make effectively the case for its role in the development of Asian security might be overlooked without apparent consequence to Indonesia.

More profoundly, Indonesian inaction could hurt Australia in operational areas, particularly those concerning people smuggling. Indonesia remains a country that, like most in the developing world, has poor infrastructure and governance arrangements. Activities, such as those aimed at people smugglers, will become dysfunctional merely if Indonesian officials decide against Australian requests, such as were made earlier this year, to undertake additional actions. (http://www.smh.com.au/opinion/political-news/jakarta-pushed-on-people-smugglers-20130625-2ovb4. html#ixzz2XHLO5gJ)

Under normal arrangements Indonesian security forces are limited in their capacity to hamper the activities of people smugglers. Insensitive comments from Australian politicians might simply exacerbate the problem of asylum seekers arriving in Australia by boat. Tony Abbott’s Opposition seems to be hoping that history will repeat itself and that adopting all of John Howard’s ‘Pacific Solution’ will make the problem of asylum boats go away. While retreat into the past is an understandable reflex in conservatives, it doesn’t necessarily address current issues. It certainly does not address the value and future of Australia’s relationships with Indonesia that, ironically, owe much to the work of Howard himself.

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Australia and New Zealand are soft theocracies

MAX WALLACE

Introduction

TRYING TO FIND AN ACCURATE WAY to describe the present relationship between government and religion I devised the term ‘soft theocracy’ and defined it as a ‘state where church and government purposes coincide to garnishee taxpayers’ money and resources, structurally through tax exemptions and functionally through grants and privileges’.

Australia and New Zealand have all the attributes of democracy except the constitutional separation between church and state. This is no accident. Like the links between government and business, government and unions, the link between government and religion involves a trade-off: money for votes.

This political arrangement is mirrored in most western ‘liberal democracies’. It implies that the French and American revolutions of the 18thC have never been fully realised. When it comes to religion and money we are still un-Enlightened.

But, it is not as if religion gets everything it wants all of the time. Policy-wise, it gets some of what it wants some of the time and its financial privileges nearly all of the time.

The usurpation of taxpayers’ money, and other privileges like exceptions and exemptions from legislation for religion, persist because few of these privileges can be questioned by citizens as being unconstitutional at a state or federal level in Australia or a national level in New Zealand.

Our politics has been crafted to create a special, ring-fenced place for religion. The consequences of the failure of governments to fully realise political secularism are fiscally serious in terms of revenue foregone through tax exemptions for religion and expenditures that could have been made elsewhere. I will discuss the situation in Australia and New Zealand and conclude with some discussion of the proposed Fijian Constitution which separates church and state.

Defining separation of church and state

The received wisdom on the question of separation of church and state is that a state is secular when ‘(1) [its] legal and judicial processes are out of institutional religious control and (2) they establish neither an official religion nor atheism.’

This is an elegant political definition. What it omits is the twin perspectives of the French legislation of 1905 separating church and state: ‘The Republic does not recognise, does not salary, nor subsidise, any religion’. Government intention to remain impartial between religion and atheism, especially with a commitment not to subsidise them, is what political secularism is really about.

When we look more closely, both legs of the two part definition above are hopelessly compromised on both sides of the Tasman because access to taxpayers’ money is what the church-state relationship in both countries is mostly about. Both legs of the definition are knee-capped to ensure that law and politics do not get in the way of churches being kept in the manner to which they are accustomed.

Prior to becoming Governor-General in 2002 Anglican Archbishop Peter Hollingworth wrote: ‘Those who have raised [the
question of church-state separation] 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 is the case in the US tradition.3 Hollingworth was fairly right. Ironically, in 2006 John Howard said ‘what the separation of church and state means in this country is that there is no established church ... we don’t have the Anglican Church as the official state religion, that’s what it means’.4 So, a Governor-General and the Prime Minister who appointed him disagreed on one of the fundamental facts about Australia’s constitutional position concerning the place of religion in the body politic.

Separation: the Australian states

If a function of the definition of separation is that it is the parliament and the judiciary that makes law, not churches, then how do we explain the fact that all Australian states and territories, since their inception, have been making hundreds of laws from the 19th century concerning churches with respect to their legal status, their trusts and their properties? If the argument was to be put that parliament has facilitated this legislation, not the churches, there are certain uncomfortable facts that are harder to hair-split away:

