MUTABILITY AND METHOD IN THE MARRIAGE REFERENCE

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The *Reference re Same-Sex Marriage*[1] has caused a headache for the federal government. Instead of resolving the issue, the Supreme Court arguably left the federal government[2] in an even worse position. At the time of writing, it is not clear whether the proposed legislation[3] will pass. Given the importance of the issue and the fact that the government decision to support same-sex marriage appears to represent a rare triumph of principle over political opportunism,[4] the reference's aftermath is regrettable.[5] This article argues that the Court's mutable analysis, combined with the government's questionable choice of method, have only partially advanced the important social goal of arriving at a defensible definition of "marriage". Following a brief overview of the reference's history the article discusses the opinion. It then proposes a modest theory of reference utility against which the government's decision to pursue the reference is assessed and, ultimately, found wanting.

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[1] *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79 [2004] SCC 79 [*Marriage Reference*; "the reference"]

[2] In this article "federal government" and "government" refers to the executive branch, and "Parliament" refers to the legislative branch.

[3] Bill C-38, *An Act respecting certain aspects of legal capacity for marriage for civil purposes*, 1st Sess., 38th Parl., 2005.

[4] I give the federal government full credit for accepting the discriminatory nature of the traditional definition of civil marriage. Unfortunately, the government's conviction did not quite extend to spearheading the initiative on its own.

[5] I fear the aftermath has been mostly negative even if ultimately the legislation fails but section 33 of the *Charter* is not used to safeguard a heterosexual definition of marriage. In other words, even if the marriage issue is resolved solely at the level of the common law (excepting Québec of course), on balance the Court's opinion in the reference has not advanced the issue in a useful way.

A. The Road to the Reference

The *Reference* had an unusual history. Beginning in 2000, three cases were launched in Quebec,[6] Ontario[7] and British Columbia,[8] arguing that the common law definition of marriage – restricting it to "one man and one woman" – violated section 15(1) of the *Charter*.[9] All three claims were vindicated in the respective provincial appellate courts.[10] In the meantime the government turned its mind to developing a legislative response. This in itself was significant because the federal government had never before engaged in sustained debate over the definition of marriage. The closest it came was the reflexive addition, in the 1999 *Modernization of Benefits and Obligations Act*,[11] of a provision asserting that marriage was an opposite-sex institution.[12]

In 2003, when the Quebec, Ontario and B.C. cases were before the provincial courts, Federal Minister of Justice Martin Cauchon announced that the Justice Committee of Parliament would conduct hearings on the issue. A discussion paper entitled "Marriage & Legal Recognition of Same-sex Unions" was released. Hearings were held across the country.[13]

On May 1, 2003, the British Columbia Court of Appeal found the common law definition unconstitutional. It issued a delayed declaration of invalidity, suspending the order's effect for two years. On June 10, 2003, the Ontario Court of Appeal issued its opinion. The panel, unanimous on the section 15(1) issue, also agreed on the

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[6] *Hendricks c. Québec (P.G.)*, [2002] R.J.Q. 2506 (Sup. Ct.) [*Hendricks* (Sup. Ct.)].

[7] *Halpern v. Toronto (City)* (2002), 60 O.R. (3d) 321 (Div. Ct.) [*Halpern* (Div. Ct.)].

[8] *EGALE Canada v. Canada (A.G.)* (2001), 95 B.C.L.R. (3d) 122, 2001 BCSC 1365 [*EGALE* (Sup. Ct.)].

[9] *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [*Charter*].

[10] *Hendricks c. Québec (P.G.)*, [2004] R.J.Q. 851 (C.A.); *Halpern v. Toronto (City)* (2003), 65 O.R. (3d) 161 (C.A) [*Halpern* (C.A.)]; *EGALE Canada v. Canada (A.G.)* (2003), 13 B.C.L.R. (4th) 1, 2003 BCCA 251 [*EGALE* (C.A.)].

[11] *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12 [*MOBA*]. *MOBA*, responding to such decisions as *M. v. H.*, *infra* note 29, removed the remaining legal distinctions between same-sex and opposite-sex unmarried couples in federal legislation.

[12] The motion affirmed "that marriage is and should remain the union of one man and one woman to the exclusion of all others, and that Parliament will take all necessary steps to preserve this definition of marriage in Canada. " *Hansard* (8 June 1999) 15960.

[13] Canada, Standing Committee on Justice and Human Rights, *Evidence of 34th Meeting*, 37th Parl, 2nd Sess. (8 April 2003); see also House of Commons, News Release, "Justice Committee's Tentative Cross-Canada Travel Plans" (28 February 2003).

appropriate remedy.[14] The Court issued an immediate declaration of invalidity,[15] meaning that gay and lesbian couples henceforth were entitled to marry in Ontario. Many did.[16]

Shortly after the Ontario Court of Appeal decision the federal government announced that it would not seek a further appeal to the Supreme Court of Canada.[17] Instead the government declared its intention to legislate the effects of the B.C. and Ontario decisions. The federal Cabinet decided to refer to the Supreme Court three questions relating to federal authority to pass the legislation; the legislation's "consistency" with the *Charter*; and the freedom of religious officials to refuse to marry same-sex couples. Some months later, a fourth question was added asking whether the traditional definition of marriage violates the *Charter*.[18]

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[14] The panel in the Ontario Divisional Court split as to remedy, with only one judge endorsing the immediate recognition of the expanded definition. *Halpern* (Div. Ct.), *supra* note 7 at paras. 5, 93, 308.

[15] *Halpern* (C.A.), *supra* note 10 at para. 156.

[16] Vanessa Lu & Tonda MacCharles, "Same-sex couples rush to the altar" *Toronto Star* (12 June 2003) A01. As of this writing, more than 1000 such marriages have been performed in Ontario.

