

A NATURAL RIGHT TO MARRY?

Liberal critique of state's regulation of marriage

Rishika Rangarajan¹

INTRODUCTION

In the landmark judgment, *Loving v Virginia*², the Supreme Court held that marriage is a “basic civil right of man” fundamental to our very existence and survival. More recently, in *Obergefell v Hodges*³, a similar line of argument was taken in allowing homosexuals to be a ‘member’ of the exclusive club that is marriage. As assumption that underlies the discourse around marriage is that it is a pre-political institution, a natural right, one that *must be* enjoyed by all citizens. However, in this paper I seek to reject this assumption and argue that marriage is a man-made institution heavily influenced by traditional and religious doctrines. The state in defining and regulating marriage is entering into the private domain and is therefore imposing a moral doctrine on all the citizens. Even in permitting homosexuals to marry, it still ignores a multitude of relationships that continue to exist in our society. Marriage as a concept emerged a purely religious institution, to ensure social and economic stability. A Marxist analysis of the history of marriage reveals that the state regulation emerged as a means to regulate labour and population in the society. My main contention is that marriage itself being a private affair, the state in defining it- even extending it to homosexuals- will be propagating or condemning a moral doctrine, which is against the basic tenets of a liberal state. Part I of the paper shall discuss the emergence of marriage as a political institution and the capitalistic structures that influenced it; in Part II I shall argue that in applying a Kantian philosophy, despite his own views on marriage, would result in separating the state from marriage; Part III shall argue through a Rawlsian lens that discourse around state regulation of intimate relationships should be around the right to contract and individual freedom and liberty; and finally in Part IV I shall argue for a domestic partnership model that is best suited in a contemporary liberal democracy.

¹ Research Fellow, Centre for IP, Innovation and Competition, NLU- Delhi

² 388 U.S. 1 (1967)

³ 576 US () 2015

‘MARRIAGE’ AS A RELIGIOUS/ PRIVATE AFFAIR

Stephanie Coontz provides a magnificent recount of the emergence of marriage in her book *Marriage, A History*⁴. Marriage is traditionally a religious institution, derived from the Judeo-Christian theology. Charles Kindregan⁵, a noted legal expert in family law, asserted that the transition of control and regulation over marriages took place only in the late nineteenth century. Until such time, love didn't even find its way into marriage. It was mainly an institution to ensure economic stability and emerged originally as a means to form alliances. In fact, one of the greatest love stories ever told, Anthony and Cleopatra, was merely to form an alliance between two of the then biggest empires, Rome and Egypt.⁶

It was not until the late sixteenth century, that the Church became involved in the regulation of marriage. The lack of neither state nor church intervention allowed the several forms of familial structures to exist.⁷ In the 1600s interracial marriages started to become regulated and finally banned in various states in America.⁸ This coincides with the period where anti-slavery movements began to emerge. The regulation of interracial marriage seemed to be an attempt at maintaining the white supremacy and prevent the economic freedom of the African Americans. This is comparable to the introduction of gender dysmorphia as a psychological illness soon after the removal of homosexuality.⁹ It was seen as a resistance to the gay rights movement to reinforce gender and sexuality norms. Similarly, the gradual move towards defining marriage as a heterosexual union between a man and a woman was a move to reinforce the familial structure which suited the state the most. Finally, in the eighteenth century the State of England became one of the first few nations to pass the Marriage Act to forbid certain forms of marriage. It is interesting to note that it was around the eighteenth century that modern capitalism began to grow, with the emergence of merchant capitalism.¹⁰

⁴ STEPAHNIE COONTZ, *Marriage, A History: From Obedience to Intimacy or How Love Conquered Marriage*, (Penguin Group USA) 2005

⁵ CHARLES KINDREGAN, *Religion, Polygamy and Non-Traditional Families: Disparate Views on the Evolution of Marriage in History and in the Debate over Same-Sex Unions*, (41 Suffolk UL Rev 19) 2007

⁶ *supra* n3; p76

⁷ BRIAN H BIX, *State Interest and Marriage- The Theoretical Perspective*, (Hofstra Law Review, Vol 32 Iss 1) 2006; LAWRENCE STONE, *Uncertain Unions and Broken Lives* (1995)

