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ON UNJUST FORMS OF MARRIAGE. COMMENTS ON THE DISCUSSION ON DISCRIMINATION AGAINST SAME-SEX COUPLES

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Abstract. This article defends the thesis that, in light of the postulates of liberal ethics, it is not possible to put forward universal arguments in support of any form of marriage. The existing forms of marriage should be either deemed unjust or founded on specific arguments recognized within a particular political community and determining the understanding of justice in a particular society. It defends the thesis that the requirement of universality, and consequently of impartiality, is not met, since behind every form of marriage there is a certain "minimum" anthropological approach. Marriage is discussed as a privilege granted to particular groups by the political community. The comments are made with reference to the discussion between Krzysztof Saja and Tomasz Sieczkowski concerning the problem of discrimination against same-sex couples in Polish legislation.

Keywords: same-sex marriage, marriage, right to marriage, liberal ethics, universality, privilege, Krzysztof Saja, Tomasz Sieczkowski.

In discussions about extended concepts of marriage, we often hear arguments referring to respect for the principles of liberal ethics, in particular fairness, impartiality, and equality. There are some rather serious flaws in such arguments, however. In this article[1], I will defend the thesis that following the postulates of liberal ethics, it is not possible to put forward universal arguments in support of any form of marriage. Consequently, we find ourselves in a situation where no

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[1] This article is a follow-up to the discussion initiated by Krzysztof Saja's *On the Discrimination Against Same-Sex Couples*, Saja (2012), in which the author attempted to demonstrate that the fact that same-sex marriages cannot be legalized under Polish legal regulations is not a form of discrimination in light of liberal ethics. The theses and argumentation proposed by Saja have been criticized by Tomasz Sieczkowski (2013). In reply to his charges, Saja published another article in which he discussed his position in more detail and added cohesion to the argumentation presented in the first paper, as well as underscoring the weight of particular arguments, Saja (2013).

just form of marriage can be developed in light of liberal principles – if a just form of marriage is defined as one that satisfies the criterion of fairness. This applies, primarily, to modern states which refer to the ideals of liberal democracy, and thus the existing forms of marriage should be deemed unjust. The requirement of universality,[2] and consequently of impartiality, is not met since, as I will argue, behind every form of marriage there is a certain "minimum" anthropological approach. Or, to be more exact, a certain view of the interpersonal relationship referred to as marriage which is endorsed in a particular culture. The criticism presented in this article is directed, on the one hand, against liberalism which refers to justice as fairness, on whose strength attempts are being made at substantiating certain specific group rights, such as the right to marry. On the other hand, it provides criticism of arguments which attempt to justify all forms of marriage by referring to such universal and liberal principles as fairness, impartiality, or equality.

I will begin my analyses by presenting some preliminary comments and assumptions. They result, first, from the discussion between Sieczkowski and Saja which I refer to, as well as from my earlier article on the issue of discrimination involved in that discussion. I will then outline a classification of rights as presented within the framework of liberal culture, and from this standpoint.[3] I will discuss marriage as a privilege which is granted to particular groups by the political community and which is distinctly opposed to the liberal view of justice as fairness. I will then analyze various possible concepts of marriage. Such a broad background needs to be outlined so that we can answer the following questions: Is there any form of marriage that could be substantiated with the principles of liberal ethics? Is there any form of marriage which satisfies the requirements of justice as fairness?

[2] Whenever I refer to universal reasons, I mean such reasons that are neutral and acceptable in any culture – a situation hypothetically possible behind Rawls's veil of ignorance. I will distinguish them from the public reason prevailing and accepted within a particular culture, e.g. Western. They are most often preceded by certain epistemological or ontological assumptions. From a Polish speaker's perspective, the borderline between these two types of reasoning is rather thin, and I am not sure to what extent I will be able to present it in the English language.

[3] A major drawback in the discussion between Saja and Sieczkowski is the absence of an explicitly defined concept of liberalism adopted throughout their discussion. Saja's description of the fundamental assumptions of liberal ethics is insufficient considering the subject matter of his reflections. In fact, the discussion is held with arguments referring to (broadly understood) liberal values, rather than a particular liberal concept of ethics. Consequently, these analyses will not represent a criticism of any specific liberal theory, but rather a criticism of a certain kind of cohesion in the use of arguments referring to vaguely defined liberal values and solutions.

Preliminary Comments and Assumptions

This article is a continuation of my comments[4] in an unpublished manuscript on the discussion between Krzysztof Saja and Tomasz Sieczkowski concerning the question whether the Polish legal regulations discriminate against same-sex couples from the point of view of liberal ethics. In the first of his articles, Saja presents four postulates from this perspective.[5] These are the following: (1) All people are morally equal; (2) Every person is autonomous and their autonomy should be respected; (3) Actions which do not harm others are morally neutral; (4) All legal prohibitions[6] should be justified by reasons which are as universal as possible, i.e. reasons which are not based on particular religious beliefs, worldviews, convictions or preferences of individuals or groups. Neither of the two authors refers to any particular interpretation of liberalism, but both of them draw on its general postulates. I will therefore also distance myself from any particular liberal conception and will refer mostly to the requirements of liberal ethics outlined above. Moreover, neither of the two authors points to any particular notion of justice they wish to refer to in their deliberations; quite the contrary, they avoid committing themselves to any definition of justice. It is necessary, however, to transfer the discussion onto the ground of justice and to adopt either a specific view of justice, or at least some assumptions by which it can be defined.

