

Law and Religion: God, the State and the Common Law

Peter Radan, Denise Meyerson and Rosalind F Croucher (eds)

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Radan, Meyerson and Croucher have completed a seemingly impossible task: assembling a diverse yet interrelated selection of essays which examine the modern relationship between law and religion. In doing so, they have made a valuable contribution for all legal academics, particularly those specialising in public law, and for those studying religion generally.

Demonstrating the common law's theological roots, and believing that many modern tensions in public law share religious foundations, this collection of essays progresses in two parts. The first seven essays investigate the differing treatments of religion in the 'constitutional law' of the United States, Australia, Canada, the United Kingdom and South Africa, as well under the *International Covenant on Civil and Political Rights* ('ICCPR').¹ The remainder of the text considers specific aspects of these relationships, regarding blasphemy, charitable trusts, clergy confidentiality, sanctity of life, death and estates.

Running the entire gamut between the Jeffersonian 'wall of separation' between church and state, and the establishment of the Church of England in the United Kingdom, a casual reader of the text's first half cannot escape two obvious conclusions. Firstly, the jurisprudence on separation between church and state is complex, confused and highly pragmatic, with no state approach examined entirely satisfactory. However, more concerning for domestic readers is the conclusion, noted by the editors, that Australian jurisprudence on this issue is peculiarly conservative. Though this has undoubted benefits for secularism and multiculturalism, as George Williams notes in his examination of religion and the *Constitution*, tensions exist both within the Constitution (given its reference to 'God' in its preamble), and with Australia's indigenous history, as *Kruger v Commonwealth*² demonstrated. Furthermore, as is repeatedly acknowledged, Australia's lack of any legal protection of religious freedom in a bill of rights is anomalous. Given the restrictive reading of s 116 of the *Constitution* following *Black v Commonwealth*,³ *Adelaide Company of Jehovah's Witnesses v Commonwealth*,⁴ and *Williams v Commonwealth*⁵ (the latter not considered by the text), this

¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

² (1990) 190 CLR 1 ('*Stolen Generations Case*').

³ (1981) 146 CLR 559 ('*DOGS Case*').

⁴ (1943) 67 CLR 116.

⁵ (2012) ALJR 713.

provision is likely to serve little practical future purpose. Resultantly, the international legal protections flowing from Article 18 of the *ICCPR*, explored by Peter Radan in the text's first essay, may not be fully protected in Australian domestic law. These conclusions, a small selection of those canvassed by this text, identify important tensions likely to influence future Constitutional litigation throughout the common law world.

The second part shifts focus to canvas the modern legal issues arising from this historical development and 'secularism'. As all five essays reveal, the application of increasingly anachronistic laws to modern, pluralist and multicultural societies creates a range of fundamental and highly-evident problems.

Lawrence MacNamara's treatment of modern law regarding blasphemy is particularly intriguing. The continuing scope of this offence in Australia is unclear, abolished in some jurisdictions,⁶ and with no prosecutions initiated since 1919 where the offence is retained. However, the offence is problematic in an increasingly information-based society, challenged by the rise of social and new media. As MacNamara notes, this offence was historically used as a form of 'class oppression', to control social and political 'undesirables', themes echoed in the House of Lords decision in *R v Lemon*, the *Gay News* decision.⁷ This case, prosecution of a newspaper for publication of a poem graphically depicting homosexual sexual acts with the post-Crucifixion body of Jesus Christ, unveils the tensions evident in attempting to apply blasphemy law to modern circumstances, potentially conflicting with modern human rights protections to free speech, and with long-respected freedoms of artistic expression. These tensions continue to the present day, and are not easily reconciled with the emergence of more generalised anti-discrimination, religious vilification and hate speech legislation, as the *Innocence of Muslims* protests demonstrated.⁸

More fundamentally, as Dal Pont's analysis directly confronts, inherent difficulties surround the judicial adjudication of what constitutes a legally recognised 'religion'. As Dal Pont suggests, the thresholds of a legally recognised 'religion' are exceptionally low and broad in nature, and once satisfied, Courts are constitutionally obliged to extend 'equal treatment' to all 'religions'. Dal Pont suggests this imprecision in the definition of 'religion' fosters arbitrary decision-making, in an attempt to circumvent the difficulties surrounding what is, inherently, a non-justiciable criteria.

⁶ *Criminal Code Act 1899* (Qld); *Criminal Code Compilation Act 1913* (WA); *Law Reform (Abolitions & Repeals) Act 1996* (ACT) s 4.

⁷ [1979] AC 617 ('*Gay News*').

⁸ See, eg, Michael Tatton, 'Radical Islam's Global Reaction: The Push for Blasphemy Laws' (2013) 175(5) *World Affairs* 25, 25-6.

For example, in requiring belief in the ‘supernatural’,⁹ traditional African religions (e.g. animism) and many ‘new-age’ beliefs that ‘deify’ the self, or nature, exceed this definition’s scope. Conversely, Courts do not require a sufficient ‘following’, nor other tests of ‘legitimacy’, arguably permitting less ‘meritorious’ groups to exploit the legal protections and concessions afforded to organised religions. This is well demonstrated by the modern debate regarding the Church of Scientology’s ‘legitimacy’, suggesting such decisions are more effectively made by the legislature. Additionally, the legal status of atheism under these criteria is also problematic.

In the final two chapters of the text, Cameron Fisher, Prue Vines & Rosalind F Croucher comprehensively and compellingly compare the common law’s treatment of the sanctity of life, and the dignity of death, against traditional Catholic, Islamic and Jewish approaches. This leads the authors to confront issues including refusal of treatment, euthanasia, inheritance and autopsies. Furthermore, profoundly important to Tasmania following the Reproductive Health (Access to Terminations) Bill 2013 (Tas), these chapters also squarely confront the divergent approaches taken to abortion. If passed, this bill would permit terminations at up to 16 weeks, providing the woman consents to the procedure, and later on the approval of two medical practitioners, if the mother’s health is threatened. This bill would thus decriminalise abortion in Tasmania, and continues the common law’s traditional privileging of personal autonomy emerging from Stewart’s analysis. Intriguingly, given the controversy and opposition surrounding this bill, Stewart’s analysis suggests Islamic law, and to an extent, Jewish Law would countenance such provisions. Given the Bill’s unclear future at the time of writing, such investigations demonstrate the continuing relevance of the themes which this text canvasses.

Accessible, comprehensive, engaging and highly useful, *Law and Religion* provides a solid foundation for individuals of all fields wishing to understand or contextualise religion’s historical, and modern, influence on the common law’s development. Future editions may expand the text’s scope even further to make the volume even more compelling and useful. Such expansions could develop Simon Fisher’s assessment of clergy confidentiality following the Catholic Church’s recent child sexual abuse scandal, and consider further the coexistence of religious and common law legal systems in modern society, given discussions regarding ‘legal pluralism’ in Australia. Regardless, Radan, Meyerson & Croucher’s text is a useful contribution for legal practitioners and theologians alike.

⁹ *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120, 132.

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