

Exclusion from Marriage

Commentary on the Papers by Sharpe, Benke & Öz

Elisabeth Holzleithner, University of Vienna

Conference “Multiculturalism, Autonomy and the Law. Forced Marriage and exclusion from marriage as contested legal fields in the UK, Austria and Turkey”

The three papers presented here show most impressively how varied the situation of gays, lesbians, bisexuals and transgendered people is in Europe. The collection of papers puts into sharp focus what is at stake. They also show which path the development of the situation of sexual minorities may take. Certain phases in this development can be extracted. This is the structure along which I want to reconstruct some of the main arguments which I have found in the papers. Of course, you are free to disagree.

To formulate it biblically, in the beginning was immorality. In the beginning was the perception of same sex attraction, acts and relationships as an abomination. The categorization of same sex acts as against nature has led to their criminalization at least at some time in nearly every legal culture of the world.

Taking a comparative look at our three countries, same sex sexual acts were first decriminalized in Turkey, that is, in the Ottoman Empire, already in the 19th century, long before Great Britain (1967) and Austria (1971) did so. It took a long time until the age of consent was also equalized (Great Britain: 2000; Austria: 2002).

Besides, Austria as well as the United Kingdom had legal provisions against the promotion of homosexuality; in Austria, the promotion of same sex bawdiness was even banned by criminal law – right until 1996. This situation is echoed in Turkey today where provisions outlawing associations which violate “law and morals” are time and again used against lgbt organizations and expressions.

In such a situation, lesbians, gays, bisexuals & transgenders are clearly second class citizens whose “lifestyle” is condemned. As long as such discriminatory laws exist, the idea of same sex marriage or of the institutionalization of same sex partnerships seems eons away. As Nikolaus Benke rightly stated, a serious discussion on civil

partnerships for same sex partners in Austria only began in 2002, after the criminal provision against certain kinds of male homosexual encounters had been eliminated.

In such a situation where immorality is the prevailing paradigm of perceiving same sex attraction in society as well as in the realm of politics one step has proven to be particularly helpful and successful: the reframing of the demands and needs of lgbs as a human rights issue.

The issue and its legal treatment is then emancipated from conventional moral or religious provisions. Decriminalization is very often combined with the assurance that same sex behaviour remains immoral but that a modern understanding of individual liberty prevents the state from interfering in such affairs.¹

Perceiving lgbt in the framework of human rights has proven to have a transformative effect. Many people have started to evaluate homosexuality differently – not as an abomination, but as a variation of human sexuality and of people’s ways of bonding intimately. This has ultimately led to many political successes, among them the legal recognition of same sex relationships.

But how far does this recognition go? And what is lost if this kind of recognition is won?

Many lgbt activists have been and still are sceptical whether this kind of recognition, the quest for same sex marriage, should be so high on the top of the agenda as it now is. It is no coincidence that, as Yasemin Öz has told us, Turkish lgbt activists oppose marriage as an institution and do not (yet) lobby for the inclusion of same sex couples. Marriage has, of course, been a primary cause of women’s oppression, after all. Accordingly, especially lesbian feminists have often violently opposed the turn towards gay marriage as the central issue of the lgbt movement. “Since when is marriage a path to liberation” asked Paula Ettlbrick already in 1989.

On the other hand, however, it makes quite a lot of sense why this concentration on marriage should occur. Sexual orientation is about the choice of partners, be it for one night or as a significant other for an indefinite time span. Accordingly, sexual orientation is pivotally about sexual relations and about committed relationships. Recognition of lgbt in turn means acceptance and recognition of their sexual relations

¹ The ECHR case of *Dudgeon versus the United Kingdom* is pivotal in this respect.

and committed intimate relationships. The relevant benchmark is, of course, heterosexual marriage.

Being able to marry would mean to be accepted as equally free – according to the prevailing terms of the current legal culture. It would mean to enter a kind of normality, which, by way of same sex couples' entering, would have proven to have been radically altered. If gays and lesbians have the right to marry, they can consider themselves to be just as normal as the next heterosexual person.

But is this what should be wanted? And what is forgotten, who is excluded if same sex marriage is the aim?

First of all, except in a few European countries and in Canada, this kind of normality has not been achieved. The UK and Austria as well make a big point retaining a distance between institutions for same sex and for different sex couples. Same sex relationships are regarded as fundamentally unequal, and legal regulations express this otherness in terms as well as in content.

Especially when it comes to saving “our children” from the dangerous influence of “homosexuals”, homophobic legislation still strikes. Considering this continuing inequality, there is still need for improvement and “equalization”.

But gaining this kind of normality by gaining access to existing institutions cannot be all there is. It has especially been radical queer theorists who have questioned priority of lobbying for same sex marriage. They point out that a more fundamental change is called for. Such a fundamental change should bring with it, in the words of Andrew Sharpe, a radical “dismantling of gender and sexual hierarchies”. The cultural and legal perception of gender and sexuality should do justice to “the potential and actual richness of sexual life and expression” and not squeeze them into a binary model of homosexuality versus heterosexuality. (This amounts to nothing less than a cultural revolution. It is not a multiculturalist position.)

The law of relationships should go far beyond the institutionalization of monogamous coupledness. It should do justice to our ever more complex relations and give those, who need support, access to legal redress. The culture has changed already, it is for the law to provide the respective range of options. The legal range of options is, according to all the analyses presented today, not yet adequate. How exactly this law should look like is open to contestation. I dare one prognosis: We will not get rid of marriage, because marriage for too many people is a highly valued core option. Many

people just love to marry. Maybe this is so because people know very little about marriage when they enter it.

In conclusion, it will be our society and political cultures which shape what is to come. And I think that most people here today will probably agree that a truly adequate law of relationships should not distinguish along the lines of the genders of those involved.

Yet there are strong players at work who try to prevent this from happening. The Catholic Church in Austria is ready to declare the institutionalization of same sex relationships a hostile act against truly Christian beliefs and to start a “Kulturkampf”.

In the light of this and considering that marriage is not in principle a path to liberation, a double strategy seems apt: First, the right to marry for same sex couples is necessary in order to achieve equality. Second, the institution of marriage time and again has to be thoroughly questioned concerning its contribution to gender equality or inequality. Wanting to marry for same sex couples is an act that is subversive as well as it is affirmative of existing structures. This is a tension we will have to live with. Alison Bechdel’s cartoon² shows how delightful this can be.



² From: “Take Me To The Clerk On Time”, Reprinted with permission of the author.