The High Court, Democracy and Same Sex Marriage

Barry Maley

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Introduction

It is becoming clear that the issues surrounding same sex marriage are more important and more complex than its proponents have suggested. There is, for example, a serious question about protecting the right to speak out against it; and although this freedom has already been put at risk for religious opponents, there are also secular opponents who wish to preserve marriage as it has been traditionally understood and who expect to be able to canvass arguments without being charged with unacceptable 'discrimination'.

There is no question that the issue is important and should be thoroughly explored. That can only be done in a context of free speech and keen argument. It is also appropriate that the *process* towards resolving the question should be politically, legally and democratically impeccable. One danger is undue haste. The Coalition has said that it wants to see a plebiscite held on the issue before the end of this year; while the Labor party would reject a plebiscite and move promptly to legislative implementation. There is strong pressure from other sources promoting a rush to judgment and speedy implementation of same sex marriage. Our concern here is to secure the integrity of due process. This has several aspects. One of them is the subject of the discussion that follows.

In the sporadic debate that has taken place so far, it is quite extraordinary how little attention has been paid — outside legal and political circles — to a crucial finding by the High Court of Australia in 2013 on the meaning of 'marriage' in the Constitution. An analysis of the High Court's arguments and findings will comprise a large part of this report because they will shape aspects of the process.

The ACT Marriage Equality (Same Sex) Act and the federal Marriage Act

In 2013 the Legislative Assembly of the Australian Capital Territory enacted a *Marriage Equality (Same Sex) Act* 2013 that sought to legalise same sex marriage in the ACT. In doing so it was believed by its authors that such legislation could be argued to be compatible with the federal *Marriage Act* 1961, which, following an amendment to it in 2004, defines marriage as: *"The union of a man and a woman to the exclusion of all others, voluntarily entered into for life"*. This amendment was intended to make explicit the common law understanding of the nature of marriage that was simply taken for granted as the meaning of the single word, 'marriage', that appears (without definition) in the Constitution.

Federal legislation, such as the *Marriage Act* 1961, is constitutionally understood as excluding the states and territories from legislating in a fashion that is incompatible with federal legislation on the same subject. The issue of the compatibility of the Australian Capital Territory *Marriage Equality (Same Sex) Act* 2013 with the federal *Marriage Act* 1961 came before the High Court for determination in December 2013.

After hearing arguments put before the High Court by the interested parties, the six justices of the court sitting on the case found unanimously that the ACT *Marriage Equality (Same Sex) Act* was incompatible with the federal *Marriage Act* 1961, of no effect, and therefore null and void. This, it seemed, settled the matter, and that was that. However, the High Court, having decided the fate of the ACT *Act*, and having therefore dealt completely with what had been brought before the court for determination, nevertheless decided to pursue discussion and argument on the nature of marriage under Australian law. This initiative might, arguably, be seen to constitute '*obiter dicta*', or what the Oxford English Dictionary defines as: "An expression of opinion on a matter of law, given by a judge in court, but not essential in his decision, and not of binding authority"[1].

‘Marriage’ in the Australian Constitution

If one goes to Part V of the Constitution, *Powers of the Parliament,* Section 51 reads: “The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to ...” and then a long list of sub-sections follows, dealing with the ‘heads of power’ under which the Commonwealth Parliament is entitled to legislate in detail.

It has been said that our Constitution is largely a ‘functional’ document establishing an institutional architecture to achieve a number of national purposes in a large variety of fields and those purposes are named and listed in the sub-sections of Section 51. Sub-section (i), for example, deals with ‘Trade and Commerce’; sub-section (ii) with ‘Taxation”, and so on to the end of the list.

The powers of the Commonwealth Parliament in respect of marriage are dealt with in two sub-sections:

- Sub-section (xxi) comprising the single word ‘Marriage’; and
- Sub-section (xxii) reading “Divorce and matrimonial causes, and in relation thereto, parental rights, and the custody and guardianship of infants.”

