IS THERE A SEPARATION OF CHURCH AND STATE IN AUSTRALIA?

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By way of commentary, following the resignation of Dr Peter Hollingworth as Governor-General, Archbishop Pell said on 27 May 'there is a distinction between church and state' in Australia. Two years before in the 2001 May edition of the Brisbane Anglican magazine Focus, and prior to his appointment as Governor-General, Anglican Archbishop Dr Hollingworth, said: 'Those who have raised the question [of separation of church and state] have confused the Australian Constitution with the United States' Constitution. The only 'separation' of powers that applies here in Australia is to do with those pertaining to the Executive, the Legislature and the Judiciary of the Commonwealth itself. There is no clear cut separation between church and state as there is in the case of the US tradition.'

This is not just a case of Christian disagreement. The often-cited opinion that there is such a separation in Australia rarely speaks to the relatively complex mix of facts concerning this critical question. These facts go to the heart of the kind of democracy we have and the kind of republic we might have.

Defending his appointment of an archbishop to the position of Governor-General Prime Minister Howard correctly pointed out that there have been precedents with the appointment of other church officers as Governors of Australian states. The next thing to note is that if the appointment breached the principle of separation of church and state in Australia it would surely have been unconstitutional.

It was not unconstitutional because the High Court in the 1981 State Aid case decided that s.116 of the Constitution, the section dealing with religion, has to be read to mean that no Federal government must make a law establishing a state or national religion, as is the case in England. The Church of England there has been granted special status as the established religion by acts of Parliament of 1534 and 1701.

Appointing an archbishop as Governor-General is not making a law. Thus appointing an archbishop as Governor-General is not unconstitutional even though, as Dr Hollingworth pointed out 'one is consecrated as a bishop for life.'

It is important to note that the 1981 State Aid case ignored a NSW Supreme Court finding in 1972 in the family law case of Evers v Evers where the court found that 'the freedom I see .. granted [by s.116] is freedom from imposition of theological ideas: Parliament and the courts cannot prefer Christianity to any other religion, or prefer any religion to none at all.' Similarly, in the 1981 State Aid case only Justice Lionel Murphy in his dissenting opinion thoroughly explored the wider meaning of the principle of the separation of church and state concluding that s.116 reflected the American model of church-state separation. Justices Stephen and Wilson stated quite explicitly that s.116 did *not* involve that question at all. Justice Wilson said:

> The fact is that s.116 is a denial of legislative power to the Commonwealth, and no more .. The provision therefore cannot answer the description of a law which guarantees within Australia the separation of church and state.

Justice Stephen said that s.116

Cannot readily be viewed as the repository of some broad statement of principle concerning the separation of church and state, from which may be distilled the detailed consequences of such separation.

The few comments on religion in other High Court cases would not seem to contradict such clear statements.

At the State level of government only the Tasmanian Constitution mentions religion but the section has never been judicially tested. State and Territory governments often pass legislation concerning church matters without breaching their constitutions or their Self-Government Acts. Also, if they so decide state governments could establish state churches: facts that do not enhance the notion that there is church and state separation in Australia.

Given this is so it is unusual that there is uncertainty at the highest levels of church and government. That is significant in and of itself as is the facts that there is no text which argues there *is* church-state separation in Australia and the historical displays at Parliament House do not mention it. Furthermore, to enhance the argument that there could be no separation I suggest there are three broad areas of concern. The first is symbolism; the second is relevant international comparisons; the third is the question of neutrality.

Symbolically, it would appear to be an open and shut case that there is no separation. God is mentioned in the Preamble to the Constitution; the Union Jack in the Australian flag includes the crosses of three Christian saints: St George, St Andrew and St Patrick; the Lord's Prayer is said at the commencement of parliamentary sessions; Ministers' swearing-in often finishes with the words 'So help me God'; on 20 October 1997 Senator Watson claimed in the Parliament that a private citizen had approached the then Governor-General, Sir William Deane, to amend the national anthem to include the words 'O God, who made this ancient land.' Senator Watson said these words were given 'official status' by the Governor-General; a vote was taken in the 1998 Constitutional Convention concerning a republic to commence proceedings with prayers; significant Federal government funding was given to help establish the Australian Centre for *Christianity* and Culture (not Religion and Culture in Canberra just down the road from the Parliament near the King's Bridge, opened by the then Governor-General, Sir William Deane; the Broadcasting Act requires a certain amount of religious broadcasting on radio stations; religious organisations are now running employment agencies effectively making them an arm of government.

