



ST GEORGE'S LECTURES

15 - Law and Religion

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Law and Religion

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Introduction

For over three years I have been gaining familiarity with the terrible happenings as the former Yugoslavia was torn apart from the inside in the 1990s. This is not the occasion to look at those events or the history and politics that led to them. There are, however, two implications that warrant mentioning in the context of this paper.

While the former Socialist Federation of Yugoslavia comprised six republics, I will mention only three, Serbia, Croatia and the republic of Bosnia and Herzegovina. Serbs, Croats and Bosniaks represent distinct cultures. Religion was a feature important to each of those three cultures. The Serbs predominantly were Serbian Orthodox, the Croats Roman Catholic, and the Bosniaks Muslim. For centuries in their history religious difference had been a divisive element. While religion had not been encouraged under the communist rule of Tito, it had been more tolerated than in other communist states, and so was alive and in many senses, well.

A feature of the grim armed conflict of the 1990s was religious intolerance. I will not comment on the vexed question whether this was encouraged by any of the three governments or by leaders of any of the three churches. What needs to be identified, however, is the clear danger that can be presented in a state when an ethnic culture and one religious faith or denomination become closely intertwined. Each can reinforce the other, consciously or unconsciously, with a consequence of severe intolerance of any other position, and with the government of the state severely compromised because it fails adequately to distinguish the interests of its people from the concerns of the dominant faith.

Secondly, the Socialist Federal Republic of Yugoslavia was subject to one system of law (although, as it was a federation there was scope for differences between republics on some issues). When Yugoslavia collapsed each former republic hurried to replace the former federal laws with its own national provisions. In each former republic the new legal system and laws remained essentially the same even though each republic went its separate way as a distinct nation. Since that time, while each former republic has reviewed and revised aspects of its laws and legal system, the three remain obviously similar. Cultural and religious differences have not automatically or necessarily resulted in different laws. Thus it can be seen that the legal system and laws of a nation do not necessarily differ from those of another nation in which a different religious faith is predominant.



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These matters have had an effect on the way I have come to view some important issues relating to the place of religion and religious values in shaping the laws of a nation, and to the desirable relationship between religious interests and the government of a nation. The recent history of many other troubled nations of the world in which religious influences have played a role in the troubles also provides much food for thought.

In what follows the primary focus is on the position in Australia. Nevertheless, experiences elsewhere have helped shape the thoughts expressed.

Some Changes Affecting Law in Australia

There can be seen throughout the history of the law in Australia, as was the case throughout the earlier history of the English legal system from which the Australian legal system evolved, an association of values, ideas and ideals between law and religion.

In that history "law" has been the Common Law, together with its complementary system of equity, in the tradition of the English legal system; in more recent centuries, together with parliamentary law. "Religion" has undoubtedly been the Christian faith, although with differences of manifestation over the centuries.

An association of values, ideas and ideals between law and religion can also be found in many other nations and can be seen to have taken different forms over the centuries. It can be identified today in many legal systems of the world. The nature of that association, though, differs between nations.

In Australian society each of the elements, law and religion, is the subject of contemporary change. Attention is drawn to two aspects of the changes affecting our law which are pertinent to this discussion.

The first is well known and has long been a developing phenomenon in our society. Elected parliamentary representatives of the Australian people, not judges, are responsible today for the majority of the changes to the law in Australia. That is not to suggest that judges no longer make law or guide the direction of changes to the law. Their role in the development of the law continues to be significant. That role involves taking entirely new directions, correcting earlier courses that have proved to be mistaken or ineffective, and further developing earlier judge-made law as new situations involving it present themselves for decision. Increasingly, today, the role of judges also involves seeking to interpret, develop and apply parliamentary law. This continuing role should not be overlooked in this present discussion. The view which is occasionally expressed, that judges should not make law, merely apply it, reveals a quite mistaken view of the reality of the role of judges in our system.

