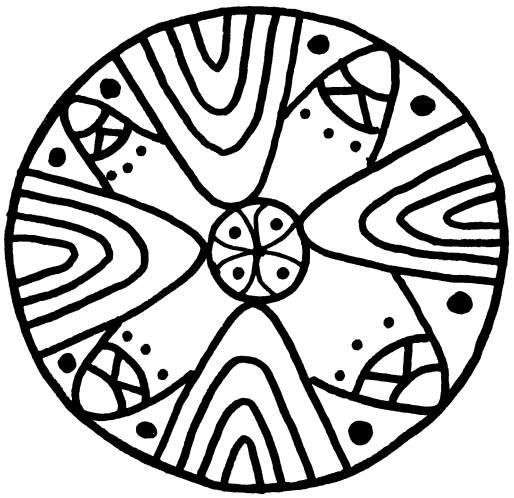
Marrying law & custom

Don Wilkinson

The Commonwealth's power to recognise customary law marriages.



The Commonwealth Parliament's powers to make laws with respect to marriage were conferred under s.51, placita (xxi) and (xxii) of the Constitution:

> (xxi) Marriage:
> (xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants . . .

The 'denotation and connotation' of those words, that is, their primary meaning and the range of objects brought within those words, are deemed not to have changed since Federation. Constitutionally the word 'marriage' means, basically, heterosexual Christian marriage, Registry Office marriage, or marriages conducted by marriage celebrants upon whom the Commonwealth has conferred powers under the *Marriage Act 1961* (Cth) to solemnise marriage.

Aboriginal tribal, or informal marriages, where they do not satisfy these conditions, are, for the purposes of Commonwealth law, *de facto* unions. Their status, recognition or definition as 'marriages' are currently subject to the primary jurisdiction of State and Territory law.

When, people today speak loosely of or lobby for other forms of union, such as 'gay marriages' or 'transsexual marriages', these are not 'marriages' according to either the common law,[1] or the meaning of the words under which the marriage power was conferred on the Commonwealth.

De facto unions were known and were common at the time of Federation but the words conferring power on the Commonwealth do not mention them. The Commonwealth's original power is therefore currently defined as not including power in relation to the recognition or regulation of *de facto* unions.[2] Power to recognise *de facto* unions is, however, part of the inherent and fundamental powers of the States and Territories.[3]

Accordingly, when the Commonwealth sought power to legislate on the status, custody and maintenance of ex-nuptial children[4] (the children of *de facto* unions), it had to obtain a grant of powers for that purpose from the States and Territories (Western Australia abstaining). The negotiations, through the Standing Committee of Attorneys-General, took 11 years.[5]

Neglected opinions?

In 1962, Windeyer J, although admittedly *in obiter*, held that the Commonwealth's marriage power was plenary and should not be narrowly construed. He held that while it is believed 'that the Constitution speaks of marriage only in the form recognised by English law in 1900', the word 'marriage' might not be as limiting as formerly supposed, and 'that . . . the legislative power does not extend to marriages that differ essentially from the monogamous marriage of Christianity . . . seems an unwarranted limitation. Marriage can have a wider meaning for law.'[6]

Don Wilkinson works in the area of administrative law and legal aid policy.

He believed that under Dixon J's views in *Bank of NSW v The Commonwealth* (1948) 76 *CLR* at 33, a single word which assigned a subject to Commonwealth power 'is not to be read as limiting or defining the kind of laws that can be made with respect to that subject',[7] and held that 'a law dealing with the tribal marriages of aboriginal inhabitants of Australia might also, I think, be within power', but, '[s]uch marriages can give rise to difficulties'.[8]

An even more radical view on the content of that power was mooted, again as obiter, by Higgins J in 1908:

> 'Under the power to make laws with respect to marriage Ishould say that the Parliament could prescribe what unions are to be regarded as marriages' [*Brewery Labels Case* (1908) 6 CLR 469]. The usage in 1900 gives us the central type; it does not give us the circumference of the power.[9]

These views, although old minority opinions, suggest a more flexible approach to connotation and appear increasingly attractive where there is a need and an impetus for achievable legislative reform.

