An Economic Assessment of Civil Marriage Act, 2005

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"Because we were defiant and did not apologise for our existence. We said that we were already married, because we were; the state just did not recognise it. In the same way that women were always persons, even before the law said we were. And now we are legally married."[1]

Language is imbued with power. It is indicative of the barriers that exist within a society and has the capacity to reduce a person to a mere label to fit them in a box, for instance a homosexual person is reduced to his or her sexual identity. Gays and lesbians have been deviant outsiders, excluded from terms like "family" and "spouse" because words are ingrained with statements of value. The Civil Marriage Act which had been passed by the House of Commons and the Senate, received the Royal Assent in July 2005, making Canada the third country in the world to legalise same-sex marriages. Earlier marriage had been defined as the lawful union of one man and one woman to the exclusion of all others, but under Section 2 of the Civil Marriage Act, marriage is defined as *the lawful union of two persons to the exclusion of all others.*[2]

While this legislation has been hailed as a milestone in the struggle of gays and lesbians for equal rights, it has met with criticism from different groups of the society. One such criticism stems from an economic assessment of same-sex marriage laws. A field called New Institutional Economics (NIE) studies how institutions are achieved, how they evolved and assess the reason behind their

[1] Radboard, Joanna "Lesbian Love Stories: How We Won Equal Marriage in Canada" *Yale Journal of Law and Feminism, 2005*
[2] Civil Marriage Act, 2005

evolution as well their impact on behaviour. This school of thought analyses marriage as an economically efficient institution that is, "*designed and evolved to regulate incentive problems that arise between a man and a woman over the life-cycle of procreation.*"[3] It argues that the institution of marriage will not be efficient in tackling the incentive problems that arise in the relationships of gays and lesbians. It is argued that the Civil Marriage Act is based on the underlying assumption that one size fits all, that is, one legislation can govern three distinct types of marriage.

This paper seeks to analyze how marriage can be assessed in terms of economics. The main question that this paper attempts to answer is whether forcing three distinct relationships to be covered under an umbrella legislation has resulted in a sub optimal law for marriage in Canada. The first part of the paper gives a brief history of the struggle of the LGBTQ community that resulted in legalization of same-sex marriage. The second part of the paper discusses how marriage can be assessed in terms of economics. This part of the paper shall throw some light on how heterosexual marriages are affected by same-sex marriages through the mechanism of a feedback loop. The third part of this paper seeks to answer the question of whether the Civil Marriage Act is a sub optimal law, by assessing the institution of marriage and the impact that legalization of same-sex marriage had in Canada.

Part I

"We are a nation of minorities. And in a nation of minorities, it is important that you don't cherry-pick rights. A right is a right, and that is what this vote tonight is all about."[4]

[3] Allen, Douglas "An Economic Assessment of Sam-Sex Marriage Laws" *Harvard Journal of Law and Public Policy,* 2006

[4] Speech given by Paul Martin before the vote http://news.bbc.co.uk/2/hi/americas/4632229.stm

On July 20, 2005, 34,000 gay and lesbian couples all across Canada were granted equal rights to those in tradition, heterosexual marriages.[5] The bill, drafted by the minority Liberal government of then Canadian Prime Minister Paul Martin, split the Liberal party, with 158 Ministers of Parliament voting in favour as opposed to 133 Ministers voting against it.

The legislation was largely opposed by the Catholic Church, for the religious leaders feared that they could be forced to perform gay marriages in the face of the risk of being taken to the human rights tribunal in case they refused to do so. Their fears were assuaged by the introduction of Section 3 of the Civil Marriage Act, which states:

"Religious Officials

3. It is recognised that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs." [6]

The rationale behind Section 3 is that this bill covers only civil unions and not religious ones, thereby protecting the freedom of religion.

In her paper *'Lesbian Love Stories: How We Won Equal Marriage in Canada,'* [7] Joanna Radbord discusses why Canada legalised same-sex marriage. She states two reason for such a decisive move, firstly Canada's functional approach to family law and secondly, their substantive equality jurisprudence.

