

Genders, sexualities and equal marriage rights

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IN WALES, 66-YEAR-OLD DIAN PARRY, formerly a man, is ready to become legally recognised as a woman. But under British law that would mean annulling her 45-year marriage to a woman, Anita, and entering a civil partnership instead. Because the government refuses to recognise same-sex marriage, if Dian is legally a woman, then she cannot be married to one. Dian is being forced to choose between her gender identity and her marriage.¹ A Scots couple, who have chosen not to be named in court, are in a similar position. One of them, a 31-year-old finance manager from Edinburgh, underwent sex reassignment surgery in 2003 and can be recognised legally as a woman only by divorcing her wife, a 28-year-old computer systems manager. They say ' We feel trapped ... This legislation breaches our human rights because it is plain interference by the state in our private lives. ... A civil partnership is just not the same as marriage'.² A spokesman for the Department of Constitutional Affairs affirmed that the government remains opposed to any marriage between people legally defined as being of the same gender: 'At the moment this country doesn't recognise same-sex marriages and there is no plan to change that.' Both these couples are claiming that the requirement that they annul their marriage and form civil partnerships instead violates the European Convention on Human Rights' guarantees of respect for privacy and family life, the right to marry, and the prohibition of discrimination.

Our own case rests on these same arguments. We are a British couple, both legally female from birth, and we married each other in British Columbia, Canada, in 2003, when marriage was opened up for everyone, irrespective of gender. Our relationship had no legal recognition at all in Britain for the first two years of our marriage. When the Civil Partnership Act came into force in December 2005, our legal marriage was automatically altered by the state to a civil partnership in our home country. Any couple who married in Canada and who were legally defined as one man and one woman would have their marriage automatically recognised as a marriage in England. We believe that treating couples differently on the basis of their gender is deeply discriminatory (see Kitzinger & Wilkinson 2004a, 2004b; Wilkinson & Kitzinger, 2005, 2006).

Whatever you think about marriage, and whether or not you want it for yourself, equal access to marriage irrespective of the gender of the partners is a fundamental issue of equality. As long as marriage is open only to male/female couples, and civil partnerships only to same-sex couples, the British government is maintaining a symbolic separation of straights and gays. It is also constructing and reinforcing an essentialist notion of gender. Governments intent upon restricting marriage to one man and one woman are involved in the monitoring and surveillance of gender. If you want a civil partnership you must be legally the same sex as your partner; if you want a marriage you must be legally a

¹ Dian Parry's story is reported in *The Sunday Times* at <http://www.timesonline.co.uk/article/0,,2090-1849743,,00.html>. More information about this couple's fight can be accessed from the Transgender Care website at www.transgendercare.com.

² This case was reported in *The Times* at <http://www.timesonline.co.uk/article/0,,2090-1849743,,00.html>

'man' and a 'woman'. There is no space here for the recognition of more than two genders, or for acknowledging the possible irrelevance of gender to caring and committed relationships between people. It presumes that each of us can clearly be labelled as either 'male' or 'female' and that the gender of the partners is a crucial defining factor of a relationship. This focus on gender as the determining feature of whether a relationship is a 'marriage' or a 'civil partnership' discriminates against and ignores the realities, complexities and diversities of genders and sexualities as we understand them today. For example:

- People who want to sustain their legally-formed marriages across a gender transition (Dian Parry and her wife, and the Scots couple) are discriminated against. If the couple wish to remain married then the transitioned partner cannot achieve legal recognition in their new gender.
- Transgendered people who achieve legal recognition in their chosen gender may thereby lose the right to marry a partner of their choice (e.g. Roan Bremner, was born legally male and, therefore, able to marry a female which is what Roan would choose. However, Roan is about to be legally recognised as female, thereby losing that right).³
- Same-sex couples who have married in countries where they are legally able to do so find that their marriage is not recognised as a marriage back home (our own case at time of

writing⁴). In order to preserve the UK definition of marriage as one man-one woman, the Civil Partnership Act says that same-sex couples who legally marry in countries where it is possible for them to do so 'are to be treated as having formed a civil partnership' (CPA, para 215).

