AUSTRALIAN COUNCIL FOR THE DEFENCE OF GOVERNMENT SCHOOLS
Press Release 725

RELIGIOUS LIBERTY: PART TWO

A FUNDAMENTAL HUMAN RIGHT OR PART OF A BALANCING ACT IN DISCRIMINATION LEGISLATION?

Michael Bachelard of 15 November in the Fairfax Press has no doubt about the answer. Religious freedom is, he claims, and should be, limited by civil laws. But the further question is, what civil laws? http://www.theage.com.au/federal-politics/political-opinion/samesex-marriage-debate-religious-freedom-is-and-should-be-limited-20171114-gzli5o.html.

http://www.smh.com.au/federal-politics/political-opinion/samesex-marriage-debate-religious-freedom-is-and-should-be-limited-20171114-gzli5o.html

His article, ***Same-sex marriage debate: Religious freedom is, and should be, limited*** is highly derogatory of some religious beliefs and/or practices. It has a whiff of 'pay-back in it.

The Jesus People consider themselves a religion; they follow an ascetic form of Christianity. They also, allegedly, violently abuse women and practise polygamy, as a way of getting closer to God. The Children of God sexually abused young children in the name of Jesus Christ. This was not ancillary to their religion; it was part of their observance….

Then there is the sub-section of Muslim believers who mutilate girls' genitalia….

OUCH! How would this affect you if you were a following of Jesus or Mohammed.

After the results of the Same Sex Marriage plebiscite were announced on the ABC, it was interesting to note how representatives of the Roman Catholic, Anglican and Muslim groups reacted. The Roman Catholic and Anglican representatives were particularly concerned about the religious integrity of their taxpayer funded education, health and social services. However, given the numbers – approximately 61% to 39% Religious exemptions relating to marriage equality have been pushed down the line, to be dealt with after Christmas, according to reports in News Corp ($) and Fairfax papers on 17 November 2017.

Yet once again, our established religions were more concerned with power and taxpayer funding and lobbying for both in the corridors of power, than they are with freedom OF – and- FROM religion.

But then, issues freedom of conscience usually loom large for persecuted minorities rather than those identified with established religion. Christ himself would say

Render unto Caesar the things which are Caesar's; and unto God the things that are God's." Mathew 22.21

DOGS believe uncompromisingly in the separation of religion from the State and the public funding of public schools only.

If Australia had separation of religion from the State, then, if marriage is nothing more or less than a civil registration of relationships, its definition should never have been the business of religious organisations unless this was relevant in a sacramental marriage ritual for their adherents.

Meanwhile, billions of dollars are being diverted into private religious schools which are concerned that they will not be permitted to discriminate against teachers, pupils and parents on whatever basis they choose to call 'religious belief'.

DOGS position is that if religious institutions take the Queen's shilling, then those institutions should fall under the civil law of the land. If they do not take the Queen's shilling, then it is a different matter.

The Muslim representative on the ABC differed from his Christian brethren. He mentioned the need for religious liberty and a Bill of Rights. Where did he get that Enlightenment idea from? It is rare to find such religious liberties in Muslim countries that practice Sharia Law.

Yet, back in 1901 when Australia was an Enlightened country, our Founding Fathers inserted such a provision in the Australian Constitution. If the High Court judges had the temerity to look at the intentions of our Founding Fathers when they placed Section 116 in the Australian Constitution, they could have such a provision again.

In 1981, in the DOGS case, the High Court refused to look at the intentions of the Founding Fathers when they placed Section 116 in the Australian Constitution. But what would happen if Section 116 was tested once again? A lot of water has gone under the legal bridges since 1981. Those interested in genuine freedom of and from religion should inform themselves of recent developments.

A lot has happened since the DOGS case of 1981.

Firstly, *The Acts Interpretation Act Amendment Act* of 1984[1], Section 7 amended the original 1901 Act to include a Section 15AB. This permitted the use of extrinsic material in the interpretation of an Act to determine the meaning of a provision when it is ambiguous or obscure , or the ordinary meaning leads to a result that is manifestly absurd or unreasonable. In 1988 the Mason High Court reversed the original interpretative rule and the books of the Convention debates were read in open court. [2]

As a result, many legal commentators and historians, confronted with recent issues of religion and the state have been revisiting the DOGS case. They have discovered what the plaintiffs could have told them in 1981 – that what was clearly a version of the religious liberty clauses in the American Constitution, has been rendered meaningless in the Australian context.

[1] *Acts Interpretation Amendment Act* (Cth) 1984 No. 27 of 1984, Section 7.

[2] *Cole v Whitfield*, [1988] HCA 18; (1988) 165CLR 360, 385 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

What role should history play in Constitutional Law

The issues of freedom of conscience, religious liberty and religion and the state are perennial and raise their head, in different guises, in every generation. What, for example would be the fate at the High Court level of a Commonwealth ban on the hijab or burqa?

