

‘Democracy Down Under - understanding our constitution’

A resource from the Presbyterian Church of Victoria

Published by:

The Church and Nation Committee
Presbyterian Church of Victoria
156 Collins Street
Melbourne 3000
Australia

1997

ISBN 0-949197-58-0

(c) Presbyterian Church of Victoria

Contributors:

Rev. Andrew Clarke
Mr. Nicholas Aroney
Rev. Dr. David Mitchell
Rev. Dr. Peter Barnes
Rev. Greg Fraser

Editor:

Rev. Gregory I. Fraser

(Thanks to: J Milne, S White, Rev. Dr. Allan Harman,
Rev. Dr. N. Lee, Rev. J Stasse).

Printer:

FRP Printers of Ballarat Victoria.

Contents:

Foreward	p. 5
1. Australian Federalism	p. 9
2. Federalism and the Formation of the Australian Constitution	p.17
3. Origins of the Australian System of Law	p.31
4. The Place of the United Nations in Australian Law	p.39
5. Church and State - a biblical survey	p.45
Afterword	p.55

Foreword

Rev. Andrew Clarke

Australia is often thought of as a young nation. It is not even a century since it was formally constituted at federation. Because of this apparent “newness” it is possible that some Australians may be and are ready to contemplate significant alterations to the way our country is governed. The 1998 Constitutional Convention provides an opportunity to discuss various proposed changes to the system put in place just a few generations ago. However, our Constitution does have a long ‘pedigree’ and this needs to be appreciated in order to properly assess any alterations.

The Constitution may be date-stamped “9th July, 1901,” but the tradition in which it stands is nothing less than ancient. The essential values embodied in the Constitution are drawn from the Judaeo-Christian heritage which has been the basis of Western civilisation for almost two millennia. The writers stated that they had composed their document “humbly relying on the blessing of Almighty God”. This is a reference to the God of the Bible, and this biblical tradition goes back to the beginning of time itself.

When we speak of “government” as Christians we are really speaking of God, because we believe that He governs all things. God has decreed that society should be ordered according to His will, and He has revealed His will for us in the Scriptures. From the time of creation onwards God guided and instructed His people as He taught them the principles and laws that were to regulate their lives. The complete, inspired, and infallible Word of God provides us with all the moral instruction we need in all matters of faith and life - including the life of a nation. The Lord Jesus Christ gave His followers the Great Commission to preach the Gospel of salvation to all people and to make disciples from all the nations, teaching them to observe all things He has commanded us. Jesus’ teaching relates to everything from the private life of the individual, to the ordering of the family, the Church, and the nation.

The fruit of this ministry can be seen in all places where the Judaeo-Christian heritage has been a key formative influence in cultures and constitutions. We see it in the Westminster system of parliament and the American federation both of which provided a basis for the foundation of our own Australian nation. The very dramatic shift we have seen this century is a departure from the biblical worldview that has formed our history and our institutions. Christians are now being challenged by secular humanists and by people of different faiths and values in relation to the principles by which we govern our society.

The questions we must ask are: If we are to change our Constitution, then what will be basis of those changes? Should we aim to maintain

the status quo rather than risk losing what we have? If we are able to review the Constitution, then what changes could be made to further - rather than to depart from - the great biblical tradition which is our heritage? This booklet is not an answers booklet but is designed to encourage Australians to think through these issues so that we can make informed choices in good conscience before God - choices that our children will bless us for even as we bless those who have provided us with the Christian laws and liberties we enjoy.

Rev Andrew Clarke
Church and Nation Committee

Australian Federalism

Nicholas Aroney (lecturer in Constitutional Law)

It is well known that Australia is a federation. The preamble to the Commonwealth Constitution recites, that it consists of six mutually independent, self-governing colonies who at the turn of the century agreed, humbly relying on the blessing of Almighty God, to unite in one indissoluble federal Commonwealth under the Crown.

As a condition of this union, representatives of the people of each of the States, especially the people of the four smaller States, insisted that they be equally represented in one of the Houses of the Commonwealth Parliament, the Senate.

Under the Commonwealth Constitution the independent governing powers of the six States are preserved (see sections 106-108), but the people of the States agreed to the creation of an overarching Commonwealth Parliament which would have legislative powers in a number of designated, and limited, fields (see sections 51 and 52). In cases where Commonwealth legislation under these sections conflicted with legislation passed by a State Parliament, section 109 provides that the Commonwealth law prevail.

This idea of federation means that the Commonwealth, or what we often loosely refer to as the national or federal government, is far from having complete control over the States. Australians are very familiar with the repeated cycle of negotiations and disagreements between the Prime Minister and the Premiers of the various States. The fundamental principle operating here is

that the Premiers represent States which have a capacity to govern themselves independently from the views, and powers, of Commonwealth politicians.

Federalism and Presbyterianism

Many Australians are aware that our form of federalism is closely modelled on the kind of federalism which was to be found in the United States of America. Both federations emerged when constituent States or colonies agreed to be united under a common constitution. However, Australians are less aware that our federal system of government at a political or civil level is also similar to, and has its roots in, the system of church government which exists in the Presbyterian and Reformed Churches and now also adopted by the Uniting Church of Australia. Indeed, in 1901, the same year when the Australian colonies federated to form the Commonwealth of Australia, the various Presbyterian Churches of the States agreed to unite into the Presbyterian Church of Australia (the PCA), a federal union which preserved their separate identities (Bradshaw 1984:90; Ward 1989:290).

It has been noticed by experts in the field that federalism as a system of civil or national government bears a close analogy to the Presbyterian and Reformed schemes of church government,¹ just as hierarchical or Episcopal forms of church government correspond to monarchical models of civil government (Elazar 1988:148-9; Bradshaw 1984:84). The Presbyterian form of church government and federal systems of civil government endeavour to strike a careful balance between unity and centralised control on one hand, and diversity and independence on the other.

¹ I will refer to these generally as "Presbyterian". It is noticeable that the Uniting Church, a union of the Methodist Church with elements of the Presbyterian and Congregational Churches, adopted a Presbyterian form of church government.

The Federal system in the Church

The leaders' council (called a Session) of local Presbyterian churches appoint commissioners to constitute a district body which oversees the work of the churches in that district. This is called a Presbytery. In turn, groups of Presbyteries can federate into General Assemblies at a State level, and State Assemblies can federate into a General Assembly at a national level, as the Presbyterian Churches of Australia did in 1901. The result is that there is no sense in which the members of the higher courts are superior to the members of the lower courts.

The great bulk of decision-making, then, occurs at the lower end of the system of graded courts. Basic and original decision-making is therefore non-centralised, and some unique functions are distributed to particular levels of church government. Individuals in local congregations or Sessions or Presbyteries often set the agenda for the State and Federal Assemblies. If someone, or group (say a Presbytery) is not happy with a decision at one level they may appeal upwards to the State or Federal Assembly.

By contrast, systems of hierarchical government fundamentally envisage that the highest officials determine overall policy and require lower-level functionaries to administer those decisions. The decision-making model is top-down, rather than bottom-up.

In federal a system of civil government, political authority is ideally built up through successive federations of local, provincial and state governments. This occurred in the United States, where local government continues to play an extensive role. Until the twentieth century, American constitutionalists tended to see the towns and local governments in this light (Elazar 1988:113). The first federation among the British colonies in America was established by the Fundamental Orders of Connecticut in 1639, which provided for the federation of colonial towns into a colony-

wide form of government, while leaving the local town governments responsible, as before, for most local matters (Lutz 1987). Ultimately, by 1789 the States had themselves federated to form the United States of America.

This can be contrasted to the greater level of enforceable unity and centralised control seen in broadly episcopal forms of church government (eg, Roman Catholic, Anglican and Eastern Orthodox) and unitary forms of civil government (eg, the United Kingdom, New Zealand and France).

Origins of federalism

Are these formal similarities between federalism and Presbyterianism merely a co-incidence? Why should constitutional and political experts compare the Presbyterian systems of church government and the federal system of civil government? The answer, it is submitted, lies in this: both systems of government are based on similar assumptions about human nature and the necessities of human organisation. And these assumptions, in the historical origin of both systems, seem to have been based in specific teachings to be found in the Bible.

