

The Government's Proposal to "make provision for the marriage of same sex couples"

Briefing for Christian Parliamentarians

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This briefing is written specifically for Parliamentarians who are Christians. It aims to assist Christian Parliamentarians to think through, in a fundamental way, the central issue raised by the Marriage (Same Sex Couples) Bill in relation to Christian teaching about government and about marriage.

The briefing largely does not duplicate what is in those produced by churches and other Christian bodies, e.g., those produced by the Church of England and the Catholic Bishops' Conference of England and Wales (links for which are given in the endnotes).²

Key Points

- Political authority is given by God and its purpose is justice, especially for the *oppressed, poor or needy, and those afflicted by violence* (sec. 1).
- Marriage is 'a gift of God in creation', not a construct of political authority (sec. 2).
- In the teaching of the major Christian denominations, 'marriage' names a certain kind of male-female sexual relationship, one that should be characterised by love and fidelity and is constituted by free consent and consummation (sec 2).
- The interest of those with political authority in relation to marriage is only to register when a marriage takes place, so that, if issues of justice arise in relation to the persons as spouses, law can be used effectively to secure justice (sec. 3).
- To do that, and so to secure justice as necessary, law needs to *recognise* marriage (sec. 3).
- The central issue raised by the Bill is: **does the current law *mis-recognise* marriage in a way that will be corrected by the Government's proposed reform?**
- This presents two questions to Christian legislators (sec. 4.1):

A. Can those who subscribe to Christian teaching about what 'marriage' is recognise a (certain kind of) same-sex relationship as *essentially the same thing as 'marriage'*, such that this word truthfully describes it?

Careful examination of this leads to the following answer (sec. 4.2):

- Significant differences between what marriage is for other-sex couples and what the Bill's provisions mean it will be for same-sex couples, notably re. what fidelity requires and re. consummation, appear to make a 'no' answer the only honest one.
- This means that, re. *what marriage is*, Christian doctrine and the Bill's provisions are contradictory.

- What is at stake are two deeply different conceptions of marriage. For convenience these can be called 'traditional' and 'voluntarist'.
- The contradiction between Christian doctrine and the Bill's provisions is recognised on the face of the Bill itself, in clause 1(3). This presents a possibly unprecedented challenge to Christian Parliamentarians.

B. Nevertheless, does *justice* require that those with political authority should change the meaning of 'marriage', so that it refers to something different, and then may be used truthfully for (a certain kind of) same-sex relationship?

Careful examination of this leads to the following answers (sec. 4.3):

- Certainly, Christians with political authority must secure justice for people, *whether or not* what people believe and do fits with church teaching (4.3.1). Certainly, Christians with political authority must secure justice for people in same-sex relationships.
- Civil partnerships substantively achieve justice for same-sex couples, even if, in time, it will become clear that civil partnerships are not the best way to do this (4.3.2).
- *The main argument* many make for same-sex marriage is that traditional marriage *discriminates unjustly* against gay couples. This argument contains a basic mistake: one of its premises assumes the 'voluntarist' view of marriage, but this is what the argument needs to demonstrate as its conclusion (4.3.3).
- *Therefore the argument from unjust discrimination can carry no weight in current debate, as an argument against the traditional conception of marriage.*
- A different argument for same-sex marriage, about equality of social and cultural status, is much stronger. Yet it is unlikely that the proposed legal change will in practice bring about the intended outcome of equal cultural status (4.3.4).

Unless there are other, different arguments from justice for same-sex marriage, it appears that justice does not require its introduction.

Conclusion: what is at stake for Christian legislators (sec. 5)

- Accepting that there is not a decisive case in justice for voting for the Government's proposal, Christian Parliamentarians are being asked to vote in a way that directly contradicts Christian doctrine – and, for those who accept this teaching, their own convictions about what marriage is.

- This is because there are at stake in the debate *two deeply different views of what marriage is*.
- This poses a challenging question for Christian Parliamentarians:

The churches teach that marriage is a 'gift of God in creation', a social institution with a given shape. Is there a basis on which Christian legislators may hold that, under God, they have the authority to articulate in law a contradictory view of what marriage is?

- The briefing argues that there is no such basis.

Key points in final section of the briefing (sec. 6)

The final section addresses why it is legitimate for Christian Parliamentarians to bring their Christian convictions to bear in deliberation about legislation.

This paper argues very briefly as follows:

- Christian legislators have the same right as all others to bring the deep, religious and philosophical reasons for their beliefs about what the law should be into public deliberation.
- There is no religiously or philosophically *neutral* conception of what justice requires or, on this particular issue, of what marriage is.
- Rather, in a pluralist society with a democratic political order, political debate necessarily requires *very difficult conversation*, in which all are entirely welcome to bring into the public square the deep reasons for their political convictions. Some writers call this 'strong democracy'.
- **Is British democracy 'strong' enough to host a serious, difficult conversation about what justice requires for the law on marriage, one in which Christian, Muslim, agnostic, atheistic, and all contributors may, freely, carefully, and respectfully, bring into the public square the deep reasons for their political convictions?**

Briefing for Christian Parliamentarians

Introduction

The primary aim of the Government's Marriage (Same Sex Couples) Bill is "to make provision for the marriage of same sex couples" (long title).

Christian teaching on marriage, notably that of the largest denominations in England and Wales, means that this Bill presents unusual challenges for Parliamentarians who are Christians.

These arise because church teaching largely corresponds with current law on marriage (as discussed below) but *prima facie* it does not correspond with the provision in the Bill for same-sex couples to marry.

In bringing this Bill to Parliament, therefore, the Government is asking legislators to vote for a conception of marriage that appears to contradict Christian teaching.

This briefing aims to identify the main issues at stake for Christian Parliamentarians in the proposed legislation, and therefore to assist them to think these issues through clearly in deliberation about how to vote on this Bill.

The briefing does not address the points which many people have made about the lack of normal democratic and governmental processes prior to publication of the Bill.³ However this lack has the consequence that some of the central issues at stake, not least for Christian legislators, have not been brought out prominently in public discussion.

