# EQUALITY RIGHTS VERSUS THE RIGHT TO MARRIAGE — TOWARD THE PATH OF CANADIAN COMPROMISE

Julius Grey

The debate about gay marriage engages three points of view: those who advocate gay access to marriage in the name of equality rights; those who affirm equality rights but uphold marriage as a heterosexual institution; and those who continue to regard homosexuality as deviant and would like to see it marginalized. The social conservatives are themselves at the margins of the debate in Canada, according to prominent civil libertarian Julius Grey. Between the positions of advocates of gay rights and the defenders of traditional marriage, he suggests the possibility of a Canadian compromise that meets the requirement of both the Constitution and the traditional concept of marriage. Civil union might fulfill the acquired rights of homosexuals as easily as marriage, and the decision to use the word "marriage" or not depends on factors other than the Charter.

Le débat sur le mariage homosexuel met en présence trois groupes de personnes aux vues antagonistes : il y a ceux qui en défendent le principe au nom de l'égalité des droits, ceux qui préconisent l'égalité des droits tout en souhaitant préserver le caractère hétérosexuel du mariage, et ceux qui persistent à considérer l'homosexualité comme une pratique déviante qu'il faut marginaliser. Or, soutient l'ardent défenseur des libertés civiques Julius Grey, c'est le groupe le plus socialement conservateur qui se trouve marginalisé dans ce débat. Aussi suggère-t-il de chercher un compromis national qui, entre la position des partisans des droits homosexuels et celle des adeptes du mariage hétérosexuel, remplirait nos obligations constitutionnelles et respecterait la notion traditionnelle du mariage. L'union civile respecte, tout autant que le mariage, les droits acquis des homosexuels. La décision d'employer ou non le mot « mariage » relève de facteurs indépendants de la Charte proprement dite.

The debate about gay marriage is not an argument between two groups, but between three. On the one hand, we have advocates of complete equality in marriage, who so far have had the upper hand before the courts. On the opposing side are two groups that have completely incompatible views, those who fully agree with homosexual equality and right to dignity but want a somewhat different institution than marriage, at least in name, and those who continue to see homosexuality as deviant conduct, perhaps a sin, and who still would like to see it marginalized.

In Canada, the last group is small and unsure of itself. Its members tend to pay lip service to equality even if their reluctance is obvious. In the United States, on the other hand, radically conservative views are neither uncommon nor expressed with reticence. While the result in Canada will clearly not favour the ultraconservatives, the existence of three rather than two camps is helpful in two ways. First, it allows us to evaluate what, if any, is the danger of a serious reaction that could imperil many Charter rights. More important, it helps us determine the limits of the domain of the courts as opposed to the legislatures. It is submitted that courts could legitimately strike down any solution that catered to antihomosexual prejudice and did not respect the dignity and equality of all. The protection of human dignity has been the courts' basic function since the adoption of the Charter in 1982. On the other hand, once the requirements of dignity and equality are satisfied, the courts should not arbitrate between the possible, acceptable solutions but leave it to the legislatures to select the best one for our times.

The present issue is the result of a revolution of breath taking speed and scope such as has not seen since Pierre Trudeau, as justice minister, decriminalized homosexual relations. In this case, the revolution was more scientific than social. Until 20 years ago, all psychiatric textbooks treated homosexuality as an illness, or at least as deviant conduct. This has since been completely discredited. We now know that homosexuality is not a choice or an illness, but a normal manifestation of human sexuality dictated by genetics or perhaps by genetic and environmental factors that cannot be altered after early childhood. In those circumstances homosexuals clearly fulfill the criteria required for a group to receive Charter protection. Their orientation is a personal characteristic they cannot modify and they have historically been mistreated because of it.

Quebec first pioneered protection of homosexuals in the *Quebec Charter of Rights and Freedoms*. Since then protection has become so universal that the Supreme Court forced Alberta, which was unwilling to go so far, to include it in its *Human Rights Act*.

More and more, homosexuals reject the traditional secrecy in which they lived and the stigma to which they were subjected and assert their rights to equal citizenship. Moreover, adverse reactions to this, so vocal in the US have in Canada been largely muted. Only the idea of extending the term "marriage" to include same-sex union has galvanized opposition to any perceptible degree.

Monogamous marriage between man and woman can fairly be said to be the most important institution of the West. Other institutions — social, economic and political — floundered and disappeared but marriage has, so far, survived even the most drastic changes.

Not only is marriage important in practice, as a social unit, but our culture has grown up around it. Traditional novels and plays could generally end only in marriage or in death. Until the 1960s a woman's life was deemed unfulfilled unless she married, and an unmarried man was the subject of speculation and rumour.

Given the central role played by marriage, and given too that prior to the 1970s virtually everyone was brought up by parents married to each other and never doubted that this was the only way, it is not surprising that, even in Canada, resistance arose to transforming marriage and its image. Nor can this resistance be characterized as obdurate old foggyism and social conservatism. In an epoch of radical social change there can be rational grounds for refusing to part with one of the few surviving links to our past.

