

Christian Foundations of the Australian Law

By Augusto Zimmerman.

While the Australian legal tradition cannot lay claim to the historical depth it has in America and England, it was still built on a similar solid Christian foundation. Christian ideology is infused in both the legal and governmental institutions and customs of Australia. As with America and England, our country possesses remarkable Christian influences – starting with the first British fleet departing for Australia in 1787, when Captain Arthur Phillip was instructed to enforce a due observance of religion and to take such steps as were necessary for the celebration of public worship.

Although the Christian religion played a vital role in originally shaping Australian society, this does not mean that people from other religions were not welcomed, nor does it mean that there was any obligation for those living in the land to belong to the Christian religion, or indeed any religion. The remarkable climate of religious tolerance and open-mindedness was stressed in the first sermon preached on Australian soil on Sunday, February 3, 1788. On that occasion, the Rev. Richard Johnson began his sermon with the following remarks:

I do not address you as Churchmen or Dissenters, Roman Catholics or Protestants, as Jews or Gentiles [...] But I speak to you as mortals and yet immortal [...] The Gospel [...] proposes a free and gracious pardon to the guilty, cleansing to the polluted, healing to the sick, happiness to the miserable and even life for the dead.

The colonisation of Australia began as the result of a decision by the Imperial Parliament (UK) to establish a new penal colony. It was Admiral Arthur Phillip (1738-1814) who founded the British penal colony of New South Wales in what later became the city of Sydney. He was determined that the common law would be fully introduced in the new colony. Since the colony was established within a context of the Western legal tradition which was steeped in Christianity, there was as a clear symmetry between Judeo-Christian values and the law of the land in numerous areas of public morality and social behaviour. As noted by law professor Michael Quinlan, ‘this was a consequence of the historical dominance of the Christian faith among the population in the colonies and historically in England from which Australia inherited ... the common law and the compendium of English legislation which they brought with them’. From the very beginning Phillip brought a philosophy of government to Australia that aimed to treat all interests in the new colony equally and to prevent sectional conflict, including the values ‘which produced the great campaign led by Wilberforce to end the institution of slavery’. As Keith Windschuttle points out,

[T]hese values include truth, courage and love, and loving your neighbour as yourself. Even with the decline of organised religion, these Judeo-Christian values continue today to permeate our laws, our language, and our fundamental institutions. They are part of our broad Australian culture.

Governor Phillip regarded slavery as a direct affront to the values of Christianity, once stating ‘that there can be no slavery in a free land and consequently no slaves’. As noted by David Furse-Roberts, ‘Phillip was resolved to execute what he saw as his humane mission to treat the

indigenous people with respect and to invite them to be part of the new society... Phillip appreciated the role of religion, and Christianity especially, as the bases for an ordered and civilised society. Accordingly, he gave support to the early chaplains to foster the religious life of the colony'. Thanks to his insistence that 'there should be no slavery in a free land', and consequently no slaves, 'abolitionist principles were embedded from the outset, and Wilberforce's influence was significant'.

Lachlan Macquarie (1762-1824) was Governor between 1809 and 1821. It was Macquarie who formally adopted the name Australia for the continent, a name earlier proposed by its first circumnavigator Matthew Flinders. To Macquarie, 'New South Wales was not just a land of punishment but also a land of redemption. Under his benign rule, he believed, convicts would be transformed into citizens'. In 1815, Macquarie appointed clergymen to every district of the new colony, ordering that all convicts attend Sunday church services. On the very next Sunday he made sure he attended the church service. Macquarie officially launched the Sunday School Movement as well as the local branches of the British Bible Society and the Foreign Bible Society.

Governor Macquarie believed that Christian principles would render the next generation 'dutiful and obedient to their parents and superiors, honest, faithful and useful members of society'. He considered these principles 'indispensable both for liberty and for a high material civilisation', and 'hoped to give satisfaction to all classes, and see them reconciled'. Macquarie is said to have initiated the land's transformation from a 'dumping ground for convicts into a model British colony'. Due to his honest and efficient government, late in his life Macquarie could claim: 'I found New South Wales a gaol and left it a colony'.

General Sir Richard Bourke (1777-1855) was the colonial governor of New South Wales from 1831 to 1837. Bourke was a devout Anglican who applied Christian principles so as to introduce judicial reforms that implemented trial by jury and reduced the severity of corporal punishment for offenders. Not only did he bring forward the ending of penal transportation to the colony, but also encouraged the emancipation of all convicts. The primary assumption behind his administration was that New South Wales should be a Christian colony. 'Hoping to see people of these different persuasions ... united together in one bond of peace' (a phrase he borrowed from Ephesians 4:3), 'Bourke promoted Christianity in its most common denominational expressions, as a basis of citizenship'.