1. The authority and role of those who govern

In the light of the Christian Bible, the churches have taught throughout the Christian era that those with political authority have received that authority from God.

This teaching remains the same in democracies, in which, at elections, 'those with political authority' are all voters, who have the responsibility to transmit that authority by electing legislators and executives to exercise it directly.

Hence all those with political authority, both voters and those in political office, are accountable to God for what they do with it.

Recognition that political authority comes from God gives no reason at all for seeing it as unlimited or for abusing it in any way. On the contrary, it should be used only for the purpose God intends for it.

This purpose can be summed up as justice.

To do justice to people is to recognise them for who they truly are, each alone and in community, and then to render to them what is due.

The Christian Bible witnesses that justice is the prime purpose of political authority in many places. One text in which this is focused is Psalm 72, which portrays an ideal king. Here are the opening verses:

1. O God, give your judgment to the king;
your justice to the king's son;
2. That he may govern your people with justice,
your oppressed with right judgment,
3. That the mountains may yield wellbeing for the people,
and the hills great abundance,
4. That he may defend the oppressed among the people,
save the children of the poor and crush the oppressor.⁴

As repeatedly elsewhere, here doing justice means above all acting for the sake of those who suffer because of injustice inflicted by others. The king is to ensure justice is done for those who are *oppressed, poor or needy, or victims of violence* (vv. 1-4, 12-14).

Only then there will there be *shalom* (v. 3) – welfare, wellbeing, true prosperity or, in perhaps the best translation of this Hebrew word, the common good. *Shalom* is inherently social, in the sense that it exists for a people together or not at all. If some are excluded from *shalom*, it can only exist in a badly impaired form for anyone. This is why justice for the oppressed and poor is a prerequisite of *shalom*, of the common good.

Among the kinds of injustice which the Bible sees it as the responsibility of those with political authority to act against are: failure to make the courts accessible to those who have a just claim against injustice (Amos 5:12-15); exploitation of workers (Jer. 22:13); shedding of innocent blood (Jer. 22:17); growth over time of excessive debts and inequality (Lev. 25).

These references are all to the Hebrew Scriptures or Old Testament. The reaction against human suffering and injustice they manifest is very evident in the New Testament too, in the ministry of Jesus and in the epistles (see, e.g., Luke 4:16-21, 2 Cor. 8:1-15, James 5:1-9).

In the New Testament we find also, astonishingly in the context of Judaism and early Christianity, affirmation that Roman Imperial rule could be seen as under God and having political authority from God. Indeed St Paul called it "God's servant for your good" (Rom. 13:4, NRSV).

This leads to recognition by Christians that all who govern, whether emperors or cabinet ministers in elected government, have the duty to do justice primarily by acting for the sake of the oppressed, the poor and needy, and those afflicted by violence. Under God, this is the first responsibility of all with political authority. It should go without saying that what this means in practice for public policy in any particular time and place needs highly rigorous, critical thought, because commitment to act for justice is certainly not sufficient for bringing it about. Sound assessment of means is just as necessary.

It is vital to add: the only reason why Christians can favour legislation (on any matter) is because *justice* requires it. That the churches believe something is *true* is not a sufficient reason to legislate for it. This point arises from the heart of the Christian gospel, God's good news for all the world. God acts through Jesus Christ and by his Spirit in the calling into being of a community of faith that lives in the midst of politically ordered society. God does not act through Jesus Christ and by his Spirit by requiring those who have faith to seek to bring in by enforced law what the gospel offers – that was not Jesus' way and to seek to do that would be fundamentally contradictory to the gospel. To the extent that Christians have in fact done this, they have only undermined their witness, indeed betrayed their mission.

This sets the context in which all matters that might be argued to be within the role of political authority should be addressed. Among these is whether and, if so how, legislation should provide for marriage. We now turn to this question.

2. Christian teaching about marriage

The churches have taught that marriage is not a construct of those with political authority. It is a particular form of human relationship that exists independently of rulers. As the Church of England's current marriage service puts it, marriage is "a gift of God in creation".⁵ This phrase reflects the traditional Christian teaching that marriage is something given in the way God has made the world, a divinely ordained social institution within which persons can be greatly blessed.

Evidently, this is a high view of marriage, but it has never been understood in the churches to entail that everyone should marry. On the contrary, through much of Christian history, to be unmarried and celibate has been widely regarded as equally open to blessing or, by some, even as a better way to live. This is now a highly counter-cultural conviction. This perspective comes largely from the churches' teaching that, in 'heaven', in the eternal life offered to all in Jesus Christ, marriage will be transcended. As Jesus taught, in the "resurrection from the dead [people] neither marry nor are given in marriage" (Luke 20:35). The life of unmarried people, especially when lived out in communities of radical Christian discipleship, can manifest communion that is wider than marriage, among persons and with God, and in this way give a real foretaste of the final coming of God's kingdom.

In summary, Christian teaching understands marriage in the context of God's blessing in creation, and it understands the diverse forms of community in which unmarried people can live in the context of God's promise of unimaginably great future blessing.

But what exactly is this 'gift of God in creation'? What is marriage?

According to the teaching of all the large Christian denominations (Catholic, Protestant and Orthodox), 'marriage' names a male-female sexual relationship in which both spouses have committed to being faithful in love and care for each other and sexually while they are both alive.⁶ In the Western churches, two things constitute a particular marriage:

- the unambiguously free consent of both partners to be united in marriage (given in the vows)
- the actual consummation of this union in full sexual intercourse.

This means there is no marriage if one partner has not freely consented, and a marriage is 'voidable' if there is no consummation.⁷

The Western churches have been in agreement in teaching that marriage, so constituted, has two *ends* or *goods*. These name the ways in which a marriage can turn out to be as good a marriage as possible. But a marriage in which they are more or less lacking is still a marriage. These two ends are, in the terms used in current Roman Catholic canon law, "the good of the spouses" and "the procreation and education of offspring".⁸ These are often referred to as, respectively, the 'good of fidelity' or the 'unitive good', and the 'procreative good'.⁹

The preface to the Church of England's Marriage Service puts the first like this: "[Marriage] is given that as man and woman grow together in love and trust, they shall be united with one another in heart, body and mind..."