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While it is indeed possible to defend restricting the word "marriage" to heterosexuals without bad faith or bigotry, it is also true that marriage has undergone such radical change in the last half century that it is by no means clear that the proposed inclusion of homosexuality is particularly radical.

Fifty years ago, the Quebec Civil Code stipulated how marriage was indissoluble even if, in a few cases, Parliament could dissolve it. The husband was viewed as the head of the household with the right to choose a dwelling place, full rights to administer common funds, and a decisive voice in disagreements concerning children. Socially, male infidelity was not considered particularly disgraceful, while an adulterous woman still faced much opprobrium and ostracism.

Even if Quebec under Premier Maurice Duplessis was particularly conservative, the notion of a single marriage in everyone's life, with the husband as ultimate decision maker and breadwinner, was entrenched in virtually all Western countries.

Today, marriage is an option, no more. People can live together, have children and run their economic affairs together as they please. Moreover, they are free to do these things in very different ways that would have been considered highly unorthodox only a few years ago.

Opponents of homosexual marriage stress the role of marriage with respect to child rearing. It is true that many serious studies still show that a relatively traditional marriage is best for children and that divorce devastates them. However, it is also true that people can and do have children without marriage or even cohabitation, and that society permits even those who do not wish to have sexual relations to reproduce themselves.

Many gay people have children either from previous heterosexual relationships or through artificial insemination or adoption. Does it still make sense to deny the word "marriage" if the effects of conventional marriage already apply to them? Or can "marriage" survive another modification of its definition or even be strengthened by it?

It is clear that all rights of married persons, for instance with respect to pensions, immigration sponsorship, successions, adoptions and tax benefits, must apply to homosexuals. Otherwise, they do not have the dignity and equality the Charter guarantees and the Courts would be justified in continuing to strike down legislation.

However, a civil union may fulfill those requirements as easily as marriage, and the decision on whether or not to use the word "marriage" depends on factors other than the Charter.

On the one hand it may be useful, for cultural reasons and because so

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**The Bishop in Drag: Celebrants in Montreal's Gay Pride parade ride past Mary Queen of the World Cathedral — seat of the Cardinal Archbishop of Montreal. Between affirming equality rights and defending the sanctity of marriage, civil unions might emerge as an acceptable compromise.**

many citizens see it that way, to maintain a distinction between the names given to the unions.

On the other hand, it may be too late, once the Courts have granted marriage in the absence of any other legislation, to take this back and to create a new institution. Rights are difficult to reverse, and the new civil union may not find widespread acceptance among those it is intended to benefit.

Moreover, if the issue is fundamentally one of terminology not substance, is it worth a continued controversy?

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A number of arguments have been raised against same-sex marriage, and most are unconvincing. The spectre of polygamous unions seeking recognition is not an analogy, since polygamy is a form of voluntary conduct and not an intrinsic part of a person's personality. Moreover, there is no social movement toward recognizing polygamy as a way of life, even if sexual taboos have become less strict and society is not disposed to punish infidelity.

One serious argument against the new "marriage" is the fear of provoking a vehement reaction from America's Christian right. This is a real concern. For instance, in the early days of the Soviet regime, homosexual relations were legalized, only to be criminalized again during the conservative Stalin epoch. It would be unfortunate if the word "marriage" helped mobilize those who cannot accept the rest of homosexual rights and permitted them to gain the upper hand.

However, these fears should not be taken too far. A civil union may also become a scapegoat for those wanting to turn back the clock. Moreover, reactions occur when they do, and it is doubtful that any measures to avoid them will placate their proponents.

Another argument, which has already arisen in British Columbia, is that if "marriage" is conceded, heterosexuality must lose all of its privileges. For instance, school texts, according to the logic of this argument, would be required to depict gay marriages as much as heterosexual ones. However, this is an issue that need not be decided at this point, and raising it merely complicates an already thorny issue.

It follows that both "civil union" and "marriage" are acceptable solutions, although this writer, who would have favoured civil union, now tends towards marriage, but with much hesitation and only because he thinks it is too late to gain acceptance among homosexuals for another form of union after the courts allowed them to marry.

This brings us to the most important issue — the role of the courts. Clearly, the courts have a major role to play, and the type of populist majoritarianism that we hear from the right of the political spectrum is wrong. It is the essence of Charter rights that they be effective against majority views as much as against minority ones. Homosexual rights cannot be decided by referendums, elections or Gallup polls.

It follows that courts will have to strike down any true discrimination. For instance, adoption rights must be given equally to homosexuals and heterosexuals, even if some citizens strongly disapprove of this.

However, Charter rights imposed by courts continue to be respected only if they are limited to basic notions of equality and dignity. The Charter was not intended as an instrument of daily administration of the state. Nor is every distinction a violation of the Charter. Indeed, all legislation is about making distinctions and only a few laws raise Charter concerns.

The courts should therefore adopt a neutral attitude toward solutions that respect the basic principles of the Charter, and both marriage and civil unions do. If new legislation creating one or the other is adopted, the courts can invalidate those portions that violate dignity or equality, but they should leave the decision about the use of the word "marriage" to the legislator.

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