

## Reframing The Same-Sex Marriage Debate

Andrew Goddard

*In addition to opposing the government's flawed proposals to allow same-sex couples to marry, Christians need to see these derive from more fundamental differences in understandings of marriage. We therefore have to consider the place of such different views in British society and the respective roles of religion, the state, wider society and marriage law in this new situation.*

The government's response to its consultation on 'equal civil marriage' has reignited the debate about marriage in British law and society.<sup>1</sup> This debate will continue for some time and Christians need to engage it constructively. Unfortunately, it risks being framed simplistically in terms of whether or not to 'open up' marriage to same-sex couples. This can lead to polarised argument focussed around homosexuality rather than enabling serious corporate ethical deliberation about marriage and its relationship to the state, religion, law and society.

### **The government's case**

At the heart of the government's case for the proposed reform are three claims. First, the history of marriage is one of 'continuous evolution'.<sup>2</sup> Second, this is understood in terms of a widening inclusion, whereby marriage changes with society to become 'available to an increasingly broad range of people'.<sup>3</sup> Third, marriage is underpinned by 'the principles of long-term commitment and responsibility'<sup>4</sup> and defined as 'two people who love each other making a formal commitment to each other'.<sup>5</sup>

Framed thus the case for same-sex marriage seems irrefutable. In contemporary society there are many same-sex couples who love each other, wish to make a formal commitment to each other and are able and determined to shape their relationship on the principles of long-term commitment and responsibility. Their exclusion from marriage is therefore an anachronistic and unjustifiable inequality: 'the state recognises equal rights in all aspects of civil life and cannot justify preventing people from marrying unless there are extremely good reasons for doing so – being gay or lesbian is simply not one of them'.<sup>6</sup> From such a perspective opponents appear driven by resistance to social evolution, rejection of equality, and hostility to gay and lesbian people. These attitudes, the government concedes, have to be tolerated, even given legal protection if they derive from religious belief, but they cannot prevent secular law reform.

### **Reframing the issue – two views of marriage**

This framing of the debate fails to do justice to the complex realities relating to marriage. Marriage has indeed changed socially and legally and further changes are conceivable but the government's interpretation is highly contentious. It fails, for instance, to recognise the strong influence of Christian understandings of marriage, the nature of humanity and the common good. It does not acknowledge how an emphasis on the 'otherness' of male and female has profoundly formed Western society and shaped marriage law. In particular, the government's definition of marriage is relatively novel. It will be seen by many – particularly most religious traditions – as highly reductionist or 'thin', offering an inadequate characterisation of both the social and legal reality. If implemented it would give legal, state-sponsored authorisation to what Girgis, Anderson and George, in their important work, *What is Marriage?*, label a 'revisionist' view – 'a vision of marriage as, in essence, a loving emotional bond, one distinguished by its intensity'.<sup>7</sup> In contrast, the traditional view of marriage is a 'thick' one, which Girgis et al label a 'conjugal' view. This view 'has long informed the law – along with the literature, art, philosophy, religion and social practice – of our civilization' and is 'a vision of marriage as a bodily as well as an

emotional and spiritual bond'.<sup>8</sup> Its focus on the body also makes it concerned with the 'otherness' of male and female presupposed in procreation.

If a constructive way is to be found through current conflicts the problems raised by these divergent understandings of marriage and whether and how they can gain legal recognition need to be addressed. What follows offers a short summary of this 'thicker' view of marriage, highlighting why it has been held by Christians. It is then shown that, despite the 'thin' rhetoric, the government's proposals remain strongly influenced by this 'thicker' view, leading to incoherence. Finally, the issue of how to relate different visions of marriage to the respective roles of religion, society and the state is explored.

### **The 'thicker' Christian vision of marriage**

The government's definition of marriage reduces it to the important but insufficient elements of mutual love and formal public commitment. It omits four key inter-connected features central to Christian understandings and often present in other faiths. The widespread recognition of these features across space and time in culture and law, including by many not aligned with a religious tradition, arises, Christians believe, because they are inherent in human nature and part of God's good ordering of creation. Respecting them enables human individuals and communities to flourish which provides supporting evidence for non-theological arguments that can be widely seen as plausible.<sup>9</sup>

First, marriage establishes a new social unit based on the union of two individuals who together embody the fundamental created distinction or 'otherness' within humanity – being male and female (Genesis 1.27, 2.24). This inherently opposite-sex character of marriage is of foundational significance but needs to be related to other features of marriage also embedded in marriage law.

Second, marriage is expressed and embodied in a physical, sexual union. This union of those who are 'other' is also the natural, biologically-given means of human reproduction. Husband and wife each commit to give themselves to one other in this way. Non-consummation, whether through inability or wilful refusal, is therefore a ground on which a marriage is voidable. Within Christian thinking the importance of sexual union in marriage is seen in Paul's remarkably egalitarian teaching in 1 Corinthians 7 about what spouses owe each other.

