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The High Court and the Meaning of 'Marriage' in Section 51(xxi) of the Constitution

Introduction

Over the past 25 years in Australia many laws affecting marriage have been instituted by the Commonwealth. However, there remains intact one major limitation, namely, that prohibiting marriage between persons of the same sex.

Same sex marriages are now recognised in the Netherlands and official recognition of the union of same sex couples is available in a number of other foreign jurisdictions and becoming more widespread.

Australia's failure to recognise the union of same sex couples is about to be raised before the United Nations in regards to an alleged case of discrimination against the partner of a deceased Second World War veteran.[1]

This Research Note details the High Court of Australia's interpretation of the term 'marriage' in s. 51 (xxi) of the Australian Constitution.

What is meant by the term 'marriage' in section 51 (xxi)?

The Commonwealth's power with respect to marriage comes from s. 51(xxi) of the Constitution. Section 51(xxi) states:

> The Parliament shall … have power to make laws for the peace, order, and good government of the Commonwealth with respect to: - Marriage.

The effect of the *Marriage Act 1961* (Cwlth) and section 109 of the Constitution is that the Commonwealth has exclusive jurisdiction over the formation of marriages in Australia (i.e. there is no room for States to legislate).

The descriptions of the term 'marriage' used in the *Family Law Act 1975* (Cwlth) (s. 43(a)) and the *Marriage Act 1961* (ss. 46(1) and 69(2)) are based on the definition in the 19th century English case of *Hyde v. Hyde and Woodmansee*,[2] namely, a formal, monogamous and heterosexual union for life.

While the High Court of Australia has interpreted the scope of the s. 51 (xxi) on numerous occasions, it has not given any detailed consideration on the meaning of the term 'marriage'. Set out below is the available High Court opinion on the term 'marriage' in s. 51 (xxi) of the Australian Constitution.

1908

In *Attorney-General for N.S.W. v. Brewery Employees' Union of N.S.W.*, Higgins J., was of the opinion that:

> Under the power to make laws with respect to 'marriage' I should say that the Parliament could prescribe what unions are to be regarded as marriages.[3]

1962

In *Attorney-General (Vic) v. Cth*, McTiernan J. was of the opinion:

> The term marriage bears its own limitations and Parliament cannot enlarge its meaning. In the context—the Constitution—the term 'marriage' should receive its full grammatical and ordinary sense: plainly in this contest it means only monogamous marriage. In my view, the term in par. (xxi) refers to marriage as a social transaction: but as the term marks the outer limits of the power conferred by par. (xxi) its meaning is not imprecise. In my view, the term cannot be extended further than to embrace uniting in marriage and the status of marriage.[4]

Windeyer J., was of the opinion that:

> It has been suggested that the Constitution speaks of marriage only in the form recognised by English Law in 1900 … 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.[5]

Windeyer J. also cited with approval the opinion of Higgins J. in *Attorney-General for N.S.W. v Brewery Employees' Union of N.S.W.*[6]

1984

In contrast, Brennan J., in *Cormick and Cormick v. Salmon* was of the opinion that:

> The scope of the marriage power conferred by sec. 51 (xxi) of the Constitution is to be determined by reference to what falls within the conception of marriage in the Constitution, not by reference to what the Parliament deems to be, or to be within, that conception.[7]

1986

Mason and Deane JJ., in *Re F.; Ex parte F.* were of the opinion that:

> Obviously, the Parliament cannot extend the ambit of its own legislative powers by purporting to give to 'marriage' an even wider meaning than that which the word bears in its constitutional context.[8]

In *Re F.; Ex parte F*, Brennan J., was of the opinion that:

> Marriage as a subject of legislative power embraces those relationships which the law … recognises as the relationships which subsist between husband, wife and the children of the marriage. Statutes enacted in purported exercise of the power cannot extend the scope of the power: only those relationships which are already embraced within the subject are amenable to regulation by a law enacted in exercise of the power.[9]

Brennan J., in *Fisher v. Fisher* was of the opinion:

> Although the nature and incidents of a legal institution would ordinarily be susceptible to change by legislation, constitutional interpretation of the marriage power would be an exercise in hopeless circularity if the Parliament could itself define the nature and incidents of marriage by laws enacted in purported pursuance of the power.
>
> The nature and incidents of the legal institution which the Constitution recognises as 'marriage' … are ascertained not by reference to laws enacted in purported pursuance of the power but by reference to the customs of our society, especially when they are reflected in the common law, which show the content of the power as it was conferred.[10]

1991

Brennan J., in *The Queen v. L* was of the opinion:

> In *Hyde v. Hyde and Woodmansee*, Lord Penzance defined marriage as 'the voluntary union for life of one man and one woman, to the exclusion of all others' and that definition has been followed in this country and by this Court.[11]

1999

McHugh J., in Re *Wakim; Ex parte McNally* was of the opinion:

> The level of abstraction for some terms of the Constitution is, however, much harder to identify than that of those set out above. Thus, in 1901 'marriage' was seen as meaning a voluntary union of life between one man and one woman to the exclusion of all others. If that level of abstraction were now accepted, it would deny the Parliament of the Commonwealth the power to legislate for same sex marriages, although arguably 'marriage' now means, or in the near future may mean, a voluntary union for life between two people to the exclusion of others.[12]

Comment

It is unclear from the judicial consideration of the term 'marriage' in section 51 (xxi) whether same sex marriage would now be given recognition through the common law or through statutory interpretation of the *Marriage Act 1961*.

Additionally, were the Commonwealth to legislate for the recognition of same sex marriage a question arises regarding its constitutional underpinning. As noted, the High Court's consideration of s. 51(xxi) leaves open whether Parliament can determine the meaning of marriage or whether the term has a fixed intrinsic meaning.

However, it may also be noted that some Commonwealth legislation has been constitutionally supported by the use of s. 51 (xxix), the external affairs power.

International treaties to which Australia is a party have become a means of supporting the constitutional validity of federal legislation outside more traditional Commonwealth fields.

It may be arguable that the Commonwealth in reliance on its international treaty obligations, would have a constitutionally valid means of legislating for same sex marriage.

Note: The 12 October decision of *Re Kevin (validity of marriage of transsexual)* which found that a post-operative female to male transsexual had validly married does not affect the current orthodoxy that a marriage has to be between members of the opposite sex.[13]

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1. http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s270857.html
2. (1866) LR 1 P. & D. 130 at p. 133.
3. (1908) 6 CLR. 469 at p. 610.
4. (1962) 107 CLR 529 at p. 549.
5. (1962) 107 CLR 529 at pp. 576–577.
6. (1908) 6 CLR 469 at p. 610.
7. (1984) 156 CLR 170 at p. 182.
8. (1986) 161 CLR 376 at p. 389.
9. (1986) 161 CLR 376 at p. 399.
10. (1986) 161 CLR 376 at pp. 455–456.
11. (1991) 174 CLR 379 at p. 392.
12. (1999) 198 CLR 511 at p. 553.
13. [2001] FamCA 1074.

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