⁸ *supra* n3; p34

⁹ DIANA TAYLOR, *Michael Foucault: Key Concepts*, (Acumen 2011) p92

¹⁰ PETER BUNHA, *Capitalism, the Concise Oxford Dictionary of Politics*, 2003 Oxford: Oxford University Press

Treating 'marriage' as a pre-political institution

The term 'marriage' has traditionally been defined by common law as the merging of a man and wife as one.¹¹ For centuries, the marriage as an institution was viewed as one that privately established sexual rights amongst consenting adults and provides an informal institution to raise children.¹² From an economic perspective, it is clear how the institution arose as a direct concept to the capitalistic nation. The state's interference was grounded on its interest in the population and production of labour.¹³ It gradually shifted from a private relationship to an economic unit with the state imposing bourgeois morality insofar as it affected the economy. In *The Origin of the Family, Private Property and the State*, Friedrich Engels, a scholar and noted Marxist, asserted that the traditional familial structure, as they exist now, had not existed originally and the present domestic roles were instead fulfilled by entire communities¹⁴. However, the state discovered that the regulation of the familial structure would increase commodity production.¹⁵ Therefore, in arguing that same-sex couples can marry, is grounded on the assumption that it is a pre-political institution and therefore it is the duty of the state to ensure all citizens enjoy the rights and benefits that are attached to marriage. However, the history of marriage shows that the heterosexual, monogamous, long term coupling of individuals with the purpose of creating a legitimized sexual relationship is a political, man-made concept.

The idea that marriage is a pre-political institution, in the sense that all persons *by nature*, are included towards a matrimonial union, is more recent.¹⁶ The arguments advanced to permit homosexuals to marry as still based on the notion that marriage itself a natural right enjoyed by all citizens, presupposing the pre-political nature. This argument is faulty as it still assumes certain basic tenets of marriage as 'right' and good for the society. Terms 'husband' and 'wife' are social constructions which are not merely confined to a merely formality, but are intrinsically

¹¹ LENORE J WEITZMAN, *Legal Regulation of Marriage: Tradition and Change: A Proposal for Individual Contracts and Contracts in Lieu of Marriage* (California Law Review, Vol 62 Iss 4) 1974

¹² BRIAN BIX, *Pluralism and Decentralization in Marriage Regulation*, (University of Minnesota Research Paper Series, No 08-06) 2006

¹³ MAURICE BLOCH, *Marxism and Anthropology: The History of a Relationship*, (Routledge 1983, 2004 Edn) p67

¹⁴ FRIEDRICH ENGELS, *Origin of the Family, Private Property, and the State*, (Marx/Engels Selected Works translated by Alick West, Vol III, available at <https://www.marxists.org/archive/marx/works/download/pdf/origin_family.pdf>

¹⁵ RICHARD WEIKART, *Marx, Engels and the Abolition of the Family*, (History of European Ideas, Vol 18 No 5) 1994 p662

¹⁶ Loving v Virginia, 388 U.S. 1 (1967); EDMUND WALDSTEIN, *Is Marriage 'Pre-Political'?* (Sancrucensis) available at <<https://sancrucensis.wordpress.com/2015/06/28/is-marriage-pre-political/>>

tied to duties and obligations. Propagating marriage as a ‘pre-political’ right is to classify the structure as key to the functioning of a society.¹⁷

Through all debates surrounding marriage, is the assumption that marriage is the ‘foundation of civilization’¹⁸, therefore justifying the role of the state in defining the terms and conditions of marriage. Despite the consensus that marriage itself falls within the private sphere of society, it continues to be treated as a political institution¹⁹. Marriage is emerging as an institution of political phenomena, thus allowing the state to control and shape familial structures, defining gender roles, and ‘normalizing’ the current familial ties that exist. This particular form of family structure has existed for this long merely due the power structures that exist in society. As Engels argued this form of marriage had remained in power due to the capitalistic gains the state sought to achieve through the control of labour, population, women, sexual freedom etc.²⁰

Changing notions of ‘marriage’ in a pluralistic society

Michael Foucault’s “theory” of power is crucial to understand through which he argued that the institution of marriage presupposes fundamental assumptions about human relationships.²¹ It is grounded upon the heterosexual, gendered, monogamous, sexual lifestyle, and the state adopting this definition of marriage is imposing- or ‘normalizing’²²- this lifestyle on every individual. However, through a resistance, our society is now (slow as it is) accepting more unconventional forms of relationships. The two main examples are that of polyamorous lifestyles and incestuous relationships, both of which are condemned by society despite the lack of harm. In the late 1980s, soon after the sexual revolution and the growth of the free love movement, polymory became a more acceptable social practice.²³ More recently, the growth in discourses on gender and sexuality has populated the internet with sexual non-conformists, including asexuals.

