

# **Contemporary Application of The Sociological Jurisprudence: A Critical Analysis of Auguste Comte's Scientific Method in Legalizing the Same Sex Marrings in Sri Lanka**

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## **Introduction**

Jurisprudence is a science concerning the study of the systemic arrangement of the general principles of the law, it is combined with the rules governed actions with the activities of officials.<sup>5</sup> Among many other schools of law Sociological Jurisprudence is very important for their scientific and philosophical investigations of the social phenomena of law and justice, which maintains that law required to be based on the social connections. Moreover Sociological Jurisprudence finds its power in discovering certain universal standards in social connections and law. Accordingly, the view of Sociological Jurisprudence can be summarized by the maxim *lex iniusta non est lex*, which means an unjust law is not a true law.

The term “Sociological jurisprudence” was coined by its forefathers, Emile Durkheim, Max weber, Eugen Ehrlich, Karl Max and Roscoe Pound. Among them Auguste Comte (1798-1857) was one of the most prominent sociologists who introduced the formal methodology for solving the social issues. Therefore to identify new social needs Comte introduced the new methodology of sociology in four steps which is same as the natural sciences. The scientific method introduced by Comte is consisted of four phases. i.e observation, experimentation, comparison, historical method.<sup>6</sup> Even though it was more difficult to apply the scientific method to sociology, it was still in his view, the most fruitful.<sup>7</sup>

Every human being has born with some desires and expectations which are inherent in nature. Homosexuality is such inherent biological setting between two people of same sex. Same sex marriage is an ancient concept which was taken a novel recognition in most countries during last two decades and its recognition has been subjected to vigorous scholarly debates across the world particularly in Sri Lanka. The rights of the individuals are basically protected by the Constitution of Sri Lanka, 1978 and right to equality is such fundamental right guaranteed by the Chapter III by virtue of Article 12. Also there are various international conventions, standards and action plans carrying out by the various international bodies in order to protect human rights and prohibit discrimination on

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<sup>5</sup> Freeman, M.D.A, (2001). Lloyd's introduction to Jurisprudence, London: Sweet and Maxwell, p.12

<sup>6</sup> Ibid, p.511

<sup>7</sup> Dias, R.W.M.(1994), Jurisprudence, New Delhi: Aditya Books Private Limited.

grounds such as race, colour, language, religion and sex. But in the era of right based approach the right to equality and its limitations such as same sex marriages are still prevailing in most societies such as Sri Lanka.

Therefore, this paper discusses the problem of protecting the rights of homosexual people by exploring the social scientific method introduced by Auguste Comte. Accordingly, this study investigates the inadequacy of the current legal framework in Sri Lanka for the protection of right to equality as a fundamental right of the mankind. It also makes suggestions to enhance the domestic legal regime to protect and promote the rights of the homosexual people by legalizing the same sex marriages in the light of other selected jurisdictions in relation to the same sex marriages.

### **Methodology**

This research mainly follows qualitative research method based on a literature review and carried out by the reference of primary and secondary sources in relation to legal status of same sex marriages. Also, the research was enhanced with the quantitative research method by data collected through the structured interviews of relevant stakeholders to identify the social status of the homosexual persons. Furthermore, the comparative analysis of successful legal position in selected jurisdictions have been followed in reaching the conclusion.

### **Results and Discussion**

By observation, Comte means that direct observation of human behavior, guided by a preliminary theory of what you expect to observe. Man as a social animal he needs a society for his living, working and enjoying the life. Society has become an essential condition for human life. There is an inherent link between society and human life. Marriage is one of the social needs of mankind which is a union of man and woman who make a permanent and exclusive commitment to each other of the type that is naturally fulfilled by bearing and rearing children together. This traditional concept of marriage has been changed over the centuries and the law has been changed significantly regarding sexual orientation and gender identity. Many countries provide statutory protections for the rights of homosexual people. Under this step it was identified that the inadequacy of such legal recognition for homosexual people in Sri Lanka is one of the emerged reforms regarding the sexual orientation and gender identity.

In the second step, Comte recognized that artificial experimentation is not possible with the society and the social phenomena. However natural experimentation frequently takes place whenever the regular course of the phenomenon is interfered with in any determinate manner. Under the experimentation this research investigates whether the same sex marriages are an essential element of the existing society in Sri Lanka.

When analyzing the data gathered from Police stations, Human rights Commission of Sri Lanka and newspapers it is clear that throughout the last decade Sri Lanka has been experiencing high rate of increasing incidents regarding the violation of the rights of homosexual persons. i.e. arbitrary arrest, detention, social stigma and discrimination. Accordingly, it is clear that the rights of the homosexual persons are always violated and it has been a controversial issue in Sri Lankan context.

Third step is comparison. It investigates the existing law regarding the homosexual activities in Sri Lanka. Like many colonial counties, Sri Lanka inherited colonial laws passed during British rule which criminalized the homosexual activities. Section 365 of Penal Code makes it a criminal offence to engage in carnal intercourse against the order of the nature. The penalty for violation of section 365 is up to ten years imprisonment and a fine. Section 365 (a) of the penal code criminalizes “any act of gross indecency with another person”. Violation of this section is punishable by up to two years in prison, a fine or both. In addition to this, Vagrants Ordinance of Sri Lanka<sup>8</sup> is used to target the homosexual people.

