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UNIVERSITY OF AUCKLAND LAW REVIEW

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THREE APPROACHES TO SAME SEX MARRIAGE

Within the space of two years marriage equality (or the provision of the legal status of marriage to couples of the same sex) moved in three countries (New Zealand, the United States of America and Australia) from what had been a highly resisted notion to one that was achieved in law or where the decks were cleared to make this legally possible.

This review affords a study in contrasts between the approaches taken to reform of the marriage law in three jurisdictions that share many common features. Each jurisdiction inherited the common law of England, as received in a time when each was a colonial possession of the British Crown. Long before local legislatures had begun to define the requirements and incidents of marriage, the common law had expressed the necessary features of that relationship, as the law would acknowledge it.

[*] Based on a text for an address given at the University of Auckland, on 25 September 2015.

[**] Justice of the High Court of Australia (1996-2009); Gruber Justice Prize 2010; Australian Human Rights Medal 1991; Honorary Fellow, New Zealand Legal Research Foundation 1984; Senior ANZAC Fellow, NZ Government, 1981.

In England, even before the common law intruded, marriage was defined by the canon law of the universal church according to Christian notions. These required that the marriage should be validly celebrated as a public contract acknowledged in a church (known as a celebration *in facie ecclesiae*) or by a clandestine celebration conducted by a person in priest's orders. Reflecting the Christian church's concern to regulate things sexual, a theory was developed in the 12th century which passed fully into English law (known as Peter Lombard's theory). This was that the man and woman who were parties to the marriage had to become "one flesh", i.e. taken part in penetrative sexual intercourse. These requirements of 'marriage' were formalised by the Church at the Council of Trent in 1563.[1] After the Reformation, the common law of England placed those is priest's or deacon's orders in the Church of England on the same footing as those in priest's orders of the Roman and Eastern Churches of Christianity. A battle was joined by the Church of England to secure uniform control over marriage, which was no small thing. If a marriage were invalid, those who were parties to it stood to lose property and claims to status.

It was this risk that resulted in the eventual intrusion in England of statute law. This followed the ascendency of the Church of England after the 'Glorious Revolution' of 1688.[2] The statutes enacted were eventually consolidated in Lord Hardwicke's Act of 1753.[3] However, that statute complicated things. Prior to its enactment, a Roman Catholic priest was recognised by the common law as being in priest's orders, sufficiently authorised to officiate in a marriage. By that statute, marriages of Roman Catholics and dissenting Protestants found that

[1] Earl Jowitt (Gen Ed), *The Dictionary of English Law*, Sweet & Maxwell, London 1959, 1245.
[2] 6 & 7 Will 3 c6 (1694); 7 & 8 Will 3 (1695), sec 35 and see also 10 Anne c19, s176 (1711).
[3] 26 Geo 2, sec 33 (1753).

their marriages were invalidated. Lord Hardwicke's Act conferring on the Church of England the sole right of celebrating marriages in the kingdom. This was the situation that probably then also obtained in England's settlements and colonies beyond the seas, including those which joined in the American Revolution of 1776. In England, and in the Australian and New Zealand colonies after their establishment, the validity of marriages outside the Church of England was eventually secured by Toleration Acts that removed the religious monopoly of the Church of England and extending civic rights to other religious orders recognised in lands subject to British dominion.

It was through this legal journey that religious notions (normally specifically Christian and for a long time Anglican nations) found their way into the law of marriage in British colonies and their successor jurisdictions. It was not inevitable that this should be so. In France, the Napoleonic *Civil Code*, in deference to the strong secular principle of *laicité* that followed the French Revolution, divorced the civilian notion of marriage from the religious concept of marriage as a public Christian sacrament. To this day, in most countries of the world that trace their civil law to the Napoleonic Code, marriage is exclusively a secular legal event, undertaken by the State. Religious ceremonies may follow; but as a matter of law they are inessential.

In English speaking countries, the history, briefly described, had two outcomes relevant to the subject matter of this article. First, although civil marriages became possible in a secular ceremony performed by a public official, usually conducted in a public registry building, most marriages until quite recently were conducted, in fact, in a place of religious observance. In that sense, a religious official was exceptionally

authorised by law to perform a function to which were attached important legal consequences. Secondly, and perhaps inevitably, in consequence of the participation of religious officials in an occasion effecting important legal consequences, the elements of the 'marriage' that could be celebrated under such law were themselves said by the judges to reflect those features that were regarded as necessary for the religious sacrament of marriage. Thus in the famous English decision of *Hyde v Hyde*[4] marriage was declared to be the voluntary union for life of one man and one woman to the exclusion of all others.

The public ceremony of marriage, conducted in accordance with these rules, was important for many laws. It controlled social acceptance of the lawfulness of sexual relations and the legitimacy of children. It controlled the passing of property and the status of women's property. It was reinforced in many ways, including by the criminal law of bigamy. It converted what might otherwise have been solely a contract between the parties into a matter of status, recognised by the community as important to its own legal order.[5]

In many, but not all[6] affected relationships, marriage was viewed as an essential precondition to the socially acceptable procreation of children and to their full protection by the law. Effectively, marriage upheld rules (usually derived from religious sources) governing permissible relationships between persons within defined degrees of consanguinity or affinity. Although love and affection might over time, have increasingly involved the feelings of those entering into marriage, at least in the three countries under consideration, (a feature reinforced by

[4] (1966) LR 1 P & D 130 at 133.
[5] *Niboyet v Niboyet* (1878) 4 PD 1.
[6] *Baxter v Baxter* [1948] AC 274, 286.

the early near impossibility or difficulty of procuring divorce) such emotions were not legally essential ingredients for the legal relationship as such. Consent publicly and properly declared by qualified parties of full age and capacity was sufficient. Love and affection were happy but inessential ingredients.[7]

As has been remarked recently in the context of the marriage equality debate, whether or not a couple married in England, from whence the common law notions of marriage were derived, was for centuries substantially a matter of social class.[8] As the status and property rights of women became enlarged in society and by law; as sexual mores changed and the stigmatisation of children as 'illegitimate' if born 'out of wedlock' was made unlawful; and as discrimination and hostility towards gay, lesbian, bisexual, transgender and intersex (LGBTI) citizens were reformed and discrimination forbidden, a romantic, consensual and universal notion of marriage came to be proclaimed.

Still, as I shall show, resistance to reflecting these changes was expressed mainly (but not exclusively) by those who saw marriage as a sacramental compact, basically designed to provide for the protection, safety and welfare of the children of such unions. For the opponents, often quite sincerely, the suggested 'opening up' of marriage to same sex partners was offensive, not simply because it was a challenge to what had gone before. It was also seen as undermining in some way the family unit of the heterosexual mother, father and children, which was seen as the bedrock of a normal stable and peaceful society. It was also a change viewed as dangerous to children. It afforded same-sex

[7] Alan MacFarlane, *Marriage and Love in England 1300-1840*, Blackwell, London, 1986.
[8] Kate Galloway, "Marriage and Equality: What's Love Got To Do With It?" (2015) 40 Alt LJ 235; L. Stone, *Uncertain Unions: Marriage in England 1660-1753*, OUP, Oxford, 1992.

partners, who until recently has been an 'abomination',[9] an unmerited legal and societal equivalence to traditionally married couples. This was neither justified nor required. To that extent, the change to permit the marriage of same-sex couples diminished the status of [traditional] marriage. It should not be reflected in the law that spoke for the majority of citizens and their beliefs which disapproved such a change.

FROM CIVIL UNIONS TO SAME-SEX MARRIAGE

A common feature of the law in virtually all English-speaking countries deriving their legal system from England was the inclusion of criminal offences for sexual activity between persons of the same sex. This was a feature of the laws of England that passed, without exception, into the laws of England's many settlements and colonies around the world. To this day, most of the countries of the Commonwealth of Nations, formerly colonies of the British Empire, continue to provide criminal prohibitions against same-sex activity.[10]

A recommendation by a high level group that such laws should be repealed has so far fallen on mainly deaf ears.[11] In 42 of the 54 member countries of the Commonwealth of Nations, such laws remain in place. Until quite recently, they were also a feature of countries that had ever been part of the British Empire, even where those countries did not continue membership of the Commonwealth.[12] In some countries with this historical background things have recently become worse. In

[9] Ch 20, verse 13 ("And if a man also lie with mankind, as he doth with a woman, both of them shall have committed an abomination: they shall surely be put to death…")
[10] Commonwealth Secretariat, Report of the Eminent Persons Group: *A Commonwealth of the People – Time for Urgent Reform*, (London, 2011), 100.
[11] Ibid, 102 (Rec 60).
[12] Burma (Myanmar), Republic of Ireland, United States of America and Zimbabwe.

