

**Submission on “Homosexual marriage”**

**Universal ethics and law**

**by the Institute for Judaism and Civilization**

prepared by

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**Universal ethics and positive law**

Civilization recognizes that societies enact laws through their Parliaments, make laws through judicial interpretation and that Governments also issue administrative ordinances, a form of law. All of these laws made by particular societies in particular circumstances are called “positive law”, law which has been set or “posited” by societies at different times. Naturally this law varies from society to society, and within societies over time. At the same time, the trajectory of civilization over millennia, in which religion has been the most salient feature of historical life to the present, has transmitted certain universal values, called by the great commentator on English law, William Blackstone, “laws of G-d”.

Thus while marriage is a civil contract, which could theoretically cover all kinds of relationships, it has been limited by universal values, to exclude certain relationships. One of these is incest, another is that of homosexual partners. These restrictions are based on a Divine template with which the human spirit or soul has resonated, generation after generation, for thousands of years. Universal ethics do not shape all laws, but in the words of the former Chief Justice of the High Court of Australia, the Hon Murray Gleeson, they “inform the content and the practical application of positive law” (Murray Gleeson, “Ideals

of a Justice System”, published by the Institute for Judaism and Civilization, 2011). In the case of the contract of marriage, universal ethics have prohibited certain, including homosexual, relationships.

### **Universal ethics and “rights”**

Universal ethics similarly arbitrate what shall be called a “right”. There is no right – by virtue of a claimed right of “equality of love” - to marry one’s sibling. Where rights exist – such as to vote – they cannot necessarily be extended to further groups. There is a right to vote, but that is not extended to children or to non-citizens. In general the existence of a right or an extension of its application has to be warranted by underlying values. The Hon Murray Gleeson also noted in this regard:

“To describe something as a ‘right’ may itself require justification. It is a commonplace feature of political and legal debate that advocates of various interests seek to characterise those interests as rights, thereby staking a claim for weight or recognition that may be contestable. By calling an interest a right, you may trump another interest. If there is a contest, then, again, it can only be resolved rationally (as distinct from resolution by power or weight of numbers) by reference to some value.” “Rights and values”, speech delivered by Chief Justice Murray Gleeson to the Melbourne Catholic Lawyers Association on 18 June 2004.

A “right” such as the “equality of love” or “equality of marriage” by definition would include incestuous marriages. As such, it is clearly a false formula, as (most) of the proponents of homosexual marriage would agree in opposing incestuous marriage. Universal ethics transmitted from the root of the world religions states that homosexual marriage is a prohibited value. It is accordingly, like incest, not a “right”.

## **The source of the challenge to universal ethics in relation to marriage**

The openness and receptivity to universal ethics clearly comes from the religious traditions of humanity. Much of the movement to introduce homosexual marriage comes from a movement which is indifferent or hostile to religion and its proponents, which it denounces as the “religious right”. This is notwithstanding that the fact many Labor (“left”) proponents of social justice have been religious persons, opposed to homosexual marriage. This was the term used by the former Premier of Queensland when she spoke in the Queensland Parliament for the Civil Unions Legislation, which was passed during her office. She also quoted the former Justice Michael Kirby as saying ‘Fortunate is a human being, straight or gay, who has such lifelong love. Evil are those who would deny such love to a fellow human being’. The word “evil” is a very strong expression to apply to the world religions and to the experience of humanity over thousands of years, which has stated that a homosexual union should not be enshrined in marriage.

The source of this attitude is one which rejects both the spiritual dimension within the person and the world religions, and which wants personal physical and emotional gratification as a primary and pervasive principle, with minimal restriction. Yet even the former Deputy Premier of Queensland in introducing that legislation noted that it would not apply to “prohibited” relationships, by which he meant incestuous ones. He did not mention that origin of that prohibition is religious. Those religious groups which *have* supported homosexual marriage are typically non-orthodox branches from the world religions: they do not believe in an eternal law (a universal ethics) given by an eternal Creator.

## **Heterosexual marriage and human identity**

### **The union of man and woman and the ability to propagate**

The teaching of the universal ethics at the root of the great world religions is that marriage expresses the unique complementarity of man and woman. It is this complementary union alone, and not any other union, which is appropriate to marriage. In practical terms their complementarity is expressed in their unique ability to reproduce and propagate humanity. In the union of man and woman, with its procreative potential, the human being has an enduring identity.

In this teaching, the human being becomes an entire person through acquiring this complementary relationship of union with a member of the opposite sex in a committed relationship. This is the “whole” person. The union of two men or two women, or of a person and an animal, does not in itself have the ability to propagate at all, or in the case of an incestuous couple, to produce strong and resilient offspring. The generic inability to propagate shows that these kinds of union miss the Divine point intended in the union of marriage, as follows.

### **Human identity through propagation**

The Bible states that “a man shall leave his father and mother and cleave to his wife and become one flesh”. This is explained to mean that man and woman become “one flesh” in the person of their offspring. Two people have become “one”. This, which is possible only with a man and a woman, means that aside from expressing their union with one another, they achieve their union outwardly through having children and creating a family. A person

gains an “extension” and a “projection” through his or her children: in heterosexual marriage, the person has not only his or her past (and origin) but also a future, in children.

Just as the parents identify their union in their child, so reciprocally, the child identifies itself significantly as the offspring of its parents. Not only do having a mother and a father supply essential formative and complementary supports for the child, but the child is sustained and nourished by the knowledge that *these* individual people are his or parents. He turns to them, seeks to learn from them and find strength in them.

