

Freedom of Religion and Section 116 of the Australian Constitution

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Freedom of Religion as an Associational Right - Abstract:

Freedom of religion is commonly thought to be an individual right. Part of the reason for this is that Article 18 of the International Covenant on Civil and Political Rights refers to the right of 'everyone' to freedom of thought, conscience and religion. Is this the understanding of freedom of religion that should be ascribed to s 116 of the Australian Constitution, or to the First Amendment to the US Constitution, both of which are expressed in similar terms?

As the recent Hobby Lobby case demonstrates, much is at stake in the question whether freedom of religion is understood to be an individual, associational or communal right. If it is essentially an individual's right to believe and practice, then the freedom will indirectly protect the beliefs and practices of religious groups and organisations only in so far as this is necessary to protect the rights of individuals to manifest and practice their religious beliefs. Such an approach requires that the formation, existence and conduct of religious organisations must be understood as resulting from the beliefs and practices of their individual adherents and members, conceived as an expression of their autonomy. Such an account of religion is quite contrary to the way it is conceived and practiced by many religious believers and religious organisations. It also has the tendency to suggest that the rights of religious groups must always be subordinated to the rights, not only of their individual members, but the rights of individuals that do not belong to such groups but nonetheless make claims against them, such as through the universalising application of antidiscrimination and other regulatory laws. However, if the freedom of religion that is protected by s 116 is a freedom of groups and organisations as well as individuals, then there is no necessity to trace the rights of a religious organisation or group to the rights of its individual members. The organisation or group is itself a bearer of rights. When this is acknowledged, a more balanced assessment of the interaction between those rights and the rights of others can then be undertaken.

In this article, I argue that there are several reasons why a narrowly individualist interpretation of s 116 of the Australian Constitution is not warranted. First, the section is not framed in language that suggests that it must be limited in this way. Secondly, the case-law clearly acknowledges a fundamental and ineradicable associational and communal dimension to religious freedom. Thirdly, when the Australian Constitution was drafted, debated, ratified and enacted in the late 19th century, local religious practice included a widely accepted and legally recognised corporate and organisational aspect. Fourthly, the relevant clauses of the First Amendment to the US Constitution, on which the Australian provision was largely modelled, had throughout the 19th century been interpreted to include a corporate dimension. Fifthly, international law further supports this conclusion in its explicit and extensive recognition of group rights, despite the apparently individualist language of Article 18.

The application of s 116 to any particular case depends, of course, on more than its conceptualisation in individual, associational or communal terms. Whether freedom of religion has these dimensions is nonetheless of far-reaching importance because this determines the nature and breadth of the premises on which any argument about its application must be based. If freedom of religion is minimally and exclusively an individual right, then s 116 offers no protection at all to

religious organisations. If it has an associational dimension, then s 116 at least applies to protect religious organisations as a by-product of its protection of their individual members and office-holders. If it also has a basically communal aspect as well, then s 116 may also operate to protect religious organisations per se, without any necessity to show that the rights of their individual members or office-holders are being affected. The question then becomes whether an alleged interference with freedom of religion is for some reason constitutionally justified. Too often, however, arguments about whether the state's interference is justified are tangled up with the unexamined assumption that religious freedom is merely or basically an individual right. Because freedom of religion is best understood as including these associational and communal dimensions, the burden upon the state to justify its interferences should not be obscured by this false and misleading assumption.

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