As I pointed out in my previous article,[7] a discussion on the discrimination of same-sex couples, or discrimination of certain groups, is unfounded from the point of view of liberal ethics. Discrimination can only be discussed in relation to an individual, and with respect to groups – and solely if we consider such groups as being made up of individuals who are not treated as equals. In other words, we can only talk about the discrimination of persons, which is the only kind of discrimination possible in liberalism, when there is an inequality between persons within the same category. As regards the unjust treatment of particular groups, on the other hand, it occurs first of all when the same features of a relationship – features revealed in the internal relations within groups – are treated differently. For example, the monogamous and intimate nature of a certain type of relationship

[4] *Injustice or Discrimination? Comments on the Discussion on Discrimination Against Same-Sex Couples.* [in review]

[5] Saja (2012): 92–93.

[6] I would like to note here that the fourth belief refers to actions or attitudes which are prohibited and not to those which legal regulations do not apply to or which are construed as privileges. In other words, legal prohibitions place restrictions on existing (natural) liberties and represent a category different from privileges which add certain new rights to existing (natural) liberties.

[7] *Injustice...*

justifies access to the benefits of marriage, such as filing a joint tax return. In such a case, however, unjust treatment may affect couples whose relationship is not only based on monogamy and intimacy, but also on close kinship. In such cases, the postulate of fairness is not satisfied, and claims may be made that such couples are not treated justly.

Further, I will consider the criterion of fairness (impartiality) as a necessary condition of any form of marriage that is to be deemed just. Let me make two provisos here. First, this does not preclude a view of justice in which individuals may be treated differently in order to make goods equally available to them, as is the case, for example, according to John Rawls. I will refer to the criterion of fairness pertaining to the way in which interpersonal relationships (those inside a group) are treated, and not to the way in which the parties in these relationships are treated. Second, the standpoint I have adopted does not preclude the existence of such conceptions of justice which, while taking the postulates of liberal ethics into account, do not consider the fair treatment of interpersonal relationships as a criterion of justice.

The problem of the justice or injustice of particular forms of marriage should be considered in a somewhat broader perspective than would result from the debate we have followed so far. The discussion between Saja and Sieczkowski centered around the access of same-sex couples to the institution of marriage. When talking about the privileged position of a certain form of marriage, in this case of the monogamous union between a man and a woman, one should ask whether other groups could raise similar claims as well. Thus, in addition to same-sex couples, the postulates of polyamorous groups should also be taken into consideration, or those of unions based on intimate relations, despite close kinship. In today's discussions concerning possible forms of marriage, the so-called concept of minimizing marriage has been proposed based on the criterion of close relationship and mutual care between members of a group. This is not the only proposed alteration of marriage. By extending the discussion to other forms of marriage, and by taking into account the arguments put forward by Saja in defense of marriage as a monogamous form of an opposite-sex union, the unjust treatment of other unions which could aspire to being recognized as marriage is revealed. Therefore, the arguments proposed by Saja should be reconsidered. My analyses will not be focused on defending any particular form of marriage but rather on whether any universal reasons may be provided in favor of any particular form of marriage that would not defy the requirement of fairness while respecting the postulates of liberal ethics.

Three Categories of Rights

When analyzing the understanding of individual rights and their related values (ideas), i.e. dignity, freedom and equality which Sieczkowski refers to,[8] one should be aware of the existence of two traditions. They have been very aptly characterized by Louis Henkin. On the one hand, the Anglo-Saxon tradition of individual rights is focused on defending the autonomy and liberty of human beings and protecting them against government interference and the abuse of power. On the other hand, the continental tradition, which emerged towards the end of the 19th century in Europe and whose source is not the autonomy of individuals, but the community, and apart from liberty and equality, also values brotherhood (solidarity). According to Henkin, this suggests "a broader view of the obligations of society and the purposes of government – not only to maintain security and protect life, liberty and property, but also to guarantee and, if necessary, provide for basic human needs."[9] This distinction is further supported by the comment made by Mary Ann Glendon who points out that the Anglo-American individualist tradition of rights emphasizes individual liberty and pays little attention to constraints and responsibilities, which differentiates it from the "dignitarian" tradition prevailing on the European continent.[10]

I would also like to note that when discussing rights, we need to remember that the autonomy of an individual is not the source of all rights. I believe that within a liberal political community there also exist rights whose source is not to be found in the individual, but in the community. These rights, however, seem to be derived more from the equality of individuals than the ideal of individual liberty. Such an understanding is more consistent with the continental tradition of human rights. The difference, however, is that such rights are not universal, but limited to a particular political community. Thus, for example, the right to education would derive from individual liberty, but the right to free education, e.g., up to the age of 18 has its source in a particular community and may be considered liberal to the extent it applies equally to all citizens. In other words, I assume that the rights which are based on the assumptions of liberal ethics, and which are not contested in the discussion here, are either derived from individual liberty or are privileges conferred by a community equally on everyone. Difficulties appear, however, when we deal with privileges conferred on particular groups, or only on a portion of society. In the present discussion it will be argued that the possibility

[8] Sieczkowski (2013): 166.