The attempt to “replicate” the child-parent relationship for homosexual couples through artificial reproductive technologies with donor gametes and surrogacy, essentially deprives the child of his or her own identity as one born and raised as the biological offspring of certain parents. Accordingly, the homosexual union does not achieve essential identity for the members of that union, since they are not a union which can become “one flesh” in offspring. It also deprives the offspring, “produced” for them through IVF, donor gametes and surrogacy, of their (the offspring’s) essential identity, to grow up in a knowing relationship with their biological parents.

### **The kinds of propagation**

The union of man and woman consists of a set of obligations to each other, but also of obligations to their offspring. The parents are obligated in the personal care of their children and their maintenance. This can mean practical concepts such as inheritance as well as ongoing provision. But it also means an education and a spiritual transmission of values. Thus, the child is a material, economic and spiritual extension of its parents. He or she

carries their identity forward in each of these dimensions. But the strength of this nurture – the child’s existence as an extension, with its own free personality, of its parents, depends on the nature of the bond between the parents which produced this offspring.

One of the essential features of marriage is associated with the fact that it *identifies* biological offspring and provides for their care. In the words of the Hon Murray Gleeson

The institution of marriage was not devised to cater for sex, but for the consequences of the procreative potential of sex. Specifically, it was a means of obliging males to take responsibility for their offspring. The family unit was considered the optimal environment for the care and nurture of children. If society is to sever, formally, the relationship between procreation and marriage, why should it retain the institution at all? (“Ideals of a justice system”)

A marriage relationship identifies unequivocally the paternity of the offspring, and provides automatically for their care. It is here that we come to the question of different kinds of “marriage” or union.

### **Forms of “marriage”**

#### **The “de facto” union**

De facto relationships are in fact a form of marriage, or what has been called “common law marriages”, even though they were not formally contracted (nor formally dissolved). The very fact of mutual designation of man and woman in a stable relationship of cohabitation, creates this status according to the decision of a society to grant it this status (very likely because of its increasing prevalence in recent history) and the statistical decline of formal marriage. Thus, in Australia, contemporary law recognizes the mutual obligations generated by a de facto relationship and these have been formalized by recent legislation. It touches property division upon breakup and provision for children amongst other matters. At the

same time the intent and stability of this relationship – for the purpose of determining such obligations - needs *proof*, and that proof can only be established in the courts. So for example, such a couple has to have be shown to have lived together for a minimum of two years and so forth. When recent legislation re-crafted the law of de facto unions placing upon it many of the features and obligations of marriage, it applied it also to homosexual couples. Inasmuch as this is a form, albeit, the least formal, of marriage, universal ethics would not see a marriage-like de facto union as applying to a homosexual union. Rather the appropriate model there is that of an interdependent household, such as that of a carer and the person cared for, or two siblings who set up a home together. The sexual basis of the relationship is not relevant. A relationship of household interdependence needs to be contracted.

### **Civil unions and registered relationships**

Civil unions and registered relationships are different from de facto unions. They are in fact *de jure* (legal), that is to say they are formally contracted and need also to be formally dissolved. The difference between them is that a registered relationship is registration of a de facto relationship, whilst a civil union involves some kind of ceremony which establishes the relationship. Registering a *de facto* relationship means that its existence does not have to be proved in court should matters come to a division of property upon breakup. Though these do not have the full strength of marriage, they are essentially *declarative*: they state a relationship between the partners and affirm a relationship to the children.

What is interesting about “civil” unions is the term “civil” itself. They are not marriage and so they are not *consecrated* relationships. However, the concept of “civil” as something

which is outside the realm of the consecrated – the heightened symbolic or the holy – will not help to free such relationships from the standards of universal ethics. This all the more so than lesser level of de facto unions to which law has given the status of marriage. This is because marriage, in any of its forms, is never a purely civil matter. The sexual union central to marriage in all its forms, is not just an interpersonal. Sexuality is also in the traditional domain of a relationship between the person and G-d. It has to do with personal identity before G-d, namely what one “is” in terms of the essential union into which one merges, and what one becomes through this in terms of one’s G-d-given purpose. Consent does not sanction incest or any sexual relationship, because it is also a relationship to G-d. Consequently by this reasoning homosexual civil unions are not permissible for this is also a marriage based on a sexual union.

### **Marriage**

Marriage, even more than registered relationships and civil union, is a strong union, in that it requires no proofs of cohabitation, no other declarations or affirmations. Marriage automatically confers obligations between spouses and establishes the prima facie paternity of children, their entitlement to maintenance and inheritance. Marriage is the strongest and most comprehensive statement of obligations and commitment to a union, that exists, even if it is only marginally stronger than a registered relationship or civil union.

The most significant feature of marriage however is its public symbolism. It possesses for the more secular person a special legitimacy and for the religious, it is consecrative of the union. It commits to spouse and endows all future offspring with complete identity with



their parents, and the fullest parental responsibility for them. "Marriage", even though it can be performed by secular celebrants, has a strong relationship to religion.

Even though homosexuals under present law could have all the benefits of marriage through a registered relationship, or where it is available, a civil union, there is a push for homosexual marriage. The significance of "homosexual marriage" is that homosexuals want public endorsement of homosexuality or that it attain a status of "sanctity". For the religious traditions, this is particularly objectionable. It seeks to publicize and "sanctify" that which G-d has in fact prohibited. That is why even those who would be prepared to accept, however mistakenly, civil unions for homosexuals yet bridle at the idea of homosexual marriage, for the reason that it constitutes an open defiance of universal ethics, and the law of G-d.

To take the further step now of instituting homosexual marriage, would constitute a deep affront to the biblical traditions and universal ethics which underpin society and civilization. For this reason it should be opposed.