When a problem of interpretation arises under the Australian Constitution, is the judicial duty to consult the historical records to discover the original intentions of the founders?[3] or Should they regard the constitutional document as having been set free in 1901 from the intentions, beliefs, and wishes of those who drafted it, a document to be viewed by each succeeding generation with the eyes of their own times? [4]

For legal commentators, the questions arising from the DOGS case include techniques of constitutional interpretation as well as well as the intentions of the American and Australian Founding Fathers. Historians have an easier question: What did delegates to the Constitutional Convention intend when they inserted Section 116 into the Australian Constitution? Who do you turn to? Mere commentators like Quick and Garran;[5] (who have been proved to be questionable) or Henry Bournes Higgins who proposed the religious liberty Clause in 1898 ; or the originator of Section 116 - Andrew Inglis Clark?

The High Court judges chose the biased commentators If they went back to Andrew Inglis Clark, we would have separation of religion from the State.

First, let's delve back into our history: What happened back in the Constitutional Convention of 1898

Long before the DOGS High Court case in 1981, Australian colonial historians had charted the 1836 abandonment of the established English Church in colonial NSW;[6] the abandonment of State Aid to religion in the 1860s,[7] and the abandonment of State Aid to religious schools in the later nineteenth century. [8]

So, when Edmund Barton and others told Henry Bournes Higgins in the 1898 Constitutional debate that there was no need for a religious liberty clause based on the American First Amendment in the Australian Constitution, it was not only because the Federal Parliament

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[3] Greg Craven 'Heresy or Orthodoxy:Were the Founders Progressives? (2003) *Federal Law Review*, Vol. 31, 87-129

[4] M. Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship', 2000 Melbourne University Law Review, Vol. 24 (1) at http://www.austlii.edu.au/au/journals/MelbULawRw/2000/1.html Accessed 20 July 2017

[5] R. Ely *Unto God and Caesar*, pp 88,- 102.

[6] B. Fletcher, 'The Anglican Ascendancy 1788-1835,' and P. Curthoys, 'State Support for Churches 1836-1860' in *Anglicanism in Australia,: A history*, 2002 edited by B. Kaye, T. Frame, C. Holden, and G. Treloar, MUP.

[7] J. Gregory, *Church and State: Changing Government Policies towards Religion in Australia; With Particular Reference to Victoria since Separation*, 1973, North Melbourne Cassell Australia.

[8] A.G. Austin, *Australian Education 1788-1900*, 1963 MUP; J. Gascoigne, *The Enlightenment and the European Origins of Australia*, 2002, Cambridge University Press.

would not have express power to deal with religion. It was also because they believed they had solved 'the religious' problem. They had already separated religion from the State. [9]

He said:

> *..Because we are a Christian community we ought to have advanced so much since the days of State aid and the days of making a law for the establishment of a religion, since the days of imposing religious observances or exacting a religious test as a qualification for any office of the State, as to render any such dangers practically impossible, and we will be going a little too far if we attempt to load this Constitution with a provision for dangers which are practically non-existent.*

Inglis Clark, Higgins, and other separationists were not convinced that there was no probability of such 'enlightened' communities retracing their steps. ? They wanted guarantees. Why?

Religious, mainly clerical leaders of the 1880s and 1890s had not always accepted their separation from either the public place, or, in the case of the Roman Catholic hierarchy, the public Treasury. The religious backdrop to the 1890s Federal Constitutional Conventions was punctuated by petitions. In the period 1897- 1898 there were two competing petitions: One, organised by the colonial Councils of Churches was a petition to recognise Almighty God in the Preamble. The other was a petition of what Higgins claimed to be 38,000 signatures organised by the 2000 plus Seventh Day Adventists recently arrived from the USA.[10] They opposed the inclusion of the recognition clause in the preamble.

This story has been well documented by Richard Ely and taken up by other commentators[11].

Of particular interest was the religious seriousness, the strong support for the recognition clause and the strong opposition to the insertion of Higgins religious liberty clause into the Australian Constitution by both Quick as a Victorian delegate to the Convention and Garren, initially as Reid's Secretary and later as assistant to the drafting committee. [12]Quick a loyal Methodist, and Garren, an active Anglican were strongly identified with the 'recognition' movement and against the insertion of Section 116. [13]

But was the Quick and Garren account adopted by the majority judges in the DOGS case mistaken, and if so, how and why? Ely certainly thought so.

The historian J.A. La Nauze has been held accountable by Stephen McLeish for giving air to the Quick and Garren account that Section 116 was inserted in the Constitution in response to

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[9] *Constitutional Debates*, Melbourne 1898, vol.2 p1770-72

[10] R. Ely, Unt God and Caesar, 24-30,55-6,82,86,138n, 142,n.

