THE CONSTITUTIONAL POSITION OF RELIGION IN AUSTRALIA

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Australia is a new society in the sense that European settlers began the white dominance of its culture and social order only at the end of the eighteenth century (1788). Yet, the roots of its social and political values are much older. They are English, Scottish, Irish, Welsh, Italian, Greek, Lebanese, Turkish, Chinese, Vietnamese, North and South American, and, of couse, Aboriginal. The main difference in a cultural comparison with any single European nation is that no one set of national values has been allowed to maintain hegemony for long. A better comparison of Australia is not with Spain or France or Britain, but with the whole continent of Europe. Australia and the United States of America, like Europe, can be understood only by accepting their essential cultural pluralism. Not surprinsingly, religion has been one of the areas of conflict in the history of establishing the rules which have made the peaceful coexistence of so many cultures possible in the one society.

In a constitutional sense there are two sources of the law which affects the position of religion. Australia is a federation. Each State has its own constitution dating from a model designed in Britain in the 1850s and bequeathed to each of the colonies in turn, with variations in each case, as they were given effective self government from Britain. Subsequently these colonies came together at the end of the century to design the rules for the federated nation which they wanted to create. These norms form the Australian Constitution which came into effect on 1 January 1901. The constitution in all the States and in the Federation itself have experienced modification since their original formulations, but a cautious nineteenth century liberalism still inspire the basic law at State and Federal level.

The six colonies, which were later to become the States of the Federation, have a more important historical and constitutional place than the federated Australia in determining the role of religion. When the convicts and soldiers of the first settlement arrived in the colony of New South Wales in 1788 they were accompanied by an official military chaplain of the Church of England. Quite clearly the officers of the new colony, appointed from London, assumed that theirs was the legally Established Church in the new settlement. Just as clearly, many of the earliest residents resented this assumption which placed all other churches in a subsidiary legal position. Irish convicts, most of them Catholic, did not accept this added manifestation of English tyranny, but they were in no position to do much about the situation. On the other hand the earliest Scottish members of the community tended to be officials or free settlers, and they resented the fact that the Presbyerian Church —itself the Established Church in Scotland— had no such status in the colony. Likewise Methodists

and Congregationalists demanded their rights of dissent and rejected the assumption of Anglican superiority which they were also attacking in Britain itself.

By 1830, faced with the competing claims of the leaders and followers of these churches, the British government had virtually abandoned the attempt to impose an Established Church on the colony, and in the 1840s the colonial administration in New South Wales had derived a set of principles with set a pattern for succeeding generations. In effect the administrative principles —which were not codified into the law or into the subsequent constitutions— mean that governments would try to be neutral in the face of the competing churches. It was not a principle of an established church nor of a clericalized state. The forces pushing for self government and democratic reform were strongly non-sectarian where they were not plainly secularist. However, neither was it a principle of separation of church and state, for the state saw the churches as partners in its task of civilizing the new society, and it was prepared to subsidize religious activities in schools, hospitals and social welfare where the churches were already making major contributions to the society. This ambiguity remains in effect till the present day.

The Constitutions of the various colonies (now the States of Australia) say very little about religion. Most of the British constitutional legislation affecting the rights of the Established Church had been abandoned for the Australian colonies before they gained effective self-government. In one important way, however, there was no need for these constitutions to be explicit about religious matters: in the British tradition of law many crucial aspects of fundamental rights and freedoms are left to the protection of incremental case precedent of the common law rather than enshrined in statutes or constitutional documents. This reliance on common law was inherited by the Australian legal system. The freedoms and rights of citizens in the matter of religion are assumed to be protected best by the common law rather than by constitutions. In the 1970s and 1980s a number of States have introduced legislation trying to codify some aspects of this common law of freedom and rights. These laws are typically designed to protect citizens from discrimination, especially in employment, on the basis of sex, ethnic origin, religious belief or political persuasion. The fundamental principle with regard to religion, as in the 1840s, is that the state regards all religions as of equal standing, and is prepared to act to protect this equality. At the same time, as in the 1840s, all the States (and the central government) maintain administrative and funding policies which provide advantages for the various churches which are involved in civic activities and provide social or educational services.

Because there is no one dominant religious establishment the forces of political radicalism in Australia do not have that tradition of anti-clericalism which is so much a part of the left in many European countries. A significant proportion of the Australian left has always been secularist, and opposed to the conservative social influence of the most questions of social and political reform. The most important conflicts involving religion have tended to be *between* the mainstream denominations rather than between a clerical establishment and anti-clerical reformers. The best example of this is the perennial question of public education. During the second half of the nineteenth century there was an extremely divisibe struggle between the defenders of public education (led by secularist liberals, but supported by most of the Protestant denominations) and those who wanted to maintain a denominational system (the Catholic Church — a relatively powerless and minority section of society). At various times of Australian history the division between Catholics (who tended to be working class, ethnically Irish, and about a quarter of the population) and the more militant Protestant denominations has been the dominant sectarian strand of Australian politics.

