could not be contradicted without discriminating against the person.

The exhortation that "religious belief must not lead to the discrimination of homosexual persons by refusing them the right to marry" sets up a false problem. Not all arguments made by religious believers can be reduced to their religious beliefs or are justified on the basis of their beliefs alone, and not all the reasons why the State should uniquely privilege marriage depend on the immorality of homosexual acts.

The contribution of religious believers to the public debate on homosexual unions cannot be dismissed as inherently irrational and biased without denying them equality as citizens.

Moral objections to sexual orientation are not necessarily irrational, and it is only unjust to discriminate on the basis of these objections in areas where the sexual orientation of the individual is irrelevant. It cannot be allowed that in political discussion pathological irrationality, bad motives or even hatred are freely ascribed to opponents of homosexual unions, disregarding basic rules of evidence.

The same is true for the voice of the Catholic Church: Scripture and Tradition are unequivocal in the condemnation of homosexual behaviour, but the difference between homosexual relationships and marriage has not been invented by Christianity, nor is it upheld only by Catholics.

If in the name of truth rational arguments can be dismissed because they accord with conscientious beliefs, and in the name of justice conscientious belief can be silenced, then freedom is not for all.

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