'Liberalism, republicanism and same sex marriage'

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Liberalism and Republicanism:

Public Policy Implications

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Introduction

The controversy regarding same-sex civil marriage[2] is currently one that is shedding more heat than light on matters of political first principles. One way of conceiving the same sex marriage debate in the Western democracies is to compare and contrast the approaches that could be taken by liberals and republicans. This is a useful exercise because it brings out not only some of the key issues involved in the same-sex marriage debate but also unpicks some of the differences between liberal and republican approaches to one of the most controverted topics in contemporary politics. I will argue that liberal and republican approaches are at least partly consonant and that by reconciling core ideas from each approach can help us theorise and legislate on the issue of same-sex marriage in a helpful way. At the same time, alternative approaches may not help achieve the social progress that same sex marriage represents. In making this argument I will draw on the notion raised by Jurgen Habermas on the 'internal relation' between human rights and popular sovereignty, contrasting it with approaches to human rights that see rights as trumps over conceptions of the political common good. I conclude that same-sex civil marriage is clearly justifiable in civil law - from both the liberal and republican perspective.

Liberal and republican principles and their application to same sex marriage

I shall assume a familiarity with the core understanding of republicanism and liberalism as has been outlined by Philip Pettit and John Rawls and those with a similar understanding of normative political theory.[3] Liberals clearly hold that "freedom is normatively basic, and so the onus of justification is on those who would limit freedom, especially through coercive means. It follows from this that political authority and law must be justified, as they limit the liberty of citizens."[4]

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[2] I use the term same sex *civil* marriage in recognition that we are discussing the status of marriage from the perspective of law and political association and not necessarily from the perspective of ethical theories that may be present in the background values of society, whether they be religious or secular.

[3] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1999) and John Rawls, *Political Liberalism*, (New York: Columbia University Press, 2005).

[4] This is the fundamental liberal principle according to Gerald Gaus and Shane D. Courtland in "Liberalism", *The Stanford Encyclopedia of Philosophy (Spring 2011 Edition)*, Edward N. Zalta (ed.), URL = http://plato.stanford.edu/archives/spr2011/entries/liberalism/ accessed 1 February 2013.

It is not clear that republicans such as Sandel or Pettit would disagree with this fundamental liberal principle beyond wishing to conceive of liberty in terms of nondomination. Republicans may say, however, that a law or public measure that necessarily involves a form of coercion but is aimed *at reducing public or private domination* clearly passes the test of liberal justification. (In this sense republicanism can be distinguished from the ethically more demanding civic humanism advocated, or at least portrayed, by other theorists such as Hannah Arendt.)

What may be a partial lacuna in the contemporary republican view is on what basis can we view a state of affairs for an agent as being 'dominated', with the aim of ending or at least vitiating that domination? Is there a notion of the human good or value present that would help citizens deliberate about such states of affairs so that ameliorative measures could be put in place to address the condition of domination? In the case of same sex partners, a republican will ask if that couple is subject to significant public or private domination by the denial of access to civil marriage? The initial response to this, of course, may be that republicanism is a set of political principles rather than a comprehensive ethical theory. But without any sense of what might constitute a state of domination short of a position of, say, legal slavery, how might citizens coherently deliberate about remediating domination.

Do, for instance, republicans use a perfectionist, pluralist or consequentialist view of value when considering what constitutes a state of domination or non-domination? How do they conceive of human goods in a determinate way, or do republicans - like political liberals - leave ethical theory in its own domain bracketing out questions of human ends in settling such questions? Philip Pettit himself seems to take something like this position but the views of other republicans such as Michael Sandel on the same sex marriage issue implicitly questions whether such an abstention is viable within republicanism.

Sandel considers that it is not possible to properly determine the rights and wrongs of same sex marriage - without coming up with at least a partial answer to the question of what is "the telos [of marriage] – it's purpose or point", making addressing the question of the *moral* significance of marriage "unavoidable".[5] Yet Sandel also states that the issue of same sex marriage is about whether gay unions

[5] Michael Sandel, *Justice* (New York: Farrer, Strauss and Giroux, 2009) at 254ff.

are “worthy of honor and recognition” in a society more widely.[6] Yet approaching the question through this particular prism rather than of neutrality would seem to fit well with John Rawls’s notion of the primary good of the “social bases of self-respect” as a citizen-good which he says should foster “a lively sense of their own worth” as citizens.[7] Though Rawls does not use the language of domination, it does not take much of a conceptual leap to say that the basis of self respect is fundamentally undermined by the presence of domination, if not actual discrimination.