This is not the occasion to explore the relative merits of parliamentary and judge-made law. Despite some rather clichéd expressions of opinion, each has strong merits. Today it may be said that the two form a loose partnership with the common object of enabling the law better to serve Australian society. In practice, each often serves as a counter-balance to the other. Of particular significance for present purposes, however, is the reality that in the majority of cases decisions as to the relevance of religious values, ideas and ideals to changes to the law are made by elected parliamentary representatives of the Australian people.

The second change affecting our law is the growing influence of internationally developed and accepted principles and norms in the ongoing development of the law in Australia. Most often these are to be found in treaties and



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international conventions, usually formed under the auspices of the United Nations and its agencies. The Australian legal system is still working through the process of how and when internationally accepted principles and norms should be directly applied, or taken into account, in deciding how the law in Australia should develop. Nevertheless, internationally accepted principles and norms are increasingly guiding the development of laws in Australia. Both judge and parliamentary-made law are being influenced.

It is of particular relevance to this development that these international principles and norms are not developed within Australia to reflect the values, ideas or ideals prevalent in Australian society, whether religious or otherwise. In most cases they have been developed by negotiation, leading to compromise agreement, reached by representatives of nations of the world. Religious and other values, ideas and ideals quite different from those generally accepted in Australia may well have influenced the resulting agreed position. The Australian government may well have signed or ratified such an agreement on the basis that its terms were the best that could be achieved, and that at least in some respects the agreement would be advantageous to Australia's interests. Thus, not every element in any of these internationally agreed norms and principles need have the full endorsement of the Australian government.

By virtue of this influence some religious values, ideas and ideals generally prevailing in Australia and accepted in our law could be overtaken and displaced by others.

It must be acknowledged that a weakness of virtually every legal system in the world is the tendency to be predominantly inward-looking. It has not been usual to look across the borders and the seas to what is happening elsewhere. Hence an opening up of a legal system to international influences can be constructive and positive and lead to healthy changes in the law. That is true for the Australian legal system.

There is a danger, however, that just because some idea is the subject of an international agreement or treaty or convention, people will be mesmerized into thinking that this must be an improvement on our existing position. It may well not be. Our existing law may already have moved ahead of the best position which could be reached by international agreement, or have taken a different direction more suited to our society and its values. Hence it is suggested that caution is called for. The fact of international agreement of itself offers no assurance of consistency with prevailing Australian values, ideas and ideals. There is a need to maintain a balance between being open to new ideas from elsewhere and ensuring that the new ideas will be in harmony with and further the interests of Australian society and the law in Australia.

The Changing Relevance and Nature of Religion in Australia

In earlier times in England the Christianity which had a significant influence on the development of the law was that of the Church in Western Europe under the leadership of the Pope of the day. This was supplanted by that of the Church of England "by law established". In both cases, however, Christianity could speak with authority and with a single voice. It held great sway in the nation.

In Australia today, Christianity has many recognised denominations and includes the influences of Reformed and Orthodox churches and a variety of movements. There is not one authoritative Christian view about many



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controversial issues in our society. Indeed, even within many Christian denominations it can be expected that a variety of views may be found on many issues which are the subject of contemporary controversy.

Other changes are, however, of even greater relevance to this discussion. More than a hundred years ago the Commonwealth of Australia Constitution Act solemnly recited that the peoples of the Australian States (with the exception at that moment of Western Australia which was still determining its stance) "... humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth ...". This was undoubtedly a Christian Almighty God.

Only fifty years ago, nearly 89% of the Australian population professed to be Christian. The most recent census figures available suggest that, today, no more than some two-thirds of the Australian population profess to be Christian. Thus, not only is Christianity manifested in a growing variety of denominations, but it represents the religious views of no more than some two-thirds of the people. Gone is any notion that Christianity can speak for the people of Australia. (Of course the profession of Christianity and its practice are different concepts and we should not think that two-thirds of the Australian population are practising Christians.)