A significant characteristic of families is the interrelatedness in social, economic as well as emotional domains. A functional approach to family law seeks to look at marriage as more than a mere contract, a relationship that is forged over time, with love, labour and care. The Canadian Charter of Rights and Freedom, which guarantees fundamental rights and freedoms, is part of the Constitution of Canada. These rights and freedoms are subjected to reasonable limits as may be

[5] Associated Press, "Canada approves gay marriage" *The Guardian* June 29, 2005 https://www.theguardian.com/world/2005/jun/29/gayrights Accessed September 27, 2017

[6] Section 3, Civil Marriage Act, 2005

[7] Yale Journal of Law and Feminism, Accessed on September 25, 2017

demonstrably justified in a free and democratic society and any law which violates the Charter is of no force and effect. It also empowers the Court to reward "*remedy as the Court considers appropriate and just in the circumstances.*"[8] In the pivotal judgement of *Miron v. Trudel*[9], the Court brought unmarried same-sex couples within the purview of "spouse" citing marital status discrimination as a violation of the equality section, i.e., Section 15 of the Charter. Four years later, in the ground-breaking judgement of *M v. H*[10], the Court reiterated that marital status discrimination constituted a violation of Section 15 of the Charter and extended the definition of "spouse" to include same-sex couples. In this case, the Court stated that exclusion of same-sex couples deems them to be less worthy of recognition and protection. Further, such a view implied that people in same-sex relationship are incapable of establishing interdependence in the economic domain and perpetuated their disadvantageous position by placing them at the periphery of society. This judgement extended the parameter of family beyond sexual orientation and marriage.

The aforementioned judgement led to the enactment of M v. H. Act[11] in Ontario. This act did not bring same-sex couples under the ambient of "spouse," rather created a separate category, "same-sex partner," referring to either of the two people cohabiting together for more than a period of 3 years. This segregation, instead of alleviating the discrimination, reinforced the offence to the dignity of same-sex couples. The Federal Government, however, introduced the Modernisation of Benefits and Obligation Act (MBOA)[12], which adopted an inclusive category of "common law partnership."

[8] Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982
[9] [1995] 2S.C.R. 418.
[10] [1999] 2 S.C.R.3.
[11] Amendments because of the Supreme Court of Canada's decision in M.H. Act, S.O. 1999
[12] S.C. 2000, c. 12

The substantive equality approach urges the court to "walk a mile" in the shoes of the claimant. Persons in same-sex relationships exist on the fringes of society, outside the ambient of law. This approach seeks to pivot the centre, keeping aside dominant notions and ideologies and taking into account the subjective experience of the marginalised groups of society. The aim of such an approach is to end the vicious cycle of systemic discrimination by delving into the question of whether the impugned law contravenes one's right to dignity. For instance, when considering a woman's decision to abort, it would be necessary under this approach to take into account the social, ethical, psychological as well as economic facets which affect her decision. Substantive equality analysis borrows it's reasoning from the feminist standpoint theory which suggests that groups which are oppressed may have epistemic privilege.

In the summer of 2000, equal marriage was pursued by three groups of litigants in different provinces of Canada. The cases were *Halpern* in Ontario, *Hendrickson* in Quebec and *EGALE* in British Columbia. After a drawn-out legal battle, the Ontario Court of Appeal rendered the definition of common law marriage unconstitutional, in the case of *Halpern.* The Federal Government decided to ask the Supreme Court of Canada to hear a Reference with regard to the proposed legislation. On December 9, 2004 the Supreme Court issued an advisory opinion in *Reference re Same-Sex Marriage* in which it stated that the Charter guaranteed equality and that marriage is a fundamental right, one that should be expanded to bring same-sex couples within its purview.

Part II

Increasingly, economists have expanded their area of interests, going beyond the monetary sector and using economic theory to delve into sectors such as racial discrimination, politics, crime and education to name a few. In 1960s and 1970s, an

economist, Gary S. Becker, analysed issues of discrimination surrounding labour force, the method of allocation of time through the course of a day as well as one's decision to procreate. Eventually, he focused on family matters, thereby laying the foundation of a field which would come to be known as "family economics."[13]

In 1974, in his chapter titled *"A Theory of Marriage,"*[14] Becker sought to analyse the institution of marriage within a framework laid down by neoclassical economics. According to him, the analysis of marriage stemmed from two principles. First, the theory of preferences can be applied to marriages, since it is entered into voluntarily by the parties or the parents of the parties in most cases. In such a case, it can be safely assumed that getting married raises the utility for the parties or the parents of the parties when juxtaposed with remaining single. Second, existence of a market for marriage can be presumed to exist since many men and women compete with one another to seek a mate. For instance, a girl would meet multiple suitors before settling on any one, depending on characteristics such as education and wealth amongst others. It can be derived from such a presumption that a person would seek out the best mate, contingent on reasonable restrictions imposed by market conditions.

