

## SAME-SEX MARRIAGES: WHY "NOT"?

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Last 5 February 2004, a decision of the Supreme Tribunal of Massachusetts (USA) sentenced that full, equal marriage rights for homosexual couples -instead of civil unions - are constitutional. In other words, that the State cannot deny gay and lesbian couples who wish to marry the protection, benefits and obligations proper of a true civil marriage. This decision was actually the confirmation of a previous sentence, issued around ten weeks earlier (on 19 November 2003) by the same Tribunal. The reaction came soon afterwards, this time in the words of the USA President, Mr. Bush: *"Marriage is a sacred institution between a man and a woman. The decision of the Supreme Tribunal of Massachusetts violates this important principle."* Furthermore, on 24 February 2004, in order to stop activist judges from changing the definition of the "most enduring human institution," President Bush called upon the Congress "to promptly pass an amendment to our Constitution defining and protecting marriage as a union of man as woman as husband and wife."

In West Virginia, a County Family Court Judge ended the civil union of two women, in December 2002. The decision, which the judge said was a necessary "judicial remedy," was filed on 3 January 2003. It was not appealed.

The Canadian government, on 17 June 2003, proposed to redefine the public meaning of marriage as "a union of two persons" to the Supreme Court of Canada. (This in spite that four years earlier

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[1999] Canadian parliamentarians gave a resounding "yes" to traditional marriage as "an union of a man and a woman" by 216 to 55 votes.) The Court has scheduled a hearing for the reference on 16 April 2004.

In Australia, the Government has recently been accused by the United Nations human rights committee of having breached the International Covenant on Civil and Political Rights -which guarantees equity before the law- for having denied the gay partner of a deceased war veteran a pension and bereavement payment. The Government, on its part, claims not to have violated any of its international obligations since the law of the country limits the definition of " couple" to married and heterosexual *de facto* partners.

In some European countries, in recent months, city officials have issued hundreds of marriage licenses to people of the same gender ...

These are but a few examples of the latest developments on an issue that day by day is increasingly becoming familiar, namely, the legal recognition of homosexual unions and same-sex "marriages." We 'are getting used to seeing in the front pages of our newspapers and bulletins headlines or titles such as "*Marriage and Same-Sex Unions: One and the Same?*;" "*Marriages of the Same-Sex: l Where is the problem?*;" "*What is Wrong with Letting Same-Sex Couples 'Marry'?*;" "*Legal Recognition of Homosexual Unions?*;" "*Homosexual Unions: A Problem of Political Ethics?*;" "*Same-Sex Marriages: A Threat?*;" etc.

Beset by such growing literature as well as by the apparent success of those fighting for the legal recognition of homosexual " marriages," one is tempted to believe that the nature of marriage is dramatically changing -if it has not already changed- in the present generation, to the point that defending "traditional marriage" seems at times defending something that no longer exists or at least that the battle is lost, being only a matter of time.

On the other hand, at the sight of the classical doctrinal orthodoxy on marriage, one refuses to believe that "irrationality" may be allowed to triumph so easily in our highly educated society. How can it be, for instance, that in the presence of evident, rational, biological, social, ethical and legal reasons against the equation of

homosexual unions with matrimony, some sectors of our society still do not share the same stand? Rationalizing that "most people nowadays do not hunger for the truth about marriage" seems to be more an excuse than a reason. No wonder a good number of Catholic scholars in the fields of constitutional law and religion think that the time has arrived to engage in the evangelical activity of defending marriage in this increasingly secularized world; that these times of overturned recognition of same-sex unions give them a privileged moment in which to relay the true meaning of marriage in and out of court.

As the debate goes on, let us formulate this point-blank question: "*Same-Sex Marriages: Why Not?*" And, in an attempt to answer, let us briefly review some significant instances that show the difficulty to equate institutional marriage with same-sex unions.

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#### MARRIAGE: A MATIER OF CIVIL RIGHTS?

If defending the traditional institution of marriage has become increasingly difficult in the present debate it is because of the terms of the debate themselves: homosexual activists have succeeded in presenting their aspirations *as a question of civil rights, instead of a conflict on the merits or demerits of homosexuality or a debate on family values*. "The right to a marriage license is not a matter of morality nor of religion nor of ethics but of EQUALITY before the law," they say. Thus the battle for the legal recognition of homosexual unions is presented as parallel, for instance, to the battle for the abolition of the old laws that forbade interracial marriages.

However, some legislators have hurried up to uncover the sophism involved in such argumentation. They ask: "*Is the institution of marriage truly just a matter of civil rights, without any other religious or social implications?*" Evidently, no. Marriage is an institution that reaches beyond government and enters the realm of religious and social institutions. As a cultural institution rooted in millenarian experience, heterosexual marriage is definitively more than civil rights and/or a mere election of life-style. Thus while equality for homosexuals in the

context of employment and other aspects of life may be acceptable, it is quite a different thing in reference to marriage.