• There is no section in any state constitution which separates church and state;
• All state parliaments commence with Christian prayers;
• Upon election, all members of parliament, at their swearing-in, are obliged to acknowledge the Supreme Governor of the Church of England, in England, the Queen, as head of state and Defender of the Faith;
• In 1910 a Queensland referendum removed the word ‘secular’ from the Education Act, allowing

religion to be taught in state schools by state teachers. This still applies as no government has sought to legislate against it and Creationism is creeping into schools;5
• In NSW in 2005 Reverend Dr Gordon Moyes MLC announced he would sponsor a private member’s bill to amend church property laws so that ‘disaffected congregations who wanted to leave the Uniting Church could sue for ownership of the church building in which they worshipped’.6 That is, the parliament was to be used to resolve a matter internal to a church;
• In 2006 the South Australian Labor government appointed Catholic Monsignor David Cappo to executive committees of the government. Even the Murdoch press was taken aback: ‘the appointment of a non-elected, non-government person to cabinet – let alone a senior church figure – is unprecedented in Australia’;7
• In 2008 the NSW government funded the Pope’s World Youth Day in Sydney to a sum somewhere in excess of $100M. When the Sydney Morning Herald’s Freedom of Information journalist sought details the government stonewalled;8
• Only Victoria and the ACT have decriminalised abortion. In 2010 a young couple were prosecuted in Queensland for procuring an abortion by importing a drug for that purpose;
• When Archbishop Jensen recently retired as Anglican Archbishop of Sydney, both the Governor and the Premier attended his farewell, as if this was some kind of government event.

More positively, state parliaments, while not decriminalising it, now leave the abortion issue alone. There has been prostitution and gay law reform, and censorship has been eased.

The Australian government

The Australian Constitution has section 116 which has four parts.

It says that the Commonwealth shall not make any law for (1) establishing any religion (see John Howard’s comment above) (2) imposing any religious observance (3) prohibiting the free exercise of any religion and (4) no religious test for public office i.e. you cannot be denied a government position because of your religion or lack of it.

Like the US First Amendment on which it is based, but unlike the French legislation, and the now proposed Fijian constitution, it does not spell out clearly that it means separation of church and state. That omission left the door open for the Australian High Court, in the 1981 Defence of Government Schools case6, to find that the funding of religious schools in Australia was not unconstitutional.

In this extremely significant decision Justice Sir Ronald 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 Sir Ninian Stephen said that s.116 ‘... cannot be readily viewed as the repository of some broad statement of principle concerning the separation of church and state, from which may be distilled the consequences of such separation.’ The Chief Justice, Sir Garfield Barwick, endorsed Wilson’s views.

This was in complete contrast to the US Supreme Court’s Justice Hugo Black in in the 1947 Everson10 case where he said: ‘In the words of [former President] Jefferson the clause against the establishment of religion by law was intended to erect ‘a wall of separation between church and state’. Justice Lionel Murphy took the American approach in 1981 recognising s.116’s First Amendment heritage but the decision was 1-6.

Defence of Government Schools was a fork in the road which has partly determined the course of Australian politics - away from the republican road that s.116 opens up, and down the road of the cosy constitutional monarchist trade-off of money for votes.
By not having to completely fund their schools from decades ago, the Catholic and other churches have been able to grow the wealth they would have otherwise had to spend on their schools. This meant the running down of government schools in our parallel education systems and hence, forty years later, the Gonski report. Churches have become large, corporate, tax-exempt organisations linked to (thanks largely to John Howard) the activities of the federal government itself through their welfare activities, a lifeline as their memberships are in freefall.

Each year the judiciary endorse our soft theocracy by filing en masse into Catholic cathedrals in Sydney and Melbourne to get the blessing of the church at the start of the legal year. Other interfaces of the federal government and politics with religion are:

- Parliament opens with Christian prayers;
- In 1996 John Howard was elected Prime Minister and the Northern Territory’s voluntary euthanasia legislation was overturned by the federal government;
- In the federal parliament on 20 October 1997 Senator Watson applauded the Governor-General, Sir William Deane, for amending the National Anthem to include the words ‘O God, who made this ancient land’ in a verse that is usually not sung;
- In 1999 an ABC radio transmitter in the Northern Territory was sold to a British evangelical group who broadcast fundamentalist propaganda non-stop in several languages to South Asia from studios on the Sunshine Coast via satellite link to the transmitter;
- In 2001 the Tax Office decided upon request that a retired pastor could receive $1,000 per week paid to a church credit card for his personal use, plus the free use of church accommodation and a car, and all that would be OK as untaxed fringe benefits because he was ‘religious’;
- On 29 May 2004 the inaugural National Day of Thanksgiving was launched with the Treasurer giving a speech in a church. On the website of the National Day of Thanksgiving it was claimed, with the approval of the Prime Minister, the Leader of the Opposition and the Governor-General, that Jesus Christ reigns over Australia;
- Exemptions were legislated for churches from industrial legislation, particularly the Catholic Church, allowing them to employ who they prefer and sack those they don’t like;
- In 2008 the High Court closed down an attempt to argue the $20M+ federal funding for the Pope’s World Youth day was unconstitutional by declaring the writ ‘vexatious’;
- To date, $500M+ has been given to evangelical organisations to employ mostly evangelical chaplains in government schools on the understanding they will not attempt to convert the children to their faith, despite the fact that for most of these chaplains, proselytising and conversion is their central aim. When the funding was found to be unconstitutional, on technical grounds by the High Court, the government legislated over the head of the Court to continue the funding;
- When the Australian National Charities Commission was created in 2012, an exemption was made so that churches are not required to report their wealth, unlike all other charities, a condition that does not apply in New Zealand or England.