[17] Kim Lunman, "Ottawa backs gay marriage: Court decisions won't be appealed" *The Globe and Mail* (18 June 2003) A1. The Prime Minister announced that neither of the appellate decisions would be appealed, and the current appeal in the Quebec decision would be discontinued. After an intervener appealed the Quebec case anyway, the Court of Appeal released its decision in March, 2004.

[18] The four questions read as follows:

1. Is the annexed *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes* within the exclusive legislative authority of the Parliament of Canada? If not, in what particular or particulars, and to what extent?

2. If the answer to question 1 is yes, is section 1 of the proposal, which extends capacity to marry to persons of the same-sex, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars, and to what extent?

3. Does the freedom of religion guaranteed by paragraph 2(a) of the *Canadian Charter of Rights and Freedoms* protect religious officials from being compelled to perform a marriage between two persons of the same-sex that is contrary to their religious beliefs?

4. Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in section 5 of the *Federal Law-Civil Law Harmonization Act, No. 1*, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?

The operative sections of the proposed legislation were:

1. *Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.*

2. Nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs.

B. The Opinion

Question 1: Federalism and the balance of power

The first question asked whether the legislation fell within Parliament's exclusive jurisdiction. The Court answered this question largely in the affirmative. The Court held that the legislation clearly pertained to "civil marriage", for which the federal and provincial governments share legislative authority. Section 91(26) of the *Constitution Act, 1867*, grants power over "Marriage and Divorce" to the federal government; section 92(27) reserves to the provinces power over "Solemnization of Marriage". In a 1912 decision[19] the Court held that laws affecting who may marry – in other words, capacity – fell within federal, not provincial jurisdiction.

It would appear, then, that the first reference question was unnecessary (at least, with respect to section 1 of the draft legislation) since it sought the Court's opinion on a legislative power – determining who may marry – that already is recognized as falling within the authority of Parliament. Why, then, did the government pose the question? Two reasons come to mind. First, the government did not raise the general issue of which level of government has the jurisdiction over capacity to marry; rather, it asked whether *the proposed legislation* was "within the exclusive authority of Parliament." An affirmative answer may have been sought to mute jurisdictional objections from the provinces. At least some such objections would mask resistance to the substantive change – expanding "marriage" to include same-sex couples – within the more neutral stance of protecting provincial "turf". An unequivocal answer from the Court would complicate such attempts.[20]

The second reason involves not the provinces but a broader argument over the inviolability of certain terms within the Constitution itself. The one court which ruled against the *Charter* claim did so on an explicitly originalist[21] approach to section 91(26). In *EGALE*, Justice Pitfield found that the word "marriage" must be understood in its historical context at the time of Confederation.[22] Pitfield J. held that the

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[19] *In Re Marriage Laws* (1912), 46 S.C.R. 132.

[20] This is exactly what happened. Those provinces most outspoken in defence of "traditional marriage" – such as Alberta – quickly conceded that they could not avoid the federal law. For example, the provinces could not use the notwithstanding clause (section 33 of the Charter), because section 33 is unavailable to a legislature with respect to a law that falls outside its powers. Katherine Harding, "Alberta plans to fight gay marriage" *The Globe and Mail* (10 December 2004), online: The Globe and Mail <http://www.globeandmail.com>.

[21] Robert H. Bork, *The Tempting of America: The Political Seduction of Law* (New York: Free Press, 1990), ch.7; Antonin Scalia, *A Matter of Interpretation* (Princeton, N.J.: Princeton University Press, 1997) at 37-47.

[22] *EGALE* (Sup. Ct.), *supra* note 8 at para. 102.

term "marriage" is restricted to its common law meaning: "the union of one man and one woman for life, to the exclusion of all others."[23] On this basis, he found that neither Parliament nor a province has the authority to redefine the word "marriage" beyond its 1867 meaning. A change of this nature, he reasoned, would represent such a fundamental break with the constitutional's original "intent" that it could occur only through amendment.

Pitfield J.'s judgment was roundly rejected in every court that bothered to address it.[24] The Supreme Court was similarly unreceptive to the argument:

> Several interveners say that the *Constitution Act, 1867* effectively entrenches the common law definition of "marriage" as it stood in 1867... The "frozen concepts" reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life... A large and liberal, or progressive, interpretation ensures the continued relevance and, indeed, legitimacy of Canada's constituting document. By way of progressive interpretation our Constitution succeeds in its ambitious enterprise, that of structuring the exercise of power by the organs of the state in times vastly different from those in which it was crafted.[25]

The Court's disposition of the "frozen rights" argument is important because it neutralizes a potent tool in the hands of those opposed to the legislation. It can be assumed that those relying on a notion of frozen rights realize that they are fighting against the tide of Canadian constitutional interpretation. Unlike the United States, Canadian jurisprudence has never really accepted the tenets of originalism.[26] Nonetheless, in the particular context of marriage the "frozen rights" approach has broader public appeal than it might, for example, in a sex equality[27] or criminal law[28] case. Its appeal relates not so much to the intention of a "framer" that "marriage" be understood in a particular way, but to a long-standing *social* conception of the term

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[23] *Hyde v. Hyde* (1866), L.R. 1 P. & D. 130 at 133.

[24] *Halpern* (Div. Ct.), *supra* note 7 at paras. 104-106, LaForme J ; *Halpern* (C.A.), *supra* note 10 at paras. 38-49; *Hendricks* (Sup. Ct.) *supra* note 6 at paras. 109-122.

[25] *Marriage Reference*, paras 21-23.

[26] Peter Hogg, *Constitutional Law of Canada* (Toronto: Thomson Carswell, 1997) 15-45; *Reference Re s. 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 *[Motor Vehicle Reference]*.

[27] *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.)

[28] *Motor Vehicle Reference*, *supra* note 26.

that is thought to transcend the power of any legislature to critically redefine it.[29] The Supreme Court's answer to Question 1 has forced opponents to recognize that, in law, "marriage" reflects a category of relationships rather than a spiritually invested state of being. The meaning of "marriage", therefore, can evolve.