• Intersex people who want to claim their intersex identity rather than conform to a legal fiction that they are clearly either 'male' or 'female' are potentially excluded from the right to marry altogether. As a person signing off as 'Jane Doe' says: 'We can all debate whether marriage for gays and lesbians should or should not happen, but those of us in the intersex community dread someone defining marriage. I have Androgen Insensitivity Syndrome (AIS) and never knew until I was 35. Though I look female I have XY chromosomes and was born with testes. It would be incorrect to describe me as biologically male or female. I am biologically intersexed. As an intersexer person, who do my politicians think I am supposed to marry? How can they define for me marriage as one man-one woman.'⁶

Transgender and intersex activists are solidly behind removing the requirement for gender-difference in marriage (see the websites of Press for Change, the National Transgender Advocacy Coalition, the Intersex Peer Support Group, the Intersex Initiative, and the Intersex Society of North America⁶). In the US, these groups are

³ Roan Bremner's home page is: www.multidimensional.me.uk/

⁴ Articles and other information about our own legal case are available from our websites (the URLs are in our biographical notes at the end of this article). At the time of writing (April, 2006), we are awaiting a High Court hearing in June 2006 which we hope will result in a declaration of the validity of our marriage in the UK.

⁵ Jane Doe's letter to the editor of *Time* magazine pointing out the flaws of a one man-one woman definition of marriage ('Intersex individual speaks out on the marriage issue') is available on the Transgender Crossroads website, www.tgcrossroads.org/news/?aid=817

⁶ Website addresses as follows: Press for Change, www.pfc.org.uk/; the National Transgender Advocacy Coalition, www.ntac.org/; the Intersex Peer Support Group, www.bodieslikeours.org/; the Intersex Initiative, www.intersexinitiative.org/; and the Intersex Society of North America, www.isna.org/. The Intersex Society of North America website includes Alice Dreger's article, 'Same-sex¹ marriage? What intersex does to the gay marriage debate' which can be downloaded at www.isna.org/news?from=20. There is also a useful article entitled 'Intersexuality and the marriage equality debate' available from Temenos: Out People of Color www.temenos.net/articles/09-14-04.shtml.

anxious that attempts to restrict marriage to one man and one woman will result in restrictive legal definitions of 'man' and 'woman' drawn from a recent case in the Texas Appellate Court, Littleton v Prange (1999). After her husband's death, Christie Lee Littleton⁷ brought a medical malpractice suit against her husband's doctor. The defence attorney argued that the marriage between Littleton and her late husband Jonathan was invalid because Littleton was a trans woman. Because she was chromosomally male (i.e. had XY chromosomes) she could not legally marry another male, and hence did not have the legal standing to sue as a widow nor the status of a proper wrongful death beneficiary. The court agreed, ruling Littleton's seven-year marriage invalid. Chief Justice Phil Hardberger relied on the fact that 'Texas statutes do not allow same-sex marriages' and that 'male chromosomes do not change with either hormonal treatment or sex reassignment surgery' in handing down his judgement that '... Christie Littleton is a male. As a male, Christie cannot be married to another male. Her marriage to Jonathon was invalid, and she cannot bring a cause of action as his surviving spouse'.⁸ Trans and intersex groups in the US are fearful that this sets a precedent for applying a chromosomal definition of gender to marriage.⁹ If so, a self-identified heterosexual woman with Androgen Insensitivity (AIS, see above) would be prohibited from marrying

her male (XY) partner since this would result in a marriage between two chromosomally XY people.¹⁰ (And who knows what the legislature would decide for people with XXY or other variations of mosaicism.) Definitions of gender incorporated into definitions of marriage and civil partnership obscure transgendered and intersex lives.

