The Constitutional underpinnings of the Commonwealth Same Sex Marriage legislation

This note addresses the ambit of s.51(xxi) of the Commonwealth Constitution, which was relied upon as a head of power to support the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).[1]

In 2004, the Howard Government amended the *Marriage Act 1961* (Cth)[2] by introducing a definition that marriage (previously undefined) was a "union of a man and a woman to the exclusion of all others".[3]

On 22 October 2013, the Australian Capital Territory passed the *Marriage Equality (Same Sex) Act 2013* (ACT)[4]. The purpose of the legislation was to legalise same sex marriage in the ACT.[5]

The Commonwealth immediately challenged the validity of the *ACT Act*. A writ of summons was issued on 23 October 2013 seeking a declaration that the Act was of no effect or, alternatively, void.

The *ACT Act* came into force on 7 November 2013. Argument took place in the High Court on 3 December 2013, and the matter was decided nine days later in *The Commonwealth v Australian Capital Territory* [2013] HCA 55; (2013) 250 CLR 441.[6]

The principal question before the Court was whether the *Marriage Act* as supplemented by the *Family Law Act 1975* (Cth) provided for a uniform law throughout Australia establishing the sole and exclusive means by which the status of marriage could be conferred.

There was no question that the Legislative Assembly of the ACT had the necessary power to pass the *ACT Act*.[7] However, the Commonwealth contended that the *ACT Act* was of "no effect" by reason of the operation of the *Self-Government Act* or, alternatively, void under the doctrine of repugnancy.[8]

---

[1] "*Same Sex Marriage Act*".

[2] "*Marriage Act*".

[3] Another amendment provided that foreign same-sex marriages would not be recognised in Australia. Concomitant amendments to the *Family Law Act 1975* (Cth) prevented same-sex couples adopting children under trans-national adoption arrangements.

[4] "*ACT Act*".

[5] The long title described the legislation as "An Act to provide for marriage equality by allowing for marriage between 2 adults of the same sex, and for other purposes".

[6] "*Commonwealth v ACT*".

[7] Section 22 of the *Australian Capital Territory (Self-Government) Act* (Cth) ("*Self-Government Act*") provides that the Legislative Assembly of the ACT has power to enact laws for the peace, order and good government of the Territory.

[8] Section 28(1) "A provision of an enactment has no effect to the extent that it is inconsistent with a law defined by subsection (2), but such a provision shall be taken to be consistent with such a law to the extent that it is capable of operating concurrently with that law".

Section 28 of the *Self Government Act* provides that a law of the Territory will be of "no effect" where it is incapable of concurrent operation with Commonwealth legislation. This provision operates similarly to, albeit more narrowly than, the criterion of inconsistency in section 109 of the Commonwealth Constitution.[9]

Background

In Roman antiquity, sexual relationships between citizens was made the subject of legal regulation.[10] One legal relationship recognised under Roman law, marriage, connoted a union between people of the opposite sex.[11] The definition of marriage given by Modestinus in Justinian's *Digest* was: "Marriage is the union of a man and a woman, a partnership for life involving human and divine law".[12]

Marriage in England was for centuries administered within the ecclesiastical courts. However, the validity of marriages increasingly became the subject of litigation where issues were raised over the requisite formal expression of consent. By the 18th Century, the ecclesiastical rules were significantly reformed by statute (*Lord Hardwicke's Act*).[13] For a marriage to be valid, it had to be the solemnised in a church or chapel in the presence of at least two witnesses and a minister, and recorded in a public register following the publication of banns or the purchase of a licence.

Lord Hardwicke's Act, however, was expressed not to apply "to any marriages solemnized beyond the seas" and so was not applicable to the Australian colonies.[14] Accordingly, the common law continued to regulate marriages until legislation was enacted in the various Australian colonies.[15]

By the end of the 19th Century, the Framers of the Commonwealth Constitution sought to create a uniform set of laws to regulate marriage and divorce.[16] The Framers profited greatly from the experience of the American model from which they borrowed. But it was apparent that one of the

[9] In *Northern Territory v GPAO* [1999] HCA 8; 196 CLR 553, Gleeson CJ and Gummow J stated (at [60]) that: "It will be apparent that s 28 operates not as a denial of power otherwise conferred by s 8, but as a denial of effect to a law so made "to the extent" of its inconsistency. To that extent the analogy with s 109 will be apparent. However, the criterion for inconsistency - incapacity of concurrent operation - is narrower than that which applies under s 109, where the federal law evinces an intention to make exhaustive or exclusive provision upon a topic within the legislative power of the Commonwealth".

[10] Dixon, S., "From Ceremonial to Sexualities: A Survey of Scholarship on Roman Marriage" in *A Companion to Families in the Greek and Roman Worlds* (Wiley-Blackwell, 2011), p. 248.