The etymological derivation of the word *federal* gives us our first clue. Our English word *federal* is derived from a Latin word *foedus*, which means pact or covenant (*Oxford English Dictionary*, sv "federal"; Davis 1978). The term *foederal* first came to be used in a political sense to describe the treaty into which independent nations would enter in order to agree to maintain peace and mutual self-defence. It was a term of international law.

The formation of covenants and treaties between independent nations with which the term *foedus* was originally associated is similar to the actions of the Australian colonies when they agreed to form an indissoluble federal Commonwealth under the Crown

at the turn of the century. And this is also similar to the process of union upon which the Australian Presbyterian Churches embarked at the same time.

The reformation of Christianity and federal agreements

A second key to the story has to do with the Reformation era (16th century) out of which federal theory continued to develop. Reformed (Presbyterian) theologians in later decades so strongly focussed on the doctrine of the covenant that their system of belief came to be known as covenant or federal theology. Essential to this system of federal theology was the biblical teaching that God deals with us through His covenant, through which He graciously offers us salvation and provides us with laws under which we can live, in unity and harmony. According to this view, covenant is a foundation, not only for our relationship with God, but for our relationships with one another. When in the Old Testament the twelve tribes of Israel entered into covenant (*b'rit*) with God, they also entered into covenant with one another, and formed a confederation consisting of their twelve tribes (Elazar 1995:227ff). Likewise, according to covenant or federal theology, when Christians under the New Testament enter into covenant with God through Christ, we enter into covenant with one another and, with Christ as our Head, we together form the Church. In this way, covenant provides a structure for the temporal organisation of the Church, based on a profession of faith and a life of piety (Calvin II:vii:12, III:xvii:5).

It follows that under federal theology, covenant is the basis upon which binding relationships are formed, both in Church *and* in State. Covenant theology provided Reformed thinkers with a world view which spoke to both Church and State (Weir 1990:7). Where the Reformed branch of the Reformation bore fruit,

presbyterial forms of church government generally developed. Reformation church leaders and theologians, such as Andrew Melville and George Gillespie, formulated and defended federalism. Melville's vision was of a Church governed "by representative elders ruling in a series of graded courts, from local church session to regional synod to national general assembly, with powers of review, control and jurisdictional appeal" (Kelly 1992:65). The same graded courts appeared in *The Form of Church-Government* confirmed by the Westminster Assembly in 1645.

Charged with this view of the world, those influenced by federal or covenant theology started to formulate theories of federal government, both for the State and for the Church. The result was like the Hebrew system under the Old Testament, which was in the view of one writer—

essentially a system of self-government. It was the government of individual independence, municipal independence, and state independence, — subject only to so much of central control, as was necessary to constitute true nationality, and to provide for the general defence and welfare. Centralisation was eminently foreign to its spirit. The local governments loom out under the Mosaic constitution; the central government is proportionally overshadowed. Herein the Hebrew constitution remarkably resembles our own [the Constitution of the United States], and as remarkably differs from other ancient polities. (Wines 1980:242).

Considerations such as these have lead Professor Daniel Elazar, a leading Jewish scholar of biblical and federal government, to the opinion that "the covenants of the Bible are the founding covenants of Western civilization" (1995:1).

Covenantal political theory

Within the same Reformation era, a large number of important theologians, constitutional historians and publicists formulated widely influential theories of constitutional law which were covenantal and federal in orientation. Among them were a number of eminent Calvinists, including Theodore Beza, John Knox, Junius Brutus (pen-name, probably, of Philippe Duplessis-Mornay), George Buchanan, Francois Hotman, Samuel Rutherford and Johannes Althusius (Kelly 1992, McCoy & Baker 1991, Elazar 1996). Roman Catholics also joined in these arguments (eg, Juan de Mariana and Francisco Suarez), and secularised versions later appeared in the social contract theories of Locke, Hume, Hobbes and Rousseau.

Those who promulgated and acted on these theories deeply influenced the constitutional development of many nations, particularly those most touched by the Reformation, such as Switzerland, Germany, Holland, Scotland, England and, later, the United States. The European countries already had an orientation to federalism rooted in the medieval use of oaths and covenants as the binding forces of society. Reformed theology served to strengthen and extend this orientation. The theory of federalism took deep root in American soil, and the American model of federalism has since encircled the globe.

The leading concern of these constitutional theories lay with resistance to royal tyranny. What the theories held in common was that when a king (representing the national government) overstepped his constitutional bounds, it lay with the lower magistrates (parliamentarians), representing the constituent elements of the nation, to resist the king, with force if necessary. Calvin had denied a private right of resistance, but affirmed the role of "magistrates of the people" to resist "the fierce licentiousness of kings", since they have been "appointed protectors" of "the people's freedom ... by God's ordinance" (Calvin III:xx:31). The lower magistrates were as equally ministers

of God as the higher magistrates (such as the king). The basic premise was that society was founded on covenants between the constituent elements (provinces, local government units and the like). As a result, when the terms of those covenants were breached, the constituent provinces could, under the lawful leadership of their duly constituted magistrates, elect to dissolve the federation and return to complete self-governance and independence (see eg Brutus 1989:31-2; Rutherford 1982:33ff, 88ff, 95ff).

Covenant thinking was carried to America by the settlers of New England, often known as the New England Puritans. These devout calvinistic Christians were so steeped in covenant thinking, that according to Perry Miller, a leading historian of this era, "covenant was the marrow of Puritan divinity" (Miller 1937). One Puritan wrote in 1624:

We are by nature covenant creatures, bound together by covenants innumerable and together bound by covenant to our God. Such is our human condition. Such is this earthly life. Such is God's good creation. Blest be the ties that bind us. (Quoted in Witte 1987:579).

Federalism and the formation of the Australian Constitution

Nicholas Aroney (lecturer in Constitutional Law)

By most accounts Bryce's *The American Commonwealth* was the most influential book read by the framers of the Australian Constitution (La Nauze 1972:18-19). They consciously chose to model the Australian Constitution, especially its federal aspects, on the US Constitution, which, according to Bryce, was heavily infused with Puritanism. The first and most important draft of the Australian Constitution, was produced by Andrew Inglis Clark in 1891, and followed the American model very closely, in conformity with Clark's admiration for the US Constitution. The general structure and specific form of federalism adopted by that draft continued into the final version which came into force in 1901.

In the formation of the Australian Constitution, the arguments for maintaining the independence of the States were consistently and eloquently put by leading federalists such as Clark, Sir Samuel Griffith and Sir Richard Baker. According to Baker, the covenanting or compacting theme was definitive: for federation is essentially a "compact made between the constituent states" (Sydney 1891:111). He also warned that English responsible government, though democratic, tends to centralise power, whereas federalism diversifies power (Sydney 1891:439-40).

On the latter aspect, John Alexander Cockburn was concerned with the autonomy of the colonies, with their independent ability to manage their own affairs. Federation, he said, would secure autonomy by "safeguarding us against all possible aggression". Cockburn wanted to see safeguards against "these powers [of local self-government] being unduly encroached upon by the federal or central authority" – against that "vortex that continually tends to draw everything to the centre, and to increase the centralizing powers". Thus:

local government, self government, and government by the people are analogous terms. ... centralization is opposed to all three, and there can be no government by the people if the Government is far distant from the people. (Convention Debates, Adelaide, 1897:338-9)

As he said later:

Of course majorities must rule, for there would be no possible good government without majorities ruling, but I do not think the majority in South Australia should be governed by the majority in Victoria, or in New South Wales. (Convention Debates, Adelaide, 1897:340)

Thus federalism was seen as a bulwark against centralised tyranny. John Hannah Gordon thought that the "genius ... of South Australian politics, has been local government," to which he contrasted "a huge system of centralisation." (Convention Debates, Adelaide, 1897:318). Likewise, Cockburn cited one Canadian writer to the effect that "State rights and provincial rights are the strongest bulwarks against despotism. In a Federation, diversity is freedom, uniformity is bondage." (Convention Debates, Adelaide, 1897:339).

One of the most controversial aspects of the Australian Constitution concerned the powers and composition of the Senate. According to the framers, the Senate was unequivocally

intended to be a "States' House", a house in which the interests and voices of the people organised as States would be heard at a Commonwealth level. However, some of the framers thought that the Senate, being part of the Commonwealth Parliament, ought to be more representative of the Australian people as whole, rather than representative of the people organised in their respective States.

