BEYOND JURISTIC CLASSIFICATION: THE HIGH COURT'S DECISION IN *COMMONWEALTH V AUSTRALIAN CAPITAL TERRITORY (SAME-SEX MARRIAGE CASE)*[1]

CHRISTOPHER JAMES DOWSON*

I INTRODUCTION

The High Court of Australia delivered its decision on the legality of the Australian Capital Territory's *Marriage Equality (Same Sex) Act 2013* (the ACT Law) on 12 December 2013. In a unanimous and brief judgment, the full bench stated that the ACT Law was inconsistent with the *Marriage Act 1961* (Cth) (the Federal Law). The High Court stated that due to the comprehensive nature of the Federal Law, there was no way in which the ACT Law could be consistent with the Federal Law and so was of no effect. Importantly, the High Court explicitly discussed the meaning of marriage as one of 'juristic classification' and that the meaning of marriage at the time of Federation was not relevant to the case before it. In doing so, the High Court has opened the way for the Federal government to potentially widen its powers under s 51(xxi) of the Australian Constitution and use it to legislate for the marriage of same-sex couples as well as heterosexual couples.

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* Christopher Dowson is a postgraduate student currently doing a Master of Arts degree at the University of Western Australia. He holds an LLB/BA(Hons) degree from the same university and has experience working for a national commercial law firm as well as in local barristers' chambers in Perth.

1 [2013] HCA 55.

II FACTUAL BACKGROUND AND HISTORY OF PROCEEDINGS

The ACT parliament passed the ACT law on 22 October 2013 becoming effective on 7 November 2013, by a vote of 9-8 in the Legislative Assembly. The Prime Minister, Tony Abbott, had sought legal advice on 11 September 2013 concerning the legislation and its operation with respect to the Federal Law. On 22 October 2013 the Commonwealth sought a hearing before the High Court and after a directions hearing on 4 November 2013, French CJ scheduled hearings on 3 and 4 December 2013 before the Full Bench. The key point in the Commonwealth's submissions was that the ACT law recently enacted was inconsistent with the Federal Law and the *Family Law Act 1975* (Cth). The Commonwealth argued that it was not open for any other legislature to purport to clothe with the legal status of marriage (or a form of marriage) a union of persons, 'whether mimicking or modifying any of those essential requirements of marriage, or to purport to deal with causes arising from any such union'.[2] The ACT's submissions countered by arguing that the Commonwealth 'had not exhausted its legislative power with respect to either recognising or prohibiting same-sex marriage'.[3] Both parties, as well as Australian Marriage Equality (as amicus curiae) all submitted that the federal Parliament had legislative power to provide for marriage between persons of the same sex.

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[2] Commonwealth of Australia, 'Annotated Submissions of the Plaintiff', Submission in *Commonwealth v Australian Capital Territory*, C13 of 2013, 13 November 2013, 5.4.3.

[3] Australian Capital Territory, 'Annotated Submissions of the Australian Capital Territory', Submission in *Commonwealth v Australian Capital Territory*, C13 of 2013, 13 November 2013, 6(d).

A *The Statutory Framework*

The ACT law specified under s. 7 that two people of the same sex could marry subject to certain provisos, such as each person being required to be an adult and not already married. Under the dictionary of the ACT law appended to the end of the act, the definition of 'marriage' was worded identically to s 5(1) of the Federal Law with the obvious change, i.e. that it was the union of two people of the same sex to the exclusion of all others, voluntarily entered into for life; but did not include a marriage within the meaning of the Federal Law. The Federal Law (s 5(1)) was amended in 2004 to limit the definition of 'marriage' under the act to read: "Marriage" means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.[4] The ACT argued in its submissions that the Federal Law was enacted to create uniform Australian laws with respect to marriage as defined under the amended s 5(1), however that did not exclude the ACT from enacting laws for the recognition of same-sex marriage.[5] The Commonwealth argued that the clear objective intention of the Federal Law was that under the Federal Law there should be 'one form of union that shall be recognised as a marriage under law', namely the amendment as it now stands under s 5(1).