[9] Henkin et al. (1999): 280.

[10] Glendon (2002): 226–228.

of entering into marriage is just such a privilege. Before I proceed to a detailed analysis, however, I will make one comment concerning group rights.

According to liberal ethics, fundamental group rights[11] are those which are derived from individual liberty (autonomy), and their limits are defined by the liberty (autonomy) of other people. In other words, the moral agent cannot be prohibited from anything that is related to his or her autonomy, e.g., his or her beliefs, eating habits, place of abode, or fellowship. These rights, and this should be clearly emphasized here, are vested in individuals irrespective of their membership in a political community, as they are independent of it by definition. In the context of this discussion, individual liberty, in particular sexual autonomy, is the basis of intimate relationships. It should be stressed that statute law does not have to say this explicitly. It would be a violation of this right to introduce, e.g., a prohibition of hetero- or homosexual relationships, as has been the case in the history of various nations.[12]

The first group of rights described above includes rights which do not depend on the political community; it is also a group of one's personal rights or the so called first generation human rights. The second group I will distinguish here in line with the ideals of liberal ethics includes rights derived from the community, but founded on the ideal of equality. In other words, they are rights vested in all members of that community in the same way. Strictly speaking, these rights are privileges, even though both in the European tradition and elsewhere they have often been treated as the fundamental rights of individuals. They include, for instance, access to elementary education, healthcare, or voting rights; providing that in the case of voting rights, there is the issue of qualifications or electoral restrictions, which may be disputable. These are rights derived from the community and not from the individual. The ability to vote in elections is the right, vested in the community, to decide not so much about what regulations will be binding on one's self, but about what regulations will be binding on others.

The third category of rights which is very important for the present discussion concerns the privileges conferred by the community upon only a portion of society. In other words, rights which are addressed directly to citizens, but which are bound with many conditions. This group includes the right to marry. Why do

[11] The distinction between three groups of rights is not meant as a strict classification, but aims at showing and distinguishing between the sources of obligations from the perspective of liberal ethics.

[12] The Prohibition of Mixed Marriages Act adopted in South Africa in 1949 prohibited both marriage and sexual intercourse between people of different races; until 1991, the World Health Organization considered homosexuality a disorder, and in many countries it was prohibited by law.

I consider marriage a privilege? Because, while the legalization of a particular relationship entails certain privileges conferred upon the union by the state, it also guards the commitments made by the marrying parties.

The standpoint I have presented here would be contradicted by Jennifer Morse. She has argued that "marriage is an organic, pre-political institution" based in nature, which the state must respect. It is thus exempt from general libertarian principles such as free contract.[13] However, the recognition of marriage as a pre-political institution would be unjustified. If we consider marriage to be solely a particular form of interpersonal relationship, the political community, understood as the state, is unnecessary for marriage to be formed. If, however, there are certain commitments which arise upon the formation of marriage[14] and which exceed the relationships existing within marriage, then the state is an indispensable element for the institution to exist.

The argument put forward by Morse, referring to marriage as an organic and pre-political institution, is off the mark. The institution of marriage understood in legal terms is characterized by something entirely different. When an external entity, in this case the state, becomes the guarantor of the internal obligations arising within the "marital relationship," such a relationship significantly changes its status. The essence of marriage is not in the terminology used to talk about it, but in the specific nature of the relationship which entails its internal and external commitments. If marriage were a pre-political institution, then the "marital relationship" could be fully realized without being recognized by the political community. In the traditional approach, and in Polish legal terminology, such a relationship is most often referred to as cohabitation. It has a number of features in common with institutional marriage, but due to the personal reluctance of the participants towards the institution of marriage or to various obstacles (e.g., kinship), the relationship is not or cannot be recognized as marriage.

The uniqueness of marriage in the context of the discussion on the legalization of same-sex marriage has also been pointed out by Ronald Dworkin. He argues that marriage without an institutional form is impossible. The status of marriage represents a social asset of irreplaceable value for those who can take advantage of it. Such value would not be available if the institution of marriage

[13] Morse (2006): 75.