At the same time that the Court affirmed in Parliament a substantial degree of authority over marriage, it imposed on it an important limitation. Section 2 of the proposed legislation said: "Nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs." In drafting section 2 the government attempted to balance the "competing" interests that may be at stake when civil marriage – a rite often performed by religious officials – is extended to gay and lesbian couples. The government argued that section 2 was declaratory. The Court disagreed, finding that section 2 created a legal exemption. Section 2 therefore was *ultra vires* Parliament because only the provinces can enact legislation affecting who may perform (or be excused from performing) marriage for civil purposes.

In essence, the Court said that the provinces alone are competent to protect the religious freedom of persons involved in the solemnization of marriage.[30] Given the constitutional division of legislative authority over marriage this appears to be straightforward. However, the federal government did not propose to control the duties of persons authorized by the provinces to solemnize marriage. The government simply desired that its own legislation not be interpreted as requiring religious officials to perform ceremonies contrary to their beliefs.

Legislative authority regarding religious officials' participation in marriage ceremonies may well be within the exclusive authority of the provinces. Nonetheless the Court removed an important mechanism for the federal government to demonstrate its sensitivity[31] to the tension that this issue seems to generate. The Court made a potentially important concession to division of powers over a more *Charter*-friendly approach that allows either level of government to signal its support for *Charter*

[29] Previous opinions by Court members have contained language and reasoning sympathetic to the traditional view of marriage. See particularly the decisions of Gonthier J. in *Miron* and La Forest J. in *Egan*. Even in *M v. H.* – a near unanimous judgment for a same-sex claimant – the majority clarified that it was *not* dealing with marriage *per se*. *Miron v. Trudel*, [1995] 2 S.C.R. 418 at 448-452, Gonthier J., dissenting; *Egan v. Canada*, [1995] 2 S.C.R. 513 at 535-539, La Forest J.; *M. v. H.*, [1999] 2 S.C.R. 3 at para. 134, Cory and Iacobucci JJ.

[30] Of course, where a province fails to do so religious officials may challenge such failure under section 2(a) of the *Charter*.

[31] I would not restrict the availability of such mechanisms to the federal government; in a given case the provinces also may wish to demonstrate sensitivity. Thus, where either level of government seeks through legislation to indicate its support for *Charter* rights and values, such a message should not be cut down by a rigid division of powers analysis.

values.[32] Of course, the government is not entitled to bolster its position through unconstitutional means. Still, given the Court's relatively uncompromising stance on Question 3– which removes much maneuvering room for the provinces anyway – its insistence that section 2 of the legislation was not merely declaratory, but *ultra vires,* is curious. In its final remarks on this point, the Court stressed the precise wording of the question: whether section 2 of the proposed legislation lay within Parliament's "exclusive" jurisdiction. The Court's words suggest that perhaps the issue could have been characterized as having a "double aspect".[33] This approach has much to recommend it, as there is a fine line between the duties imposed on those who solemnize marriage within the provinces and the religious freedoms that may be implicated by the adoption of a broader definition of marriage. Such an approach is also at least suggested by the bifurcation of the marriage authority in the *Constitution Act, 1867.* However, the Court's ultimate disposition with respect to section 2 does not follow such an approach.

Critics of the legislation responded swiftly to the curtailment of section 2. The Official Opposition seized on this part of the opinion, claiming that the Court had admitted that Parliament was powerless to safeguard religious freedoms. The Opposition, carefully sidestepping the Court's firm answer to Question 3, sought to excite public opinion using the spectre of same-sex marriage ceremonies being forced on unwilling religious officials.

The federal government responded by introducing in Parliament essentially the same legislation referred to the Court. The legislation continues to include a clause mentioning religious freedom.[34] The federal government has explained its decision to retain section 2, albeit in a slightly different form, as a simple recognition that "religious officials are already protected by the *Canadian Charter of Rights and Freedoms* from being compelled to perform marriages that would be contrary to their religious beliefs, as confirmed by the Supreme Court of Canada in its opinion on the

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[32] For example, in *Rothmans Benson & Hedges Inc. v. Saskatchewan* (2003) 232 D.L.R. (4tth) 495, the Saskatchewan Court of Appeal held that provincial restrictions on tobacco advertising triggered the doctrine of paramountcy because the more lenient federal legislation was motivated by a desire to preserve, to some extent, advertisers' freedom of expression. The Supreme Court of Canada reversed, [2005] S.C.J. No.1, holding that a "true" inconsistency did not arise, *inter alia,* because an advertiser could comply with both laws by following the stricter one. In its brief reasons the Supreme Court did not address whether a federal intent to protect *Charter* interests could be frustrated by a less *Charter*-sensitive provincial law governing the same behaviour.

[33] *Hodge v. R.* (1883), 9 App. Cas. 117 (P.C.); *Multiple Access Ltd. v. McCutcheon,* [1982] 2 S.C.R. 206.

[34] Section 3 of the *Act* reads:

> 3. It is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs.

[M]arriage Reference".[35] If the legislation passes in its current form, it may represent the first time that the government has disregarded specific advice obtained through a reference.[36]

Question 2: Charter compatibility

Question 2 asked whether section 1 of the proposed legislation, which extends capacity to marry to same-sex couples, is "consistent" with the *Charter*. At the time the reference was first put to the Court, Question 2 appeared to be something of an oddity. It did not seem plausible that the expanded definition might actually *violate* the *Charter*. Indeed, the government's choice of words suggested that it was "hedging" its bets by obtaining the Court's approval without ever putting before it the key question (ultimately, Question 4).