For the purpose of economics, marriage refers to sharing of a household if the spouses expect an increase in their utility, i.e., they are made better off by marrying. The utility depends on the goods created by each household, which partly include market goods and services and partly consist of the time of the members of the household. The commodities produced by a household include quality of food, love, health status, quantity as well as quality of children, recreation and companionship. Although the commodities thus produced may be

[13] Becker (1991) Definitive neoclassical treatment of family matters
[14] Volume: Economics of the Family: Marriage, Children, and Human Capital, *University of* Chicago and National Bureau of Economic Research, 1974 http://www.nber.org/chapters/c2970

transferable among the members of a household, they are neither marketable nor transferable among the market or households.

It is argued by economists that the purpose of a marriage between a man and a woman is to raise own children and the emotional as well as physical attraction between the sexes. Living in the same household reduces the cost of frequent contact and of resource transfers.[15] These economists cite sociological literature, which suggests complementarity between the husband and wife as the major source of gain from a marriage. It is also argued that a monogamous union is the most efficient form as it is easy to identify the father of the child. The cost of a marriage, which includes legal fees and the cost of looking for a mate, is outweighed by the gains which serves an incentive to marry. The gain from a marriage is dependant on an increase in property income and a rise in the wage rate of the household as well as traits such as intelligence, level of education and beauty which affect the non-market productivity as well as market opportunities.

A body of economic theory, new institutional economics (NIE), has put forth a general hypothesis that states that institutions are designed to maximise wealth as well as net of the costs of establishing and maintaining such organisations. This theory argues that only those institutions which are optimal survive in the competitive world of social interactions. The implication from this argument is that any institution that survives is an economically efficient one. Marriage is one of the oldest institutions known to mankind, one that is prevalent till date. If the Darwinian conclusion is applied, it can be said that the institution of marriage is an efficient one, for it is the result of centuries of evolution. It has been concluded by many economists that some characteristic of marriage have evolved, while other have not,

[15] Becker, Gary S. A Theory of Marriage University of Chicago and National Bureau of Economic Research, 1974 http://www.nber.org/chapters/c2970

is due to the fact that, *"Marriage is an institution uniquely equipped to handle incentive problems between a man and a woman over their full life cycle."*[16]

Studies have shown that, on the basis of observable behaviour, heterosexuals, gays and lesbians form relationships that are distinctly different from one another.[17] The major distinction which sets these relationships apart is the biological relationship shared by the parents and the children. In the eyes of law, a biological parent is equated as a natural parent. In a marriage between persons of the same-sex, a biological link is necessarily severed with at least one of the parents, which could be due to adoption, artificial insemination or previous marriage by a partner. Therefore, it follows deductively, that the legal system that is efficient for a heterosexual marriage may not be efficient for same-sex marriage.

Another problem that arises in a same-sex marriage is that the children in such a marriage are exposed to only one type of gender influence. In such cases, the parents may try to fill in the gap by seeking out role models of the opposite sex, like the biological mother or father. This problem could also play out differently, with an increased role of the state in inculcating identity amongst children. However, this brings about the issue of legal rights of the third party. For instance, there was a case in 2007, known as A.A. v. B.B.[18] wherein two women, A.A. and C.C. decided to have a child together and sought the assistance of their male friend B.B. to conceive a child. The male friend wanted to play an important role in the life of the child, as a father, despite the fact that the two women wanted to be the primary caregivers. B.B. and C.C. were listed as the child's birth parents so A.A. filed a suit to be recognised as a mother of the child. The Trial Court as well as the Ontario Court of Appeal held that they did not have jurisdiction under a relevant legislation to name a third parent, as the laws in place were designed to cater to heterosexual marriages. The Ontario

[16] Allen, Douglas W. An Economic Assessment of Same-Sex Marriage Laws, *Harvard Journal of Law and Public Policy* (2006)
[17] Blumstein Phillip, Schwartz Pepper, *American Couples (195-196) (1983)*
[18] A. A. v. B. B., 2007 ONCA 2

Court of Appeal, however, found that as a parens patriae, they are permitted to bridge a legislative gap. Despite the declaration by the Court that there is a legislative gap, the Ontario Legislation has made no attempt to address the situation. Since no jurisdiction in Canada, other than British Columbia, permit multiple parents for a child, a court order becomes vital. In the case of A.A. v. B.B., Justice Rosenberg cited a trial court decision in which a 12 year old daughter of a lesbian couple provided the court with an affidavit which states: *"I just want both my moms recognized as my moms. Most of my friends have not had to think about things like this—they take for granted that their parents are legally recognized as their parents. I would like my family recognized the same way as any other family, not treated differently because both my parents are women. It would help if the government and the law recognized that I have two moms. It would help more people to understand. It would make my life easier. I want my family to be accepted and included, just like everybody else's family."*

