Samuel Griffith Society Lecture - Love

(14 May, 2020)

Thank you to John Pesutto and Xavier Boffa for organising this zoom talk today. This is a wonderful organisation, the Samuel Griffith Society, and it's been a real pleasure and honour to have been associated with it over the decade and a half that I've lived in Australia. We are a voice of sanity in the constitutional law world. Thank you, too, to our head honcho Stuart Wood QC who puts in a lot of his own time on all of our behalves.

I was asked to speak here today on the topic of the High Court's *Love* decision and to do so for 20 to 25 minutes to be followed by questions. Nothing else. They told me 'All you need is Love', which as it happens isn't the worst five word precis of the majority decision, apologies to John Lennon and Paul McCartney. At any rate I'm taking the organisers at their word. Also, as a sort of tribute to the brilliance with which Coalition governments these last 7 years have made appointments to the High Court I want to do something unique – because remember of the 4 Justices in the *Love* majority 3 were appointed by the Coalition, the most recent 3 appointees to the court in fact, all having been picked by that outstanding John Stuart Mill clone and former Liberal Attorney-General George Brandis. What I'm proposing, as a tribute to the skill with which the Liberals have appointed top judges to the High Court, is that about

half way through this talk today I will retire and be replaced by my wife. You may think that sort of thing would constitute a world first, but if so you're not familiar with Mr Brandis's approach to making appointments to our High Court. (And as an aside, let me say that I still get constitutional law academics from overseas ask me if that really happened, did the Australian government really choose as the top court's replacement for a retiring Justice, his wife? I suppose on the bright side you can say that at least in one way these Coalition governments have taken the family seriously.)

Now my first inclination, on being asked to do this talk and knowing I'd have only 20 minutes, was to take you on a survey of some rather dry constitutional law concepts, the sort of terms of constitutional art and deep legal significance that top barristers and top judges are forced to immerse themselves in when it comes to the finer intricacies of constitutional law. What I was tempted to do, then, was to look at the majority decision in *Love* and select some of the key concepts that drove the thinking of the judges who were in the four person majority. Here we would have had to open up the constitutional law textbooks and delve into the meaning of such arcane legal concepts – and I am not making this up I assure you – but concepts such as 'otherness' (I'll say that again, 'otherness', because in my 31 years of teaching law in universities around the world I've never encountered a case where a judge had decided a case where

this notion of 'otherness' was a core part of the ratio); or 'deeper truths'; or, when it comes to Australia, of 'connections [that] are spiritual and metaphysical' – using all these core legal precepts and more, combined together as in some holistic alternative medicine brew, to claim that judge-made law now recognises 'that Indigenous peoples can and do possess certain rights and duties that are not possessed by, and cannot be possessed by non-Indigenous peoples of Australia.' And that was just Justice Gordon, aka Mrs Hayne the Brandis appointee who replaced her husband in a literal world first, exemplifying the genius of the Liberal Party as well as anything could. Of course we could all sit in on one of the post-modernist grievance politics type classes now so common in Australia's universities in an attempt to try to have some glimmer of a smidgen of a hint of an idea of what 'otherness' is, or what 'otherness' means, because truth be told I have absolutely no idea.

But then perhaps instead we can consider Justice Nettle. This was another Brandis appointee, so obviously a rock solid interpretive conservative not prone to judicial activism, to flights of fancy and to succumbing to identity politics. In his judgment in *Love* Justice Nettle talks of how 'different considerations apply … to … a person of Aboriginal descent'. (Now of course one wonders why different considerations would apply in a liberal democracy committed to the rule of law and to formal equality, as opposed to one committed to the sort of identity politics poison that the British author Douglas Murray skewers in his