¹⁷ CHESHIRE CALHOUN, *Feminism, the Family, and the Politics of the Closet: Lesbian and Gay Displacement* (Oxford University Press 2000) p126

¹⁸ PRISCILLA YAMIN, *American Marriage: A Political Institution* (University of Pennsylvania Press 2012) p224

¹⁹ *ibid*

²⁰ *supra* n13

²¹ LINNELL SECOMB, *Philosophy and Love: From Plato and Popular Culture*, (Edinburgh University Press 2007) p132

²² *ibid*

²³ COLETTE BERNHARDT, *Meet the polyamorists; a growing band of people who believe that more lovers equal more love*, (Independent UK, 13 Sep 2009)

Furthermore, the boost in our economy, has forced the pre-existing gender norms to radically change to allow women to enter the workforce as well. Continuous changes in our economic and social relations would ultimately mean that there can't exist merely one form of familial structure. Feminist writers such as Martha Feinman²⁴, Virginia Braun²⁵, Claudia Card²⁶ have continuously rejected marriage as an institution due to its oppressive nature against women. However, despite the changing notions of relationships and familial structure, most activists are leaning towards redefining marriage as opposed to rejecting the institution altogether.

II.

VIEWING 'MARRIAGE' THROUGH A KANTIAN LENS

Immanuel Kant himself viewed marriage as a virtuous relationship, removing the inherent objectifying nature of sex²⁷. He believes that marriage is the only way to negate the immorality of sex and argues that marriage as an institution ensures equal rights between partners. However, Kant's view of marriage is heavily influenced on his belief in the Christian theology and the contemporary moral standards that existed during his time.²⁸ However, I would argue that in applying the Kantian philosophy, which expressly prohibits the treating of a person as a means to an end, would mean that the state doesn't have a right to control the tenets of marriage.

The defense for marriage stems from the elevated position that it enjoys in society.²⁹ Marriage plays a key role in contributing to our economy, being a primary source of labour, wealth and social insurance.³⁰ Therefore, advocacy of marriage stems from the benefits that it has on either the economy, or the future citizens, therefore making it a public concern. The first and more obvious concern with this argument is the fact that these concerns are without evidence.

²⁴ MARTHA ALBERTON FINEMAN, *Why Marriage?* (Emory University School of Law Research Paper Series, No 12-204)

²⁵ VIRGINIA BRAUN, *Thanks to my Mother....A Personal Commentary on Heterosexual Marriage*, (Feminism & Psychology, vol 13 no 4) 2003

²⁶ CLAUDIA CARD, *Against Marriage and Motherhood*, (Hypatia, vol 11 no 3) 1996

²⁷ ALAN SOBLE, *Kant and Sexual Perversion*, (The Monist 86:1, Jan 2003) p63

²⁸ BROOK J SADLER, *Marriage: A Matter of Right or of Virtue? Kant and the Contemporary Debate*, (Journal of Social Philosophy, Vol 44 Iss 3, 2013) p213

²⁹ JAMES L MUSSELMAN, *What's Love Got To Do With It? A proposal for elevating the status of marriage by narrowing its definition, while universally extending the rights and benefits enjoyed by married couples* (Duke Gender Law and Policy 2008)

³⁰ MAGGIE GALLAGHER, *If Marriage is Natural, Why Is Defending It So Hard? Taking Up the Challenge to Marriage in the Pews and the Public Square*, (Ave Maria Law Review. 409, 2006)

However, the more problematic concern is that the state in imposing a form of familial structure on the society for their own gains is essentially treating its citizens as a means to an end. Kant's concept of personhood rests on the idea of allowing rational beings act on their autonomous will. A person should be allowed construct his own laws suitable for his life. Therefore, the state must respect individual freedom. In *Theory and Practice*, Kant argues that³¹,

Public welfare which demands first consideration lies precisely in that legal constitution which guarantees everyone his freedom within the law so that each remains free to seek his happiness in whatever way he thinks best, so long as he does not violate the lawful freedom and rights of his fellow subjects at large.....noone can compel me to be happy in accordance with his conception of the welfare of others, for each may seek his happiness in whatever way he sees fit, as long as he does not infringe upon the freedom of others to pursue a similar end which can be reconciled with the freedom of everyone else within a workable general law.