Returning to the theory that marriage is an efficient one, it logically follows that the extent to which the institution of marriage is tailored to meet the demands of a same-sex marriage, these changes will have a detrimental effect on a heterosexual marriage. However, if these changes are not brought about, the institution of marriage will prove to be insufficient for same-sex marriages. The root of this lies in the fact that we are attempting to govern three different sets of households which have distinct cost structures with one set of guidelines. Once the biological elements in the definition of marriage are removed, changes will occur little by little. This modified common law will apply to heterosexual marriages as well which will result in a legal misfit. Over time, these loopholes will be exploited by spouses in heterosexual marriages to their advantages, which will have a detrimental effect in the value of family in the society. The Civil Marriage Act brings about changes in other federal legislations to bring them in line with the legislation in question. For instance, the definition of a natural parent has been replaced with that of legal parent,

which can be problematic as there is no limit to the number of legal parents a child can have.

Another problem is that of presumption of paternity. The traditional understanding of presumption of paternity is that no one, not even a spouse, can challenge a father's paternity to his legitimate children. This traditional understanding of paternity was transformed to presumption of paternity in the case of *Goodridge v. Department of Public Health.* Maggie Gallagher notes:

"What will the presumption of parentage do? Well, no one knows exactly, as this is uncharted legal ground.... Can these new grounds for contesting parenthood be limited only to same-sex couples? Or will all men (thanks to the new presumption of parentage) have a new legal standing to reject the obligations of fatherhood on the grounds they only consented to sex and not to parenthood?" [19]

This is an instance of how introduction of same-sex marriages feedback to heterosexual marriages.

Douglas W. Allen argues that there was a paradigm shift in family law, namely no-fault divorce, the consequences of which became apparent thirty years after it was introduced. The consequence of such a conceptual revolution was an increase in the divorce rate as well as the age at which individuals got married. These were unintended and unanticipated consequences as it was based on false theories of marriage. It is argued that proponents of same-sex marriage are basing their arguments on false theories of marriage and will result in unanticipated consequences similar to those of no-fault divorce.

Part III

[19] Gallagher, Maggie (How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman, *2 U. ST. THOMAS L.J. 33, 57* (2004)

In conclusion, it can be argued that the potential cost of a same-sex marriage is unprecedented and would impact heterosexual marriages in a large way. The feedback mechanism, as discussed above, will result in destabilising the institution of marriage as we know it. The rationale upon which this argument is based that marriage is an age old institution and the process of evolution has ensured that this institution is an efficient one. Similar arguments as were put forth by proponents of no-fault divorce are being propounded by people in favour of same-sex marriage, which is fallacious and will lead to fatal consequences.

The solution proposed to this problem would be to create a separate legal structure which would be known as 'homosexual marriage.' The institution of homosexual marriage would evolve in a similar way to that of heterosexual marriage, but independent of it. While this solution opens the door for private contracts in all marriages, it solves the issue of feedback loop of an assumption that,"one size fits all."

The institute of marriage has evolved when the benefits that a couple derives from changes in a marriage have exceeded than the cost. Rauch has raised an objection which states:

"An off-the-cuff list of fundamental changes to marriage would include not only divorce and property reform but also the abolition of polygamy, the fading of dowries, the abolition of childhood betrothals, the elimination of parents' right to choose mates for their children or to veto their children's choices, the legalisation of interracial marriage, the legalisation of contraception, the criminalisation of marital rape (an offence that wasn't even recognized until recently), and of course the very concept of civil marriage. Surely it is unfair to say that marriage may be

reformed for the sake of anyone and everyone except homosexuals, who must respect the dictates of tradition."[20]

Consequently, it can be argued that the Civil Marriage Act in Canada has led to a sub-optimal law. This Act is an umbrella act which attempts to govern three distinct types of relationship. This has led to the creation of certain loopholes which be exploited by heterosexuals to their own advantage which results in the detriment of institution of marriage.

[20] Rauch, Jonathan; Objections to These Unions: What FriedrichHayek Can Teach Us About Gay Marriage, *Reason Online*, 2004, http://www.reason.com/0406/ fe.jr.objections.shtml.