latest book). Still, different considerations for them apparently apply because that's what this judge says. If you're sceptical about that Justice Nettle goes on to re-educate you by noting that the Commonwealth's claims to the contrary 'intuitively … appear at odds with the growing recognition of Aboriginal peoples as "the original inhabitants of Australia"' and of their 'essentially spiritual connection with "country"'. So our top judges, unelected each and every one, now decide key constitutional law cases based on intuitions that provide them with some sort of ineffable expertise as far as discerning 'growing recognitions' is concerned – by whom we aren't told, and to be frank I would have thought that if you were looking for the group of people least likely to have their fingers on the pulse of what the community does and doesn't recognise you'd be hard pressed to do better than choose a cocooned committee of ex-barrister top judges who are genuflected to day in and day out, but I defer to Justice Nettle here. These top unelected judges, says Justice Nettle, are also able to discern 'essential spiritual connections'. Maybe they get special training on this once they're appointed to the High Court. Or maybe they read up on Arthur Conan Doyle's essays on spiritualism. Who knows? And let me note too, because it's rather pathetic, that Justice Nettle put 'country' in scare quotes. Not country, but 'country'. Either that's some sort of genuflection in the direction of identity politics or his law clerks were being overly careful about plagiarism concerns. You decide. The key takeaway here, though, is that we have yet more crucial constitutional law concepts being thrown into the mix;

we've now got 'essential spiritual connections with 'country'' (remember not to forget those scare quotes) joining 'otherness' and 'deeper truths' as things that a committee of unelected ex-lawyers happen to have extra special expertise about, and which they are able to use to remove decision-making power away from the elected Parliament (as they do in *Love*, and all because they've given the power to do so to themselves). *Mirabile dictu*!

If all of this sounds as though I'm less than enamoured with the quality of the reasoning of the majority judges in this case, give yourself a prize for being able to see through these subtle criticisms of mine. And yet there's more. The third Brandis appointee to the High Court, the most recent, was Justice Edelman. Can we at least hope that he would shun the idiocies of a bizarre sort of judicial activism premised on the worst sort of political correctness? To ask is to know the answer. No. Justice Edelman, in his judgment, talks of 'essential meaning[s]', 'metaphysical construct[s]', 'powerful personal attachment[s] to land' and then, remarkably I think, says 'To treat differences as though they were alike is not equality. It is denial of community. Any tolerant view of community must recognise that community is based on difference'. I have no clear idea of what that means, by the way, but neither it, nor any of the other political ramblings, have anything to do with the judges' assigned task, which is to interpret a Constitution.

And if you want to talk about formal equality of the sort that underlies the rule of law then treating those claiming Aboriginal ancestry the same as you treat everyone else is not 'denial of community'. It is how any decent jurisdiction committed to liberal democracy acts – because of course the Edelman political ramblings about community could justify any group getting special treatment. Does affording the Boers special treatment in the 1970s get a tick because you don't want to indulge in (and I quote) 'denial of that community' or because 'community is based on difference'. Let me blunt, all this Gordon/Nettle/Edelman stuff is just about the worst sort of mumbo jumbo ever used in a constitutional law judgment. And believe me, there is some amazingly tough competition for the prize of worst judicial mumbo jumbo.

At any rate, you'll all be glad to know that I opted to resist the temptation to walk you through the core constitutional concepts employed by the three recent Liberal appointees to our High Court in the *Love* case. Well, I didn't wholly resist the temptation to point out to you some of the lunatic, post-modernist, steeped-in-identity-politics, blatantly activism-enhancing comments of these three recent Coalition-appointed High Court judges. I'm only human after all.

That said, allow me to move to a more orthodox account of the case, even though in many ways the most important criticism of it is the one I've just taken

you through in highly expedited fashion – namely, that supposed interpreters of our written constitution (one of the world's oldest and most successful) decided to trade in their jobs as interpreters of legal text for the far more invigorating job of identity politics professors, latter day Professor Foucaults who've been given license (well, given it to themselves) to make social policy above the heads of the elected parliament. Now there are two looming retirements on the High Court, Nettle goes this December – and I'm told his wife is pretty excited about her prospects of being appointed in his place – and Justice Bell in March of next year. Both were in the majority in this case. My desire is that we get two (not one, but two) interpretive conservatives from Attorney-General Christian Porter and that a case similar to this one is then appealed back to the High Court with the Solicitor-General being ordered not to wimp out (as is the general practice where Solicitors-General genuflect before terrible past decisions and never argue they were wrongly decided – see *Roach* and *Rowe* and *Brown*) but instead to go into the newly constituted High Court sometime next year and flat out argue that *Love* is bad law, terrible law, and that the High Court must overturn its own precedent. And that the government will continue to argue this in all future cases where it's relevant.

