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On higher ground

Is there a place for religion in the judicial system in multicultural Victoria in the 21st century?

BY JUSTICE EMILIOS KYROU

English law, which Australia inherited when Britain established its colonies here, was based on notions of Christian morality. Indeed, the principle that "Christianity is part of the law of England" was accepted until 1917 when it was rejected by the House of Lords in the case of *Bowman v Secular Society Ltd.*¹ The Church of England was intricately involved in England's judicial system and operated its own courts until they were absorbed within the secular court system during the Reformation in the 16th century.

Before discussing these historical events further, I want to mention the concepts of "ecclesiocracy" and "canon law".

The word "ecclesiocracy" is derived from the Greek words "ekklisia" which means church and "kratia" which means government. For present purposes, ecclesiocracy can be defined as a system in which the official church is directly involved in the government, including the judicial branch. In that sense, the Vatican can be described as an ecclesiocracy.

The phrase "canon law" describes church-made law. The word "canon" is derived from the Greek word "kanon" which means a rule or a precept.

SNAPSHOT

- Religion has had a major influence on the law.
- Recent changes in legislation have enabled court processes to better accommodate religious diversity.
- Religion can only continue to have a role in the judicial system if it is inclusive rather than prescriptive and accommodating rather than alienating.

Canon law began with rules adopted by the Apostles at the Council of Jerusalem in the first century. Over time, it developed into an integrated legal system in Europe as part of the civil law with its own lawyers, courts, judges, legal principles and enforcement mechanisms. Canon law also thrived in England alongside the common law.

In England, between the 12th and 16th centuries, the ecclesiastical courts were separate from the King's Courts (secular courts). However, during the Reformation they were absorbed within the hierarchy of the King's Courts. The ecclesiastical courts had both civil and criminal jurisdiction. Their civil jurisdiction included marriage, dissolution of marriage, inheritance of property and defamation and the criminal jurisdiction extended to crimes such as blasphemy and contempt of the clergy. The jurisdiction of the ecclesiastical courts was gradually reduced after the Reformation but did not disappear completely until the 19th century.

Interestingly, when the UK parliament enacted the *Commonwealth of Australia Constitution Act* in 1900, it included a preamble which began: "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..."

Physical manifestation of religion in the judicial system

Even though we no longer have separate ecclesiastical courts, religion continues to influence the administration of justice in both overt and subtle ways. There are many physical manifestations of religion in the judicial system.

Opening of the legal year

Although the courts operate throughout the year, the legal year in Victoria is notionally divided into four terms with the commencement of the first term marking the opening of the legal year. This is celebrated by holding religious services at St Patrick's Cathedral, St Paul's Cathedral, a synagogue and St Eustathios Greek Orthodox Church.

Celebrating the opening of the legal year originated in Paris in 1245. A Catholic mass was held in Notre Dame Cathedral to invoke the guidance of the Holy Spirit over the ecclesiastical court judges. The Holy Spirit was considered the source of wisdom, understanding, counsel and fortitude. Later, in France, the mass was celebrated in honour of the patron saint of lawyers St Yves of Brittany. The Eastern Orthodox patron saint of lawyers is St Dionysius the Areopagite.



The mass commenced in England in 1310. All judges and barristers attended the mass at Westminster Abbey on the first day of the first term of the legal year, known in England as Michaelmas term. They celebrated the inauguration of the new legal year, and sought divine guidance for their work.

The mass came to be known as the Red Mass because of the red vestments worn by the priests to symbolise the tongues of fire that descended on the Apostles at Pentecost, those flames being the manifestation of the Holy Spirit. Senior judges wore red robes and the barristers wore red hoods, to make for a cathedral resplendent in red.

The first Red Mass in Australia was held at Sydney's St Mary's Cathedral on 16 February 1931.

Since 2008, a community gathering has also been held to celebrate the community and the legal system working together to achieve a just society.

Today, ceremonies and religious services to mark the opening of the legal year in Australia are attended by governors, judges, senior ministers and other politicians, consular officials, academics, religious leaders and lawyers who seek guidance and blessings for the year to come.

In the religious services, prayers and blessings focus on the roles and responsibilities of the leaders present. They reflect on the part they play in the administration of justice and seek the guidance of the Holy Spirit and blessings of strength, wisdom, truth and justice for the legal system.

In 2014, in addition to a ceremony at St Patrick's Cathedral and St Eustathios Greek Orthodox Church, a multi-faith service was held at Government House. This service included the Catholic, Anglican, Eastern Orthodox, Hindu, Buddhist, Jewish and Muslim faiths. This type of service may become an annual event.

Oaths and Affirmations

An important ongoing physical manifestation of the role of religion in the judicial system are the oaths that must be taken by judges, witnesses, jurors, interpreters, stenographers and other persons involved in the court system before they can lawfully commence to discharge their functions. While an affirmation can be made instead of taking the oath, many people continue to take an oath.

There are three judicial oaths, the Oath of Allegiance to the Queen, the Oath of Office as a Judge and the Oath of Office as Administrator or Governor's Deputy.

The Oath of Office as a Judge is in the following form:

"I swear by Almighty God that as a Judge of the Supreme Court of Victoria, I will at all times and in all things discharge the duties of my office according to law, and to the best of my knowledge and ability without fear, favour or affection".

The Oath of Office as Administrator or Governor's Deputy is interesting. In essence, if the Governor and the Lieutenant Governor are unable to administer the

government of Victoria, that role is to be performed by the most senior judge of the Supreme Court who is available to do so.