There are further developing changes that must be borne in mind. Judaism has always been represented in Australian society and it continues to grow. Although the most recent census statistics are some years out of date, even they reveal that we now have statistically significant percentages of people who adhere to some of the other non-Christian religions of the world, the most statistically significant being Buddhism, then Islam, then the Hindu faith. In 2006, together they represented over 4% of the Australian population. Even more telling is that in 2006 the percentage of Australians who professed no religion had grown to more than 18%.

Thus, in Australia today, religion can no longer be thought of merely in terms of Christianity, or the Judaic-Christian tradition. The influence of other great religions of the world is real, and growing. We must also expect that soon, if not already, over one in five Australians will profess no religious faith, Christian or otherwise.

This is the changing nature of the Australian population which our political leaders represent and for which they must determine what values, ideas and ideals should influence the future shape of law in Australia. It is also the society for which judges must try to determine appropriate developments in the law.

The Role of Religion in Developing the Law

Because of the history of the development of the law in Australia, and its origins in English law, we are used to laws which are in general harmony with Christian principles. This has been so from the earliest development of the English Common Law. In the earliest stages clergy often had a direct role in the administration of justice to the subjects of the King, who, of course, ruled by "Divine Right" and was the "Fountain of Justice". Essentially these clergy sought to find solutions which were fair and just as cases presented themselves. Not unnaturally, they drew on the religious values and principles with which they were familiar. As professional judges assumed responsibility they also were able to draw on these religious values and principles; they, too, usually being adherents, as were the litigants before them. As this body of decisions grew and became formalised as the law of England, the principles of law that emerged reflected this religious influence.



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For reasons which have been briefly mentioned, the social and religious framework in which that could occur is not to be found in Australia today. While both legislators and judges must search for fair and just principles as new issues arise for legislation or decision, it is not the case they can resort to one set of values and principles which are both religious and generally accepted as authoritative and appropriate in our society.

It is also instructive to bear in mind that from earliest times it became apparent, sometimes only after attempts to do so, that there can be difficulties in applying the teachings of Christianity as the law of the land. Some proved not to be suited to adaption as the law of the land or even as a model for that law. Take the Ten Commandments as an example; although from the Judaic heritage they are fundamental to Christian teaching. Consider the often troubled history of the various approaches taken in England over the centuries, and in Australia, to such matters as adultery and the observance of the Sabbath. At best they have found varying and only partial acceptance as appropriate in the law of the land. The commandments against coveting appear never to have been reflected in the law. The commandment against murder may have been variously understood as a matter of Christian teaching, but as it has come to be reflected in the law of the land it has been seen to be necessary and appropriate to create exceptions - to excuse, for example, murder committed in self-defence and in some other circumstances.

Looking beyond the commandments to other Christian teachings, controversy continues in the United States of America in respect of prohibitions in some State law against teaching in schools which calls in question the biblical account of creation. Today, in a number of matters such as the contemporary debate in Australia over the issue of stem cell research, different understandings of Christian teaching introduce a further complication into the relationship between the law of the land and Christian teaching, and bear significantly on the issue of whether, and if so how and to what extent, that teaching should influence the policy of the law.

While it may not always have been clearly appreciated, it is suggested that a correct understanding of the role of religion in developing the law in our society involves a need to understand the different nature and role of religious faith from that of the law of the land. The law of a society is imposed by the society for the general wellbeing of all its members. That appears to be an objective which can be satisfied by laws much more limited and less intrusive, laws which have a different objective, than the code of personal conduct which an individual, in search or furtherance of salvation, may choose to impose on him or herself as a matter of faith

Thus, even in a society in which one Christian denomination or some other religious faith has general acceptance, it should not be expected that the law of that society will always express or reflect the principles or teachings of that denomination or faith. Of course we are also well aware that there are nations in which a policy is being pursued for the teaching or law of one religion to be the law of the nation. History, culture and particular religious teachings no doubt all play a part in encouraging that situation. It need not be the case. Time and experience will demonstrate whether this policy will prevail in these nations.

