

Analysis of the Legitimacy of Homosexual Marriage

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Abstract

With increasing public attention as well as wide research on the homosexual phenomenon, there arises a flourishing movement of legal protection for homosexual rights, including marriage, throughout the world. Homosexual marriage has had its record in history since the origin of human civilization, and nowadays it is gradually accepted in jurisprudence and for the protection of human rights. To combine different legislative modes with the current conditions in China, proposals on the legitimacy of same-sex marriage are put forward.

Keywords: *Homosexuality, Homosexual Marriage, Quasi-marriage, Civil Union.*

1. Introduction

Homosexuality refers to sexual behavior or attraction between people of the same sex or to homosexual orientation. As a sexual orientation, homosexuality refers to "having sexual and romantic attraction primarily or exclusively to members of one's own sex"; "it also refers to an individual's sense of personal and social identity based on those attractions, behaviors expressing them, and membership in a community of others who share them." And this is not a new occasional phenomenon but has had its record even since the origin of human civilization.

The statistics gave a surprising result that 90 percent of the voters support the legitimacy of homosexual marriage with only 3.4 percent against it and that 70 percent of them understand and support homosexual behavior. The data may be higher than it in real life because of the netizens' more open and tolerant attitude; nevertheless it's an obvious signal conveying the message that there has been a trend towards increasing visibility, recognition, and legal rights for the homosexual, including marriage and civil unions, parenting rights, and equal access to health care.

2. Necessity of Legitimacy

The first reason for legitimacy of same-sex marriage lies in the factual existence of homosexuality. In terms of its time span (discussed above) as well as population scale, it's an issue of great significance. It's difficult and even impossible to know the exact proportion of gays and lesbians in population, but scientific estimates of the incidence of exclusive homosexuality range from 3% to

10% of the population. A 2003 survey reported that 12% of Norwegians have had homosexual sex. According to a 2008 poll, while only 6% of Britons define their sexual orientation as homosexual or bisexual, more than twice that number (13 percent) of Britons had some form of sexual contact with someone of the same sex. But these figures are inaccurate, as not all those who have had homosexual experiences necessarily have a homosexual preference and not all individuals who may have a homosexual preference or who may be predominantly homosexual are necessarily sexually active or have physically acted on it. This proportion may be a minority to the world's population but the absolute number of homosexuals is big enough to draw our attention to their legal rights.

Secondly, freedom of marriage is a legal right entitled to all human beings including homosexuals. Article 2 of Human Rights Act 1998 affirms that "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Here the term "other status" includes the distinction of homosexual orientation. In the highly civilized society today, it stands no ground to oppose the legitimacy of same-sex marriage on the basis that traditional marriage are limited to the combination of opposite sex. Neither is it convincible in jurisprudence to resist the justice and equity according to the existed definition and regulations. The goal of law is to pursue the freedom and privileges of human beings, and any amendment of law on the purpose of people's welfare should be allowed and encouraged. Homosexuals, as social minorities, are entitled to enjoy the freedom of marriage safeguarded by Constitutions of every nation. If the rights were to be deprived, justifiable reasons must be given, for the classification of people by sexual orientation is discrimination and there's no scientific evidence showing that homosexuality and homosexual marriage do harm to public order and morality.

Thirdly, the legitimacy of homosexual marriage will encourage stable relationships between partners of the same sex. Homosexual relationships tend to be more temporary and transient due to lack of formal protection currently, and the phenomenon that a gay has more than one sex partner simultaneously is common, consequently the homosexual are one of the groups most vulnerable to

AIDS affection. Thus it's obvious that the legislation to protect homosexual combination will lead to more long-lasting and one-to-one relationships, which benefits the health and safety of the homosexual as well as the order and security of the whole society.

Finally, homosexuality is not an offense to the existed laws. It is clearly stated in Article 33 of the Constitution of China that "All citizens of the People's Republic of China are equal before the law." Meanwhile there are clauses in the General Principles of the Civil Law of China that "All citizens are equal as regards their capacity for civil rights" and that "Citizens shall enjoy the right of marriage by choice. Mercenary marriages, marriages upon arbitrary decision by any third party and any other acts of interference in the freedom of marriage shall be prohibited." So the gays and lesbians enjoy the same rights of freedom of marriage as the heterosexuals, because they disturb neither social order nor public interest.

