ST JAMES CHURCH SYDNEY CHRISTMAS SERVICE FOR LAWYERS

THE HON MURRAY GLEESON AC*

The Australian Constitution commences with an expression of two sentiments, both of which are now deeply unfashionable. It recites that the people of the uniting colonies were humbly relying on the blessing of Almighty God. Humility and reliance on God are now not generally regarded as virtues. The Constitution might be more in keeping with the spirit of our times if it recited that the people of Australia were confidently relying on themselves. I refer to an important constitutional provision concerning religion. Section 116, curiously located in Chapter V, which deals with the States, provides that the Commonwealth shall not establish any religion, impose any religious observance, prohibit the free exercise of any religion, or introduce a religious test as a qualification for any office under the Commonwealth.

In our community there is no established Church. Church and state are separate, and the majority of people do not attend church regularly. Most do not expect the law to enforce religious doctrine. Our community prides itself on being multicultural, and multiculturalism necessarily involves a multiplicity of values, including religious and moral values. We do not equate religion with morality. Many people have strong moral values without basing those values on religious doctrine. People of religious faith do not assume that they have a monopoly upon moral values. Some who profess religious beliefs are notably deficient in religious virtues.

Our legal system is not in the least theocratic. The separation between religion, morality and law, now taken for granted by most people, is relatively recent. Even now, it is not as clear-cut as many people assume. After Thomas More was convicted, he asserted that the Act of Parliament upon which his indictment was based was oppugnant to the laws of God and of His Holy Church. To a modern lawyer, what is interesting is the brief argument he advanced in support of that proposition. He developed only the minor premise, explaining why the legislation in question was contrary to religion. He did not bother to develop the major premise, no doubt

* Chief Justice of Australia.

because, in the sixteenth century, it would have been generally accepted that Parliament lacked authority to legislate contrary to true religion. Now, both in the United Kingdom and in Australia, the opposite view prevails. The fact that legislation might be contrary to religious teaching might sometimes be of political significance, but is legally irrelevant.

In many respects these changes are a good thing. We are now largely spared concerns about fine points of doctrinal contention. It is more than 50 years since Catholic school children were expected to know what the Albigensian heresy was, and to understand how fortunate we are that Europe was saved from it (that, I suppose, was looking on the Inquisition from the bright side). And modern Australia is largely free of the unpleasant sectarianism which used to be associated with religious observance. In 1902, Australia's first Prime Minister, Edmund Barton, visited London. In the course of his journey he went to Rome, and paid a courtesy call on the Pope. The response was a petition said to have been signed by 30,000 Australians, protesting against his action. This does not mean, however, that the significance of religion is now confined to personal piety and charitable works. The influence of religion on various aspects of civil and criminal law is indirect, and largely by way of the influence of religion on morality. Lord Devlin once pointed out that the criminal law functions best when the rules it enforces reflect moral principles generally accepted in the community.[1] No one believes that the law should prohibit all conduct that is immoral. At the same time, it is usually difficult to justify imposing serious criminal sanctions upon conduct that is not generally regarded as morally wrong. Lord Devlin wrote:

> To my mind the law of tort is the least satisfactory branch of English law. It may not be accidental that it is also the one which of its nature has least to do with morals. The criminal law is shaped by the moral law; the quasi-criminal is based on it; the law of contract is the legal expression of the moral idea of good faith; the law of divorce formulates the permissible relaxations from the moral ideal of the sacramental marriage. The judges of England have rarely been original thinkers or great jurists. They have been craftsmen rather than creators. They have needed the stuff of morals to be supplied to them so that out of it they could fashion law; when they have had to make their own stuff their work is inferior.[2]

The law concerning marriage still provides a good example of the influence religion has had, and continues to have, on the law. Section 43 of the *Family Law Act 1975* (Cth) (the so-called Murphy legislation), provides the first of the principles to which the Family Court must have regard in the exercise of its jurisdiction. This is 'the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life'. That definition of marriage, which accords with the common law, and the assertion of the need to preserve and protect it as an institution, has its historical origin in religious doctrine. However, for many people the community values reflected in the legislative

[1] Lord Devlin, *The Enforcement of Morals* (1968) 42.
[2] Ibid.

provision exist independently of religious conviction. The modern law regulates marriage, and the incidents of marriage, closely.

Consider three aspects of that regulation: exclusivity, formality, and publicity. Bigamy and polygamy are crimes, even if they involve no element of deception. A person cannot have two or more spouses at the same time, even though the spouses involved may consent. It is difficult to explain why bigamy is criminal, even though no deception is involved, except by reference back to religious doctrine. The law imposes formalities upon entering into, and ending, the relationship of marriage. Dissolution of marriage requires an order of a court, even where there are no matters in dispute between the parties.

Entering into a relationship of marriage carries with it an obligation of publicity. Even in an age where privacy is treated as a human right, especially in the sensitive area of personal relationships, people who desire to enter into the relationship of marriage must publicly register their status. Public disclosure of marriage is not optional. These requirements of formality, exclusivity, and publicity reflect a view of the nature and importance of marriage which was derived from religious teaching.

This brings me to the point I want to make about the continuing public importance of religion. Lord Devlin also pointed out that 'no society has yet solved the problem of how to teach morality without religion'.[3] Individual people have personal moral values which, in many cases, have been formulated without any religious underpinning. These values are often more firmly held than the corresponding values of many people who profess religious faith. There can be morality without religion, just as there can be religion without true morality. But having an individual and personal conviction is not the only thing that is important. It is the general acceptance of values that sustains the law and social behaviour, not private conscience. Whether the idea is expressed in terms of teaching or communication, there has to be a method of getting from the level of individual belief to the level of community values. Religion is one method of bridging that gap. What are the alternatives? Apart from religion, what is it that forms and sustains the moral basis upon which much of our law depends? How are community values developed and maintained in a pluralist society? I do not suggest that it cannot be done, but it is not easy.

This aspect of the contribution of religion to society, and to the law, is often overlooked or underestimated. People sometimes react with surprise, even indignation, when Church leaders make a public affirmation of religious doctrine. But what is to be expected of Church leaders if they do not, from time to time, do that? Have people really considered the potential social consequences of the great religions abandoning their teaching role?

The relationship between the Church of St James and the courts and legal profession of this city reflects a lot more than history and geography. The Supreme Court

[3] Ibid 25.

of New South Wales has long forgiven the Parish of St James for appropriating its building. But I am sure it continues to expect, and we all continue to expect, that from this church, and others like it, there will continue to flow that stream of teaching which is so important to the sustenance of the law.