Although Bourke was a pious Anglican, he also championed the interests of Roman Catholics and other religious minorities, particularly Nonconformist Protestants. The passage of the *Church Act* in 1836 de-disestablished the Church of England, so that each religious denomination could be placed on an equal footing before the law, warranting not only toleration but full protection of the civil law. As noted by Furse-Roberts, 'his decision to disestablish the Church of England was not so much based on a secular impulse to diminish the role of religion as it was by a desire to afford justice to the aggrieved Catholic minority and to give equal strength to the various strands of Christianity in public life'.

Inspired by the example of Wilberforce and guided by the morality of the Gospels, the Christian clergy set themselves to protect the Aboriginal peoples of the continent, 'benevolence being an essential for Christian salvation as for the salvation of the heathen'. Without the Christian religion (and colonisers

motivated by its values and beliefs), it is reasonable to imagine that the Australian Aborigines would have been completely wiped out. 'The whole venture could have been a disaster', writes Roy Williams, who explains that 'saving the Indigenous population of Australia from total extinction may be the Christian Churches' most important collective achievement'. Yet they get little credit for it. As noted by Windschuttle:

Evangelical Christianity was the dominant Protestant movement of nineteenth-century Australia and a contemporary driving force for social reform. Britain's great Evangelical revival in the eighteenth century required its adherents to apply the principles of the Gospel to social life and to engage not only in religious rituals but in benevolent social works [...] [including] prison reform, orphan schools, education for the poor, and especially [...] the abolition of British engagement in the slave trade in 1807 through the efforts of William Wilberforce.

The British settlement of Australia was an ambitious project. Evangelical faith was a strong support of a settlement that did not break the ties to the old world, and that was accompanied by the belief that 'one should reproduce in the new colonial world what was best in the culture and values of the old'. Significantly, Christian traditions came to Australia particularly through the English legal system. Australian government and laws were developed out of English legal-political institutions, which are deeply imbued with this important Christian heritage. At the time of British settlement in the continent, Christianity formed an integral part of the theory of English law and government. Christian values were naturally manifested in the legal system, and applicable to the situation of the colonists. As Roy Williams points out:

All Western legal systems were grounded on two core assumptions, both of them Biblically based: man has free will, and morality is God-given. But the English went further. For centuries Christianity was recognised as an integral part of the law of the land. Chief Justice Sir Matthew Hale's statement to that effect in 1676 – 'The Christian religion is a part of the law itself' – was still received wisdom when the First Fleet arrived at Port Jackson. Such procedures continued to be followed long into the nineteenth century. It is therefore unsurprising that the notion that Christianity was central to English society and English law was widely held in the Australian colonies.

Sir Henry Parkes (1815-1896) was the longest non-consecutive Premier of the Colony of New South Wales. He is known as 'the Father of Australia's Federation' for his indefatigable efforts to bring Federation to fruition. Parkes believed that Christianity comprised an 'essential part' of the country's legal system. When the *Public Instruction Acts* were passed in most colonies during the 1870s and 1880s, he commented: 'It was never the intention of the framers of this Bill to exclude ... a knowledge of the Bible as all divisions of the Christian church must possess, or a knowledge of the great truths of Revelation'. Secular education, on Parkes's view, 'meant rejecting sectarian division in favour of common Christianity as a bases for citizenship'. In a column published in the *Sydney Morning Herald* on 26 August 1885, he stated: 'We are pre-eminently a Christian people – as our laws, our whole system of jurisprudence, our Constitution [...] are based upon and interwoven with our Christian belief.'

Curiously, the early disregard of Aboriginal customary law was based on established common-law principles coupled with a Christian interpretation of the 'Divine Law'. This was based on the contrast to be drawn between

Christian principles and the idea of law in traditional Aboriginal culture. Aboriginal communities had their own laws and those laws were deemed inseparable from their animistic religion. However, the colonisers thought that Aboriginal law conflicted with the authority of reason and revelation, meaning it was perceived as being unable to more properly secure the protection of fundamental rights, in particular the rights to life, liberty and property.