B *The High Court's Decision*

The High Court decided that the Federal Law, read as a whole, 'at least in the form in which it now stands' (an important aside from the court),[6]

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[4] *Marriage Act* 1961 (Cth) s 5.

[5] Australian Capital Territory, 'Annotated Submissions of the Australian Capital Territory', Submission in *Commonwealth v Australian Capital* Territory, C1 3 of 2013, 13 November 2013, 6(g).

[6] As will be discussed below, the High Court uses this case to shift the onus back on the legislature to deal with the statutory definition of same-sex marriage.

'makes the provisions which it does about marriage as a comprehensive and exhaustive statement of the law with respect to the creation and recognition of the legal status of marriage'.[7] The court said that this was so, otherwise why was the Federal Law amended in 2004 by the introduction of a definition of marriage, 'except for the purpose of demonstrating that the federal law on marriage was to be complete and exhaustive?'[8] The court concluded that the particular provisions of the Federal Law, read in the context of the whole Act, necessarily contained the implicit negative proposition that the kind of marriage provided for by the Act was the *only* kind of marriage that may be formed or recognised in Australia. It followed that the provisions of the ACT Law which provide for marriage under that Act could not operate concurrently with the Federal Law and accordingly were inoperative.[9]

C *The High Court and the Definition of Marriage*

The difficult area of the High Court's judgment was its reluctance to indulge in any analysis of the tradition behind the definition of marriage. This reluctance led the court to follow what it called a 'juristic classification' of marriage[10] as espoused by Windeyer J in *Attorney-General (Vic) v The Commonwealth.*[11] This interpretation of the definition of marriage ignored the intent of the original framers of the Australian constitution, as the court stated:

> …'What, then, is the nature of this institution as understood in Christendom?' The answer to that question cannot be the answer to

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7 *Commonwealth v Australian Capital Territory* [2013] HCA 55, [57].
8 Ibid.
9 Ibid [59].
10 Ibid [14].
11 (1962)107 CLR 529, 578.

> the question 'What is the nature of the subject matter of the marriage power in the Australian Constitution'.[12]

In this statement, the High Court removes the Western Christian tradition from the Australian Constitution, in keeping with the philosophies of figures such as Thomas Jefferson and John Locke. However, the Constitution under s 116 only explicitly mentions the prohibition on the Commonwealth making any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion. The Constitution derives its values largely from Western civilisation, particularly from British, American and Swiss models, and affirms Australia's Christian heritage in the Preamble itself, which begins:

> Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland…

The question now becomes one of originalism versus progressivism, an ongoing debate amongst Constitutional lawyers. The current High Court clearly sees marriage as a purely legal concept without any connection to Christian or Western tradition. They single-out a quote from Windeyer J to prove their point:

> The statute law of marriage may seem to be in a small compass. But it embodies the *results of a long process of social history*, it codifies

[12] *Commonwealth v Australian Capital Territory* [2013] HCA 55, [19].

> much complicated learning, it sets at rest some famous controversies.[13]

Yet no doubt their Honours would have seen Windeyer J's statement in the preceding paragraph: 'We share in the inheritance of European Christian civilisation. We derive from it a concept of marriage that is universal in all systems of law that participate in that inheritance'.[14] Indeed their Honours quote from this very paragraph when they ask what is the relevant 'topic of juristic classification' for marriage, concluding it is laws of a kind: 'generally considered, for comparative law and private international law, as being the subjects of a country's marriage laws'.[15] The court stated that the description given by Windeyer J identified the content of the relevant topic of juristic classification 'in a way which does not fix…the concept of marriage…to the state of the law at federation'.[16] This signaled a clear intent by the Court not to follow an originalist interpretation of 'marriage' under s 51(xxi) and instead follow a progressive interpretation of the Constitution as something able to adapt to changing social pressures and attitudes. Craven has argued for the central importance of progressivism as a potential constitutional methodology:

> By wielding the Constitution as a 'living force', the Court can mould its provisions so as to permit the judicial disposition of an entire range of important social and policy questions…[17]

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[13] *Commonwealth v Australian Capital Territory* [2013] HCA 55, [18], citing *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529, 579 (Windeyer J).