[14] External obligations refer first of all to the safeguards and guarantees afforded by the state (the political community) with respect to internal commitments. They are mainly concerned with mutual care, joint upbringing of children, and joint property. For external obligations to arise, it is necessary for a particular relationship to be recognized as a marriage by the political community.

did not exist.[15] This means that by providing a framework for the institution of marriage, the state decides who this irreplaceable good can be accessed by. To summarize, it should be made clear that the view of marriage has been created, and not discovered as something that already exists. Relationships between men and women are dictated by the need to procreate and ensure the continuation of the species and, in this sense, they are something natural. The institution of marriage, on the other hand, understood as a permanent and monogamous union between a man and a woman is not, and consequently may change. Irrespective of the recognized form of marriage, however, the political community (the state) is necessary for the institution of marriage to come into existence. The essence of the marital relationship entails making a public commitment towards the other person (or other persons), which results in the emergence of internal obligations. The political community (the state) confirms the existence of such obligations and undertakes to guard them, resulting in the emergence of external obligations entailed in the specific relationship of marriage. Such an understanding of the institution of marriage reveals that marriage is an asset whose source is the political community and cannot be achieved without it. Therefore, the form of marriage recognized within a particular political community depends on that community and not on any fundamental rights or values.

If the recognized form of marriage depends on the political community, we need to ask the following question: why should any particular form of interpersonal relationship be recognized as marriage while other forms are not? Why is the possibility to enter into marriage offered to a particular group of individuals (citizens) and not to any other? In the context of the discussion between Saja and Sieczkowski, we could ask why marriage in Poland has the form of a monogamous union between two people of the opposite sex, with the exception, for example, of closely related persons? We could also ask why the existing formula of marriage should not be extended. This last question is directly related to the problem raised by Saja. He argues that a change of the *status quo* which has existed for many centuries is possible, but that it would require the gathering of a multitude of essential empirical data, a serious discussion about the philosophy of family and marriage,[16] and the presentation of sufficiently good reasons by those who wished to perform such a profound deconstruction of the time-honored institution of marriage.[17] Nevertheless, taking into account the requirements of liberal ethics,

[15] Dworkin (2008): 86.

[16] Saja (2012): 112.

[17] Saja (2013): 208.

as well as another liberal postulate which talks about extending the borders of freedom,[18] the answer seems evident. If privileges can be extended, they should be. The very possibility of extending privileges or, more broadly, the possibility of accessing certain goods appears to be a sufficient reason justifying the modification (extension) of the existing form of marriage. The question remains, however, whether any change in the scope of marriage can result in a just, or fair, form of marriage.

Forms of Marriage

When considering the injustice of particular forms of marriage, it is necessary to ask what this injustice is concerned in. Does it refer to which relationships are recognized as marriage in a particular state or to the inaccessibility of privileges offered within the institution of marriage? Saja's position in this regard is clear.

> Neither will I enter into the dispute about the nature of marriage, or the discussion over whether it is essentially an opposite-sex relationship. I am not concerned with what types of couples should be called marriage, but solely with who should enjoy the rights inherent to marriage. Although in this article I am going to talk about marriage, I will use this term as it is understood in positive law: I will take marriage to mean the institution whose nature is determined by the set of rights and obligations provided for in the applicable legal regulations of the Republic of Poland.[19]

For Saja, the key issue related to the access to the institution of marriage is primarily the ability to enjoy additional rights. The issue of equal access to rights has also been taken up by Dworkin in his analyses. The problem is particularly relevant in countries which recognize various types of civil unions in addition to marriage, or which in the discussion about the form of marriage offer to make some rights available outside of the institution of marriage. In this context, the American philosopher and lawyer asks a question that is important for the discussion we are concerned with. If there is no difference between the material and legal consequences of marriage or a contrived civil union, then why should marriage be reserved for heterosexuals?[20] And if there are indeed no differences, then the discussion shifts from the issue of marital rights to the issue of access to the institution of marriage and is consequently concerned with the form of marriage recognized in

[18] Rawls (1971/1999): 130–139.

[19] Saja (2012): 93.

[20] Dworkin (2008): 87.

a particular country. While the institution of a civil union does not exist in Polish legislation, Dworkin's question touches upon the essence of the problem. In his deliberations, Saja focuses on the rights available to spouses, but does not analyze the problem of whether such rights can also be transferred outside marriage. It is a topic that would require a separate and broader discussion. This issue is discussed by Clare Chambers, who presents a solution in which the state recognition of marriage is abandoned, and each of the privileges related to marriage is available under a separate contract. In my own analyses, I will focus on the possibility, or right, to access the institution of marriage. I will be interested in whether the good reasons to which Saja refers in his arguments supporting monogamous, opposite sex marriage satisfy the requirements of fairness and universal liberal principles.