New Zealand

The 2013 census will likely show that less than 50 per cent of citizens now identify as Christian and those ticking the ‘no religion’ box will have climbed again from their 2006 level of 32 per cent. Religion has declined at every recent census yet the government continues to doff its cap to matters religious, even though overtly religious political parties fail to get elected. Their tactic now is to run scare campaigns to maintain political purchase. Like Australia, there are some positives:

- In 1983 a bill to ban abortion was lost 30-48;
- Recently, Prime Minister John Key allowed the free provision of contraceptives to women and their daughters on benefits, to address the high rate of teenage pregnancy;
- This year, legislation allowing gay marriage passed comfortably. On the other hand:
- New Zealand does not have a written constitution and case law has not formalised separation of church and state;
- The National Anthem, God Defend New Zealand, is in effect a Christian hymn;
- Parliament opens with prayers;
- In 1975 the government legislated to fund religious, mainly Catholic schools. The legislation was sneakied through late at night before the parliament rose for an election. A report commissioned by the government from a private consultancy, which argued against funding religious schools, was never released. We only know its contents as it was leaked to a public school activist;
- In 1985, an Anglican Archbishop, Sir Paul Reeves, was made Governor-General. After his appointment was announced he said, amusingly, that he would ‘fulfil his clerical vocation in the new position’;
- The Charities Commission in Wellington does have a wealth reporting requirement. The churches have about $11B in assets. The Catholic diocese of Auckland is the wealthiest in the country with $695M. Churches, including the Salvation Army, are sitting on significant sums in the bank while it was recently argued a quarter of New Zealand’s children are living in poverty;
- The parliament recently passed legislation to allow charter schools in New Zealand, a regressive step that can enhance private, religious education at the expense of support for public education. There has long been religious instruction in schools and Maori karakia, a ritual chant, has often been used as a form of prayer.
Fiji

Fiji became a Republic in 1987 after a coup. In 2012 a Constitution Commission was established, chaired by Professor Yash Ghai, an eminent legal scholar.

Their draft constitution says this, in part, at Section 4 (1):

Secular State
1. Religious liberty, as recognised in the Bill of Rights, is a founding principle of the State.
2. Religious belief is personal.
3. Religion and the State are separate...

The Fijian Constitution ‘recognises’ all religions, whereas the stricter 1905 French legislation does not recognise religions at all, allowing them as voluntary associations to register with the government; at the same time, in Fiji, there is an intention that the state is to be secular, a bridge that Australia and New Zealand are yet to build let alone cross.

Professor Ghai explained: This doesn’t mean the state is anti-religion, but just a feeling that the function and responsibility of religion or beliefs within societies should be separated from the functions and policies of the institution of the State.21

While the Methodist Church wanted Fiji to be a Christian state, the Catholic Church22 and the Church of England23 both supported the move by the government to formally separate church and state in the new constitution. In addition, the Queen’s face is to be removed from the currency and the Union Jack is to be removed from a new Fijian flag.

Conclusion

It will be some time, if ever, before the provisions of the new Fijian Constitution are tested in the courts to see whether government funding of religion through tax exemptions, grants and school subsidies could be held to be constitutional.

Be that as it may, the Fijian move makes a mockery of Australian and New Zealand political parties, and the Australian Republican Movement (not the Australian Republican Party or the New Zealand Republican Movement) all of whom, with the exception of the Australian Democrats, have had very little to say about constitutional separation of church and state.

The question, it seems to me, is: can constitutional monarchists and most Australian republicans, joined at the hip in their opposition to constitutional separation of church and state, blindside the public forever about an idea that should be a cornerstone of a future republic, and thereby protect the cosy trade-off between religion and government from the ‘militant’ intentions of citizens who think government should be truly impartial between religion and atheism? Or will Lionel Murphy, Thomas Jefferson, and Roger Williams24, come back to haunt them?

Max Wallace is Vice-president of the Rationalist Association of NSW and a council member of the New Zealand Association of Rationalists and Humanists.

FOOTNOTES
7. The Australian, 4-5 February 2006.

The hurdles in accessing the legal system for the disadvantaged

LIZ CURRAN

This article seeks to broaden the understanding of why legal aid services are critical, why they need adequate funding, how the most disadvantaged face increased hurdles and the challenges that lie ahead.

In Australia there has been recent discussion about changes in guidelines as to what legal aid will and will not fund due to funding...
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