Therefore, in applying Kantian philosophy the discourse around state regulation of private and intimate relationships should be around individual liberty, right to contract, right to act on his autonomous will. I will argue that the complete removal of marriage from the state regulation would be best suited under the Kantian philosophy.

III.

DIVORCING 'MARRIAGE' FROM THE STATE: A RAWLSIAN ARGUMENT

John Rawls, known for his liberal philosophy, did not speak of the controversy surrounding same sex marriage in his writings. He proposes an account of political liberalism, advocating a theory of *justice as fairness*³². His theory envisions a just society as one where all citizens are free and equal. In a liberal democracy, it is the duty and interest of the state to ensure that law and policy is based on public reason, as opposed to any religious or majoritarian moral doctrine. The Rawlsian theory would necessitate any contentious social issue be decided based on pure public reason in the wake of any moral pluralism. Rawls acknowledges that in any liberal society, there

³¹ ALLEN D ROSEN, *Kant's Theory of Justice*, (Cornell University Press 1993) p 226

³² JOHN RAWLS, *A Theory of Justice*, (Harvard University Press 1971, Edn 6) p3

will be a diversity of values which will influence even reasonable citizens. He terms these diverse values as *burdens of judgment*. He believes that even in a society consisting of only reasonable and rational citizens, disagreements on account of irreconcilable notions of moral or religious philosophy will continue to exist. However, the capacity of human beings to be tolerant will ensure that this pluralism remain reasonable.

Therefore, in any pluralistic society, the question of marriage is best decided through Rawls idea of public reason. It is beyond the capacity of the state to decide the conflicting comprehensive doctrines and it is not the duty of the state to either promote or condemn any particular doctrine over another. In his *The Idea of Public Reason Revisited*, Rawls argued that any appeal to monogamy or even against same sex marriage would automatically reflect moral doctrines and therefore fall outside the scope of the State's legitimate interest³³. He then provided an additional ground in that if public reason cannot *per se* prohibit a particular behavior, it is the duty of the state to protect the citizen's right to act in whichever way he/ she pleases.

In any given society, there are multiple sources of normative ordering, thus paving way for several forms of marriages and the state must accommodate place for such diversity to protect individual choice and freedom. The state cannot endorse any particular ideal of a relationship on the citizens, be in monogamous, homosexual, long-term etc. As argued previously, it is sufficiently clear that the 'marriage' does not restrict its meaning to any one form of relationship, but covers a wide variety of couples and is based on religious notions of a familial structure. Therefore, the state by adopting the term 'marriage' itself is imposing a particular comprehensive doctrine on the citizens. It is important for the state to differentiate between moral/religious notions of marriage and a civil union amongst the citizens. Any argument raised in favour of a liberal democracy would mean preventing the state from imposing one 'truth' on the citizens.

In most societies, the state laws have adopted a monogamous and heterosexual form of union with the underlying purpose of sexual relationship as 'marriage' and even an argument to extend the definition to include same-sex couples would still mean ignoring the multitude of relationships that exist in any society. Allowing same-sex couples to form a union under the term 'marriage' would negate the rights of say, polyamorous or incestuous couples. The cultural and

³³ JOHN RAWLS, *The Idea of Public Reason Revisited*, (The University of Chicago Law Review, vol 64, no 3 1997) p779

religious significance of the term ‘marriage’ follows that there exist several forms of marriage, considering the moral pluralism in our society. It is key that arguments should be centered around individual freedom, liberty, autonomous will as opposed to argument that marriage itself is a right enjoyed by all. Therefore, to avoid this moral relativism I will argue in the next section that the State has the legitimate interest only in regulating civil unions, whereas ‘marriage’ is best regulated in the province of religious communities.