Brunei[13] the newly proclaimed Sharia criminal laws have reintroduced the death penalty for such offences. In India, an enlightened decision of the Delhi High Court (which had held such offences to be incompatible with the Indian Constitution[14]) was reversed by a two judge Bench of the Supreme Court of India.[15] In consequence, homosexual acts were again recriminalized in India.[16] Recent adverse decisions of final courts in Singapore[17] and Malaysia[18] have apparently closed off judicial avenues of reform. In the face of statutes criminalising same-sex activity, one could scarcely begin to contemplate valid recognition of same-sex personal relations which did, or might, include sexual activity.

Although in non-English speaking countries, some of the same legal history was missing by reason of the repeal of the equivalent criminal laws in France in 1793 (a development that affected the influential Napoleonic Penal Code that followed) social attitudes to same-sex minorities were often hardly better than in English speaking countries. But at least the underpinning of prejudice by enforceable criminal laws was missing: making changes in social education and relationship recognition easier to achieve.

Two developments then appeared the changes that profoundly affected the foregoing integers. First, the highly publicised research of scientists (including Alfred Kinsey)[19] revealed the comparatively common occurrence of LGBTI minorities in the countries studied. In the result,

[13] The amendment to the law in Brunei is timed to commence in 2016.
[14] *Naz Foundation v Delhi* [2009] 4 LRC 838.
[15] *Suresh Kumar Koushal v Naz Foundation*, (2014) 1 SCC 1.
[16] See M.D. Kirby, *Sexual Orientation & Gender Identity – A New Province for Law for India* (Tagore Law Lectures, 2013) Universal, New Delhi, 2015, 3-4.
[17] *Lee Meng Suang v Attorney-General* [2013] 3 SLR 118 (CA 125/2013) and later cases.
[18] *Government of Negeri Semblam v Khamis*, unreported, Court of Appeal (Mal), October 2015.
[19] A.C. Kinsey et al, *Sexual Behaviour in the Human Male*, 1948 at 639. See W.N. Eskridge Jr and N.D. Hunter, *Sexuality, Gender and the Law* (Foundation Press, New York, 1997), 145 at 146.

increasing numbers of scientists, social and political leaders, and LGBTI people themselves, began to demand the removal of criminal and other discriminatory laws. The coincidence of similar demands for an end to legal discrimination against women, indigenous peoples and others stigmatised by reference to their race or skin colour, boosted the moves to remove the criminal sanctions against LGBTI people, at least in western and developed countries.

Secondly, reflecting changes that had occurred in sexual mores in the same countries, affected by the widespread availability of various forms of contraception, resulted in increasing numbers of heterosexual couples living together without benefit of marriage. To regulate the legal incidents of such relationships (heterosexual and otherwise) legislation was enacted in many jurisdictions in western countries both to provide property and financial protections to both parties to such relationships and to provide enforceable rights to any children of such relationships.

In Australia, the founders of the federal constitution (unlike the United States) decided to assign the power to make laws with respect to "marriage" to the Federal Parliament.[20] However, this facility left the enactment of legislation on de facto marriage relationships within the continuing constitutional authority of the State and Territory legislatures. The result has been the enactment of such laws in most Australian jurisdictions.[21] Such legislation (sometimes expressly applicable to LGBTI relationships) facilitated a new way of thinking about the relationships of, and protection for, the parties (and any children) to such arrangements. However, it did not at first, provide formal recognition for

[20] *Australian Constitution*, s 51 (xxi) and (xxii). In the United States, the legislative power is not assigned to the US Congress. It thus remains, subject to the Constitution, a matter of state legislative power.
[21] See e.g. *De Facto Relationships Act 1984* (NSW) and similar legislation in other states.

the relationship as such. Nor did it provide for a ceremony, registration or certification of the relationship or for a public occasion to mark its existence in the community.

Steps to change the foregoing situation first began in Scandinavia, with the introduction of laws to permit same-sex couples to enter into domestic partnerships or unions. Substantially, these laws occasionally built on earlier laws protecting de facto heterosexual relationships. But they added the ingredient of a formal relationship status. Such laws quickly spread to many Western European countries and to a number of jurisdictions beyond Europe: specifically a number in North America, Latin America and New Zealand.

The first country to take the step of permitting 'marriage', as such, to be entered by same-sex couples was the Netherlands. It did so by a law enacted by the legislature, stated to be for the 'opening up' of marriage to people of the same sex.[22] Such law was enacted in 2000 and came into operation in 2001. Since that move, the adoption of marriage by legislative (L) and judicial (J) decisions, in a comparatively short space of time, has been extraordinary. At the time of writing, the jurisdictions that have provided for marriage by LGBTI couples are Argentina (L); Belgium (L); Brazil (L); Canada (J); Denmark and Greenland (L); Finland (L); France (L); Iceland (L); Ireland (L following referendum); Luxemburg (L); Mexico (sub-National) (L); Netherlands (L); New Zealand (L); Norway (L); Portugal (L); Slovenia, (L, subject to reversal in a later referendum); Spain (L and J); South Africa (J); Sweden (L); United

[22] The Netherlands law for the opening up of marriage was introduced into the House of Representatives in September 2000 and passed by 109 votes to 33. On 19 December 2000 it was approved by the Senate by 49 votes to 26. It came into effect on 1 April 2001 by changing Article 1:30 of the previous marriage law to broaden the availability of marriage to include one entered into by two persons.

Kingdom (except Northern Ireland) (L); various states of the United States of America (J after L); and Uruguay (L).

The specific instances of reform and attempted reform in New Zealand, the United States and Australia are worth noticing. They illustrate the different paths to reform for marriage equality and the pitfalls that have sometimes arisen. They also give rise to certain general conclusions.

NEW ZEALAND LEGISLATIVE REFORM

The first step on the path to the recognition of the equality of LGBTI people in New Zealand to marry was, necessarily, the repeal of the provisions of the *Criminal Code.* These imposed penal sanctions on sexual activity between gay men, even if conducted between adults, with full and knowing consent and performed in private. The repeal of those laws was a tortuous story. It was ultimately achieved by the Parliament of New Zealand in Wellington in 1986, after a number of false starts.[23] Virtually to the end, the enactment of the reforms was opposed by a number of religious organisations and conservative politicians. However, over time, reform gathered support from both sides of Parliament and was finally enacted in 1986.

After the passage of the *New Zealand Bill of Rights Act* 1990 (NZ) and the *Human Rights Act* 1993 (NZ), three couples in stable long term lesbian relationships applied to the Registrar-General of Births, Deaths and Marriages for marriage licences under the *Marriage Act* 1955 (NZ).

[23] Attempts were made to amend the New Zealand laws against buggery (unnatural offences by males) in 1974, 1979 and 1980 but were not successful. In 1985 a Bill to remove provisions of the *Crimes Act 1961* (NZ) to de-criminalise homosexual conduct between males was approved on 9 July 1986 and became the *Homosexual Reform Act* 1986 (NZ). The legislation was introduced by Fran Wilde MP (Labour).

The Registrar refused to grant the licences. He did so on the ground that marriage could not take place between a same-sex couple. This was so although the word 'marriage' was not defined in the 1955 Act. The view was taken, nonetheless, that in 1955, the New Zealand Parliament had adopted a 'traditional' concept of marriage, as stated in the 1866 English judicial decision in *Hyde v Hyde*.

The decision of the Registrar-General was challenged in the High Court of New Zealand. However, the challenge was rejected by the trial judge (Kerr J).[24] An appeal was then taken to the Court of Appeal of New Zealand. In that court, the appellants relied on the fact that the *Human Rights Act* 1993 (NZ) had expressly prohibited discrimination on the grounds of sexual orientation. Whereas the *Bill of Rights Act* 1990 (NZ) had created a right to freedom from discrimination, relevantly on the grounds of sexual orientation, it also provided that interpretations of legislation consistent with the *Bill of Rights Act* were to be preferred to those that were inconsistent "where possible".