These two sub-sections signify the subject matter of the marriage powers, but not the potential scope of the Commonwealth’s marriage and family legislation, where scope means those details of actual legislation — such as the content of the *Marriage Act* 1961 — that are compatible with advancing the functions and purposes intended by the words and meaning of the sub-sections. We can infer that the marriage powers are intended to contribute to ‘peace order, and good government’ through the established institutions of marriage and family devoted to male-female bonding — valuable in itself — and oriented especially to family formation, the increase of the population through sexual intercourse, an enduring union promising care of children to maturity, and the creation of a unique form of productive cooperation by the parties of the union.

As noted, the Constitution, adopted in 1900, does not attempt to define ‘marriage’. Nor, for example, does it define ‘trade’ or ‘taxation’. We, and our legislators, are to assume their commonly understood meanings in law and among the public when the Constitution was

written in 1900, and democratically accepted overwhelmingly by the people of Australia at that time.

'Marriage' then, and still at this time of writing, could be nothing other than "the union of a man and a woman to the exclusion of all others voluntarily entered into for life" as currently defined in the *Marriage Act* 1961.

What follows is a putative interpretation, or understanding, of the intentions of the Constitution in respect of 'Marriage' and how those intentions are realised.

Constitutional legislative scope is provided in sub-section (xxii); for dealing with variations in circumstances affecting the terms of the ongoing marriage union. The core characteristic of 'marriage' in sub-section (xxi) is a voluntary and enduring heterosexual bonding, creating a singular entity that is immutable until death or dissolution; but otherwise subject to mutable rules (indicated in sub-section (xxii), affecting the conduct, rights and obligations of the parties to the union (husband and wife), during the marriage and at separation.

In sum, the Constitution's meaning and intentions, as expressed in sub-sections (xxi) and (xxii), are to secure two things:

1. The common law understanding of marriage as essentially and always (in Australia) a voluntary and exclusive, life-time heterosexual union or bonding (sub-section (xxi); and
2. In sub-section (xxii): to make provision for the law to adjust the rights, privileges and obligations of the *relationships* between the parties of the union.

As social or economic circumstances — or public expectations of marital conduct — change, the Parliament is empowered, through sub-section (xxii) to respond and vary the *conditions* under which the relationships of husband and wife are pursued within the marriage union. We have seen, for example, the introduction in 1975 of no-fault divorce, together with evolving rules concerning custody of children, spousal and child maintenance, and pre-marital financial agreements. Some of these changes implicitly acknowledge the heterosexual nature of the parties to the marriage, and this remains unchanged because that is the Constitution's intention.

So, a vital issue in this discussion, and in the High Court's ruminations, is to determine what is permanent and what may be variable in the Constitution's conception of the composition of the marriage union as a distinct entity, on one hand, and the consummation of the relationships within that union established by law that may differentially affect the conduct and interests of the parties composing the union (husband and wife), on the other hand. Or, to use the terms adopted in the High Court's arguments discussed below: what is 'mutable' and what is 'immutable' in a correct understanding of the constitutional nature of marriage in Australia

The above interpretation of the meaning of 'marriage', and the suggested understanding of sub-sections (xxi) and (xxii) in the constitution, is consistent with important observations on the meaning of 'marriage' in the Constitution in an article by distinguished lawyers Professor Patrick Parkinson and Professor Nicholas Aroney reviewing the High Court's 2013 decision**.** They point out:

> "One of the most fundamental principles of constitutional interpretation is that the words of the Constitution are to be understood by reference to their meaning when enacted in 1900. Closely accompanying this principle, however, is the proposition that a distinction needs to be drawn between the meaning the words had in 1900 and the application of those words to changing circumstances. The High Court has often used the philosophical terms 'connotation' and 'denotation' to draw this distinction. The connotation is the definition or the essence of the concept referred to, whereas the denotation is the class or object of things which at any time are designated by a word. The point was put clearly by Windeyer J in the *Professional Engineers* case in 1959:
>
> "We must not, in interpreting the Constitution, restrict the denotation of its terms to the things denoted in 1900. The denotation of terms becomes enlarged as new things falling within their connotation come into existence or become known. But in the interpretation of the Constitution the connotation or connotations of its

> words should become constant. We are not to give words a meaning different from any meaning they could have borne in 1900. Law is to be accommodated to changing facts. It is not to be changed as language changes"[2].