In terms of international comparisons Australia is closer indirectly to the British non-separation than it is to the separations of the United States and France.

Briefly, the US Constitution makes no reference to Christianity. The word 'God' does not appear in their Constitution. The issues generated by separation are frequently debated in the public domain and in the courts. Currently, the courts are holding firm in the face of ferocious public opposition from members of Congress concerning an atheist's complaint against his daughter having to recite the Pledge of Allegiance at school including the words 'under God' which were included by Congress in 1954 at the height of the Cold War. A sculpture depicting the Ten Commandments has been ordered out of a public building by a court. Doubtless those same members of

Congress complaining about the Pledge of Allegiance matter would be insisting that Iraq not become an Iranian style Islamic state and that a future government should divide mosque and state. Though the 'wall of separation' between church and state in the US is often attacked and sometimes compromised, it is still there. The whole point of the wall in the beginning was to protect religion from the state.

In France, an Act of Parliament was passed in 1905 formalising the separation. The French say religion is a matter for individual conscience. They make the point that if there are one or more recognised religions there must be inequality between those who believe those religions and those who do not. They say secular government is not anti-religion because it neither favours nor condemns religion. Similarly, Professor Sadurski argued in his 'Neutrality of law towards religion' in the Sydney Law Review of March 1990 that

> the only plausible interpretation of neutrality is along non-interventionist lines: the state has to remain aloof from religious activities (just as it should not get involved in *anti*-religious, as contrasted to non-religious, activities and beliefs.)

Similar sentiments have echoed in Israel where, as The Australian reported on 25/26 January, the centrist secular Shinui party has ridden a backlash against religiously influenced government 'to become the fastest growing force in Israeli politics.'

If Australia's High Court had found that s.116 meant American style separation, what has turned out to be billions of dollars in grants to religious schools would have been unconstitutional. By finding that s.116 had to be read literally, the Court, I suggest, generated a situation something like 'multiple recognition', similar in effect or appearance to what was the case in the colonies in the early nineteenth century formalised in the Church Act of 1836 (NSW). It is a result more by deed than by word.

Following this line of reasoning, there would be no separation of state and church in Australia. There would only be equal treatment of those religions that apply to the Tax Office for common law tax exempt recognition and who also apply to state governments for grants for their schools. Legally, religions in Australia are charities with a supernatural belief, a view confirmed in the 1983 High Court Scientology case. Separation of church and state is compromised by the common law tax privileges that date back to the 1601 Statute of Charitable Uses that apply to these 'supernatural charities.' This common law, I would argue, is at odds with the principle of equality of treatment between belief and non-belief understood as a characteristic of s.116 and subsequent treaties to which Australia became a signatory.

Furthermore, according to the latest census about 25 per cent of Australians have no religion, a figure that is likely to be understated by the coaching qualities of the 'tick a box' census question. It is not a novel observation that our society is more secular than religious. Our materialistic lifestyle, I would argue, effectively swamps heartfelt supernatural commitment for the majority.

CONCLUSION

The former Governor-General, Dr Peter Hollingworth, was probably understating it when he said there is no 'clear cut' distinction between church and state in Australia. The reality has been concealed by legal complexity and general disinterest. It is only with the Prime Minister's appointment of the archbishop to Governor-General that the silence has been broken, albeit unintentionally.

I suggest this topic should be the subject of an academic conference with a view to rediscovering this absent category in Australian religious, political and legal history. New Zealanders could usefully contribute to such a forum. It is striking that the church-state question is missing from many Australian textbooks in the social sciences. Meanwhile in 2005 France will celebrate the centenary of their legislation separating church and state with a conference in Paris. They have proved separation is possible. They have demonstrated that with such separation the sky need not fall in for the churches and that a republic that does not formally separate church and state is not worth the paper it is written on.

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