The majority of the Court of Appeal concluded that there was no discrimination evident in the refusal of marriage licences to the applicants. In his reasons, Gault J stated that to "differentiate" was not necessarily to "discriminate". Because the *Marriage Act* only envisaged a married relationship between opposite sexes, there was no discrimination in applying that statute to refuse the application of the Act to the appellants who were in some-sex relationships.

In his reasons, Keith J, referred to the state of international law. He concluded that, viewed in the international context with non-acceptance

[24] *Quilter v Attorney General* (1996) 19 FRNZ 430.

by the world community of a right to same-sex marriage, by the failure to provide for same-sex marriage, the New Zealand statute did not breach the rule against discrimination.

On the other hand Tipping J concluded that the impact of the prohibition against same-sex marriages, inherent in the *Marriage Act* did *prima face* amount to discrimination against persons on the grounds of their sexual orientation. However, he concluded that the purpose of anti-discrimination laws was to be kept in mind. Although there was no definition of 'marriage' in the 1955 statue, it was lawful to exclude same-sex relationships because they did not thereby breach the combined operations of the subsequent laws. This was because the New Zealand Parliament had reserved to itself all legislative functions. The necessary process of interpretation of legislation was "not to be used as a concealed legislative tool". He also pointed to the suggested inconsistency between certain provisions in forms under the Act referring to "husband" and "wife" under the *Marriage Act.* He concluded that these words provided a textual impediment to the gender neutral reasoning urged by the appellants.

The reasoning of Thomas J in the Court of Appeal could not have been more different from that of the other New Zealand judges.[25] He agreed with the view of the others that it was preferable that Parliament should address the issue of same-sex marriage than that it should be determined by a court. However, he concluded that this reference only begged the question in issue in the appeal. This was the operation of the 1955 Act in light of the subsequent passage of the human rights statutes. It was for the court to address and answer the submission of

[25] See *Quilter v Attorney General* [1998] 1 NZLR 523; [1998] 3 LRC 119.

the appellants that they were subject to discrimination and entitled to relief as a consequence. These were proper judicial, not legislative, questions:

> *"In this country, as in many societies throughout the world, marriage is the single most significant communal ceremony of belonging. The legal recognition it has been accorded has conferred on it a status which, apart from the symbolism of legal recognition, attracts many consequential legal benefits. To exclude from that status gays and lesbians who live in enduring and committed relationships, which can reflect all the qualities of heterosexual marriage other than procreation, is necessarily discriminatory. The exclusion is inescapably based on their sex or sexual orientation. Such a basis equally inescapably judges them less worthy of the respect, concern and consideration deriving from the fundamental concept of human dignity applying to all human rights legislation."*[26]

The only reason why Thomas J ultimately refused the relief sought by the appellants was that he concluded that the word 'marriage' (and some other words such as 'husband' and 'wife') were so well established that they could not be transferred to aid a contrary interpretation of the *Marriage Act*. At least they could not do so "without usurping Parliament's legislative supremacy".[27]

Because of the difference between the reasons of the judges (Thomas J and Tipping J both found there was discrimination against LGBTI persons), Richardson P made it clear that he agreed with the views of

[26] Ibid at 158.
[27] Ibid at 159.

the other judges, inferentially concluding that the legislation 'differentiated' but did not 'discriminate'.

At the time I first read of the decision of the New Zealand Court of Appeal in 1998, I was approaching the 30th anniversary of my own relationship with my partner, Johan van Vloten.[28] It is a mark of the narrow orientation common to the legal mind that I admit that I first thought the majority in the Court of Appeal had the better of the arguments. Could not Ted Thomas see that 'marriage' in 1955, and indeed always, had meant opposite sex marriage. If something bigger and newer were 'intended', surely that was for Parliament to provide; not a court.

Looking back now I can see that Thomas J (and to some extent Tipping J) were the only judges in the case who approached the matter as it should have been approached: as a human rights question. Of course, there was discrimination. Of course, Parliament could have corrected this. However, clearly, Parliament had failed to do so. And the courts had their own separate function, conferred on them by Parliament itself, which they had to discharge judicially. In retrospect, it is only perhaps surprising that Thomas J, having correctly found discrimination, did not allow the wind behind his judicial sails to carry him forward to the provision of relief by techniques of interpretation authorised by the *Bill of Rights Act*.

In July 2002, undeterred by the Court of Appeal's reasoning and order, a New Zealand citizen made a communication to the United Nations

[28] A.J. Brown, *Michael Kirby, Paradoxes/Principles*, Federation, Sydney 2011, 81.

Human Rights Committee.[29] By that communication it was argued that New Zealand was in breach of the *International Covenant on Civil and Political Rights* by refusing or failing to provide the facility of marriage to same-sex partners. It was contended that this was inconsistent with the decision of the UN Human Rights Committee, reached earlier in *Toonen v Australia*.[30] That decision had concluded that, by failing to reform the criminal laws against gays in Tasmania, Australia was in breach of that *Covenant*. The New Zealand communication relied on argument by analogy.[31] However, this argument did not make any more headway in Geneva than it had done in Wellington.[32] The UN Committee concluded that the state of New Zealand law did not violate the ICCPR.

It was after reaching that *impasse*, followed by the immediate failure of New Zealand Parliament to amend the *Marriage Act,* that moves were finally initiated to pursue legislative reform. On 14 May 2012, Louisa Wall MP, a member of the Labour Party, introduced in the New Zealand Parliament the *Marriage (Definition of Marriage) Amendment Bill* 2012 (NZ). It was a Private Member's Bill. It proposed amendment to the definition of marriage in the *Marriage Act* 1955 (NZ). The amendment proposed that "marriage" should be "the union of two people regardless of their sex, sexual orientation or gender identity". Its purpose was to permit same-sex couples to marry and to access all of the legal rights available to married couples, including the adoption of children. On 24 July 2012, that Bill was selected, by a ballot procedure, to permit a vote in Parliament. Both the Prime Minister of New Zealand (the Hon. John

[29] Established by the First Optional Protocol to *the International Covenant on Civil and Political Rights* (ICCPR). New Zealand had ratified the ICCP and accepted the authority of the Human Rights Committee.
[30] *Toonen v Australia* (1994) 1 *International Human Rights Reports*, 97 (Number 3); HRC number 488/1992.
[31] S. Joseph, "Gay Rights and the ICCPR – Comments on Toonen and Australia" (1994) 13 *Uni Tas LRev 392 at 405*.
[32] See e.g. *Quilter* above n.25 [1998] 3 LRC 119 at 157-8 per Thomas J. See also ibid at 164-167 per Keith J.

Key, National) and the Opposition Leader, (David Shearer, Labour) announced that they would vote in favour of the Bill at all stages. They indicated, however, that members of their respective political parties would be permitted a conscience vote.

On 29 August 2012, the Bill was approved on its first reading (80-40). On 13 March 2013, the Bill passed its second reading (77-44). On 17 April 2013, the Bill passed the third and final reading (77-44). Significantly, 27 of 59 National Party Members of Parliament (46%) voted in favour of the Bill, as did 30 of the 34 Labour Party members (89%). All of the members of minor parties, except the New Zealand First Party and independent Brendan Horan, voted for the Bill. An emotional scene in the New Zealand House of Representatives was seen worldwide. The legislative process having completed the New Zealand unicameral Parliament, the Bill received the Royal Assent of the Governor-General on 19 April 2013. The amending Act came into force on 19 August 2013. Since that time, marriage equality has been a feature of the New Zealand community.

UNITED STATES LEGISLATIVE & JUDICIAL REFORMS

The achievement of marriage equality in the United States took a course different from New Zealand. That course began with the same obstacle, presented by the inherited laws that included 'sodomy' – the so-called 'unnatural offence' which was 'not to be spoken of'. In most of the States of the United States until the 1970s the offence was severely punished, upon conviction: whatever the ages of the actors, the private place of the offence or the consent of the parties. The fact that the offence was recorded in Blackstone's *Commentaries on the Law of*

England helped to ensure that is passed seamlessly from England into American law. It did so in every colony and then in every state and territory of the Union.