The freeman/slave distinction has been central to the way in which republicans have theorised the notion of domination. It is therefore relevant that slaves, for instance in the antebellum South were systematically denied the right to civil marriage. One hundred years after the Civil War the UN Declaration on Human Rights synthesised the republican and liberal positions neatly by stating both that the family is the fundamental unit of a political society but also that it must be based on ‘free consent’ and ‘equal rights’ of the spouses.[8] This takes from classical republicanism the notion that domestic societies are one of the foundations of the republic,[9] something that is again reflected, in a not dissimilar way, by Rawls when he considered the family to be part of the basic structure of a society and necessary for the social reproduction of societies.[10]

This is clearly different to the approach to the same sex marriage dispute that may issue from a liberal position based upon *primary* constructivism.[11] By primary constructivism I mean a form of universal interpersonal construction of norms which

[6] Ibid. 254.
[7] See John Rawls, *Justice as Fairness: A Restatement* (Cambridge. MA: Harvard University Press, 2001), at 59. Helpful in locating Rawls here in relation to republicanism is Andrés De Francisco, ‘A Republican Interpretation of the Late Rawls’ *The Journal of Political Philosophy* 14 (2006): 207-288.
[8] Article 16 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.* (Italics added). See UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: http://www.unhcr.org/refworld/docid/3ae6b3712c.html, accessed 1 February 2013.
[9] This is obvious in Aristotle’s *Politics* in book I describing the role of the *oikos* in the *polis*, and in the section of the *Nicomachean Ethics* (book VIII, 12) where he comments that men are more naturally conjugal than political.
[10] See Rawls, *Justice as Fairness*, section 50, 162ff.
[11] I refer here to the sense of universal primary constructivism as discussed by Peri Roberts in his monograph *Political Constructivism* (Abingdon: Routledge, 2007) as explored especially at 147ff. Examples of primary constructions include Onora O’Neill’s twofold ‘modal’ practical reason or in John Rawls’ original position and the notion of reflective equilibrium according to Roberts.

create moral obligations for all relevant persons that could possibly be affected by the practical issue concerned. This can be moral or moral/political depending on the conception of practical reason concerned. Secondary constructivism by contrast "building from starting assumptions which it regards itself unable to subject to criticism, or which it exempts from examination."[12] Though my own understanding of practical reason has no need for *primary* constructivism, the use of a *secondary* constructivism in the *political* domain can be of use in filtering and judging positions that may appear to be arbitrary or unduly partial.[13]

This distinction is relevant because contemporary theorists have advocated radical reform of marriage either by disestablishing marriage altogether - as some libertarians have argued - or by radically broadening marriage to any "nondependent caring relationships between adults [of an unlimited number] ('marriage') and [consider] that this framework is a fundamental matter of justice."[14] Elizabeth Brake is one of those who would wish marriage to be transformed in this way, to rid it of the "sexist and heterosexist assumptions" basis of martial law.[15] Brake argues that "public reason, with its ban on arguments which depend on comprehensive religious, philosophical, or moral doctrines, cannot provide [any] justification for more-than-minimal marriage".[16]

[12] Roberts, *Political Constructivism*, 148. It is not that the foundations of practical reasoning should be exempt from inquiry, but that the very basis of ethics itself is the subject of philosophical reflection in itself and the procedures of construction are not core to that inquiry.

[13] The need for a primary constructivism is superfluous because in the natural law perspective I hold that moral agents can, at least at an elementary level, apprehend certain fundamental human goods (life, knowledge, health, aesthetic experience, companionship, etc) which reflect basic human needs. Constructivism at the primary level is not required because it is through the spontaneous operation of the practical reason - as it interacts with personal virtue of the agent herself - that moral norms are fully understood and become capable or being realised in *praxis*. Despite apparent similarities, this is somewhat different from the ethical approach advanced by John Finnis and the New Natural Law school and is closer to the position outlined by Martin Rhonheimer in his *The Perspective of Morality* (Washington. D.C: Catholic University of America Press, 2011) and other works - though I obviously do not share Rhonheimer's applied ethical conclusions on some important matters relating to sexual ethics (contraception, same sex relations etc).

[14] Elizabeth Brake, 'Minimal Marriage: What Political Liberalism Implies for Marriage Law', *Ethics* 120 (2010), 302-337.

