ALL OUR PROBLEMS BEGAN OVER A MARRIAGE

> 'It was not for the Supremacy that you have sought my blood—but because I would not bend to the marriage !"
>
> Sir Thomas More to the Court of King's Bench, 1 July 1535[1]

In Australia the parliaments of the State of Tasmania and of the Australian Capital Territory have recently passed legislation purporting to make legal the marriage of two people of the same sex. That marriage itself, the state of permanent union between a man and a women for the sake of human offspring, is not something over which man (or any parliament of men) has power, never occurs to the majority of their members or to the many who think the homosexual should be permitted to institutionalise the perversity of his lifestyle in this way.

On 12th December 2013 the High Court of Australia ruled the ACT legislation to be inconsistent with the *Marriage Act* 1961 (C'th) and therefore of no legal effect.[2]

That the Court's determination provides no grounds for complacency for those who recognise the folly of 'gay marriage' may be seen in this statement of principle made *obiter dicta* by the judges, that is, gratuitously, having nothing to do with the legal issues before them :

> "The status of marriage, the social institution which that status reflects, and the rights and obligations which attach to that status never have been, and are not now, immutable." [n. 16][3]

The sentiments expressed here may represent the view of many Australians. It would not matter if it represented the view of a majority. Truth is not measured by opinion but by something objective. There is an admirable criticism of the decision in *The Australian* by Geoffrey Luck.[4] For those who wish to read it here, it has been reproduced in the Appendix.

The judges ignore the reality, which is patent, that marriage derives its essence from nature not from human will. They ignore the testimony of history : long before the ACT parliament existed, before the parliament of the Commonwealth of Australia existed, or that of any country from which Australia, its States and Territories, derives their legal traditions (such as England), men and women married. Though it must be entered into rationally and with prudence, the state of marriage is not something invented by man, as neither are the rights and obligations attaching to it. Just as man did not invent himself, neither did he invent marriage. Government may regulate its celebration and the terms to be met to enter into it, and, if it serve society truly, it will see these terms are enforced through posited law, but government is the source neither of marriage nor of the right to marry.

Just as man is ontologically prior to the state and to society (each of which exists only to serve him), so is marriage. Indeed, both society and the state only exist because of marriage's natural priority.

The judges' statement is philosophically and historically inept. One is minded of the claims of the National Socialists in Germany, of the Communists in Soviet Russia, neither of whom would

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[1] Rendered thus in Bolt's *A Man For All Seasons*, Act Two. More accurately, as quoted in E. E. Reynolds, *The Field Is Won, The Life and Death of Saint Thomas More* (Milwaukee, 1968) p. 370, "Howbeit, it is not for this supremacy so much that ye seek my blood, as for that I would not condescend to the marriage."

[2] *Commonwealth of Australia v. Australian Capital Territory* [2013] HCA 55

[3] That the High Court's decision was expressed in one judgement only is significant. We may take it that none of the six judges would depart from the view expressed in this statement.

[4] Cf. http://www.theaustralian.com.au/opinion/rush-to-judgment-has-hidden-agenda/story-e6frg6zo-1226790189199

acknowledge the demands of nature where these stood in the way of their ideologies. Whereas, however, Nazis and Communists imposed their world view on the populace willy nilly, implicit in the present claim is the assertion that the ideology which grounds it is embraced freely by the Australian people.

Twenty centuries ago Horace encapsulated the truth at stake in the epithet *Naturam expelles furca, tamen usque recurret*.[5] Its force persuaded Sir Owen Dixon, judge of the High Court from 1929, Chief Justice from 1952 to 1964, the greatest common law judge of his day, to prophesy the collapse of Communism long before it occurred. The expulsion of the natural from human conduct must inevitably fail. Recognition of the 'marriage' of homosexuals is one more attempt to refuse nature's dictate. It will fail. But, as with National Socialism and Communism, it will work great harm in society until it does. In place of the cultural heritage in which earlier judges of the High Court were formed, the current crop prefer ideology.

There is a philosophy underlying the judges' view, legal positivism, which marks the defective jurisprudence in which a majority of Australian lawyers are formed. It may be summarised in the statement—*the law is what the people say it is ; there is no higher principle than human will.* It is worth exploring the provenance of this philosophy because its exemplification in the present case reflects the circumstances that gave it rise ; for they, too, involved marriage. This, and innumerable other false philosophies that plague the modern world, began with Henry VIII's assertion, against the authority of God, of a human authority over marriage.