Is reserving marriage to a man and a woman not an unfair and discriminatory exclusion? By no means, experts answer. Homosexuals have exactly the same right to marry as anyone else; however, the freedom of homosexuals to marry is subject to the same restrictions as anyone else, as well. No one is simply free to marry any willing partner. For instance, every person is legally barred from marrying a child, a close blood relative, or a person of the same sex. Will the fact that a vocal minority desire to have homosexual "marriages" mean that they have a "right" to them, any more than the desires of other minorities give them a "right" to pedophilic "marriages," incestuous "marriages," or polygamous "marriages"? The answer is no, if we consider not only that society owes its continued survival to the family, founded on marriage, but also that homosexual unions are totally lacking in the biological and anthropological elements of marriage and family which would be the basis, on the level of reason, for granting them legal recognition. Besides, the absence of sexual complementarity in these unions creates obstacles in the normal development of children who would be placed in the care of such persons: they would be deprived of the experience of either fatherhood or motherhood. Therefore, not granting marital recognition to homosexual couples is not an act of discrimination, as homosexuals can always make use of the provisions of law -like all citizens from the standpoint of their private autonomy- to protect their rights in matters of common interest. Rather it would be gravely unjust to sacrifice the common good and just laws for the family in order to protect personal goods that can and must be guaranteed in ways that do not harm the body of society.

#### MARRIAGE: A SOURCE OF BENEFITS?

"Allowing homosexual partners acquire the legal status of married couples would bring benefits both for the private individuals and for the State." This is the contention of homosexual activists who, looking at marriage as a source of benefits, consider themselves and the State deprived of multiple benefits for the simple fact that their

unions are not given the legal recognition of marriages.

a) At the *individual* level, this takes the semblance of personal *injustice*: "Married couples receive from the State multiple protections and responsibilities, which are being unjustly denied to same-sex partnerships," they contend. Furthermore, putting same-sex unions' on the same level as heterosexual marriages seems to be for homosexuals an essential part of the battle to gain equality. Besides homosexuals think they need the right to marry each other to ensure that they will be able to bequeath their estates to their partner when they die.

The reaction to these arguments is that they ignore a key factor, namely, that the relationship between a man and a woman is *qualitatively different from that of a homosexual couple*. Marriage is not just *any* intimate relationship, but rather a normative, social, family-oriented institution, whose basic reason for being is the society's survival. By the mere fact of being child-centered, marriage has always been considered by law as to require a man and a woman: first, because only their sexual relationship can lead to the conception of a child; second, because the unique contribution of men and women to child rearing cannot be duplicated by any other contexts in which child rearing takes places. Now, same-sex marriages put all this at a risk.

What about the above-mentioned alleged deprivation of benefits to homosexual partners? The time may have arrived to acknowledge the concession of certain benefits to some *de facto* unions, even homosexual ones. But in any case, the tutelage of such unions would have always to be kept within the frame of "personal rights," never within the sphere of "family rights"; that is, without any reference to or analogy with marriage. As a Chicago Tribune editorial of 20 November 2003 observed, equal rights for homosexuals in the context of employment or other matters is one thing, but marriage is an institution that reaches beyond government and social institutions. More than civil rights are at stake here.

The same is also applicable to those homosexuals who claim the right to marry each other to ensure the transmittal of their state to their partner when they die. After all marriage is not required to resolve this issue, since an individual may leave the rest of his/her estate to

whomever he/she wishes, simply by writing a will. Changing the definition of an institution like marriage is a rather extreme way of addressing this issue!

b) At the *State* level it takes the characteristic of a *plus factor*: "Since marriage promotes stability for adults and children and helps them to lead happier and more stable lives, allowing more and more couples to enter into this status would be beneficial for the State, which would benefit from the mutual economic support that married couples provide for each other." In addition, "public health benefits might also be achieved and eventual separation of couples could be dealt with in a legally ordered way."

This claim of the defenders of homosexual unions is contested by those who say that collective interests and productivity will not be enhanced by allowing same-sex marriages. To start with, parenting by a same-sex couple would not be a source of public benefit because it denies the child either a father or a mother, inevitably leading to problems. Besides, if social expediency and individual happiness become the criteria for reforming marriage laws, then arguments against incestuous, adolescent and polygamous marriages must also fall aside.