This is evident in the decision of the Supreme Court of New South Wales decision in *R v Jack Congo Murrell* (1836) where Justice Burton expressed the view that the Aborigines 'had no [proper] law but only lewd practices and irrational superstitions contrary to Divine Law and consistent only with the grossest darkness'. Such a characterisation of Aboriginal laws amounts to a direct recognition of Christian principles extending to the law of the land. This reception of Christian jurisprudence is perhaps best encapsulated in Justice Hargraves's comment for the Supreme Court of New South Wales in *Ex Parte Thackeray* (1874):

We, the colonists of New South Wales, 'bring out with us' (to adopt the words of Blackstone) this first great common law maxim distinctly handed down by Coke and Blackstone and every other English Judge long before any of our colonies were in existence or even thought of, that 'Christianity is part and parcel of our general laws'; and that all the revealed or divine law, so far as enacted by the Holy Scripture to be of universal obligation, is part of our colonial law – as clearly explained by Blackstone Vol 1 pp. 42-43 and 43-60.

These judicial pronouncements exemplify the official recognition of the Christian heritage of the Australian legal system. In *Thackeray* the court not only acknowledged Christianity's embedment in the common law, but also took the major step of declaring the supremacy of Christian legal principles – namely, that the divine or revealed law is applicable, and superior, to all the existing laws – and that 'all the revealed or divine law, so far as enacted by Scripture to be of universal obligation', are applicable and superior to colonial laws. Thus the colonial courts recognised that principles derived from Christianity should be declared universal and be objectively applied to all.

The Aborigines the settlers encountered were not a nation state. As noted by the editor-at-large of *The Australian* newspaper, Paul Kelly, 'they were a collection of hundreds of tribes speaking different languages, devoid of collective political purpose or leadership, often at war at each other and without the structures to allow sovereign negotiations or dealings'. The common law therefore became from the outset the applicable legal system of the colony to be administered by its tribunals. It was the sole legal system the tribunals fully recognised and applied. Nonetheless, writes law professor Prue Vines, 'the instructions from the King to Governor Phillip expressly provided for the protection of the native people'. Because the Aborigines immediately became the subjects of the Crown, they were not just liable for breach of the law but fully entitled to the protection of the law.

Held between 1891 and 1899, representatives of every British colony in Australia attended conventions which agreed on the elaboration of a federal Constitution. Upon the request of the colonies, on 5 July 1900, the Imperial (British) Parliament passed the *Constitution of Australia Bill*. Queen Victoria assented four days later and proclaimed in September that the Commonwealth of Australia would come into existence on the first day of the twentieth century (1st January 1901). On the occasion, one of the Constitution's most distinguished co-authors, Sir John Downer of South Australia, solemnly

proclaimed: 'The Commonwealth of Australia will be, from its first stage, a Christian Commonwealth'. Prior to this, in March 1898, during a debate at the Constitutional Convention in Melbourne, Downer declared:

The Christian religion is a portion of the English Constitution without any decision on the subject at all. It is part of the law of England which I should think we undoubtedly brought with us when we settled in these colonies.

These statements are far more than just rhetoric. They made its way directly into the Preamble of the Australian Constitution: 'Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, *humbly relying on the blessing of Almighty God*, have agreed to unite in one indissoluble Federal Commonwealth [...]'. As noted by law professor Helen Irving, the preamble is that part of the constitution laying out 'the hopes and aspirations of the parties involved'. That being so, according to Professor Irving:

During the 1897 Convention delegates have been inundated with petitions [...] in which the recognition of God in the Constitution was demanded. The petitions, organized nationally [...] asked for the recognition of God as the 'supreme ruler of the universe'; for the declaration of national prayers and national days of thanksgiving and 'humiliation'. But, the essence of their petition was that the Constitution should include a statement of spiritual—specifically Christian—identity for the new nation.

The explicit reference to God in the Constitution received the strongest popular support of *any* part of the nation's foundational document. Remarkably, all the colonial Parliaments of Australia explicitly demanded acknowledging God in the federal Constitution. In the process of popular consultation, which took place during the constitutional drafting, the legislative assemblies of Western Australia, Tasmania, New South Wales, and South Australia, submitted proposed wordings for the preamble acknowledging God. For example, the legislative assemblies of New South Wales and South Australia, as well as the West Australian Legislative Council, proposed a preamble 'acknowledging Almighty God as the Supreme Ruler of the Universe'. John Quick (one of the drafters of the Constitution) and Robert Garran (who played a significant role in the Australian Federation movement) wrote in their standard commentary on the Australian Constitution:

This appeal to the Deity was inserted in the Constitution at the suggestion of most of the Colonial Legislative Chambers, and in response to numerous and largely signed petitions received from the people of every colony represented in the Federal Convention [...] In justification of the insertion of the words stress was laid on the great demonstration of public opinion in their favour, as expressed in the recommendations of the Legislative bodies and in the petitions presented.