Likewise in our day the composition of the Senate has been the subject of criticism. It has often been pointed out that Senators, though formally representing the interests of particular States, actually vote along party lines. With these facts in view, some commentators have suggested that the Senate should be reformed so as to be more democratic and to represent their states or even the people of Australia as a whole.

Presbyterian lessons for Australian federalism

If federalism then is seen to be both an ancient and well-developed form of government, are there any points at which Australian federalism can be improved? Given the Presbyterian and Reformed influences on the early development of federalism, can they provide any assistance to the problems of federalism in Australia today?

Vertical fiscal imbalance

It is submitted that there are a number of areas in which this is the case. First of all, it is an oft-cited fact that the Australian federal system suffers from a chronic case of vertical fiscal imbalance. What this means is that the Commonwealth dominates the States when it comes to the collection and spending of government revenue. On one hand, this imbalance relinquishes the States from any substantial and direct responsibility for fiscal policy, since they continue to spend more

than they earn. On the other hand, this enables the Commonwealth to dictate policy to the States in areas which do not fall within its specific heads of power under sections 51 and 52 of the Constitution. A very recent decision of the High Court has further weakened the tax base of the States by deciding that their taxes on tobacco and by implication alcohol and petrol are largely unconstitutional. The issue has therefore become a very current one.

Under the Presbyterian and Reformed (and many other church) systems of government, the primary collection and spending of revenue occurs at the level of the local congregation. Only relatively limited remittances are made to the central organs of the church. These remittances go far in meeting the special needs of particular congregations in need and to support special charitable works. But the limited amount of remittances means that the bulk of the money is spent by people at the local level, where human needs are intimately known and those who spend the money can be watched carefully by those whose money is being spent.

This of course suggests a quite radical reform to the way in which government revenues are recovered and spent in Australia. At the very least, however, it suggests that the effective monopoly the Commonwealth enjoys over tax needs to be redressed, as many commentators have in fact recommended.

True Democracy

The second problem that can be addressed concerns one of the most common misunderstandings of our system of government. It is generally assumed that ours is a "democratic" system of government. Now in a particular sense this is true: free elections are and should be fundamental to our system of civil government, as they are in Presbyterianism. But in another sense, this is not so true. In simple terms, one "democratic model" would be as follows:

PEOPLE



COMMONWEALTH GOVERNMENT



STATE GOVERNMENTS



LOCAL GOVERNMENTS



INDIVIDUALS

This model is certainly democratic, but it is also totalitarian, in the sense that the people *as a whole* are seen as sovereign over the Commonwealth Government, and the Commonwealth Government is sovereign over the States, and so on. Professor Elazar has called this "Jacobin democracy", the view of democracy which triumphed in the French Revolution (Elazar 1988:34). Under Jacobin democracy there is no realm of relative autonomy or "sphere sovereignty", whether for local or state governments, or for the various non-civil institutions of society, such as families or churches (see Kuyper 1983). It tends to adopt a managerial model of society, under which distant, centralised governments suppose that they are able to recognise, diagnose and treat social problems (problems that are most often better understood, and resolved, at a local level, and in a non-political manner. Roscoe Pound put it well:

... the experience of English-speaking peoples has

shown that local matters are best dealt with in the locality instead of by postulated *ex officio* supermen at a distance. (1942:21)

By contrast, Jacobin democracy sees the central government as setting the policy agenda for local governments. Now, indeed, under the Australian Constitution, as it has been interpreted since about 1920, the Commonwealth has been increasingly able to dominate policy formation. Of course, the States do retain a level of autonomy, but fundamental policy-making occurs at a centralised level: local government has very little say, the States have a significant say, but the Commonwealth tends to dominate. A more thoroughly federal perspective would see fundamental decision-making based in local governing communities. Elazar defines it as follows:

Federal democracy is based on the premise that civil society is composed of many different groups and hence must be organised around multiple centres of power, each able to preserve its own integrity even as it functions within a common political matrix. (1988:7)

The Presbyterian and Reformed systems point the way for reform here, in that they are themselves composed of a multiplicity of levels of government which are seen as part of the overall federal system: congregation, session (local leadership), presbytery (district leadership), state assembly and national assembly; and the system of representation from each sector ensures that the local "governments" contribute to decisions of the broader assemblies of the church.

While we recognise local, state and federal levels of civil government, our federal political system does not recognise the autonomy of local government as fully independent of state or federal government control. A key case in 1919 held that local municipal corporations do not enjoy immunity from federal control in respect of their responsibility for the provision of local

roads and street lighting. Ironically, in that case the argument in favour of local government immunity from the Commonwealth was premised on the subordination of local government to the States. Thus, as was further held in 1947, local government immunity from Commonwealth legislation, where it exists, is merely an outworking of State immunity from Commonwealth legislation. Thus federalism in Australia is generally limited to the Commonwealth and State governments. The leading judgment in the 1919 decision reasoned that local government is subject to Commonwealth power because local government is largely independent of the State governments. It is submitted that a more fully-orbed federal system would recognise the independence, and therefore immunity of local government, and allow it to assert greater responsibility and autonomy.

In the United States local government continues to play a relatively vital role in important areas of public policy, such as education. With the increasing recognition in our day that local problems need to be solved locally and that centralised and remote governments are often unable to understand, let alone solve, local problems, it may be that a greater role for local government is one of the ways forward for Australian federalism.

Local power and responsibility

A third and related reform to our federal system addresses problems which derive from the basic fact that our political representatives are remote from the people whom they represent. Such is the sense of alienation that we habitually refer to members of parliament as politicians, rather than as representatives. This is largely due to the remoteness of the federal and state governments. Very few voters have ever met their representatives; fewer still have any first-hand knowledge of their character and abilities. Most of the information about candidates is relayed through the mass media, and that information is distorted through editorial and reporting biases and necessarily partisan press releases. It takes a great deal of money to mount

an effective campaign, so the sourcing of funds provides ample prospect for corruption. In 1992, the federal government recognised this, and sought to moderate the potential for corruption by prohibiting paid political broadcast advertising and mandating free political advertising for the established players in the political process. In turn, the High Court was asked to intervene, and found the prohibition unconstitutional by "discerning" within the Commonwealth Constitution an implied guarantee of freedom of political communication (even though the framers of the Constitution quite explicitly decided *not* to include a "free speech" clause in the Constitution (see Aroney 1995).

It is suggested that this course of events derives in part from the fact that local government is not our basic form of government. The locus of power and the focus of attention is on the more centralised organs of government (state and especially federal); politicians are distant from the populace; and voters are confronted by mass communications which tend to concentrate on image and style, rather than content and character. In responding to the corrupting influence inherent in this system by restricting political broadcasting to the established parties, the government consolidated the centralisation of power. In turn, the High Court overturned the legislation in a manner which ironically served to consolidate its own centralised power as the supreme interpreter of the Constitution.

By contrast, Presbyterian church government centres on the local presbytery and congregation. As the First and Second Books of Discipline emphasised (eg First Book IV:4; X; Second Book XII:9-10), ministers and elders (lay church leaders) should be "freely elected" by people who have an intimate knowledge of their character and abilities. On the whole, one cannot rise to offices of wider and greater power in the church without having first run the gauntlet of achieving a local reputation for integrity and competence. In due course, voting in state and national assemblies is according to conscience, and not (in theory)

according to party lines or according to the dictates of their respective Sessions. If our civil system of government were to be reformed in the direction of greater local power and autonomy, one might expect a greater level of accountability on the part of our elected representatives. Notably, the framers of the Australian Constitution often insisted that while the House of Representatives would be the national or popular house, it should also be understood as the house in which the people organised in local electorates chose representatives which were known to them. There were oft repeated concerns that civil government be kept close to the people and that the system of representation guard against favouring politicians having the advantages of a national or state-wide reputation, a reputation possibly based more on eloquence than on character. The system of local electorates thus helps; but because election to national office is not organically linked to election to local office, the sense in which Members of the House represent their electorates has been diluted.

But how could we achieve such a fundamental change in our preconceptions of government? If local government is to be revitalised, it must come through a genuine resurgence of community. It is here that local churches of all denominations can contribute in the most fundamental way: by working seriously towards the re-integration of our neighbourhoods. Federalism grew out of a Christian commitment to covenant and local community. In the early New England colonies of America, church covenants and church community were the life-blood of the civil covenants which soon emerged. Federalism grew out of this orientation; and if federalism is to be renewed, it will involve a recovery of this same outlook.