[11] H. Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (1999) (Cambridge University Press);S, McLeish, ' Making Sense of Religion and the Constitution: A Fresh Start for Section 116' *Monash University Law Review*(1992) Vol 18, No 2. 207 at 228; L. Beck, *Higgins' Argument for Section 116 of the Constitution*, Legal Studies Research Paper No 14/45 May 2013, Sydney Law School, University of Sydney; R. Mortensen, 'The Establishment Clause: A Search for Meaning,' *University of Queenslamd Law Journal*, (2014) Vol. 33(1) 109.

[12] La Nauze, The Making of the Australian Constitution (1972) 135.

[13] Ely Ibid 143 notes 35 and 36.

H. B Higgins concern that the recognition of God in the Preamble might justify intolerant or restrictive religious legislation.[14] But this is not entirely fair on La Nauze. Quick and Garran dealt with the Inglis Clark guarantee of religious liberty namely

' ***A State shall not make any law prohibiting the free exercise of any religion***'

included in the draft federal Constitution handed down by the 1891 Convention. They remarked:'How such a clause crept into the Bill of 1891 it is difficult to conjecture' La Nauze remarked briefly, but aptly that 'Inglis Clark could have told them" [15]

So who was Inglis Clark, the Tasmanian Attorney General and in 1898 Supreme Court Judge, who first placed a religious liberty clause in his 1891 draft of the Australian Constitution, and what were his reasons for doing so.

In the last twenty years, interest in the Tasmanian responsible for the first draft of the Australian Constitution has increased a thousandfold.

But before that, Clark dropped off the historians' radar for many decades. He had few wealthy and powerful friends on the mainland, and died, in 1908, disappointed in his ambition of a position on the Australian High Court. But the descendants of his Hobart family and friends always knew about him. They knew about his house 'Rosebank' in Hamden Road, Battery Point. They knew about the shipyard of his anti-transportation father-in- law, Ross, and his final resting place in what remains of the Sandy Bay cemetery. They knew he was an Americanophile and an admirer of the Italian democrat, *Giuseppe* Mazzini. The historian John Reynolds resurrected his memory in the 1960s, and Richard Ely connected him to issues of religious liberty in the 1970s. By 2001, with Federation centenaries in vogue, books on his life and work were launched and scholars came from all over Australia to Hobart to celebrate his contribution to the Australian polity.

Clark published a commentary on the Constitution in 1901 (second edition in 1905) But he did not attend the 1898 Convention, preferring instead a visit to America to visit Justice Oliver Wendell Holmes. Nor did he comment on Section 116 in his Constitutional commentary. It is not surprising that Clark fell into semi-oblivion. But although he was not present at the 1898 Convention he had been active in the Tasmanian House of Assembly debates on the Draft Commonwealth Bill in 1897.

And there is other evidence in his manuscript papers concerning his adherence to a strong separationist position. .In this context I would like to refer to two papers in manuscript, one in The Clark Paper, an 1885 essay entitled 'Denominational Education'[16] and the other is in a 1901 notebook sold at a Christie's auction in 1996 . The notebook contained poems by Clark, an intensively worked-over handwritten fragment of his 1901 *Studies in Australian Constitutional Law*, and a short essay entitled 'The Preamble to the Constitution of the

[14] S, McLeish, ' Making Sense of Religion and the Constitution: A Fresh Start for Section 116' Monash University Law Review, (1989) Vol 18, No 2. 1992, 2017 at 229

[15] La Nauze, *The Making of the Australian Constitution*,(1972) 228

[16] R. Ely , 'Protecting Commonwealth from Church: Clark's 'Denominational Education', and Beyond, Chapter 8 in *A Living Force; Andrew Inglis Clark and the Ideal of Commonwealth*, ed. Richard Ely, with Marcus Haward and James Warden, Centre for Tasmanian Historical Studies, University of Tasmania, 2001 140-183

Commonwealth of Australia.'This essay was published by R.Ely in the *Australian Law Journal* in 2001

Tasmanian Debate on the Draft Commonwealth Bill 1897

On 'recognition' Clark was one of the minority in the Tasmanian House of Assembly who unsuccessfully opposed it. He believed that those opposed as well as those who were indifferent, represented the majority. Acknowledgement of God could only come from individuals. 'Recognition' practically compelled 'a minority to stand before the world as having desired it also…From a religious standpoint it would be irritating; he would think his worship had been violated and desecrated. '[17]

Clark also proposed an amendment to what had been Clause 81 in his original draft, and was now Section 109. His proposals was to add to the words 'No State shall make any law prohibiting the free exercise of any religion' the words' nor appropriate any portion of its revenue or property for the propagation or support of any religion'. It passed the Assembly on the voices.

In relation to the amended Section 109 he wrote a Memorandum to the 1898 Convention. He argued that in no way were forms of religion to be aided or impeded by the provincial legislatures.