It was not so much Henry's act of rejecting the bond[6] that tied him to his Queen, Catherine of Aragon, to enable him to 'marry' another woman, Anne Boleyn, as the 'legalisation' of that decision by his parliament, that cemented the harm in place. The *Act of Succession* (1534) with its unprecedented, and importunate, demand that every member of the realm be compelled to confirm its content under oath, and its brutal enforcement by Thomas Cromwell, suppressed the immutable principle in favour of one subject to (and as variable as) human will. The demand that the King's subjects confirm under oath that to be true which was a lie involved a compulsory breach of the second of the Ten Commandments.[7]

This was impossible under the rule of Christ's Church for she exists to uphold the laws God has laid down, not to foster a mocking of God to His face. Here we uncover the reason Henry was driven to reject the Pope's authority, here the reason the King's late Chancellor, Sir Thomas More, was executed. Yet, at the heart of the matter was not the Pope's authority *but God's authority*, for the issue was whether marriage is of God or of man. Accurately, then, did More, as he was condemned to death by a cowardly Court of King's Bench, utter the sentence that serves as anagraph to this paper.

This, then, is the background. What follows is a consequence.

When, in 1900, the six Australian States ceded authority to the new Federal body under the Constitution to make laws for the peace, order and good government of the Commonwealth "with respect to marriage" (s. 51 pl. xxi.) they did so pursuant to terms set out in the Constitution's

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[5] *Epistles* I, 10, 24 'You may drive nature out with a pitchfork, she will always return.'

[6] It was done in the form of 'annulment', a ruling (by Archbishop Thomas Cranmer) that Henry had never been lawfully married to Catherine, notwithstanding that Christ's Church had removed the impediment of her marriage to his late brother, Arthur, and sanctioned Henry's marriage with her.

[7] There is consistency here : having abandoned his vows made before God, Henry had to see to it that his subjects did the same.

Preamble—that the people of the various Australian States "humbly relying on the blessing of Almighty God" have agreed to unite in one indissoluble Federal Commonwealth. The rider that they agreed to do so "under the Crown of Great Britain and Ireland" had, however, the effect of subjecting the laws laid down by Almighty God through nature to human will wherever convenient. For, from the date when Henry VIII suborned the English parliament to give legal effect to the dissolution of his marriage, "the Crown" ceased to be the upholder of God's laws *in se*, but their interpreter ; and God and His laws were bound under the Protestant imperative to serve the ends "the Crown" laid down. Henry Tudor's rejection of God's authority institutionalised by his Protestant heirs subjected God's rule to the rule of men.

Had he been deposed, or had Luther's revolt, which he endorsed, failed ; or had the populace of England and Scotland rejected Protestantism, Henry's unilateral and tyrannical act would have failed in its scandalous effects. The violence that was its proper effect would not have been retained in the public psyche to haunt us today, dulling men's grasp of natural principle, providing grounds for 'gay marriage' and persuading High Court judges to utter a nonsensical statement. We would be free of a host of evils that afflict us, not the least of which is the abandonment of the compulsory demand for an oath when circumstances demand it[8].

If I am not subject to God's rule, He is (so to speak) subject to mine, *His* authority subject to *my* authority. From this beginning, the weakness of human nature inclining me to pride and self-conceit[9], I move easily to the view that I am not responsible to Him (or anyone else) for my actions. The next step is to question His existence, to find reasons to doubt it, then to reject it : from agnosticism I pass to atheism. This process, precipitated by the rejection of God's authority by Luther and Henry Tudor, has taken centuries to reach its apotheosis.

It is with us now.

Michael Baker
27th December 2012—*St John the Evangelist*

APPENDIX

RUSH TO JUDGMENT HAS HIDDEN AGENDA

Geoffrey Luck, *The Australian*, 27th December, 2013

THE High Court's destruction of the ACT's parallel marriage system for same-sex couples was so swift and devastating that many people may not have read on to see what else it had to say in its judgment.

The six justices found it so simple to decide that the ACT Marriage Equality (Same Sex) Act 2013 was inconsistent with the Commonwealth Marriage Act 1961 they took advantage of the spare time they had left to exercise their minds on something they were not asked to consider.

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[8] The abandonment of the oath before God to speak the truth is, of course, a function of the burgeoning atheism that afflicts the 21st century world. But taken in its roots, it is the inevitable consequence of the breach *of his oath* by Henry VIII and the compulsion he sought to visit upon his people to do the same.

[9] Which the Catholic Church identifies in the doctrine of Original Sin.

Lawyers have been stunned to find the judgment offered an elegantly developed argument for a redefinition of marriage, arguing both a historical and a constitutional basis on which the commonwealth parliament could pass a same-sex marriage bill.

It is cleverly interwoven with its consideration of the ACT act. Here, critics say, is the latest proof of the court's predisposition to judicial activism.

The first step in the argument was to demolish the 19th-century English law cases frequently cited as the basis for Australia's Marriage Act 1961 (as amended in 2004) and demonstrate they are out of date because of their reliance on definitions derived from Christianity.