[14] Ibid 578.

[15] Ibid.

[16] *Commonwealth v Australian Capital Territory* [2013] HCA 55, [23].

[17] Greg Craven, 'Heresy as Orthodoxy: Were the Founders Progressivists?' (2003) 31 *Federal Law Review* 87, 88.

This inevitably invites debate as to whether or not it is the judicature's role in the first place to be shaping the Constitution according to changes in social and policy questions instead of putting such important changes to the people via referenda.[18] The apparent traditions and values upon which the Australian Constitution was framed are thus now called into question. Marriage, being a cornerstone of the Christian faith and tradition, is now rendered a topic for 'juristic classification'. The High Court noted that in other Federal laws such as the *Family Law Act 1975 (Cth)* under s 6, polygamous marriages from outside Australia are deemed to be 'marriages' for the purpose of the Act.[19] Their Honours concluded that from such an example, it becomes evident that the juristic concept of 'marriage' cannot be confined 'to a union having the characteristics described in…nineteenth century cases'.[20] Instead their Honours attempted to define marriage:

> …[T]o be understood in s 51(xxi)…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.[21]

The High Court also noted the importance of global trends in the law with respect to same-sex marriage, observing that other legal systems now

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[18] See, eg, Jeffrey Goldsworthy, 'Interpreting the Constitution in its Second Century' (2000) 24 *Melbourne University Law Review* 677; Sir Anthony Mason, 'Constitutional Interpretation: Some Thoughts' (1998) 20 *Adelaide Law Review* 49; Michael Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) 24 *University of Melbourne Law Review* 1.

[19] *Commonwealth v Australian Capital Territory* [2013] HCA 55, [32]

[20] Ibid [33].

[21] Ibid.

provide for marriage between persons of the same sex.[22] Their Honours make it clear that:

> It is not useful or relevant for this Court to examine how or why this has happened. What matters is that the juristic concept of marriage (the concept to which s 51(xxi) refers) embraces such unions.[23]

The connection between the High Court's own 'juristic classification' of marriage under s 51(xxi) and the recognition of same-sex marriage in other jurisdictions overseas is unclear. Jurisdictions such as the United States of America were based on very different legal frameworks (their Bill of Rights is but one example),[24] or in the United Kingdom which lacks a formalised Constitution altogether. How relevant, then, is the explicit reference to God in the Australian Constitution's Preamble? The question of whether such a reference makes Christianity and its values relevant to the reading of the Constitution (and subsequently s 51(xxi)) as a historical document, but also a 'living force' in the evolution of society is a debate outside the scope of this case note. The High Court has clearly signaled that the powers of the Commonwealth under the Constitution are not in any way related to the values or traditions upon which the document was framed. Instead, the powers are so wide that the Federal government can legislate for 'marriage' in a new and expanded sense of a 'consensual union formed between natural persons'. It is through the choice of the Federal government of the day as to whether it restricts this power or expands it beyond the traditional definition of marriage into yet unexplored and undefined territory.

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22 *Commonwealth v Australian Capital Territory* [2013] HCA 55, [37]

23 Ibid.

24 There is also a conspicuous absence of any appeal to a God or any Christian references in the United States Constitution's Preamble.

III CONCLUSION

The High Court's recent decision in *The Commonwealth v Australian Capital Territory*[25] resulted in the invalidation of the ACT's same-sex marriage legislation which had been passed in October 2013. This has rendered the marital status of many same-sex couples that had legally married in the ACT void and has cemented the expansive powers of the Commonwealth to legislate for marriage. The High Court has now effectively resolved to leave the matter to the federal legislature. The High Court also removed the originalist conception of the definition of marriage under s 51(xxi) and has redefined it as a topic of 'juristic classification' which includes same-sex marriage. Whether this is at odds with the Western values and Christian traditions upon which the Australian Constitution was clearly framed is a broader and perhaps more compelling debate beyond the scope of the 'juristic classification' and even the legal system itself.

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[25] [2013] HCA 55.