Nevertheless, publicity surrounding the research of Alfred Kinsey and his successors eventually led to a movement in the United States, slow at first, for the repeal of the offences. This movement had to confront religious opposition and even security 'scares', during the Cold War decades. Homosexuals were blamed for leaking intelligence to foreign enemies when blackmailed for their 'deviance'.

In 1986, in *Bowers v Hardwicke,* a first attempt was made to secure a ruling from the Supreme Court of the United States that the constitutional right to privacy, which had earlier been held to protect "family, marriage or procreation", gave protection to adult, consensual sexual conduct, including by homosexuals. In June 1986, by a vote of 5 to 4, Justice Byron White led a narrow majority to rejecting the analogy. It held that the prohibition was "deeply rooted in this Nation's history and tradition". The contrary argument was said to be "at best, facetious".[33]

Justice White found support in the fact that, until 1961 all 50 states of the United States had outlawed sodomy and that, in 1986, 24 states and the District of Colombia continued to do so.

The deciding vote in the case was that of Justice Lewis Powell. He had initially favoured striking down the Georgia statute. However, he then changed his mind.[34] Notoriously, he claimed that he had never known a

[33] *Joslin v New Zealand*, Communication number 902/2002; UN doc A/57/40 (2002).
[34] *Bowers v Hardwick* 478 US 186 at 191, 194 (1986).

homosexual person. It is now known that one of his clerks at the time was gay. In 1990, Powell J sought to defend his decision in *Hardwick* on the basis that no one in the case was actually being prosecuted. Nevertheless, he acknowledged that he had "probably made a mistake" in failing to join the dissenting opinion of Blackmun J.[35] Whilst *Bowers* stood, it was legally impossible to contemplate a Supreme Court decision upholding the right of LGBTI people in the United States to marry. Because marriage would often, or usually, involve sexual activity, a relationship that contemplated illegal conduct could not be constitutionally protected.

The first step on the path to constitutional protection occurred in 2003 in another sharply divided decision in *Lawrence v Texas*.[36] The Supreme Court's opinion in that case was written by Kennedy J. He concluded that *Bowers* had been wrong when it was decided. He held that anti sodomy laws offended the due process clause in the Fifth Amendment to the United States constitution and the constitutional right to privacy. To the complaint that sodomy laws had existed at the time of the adoption of the United States Constitution and that they were found throughout the world, Kennedy J cautioned that the founders did not seek, and did not have the power to impose on later generations, a final statement of the manifold dimensions of liberty provided by the *United States Constitution*. The result was that legislation throughout the United States, imposing criminal sanctions on LGBTI people was struck down as unconstitutional. The impediment to relationship recognition was removed.

[35] J.A. Maltese, "Bowers v Hardwick" in K.L. Hall (ed), *The Oxford Companion to the Supreme Court of the United States*, OUP, New York, 1992, 79 at 80.
[36] 539 US 558 (2003); 123 Ct 2472.

Fearing that legislative moves would be enacted in a few states to provide legal recognition for long-term personal relationships of non-heterosexuals, the United States Congress enacted the *Defense of Marriage Act* (DOMA).[37] That law defined "marriage" for federal purposes as the union of one man and one woman. It allowed states to refuse to recognise same-sex marriages granted under the laws of other states. It barred same-sex couples who had effected a marriage under a state law from being recognised as 'spouses' for the purposes of federal laws. It imposed burdens on the relationships permitted by some state laws.

The DOMA Act was passed by both Houses of the Congress by large veto-proof majorities and signed into law by President W.J. Clinton. This instituted a new obstacle to the recognition of same-sex marriage in the United States. DOMA statutes were then enacted by a large number of state legislatures. The legislation was carried on a wave of popular support. At the time, it was hoped that DOMA would stop legislators and impede courts from any temptation to change the definition of 'marriage'. However, concurrently with these moves support for a change began to appear in sections of the judiciary and the legal profession.[38]

For a time, the divided debates over DOMA became a critical, even possibly decisive, argument in the United States political scene. Once again, it was the United States Supreme Court that cleared the way to

[37] PubL 104-199; 110 Stat 2419 (1996). The Act was adopted by the 104th US Congress and became effective on 21 September 1996. Contrast the decision of the Supreme Court in *Loving v Virginia* 288 US 1 (1967) where the Court unanimously struck down an anti- miscegenation law in force in Virginia which polls before the US Supreme Court decision showed was popular, enjoying strong community support.

[38] P.S. Gutis, "Small Steps Towards Acceptance – Renewed Debate on Gay Marriage", *New York Times*, 5 November 1989. The decision of the Massachusetts Supreme Judicial Court in *Goodridge v Department of Public Health* 798 N.2d 941 (Mass.) 2003; 440 Mass 309 was a highly influential case, the first by the highest court of a state in the United States upholding the right of same-sex partners to be married without discrimination under state law.

permit relationship recognition. On this occasion, it did so by finding, in *Windsor's Case,*[39] that part of the federal DOMA Act was unconstitutional, so far as it related to the federal recognition of same-sex marriages. On the same day as *Windsor* was decided, the Supreme Court, in another 5-4 decision, allowed same sex marriages in the State of California to recommence. It did so by ruling that the proponents of the constitutional initiative to bar such marriages, in that state, had lacked standing, under Article III of the federal Constitution, to challenge the decision of the federal trial judge invalidating the operation of the state Constitution by which the marriages had been terminated.[40]

The *Windsor* decision of the Supreme Court held that the federal government in the United States was obliged to recognise same-sex marriages validly conducted under state law. At that point, only 10 states and the District of Colombia had so provided in their laws. Following the decision in *Windsor,* all such state and territory same-sex marriages immediately became entitled to the rights conferred on married couples by federal law.

On 6 November 2014 a new blockage arose. The sixth circuit Court of Appeals (covering Kentucky, Michigan, Ohio and Tennessee) applied an earlier decision of the United States Supreme Court in *Baker v Nelson.*[41] It held that *Baker* required the court of appeals to uphold a state prohibition on same-sex marriage and precluded it from endorsing the contrary view. Specifically, the appeals court concluded that the decision in *Windsor* did not control its decision because Windsor had

[39] *United States v Windsor* 570 US 1 (2013). By this decision, section 3 of the USC 7 was struck down as unconstitutional on 26 June 2013. The decision of the Supreme Court was given by Kennedy J with whom Ginsburg, Breyer, Sotomayor and Kagan agreed; Roberts CJ, Scalia, Thomas and Alito JJ dissenting.
[40] *Hollingsworth v Perry* 570 US ; 133 SCt 2652 (2013).
[41] *Baker v Nelson* 291 Minn 310; 191 NW 2d 185 (1971)

merely invalidated a federal law that refused to permit state laws allowing gay marriage, whilst *Baker* had upheld the right of the people of a state in their legislatures, to define "marriage" as they saw fit.[42] One judge of the circuit court dissented. There were also conflicting opinions in other federal courts. This state of affairs virtually obliged the Supreme Court to resolve the differences of judicial view. That resolution was provided in the next case in the American series: *Obergefell v Hodges*.[43] Again the Supreme Court was divided 5-4. Again, Kennedy J wrote the majority opinion for the Court. In that opinion, he said:[44]

> *"The life-long union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfilment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations."*

Technically, the majority in *Obergefell* concluded that a fundamental right to marry was guaranteed to same-sex couples in the United States both by the due process clause (Fifth Amendment) and the equal protection clause (Fourteenth Amendment) of the United States Constitution. The majority held that, because of its fundamental character, prohibitions on same-sex marriage in state as well as federal law sought to impose inequality on same sex couples by denying them rights afforded to opposite sex couples. They thus prevented them from

[42] *De Boer v Snyder* 6th Cir CA, 6 November 2014, 45, ibid 15.
[43] 576 US 1 (2015).
[44] 576 US ibid at 3.

exercising a fundamental right enjoyed under the Constitution. The majority did not find that sexual orientation, as such, was a 'suspect class' under the equal protection clause of the Constitution (as race or religion has earlier been held to be). Such a finding would have had considerable significance for laws other than marriage under which LGBTI people in the United States still suffer disadvantages. However, the outcome of *Obergefell* was that the DOMA Acts in 14 states of the United States were invalidated.