Commonwealth powers generally

Apart from emergency and defence powers, and implied powers of state, the Commonwealth is generally limited on the ambit of its heads of power conferred under the Constitution. These may be amplified or refined by reading several heads of power in conjunction, or by discovery of the extent of those powers in the resolution of difficult case law, or through accumulated common law changes in the denotation and connotation of the existing words conferring specific powers on the Commonwealth.

The Commonwealth may also acquire additional powers by:

- referendum (s128, Constitution);
- grants of powers from the States; or
- enacting legislation pursuant to treaties and international conventions under the head of the external affairs power (s.51 (xxix)).[10]

While it is theoretically possible for the Commonwealth to use its s.51 (xxvi) head of power to enact any law, at any time, with respect to: '[t]he people of any race, for whom it is deemed necessary to make special laws', the consequences of removing large numbers of people from the control of State jurisdictions, without the consent or co-operation of the States, especially in matters of fundamental jurisdiction under their own constitutions and the inherent powers of their courts, might prove politically unacceptable.

ALRC Report No.31 Recommendations

The Australian Law Reform Commission,[11] recognising of the difficulties inherent in the constitutional head of marriage power, in common law and statute law, did not recommend *de jure* recognition of Aboriginal marriages, but proposed that functional recognition be given to certain consequences of such marriages, as if they were marriages under the *Marriage Act*. It recommended:

- acknowledging the status of offspring and removing any legal disabilities accruing to children by virtue of the marriages being held as *de facto* unions;[12]
- statutory acknowledgement of the *Aboriginal Child Placement Principle* in both child custody and adoption;[13]
- spousal rights for all spousal partners in accident compensation, social security, superannuation benefits, taxation and inheritance; and
- spousal immunity from giving evidence against a spouse in criminal hearings when such immunity also attaches to *Marriage Act* spouses.

Some Australian States have laws relating to *de facto* marriages[14] and the Commonwealth is currently negotiating with the States and Territories for a grant of powers so that Australia-wide uniform legislation can be enacted in relation to *de facto* marriages. Only Queensland has so far agreed to transfer such powers.

Proscribed marriage practices

Even in the much simpler legislative environment of 1962, Windeyer J said that, under his notion of Commonwealth power, 'Such marriages can give rise to difficulties'.[15] Those difficulties have increased. Australia has since signed and bound itself by ratification, with few or no reservations, to significant international conventions[16] which have no withdrawal clauses. These conventions proscribe certain marriage practices and require all signatory states to refuse legal recognition to others.

Child betrothals and marriages, non-consensual marriages and polygamous marriage are contrary to long standing rulings at common law, statute law and public policy. The first two marriage forms also breach international obligations. Even if the Commonwealth were given clear constitutional power to legislate for customary law marriage, either by judicial expansion of the connotation of the head of marriage power, or by the High Court pruning the overgrowth of judicial learning on the marriage power,[17] or further as a result of conferral of States' powers relating to all aspects of *de facto* unions, it would still be constrained not to confer legal status on the three types of marriage just mentioned. This also means that it would still be obliged in equity to maintain those aspects of functional recognition currently accorded to the consequences of customary law marriage for particular purposes, such as the status of children, welfare, family support, social security, superannuation, pension rights and medical and pharmaceutical benefits.

It is sometimes argued that if Australia recognises polygamous marriages contracted abroad under the laws of other sovereign states, then it should also recognise local customary law marriages of the same type. In its commitment to the comity of nations, Australia recognises marriages *lawfully* contracted under the laws of sovereign overseas powers. As there are no sources of sovereign power in Australia other than the Commonwealth, the States and Territories,[18] polygamous marriages contracted domestically cannot be recognised as lawful.[19] If an Australian citizen ordinarily domiciled here enters such a marriage overseas, it is void, and the union is at best a *de facto* relationship.

Transfer of States' powers

In his address to the Sixth National Family Law Conference (Adelaide, October 1994), the Attorney-General urged all States to follow Queensland's example and make similar transfers of power over *de facto* unions, because the Commonwealth could not extend 'the specialised procedures and facilities of the FamilyCourt to these couples unless it obtains a referral of constitutional power to do so'.