It puts the second this way: "[Marriage] is given as the foundation of family life in which children are born and¹⁰ nurtured, and in which each member of the family, in good times and in bad, may find strength, companionship and comfort".

The above outlines what 'marriage' has referred to in Christian teaching. Putting this differently, marriage is the common English word that the Christian churches have used to name that particular form of human relationship, that 'package' we might say. It is not the only such word; 'matrimony' is another.

3. The responsibility of those who govern in relation to marriage

Granted that marriage, so understood, is a 'gift of God in creation' and not a construct of political authority, why might it be right for those who have this authority to make legal provisions for marriage? The answer is: for reasons of justice and the common good.

Before we explore what this means, it is worth noting that whether a couple are in fact married, under God, does not depend on their marriage being recognised in law. If they have freely consented to marry (understanding what they are doing) and their relationship is consummated, they are married. The essential point of a marriage ceremony is to witness their consent, so that they are publicly recognised as married. The proper interest of those with political authority in the ceremony is only to register that the marriage has taken place, with reliable witnesses, so that if issues of justice arise in relation to the persons as spouses, the law can be used effectively to secure justice for them or others directly affected.

Like every human relationship and community, marriage can be a site of great injustice, notably of violence, rape, emotional cruelty, neglect and/or desertion, among other wrongs.

Some of these injustices, such as violence and rape, can occur in many forms of human relationship. The task of those who govern in relation to these is, in principle, simple (even if it has also been controversial). Taking the example of violence, it is to seek to ensure that the law on violence in general is enforced against people (overwhelmingly men) who are violent in marriage.

Other such injustices are specific to marriage partners or spouses. One example is desertion without divorce followed by a second marriage. The possibility of this injustice is why those involved in conducting marriage ceremonies have to be satisfied that neither partner is already married and that both are, therefore, free to marry. Another wrong that is specifically against spouses is sexual infidelity, known as adultery. (For a long time now, the Protestant churches have held that adultery is a sufficient ground for divorce and that this should be recognised in law.¹¹ On this there is now a significant difference between Roman Catholic and Protestant teaching. The Catholic Church holds that marriage is indissoluble, and therefore that divorce is never possible.)

The task of those who govern in relation to the *second* kind of injustice, those specifically against spouses, means they have to make legal provisions relating to marriage per se.

For this to be possible, those who govern need first to *give recognition in law to what marriage is*. Whether there have been wrongs against a particular spouse that may justify legal redress depends on whether there is a marriage. For this, the law has to say what marriage is.

There is perhaps nothing more important for Christian Parliamentarians to understand in current deliberation about marriage than that the fundamental task of legislators in relation to marriage is one of *recognition*. This simply reflects the fact that marriage is a 'gift of God in creation' and is not a construct of political authority. In other words, marriage is not what the law says it is; rather, justice requires that the law articulates accurately what marriage is.

Legislators can either *recognise* or *mis-recognise* marriage.

4. Should the law be changed so that same-sex couples can marry?

4.1 Introduction

The central question raised by the Government's Marriage (Same Sex Couples) Bill is this. Does the current law *mis-recognise* marriage in a way that will be corrected by the Government's proposed reform? Will making this change mean that the law will recognise marriage more accurately?

It will be helpful to note that English law currently does reflect the Western churches' conception of marriage in a number of significant ways:

- The long-accepted definition of marriage in English common law was given as an expression of Christian understanding: "marriage, as understood in Christendom,

may... be defined as the voluntary union for life of one man and one woman to the exclusion of all others" (Lord Penzance, *Hyde v. Hyde and Woodmansee*, 1866).

- The word 'voluntary' recognises that consent to marriage must be unambiguously free; hence if either partner has entered marriage non-voluntarily, this is a sufficient legal basis for annulment.
- The law recognises too that non-consummation is a sufficient ground for annulment.
- As 'exclusion' in that definition implies, the law recognises that those who marry are committing themselves to sexual fidelity, and, in a way consistent with this, it recognises adultery as a sufficient ground for divorce.

Indeed, the second and third of these points show that both in Christian teaching and in English law it is the same two things that constitute a marriage: free consent and consummation.

In short, current English law recognises marriage accurately, more or less. It articulates a true understanding of marriage.

Clearly, the main change the legislation will make is to the common law ruling that marriage is the union "of one man and one woman".

The fundamental questions this presents to Christian legislators are two.

- A. Can those who subscribe to Christian teaching about what 'marriage' is recognise a (certain kind of) same-sex relationship as *essentially the same thing as 'marriage'*, such that this word truthfully describes it?
- B. Supposing that the answer to the first question is 'no', does *justice* require that those with political authority should change the meaning of 'marriage', so that it refers to something different, and then may be used truthfully for (a certain kind of) same-sex relationship?

It should go without saying that the law needs to be truthful. (Legislation that characterised things in the world untruthfully would make the law self-contradictory and legal judgment impossible.)

The next two sections address those two questions.

4.2 Is Church teaching on marriage compatible with the Bill's conception of same-sex marriage?

In light of the outline earlier of the churches' teaching on marriage, it is obvious enough that *prima facie* the answer to this question is 'no'.

This is because 'marriage' is, simply, the word in English that the churches use to refer to that kind of male-female relationship, that 'package'. For hundreds of years, the churches' use of

it has corresponded closely with how English-speakers in general have used it. This is reflected in the common law definition.

Obviously, there is nothing wrong with the fact that a language *has such a word*. It is simply the label for that particular kind of relationship. That there is a word for this simply implies nothing about same-sex relationships, whether negatively, neutrally or positively.