The strongest part of the Court's answer related to the proposed legislation's purpose and lack of discriminatory effects on religious groups. The Court found that section 1 of the draft legislation directly responded to the lower court findings that the traditional definition of marriage violates the *Charter*;[37] and that the law's preamble stated a clear intent to honour the *Charter*'s equality guarantee.[38] The combination, the Court held, meant that the law's purpose, "far from violating the *Charter*, flows from it".[39] It might be thought that with this statement the Court revealed its true posture on the issue of *Charter* obligation, in other words, that its answer to Question 4 would have been "no". In the main, the sentiment overstates because it does not recognize the possibility that legislation can "flow from", promote, or be inspired by the constitution without being required by it.[40] I concede that the general tenor of the Reference is receptive to the legislation. Nonetheless, the answer to Question 2 does not settle the underlying issue of whether the concept of civil marriage *must* include same-sex relationships.

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35 Federal Department of Justice (Canada), Fact Sheet, "Civil Marriage Act" (1 February, 2005).

36 Peter Hogg notes that no government has ever disregarded a point of law established in a reference opinion. Peter Hogg, *Constitutional Law of Canada* (Scarborough: Thomson Carswell, 1997) at 8-17. It might be argued that since the federal government changed the wording of the above provision it did follow the Court's advice. While I disagree with the Court's reasoning I suspect that even the redrafted section violates the spirit of the opinion.

37 *Marriage Reference, supra* note 1 at para. 41.

38 *Marriage Reference, supra* note 1 at para. 42.

39 *Marriage Reference*, para 43.

40 Henry P. Monaghan, "The Supreme Court 1974 Term – Foreword: Constitutional Common Law", (1975) 89 Harv. L.Rev. 1 at 2. Carissima Mathen, "Constitutional Dialogue in Canada and the United States" (2003) 14 N.J.C.L. 403 at 420. [*Mathen*]; Michael Plaxton, "In Search of Prophylactic Rules" (2005) 50 McGill L.J. 127.

As noted above, few constitutional scholars questioned the constitutionality of section 1 of the draft legislation; yet some interveners did raise *Charter*-based objections. In the main these amounted to very weak arguments that the proposed legislation violated the equality rights and religious freedoms of persons opposed to same-sex marriage for religious reasons.[41] The equality argument can only be described as bizarre: some interveners argued that the recognition of same-sex marriage offends the equality rights of persons opposed to such marriages on religious grounds and of opposite-sex married couples. The Court quite properly gave short shrift to such arguments, holding that it would be impossible to apply section 15(1) if an extension of equality rights diminishes the rights of individuals who oppose the extension on, essentially, discriminatory grounds:

> The mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another. The promotion of *Charter* rights and values enriches our society as a whole and the furtherance of those rights cannot undermine the very principles the *Charter* was meant to foster.[42]

The *Charter* section 2(a) argument had several factors,[43] but the Court focused on the claim of an "impermissible conflict of rights".[44] Several of the parties argued that expanding the definition of marriage would create such a conflict in spheres other than solemnization. The Court rejected the argument as both purely hypothetical and insufficiently appreciative of the *Charter*'s ability to minimize conflicts through proper delineation of the rights at issue.

<u>Question 3: Same-sex marriage and religious freedom</u>

Question 3 asked the Court to provide guidance regarding the proper balance between the rights of gays and lesbians to access marriage, and the freedom of religious officials (and their institutions) to refuse to perform such marriages.

As the Court noted Question 3 did not deal with the proposed legislation but posed a more general query. Interestingly, while the Court firmly rejected the "hypothetical" argument – raised under Question 2 – that the legislation produced an impermissible conflict of rights, it did not hesitate to answer Question 3. The Court

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[41] Factum of the Intervener Canadian Conference of Catholic Bishops paras. 52-61.

[42] *Marriage Reference, supra* para. 46.

[43] *Marriage Reference, supra* para. 47: "It is argued that the effect of the *Proposed Act* may violate freedom of religion in three ways: (1) the *Proposed Act* will have the effect of imposing a dominant social ethos and will thus limit the freedom to hold religious beliefs to the contrary; (2) the *Proposed Act* will have the effect of forcing religious officials to perform same-sex marriages; and (3) the *Proposed Act* will create a "collision of rights" in spheres other than that of the solemnization of marriages by religious officials."

[44] *Marriage Reference, supra* at paras. 50-54.

noted that the question relates to the forced performance of both religious and civil marriages where such ceremonies violate the official's religious beliefs. It held that such compulsion emanating from the state clearly would violate section 2(a). It then said: "[A]bsent exceptional circumstances which we cannot at present foresee, such a violation could not be justified under s. 1 of the *Charter*."[45] Section 2(a) also was held to protect against "the compulsory use of sacred places for the celebration of such marriages and [from] compelled to otherwise assist in the celebration of same-sex marriages."[46]

The *Marriage Reference* provides relatively robust protections for religious officials and institutions. This would seem to answer some objections. However, the legislation's critics have continued to voice concerns premised on potential infringements of religious freedom.[47] The issue has gained traction in a different yet related area: some civic officials indicate they will refuse on religious grounds to perform same-sex ceremonies. The federal Minister of Justice has urged the provinces to accommodate such persons, but at least two provinces – Manitoba and Saskatchewan – firmly reject such accommodation on the ground that an exemption of this sort would run contrary to public policy.[48] An additional issue has arisen with respect to the use of religiously affiliated spaces. A lesbian couple has brought a human rights complaint against the Port Coquitlam Knights of Columbus. The couple alleges that, after renting a wedding hall from the Knights, their agreement was terminated when the Knights discovered the nature of the event.[49] The complaint is currently before the B.C. Human Rights Tribunal.

About the most that can be said is that the line between protected religious belief and unjustified discrimination remains "murky". The Reference opinion provides little guidance to human rights commissions – and provincial governments – as they navigate these unsettled waters.

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[45] *Marriage Reference, supra* para. 58.

[46] *Marriage Reference, supra* para. 59.