Conclusion

When Alexander Cockburn stated that "local government, self

government, and government by the people are analogous terms" and that "there can be no government by the people if the Government is far distant from the people", he meant that State government was local government, and preferable to a distant national government. But he said this a whole century ago. Much has changed since then. Are his views dated? Or, rather, have events made his comments even more timely? One thing certainly has changed, and that is Australia's population. When Cockburn spoke, South Australia had a population of approximately 350,000, and the Australian population was around 3,700,000. Today, with a population of almost 1,500,000, the government in South Australia now approaches the size of the (forthcoming) national government of Cockburn's day. With this growth in population, and anticipating further growth into the third millenium, it is submitted that the need for more local government has only increased.

We have argued that it is no coincidence that federalism has been compared to the Presbyterian form of church government. Both systems of government are rooted in similar conceptions of the social nature of humans and the necessities of human organisation. This federal vision was implemented in the United States and transported, in part, to Australia. The Australian system draws, in part, from the parliamentary form of government we inherited from the Parliament at Westminster. The United Kingdom, of course, is classified as a unitary, not federal, system of government, and this aligns comfortably with the Episcopalian polity of the Anglican Church. Through the seventeenth century, it was well recognised that the fate of the Bishops and the fate of the Monarchy were one. The system of responsible government, which we have inherited from the United Kingdom has likewise a centralising tendency. In the Constitutional Convention Debates of the 1890s, federalism and responsible government fought out an uneasy truce, the terms of which continue to cause difficulties for our constitutional system.

Lessons from the long history of constitutional thinking of the Presbyterian Church point the way forward in relation to taxation reform, clarifying the nature of democracy and federalism, and returning power and responsibility to local communities for a truly integrated, relevant and dynamic Australia of the twenty first century.

Bibliography for chapters 1 and 2

J Althusius, *Politica*, Liberty Fund, Indianapolis, 1995.

N T Aroney, "A Seductive Plausibility: Freedom of Speech in the Constitution", *The University of Queensland Law Journal*, volume 18, 1995.

J W Baker, *Heinrich Bullinger and the Covenant: The Other Reformed Tradition*, Ohio University Press, Athens, Ohio, 1980.

C Bolick, *Grassroots Tyranny: The Limits of Federalism*, The Cato Institute, Washington, 1993.

F M Bradshaw, *Basic Documents on Presbyterian Church Polity*, Christian Education Committee, Presbyterian Church of Australia, 1984.

J Bryce, *The American Commonwealth*, Macmillan, London, 1889.

J Brutus (pen-name of Phillipe Duplessis-Mornay), *A Defence of Liberty Against Tyrants*, Still Waters Revival Books, Edmonton, Alberta, 1989.

G Buchanan, *The Rights of the Crown in Scotland*, Sprinkle, Harrisonburg, Virginia, 1982.

J Calvin, *The Institutes of the Christian Religion*, The Westminster Press, Philadelphia, 1960.

Church of Scotland, *The Confession of Faith*, Free Presbyterian

Publications, Lochcarron, Scotland, 1981.

J Eidsmoe, *Christianity and the Constitution: The Faith of Our Founding Fathers*, Baker Book House, Grand Rapids, Michigan, 1987.

D J Elazar, *Covenant and Commonwealth*, Transaction Publishers, New Brunswick, 1996.

D J Elazar, *Covenant and Polity in Biblical Israel*, Transaction Publishers, New Brunswick, 1995.

D J Elazar, *The American Constitutional Tradition*, University of Nebraska Press, Lincoln, 1988.

H D Hazeltine, "The Influence of Magna Carta on American Constitutional Development", *Columbia Law Review* volume 17, 1917.

C Hodge, *The Church and its Polity*, Thomas Nelson, London, 1879

D F Kelly, *The Emergence of Liberty in the Modern World: The Influence of Calvin on Five Governments from the 16th Through 18th Centuries*, Presbyterian & Reformed Publishing, Phillipsburg, New Jersey, 1992.

A Kuyper, *Lectures on Calvinism*, Eerdmans, Grand Rapids, Michigan, 1983.

J A La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, Carlton, 1972.

D Lutz, *Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions*, Louisiana State University Press, Baton Rouge, 1980.

D Lutz, "Religious Dimensions in the Development of American Constitutionalism", *Emory Law Journal*, volume 39, 1990.

D Lutz, "The Origins of American Constitutionalism: The Colonial Heritage", *Juris: For Jurisprudence and Legal History*, volume 2, 1987.

C S McCoy & J W Baker, *Fountainhead of Federalism: Heinrich Bullinger and the Covenantal Tradition*, Westminster/John Knox Press, Louisville, Kentucky, 1991.

P Miller, "The Marrow of Puritan Divinity", *Publications of the Colonial Society of Massachusetts*, volume XXXII, 1937.

I H Murray, *The Reformation of the Church*, The Banner of Truth Trust, Edinburgh, 1987.

R Pound, "Law and Federal Government" in R Pound, C H McIlwain & R F Nichols, *Federalism as a Democratic Process*, Rutgers University Press, New Brunswick, 1942.

E Rosenstock-Huessy, *The Christian Future or the Modern Mind Outrun*, SCM Press, London, 1947.

S Rufus Davis, *The Federal Principle: A Journey Through Time in Quest of a Meaning*, University of California Press, 1978.

S Rutherford, *Lex, Rex, or The Law and the Prince*, Sprinkle, Harrisonburg, Virginia, 1982.

C J G Sampford, "Responsible Government and the Logic of Federalism: An Australian Paradox?" (1990) *Public Law* 90.

G Sawyer, *Modern Federalism*, Watts, London, 1969.

G Spykman, "Sphere-Sovereignty in Calvin and the Calvinist Tradition" in D E Holwerda (ed), *Exploring the Heritage of John Calvin*, Baker Book House, Grand Rapids, Michigan, 1976.

W Walker, *The Creeds and Platforms of Congregationalism*, The Pilgrim Press, Boston, 1960.

R S Ward, *The Westminster Confession for the Church Today*, Presbyterian Church of Eastern Australia, Melbourne, 1992

R S Ward, *The Bush Still Burns*, Wantirna, Victoria, 1989

DA Weir, *The Origins of the Federal Theology in the Sixteenth-Century Reformation Thought*, Clarendon Press, Oxford 1990

KC Wheare, *Federal Government*, Oxford University Press, 1953

EC Wines, *The Hebrew Republic*, American Presbyterian Press, Uxbridge, Massachusetts, 1980

J Witte, Jr., *From Sacrament to Contract: Marriage, Religion and Law in the Western Tradition* (forthcoming, 1997)

J Witte, Jr., "How to Govern a City on a Hill: The Early Puritan Contribution to American Constitutionalism", *Emory Law Journal*, volume 39, 1990

Origins of the Australian System of Law

Rev. Dr. (law) David Mitchell

It is very important for Australians to understand the conflict of views that exists in relation to theories of law and government. The United Nations Organisation is becoming the measure of right and wrong in Australia in place of the historic principles of the common law.

There are two contrary perspectives on the function of government. The one is that the government of a nation must represent the people of the nation rather than God. The other is that the government is the representative of God for administering godliness for the benefit of the people (see Romans 13:1-7). From this flow the conflicting ideas that law is the measure of right and wrong established by the government (or the people) on the one hand, or, on the other hand, that it is the measure of right and wrong established by God and revealed in the Bible.

What is Law and from where does it come?

Put simply, law is the measure of right and wrong in society. A basic distinction between the philosophy of humanism and the philosophy of Christianity exists in this area. A humanist will say that whether something is right or wrong is the product of human thinking. A Christian will say that something is right or wrong irrespective of what any number of people might say or think. There are essentially four

possible sources from which to choose:

a. Revelational

For a Christian, or a nation with Christian principles of government, the Bible is the infallible guide to God's measure of right and wrong and will be applied as far as possible to every circumstance.

