Same-Sex Marriage: A Legal Error Based On An Empirical Mistake

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A recent ruling in December 2013 by the Australian High Court placed the responsibility for defining marriage for purposes of registration in the hands of the Federal Parliament. Thereby, the court also confirmed that marriage registration would remain in the sphere of politics. Hence, the question of legalising same-sex marriage (SSm) should also be treated as a *political* issue (rather than only a biblical-theological one).

It is a political issue, not because the Federal Parliament can *determine* the meaning of marriage itself, but because the Parliament has the task of deciding what to recognise as true marriage for a number of purposes. That task in turn raises the all important question, 'What is marriage?

In opposition to claims of the validity of SSm, I will argue that the traditional, ages-long view of marriage as a conjugal relationship between a man and a woman (Girgis, Anderson, & George, 2010; Girgis, George, & Anderson, 2012) is the correct one.

My argument will be framed by the proposition that any state[1] recognition of SSm is a 'legal error based on an empirical mistake' (Homosexuality, 2012).

1 A state comprises a nation's law-making executive and those subject to those laws.

1. The Empirical Mistake

We recognise readily that all Australian citizens have rights upheld by Acts of Commonwealth and State law, and Common Law; what we are less aware of are the rights of institutions which also ask to be recognised, supported and protected.

Marriage is one of mankind's basic institutions and its rights should be respected by the Federal government as an institution: marriage, unlike any other institution, has members who procreate and nurture successive generations forming ongoing family bloodlines. Hence, Girgis, Anderson and George (2012) define conjugal marriage in these words,

> a bodily as well as an emotional and spiritual bond, distinguished thus by its comprehensiveness, which is, like all love, *effusive*; flowing out into the wide sharing of family life and ahead to lifelong fidelity (p.1, italics in original).

Consideration of same-sex relationships (SSR), on the other hand, leads to the inevitable conclusion that they don't qualify for admission to the present Australian conjugal marriage institution because they cannot in principle meet the core requirements of the above description. That is, they can't meaningfully copulate or procreate. The physical-sexual homogeneity of same-sex couples does not allow for primary sex organs to be used in sexual intercourse in which two bodies are joined together in coitus.

The fact that marriage has typically involved heterosexuality at its core for six thousand years of written history according to the Hebraic-Christian tradition and other traditions too, is telling evidence. One has only to consider the

persuasiveness of the myriad of varying cultures with differing religious beliefs and practices, civic structures, government authority structures and economic systems that have displayed conjugal marriage over millennia.

Heterosexual marriages (HeSms), in their marriage bond, are potential pro-creators of new human lives. Moreover, the father and mother of the potential children of their sexual bond take responsibility for the upkeep, guidance, and nurture of their children. In addition, the mother and the father are themselves in a bloodline of parents and grandparents and will themselves in time become grandparents and perhaps great-grandparents too.

Genealogical continuance is a unique feature of conjugal marriage (which does not happen and can not happen in SSm) and is part of a family's larger sense of identity. It also contributes to the stability of any society as these strong family ties bind the generations together and this feature is a public good.

For incidental reasons (e.g., infertility, old age, infirmity, medication, informed choice, government policy) not all marriage partners will engage in sexual intercourse or have children. Such reasons do not compromise the conjugal definition of marriage because such peripheral exceptions occur with many (if not all) definitions of classes. The Latin tag is appropriate at this point: *de minimis non curat lex*: 'the law is not concerned with trifles', or more positively, 'the law is only made for what normally obtains' (Novak, 2011).

However, we do know with certainty that those in a SSR can not copulate or procreate (within the normal meaning of these terms) because such couples lack, and in principle must lack, sexual complementarity.

Doubtless, wealthy lesbian couples will be able to afford the technology needed for donor sperm transfer or gay men may use surrogate mothers. Or they may choose to go through the process of adopting children (of heterosexual unions of course, since children cannot be produced by SSms)! However, in these cases, clearly the resultant child has not arisen from within the putative SS relationship. As Lee (2008) argues,

> Unique to marriage is the fact that the bodily, emotional, and volitional relationship between the man and the woman is intrinsically oriented to being prolonged and fulfilled by their becoming a family.

Indeed, SSm advocates have had to work with another definition of marriage to answer the conjugal view although this marriage description is not always made explicit in what they say. Frequently though, it is expressed in the slogan, 'We want to marry the one we love'.