[47] Canadian Islamic Congress, News Release, 8:11 "Islamic Congress Urges Government to Dump Same-sex Marriage Bill: — MPs Spending Too Much Political Capital on the Issue" (7 February, 2005); Catholic Civil Rights League, Press Release, "CCRL Calls For Free Vote On Marriage Legislation" (1 February 2005); Canadian Conference of Catholic Bishops, Media Release, "Marriage Debate: Letter to Prime Minister from Conference of Bishops – Freedom of Conscience and Religion Threatened" (15 February 2005); *House of Commons Debates*, 058 (16 February 2005) at 3584 (Hon. Stephen Harper).

[48] "Don't give officials a licence to discriminate," Editorial, *The Globe and Mail* (7 January 2005) A14.

[49] Michael Valpy, "The Knights and the lesbians: Exhibit A in same-sex uproar" *The Globe and Mail* (2 February, 2005) A1.

Question 4: Same-sex marriage as an equality right

The fourth and final question asked whether the heterosexual definition of marriage violates the *Charter*. Whereas Question 2 asked whether an expanded definition of marriage is "consistent" with the *Charter*, Question 4 asked whether a particular definition of marriage violates the *Charter*.

The Court refused to answer this question, but not on grounds asserted in previous references.[50] Instead, the Court said that the *Marriage Reference* was attended by a "unique set of circumstances"[51] – if it were to find that the opposite sex definition of marriage does not offend the *Charter* "confusion" could result. While its opinion would not affect the law in any of those provinces in which final judgments had issued from appellate courts, it would create an anomaly because there is no way that such an opinion would be perceived as other than an authoritative statement of the law.[52] The Court was most concerned by the potential impact on those persons who, relying on the finality of the appellate decisions, took advantage of the new common law rule and got married. In the wake of a contrary opinion by the Court what would happen to them? With respect, the difficulty faced by such couples, while moving, is not a persuasive reason for refusing to answer the question. As my colleague points out elsewhere in this volume,[53] the fact that persons may have entered into such marriages has little to do with Question 4, which seeks the Court's opinion on the constitutional validity of a heterosexual definition of marriage.

As discussed below, one of the values that a reference can promote is coordination. The Court's analysis suggests that Question 4 actually provoked a coordination problem. However, the idea that law functions primarily as a coordination mechanism is challenged in the federalism context, because a federalist regime can tolerate divergent legal rules. Therefore, the Court's refusal to answer question 4 does not correct the situation of uncertainty that could be produced by a contrary opinion issued by another provincial appellate court. Several interveners argued forcefully that the principles of *stare decisis* and federal common law preclude this possibility.[54] In other words, the government's refusal to appeal the lower court decisions changed the law throughout Canada. If true, this means that a federal refusal to

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[50] *Reference Re Same-sex Marriage*, [1988] 2 S.C.R. 217 at para. 30; John McEvoy, "Refusing to Answer: The Supreme Court and the Reference Power Revisited" (2005) 54 UNB L.J. 27 at p. 28 [*McEvoy*].

[51] *Marriage Reference* at para. 64.

[52] See discussion of references, *infra*.

[53] *McEvoy, supra* note 50.

[54] Factum of the Intervener BC Couples, paras 32-39; Factum of the Intervener EGALE at paras. 7, 18-23.

appeal a single decision, perhaps at the lowest court level, permanently changes the common law across Canada. This argument cannot be correct. In a variety of circumstances, a government respondent might prefer to appeal one case but not another. If the time for an appeal in one jurisdiction has not expired, the mere existence of decisions in other, non-binding jurisdictions cannot be sufficient to deny a right to appeal.

Some interveners emphasized the fact that orders confirming the declaration of invalidity were entered on consent of the parties including the federal government.[55] Again, this does not quite make out the argument that in another case, the government could not take a different approach. Suppose, for example, that the government falls. By what principle is a new government precluded from pursuing an appeal in a province where the issue has yet to be litigated?[56]

It therefore is possible that in one of the remaining provinces a court might rule against the putative *Charter* claimants. Assuming that the Supreme Court agreed to hear an appeal from such a decision – and it is difficult to imagine that it would refuse – surely the Court would not deny that it had an *independent* obligation to consider the substantive issue (the defensibility of the common law definition of marriage).

The Court also stressed that an answer to Question 4 was unnecessary because the government admitted that it would proceed with the legislation regardless of whether the latter is constitutionally required.[57] The Court apparently did not consider the possibility that the government might fail in its attempt. In that case, the question could remain "live" as other cases wind their way through provincial courts.

By refusing to answer the fourth question, the Court contributed to the confusion that immediately followed the opinion. Most significantly, the Court did not address the question of whether alternatives to changing the definition of marriage might also satisfy the *Charter* (the "civil unions issue").[58] Some lower courts rejected this alternative, but the government evidently did not regard those decisions as providing enough cover for its choice of marriage over civil unions. The government, then, is in a poor position to argue that the key substantive equality question has been settled. The refusal to answer – which an appeal would have addressed – has encour-

[55] Factum of the Intervener BC Couples, para. 40.

[56] The issue remains to be decided in Alberta, New Brunswick, the Northwest Territories and Nunavut. It has been decided in the Yukon Territory: *Dunbar v. Yukon Territory*, 2004 YKSC 54.

[57] In addition, as my colleague notes, the Court conflated the "Attorney General" with the "Governor in Council". *McEvoy, supra* note 50.

[58] Factum of the B.C. Couples, Interveners in the *Reference re Same-Sex Marriage*, para. 53; Factum of the Intervener Working Group on Civil Unions.

aged some persons to argue that the Court left it up to Parliament[59] to have the final say on the matter. This argument is disingenuous to the extent that it constructs the decision as one of parliamentary supremacy unconstrained by the *Charter*. But, the reaction is predictable.