The principles of 'connotation' and 'denotation' defined by Parkinson and Aroney, and Windeyer, support what has been argued here as the conception of marriage. That is, essentially a heterosexual and immutable union being the 'connotation', and subsumed by the word 'marriage' in sub-section (xxi) on one hand; and on the other hand, the mutable adjustments to the marriage relationship previously described in relation to sub-section (xxii) that could be seen as constituting 'denotations' — delivering additions and variations to the terms of the relationships between the parties composing the union (husband and wife) as deemed necessary by the Parliament.

It may also be noted, in passing, that the Constitution's sub-section (xxii) references to 'parental' rights and 'infants' are only understandable as features attendant to a heterosexual union.

On the grounds outlined by Windeyer, if 'marriage' in 1900 was properly to be understood as a 'constant connotation' signifying an exclusive, voluntary heterosexual union for life, that is still its meaning today.

The background in law of such an understanding is summarised by Parkinson and Aroney as follows:

"The traditional definition, that marriage is the voluntary union of a man and a woman for life to the exclusion of all others, is derived from the classic definition of Sir James Wilde (who later became Lord Penzance) in *Hyde v Hyde and Woodmansee* (1866). There are four elements to that definition. A marriage must be: (1) a voluntary union; (2) for life; (3) of one man and one woman; and (4) to the exclusion of all others.

Hyde v Hyde and Woodmansee was a decision on the construction of a statute which conferred jurisdiction on the court for Divorce and Matrimonial Causes in England to grant a divorce. It had no necessary bearing on the meaning of marriage for the purposes of the Commonwealth Constitution. Nevertheless, it was what marriage had meant in English and Australian law in 1900."[3]

The High Court's Definition of 'Marriage'

In its judgment of December, 2013, the High Court of Australia concluded:

"Marriage is to be understood in s.51(xxi) of the Constitution as referring to a consensual union formed between natural persons in accordance with legally prescribed requirements which is not only a union the law recognises as intended to endure and be terminable only in accordance with law but also a union to which the law accords a status affecting and defining mutual rights and obligations"[4].

And: "When used in s.51(xxi), "marriage" is a term which includes a marriage of persons of the same sex."[5]

These extraordinary conclusions, the way in which they were reached, and their implications will be discussed below. But it is the court's findings that now allow the Commonwealth to legislate the introduction of same sex marriage and other forms of marriage (it could include polygamy, for example, if it so chose).

In effect, a major change in the nation's Constitution has taken place without any democratic endorsement or rejection by the people of Australia. This is simply unacceptable. It cannot be remedied by a plebiscite, no matter what its outcome if held.

Key Elements of The High Court's Proceedings

The unexpected and unusual decision of the High Court to extend inquiry by exploring the scope of the marriage power in the Constitution has provoked strong criticism in legal circles. Apart from the possibility that such an initiative could arguably be seen as *obiter dicta*, proceeding as the Court did would be unjustified "if both the *Constitution* and the *Marriage Act* defined marriage exclusively as unions of people of the opposite sex and the Commonwealth law covered the field of 'marriage'," [6] in the opinion of Anne Twomey, Professor of Constitutional Law at the University of Sydney.

This is consistent with the similar conclusion, quoted earlier,[7] by Parkinson and Aroney on the meaning of 'marriage' in the Constitution. The quoted articles by them and by Professor Twomey deserve wider attention for their cogent and highly critical assessments of the High Court's mode of argument and its conclusions.