In the Polish legal system, marriage is a monogamous union between a man and a woman. According to Saja, the following reasons substantiate such legislation:

> The only convincing reason for the existence of the institution of marriage *in the form presently recognized in Poland* (including its privileges) are the procreative and educational functions of marriage. This is based on the assumption that a properly functioning institution of marriage is beneficial to all citizens, just like the institution of local government, the army, the police or the fire department. Otherwise, it would be unjust to other people, those who are single, and should be considerably restricted, if not abolished.[21]

In both articles, Saja's extended argumentation is founded on the difference between monogamous opposite-sex couples and monogamous same-sex couples. The main distinction is related to the procreative possibilities of the two types of couples and their parental obligations. As can be seen from the above passage, such a form of marriage is supposed, in his opinion, to be advantageous to society at large, as it is opposite-sex couples that carry the burden of raising new generations of citizens.[22] Consequently, all additional rights vested in monogamous opposite-sex couples are justified. Saja also believes that the criterion he has adopted is also just with respect to other types of relationships. Surprisingly, however, the author departs from his argumentation based on good reasons, including, among others, benefits to society, and shifts to arguments referring to justice. Apparently,

[21] Saja (2013): 202.

[22] Ibidem.

this confirms the stance that it is impossible to solve the dispute without referring to the category of justice.

It should also be pointed out that in Saja's argumentation the same reasons which he believes to support the cause of opposite-sex couples are no longer useful in the discussion of alternative forms of marriage, for example polygamy, or unions between close relatives. Consequently, this means that the reasons he puts forward do not so much argue for monogamous opposite-sex couples, or the specific form of a particular type of marriage, but rather against same-sex marriage. Analyzing Saja's argumentation from a broader perspective, one could claim that Polish legislation is unjust towards polyamorous groups involving opposite-sex members, as they satisfy all of the requirements demanded of monogamous same-sex couples. In fact, one could even argue that they would perform the educational function better, as such families have more possibilities for providing care to their members.

When talking about polyamorous unions, not only polygamous or polyandrous relationships, such unions are often seen as oppressive.[23] It is assumed they are largely the result of cultural factors, mostly in African and Muslim countries. In consequence, such charges are brought mainly against marital practices, in particular against abuse, rather than against such a form of marriage *per se*. What concerns us, however, are polyamorous relationships which could be considered as group marriage, and which are defended by Elizabeth Emens.[24] In such relationships, the spouses are all members of the marital union. Marriage is contracted by every member with all other members of the union, and not, for example, between a man and all of his wives. It is a view of marriage which goes beyond the view of traditional relationships not only in terms of the number of its members, but also of the understanding of interpersonal relationships as such.

One ardent advocate of monogamous marriage is Stephen Macedo. He believes that the feature most characteristic of marriage is precisely its monogamous nature. The defense of such a view of marriage, in his opinion, contributes to the protection of public values, in particular the welfare of the spouses and their children, as well as society at large. Macedo argues that:

> […] from the standpoint of justice, monogamous marriage helps imprint the DNA of equal liberty onto the very fiber of family and sexual intimacy.[25]

[23] Brooks (2009); March (2011); Bailey, Kaufman (2010): 133–142.

[24] Emens (2004).

[25] Macedo (2015): 211.

His view of monogamous marriage includes same-sex couples. He does not begin with any preliminary assumptions concerning the institution of marriage, but with the changing view of marriage in American society.[26] He claims that it is the outcome of broader culture, with its crystallizing changes apparently being recognized as good. Therefore, he does not hesitate to claim that, thanks to same-sex marriage, monogamous marriage is made stronger as a liberal and democratic social institution.[27]

Another perspective on the traditional form of marriage is presented by Sonu Bedi. He asks explicitly about incestuous unions, which he believes to be an example of a huge, widespread taboo and which should be reconsidered. He claims that the state does not recognize the right to same-sex marriage, because it holds one type of couples to be inherently morally superior to other types. This is the same reason for which incestuous relationships between adults and polyamorous unions are rejected. It results from the privileged position of one concept of good, in which marriage is seen as a union of two people, not related by blood, over another concept of good, in which marriage can be a relationship of three people or of people who are related to one another. He presents an interesting argument in that, according to Bedi, the state should not adopt any standpoint on people's most personal decisions which constitute what we call a good life.[28] What could this mean as a result? The state should abandon the institution of marriage, as its present forms unfairly favor some conceptions of the good life over others.

One of the more interesting proposals from the perspective of liberal ethics and the category of fairness has been presented by Elizabeth Brake. She wants to redefine and extend the state's interest in marital relationships. This should be accomplished by using marriage as an institution designed to recognize and support the basic needs of every person – the need for care and protection. Brake claims that caring relationships are essential for human well-being.[29] Such relationships are a fundamental good, and therefore the political community should protect all of the social foundations on which they are based. Brake's standpoint goes beyond a narrow understanding of marriage. Her view of minimizing marriage encompasses all independent and caring relationships between adults, irrespective of the number or gender of their members. How does her proposal differ from the con-

[26] Macedo (2015): 19–20.

[27] Ibidem: 16.

[28] Bedi (2013): 210.