For a humanist, however, or a nation with humanist principles of government there are three possible measures of right and wrong. Of course, there can be an overlapping of these three measures without clear lines dividing them, but it is helpful to understand what the humanist measures are:

b. Totalitarian

The government sets the measure of right and wrong. The government is supreme. The government knows "best". The opinions of the people or the statements in the Bible might be taken into account but the government decides. Even in a home situation the husband (or the wife) might exercise a totalitarian regime, or take occasional totalitarian decisions. Who has not heard: "Why must I, Mummy?" "Because I say so, Johnny!"? In other words, "I am the government and I know best." Of course, it might very well be true, and probably is, that Mummy does know best but the answer and the attitude is totalitarian. In a national situation even governments that have been elected by popular vote can be thoroughly or occasionally totalitarian.

c. Anarchy

There is no standard measure of right and wrong. Every individual makes his (or her) own decisions on every occasion. Everyone does what is right in his own eyes. There is complete freedom for everyone to do or say what he likes. There are no laws or rules because rules and laws are the antithesis of freedom; rules and laws inhibit the development of individual personality and necessarily make an individual subservient to the ideas of others. Almost everyone could identify one or more homes that run on the basis of anarchy, where the children do exactly as they please. In the national sphere it is easy to identify aspects of anarchy,

for example, homosexual practices were once illegal. Now everyone is allowed and, indeed, encouraged to do what is right in his own eyes.

d. Majority Rule

The people decide every issue. The government does not “know best” but must listen to the “voice of the people”. Decisions of the majority of the people are binding on the whole of society. Individuals and minorities must abide by and implement decisions of the majority no matter how prejudicial those decisions might be to the minority or to the individual. No one may do what is right in his own eyes but only what is right in the eyes of “society”. Who hasn’t heard a parent telling a child: “You mustn’t do that! People won’t like you if you do.” Indeed, some families run on the basis that all domestic decisions are put to the vote and the majority always has its way.

Aspects of “majority rule” can be identified in the history of government. Some of the city states of ancient Greece ran on the basis that all the people met to discuss and vote on all affairs of state and the majority decision became the law. “People” did not include women, slaves, hired workers, young people (perhaps even those under 40 years of age were excluded in some States), residents of “ethnic” origin or descent, and so on.

Even today, in many “democratic” countries signs of majority rule can be seen on election day when a majority of the people decide who will make their laws (i.e. establish the measure of right and wrong for the nation) for the ensuing number of years, and when public outcry causes the government of the day to take or desist from particular action. Indeed, in some countries there is specific provision for a referendum or majority vote in particular circumstances.

Most readers will be familiar with the “majority rule” decisions at the foot of Mount Sinai that resulted in the making and worship of a golden calf, and in Pilate’s judgment hall that resulted in the crucifixion of our Lord and Saviour.

Australia's historic heritage

The principles of government and law in every country in the world are based on one or other of these four principles, one Christian and three humanistic in origin. In most there is an amalgam, with some aspects of each of the three humanist principles being discernible. Where one or other of the three humanist principles dominates (usually the totalitarian principle) the country should not be called a "Christian nation". It is countries where government and law are based on the Bible that can properly be called "Christian nations". The question then arises: is Australia a Christian country?

Historically, the power of government in England rested in the king. The king was regarded as God's representative for the purpose of ruling the nation. He was not unfettered in this responsibility but was required to govern lawfully, justly and mercifully, to maintain God's law and to regard the Bible as the rule for the whole of life and government. Interestingly, these very requirements continue to the present day and were incorporated in the promises required of Her Majesty, Queen Elizabeth II as part of her coronation ceremony.

In addition to the king, in the historical structure there was a Parliament for the purpose of advising the king but he did not have to act on this advice if he believed the advice was contrary to his responsibilities. The idea was that the king was subject to "the law" rather than to parliament. The parliament, too, was subject to "the law" and was expected to tender advice on the basis of the Bible being the rule for the whole of life and government. Christianity was part and parcel of the common law of England.

When the colonists came to Australia in 1788 they brought with them the law of England as it then stood. By 1828, with the enactment of the Australian Courts Act on 25th July 1828, the Governors of the several colonies (and subsequently the States), as the representatives of the king, were advised by their parliaments and exercised authority under

God on the same basis as the king historically did in England. The Australian courts of law, too, had responsibility to resolve disputes and administer justice on the same basis. Appeals lay from those courts to the Privy Council which, after 25 July 1858, sat as an Australian court when hearing Australian cases.

The correctness of the above assessment of the Christian and biblical character of the law established in the various Australian colonies is supported by the judgment of Mr. Justice Hargrave in 1874 in the case of *ex parte Thackeray* (1874 13 S.C.R. (N.S.W.) 1 at p. 61). He said: “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 legal 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 Scriptures to be of universal obligation, is part of our colonial law — as clearly explained by Blackstone Vol. I pp. 42-3; and Vol. IV pp. 43 60.” This statement continues as a judicially unchallenged precedent to the present day. It is not surprising that it is unchallenged since it presents the true basis of Australian common law.

It is often said that the Christian and scriptural basis of law was terminated in England by the House of Lords in the case of *Bowman v. Secular Society* in 1917 (1917 A.C. 406). A careful reading of that case, however reveals that it held only that an “offense” against Christianity was no longer necessarily cognisable in the courts. Certainly, no change to the historic Christian basis of law has been formally recognised by the courts in Australia. Indeed, the Supreme Court of Victoria adopted with apparent approval a statement that Australia is “predominantly a Christian country” (*Noontit v. Auty* 1992 1 V.R. 365).

The Christian theory of government and law in Australia did not change with the agreement of the colonies to establish a federal parliament. Unlike France or the USA, the Constitution of the Commonwealth of Australia did not establish a new principle of government or purport to

be the “fountain head” of law or to establish or guarantee citizens’ rights. Indeed, the use of the term “Constitution” to describe the agreement can be somewhat misleading. Rather than being a Constitution in the same sense as the Constitutions of some other countries, it has the nature of a treaty among six Colonies, entered into with the approval of the colonial power (Britain).

The Federal Commonwealth of Australia came into existence on 1st January 1901 as a result of the Commonwealth of Australia Constitution Act to which royal assent was given on 9th July 1900. The historic basis of government and law applicable in the former colonies continued in the States and the newly formed Commonwealth.

It is worthy of note that the preamble to the Commonwealth of Australia Constitution Act begins:

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 under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established....

The important point is that reliance on God was clearly expressed. Quick and Garran in their authoritative book on the Constitution recognise that “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” that prepared the text for the Act. Although modern revisionists might give other interpretations, the fact is that the framers of the Constitution recognised that the only measure for right and wrong within the Commonwealth of Australia was to be God’s measure.

Australia today

A.V. Dicey, writing last century, used the expression “sovereignty of parliament”. By it he meant that Parliament was supreme and could make any laws it chose without restriction. This, of course, did not accord with the principle that parliament could only make laws in accordance with the “constitution”. This was an expression of the totalitarian idea that the government decides the measure of right and wrong and the Bible, while its teachings could be considered, was not the unchanging and binding law of the land.

As far as Australia is concerned, Dicey’s statement of the sovereignty of parliament was judicially approved for the first time in 1983. Of course, Dicey’s principle had been taught in law schools for many years before that, and the teaching of the supremacy of the Bible had fallen into disuse long ago. It is not surprising, therefore, to find a judge adopting Dicey’s humanist approach. What is surprising is that judges, having been taught humanist theories of law as students, have not been more outspoken in those theories when giving judgments.

The theory in Australia is that the Governor General, the parliament (both Federal and State), the courts and the administration are all subject to God and the Constitution and are bound by the Bible and by the exact words of the Constitution. Is this theory also the practice?

Many administrators, parliamentarians, lawyers and judges would laugh at the idea that all legislation contrary to the Bible is invalid. Indeed, some might laugh at the idea that parliamentarians will be held to account on the day of judgment for the legislation they have passed. Some might even laugh at the idea there is going to be a day of judgment or that there is a God. Laugh they might, but the fact is that Australia’s historic measure to distinguish right from wrong has not been formally changed. Perhaps the historic position is not made clear in any current text books; perhaps it has not been taught in schools for the last two generations; perhaps it sounds inappropriate to minds that have not been

directed towards eternal things; but the fact remains — legal theory recognises the Bible as the measure provided by God for discerning right and wrong and anything described as wrong by that measure is “unconstitutional”.