#### MARRIAGE: A "MALLEABLE" INSTITUTION?

In recent months, some activist judges and local officials of a number of countries have made an aggressive attempt to redefine marriage; initially, by giving legal recognition to homosexual unions, then by equating those unions to marriage. The initiative, ironically has come from the judiciary (judges and courts), not from legislative bodies (Congresses and Senates). Many countries now, pressured by influential sectors and court cases that consider the opposite-sex definition of marriage as discriminatory, are contemplating to redefine marriage as "a close relationship between consenting adults" or simply as "a union of two persons." These redefinitions, done in the name of attuning legislation to present times, give weight to a "new" marriage model characterized by a number of assumptions, to wit: marriage has nothing to do with sexual differences; it is an "at-will affiliation of

affection"; marriage is a wholly malleable social institution; child bearing is an optional extra; same-sex couples are held to be just as capable of looking after children; marriage is to be used by the state as a matter of basic fairness; etc.

One wonders why good-willed people in other times would have cried out to heaven and provoked to angry reaction against these redefinitions but look at the same now with indifference if not with certain benevolence. Why? Might not it be because "each generation has what it deserves?" To my mind some sort of explanation may be found in such proverb. In fact, these characteristics mentioned are somehow the logical results of the ideology and criteria professed by the present-day generation. The introduction of no-fault divorce, the changing sexual mores that no longer view intimacy outside marriage as reprehensible, the use of birth control to render marital unions sterile, the concept that childbearing should not be confined to marriage, etc., are factors that have changed the view society has of marriage and the couples' vision of the law in relation to their union.

With these premises and the on-going socio-political pressure to redefine what constitutes marriage it is understandable that some states are having a-hard time to keep unchanged their respective Family Codes, not only on the section dealing with the definition of marriage, but with more reason on those sections which deal with its effects and properties, as well as with the separation of spouses.

A "redefinition" of marriage may be often tantamount to desecration of this fundamental institution. For in fact most Family Codes consider marriage as a natural and social institution inextricably linked to self-giving, procreation and the formation of a family. A beautiful example of it is the Family Code of the Philippines (1987) which, after defining marriage as "*a special contract of permanent union between a man and a woman entered into in accordance with law for the establishment of conjugal and family life,*" describes it as an inviolable social institution whose nature, consequences, and incidents are governed by law and not subject to stipulation" (Art. 1). Expanding the definition of what " marriage " is to include relationships of a homosexual nature would inevitably, in the long run, change people's concept of what marriage is, what it requires, and what one should

expect from it. So to the other pillars of marriage that have already fallen, the idea that marriage should be a sexually exclusive and faithful relationship would undoubtedly be added. The negative consequences will follow.

Foreseeing the negative impact on individuals and society, and as a warning to judges, politicians and legislators, pro-family groups have sounded the alarm: "We need clear leadership in a time of judicial tyranny, not politicians who do not have the spine' to stand up for something as basic as marriage, " they voiced out; Actually, on a matter of such importance, the voice of the people must be heard.

The key point here is the understanding of marriage not as a mere social construct, but *as a natural and social institution that exists according to an original design pre-existent to the law*. Indeed marriage is not the creation of law; it did not come into being by statute, but preexists the state, having been recognized by the latter because of its intrinsic value. This truth, which is not a theological one but simply the conclusion of an ethical judgment based on right reason, poses a big challenge to legislators, politicians and good-will persons in general; the challenge to honor the rational, biological, social, juridical and religious reasons that argue against the equating homosexual unions with marriage.

#### JOINING TOGETHER WHAT GOD HAS SEPARATED?

"There are absolutely no grounds for considering homosexual unions to be in any way similar or even remotely analogous to God's plan for marriage and family," states a Vatican document of 13 July entitled "Considerations Regarding Plans for the Legal Recognition of Unions Between Homosexual Persons."

This statement was recently echoed by John Paul II: "There is need to uphold the uniqueness of marriage as a lifelong union between a man and a woman in which as husband and wife they share in God's loving work of creation. Equating marriage with other forms of cohabitation obscures the sacredness of marriage and violates its precious value in God's plan for humanity" (*Address to the English and Welsh bishops in Rome, October 2003*).

That sacredness of marriage and its value in God's plan for humanity is revealed in the Bible: " Have you not read that the Creator from the beginning made them male and female, and that he said, 'This is why a man leaves his father and mother and becomes attached to his wife, and the two become one flesh'? (cf Gen. 2) They are no longer two, therefore, but one. Man must not separate, then, what God has joined together" (Mt 19:4-6).

The revelation contained in the biblical accounts of creation only confirms the natural truth about marriage, evident to right reason and recognized as such by all the major cultures of the world ... "Across times, cultures, and very different religious beliefs, marriage is the foundation of the family. The family, in turn, is the basic unit of society. Thus, marriage is a personal relationship with public significance," the Catholic Church affirms. In this light, same-sex unions contradict the nature of marriage; not only are they not based on the natural complementarity of male and female, but they cannot cooperate with God to create new life.