3. The Dilemma

The dilemma for the homosexuals now is that our country lacks in the substantial clauses to legitimate the gay and lesbian couples into marriage, but once they get married with the opposite sex due to social pressure, they are often to be blamed by the public in the name of dishonesty. Thus, the issue of legitimacy of same-sex marriage is not simply about the justice and rationalness of this relationship in the scope of the homosexuals, but extends to the difficulties that homosexuals face in heterosexual marriages. Our legal system is designed for heterosexual marriages, so that gays and lesbians can only marry the opposite sex, but the public voice have announced their dissatisfaction towards the homosexuals in heterosexual marriages, in this way the rights of marriage for gays and lesbians become virtually impracticable, that is to say, the homosexuals are in fact deprived of equality in terms of freedom of marriage.

"State recognition of same-sex partnerships as marriages is a sensible idea that is simultaneously radical and conservative. It is sensible because it insists on formal equality in state treatment of same-sex and different-sex couples. It is radical because marriage between two people of the same sex challenges the conception of marriage and gender roles held by most Americans: a woman cannot be a wife unless partnered with a man, her husband; a man cannot be a husband unless partnered with a woman, his wife. It is conservative because it accepts the value of marriage – interpersonal commitment in particular – and offers it as a positive aspiration for gay and lesbian couples." To quote Professor Eskridge's comment in his work, the legitimacy of Homosexual marriage is a complicated issue bearing too much cultural, social and

even religious elements, but the work needs to be done for social justice as well as for the welfare of people.

4. Overseas Practice

4.1 In Common Law Countries

In the United States, marital law is legislated by states themselves, thus not all states legitimize homosexual marriage. Same-sex couples can marry in Massachusetts and Connecticut, but their unions are not recognized nationally. California also authorized same-sex marriages for a short period of time from June 2008 to November 2008. The states of Vermont, New Jersey and New Hampshire offer civil unions while Oregon, Maine, Washington, Maryland, and the District of Columbia grant certain limited benefits and responsibilities of marriage through domestic partnerships. In 1996, the United States Congress passed the Defense of Marriage Act (DOMA) limiting marriage only to be between a man and a woman. Twenty-nine states had passed constitutional amendments explicitly eliminating the recognition of homosexual marriage, nineteen of which prohibit the legal recognition of any same-sex union. But the new President of the U.S., Barack Obama, gives the hope of full repeal of the DOMA.

Civil Partnerships Act in the United Kingdom came into force on December 5th, 2005. The law gives civil partners identical legal status, associated rights and responsibilities as civil marriage. Civil partners are entitled to the same property rights, the same exemption as married couples on inheritance tax, social security, pension benefits, the parental responsibility for a partner's children, next-of-kin rights in hospitals and so on. It should be noted that the civil partnership in the United Kingdom is not a form of marriage, but a quasi-marriage.

On July 19, 2005, the Canadian Senate passed the Civil Marriage Act (Bill C-38), which came into effect on July 20 after receiving Royal Assent. In 2006 a bill proposing the repeal of homosexual marriage failed at its first reading, hence same-sex marriage is recognized throughout Canada.

4.2 In Civil Law Countries

Denmark was the first country worldwide to legitimize the combination of couples of the same sex. In 1989, the legally recognized homosexual union called "registered partnership" was established, which guarantee the same rights as heterosexual marriage, though not yet a form of marriage. The Netherlands was the first modern nation to legalize same-sex marriage in 2001. And the Netherlands, Belgium, Canada, Spain and Norway are the only countries where the legal status of same-sex marriage is exactly the same as that of opposite-sex marriage.

Protection for homosexual partnerships was established later in France in January, 2000, in Germany in November of the same year, and in Finland, 2001. Among them, the *Parte Civil de Solidarit (PACS)* of France is a different legislation pattern from the Netherlands mode, and some of its clauses were not adopted in the part of marriage and family law of its civil code, but regulated in the chapter about natural person and civil identity.