This decision, and the reasoning of the majority, was strongly criticised by the dissenting Justices in the Supreme Court. Roberts CJ (joined in this respect by Thomas J and Scalia J) concluded that the case was really about who should have the power to change the law on "marriage". Pointing to the many states that had already enacted legislation in favour of same sex marriage, he argued that the change should be left to the people, exercising their votes by democratic process in state elections. Specifically, Roberts CJ predicted that the majority ruling would lead to uncertainties in the law, as future clashes would occur between the rights of people with religious beliefs assented against LGBT persons, to oppose their claims on the basis of their religious convictions. Still, a significant change in tone was noticeable in the minority's reasoning in *Obergefell*. Unlike earlier opinions, particularly those of Scalia J, all of the dissentients wrote respectfully of the same-sex couples litigating the case. Roberts CJ even offered an olive branch to them, absent from the earlier rhetoric.[45] They would, he acknowledged "celebrate the opportunity for a new expression of commitment to a partner". This indicated that even those who, for constitutional, philosophical or religious reasons opposed marriage

[45] Ibid, 15.

equality, could understand the deep feelings that the claim evoked amongst those who advocated its availability to LGBTI people and amongst LGBTI people themselves.

On the whole, the reaction to the decision in *Obergefell* was affirmative, even amongst some religious observers.[46] By the time *Obergefell*, was decided, 36 states and the District of Columbia and the federal territory of Guam had come round to providing for marriage between same-sex couples. The Supreme Court simply administered the *coup de grace* to the opposition by invoking a constitutional norm. The battleground on LGBTI rights immediately shifted to other areas of suggested discrimination. However, whilst most academic commentary was favourable to the decision and to the outcome in the Supreme Court, some politicians have maintained their rage in the ensuing presidential election campaign. Some lawyers cavilled at the legal reasoning of the majority. Some opponents shifted their ground to the competing right of those with religious convictions to have such convictions respected and upheld.[47] However, the battle over marriage was to all intents over in the United States. The legal caravan in that country had moved on.

AUSTRALIAN RELUCTANCE AND DELAY

Whereas New Zealand and the United States had, by 2015, resolved the same-sex marriage debate, Australia proved slow to follow. At the time

[46] Rabi Brad Hirschfield, "There's much to celebrate in the Supreme Court's ruling", *Washington Post* 27 June 2015, B2.

[47] Thus the Marriage Registrar in Rowan County Kentucky (Kim Davis) refused to issue licences or to allow deputies to do so to any same-sex couple. In doing this he failed to conform to the law as stated by the US Supreme Court and with a direction she had received from the State Governor. She was convicted of contempt of court on 3 September 2015 and committed to prison. When she was released she received a hero's welcome. Allegedly, she discussed her resistance in a meeting with Pope Francis during his visit to the United States. The US Supreme Court unanimously refused to intervene in her case: *New York Times* 4 September 2015, 1.

of writing, the position is unresolved. Neither marriage nor civil unions or partnerships are available to same-sex couples in Australia. In some sub-national jurisdictions, forms of recognition of the relationships of LGBTI persons have been enacted; but they fall far short of marriage.

Despite the fact that federal power existed to enact a uniform marriage law in Australia after federation in 1901, marriage and divorce, until the late 1950s, remained governed by colonial and later state legislation, read with the common law. Thus, divorce in New South Wales was regulated by the *Matrimonial Causes Act* 1899 (NSW). Marriage was regulated by the *Marriage Act* 1899 (NSW). And the *Married Women's Property Act* 1901 (NSW) governed the "rights and liabilities of married women". Despite the fact that these laws substantially reflected the values of the colonial era, they endured for more than half of the first century of Australian federation.

In 1961, the Federal Parliament at last utilised its constitutional power and enacted the *Marriage Act* 1961 (Cth). As in the case of the contemporaneous New Zealand statute, that law omitted a definition of "marriage". 'Marriage' was expressed in gender neutral terms ("each of the parties…" s5 (1); "person", s9(1); "parties", s13). However, it was generally assumed that the facility was confined to opposite sex couples. There was some, weak, textual support for this view in the use of words generally treated as referring opposite sex couples ("widower or widow) s9(1); "widow of his deceased brother", s18(A); "husband", s22(1). And because the criminal law continued to provide offences for so-called

"unnatural offences",[48] and because asserting LGBTI rights was heavily stigmatised, virtually no one at that time demanded gay marriage in Australia. Most people concerned felt obliged to hide, or deny, their minority sexual orientation or gender identity or feelings.

The reform of the criminal law in England in 1967,[49] following the Wolfenden Report on homosexual offences[50] led to demands for similar changes in Australia. Starting with South Australia in 1974, reforming statutes were enacted for all states and territories except Tasmania. The criminal law in that State[51] was eventually the subject of a communication to the Human Rights Committee of the United Nations. It was the decision of that Committee[52] that led to the enactment of a federal law[53] that was designed to give effect, in Tasmania, to Australia's international obligations under the ICCPR.

A challenge to this legislation in the High Court of Australia having been decided, in part, in favour of the complaint,[54] the Tasmanian legislation was finally reformed by act of the Tasmanian Parliament. In consequence, the last criminal prohibition on same sex (ordinarily male) sexual conduct in Australia was abolished. This step coincided with growing demands for the removal of other discriminatory laws in matters such as compassionate rights; property relationships; and the adoption

[48] *Crimes Act* 1900 (NSW), s79 ff. ("Whosoever commits the abominable crime of buggery or bestiality with mankind… shall be liable for penal servitude for 14 years". In s81 the offence was provided of "indecent assault upon a male person". Consent was no defence to either crime.
[49] *Sexual Offences Act* 1967 (UK).
[50] United Kingdom, Commission on Homosexual Offences and Prostitution *Report*, cmnd 247, HMSO, 1957 (Wolfenden Report).
[51] *Criminal Code* (Tas), s122 (a), (c) and s123.
[52] *Toonen v Australia* (1994) 1 *Int Human Rts Reports*, 97 (Number 3).
[53] *Human Rights (Sexual Conduct) Act* 1994 (Cth).
[54] *Croome v Tasmania* (1997) 191 CLR 119. The decision concerned the standing of the applicant to bring his challenge against the *Tasmanian Criminal Code* provision.

of children.[55] Additionally, de facto relationships legislation was enacted to protect both heterosexual and other persons (many gay) in long-term personal relationships.[56] LGBT people in several parts in Australia began to demonstrate publicly in favour of the removal of discriminatory laws affecting them. Eventually, these demands gave rise to claims (following European and North American models) for legal recognition of 'civil unions', 'civil partnerships' and ultimately 'marriage'.

In 2004, during the Howard Government, the Australian Parliament enacted two laws evidencing a measure of ambivalence about LGBTI relationships. One was an alteration to the federal laws on superannuation (contributory pension) rights and employment entitlements.[57] However, whilst such federal laws edged forward with entitlements for those in so-called 'eligible' or 'interdependent' relationships (mostly gay), a specific blow was struck at those who dreamed of marriage for LGBTI peoples or its equivalent. The blow came in two measures.

The first was the exceptional disallowance by the Federal Parliament, on the initiative of the Howard Government, of a law providing for civil unions in the Australian Capital Territory. That law had been enacted pursuant to the *Australian Capital Territory (Self-Government) Act* 1988 (Cth). It was complained that this law, both by the use of the word 'union' and by its detailed provisions, 'mimicked' marriage and thus caused an unacceptable confusion, incompatible with the federal *Marriage Act* 1961, confined to heterosexual or opposite sex couples.

[55] M.D. Kirby, "Same-Sex Relationships" in Michael Kirby, *Through the World's Eye*, Federation, Sydney, 2000, 64 at 69 ff where the relevant NSW legislation is described.
[56] *De Facto Relationships Act* 1984 (NSW).
[57] Kirby n.55 above, 75-77, citing *Superannuation Legislation (Commonwealth Employment- Repeal and Amendment – Consequential Visions) Act* 1997 (Cth).