In sum, the *Marriage Reference* affirmed a well-settled rule of federalism (Parliament has the sole authority to define "capacity to marry"); struck down a federal message affirming the religious freedom of provincial officials; made the important but hardly ground-breaking point that extending the definition of marriage is "consistent" with the *Charter*; ruled that section 2(a) of the *Charter* provides almost complete protection from being forced as a religious official to perform, or permit to be celebrated, a same-sex marriage ceremony; and refused to specify whether the legislation is constitutionally required, after all. In its blend of evasive and highly assertive answers, the opinion is a model of mutability which some people described as a masterstroke.[60] Certainly the Court was able to sidestep some of the political "heat" that attends this issue. In legal terms, however, the opinion hardly provides a stable blueprint, because it raises almost as many questions as it purports to answer.

C. The Reference as Constitutional Method

It is unfair to critique the Supreme Court opinion without also laying some of the blame at the federal government's door. The marriage reference, in particular Question 4, was a transparent attempt to punt the issue to the Court on terms most palatable to the government. Perhaps, at a political level, we should admire the government's *chutzpah*. As a matter of normative constitutional theory, however, the federal government should have sought resolution of the issue by appealing the provincial decisions, or through forthright defence of its legislation independent of the Court.

The reference jurisdiction is an important and distinguishing feature of Canadian constitutionalism. For example, it represents a key difference between Canada and the United States. Article III of the U.S. Constitution assigns the judiciary – at the federal level at least – a specific and exclusive function, namely, the

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[59] House of Commons Debates, 058 (16 February 2005) at 1545 (Hon. Stephen Harper):

"I want to take this opportunity to thank the government, or maybe, ironically, I should be thanking the Supreme Court of Canada for at least one thing. At long last the question of marriage has been returned to where it should have been from the beginning: in the Parliament of Canada."

[60] John Ibbitson, "Here's the bottom line: The system works", *The Globe and Mail* (10 December 2004) online: *The Globe and Mail* ,http://globeandmail.com>.

responsibility to decide particular "cases and controversies".[61] For that reason, Article III has been interpreted to prohibit the federal courts from hearing references, or, as they are called in the U.S., "advisory opinions".[62] Anglo-Canadian constitutionalism appears to view the judiciary, at least in part, as an office of the Crown: "the official adviser of the executive."[63] Rather than functioning only as a "check" on the executive branch, it is more accurate to regard the Canadian judiciary as occasionally aligned[64] with the executive branch.

Note the chief difference between references and appeals. References are triggered by a question from one of the other branches; they do not engage the court's remedial function and are strictly advisory.[65] They lack the basic character of a legal rule: they do not bind anyone to their result.[66] In Canada, however, the notion that

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[61] U.S. Constitution, Art. III, s. 2. In addition, the U.S. Constitution provides for a "supreme court" in which shall be invested "the judicial power of the United States". U.S. Const., Art.3, §1. The Canadian constitution contains no equivalent provision. The Supreme Court of Canada is established by a federal statute, *The Supreme Court Act*, R.S.C. 1985, c.S-26, which implies that the Court could be eliminated by an ordinary Act of Parliament. I recognize that there is ambiguity on this point because of section 43 of the *Constitution Act 1982*, which states that a change to "the composition of the Supreme Court" requires a unanimous constitutional amendment.

[62] *Muskrat v. United States*, 219 U.S. 346 at 362 (1911). Some state constitutions do allow for advisory opinions. However, Professor Tribe writes that even in such states the courts generally describe the advisory opinion as "extrajudicial" and possessed of "dramatically limited stare decisis effect." Lawrence Tribe, *American Constitutional Law* (Mineola: The Foundation Press, 1988) 73 n.4. See generally Note, *Advisory Opinions on the Constitutionality of Statutes*, 69 Harv. L. Rev. 1302 (1956).

[63] *In re References by the Governor-General in Council* (1910), 43 S.C.R. 536 at 547, aff'd [1912] A.C. 571 (P.C.).

[64] Thus in the *Quebec Secession Reference* the Supreme Court of Canada notes that the American conception of separation of powers does not find an exact corollary in Canada. *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 15.

[65] In *Reference re Criminal Code*, Justice Girouard stated that "as our advice has no legal effect, does not affect the rights of parties, nor the provincial decisions, and is not even binding upon us," he had no objection to answering the reference. Justice Davies made the same point in *Reference re References:* "Being advisory only and not binding upon the body to whom they are given [the Governor General in Council] or upon the judges who give them they cannot be said to be in any way binding upon the judges of any of the provincial courts." *Reference Re Criminal Code (Canada), s. 873(A)* (1910), 43 S.C.R. 434 at 436; *Re References by the Governor-General in Council* (1910), 43 S.C.R. 536 at 561.

[66] The non-binding nature of references, in part, explains why U.S. federal courts regard them as an alien function. The reference power seems to weaken the Court's position. For example, references echo a theory of "coordinate construction". Under this theory, U.S. Supreme Court decisions, while dispositive of the case or controversy before it, do not change the Constitution itself. The Court's decision merely "binds" the parties to the dispute and the Executive insofar as it must enforce it. But, the opinion has no lasting impact, nor does it "change" the constitutional text insofar as that text is interpreted by other branches. In pure theory terms, then, the description of the reference function meshes surprisingly well with some conservative U.S. theories that seek to greatly limit the Court's power over other branches. See *e.g.*, Edwin Meese, "The Law of the Constitution" (1987) 61 Tulane Law Review 979.

references are strictly advisory is credible *only* as a matter of pure constitutional theory.[67] In reality reference opinions have the force of law. The government has never regarded a reference as "mere advice".[68] In fact the *Marriage Reference* is one of the few examples in recent times where the Court takes pains to distinguish references from ordinary cases.