After the discussion about legal practice of homosexual marriage in the developed countries, let us turn our attention to developing countries similar to China, where legal status of the homosexual has not been established as commonly as in the west.

4.3 In Developing Countries

On December 1st, 2005, the Constitutional Court of South Africa issued a ruling that the exclusion of same-sex marriages in South African law "represented a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples." Same-sex couples joined in a marriage partnership according to the Civil Union Act 2006, and enjoy the same privileges as heterosexual couples married according to the Marriage Act.

Though, in Latin American countries where Catholicism is embraced by most of the people there, it's difficult to promote the legitimacy of homosexual marriage, Buenos Aires, the capital of Argentina, passed Bill 1004 to provide a same-sex civil union registry on December 13th, 2002; thus it became the first city in Latin America that legitimizes the homosexual combination.

There arises the hot discussion of protection about the gay rights, including marriage, throughout the whole Europe, and this trend has quickly spread to North America, Africa, Asia and even Latin America.

5. Outlook on Legitimacy

To examine the status of same-sex marriage in countries where homosexuality is legal, there are mainly three types of partnerships recognized all around the world: one is to give the homosexual partners the same or highly similar recognition and protection that heterosexual marriages enjoy, under the name of 'marriage'; another is to create a new status, such as civil unions, civil partners, domestic partnerships, and registered partnerships, which share the same essence with different names; the third type is to protect homosexual relationships through special procedures, for example, the PACS of France achieves this by entering into an agreement between two parties of marriage. It's worth noting that the French mode does not

render the homosexual a legal status, but merely protects the social contract agreed by two parties and registered by the court.

The absence of the tradition of the contractualization of personal identity in China, together with the complicated procedures required, decides that the French mode is impracticable in China. As for the first type of 'marriage', it's improper to simply extend the word 'spouse' in current family law which indicates a husband and wife to include homosexual couples, considering the social tradition and the differences between homosexual and heterosexual marriages, such as the issue of fertility and inheritance. The civil union, adopted by most countries, is a quasi-marriage in essence. It is a compromise of the sanctity of marriage and the nature of human rights, a balance between the stable public order and the homosexual conjugal rights. Taken all factors into consideration, the mode of civil union is more practicable in China.

The establishment of a civil union, similar to that of a heterosexual marriage, is a 'contract' of identity based on the meeting of minds, and the contract shall come into effect under the supervision of public authority. Therefore, the law of civil union can be stipulated according to the marriage law system. The substantive requirements may include: civil union shall be based on the complete willingness of two persons of the same sex; the man or woman shall reach certain ages stipulated; a person shall not be in marriage or civil union with two or more partners at one time; civil union shall be prohibited in the same circumstances forbidden by heterosexual marriage law, such as lineal relatives or collateral relatives by blood up to the third degree of kinship and suffering from diseases that is regarded by medical science as rendering a person unfit for marriage. As for the formal requirements, the partners who apply for civil union shall go to the registration authority in person to get registered. The civil union registration should share the same authority as marriage registration in order to facilitate the censorship and to unify the two systems.

As for the rights and obligations to each other in the civil union, the disposal of property, the termination of relations, all the standards can be referred to heterosexual marriage, except the obligation of the birth control policy due to the physiological condition of homosexual partners.

6. Conclusions

With the complete blank in this field currently, a self-contained code or act on homosexual marriage can still not be accomplished in an action. Legislation is a complex strict process rather than a Utopia realized overnight, especially on such a controversial issue as homosexuality. The 'relative rationalism' method seems a practical way: it encourages the accumulation of actual cases at first, and

then turns to the ordination of judicial interpretation, finally reaches the goal of systematic legislation, which continues to be amended by later practice. This whole process of discussion, examination and correction perfects the legitimacy of homosexual marriage.

It is hoped that the legitimacy of homosexual marriage in China will provide the minority with inviolable rights for the essential achievement of equality, freedom and humanism.

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