These binary sex/gender definitions also impose a dichotomous version of sexual identity on the continuum of actual lives and experiences, since male/female couples (however 'male' and 'female' are defined) are presumed to be 'heterosexual', and same-gender couples are presumed 'lesbian' or 'gay'. The invisibility of bisexuals in discussions about marriage and civil partnership is a feature of this binary thinking about gender and sexuality. One of the first same-sex couples to marry in Massachusetts in May 2004, Robyn Ochs and Peg Preble, were widely described in the media as a 'lesbian' couple. In fact Robyn Ochs is a bisexual activist, a co-founder of the Bisexuality Resource Centre¹¹. Another bisexual activist, Toby Adams, whose bisexuality was also erased in media reports of her marriage to a woman, is fighting for marriage equality in California. She says:

Same-sex marriage is more than a lesbian or gay issue. The marriage issue is a big deal for bisexuals who haven't found their life partner yet. On a first date, with everything else going through your mind, who wants to be thinking 'So if this is The One, I get to look forward to either (a) a life of wedded bliss, or

⁷ For Christie Lee Littleton's story, see her website, www.christielee.net

⁸ This is quoted from the Judgment of the Texas Appeals Court, Case No. 04-99-00010-CV, which you can download from the Press for Change website. Note that Christie Lee Littleton's own website comments that the US Supreme Court misspelled Jonathan's first name as 'Jonathon' (as in the extract quoted here).

⁹ A subsequent case in the Supreme Court of the State of Kansas concurred with the Littleton decision. Texas and invalidated the marriage of J'Noel Gardiner, a trans woman, and her late husband, Marsh Gardiner. After his death in 1999, Marshall's son, Joe, challenged the validity of his father's marriage to J'Noel on learning that she was a trans woman, and thus her share of his father's estate. He won, since the court decided that trans women are 'biologically male' (reported on the Intersex Initiative website).

¹⁰ Of course, the flip side of this is that intersex people with XY chromosomes and who identify as women, could legally marry other women. In fact, since the Littleton v Prange judgement that defined gender as chromosomal, there have been several transsexual cases in Texas in which marriage licenses have been legally issued to female couples, since in each case one of them was a trans woman with XY chromosome. See the report on Robin and Jessica Wicks, and Lori Killough and Cynthia Young at www.gaypeopleschronicle.com/stories/00sep29.htm.

¹¹ See Ochs, Robyn www.robynocho.com/resources/Marriage.html

(b) a life of second-class citizenship, depending on what sex that date happens to be.¹²

The right to marry (or to form a civil partnership) irrespective of gender would mean that categories like 'male' and 'female', and 'lesbian'/ 'gay'/ 'bisexual' etcetera do not have to be continually reproduced. What's needed is not 'same-sex marriage' or 'gay marriage' - just equal access to marriage (and to civil partnership) for everyone regardless of gender and sexuality.

In Canada, Belgium, the Netherlands and Spain marriage is legally available to any two people of marriageable age, regardless of gender and sexuality - and various other governments (including South Africa) are considering new marriage legislation. In Britain both the Gender Recognition Act and the Civil Partnership Act represent a huge step forward in terms of social change and acceptance of sexual and gender diversity -but they are both compromise solutions. The first gives transsexuals official recognition of their new gender but at the cost of erasing their marriages to what are newly seen as same-gender partners; the second gives lesbians and gay men rights and responsibilities virtually equivalent to those of marriage¹⁵ but at the cost of what the Green Party, the first UK political party to support the campaign for equal access to civil marriage, has called 'sexual apartheid'.¹⁴

In Canada, equal access to marriage is seen

as the non-negotiable hallmark of equality. The main campaigning organisation, Egale, puts it like this:

Registered partnerships are no substitute for equal marriage. Imagine if the federal government prohibited inter-racial couples or Jewish couples from marrying, but said we'll let you register your partnership instead. The very idea is offensive and demeaning. (Egale, 2003) In South Africa, lesbian and gay activists have made explicit links between the racist oppression of the segregationist apartheid policy and the heterosexist oppression of the segregationist civil partnership policy¹⁵. In Britain, the Coalition for Marriage Equality¹⁶ is demanding equal access to marriage for everyone as a simple matter of justice. And it's not just LGBTQI people who are discriminated against by the new civil partnership system. According to gay human rights campaigner Peter Tatchell:

Same-sex civil partnerships are heterophobic. Excluding heterosexual couples perpetuates and extends discrimination. We cannot accept the exclusion of our heterosexual brothers and sisters from civil partnerships, anymore than we can accept the exclusion of lesbians and gays from civil marriage. [...] There should be one law for everyone. Equality means opening up civil marriage to lesbian and gay partners, and making civil partnerships available to heterosexual couples.¹⁷

¹² Toby Adams was quoted on the Temenos: Out People of Color website, www.temenos.net/articles/09-13-04.shtml

¹³ For just how closely civil partnerships are modelled on marriage in Britain, see the government's information on Civil Partnerships: www.womenandequalityunit.gov.uk/lgbt/partnership.htm. You can also download the full CPA legislation at www.publications.parliament.uk/pa/pabills.htm.