In Australia, however, it is clear that religious views and values are increasingly varied in our society and must co-exist with other views held by a significant proportion of the population. It believe that in our present society it should not be expected that religious teachings, let alone the teachings of any one faith or denomination, should necessarily find expression as the law of the land or be reflected in that law.



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The Future

These views do not spell the end, however, of the relevance and value of religious teachings and principles in the future development of law in Australia. While they may not claim any right of place as “Divine Law” to be incorporated into the law of the nation, as some may have asserted in the past, they remain and are properly among the matters to be weighed and considered by legislators and judges. Less directly, they can be anticipated to continue to influence the prevailing balance of opinion in Australian society with which the law can be expected to be in general harmony.

Because of the changing nature of our society the process of development of the law may become less certain and more complex in the future, but that will be a gradual process.

The essentials of the process will remain those with which we are already familiar. When determining a new course to be taken, both legislators and judges will, of necessity, among other considerations, seek to find solutions which will be generally accepted in society as fair and just. The process differs in some respects as between judges and legislators. It may be more obvious to casual observers in the case of legislators, but it is just as real for both. That objective will not be perfectly achieved, of course, for many reasons. Differing values in society, the difficulties for both members of parliament and judges in assessing what will receive general acceptance in society, the need to accommodate significant but differing interests in society, the difficulty of forecasting the effects of changes in the law, the desirability of consistency of principle in developing the law, are among them. However, experience both in Australia and elsewhere, strongly indicates that unless the general trend of the law can be accepted by the society as fair and just, the legal system will fall into disrespect or distrust and the order of the society will be threatened.

Fortunately, in Australia we have not experienced a state of general disrespect or distrust of the legal system in this country. We do have clear examples of society's intense reaction against a particular parliamentary law, or an individual judicial decision, which has failed, significantly, to reflect strongly held views of our society. These examples, however, are an illustration of the working of a free democracy and are fundamentally different from a general disrespect for, or distrust of, the legal system.

To sustain the general respect of Australian society for the law, both legislators and judges will need to remain alert to the mood of our society, as well as its needs, in shaping the future development of the law. It is in that process in which legislators and judges try to assess the prevailing view of our society that religious values, whether reflecting the values, ideas and ideals of all or some Christian denominations or of other religious faiths, will continue to be relevant and of some effect.

Just how effective that will be in a particular case must be expected to vary with the level of support apparent in society for the relevant religious value. It should be borne in mind that non-religious people may well support a religious value because its relevance and intrinsic merit commends it. It may also be the case that a number of denominations or faiths share a somewhat similar view. Unanimity of religious thought need not be essential for religious values to be effective in influencing the future direction of the law. It may well be enough for differing religious perspectives of the one issue to be prevalent in our society to make it apparent to legislators and judges that the issue has a dimension to which religious values are material, and can make a healthy contribution; by that means ensuring that those religious values are given serious attention.



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In this process it cannot be expected that a religious value will be persuasive because it represents “Divine Teaching”, or the like; it is likely to be evaluated for relevance and merit on a more pragmatic basis and it will need to be able to hold its own against competing values and interests.

Because of the changing relevance of religious views and their nature and variety in the Australian society it is reasonable to expect that there may well be an increasing trend for other values to be reflected in aspects of our law, with the displacement of some religious values. We only need to consider the changes in our law in recent decades which have enabled, for example, the development of commercial and sporting activities on Sundays and have established an entirely new understanding of public morality in entertainment, dress and behaviour, to recognise that this is a phenomenon that is already having effect in some areas of legal regulation in Australia. It can be anticipated that this influence will continue to grow but not to the total displacement of religious values, particularly more significant and widely accepted religious values.

I do not find this a disheartening prospect. It will present an increasing challenge to Christianity in Australia. It could have the effect, in time, of encouraging Christianity to re-examine, closely, the centrality of some of its positions and of some of the issues that tend to divide Christians, if it is to continue to be heard and effectively to influence issues of importance in the nation such as the trend of changes to our laws.