But I digress. Here's my quick summary of the *Love* case, not as quick as the one given by the Beatles above, but quick. This case, on the question of

deporting plaintiffs who were born outside Australia, who are foreign citizens and who have not been naturalised or made Australian citizens, but who claim to be Aborigines, was in my view (as some of the more astute listeners will have already discerned) a disgrace. By 4-3 it effectively constitutionalised identity politics; in a weird sort of way it elevated the common law – judge made law to be clear – above the Constitution itself; it introduced a race-based limit on the Parliament's power; it looked very much to be a clear case of outcome oriented judging, meaning you start with the conclusion you want and then struggle to find rationales to get you there; amusingly or depressingly, depending on your cast of mind, the case more or less ignored or abandoned the established heads of powers interpretive methods – the ones that to my mind have unfortunately been used by our top court to deliver the most pro-centre federalism case law in the world – but did so out of the blue in a case, this case, where no Australian State actually benefitted from that abandonment; oh, and given the tools the judges had to work with it is now fair to say that this *Love* case means our top judges are vying for the title of the most activist judges in the common law world. (Remember, we have no national bill of rights so simply making things up at the point-of-application is a lot harder here in Australia, the tools for doing so being pretty much absent.)

What I'm going to do with the rest of my time is to look at one unusual aspect of the *Love* case that relates to federalism – a core concern of the Samuel Griffith Society – and that will take up my assigned time so we can thereafter move to questions – though if you want to know about 'otherness' please ask our current High Court, not me.

Let me start with a short and therefore highly generalised digression comparing the approach to federalism judicial review of legislation in Canada and in Australia. In my native Canada, where there is a two-list system of federalism (a list of the centre's heads of powers and a list of the province's), the approach to federalism interpretation is very, very different to here. In Canada the approach came out of the Privy Council in London in the 19th Century; it's still unquestioned orthodoxy today; and the test centres on what's known as a law's 'pith and substance'.

You as a judge take a contested law and ask yourself what is that law's 'pith and substance'; what is its essential character; what does it in substance relate to.

So if you decide that this contested statute, in substance, relates to X (one of the heads of powers on one of the lists), but incidentally and less substantively touches on Y and Z (from the other heads of powers list), then the challenged

law is *intra vires* the legislative competence of the X list, the one that contains head of power X.

Or put differently, Canada in effect has a two step process: 1) What is the pith and substance of the impugned law? 2) Take that essential character, that pith and substance, and ask which head of power it most fully falls under; does it fall under list one (s.91 in Canada, the powers of Ottawa) or list two (s.92, the Provinces listed powers)?

Now compare that to Australia's approach to federalism judicial review of legislation. My colleague at UQ Nick Aroney labels this approach 'interpretive literalism'. And to be clear we're talking about the post-1920 approach that flowed from the *Engineers Case*. How does it work here, where we copied the US form of federalism and opted for a one-list system (so only the powers of the centre are listed and everything not listed goes to the States)? Well, you look at the s.51 heads of powers and read these granted heads of powers 'as widely and liberally as the words used permit'. And then you ask if the contested statute can fit under any of the s.51 heads of powers, read in this wide and liberal way. If so, this is a matter for the Commonwealth. If not, it's for the States.

Now it's pretty obvious that the Australian approach to federalism judicial review is remarkably friendly to the centre; it's why we have what is probably

the world's most pro-centre federalism jurisprudence. I will skip over whether that is a good thing or a bad thing – most Australians clearly are centralists and think it a good thing; most members of this SGS cult are not centralists and think it a bad thing. I do think it's fair to say that none of the framers of Australia's Constitution over a century ago would ever have imagined that Australian States would be as emasculated as they are today. None would have anticipated that the 'corporations' power (s.51(xx)) would be held to allow the Commonwealth to take over the field of industrial relations or that the 'external affairs' power (s.51 (xxix)) would be deemed to enable the Commonwealth to enact far-reaching environmental and human rights laws. Put differently, if Canada's approach to federalism judicial review had been used in the *Tasmanian Dam* case or in the *WorkChoices* case then the States would have won and the centre would have lost.