While the context was property settlement and ownership agreements, progressive transfers of State powers could extend to all incidents of *de facto* unions. This would enable the Commonwealth to legislate in the context of the *Family Law Act 1975* (Cth) for recognition of various forms of

informal marriage, including those incidents of Aboriginal customary law marriage which do not violate common law norms or Australia's international covenanted obligations. Such marriages should be referred to expressly with a formula for their ascertainment or could be included in the definitions section of the *Family Law Act*, by way of example or illustration of the kinds of previously informal marriages now subject to Commonwealth powers.

Ascertaining existence of Aboriginal customary law marriages

This issue arises where a marriage is not otherwise solemnised according to the requirements in the *Marriage Act*. An acceptable statutory formula, which could serve as a model in all jurisdictions, is found in the Northern Territory *Family Provision Act 1980*, at s.7(1A). It could be incorporated into the *Family Law Act 1975* (Cth) should appropriate amendments be made. The *Safety and Rehabilitation and Compensation Act 1988* (Cth) also contains a brief formula.[20]

The NT words are, 'an Aboriginal who has entered into a relationship with another Aboriginal that is recognised as traditional marriage by the community or group to which either Aboriginal belongs is married to the other Aboriginal and all relationships shall be determined accordingly'.[21] Such definitions require courts to ascertain the nature of such relationships, as evidence of fact, and constitute recognition of the relevant customary law. A similar, but briefer definition exists at s.4(3) of the *Adoption of Children Act 1988* (SA).[22]

Summary

In the absence of an appropriate international covenant to invoke the foreign affairs head of power, or the direct use of the races power alone, statutory recognition and legitimation of Aboriginal customary law marriages would seem to depend either on a courageous re-evaluation and judicial re-examination of the connotation of the marriage power or on reforms based on the transfer of the States' powers in relation to *de facto* unions to the Commonwealth. Status conferred by Commonwealth legislation would remove current objections to the issue of recognition of Aboriginal customary law marriages being left to the vagaries of separate State laws relating to *de facto* marriages.

References

1. *Corbett v Corbett (orse Ashley)* [1971] 2 *All ER* 33: a key case now used for defining 'marriage' (but challenged in UK per European Convention of Human Rights, Articles 8 and 12, in *Cossey v United Kingdom*, [1991], *Family Law* 362, without success).
2. The issue is arguable. Prior to *Lord Hardwicke's Act 1753* (UK) against clandestine marriages, marriages at common law could be by mutual consent alone. Accordingly they were part of the received common law of the colony of NSW, and recognition in NSW persisted for at least 40 years after settlement: Parker, S; Parkinson, P; and Behrens, B; *Australian Family Law in Context*, Law Book Co, 1994, p.302.
3. *The Australia Act 1986* (Cth) affirmed that all State Parliaments, subject to their Constitutions and apart from those powers conferred on the Commonwealth at Federation, had the same powers inherent in the UK House of Commons.
4. *Family Law Amendment Act 1987* (Cth).
5. The issue intimately involves the Commonwealth's power and the Family Court's power in relation to the offspring of all types of 'marriage'. It is also of increasing importance because of criticism of the Commonwealth's inability or reluctance to legislate so that the Family Court may recognise certain indigenous customary law and adoptive practices where appropriate.