Third, in marriage, husband and wife each commit to give themselves physically to each other in this way exclusively for life. Sexual union with another person

of the opposite sex is 'adultery' which is a specific ground for divorce in statute law.

Fourth, among the wider social goods that result from giving recognition to such structured commitments in marriage is the trans-generational good of establishing a legally-recognised and socially-supported context for both the procreation of children and their continued nurture and healthy development to adulthood in a community based on 'otherness': a man and a woman who are their biological parents and committed to each other.

### **The government's hybrid proposals and their incoherence**

The government's proposals appear simply to extend marriage to same-sex couples on the basis of equality. Within the 'thin' view of marriage this rights the 'injustice' that marriage is one of few remaining areas of legal discrimination against lesbian and gay people. The detailed proposals, however, are flawed on their own terms:

- they fail to carry through the logic of equality
- they maintain elements of the 'thick' view from existing marriage law, introducing incoherence and further undermining equality

The most obvious failure to carry through the logic of equality relates to civil partnerships and marriage. Since 2005 civil partnerships offer same-sex couples a recognised legal structure – with the same legal status as marriage – for what the government defines as the essence of marriage: 'two people who love each other making a formal commitment to each other'.<sup>10</sup> The complaint is that this lacks the history and symbolic status associated with 'marriage'. However, if 'marriage' is re-defined in this 'thin' manner then it is not essentially different from civil partnership. This is implicitly acknowledged by proposing that civil partners should be able to convert their partnership to marriage with no further ceremony (despite civil partnerships lacking any formal vows) and that this would not be the ending of one legal relationship and the start of another.<sup>11</sup>

The 'inequality' arises because the government is not creating 'civil partnerships' for opposite-sex couples, despite strong support for this development. If 'equality' entails opening marriage to same-sex couples it also entails opening civil partnership to opposite-sex couples. To rephrase the Foreword quoted above, the state recognises equal rights in all aspects of civil life and cannot justify preventing people from forming civil partnerships unless there are extremely good reasons for doing so – being straight is simply not one of them.

Other difficulties become obvious in relation to

transsexuals seeking recognition in a new gender. Currently couples must end any existing marriage or civil partnership before a partner gains recognition in a new gender. They can then re-establish the relationship in the legal form fitting their new gender. Under the proposals a civil partnership could automatically become a marriage and a marriage could stay a marriage. Nevertheless, a basic inequality remains. For example, civil partners who do not wish to be married post-transition have to dissolve their civil partnership and lose legal recognition. The fundamental problem stems from enabling legal recognition in a new gender while rejecting equal patterns of legal recognition for same-sex and opposite-sex couples.

Other inequalities arise in relation to adultery and consummation. The government proposes to uphold existing heterosexual definitions.<sup>12</sup> Only a heterosexual affair therefore counts as adultery and a distinct ground for divorce. Someone who is sexually unfaithful to their same-sex spouse with another person of the same sex has not committed adultery. It is unclear how this affirms the integrity, exclusivity and equality of a same-sex marriage. In addition, the concept of non-consummation will remain in marriage law but only applies to heterosexual marriages – ‘we are proposing to create an exception for same-sex couples’.<sup>13</sup> Once again, equality is abandoned and ‘marriage’ is different for a same-sex relationship.

The pursuit of equality has thus overturned the heterosexual definition of marriage but has neither abolished nor reconfigured these essentially heterosexual elements. New ‘inequalities’ will therefore also arise in marriage law due to maintaining elements of the ‘thick’ understanding of marriage which stress the importance of physical otherness and sexual union and not just mutual love and commitment.

### **The churches and marriage law reform – what ways forward?**

The problems described above provide further support for the view that the easiest and best solution would be to abandon the proposals and maintain the ‘thick’ understanding of marriage. Civil partnerships would continue to have equal standing in law but as a same-sex union distinct from marriage. From the ‘thin’ perspective on marriage this will, however, be an ‘equal but different’ situation. Even if successfully defended in 2013, such a ‘thick’ view will remain under constant attack. There needs, therefore, to be recognition of the different deeper views and consideration of the new and fundamental questions arising from the breakdown in consensus about the central social institution of marriage.

In relation to the law, as a society we need to ask what the concerns of legislation should be in relation to committed relationships. The current proposals speak of establishing marriage as a formal, recognised long-term commitment between two people who love each other, open equally to same-sex and opposite-sex couples. But, in addition to the problems noted above, the secular case has not yet been clearly made as to why the state needs to provide such recognition. Indeed there are strong critics of privileging such relationships in a secular, liberal state.<sup>14</sup>

Christians also need to ask about the second-best alternatives in law if a democratic state is unwilling to continue recognising marriage in the form instituted by God. Could alternative legal forms be created to serve the common good and protect the weak and vulnerable?