[15] Brake, 'Minimal Marriage', 337.

[16] Brake, 'Minimal Marriage', at 303,

Brake seeks not to work from the "public political culture" of societies[17] as Rawls does to make this principled argument but instead sees the prior social and legal practice of marriage as something that should be treated with suspicion. Reconceiving marriage *de novo* for Brake is the only way to avoid the legacy of comprehensive ethical doctrines in civil marriage law. In doing so she interprets the late Rawls as a primary constructivist, disregarding passages in *Political Liberalism* where Rawls seems to work out his liberalism from existing traditions and social understandings *without privileging those practices*, as conservatives do.

My own approach to same sex marriage would be to work from the existing public political culture while using a secondary constructivism to critique the sexist and heterosexist practices within marriage but to use the evolving common law conception of marriage to advance the notion that the traditional 'ends of marriage';[18] procreation and companionship are properly distinct. This being the case, a companionate justification of marriage alone is sufficient to justify eligibility for an adult consenting marriage in civil law. This should relevantly apply to same sex couples as there is, in law, no necessary connection between procreation and the accessibility of civil marriage for *hetero*sexuals.[19] (With the advent of contraception and the changed position of women in society since 1960, the companionate aspect of marriage is now easily understood as clearly distinguishable from the procreative potential of marriage.)[20]

[17] See Rawls's political constructivism which draws the materials for a *secondary* construction of a political conception of justice from the public political culture of a society in terms of its conventions, laws and practices; Rawls, *Political Liberalism* at 13-14 and in Lecture III 'Political Constructivism' generally.

[18] This goes back to Augustine and Aquinas and the Western canon law tradition, which was in turn absorbed into the Common Law tradition. These goods are *procreation (procreatio), mutuum audiutorium* (or mutual aid) and as a *remedium concupiscentium* (as a remedy for concupiscence or a way or legitimately ordering sexual desire).

[19] In that postmenopausal women and infertile women and men are allowed to marry without restriction as are those who avowedly profess no intention to procreate.

[20] As Elizabeth Anscombe presciently wrote (though she thought homosexuality immoral) "[f]or if that [reproduction] is not...[the] *fundamental purpose* [of sex] there is no reason why for example "marriage" should have to be between people of opposite sexes." Emphasis added, see Elizabeth Anscombe's essay, 'Contraception and Chastity', available at http://www.orthodoxytoday.org/articles/AnscombeChastity.php accessed 20 December 2012

Same sex civil marriage, in my view, effects a political common good by ameliorating the domination of gay and lesbian couples and by reflecting their proper interests as citizens. The denial of same sex marriage rights is to be considered domination because it unduly frustrates those couples' 'plans of life' and subjects them to potentially unjust discrimination compared to straight couples. This discrimination is unjust and potentially dominating not only because of any tangible negative effects but because it either rests on premises that cannot expect to be shared in common through public deliberation (because the nature of argumentation is metaphysical or theological[21]) or because it rests on reasons that are partial or arbitrary.[22]

Though ideal theory has a legitimate role in political theory, I would venture that a liberal primary constructivist position is not only unnecessary but may (unintentionally) frustrate incremental social change. This is because the type of arguments used may have little traction within the social context of actually existing political societies. Indeed, many of those proposing some form of very broad domestic relations recognition in fact appear to do so in order to block or delay the introduction of same-sex marriage – using the notion almost as a *reductio*.[23] This of course is not Brake's motivation, which is the opposite, which is to end the heteronormative institution of marriage in its conventional form, as she sees it.

This may be straightforward enough, but this again raises the question of what human good(s) are involved in the issue of civil marriage. Can we come to an understanding of civil marriage that does not necessarily refer to comprehensive human ends but may perhaps refer to human goods that have a specifically civil or political value? Are there what we might call intermediate or 'infravalent' ends (as

[21] Such as in arguments that rely on the alleged lack of sexual complementarity between homosexual couples on the basis of 'natural kinds', a metaphysical teleology, or arguments from revealed religious sources.

[22] Partial and or arbitrary in the sense that some opponents of same sex civil marriage use the natural infertility of gay and lesbian couples as a key argument against same sex civil marriage but at the same time advocate no restrictions on the martial rights of heterosexual couples who are infertile (because of age, genetic issues or pathological conditions). See the recent article which surveys this question: Erik A. Anderson, 'A Defense of the 'Sterility Objection' to the New Natural Lawyers' Argument Against Same-Sex Marriage', *Ethical Theory and Moral Practice, (*November 2012), DOI: 10.1007/s10677-012-9393-0.