With the attitudes referred to in the preceding paragraph comes a degree of uncertainty, a degree of insecurity and a feeling that society, economy and justice is out of control or could easily elude the control of those in government. Writing in 1970, R. J. Rushdoony stated:

Man needs a source of certainty and an agency of control: if he denies this function to God, he will ascribe it to man and to a manmade order. This order will, like God, be man’s source of salvation: it will be a *saving* order. The Charter of the United Nations, in its Preamble, begins by declaring that “We the people of the United Nations determined to save . . . have resolved to combine our efforts to accomplish these aims.” The phrase “determined to save” is expressive of the high religious resolution of the United Nations. The United Nations is, by its own Charter, clearly a humanistic organisation, dedicated to . . . “humanitarian principles”. We will either fail to understand the UN or to cope with it unless we recognise that it is religious in inspiration and a religious necessity for humanism, or the religion of humanity. *First*, man needs an agency of certainty in order to meet this world of change and decay and give it meaning, and, *second*, man will make of that agency a substitute god. (*Politics of Guilt and Pity* (Fairfax, VA: Thoburn Press, 1970), p. 185.)

Conclusion

Australia, then, is a nation that has a Christian basis for government. But, while Australia is an island geographically, it is not isolated from ideas abroad. Thus, powerful external influences bear down on our historic legal and political system. The following chapter explores how the United Nations has become an influence in the political and legal process in Australia.

The Place of United Nations Law in Australian Law

Rev. Dr. (law) David Mitchell

After World War II the United Nations was established in the hope of preventing another terrible war. The hub of the plan was the General Assembly of the United Nations and the Security Council, with the various UN Agencies effecting rehabilitation of the war-torn world, re-establishment of displaced and distressed people and organisation of international activities such as health, trade, aviation and crime control.

There is a view that inequality is a basic cause of war and, in any case, it should be abolished on a worldwide basis in the interests of social justice and friendship. In the ultimate, this would mean that a worker in China or India should enjoy exactly the same working, living and social conditions as a worker in Australia or the USA. It follows that the conditions and standard of living of people in the third world would need to be improved and in Australia and USA. the standard of living and general conditions might need to be lowered. To achieve equality, attention needs to be given to social, political and economic circumstances.

In order to achieve economic, social and political equality and conformity throughout the world, it would be necessary to establish a universally applicable system of law. The question, of course, is, 'What system of law?' If the historic Christian base of the common law inherited by Australia were to be adopted, other legal systems would

have to give way and not be recognised as equal. What needs to be done, then, (it is thought) is for the General Assembly to develop a scheme of law recognising “a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, and in full consciousness that the energies and talents of every person should be devoted to the service of his fellow men”. For a Christian, the problem with this high sounding proposal is that “man” is determining the measure of law, the measure of right and wrong. The scheme developed by the United Nations becomes “the rule of life and government”. The chief purpose of mankind ceases to be to service of God and becomes the service of mankind.

Steps towards a universal law of equality for all people have been taken by the United Nations General Assembly in a series of “instruments” referred to as “human rights conventions” (or treaties).

Historically, treaties were made for the purpose of establishing binding rules for the relationship of nations with one another, such as a peace agreement after a war or a trade or defence agreement or the delineation of international borders. The idea of treaties to establish standardised laws in many or all countries was first introduced through the International Labour Organisation before World War II. Since World War II, however, international treaty machinery has been widely used to lay down standards to be applied throughout the world. Consistent with the principles referred to above, such treaties are for the purpose of ensuring fundamental human rights, the dignity and worth of the human person, and the equal rights of men and women and of nations large and small. They are intended to supersede or replace any inconsistent laws, rules or standards previously existing in every country so that laws throughout the world will be identical, or at least consistent, and will no longer vary in accordance with differing history, religions, cultures, traditions or practices. While any or all such treaties might be formulated with the highest and best motives, their syncretic nature is likely to cause concern among people committed to historic or religious values if any particular value is challenged or changed.

A “human rights treaty” prepared by the General Assembly of the United

Nations does not automatically replace or supersede any Australian law. It does not do so unless and until it is incorporated into, or its terms are reflected in, an actual law made in Australia. Incorporation can occur in any of several different ways.

United Nations laws made Australian

In 1986, with the agreement of all members of the Federal Parliament, a law was passed empowering the Commonwealth Attorney General to declare by notice in the *Commonwealth of Australia Gazette* that any particular “international human rights instrument” is part of Australian law for the purpose of the Human Rights and Equal Opportunity Commission Act. This procedure requires the declaration of the Attorney-General and the “instrument” to be tabled in both Houses of Federal Parliament within fifteen sitting days after the declaration appears in the *Gazette*. The “instrument” becomes applicable in Australia when it appears in the *Gazette* but ceases to be applicable if not tabled within those fifteen days. If it is tabled within fifteen days, any member of the House of Representatives and any Senator may, within a further fifteen days, give notice of motion to “disallow” the instrument. If such notice is given and the matter is not disposed of by the relevant House within fifteen days after the giving of such notice, the “instrument” then ceases to be part of Australia’s internal law. The *Convention on the Rights of the Child* and the *Declaration on the Elimination of All Forms of Intolerance and or Discrimination Based on Religion or Belief* are among the “international human rights instruments” introduced into Australian law by this method.

A second method of incorporating the terms of a human rights treaty is simply to amend existing legislation to comply with the treaty.

A third method is to pass a special Act of Parliament, as (for example) has been done in the case of the *International Convention on the Elimination of all forms of Racial Discrimination* (Racial Discrimination Act, 1975) and the *Convention on the Elimination of All Forms of*

Discrimination Against Women (Sex Discrimination Act, 1984). These Acts have since been updated by amendment.

Remarkable features of the new law

Whatever method of incorporation is used, the new law incorporating the terms of a human rights treaty has some remarkable features. The first is that it must be interpreted in accordance with the intention of the treaty, and judgments in cases in foreign countries interpreting the treaty are precedents to be used in Australia. The second, and of great significance, is that if a human rights treaty has been ratified by Australia, Australia is in breach of international law if the Australian law applying the treaty is amended inconsistently with the terms of the treaty or if it is repealed. This is clearly a limitation on the power of the Parliament to legislate in accordance with its will or the will of the people or even in accordance with the Bible. The third, also of great significance, is that the measure of right and wrong has been drawn up by people and, what is more, by people who have not been elected by Australians (or, indeed, by anyone).

Appeals from Australian courts to the Privy Council continued from colonial days until 1986 when the Australia Act finally terminated that right. The expressed reason for the termination was to complete Australia's independence and to ensure that Australian justice is administered in Australian courts rather than in "foreign" courts. The High Court of Australia became the final place of appeal for Australians. Understandably, this action pleased the nationalistic and patriotic instincts of many Australians. Even though the Privy Council was (and still is) a court applying the common law with a historic Christian and biblical base as the measure of justice, and was theoretically an Australian Court when sitting on an Australian case, many people found it difficult to defend an arrangement whereby disputes in which other recourse had been exhausted could be adjudicated outside Australia by non-Australians over whom Australia had no authority.

Interestingly, subsequent to removing the jurisdiction of the Privy Council, the Australian Government has, by administrative process, opened the way for Australians whose recourse within Australia has been exhausted to take their complaints to United Nations tribunals. This has been done by the implementation of “international human rights instruments”. Australians can now take disputes on a wide range of matters to United Nations tribunals. These tribunals do not adjudicate on the basis of Australian law, they are not (even theoretically) sitting as Australian Courts, the adjudicators are non Australians and Australia has no control over the adjudicators. Was the Privy Council preferable to what exists now?

Where to from here?

If the leaders of Australia have forgotten, or are intentionally turning their backs on, the biblical basis of government and law in this land it is not surprising that the principles laid down by a “substitute god” are being adopted to replace the principles of our historic heritage. In this context it is significant to note that the decisions of the United Nations, whether adopted as internal law by particular countries or not, form principles of international law to which all “law abiding” nations will conform. In other words, the world measure of right and wrong is now determined by the United Nations Organisation. The structure of what some might call “this modern tower of Babel” is growing from month to month.

Both those who fully applaud the human rights conventions and determinations of the United Nations and those who have concerns about them are readily able to understand that the basis on which their principles are determined are the decisions of unelected representatives at the United Nations.