The inclusion of the words 'humbly relying on the blessing of Almighty God' into the primary source of Australian law and government exemplifies the nation's undeniable Christian heritage. It can, at the very least, be said that Judeo-Christian values were so embedded in Australia in those days so as to necessitate the recognition of God in the nation's founding document. Indeed, it may well be argued that the overwhelming public support for a reference to God in the basic law reflected the view that the validity and success of an Australian Federation actually depended on the providence of God. According to Dyson Heydon AC QC, a former Justice of the High Court of Australia, this

acknowledgement of Almighty God in the Constitution 'reflected what the elite of the Federation generation saw as fundamental'. The Australian framers thought of the new nation as a singled unit comprised of people 'moved by spiritual impulse towards one might destiny'. As Dr Meredith Blake points out,

Federation underscores the importance of civic Protestant nationalism in Australian public life and feeling in the decades either side of 1901. Although cast in an Old Testament mould, mainly by Protestant hands, its key ideas were readily secularised and accepted by people of varied theological commitments – from Jefferis to Deakin to Patrick Glynn. We hear it in Gay's poem, which describes the barriers to federation in essentially moral rather than practical or political terms. We see it in the widespread notion that federation would be achieved only in humility, penitence and obedience to the call of God. And we meet it in every suggestion that creating a Commonwealth accorded with God's plan not only to bless Australia but to forward his purposes in the wider world.

When Australians think about Federation, they are not used to thinking about its deeply Christian undertakings. And yet, the opening of the first federal Parliament suggests a Christian society that was deeply comfortable with the role of religion in the public square. The then Governor General, Lord Hopetoun, delivered the prayers for their Majesties the King and Queen, and for the new Federal Parliament of Australia. Hopetoun bowed his head as a sign of humility and the multitude joined him in the Lord's Prayer. He read out the oath and the first members of federal Parliament were sworn in with their Bibles in hand. The Christian ceremony was concluded with the *Halleluiah Chorus* from Handel's *Messiah* – 'For the Lord God omnipotent reigneth' – then the national anthem and an eruption of cheers. These proceedings, writes Dr Lake, 'suggest a society comfortable with Christianity in public, even in the political square. They also hint at the Bible's influence on an emerging national polity – in ritual, sentiment, and ideas'.

The powers of the Governor General also illustrate the relevance of Christianity in the current legal system. The Governor General, who is constitutionally authorised to exercise the executive power as the Queen's representative, swears allegiance to the monarch under section 42 of the Australian Constitution, binding himself to the principles expressed in the Queen's oaths of office. These oaths include significant Christian undertakings. For instance, at her enthronement Queen Elizabeth solemnly promised to 'maintain the Laws of God and the true profession of the Gospel', and to 'continue steadfastly as the Defender of Christ's religion'. She made a solemn vow that 'to the utmost of [her] power [she must] maintain the Laws of God and the true profession of the Gospel'.

Whatever one might think of all this, it is simply not possible to understand it without reference to Christianity. Curiously, Christian practices still deeply permeate Australia's legal-institutional traditions even to this very day. For example, prayers are still conducted prior to opening proceedings at both state and federal Parliaments in Australia. Standing Orders for the House and Senate determine that the Speaker must read a prayer for Parliament, which is followed by the *Lord's Prayer* before calling for the first item of business. With all parliamentary members remaining standing, the Speaker concludes the opening proceedings with this prayer:

Almighty God, we humbly beseech Thee to vouchsafe Thy blessing upon this Parliament. Direct and prosper our deliberations to the advancement of Thy glory, and the true welfare of the people of Australia.

Strangely, however, the Christian foundations of our constitutional democracy now appear to be increasingly doubted, suppressed and even denied. Since Australian society is normally viewed as entirely “secular” and “multicultural”, our Christian legal heritage is almost never mentioned, much less appreciated, in political and intellectual discourse in this country. Despite the best efforts of secularists to suppress the truth about our rich Christian heritage, it is simply impossible to deny that our legal system has a distinct Christian philosophical foundation that has prevailed till the present day. To state this fact is not to be ‘intolerant’ of other cultures and religions, but simply to stress an undeniable truth.

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