Secondly, to put the matter beyond doubt, the Government introduced a Bill into the Federal Parliament, and enacted with bipartisan support in 2004, inserting in s5(1) of the *Marriage Act* a definition of marriage in terms providing that it was "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life". To rub salt into the wound caused by this prescription, the amending Bill also inserted into the *Marriage Act* a provision stipulating that any foreign marriages of same-sex couples "must not be recognised as a marriage in Australia". Furthermore, the restricted definition of marriage was henceforth to be read publicly at every "marriage" conducted in Australia, so that no one present would be in any doubt.[58]

Undeterred by this set back, which took its inspiration from the earlier enactment of DOMA legislation in the United States, the Australian Human Rights and Equal Opportunity Commission in 2007 published a report on an audit of federal legislation by reference to equality in matters of sexuality: *Same-Sex: Same Entitlements*. [59] This report coincided closely with the electoral defeat of the Howard Government and the return of the Australian Labor Party to government under Prime Minister Kevin Rudd. However, when the ACT Legislative Assembly tested the waters by reintroducing a civil partnership law, so named and dropping the description of 'union', the Rudd Government moved once again to disallow the Bill in the Federal Parliament. Allegedly, this was done because of promises made to religious groups during the preceding federal election.

[58] *Marriage Act* 1969 (Cth), s88EA. See also *Marriage Amendment Act* 2004 (Cth), s3, Sch. 1, item 1.
[59] Australia, Human Rights and Equal Opportunity Commission, *Same-Sex: Same Entitlements* 2007.

Notwithstanding this negative stance, as if in amelioration, the Rudd Government quickly introduced legislation to amend nearly a hundred federal laws to eliminate discrimination against LGBT people in Australia.[60] Welcome as such reforms were, they did not provide for specific relationship recognition. A first measure to introduce a Bill for marriage equality was taken in August 2009 by the Australian Greens Party. However, this Bill died in a Senate Committee. In February 2010 another M*arriage Equality Bill* 2009 reached a vote in the Senate. It was defeated 45-5. Only the Greens voted in favour. Many senators absented themselves from the vote.

Despite a change of leadership and Prime Minister in Australia, and the appointment of the Hon. Julia Gillard, she maintained a commitment to the Australian Christian Lobby to oppose the enactment of marriage equality. Both the Labor and the Coalition parties continued to tread more warily on the subject of same-sex marriage than opinion polls suggested was acceptable to the Australian population. By the time the next federal election came around, in March 2013, Mr Rudd had been restored as leader and Prime Minister. He announced his personal conversion to the cause of marriage equality. His party had earlier adopted the principle as part of its political platform. Nevertheless, at the election in 2013, the government changed.

The Coalition were returned to power in Australia. Their leader and the new Prime Minister, Tony Abbott, opposed amendment of the *Marriage Act* to permit same-sex marriage. Moreover, he made it clear that he would not allow members of his party (many of whom were rallying to

[60] *Same-Sex Relationships (Equal Treatment in Commonwealth Law – General Law Reform) Act* 2008 (Cth) and *Same-Sex Relations (Equal Treatment in Commonwealth Law – Superannuation) Act* 2008 (Cth).

the cause of marriage equality) a conscience vote. The issue continued to be divisive on both sides of the aisle in the Federal Parliament.

It was at this time that the Australian Capital Territory Legislative Assembly acted once again in its third attempt at relationship recognition. It enacted the *Marriage Equality (Same-Sex) Act* 2013 (ACT). The new Government immediately challenged the constitutional validity of the statute in the High Court of Australia. It contended that, within the meaning of the *Australian Capital Territory (Self Government) Act* 1988 (Cth), s28(1) the Act was inconsistent with the *Marriage Act* 1961, a valid law of the Federal Parliament. It therefore had no legal effect or, alternatively, was repugnant to the *Marriage Act* and, on that ground, void.

An element of urgency was introduced into the issue by the passage of the ACT law. Accordingly, the constitutional challenge was heard with expedition on 3 December 2013. It was decided on 12 December 2013. In the interim, a number of LGBTI people had rushed to secure marriage certificates. In the result, they were disappointed. The High Court upheld the Commonwealth's challenge to the ACT law. [61] It declared ACT Act to be inconsistent with the federal *Marriage Act* 1961 and hence of no effect. It concluded that the latter Act provided a "comprehensive and exhaustive" statement of the law of marriage in Australia. The territory law was an incompetent attempt to venture into the creation and recognition of a legal status of marriage in Australia. Because that subject was already comprehensively provided for in the federal law, the territory law was of no legal effect.

[61] *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441.

Territory arguments before the Court had pressed the contention that, in effect, by the 2004 amendment to the *Marriage Act,* the Commonwealth and the Federal Parliament had withdrawn from the legislative topic of same-sex marriage. They had therefore left a legislative space into which the ACT Assembly was entitled to move. The arguments were subtle. They had some intellectual support outside of the only place where it mattered most: the Bench of the High Court of Australia. The Justices were swift and unanimous in reaching the contrary conclusion.

However, to many clouds there is a silver lining. In this case, it was provided by observations expressed in the unanimous opinion of the High Court of Australia. [62] The Justices had neither a constitutional bill of rights to appeal to (as the Supreme Court of the United States could do) nor a statutory Bill of Rights Act or other operative federal human rights law to direct their attention to broad questions of equality of citizenship; due process; privacy or vulnerable minority status (as had been invoked in New Zealand). But they did have the responsibility to interpret the Australian Constitution, with its provisions separating federal, state and territory powers.

An obvious question presented at the threshold of the case was whether the Australian Federal Parliament could validly enact a statute on same-sex marriage. Opinions had been ventured (although not in the arguments in the instant case) that, because the only "marriage" known to the law at the time of the foundation of the Australian Commonwealth was "traditional" or "opposite sex" marriage, therefore no power existed to enact a federal law on same-sex marriage. Whilst this point was not advanced by any party in the case, parties cannot by their arguments or

[62] Per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.

assumptions resolve important constitutional questions that are inherent in the resolution of the legal issues before the court.

The Justices of the High Court of Australia expressed cautionary words about argumentation expressed in general terms of "originalism" or "original intent". [63] Still, they left no doubt about the breadth of the federal power granted by the Australian Constitution: [64]

> *"[T]he federal Parliament has power under s51(xxi) to make a national law with respect to same-sex marriage. ... The federal Parliament has not made a law* permitting *same-sex marriage. But the absence of a provision* permitting *same-sex marriage does not mean that the Territory legislature may make such a provision. It does not mean that a territory law permitting same-sex marriage can operate concurrently with the federal law. The question of concurrent operation depends upon the proper construction of the relevant laws. In particular, there cannot be concurrent operation of the federal and Territory laws if, on its true construction, the* Marriage Act *it to be read as providing that the only form of marriage permitted shall be a marriage formed or recognised in accordance with that Act. ... Why otherwise was the* Marriage Act *amended as it was in 2004 by introducing a definition of marriage in the form which now appears, except for the purpose of demonstrating that the federal law on marriage was to be complete and exhaustive?"*

The result was that the proponents of marriage equality in Australia secured a clear and unanimous opinion from the nation's highest court that, if the Federal Parliament decided to enact marriage for same-sex

[63] (2013) 250 CLR 441 at 455 [14].
[64] Ibid at 467 [56].

couples, such a law would be upheld under the Constitution. In effect, Court placed the responsibility where, in its opinion under the Australian Constitution, it lay and should lie, namely with the Federal Parliament. The Court upheld the possibility, uncomplicated by federal restrictions, of a democratic solution to the issue similar to what had been achieved in New Zealand. It took the course of facilitating that democratic solution, as had been urged by the dissentients in the United States Supreme Court in *Obergefell*. This was done because the Court held that it had no alternative legal principles to which it could appeal to uphold the legislation in question.

Since the decision of the High Court of Australia, debates in Australia on same-sex marriage have waxed and waned. On 15 September 2015, Liberal Party meeting withdrew support from Tony Abbott as leader of the Party and as Prime Minister. His successor, the Hon. Malcolm Turnbull MP, is a committed supporter of marriage equality legislation. However, as part of his negotiations with party colleagues to win election to the leadership, he agreed to proceed with a national plebiscite on the subject, earlier promised by Mr Abbott. Many supporters of marriage for LGBTI persons in Australia have opposed the conduct of a plebiscite. Certainly, it is exceptional in the Australian context, having only previously been utilised in symbolic matters such as the change of the national anthem. Conducting a plebiscite that is not constitutionally required involves, in the instance at least, a departure from the representative form of government through the Federal Parliament, established by the Australian Constitution. Some concern was expressed that the initiative might become a precedent for evading the exercise of clear constitutional power and political responsibility.