IV.

A CASE FOR PRIVATE DOMESTIC PARTNERSHIPS

The recognition of the marriage institution by the state brings up the debate of its ‘symbolic’ status and normalizes one particular way of life: heterosexual monogamous coupledom³⁴. Even if the state were to extend the scope of marriage to homosexuals, it continues to emphasize on other factors such as monogamy, the long term nature, sexual relationships etc. Therefore, the state’s interest lies in being ‘neutral’. Charles Larmore defines ‘neutrality’ as:

A political decision....can count as neutral only if it can be justified without appealing to the presumed intrinsic superiority of any particular conception of the good life. So long as a government conforms its decisions to this constraint, therefore, it will be acting neutrally...Of course, some ends are impermissible, because there can be no neutrally justifiable decision to pursue them. But any goals for whose pursuit there exists a neutral justification are ones that a liberal state may pursue.³⁵

A liberal approach to justice would meaning eliminating the term ‘marriage’ from the state’s mandate and instead replacing it with a more neutral term such as civil union or a domestic partnership. As Tamara Metz argued³⁶, the state must ‘disestablish’ marriage to prevent the blatant violation of one’s liberal freedom and privacy. I would propose a private contractual approach to private domestic partnerships, where individuals are free to decide the terms of their

³⁴ CLARE CHAMBERS, *Inclusivity and the Constitution of the Family*, (LSE Law Society and Economy Working Papers 2/2009) available at <http://eprints.lse.ac.uk/24580/1/WPS2009-02_Chambers.pdf>

³⁵ CHARLES E. LARMORE, *Patterns of Moral Complexity* (CUP, 1987) p. 44.

³⁶ TAMARA METZ, *Untying the Knot: Marriage, the State, and the Case for their Divorce*, (Princeton University Press 2010)

relationship. This paves way for alternative forms of relationships and thus promotes egalitarianism. This also means that all individuals are forced to negotiate the terms of their relationship, preventing any future problems.³⁷

In a private civil union market, similar to any other form of private contractual arrangement, the state's duty to enforce remains the same. Contract law would regulate the terms of the contract, therefore allowing it be void or voidable in cases of fraud, misrepresentation or contracting with a minor etc. In my model, the domestic partnership agreement should be along the lines of a business partnership agreement, where the 'partners' can pre-decide their duties and responsibilities, relating to property-sharing, child rearing, income sharing etc. These partnership agreements can take the form of renewable civil unions, or long term committed relationships, or a partnership between three or more individuals with or without children. In such a model, it ensures the legitimate interest of the state in recognizing the various domestic partnerships, while also respects the interest of individuals in making decisions regarding the welfare of their own lives.

CONCLUSION

There are several issues in the domestic partnership agreement particularly relating to prevention of child neglect and abuse. However, while it within the state's legitimate interest in regulating the treatment of children by the parents, it still is not within its mandate to impose one familial structure on all the citizens. Where the state is propagating or condemning any one form of marriage, it becomes the duty of the state to justify the imposition of a particular comprehensive doctrine on all the citizens. The intention of this paper is not to propose a definite model of civil union, rather it is to emphasize on the importance of shifting the discourse around freedom to contract and individual liberty as opposed to the natural right to marry. It is well established that marriage as it exists now is based on centuries of religious, social and class struggles to maintain a particular model of society. However, the past fifty years, since the sudden explosion of the gay rights and feminist movement, it is sufficiently clear that several forms of intimate relationships can exist and are as legitimate as the heterosexual union. While it may be argued

³⁷ LAWRENCE G TORCELLO, *Is the State Endorsement of any Marriage Justifiable? Same Sex Marriage, Civil Unions and the Marriage Privatization Model* (Public Affairs Quarterly, Vol 22 No 1) 2008 p52

that marriage as regulated by the state can continue to exist whilst also permitting separate civil unions, this raises the issue of the 'separate but equal' treatment. Moreover, as argued, marriage belongs to the private sphere, and any definition- even the most progressive one- will be imposing a particular moral doctrine on the citizens. Debates and discussions should be around the regulation of private domestic partnerships- number, responsibility over children, income sharing etc- and not around the expanding the definition of marriage.