Twomey makes another pertinent observation on the departure by the present High Court from established past practice of the Court:

"As is well known, the High Court has consistently refrained from declaring the full scope of a head of legislative power, as this would involve going beyond the matters at issue in the case before it. It would also involve the court in adjudicating on questions that affect the interests of others who have not been represented in the proceedings and were therefore unable to present arguments for the court's consideration."[8]

Apart from the legal point at the beginning, these remarks draw attention to the absence from the High Court, when crucial issues were unexpectedly raised, of those persons and interests that might otherwise have challenged the direction and arguments of the court. Same sex marriage is a question of vital concern to many community interests that were given no hint of what was eventually to take place. In addition to the judges, the only interests represented legally were the Commonwealth, the Australian Capital Territory, and Australian Marriage Equality as *amicus curiae*. As Professor Twomey later remarks:

"No one appeared before the court to present any contrary view"[9]

Parkinson and Aroney make a similar point:

"Notwithstanding that the decision was unanimous, it is at least arguable that the court failed to adhere to the standards of legal reasoning and process that it justifiably expects of lower courts. If a lower court were to make a decision of such importance without the benefit of a contradictor, and without properly reviewing the considered dicta contained in previous High Court judgments for and against the position in dispute, one might expect the High Court to be very critical"[10].

It would seem, then, that there is a legitimate concern with the absence of 'due process' and attention to precedents in the determination of the High Court's judgment. There is more to be said on that score.

Paragraph 7 of the transcript of the High Court's judgment begins the rationalisation of the decision to go beyond dealing solely with the ACT *Same Sex Act* with the words:

"This Court must decide whether s.51(xxi) permits the federal Parliament to make a law with respect to same sex marriage... ." After further discussion, the court observes in Paragraph 14:

"The utility of adopting or applying a single all-embracing theory of constitutional interpretation has been denied [source indicated in citation]. This case does not require examination of those theories or the resolution of any conflict, real or supposed, between them. The determinative question in this case is whether s.51(xxi) is to be construed as referring only to the particular legal status of "marriage" which could be formed at the time of federation (having the legal content which it had according to English law at that time) or as using the word "marriage" in the sense of a "topic of juristic classification" [source indicated in citation]. For the reasons that follow the latter construction should be adopted. Debates cast in terms like "originalism" or "original intent" (evidently intended to stand in opposition to "contemporary meaning") [source indicated] with their echoes of very different debates in other jurisdictions are not to the point and serve to obscure much more than they illuminate."[11]

So, with 'original intent' dismissed as an appropriate route to interpretation, the broad vista opened up by marriage considered as a 'topic of juristic classification' beckons, and is chosen. In an observation by Twomey, this decision by the court entails attributing authority, in the process of interpretation of terms in the Constitution, "to the scope of marriage in other countries."[12]

In other words, it is claimed by the court that consideration of forms of marriage recognised in other countries may legitimately be employed in determining what constitutes 'marriage' in Australia.

Also, within the rubric of "topics of juristic classification", the Court repeatedly, in its discussion of s51(xxi), attributes to 'marriage' in that subsection a capacity for variability that is properly within the province of s51(xxii). The interpretive significance of having two sections in the Constitution with separate understandings is effectively ignored and their separate intentions and functions are constantly elided in ways that impede clarity and original intention.

The consequence is that the core of 'marriage' as immutably a heterosexual union in sub-section (xxi) becomes entangled as a subject of the Court's 'mutabilities' that could be legitimate in respect only of s51(xxii), the purpose of which is to provide for legislative variations of marriage that affect only the rights and obligations, etc., governing the terms of the *relationships* established within the *union* of a man and a woman. As concluded earlier, if s.51(xxi) is properly interpreted as immutably a 'connotation' comprising an exclusive, voluntary and enduring heterosexual union, neither sub-section (xxi) or sub-section (xxii) could accommodate same sex marriage

The outcome of the court's mode of argument is to shred the traditional understanding of marriage not only in the law but in popular belief. In addition, it allows marital practices in other countries to influence the course of marriage law in this country.