Perhaps it is natural that people pay close attention to a reference. In tone, content and reasoning they are virtually indistinguishable from cases. Compare, for example, the decision in the *Motor Vehicle Reference*[69] (which struck down most absolute liability offences) to the judgment in *Vaillancourt*[70] (which struck down the felony murder rule). Apart from the style of cause, and the formal judgment rendered in the latter, it is difficult to tell them apart. Whether an opinion emerges from a reference or an ordinary appeal, the Court appears to perform the same function: determine the correct scope and application of a legal rule based in part on broader principles which themselves may require elaboration. Even if the issue is not "before" the Court, once the Court has "advised" the Executive of the "correct" legal answer that seems to settle the matter. The government is presumed to not want an unconstitutional law to stand. This seems to make references just as binding, in the sense of having legal authority, as other cases.[71]

Eventually it may become necessary to reconcile references' technical (non-binding) status with their actual (force of law) result. In this article I will not attempt such reconciliation. Nonetheless, it is a good idea to consider what theory of reference utility might provide a basis for judging decisions to put references to the Court. What follows is a modest attempt to articulate one such theory.

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[67] While in 1910 the Chief Justice implied that it was unthinkable that the Court would consider itself bound by its reference opinions, this is precisely what has happened. *Reference Re Criminal Code*, [1910] 43 S.C.R. 536 at 550.

[68] Hogg, *Constitutional Law of Canada* 8-17. The Court itself refers to reference holdings as being "persuasive". *Manitoba v. Canada*, [1981] 1 S.C.R. 753 (per Martland J. referring to the *Reference Re Legislative Authority of the Parliament of Canada in Relation to the Upper House*, [1980] 1 S.C.R. 54.)

[69] *Supra* note 28.

[70] *R. v. Vaillancourt*, [1987] 2 S.C.R. 636.

[71] Given the special nature of references it must be recognized that the federal Cabinet enjoys a particular power – to refer questions to the Court, and treat the answer as binding – that align the executive and the Court against the legislative branch and, indeed, against the provinces (although this latter concern was addressed early on in the *Supreme Court Act*, which now allows for provincial appeals of provincial advisory opinions). The risk of inappropriate alignment between the executive and judiciary is somewhat mitigated by the authority of either house of the legislature to refer bills to the Court. *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 54. However, this power has fallen into disuse.

One reason to pursue references is to facilitate the development of constitutional law.[72] By allowing the government to obtain an authoritative pronouncement on an important issue quickly, references provide a form of judicial economy. Given that the Constitution empowers judges to lay down rules obligating members of the legislative and executive branches, it seems strange that courts are prohibited from doing so when it would be most useful, *i.e. before* acts are committed that might provoke a "case or controversy."[73] The alleged reason for this disability is that references may not provide a proper factual context; this is the main objection, in the United States, to a reference power for federal courts.[74] The argument is based on institutional competence: the judiciary is ill-equipped[75] to draft broad abstract rules in the absence of real cases or controversies.

The degree to which this is a valid concern depends in part on the actual question put to the court; the concern may have some force where a reference involves draft legislation, or a broad question of law. On the other hand, if the reference concerns a law already in force, or draft legislation that builds on an existing law; or if the problem giving rise to the question is well documented, a reference can allow for consideration of a full factual context. The Supreme Court retains normal control of its processes, and it can structure a reference hearing to address any factual gaps,[76] for example by appointing *amici*.[77] Apart from all this, if a question remains unacceptably vague, or the Court does not have sufficient information, the Court has

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[72] *Residential Tenancies Act Reference*, [1981] 1 S.C.R. 714: "A constitutional reference is not a barren exercise in statutory interpretation. What is involved is an attempt to determine and give effect to the broad objectives and purpose of the Constitution."

[73] Oliver P. Field, "The Advisory Opinion – An Analysis" (1949) 24 Ind, L. J. 203 at 221:

> The advisory opinion has a great advantage over judicial review with respect to the time element, for the advisory opinion operates when a device for testing the validity of statutes is needed. Judicial review often operates long after it is needed, and for practical purposes, sometimes not at all. Dependent as judicial review is upon private initiative in testing validity, and on common law tests of adequate interest, the ordinary process of judicial review is seriously inadequate to serve the real needs of the public.

[74] Of course, the objection also draws on the specific wording of Article III.

[75] See *e.g.* Cass Sunstein, "The Right to Marry", University of Chicago Public Law and Legal Theory Working Paper No. 76 (October, 2004) at 34.

[76] *Supreme Court Act*, *supra* note 71, s. 53(6).

[77] The problem is hardly unique to references. The Court has decided actual appeals on the basis of hypothetical situations, or admissions that eliminated the need to consider facts: *Schachter v. Canada*, [1992] 2 S.C.R. 679; *R. v. Smith*, [1987] 1 S.C.R. 1045. This does not mean that the lack of a factual context is of no concern, only that one cannot confine such an objection to references particularly.

asserted a right to refuse to answer it.[78] So, on balance the facilitation argument appears reasonable; it is, at least, a potential benefit. Through references, governments can predetermine the constitutionality of legislation; and this contributes to efficacy and the Rule of Law.

The *Marriage Reference* did produce some rules that would not otherwise have arisen in the provincial appeals. In particular, the Court's assessment of section 2 was unanticipated. As well, the Court set out a rule that strongly protects religious freedom. However, the opinion did not facilitate any closure on Question 4. Given that Question 4 represented the issue *most* in need of facilitation, the opinion must be judged correspondingly inadequate.

A second possible benefit of references is that they promote certainty and coordination. This value can have particular force in a federal system, which often produces multiple and competing legal interpretations. Rather than waiting for a case to wend its way up to the Court – which can produce conflicting rules in different jurisdictions – a reference provides speedy clarification.[79] In the marriage reference, because the Supreme Court confirmed that Parliament has *exclusive* jurisdiction over capacity to marry – which includes the power to define marriage to include same-sex couples – the Court resolved a potential coordination problem by closing down provincial challenges based on a notion of shared competency over different aspects of marriage.[80]

Certainty often is elusive in *Charter* cases.[81] However, the issue posed by

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[78] *Marriage Reference, supra* note 1 at para. 63:

> "Instances where the Court has refused to answer reference questions on grounds other than lack of legal content tend to fall into two broad categories: (1) where the question is too ambiguous or imprecise to allow an accurate answer: see, e.g., *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445, at p. 485; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 256; and (2) where the parties have not provided the Court with sufficient information to provide a complete answer: see, e.g., *Reference re Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54, at pp. 75-77; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, at para. 257. These categories highlight two important considerations, but are not exhaustive."