   While the Commonwealth now has powers with respect to all children, where there is a break up of a liaison, both in relation to children of marriages and to children of *de facto* marriages or ex-nuptial children, there is as yet no definitive opinion as to the extent of that grant of powers. It is not certain if the grant should be deemed as a one purpose grant, or if it may be taken as a grant of power in relation to ex-nuptial children for all purposes. For constitutional limitations inherent in the words 'child welfare', see Wilkinson, D., 'Aboriginal Child Placement Principle', (1994) 3(71) *Aboriginal Law Bulletin* 13 at 13-14. See also the limitations placed on the Family Court's jurisdiction in certain 'welfare' issues by s.60(H) of the *Family Law Act 1975* (Cth).
6. *Attorney-General for the State of Victoria v the Commonwealth of Australia* (1962) 107 CLR 529 at 576 and following.
7. *Attorney-General v Cth,* above, at 578.
8. *Attorney-General v Cth,* above, at 577.
9. *Attorney-General v Cth,* above, at 610.
10. But see limitations, 3(71) *Aboriginal Law Bulletin* 13 at 14 and ref. 11.
11. The Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws,* ('The Customary Law Reference') Report No.31, 1986.
12. Legitimacy now exists for offspring of all *de facto* unions in all Australian jurisdictions, viz: *Status of Children Act 1978* (Qld); *Children (Equality of Status) Act 1976* (NSW); *Status of Children Act 1974* (Vic); *Birth (Equality of Status) Act 1989* (ACT); *Status of Children Act 1974* (Tas); *Family Relationships Act 1975* (SA); no separate Act, but s.41(1) of *Inheritance (Family Dependants Provision) Act 1973* (WA); *Status of Children Act 1978* (NT); and *Family Law Amendment Act 1987* (Cth). The only remaining concern would be removal of any residual legal effect resulting from ex nuptial origins. As the Customary Law Reference said at para.271, 'The recognition of traditional marriage for the purpose of legitimacy of children born of that marriage is a minimum consequence of the legal recognition of traditional marriage for any purpose'.
13. Wilkinson, D., 'Aboriginal Child Placement Principle', 3(71) *Aboriginal Law Bulletin* 13 at 13-15.
14. NSW, NT, ACT, and Victoria in its *Conveyancing Act.*
15. International Convention on Economic, Social and Cultural Rights 1966 (ICESCR), ratified 10.12.75; International Convention on Civil and Political Rights 1966 (ICCPR), ratified 13.8.80; International Convention on Elimination of All Forms of Racial Discrimination (ICERD), ratified 16.9.75; and International Convention on the Elimination of All Forms of Discrimination Against Women 1980 (CEDAW), ratified 20.7.83.
16. Non-consensual marriages: ICESCR, Article 10; ICCPR, Article 23(3); ICERD, Article 5(d)(iv); CEDAW, Article 16(10(a) and (b). Child betrothal/marriages: CEDAW, Article 16(2), to 'have no legal effect', plus specifies 'minimum age for marriage'. CEDAW Article 16(1) requires elimination of 'discrimination against women in all matters relating to marriage'.
17. As it did with s.92 of the Constitution in *Cole v Whitfield* (1988) 62 ALJR 303.
18. *Coe v The Commonwealth of Australia* (1979) 53 ALJR 403; *Coe v Commonwealth of Australia and Anor.* (1993) 118 ALR 193 at 199 (Wiradjuri Land Claim); *Denis Walker v The State of NSW*, High Court of Australia, Mason CJ (16 December 1994), unreported (see Brief in this issue), p.39. These decisions hold that the concept of 'domestic dependant nation' as a source of sovereign power is unknown to Australian law, and that 'The [A]boriginal people are subject to the laws of the Commonwealth and of the States or Territories in which they respectively reside'. Gibbs J, 53 ALJR at 408.
19. Part VA of *Marriage Act 1961* (Cth). Polygamous marriages are also not acknowledged by the Convention on Celebration and Recognition of the Validity of Marriages (Hague, 14 March 1978).
20. Section 4 states, '. . . a person who is or was recognised as an employee's husband or wife by the custom prevailing in the tribe or group to which the employee belongs or belonged'.
21. Some of the States, notably the Northern Territory, appear to be setting the pace with advanced legislative proposals for the recognition of customary laws. See NT proposals for possible customary law recognition in their forthcoming Constitution, viz: *Recognition of Aboriginal Customary Law: Paper No.4*, August 1992, Session Committee on Constitutional Development (NT Assembly); and *Aboriginal Rights Issues — Options for Entrenchment: Discussion Paper No.6*, July 1993, Session Committee.
22. '. . . if a man and a woman are married according to Aboriginal tradition, they will be regarded as husband and wife for the purposes of this Act'.