When the various colonies came together in the 1890s to frame a Constitution

which would make possible a united nation they envisaged a document which would interfere in the least possible way with the prerogatives of the colonies themselves and with their own Constitutions. The Australian Constitution is thus a minimalist document. There is nothing in it like the Bill of Rights which is part of the Constitution of the U.S.A. Nor is there anything like the Titulo 1 «De los derechos y deberes fundamentales» of the current Spanish Constitution. The Australian Constitution contains the rules for the parliament, the government and the courts of the new Federation, and it sets out specifically the powers which the central 'Commonwealth' will have. These are enumerated in section 51 of the Constitution. Whatever is not specifically mentioned in that list remains with the States. Religious issues are not mentioned. Consequently religious issues, like most other civil rights and freedoms, remain (as before federation) a matter primarily for State jurisdiction. And, in that context, they remain protected by the common law much more significantly than by the constitutional or statute law. As the Aboriginal community has found to its cost, the common law assumes a cultural homogeneity and can be very blind when new situations arise. It is at its best protecting immemorial rights; its is a brake on any basic redistribution of rights.

Although religion is not one of the matters over which the central government has authority, some of the designers of the Constitution were disturbed at the prospect of the central government itself discriminating on religious bases in its own activity. This was motivated by a fear of some secularist politicians that the new Commonwealth would provide an opportunity for domination by religious groups — so as to challenge established *State* rights of control over social questions. The issue was not so much religion as it was a desire to restrict the activity of the central government and prevent loss of control by the States. As on a number of other issues in the constitutional debate the members of the drafting committees looked to the United States for a constitutional model. Curiously, almost alone of the traditional civil liberties, religious equality gets a mention in the Australian Constitution. Even more curiously, in a nation which had not embraced a principle of separation of church and state, the text is unashamedly borrowed from the Constitution of the United States, where that principle has been accepted as axiomatic. Consequently, it should not be surprising that there is considerable ambiguity in the interpretation of the article.

Article 116 of the Australian Constitution reads:

> «The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.»

For comparison, look at the first article of the First Amendment (the Bill of Rights) of the U.S. Constitution.

> «Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; ...».

There are clearly some differences both in the actual words used and in the extra detail of the Australian version, but, just as clearly, the Australian drafters were looking to the United States to provide a model guarantee of religious freedom. In fact article 116 has not provided that guarantee. The reason lies primarily in the mechanisms for *interpreting* the Constitution.

As in most nations with a written Constitution the task of interpreting the document is given to a special tribunal. In Australia this is the High Court. For most of its history the High Court has exercised its authority in a very narrow, literalist,

way. The most important consideration has been the literal meaning of the words, not the intention of the legislators nor the dominant values of the society. In the U.S.A. the First Amendment has been interpreted much less narrowly as supporting the principle of separation of church and state, and its provisions have been extended so that it applies to all the States, not just to the central government. In Australia, on fhe other hand, section 116 has been interpreted merely as preventing the central government from discriminating on the basis of religion — and as providing no other guarantees. It does not prevent *State* governments from discriminating on the basis of religion. That is left for the common law of for individual State statutes. Nor does it prevent ordinary members of society from acting in a discriminatory manner. That, again, is for the States to control — if they are so inclined. It is unconstitutional for the central government to declare an Established Church, but it would be quite constitutional (although extremely unlikely) for any of the States to do so. As an effective protection for religious freedom or religious equality section 116 is extremely weak.

A number of cases have come before the High Court in recent years in which section 116 has been the subject of litigation. The most important was a challenge in the 1970s to the validity of government funding for denominational schools. The argument of the appellants was that for the Commonwealth to provide funds to religious schools was effectively to 'establish' those churches which had schools. Interpretations of the American Supreme Court were used in order to argue that to 'establish' should be understood in this more expansive way. After a very long case the seven judges of the High Court ruled in 1981, with one dissenting voice, that the funding of denominational schools was not invalid under section 116, that American precedent has no value in an Australian court, and that to 'establish' meant to set up an Established Church in the same way that England has an Established Church, with legally defined privileges over all other churches.