[11] Bierkan, A., Sherman, C., & Jur., E. (1907), Marriage in Roman Law, *The Yale Law Journal, 16*(5), 303-327 at p.304 ("marriage implied the intention of the husband to have a legal wife, to raise her to his rank, to make her his equal, and the corresponding intent of the wife; this was called the *affectio maritalis*").

[12] Book 23, Title 2.1 ("*Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio*").

[13] 26 Geo II c 33 Act (1753).

[14] By section 18; Commonwealth of Australia, Annotated Submissions of the Plaintiff, Submission in Commonwealth v Australian Capital Territory, C13 of 2013, 13 November 2015 at [9]-[10].

[15] Atkinson A., 'Convicts and courtship,' in Grimshaw P., McConville C. & McEwen E. eds*, Families in Colonial Australia* (Allen & Unwin, Sydney, 1985,) p. 25.

[16] The term "marriage" in s.51(xxi) was understood to refer to "what is technically called a status, involving a complex bundle of rights, privileges, obligations, and responsibilities which are determined and annexed to it by law independent of contract": Quick J. & Garran R.R., *The Annotated Constitution of the Australian Commonwealth* (Websdale, Shoosmith & Co., Sydney, 1901) at 608.

greatest defects of the Constitution of the United States was "its inability to provide a number of contiguous and autonomous communities with uniformity of legislation on subjects of such vital and national importance as marriage and divorce".[17]

The Framers thus included a clause in the draft Constitution empowering the Commonwealth to make laws with respect to "marriage and divorce".[18] This clause eventually became sections 51(xxi) and (xxii) of the Commonwealth Constitution.

Despite the Commonwealth having the power to make the type of laws envisaged by the Framers, each State and Territory continued to regulate marriage within their respective jurisdictions for some 60 years after Federation. A person's eligibility to marry could (and did) therefore change when moving from one State to another. Of this 'system', the then Commonwealth Attorney-General, Sir Garfield Barwick, wrote:

"At present there are nine separate systems of marriage law in the States and these Territories; systems which, although possessing many features in common, display considerable diversity in principle and detail".[19]

The Marriage Act was passed in 1961. The validity of certain of its provisions was challenged and upheld by a majority of the Court.[20] The Court held that the Parliament could validly legislate to enforce monogamy as a requirement of a legal marriage and, by extension, the involvement of one man and one woman as an essential requirement of such a marriage. Clearly what the Parliament had legislated for was "Christian marriage".[21]

Kitto J in *the Marriage Act Case* rejected that view that the expressions used in the Constitution were limited by reference to the practice of legislatures prior to Federation. He was of the view the utility of historical conceptions of marriage was limited to establishing "the minimum content of a power" rather than its outside limits.[22]

Windeyer J (although in dissent) similarly rejected the notion that the expressions in the Constitutional heads of power were to be read according to the manner in which they were originally understood:

"It has been suggested that the Constitution speaks of marriage only in the form recognized by English law in 1900. The word, it is said, is to be read as defined by the famous phrase of Lord

[17] Quick J. & Garran R.R., *The Annotated Constitution of the Australian Commonwealth* (Websdale, Shoosmith & Co., Sydney, 1901) at 610.

[18] This clause was maintained in the Adelaide draft of 1897 and was approved by the Sydney Convention in the same year. The clause was divided into two parts at the Melbourne session of 1897 and the phrase "matrimonial causes" was added to the *placitum* dealing with divorce; see Sackville, R. & Howard, C., "The Constitutional Power of the Commonwealth to Regulate Family Relationships" (1970-1971) 4(1) *Federal Law Review* 30 at p.33.

[19] Barwick G., "The Commonwealth Marriage Act 1961", *Melbourne University Law Review*, vol. 3, 1961-1962, p. 277.

[20] *Attorney-General for Victoria* v. *Commonwealth* (1962) 107 CLR 529 ("*the Marriage Act Case*").

[21] *The Marriage Act Case* (1962) 107 CLR 529 at 594; and see Sackville, R. & Howard, C., "The Constitutional Power of the Commonwealth to Regulate Family Relationships" (1970-1971) 4(1) *Federal Law Review* 30 at p.48ff.

[22] *The Marriage Act Case* (1964) 110 CLR 353 at 363 (Kitto J).

Penzance in *Hyde v. Hyde* (1866) LR 1 P & D, at p 133 , "the voluntary union for life of one man and one woman, to the exclusion of all others"; and that therefore the legislative power does not extend to marriages that differ essentially from the monogamous marriage of Christianity. That seems to me an unwarranted limitation. Marriage can have a wider meaning for law".[23]

The *Marriage Act* originally did not contain a definition of "marriage".[24] A definition, consistent with the common law definition that Lord Penzance formulated in *Hyde v Hyde & Woodmansee* (1866) LR 1 P & D 120, was introduced by way of amendment in 2004.

