

# Opinion & Analysis

To deny same-sex couples the chance to marry is discriminatory and undemocratic, just as the recent ruling criminalising circumcision is in Germany.

## Marriage rites are rights for all

### Viewpoint

JUSTICE STEPHEN ROTHMAN



OME sections of the community have opposed amendments to the Marriage Act to include same-sex marriage. At the same time, those persons vehemently criticise the decision in Germany to render circumcision illegal.

The two issues have one fundamental common thread: the nature of minority rights.

Current opposition to same-sex marriage is irrational and fundamentally undemocratic; even more undemocratic than rendering male circumcision illegal.

Yet each is a different side of the one coin. These statements need explanation.

When occupying a communal position, I once suggested, somewhat arrogantly, that multiculturalism is a Jewish concept.

But multiculturalism, when properly implemented, is a species of equal justice.

Its origins are pre-enlightenment. Aristotle wrote about it.

Equal justice requires that like should be treated alike and that the difference in treatment of different persons should be rational.

Equal justice is a principle that is fundamental to the exercise of judicial power and ought also be fundamental to, and a limitation on, the exercise of legislative power in a constitutional democracy in which the implementation of the rule of law is required.

Equal justice prohibits discrimination, except to the extent required to meet and ameliorate disadvantage. It is protected by the US Constitution and the Canadian Charter of Rights.

The concept of equal justice, and adherence to it, defines the strength of

the democracy that implements it. Democracy is not simply the rule of the majority.

Democracy requires, among other things, that the majority not interfere with the capacity of a minority to engage in conduct that is not antithetical to the values of the society in which that minority resides, and that causes no reduction in the rights of other members of society.

While the majority has rights, so too do members of the minority group.

Discrimination against minorities is undemocratic and contrary to the rule of law, regardless of whether the minority discriminated against is based on gender, race, colour, religion or sexuality.

Yet each of the major religions, including the Orthodox rabbinate, has opposed the amendments to the Marriage Act to include same sex relationships.

Why? Is it because the Mosaic laws describe lying with man as with woman as an abomination?

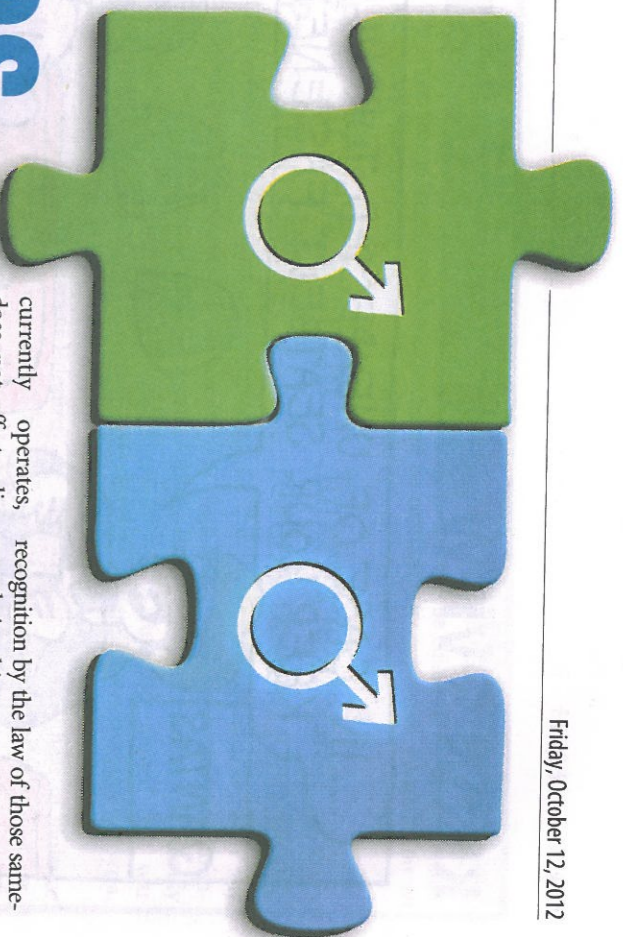
If so, it joins adultery, idolatry, breaking the Sabbath and eating non-kosher food; hardly a compelling group for a basis to discriminate against a minority in secular society.