And later, Twomey notes:

"As same sex marriage has not been recognised yet in a majority of countries, it would appear that this topic of juristic classification can be affected by the laws of a minority of countries and as the High Court understandably is no longer prepared to draw distinctions between countries, such as 'Christian countries' and others, then the potential is opened for laws of even the most oppressive of countries to affect a topic of juristic classification in Australia. Moreover, as noted above, it seems that some aspects of the constitutional meaning of marriage can be changed by reference to laws in other countries (such as polygamy and same sex marriage) but that other aspects, such as the consensual nature of marriage and the intention that it endure, remain immutable and unaffected by foreign law. No explanation was given as to why this was so, leaving this new method of constitutional interpretation shrouded in uncertainty."[13]

Doubtful Decisions and a Democratic Deficit

The observations by distinguished lawyers quoted above give grounds for grave misgivings about the High Court's proceedings. They make a number of disturbing points:

1. The exploration in detail of the 'heads of power' at issue went beyond the accepted principles of constitutional interpretation.
2 .The proceedings went ahead in the absence of any contradictor(s).
3. The mode of inquiry and determination of an interpretation in terms of 'topics of juristic classification' is flawed and creates a precedent of dangerous scope and uncertainty. It opens the door to using various forms of marriage in other countries and jurisdictions as possible sources of change in Australian marriage law.
4. The scope of the inquiry went beyond deciding the case (compatibility of the ACT *Marriage Equality (Same Sex) Act* 2013 with the *Marriage Act* 1961) requiring determination.

What has been presented here represents a damning criticism of the High Court's mode of argument and its findings on the nature and definition of 'marriage' in the Constitution. If that criticism is accepted, the only conclusion is that the High Court has made a mistake of constitutional stature that demands a remedy. As things now stand, the High Court has used its position to radically dismantle a definition of marriage of long standing in the common law, an understanding that was then lodged 116 years ago in our Constitution, and then legislatively expressed and re-affirmed by the federal Parliament only 12 years ago in an amendment to the *Marriage Act* 1961.

It is extraordinary that such a process has led to this, with six judges of the High Court unanimous in their finding.

One cannot help being reminded of an element of similarity in all of this with the decision by the Supreme Court of the United States in 2015, when five of the nine judges of that court found

that the American Constitution allowed the legality of same sex marriage. The other four judges disagreed, and among their dissenting comments they said this:

"Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing the issue from the people will for many cast a cloud over same sex marriage, making a dramatic social change that much more difficult to accept."

There is constitutional similarity here in the absence, in both cases, of democratic process in the overturning of an understanding of the meaning of marriage by the people of both countries. A profound constitutional change has been wrought legally, but undemocratically.

It was said at the beginning of this paper that the process in dealing with the issue of same sex marriage should be politically, legally and democratically impeccable. That has not been the case so far.

Enough has been said here on the legal aspects of the matter. The outcome has been the finessing of due process that diminishes the Constitution and its role as a bulwark of long-term social stability and predictability. We have not seen the best of legal argument and decision on a subject of outstanding importance. We have an outcome, therefore, which has been justly criticised.

The politics, in the form of political leadership, public debate, timing, and access to the public forum for all points of view, has been seriously deficient. The leaders of the political parties have settled and published their views long ago and have shown undue haste in moving towards the approval and establishment of same sex marriage. Public debate for those opposed to its introduction has been made difficult in the face of anti-discrimination law. Attempts to publish views in some media have been stymied and individuals and organisations intimidated. Free speech, in short, is being smothered.

A disturbing development has been the branding of commentators, who may believe that heterosexual marriage should be sustained, as necessarily 'homophobic' and filled with hatred.[14] It is inconceivable to such accusers that an individual may have no animus whatsoever to gay men and women and yet see marriage as essentially a heterosexual privilege capable of being defended for good reasons. It is even quite possible that a large proportion of the

population feels that way. If so, the democratic solution to such a dilemma is civil debate and the best way to do that is vigorous discussion prior to a national referendum. Regrettably, Bill Shorten, as leader of the Labor Party, has taken a dim view of his Australian fellow-citizens in denouncing the democratic route to a solution as a "taxpayer-funded platform for homophobia."[15] Does he believe that this applies to the citizens of Ireland who took the democratic referendum route to approving same sex marriage?