[29] Brake (2012): 178–179.

cept of polyamorous marriage? First of all, in that it does not require sexually intimate relationships. Consequently, access to the institution of marriage would be given to all couples and groups which take care of their members. This could apply to a group of friends, mutual care groups of neighbors, or caretakers and caregivers.[30]

Analyzing the above proposals concerning the extended definitions of marriage, we must brace ourselves for potential liberal criticism. I will focus on two objections that may be anticipated. The first one is related to the oppressive nature of polygamous marriage. Referring to this objection, we must first consider what it refers to. Does it refer to the legal and theoretical construct of polygamy? If we cannot consider the spouses to be equal in legal terms, then such a form of marriage should be deemed oppressive. This is one reason against extending the definition of marriage so that it includes polygamous unions. Or does it refer to oppression rooted in the historical submission of women to men, and cannot be removed despite the legal equality of husbands and wives?[31] If so, the problem is not a theoretical or legal one concerning the scope of marriage, but a sociological and psychological one concerning social changes and attitudes. In this case, there are no reasons why a polygamous view of marriage should be rejected from the perspective of liberal ethics. It should also be added that polygamous unions may be considered as group marriages. By means of this solution, not only can a man have two wives, but each of the wives can have a husband and a wife as well. Upholding the principle of equality in law, in such a union we avoid both legal and theoretical oppression. The other objection may refer to the restriction on extending the definition of marriage to closely related persons in view of the possible genetic diseases in future offspring. From the perspective of liberal ethics, this objection has two major shortcomings – a theoretical and a practical one. From the theoretical point of view, such restriction is unfair to people who, while remaining in close family relationships, are not related by blood. This applies primarily to persons who have been adopted into a family as well as to more distant relations incurred by marriage. This restriction is also unfair with respect to homosexual persons. In both cases, the objection referring to the need to prevent serious genetic diseases is groundless. From the practical standpoint, the possibility of genetic diseases is related to their probability. The likelihood of a genetic disease cannot be a reason preventing marriage. Besides, many advocates of liberal ethics largely

[30] Brake (2012): 156.

[31] Toerien, Williams (2003); Jeffreys (2004); Card (1996).

support solutions which eliminate the possibility of giving birth to children with serious genetic defects.

From the perspective of liberal ethics, the extension of access to the institution of marriage appears to correspond to the postulate of equal treatment and equal access to rights. What concerns us is whether the reasons put forward in favor of extending the form of marriage may be considered universal. In other words, one must answer the question whether the reasons weighing in favor of any particular form of marriage satisfy the criterion of fairness and may be considered both universal and just.

There is yet another solution, more radical perhaps, but one that can satisfy the requirements of justice as fairness. Analyzing the feminist arguments concerning the oppressive nature of the institution of marriage, Clare Chambers proposes that state-recognized marriage should be done away with.[32] The solution she suggests aims at removing what she refers to as "symbolic" marriage, which consists in making a statement about a particular relationship, to the private sphere, e.g. to religious or secular ceremonies, which do not have any legal status. The "practical" benefits in the form of privileges should not be offered in a bundle, as they are now, but rather each of them separately. This way, "marital privileges" would be available to anyone who wishes to enter into a particular contract, e.g. concerning succession, access to personal (health) information, or joint property. The solution proposed by Chambers has some significant advantages. First of all, it upholds access to privileges traditionally related to the institution of marriage. Secondly, by removing state-recognized marriage, it solves the problem of its institutional definition. Consequently, the question about a fair form of marriage is no longer valid. Therefore, we should try to determine whether any form of marriage at all can satisfy the requirements we have defined and those put forward by liberal ethics.

Universal Rationality and Fairness

In his arguments, Sieczkowski referred to three values: dignity, equality, and freedom. The reference to universal values makes it appear as though the reasons behind such argumentation are universal as well. He points out that:

> […] freedoms (or liberties) are treated as a central value in a democratic political community, and the marital privileges of same-sex couples do not deprive anyone of their good or hinder its achievement; people should enjoy the possibility of en-

[32] Chambers (2013, 2016).

> tering into legal unions, recognized by the state, irrespective of their own sexual preferences.[33]

From the liberal perspective, this argument is reasonable, but it is based on two assumptions. First, marriage is a primary good and everyone should have the broadest possible access to it. Second, he considers the extension of the existing form of marriage to be just. Similar arguments may be encountered in the proposals of various other forms of marriage. The right answer has been provided by Saja, however, in his criticism of references made to such values as dignity, equality, or freedom in defining the valid form of marriage.