Do we discriminate against pravina eaters? As a society, Australia does not prohibit same-sex relationships.

Some suggest that there should be an act to recognise civil unions, which would include same-sex relationships.

Why? That is precisely what the Marriage Act does: it recognises civil unions.

It recognises such unions, albeit currently restricted to heterosexual relationships, and thereby avoids the couple meeting the more ambiguous tests necessary to establish a de facto relationship and also truncates the time period that may be necessary to achieve recognition. The Marriage Act, as it



currently operates, does not affect religious observance and does not implement religious practice. Each of Christianity, Islam and Judaism do not accept all marriages recognised by the Marriage Act, even though they are confined to persons of different gender.

Likewise, the Marriage Act does not recognise all religious marriages.

One only has to instance the Roman Catholic prohibition on divorce and the need for religious divorce and/or annulment in Judaism and Islam to understand that there are many marriages that religion considers as continuing and valid, that the civil law does not recognise.

Likewise, using the same example, there are many marriages that the civil law recognises that these religions will not, e.g. a second marriage of a person who has not received a religious annulment or divorce, or any non-religious marriage conducted by a celebrant.

So the recognition of a relationship under the Marriage Act does not impact upon the religious observance of any person in Australia or the recognition of the relationship by any religion.

An amendment to the Marriage Act to allow for the recognition of same-sex couples would not prevent any and every rabbi berating congregants on the alleged evils of homosexuality.

It would not stop the Cardinal Archbishop doing likewise; nor the Anglican Archbishop of Sydney, Humankind is, in the religious

view, created in the image of God. Our traits and characteristics are God-given. Our capacity to choose what is right or wrong is God-given. We were given the ability to make moral choices. It is for the individual to choose what she or he considers right or wrong.

Unless that choice results in conduct that interferes with the relationships between members of society or the ability of others to enjoy their own lives, government has no role in prescribing the conduct.

Nor does it have a role in prescribing advantages for some people over others, based on other than conduct.

There is no prohibition on same-sex relationships. Therefore, excluding same-sex relationships from the Marriage Act does not implement any societal purpose.

It simply discriminates, not on the basis of conduct, to deny rights to some that are available to all others.

For my own part, whether, as an adherent to Orthodox Judaism, I support or oppose same-sex relationships is irrelevant.

Assuming I oppose them, it is not my decision to make. I am not affected in the enjoyment of my rights in society by the existence of same-sex relationships, nor by the

recognition by the law of those same-sex relationships.

If otherwise observant Jews engage in same-sex relationships, openly or otherwise, that is a matter for their conscience and between them and God, and possibly their rabbi.

But for our community to oppose the recognition of same-sex relationships for all, even atheists, is wholly hypocritical.

This is not post-modernism. The foregoing principles of equal justice enshrine the view that some viewpoints ought not be allowed to be put; those viewpoints that encourage illegality or those that intimidate or insult minorities to the point where those minorities are constrained in enjoying all of the privileges that flow with the democratic society in which they live.

But we, as a group, would oppose, quite properly, any prohibition on male circumcision, because male circumcision is fundamental to our religious beliefs and our existence as a minority.

**The recognition of a relationship under the Marriage Act does not impact upon the religious observance of any person in Australia or the recognition of the relationship by any religion.**

There is no suggestion, or evidence, that male circumcision adversely affects the child.

In that opposition, we would be joined by members of the Islamic faith. Yet, it is quite conceivable that a majoritarian view would see the mutilation of a child at a time when s/he is incapable of giving informed consent as a moral question.

That is the position adopted in Germany.

I interpose, at this point, to make clear that the arguments against female circumcision are fundamentally different, because of the purpose of female circumcision and the evidence that it injures the "victim", both physically and psychologically.

In the end, the issue is a simple one. Should the law recognise some civil unions and not others in circumstances where those that are not recognised are unions that are not illegal and do not affect the rights, life or liberty of others?

We have the right to observe our religion; we do not have the right to force its teachings and observance on others.

Justice Stephen Rothman is a judge of the Supreme Court of New South Wales and a former president of the NSW Jewish Board of Deputies. He says the article does not relate to the constitutional validity of any amendments to the Marriage Act.