In this *prima facie* understanding, 'marriage' and 'same-sex relationships' are referring to different kinds of thing.

But there is, of course, more to the issue than this.

The reason there is more to it is that same-sex relationships can be *like* what the churches call 'marriage' in some respects, even though they are *unlike* it in other respects. In other words, a certain kind of same-sex relationship is *analogous to marriage*. (A is analogous to B if A is like B in some important ways, even though A is unlike B in other ways.)

The question raised by the proposal for same-sex marriage is whether a certain kind of same-sex relationship is analogous to marriage in a sufficiently close way that it would make sense to use the word 'marriage' for it.

One of the arguments Government spokespeople have made for same-sex marriage has exactly this form. For example, Nick Clegg, the Deputy Prime-Minister, has said, "If two people love each other we should celebrate that and let them get married if they want to – love is love. We should celebrate it if people want to make commitments to one another...."¹²

Many other advocates of same-sex marriage have made similar statements. The claim here is that love and willingness to commit freely to marriage mean that a same-sex relationship can be so closely analogous to what 'marriage' has traditionally meant that the differences may be discounted. Therefore it should be called marriage.

This poses a particular challenge to Christian Parliamentarians who subscribe to Christian teaching on marriage. This is whether they may regard as truthful an articulation in law of what marriage is in which the meaning given to 'marriage' has some but not all the essential characteristics of what the churches teach marriage is.

In order to address this, we need to look at how the Bill characterises the marriage that same-sex couples will be able to have. Can this be described as 'marriage' in a way such that its differences from church teaching are insignificant enough that they can be discounted? If so, Christian legislators could vote for it without thereby contradicting their Christian conception of what is true about marriage.

As well as the main change the Bill will make (in relation to 'one man and one woman'), it will change what marriage is in two other ways. These relate respectively to the two things that constitute a marriage in the churches' teaching and in law: consent and consummation.¹³

- In relation to consent, there will continue to be the same understanding that this must be voluntary or free. Indeed, what other-sex and same-sex partners will consent to will have the same wording. Nevertheless, there will be one major difference in what they are committing substantively to do. Spouses in other-sex marriages will be committing to sexual exclusivity where this is understood in the law as breached by heterosexual relationships with other partners. Spouses in same-sex marriages will not be making an equivalent commitment, because *sexual exclusivity will not be understood in law as breached by sexual relationships with other same-sex partners*. This is because, in law, adultery will continue to be understood only in terms of other-sex relationships.¹⁴
- *Consummation will not be necessary* to constitute marriage for same-sex couples.¹⁵ It will continue to be necessary for other-sex couples.

These two points mean that marriage for other-sex and same-sex couples will be different.¹⁶ The differences mean, in turn, that other-sex marriage will still correspond quite closely to the churches' teaching, while same-sex marriage will contrast greatly with it. Whereas for other-sex couples, marriage will continue to be inherently a full sexual relationship, faithfulness to which is broken by adultery, for same-sex couples there will be no provision in law according to which it is a sexual relationship at all.

This has the surprising implication that the law will have added to the category of 'marriage' just one subset of (legally) non-sexual relationships.

Even leaving aside the main change that removes the requirement that marriage is a 'union of one man and one woman', it is impossible not to conclude that the conception of marriage for same-sex couples that the Bill will introduce is not what Church teaching recognises as marriage.

Rather, marriage for same-sex couples will be *constituted only by consent or voluntariness*, and this consent *will not require a faithful sexual relationship*.

The conception of marriage that this expresses can, for convenience, be called 'voluntarist'. This label is not perfect, but it fits to the extent that what marriage *is* is being reduced to one constitutive element: voluntariness or free will (*voluntas*, Latin: will). The traditional Christian understanding, that marriage names a social institution which has a certain shape and which people freely *enter*, is very different from that voluntarist conception.¹⁷

We may contrast, then, 'traditional/Christian marriage' and 'voluntarist marriage'. These have also been distinguished metaphorically and vividly as 'thick' and 'thin' conceptions of marriage.¹⁸

That the Bill provides for marriage to be different for other-sex and same-sex couples means that the Government's proposal is for a hybrid of the two conceptions – of 'thick' and 'thin'. We can only speculate about whether, if the Bill becomes law, this hybrid will be stable, or whether legal challenges that could be made on the basis of the voluntarist conception

inherent in the provision for same-sex couples might lead to removing provisions re. consummation and adultery from other-sex marriage.

The challenge facing Christian Parliamentarians is now clearer. The Government is asking them to vote for a voluntarist conception of marriage, one that contrasts greatly from the traditional conception. The issue here is focussed in clause 1(3) of the bill. This basically acknowledges that what the Church of England (CofE), in particular, teaches about marriage and what the Bill says marriage is, are contradictory. Clause 1(3) says:

No Canon of the Church of England is contrary to section 3 of the Submission of the Clergy Act 1533 (which provides that no Canons shall be contrary to the Royal Prerogative or the customs, laws or statutes of this realm) by virtue of its making provision about marriage being the union of one man with one woman.

The apparent meaning of this is that, even though CofE canon law and this Bill are contradictory, CofE canon law can stand. So the Bill is itself providing for the future circumstances in which church teaching and the law will contradict.

The challenge this poses for Christian legislators is pointed and possibly unprecedented. On one hand, long-established Christian doctrine says, 'The truth about marriage is X'. On the other hand, the Government is asking them to vote to articulate in law: 'The truth about marriage is Y'. X and Y are contradictory. *The Government is asking Christian legislators who themselves subscribe to the churches' traditional teaching to affirm in law that something is true which their Christian convictions mean they believe is false.*

The reason this may be unprecedented is subtle but important. Similar challenges have been raised by issues such as deployment of weapons of mass destruction and abortion, on which, for at least Christians of some denominations, their church teaches that to intend such actions is always wrong and that the law should not allow them. However, in such cases what is at stake is whether the law permits a kind of action that Christian teaching doesn't. In the case of same-sex marriage, the issue seems to be of a different kind – namely, a matter of two contradictory sets of truth-claims. The churches' teaching is that marriage is X. The Government is proposing that the law will say that marriage is Y.