The record of Australian constitutional referendums, a proximate procedure, since 1901 has been unpromising.[65] Only 8 of 44 have succeeded. Although a referendum on same-sex marriage held for constitutional reasons in Ireland in May 2014 approved the extension of marriage to same-sex persons, the repeated conservatism of Australian electors in popular votes means that a repetition of the Irish experience cannot be guaranteed. Many LGBTI citizens in Australia ask why, exceptionally, they should be singled out for this added procedural requirement, in the face of the clear affirmation of the High Court of Australia that the power resides in the Federal Parliament. Why should that legislative power not be invoked, whatever its outcome?

A negative plebiscite on the issue recently occurred in Slovenia, reversing the vote of the nation's parliament in favour of availability of marriage to same-sex couples. LGBTI citizens and their supporters ask: What right does a majority have, by plebiscite vote, to deny a minority of entitlements grounded in universal human rights whose effect is substantially, or wholly, confined to the parties intimately concerned? And why should such an issue be canvassed outside the responsible legislature, where the strong passions and prejudices are likely to occasion deep communal hurt, insult and individual upset?

However this may be, a plebiscite will apparently be held. At the very least, it will be a test case by which Australian electors will be able to express their social values at a time when the nation is described, in opinion polls, as one of the least religious in the world. The religious minority will be hoping for a visceral reaction tapping deep seated

[65] Required under s 128 of the *Australian Constitution* to approve formal changes to the constitutional text.

hostility to a small minority against which no court can, and no parliament will, provide constitutional protection.

TEN CONCLUSIONS

What conclusions may be drawn from the tale recounted in this chronicle?

1. *Scientific research*: The first, I would suggest, is the importance of scientific research. Long before the issue of same-sex marriage came to the fore, attitudes of hostility existed towards sexual minorities in Australia and elsewhere. This has been so for centuries, even longer. The attitudes shamed and intimidated millions of people with same-sex attractions into repressing or hiding that aspect of their reality. They encouraged some writers of theological texts, philosophical analysis and social studies to embrace hostile stereotypes of LGBTI people. They produced persecution and hostility that lasted for a very long time, essentially up to recent years. The criminal offences were regarded as so horrible that decent people could not even name them. There were similar examples of hostility against women, illegitimate children, racial minorities, indigenes and people suffering disabilities and from a number of diseases. Still, the venom targeted at sexual minorities, whose sexual orientation, gender identity or experience were different from the majority was specially cruel and persistent. So what triggered the change of such deep seated, visceral feelings? Something happened that caused a change in the rejection of rational discussion. At a certain point in Berlin, in the late 19th century, homosexuality was given its name and LGBTI people began to demand an end to the

hostility. [66] The source of this change was ultimately the appeal to actual human rationality applied to shared, or discovered, experience. The work of Alfred Kinsey and his predecessors and successors gained widespread publicity in the United States after the 1940s. This publicity confronted the demand for silence. Publicity was encouraged in the United States by the First Amendment to the Constitution providing protection for publication of unorthodox opinions. These initiated moves towards attitudinal and legal reforms. Soon it was impossible to put the genie back in the bottle. Scientific truth proved to be an antiseptic that helped to reverse the demand for silent acquiescence in shame and silence of a minority in respect of self-regarding and consensual adult activity. Suddenly, the ignorance came to be challenged. Facts challenged myths. Science and knowledge have been strong allies of reform.

2. *Parallel movements*: It is no coincidence that legal reform affecting LGBTI people followed closely upon reforms affecting women, people of different races, indigenes and other minorities. Many such reforms grew out of the same or similar stimuli. In each case, rationality suggested that it was unjust and intolerable to treat another human being as inferior because of some indelible feature of their nature, which they did not choose and could not change. Once analogies came to be perceived between racial, gender and other forms of discrimination and phobias, the need for change and an end to discrimination against gays became clear. The LGBTI community learned from the earlier movements for reform, particular the women's movement with its appeal to equality, rationality and respect for the dignity of fellow human beings.

[66] Robert Beachy, *Gay Berlin – Brithplace of a Modern* Identity, A.A. Knopf, New York, 2015, 59.

3. *Criminal law repeal*: The achievement of a wider ambit of criminal law reform, affecting LGBTI people, was essential to any serious move to secure legal recognition, and eventually equality in honouring LGBTI personal relationships. Once repeal of criminal laws had started they were bound to spread as more communities were confronted with the wisdom of repeal. Most European countries had criminal laws against LGBTI conduct in the 18th century because of the influence of Judeo-Christian scriptures and teaching. When such laws were abolished in France in 1793, the initiative attracted intellectual support in England. [67] However, it took 150 years for England to follow the French lead, and longer for its settler dominions. Advancing the same reforms in non-settler societies of the Commonwealth of Nations has proved extremely difficult. Advocates of reform must insist on the same principles as earlier confronted the defenders of racial apartheid in southern Africa. The opponents of change to LGBTI criminalisation in Africa, the Caribbean and parts of Asia must be helped to see that sexuality apartheid is as offensive for human dignity and universal rights as racial apartheid was. Lawyers, who know, implement and help to apply the law, must take a leadership role in the persuasion. In most of the countries concerned, the pre-existing criminal law did not include laws against same-sex activity. Demands to respect national cultures and traditions cannot impede the promotion of reform. Even if the criminal laws are not normally enforced, until the criminal laws are repealed, there is no possibility of relationship recognition or broader initiatives for anti-discrimination and cultural change.

[67] HLA Hart, "Benthem, Jeremy" in AWB Simpson (ed) *Biographical Dictionary of the Common Law* (Butterworths, London, 1984) 44 at 44, 46.

4. *The place of religion:* Although freedom of (and from) religious belief is included among universal human rights, and although religious organisations have often been in the forefront of opposing reform of the laws against LGBTI people, in most developed countries, the power of religious organisations have been wound back. This is not only the result of the recent awareness of systemic abuse of vulnerable believers. It is also a consequence of more widespread knowledge of facts that challenge some of the notions said to derive from 'inerrant' scriptural texts. [68] Despite declining church attendances; reduced resources of many traditional religions; and sensible concessions by some church leaders on LGBTI issues,[69] the same institutions appear to influence disproportionately political decisions made in many countries. Time does not appear to favour the continuation of such influence, at least in western countries. The extremely rapid spread of legal (mostly legislative) versions of same-sex marriage in Europe, North and South America, South Africa and New Zealand in the face of consistent Christian church opposition and campaigning speaks volumes about the direction in which such opposition is travelling.

5. *Mature secularism*: One of the most important bequests of English constitutionalism has been the spread of the idea of the secular state. The idea was never a pure or absolute one, as the establishment of the Church of England in England demonstrates. However, in many former colonies of the United Kingdom, the principle has been enshrined, both in constitutional provisions[70] and in ethical practice.

[68] Keith Mascord, *Faith without Fear – Risky Choices Facing Contemporary Christians*, 2016, Sydney.
[69] As for example, the well-known statement of Pope Francis "Who am I to judge?" in response to a question concerning his attitudes to homosexual persons.
[70] E.g. *United States Constitution*, Amendment 1; *Australian Constitution*, s116.

At a time of particular global dangers from religious intolerance and fanaticism, the secular principle is revealed as specially important and valuable. It helps to secure common allegiance to living peacefully together, despite religious differences. It is a particular product of the need felt in England to accommodate Roman Catholics, Protestants, dissenters and others, whilst also respecting the observance of their diverse religious beliefs. Such observance had to be accommodated to beliefs (or lack of beliefs) of others, if violence and hostility were to be avoided or their risks minimised. An appreciation of this history is essential for the accommodation of the demands of some citizens that their religious "faith" forbids respect, or even acknowledgement, of the civic rights of LGBTI people. However, as J.S. Mill famously put it: 'my right to swing my arms in any direction ends where your nose begins'.[71] To deny another citizen a right to the legal status of marriage, because the very thought of that possibility is disturbing to a stranger to the relationship, appears to invoke Mill's aphorism. Especially when the well-established benefits of the relationship in issue, if desired by the participants, are so many and substantial – extending to health, financial, spiritual and social advantages.