> None of the above values, just like none of the other fundamental autonomous values, can justify any specific rights granted to specific groups. The mistake consists in misunderstanding their role in the structure of ethics. These values cannot substantiate privileges granted to a particular exceptional group, but are the foundation of universal ethical liberties expressed in the language of deontic rules. These moral prohibitions, founded on the idea of human dignity, equality and liberty, protect all individuals against harm done by others (also for the sake of immediate benefits), but cannot justify their specific privileges. This is due to a simple cause: the specific rights of particular groups must be based on specific features characteristic of such groups (e.g. holding a license certifying required predispositions, expertise and skills), while the values Sieczkowski refers to are *public*.[34]

Saja's stance reveals an important problem in the discussion concerning the just forms of marriage which has apparently been overlooked by liberal debaters. He points out that marriage is a specific relationship and not only an institution provided by the legal system. This means it differs significantly from other relationships, for example, those based on friendship or shared interests and this is why Saja's viewpoint could be upheld, if it were not for the fact that many advocates of liberal ethics would refer to equality in order to extend the traditional formula of marriage. Saja's argumentation is relevant as long as we stick to the "narrow" formulas of marriage. My claim, however, is that the main problem is elsewhere. It does not concern the scope of any particular formula of marriage itself. Some liberal thinkers seem to believe that the extension of the marriage formula will serve the cause of justice and equality. This may result from the belief

[33] Sieczkowski (2013): 174.

[34] Saja (2013): 206–207.

that the more couples (groups) have access to the institution of marriage, the more the ideal of freedom, and thus of justice, will be realized. Such a way of thinking is but a rhetorical stratagem, however. What makes any form of marriage distinctive is not its scope or accessibility, but the specific nature of the relationship involved, as Saja has rightly pointed out. Extending the formula of marriage would be an injustice to those who hold a "narrower" view of marriage. The "broader" marriage formula becomes oppressive towards those who recognize the "narrower" formula, as it forces them to recognize other forms of relationships as marriage. In other words, on the one hand, broader access to the institution of marriage seems to serve the ideal of equality, as more couples will be able to realize their view of a good life. On the other hand, broader access to marriage violates the freedom of those who hold a "narrower" view of marriage. This results from the fact that the marriage formula, as I have argued above, depends on the state and is the effect of recognition (the will of the political community), rather than on any fundamental rights. Naturally, this situation is analogous to that in which the recognized view of marriage is the "narrower" one, the difference being that representatives of the "broader" view do not have access to marriage as an institution which recognizes their relationship to be marital.

As Chambers has been right to point out, a statement made by a couple creates the relationship both between themselves and with respect to the society. This "symbolic" aspect of marriage is as essential as the "practical" aspect which is concerned with specific privileges.[35] Therefore, marriage is not an institution based solely on a contract but it is preceded by actual, pre-legal relationships. The mistake Chambers makes consists, however, in the fact that she fails to distinguish between the recognition of a particular relationship, understood as marriage, by the parties to that relationship (spouses), and the recognition of their relationship by the society. This social recognition of a particular relationship as marriage is a significant issue, otherwise there would be no debate around the legalization of same-sex marriage; instead, we would be discussing the proposals made by Chambers, focused on extending access to "practical" privileges.

Institutional marriage is not a simple contract. It is preceded by actual relationships, in which the age, sex, affinity and the number of members are all relevant. The parties to business contracts are referred to in impersonal terms, while the institution of marriage is burdened with the complex dimension of interpersonal relationships. If this were not the case, sisters or cousins could enter into marriage. Thus, when we discuss the problem of group rights, including mar-

[35] Chambers (2013): 127–128.

riage, another question could be asked. Is it fair to say that "only persons who hold a pilot license can be pilots"? It is just as fair as saying that "only married persons can be referred to as spouses." What is necessary to obtain a pilot license, however? One needs to have certain skills which the society recognizes to be sufficient for a particular license to be granted. The fact one does have such skills does not mean he or she holds a pilot license – not until their skills are recognized by the state. The same applies to marriage. In addition, the problem of marital rights understood as group rights consists in the fact it is not "I" who is granted a particular privilege or is recognized as a spouse, but that it is "us." This distinguishes the right to marry from other rights granted to people in view of their having a particular feature or skill. In order to obtain a license, I must satisfy all requirements related to the holding of such a license myself. In marriage, not only does each person need to satisfy certain requirements themselves, but the relationship between them must satisfy certain conditions which the society considers sufficient as well. If the recognition of a particular state of affairs were not required or desired by the society (state), no licenses or the institution of marriage would be necessary. In the context of this discussion, what we are trying to determine is whether the recognition of a particular form of marriage by the society can satisfy the requirements of fairness.

Discussions around the formula of marriage are not, in fact, concerned with its scope, but rather with the specific nature of the marital relationship. Consequently, arguments pointing out that certain couples (groups) will not have access to the institution of marriage are not, in fact, arguments referring to equal access. Rather, they are postulates that a different definition of the marital relationship, competitive with the one currently recognized, should be preferred in a particular political community. Behind each such postulate there are certain anthropological and social assumptions.