Many people in Australia are unsatisfied with the lack of constitutional guarantees for their various civil liberties, and there have been frequent demands for the introduction of some kind of Bill of Rights into the Constitution. These demands have been taken up by the Labor Party during the last twenty years. In the early 1970s a reforming government led by the Labor Prime Minister, Gough Whitlam, tried to introduce a Bill o Rigths which would include a guarantee of religious liberty and equality. It soon became obvious that it would fail to get the support of the Senate, which was not controlled by the government. More importantly, the opposition to the idea came from a number of very important sections of the general society which saw their own traditional privileges challenged by such legislation. Employers' group were loudest in their opposition to a project wich would restrict their freedom to hire and dismiss employees. More surprisingly, the main Christian denominations vigorously opposed any attempt to define (and consequently, they argued, to restrict) freedom of religion. They felt threatened by the intentions of a government which they regarded as secularists in spirit. They also saw any constitutional definitition of religious liberty as threatening the privilege wich the major churches have always enjoyed in Australian society. On the other hand, the government plans attracted support from members of minor sects and smaller denomination which felt that the traditional guarantees in the common law were not sufficient to protect their members against the social and political power of the larger churches. In the event the government of Whitlam was dismissed from office before anything came of the project.

A Bill of Rights was still part of Labor Party policy when that party returned to office in Canberra in 1983 under a new leader, Prime Minister Bob Hawke. A revised project was presented for public scrutiny before being introduced to parliament. Again, the coalition of conservative and religious forces was extremely vocal.

Again, it was religious organisations which were most hostile to constitutional guarantees of religious freedom. The project was eventually abandoned without putting it to the legislative test. During the same period various States were introducing cautious anti-discrimnation laws. Church opposition was just as evident, although there was greater willingness to allow limited measures that were not to be enshrined in the Constitution.

Since the fall or the Whitlam government in 1975 —dismissed from office by a non-elected Governor General— the whole nature of the Australian Constitution has become a matter for political debate. In an attempt to accommodate this debate, yet maintain generally intact a Constitution under which Australia has prospered, the conservative Liberal and National Party government of Malcolm Fraser established a Constitutional Commission of notables to recommend changes to the Constitution which could achieve bi-partisan support and general community consensus. As a result of these deliberations the succeeding Hawke Labor government introduced a package of amendments for popular referendum in 1988. The proposed reforms were presented by the government to the people as fundamentally non-controversial matters on which there had been general consensus among the members of the Constitutional Commission. Among the package of proposals was one one which simply proposed to make section 116 applicable to the States and not just to the Commonwealth. After a remarkably dishonest campaign by the conservative parliamentary opposition (which had previously supported most of the individual changes envisaged) and the fierce resistance of the major church leaders, all the items in the package were rejected by a majority of the voters, including majorities in each of the States. The movement for constitutional reform is clearly a minority interest in contemporary Australia. It also, just as clearly, has as one of its strongest opponents the combined influence of the major religious denominations.

With regard to religion, then, Australia is in a kind of mid position between the characteristic 'establishment' which is part of the history of so many European nations, and the American model of a strict separation of church and state. Many Australians believe that the American model does apply to Australia, but it is obvious both from the constitutional statutes and from long esablished administrative practice that church and state are partners in effect. And that the major churches wish the state to continue to give assistance to them and to continue to their privileged position.

On the other hand Austalia enjoys religious pluralism in a sense that is not always obvious in European countries, and which is much more similar to the situation in the United States. The argument about religious pluralism in the society takes the some form as an argument about ethnic pluralism. The general principle of equality is accepted with very little dissent, but newcomers to the system (in contemporary Australia they are Muslims, Buddhists, some American pentecostalist groups, and minority sect of new immigrants) are not accorded equality if status simply by their presence. Nor can they invoke the Constitution to support their claim. They have to demand in through the political process. In the area of religious equality they will find their aspirations opposed by the major churches who have already achieved a privileged position through that same political process. Yet, this is the socially and politically accepted path to the acquisition of rights. They are respected only when they have been fought for and won.

The Australian Constitution, the statute law of the States and the common law do not so much *guarantee rights* and freedoms as they provide a support for rights and freedoms which have already been achieved. The reverse side of this picture of inadequate constitutional guarantees for religious equality and freedom is that the political process itself is quite open. In the nineteenth century the Catholic community had to struggle to claim its rights which are now taken for granted. In the

twenty first century other religious minorities woll presumably follow the same path. In a sense, this struggle is of the essence of a pluralist society. It is not always a pretty picture for believers in equality and human rights, for it is usually possible to point to minority groups who suffer some relative deprivation — and sometimes the deprivation becomes institutionalized. When that happens, however, the pluralist nature of a society is itself very questionable. Constitutions and laws merely mark the current state of competition in any dynamic society. If they try to assert a permanent solution to controverted problems hen they run the danger of canonizing an established —and essentially conservative— distribution of power.

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