Girgis, Anderson, and George, (2012) have termed this understanding the 'revisionist' view of marriage which they define as:

> in essence, a loving, emotional bond, one distinguished by its intensity—a bond that needn't point beyond the partners, in which fidelity is ultimately subject to one's own desires (p. 1-2).

Although this is an excellent *definition* of a revisionist view of marriage, the latter could also be *described* as the 'romantic-passionate' view based on a constructivist[2] sociology in which no reality exists except for that which is constructed by human consciousness.

SSm supporters believe that romantic-passionate love is the essential mark of marriage but their understanding is narrow and limited to Western thinking.

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2 See Alan Sodal's amusing article on this subject, http://www.physics.nyu.edu/faculty/sokal/lingua_franca_v4/lingua_franca_v4.html

Indeed many arranged marriages are conducted in India, Pakistan, China, the UK, the USA and even in Australia that are not born of passionate-love at all. Some of these marriages may never demonstrate such love. Yet, it cannot be said that these unions are not true marriages.

Early marriages often arose from the capture of women from one's enemies. By the Medieval period, the Age of Chivalry, 'love' as admiration emerged in the practice of marriage but not all marriages were 'love matches' by any means. Only in the 19th century during the Victorian period in England did romantic, passionate-love become the dominant feature of Western marriage.

Therefore, we can say that romantic or passionate-love combined with a commitment is not the *sine qua non* of marriage. What then is the *sine qua non* of marriage? One can only say that as reflected in history, custom and tradition that it is the one-flesh, copulatory union of a man and a woman made possible by the physiological complementary of a male and a female typically leading to the birth of children and the formation of a family.

SSrs, no doubt, do exhibit genuine love and caring. (But so does love between siblings and between close friends.) In no way though, do these relationships qualify in principle as marriages. For them to qualify as marriages would require a radical alteration to the essential nature of the marriage relationship itself. Politicians, lawyers and lobby groups would be required to craft a newly-defined relationship so that homosexual couples would be able to marry. This new relationship would redefine marriage in terms of a romantic-passionate love definition implicit in the SS relationship and hence reduce the richness of

historically-given marriage.

Thus, a significant empirical mistake is made to imagine that these two different types of relationships can be treated as equivalent. Clearly both cannot be marriage. This conclusion is a serious problem for any campaign agitating for SSm because proponents must show that SSrs display the defining characteristics that HSm shows *or* that HSm can be easily reduced to SSm without loss of the former's essential characteristics. That task is clearly beyond the bounds of even the most ardent of supporters of SSm unless they are completely blinded by superficial, legal-sounding terms such as 'marriage equality', 'treating all people equally', and even the call for 'natural justice' (whatever that might mean in this context) each of which obscures the challenge of demonstrating how empirically SSrs, without blind faith, can purport to be marriages at all.

In any case, the supposed legal issues surrounding SSm will now be discussed.

2. The Legal Error

The 'marriage equality' slogan has been effective as a catch cry. It has given supporters of SSm a phrase that appears to suggest that the SSm is a 'civil rights' issue and can be argued on the basis of the principle of equality before the law.

To the normal voter this slogan implies a semblance of a rational-moral foundation for SSm. After all, who would want to deny certain people their civil right to be judged equally with others?

Marriage as a civil right

Implicit in the SSm campaigning is the claim that marriage is a 'civil right' but that claim is unsubstantiated. As we know, the SSm lobby is implicitly asking the parliament to adopt a new legal definition of marriage which is to be imposed on society because of the lobby's demands to facilitate SSrs to marry.

The effort to invoke 'civil rights' in this debate is illegitimate. The demand for equality (for equal rights) masks the fact that homosexuals have the same rights as heterosexuals in the matter of marriage now. They can marry as long as they fulfil the conditions of present law which everyone else must also fulfil. Of course, homosexuals will quickly answer that their wish is to marry someone of their own sex. They don't want to marry someone of the opposite sex. In other words, they are asking that a special, extra 'right' be recognised in regards to them which heterosexuals do not currently have either. But, by the same reasoning, those who prefer under-age children, or one of their siblings, or more than one other adult, can likewise raise the 'marriage equality' banner.