Saja's arguments against references to universal values are a two-edged sword, in fact. For if we cannot capture the specific nature of the marital relationship using universal values, as they do not substantiate any specific relations, then the same charge may be brought against universal reasons. Universal reasons cannot be used to justify specific relationships. Saja postulated that in the discussion at hand, maximally universal reasons should be referred to[36] but they do not, however, mean universal reasons, only good reasons. As a result of argumentation based on good reasons, we will also be dealing with certain preferences or anthro-

[36] Saja (2012): 92–93.

pological assumptions accepted in a particular society and supporting the definition of marriage in the political community. Saja admits it himself when he writes:

> This does not mean that today's legislation cannot change. If it turned out that alternative family regulations (e.g. minimizing marriage + parental rights) were more socially beneficial, or delivered values important to a majority of the society *without otherwise causing injustice*, this would be a valid reason for changing them.[37]

Saja provides a certain solution to the problem presented above. He suggests that we should pay attention to the "values important to a majority of the society". In this manner, however, he departs from his earlier arguments and refers to universal values, or at least to values prevailing in a particular society. And second, a view of marriage referring to values prevailing in a particular political community must presume a certain anthropological viewpoint. In addition, the reference to "important values" does not provide us with any new, important reason, but rather endows the existing reasons with new weight. Saja's line of argumentation approximates the reasoning presented by Macedo here. It is a change that occurs within society that determines which relationships are recognized as marriage. In other words, the assignment of new weight to particular reasons or values within a certain political community determines whether or not a relationship is recognized as marriage. We should also remember that some contrary good reasons may exist, but be assigned different weight within that political community. The rationality or "universality" of reasons alone does not play a major role in such cases, unlike the weight assigned to particular reasons in a particular society.

I would also like to point out the fallacy of arguments claiming that extended access to the institution of marriage is more just. The adoption of such a line of argumentation leads to injustice towards those who have a "narrower" view of marriage. The introduction of a "broader" formula forces the opponents of such a view to recognize certain forms of relationships which they have been decisively against so far as marriage. A good example of such legislative stratagems is to be found in the laws of the European Union. Its practice of extending privileges is particularly well illustrated by regulations under which carrots are considered fruit, and snails – inland fish. An extension of the definition of fruit or fish makes it possible for economic privileges to be extended to particular producers. There is evident injustice, however, in that a chosen vegetable is recognized as a fruit in order to extend the said privileges. In order for such injustice to disappear,

[37] Saja (2013): 202.

a non-legislative change in the classification of fruit and vegetables would have to take place. An analogous situation occurs in the case of the forms of marriage recognized in a particular state. xtension of the existing form of marriage, most often the opposite-sex monogamous relationship, may be unfair to those who do not recognize such a type of interpersonal relationship as a form of marriage. Naturally, a shift in social attitudes is much easier than a change in botanical classification. Therefore, in the problem I have endeavored to explore, it is social change that will determine the particular forms of marriage in particular states. Probably the best example illustrating such social change is the referendum held in Ireland in 2015. In a country in which homosexual relations had been illegal until 1993, same-sex relationships came to be recognized by the society as marriage, and the decision of citizens expressed in the referendum was reflected in the Constitution. And yet, in spite of the fact that social justice has been achieved through a referendum, the liberal postulate of justice as fairness is not satisfied. The endorsed form of marriage still remains a form of marriage which is preferred within the framework of a particular political community or a particular culture.

Summary

One should agree with Sonu Bedi who says that modern states demonstrate a deeply rooted identity approach. Such an approach prefers "group" solutions based on a consensus which prevent genuinely equal treatment by law and the achievement of fairness. Therefore, only rejection of identity by the state enables fair treatment. As regards the form of marriage, he comes to the provocative but logical conclusion that the institution of marriage should be entirely removed from the legal system.[38] He is not alone in holding such views and a similar standpoint has been adopted by Clare Chambers. However, this is impracticable, since people, unlike hypothetical ones such as those behind Rawls's veil of ignorance, have identities and build them in relation to others: those with whom they live and on whom they depend.[39] Therefore, as citizens of a particular state, through their individual identity and mutual co-dependence, they create what we could call society's moral identity. Within the framework of this changeable, and sometimes ambivalent normative identity, an acceptable view of justice emerges. It is based, among others, on accepted (dominating) values and anthropological views prevailing in a given society. Therefore, in my analyses performed from the liberal perspective, I agree with Stephen Macedo who says:

[38] Bedi (2013): 208–246.

[39] Held (2006): 146–157.

> Obviously, marriage is not perfectly neutral with respect to the variety of preferences that people have concerning the shape of their lives and our common social world.[40]

Consequently, we must accept Bedi's argument that equality in law is only possible without identity, and the institution of marriage should be abandoned. Those who refer to liberal and universal principles, on the other hand, must admit that their ethical standpoint on particular forms of marriage is preceded by certain anthropological and social assumptions. As a result, such an ethical perspective does not satisfy the criterion of fairness, and in accordance with the viewpoint adopted in these analyses must be considered unjust and not founded on universal reasons. In other words, no form of marriage, whether or not its scope may be considered "narrow" or "broad", satisfies the criterion of justice as fairness.

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