Between the time of the 2004 amendments and the passage of the *Same Sex Marriage Act*, a number of other jurisdictions had taken steps to recognise marriage equality.[25] This was referred to by the Court in *Commonwealth v ACT*.[26]

Commonwealth v ACT (2013)

Section 51(xxi) of the Constitution gives the federal Parliament power to make laws with respect to "marriage". The *Marriage Act* relied upon this Constitutional head of power for its validity.

There was no dispute between any of the parties in *Commonwealth v ACT* that the marriage power in s.51(xxi) empowered the parliament to make laws for marriage between persons of the same sex. However, this was an issue that could not be the subject of a consent position. The Court was required to satisfy itself of the ambit of s.51(xxi) of the Constitution, and did so.[27]

The Court rejected the notion that s.51(xxi) was to be construed as referring only to the particular legal status of "marriage" which existed at the time of Federation, that is, by reference to what the common law had understood it to be at that time.

The approach taken by the Court was to construe "marriage" in the sense of a "topic of juristic classification".[28] This approach harkens back to what Higgins J said in *Attorney-General for NSW v Brewery Employees Union of NSW,* namely that it is necessary to construe the Constitution

[23] *The Marriage Act Case* (1962) 107 CLR 529 at 594-595 (Windeyer J).

[24] However, section 46 of the *Marriage Act* incorporated the substance of the definition of marriage found in *Hyde v Hyde & Woodmansee*, namely celebrants should explain the nature of the marriage with words that include: "marriage, according to law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life".

[25] *Reference re Same-Sex Marriage* [2004] 39 SCR 698 at [65]; *Obergefell v Hodges*, 579 US ___ (2015); *United States v Windsor* (2013) 570 US 12 (p 14); *Marriage (Same-Sex Couples) Act 2013* (UK).

[26] *Commonwealth v ACT* at [37].

[27] *Commonwealth v ACT* at [2] and [8]; The issue was raised directly in argument (for example as between the Bench and Senior Counsel for the *Amicus* party): *The Commonwealth of Australia v The Australian Capital Territory* [2013] HCATrans 299 (3 December 2013):

Hayne J: You assert the Commonwealth has no power to enact a law for same-sex marriage, do you?

Mr Kirk: No, no, to the contrary.

Hayne J: I thought so.

[28] *Commonwealth v ACT* at [22].

remembering that "it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be".[29]

Section 51(xxi) is therefore properly viewed as giving legislative power with respect to a status, reflective of a social institution, to which legal consequences attach and from which legal consequences follow.

The Court traced the various changes to what had, at the time of Federation, been considered by the common law to be the essence of marriage. One change in the social institution of marriage was "the voluntary union for life" element. That is, the legal rights and obligations attaching to the status of marriage which were once indissoluble could be dissolved under legislation.[30]

Another change was the law's ability to recognise other forms of marriage, such as polygamous marriages, in order to regulate such unions.[31]

Finally, the old English common law limitation of recognition of "marriages throughout Christendom"[32] had been overtaken by reforms in other legal systems which now provided for marriage between persons of the same sex.[33]

It followed that the juristic concept of "marriage" could not be confined to a union having the characteristics described in *Hyde v Hyde* and other nineteenth century cases.[34]

Conclusion

The upshot of the finding that "marriage" in s.51(xxi) was a term which includes a marriage between persons of the same sex, and that the *Marriage Act* exclusively and exhaustively regulated who may be married in Australia, was that the *ACT Act* was inconsistent with the *Marriage Act* as it purported to regulate the same juristic topic.

Notably, as an augury of things to come, the Court held that "so long as the *Marriage Act* continues to define "marriage" as it now does" (which was limited to marriage between a man and a woman) then the provisions of the *ACT Act* providing for same sex marriage were held to be inoperative.

[29] [1908] HCA 94; (1908) 6 CLR 469 at 612 ("*the Union Label Case*"); see also *McCulloch v Maryland* 17 US 316 at 407 (1819) (Marshall CJ).

[30] *Commonwealth v ACT* at [17].

[31] For example, section 6 of the *Family Law Act 1975* (Cth) provides that "*For the purpose of proceedings under this Act, a union in the nature of a marriage which is, or has at any time been, polygamous, being a union entered into in a place outside Australia, shall be deemed to be a marriage*".

[32] *Bethell v Hildyard* (1888) 38 Ch D 220 at 234.

[33] The Court referred to New Zealand, Canada and the UK: *Commonwealth v ACT* at [37], footnote 50.

[34] *Commonwealth v ACT* at [33].

Although the decision no doubt represented dashed hopes for couples who wished to solemnise their union under the *ACT Act* in 2013, the Court's decision nevertheless paved the Constitutional path for the Commonwealth parliament to legislate for the same sex marriages four years later.

T. J. Dixon

State Chambers

Date: 30 November 2018

……