

Same-Sex Marriage and Human Rights

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The question of human rights is at the core of the same-sex marriage debate. Proponents argue that same-sex marriage is a human right, citing Article 16 of the Universal Declaration of Human Rights (henceforth UDHR). I argue that Article 16 not only provides no support for same-sex marriage but implies that creating such a law could in fact be a violation of a human right.

Article 16 (UDHR) states:

- (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.*
- (2) Marriage shall be entered into only with the free and full consent of the intending spouses.*
- (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*

(See also a similarly worded Article 23 of the International Covenant on Civil and Political Rights, henceforth ICCPR)

The text arguably refers only to a union between opposite sexes, 'men and women ... without any limitation due to race, nationality or religion'; not 'men and men' etc.; not 'every human with any other human'; not 'men and women without any limitation due to sex or gender'. The omission of a reference to sex or gender as a prohibited ground of discrimination leaves little doubt that 'marriage' is intended to mean that of a man with a woman, to the exclusion of all others. This is consistent with the further provision about 'founding a family', the most direct interpretation of which is that of parents having children with one another: something that same-sex couples are biologically precluded from achieving through no fault of their own. Point 3 of Article 16 provides further insight about the intended meaning of 'family': a natural and fundamental unit of society. It makes little sense to regard same-sex union as a 'fundamental unit of society' since same-sex partners cannot create life with one another, while it makes total sense for opposite-sex couples to be considered as such: humanity depends on the union of opposite sexes for procreation, even if it does not always result in procreation.

This interpretation reflects the standing precedent established by the Human Rights Committee in *Joslin v New Zealand*, Communication No.902/1999, UN Doc. CCPR/C/75/D/902/1999 (2002), [8.2]–[8.3]. Some commentators (for example Gerber, P. et al. "Marriage: A Human Right for All?" *Sydney Law Review*, 2014:643-667) nonetheless argue that this interpretation is too narrow and overlooks the more general principle of 'equality before the law' stipulated in Article 26 of ICCPR:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Although discrimination on the basis of the sexual composition of a family is not explicitly prohibited under Article 26, it is alleged that the relevant prohibition is implied by the reference to 'other status'. I do not think this argument succeeds, as there are obviously good reasons to discriminate in the relevant context on some grounds, for example, against incestuous family composition, even if the related couple consists of opposite sexes. The principle of equality before the law evidently prohibits only unjust or arbitrary discrimination, what in turn begs the question whether the contested kind of discrimination is objectively unjust or arbitrary. More generally, prohibition of discrimination on the basis of some status does not preclude cases of justifiable discrimination on the basis of some other status. In the present case it is also important to differentiate between discrimination on the basis of 'sexual composition of a family' and 'sexual orientation of partners': sexual orientation of partners does not preclude access to legal marriage between a man and a woman and is generally of no concern or interest to the State. In that sense, marriage equality already exists: every man can marry a woman and every woman can marry a man, irrespective of sexual orientation, provided that they are not relatives. The same-sex marriage debate is therefore not just about individual rights but, primarily, about changing the meaning of marriage: whether to decouple the legal protection afforded to marriage from the sexual norm of procreation.

The natural, fundamental social unit consisting of a man and a woman is singled out in Article 16 as ENTITLED to protection by society and the State. By equivocating between the same-sex union and the union of opposite sexes under the common rubric of 'marriage' we may be undermining the very sense of 'natural family' as the vehicle of procreation, deprioritising its life-giving function in favour of other values. The sexual norm, the fundamental condition of human existence, thus stands to be legally effaced in favour of normalising all possible sexual combinations. On this interpretation, legalising same-sex marriage under the same statutory provisions as the marriage of opposite sexes would amount to a violation of a human right stipulated in Article 16, namely, that the natural family consisting of a man and a woman, the fundamental unit of society and the only combination of sexual beings capable of producing an offspring, must be given special protection by society and the State. Some may object that the supposed threat to traditional family posed by same-sex marriage is too vague, but even if that is the case the accusation cannot be simply ignored. There are clearly two legitimate sides to this debate and therefore a more rigorous examination of the matter from psychological, sociological and philosophical perspectives is necessary before committing to the change. Is there a broadly normative dimension associated with sexual differentiation that is being impinged on by same-sex marriage? What are the social benefits versus the risks associated with rejecting this norm?

I believe that the individuals in same-sex relationships ought to have as many rights and protections as practicable to lead fulfilling, dignified and fruitful lives, perhaps All the rights that we already grant to families composed of a man and a woman. This is indeed

the view shared by a growing number of nation states. We ought nonetheless to preserve the distinction between same-sex and opposite-sex couples in regard to the institution of marriage because only a man and a woman can bring new life into this world in a natural way, and that is of critical existential importance. On the other hand, if the social unit possessing the natural capacity for procreation is indeed the main focus of the right to marriage then it makes no sense for any other social unit to claim that right on the ground of 'equality before the law' without also possessing the natural capacity for procreation. One cannot justifiably claim legal protection for a function of a unit that cannot be performed by that unit.

Lastly, proponents of same-sex marriage accuse the 'traditional' marriage of being increasingly dysfunctional, but that does not entail that changing the meaning of marriage or watering down the sense of 'natural family' would be beneficial to the implied functionality. On the contrary, the traditional family arguably needs more protection, more self-respect and a more dignified treatment by the State and society. After all, we All come into the world the same way, by means of a natural father and a natural mother. This life-giving union deserves to be protected and cherished above all other social groups because it is a necessary condition of humanity, freedom, rationality, and of valuing anything at all.

There may be good reasons to judge the present interpretation as objectively wrong, but the relevant question is evidently far more complex than most proponents of same-sex marriage are willing to admit. If I have missed some important reason in favour of same-sex marriage then perhaps one day the UN General Assembly will apply superior reasoning and agree on a new, more explicit formulation of the relevant human right.