To be clear: the issue here is not that the churches think that Christian doctrine *per se* should be turned into law (see sec. 1). They certainly don't. The issue is whether Christian legislators may support direct contradiction between Christian doctrine and law.

Therefore, one specific question on which Christian legislators need to seek an answer is whether there are any exact precedents for this kind of contradiction. In other words, is there previous legislation in which there is an equivalent provision as clause 1(3)?

The general question this raises is: *on what possible basis could Christian legislators claim that, under God, the source of all political authority, they have authority to vote against Christian doctrine?*

It is very hard to see what such a basis could be as, on the face of it, such a vote would (a) be self-contradictory and (b) go beyond what God has given political authority to do.

However, if there is such an argument, it would need to be cast in terms of the responsibility of political authority to do *justice*, as outlined earlier (sec. 1). We need to address this question: does justice require same-sex marriage?

4.3 Does *justice* require same-sex marriage?

4.3.1 Introduction

Granted that the primary purpose for which God intends that political authority should be used is justice (see sec. 1), Christian Parliamentarians have to ask of the Government's proposal: *does justice require it? Or, more sharply, is there an injustice which this reform will put right?*

However a preliminary question arises. Is it conceivable that justice could 'trump' the problem with the Government's Bill identified in the last section, namely that it articulates an untrue conception of marriage, one that Christian legislators cannot vote for without self-contradiction?

It is certainly incoherent to say that that justice could trump truth. Rather, doing justice depends on truth – on understanding the truth about the person or persons who need justice. If those who govern don't recognise people for who they truly are, each alone and in community, it cannot do them justice.

But, beyond this, Christians with political authority owe justice to persons regardless of what those who need justice believe is true – whether about God, about how to live, sexual ethics, marriage, etc. – and also regardless of what they *do*, as long as what they do is not contrary to the justice that governments must secure.

How does this bear on the current deliberation about same-sex marriage?

The last section (4.2) pointed out that the fact that the word 'marriage' is used in Christian teaching – and has been used in English generally – to refer to a particular kind of male-female relationship implies nothing about same-sex relationships, whether negatively, neutrally or positively. 'Marriage' and 'same-sex relationships' simply refer to different things. In fact, among different voices in current discussion within the churches about same-sex relationships, there are those who understand them, relative to marriage, in all those three ways:

- negatively (as inherently not good, and so as asking gay people to commit to celibate living, ideally in contexts that can manifest the eschatological promise of communion that transcends marriage; cf. sec. 1)¹⁹
- neutrally (as closely analogous to and ethically equivalent to marriage),²⁰ and

- positively (as giving, in contexts of relationship/community in which same-sex attraction is given sexual expression, the same possibility as the negative view envisages of manifesting God's coming reign in Christ more clearly than marriage can).²¹

The current fraught debate within the churches comes, of course, against the background of a long history in which the first of these views has been dominant.

But the role of political authority is to secure justice for gay people, including those in same-sex relationships, regardless of their religious and ethical views, and of what they do or don't do – and regardless too, therefore, of the churches' internal discussion. This is required by the truth of Christian teaching that those who govern must do justice. There is no issue here of justice trumping truth.

What arguments are there, then, relating to whether justice requires the introduction of same-sex marriage? Three main ones can be distinguished.

4.3.2 *Civil partnerships substantively achieve justice for same-sex couples*

There is no serious dispute that since the introduction of civil partnerships in 2005, committed same-sex couples have almost exactly equivalent legal rights in relation to their partners as married couples do. Granted that the main way in which law secures justice for people can be expressed in terms of establishing justiciable rights, and even if civil partnerships are not the best model for securing rights in law for people in same-sex relationships, that legislation means that, substantively, justice in law for committed same-sex couples has already been achieved.²²

Therefore the existence of civil partnerships means that there are not substantive and urgent reasons of justice – i.e., of lack of protection of substantive rights – that require legislation to overcome.

4.3.3 *The argument from unjust discrimination*

Even taking full account of civil partnerships, one of the main arguments which advocates of the current proposal make is that this will put right a serious injustice. This is *the argument from unjust discrimination*.

In its simplest form, this argument can be put briefly. In law, gay couples can't get married, which shows that the law discriminates against them, so the law should be changed so that they can marry.

Especially as this argument is so prominent in advocacy of same-sex marriage it should be examined carefully. This can be done by attempting to set it out more fully in the form of a series of syllogisms. The conclusion of each argument forms the first premise of the next one.²³

1. (i) In law, the good called 'marriage' is the union of a man and a woman.

(ii) Same-sex couples do not comprise a man and woman.

Therefore, in law same-sex couples cannot have the good called 'marriage'.

2. (i) In law same-sex couples cannot have the good called 'marriage'.

(ii) *The law is wrong, not truthful, in saying that same-sex couples cannot have the good of marriage.*

Therefore a different law could enable same-sex couples to have the good of marriage.

3. (i) A different law could enable same sex couples to have the good of 'marriage'.

(ii) A law that deprives someone of a good that a different law could enable them to have unjustly discriminates against them.

Therefore the current law on marriage unjustly discriminates against gay couples.

Each of these three arguments is logically valid (which in logic is not the same thing as 'soundness' or 'truth'). Therefore the argument that the three make together is valid.

Whether they are each also 'sound' arguments, i.e., whether they express things which are true, depends on whether their premises are true.

Both the premises of the first argument are true (all would agree). As the conclusion of this argument is the first premise of the second, this is true also.

However the second premise of the second argument, 2(ii) (italicised above), is open to dispute. Whether it is true depends precisely on what 'marriage' is, i.e., on what this word is being used to refer to.

This briefing distinguished earlier (sec. 4.2) between two substantively different conceptions of marriage, labelling these 'traditional/Christian' and 'voluntarist'.