[23] As Sir Roger Gale (Cons, Thanet North) seemed to do in the Second Reading Debate of the Marriage (Same Sex Couples) Bill on 5 February 2013, HC Deb, 5 February 2013, c152.

Jacques Maritain called them)[24] that may be 'structurally included' within final human ends or a plan of life. [25] Though these ends may not be considered fully freestanding as in Rawls's understanding, they be distinguishable and intelligible apart from the final eudaemonic ends sought by persons.[26]

I think this is a helpful way of conceiving the civil marriage question – as a proximate infravalent end relating to civil life that can be 'included' within more comprehensive ends by the agent. Citizens in their own moral doctrines, for example, may choose also to include marriage (in its deepest meanings) as a final good - such as in the Catholic understanding of marriage as a sacrament - but this does not undermine or subsume the infravalent good of *civil* marriage and its justification in law.

Reconciling liberal and republican concerns: the internal relation between law and democracy

But how can we reconcile people's own conception of their ends - including marriage - and a society's self understanding of its public autonomy? In other words, in what sense can this picture be seen as republican? Here we may call for assistance from a notion developed Habermas who has spoken of the internal relation between popular sovereignty and human rights or between law and democracy. By this I take him to mean a proper conception of rights and sovereignty in a constitutional democracy should not be mutually opposing or cut across each other but should be seen as co-original.[27] The foundation of human rights should not be based on

[24] Jacques Maritain, *True Humanism*, translated by M. R. Adamson. (London: The Centenary Press, 1946 [1938]), 127.

[25] Unconvinced with both 'dominant end' and 'aggregative' interpretations of *eudaimonia* in Aristotle, Henry Richardson has put forward an interpretation of eudaimonia I find quite persuasive, which he terms 'structured inclusivism'. In this reading, non-final ends which constitute intrinsic goods are nonetheless structurally ordered and subordinated to an ultimate eudaemonic end. Intrinsic value is generated not only by the final end alone but also by non-final intrinsic ends, including moral virtue and natural or 'external' goods such as health or one's reputation. If we take these non-final ends to be publically accessible then there a basis for an overlapping consensus of partial ethical views within a society to form a political conception of justice even if people's final ends differ widely. I take this threefold formulation of human ends from: Henry S. Richardson, 'Degress of Finality and the Highest Good in Aristotle', *Journal of the History of Philosophy* 30 (1992), 327-352, at 331.

[26] Martha Nussbaum clearly sees Jacques Maritain as the first '*political* liberal' though there is little evidence that his writings had any impact on the philosophies of John Rawls or Charles Larmore. See Martha C. Nussbaum, 'Political Liberalism and Respect: A Response to Linda Barclay', *Sats – Nordic Journal of Philosophy*, 4 (2003), 25-44 at 27.

[27] See Jurgen Habermas 'On the Internal Relation between Law and Democracy', in Ciaran Cronin and Paolo De Grieff (Eds.), *The Inclusion of the Other: Studies in Political Theory* (Cambridge, MA:

supposedly ‘pre-political’ moral rights (derived from a comprehensive ethical doctrine) but be formed by public deliberation in line with discourse principles and public reasoning.

A constitutional democracy therefore seeks to reconcile the private autonomy of citizens (expressed in actionable rights/liberties) with the public autonomy of the republic as a political community (a sovereign power enacting the democratic will). Rawls himself, when replying to Habermas’ critique of *Political Liberalism* stated that his own theory also understood there to be an co-original relation between political and private autonomy by referring to the complementarity of the two ‘moral powers’ of the person. [28]

This is a position that has consonance with the contemporary natural law position which sees subjective human rights as being “a fundamental *component of* the [political] common good”[29] and not something that externally constrains or fetters the political common good. It also fits well with the characteristic republican emphasis on the common good or public interest.[30] The notion of the common good - though not a term Habermas would be happy with - is clearly central in this republican conception, and this has emerged clearly in Pettit’s more recent political writings.[31] This, of course, contrasts with some Anglo-American understandings of the relation between democracy and human rights, which sees human rights essentially as side

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The MIT Press, 1998), 253-264. Habermas’s post-Kantian republicanism is the polar opposition of Sandel’s neo-Aristotelian republicanism that I see as a form of civic humanism-lite. Habermas makes this point in a wider argument about the aptness of modern law to fulfil societal functions previously exercised by a communal ethos and generated by traditional morality.