[79] I acknowledge that under the *Supreme Court Act* direct appeals can be taken; references however allow the federal government to refer provincial as well as federal rules. *Supreme Court Act, supra* note 71, s. 40(1).

[80] Even if the Court had decided the issue the other way, the opinion still would have provided some coordination value.

[81] In fairness, one should be careful to not overstate the importance of certainty in *Charter* cases. To the extent that certainty is a virtue in *Charter* law, it tends to be honoured more in the breach. Courts' interpretation of the *Charter* is marked by fluidity, even *ad hoc*-ness. This is not always the Court's fault. Even where an opinion produces a plain answer other related issues, demanding new consideration, can rise.

same-sex marriage falls within a smaller class of rights cases where a clear answer not only can be ascertained, but is likely to hold for a long period of time and is unlikely to require further rule-making to determine its limits or its interaction with other principles or policy goals. To illustrate, while a society can agree on a law criminalizing sexual assault,[82] it may well disagree over a myriad of issues connected to that law: disagreement, for example, over the limits of consent,[83] or the relevance of particular kinds of evidence,[84] or the possible mitigating effect of intoxication.[85] In contrast, a rule that civil marriage extends to same-sex couples is self-contained. So the attempt to achieve a clear answer from the Supreme Court is, at least, feasible. However, while the Court's answers to the first three questions are somewhat clear, its answer to Question 4 produced anything but clarity. For many persons, it remains an open question whether the *Charter* "really" requires same-sex marriage. Given that Question 4 was most in need of a clear answer, the opinion falls short with respect to the certainty function.

So, on balance, the reference only partially satisfied two benefits that justify the reference jurisdiction. Since one cannot predict the Supreme Court's reaction to a particular set of reference questions, it may be inadequate to criticize the Executive for what is essentially a strategic mistake. However, the *Marriage Reference* is subject to more robust critique as well.

The final criticism offered in this article, analyzes the *Marriage Reference* as an undesirable constitutional method. When the reference jurisdiction is abused it can lead to "democratic debilitation", a term used to describe abandonment by the legislature or executive of any obligation to consider and apply constitutional norms.[86] If one is concerned to keep a meaningful constitutional role for the non-judicial branches,[87] such debilitation is a serious issue.

Democratic debilitation can be self-inflicted. For example, the government could intentionally refer a controversial issue to the courts to avoid making a difficult decision. This is different from honestly seeking "advice" in the sense of fram-

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[82] *R. v. Chase*, [1987] 2 S.C.R. 293.

[83] *R. v. Ewanchuk*, [1999] 1 S.C.R. 330.

[84] *R. v. Osolin*, [1993] 4 S.C.R. 595.

[85] *R. v. Daviault*, [1994] 3 S.C.R. 63.

[86] Mark Tushnet, "Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty", 94 Mich. L. Rev. 245 (1995). Tushnet argues from a normative position of weak judicial review. However, one need not subscribe to that theory to agree with his critique of democratic debilitation.

[87] I have argued for just this kind of role, albeit subject to a "final word" by the Supreme Court as regards the meaning and scope of constitutional norms. *Mathen, supra* note 40 at 413.

ing options for decision-making. When one branch tries to obtain a judicial decision as a legitimating mark and, thereby, shut down democratic debate, a particularly insidious kind of debilitation results. Regrettably, that seems to best explain the government's decision to initiate the *Marriage Reference*. Democratic debilitation quite blatantly occurred when the government did not pursue appeals because it had already decided to promote legislation in favour of the rights-claim,[88] yet it *still* thrust the issue before the Court.

It is deeply concerning when the reference procedure is used by one branch to deliberately obtain a quasi-legal result outside of ordinary and available legal processes.[89] Such ploys threaten inter-branch relations and cooperation. While the Canadian parliamentary system often produces a linked executive and legislature, the *Marriage Reference* shows how the executive advantage over the reference power can produce resistance to laudable law reform in an independent legislature not controllable by a minority government.

If the government truly believed that an expanded definition of civil marriage was required by the Constitution, or would be desirable on its own terms, it should have presented draft legislation for debate and ratification. If the legislation failed, it would then be up to a different majority to try to legislate a different result. Either law would be subject to judicial review as appropriate. If both legislative solutions failed to produce majority support, the applicable common law rule would prevail.

Instead, the government implicitly set up the Supreme Court opinion to smooth the way for its legislation. Viewed in a broader context the *Marriage Reference* confirms the tendency of non-judicial actors to shy away from rights disputes. The default position we seem to have reached, is that the Court is the only "true" forum for discussing constitutional norms and, occasionally, achieving constitutional compromises. This has become a sort of *modus operandi* for most governments in the *Charter* era. In the long run, I believe, we will pay a heavy price for abandoning to courts the bulk of our moral and political reasoning. We must use the example of the marriage reference to demand that governments change course. The reference power must be used with restraint and respect. Governments must display the basic courage to act on their convictions. Otherwise, if the Court refuses to cooperate – as it did here – we will find ourselves adrift, with little guidance on the way forward, and our most important values under-promoted and unachieved.

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[88] *Marriage Reference*, *supra* note 1 at para. 65.

[89] Martin Cauchon has admitted that the government consciously used the reference power to enlist the Court's help to "sell" same-sex marriage. Oliver Moore, "Cauchon hoped Court would help Grits sell gay marriage" *The Globe and Mail* (17 January 2005) <http://www.globeandmail.com>.