6. *International momentum:* There is little doubt that the momentum for change on marriage for LGBT people has assisted the process of adjusting to the new idea in particular jurisdictions. When judges in New Zealand in 1998 were asked to construe the *Marriage Act* 1955 (NZ), so as to apply it to LGBTI applicants without discrimination, the notion was novel at least in modern times. All that had recently gone before was a few instances of relationship recognition in Scandinavia, and these confined to civil partnerships. A judge or legislator asked

[71] AGL Hart, "Mill, John Stuart" in Simpson, above n.66, 364 at 365.

today to embark upon this issue is no fresh explorer. There are now many decisions of courts in Europe, North and South America, South Africa and Australasia favourable to various aspects of the notion. Many statutes have now been passed. These also provide visible recognition of this civil legal status for millions of people. Even in Asia, law-makers in Vietnam and Nepal have reportedly begun to consider the concept.[72] Although the idea is still viewed as radical in many parts of the world, and more countries exist where it is unavailable and unthinkable than where it is lawful, the notion is no longer astonishing or unheard of. Lawyers, and especially judges, are understandably cautious about embracing bold ideas. Naturally, most prefer to leave these to legislators. Yet often they know that for progress on such matters law-makers are even more cautious about the perils of the democratic imperative and insensitive to the demands of minorities.

7. *Institutional interaction:* In most jurisdictions where marriage has become availability to LGBTI people, it has come about as a result of interaction between legislators, practising lawyers and the judiciary. In the Netherlands, the first law 'opening up' marriage was made by Parliament, unaided by the judiciary. However, even that step followed a series of highly influential decisions of the European Court of Human Rights. By those decisions that court reversed its earlier stance of hostility to sexual minorities and, insisting on civil equality, struck down criminal laws against same-sex activity. [73]

[72] R. Roca, "Nepal – South Asia's LGBTI Rights Pioneer" in *Star Observer*, December 2015, Sydney, 26.
[73] Julius Stone, *Legal System and Lawyers' Reasonings*, Maitland, Sydney, 1964, 319-321 see discussion of the writings of Gustav Radbruch, ibid, 188-189.

In New Zealand, the road to reform led to Parliament in Wellington passing the law that followed important judicial decisions of the Court of Appeal including the brave and original opinions of Thomas J (and Tipping J) upholding the complaint of discrimination made by the same-sex appellants. The decision of the Massachusetts Supreme Judicial Court in 2004 on same-sex marriage in that state, appeared heterodox, even foolhardy in the political circumstances in which it was delivered.[74] Yet it undoubtedly helped to propel a legal and community movement that eventually culminated in the United States Supreme Court's decision in *Obergefell*. Even in Australia, where most of the supportive activity has been in legislatures, the moves for change sharpened the judicial appreciation of the need for the final decision on marriage equality to be made in the Federal Parliament. In the event, that has hastened the exceptional steps leading to the plan for a plebiscite and the acceptance by some of its proponents that the Federal Parliament would have to follow the outcome of the plebiscite, although not constitutionally bound to do so.

8. *National differences:* Where change is proposed in matters long assumed or considered settled, it is inevitable that teachers of the law and the legal culture of each jurisdiction will impact the way the question of gay marriage will be decided. Thus, in New Zealand, in a country not unused to legal innovation,[75] the existence of a small population, readily engaged in debates over values and with a unicameral legislature, made the road to reform simpler. However, even in the United States, the fast moving embrace of same-sex marriage laws in so many states (and some territories) undoubtedly

[74] *Goodridge v Department of Health,* above n.38
[75] New Zealand was, for example, the first country to enact women's suffrage; divisions for industrial arbitration; and judicial power to vary testator visions by testator's family maintenance legislation.

supported the resolve of the Supreme Court to intervene, as ultimately and repeatedly it did. It cut the Gordian knot presented by unequal treatment of persons from different states, recognising that the differences arose in a matter intimate, personal and important to the lives of persons concerned. In Australia, the delay in reaching resolution can be explained in part by the complex federal system that often makes swift action difficult; the need to secure progress through federal legislation in a highly politicised time; and the absence of a human rights powers to stimulate the courts or the legislative process. About the time that many western countries were changing their laws on same-sex marriage recognition, Australia was led by politicians who, for one reason or another, were hostile (or at best luke warm) towards the idea of gay marriage. When, at last, both the Government and the Opposition in Federal Parliament elected leaders committed to same-sex marriage reform, the politics of the conservative parties restrained swift action of the kind achieved by political leadership in Spain (Zapatero), the United Kingdom (Cameron) and France (Hollande). The recent developments teach once again that the movement for reform will find expression at different times, in different countries, in different places and with differing energy.

9. *A generational shift:* It is obvious that, in legislatures, courts and communities, support for LGBT rights is one led by young people. In part, this is because older LGBTI citizens, like myself, were accustomed most of their lives, to be silent on such matters. To deny their sexuality. To pretend that it was different. To pretend even to their families and loved ones. This is what was expected. Don't ask; don't tell. Some of the older generation observe this rule this,

including in the law and on the bench. But things are changing. Amongst young people is western societies, many have friends who identify as LGBTI. They may not be many in absolute numbers. But they are sufficient, remembers the oppression of the Jews and other small minorities in Nazi Germany and the lands it conquered. For many young people, sexuality is not an issue. They see churches and religions as deeply hostile to LGBTI people. Within those institutions, those who raise their voices to question the old oppression are themselves sometimes bullied and threatened. This results to a kind of abuse. Indeed, is another abuse for which religious institutions will eventually be held accountable. Anti-miscegenation laws were originally justified by alleged religious texts. So was apartheid in South Africa. So was slavery worldwide. It will be the duty and privilege of young people in countries that embrace change to offer leadership, encouragement to the reform movement in other countries. Including in Africa, the Caribbean and Asia. Including in Islamic countries. Including in resistant communities, influenced by the Roman, Orthodox and Russian churches of Christianity. Including amongst evangelical and Pentecostal Protestants on the eve of the 500th anniversary of Martin Luther's Reformation that questioned long held beliefs and authority.

10. *Timing:* So when does the unimaginable in the law become inevitable and then desirable? The lesson of the developments that I have described in Wellington, Washington and Canberra teach us this. Timing is critically important. Julius Stone, onetime Dean of Law at the University of Auckland and later Dean at the University of Sydney, adapting *Radbruch*, taught that, in finding and declaring the law, judges have choices. Those choices may give them leeways for

action. Sometimes the exercise of those choices will result in conclusions that the prohibitions on same-sex marriage, contained in state laws, are constitutionally valid.[76]

The issue of the legal recognition of same-sex marriage is not one of the most urgent legal issues of our time. Amongst these, I would rank (1) new efforts to secure, and radically extend, global control and elimination of nuclear weapons, the very existence of which is a threat to the human species and the biosphere; (2) the provision of a timely and effective responses to global climate change, including on the part of the courts and lawyers of the world; (3) the improvement in the international efforts to uphold universal human rights, when nation states fail to do so; (4) the specific and urgent attention to the global problem of poverty by which more than a billion human beings go to sleep at night hungry and are reduced to a kind of slavery from whose shackles there is no easy release; and (5) the new and urgent attention to international cruelty to animals that are sentient yet regarded as mere property, although they clearly feel pain, grief and fear, as we humans do.

There is no doubt that, as my own life teaches, LGBTI people can get through life, in stable and loving relationships, without the benefit of legal recognition. Yet it should be there for those persons of full age, otherwise qualified, who desire it. Still, those who advocate its provision must keep their sense of proportionality and clear-sightedness about the priorities. The achievement of same-sex marriage in so many countries so quickly is a testament to the global power of ideas and the

[76] Julius Stone, *Legal Sydstem and Lawyers' REasoninings,* Maitland, Sydney, 1964, 319-321 see discussion of the writings of Gustav Radbruch, Ibid, 188-189.

international technology by which those ideas are rapidly spread.[77] Lawyers are sometimes hostile or very doubtful about new ideas. At first I was myself, in respect of marriage equality. Even now, my partner and I, who have shared our lives over 47 years, are not certain that we would marry if the status were available to us in Australia in law. But we would like to have the option to decide. That privilege is undoubtedly an idea whose time has come in New Zealand, the United States and Australia and far beyond.

[77] See e.g. *Dudgeon v United Kingdom* (1982) 4EHHR 149; *Norris v Republic of Ireland* (1988) 13 EHHR 186 and *Modinos v Cyprus* (1994) 16 EHHR 485. These cases are discusses in Kirby, Tagore Law Lectures, above n.16, 104, 138, 149, 214-219, 226.