In any case, the European Court of Human Rights in Strasbourg (ECHR) did not think marriage to be a civil right when it concluded that the ‘European Convention on Human Rights does not require member states’ governments to grant same-sex couples access to marriage’ (Doughty, 2012, updated June 8). The 'court of human rights [found] that there was no violation of human rights for an Austrian couple denied the right to marry' (Buyse, 2010, June 24).

Skillen (2004) in a detailed analysis of this question concluded that although marriage is within the purview of the state to make laws about, that does not

mean marriage is a civil *right*. That is, although marriage is a civil matter and is regulated by civil law that does not make marriage a civil right.

A licence to drive a car is a matter of civil law. But one has to fulfil various stipulations (e.g., age, passing an approved driving test, physical-mental health) in order to get a licence. Clearly, a vehicle licence, although a civil matter, is not thereby a civil *right*.

Marriage licensing is in a related position as driver licensing with regard to the state. One cannot be married to another unless one meets particular qualifications for becoming married or unless *persuasive reasons are offered for a change in the qualifications*. So far, on the empirical evidence any case for that change on empirical grounds fails.

However, some homosexuals will say that the present qualifications for marriage discriminate against them by preventing them in principle from entering the marriage institution. But, the question is not one of whether the law discriminates[3] but whether it does this fairly or unfairly. On the present evidence we have to conclude that the discrimination against SS people is not unjust.

State power cannot alter the social reality of marriage

In order to include homosexual marriage within normal marriage, advocates for SSm are asking that the state change the fundamental social reality that is the marriage institution.

3 The law already discriminates quite properly in respect to age and marrying close relatives with respect to marriage.

So SSm supporters are not only wanting special rights for SSR, they also are urging for a novel perspective to be adopted for marriage itself which they understand will benefit SSrs. In short, they seek through parliament, the adoption of a society-wide change in the marriage institution itself. In doing that, it shouldn't be lost to view that inherent in this change is the use of a philosophy by the state where marriage is merely a convention that can be changed by the use of political-cultural power.

That fact alone should raise a red flag to all who believe that state power should be circumscribed and not be encouraged to enter the realm of creating its own form of 'marriage'. Wearne (2010) raises the significant issue that the so-called 'progressives' in this debate could be more readily dubbed 'reactionary' because they are calling for the state to exercise power beyond its proper scope to get their view of marriage made lawful.

The consequences of getting a government to do this is going to encourage the use of state power in the sphere of marriage and can only bode ill for the future of less dictatorial statecraft in Western governments.

The question is whether any state is actually competent to undertake such a change. Skillen (2004), says that the SSm debate concerns whether the laws that now govern marriage, in particular who can enter marriage, are good or bad, right or wrong. Hence to discuss the matter further, moral principles that are beyond the present law must be taken into consideration for we cannot decide the rightness or wrongness of a law by merely appealing to the marriage law itself.

In addition, Skillen (2004) insists that the principle of equality *in itself* cannot establish the nature of marriage. He illustrates his point by offering a case example where a couple of business partners apply to a court to be treated as a marriage because they want to be, and should be, because of their constitutional right to equality. But no court would accept this argument because,

> the civil right of equal treatment *cannot constitute social reality by declaration*. Civil rights protections function simply to assure every citizen equal treatment under the law depending on what the material dispute in law is all about. Law that is just must begin by properly recognizing and distinguishing identities and differences in reality in order to be able to give each its legal due (Skillen, 2004), n.p., italics mine).

The state and its interests[4]

The major reason the state is directly involved in the registering and supporting of marriage is because marriages typically produce offspring from within the conjugal bond; hence, the state has a direct interest in encouraging and supporting the marriage institution because it provides a stable nurturing pair for future projected generations. This provision of a new generation who are principally cared for and supported by blood relatives is a public good.

However, a pertinent question for lawmakers is, why should the state have any interest in SSrs? As we know, the state has no interest in friendships, companionships, or house-mates which it displays by not seeking to register or privilege these voluntary associations. And when we examine SSrs they also present as companionships or friendships that exhibit the added extra of homoerotic play. So the question remains, why should the state interest itself

4 *Interest* is used in the sense of 'responsibility for'.

in SSrs?

Marriage and children

SSm advocacy has pushed the claims of SSrs for equity to the point where, in some Australian states, the right to adopt children and/or for one partner to be artificially inseminated has been granted. The prospect of SSrs raising children has sparked debate about whether this would be harmful to children or whether this situation would be any different from being raised by a married heterosexual couple.