The alteration in the basis of law in Australia is so extensive that it may be termed a revolution, and one which is largely unrecognised by the Australian people.

CHURCH AND STATE - A BIBLICAL SURVEY

Rev. Dr. (history) Peter Barnes

Old Testament Law

Before Christ, Israel, the nation of the Old Testament, was to operate as a theocracy - its law was to be God's law. So far as this law is concerned, it is customary to delineate the ceremonial law, the moral law, and the judicial law. The ceremonial law deals with the sacrificial system which operated before the coming of Christ as the Lamb of God who takes away the sin of the world. This law, of course, was fulfilled in Christ.

The moral law is summarised in the Ten Commandments, but there are many other related moral laws in the Old Testament. Since Christ came not to destroy the law but to fulfil it (Matt.5:17; Rom.3:31), the moral law of the New Testament is in essence similar in content with that of the Old Testament.

It is the judicial law which raises most cogently the relationship between church and state in the Old Testament. Not only did God declare what was right and wrong but also instituted civil penalties. For example, stealing was forbidden, and God declared: "If a man steals an ox or a sheep, and slaughters it or sells it, he shall restore five oxen for an ox and four sheep for a sheep." (Ex.22:1). Some circumstances, including the failure to make proper restitution, lead to debt slavery (Ex.21:2-6; 22:3; Deut.15:12-18). Corporal punishment was allowed (Deut.25:1-

3) - as was mutilation for one offence (Deut.25:11-12) - but in the law itself there is no provision for imprisonment and fines payable to the state.

For more serious matters the death penalty was allowed: for murder (Ex. 21:12-14; note the mandate given in the covenant with Noah in Genesis 9:5-6); striking or cursing a parent (Ex.21:15; Lev.20:9); kidnapping (Ex.21:16); adultery (Lev.20:10-21); incest (Lev.20:11-12, 14); bestiality (Ex.22:19; Lev.20:15-16); homosexuality (Lev.20:13); unchastity (Deut. 22:20-21); rape of a betrothed virgin (Deut.22:23-27); witchcraft (Ex.22:18); offering human sacrifice (Lev.20:2); incorrigible delinquency (Deut.21:18-21); blasphemy (Lev.24:11-14, 16, 23); Sabbath desecration (Ex.35:2; Num.15:32-36); false prophecy (Deut.13:1-10); sacrificing to false gods (Ex.22:20) and refusing to accept a court decision (Deut.17:8-13). Israel's task was not only to proclaim God's moral law, but to enforce it in the civil sphere.

Civil service was embraced in the Old Testament, even civil service to foreign authorities. Joseph, served the pagan government of Pharaoh in Egypt, and Daniel was later to serve the Babylonian and Persian governments. Esther also served as queen in the Persian court.

Obedience to God and/or the State - Old Testament Law

Obedience to the state was generally expected; "You shall not revile God, nor curse a ruler of your people." (Ex.22:28). Yet the claims of spiritual and civil rulers were never regarded as absolute. The king himself was subject to the law of God (Deut.17:18-20). Leadership requires godly integrity (Ps.78:72). It was because the Hebrew midwives feared God that they disobeyed Pharaoh's order to put all newborn Hebrew males to death (Ex. 1:15-22).

Much later, in the sixth century B.C., Daniel, Shadrach, Meshach and

Abed-Nego would not defile themselves with the Babylonian kings delicacies and wine (Dan.1). Of more significance was the refusal of Shadrach, Meshach and Abed-Nego to bow down before the huge image of gold which Nebuchadnezzar had set up (Dan.3). Under threat of being cast into a fiery furnace, the three Jews held faithfully to the God who claims absolute allegiance and who cannot be known through images. After the collapse of the Babylonian empire, the Medo-Persians decreed that for thirty days no one was to petition any god or man except the king, Darius the Mede. The aged prophet Daniel refused to deviate from his usual practice of praying to the God of Israel three times a day. As a result, he was cast into the lions' den (Dan.6).

Not only did believing Israelites confront the claims of the pagan kings of Egypt, Babylon and Persia, but within Israel herself there remained a distinction between church and state. It was God, not the king, who reigned over Israel (1 Sam.8). Hence, in the name of the Lord, Samuel confronted Saul (1 Sam.13, 15) and Elijah confronted Ahab (1 Kings 18-22). Kings were accountable to God, through His prophets, if they broke His law. Thus it was that Ahab was called to account by Elijah for his judicial murder of Naboth (1 Kings 21) and Teremiah condemned Zedelluah for failing to free the slaves in Judah (Jer.34:8-22). In the terms of Samuel Rutherford, the great Puritan divine, it is a case of Lex Rex - the law of God, not any authority, governs the realm.¹

- New Testament Law

In the New Testament, the sacrifice of Christ ('the Lamb of God who takes away the sin of the World', John 1:29) fulfils the sacrifices of the Old Testament (see Heb.5-10). In essence, the moral law of the Old Testament is endorsed in the New (e.g. Matt.5:17-48; Luke 18:20; Rom.3:8-10; 1.John 2:3-4). The judicial law is different in that the New Testament church was hardly in a position to influence the Roman Empire regarding the content of the civil law and the penalties for breaking it.

The New Testament maintains that the primary task of the state is not to engage in 'corrective services' but to administer justice (Rom.13:4) by praising those who do good and punishing evildoers (1 Pet.2:14).² One of the few hints that is given regarding the perpetuity or otherwise of the judicial law is found in the account of Jesus' dealing with the woman taken in adultery (John 8:1-11). Under Old Testament law, adultery attracted the death penalty (Lev.20:10). In the New Testament the adulteress was not condemned by Jesus (John 8:11). However, perhaps one should not make too much of this - the scribes and Pharisees were corrupt in their motives so Jesus would not support a travesty of justice. In any case not every law-breaker in the Old Testament felt the full force of the law - God himself protected the murderer Cain (Gen.4:1-15) and David was forgiven by God despite his sins of adultery and murder by proxy (2 Sam.11-12; see Ps.51). It is this ambiguity about the New Testament's treatment of the judicial law that has made for considerable debate down through the ages concerning the right relationship between church and state.

Obedience to God and/or the State

The starting point for any discussion of this issue must be the Lord's declaration that His followers were to render to Caesar the things that are Caesar's and to God the things that are God's (Matt.22:21). There are two kings and two kingdoms - and Christ and His kingdom are not of this world (John 18:36-37). Like the Old Testament, the New Testament generally expects Christians to obey the state (Rom.13:1-7; 1 Tim.2:1-4; Tit.3:1-2; 1 Pet.2:13-17).

Yet, as in the Old Testament, when the two kingdoms clash, the Christian's allegiance is clear: "We must obey God rather than men." (Acts 5:29). At such times, stated Dietrich Bonhoeffer, the Lutheran martyr under Nazism, the church can respond in three possible ways: it can ask the state whether its actions are legitimate; it can aid the victims of state action; or it can adopt the position "not just to bandage the victims under the wheel but to put a spoke in the wheel itself."³ The

state, which should be God's minister (Rom.13:4), can become satanic (Rev.13, 17).

Options in Church-State Relations

The Bible does not commit itself to any particular norm of civil government - monarchy, oligarchy or democracy. The effects of the fall of mankind into sin and animosity toward God are to be seen everywhere. As John Henry Newman put it: "What monarchy is there but began in invasion or usurpation? What revolution has been effected without self-will, violence, or hypocrisy? What popular government but is blown about by every wind, as if it had no conscience and no responsibilities?"⁴ The Bible is more interested in the obedience of faith than in the mechanics of government.

Historically, a number of relationships between church and state have been suggested and implemented:

(a) Tolerance.

After almost three centuries of intermittent and occasionally brutal persecution the Christian Church was suddenly faced with the Edict of Milan issued by the emperors Constantine and Licinius in 313. This Edict was already tending to favour Christianity but it declared of every faith that "each should have freedom to worship God after his own choice: and we do not intend to detract from the honour due to any religion or its followers."⁵

Centuries later, the First Amendment of the United States Constitution was to affirm that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' In Scotland this was known as the Voluntaryist principle - the belief that the state should not offer financial support to any established Church.

The Anabaptists of the sixteenth century Reformation championed the separation of church and state, but in recent decades modern Western

states have increasingly sought not freedom for Christianity but freedom from Christianity. New meaning has been poured into Thomas Jefferson's call for a 'wall of separation between church and state'. Prayers - to cite just one example - have been illegal in American public schools since 1963. Religious freedom owes much to this view. but its weak point is located in the fact that moral neutrality is an impossibility.