¹⁴ See www.pinkuk.com/community/newsArticle.asp?id=66.

¹⁵ See Judge, M. & Vilakazi, F. (2004), 'Equality is imperative for same-sex couples', www.equality.org.za/features/2004100Vequalmar.php. Accessed 28 October 2005.

¹⁶ See the news release at www.queeryouth.org.uk/phpnews/news.php?action=fullnews&id=36. According to Bre Lock, a spokesperson for the Coalition: 'We support only the principle of equality. We recognise that Marriage (as an institution) has historically contributed to the oppression of women and that many people - gay and straight — are uncomfortable with it for that reason. What we reject is the principle that there should be separate laws for same- and opposite-sex couples. Lesbian and gay people should not be banned from marriage, and heterosexuals should not be barred from civil partnerships.'

¹⁷ A series of articles about marriage and civil partnership is available from Peter Tatchell's website, www.petertatchell.net.

There's another problem with civil partnerships in Britain. They are modelled very closely on marriage - some have called them marriage-by-another-name. Many people -heterosexuals as well as LGBTQI folk - don't want marriage, even if it's labelled 'civil partnership' instead. They see it as mimicking straight lifestyles or forcing them into a traditional legal straightjacket. The government missed out on the possibility of creating a new legal framework of relationship recognition that might have been open to everyone, irrespective of gender and sexuality. Instead of creating a two-tier system of a virtually identical package, the government could have legislated instead for equal access to marriage for same-sex couples, while at the same time developing a more flexible and modern approach to relationship recognition. For example, Peter Tatchell proposes a Civil Commitment Pact that would encompass all relationships of mutual care and commitment, giving people the freedom to nominate as their companion or beneficiary non-sexual - as well as presumed-sexual - relationships, including friends, brothers or sisters, carers, or housemates (and possibly more than just one). Instead of a one-size-fits-all model of relationship recognition, exemplified by marriage and by the civil partnership that mimics it (both of which underwrite traditional definitions of gender and sexuality), the government could have found a way of acknowledging and supporting the diverse range of different relationships that sustain people in Britain today.

The right to marry is guaranteed as a human right in the European Convention of Human Rights (Article 12), incorporated into domestic law by the Human Rights Act 1998. No government is likely to abolish marriage in the foreseeable future - in fact, rather the contrary, as the right to marry is being extended, across Europe, to same-sex couples who have not historically had access to this institution. A government which claims to respect people's rights should not be stripping trans people and their spouses, and same-sex couples married overseas, of their lawful marriages and substituting civil partnerships instead. The definition of marriage as restricted to one man-one woman (and of civil partnerships as restricted to same-sex couples) functions as a method of patrolling gender boundaries and reinforcing the binary sex/gender definition.

One of the most important contributions of LGBTQI research has been to challenge the binary sex/gender definition with theories and empirical studies that expose the rich diversity of lived experience that escapes the dichotomous categories of 'male'/ 'female' and 'heterosexual'/ 'homo-sexual. It is important for LGBTQI psychologists to contribute our voices to the struggle for equal marriage rights, because only when everyone has equal access to marriage (and to alternatives to it) will we have achieved human rights for all people, irrespective of their genders and sexualities.¹⁸

¹⁸ In addition to the resources cited above, useful information on the equal marriage struggles can be accessed from the following websites. In the US: The Freedom to Marry Coalition of Massachusetts, <equalmarriage.org> and the Human Rights Commission, <www.hrc.org>; in Canada: Egale, <www.egale.ca> and Kevin Bourassa and Joe Vamell's <www.samesexmarriage.ca>; in South Africa: The Equality Project, <equality.org.za>.

Note: All websites were accessed on 28 April 2006 unless otherwise specified.

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