In the first of these understandings of marriage, premise 2(ii) is not true. This is simply because 'marriage' labels a certain kind of male-female relationship. This means the premise is self-contradictory.

In the second, voluntarist conception of marriage, that premise *is* true because whether a couple is male-female or same-sex is irrelevant to what marriage is understood to be.

From this it follows that the argument from unjust discrimination for same-sex marriage has no bearing on the traditional conception of marriage. It is not a sound argument against this conception, because anyone who holds to this conception believes that one of its premises is false.

The argument from unjust discrimination holds *only if the voluntarist conception of marriage is already accepted.*

As this is the conception which is implicit in the Government's proposal for same-sex marriage, we can say very clearly that the argument from unjust discrimination assumes its

conclusion in its premises. It is convincing only for those who already assume what it is seeking to demonstrate.

This makes clear that the argument from unjust discrimination has no purchase as an argument against the traditional conception of marriage. It rests on a category mistake. What the law is recognising in providing for marriage is a certain kind of male-female relationship. There can be nothing wrong with the law doing this, even though the law can and should also provide for people in same-sex relationships.

Therefore it is not true that marriage, as traditionally understood and currently defined in law, discriminates against gay couples.

Looking at this another way, this problem in the argument from unjust discrimination arises from the point noted earlier, that the traditional conception of marriage in itself says nothing at all, positively, neutrally or negatively about same-sex relationships.

It is of course really important that legislation is not based on logically flawed arguments. It is especially important for Christian Parliamentarians to recognise that the argument from unjust discrimination, when presented as an argument against traditional marriage, is mistaken. It cannot carry weight in current deliberation about whether to introduce same-sex marriage.

Rather, the focus of the debate should be the two substantively different conceptions of marriage that are at stake.

4.3.4 An argument about legal and cultural status

Another argument for same-sex marriage is much stronger. This is to do with perceptions of the status, in law and culturally, of civil partnerships and marriage. It claims that civil partnerships are regarded, both by people in them and many others, as of lower status than marriage, a kind of 'second best'. It argues that the current law is sustaining those perceptions and assumptions, and also therefore, if indirectly, sustaining an injustice against same-sex couples. Even if, in fact, the legal provisions for civil partnerships and marriage are as equivalent as the law can make them, the injustice for gay couples of being able to enjoy only a lower status relationship can and must be removed by making the legal status of 'marriage' equally open to male-female and same-sex couples.

This is a powerful argument. In terms of Christian teaching about the role of those who govern (sec. 1), it can be interpreted like this. The perception that civil partnerships are of lower legal and cultural status than marriage means that, *de facto*, gay couples in those partnerships are not able to participate in the wide range of activities in society that would enable them to contribute to the common good as fully as they otherwise could. For this reason, the law *de facto* disadvantages them, which, regardless of legislators' intentions, is an injustice. Justice being a prerequisite of the common good, the law should be changed to overcome that injustice.

Yet there are some difficulties with this argument.

One is that, to some extent, it is a self-fulfilling prophecy. When people argue in public debate that civil partnerships are of lower status, this can only confirm the impression that they are.

A second difficulty is that government cannot easily control public perceptions or, once substantial rights in law are already established, easily effect cultural change. A widely reported section in a lecture by Archbishop Rowan Williams is relevant here:

Law must prohibit publicly abusive and demeaning language, it must secure institutions that do not systematically disadvantage any category of the community. But these tasks remain 'negative' in force. If it is said, for example, that a failure to legalise assisted suicide - or indeed same-sex marriage - perpetuates stigma or marginalisation for some people, the reply must be, I believe, that issues like stigma and marginalisation have to be addressed at the level of culture rather than law, the gradual evolving of fresh attitudes in a spirit of what has been called 'strategic patience' by some legal thinkers.²⁴

Third, and probably most significantly, it seems unlikely that introducing same-sex marriage would, in the medium and long term, be an effective way to bring about such an equal cultural status. Marriage in law would now contradict the churches' teaching, so it would be likely that Christian teachers (of various kinds) would use a different term when expounding what marriage is. (Matrimony is an obvious candidate here.) What this would lead to over time is an analogous contrast as that between civil partnerships and marriage now.

Related to this, a fourth difficulty is that, as marriage will have been changed by law into something different from the traditional conception, it is not self-evident that it will retain the status it has generally had. However this point is speculative so little weight can be placed on it.

To conclude, as 'civil partnerships' is a very new term, it is not surprising that it lacks the cultural status of 'marriage'. There may well be a better term to use in law than 'civil partnerships' but it is likely that this would take some time to emerge. However it is not obvious that seeking to overcome the perception of unequal status will, in the medium and long term, actually be achieved by introducing same-sex marriage. This third argument does not decisively establish that justice requires the introduction of same-sex marriage.

4.3.5 Conclusion

The primary purpose for which God intends that political authority should be used is justice (sec. 1). This section has asked if justice requires the introduction of same-sex marriage. The conclusions are:

- First, the existence of civil partnerships means that substantive rights for same-sex couples equivalent to those for other-sex couples are already established in law.
- Second, the argument from unjust discrimination is logically mistaken, and so can carry no weight in the debate about same-sex marriage.

- Third, the argument from unequal legal and cultural status has force, but there are reasons for expecting that legislating on the basis of it will not have the intended effect.

Unless there are convincing justice-based arguments other than those three, it appears clear that introducing same-sex marriage is not required as a matter of justice.

5. What is at stake for Christian Parliamentarians: summary

As sec. 3 showed, the reason why it matters that the law recognises marriage is *justice*. This is necessary to ensure justice for people who, in marriage, suffer injustice.

The arguments that justice requires changing marriage by providing for it for same-sex couples are either logically mistaken (sec. 4.3) or not decisive (sec. 4.4).

This means that the challenge for Christian Parliamentarians identified in sec. 4.2, namely that the Government is asking them to vote in a way that directly contradicts Christian doctrine, really does arise.

This is because what is really at stake in the current debate are *two substantively different conceptions of what marriage is*.