Marriage is not just any relationship between human beings... No ideology can erase from the human spirit the certainty that marriage exists solely between a man and a woman who, by mutual personal gift, proper and exclusive to themselves, tend toward the communion of their persons. In this way, they mutually perfect each other, in order to cooperate with God in the procreation and upbringing of new human lives.

This is precisely the definition of marriage contained in the Code of Canon Law: "The covenant, by which a man and a woman establish between themselves a partnership of their whole life, and which of its own very nature is ordered to the well-being of the spouses and to the procreation and upbringing of children ... " (Can 1055 §1). It is a covenant that has, between the baptized, been raised to the dignity of a sacrament and whose essential properties are unity and indissolubility (cf. can. 1056).

Faced with the fact of some civil authorities granting homosexual unions legal equivalence to marriage, along with the legal possibility of adopting children, one has the impression that some sacred values are being violated. The traditional principle "*What God has united let*

*no man separate*" seems to have been inverted, for the other way around it looks true: "*Let no man unite what God has separated.*" The same principle but differently formulated!

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Not, because laws in favor of giving homosexual unions legal equivalence to marriage are contrary to right reason;

Not, because homosexual unions are totally lacking in the biological and anthropological elements of marriage and family which would be the basis for granting them legal recognition;

Not, because the absence of sexual complementarity in homosexual couples creates obstacles in the normal development of children who would be placed in the care of such persons;

Not, because society owes its continued survival to the family, founded on marriage, and legal recognition of homosexual unions would inevitably bring the redefinition of marriage, which would become, in its legal status, an institution devoid of essential elements linked to heterosexuality;

. Not, because homosexual unions, unlike traditional married couples, cannot ensure the succession of generations and therefore are not, from the legal standpoint, eminently within the same public interest as to be granted institutional recognition;

Not, because sacrificing the common good and just laws on the family just to legally ensure some personal benefits (pension, bereavement, inheritance ... ) of homosexual partners that could be guaranteed in other way, is clearly unjust;

Not, because "there are absolutely no grounds for considering homosexual unions to be in any way similar, or even remotely analogous, to God's plan for marriage and family." [ ... ]

The debate on homosexual unions has just started. It is interesting to see the different positions being adopted by civil authorities and legal bodies in confronting the phenomenon. At times they simply tolerate it; at other times they advocate legal recognition

of such unions, under the pretext of avoiding, with regard to certain rights or benefits, discrimination against persons who live with someone of the same sex. In other cases, they favor giving homosexual unions legal equivalence to marriage. At present most countries are opposed to the legal recognition of such unions, while a few are in the process of equating them to marriage, even going as far as allowing homosexual couples to adopt children ...

Shall we start considering homosexual marriages as normal? If by "normal" it is meant "already existing," well, there is no alternative but to accept reality. But if by "normal" we mean "right" or a truth universally adopted, then, I do believe this "phenomenon" will never prevail. Not, without a radical perversion of our legislators' value system that may, in turn, lead people to see as legally acceptable what they know is in itself ethically and morally unacceptable.

#### **THE DEBATE GOES ON...**

As the debate goes on, some avenues for dialogue should, however, be left open, obviously within certain parameters ... Perhaps by fully protecting marriage as a union of man and woman as husband and wife, while leaving the state legislatures free to make their own choices in defining legal arrangements other than marriage. Perhaps by accepting that in the debate on the legal regulation of homosexual unions the problem may not be so much the granting of certain effects to those unions, as to rather the vehicle through which such effects are granted.

One thing is clear: The legal equation of homosexual unions to marriage seems to create more problems than solutions! The "new" marriage model based on the hedonistic criteria of our secularized society will only aggravate the problem. If the application of the Family Code norms were done to civil unions based exclusively on the principles of equality of rights, non-discrimination, social expediency and individual happiness, why to exclude from them incestuous, adolescent and polygamous marriages? Who would fix the limits? On the other hand, saying "no" to the adoption of children by homosexual couples is saying "yes" to common and juridical sense.

What stand to take? Let each one decide in all honesty after appealing to personal conscience and right reason.

A bold advise on this regard is given by the Catholic Church to all men and women of good will: "In those situations where homosexual unions have been legally recognized or have been given the legal status and rights belonging to marriage, clear and emphatic opposition is a duty. One must refrain from any kind of formal cooperation in the enactment or application of such gravely unjust laws and, as far as possible, from material cooperation on the level of their application. In this area, everyone can exercise the right to conscientious objection."

Incisive words indeed from a motherly institution that also proclaims that "men and women with homosexual tendencies must be accepted with respect, compassion and sensitivity."