To demonstrate whether being brought up by a SS couple would harm the futures of children, sociological studies have examined the question of whether significant differences arise between heterosexual couples and SS partners in the raising of children.

The American Psychological Association (APA) felt so confident of the research on the matter of the raising of children that it was bold enough to conclude (somewhat incautiously) that: 'results of research suggest that lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children' (Paige, 2005).

However, Marks (2012) examined the 59 studies that this APA judgement was based upon and found that *none of them* was rigorous enough scientifically for the APA to find as it did. He concluded that 'strong assertions, including those made by the APA, were not empirically warranted' (p. 735).

Furthermore, Mark Regnerus[5] (2012a, 766) concluded his ground-breaking study of nearly 3,000 families with these words:

> Do children need a married mother and father to turn out well as adults? No, if we observe the many anecdotal accounts with which all Americans are familiar. . . . . But the NFSS [New Family Structure Study][6] also clearly reveals that children appear most apt to succeed well as adults—on multiple counts and across a variety of domains—when they spend their entire childhood with their married mother and father, and especially when the parents remain married to the present day. Insofar as the share of intact, biological mother/father families continues to shrink in the United States, as it has, this portends growing challenges within families, but also heightened dependence on public health organizations, federal and state public assistance, psychotherapeutic resources, substance use programs, and the criminal justice system.

Regnerus did not claim that his results supported the idea that 'new family structures' were directly responsible for negative effects on children. Nevertheless, he did statistical analyses for other possible influences and still found significant positive differences favouring married couple-families (heterosexual) over other types of family structures. The research's conclusions are couched in cautious terms as befits all reputable scientific work. His caution can be seen in the conclusion above. In his follow-up study in response to critics Regnerus (2012b) concluded that:

> [t]he new analyses [of the 2012b paper] I present here still reveal numerous differences between adult children who report maternal same-sex behavior (and residence with her partner) and those with still-married (heterosexual) biological parents. Far fewer differences appear between the former and several other groups, most notably never-married single mothers.

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5 Despite the ferocity of the attacks meted out on Regnerus and his findings, often by those not qualified to deliberate over peer-reviewed social scientific literature, and also by those with large left-leaning axes to grind, Regnerus' studies have been completely vindicated by the University of Texas as using sampling methods, methodology procedures and drawing conclusions within the normal range of extant sociological research. See also M. J. Franck. (2012a). Mark Regnerus and the storm over the New Family Structures Study. http://www.thepublicdiscourse.com/2012/10/6784/ ; M. J. Franck. (2012b). The vindication of Mark Regnerus. http://www.thepublicdiscourse.com/2012/10/6786/; A. Samuel. (2012). The kids aren't all right. New Family Structures and the “no differences” claim. http://www.thepublicdiscourse.com/2012/06/5640/

6 Regnerus was investigating a certain types of newly-defined families with lesbian-only or gay-only parents which he termed *new family structures.* Hence, his project was a new family structures study or NFSS.

Sociologists of various persuasions will debate these matters endlessly. However, the question of the raising of children by SS couples is a larger one than scientific research alone.

Equity for children

The raising of children by SSm couples is a question also of equity. Although SSm advocates have trumpeted the claims of equity and fairness for the adults in SSrs, it has to be asked whether the lobby has paused to consider the rights of children in this matter. Indeed one wonders whether the notion that other stakeholders in this SSm debate have rights that ought to be both represented and heard within non-prejudicial forums is even considered.

For example, have those who have proclaimed the rights of SSms to be recognised considered that in doing that greater ease will be granted for the gaining of children through various means and that that will mean these children will have no choice but grow up in fatherless or motherless families? In a time when SSrs are demanding *their* choices be recognised by society, SSm advocates at the same time, are denying any children in their own relationships any right of choice about having a father and/or a mother as the case may be.

With this opinion, Frank Brennan SJ, AO, former Chair of Australia's National Rights Consultation Committee agrees:

> [i]n the name of equality of adults, future children should not be deprived the opportunity to be born of a man and a woman. Citizens need to consider not only the right of same sex couples to equality[7] but even

7 Although Brennan has now changed his mind about the legalisation of SSm, he still holds to the above view on

more so the rights of future children (2013, n. p.).