At the beginning of each court hearing, when the judge comes on to the bench, everybody stands and bows. A court official then formally signifies the commencement of the hearing by making the following proclamation:

"All persons having business before this honourable Court are commanded to give their attendance and they shall be heard. God save the Queen".

The same official signifies the adjournment of the hearing by proclaiming:

"This Honourable Court stands adjourned ... God save the Queen".

The oath taken by a witness is in the following form:

"I swear by Almighty God that the evidence I shall give will be the truth, the whole truth and nothing but the truth".²

Lawyers in Victoria cannot practise law unless the Supreme Court makes an order permitting them to do so. This takes place in a formal admission ceremony in which those who wish to take an oath rather than make an affirmation take the following oath:

... the prescribed oath does not cater for polytheistic religions such as Hinduism.



"I swear by almighty God that I will well and honestly conduct myself in the practice of my profession as a member of the legal profession and as an officer of this honourable Court to the best of my knowledge and ability".³

There is a discernible trend away from taking an oath. When I was admitted to practice in 1984, more than 90 per cent of lawyers being admitted took the oath. Now, between 40 and 50 per cent do so and the rest make an affirmation. There is a similar trend away from oaths in the case of witnesses, jurors and other people involved in the judicial system.

Of course, when a separate judicial system was established in Victoria in the 19th century, the reference to Almighty God in the various prescribed oaths was to the Christian god and the oath was taken by holding the Holy Bible. If this was ever appropriate given our Indigenous population, it certainly ceased to be so following the mass post-war immigration

to Australia. Yet, despite the recognition of multiculturalism, prior to 1 January 2010 people who had a faith other than Christianity or no faith at all could only be accommodated by making an affirmation instead of taking the prescribed oath.

Since 1 January 2010, there has been much more flexibility with it no longer being necessary to use a religious text when taking an oath.⁴ Also, the prescribed oath has been amended to allow a person to promise rather than to swear and to do so by the name of a god recognised by his or her religion rather than by Almighty God.⁵ However, the prescribed oath does not cater for polytheistic religions such as Hinduism.

Court staff have been trained to be culturally sensitive in order to avoid any embarrassment to witnesses and other court users. For example, they discreetly ask witnesses whether they will be swearing or affirming⁶ and they have a ready supply of bibles and other religious texts such as the Koran. The Koran is suitably covered so as not to be directly touched by the court staff.

Various courts also produce guidebooks to educate and assist judges in cultural and religious matters. For example, the guidebook for the Supreme Court of New South Wales provides that a person should not be asked to remove publicly in court a hat or head covering which is worn for religious reasons.

Indirect influences of religion on the judicial system

The Holy Bible and other great religious texts which provide spiritual guidance to the community also have important indirect influence on the judicial system.

The law of negligence in England, Australia and other common law countries was inspired by Jesus' exhortation that we love our neighbour.⁷ In the famous 1932 case of *Donoghue v Stevenson*⁸ Lord Atkin stated:

"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour".⁹

The law of contract permits parties to a contract to provide that an "act of God", such as a tsunami, may constitute an acceptable ground for non-compliance with a contractual obligation. Some insurance policies also refer to the concept of "act of God".

The basic principle of natural justice that a public authority should not take adverse action

against a citizen without first giving the citizen an opportunity to be heard may well have been influenced by God giving Adam a chance to explain himself. In the 1723 case of *R v Chancellor of the University of Cambridge*¹⁰ the following was stated by Fortescue J:

"The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence. Adam (says God) where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also".¹¹

Other principles of the law, particularly equity, have their origins in values which feature prominently in the great religious texts. Those values include fairness, equality, good conscience, good faith and the protection of vulnerable members of the community.

In my opinion, these values also inform the attributes that define a good judge.

Earlier this year, I delivered a paper on the attributes of a good judge.¹² Those attributes included humility, compassion and cultural awareness and tolerance.

Conclusion

I believe that religion can only have a role in the judicial system in multicultural Victoria in the 21st century if it is inclusive rather than prescriptive, and accommodating rather than alienating. No court user should ever feel that they have not been treated equally and with respect due to their religious beliefs. ■

The Honourable Justice Emilios Kyrrou is a judge of the Victorian Court of Appeal and the Victorian patron of the Hellenic Australian Lawyers Association. The author gratefully acknowledges the research assistance of Nuwan Dias and Megan Styles in the preparation of this article.

*This article is adapted from a speech given by Justice Kyrrou at St Eustathios Greek Orthodox Church on 21 September 2015.

1. [1917] AC 406, 446, 464.
2. Evidence Act 2008 sch 1.
3. Supreme Court (Miscellaneous Civil Proceedings) Rules 2008 Form 2-14.
4. Evidence (Miscellaneous Provisions) Act 1958 s103(1); Evidence Act 2008 s24(1).
5. Evidence (Miscellaneous Provisions) Act 1958 sch 3 pt 1; Evidence Act 2008 sch 1.
6. Evidence Act 2008 s23(2).
7. The Holy Bible (King James Version) Luke, ch 10, verse 27.
8. [1932] AC 562.
9. *Donoghue v Stevenson* [1932] AC 562, 580.
10. (1723) 1 Str 557; 93 ER 698 (*Dr Bentley's Case*).
11. *Dr Bentley's Case* (1723) 1 Str 557, 567; 93 ER 698, 704.
12. The paper also dealt with the attributes of a good lawyer. It was published in (2015) 73 *Hearsay* www.hearsay.org.au. Earlier versions were published in (2013) 23 *Journal of Judicial Administration* 130 and May 2014 *LLJ*.

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