(b) Erastianism.

This refers to a situation whereby the state governs the church. Such a situation can be quite sinister, as exemplified by Mussolini's outlook: "Everything *for* the state. Nothing *against* the state. Nothing *outside* the state."⁶ Even in its milder form, Erastianism is less than inspiring. Lord Melbourne, in opposing William Wilberforce's campaign against the abolition of the slave trade, lamented: "Things have come to a pretty pass when religion is allowed to invade public life."⁷ A more religious perspective is that of the classic Anglican apologist Richard Hooker who maintained that church and state are one in a Christian country. The Eastern Orthodox Churches have often lived under a system which was called Caesaropapism whereby the state ruled the Church.

Perhaps the most powerful expression of the church's freedom under God before the state is found in Andrew Melville's reference to King James VI of Scotland in 1596 as "God's silly vassal". Melville affirmed: "There are two kings and two kingdoms in Scotland: there is Christ Jesus the King of the church, whose subject King James the Sixth is, and of whose kingdom he is not a king nor a lord nor a head, but a member."⁸

(c) Church Domination of the State.

In 1309 Pope Boniface VIII issued the bull *Unam Sanctum* which declared that there were two swords in this world the spiritual and the temporal - and both of these were in the power of the Church. In Boniface's view: "the latter is to be used for the Church, the former by her; the former by the priest, the latter by kings and captains but at the will and by the permission of the priest."⁹ The modern-day Theonomy movement also has some links with this approach in that it affirms that the civil law should reflect the teaching of the Old Testament.¹⁰

(d) Church-State Cooperation.

This is the view of the 19th century Free Church (Presbyterian) scholar James Bannerman. Bannerman rejected the claim that the state could be morally neutral, and considered that “without an appeal to God in some shape or other, the offices of civil society were impossible.”¹¹ Ideally: “The church and the state, because equally the servants of Christ, are helps made and meet for each other.”¹² In the Bible both freedom and order are precious. Without order, each man simply does what is right in his own eyes (Judges 21:25); without freedom there is only the yoke of slavery (Gal.5:1). Order can become tyranny, freedom can become chaos. Christians are not to withdraw from the world but operate as salt and light within it (Matt.5:13-14; John 17:14-16). That is why John Newton advised William Willberforce to remain in the British parliament to fight the slave trade rather than to enter the Christian ministry.

There can be no doubt that this fourth option is the most attractive, provided that both freedom and order can be maintained as far as they can be in a fallen world. Not for nothing did Dietrich Bonhoeffer remind us that the first message of the church to the state was not “Make politics Christian” but “recognise finitude”.¹³ Yet he also claimed that “the place of the decalogue (the 10 Commandments) is both in the church and in the government building.”¹⁴

For all that, the Church is not to be politicised, yet faith is not to be confined to the realm of private piety. Law, whether civil, ceremonial or moral, is not the power of God for our salvation. The law can restrain sin, point out sin, and lead us in the right way, but only the gospel can save us. Whatever the state decides to do, the Church must remain the Church.

End Notes

¹ See S. Rutherford, *Lex Rex*; Sprinkle, Virginia, first published in 1644, reprinted 1980.

² However, deterrence does have some place in biblical law (eg Deut. 13:11; 17:13; 19:18-19).

³ D. Bonhoeffer, *No Rusty Swords*, Collins, London, 1970, p.221.

⁴ cited by Christopher Dawson in M. C. D'Arcy et al, *Saint Augustine*, Meridan, Ohio, reprinted 1964, pp.63-4.

⁵ see Henry Bettenson (ed), *Documents of the Christian Church*, Oxford University Press, London, 1974, p.16.

⁶ Cited in Paul Johnson, *The Pick of Paul Johnson: An Anthology*, Harrap, London, 1985, p137.

⁷ cited in C. Colson *Kingdoms in Conflict*, Hodder and Stoughton, London, 1987, p.95.

⁸ T. M'Crie, *The Life of Melville*, vol 2. American Presbyterian Press, reprinted 1985, p.66.

⁹ See Bettenson, *Documents*, p.115.

¹⁰ See G. Bahnsen, *Theonomy in Christian Ethics*, Craig Press, New Jersey, 1979; R. J. Rushdoony *The Institutes of Biblical Law*, Presbyterian & Reformed, New Jersey, 1977. Rushdoony does not simply echo Boniface VIII, when he declares: "The state is no less called to be under Christ than is the church." (p.305), but he considers that Christ did not abolish the death penalty for adultery and incest (pp.398ff). Something like this position is defended in George Gillespie, *Aaron's Rod Blossoming*, Sprinkle, Virginia, first published in 1646, reprinted 1985.

¹¹ J Bannerman, *The Church of Christ*, vol 1, Banner of Truth, Edinburgh, reprinted 1974, p.139.

¹² J Bannerman *The Church of Christ*, vol 1, p.114.

¹³ Edwin Robertson, *The Shame and the Sacrifice*, Hodder and Stoughton, London, 1987, p.77

¹⁴ D.Bonhoeffer, *Ethics*, SCM London, 1971, p.278.

Bibliography

- D. Bonhoeffer, *Ethics*, ed by E. Bethge, SCM, London 1971.
- C. Colson, *Kingdoms in Conflict*, Hodder and Stoughton London, 1987.
- T. Robert Ingram (ed), *Essays on the Death Penalty*, St Thomas Press, Texas, 1978.
- J. Marcellus Kik, *Church and State: The Story of two Kingdoms* Thomas Nelson & Son, New York, 1963.
- J. W. Montgomery, *Human Rights and Human Dignity*. Zondervan/Probe, Michigan and Texas, 1986.
- D.W.Van Ness, *Crime and its Victims*, IVP, Illinois 1986
- F. Schaeffer, *A Christian Manifesto*, Crossway, Illinois, 1982

Afterword

Rev. Greg Fraser

Australians care about their political system. However, this positive interest seems to be dampened by a growing frustration on the part of some and growing apathy on the part of others as people feel increasingly disenfranchised from the political system. People feel powerless to significantly influence their community or even their own life circumstances.

This booklet has brought attention to some of the ground rules for a vigorous, secure democracy. There is a positive way forward. The future need not be seen as sailing into uncharted waters, regardless of monarchist or republican sentiment.

It is vital that the basis of justice and common law be maintained, and in some cases, returned to. We need a basis of right and wrong which is bigger than ourselves. The preamble to the Australian Constitution refers us to our ultimate foundation - 'Almighty God'. This foundation needs to remain and be allowed to influence our community life, reaching as far as our legal system and our legal sovereignty in relation to international law and United Nation's law in particular.

This booklet points in the direction of the reinstatement of the individual. By returning to the fundamentals of our democratic federalism we return power and responsibility to individuals in their local communities. Local problems are addressed by the local community who have local responsibility rather than being disenfranchised by 'supermen' in Canberra. Federal politics then loses its totalitarian flavour and is hedged in by constitutional decree.

The Federal government would, over time, transfer some power back to the States and the States, in time, back to the local communities. The role of the Governments, both state and federal, diminishes to some degree while the role and power of individuals in their local communities increases. Our Constitution then would provide a system of government geared to international demands without disenfranchising people at a local level.

We trust that by highlighting some of the ancient principles of federalism and community life, which are so foundational to Australian and western democracy, that they help point the way to an enduring and secure future for all Australians.

The church has centuries of constitutional practice and federal thinking, creating the seed bed for a mature federalism, yet the church has much more to say about much bigger issues. Political federalism can give a people some semblance of security and integration, however, individuals and nations are still subject to the vagaries of this life where change and circumstances threaten to sweep them aside. The Christian church has a message about individual people being reconciled to the living God and then being enabled to face the future regardless of its uncertainties. The living God touches our lives in the person of his Son, Jesus Christ, and we trust that you will have a secure, eternal, future with him.

Finally, as people find renewed life in God's Son and renewed love for their neighbour they will invariably act as a positive influence to renew our nation, politically, legally, socially, environmentally and, more significantly, morally and spiritually.

Greg Fraser
Convener
Church and Nation Committee
Presbyterian Church of Victoria.