The Labor party has also used the expense of a plebiscite as a reason for going straight to legislation. Yet they are happy to fund a *referendum* on Aboriginal recognition. Why not, then, save money and hold a joint referendum on a matter of at least as great moment, and include same sex marriage?

The present trend, however, is that we are in danger of losing the fullness of democratic voice in a matter where it is imperative. The Labor party wanted to legislate on the matter within 100 days if it won government. The Coalition proposed holding a plebiscite before the end of this year followed by legislation, if it so chose. Yet there is evidence, unsurprisingly, that the Australian people are aware that they are being plunged into a hasty and inadequate treatment of a matter that is important to them.

According to a survey published in *The Australian* newspaper 70% of those surveyed answered 'yes' to the question of whether the Australian people, rather than the politicians, should decide "Whether people of the same sex should be able to get married." The article outlined: "Voters overwhelmingly want a direct say on issues such as gay marriage and to not leave the decision to politicians."[16]

It is possible that many citizens may believe a plebiscite will *determine* the issue, rather than simply indicate the state of public opinion through a majority finding one way or the other, while leaving a legislative option to the politicians. Such a course is democratically flawed in dealing with a matter of constitutional stature.

Only a referendum, with its constitutional legitimacy and authority, and an opportunity for well-informed and sober reflection, can deliver the fair method, and a solution, befitting a federal democracy. We have the opinion of six judges; let us have the determining opinion of millions of Australian adults.

Endnotes

1 *The Shorter Oxford English Dictionary*, Oxford at the Clarendon Press, Third Edition, 1968, p. 1349

2 Parkinson, Patrick and Nicholas Aroney, "The territory of marriage: Constitutional law, marriage law and family policy in the ACT same sex marriage case", Australian Journal of Family Law, 2014, 28 AJFL No. 2, p.3

3 End note ii at p.3

4 The High Court of Australia, *The Commonwealth v Australian Capital Territory*,[2013] HCA 55, *12 December 2013*, C13/2013, at paragraph 33

5 End note 4, at paragraph 38

6 Twomey, Anne, "Same-Sex Marriage and Constitutional Interpretation" , Australian Law Journal, (2014) 88 ALJ 613, p.2

7 End note 2, at p.4

8 End note 6, at p.1

9 End note 6, at p.1

10 End note 2, at p.2

11 End note 4, at paragraphs 7 and 14

12 End note 6, at p.3

13 End note 6, at p.4

14 "Same-sex plebiscite will give 'haters a chance to make life harder: Shorten', *The Sydney Morning Herald*, June 18-19, 2016, p.9

15 "Plebiscite branded a 'homophobia platform", *The Australian*, 20/6/2016, p.1

16 "Gay marriage for voter to decide", *The Australian*, 16/6/2016

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The High Court in 2013 overturned the understanding of marriage in the Marriage Act 1961 as an exclusive, voluntary, heterosexual union for life, and that the Constitution therefore allowed the introduction of same sex marriage if the Parliament so decided. It is argued that the High Court's decision was incorrect. In effect, the Constitution has been altered in a regrettable and undemocratic way, and this should be remedied by holding a national referendum. A plebiscite to test public opinion, promised by the Coalition parties, does not allow the people of Australia to have a determining say on the matter. Only a referendum can achieve that, and the publication so recommends.

Barry Maley is a Senior Fellow at The Centre for Independent Studies. His research primarily focuses on social policy with particular attention to family and taxation. Other areas of interest include cultural change, the British and Continental Enlightenment of the eighteenth century, the scope and limits of government, ethics, and civil society. He is a former Senior Lecturer in Behavioural Sciences, University of New South Wales. While he was teaching at UNSW, Barry contributed a chapter titled 'The Entrepreneurial Spirit' to The Entrepreneur in Society (CIS, 1983). Since then, he has written numerous books and policy monographs, including Family & Marriage in Australia (2001), Divorce Law and the Future of Marriage (2003), and Family on the Edge (2009).

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