These laws, which target and harass homosexual persons and violate their rights. Also Social Stigma, discrimination, harassment, violence and unequal treatment towards the homosexual persons can be seen everywhere in Sri Lanka. Being a signatory to International Convention on Civil and Political Rights, 1966 (ICCPR)<sup>9</sup> Sri Lanka has incorporated some provisions of ICCPR convention into domestic law through the International convention of civil and political rights Act No 56 of 2007. The constitution of Sri Lanka guarantees certain fundamental rights which were recognized within the ICCPR, such as right to equality, non-discrimination, freedom from torture, arbitrary arrest, detention and punishment, freedom from assembly and association. Article 2(1) of ICCPR guarantee the right to equality and prohibit discrimination on grounds such as race, colour, sex. Article 17 recognizes the rights of all people to be protected arbitrary or unlawful interference with their privacy. Also Article 9 guarantees the right to liberty and security of persons and prohibit arbitrary arrest and detention or any form of physical abuse or violence towards those in police custody. Article 7 prescribes the torture and any other cruel, inhuman and or degrading treatment or punishment. Notwithstanding the Sri Lanka’s obligation as a state party to the convention, rights of the homosexual persons are more often subjected to arbitrary arrest and detention and to abuse and violence at the hands of police. Most importantly, Article 23(3) of the ICCPR states that “No marriage shall be entered into without the free and full consent of the intending spouses”. As police records reveal a number of lesbians have been forced into heterosexual marriages in Sri Lanka.

The right to marriage of same sex individuals has been recognized in a number of international and regional human rights documents, most notably apart from Article 16 of Universal Declaration of Human Rights, 1948 (UDHR)<sup>10</sup>. Article 2 states:

“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other states”

Under the fourth step; historical method, Comte originally classified historical analysis as a variation of the comparative method, comparing present with the past. Historical method

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<sup>8</sup> Online available at: <https://www.lawnet.gov.lk/1947/12/31/vagrants-4/>

<sup>9</sup> Online available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

<sup>10</sup> Online available at: <http://www.un.org/en/universal-declaration-human-rights/index.html>

compares societies throughout the time in which they have evolved. Examining changes in society over time, is what constitutes the historical method.

The Netherland was the first state to legalize same sex marriage in 2001 and further followed by Belgium, Spain, Canada, South Africa, Norway, Sweden, Argentina, Denmark, USA, Brazil, France, New Zealand and England and wales in United Kingdom. Instead of enacting a specific legislation for legalizing the same sex marriages, in 2001the Netherlands amended the rules of marriage in their civil Code, stating that marriage could be contracted by two persons of different sex or same sex<sup>11</sup>and provides legal provisions to adopt children too.<sup>12</sup>

In South African perspective, as per Article 9(3) of the Constitution prohibited discrimination basing on sexual orientation. The marriage Act No25 of 1961 of South Africa defined marriage as a union between man and a woman, but in 2005 the Constitutional court gave a landmark judgment in Minister of Home Affairs and another V Fourie and Another by amending the Marriage Act to include same sex marriages.<sup>13</sup> While considering the human rights, values, human dignity, equality and freedom. South African Parliament enacted the Civil Union Act 17 of 2006.<sup>14</sup> Article 1 of the Act states that:

“Unless the context otherwise indicates, “Civil Union” means the voluntary union of two persons who are both eighteen years of age or older, which is solemnized and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others.”

With regard to parenting, the rules on parental responsibilities are established in South African Children’s Act 38 of 2005.<sup>15</sup>According to legislation, it is possible for the spouse of the biological parent to enter into an agreement by which he or she assumes parental responsibilities of the child. The rules apply to same sex and opposite sex marriages in same way.

Accordingly, it is clear that throughout the last decades sates recognized the current social issues and took necessary actions in order to address such social issues in legal backdrop.

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<sup>11</sup> Dutch Civil Code,Book I ,1992, Art 1:30, ‘A marriage can be contracted by two persons of different sex or of the same sex.’. Online available at: <http://www.dutchcivillaw.com/civilcodebook01.htm>

<sup>12</sup>Act of 21 December 2000 amending of Book 1 of the Civil Code (adoption by persons of the same sex).Article 1:227 shall be amended as follows:

“Adoption is effected by a decision of the district court at the joint request of two persons or at the request of one person alone. Two persons cannot make a joint adoption request if according to article 41 they are not allowed to marry each other.”

<sup>13</sup>2006(3) BCLR 355 (CC)(S.Afr.) , Online available at:<http://www.saflii.org/za/cases/ZACC/2005/19media.pdf>

<sup>14</sup>Online available at: [http://www.saflii.org/za/legis/num\\_act/cua2006139.pdf](http://www.saflii.org/za/legis/num_act/cua2006139.pdf)

<sup>15</sup> Online available at: <http://www.justice.gov.za/legislation/acts/2005-038%20childrensact.pdf>

## **Conclusion**

Finally, under the conclusion, it can be identified that the homosexual persons are also humans who have biological needs. Therefore it is a responsibility of legal authorities to make suitable platform to ensure their ability of enjoy same legal protection and benefits as those granted to heterosexual couples. This includes to have relationship recognized under the law, protection against violence, discrimination and social stigma and other social and economic benefits. Amending or replacing the Section 365 and 365 (a) of the Penal Code of Sri Lanka and enacting national legislation and policies by recognizing their rights and provide protection against the discrimination on the grounds of sexual orientation and sexual identity are some recommendations for Sri Lanka. Furthermore, obtaining knowledge by studying the lessons learnt by European and African countries that have legalized same sex marriages from the course of actions taken by them during the interim periods can be used under the scientific method introduced by Auguste Comte in Sociological Jurisprudence.

**Keywords:** Auguste Comte; Legalizing; Same Sex Marriages; Sociological Jurisprudence; Sri Lanka.

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