Evidently, it is very important that Christian Parliamentarians learn what precedents there are for what the Government is asking them to do in this Bill, and whether there are any exact precedents.

The briefing began with a reminder that the churches have taught throughout the Christian era that those with political authority have received that authority from God. The question which the proposal to introduce same-sex marriage poses to Christian legislators is the following.

- *If there is not a decisive case in justice for voting for this proposal, on what grounds could it be right to vote in way that directly contradicts Christian doctrine?*
- *Putting this substantively, the churches teach that marriage is a 'gift of God in creation', a social institution with a given shape. On what basis, under God, could Christian legislators have the authority to change marriage away from that shape?*

It is regrettable that it appears that this legislation presents, perhaps in an unprecedented form, a contradiction between what Christian legislators may do and what the government of the day is asking them to do.

An alternative

In public debate provoked by the Government's proposal, there is a growing number of voices proposing, as an alternative, the introduction of a legal status that is equally for same-sex and other-sex couples, but which does not claim to be 'marriage'. Such a legal category could be named 'civil union', as some have suggested. While this might, in Christian perspective, be a second best, it does not have the problem which the Government's proposal has of a direct contradiction between Christian teaching and the law.

This briefing has not been written to examine this alternative proposal, so doesn't comment on it further. For discussion of possible ways forward along those lines, see, among other sources, articles by Jonathan Chaplin and Andrew Goddard at the KLICE website.²⁵

6. Why it is legitimate for Christian Parliamentarians to take into account their Christian convictions in deciding how to vote on this issue

While this is a fundamentally important question, the briefing addresses it last so that it is not a distraction from the issue of same-sex marriage itself.

One very influential strand of current liberal political thought, associated especially with the philosopher John Rawls, holds that it is both unnecessary and unreasonable for people to appeal to religious or other deep philosophical convictions in public, political discussion. Rather, political deliberation that is sufficient to enable us to agree on what we need to agree on in order to live together justly can be *neutral* in relation to the many deeply different religious and philosophical views that exist in liberal, pluralist societies. Rawls's particular argument for this view is articulated rigorously and powerfully. This is not the place to expound it.

This position can be called *neutralist liberalism* and it is very influential especially in English-speaking Western societies. The effect of this influence is that some religious people think they indeed should not appeal to religious reasons for their political positions.

However, there is one fundamental problem with neutralist liberalism. It says: even though we disagree deeply on pretty much everything, it so happens that we agree on what matters for politics. This is an optimistic, even utopian, position. But, in fact, many of the issues which we (in pluralist societies) *both* disagree on politically *and* have to make political decisions about are *not* capable of resolution on the basis of such a 'neutral' discourse. This is because our differences on them are inherently connected with our deep religious and philosophical convictions. Our differences 'go all the way down'.

As soon as we start thinking clearly about why people disagree on major controversies in political debate, it quickly becomes obvious that the differences are inseparable from different philosophical and religious convictions. Consider:

- What is the relationship between human beings and non-human nature – and what responsibilities do we have for non-human creatures?

- When does human personhood begin?
- On what basis should the law determine what people may wear in public (pyjamas, bikinis, burkas, anything at all)?
- Is it generally best that children are brought up by their own parents and, if so, what follows for public policy?
- Should economic rewards for work be distributed on the basis only of individual contribution to a collective goal, or also - or instead - on the basis of the reward that each worker can receive from participation in a common endeavour in itself?
- What is marriage?
- What should be included in a school curriculum?

This list could go on. Rawlsian 'neutralist' discourse simply cannot begin to address such issues in a way that, in highly pluralist societies, can lead even to procedurally fair outcomes.

Rather, the kind of political deliberation that such societies need has to be entirely welcoming of contributions that are made on the basis of people's deep, religious and philosophical convictions. Of course, such contributions need to be made carefully, respectfully, and in terms of reasoned argument (even when appealing, for example, to what participants believe are revealed sources of knowledge). What is needed is a *difficult conversation* among participants who know they disagree deeply.

Some critics of neutralist liberalism have called the kind of democratic debate this describes '*strong democracy*'.

The issue of what marriage is very clearly illustrates the problem here. The reasons people disagree on this are inherently connected with their wider visions of what is true about the world and, therefore, of how what can be called 'marriage' fits coherently into these.

This is why, in the current debate, people who take a 'traditional' view of marriage and others who take a 'voluntarist' view of marriage need to be completely upfront about why they hold the view they do and to argue for it, carefully and respectfully, drawing on the deep philosophical and/or religious reasons for why they hold it.

This is what is at stake in the debate about same-sex marriage.

Is our democracy *strong* enough actually to have the necessary, difficult conversation about what marriage is?

It follows from this that, in the kind of pluralist society that Britain is in the twenty-first century, it is not only *acceptable* but also *very necessary* for people to bring into political deliberation their deep religious and philosophical convictions.

Given this, Christian Parliamentarians may, without any qualms at all, bring their Christian convictions into the current debate about marriage and argue on the basis of them for what justice requires the law relating to marriage to be. They just need to do so intelligently, and also respectfully, patiently, generously, wisely and with self-control, and so on – that is, in a way characterised by the fruit of the Holy Spirit.

Endnotes

¹ This briefing has been written in close consultation with Jonathan Chaplin and Andrew Goddard, respectively Director and Associate Director of KLICE. It is commended by KLICE but the views expressed in it are not necessarily those of KLICE or of the Director or Associate Director.

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² The URLs are: <http://www.churchofengland.org/media/1657614/ssmarriagebillbriefing.pdf> and <http://www.catholic-ew.org.uk/Home/Featured/Speak-Out-For-Marriage/Marriage-Bill-Briefing>.

³ The 'lack of normal democratic and governmental processes' refers to: no party manifesto commitments to legislate on this issue, and therefore no pre-election debate about it; no enquiry into the issues (such as led to the Wolfendon Report or the recent Dilnot Report) before the formal governmental process starts; no Green Paper; no White Paper.