The respective roles of religious and civil authorities is one flashpoint of different views of marriage. The traditional agreement and partnership between religious bodies and secular government and law in relation to marriage is now unravelling. When focussed simply on ‘same-sex marriage’ this has been understood in terms of competing rights and the need to protect ‘religious freedom’.<sup>15</sup> The original plan was ‘equal civil marriage’ with same-sex religious marriage banned. The new proposals speak of ‘equal marriage’ and seek to protect religious groups from having to marry same-sex couples but permit them to do so if they ‘opt in’. This fails to address the more fundamental difficulty of contradictory definitions and unhelpfully presents religious bodies as demanding a right to limit full marriage equality.

A more radical but more consistent and creative solution would be to acknowledge that deeper incompatible views of ‘marriage’ now exist and will persist in British culture. Given this, should we consider seeking new terminology in law and separating state legal registration of unions from their religious celebration and solemnization? The state could then embrace a consistently ‘thin’ gender-blind understanding in secular law, following through the logic of equality by offering a single category of ‘civil union’ or, perhaps, ‘domestic partnership’. This could establish the legal rights and duties currently contained in a civil partnership and would be aimed at protecting vulnerable parties, notably children when present, from unjust treatment. This change would remove the now highly-contested language of ‘marriage’ from legislation and so end political and legal disputation over state definition. Different religious communities could then order their common life within civil society according to their own ‘thicker’ definitions. Different

definitions of 'marriage' in society could then have equal standing with none of them legally privileged and so schools, marriage courses and others need not worry about having to adhere to the state definition of marriage.

From a Christian viewpoint this would be a second-best solution and it raises many other questions. It would, however, be consistent with the Christian claim that 'marriage' is a created social institution not defined by the state. Faced with a state no longer recognising this God-given reality, the church and others would be free to bear witness to marriage without having to compete with the state, risk legal challenge or negotiate the terms on which they can act as the state's agents in its administration and regulation of unions.

## Conclusion

The coming debates risk triggering a culture war focussed on same-sex marriage. Christians can step back and address the wider and deeper questions noted above. These arise from the diversifying patterns of marital and quasi-marital relationships in our society and the changing role of law in supporting and protecting such pair-bonds. In addition to defending marriage we need to learn how to live peaceably and seek the welfare of a society with different understandings of 'marriage'. Whatever happens to current proposals, we probably need to prepare to rethink the respective roles of statute law and religious communities in the social celebration, recognition and definition of 'marriage' in our religiously plural, post-Christendom context.

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1. HM Government, *Equal Marriage: The Government's Response*, December 2012, linked online from <http://www.homeoffice.gov.uk/publications/about-us/consultations/equal-civil-marriage/>
  2. *Ibid.*, Ministerial Foreword and 2.3.
  3. *Ibid.*, Ministerial Foreword.
  4. *Ibid.*
  5. *Ibid.*, 3.1.
  6. *Ibid.*, Ministerial Foreword.
  7. Sherif Girgis, Ryan T. Anderson and Robert P. George, *What is Marriage? Man and Woman: A Defense* (Encounter Books, 2012), p. 1.
  8. *Ibid.*
  9. See, e.g., Julian Rivers, 'Redefining marriage – the case for caution', *Cambridge Papers* 21.3 (September 2012).
  10. HM Government, *Equal Marriage: The Government's Response*, 3.1.
  11. *Ibid.*, Chpt 6.
  12. *Ibid.*, 9.8-11.
  13. *Ibid.*, 9.10.
  14. Most recently and fully see Elizabeth Brake, *Minimizing Marriage: Marriage, Morality and the Law* (OUP USA, 2012).
  15. On 'religious freedom' and the problem of appeals to it see my 'Civil Partnerships, Religion and the State', *Ethics in Brief*, 16. 5, Spring 2011.

## For further reading:

- Sherif Girgis, Ryan T. Anderson and Robert P. George, *What is Marriage? Man and Woman: A Defense* (Encounter Books, 2012).
- Julian Rivers, 'Redefining marriage – the case for caution', *Cambridge Papers* 21.3 (September 2012), online at [www.jubilee-centre.org/resources/redefining\\_marriage\\_the\\_case\\_for\\_caution](http://www.jubilee-centre.org/resources/redefining_marriage_the_case_for_caution)
- 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](http://www.klice.co.uk/index.php/resources/ethics-in-brief)
- Jonathan Chaplin, 'Can the State 'redefine' Social Institutions?' (2012) online at [www.fulcrum-anglican.org.uk/714](http://www.fulcrum-anglican.org.uk/714)
- Andrew Goddard, 'Should we redefine marriage? (2012) online at [www.fulcrum-anglican.org.uk/708](http://www.fulcrum-anglican.org.uk/708)
- John Milbank, 'Gay Marriage and the Future of Human Sexuality' (2012) online at [www.abc.net.au/religion/articles/2012/03/13/3452229.htm](http://www.abc.net.au/religion/articles/2012/03/13/3452229.htm)

**Andrew Goddard** is the Associate Director of the Kirby Laing Institute for Christian Ethics and is researching and writing a book on marriage and sexual ethics. His book *Rowan Williams: His Legacy* has just been published by Lion.