> In its present form Section 109 secures religious equality for all the citizens of a State, so far as it prevents the State from placing the adherents of any form of religion under any disadvantage or restriction in the exercise of it in comparison with adherents of other forms of religion; but it does not secure perfect religious equality to all the citizens so far as the granting of any special privileges or favours or endowments to particular forms of religion is concerned. And the object of the amendment is to secure perfect religious equality in both directions, but preventing any particular benefit or support being given to any form of religion. [18]

In the event, the Convention not only declined to accept Clark's amendment, but omitted Clark's Section 109 altogether. Clark's bid to constitutionally entrench freedom of and from forms of religion in the States failed. It was left to H. B. Higgins, armed with petitions against the 'recognition' clause in the Preamble to insert a comparable clause relating to the Commonwealth rather than the States on March 2 1898. The result, as John La Nauze remarked, was that 'the States were left free if they wished, to legislate for religious intolerance.

Justice Wilson, following the Quick and Garran account, refers to the rejection of Clark's amendment as follows:

> It will be recalled that the 1898 Convention was invited to adopt a form of words for the religion clause which would have placed the present issue beyond doubt, when an amendment from Tasmania to the effect that the clause include the words 'nor

[17] Parliament of Tasmania, Debate on the Draft Commonwealth Bill, 1897, Hobart 1897 266-7.

[18] A Inglis Clark, Proposed Amendments to the Draft of a Bill to Constitute the Commonwealth of Australia (1 September 1897) (Records of the Aistralasian Federal Convention of 1897-1898: National Archives of Australia, AA 1971.506, item series 12/9, F162 Clark here refers to equality but not to liberty.

> appropriate any portion of its property for the propagation or support of any religion' was proposed and defeated.

But

> 'Be these things as they may, I believe it would be wrong to attach undue significance to the history of the clause. The actual words of the text supply the only firm ground on which to base a conclusion. [19]

So thought six of his fellows on the bench.

Clark on Denominational Education

This paper was an argument against the 'payment by results' system which was being used by religious interest to regain the State Aid to their schools which had been withdrawn in 1854. In this paper Clark proved himself a 'hard liberal' a man with a deep belief that the liberal political order evolving towards true freedom of the individual, civic and religious order – was a fragile plant, vulnerable to subversion within and perils without. [20]

He wrote

'*..if the state should restore to the Roman Catholic portion of the population the whole of that portion of its revenue which it derives from them as citizens to be expended by them in establishing and maintaining a social organisation sufficiently separate from the state to permit it to be sufficiently permeated with Roman Catholic teaching …then the state…must refuse it; because the concession of it would be a recognition of the propriety of* ***an imperium in imperio****, and a divided sovereignty is simply political emasculation and asthenia*.

And later,

Separate grants by the state in aid of denominational schools upon the principle of payment by results must necessarily amount to state endowment of particular forms of religion.

The Preamble to the Constitution of the Commonwealth of Australia.[21]

Clark , the 'hard' liberal who believed in fundamental laws for the protection of the natural rights of the individual beyond the reach of the majority of the hour, wrote fighting words on the recognition of God in 'The Preamble to the Constitution of the Commonwealth of Australia'. He wrote tortuously, but fiercely. To require, he wrote

> …a minority of citizens to expatriate themselves in order to escape from membership of a nation or community which by a vote of a majority of its members undertakes to make a corporate confession of any religious doctrine or belief is to use political, and

[19] *Attorney-General (Vic) (Ex rel Black) v Commonwealth* [1981] HCA 2, (1981) 146 CLR 580, at 654

[20] This awareness of the vulnerability of the liberal order is also clear in his ' Why I am A Democrat.' Ibid, Chapter 3.

[21] R. Ely, ' Andrew Inglis Clrk on the Preamble of the Australian Constitution, ' 2001 The Australian Law Journal, Vol 75, 36-43.

> consequently physical, force in the name of religion as clearly and directly as it was at any time used for the burning or expulsion of heretics.

In this paper Clark chose his most trenchant criticism, not for Catholics, who were but being consistent in imposing a declaration of the existence of God upon the people of Australia , but for Protestants whose ‘fundamental doctrine was the essentially and absolutely individualistic character of relations of each human soul to its creator.’ Not unsurprisingly, Clark by at this stage of his life, like Oliver Wendell Holmes, a Unitarian. His remarks pertinently illustrate Milton’s allegation that ‘New Presbyter is but Old Priest write large.’

So Andrew Inglis Clark, and those who voted to insert Section 116 into the Australian Constitution were underlining a situation which their colonial forebears had already forged – a separation of religion from the State in which neither religion nor religious schools received ANY taxpayer funding.

This is the answer to the Historical question.

But what has happened in case law and legal commentaries since 1981?

That is the subject of the next Press Release.