⁴ The translation given here is slightly adapted from that in the New American Bible. This translation is used because it is, helpfully, more literally faithful to the Hebrew than most others. This is especially because it translates the two Hebrew words for 'justice' that come in both vv. 1 and 2, *mishpat* and *tzedakah*, as 'judgment' and 'justice'. This is accurate because *mishpat* refers primarily to the concrete act of giving just judgment in court and *tzedakah* to justice in a more general sense, justice that judgment in court helps to generate. Many translations give, respectively, 'justice' and 'righteousness', for these Hebrew words, but the first doesn't capture the way that *mishpat* refers to concrete acts of doing justice, while 'righteousness' tends to evoke a personal quality of moral uprightness which means the social dimension of the Hebrew is lost. The single adaption from the NAB is this: in v. 3, 'wellbeing' replaces the NAB's 'their bounty' as the translation of *shalom*. The text below comments on the meaning of *shalom*.

⁵ Church of England, *Common Worship, 'The Marriage Service'*, Preface.

⁶ See *inter alia*: Canons of the Church of England, canon B30; *Catechism of the Catholic Church*, #1603ff; Methodist Church in Britain, Standing Orders.

⁷ In the Orthodox churches, the blessing of the priest conducting the marriage ceremony is also necessary to constitute the marriage.

⁸ Code of Canon Law, canon 1055, par. 1, quoted in *Catechism of the Catholic Church*, #1601

⁹ St Augustine of Hippo was influential in describing these two goods, and he also spoke of a third, the 'sacramental good' by which marriage is a sign of the union between Jesus Christ and the Church (see especially St. Augustine, *De bono coniugali*). In the Protestant churches, including the Church of England, marriage has not been seen formally as a sacrament. The Church of England's *Book of Common Prayer* (1662) gave a rather different third end or "cause" of marriage: "It was ordained for a remedy against sin, and to avoid fornication". The preface to the current CofE marriage service does not refer to a remedial purpose of marriage.

¹⁰ The words 'born and' are optional in the service because some couples – in fact, increasing numbers – marry after the period of life during which, if granted good health, they can bear children.

¹¹ Protestant teaching on this is on the basis of Matthew 5:32 and 19:9, the 'Matthean exception'. Its effects on law included that both English and Scottish law had begun by the late 1600s to permit divorce, for some people, on the ground of adultery. Until 1923 the law operated unequally for women and men: adultery was a *sufficient* ground for obtaining a divorce for men only.

¹² Nick Clegg, at Nottingham Trent University, 13 Sep. 2012, accessed 29 Jan. 2013 at <http://www.thisisnottingham.co.uk/s-question-time-Nick-Clegg-drops-meet-public/story-16902285-detail/story.html>

¹³ The Bill will make these two changes, although it is not self-evident that either of them is, in principle, a necessary condition of making that main change.

¹⁴ *Marriage (Same Sex Couples) Bill*, Schedule 4, 3(2)

¹⁵ *Marriage (Same Sex Couples) Bill*, Schedule 4, 4(3)

¹⁶ Theoretically these differences could be removed *either* by providing that the law recognizes same-sex relationships with other partners as adultery and making consummation a prerequisite of marriage (which would of course require a change in what consummation means), *or* by removing adultery and consummation from legal provisions for what constitutes marriage of other-sex partners. It is not impossible that the substantive differences between what marriage will be for other-sex and same-sex partners will lead to legal challenges by same-sex spouses that legislation discriminates against them by, for example, specifying that adultery is a sufficient ground for divorce.

¹⁷ Cf. "At root, the meaning of marriage is socially, not legally, defined. When a couple decide to get married, they do not start negotiating the clauses of an open-ended contract. Rather, they assume that there is a pre-existing and familiar type of relationship they are about to enter... This is what we mean by saying that marriage is a *social institution*", Julian Rivers, 'Redefining marriage – the case for caution', *Cambridge Papers* 21.3 (September 2012), p. 2 (italics original), online at www.jubileecentre.org/resources/redefining_marriage_the_case_for_caution.

¹⁸ Andrew Goddard, 'Reframing the Same-Sex Marriage Debate', *Ethics in Brief*, 18.4 (KLICE, 2013) accessible at: <http://klice.co.uk/index.php/resources/ethics-in-brief>

¹⁹ An example of a negative assessment of homosexual inclinations (as well as relationships), is in the description of the former as "objectively disordered" (*Catechism of the Catholic Church*, #2358).

²⁰ An example of an argument that Christian teaching should see same-sex partnerships as closely analogous to marriage is Jeffrey John, *'Permanent, Faithful, Stable': Christian Same-Sex Marriage* London: DLT, revised ed., 2012. The previous edition of this book (2000) had the subtitle *Christian Same-Sex Partnerships*, and, surprisingly, the new edition doesn't add a substantive argument for the applicability of the label 'marriage'.

²¹ An example of such a line of argument is found in James Alison, *Faith Beyond Resentment: Fragments Catholic and Gay* (DLT, 2001), pp. 100-103.

²² To the extent that there are minor discrepancies between the rights in law of civil partners and married people, it should be possible to remove these – if they are open to legal remedy – by minor legislation intending to do this.

²³ As these three syllogisms are formulated in the text, they assume that marriage is a 'good', something that benefits people. This would of course be challenged by some. But it is not by advocates of same-sex marriage; on the contrary, they tend to emphasise very strongly what a good thing marriage is.

²⁴ Archbishop Rowan Williams, lecture to the World Council of Churches in Geneva, 28th February, 2012, accessible (30 Jan. 2013) at:

<http://www.archbishopofcanterbury.org/articles.php/2370/human-rights-and-religious-faith>

²⁵ See Jonathan Chaplin, 'A Time to Marry – Twice', *Ethics in Brief*, 18.2, Autumn 2012, online at www.klice.co.uk/index.php/resources/ethics-in-brief, and Andrew Goddard, 'Reframing the Same-Sex Marriage Debate', cited above.