Character of proposed changes in marriage law

To change marriage law in the way suggested by SS supporters would be a profound change in marriage itself. No longer would marriage be founded in a conjugal and coital relationship, the new 'marriage' definition would have to incorporate a different kind of relationship (i.e., a revisionist one) within its structure.

Hence, SS advocates require the state now to adopt their advocated, implicit view of marriage defined as a romantic-passionate love relationship and impose this view on all marriages as their new *sine qua non* making for historical discontinuity with the past millennia of normative marriage.

It is no exaggeration to say that both these changes and the worldview that lies behind them are profound in nature. These are not just minor alterations but changes that stem from a radical worldview which understands mankind's freedom over all of life as a given and is expressed in the message that 'we can make marriage whatever we want it to be'. Hence, it propounds the view that marriage can just be changed simply by mankind's pretended sovereign choice backed up by the power of the state.

This essentially nihilistic worldview can only destroy any institution on which it chooses to apply its radical outlook. For if marriage's definition and character is just a matter of human convention then no reason exists to restrict that understanding to marriage only. Any societal institution whatsoever falls under

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children which would be classed as discriminatory by the 'marriage equality' movement.

the same rule. Moreover, the rule itself being just a convention can at any time be changed by those with the political power and will to do this.

In opposition to this above worldview is another radical worldview in this debate countering the above worldview and resultant philosophy and sociology. Those who hold with this worldview believe that marriage law over the millennia has been a reflection of ordinances that are embedded within created reality but give mankind *freedom within limits*. With respect to marriage, this perspective would observe that although its forms have varied throughout history it has also remained within certain boundaries. (Moreover a distinction between “weddings” - formation of a marriage, and marriage itself, is often missing. Weddings vary in form across time and between cultures far more than marriages do but this variation is merely incidental to the resultant marriage).

Likely discriminatory results of the adoption of SSm laws

The assertion often made is that if others have a SSm it would have no (unjust) effects on anyone else's (traditional) marriage, family, workplace, professional employment, worship institution. This statement is untrue because marriage is, among other things, a social-public institution. To imagine that a central institution can be changed and have no effect on marriage in general and in other spheres of life is to be either naïve or disingenuous.

For example, the introduction of SSm into Massachusetts in 2004 brought about many extreme societal changes across a wide spectrum of life (Camenker, 2012). Perhaps not every jurisdiction will experience quite the

extensive and intensive changes that Massachusetts continues to experience because that place has become a haven for homosexuality but changes will occur without doubt in every state that creates SSm.

Privately, the practice of the normal marriage may not substantially change but even that is debatable; but publicly the introduction of SSm will bring about major alterations in all societal spheres to some extent. These consequences will follow because of marriage's public character which is implicit or explicit in school curricula, in worship places, in business practices, health professional organisations, youth clubs, charities and in marriage itself.

For example, Victorian schooling is already being affected (even though SSm is not lawful!) because schools are being pressurised by the state—in the guise of removing bullying and stamping out 'homophobia'—to educate their pupils in the truth that SS attraction and gayness is to be unquestioned and supported (Tomazin, 2010, October 21).

In another glaring example of 'heterophobia' in 2012, a Professor Kuruvilla George, Victoria's deputy chief psychiatrist no less, and a member of the *Victorian Human Rights and Equal Opportunities Commission*(!) had his position come under pressure from Green's Senator Hanson-Young, Labor's shadow Attorney-General, the Hon. Martin Pakula, and others.

George's dire 'sin' was that he dared to sign his name to a document sent by 150 doctors to the Australian Senate pointing out the health implications of SSm (Herald Son, 2012, May 13). This subject, one on which he was well-qualified to render an opinion (even though it was a private opinion), was one

for which he received no protection of his right to free speech because his expert opinion did not coincide with those of lesser minds who are pursuing the so-called 'liberalisation' of Australian society. Heterogeneity is always scorned when it doesn't suit the political agendas of powerful elites.

However, what happens when all these changes are pushed on Australia by the state, to those reported 40% of Australians (Essential Media Communications, 2011, March 14) who don't accept SSm, many of whom are parents, aunts and uncles, godparents and grandparents of Australian children?

Are their deeply held views to be pushed aside? How do we then claim to be a just and tolerant society that values 'plurality'? Or is 'diversity' just an empty, 'weasel' word that means nothing more than a practice of adroit hypocrisy?

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