Why do I bring up that ancient history? It's not part of a James Allan ritualised lament about the woeful state of federalism in Australia, although I'm not against regularly making such laments. No, I bring it up now because in theory the *Love* case was a federalism heads of power case. So one would assume that we're playing the interpretive literalism game. One would assume what we'd see is something along the lines of the same-sex marriage case, *Commonwealth v Australian Capital Territory* [2013] HCA 55, where the High

Court read s.51 (xxi) – the 'marriage' head of power – in a wide and liberal and broad way so that it included marriages between persons of the same sex. Had it not done that, had it read the head of power more narrowly, or in line with the framers' intended meaning, then odds are the power would not have rested with the centre. It would have gone to the States, or in this case to the ACT. But that's not the pro-centre Australian way. That's not the orthodox approach to federalism judicial review, like it or lump it.

And yet when we turn to *Love* we see the majority implicitly reject federalism heads of power orthodoxy – and let me be clear, I don't like the orthodox approach to federalism judicial review in this country. I merely tell you what it is and note that this *Love* decision is a completely bizarre case to break away from orthodoxy because no State or Territory gets to benefit from the limit on the centre's power. One would have expected the majority to look at the head of power in play, s.51 (xix) 'aliens', and then read that in a broad, wide, liberal, extremely friendly to the Commonwealth manner. As they always have done, which is why our States are mendicants and why we have the world's worst vertical fiscal imbalance, etcetera. So using anything remotely coming close to that orthodox approach to federalism judicial review it looks like a sure thing that the Commonwealth legislation will stand and these gentlemen will be deported. It won't be long before 'Love is in the Air', to move from the Beatles

to John Paul Young. But with hardly a mention of why orthodoxy was being jettisoned that's not what happened in *Love*; it's not the approach that was taken by the majority. Instead we get The Troggs and 'Love is All Around'.

And that's doubly unusual here, weird almost, because with federalism judicial review – unlike with rights-related judicial review of the sort you see in Canada and the US under a justiciable bill of rights – the judicial task is premised on the judges having to 'choose between two elected legislatures, central or State'. Judges here act as umpires between two democratically elected legislatures. If legislature X does not have the power to do what the statute is doing then legislature Y does. And vice versa. But in the *Love* case we are talking about a statutory power to deport non-citizens. I'm the most pro States rights law prof in Christendom – can we still say that? – but if anything is a power that has to go to the centre it is deportation. There was never any chance at all that if the Commonwealth could not deport Mr Love then one of the States could do it. No. In effect the High Court majority judges took it away from *all* elected legislatures. Or put more bluntly, Bell, Gordon, Nettle and Edelman turned a heads of power federalism case into a sort of rights-related judicial review case – the sort of case you see under bills of rights where *no elected body* can do what is being proposed to be done in the statute. And that is almost never the scenario with federalism judicial review. Remember, we have no national bill of rights in Australia (though I recognise that with *ACTV*,

Lange, *Roach*, *Rowe*, *Brown et al* our top judges are doing what they can to judicially create something similar). Or put differently yet again, the end result here is yet more judicially made-up implications that no real life Founder ever actually held, the implication in *Love* being that there is a sort of identity politics, bastardized race-based exception to s.51 (xix) – a constitutional implied limit on Parliament's sovereignty that has nothing to do at all with federalism limits.

I'll say that again. This *Love* case on its face is a federalism judicial review case. But the majority judges transmogrify it into a bastardized rights-related sort of judicial review case, most clearly seen because on their ratio no elected legislature can deport these men (assuming they meet the politically correct criteria laid down). How did that happen? Well, it happened with a hefty dose of 'otherness', 'deeper truths', 'different considerations for persons of Aboriginal descent', the keen application of 'intuitions', discerning 'essential spiritual connections' and 'metaphysical constructs' – the list of dry, arcane constitutional concepts continuing on in that vein.