[28] See John Rawls, ‘Lecture IX’: Reply to Habermas’ in *Political Liberalism* (Cambridge, MA.,Harvard University Press, 2005) 412-420.

[29] See John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 214-218, at 218 (emphasis added). Contemporary theorist much influenced by republicanism also hold this argument, see Richard Bellamy, *Political Constitutionalism* (Cambridge: Cambridge University Press, 2007) at 31. Much of chapter one of Bellamy’s monograph - especially 29-31 - echoes a common good oriented political philosophy - and Finnis’s *Natural Law and Natural Rights* is itself cited at fn.36, at 30.

[30] The continuing use of the term and concept of the common good is a major theme in Thomistic social and political theory but was Aquinas clearly was influenced by (and developed) classical republicanism in important ways, see John Kayser and Ronald J. Letttieri, ‘Aquinas's *Regimen bene comixtum* and the Medieval Critique of Classical Republicanism’ *The Thomist,* 46 (1982), 195-220. For a clear and helpful view on how Roman law affected the Thomistic and scholastic natural law tradition, including Aquinas, see Jean Porter’s *Ministers of the Law: A Natural Law Theory of Legal Authority* (Cambridge: Wm. B. Eerdmans, 2010).

[31] “If there is a plausible conception of the public interest, and a feasible means of giving the public interest the required control over law-making, then there will be some hope of establishing a regime where the laws are not arbitrary and government does not represent a form of domination over individual citizens.” From Philip Pettit, ‘Law and Liberty’ in Samantha Besson and Jose Luis Marti, (Eds.), *Law and Republicanism*, (Oxford: Oxford University Press, 2009), 39-59, at 53.

constraints or as 'trumps'[32] in relation to majority rule, either from a libertarian perspective or an egalitarian liberal point of view.

Same sex marriage, when considered from the perspective of a liberal republicanism, thus emerges not as something that extrinsically changes the *essential* social nature or marriage, but is the product and expression of a reconceived good in held common by citizens and thrashed out through a process of 'contestatory democracy' and public reasoning. How political rights and majority rule may interact with each other in practice brings us to the current debate between so called 'legal' and 'political' constitutionalists, but this is something that I do not propose to address here.

Conclusion

Like Michael Walzer, I hold that social criticism comes most effectively from sources within a society and its traditions. In this respect the weakness of a liberalism based on a primary constructivism as it might apply to the same sex marriage issue is significant – as I have intimated. Walzer views a philosophy of 'discovery' or 'invention', in which one either externally receives or goes out of oneself to discover moral truths against which social practices are critiqued, as having significant drawbacks.[33] He views a primary liberal constructivism in this light. Walzer himself prefers a morality of 'interpretation' where existing social understandings are reviewed in ways that renarrate societal norms with the outcome that change is not seen or as an alien imposition or externally determined. This is the way that progressive social change is often effectuated.

In the civil marriage debate I would argue that change away from heterosexual marriage will most effectively be achieved not by applying a form of liberal primary constructivism, as Elizabeth Brake does, to create an institution that bears no relation at all to the existing institution of marriage. Instead, by critiquing and reforming the existing institution of marriage and by using resources at our disposal

[32] Ronald M. Dworkin, 'Rights as Trumps' in Jeremy Waldron (Ed.), *Theories of Rights* (New York: Oxford University Press, 1985), at 153ff.
[33] See Michael Walzer, *Interpretation and Social Criticism* (Cambridge, MA.: Harvard University Press, 1993).

in our public political culture, we can help make the institution significantly less dominating and more just.

This is a view that both political liberals and republicans could in principle agree to - and in doing so would make clear the substantial commonalities between the two theories. [34]

[34] This is not an original insight in itself, as Henry Richardson for one concludes that "in short, there seems to be no fundamental incompatibility between Rawls's liberalism and Pettit's republicanism." Henry S. Richardson, 'Republicanism and Democratic Injustice', *Politics, Philosophy and Economics*, 5 (2006), 175-200, at 180. Rawls also writes that a form of classical republicanism could be consistent with political liberalism but that an Aristotelian inspired 'civic humanism' would not be; see John Rawls, *Political Liberalism*, (New York: Columbia University Press, 2005), at 205-206.