Hyde v Hyde, the 1866 case that defined marriage "as understood in Christendom is the voluntary union for life of one man and one woman, to the exclusion of all others", gave Australia the phrase adopted in the 2004 amendment. This accurately described the state of the law at Federation, the court said.

But Hyde v Hyde dealt with the problem of dissolution of a polygamous marriage in Utah.

Statements made in that case suggesting that a potentially polygamous marriage could never be recognised in English law had since been qualified to the point where in both England and Australia the law now recognises polygamous marriages for many purposes.

Once it is accepted that "marriage" can include polygamous marriages, the court went on, it became evident that the juristic concept of "marriage" could not be confined to a union having the characteristics described in Hyde v Hyde and other 19th-century cases.

The court here seems to have deliberately misled by omission. Section 6 of the Family Law Act 1975 recognises polygamous marriages only if entered into outside Australia.

The judgment went on: "The 19th-century use of terms of approval, like 'marriages through Christendom' or marriages according to the law of 'Christian states', or terms of disapproval, like 'marriages among infidel nations' served only to obscure circularity of reasoning. Each was a term which sought to mask the adoption of a premise which begged the question of what 'marriage' means."

This completely disingenuous argument destroys itself by its own circularity. Moreover, it exposes the meddling intentions of the learned justices.

When Lord Penzance handed down his judgment in Hyde v Hyde and Woodmansee on March 20, 1866, everyone in England was absolutely clear as to what marriage was, and what it meant. Whether celebrated in Canterbury Cathedral or the poorest Methodist chapel, marriage meant the union of a man and a woman only, promising to remain together for life. It was implicit (and usually explicit) in every ceremony that this structure was for the comfort and enjoyment of both, and the nurture of children of the union.

The High Court has quite deliberately misconstrued phrases such as "marriages among infidel nations" as terms of disapproval, whereas they were used to distinguish different legal jurisdictions. For example, Lord Penzance dealt with the question of definition of marriage when he said: "It does not mean the same thing in Utah, as the man is at liberty to marry as many women as he pleases."

So much for the historical argument. The court's second line of attack was constitutional, as it turned to Section 51(xxi). It began quoting with approval justice Victor Windeyer's comment in 1962 in the Marriage Act case that the scope of powers in the Constitution is "not to be ascertained by merely analytical and a priori reasoning from the abstract meaning of words". It also endorses Windeyer's statement that "marriage is not a matter of precise demarcation" but "a topic of juristic classification".

That comment is used to legitimise the process by which the courts usurp the legislative powers by undertaking an interpretation that would undermine the basic purpose of legislation.

It is a process which began in the US with chief justice Earl Warren in the famous 1954 Brown v Board of Education case, and has since been adopted with enthusiasm by those justices who believe they are justified in advancing rights law. The term "judicial activism" was in fact coined seven years earlier by Arthur Schlesinger in a landmark article on the US Supreme Court for Fortune magazine.

In the Roach case in 2007 concerning prisoners' voting rights, chief justice Murray Gleeson concluded that the judiciary in Australia did have a supervisory role in vetting commonwealth legislation. This is the concept of a "living constitution" which some authorities have termed the "living tree" approach to issues.
In a paper on the question of judicial activism in 2009, present Chief Justice Robert French described the assumption that the functions of making the laws, administering them and adjudicating on them as institutionally separate as a "conservative assumption", assuming the narrowest function for the judiciary.

A contrary critical view has been expressed by Greg Craven, the vice-chancellor of the Australian Catholic University. Constitutional interpretation, he believes, appears to equate activism with progressivism, continually updating the Constitution in line with perceived community and social expectations.

So the High Court went on to argue in favour of defining the marriage power in the Constitution in a new way: "Because the status, the rights and obligations which attach to the status and the social institution reflected in the status are not and never have been, immutable, there is no warrant for reading the legislative power given by s.51(xxi) as tied to the state of law with respect to marriage at Federation."

The rights and obligations had changed with the Matrimonial Causes Acts, the court said; marriage became a voluntary union entered into for life - it was no longer a union for life.

To subtly weave these arguments into its judgment on the narrow issue of the conflict of marriage laws was misleading because it was unnecessary. The definition of marriage was not before the court; it had not been argued by either the commonwealth or the ACT and was in fact irrelevant to the case, as it admitted itself.

Here, it seems, is yet another instance of the superior court taking on itself to indicate the future direction of social policy, just as bills arguing for same-sex marriage are coming before state and federal parliaments. Can no one rid us of these turbulent judges?

We should remember Montesquieu in his *The Spirit of the Laws* (1748) : "There is no liberty, if the power of judgment be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of the oppressor."

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